EXPLANATORY MEMORANDUM TO

THE ELECTRICITY (OFFSHORE GENERATING STATIONS) (APPLICATIONS FOR CONSENT) REGULATIONS 2006

2006 No. 2064

1. This Explanatory Memorandum has been prepared by the Department for Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Regulations set out certain requirements relating to applications for a consent for the construction, extension or operation of an offshore generating station under section 36 of the Electricity Act 1989 (c.29).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 Under section 36 of the Electricity Act 1989 a consent from the Secretary of State (for Trade and Industry) is required for the construction, extension or operation of a generating station of a capacity above 50 MW. The Electricity Act 1989 (Requirement of Consent for Offshore Wind and Water Driven Generating Stations) (England and Wales) Order 2001 (S.I. 2001/3642) lowered the capacity of generating stations where a section 36 is required to those above 1MW for offshore generating stations in the territorial sea.

4.2 Schedule 8 to the Electricity Act gives the Secretary of State the power to make regulations in regard to the application process for a section 36 consent. The Electricity (Applications for Consent) Regulations 1990 (S.I. 1990/455) were drawn up shortly after the Electricity Act was enacted. At that time offshore generating stations such as wind farms and wave and tidal devices were not in prospect and the provisions relate essentially to onshore generating stations.

4.3 The Energy Act 2004 (c.20) introduced new provisions into section 36 and Schedule 8, which relate specifically to offshore generating stations. The 1990 Regulations are therefore out of date as far as offshore generating stations are concerned.

4.4 The Electricity (Offshore Generating Stations) (Applications for Consent) Regulations 2006 relate specifically to applications for consent for offshore generating stations. The new regulations follow the same basic format as the 1990 regulations, amended appropriately, and the 1990 regulations will remain in force for onshore power stations.

5. Extent

5.1 This instrument applies to England and Wales and the UK Renewable Energy Zone with the exception of that part where Scottish Ministers have functions, as designated in the Renewable Energy Zone (Designation of Area) (Scottish Ministers) Order 2005 (S.I. 2005/3153).

6. European Convention on Human Rights

6.1 As this instrument is subject to negative procedure, and does not amend primary legislation, no statement is required.

7. Policy background

7.1 It is important that applicants who wish to apply for a section 36 consent for an offshore generating station know what is required of them and for stakeholders such as interest groups who may wish to object to the proposed development to understand the application process. The 1990 Regulations relate essentially to onshore generating stations. They are difficult for applicants for section 36 consent for offshore generating stations to use and do not offer a clear picture of the application process to stakeholders and others with an interest. Furthermore the 1990 Regulations are out of date, as they do not reflect the changes made to section 36 by the Energy Act 2004.

7.2 These new regulations clarify and update the applications process, which should make it simpler for applicants to know what is required of them and for stakeholders to understand how they can engage in the process.

8. Impact

8.1 A Regulatory Impact Assessment is attached. Copies can be obtained from the DTI's website at www.dti.gov.uk.

8.2 As the new regulations are more fit for purpose the expectation is that the application process will become smoother, thus resulting in cost savings for the DTI in not having to work with regulations which are out of date and confusing.

9. Contact

9.1 Tony Keegan at the Department of Trade and Industry (tel. 020 7215 0479 or e-mail tony.keegan@dti.gsi.gov.uk) can answer any queries regarding the instrument.

Final Regulatory Impact Assessment

1. Title of proposal

1.1 Revised regulations covering applications for consent under section 36 of the Electricity Act 1989 for offshore generating stations.

2. Purpose and Intended Effect

Objective

2.1 The objective of the revised regulations is to update and improve the current regime for making an application for a section 36 consent for the construction, extension and operation of an offshore generating station. The intention is to avoid imposing an onerous regulatory burden on the applicant, but at the same time it is important that the process encourages inclusivity by ensuring the proposal is brought to the attention of all parties who might have an interest in it and wish to register an objection to it with the Secretary of State. The application process will be based on the current Electricity (Application for Consent) Regulations 1990, whilst revising it to make it clearer and more relevant for offshore generation, and to reflect the amendments which were made to the Electricity Act by the Energy Act 2004. Our aim is to introduce a set of regulations which provide a governance regime with clear requirements and which is simple to operate.

Background

2.2 Under section 36 of the Electricity Act 1989 it is an offence to construct, extend or operate a generating station without a consent from the Secretary of State for Trade and Industry. This regime enables the Secretary of State to make decisions about whether such generating stations should go ahead, within the context of energy policy current at the time of the application.

