



Department
of Energy &
Climate Change

Varying consents granted under section 36 of the Electricity Act 1989 for generating stations in England and Wales

A guidance note on the new process

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Note: This guidance 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 as appropriate. While the guidance sets out the Department's current views on how the legislation should operate, ultimately, only the Courts can give a definitive ruling on the law.

Introduction

1. This guidance is about varying consents which have been granted under section 36 of the Electricity Act 1989 for the construction or extension, and operation, of electricity generating stations (“section 36 consents”) granted by the Secretary of State¹ or the Marine Management Organisation (MMO).
2. By applying to vary a section 36 consent it may be possible to obtain authorisation for a generating station to be constructed, extended and/or operated in a way that would not be consistent with the existing consent.
3. This guidance applies to England and Wales (and adjacent offshore areas) only. It does not apply to Scotland, where applications to vary section 36 consents must be made to Scottish Ministers.
4. 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 and other interested parties who are given an opportunity to comment on applications from developers or operators to vary section 36 consents.
5. Applications and any inquiries about potential applications to vary section 36 consents should be addressed to whichever authority issued the original consent.²

The legislative framework

6. 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 electrical (MW). Section 36 also applies (subject to the Planning Act 2008) to proposals for any offshore generating station above 1 MW in the case of wind, wave or tidal power located up to the seaward limits of the territorial sea or in a Renewable Energy Zone.
7. All onshore section 36 consents to which this guidance applies were granted by the Secretary of State. Since 1 April 2010, electricity consent functions for offshore generating stations with a capacity of above 1MW and not more than 100MW were transferred from the Secretary of State to the MMO. Since 1 March 2010, section 36 consents have no longer been required for offshore operating stations with a capacity greater than 100MW (or, onshore, for those of more

¹ Currently the Secretary of State for Energy and Climate Change, previously the Secretary of State for Business, Enterprise and Regulatory Reform, and before that, the Secretary of State for Trade and Industry.

² In the legislation on variation of section 36 consents, both the Secretary of State and the MMO are referred to as “the appropriate authority” – meaning the Secretary of State where the original consent was granted by the Secretary of State and the MMO where it was granted by the MMO. The MMO has had section 36 consenting functions in respect of certain offshore renewable energy installations since 1 April 2010 (see section 12 of the Marine and Coastal Access Act 2009 and paragraph 3 below).

than 50MW capacity) where development consent is required, and is granted, under the Planning Act 2008 (see below).³

8. Where it is proposed to construct a generating station or ancillary development (such as a substation) within the territory of a local planning authority (i.e. in the case of any onshore, and some offshore generating stations⁴), planning permission under the Town and Country Planning Act 1990 (“the 1990 Act”) is also required for any works which are “development” for the purposes of the 1990 Act. Where a section 36 consent is granted by the Secretary of State,⁵ it is possible for a direction to be given under section 90 of the 1990 Act (“section 90 directions”) that planning permission be deemed to be granted. Where a section 90 direction is given, it has been the usual practice of the Secretary of State to include the majority of the conditions which apply to the construction and/or extension of a proposed generating station in a section 90 direction, where they are enforceable by the local planning authority, rather than in the section 36 consent itself.

9. On 1 March 2010, a new regime for consenting major energy infrastructure projects in England and Wales came into force in the form of the Planning Act 2008 (“the 2008 Act”). Projects which would previously have been the subject of section 36 consents and section 90 directions, but for which applications for section 36 consent were not submitted before that date now need development consent under the 2008 Act, which is granted by means of a development consent order.

10. Since the 2008 Act regime came into force, it has not been possible or necessary to apply for section 36 consent in respect of an onshore generating station in England and Wales. However, as at 1 March 2010 significant numbers of section 36 consent applications either remained to be determined by the Secretary of State; had been granted but not yet implemented; or had been implemented and remained part of the regulatory framework governing operating generating stations.

11. Offshore, the impact of 2008 Act has been confined to projects with a capacity of more than 100 MW: new projects above that threshold are now subject to the 2008 Act regime, but those below it (but above 1MW) remain subject to section 36 consent. As is the case onshore, significant numbers of projects are covered by section 36 consents which have been granted but not yet implemented, or have been constructed and are regulated by section 36 consents.

