

dti

**GUIDANCE ON THE
CONSENTING PROCESS FOR
ONSHORE GENERATING
STATIONS ABOVE 50 MW IN
ENGLAND AND WALES**

**AN ENERGY REVIEW
CONSULTATION**

MAY 2007

URN 07/975

Why is DTI conducting this consultation?

In the Energy Review document 'The Energy Challenge', published in July last year, the Government committed to making improvements to the planning system for energy. Those improvements were to be made at two main levels: (i) fundamental reforms to the planning system for major energy projects; and (ii) more immediate changes to the current planning system to reduce risk and uncertainty for developers and others, while maintaining the openness, fairness and accountability of the current system. The publication of this guidance relates to the latter objective.

Section 36 of the Electricity Act 1989 is the legislative provision under which the Secretary of State grants development consents for generating stations above 50 Megawatts (electrical). The Secretary of State also grants consents, under Section 37 of the Electricity Act 1989, for the overhead lines that are needed to transmit and distribute the power thus generated. In 'The Energy Challenge', the Government undertook to publish generic guidance on Section 36 and the procedures attached to it, including information on co-operation between developers and the transmission companies about joining up on applications for consents.

The Government has previously published guidance on applications for offshore consents under Section 36, but not on onshore applications. The guidance therefore sets out the generic provisions of Section 36 but focuses on the onshore context. It also provides a link to the existing offshore guidance.

This consultation seeks views on the content of the guidance.

Issued on **11 May 2007**

Respond by **3 August 2007**

Enquiries to

Nick French
Section 36 Guidance Consultation
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1 Victoria Street
London SW1H 0ET
☎ 020 7215 5631
✉ edu.consents@dti.gsi.gov.uk

How to respond

When responding, please state whether you are doing so as an individual, or representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

Responses can be submitted by post or email by 3 August 2007 to:

Nick French
Section 36 Guidance Consultation
Bay 2115
Department of Trade and Industry
1 Victoria Street
London SW1H 0ET
☎ 020 7215 5631
✉ edu.consents@dti.gsi.gov.uk

We would also be pleased to meet with you and hear your views on the issues raised.

We are sending this document to all the key interested parties of this consultation. We would welcome suggestions of others who may wish to be involved in this consultation exercise. A copy of the above document is also available on request from the address above and on the DTI website at <http://www.dti.gov.uk/consultations/open-consultations/index.html>

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What Happens Next?

Following the end of this consultation, and in light of the comments received, the DTI will publish formal Guidance on Section 36 of the Electricity Act 1989. This will be available on the DTI website, with paper copies available on request.

Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Help with queries

Questions about the policy issues raised in the document can be addressed to Nick French at the address on page 3.

If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Stephen Childerstone
Consultation Co-ordinator
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Better Regulation Team
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A copy of the Code of Practice on Consultation is in Annex A.

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Executive Summary

Section 36 of the Electricity Act 1989 sets out the provisions for the granting of consents by the Secretary of State 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) or an offshore renewable generating station over 1 MW within UK territorial waters.

A number of actions on planning for energy infrastructure projects were identified in the Energy Review, amongst them a commitment to publish generic guidance in England and Wales on Section 36, including information on co-operation between developers and the network companies about joining up on applications. The Government is also committed under Article 6 of the Electricity Market Directive¹ to publishing the criteria against which generating stations are considered. This guidance seeks to fulfil those remits and builds on guidance already available in Circular 14/90 Electricity Generating Stations and Overhead Lines.

Guidance has previously been produced on applications for offshore consents under Section 36, but not in relation to onshore consents. This guidance therefore focuses on onshore consents, but cross-refers to the existing offshore guidance.

The guidance once finalised will apply in England and Wales. Decisions on applications under Section 36 in Scotland are devolved to Scottish Ministers and the Scottish Executive is responsible for any guidance produced on that process.

The Guidance starts with a simplified flowchart to give an overview of the Section 36 application process before setting out more detail including on issues such as environmental statements, publicity requirements and consultation. It then sets out information on the how the Secretary of State arrives at a decision and on appeals. Finally, the guidance contains a number of annexes including a detailed flowchart, sample public advert and non-exhaustive checklist for applicants as well as information on issues such as public inquiries, appropriate assessments and judicial review. It is intended that the guidance should be of use to prospective developers, planning authorities, members of the public and any other interested parties.

The information provided in this document is neither definitive nor exhaustive. The guidance should be read in conjunction with the legislation to which it refers and other legislative guidance or advice where available.

¹ EU Directive 2003/54/ec on common rules for the internal market in electricity

The Department is unable to provide legal advice and this advice should not be seen as a substitute for independent professional advice.

The Government is seeking views on whether the guidance set out below explains the processes, requirements, timescales and other information relating to Section 36 of the Electricity Act 1989 in a sufficiently clear and comprehensible manner to meet the needs of industry, interested and representative bodies and individuals.

Consultation Questions

The consultation asks the following questions; these are repeated in the main text, and in order to fully understand them, we suggest that it is necessary to read the text.

Part 2

Q1. Is any additional information required in the overview flowchart?

Part 3

Q2. Is the language used to describe the scope of Section 36 of the Electricity Act 1989 and to whom it applies clear and comprehensible?

Q3. Is any additional information required on the detailed processes for obtaining development consents under Section 36 of the Electricity Act 1989 or on related matters such as planning conditions or associated works? If yes, please explain.

Q4. Is any additional information required on co-operation between power station developers and network companies on overhead power station 'feeder' lines? If yes, please explain.

Q5. Are the consultation requirements clear? If further explanation is required, please explain.

Part 4

Q6. Is the process for decision-making clear? If further explanation is required, please explain.

Annexes and general

Q7. Are there any additional topics that could be considered for inclusion in an annex? If yes, please explain.

Q8. Is any additional information required in the detailed flowchart? If yes, please explain.

Q9. Do you have any additional suggestions for improving the style, content or layout of the guidance to improve its usefulness to all parties?

**THE CONSENTING PROCESS FOR
ONSHORE GENERATING STATIONS
ABOVE 50MW IN ENGLAND AND WALES**

*A guidance note on Section 36 of the
Electricity Act 1989*

Part 1 - Introduction

1.1 The Government's report on the Energy Review 'The Energy Challenge'² examined the UK's progress against the medium and long-term goals set out in the 2003 Energy White Paper 'Our energy future - creating a low carbon economy'. It also considered options for further steps to achieve those goals.

