Derogation, an opportunity or a barrier for the UK's future offshore wind ambitions?

GOBe

Overview

The following article provides a thought piece on what is likely to form a critical aspect of the consenting process for recent and near future offshore wind leasing rounds in the UK (i.e., ScotWind and the Celtic Sea).

In Scotland, the recent ScotWind seabed leasing round aimed to procure at least 10 GW of offshore wind but resulted in 17 offshore wind project awards with a total capacity of just under 25 GW. The Sectoral Marine Plan for Offshore Wind for Innovation and Targeted Oil and Gas Decarbonisation (INTOG) identifies a further nine areas of search suitable for future leasing off the east / north east coast of Scotland. In the Celtic Sea, The Crown Estate are leading a leasing round of up to 4 GW of floating offshore wind, which will see rights awarded in 2023, but has already triggered a significant level of pre-emptive project activity.

Derogation under Article 6(4) of the Habitats Directive is likely to play a key role in determining whether many of the projects that come forward under these leasing rounds can secure their necessary consents. In simple terms the derogation process is formed of three principle tests:

1. There are no feasible alternative solutions that would be less damaging or avoid damage to the site.
2. The proposal needs to be carried out for imperative reasons of overriding public interest (IROPI).
3. The necessary compensatory measures can be secured.

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This article focuses on the experience gained from those offshore wind projects that have engaged with this process to date, and what lessons may be learned for future development throughout the UK.

Derogation in the industry to date

Derogation has become a familiar term / concept for the offshore wind sector in English waters over the last three years. Two offshore wind farm projects (Hornsea Project Three, and Norfolk Boreas) have been consented with a reliance on derogation, a further three projects are awaiting consent decision (Norfolk Vanguard, East Anglia ONE North and Two) and one is about to start its examination (Hornsea Project Four), all of which, if consented will likely rely on this process. Finally, a further seven North Sea projects (Dudgeon & Sheringham Extension projects, Five Estuaries, North Falls, Outer Dowsing, and the two Dogger Bank South Projects) are in the pre-application phase and will also be preparing their consents with derogation in mind.

To date, and in English waters, passage through the first two tests (alternatives and IROPI) of the derogation process has been relatively straight forward, with the Governments renewable energy commitments supported by the National Policy Statement's and, the way The Crown Estates leasing round process has been delivered, has provided a solid framework for the need and alternatives tests.

We have learnt through experience how the concept of "in-principle" derogation cases can be made and what they must entail (we have now secured support for this through a Government position paper), how these in-principle cases can be relied

upon by regulators when determining consents, and what the framework is post consent for ensuring the measures are fully secured and delivered. This process has taken time for the industry, stakeholder community and regulators to become comfortable with the concept and how it works in practical licensing terms.

The third test (compensatory measures) of the derogation process (in England) has been more challenging and to date has largely been negotiated on a case-by-case basis with the more easily available options / locations being utilised by the forerunning projects. Whilst we have started to see some alignment regarding the coordinated delivery of compensation measures these are still very much focused on options which can be delivered by a single project. As we move forward through the UK's North Sea project pipeline the compensation options are becoming increasingly limited and therefore more challenging to agree / secure on a case-by-case basis and to deliver at a single project level. We have reached the point where it is clear that tackling this process piecemeal is carrying ever increasing risk as the remaining options are either too disproportionate for the scale of the project level impact or, can only be delivered through Government intervention. Strategic solutions are therefore paramount. However, getting the industry, The Crown Estate and government organised, aligned and strategic initiatives in place with a regulatory framework in place to support this, and a scientific stakeholder community aligned with the needs of the sector is not a simple or quick process.

Working alongside industry and government, we (here, at GoBe Consultants Ltd.) are trying to address how we can ensure derogation can be a long term and viable solution for a pipeline of offshore wind projects throughout the UK. As an example, this week will see a convening of industry, Government, Government advisory bodies, and regulatory authorities from across the devolved administrations to try

and map out a pathway to ensure the UK is not held back by the consenting process in meeting its offshore wind energy commitments. The derogation workstream will form a central piece of these discussions.