Varying a section 36 consent: the problem

12. Generating station development consents are often not implemented until some years after they are granted. Each consent reflects technology and industry practice at the time it was applied for, but such practices do not stand still, even in relatively mature sectors. This means that when a developer comes to construct a generating station, it will sometimes be uneconomic

³ Prior 1 April 2010, offshore section 36 consents in what is now the MMO’s area of responsibility were granted by the Secretary of State, who also continued to have section 36 consenting functions after that date in respect of projects with a capacity of more than 100MW for which applications were submitted before 1 March 2010 (see further paragraph 5).

⁴ I.e. those offshore generating stations in respect of whose onshore “ancillary development” (such as export cables) requires planning permission and is the subject of an application for a direction under section 90 of the Town and Country Planning Act 1990 (see below).

⁵ Note that the MMO does not have the power to make section 90 directions when it grants a section 36 consent, and that the Secretary of State can only give a section 90 direction in respect of a project where the Secretary of State grants the section 36 consent. Accordingly, where planning permission is required in respect of an aspect of an offshore project for which the MMO grants the section 36 consent, that permission must be obtained from the local planning authority, not through a section 90 direction.

or have more detrimental effects on the environment to do so according to all of the details specified in the consent. In practice, this means changes to the original proposals to make the project feasible. The changes concerned may not be very great, but they may nevertheless involve work which would not be consistent with the terms of the existing consent, for example installing more efficient technology generating more power without radically changing the physical dimensions of the buildings and/or structures.

13. The 2008 Act recognises this potential problem, and it allows developers to apply to have changes made to development consent orders. Schedule 6 to the 2008 Act and the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 set out a procedure for making such changes. However, the 1989 Act makes no provision for the terms of section 36 consents to be varied. Before 1 March 2010, it was possible to grant a fresh section 36 consent that took account of updated plans for a proposed generating station. Although this involved going through the whole section 36 application process again and producing what was in legal terms a new consent rather than a variation of the existing consent, this provided a convenient “work-around” for the lack of a formal power to vary section 36 consents, at least in cases where relatively little time had passed since the original consent was granted and only a small number of changes were being made to the proposals. However, since the 2008 Act came into force, this is no longer possible in most cases, as (with the exception of offshore developments in the 1-100MW range) no new section 36 application can be made after 1 March 2010. Accordingly, if, since that date, a developer found that what it wanted to construct was not consistent with the terms of its section 36 consent, its only option (prior to the entry into force of the legislation on variation of section 36 consents) was generally to apply to the Planning Inspectorate for a development consent order under the 2008 Act for the revised scheme, starting from scratch – a process which the Government considers disproportionate as a way of authorising minor changes to a proposal which has already been given consent.

The solution: the Growth and Infrastructure Act 2013, sections 20 and 21

14. As part of the Government’s strategy to promote growth and investment, the Growth and Infrastructure Bill was introduced into Parliament in October 2012. The Bill received Royal Assent on 25 April 2013. In order to deal with the problem of highlighted above in relation to section 36 consents, the Growth and Infrastructure Act (“the 2013 Act”) provides, amongst other things:

- for the Secretary of State or the MMO, where they consider it appropriate, to be able to vary section 36 consents which they have granted (section 20, inserting a new section 36C into the 1989 Act); and
- for the Secretary of State, when granting such a variation, to be able to make or vary a section 90 direction under the 1990 Act that planning permission be deemed to be granted (section 21, amending section 90 of the 1990 Act).

15. The main aim of section 20 of the 2013 Act, which inserts new section 36C into the 1989 Act, is to make it possible for the designs of generating stations, already consented but not constructed, to be modified in ways which the relevant section 36 consents would not otherwise permit and (in the case of those projects that would otherwise require development consent under the 2008 Act) without the developer having to apply for a development consent order under the 2008 Act.

16. The purpose of section 21, which inserts new subsections (2) and (2ZA) into section 90 of the 1990 Act, is to make it possible for those who are granted variations to their existing section 36 consents under section 36C of the 1989 Act, to obtain any necessary changes to planning permission from the Secretary of State in a “one-stop shop” process. As an alternative, they may choose to address the question of any such changes by making a separate application to the relevant local planning authority for planning permission under the appropriate provisions of Part 3 of the 1990 Act.

The variation process in outline

17. The aim of the variation process is to reduce the time that might otherwise be taken to authorise development which is not consistent with an existing section 36 consent. It is not intended to relax the standards to which a consent must conform.