1.2 A number of actions on planning for energy infrastructure projects were identified in the Review, amongst them a commitment to publish generic guidance in England and Wales on Section 36 of the Electricity Act 1989, including information on co-operation between developers and the network companies about joining up on applications.

1.3 The Government is also committed under Article 6 of the Electricity Market Directive³ to publishing the criteria against which generating stations are considered.

1.4 This guidance seeks to fulfil those remits and builds on guidance already available in Circular 14/90 Electricity Generating Stations and Overhead Lines. It starts with a simplified flowchart to give an overview of the process before setting out more detail on particular aspects of it. It is intended that the guidance should be of use to prospective developers, planning authorities, members of the public and any other interested parties.

1.5 Section 36 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) or an offshore renewable generating station over 1 MW within UK territorial waters.

1.6 For offshore consents, a FEPA⁴ licence is also required from Defra. Under FEPA, a licence is required from the

² 11 July 2006

³ EU Directive 2003/54/ec on common rules for the internal market in electricity

⁴ Food and Environment Protection Act (Part II) 1985

Secretary of State for Environment, Food and Rural Affairs (or, in Wales, the Welsh Assembly Government) for depositing articles or materials in the sea/tidal waters, including the placement of construction material or disposal of waste dredgings. However, separate detailed guidance on offshore wind farm consents is already available and this guidance does not seek to replicate it. The offshore guidance is available at: <http://www.dti.gov.uk/energy/markets/electricity-development-consents/page22743.html>

1.7 This guidance focuses mainly on the onshore consents process, for which no guidance has previously been published, and cross-refers where appropriate to the existing offshore guidance.

1.8 The DTI's Electricity Developments Consents team handle various electricity consenting and gas pipeline applications that fall to be determined by the Secretary of State for Trade and Industry. They receive objections and other letters on behalf of the Secretary of State and assess applications on his behalf. They also aim to make sure that the procedures are carried out fairly and transparently. A site visit may be carried out with the relevant planning authorities and applicant in order to familiarise the case officer with the development site and surrounding area (usually after the consultation period has closed). However, neither the Secretary of State nor officials acting on his behalf can discuss the merits of individual cases or give an indication of what the Secretary of State's decision might be.

1.9 Any queries on the Section 36 process should be addressed to the team managers below (depending on whether the consent sought is onshore or offshore) who can then identify the appropriate manager to deal with that query:

Lawrence Cadman
The Onshore Consents Team
Energy Group
Bay 2121
1 Victoria Street
London SW1H 0ET

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1.10 This guidance only covers the consenting process in England and Wales. Consents in Scotland under the Electricity Act 1989 are issued by Scottish Ministers. Anyone with enquiries about Section 36 consents in Scotland should contact the Scottish Executive:

