Guidance Note

Applications for variation of section 36 consents

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Introduction

1. This document provides guidance on the process for varying consents which have been granted by the Scottish Ministers under section 36 of the Electricity Act 1989 for the construction or extension, and operation, of electricity generating stations ("section 36 consents").

2. This guidance sets out the current view of ECU and MS-LOT on how the legislation should be applied. It should be used alongside the legislation to which it refers and is not intended as a substitute either for reading that legislation or for taking the advice of suitably qualified professionals.

3. By applying to vary a section 36 consent it may be possible to obtain authorisation for a generating station to be constructed, extended or operated in a way that would not be consistent with the existing consent.

4. This guidance applies to Scotland (and adjacent offshore areas out to 200 nautical miles) only.

5. The section 36 process in relation to terrestrial projects is administered by Energy Consents Unit (ECU), while the section 36 process for marine projects is administered by Marine Scotland - Licensing Operations Team (MS-LOT).

6. This guidance is likely to be of interest to:

    - developers and operators of generating stations (or proposed generating stations) which are the subject of section 36 consents; and

    - local authorities, statutory consultees, affected communities and other interested parties who are given an opportunity to comment on applications from developers or operators to vary section 36 consents.

The legislative framework

7. Section 36 of the Electricity Act 1989 ("the 1989 Act") applies to proposals for the construction, extension or operation of an onshore electricity generating station whose capacity exceeds (or, when extended, will exceed) 50 megawatts (MW). Applications to construct or operate electricity generating stations below this threshold which do not require section 36 consent are made to the local planning authority under the Town and Country Planning (Scotland) Act 1997. On granting consent under section 36, Scottish Ministers may also direct under section 57 of the Town and Country Planning (Scotland) Act 1997 that planning permission is deemed to be granted for the development necessary to construct the generating station and any ancillary development.

8. Section 36 also applies to proposals for any offshore generating station whose capacity exceeds 1MW within Scottish territorial waters or the Scottish Renewable Energy Zone (REZ). Offshore generating stations also require a

marine licence under the Marine (Scotland) Act 2010 (between 0 and 12 nm) or under the Marine and Coastal Access Act 2009 (between 12 and 200 nm).

9. Section 20 of the Growth and Infrastructure Act 2013 inserted a new section 36C into the 1989 Act to provide for the making of variations to section 36 consents. Prior to 2013, the 1989 Act did not provide for section 36 consents to be varied.

10. Section 21 of the Growth and Infrastructure Act 2013 amended section 57 of the Town and Country Planning (Scotland) Act 1997 to provide that Scottish Ministers, on varying a section 36 consent, may give either a direction for planning permission to be deemed to be granted, or a direction for an existing planning permission (or the conditions to which that planning permission was made subject) to be varied as specified in the direction.

11. The Electricity Generating Stations (Applications for Variation of Consent) (Scotland) Regulations 2013 ('the 2013 Regulations') came into force on 1 December 2013. The regulations make provision for the content of a variation application and the consultation process to be followed with respect to section 36C applications. The regulations also provide that the Scottish Ministers may cause a public local inquiry to be held if they consider it appropriate to do so.

12. The 2013 Regulations provided for a procedure which ensured that the relevant provisions of Directive 2011/92/EU (now as amended by Directive 2014/52/EU) on the assessment of the potential effects of certain public and private projects on the environment (commonly known as the "Environmental Impact Assessment" or "EIA" Directive) would be implemented as necessary in relation to applications to vary a section 36 consent.

13. The 2013 Regulations were amended by regulation 42 of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (as amended) ('the EIA Regulations'). The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 were amended in December 2017 (by The Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017). Note that at present there is no consolidated version of the EIA Regulations available at http://www.legislation.gov.uk/ (the official website housing UK legislation) and the documents therefore need to be read together to comprehend the EIA Regulations[1]. The EIA Regulations essentially apply to variation applications under section 36C as they apply to applications for section 36 consent.

The need for a section 36 variation procedure

14. After consent has been granted developers may wish to modify their consented proposals. Without the power to vary a section 36 consent, if the developer's plans changed, they may have found themselves unable to proceed, even along lines which may have been more efficient or

[1] Note that the 2017 Regulations were also amended in minor ways by the Environmental Impact Assessment (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/168).

environmentally beneficial. It is not unusual for circumstances to arise where changes to a generating station development are required following the grant of development consent. For example, such consents are often not implemented until some years after they are granted (noting that a standard condition of any section 36 consent is that development must commence within five years of the consent). Each consent reflects technology and industry practice at the time it was applied for, but such technologies and practices can evolve quickly, even in relatively mature sectors. This can mean that when a developer comes to construct a generating station, it may be uneconomical or cause avoidable detriment of the environment to do so according to all of the details specified in the consent.