Implications for future development

Looking ahead to the immediate prospect of delivering ScotWind, derogation will become a key phrase for these projects. At first glance there is potential for greater risk in the ability for projects to pass smoothly through the first stages of the derogation process given that the target of the leasing round (and its HRA) was based on a 10 GW pipeline of projects, which is clearly well below the level of headline capacity in the project awards. Will we see the project need and alternative arguments that have been a relatively easy hurdle to pass for the sector to date, become a more focused point of discussion and challenge? The potential for some level of attrition to headline capacity must be factored into project risk management.

There are many questions around the practicalities of any derogation case:

- Will there be an expectation for or, acceptance of "in-principle" derogation submissions, and if so, what will the expectations of Marine Scotland be in terms of how they are prepared?
- How will any such "in-principle" derogation case play-out to the determination and subsequent licensing processes?
- Will there be coordination across projects impacting on the same designated features to align the strategy of the derogation case taken, or will projects forge ahead on their own terms?

- How involved will Marine Scotland and its advisory bodies be in influencing this process during the pre-application stage?

These are just some examples of the many important points to consider which will have a material impact on how and when projects bring forward any derogation submissions, and how smoothly projects are able to navigate this process in their efforts to secure a timely consent. It is already good to see Marine Scotland consulting early on national guidance for derogation, IROPI and compensation.

With regard to compensation, it is likely that there will be some projects for which available and appropriate project level compensation options will prove the most pragmatic solution. For other sites, particularly where multiple sites are impacting on the same designated receptors, a more strategic solution will likely be required (if we are to avoid a first come first served approach to compensation). For strategic compensation to be a viable option on which to deliver a consent there will need to be regulatory framework in place that has grappled not only with the concept of what the compensation measures may comprise and how Government and industry would deliver them, but also some of the more nuanced issues such as:

- how individual projects would "buy into" these measures (who owns the compensation pot and how is it managed);
- how the consent envelope concept would be factored into this process (worst case verses final design);
- how projects coming forward at different timeframes could ensure equality of delivery (could the early projects be held up waiting for later projects to deliver, or conversely could the later projects risk missing out if the early projects take up all the compensation capacity);

- how any adaptive management would be managed at a portfolio scale (especially if different projects contribute different aspects of the collective compensation measure); and
- how to build in resilience to the delivery of the measures, such that if one or more projects no longer contributes, the measure(s) can still be delivered.

Understanding, managing, and navigating these derogation risks whilst maintaining alignment with the programme will be a key issue ScotWind and INTOG developers will need to become rapidly fluent in.

Looking further ahead to the Celtic Sea floating offshore wind leasing round, it is clear that many of the lessons learnt from the Round 3 and 4 leasing processes will be evident in how TCE approach the plan level HRA. However, it is recognised that many potential projects have started early development work, essentially pre-empting the leasing process. A further key consideration for the Celtic Seas round will (given the different licensing regimes) be around the ability for the English and Welsh Governments and their statutory nature advisors to work together to ensure a coordinated and joined up approach is taken with regard to the derogation process. This will likely hinge on an aligned vision in terms of how cases can be brought forward, but also how they are managed through the determination process.

At GoBe we are operating at the forefront of the derogation process having led on the UK's first offshore wind farm to have been through stages 3 & 4 of the HRA (derogation). This experience has led to GoBe leading on numerous other derogation cases (covering all stages of the derogation process) for multiple projects within the offshore wind sector throughout the UK. In addition to our project level

support, we are also working closely with industry wide initiatives such as the Offshore Wind Industry Council's (OWIC) Pathway to Growth (P2G) group, which is spearheading the efforts to ensure that all parties engaged in this process (throughout the UK) are aligned on the risks, opportunities and frameworks that need to be in place to ensure the derogation process is compatible with our offshore wind energy commitments.

Working across the scientific, procedural and governance strands of the derogation process is something our company is hugely proud of, and the diverse nature of the workstreams are well reflected in the composition of our staff. GoBe looks forward to continuing to help drive this exciting workstream at both project and industry level as we progress with ScotWind and the Celtic Seas leasing rounds.