Howard Steele

Scottish Executive

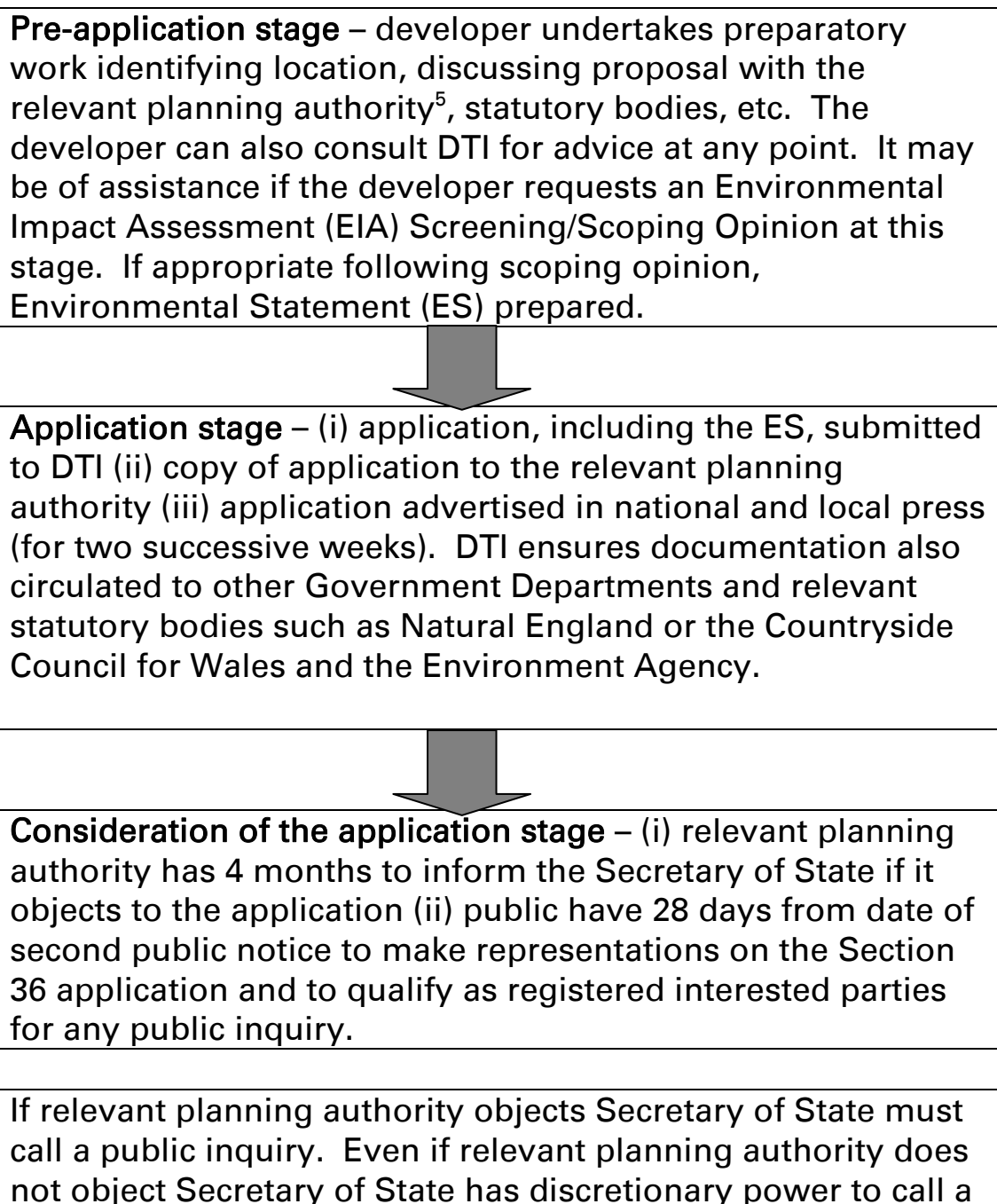
Tel: 0141 242 5795

E-mail: howard.steele@scotland.gsi.gov.uk

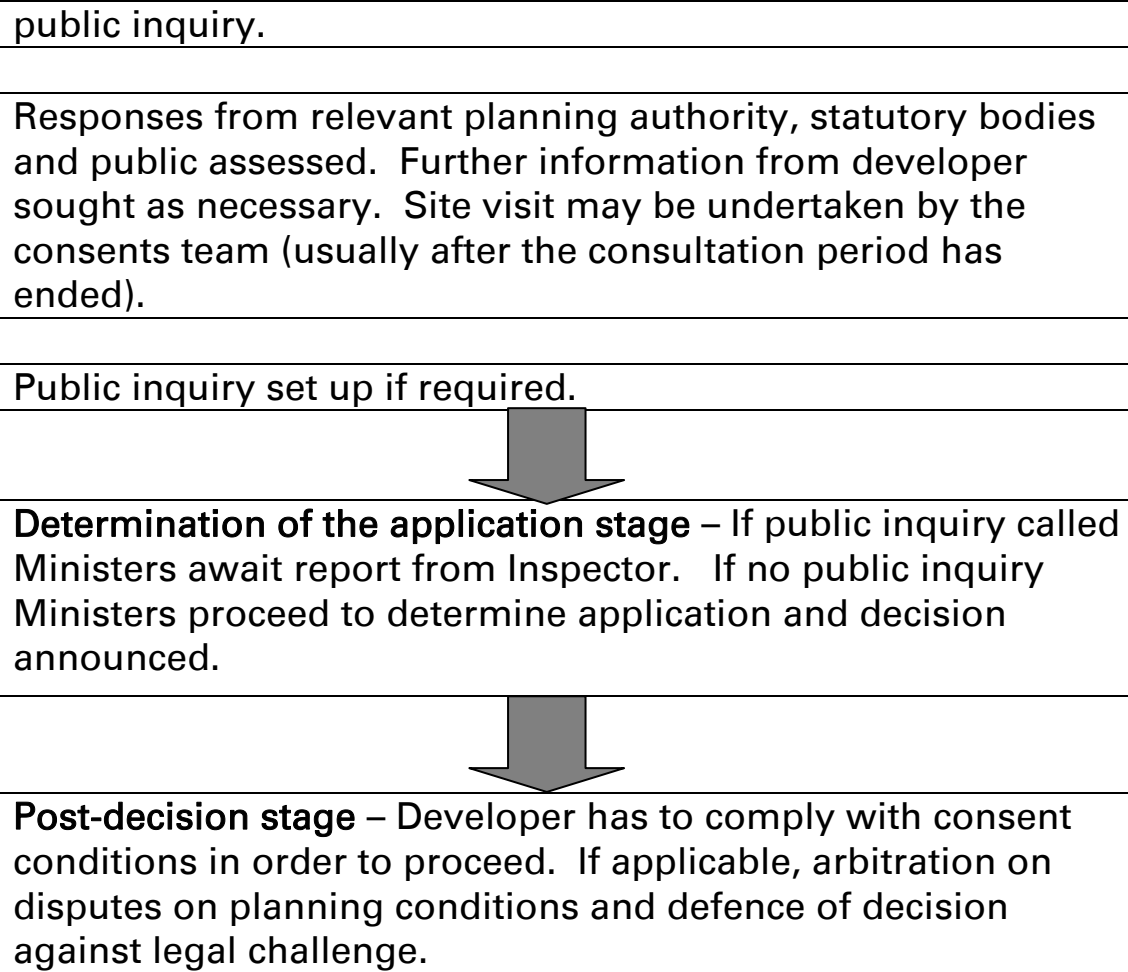
1.11 Please note that the information provided in this document is neither definitive nor exhaustive. It sets out general guidance rather than a mandatory application process to be followed in order to obtain the required consents under Sections 36 of the Electricity Act 1989. It should be read in conjunction with the legislation to which it refers and other legislative guidance or advice where available. All applications made under Section 36 or any other statutory regime will be considered on their merits and nothing in this guidance will pre-judge the outcome of any such decision.

Part 2 – Overview flowchart

FLOW OF ACTIONS FOR SECTION 36 PROCESS AND ENVIRONMENTAL IMPACT ASSESSMENT (EIA)



⁵ Relevant planning authority has the same meaning as defined in paragraph 2(6) of Schedule 8 to the Electricity Act 1989. The relevant planning authorities will usually be both the County and District Councils covering the proposed development site. However, if the proposed development is sited in a London Borough, a Metropolitan Borough Council or Unitary Authority, there will only be one relevant planning authority.



Q1. Is any additional information required in the overview flowchart?

Part 3 – The process

Scope of Section 36 and Other Consenting Regimes

3.1 Since privatisation of the electricity industry, proposals for new electricity generating stations to meet the evolving needs of the energy market have been a matter for private sector companies. Whilst Government may seek to influence the market through various incentives (e.g. renewables obligation, climate change levy exemption), it is ultimately for the market to determine what development proposals and what types of technology it puts forward.

3.2 Power stations onshore below the Section 36 threshold are considered by local planning authorities under the requirements of the Town and Country Planning Act 1990 as amended.

3.3 Section 36 covers all generating technologies including nuclear, coal, gas, energy from waste and renewable forms of energy such as wind and biomass. There is no restriction on who applies for a Section 36 consent.

3.4 Section 36 is administered by the Secretary of State for Trade and Industry for proposals for England and Wales, and by Scottish Ministers for proposals in Scotland. This guidance note only considers how the Secretary of State for Trade and Industry administers his function.

3.5 Alongside Section 36 consent developers will need planning permission for the development. This is usually obtained by also applying to the Secretary of State for 'deemed' planning permission. This is a provision under Section 90(2) of the Town and Country Planning Act 1990 whereby the Secretary of State can provide the planning permission for the development, rather than the developer having to separately apply to the local planning authority for it. Such planning permission provides the conditions by which the development is controlled and mitigated and is enforced by the local planning authority.