What types of variations might be considered under section 36C?

15. The following paragraphs provide a steer on what ECU/MS-LOT might consider appropriate to deal with under the section 36C variation process. Given the potentially very large range of different applications that could be submitted, it is not possible to give definitive guidance in advance on the specific types of variations that could reasonably be considered under section 36C. What follows is therefore only a broad outline, which should be taken as providing a framework for prospective applicants to consider their options, and as a starting point for discussion with ECU/MS-LOT in individual cases.

16. The variation process is not intended as a way of authorising any change in a developer's plans that would result in development that is likely to be fundamentally or substantially different in terms of scale and/or nature from what is authorised by the existing consent.

17. Where proposed modifications are fundamental or substantial, it is likely that a completely new section 36 application will need to be submitted. Where less substantial changes are proposed, it is likely an application can be made under section 36C.

18. The legislative change brought about in relation to section 36 consents by the 2013 Growth and Infrastructure Act was primarily aimed at projects which had been consented but not constructed. There are two broad categories of case for which Scottish Ministers may consider it appropriate to exercise the power in section 36C – namely, to enable:

    (a) The construction of either a generating station or of an extension to a generating station in a different manner or using different components to that set out in the existing consent; or

    (b) The operation of a generating station (whether or not it is already operational) in a manner, or for a period of time, that is different from that specified in the existing consent.

19. A range of possible changes may be appropriate to determine under the section 36C variation procedure, including for example changes to turbine dimensions, changes to the consented operational life, and changes to time-

limits on commencement of development. The common proviso however is that the proposed change would not result in development which would be fundamentally or substantially different in terms of scale and/or nature from that authorised by the existing consent.

20. Developers seeking to repower existing and operational wind generating stations (both onshore and offshore) will not usually be able to do so by way of an application to vary an existing consent. Such proposals will, in most cases, involve the full or partial replacement of a constructed generating station, and require extensive construction works such that a new development consent will be required. Where the prospective applicant seeks to vary to extend the operating period of an existing generating station, it may be possible to do this by way of section 36C.

21. Pre-application discussions will be useful to judge the appropriateness of the section 36C route in advance of any application being submitted. It is for a developer, being entitled to the benefit of a relevant section 36 consent, to decide whether they will submit an application under section 36C. However, if an application for a section 36 variation is rejected, the alternative may be that a new consent must then be sought and this could result in delays. It is advisable therefore that pre-application discussions are held with ECU/MS-LOT before any variation application is submitted. Such discussion should happen at as early a stage as is practicable. ECU/MS-LOT may be then able to advise, without prejudice, whether the proposed changes are likely to be appropriate for consideration under the section 36C variation process. To support such pre-application discussion, the developer should set out as clearly as possible the proposed changes to the existing consent that they would wish to make and the reasons for those changes.

22. In terms of section 57(2) and (2ZA) of the Town and Country Planning (Scotland) Act 1997, Ministers may on varying a section 36 consent give a direction in respect of planning permission. Noting this provision, the developer may, in addition to seeking that an existing section 36 consent is varied, also wish to request that Scottish Ministers make a direction either to vary an existing deemed planning permission, or grant a new deemed planning permission for the development. If this is the case then, similarly, there should be pre-application discussions about those proposed changes.

23. Pre-application discussions for proposed variations should cover whether it would be technically possible and appropriate to vary the consent under Section 36C as proposed, and whether it would be possible for Scottish Ministers to make any section 57 direction proposed by the developer. To the extent that Scottish Ministers consider the developer's proposals to be viable, the pre-application discussion should explore the likely environmental effects of the proposed variation and whether it may constitute EIA development. Discussions may also cover the likely scope of information that would require to be submitted with any future application.

The EIA screening and scoping process

24. The developer should initially approach ECU/MS-LOT, at as early a stage as is practicable, to discuss any proposed application to vary an existing consent. If it appears that the proposed variation application would constitute EIA development, ECU/MS-LOT will recommend that the developer submits a request for a scoping opinion from Scottish Ministers to inform the content of an EIA report to accompany the future application. A scoping opinion request should be accompanied by a scoping report, which should be submitted in line with the requirements as set out in regulation 12 of the EIA Regulations. Scottish Ministers will aim to provide a tailored scoping opinion for variation applications to ensure that the future EIA report is effective and proportionate, minimising the burden of information provision where it is appropriate and possible to do so.

