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Transport and Works Act 1992

THE MORLAIS DEMONSTRATION ZONE ORDER

Applicant's note on the draft Order, the controls that it provides and its relationship with other consenting regimes

Statement of Matters
Items 1(ii), 5(iv), 5(v) and 7

1. The Statement of Matters issued by the Inspector on 13 November 2020 identified matters on which the Welsh Ministers particularly wish to be informed for the purposes of their consideration of the Order.
2. The Applicant has addressed the majority of the identified matters in evidence submitted to the inquiry, but in response to discussions at the Pre-Inquiry Meeting, the Applicant offered to submit a supplementary note setting out the Applicant's position in response to items 1(ii), 5(iv), 5(v) and 7 to assist an anticipated roundtable session to be programmed to consider the draft Order and the terms of the deemed planning permission.
3. This note has been prepared by Eversheds Sutherland (International) LLP, as legal advisors to the Applicant for that purpose.

Item 1(ii) – the relationship between the Order, marine licensing and the deemed planning permission and their controls for the works proposed

The interrelationship between the consenting regimes

4. This project will require consenting under three different regimes:
 - 4.1 An order under the Transport and Works Act 1992 ("the Order")
 - 4.2 A planning permission under the Town and Country Planning Act 1990 ("TCPA"), deemed to be granted by provisions under the Transport and Works Act 1992 ("TWA")
 - 4.3 A marine licence, required by the Marine and Coastal Access Act 2009 ("MCAA").
5. The application before this inquiry concerns the first two. The precise relationship between the three regimes in this case is explored in more detail below, but it might be helpful to lay out, in broad terms, how the three regimes interact.
6. The TWA sets out procedures for authorising the construction and operation of certain transport projects (such as railways or works which interfere with navigation rights) that formerly required statutory approval under the Private Bill procedure in Parliament. The Private Bill procedure was required because the construction of such projects almost inevitably interferes with the rights of private citizens – compulsory purchase may be the only practical way of acquiring the necessary land, a new marina might interfere with navigation rights, and the operation of a project such as a railway might leave the operator liable to a nuisance claim. Without some sort of legislative attenuation of those rights, individuals might be able to prevent a project taking place. The Private Bill procedure allowed the attenuation of those rights, and the grant of various ancillary rights to (for example) undertake works on streets. The TWA allows that to be done via a Transport and Works Act Order. See further the Encyclopaedia of Planning Law and Practice at para 2-3372.

7. However, where something is to be built it is not enough to attenuate others' private rights. Two statutory regimes also exist to control development – a terrestrial development requires a planning permission under the TCPA, a development in the water required a marine licence under the MCAA. In the case of *R. (Powell) v Marine Management Organisation* [2017] EWHC 1491 (Admin) the Court held at para. 82 that "*Just as planning control is concerned with factors relating to the use of land (**Stringer v Minister of Housing and Local Government** [1970] 1 WLR 1281, 1294), marine licensing is concerned with use of the sea. Those uses are not limited to navigation, nor is the focus on rights of navigation. Amenity uses and development in the form of mineral extraction are examples of legitimate uses of the sea. Given that section 69(1)¹ is relevant to whether or not an application for a marine licence should be granted, it can be seen that "legitimate" is not used simply to refer to a lawful use or to legal rights, but in a broader sense to describe justified, proper or acceptable uses. Thus, "legitimate" allows the MMO to evaluate the merits of a use or of competing uses, including existing uses. Accordingly, the MMO can decide how much weight or merit to give to a proposal to use an area of sea for temporary development such as mineral extraction, or for permanent development such as residential or commercial buildings, as compared with the extent to which practical use is made of that area for navigation or indeed other "legitimate uses". For example, in the present case it is plain from the evidence received by the MMO that the spending beach and area of sea affected by the phase 2 works are used for only very limited navigation purposes and relatively infrequently.*"
8. Section 90(2A) of the TCPA,² allows the Welsh Ministers to make a direction deeming that planning permission be granted for the onshore works (subject to conditions set out in the direction) alongside the making of the Order. There is no equivalent provision for a marine licence, which therefore always requires a separate application and approval.
9. In this case the Application for an order under the TWA ("the Order") is made to enable the construction, operation, maintenance, repowering and decommissioning of a new offshore generating station with a gross output capacity of up to 240 megawatts comprising tidal devices and associated infrastructure offshore together with onshore cabling and connection to the existing electricity network ("the Project").
10. The Order allows the installation and operation of tidal devices located in an offshore array area from which power will be collected in offshore hubs and exported via cables, a landfall substation and a switchgear building at Parc Cybi, to an existing grid connection point at Orthios Eco Park to the west of Holyhead. As the Project is intended to operate as a demonstration zone, the draft Order also authorises the removal of devices and for new

