Summary of joint response from the Countryside Council for Wales , English Nature and the Joint Nature Conservation Committee to Department of Trade and Industry's consultation on revised offshore s.36 consent application regulations.

Draft Regulations

1. It would appear from draft regulation 3 (1) that these new regulations will only apply in the Renewable Energy Zone ("REZ") and from the Mean Low Water mark ("MLW") to the limit of territorial sea. We believe that the status of inter-tidal devices (such as Wavegen's "Limpet") under the regulations could not be easily determined, particularly if their output were less than 50MW (and therefore not within the scope of the terrestrial s.36 regulations). Any operator of such a device could be faced with applying for planning permission and s.36 consent for the same development.

2. The 1990 regulations that the proposals seek to amend required service of a notice on EN/CCW if the development included land within a SSSI. Draft regulation 5 applies notice provisions where development is in, or adjacent to and likely to have an impact upon, a European marine site (i.e. SACs). We would want to retain the SSSI provisions (in addition to the reference to European marine sites) in the new regulations as some SSSIs go below MLW and are not within SACs.

3. The text reading "and likely to have an impact on" in draft regulation 5 gives rise to some complications. The assessment of whether a development or activity is likely to have a significant effect is part of the Habitats Directive / Environmental Impact Assessment screening process and is a question which DEFRA or the DTI (as Competent Authorities) seek advice on from the Statutory Nature Conservation Agencies. There is the risk that the use of this phrase could prejudge this process. Because this is not an onerous provision (requiring only service of a notice) our preference would be to have a requirement for service where the application site is in or adjacent to a European marine site. This would also use the same terminology used in FEPA and CPA consents.

4. Notwithstanding the above paragraph we also have some concern that there could potentially be significant effects on the SACs and SPAs which are at a distance from proposed development (i.e. proposals are <u>not</u> in or adjacent to such sites). For example impacts could affect breeding birds from colony SPAs at some distance. The current wording of draft regulation 5 means that in such an event there would be the potential for the Statutory Nature Conservation Agencies not to be served a notice of an application. Additionally, future SACs may be designated outside of the territorial waters but within the REZ. The draft regulations should provide for the service of a notice on the JNCC in the event of development proposals in the vicinity of such sites.

5. The purpose of draft regulation 5(2) is unclear. It indicates that a notice should be served upon the Countryside Agency or CCW where the application is within the area of a relevant planning authority in England or Wales. We assume that this is because of the potential visual impact of developments. However, there appears to be no requirement to serve a notice on CCW or the Countryside Agency if the development is outside of the

area of a relevant planning authority. Such a development outside of such an area could still have a visual impact so we are uncertain what the aim of this clause is.

6. Given the above concerns, and the fact that these provisions are not onerous, we believe that it may be simpler for both developers and consultees if notices are served on a fixed list of consultees regardless of the circumstances. For example there could be a simple requirement to serve on the relevant statutory nature conservation agency (English Nature or CCW for the relevant area of territorial waters and JNCC beyond 12nm) and all planning authorities for areas from which development is visible.

7. Consideration should be given to the relationship between the 28 day period stated in draft regulation 7(1) and time limits allowed for responses to DTI/DEFRA consultations on applications, particularly those involving statutory consultees. In recent cases developers have served 28 day notice periods on the nature conservation agencies but DEFRA/DTI have given us longer periods to respond (e.g. in respect of London Array, Greater Gabbard and Gwynt y Mor consultations). Given the size and complexity of the environmental statements involved with these applications we believe that longer periods for consultation are required.

Annexes

1. Annex 2 (5) - In light of comments above (bullet point 1) in relation to the intertidal zone we suggest that further text could be added to the annex to clarify the position of generating stations which may span the intertidal zone.

2. Annex 2 (19) – We refer to the time limit issue raised at point 6 above.

3. Annex 2 (14) – Cables to shore seems an obvious omission from the examples quoted in this section.

Section 7 – The proposals

1. Section 7.10 – It should be noted that there is the possibility that renewable energy developments less than 50MW could occur in the REZ outwith territorial waters. In such an event the s.36 procedure would not apply (the 1MW threshold only applies within territorial waters). It is foreseeable that wave and tidal generation projects could be constructed outside of 12nm in the future. We believe that the scope of the 2001 regulations may need to be reconsidered.

2. Section 7.20 – The commentary adds to the confusion in draft regulation 5 as to the status of consultees. There appear to be at least three tiers of consultees envisaged by this document – those covered by draft regulation 5, statutory consultees under other provisions and the “wider” list of consultees referred to at 7.20.

Questions at pages 13 & 14

Our responses to these questions are as follows:

Q1 – Regulation 4 seems sensible but see comments above in relation to regulation 5.
Q2 – Regulation 4 seems sensible.

Q3 – See comments but see above on Regulation 5.
Q4 – No comment.

Q5 – The Welsh Assembly Government is clearly missing from this list and indeed from the document throughout. Whilst we recognise that there are ongoing discussions between DTI and the Welsh Assembly about the possible transfer of powers of Section 36 this is a significant and serious omission.

Q6 – We have some concerns about the non-prescriptive approach as to which local Planning Authorities to serve a notice on (e.g. Regulation 6a) when no part of the development is within the area of a relevant Planning Authority. We recognise the difficulties in drawing up a set of rules or guidelines but feel this would be more inclusive and would be welcomed by applicants as a clear steer as to which LPA's to consult. We recommend that guidelines include the relevance of the visibility of the proposed development from LPA areas.

Q7 – No comment
Q8 – No comment
Q9 – No comment

17 February 2006