25. If the outcome of discussions between the developer and ECU/MS-LOT is that there is uncertainty over whether the variations sought would constitute EIA development then ECU/MS-LOT would recommend that the developer requests a screening opinion from Scottish Ministers as to whether the proposed variation is EIA development, and therefore requires an EIA to be carried out in terms of the EIA Regulations. This request should be submitted with the information as set out in regulation 8 of the EIA Regulations. Further information in regard to the EIA Regulations with respect to section 36C variation applications is given below.

26. When a section 36C application to vary consent to construct, extend or operate a generating station is an application for schedule 2 development, but is received without an EIA report, and no screening opinion has previously been issued, regulation 10 of the EIA Regulations would apply, and a screening opinion would be adopted by Scottish Ministers. Before doing so, Scottish Ministers may seek further information from the developer.

Variation applications and EIA – working principles

27. This section provides information on how variation applications should be considered in relation to EIA.

28. The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 were amended in December 2017 (by The Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017).

29. The policy note which accompanies the December 2017 Amendment Regulations states that the underlying purpose of the amendments was to clarify the EIA Regulations as far as they apply to variation applications under the 1989 Act. Prior to the amendments, the EIA Regulations in effect required that an EIA was to be carried out in respect of *any* variation to section 36 consent, even if the variation itself would have no additional environmental effects. The policy note suggests that as a result of the amendments, only variation applications where the changes proposed by the variation may cause

significant environmental effects would require EIA to be carried out (also taking account of the selection criteria set out at schedule 3 of the EIA Regulations). Regulation 28(1) now sets out that Scottish Ministers must not vary a section 36 consent, or when varying a consent direct that planning permission is deemed to be granted, in respect of EIA development unless an environmental impact assessment has been carried out in respect of the "proposed variation".

30. Several other amendments were made, with the result that:

- Regulation 28(3) clarifies that "proposed variation" means the proposed change to, or proposed extension of, the authorised development.

- Regulation 28(2)(a)(iii) clarifies that "proposed development" means, throughout the regulations other than in schedules 1 and 2, the "proposed variation".

- Regulation 2 'Interpretation' explains that "EIA development", in relation to variation applications, is a "proposed variation" which is either: schedule 1 development; or schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

31. The amendments mean that in situations where the proposed variation is unlikely to have significant environmental effects, no EIA Report or process would be required in respect of the variation application. Under EIA Regulations as they stood before this, where an EIA had been required for the original section 36 consent application it would in practice have been required for a variation of that consent.

32. Although the amendments now place a greater focus on the proposed variation, or change, it is nevertheless important to recognise that, in determining whether there would be significant adverse effects, consideration needs to be given both to the effects of the change itself, and to the overall or cumulative impact of the proposed variation. In addition, where an EIA report is required then, as before, it must in terms of regulation 28(2)(c)(i), include the main respects in which the likely significant effects of the proposed varied development (i.e. the development which would then be authorised if modified as proposed) would differ from those described in the EIA report or environmental statement prepared in connection with the section 36 consent.

33. Noting this background, the following principles should inform the approach to EIA for variation applications:

a. Proposed variations which, when considered together with their effect on the environmental impacts of the development as a whole, or with other cumulative impacts, are not likely to have significant environmental effects should be screened out from the need for EIA. In such a case the proposed variation would not fall within the definition of "schedule 2 development".

b. The need for EIA should be screened out for variation applications where the intensification of existing environmental effects would be so small as to be clearly insubstantial. This would be on the basis that these proposed variations are not considered to be "schedule 2 development". In circumstances where there is reasonable doubt as to whether such intensification was insubstantial further consideration should be given.

c. EIA would be required where (i) the proposed variation, taking account of schedule 3 criteria, introduces a new significant effect, or (ii) the proposed variation may increase or intensify an existing effect, such that the effect would *now* be likely to be significant for the "proposed varied development" (i.e. the development which would be authorised, if varied as requested in the application).

d. If the proposed variation is likely to intensify an *existing* significant effect an EIA would also be required in order to provide decision-makers with information on the nature of that intensified significant effect. In other words, in this situation it would not be appropriate to say that because an effect was and still will be significant there is no need to provide further information describing what that new effect will be. The nature of the intensified significant effect will be different, and this may be material to determination of the variation application. The approach would not, therefore, just be about entirely *new* significant effects, or even whether the *level* of significance would necessarily change (e.g. from 'moderate' to 'high').