2.3 Offshore the section 36 regime applies to all generating stations above 50MW in waters up to the limit of the territorial sea, and the Energy Act 2004 extended the consent requirement to the UK Renewable Energy Zone beyond territorial waters. In the case of offshore wind farms and water driven (wave and tidal) generating stations a section 36 consent is necessary for installations with a capacity above 1MW, up to the limit of the territorial sea.

2.4 The section 36 regime applies to generating stations in England and Wales onshore and in offshore waters up to the limit of the territorial sea. It applies also to Scotland and its territorial waters, but, as section 36 functions have been executively devolved to Scottish Ministers, the revised regulations would not apply to generating stations in Scottish waters. The section 36 regime does not apply to Northern Ireland or its territorial waters. It applies to the UK Renewable Energy Zone beyond territorial waters, including that part adjacent to Northern Ireland’s territorial waters, but the revised

regulations do not extend to that part of the Zone where Scottish Ministers have functions under section 84(5)of the Energy Act. This area has been designated in the Renewable Energy zone (Designation of Area) (Scottish Ministers) Order 2005 (SI 2005/3153).

Rationale for Government intervention

2.5 It is in the interests of applicants, stakeholders and Government as regulators to have available a set of regulations for section 36 consent applications which is up to date and which sets out clearly how the applications process operates. The current 1990 Regulations are confusing and difficult to apply to generating stations in the marine environment. For example the list of organisations on which service of notice of a consent application must be made is not relevant to offshore generating stations. The new regulations include an updated list of organisations who have specific responsibilities for offshore activities. Similarly the list of publications in which notice of an application must be given publicity may not bring the proposal to the attention of those most likely to have an interest in an offshore generating station. The list has been tailored to make it more appropriate to an application for an offshore generating station.

2.6 The 1990 regulations need updating also because they do not reflect the amendments to the section 36 process in respect of offshore generating stations which were made in the Energy Act. For example, following the Energy Act the role of a local planning authority in the section 36 process is different, depending on whether the generating station is within its jurisdiction or not. Any new regulations should reflect this changed role for local planning authorities where a generating station is not within their jurisdiction, and require the applicant to serve notice of an application on them. Any new regulations should also take account of the fact that under the new section 36A of the Electricity Act, which was inserted into the Act by the Energy Act 2004, an application can be made to extinguish rights of navigation in territorial waters.

2.7 In summary this clarification of the application process for a consent for offshore generating stations should make it simpler for applicants to know what is required of them, and for stakeholders to have a clear understanding of the process.

3. Consultation

Within Government

3.1 The proposals have been developed in conjunction with other Government Departments with an interest, mainly Defra and the Department for Transport.

Public consultation

3.2 The Department has indicated within its renewables industry/stakeholder liaison groups (NOREL (Nautical and Offshore Renewable Energy Liaison Group), OREEF (Offshore Renewable Energy and Environmental Forum) and FLOW (Fishing Liaison with Offshore Wind Group)) that it intends to revise the 1990 regulations. In anticipation of the revised regulations one applicant for a section 36/36A consent cooperated with the Department in following the new process.

3.3 A formal public consultation was carried out on the regulations from November 2005 to February 2006. The regulations have been amended to take account of the key points raised in the consultation. In particular Regulation 5 has been amended to give a list of organisations on whom notice of an application must be served, in simplified format. This will make it more straightforward for the applicant to comply with the service of notice requirements. The list of organisations on whom service of a notice must be made has been expanded. However, given that service of notice is a straightforward matter of sending a letter or e-mail, we do not consider that it would add significantly to the administrative or cost burden on the applicant.

3.4 Amendments have also been made to the guidance notes accompanying the regulations to explain the provisions more clearly.

4. Options

4.1 The three options are

(i) do nothing.

(ii) amend the 1990 Regulations to cover offshore generating stations.

(iii) introduce a new set of regulations dealing specifically with offshore generating stations.

(i) It would be possible to continue to work with the current Regulations and ask applicants to comply voluntarily with the requirements which are set out in the new draft regulations. However, it would be unsatisfactory to operate a statutory regime which is out of date and confusing in parallel with a non-statutory, voluntary process. Accessibility would be reduced and there would be a lack transparency as far as stakeholders are concerned who might wish to object to a particular development. A serious shortcoming is that stakeholders would not be able to mount a legal challenge if applicants failed to follow the non-statutory process, whereas this course of action would be available in respect of applications for onshore generating stations.