18. Section 20(4) of 2013 Act confers on the Secretary of State and the MMO a power to make “such variations as appear [to them] to be appropriate” to a section 36 consent, following an application from the person for the time being entitled to the benefit of that consent. Before the Secretary of State or the MMO exercise this power, an application for a variation must be made, published and considered in accordance with the Electricity Generating Stations (Applications for Variation of Consent) Regulations 2013 (“the 2013 Regulations”). Applications for variation should be made to the authority which granted the existing section 36 consent (i.e. DECC or the MMO). Applications relating to projects in Scotland (which fall outside of the scope of this guidance) will be dealt with by Scottish Ministers under separate regulations.

19. In cases where an application to vary a section 36 consent is made to the Secretary of State and the developer or operator is also seeking a change in the conditions of planning permission applicable to a generating station, a request for the making or variation of a direction that planning permission be deemed to be granted under section 90 of the 1990 Act (as amended by section 21 of the 2013 Act) should accompany the application for variation of the section 36 consent. Such requests may be made both in cases where the applicable planning permission is that originally given under a section 90 direction by the Secretary of State and in cases where a new planning permission has subsequently been granted by the local planning authority (for example, under section 73 of the 1990 Act). The only difference is that in the latter case, the Secretary of State will have to grant a direction under section 90(2) (effectively granting a new deemed planning permission) rather than under section 90(2ZA) (which allows for variation of existing deemed planning permissions, but not of those granted by local planning authorities). Requests for section 90 directions will be considered alongside the application for variation of a section 36 consent to which they relate.

20. Where a section 36 consent is varied (and a section 90 direction made or varied in consequence), it may be necessary to seek other regulatory consents before carrying out the work permitted by the variation. In some cases what will be required is a variation to an existing consent (for example, a marine licence from the MMO or a permit issued under the Environmental Permitting (England and Wales) Regulations 2010 by the Environment Agency or Natural Resources Wales); in other cases, the change from what was permitted under the existing consent may be such that a form of consent that was not previously required is now necessary before the change permitted by the section 36 variation can go ahead. Forms of consent other than section 36 consents and section 90 directions are outside of the scope of this guidance. Before proceeding with an application, you should seek advice on what variations to non-section 36 consents may be required in respect of the development you are proposing and ensure that the authority to whom you have applied for a section 36 variation is kept informed of

your discussions with those responsible for the non-section 36 consent. For example, it is likely that DECC would wish to know that the Environment Agency saw no reason to believe that it would not make necessary variations to a relevant environmental permit before granting a variation to the section 36 consent for the plant to which the permit related.

What type of proposal is the section 36 variation process aimed at?

21. The power conferred on the Secretary of State and the MMO by section 36C of the 1989 Act is a broad and discretionary one to make “such variations...as appear to [the Secretary of State or the MMO] to be appropriate”. Each application to vary section 36 consent will be considered on its merits on a case by case basis. However, the following paragraphs set out such guidance as it is possible to give on the consideration of applications under a new procedure before any applications under it have been determined.

22. The variation process is designed to apply to projects that have been consented under section 36, where the operator wishes to carry out development that is inconsistent with the existing section 36 consent. As noted above, the legislative change brought about in relation to section 36 consents by the 2013 Act were primarily aimed at projects which had been consented but not constructed. However, it should be noted that there are two broad categories of case in which it is likely that the Secretary of State or the MMO may consider it appropriate to exercise the power in section 36C – namely, to enable:

(a) The construction or extension of a generating station (whose construction or extension has either not yet commenced or has not yet been completed) along different lines from those set out in the existing consent;

(b) the operation of a generating station (whether or not it is already operational) in a way that is different from that specified in the existing consent (this may sometimes involve making limited physical alterations to a generating station, but should not involve work that could be characterised as an “extension” of an existing generating station which has been granted section 36 consent⁶).

23. Determining that any given proposed variation is “appropriate” to be made under section 36C (4) potentially requires the Secretary of State or the MMO to exercise judgment on two distinct questions:

(a) Whether the change proposed to the generating station (or proposed generating station) concerned is of a kind that it would be reasonable to authorise by means of the variation procedure (regardless of its merits in planning / energy policy terms);

(b) if the answer to question(a) is positive, whether (from a planning / energy policy point of view) the variation should in fact be made, thereby authorising whatever development the making of the variation will permit to be carried out.