¹ This provides "*In determining an application for a marine licence (including the terms on which it is to be granted and what conditions, if any, are to be attached to it), the appropriate licensing authority must have regard to— (a) the need to protect the environment, (b) the need to protect human health, (c) the need to prevent interference with legitimate uses of the sea, and such other matters as the authority thinks relevant.*"

² Inserted by s. 16 TWA

technologies to be installed in the same or different locations throughout the Project's lifetime.

11. The Project does not fall within the definition of a Nationally Significant Infrastructure Project in section 15(3B) Planning Act 2008³. See further David Bell's proof at para 3.2.1 and also the Applicant's Statement of Case at para 3.2.1
12. As the proposed generating station will interfere with rights of navigation in waters within or adjacent to Wales up to the seaward limits of the territorial sea, Section 3(1)(b) TWA empowers the Welsh Ministers to make an order relating to the carrying out of such works if they are of a description prescribed by Order. The Project comprises the construction of an offshore installation and utilities structure as prescribed by the Transport and Works (Description of Works Interfering with Rights of Navigation) Order 1992.
13. There are no provisions within the TWA equivalent to those set out in sections 33(1)(a) or 149A Planning Act 2008⁴. Therefore an Order granted pursuant to the TWA does not obviate the need to obtain planning permission as required by the TCPA, nor can it incorporate a deemed marine licence as required by the MCAA to the extent that undertaking any works authorised by the Order requires such consents. As the "onshore works" fall within the definition of development for the purposes of the TCPA, and the "tidal works" constitute licensable activities for the purposes of the MCAA, they require planning permission and a marine licence respectively.
14. Section 16 TWA introduced section 90(2A) of the TCPA, which allows the Welsh Ministers to make a direction deeming that planning permission be granted for the onshore works (subject to conditions set out in the direction) alongside the making of the Order. Thus, as is explained in the Encyclopaedia of Planning Law and Practice at P 90.06 "Subsection (2A) extends the section to orders made under the Transport and Works Act 1992 ... The procedures are in substitution for private parliamentary legislation. Where works are authorised by a private Act of Parliament, Pt 18 of Sch.2 to the Town and Country Planning (General Permitted Development) Order 2015 automatically grants a form of outline planning permission. The Government took the view that for orders under the 1992 Act it would be preferable to combine the planning approval with the other authorisations conferred under that Act" by the seeking of a direction. Consequently, an application for such a direction has accompanied the application for the Order, and the consideration of its terms are before this Inquiry (CD ref MDZ/A19-24.2)

³ The Wales Act 2017 introduced amendments to the Planning Act 2008 with effect from 1 April 2019 which removed offshore generating stations within the Welsh territorial sea with a capacity of less than 350MW from the definition of generating station set out in section 15

⁴ Section 33(1)(a) has effect such that planning permission is not required for development authorised by a development consent order. Section 149A allows a development consent order to contain provisions deeming that a marine licence be granted for development authorised under the Order, although such provision does not extend to Wales.

15. There is no equivalent to section 90(2A) TCPA in the MCAA. As such, a separate application is required for a marine licence to authorise those licensable marine activities forming part of the tidal works. An application has been made by the Applicant for a marine licence for this purpose to Natural Resources Wales to whom the function of licensing authority has been delegated by the Welsh Ministers⁵. That application is subject to a separate determination process which lies outside of the remit of this Inquiry.
16. The principal consents authorising the Project will therefore comprise:
- 16.1 the proposed Order
- 16.2 the deemed planning permission
- 16.3 a marine licence
17. The Order will not of itself authorise the carrying out of any onshore works in the absence of the deemed planning permission, nor will it authorise the carrying out of any tidal works in the absence of a marine licence. However, the Order does grant ancillary powers necessary to deliver the Project, for example, the compulsory acquisition of land interests and powers related to the installation of cables in streets. This interdependency between the three principal consents is at the heart of the Applicant's approach to the drafting of the Order. The Order essentially provides the permissive framework for the Project, whilst the deemed planning permission and the marine licence will contain the conditions regulating the way in which the Project is undertaken.