e. In respect to the environmental issues affected by the proposed variation, the EIA should present the likely significant effects on the environment of the "proposed varied development" (i.e. the development which would be authorised if varied as requested in a variation application). Regulation 28(2)(c) of the EIA Regulations requires the inclusion in an EIA report of: (i) the main respects in which the developer considers that the likely significant effects on the environment of the proposed varied development would differ from those described in any EIA report or environmental statement that was prepared in connection with the relevant section 36 consent; and (ii) a non-technical summary of those differences.

f. Scottish Ministers would expect that identification of the significant effects on the environment of the proposed varied development would be carried out taking into account current knowledge and methods of assessment. This is the standard referred to in various places in the EIA Regulations (see regulations 5(3), 19(2) and 21(4)).

Change to time-limits for commencement of development

34. A standard condition of any section 36 consent is that development must commence within five years of the consent, or such other period as the Scottish Ministers may thereafter direct. A developer may write to the Scottish Ministers requesting such a direction. Any direction which Ministers may choose to make in accordance with the condition will operate to extend the

implementation date only in respect of the Electricity Act consent. Such a direction does not operate to extend the implementation date for any associated deemed planning permission.

35. When varying a consent under section 36C, it is open to Scottish Ministers to make a direction under section 57(2) and/or (2ZA) of the Town and Country Planning (Scotland) Act 1997 that they consider to be appropriate. In terms of section 57(2ZA) this means that Ministers when varying a section 36 consent can vary an existing section 57 direction but this does not operate as a new planning permission. Time limits for implementation of the planning permission would continue to apply as before.

36. On varying a section 36 consent it is open to the Scottish Ministers under section 57(2) to make a direction for planning permission to be deemed to be granted afresh. This would operate as a new planning permission and new time limits for implementation would apply.

37. The effect of a direction made under section 57(2) would be to grant a new development consent. Where a new development consent is sought a new EIA report for the development may be required. The new EIA report should take account of the current state of the environment, current knowledge and methodologies. Depending on the circumstances of each individual application, the new EIA report may be able, to a greater or lesser extent, to draw upon the earlier EIA report or environmental statement associated with the relevant section 36 consent.

Change to consented operational life

38. A variation application may seek an extension to the period of operation of a consented or operational generating station. Determination of such an application would weigh any identified likely significant effects on the environment against other material considerations if the change in the period of operation may have significant adverse effects on the environment.

    Depending on circumstances, an application to extend the period of operation of a generating station may or may not constitute EIA development. In cases where such a change constitutes EIA development, it may be possible for the required EIA report to draw upon information presented in the original EIA report or environmental statement. However, there may have been changes in circumstances including for example, changes to the baseline for landscape and visual impact assessment, or to the abundance, distribution or conservation status of any sensitive bird species present. These changes may result in the need for new environmental surveys and assessments to be undertaken.

Making an application to vary a section 36 consent

39. When submitting variation applications to ECU/MS-LOT, developers should ensure that they meet the requirements of regulation 3 of the 2013 Regulations. Failure to do so is likely to result in delay to the process of

considering the application. Developers should discuss with ECU/MS-LOT the number of electronic and hard copy versions of documents that are required to be submitted with any application. Should the variation application require an EIA, the EIA report submitted with the application will need to meet the requirements of the EIA Regulations.

40. To comply with regulation 3 of the 2013 Regulations, the variation application must describe the proposed development as varied, regardless of the need for EIA or the scope of any EIA report. It must contain the reasons why it is proposed that the requested variation(s) and section 57 direction should be made, and drafts of the variation(s) and the section 57 direction.

41. Applications to the Energy Consents Unit should be made through the ECU website at www.energyconsents.scot. Developers experiencing difficulties using or accessing the website should contact ECU at Econsents_Admin@gov.scot.

42. Applications to Marine Scotland should be made to MS.MarineRenewables@gov.scot.

43. ECU/MS-LOT will aim to acknowledge receipt of an application within 10 working days. If an acknowledgement has not been received within 10 working days, developers should contact ECU/MS-LOT to confirm that the application has been received. A unique reference number is allocated to each application received, and this reference number should be quoted in all correspondence relating to the application between the developer and ECU/MS-LOT.