⁶ The extension of an existing generating station which has been granted section 36 consent requires development consent under the 2008 Act or (in the case of offshore generating stations in the 1-100MW range), a fresh application for section 36 consent. Section 36(9) of the 1989 Act provides that ““extension”, in relation to a generating station, includes the use by the person operating the station of any land [or area of waters] (wherever situated) for a purpose directly related to the generation of electricity by that station and “extend” shall be construed accordingly”. However, a generating station which has not yet been constructed cannot be extended, so it may be possible to use the variation process to authorise an increase in the area covered by a proposed generating station.

24. A detailed consideration of question (b) is largely beyond the scope of this guidance. It will be necessary for applicants to make a case for the changes in planning and energy policy terms, and to engage with interested parties both before and after making an application to address concerns that they may have about what is proposed. Guidance on the issues which should be considered is provided by the National Policy Statements on energy infrastructure designated by the Secretary of State under the 2008 Act⁷.

25. In relation to the first question, potential applicants should note that in each case, the scope of what can be authorised under the variation procedure will depend on the provisions of the existing consent, the specific circumstances of the project, and the nature and extent of the proposed changes and their environmental impacts. Given the potentially very large range of different cases that could arise, it is not possible to give definitive guidance in advance on the scope of the variation procedure. What follows are therefore only very broad outlines, which should be taken as providing a framework for potential applicants to consider their options and a starting point for discussion with DECC or the MMO in individual cases.

26. The key point to note is that the variation procedure is **not** intended as a way of authorising any change in a developer's plans that would result in development that would be fundamentally different in character or scale from what is authorised by the existing consent. Such changes should be the subject of a fresh application for consent in the form of a development consent order under the 2008 Act or (offshore between 1 and 100MW) a section 36 consent. However, beyond that, it is very hard to lay down any meaningful general statements of principle, because of the variety of consented generating station projects and the range of circumstances in which applications to vary them may be made. The appropriateness or otherwise of granting a variation therefore has to be considered by reference to what has been consented already and the changes that are contemplated in each case where a variation is proposed. However, without prejudice to such case-by-case consideration of individual applications, we would expect to start from the following broad assumptions as regards what it is and is not appropriate to authorise under the section 36C variation procedure.

- Changes in the plant's main fuel or other power source⁸ are unlikely to be considered suitable subject-matter for a variation. In the case of an existing generating station, this could involve constructing again substantial parts of the plant (see below). In the case of a plant that has been consented but not yet constructed, such changes could well result in the modified plant having fundamentally different environmental impacts from those that would have been likely to arise from the originally consented design.
- Some less significant changes to the particular type and/or operation of technology used may, however, be suitable for consideration under the variation procedure (for example different boiler or turbine designs, or operating a combined cycle gas turbine (CCGT) generating station in open-cycle (OCGT) mode). However, as regards existing generating stations, it should be noted that since section 36 consent to construct a generating station is granted on a "one-off" basis, to construct a particular project, it does not entitle the holder of the consent to construct a series of new generating stations on the same site over a period of time.

⁷ <https://www.gov.uk/consents-and-planning-applications-for-national-energy-infrastructure-projects#national-policy-statements-for-energy-infrastructure>

⁸ Where this is specified in the original section 36 consent. If the original section 36 consent provided that a generating station was to burn a mixture of, for example, "clean" biomass and waste products in certain proportions, it might be appropriate to contemplate a change in those proportions under the variation procedure.

- Changes in the design of generating stations which have been consented but not constructed which would allow them to generate an amount of power that would be inconsistent with the original consent are likely to be appropriate subject matter for a variation application, provided there are no major changes in the environmental impact of the plant. Similar changes to an existing plant could be appropriate subject matter for a variation application only if they did not involve physical extension of the generating station, relocation of generating plant, or the installation of new equipment that would amount to the construction of a new generating station.
- It should generally be possible to consider authorising changes which only affect the operation of an existing station (and do not involve construction of a new generating station or extension of an existing one) under the section 36 consent variation procedure.

Early discussions with interested parties

27. Developers who are considering making an application to vary a section 36 consent are strongly recommended to contact DECC or the MMO to discuss the generating station project changes envisaged **before** making an application. This should enable potential applicants for variations to avoid unnecessary effort and expense on preparing a variation application in respect of proposals that are not appropriate for consideration under the variation process. It should also help applicants to make better focused applications and enable the process of publishing and considering them to run more smoothly.⁹ At this stage, developers would normally be expected to provide an outline of the proposed project changes and an indication of the likely environmental impact¹⁰, if any, of the proposed changes compared to what was originally assessed and consented. This is particularly important if a significant period of time has elapsed since the granting of consent and the intended application for a variation (see further below). In order to help speed up the application process and identify issues of concern at any early stage, developers are also strongly encouraged to discuss proposed project changes with the statutory consultative bodies identified in the Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2000 (“the 2000 Regulations”), and other interested parties, in advance of preparing and submitting any variation application and supporting environmental information.