The controls imposed on the works proposed

18. The TWA allows the Welsh Ministers to make an Order (inter alia) relating to, or to matters ancillary to, the carrying out of works which interfere with rights of navigation in waters within or adjacent to Wales up to the seaward limits of the territorial sea. The powers are both broad and general and as such the TWA provides a permissive consenting framework for the Project.
19. This power is subject to sections 13B to 13D TWA which require that before determining an application for an EIA Order⁶ the Welsh Ministers must consider the EIA information submitted by the Applicant and reach a reasoned conclusion about the likely significant effects of the proposed works or other projects on the environment.
20. In accordance with section 13C of the TWA, if the Welsh Ministers propose to make an EIA Order they must consider whether monitoring of the significant adverse effects of the works

⁵ Article 3 of the Marine Licensing (Delegation of Functions) (Wales) Order 2013 delegates all marine licensing functions under Part 4 of the MCAA to NRW

⁶ an order authorising works or other projects which are either in a class listing in Annex I to the EIA Directive (2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment) or in a class listed in Annex II and, by virtue of their nature size or location, likely to have significant effects on the environment

is appropriate and thus whether to impose a monitoring measure and/or a requirement to take remedial action.

21. It is expressly acknowledged in section 13C that where a direction for deemed planning permission is given under section 90(2A) of the TCPA, a measure or requirement can be secured by condition specified in that direction.
22. The approach therefore taken by the Applicant, is that in relation to the onshore works the appropriate controls can be secured by the conditions proposed to be attached to the deemed planning permission.
23. Subject to the provisions described below, the Applicant's position in relation to the tidal works is that the appropriate controls are best secured through conditions to be imposed on the marine licence. There are a cogent reasons for this approach:
 - 23.1 It eliminates the potential for conflict or discrepancies between any conditions imposed in the Order and the Marine Licence;
 - 23.2 It avoids the risk of different submissions being made on the same topic to different consenting bodies which has the potential to delay deployments and confuse stakeholders;
 - 23.3 It avoids the risk that approved details under different consents could conceivably require the project to be undertaken in ways which conflict with each other.
 - 23.4 As a demonstration zone, there is a need for the Project to be flexible to respond to emerging technology or changes in circumstances from time to time. This might legitimately require conditions to be amended from time to time. This is not possible in the case of conditions imposed on the Order since, unlike the Planning Act 2008, there is no statutory mechanism within the TWA to amend the Order once made. This is possible under the MCAA, following a determination process.
24. The following sections describe the approach taken in the draft Order in greater detail to ensure that it secures appropriate controls:

The tidal works

- 24.1 The Order authorises through article 3(1) the construction, maintenance and decommissioning of the authorised works as set out in Part 1 of Schedule 1. Article 3(2) authorises the construction, maintenance and decommissioning of the tidal works within the offshore Order Limits and Article 3(3) authorises the repowering of Work No. 1 or any parts thereof.
- 24.2 Work No. 1 identifies elements of the offshore tidal generating station and defines it by reference to the maximum parameters for various elements. This follows the approach adopted in the environmental statement of identifying a project design envelope for the

purpose of the environmental impact assessment. The elements comprising Work No.1 reflect a number of the parameters assessed in the environmental statement.