3.6 Some ancillary and supporting facilities may also be included in the application for deemed planning permission, although it is not possible to give detailed guidance on this issue, which depends very much on the circumstances of the individual project. As a rule of thumb, ancillary facilities which are on-site or very localised may be included, whereas, for example, pipelines or railway lines stretching for some miles, or jetties remote from a generating station, may not be included.

3.7 Developers may also seek clarification from DTI concerning the scope of the Section 36 application, including on issues such as ancillary facilities and ash disposal, at the same time as they request a 'scoping opinion' from the Secretary of State for the purposes of the Environmental Impact Assessment (see paragraph 3.18 below).

3.8 The Secretary of State for Trade and Industry also administers an energy policy control on new oil-fired and gas-fired power stations through Section 14(1) of the Energy Act 1976, which, as well as encompassing projects falling within the scope of Section 36, captures those oil or gas-fired projects of 10 MW or more handled by local planning authorities.⁶

3.9 Section 36 does not include consent for connections to the electricity grid system which are dealt with under Section 37 of the Electricity Act 1989 and which is required when the connection is to be installed above ground and is in excess of 20kV (kilovolts) (see Part 3 Other Considerations for further guidance). Underground connections and overhead lines less than 20kV need to be considered through the planning regulations and may be classed as permitted development.

Q2. Is the language used to describe the scope of Section 36 of the Electricity Act 1989 and to whom it applies clear and comprehensible?

⁶ This control is exercised on a GB-wide basis

Pre-application Stage

3.10 Before submitting a Section 36 application, it is best practice for the developer to have consulted widely with relevant statutory and non-statutory bodies and members of the local community in order to gauge the reaction to the proposal and to identify any particular issues. The developer will use this information to help in preparing a detailed environmental statement (ES). An ES is normally required for a Section 36 proposal.

Good practice tips for pre-application stage

- Consult widely and at an early stage with the relevant planning authorities, statutory and non-statutory bodies (such as parish councils, the RSPB, and local interest groups such as wildlife trusts, conservation and archaeological groups, who will have specialist local knowledge of how the development may impact upon the area).
- In order to ensure that the potential for use of Combined Heat and Power (CHP) is fully explored, developers are advised to contact regional planning authorities and the Regional Development Agencies to ensure that any existing and future heat customers are identified. Developers are also advised to contact DEFRA and their Good Quality CHP team to ensure that they have fully explored the incentives for CHP and the economic benefits of Good Quality CHP. Details can be found in the recently updated guidance to power station developers to maximise the uptake of CHP where economically feasible: <http://www.dti.gov.uk/energy/environment/efficiency/chp/index.html>
- Ensure that all the necessary environmental surveys and studies have been carried out before submitting the application. If not, the Secretary of State and consultees won't be able to consider properly and a developer will be directed to carry out the assessments later, leading to delays.
- Consider the grid connection and the consents process for this required under Section 37 of the Electricity Act 1989 (as well as possible requirements for related Compulsory Purchase Orders or wayleaves). Discuss the grid connection with the network company at an early stage. Although it will not be possible to carry out a full environmental impact assessment until the clearer route options are known, the Secretary of State considers that a developer of a generating station will still need to demonstrate that they have given consideration to how the power will be delivered from the development site, the likely impact and whether that impact can be mitigated (e.g. where it is intended to connect to the grid, the likely route corridor, whether it will cross sensitive areas such as National Parks, SSSIs, SPAs, bridle paths, other public rights of way, etc).
- Set a realistic timetable for the development proposal. For example, it is worth speaking to the relevant planning authority before submitting a Section 36 application to find out how their planning committee cycle fits in with the statutory consultation period. The Onshore Consents Team (see contact at paragraph 1.9) will also be able discuss procedural matters relating to Section 36 applications and give an indication of timings. Factor in the possibility that an inquiry might need to be held.

The Environmental Statement (ES)

3.11 In most cases, an applicant wishing to develop a generating station above 50 Megawatts will need to have carried out a detailed environment impact assessment (EIA) and provide an Environmental Statement (ES) in support of an application in accordance with the Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2000 ('the 2000 Regulations'). An EIA may not always be required for extensions to existing generating stations, but it should be established whether the proposal is "EIA development" for the purposes of the 2000 Regulations. Where an EIA is required this is subject to publicity requirements set out in the 2000 Regulations.

3.12 An ES is likely to involve a considerable amount of work. The ES should include an assessment of the potentially significant effects of the proposed development on the environment (including its cumulative impact alongside other developments already consented but not yet built or in the planning system) and proposed mitigation and compensatory measures. Potential developers will also need to provide details of the connection to the electricity network or of how the gas or oil will be delivered if a gas or oil-fired power station.

3.13 Developers should state whether they or the Network Operator will be responsible for designing and building the connection and if this is not included in the Section 36 ES then a separate ES may be required by the network operator when they come to design and build the connection. If the developer intends to progress the Section 37 consent as part of the generating station project, they will have to provide sufficient information on the proposed route or routes (or route corridors) for the grid connection to enable it to be properly assessed together with an assessment of any likely environmental effects (including habitat to be traversed and proposed mitigation measures) and, if applicable, to give consideration to the sharing of electrical or gas connections with any other proposed developments in the area.

3.14 Details of grid connection can be discussed with the licensed network operator for the area where the development is proposed.

3.15 If developers are unable to provide sufficient details of the connection at the time they submit their Section 36 application they should acknowledge that the time to prepare an ES may be affected by the time taken to agree a connection with the licensed network operator and a decision should be taken on whether the connection should require a separate EIA. Network operators have a duty of care under Schedule 9 of the Electricity Act 1989 to find the most acceptable environmentally and (elsewhere in the Act) the preferred economically efficient route, and this can require time to examine alternative routes before identifying the proposed route.

3.16 If developers have considered alternative sites for the proposed development, they should provide an outline of what criteria were used in identifying sites and what those sites were. Alternative sites must always be considered if the proposed development could impact on a European designated site and in such a case the consideration of alternative sites may be scrutinised in a public inquiry.

3.17 The ES should contain some information on the likely visual impact of the generating station. It is not necessary to provide detailed information on issues such as plant configuration. However, some idea of the parameters of the generating station development and its possible visual impact will need to be factored into the ES so that they can be assessed as part of the consents process.