Changes involving development outside of the “red line” boundary

28. In principle, there is nothing to stop the section 36 variation process being used to facilitate changes which would involve development outside the “red line” indicated in the existing consent.¹¹ However, a substantial expansion of development outside the original boundary may well be taken as an indicator that what is being proposed is really a new project (that may, for example, require development consent under the 2008 Act), rather than something that it would be appropriate to authorise by means of a section 36 variation. In any case where development

⁹ The 2013 Regulations allow the Secretary of State or MMOR to refuse applications relating to proposals which are clearly not appropriate for consideration under the variation process before they are published, but it will be more efficient if such proposals can be screened out informally before an application is made.

¹⁰ Using the term “environmental” in the broad sense that it is used in the Environmental Impact Assessment Directive (2011/92/EU). In offshore cases, this will for example include likely impacts on navigation, human health and legitimate uses of the sea.

¹¹ The “red line” is the name given to the boundary of the development which is the subject of a section 36 or planning permission, as denoted by a red line on a plan attached to it. Developers often include a “buffer zone” when undertaking pre-planning site surveys that can extend beyond the red line boundary.

outside the original red line is proposed, it is very important that the applicant demonstrates both that adequate steps have been taken to make interested parties aware of what is proposed (for example local neighbours, especially where they may not have been affected by the existing consented development) and that any resulting environmental impacts not covered in the environmental statement submitted with the application for the original consent have been properly assessed.¹²

What are the alternatives to a variation application?

29. Existing section 36 consents cover a number of different kinds of generating station projects. As noted above, the variation power conferred by section 36C of the 2013 Act was conceived primarily as a way of dealing with issues arising in relation to a project that had been granted section 36 consent, but had not yet been constructed.

30. Alternatives available to a variation of a section 36 consent will depend on the type of project concerned and other relevant factors. Whilst in some cases the proposed changes may go further than the Secretary of State or the MMO would consider to be appropriate for a section 36 variation, in other cases it may be possible to carry out works that are different from those envisaged at the time the existing section 36 consent was applied for without obtaining a variation or applying for development consent under the 2008 Act. Using the three broad categories of potential variation case referred to in paragraph 20 above, the position may be summarised as in the table below.

Category of change which it is sought to permit	Points to consider before applying for section 36 variation	Possibilities to consider if section 36 variation inappropriate ¹³
Onshore project, not yet constructed – permission sought to construct along different lines	Is change inconsistent with existing consent? ¹⁴ Would “variation” of the existing deemed planning permission under section 73 of the 1990 Act suffice?	Application for development consent under the 2008 Act ¹⁵
Existing onshore project – permission sought for physical alteration	Is change inconsistent with existing consent? Could the alteration be authorised by a free-standing application for planning permission under the 1990 Act?	Application for development consent under the 2008 Act (e.g. application for consent to extend a generating station)
Existing onshore project –	Is change inconsistent with	Not applicable. ¹⁶

¹² I.e. where the environmental impacts that would be likely to arise if the variation were granted would go beyond any “worst-case” evaluation undertaken in the original environmental statement on “Rochdale envelope” principles (which are conveniently explained in the Planning Inspectorate’s advice note “Using the Rochdale Envelope”, prepared to assist those making applications for development consent orders under the 2008 Act.

¹³ (And the alternatives to section 36 referred to in the second column of this table are inadequate.)

¹⁴ Some section 36 consents are drafted in such a way as to provide some flexibility over matters such as maximum electrical output or the height of wind turbine units.