- 24.3 The authorisation for the carrying out of tidal works under Articles 3(2) and 3(3) is constrained by the terms of Article 3(4). This requires that the documents identified in column 1 of Part 4 of Schedule 1 are submitted to and approved in writing by the Welsh Ministers prior to the activity in column 2 of the table occurring. Article 3(6) then requires that the tidal works must be constructed maintained repowered and decommissioned in accordance with the documents approved pursuant to Article 3(4).
- 24.4 The documents listed in Part 4 of Schedule 1 comprise various plans, programmes, protocols and assessments identified in the environmental statement as securing mitigation to avoid, prevent, reduce or offset likely significant adverse effects on the environment. The "trigger points" listed in column 2 ensure that appropriate mitigation is identified and approved prior to the related activity which might result in a significant environmental effect occurring.
- 24.5 In order to ensure that the Project remains within the parameters assessed in the environmental statement, Article 3(4) provides that *'in constructing, maintaining, repowering and decommissioning the tidal works the documents in column 1 of Part 4 of Schedule 1 must be submitted to and approved in writing by the Welsh Ministers prior to the activity in column 2 occurring and such documents shall accord with any conditions relating to their content imposed on any marine licence for the relevant tidal works and **shall not authorise any works outside the project parameters.**'* The project parameters are defined by reference to the table of parameters set out in the environmental statement.
- 24.6 The effect of the Order on rights of navigation is also controlled through the terms of Articles 17 to 21 and Article 43 which have been agreed with Trinity House and the Maritime and Coastguard Agency. In addition, Article 15 provides a saving for the MCAA thereby explicitly recognising the requirement for a marine licence to be obtained for the tidal works.

The deemed planning permission

- 24.7 The project parameters and mitigation identified in the environmental statement in respect of the onshore works are secured through the proposed conditions on the deemed grant of planning permission. A suite of conditions securing environmental mitigation and other regulatory controls has been agreed between the Applicant and the local planning authority and submitted to the Inquiry (CD MDZ/A24.2).
- 24.8 Associated powers in the Order authorise the Applicant (inter alia) to carry out street works, survey land and compulsory acquire the necessary land and rights to deliver the Project.

In these respects the Order broadly follows the model clauses⁷ and protection for stakeholders is built into the Order either through the operation of the Articles or protective provisions.

The marine licence

- 24.9 An application for a marine licence for the Project has been submitted to NRW. The process for determination of the marine licence application is progressing behind that for the Order.
- 24.10 It is reasonably expected by the Applicant that adherence to the project parameters and the mitigation identified in the environmental statement in respect of the tidal works will be secured by conditions imposed on the marine licence in due course. The terms of such conditions will be the subject of ongoing discussion between the Applicant, stakeholders and NRW until any marine licence is granted. The Applicant has included a set of proposed marine licence conditions at CD MDZ/I6, to illustrate how the interrelationship between the Order and the marine licence might work⁸.
- 24.11 In order to avoid the situation referred to at paragraphs 18.1-18.3 above arising, the draft Order contains the following provisions:
- 24.11.1 Article 3(4) requires that any documents listed in Part 4 of Schedule 1 submitted to the Welsh Ministers for approval under the Order, must accord with the requirements relating to equivalent documents contained in conditions to be imposed on a marine licence.
- 24.11.2 Article 3(7) states that approval of an equivalent document pursuant to a condition of the marine licence will be a deemed approval of the Welsh Ministers under the Order, thereby avoiding the need for duplicate submissions.
- 24.12 In practice, the Applicant anticipates that in relation to the tidal works, submissions will largely be to NRW in the first instance to discharge marine licence conditions, which once approved will also be deemed to be approved under Article 3(4) by virtue of the operation of Article 3(7).
- 24.13 A 'Mitigation Route Map' showing how the measures identified in the environmental information, and the detailed implementation of those measures, are secured either through the Order or grant of deemed planning permission, and intended to be addressed by the conditions of a marine licence, is provided at CD MDZ/A16.7.

⁷ Transport and Works (Model Clauses for Railways and Tramways) Order 2006

⁸ It is accepted by the Applicant that these conditions are not yet agreed.

Item 5(iv) Whether the Order, and associated processes e.g. marine licensing, would provide adequate controls, conditions and consenting process(es) to fully address the range of potential device designs and deployment