(ii) It would also be possible to have a combined set of regulations which cover both onshore and offshore generating stations. However, such a document would be very complex. Whilst the basic application process is the same whether the proposed generating station is onshore or offshore, a combined set of regulations would need to specify where the requirements differ depending on the location of the installation. For example, the role of local planning authorities is different depending on where the generating station is to be sited. The role of the statutory consultees on whom notice of an application has to be served is also complex. Some have an interest in installations both onshore and offshore, whilst others have a role only where the generating station is to be located offshore. In summary the combined regulations would be very difficult for the reader to follow.

(iii) The preferred option is to introduce a separate set of regulations for offshore generating stations which are up to date and set out a clear and transparent process for applications for section 36 consents. This approach has the benefit of simplicity and clarity for applicants and stakeholders alike. It will be easier and clearer to update the regulations where amendments need to be made in due course which affect only offshore generating stations. As generation offshore is still a relatively new activity it is more likely that changes will be necessary in respect of the application process for offshore generating stations than those onshore.

5. Costs and benefits

Sectors and groups affected

5.1 The new regulations (whether in a form which combines the process for onshore and offshore generating stations or address only the process for offshore generating stations) would apply most directly to the applicants for section 36 consent for the second round of offshore wind farms. There are 15 projects which have been granted agreements for sites leases by The Crown Estate. A section 36 consent application has already been made for the first few of these projects. More applications are expected in 2006, with the majority of the others following probably over a three year period. The promoters of these projects are all large companies or consortia with the expertise necessary to develop multi- million pound projects.

5.2 In the medium term we expect the first applications for section 36 consent to be made for a limited number of demonstration scale wave and tidal projects above 1MW. Commercial scale wave and tidal projects are still some years away. The applicants for section 36 consents are likely to be smaller companies than those taking forward larger-scale Round 2 offshore wind farms.

5.3 There is a wide range of stakeholders who have an interest in offshore generating stations including the navigation community (both

recreational and commercial interests), the fishing industry and groups with an interest in the conservation of the marine environment.

Benefits

Option (i) – do nothing.
Economic, social and environmental

5.4 Developers and stakeholders alike have become familiar with the existing regulations and there could be benefit from an economic, environmental and social perspective in maintaining current practice and not disturbing the status quo. There will be a cost to everybody involved in the section 36 process in familiarising themselves with the new regulations. However, the benefits of maintaining the status quo would be insignificant, compared with the costs of continuing to operate with regulations which are unsatisfactory.

Option (ii) – amend the 1990 Regulations to cover offshore generating stations.

Economic, social and environmental

5.5 The economic, social and environmental benefits of updating the current regulations for offshore generation will be similar for options (ii) and (iii) and are explained in more detail under option (iii), the preferred option, below. The particular benefits from an economic, social and environmental perspective of updating the current 1990 Regulations would be that developers and stakeholders who have an interest in both onshore and offshore generating stations would only need to have access to a single set of Regulations. From an economic perspective it would be necessary to purchase only one set of regulations. Stakeholder groups may feel there is a social benefit in having to consult only a single set of regulations. However, this accessibility benefit would be offset by the scope for confusion of having to cover different processes for offshore and onshore generating stations.

Option (iii) – introduce a new set of regulations dealing specifically with offshore generating stations.

Economic

5.6 The economic benefit of having new separate regulations is that applicants and regulators will be able to work from a clear and up- to-date set of requirements which apply specifically to proposed generating stations in the marine environment, thus avoiding the costs of the current complexity and confusion. In addition, having new separate regulations could facilitate clear and timely updates to the application process, where developments affected only offshore or

onshore consents but not both.

Social

5.7 It is important from a societal perspective that those persons and organisations who have an interest in a particular project are encouraged to participate in the process of providing views on the proposal which are taken into account in decisions on the application. This participative approach is the foundation for good decision making which has a social benefit. Having a transparent and open consents process with access to a set of clear regulations is an important prerequisite for such a participative approach.

Environmental

5.8 The participation of parties with environmental expertise in the consents process is of particular value. The generation of electricity offshore is a relatively new activity and the possible impacts of such development on the marine environment are not fully understood. It is important therefore that the consents process is designed to facilitate the participation of environmental organisations and other parties who can provide the information and specialist expertise necessary to assist Government to make sound decisions.

Costs

5.9 The main costs of complying with the applications process are those associated with publication of the notice of application for consent in local, national and specialist press. The publications requirements are consistent with those established in related legislation including the Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2000 so that costs can be minimised by using a combined notice. The Department will be consulting on the amendments necessary to the 2000 Regulations to implement the requirements of Commission Directive 2003/35/EC, the Public Participation or Aarhus Directive.