3.18 Potential developers may also ask the Secretary of State for a formal 'scoping opinion' under the 2000 Regulations. This is a provision whereby a developer may ask the Secretary of State for his formal opinion on the information to be supplied in the ES, allowing the developer to be clear what the Secretary of State considers are likely to be the main effects of the development and what the ES should focus on.

3.19 Guidance on the 2000 Regulations, including on scoping opinions, is provided on the DTI website.

<http://www.dti.gov.uk/energy/markets/electricity-development-consents/page22743.html>

What makes a good quality Environmental Statement (ES)

- Good preparation is everything. If the ES is considered deficient, the Secretary of State will issue a direction for further information. This in turn will need to be gathered and advertised and a further opportunity will have to be given for representation to be made.
- Ensure that the ES and, in particular the Non-Technical Summary is easy to understand, well cross-referenced and written in plain English.
- If requested, don't rely on a scoping opinion from the Secretary of State to capture everything that should be included in the ES. Only a limited consultation exercise is carried out and consultees have only three weeks to make their views known.

Format of Section 36 Applications

3.20 There is no set application form for a Section 36 consent. The 1989 Act lays down the statutory basics:

**SCHEDULE 8
CONSENTS UNDER SECTIONS 36**

Section 36: Paragraph 1 of Schedule 8 that it "shall be in writing and shall describe by reference to a map the land to which the application relates, that is the land (a) on which the generating station is proposed to be constructed, extended or operated; or (b) across which the electric line is proposed to be installed or kept installed."

3.21 A non-exhaustive checklist for Section 36 applications is set out at Annex v.

Publicity Requirements

3.22 At the same time as the developer applies to the Secretary of State, they are required to notify the relevant local planning authority of the application. DoE Circular 14/90 'Electricity Generating Stations and Overhead Lines' explains in detail the procedure for an applicant to follow when serving notice of an application on the relevant local planning authorities. This is done by sending them a notice, a Form B (Type 1), for completion, at the same time as they are sent a copy of the application and supporting Environmental Statement. A template is shown in Appendix A of the Circular. The Circular is no longer available from the Stationery Office but can be obtained online at <http://www.dti.gov.uk/energy/markets/consents/page22743.html> . Alternatively, hard copies can be obtained by contacting the Consents Team (see contact at paragraph 1.9).

3.23 There is also a requirement to advertise both notice of the application under regulation 4 of the Electricity (Applications for Consent) Regulations 1990 and notice of the supporting environment statement under regulation 9 of the 2000 Regulations. For convenience, regulation 9(3) of the 2000 Regulations makes provision for both notices to be combined. This provides an opportunity for members of the public and other interested parties not directly consulted by the Secretary of State to make representations on the application and the supporting ES.

3.24 The notice is required to describe the application in question and state that it is accompanied by an environmental statement. It must be published in two successive weeks in one or more local newspapers circulating the locality of the development land and also in the London Gazette and in one or more national newspapers. The notice also needs to state where the application and supporting environmental statement may be inspected (which is normally at the offices of the relevant planning authorities or at public libraries) during reasonable working hours and gives the address to which any representations should be made and the closing

date for such applications (which under the 1990 Regulations shall not be less than 28 days from the date or latest date of publication of the notice, or less than 28 days from the date of service of the notice and under the 2000 Regulations not less than four weeks after the date on which the notice is to be last published).

3.25 In the case of applications for extensions or changes of operation of an existing generating station, the developer should consult the DTI before initiating the publicity procedure as the Secretary of State may dispense with the requirement for the publicity in the national press where the proposal is of a minor nature.

3.26 The notice should also specify where copies of a Non-Technical Summary of the Environmental Statement can be obtained free of charge and also specify the amount payable for the full Environmental Statement.

3.27 Although not a statutory requirement, the Secretary of State will also ask for notices to be displayed at prominent locations near the proposed development site.

3.28 Although developers should always seek their own legal and professional advice, the Secretary of State is willing to look at a draft notice in advance and recommends that developers send them to the Onshore Consents Team prior to advertising. A model form of notice is attached at Annex vi.

Consultation During the Consents Process

3.29 A thorough consultation process is carried out by the Secretary of State for each application, gathering the views of the relevant local planning authorities and other statutory and non-statutory bodies (e.g. including the relevant nature, environment, countryside, aviation, heritage and health and safety bodies).

3.30 Through the public notice, members of the public also have the opportunity to have their say. This is particularly important, as those local to the development are the

community most likely to be impacted upon by the development.

3.31 The advertised notice of the application will give the name and postal and e-mail address to where representations should be sent (i.e. a member of the Consents Team who will handle the application on behalf of the Secretary of State). All representations, including e-mails, should include a home postal address.

3.32 The Secretary of State has to take account of all representations and information he receives within the time limits mentioned above. Only those interested parties who respond within the specified period have an automatic right to appear at a public inquiry that may be held (i.e. they are considered 'qualifying interested parties' under the Electricity Generating Stations and Overhead Lines (Inquiries Procedure) Rules 1990), whilst those who object outside the specified period can only appear at the discretion of the inspector. It is therefore advised that any representation should be made within the specified period. For further information on public inquiries see Annex ii.

Who is consulted, and how, in a typical power station case?

- The relevant planning authorities are sent a copy of the application and supporting Environmental Statement direct and are required to make their formal views known to both the applicant and Secretary of State.
- The Secretary of State also consults direct other statutory and non-statutory bodies including the Environment Agency (or Environment Agency Wales), Natural England (or the Countryside Council for Wales), Civil Aviation Authority, National Air Traffic Services, Health and Safety Executive, Ministry of Defence, Welsh Assembly Government (if applicable), Greater London Authority (if applicable) and other government departments and the relevant Government Office.
- Consultees may also have their own internal and external network of contacts (for example, Parish Councils, RSPB, local nature trusts, local archaeological societies, and local conservation organisations etc).
- All the responses received by the Secretary of State are copied to the applicant and relevant planning authorities. These will appear on the planning register of the relevant planning authority and be available for inspection locally.

3.33 It is obviously important that power station proposals, as part of the nation's energy delivery systems, are handled in a timely manner. For that reason the process seeks to capture, early on, the views and issues identified by the various participants in the process.

Timescales for views to be made known.

- The relevant planning authority must serve notice of any objection to a power station application within 4 months unless a longer period is agreed in writing with the applicant and Secretary of State (regulation 8 of Application for Consents Regulations 1990 refers).
- The Secretary of State's consultees are normally given 2 months to make their views known.
- Members of the public and other interested parties must be given a minimum of 28 days from the date of the last published notice of the application and supporting environmental statement.