25. Article 3 provides authority for the construction maintenance and decommissioning of the tidal works together with the repowering of Work No.1 within the offshore Order limits. This is subject to the restriction at Article 3(4) which prevents the Welsh Ministers from approving any documents which would authorise the Project to exceed the project parameters. For example, the Welsh Ministers would not be able to approve a cable management plan which enabled cables to be installed exceeding the total lengths of cables identified in table 4-21, or exceeded the permanent seabed habitat disturbed area footprint or swept area established in table 4-26, or exceeded the temporary seabed habitat disturbed area during post lay cable management identified in table 4-28.
26. The submission and approval of documents as required pursuant to Article 3(4) therefore provides a mechanism to verify that the project parameters will not be exceeded and that appropriate mitigation is secured prior to tidal works being undertaken.
27. In relation to device design and deployment, Article 3(4) secures the submission of a Device Deployment Protocol. This is required to be submitted and approved prior to the deployment of any tidal device or operational hub which will be
- 27.1 surface emergent
- 27.2 have an under keel clearance of less than 8 metres below lowest astronomical tide in the restricted area – UKC 8m, or
- 27.3 have an under keel clearance of less than 20 metres below lowest astronomical tide in the restricted area – UKC 20m.
28. The Device Deployment Protocol is required to identify specified information in respect of the devices proposed for deployment which will enable:
- 28.1 in respect of surface emergent devices an assessment as to whether the device will be visually prominent in the sensitive area identified as the restricted area – northern to be ascertained (the environmental information commits that no visually prominent devices will be permitted in this area). The assessment will also take into account the cumulative impact of the surface emergent devices with existing deployed and consented devices.
- 28.2 in respect of devices with an under keel clearance of less than 8 metres or 20 metres in the relevant zone whether, taking account of the specific characteristics and location of the proposed device(s), they will have an impact on navigation in the relevant restricted area; the environmental information and the associated navigational risk assessment and addendum require that these areas are safe for navigation of vessels with a draught of <3

metres (in respect of the restricted area - UKC 8m) or larger vessels seeking refuge in bad weather (in respect of the restricted area – UKC 20m).

29. The controls provided by Article 3(4) and Part 4 of Schedule 1 constitute a mechanism to secure the mitigation identified in the environmental statement. Where the marine licence conditions secure equivalent mitigation Article 3(7) provides that approval of an equivalent document pursuant to the marine licence shall be deemed to be approval of the Welsh Ministers under the Order.

Item 5(v) In relation to these matters, and the biodiversity topic above, the inquiry needs to be clear on: the differing regulatory controls that would apply and the extent of their coverage for works within the Order; and, matters regarding the possible use of an adaptive management approach for environmental mitigation and monitoring of works under the Order

30. Article 3 of the Order authorises the construction maintenance and decommissioning of the authorised works, and also the tidal works together with the repowering of Work No. 1, subject to the other provisions of the Order.
31. In terms of the onshore elements of the authorised works as they effect biodiversity (and other elements of the environment), controls will be imposed by conditions of the deemed planning permission which may be granted by the Welsh Ministers.
32. In terms of the offshore works, mitigation is secured to avoid, prevent, or reduce and offset the likely significant effects of the Project on the environment including on biodiversity through the submission, approval and then implementation of the plans, programmes and protocols etc. secured through Article 3 and Part 4 of Schedule 1.
33. One of the documents secured through this process is the Environmental Mitigation and Monitoring Plan (EMMP). Pursuant to Part 4 of Schedule 1 this document must be submitted and approved prior to
- 33.1 the commencement of any tidal works; and
- 33.2 the repowering of any tidal works
34. An outline EMMP (CD MDZ/A16.8) has been submitted with the application (and has evolved through discussions with stakeholders as the application process has progressed). This document sets out an adaptive management approach to environmental mitigation and monitoring during the phased deployment of the Project. In summary it recognises that the Project will be brought forward on a phased basis, within the parameters established by the Order, but also in a manner in which any potential effects of the Project on protected marine mammals and diving birds species can be mitigated, monitored and managed.

35. The requirement for the EMMP to be submitted and approved by the Welsh Ministers prior to the commencement of any tidal works ensures that the deployment is consistent with the adaptive management approach and that mitigation, as agreed with the advisory group established pursuant to the EMMP, is secured for the relevant phase prior to the deployment being undertaken.
36. As with other documents required to be submitted approved and implemented pursuant to Articles 3(4) and 3(6), it is expected that the marine licence will also secure mitigation in the form of an EMMP. Article 3(7) allows approval of the EMMP pursuant to the marine licence to be a deemed approval pursuant to the Order.

Item 7 - The Order and the controls that it would provide

37. An explanation of the Order is set out in the Explanatory Memorandum (CD MDZ/A16.4) which has been updated as amendments to the Order have been incorporated to address amendments required by stakeholders. Further details of the controls that it would provide from an environmental perspective are set out in the preceding sections.