¹⁵ Note that an application for development consent under the 2008 Act cannot be used to vary a section 36 consent: it is a completely new application for consent under a different regime.

permission sought to operate in a different way	existing consent? Could the alteration be authorised by a free-standing application for planning permission under the 1990 Act?	
Offshore project, not yet constructed – permission sought to construct along different lines	Is change inconsistent with existing consent? For onshore elements of the project: would “variation” of the existing deemed planning permission under section 73 the 1990 Act suffice?	For projects below 100MW: consider a fresh section 36 application For other projects: application for development consent under the 2008 Act
Existing offshore project – permission sought for physical alteration	Is change inconsistent with existing consent? For onshore elements of the project: could the alteration be authorised by a free-standing application for planning permission under the 1990 Act? For other elements: is there scope to authorise proposed changes under a marine licence?	Application for development consent under the 2008 Act (e.g. application for consent to extend a generating station)
Existing offshore project – permission sought to operate in a different way	Is change inconsistent with existing consent? For onshore elements of the project: could the alteration be authorised by a free-standing application for planning permission under the 1990 Act?	Not applicable.

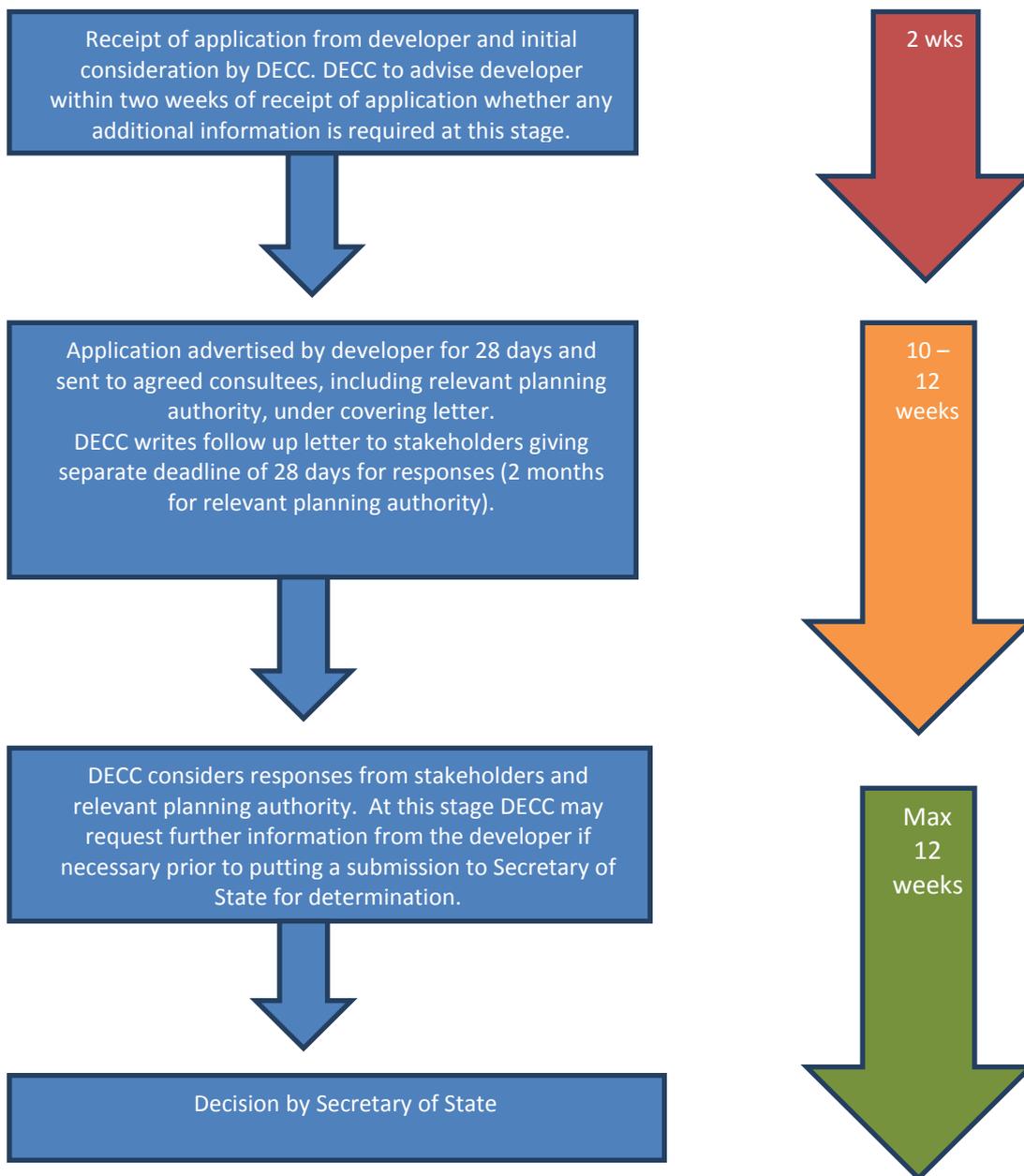
How much does a Section 36 variation application cost to process?