3.34 Typically an application for a Section 36 consent will take 9-12 months to process (depending on a number of factors, such as the quality of the initial ES) with any public inquiry adding to that timescale. Where a public inquiry takes place the timescale has been more of the order of 36 months.

3.35 Relevant planning authorities have a key role to play in the process since they represent the local community and are familiar with the planning requirement of the locality. Thus they are the only participants given the statutory power to trigger a public inquiry.

3.36 Again, given their key role in the process, relevant planning authorities are the only participants given the right to seek more time to make their views known. However, such extensions of time have to be agreed with the applicant and the Secretary of State first and need to be justified with genuine reasons as to why they have not been able to reach their view in time. Given that the Act provides for them to object and then subsequently to withdraw their objection, extensions in time should not be used where the relevant planning authority quite clearly objects to the development.

Public Participation

3.37 In order for participants to be able to participate in the process it is essential that they are able to access information on the proposed development. The Department of Trade and Industry has no public inspection facility of its own and is not required to make information available where the information requested is accessible by other means⁷. Information is therefore delivered in a number of ways.

⁷ Section 21 of the Fol Act 2000

How information is made public in the process

- The application and supporting environmental statement are advertised in the local and national press and are available for inspection or to purchase from the applicant (except the Non-Technical Summary of the ES, which is available free of charge). Copies are normally placed in the local public library.
- The application and supporting documentation are notified to the relevant planning authority and will be placed in the Planning Register.
- Any further information directed by the Secretary of State under regulation 13 of the 2000 Regulations is also advertised in the local and national press and is available for inspection or to purchase from the applicant.
- All representations received by the Secretary of State are copied to the applicant and relevant planning authority. These should appear on the Planning Register and be available for inspection locally.

3.38 The length of time taken to determine a consent will be influenced by the adequacy of the ES and any particular sensitivities with the chosen location. As indicated in paragraph 3.24 views and issues are identified early on and in the light of that information the Secretary of State may issue a formal direction for information.⁸ Even if a formal direction is not issued inevitably there will be questioning in relation to the environmental information by parties as they seek to satisfy themselves over the impact.

Appropriate Assessments

3.39 One important issue to consider is whether the proposed development, either alone or in combination with other plans or projects, would be likely to have a 'significant effect' on a 'European site' – a designated nature site pursuant to the Conservation (Natural Habitats, etc) Regulations 1994, which

⁸ Regulation 13 of the Electricity Work (Environmental Impact Assessment) (England and Wales) Regulations 2000

implement the Habitats Directive (92/43/EEC). If it is likely to have such an effect, a competent authority (in this case the Secretary of State) must undertake an 'appropriate assessment', consulting as appropriate. If the development would have adverse impacts upon a European site it should not be approved, unless considerations of overriding public interest justify approval (further information and a link to the 1994 Regulations is set out in Annex iii).

Public Inquiries

3.40 In certain circumstances a public inquiry can be called under the 1989 Act in relation to a proposed development before any decision is made on it, as set out below:

SCHEDULE 8

OBJECTION BY RELEVANT PLANNING AUTHORITY

Paragraph 2(2) - Under Paragraph 2(2) of Schedule 8 to the Electricity Act 1989, where the relevant planning authority notify the Secretary of State that they object to the application and their objection is not withdrawn, the Secretary of State – (a) shall cause a public inquiry to be held; and (b) before determining whether to give his consent, shall consider the objection and the report of the person who held the inquiry.

Paragraph (4) - Section 2(4) states that sub-paragraph (2) above shall not apply where the Secretary of State proposes to accede to the application subject to such modifications or conditions as will give effect to the objection of the relevant planning authority.

SCHEDULE 8

OBJECTION BY OTHER PERSONS

3(2) - Paragraph 3(2) of Schedule 8 to the Electricity Act states that where in the case of an application for consent under section 36 or 37 of this Act – (a) the Secretary of State is not required by virtue of paragraph 2(2) above to cause a public inquiry to be held; but (b) objections or copies of objections have been sent to the Secretary of State in pursuance of regulations made under this paragraph, the Secretary of State shall consider these objections, together with other material considerations, with a view to determining whether a public inquiry should be held with respect to the application and, if he thinks it appropriate to do so, shall cause a public inquiry to be held, either in addition to or instead of any other hearing or opportunity of stating objections to the application.

3.41 Further information on public inquiries is provided in Annex ii.

3.42 As part of the package of measures designed to make the energy planning system more streamlined and efficient, the Government has recently consulted on new inquiry rules for such public inquiries. The improved new rules will make inquiries more streamlined, with more certainty of process and timeline and will make participation easier. The Government plans to have the new rules in effect for Spring 2007. More information on the recent consultation can be found at:

<http://www.dti.gov.uk/energy/review/implementation/electricity-act-inquiry/page35205.html>

Planning Conditions

3.43 Often, rather than object, a relevant planning authority will make their agreement conditional, i.e. subject to a number of planning conditions being imposed. They may well also insist on the applicant entering an agreement to deal with offsite matters. Such agreements are dealt with under Section 36 of the Town and Country Planning Act 1990 as amended and are known as 'Section 106 agreements'. The Secretary of State is not party to a Section 106 agreement, but the Consents Team will want comfort on that agreement before any decision is taken on the application.

3.44 Planning conditions will therefore arise from the views of the relevant planning authority, the advice of statutory advisers and the experience of the Consents Team. They will take account of the particulars of the locality and the type of generation. Planning Circular 11/95: The Use of Conditions in Planning Permission provides general advice on planning conditions and includes suggested models of acceptable conditions for use in appropriate circumstances. Whatever conditions are proposed they have to meet the six tests specified in the Circular. The Circular can be found at: <http://www.communities.gov.uk/index.asp?id=1144452>

Planning conditions should be:

- necessary;
- relevant to planning;
- relevant to the development to be permitted;
- enforceable;
- precise; and
- reasonable in all other aspects.

3.45 Any Section 36 consent granted will contain a condition that the commencement of the development shall not be later than five years from the date of the consent, or such longer period as the Secretary of State may direct in writing. Similarly the deemed planning permission will contain a 5 year duration within which development must start, but that can only be extended by the relevant planning authority. Where any matter is required to be agreed or approved by the Council under any of the conditions attached to the 'deemed' planning permission, it is standard practice to include a default provision whereby the Secretary of State can determine the matter.