44. All offshore renewable energy developments require a marine licence in addition to a section 36 consent. Marine licences are issued at the same time as a section 36 consent. In relation to a variation application for a section 36 consent, if consent is granted for the variation application, the Scottish Ministers will consider exercising their discretion to vary the marine licences granted in respect of the development. The Scottish Ministers would consider the variation of the marines licences in terms of section 72 (3) (d) of the Marine and Coastal Access Act 2009 and section 30(3)(d) of the Marine (Scotland) Act 2010 to ensure that the marine licence and consent granted under section 36 of the 1989 Act are consistent.

How much does a section 36 variation application cost to process?

45. At the time of publication of this document, no fee is payable to Scottish Ministers when an application to vary a section 36 consent is submitted, or when the variation is made. However Scottish Ministers have announced the intention to promote regulations which will introduce fees for variation applications. It is expected that if desired timescales for implementation are met, that application fees for variations will be introduced from May 2019. In the meantime, developers still have to meet the cost of publishing, and advertising the publication of, their application and preparing the necessary documentation as required by the 2013 Regulations. Developers will also need to devote an appropriate amount of resources to consulting, and responding to

questions from, statutory consultees and other interested parties about their proposals. They may well also need to seek professional advice, for instance from lawyers or environmental and planning consultants, especially in relation to the preparation of any EIA report.

Timescales

46. Under the 2013 Regulations, the planning authority has a period of 2 months to respond following the date on which the last notice is published. This provides for a reduced timeline in comparison with section 36 applications. However, the time taken to process the application will depend on the complexity of the individual case, including the scope of changes proposed; and the quality of the application, including any supporting environmental information.

Publication of application

47. The developer must publish the application on a website, serve a copy of the variation application on the planning authority and advertise by public notices, in specified publications, as set out in regulation 4 of the 2013 Regulations. If the variation application is for EIA development, the publicity requirements set out in the EIA Regulations must also be met. Joint notices in these circumstances are acceptable.

48. The deadline for representations from consultees (i.e. those consulted on the original application plus any other parties Scottish Ministers consider it appropriate to consult on the variation application) and other interested parties (e.g. local individuals and local interest groups) will be no less than 30 days after publication of the last notice (for non-EIA development this would be 28 days). Planning authorities are given two months after service of the variation application documents to comment.

Public Inquiries

49. Before determining a variation application, Scottish Ministers may cause a discretionary public inquiry to be held if it is deemed appropriate to do so having considered the representations received and all other material considerations. Scottish Ministers will carefully consider the views of the Local Planning Authority. The public inquiry process will follow that laid out in relevant paragraphs of schedule 8 to the 1989 Act and in the Local Government (Scotland) Act 1973, with modifications set out in regulation 6(3) and (4) of the 2013 Regulations.

Deadlines

50. Scottish Ministers have the discretion to extend deadlines for representations and the publication of notices, and to request further information from the developer if necessary.

Identifying consultees

51. The developer should consult ECU/MS-LOT on appropriate consultees and timescales before submission of the application, and issue any required EIA report under a covering letter to the relevant planning authority or authorities and other consultees as soon as practicable after submitting the variation application.

Decisions

52. It is important to point out that each application to vary section 36 consent will be considered on its own merits on a case by case basis. As stated within section 36C of the 1989 Act, on an application for a section 36 consent to be varied, Scottish Ministers may make such variations to the consent as appear to them to be 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.

53. Scottish Ministers may determine at any stage that it would not be appropriate to authorise a developer's proposals under section 36C, without prejudice to the assessment of their merits under any other applicable legislation.

54. On determining an EIA variation application, Scottish Ministers will publish the decision notice, which will contain among other things the terms of the decision and main reasons and considerations on which the decision was based, including a reasoned conclusion on the significant effects of the proposed development on the environment.

55. Any person aggrieved at a decision to grant or refuse an application for variation of a section 36 consent may apply to the Court of Session for permission for judicial review of that decision on any of the grounds on which an application for judicial review may be founded (illegality, irrationality, procedural impropriety and so on) that are or appear to be applicable in the particular case.

Key Contacts

Any questions on the section 36 variation process in relation to terrestrial projects should be addressed to:-

Scottish Government Energy Consents Unit
4th Floor
Atlantic Quay
150 Broomielaw
Glasgow
G2 8LU
Econsents_Admin@gov.scot

Any questions on the section 36 variation process in relation to marine projects should be addressed to:-

Marine Scotland Licensing Operations Team
Marine Laboratory
375 Victoria Road
Aberdeen
AB11 9DB
MS.MarineRenewables@gov.scot

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