31. At present, no fee is payable to the Secretary of State or the MMO when an application to vary a section 36 consent is submitted, or when the variation is made (although the Secretary of State has discretion to make regulations providing for payment of such a fee). However, applicants 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. Applicants 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 / planning consultants, especially in relation to the preparation of any environmental statement.

¹⁶ It is not possible to make a development consent order under the 2008 Act that provides only for the operation of a generating station and not its construction or extension as well.

How long will the process take from start to finish?

32. The intention is to have a relatively short process for deciding variations on consents. However, the actual time taken 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. In the most straightforward cases, where the changes being proposed are minimal, it may take as little as 3 months. However, in more complex cases it could take 6-9 months or longer. The Secretary of State and MMO have discretion under the 2013 Regulations to refer applications to a public inquiry where they consider this appropriate (for example, because of the complexity or controversial character of what is proposed).



Applying for a variation under the 2013 Regulations

33. When submitting variation applications to DECC or MMO, 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. Electronic versions and hard copies (2 hard copies and 2 CDs) of **all** variation application documents should be submitted.

The Application must describe the whole of the proposed development

34. Applicants will note that the Regulations refer in regulation 3 and elsewhere to the provision of information about “the proposed development”. This term is defined in regulation 2(1) as follows:

“proposed development” means—

- (a) the generating station, or extension of a generating station, which the applicant would be authorised to construct under a relevant section 36 consent if that consent were varied as requested in a variation application;
- (b) the way in which a generating station so constructed or extended would be authorised to be operated under the relevant section 36 consent as so varied; and
- (c) any section 90 development in respect of which section 36 consent is not required;¹⁷

35. In other words, the application must describe the whole of the development that it is proposed should be authorised once the section 36 consent which the applicant is seeking to vary has been varied (and any related section 90 direction has been given). In many cases, subject to any need to update information about environmental impacts, it may be possible for the application to do this by resubmitting documents prepared in support of the section 36 consent which it is now proposed to vary and describing the changes in construction, operation or extension which are proposed, but it is essential that the application documents give a clear and complete picture of what development would result if the variation is granted and the varied consent is then implemented in accordance with its terms.

Other legislation which must be complied with as part of the variation process

36. Before an application for variation of the section 36 consent is determined by the Secretary of State or MMO, both the decision-maker and the applicant must have complied with the relevant requirements of the 2000 Regulations regarding environmental assessment (see below) and with the relevant Regulations implementing the Habitats and Birds Directives (the Conservation of Habitats and Species Regulations 2010 for onshore developments and the Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007 for offshore developments).

¹⁷ “Section 90 development” is development in respect of which a section 90 direction has been given or is being sought.

37. The 2013 Regulations provide (in regulation 7) that the 2000 Regulations apply to applications to vary section 36 consents as they apply to original applications for consent under section 36, with certain modifications. Since most, if not all, developments consented under section 36 are likely to have significant effects on the environment, it is expected that applications to vary section 36 consents will invariably need to be accompanied by some form of environmental statement. In cases where the changes that it is proposed to make to the design of the generating station do not result in the overall development having a different environmental impact from the generating station as originally consented, it may be that only minor updating of the original environmental statement is required, to take account of (or confirm the absence of) any changes in the wider environmental context of the development (for example, in the form of other adjacent development that may have been constructed or made the subject of a planning application since the original consent was granted). On the other hand, the impacts of any change in design which are likely to have significant effects on the environment must be properly assessed.

38. Any likely difference in the impacts on protected habitats and species must be fully described in the environmental statement. The provisions of the relevant Habitats Regulations relating to consenting of plans and projects will apply directly to DECC's or the MMO's decision-making process as in the case of an original section 36 consent application.

Initial assessment of applications by DECC and MMO

39. Variation applications must be published, and their publication advertised, in accordance with regulation 5 of the 2013 Regulations. However, an application must not be published until the Secretary of State or MMO has decided that it is suitable for publication (as defined in regulation 4(6)). An application will be unsuitable for publication if it appears to the Secretary of State or MMO that a variation is not required to enable the applicant to carry out its proposals; that the proposals go beyond what can be authorised by means of a variation (e.g. because development consent under the 2008 Act would be required); or that the application or any accompanying environmental statement contains insufficient information.