5.10 The costs of publication will vary depending on a number of factors the most important of which are the size of the notice and the number of local newspapers in which it is included. The new regulations require the publication of a notice additionally in the specialist press, Lloyds List and a fishing industry trade journal such as Fishing News, which will bring the proposed project to the attention of the navigation community and the fishing industry. The extra costs associated with this requirement are justified by the need to bring the proposed project to the attention of those who may be most directly affected by it.

5.11 On the basis of experience of applicants who have made applications under the 1990 Regulations and one applicant who has

followed the revised process on a shadow basis we estimate that the costs of publication will be in the range of £5,000 – £15,000. There is a correlation between the scale of a proposed project and the costs of meeting the requirements for publicity set out in the draft regulations. A large offshore wind farm which could be of interest over a wide area is likely to require a notice in more than one local newspaper, particularly if the proposed site is in an estuary. If the notice is very large costs could be in the region of £15,000. The costs of a notice for a small demonstration-scale wave or tidal device are likely to be towards the lower end of the range of costs.

5.12 The costs of complying with the requirement to serve notice of the application on certain organisations and local planning authorities likely to be interested in the project are minimal. All that is required is a standard letter or e-mail to the organisations in question. The regulations are not prescriptive about how the requirement to display a map which shows the location of the proposed development is to be met. Applicants can choose no cost options such as display in public libraries and local planning authority offices.

Option (i) – do nothing.

Economic

5.13 The economic costs of the "do nothing" approach are difficult to quantify as they are mainly the hidden costs of applicants having to work with 1990 Regulations which are outdated and confusing. Currently, applicants invariably need to seek advice from the Department on how the 1990 Regulations apply to their particular projects, which is a delay and cost burden on both the applicant and the Department. Also Departmental regulators need to seek legal advice from time to time about whether the 1990 Regulations apply in certain circumstances, again leading to additional cost and potentially delay. Companies are stakeholders who have experience of the current regime for offshore generating stations may wish to offer information on the difficulties they have experienced in working with it.

Social

5.14 There is a social cost, which is again difficult to quantify, if stakeholders and other parties who have an interest in a particular offshore generating station miss the opportunity to participate in the consents process because they feel uninformed about the process and how they can make their views known. Furthermore, in the current regulations the list of publications in which the applicant must place a notice giving details of the section 36 consent application for a generating station is not tailor-made for offshore generating stations. There is a risk that not all the organisations and parties interested in a particular development may be aware of specific proposals.

Environmental

5.15 As noted above, it is particularly important that organisations with environmental expertise are encouraged to participate in the consents process. Conversely there could be a cost in terms of possible poor decision making if Government does not have available the fullest information possible on which to base a decision.

Option (ii) – amend the 1990 Regulations to cover offshore generating stations.

Economic

5.16 Both options (ii) and (iii) reduce the wider costs of the current application process, in simplifying the outdated and confusing regulations. However, we believe a combined instrument would be more complicated than self-standing regulations for offshore and onshore generating stations. Applicants and stakeholders alike may continue to face additional costs, for example in needing to take legal advice, so they understand how the provisions of a combined set of regulations work. The resultant delays will also have an economic cost. The costs of the applications process itself will be broadly similar in options (ii) and (iii) as the process for offshore generating stations will be the same whether it is set out in regulations which combine the process for onshore and offshore generating stations or in a separate statutory instrument.

Social

5.17 There would be a social cost if parties with an interest in a particular development feel deterred from participating in the consents process because they cannot understand a complex set of regulations. There would be a similar risk if such parties were to misunderstand their role and fail to comply with the requirements set out in the regulations.

Environmental

5.18 It would be particularly unfortunate if environmental groups were to be deterred from participating in the consents process or want to participate but misunderstand what is required of them.

Option (iii) – introduce a new set of regulations dealing specifically with offshore generating stations.

Economic

5.19 Self-standing regulations offer the simplest approach, minimising the need to take legal advice to interpret the regulations. There will be a

one-off cost in terms of familiarisation with the new arrangements, but this will be minimal compared with the ongoing confusion of the existing regulations.

As noted above the economic costs of option (iii) will be broadly similar to the costs which applicants already bear in complying with the existing Regulations.

Social

5.20 The social costs of this option should be minimal. The application process has been designed to ensure the maximum possible participation by interested parties so that they feel they have a voice in decision making. For example, the publications in which the applicant must insert a notice giving details of the proposed development and how interested parties can make their views known to the Secretary of State have been chosen to ensure the proposal is brought to the attention of a wide audience. Similarly the requirements for display of a map or chart showing the location of the planned development are designed to facilitate public access.