Associated Works

3.46 In applying for a Section 36 consent, it is possible that the site specified in an application may include associated works such as an electrical sub-station. In those circumstances, the applicant can apply to the Secretary of State for Trade and Industry for deemed planning permission under Section 90 of the Town and Country Planning Act 1990 to cover these associated works. Alternatively, a developer may apply for planning permission direct to the local authority under section 57 of the TCPA 1990.

Co-operation between power station developers and network companies on overhead power station 'feeder' lines

3.47 The Secretary of State's consent under Section 37 of the Electricity Act 1989 may also be required if the proposed

generating station is connected to the transmission or distribution system via an overhead line.

3.48 Development consent is not normally required for underground cables. Such development is carried out under permitted development rights (the Town and Country Planning (General Permitted Development) Order 1995). Specific planning permission is not therefore necessary. However, in certain circumstances, e.g. where the proposed development has an impact on a European designated site, the local planning authority can seek that the permitted development rights be removed.

3.49 It is best practice for developers and distribution / transmission companies to engage with one another early in the development of a project about joining up on applications under Section 36 and Section 37 of the 1989 Act.

3.50 This is important because, although separate applications must be made for consents for generating capacity and for new overhead lines or significant upgrades to overhead lines to connect generating capacity to the grid, the Government believes that where possible the applications should be considered in parallel. This has benefits in ensuring that generating capacity is not constructed that is then delayed because the associated Section 37 consent has not been properly considered and cannot be granted. It also means that where an inquiry is required for a Section 36 consent and also for the associated overhead line application, the two can be held simultaneously.

3.51 The Government has recently published a consultation document on guidance on both the general Section 37 consenting process and on proposals to modify the regime so that there is greater flexibility to upgrade existing lines without having to re-apply for a separate consent from the Secretary of State. The consultation document can be found at:

<http://www.dti.gov.uk/consultations/page36107.html>

Wayleaves and compulsory purchase orders

3.52 A 'wayleave' is the term used to describe a right secured by an electricity licence holder to access land for the purpose of installing and maintaining power lines. Before any section 37 consent is granted the Secretary of State will need to ensure that wayleaves are in place with owners and/or occupiers. Further information on wayleaves is available on the DTI website at:

<http://www.dti.gov.uk/energy/markets/consents/page22743.html>

3.53 Compulsory Purchase Orders may be made by electricity licence holders using compulsory powers under Schedule 3 of the Electricity Act 1989 for purposes connected with the carrying of licensed activities, namely construction and operation of generating stations or overhead lines. The DTI guidance on wayleaves listed above touches briefly on compulsory purchase orders, but more detailed generic guidance can be found at:

http://www.communities.gov.uk/pub/561/Circular0604CompulsoryPurchaseandTheCrichelDownRules_id1162561.pdf

Fees for consents

3.54 There is a scale of fees payable on application for consent and these are set out in The Electricity (Application for Consent) Regulations 1990. No application will be processed without payment.

http://www.opsi.gov.uk/si/si1990/Uksi_19900455_en_1.htm

Other consents

3.55 It is a matter for applicants to ensure they have all the relevant consents/permissions/licences, etc., they require in order to construct and operate a generating station. However, the Secretary of State's approval is also required under Section 14 of the Energy Act 1976 to use oil or gas as a fuel for

power stations over 10 Megawatts. Other consents and approval may also need to be obtained from other statutory bodies. For example, an integrated pollution control licence under the Environmental Protection Act 1990 has to be sought from the Environment Agency for some generating stations.

Q3. Is any additional information required on the detailed processes for obtaining development consents under Section 36 of the Electricity Act 1989 or on related matters such as planning conditions or associated works? If yes, please explain.

Q4. Is any additional information required on co-operation between power station developers and network companies on overhead power station 'feeder' lines? If yes, please explain.

Q5. Are the consultation requirements clear? If further explanation is required, please explain.

Part 4 – The decision

4.1 In reaching his decision, the Secretary of State must take account of relevant factors. These factors can vary from case to case but include Government Policy (both energy and other Government policies); planning considerations (including national, regional and local plans and guidance); environmental issues; local issues and the views of the relevant planning authorities and local people; Government statutory advisers; the developer's arguments in favour of the proposal; and any other representations received on the proposal. Each case is considered on its individual merits.

4.2 He will also consider the proposal against the following criteria laid down in response to Article 6 of EU Directive 2003/54/EC:

- (a) the proposal must be consistent with the Government's energy policy and its goals of reducing carbon emission, maintaining the reliability of our energy supplies, promoting competitive markets, and ensuring that every home is adequately and affordably heated;
- (b) that the proposer must have provided adequate environmental information for the Secretary of State to judge its impact;
- (c) that the proposer has identified what he can do to mitigate the impact of his proposed development;
- (d) that the Secretary of State judges that the environmental impact is acceptable;
- (e) that the procedures for considering the power station proposal have been properly followed;
- (f) that the proposer of a fossil fuel power station has provided evidence of what he has done to explore the use of combined heat and power technology for his development;
- (g) that the Secretary of State is satisfied that the power can be delivered to the electricity supply network;
- (h) that the proposer of an offshore power station has to the Secretary of State's satisfaction, adequately addressed navigation and fisheries issues.

4.3 On criterion (f) the Department has recently published updated guidance for developers which is available on the DTI website:

<http://www.dti.gov.uk/energy/environment/efficiency/chp/index.html>

4.4 Compliance with that criterion is assessed jointly by DTI and DEFRA who lead in Government on CHP matters. For criteria (b) and (e) the EIA Regulations require that the Secretary of State in taking his decision must be satisfied that environmental impact assessment procedures have been properly followed and that adequate environmental information has been provided to assess the impact.

4.5 The Secretary of State will also consider the Inspector's report from any public inquiry held into the proposal.

4.6 Having considered all relevant matters the Secretary of State will make his decision. That decision will be promulgated by a decision letter issued by the Consents Team, on behalf of the Secretary of State, setting out the reason for the decision. Where the Secretary of State has consented to the development, the decision letter will be accompanied by the Section 36 consent and 'deemed' planning permission.