40. Where an application is considered unsuitable for publication, the applicant is to be given reasons for this decision and invited to make representations to DECC or MMO. The applicant may, for example, choose to supply further information or revise and resubmit the application. If the application is still not considered suitable for publication, further representations may be made until the Secretary of State or MMO is either persuaded that the application is suitable to be published or decides that it should be refused (for example, where it has reached a firm view that the applicant's proposals go beyond the scope of what can be authorised under the variation process).

Consequences of inadequate environmental information

41. Potential applicants are urged to take professional advice on the environmental impacts of variation proposals and to discuss the likely requirements for environmental statements to accompany their applications with DECC or the MMO before they submit an application. If the information provided with an application is deficient, DECC or the MMO may require the deficiencies to be made good, either before the application is published (under regulation 4), or

before reaching a decision on it (under the provisions of the 2000 Regulations)¹⁸. In cases where it appears that it will take a significant amount of time to remedy such deficiencies (for example, where information about the impacts on a protected animal species are missing and these cannot be collected for several months because of the behavioural patterns of that species), DECC or the MMO may suggest that the application to be withdrawn (without prejudice to its being re-submitted with the missing information supplied at a later date).

Publication of application

42. Once an applicant has received notice from DECC or the MMO that its application is considered suitable for publication, it must be published (unless withdrawn) on a website, and the fact that it has been published must be advertised by notices in specified publications, as set out in regulation 5 of the 2013 Regulations.

43. The deadline for representations from DECC or MMO consultees (i.e. those consulted on the original application plus any other parties the Secretary of State considers it appropriate to consult on the variation application) and other interested parties (e.g. local individuals and local interest groups) will generally be 28 days after publication of the last notice.

44. Regulation 5 also provides for a copy of the application to be served on the relevant planning authority(ies), who are given 2 months after service of the variation application documents to comment.¹⁹

45. Please note that the Secretary of State or the MMO may disregard representations submitted after the relevant deadlines.

Public inquiries

46. Before determining a variation application, the Secretary of State or MMO 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. The public inquiry process will follow that laid out in relevant paragraphs of Schedule 8 to the 1989 Act and in the Electricity Generating Stations and Overhead Lines (Inquiries Procedure) Rules 2007, with modifications set out in regulation 8(3) and (4) of the 2013 Regulations. The Secretary of State or MMO has the power to award costs as outlined in section 62(2) of the 1989 Act.

Deadlines

47. The Secretary of State or MMO has the discretion to extend deadlines for representations and the publication of notices, and to request further information from the developer if necessary.

¹⁸ Any indication by DECC or MMO that further information about environmental matters is required to make an application suitable for publication under regulation 4 is without prejudice to any of the provisions of the 2000 Regulations (as modified by the 2013 Regulations) relating to requests for information by the Secretary of State or the MMO, or to the processes of “screening” and “scoping” environmental information requirements for an application.

¹⁹ The term “relevant planning authority” is defined in regulation 2(1) of the 2013 Regulations.

Identifying consultees

48. The Developer should consult DECC's National Infrastructure Consents Unit (NIC) or the MMO Licensing Team on appropriate consultees and timescales before submission of the application, and issue consultation documentation under a covering letter to the relevant planning authority(ies) and other consultees as soon as practicable after submitting the variation application. NIC / MMO will follow up with letters to the relevant planning authority(ies) and consultees.

Decisions

49. The Secretary of State or the MMO may determine at any stage that it would not be appropriate to authorise an applicant's proposals under s.36C, without prejudice to the assessment of their merits under any other applicable legislation.

50. On determining a variation application, the Secretary of State or MMO must publish the reasons for his decision (including for any variations not requested by the applicant), and will provide clean and marked-up versions of the varied consent (and deemed planning conditions, if applicable).

51. Any person aggrieved at a decision to grant or refuse an application for variation of a section 36 consent may apply to the High Court 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. Amongst other things this satisfies the requirement of Article 7(4) of Directive 2009/72/EC on common rules for the internal market in electricity, that applicants have a route of appeal in respect of applications for authorisation of new generating capacity.

Key Contacts

52. Any questions on the section 36 variation process should be addressed to the contact points below.

NIC/DECC

Mailbox: deccnic@decc.gsi.gov.uk

Telephone: 0300 068 5677

MMO

Email: marine.consents@marinemanagement.org.uk

Telephone: 0300 123 1032

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