Environmental

5.21 Similarly the regulations have been designed to minimise environmental costs by taking an inclusive approach to the participation of stakeholders with an interest in the environment in the application process. As noted above it is important for sound decision making that the Secretary of State has the best available environmental information.

Small Firms Impact Test

6.1 No section 36 applications for demonstration-scale wave and tidal generating stations in English and Welsh waters have yet been made but, as noted above, it is possible that developers of such projects will be small firms. It is not clear how many demonstration-scale wave and tidal projects will come forward to the Department for consideration of a section 36 consent, but they are likely to be very few in number, particularly at this early stage in the development of the industry. In our view it is not likely that the costs of complying with the draft regulations will have a significant impact on small firms, particularly as the costs of the application process can be kept as low as £5,000. The costs of the section 36 application process are likely to be an insignificant element of the overall development costs of a project. The British Wind Energy Association as one of the representative bodies of the wave and tidal industry has confirmed that this is the case.

7. Competition assessment

7.1 The market for the purposes of undertaking the competition assessment comprises energy-related companies who are looking to construct and operate offshore generating stations including wind farms and wave and tidal devices. The offshore wind energy market is newly established with the first experimental 2 turbine installation being commissioned in December 2000. The industry has developed rapidly since this first installation and four commercial-scale 30 turbine wind farms are now fully or partially operational. A second phase of development is now underway comprising much larger wind farms. Section 36 consent applications have recently been received for the first few of these developments.

7.2 The offshore wind energy industry is characterised by several large vertically integrated utility companies, a number of oil and gas companies seeking to diversify into renewable energy and several niche market players who specialise in renewable energy. It is a multinational industry with participation by a number of European-based energy companies who are seeking business opportunities in the UK energy market. The sector is a dynamic one and has seen a number of recent acquisitions and mergers.

7.3 The wave and tidal sector is less well developed. A number of companies have been developing prototype devices of different kinds of wave and tidal installations. The industry is now ready to move forward to demonstrating the capabilities of larger scale devices for which section 36 consents are likely to be required.

7.4 The costs of developing and installing any kind of electricity producing device in the marine environment are considerable. The costs of complying with the process for making an application for section 36 consent are insignificant in comparison and the risks that there will be any impact on competition is very low. It can only be helpful to established market players and new market entrants to have set out in regulations a clear and up to date process for making an application for section 36 consent.

8. Enforcement, sanctions and monitoring

8.1 The Department will not consider an application for section 36 consent where the application process set out in the regulations has not been followed. The Department has issued guidance to assist applicants to follow the process and is willing to provide advice to applicants who have particular queries.

8.2 The number of section 36 applications received annually is very low and it is possible for the Department to monitor each application to ensure the process has been followed correctly. For example we routinely ask for copies of the notices of application for consent which are published in publications and the notices served on relevant

organisations. Our intention would be to continue with these requirements.

9. Implementation and delivery plan

9.1 It is our intention to lay the Regulations before Parliament, to come into force on 1 October 2006, one of the two common commencement dates for regulations which have an impact on business. The regulations and the accompanying guidance notes will be published on the DTI website. We will take every opportunity (eg the newsletter issued by the Electricity Development Consents team to bring the new regulations to the attention of those likely to be affected by them.

10.Post-implementation review

10.1 The operation of the new regulations will be monitored after their implementation and a formal review will be undertaken five years after implementation.

11. Summary and recommendation

11.1 Our objective is to put in place a set of regulations which is tailor-made for offshore generation and which establishes an application process for section 36 consents which encourages all parties who have an interest in a particular proposal to participate whilst avoiding an onerous administrative and cost burden on the applicant. Option (i), the "do nothing" option, is unacceptable in our view as the Department would be failing to address the shortcomings of the present situation which gives rise to the economic, social and environmental costs outlined above. The cost/benefit analysis above indicates that the option which best meets our objective is option (iii) – to introduce a new set of regulations dealing specifically with offshore generating stations. The consultation undertaken on the draft regulations confirmed us in our view that this option is preferable. Our recommendation therefore is to proceed to place a new set of regulations before Parliament which deal specifically with the application process for a section 36 consent for an offshore generating station.

12. Declaration and publication

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed **Malcolm Wicks**

Date **23 July 2006**

Malcolm Wicks, Minister for Energy, Department of Trade and Industry