Appeals

4.7 There is no statutory appeals mechanism under the Electricity Act 1989 and the Secretary of State's decision is final unless it is successfully challenged in the High Court. That challenge would be by the way of the process known as judicial review and involves making an application to the High Court expeditiously and in any event no later than 3 months after a decision. The Court will not consider the merits of the potential development, only whether the Secretary of State has properly exercised his powers and the procedures have been properly followed. Annex iv provides further information.

Q6. Is the process for decision-making clear? If further explanation is required, please explain.

Detailed flowchart

The Pre-Application Stage

Developer identifies location, discusses proposal with relevant planning authority, statutory and non-statutory bodies, interest groups and local people (e.g. by holding public meetings and exhibitions etc) and starts to undertake an environmental impact assessment (EIA). Developers may also wish to meet with the Onshore Consents Team of DTI to discuss Section 36 procedures

Preparation of an Environmental Statement for an EIA Development

EIA Screening Opinions

The developer can seek a screening opinion from SoS if unsure whether the proposal may be an EIA development (an EIA will be required for all new generating station projects but may not be required for extensions of existing generating stations). **In reality, a potential developer will contact the Consents Team and discuss informally if in doubt whether an EIA needs to be carried out.**

SoS may within 3 weeks of receiving a request ask for further information if he considers he does not have sufficient information to give an opinion

Where he consider he has sufficient information, the SoS consults relevant planning authorities (RPAs) to gain their views on whether the proposal is an EIA development unless the developer has already conveyed their views. RPAs have 3 weeks to respond unless a longer period is determined by the SoS

When the SoS considers he has sufficient information, unless a longer period is agreed in writing with the developer, he will give his views with 3 weeks of whichever is the latest- the date of receipt of the request; the date further information has been provided; and the date by which the RPA is required to give its views (or earlier if received before then)

EIA Scoping Opinions

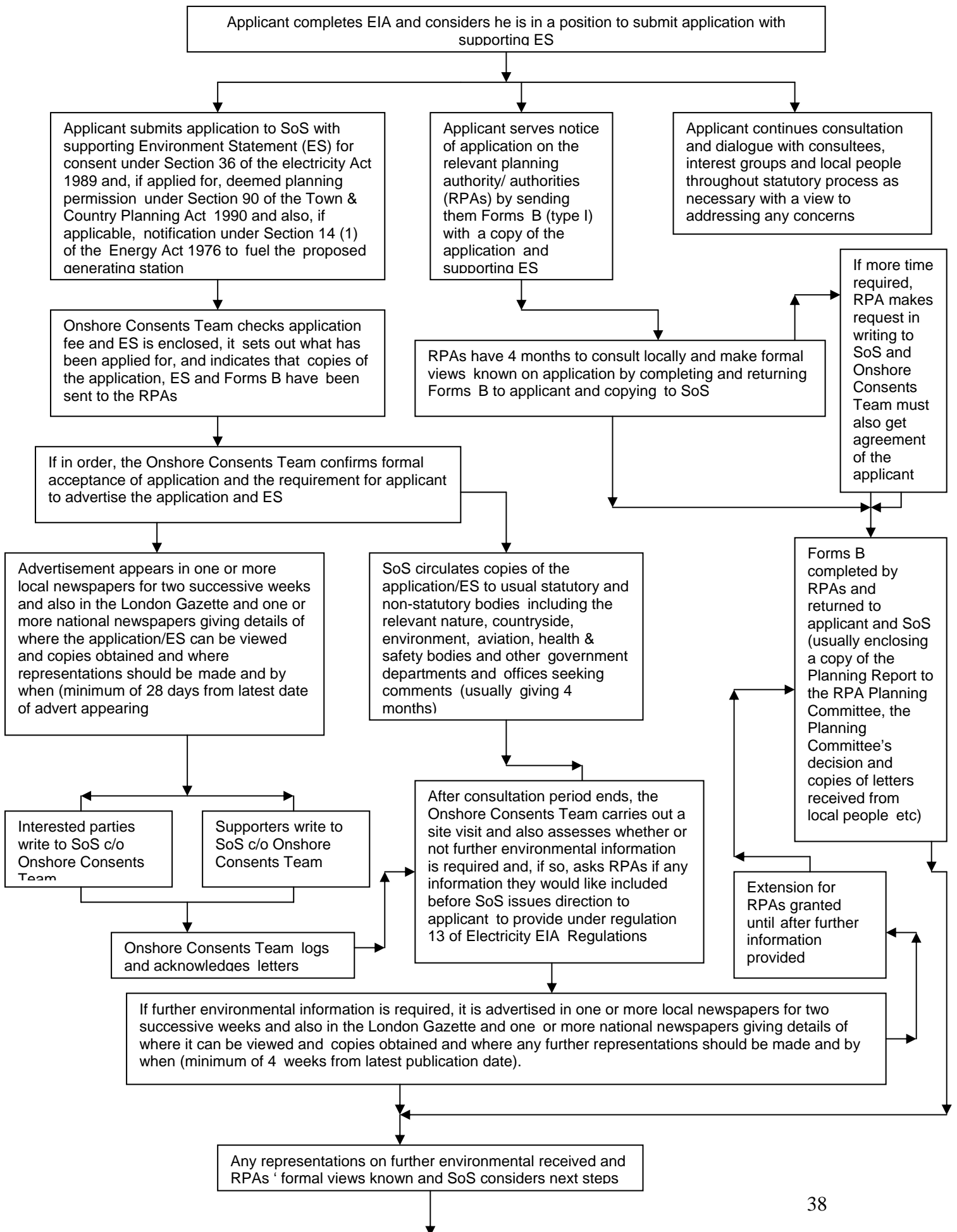
Developer can seek a scoping opinion on scope of EIA from Secretary of State (SoS)

SoS may within 3 weeks of receiving a request ask for further information if he considers he does not have sufficient information to give an opinion

Where he considers he has sufficient information, the SoS consults relevant planning authorities (RPAs), appropriate consultative bodies and anyone else in his view who is likely to be concerned by the proposed development by reason of their specific environmental responsibilities and, unless a longer period is agreed with SoS, gives them 3 weeks to make representations

SoS considers representations made and, unless longer period agreed with the developer, issues a formal scoping opinion with 3 weeks of whichever is the latest - the date of receipt of the request; the date further information has been provided; and the last date by which consultees are required to make their representations (or earlier if received before then).

The Application and Consultation Process



Public Inquiry (if applicable) and Decision Stage

