

Explanatory Memorandum to the Electricity (Offshore Generating Stations) (Fees) (Wales) Regulations 2019:

The Explanatory Memorandum has been prepared by Planning Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary / Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Electricity (Offshore Generating Stations) (Fees) (Wales) Regulations 2019.

I am satisfied the benefits justify the likely costs.

Julie James

Minister for Housing and Local Government

20 February 2019

PART 1

1. Description

1.1 Sections 39 to 41 of the Wales Act 2017 (“the 2017 Act”), among other things, devolve to the Welsh Ministers:

- responsibility for the consenting of offshore generating stations up to and including 350MW to the Welsh Ministers, and
- other associated functions such as the ability to extinguish public rights of navigation and provision relating to safety zones around renewable energy installations.

These provisions will be commenced on 1 April 2019.

1.2 As a result of amendments to the Electricity Act 1989 (“the 1989 Act”) and the Planning Act 2006 made by the 2017 Act, the Welsh Ministers are the appropriate (consenting) authority in relation to applications made after 1 April 2019 under sections 36 and 36A of the Electricity Act 1989 (“the 1989 Act”) relating to generating stations (or proposed generating stations) in Welsh waters (as defined in section 36 of the 1989 Act) which have or will have a capacity not exceeding 350MW.

1.3 The Electricity (Offshore Generating Stations) (Fees) (Wales) Regulations 2019 set out the fees payable to the Welsh Ministers in respect of applications for consent under section 36 of the 1989 Act, together with any applications made under section 36A of that Act.

2. Matters of special interest to the Constitutional and legislative Affairs Committee

2.1 There are no matters of special interest to the Constitutional and Legislative Affairs Committee.

3. Legislative Background

3.1 These Regulations are made in exercise of the powers conferred on the Welsh Ministers by sections 36(8A) and 60 of the 1989 Act.

3.2 Paragraph 47 of Part 3 of Schedule 6 to the 2017 Act inserts subsection (8A) into section 36 of the 1989 Act. The Wales Act 2017 (Commencement No.4) Regulations 2017 commences paragraph 47 of Part 3 of Schedule 6 on 1 April 2019. Section 36(8A) gives the Welsh Ministers power to make provision about the grant of consents under section 36 of the 1989 Act in relation to

generating stations in respect of which they are the appropriate authority, including provision about the payment of fees in relation to such consents.

3.3 Section 60 of the 1989 Act contains supplemental powers in relation to regulations made under Part 1 of the 1989 Act. Regulations made under section 36(8A) of the 1989 Act are made under part 1 of that Act.

3.4 These Regulations are made using the negative procedure.

4. Purpose and Effect

4.1 Since the coming into force of the Development Consent Order process under the Planning Act 2008, which moved the consenting of all offshore generating stations above 100MW from the Electricity Act 1989 to the Development Consent Order process, the procedures for consenting generating stations up to 100MW has scarcely changed, including the relevant fee level, which no longer ensures full cost recovery. The fees are currently set out in regulation 9 of the Electricity (Offshore Generating Stations) (Applications for Consent) Regulations 2006.

4.2 The purpose of these Regulations is to ensure an efficient and self-funding process is in place for the consenting of offshore generating stations, in line with Public Finance Principles. They provide a fairer method for calculating fees which achieves full cost recovery, based on the evidence and actual costs which underlies the DNS process. These fees reflect the typical cost for the Welsh Ministers to administer applications, examine and determine applications for consent to develop.

4.3 The Regulations provide for a three-stage fee structure which is different from the existing method of calculating fees for section 36 consents under the Electricity Act 1989 and will apply to all application types: the construction, extension, operation, alteration or a single application which combines any of these, together with an application under section 36A(1) of that Act for a declaration relating to rights of navigation which is made with the application under section 36. While this method may appear more complex to the applicant, it is a fairer method which reflects the complexity and impacts of a proposal, rather than its output.

4.4 As the fee may vary for each development type, the Regulations include the requirement for the Welsh Ministers to give the applicant as soon as reasonably practicable an estimate in writing of the number of days examination of the application is likely to take. This is to provide more certainty to the applicant in respect of the extent of the fee to be paid.

4.5 The new fee structure is repeated below:

	Fee level
Initial fees	
Fee for submission of application	£15,350
Examination fees	
(a) Daily rate for the Welsh Ministers examining the application by way of hearing or inquiry	£920 per day
(b) Daily rate in all other cases	£870 per day
Determination fee	
Fixed fee for the Welsh Ministers determining an application.	£14,700

5. Consultation

- 5.1 A 12 week consultation ran from 30 April to 23 July 2018 on changes to the consenting of infrastructure in Wales. The consultation was drawn to the attention of a wide range of stakeholders including LPAs, generating station operators and their representatives, businesses, planning consultants, interest groups and other public sector agencies. A total of 47 responses were received.
- 5.2 Question 4 related to the arrangements for offshore generating stations, as well as the associated fees. Of the comments in response, one of the main objections stated an increase in fees may be a material factor in preventing smaller schemes from coming forward.
- 5.3 In response, it was considered a change is considered necessary as fees have remained largely unchanged since 2006. The Welsh Government considers the proposed method of calculating fees to be fairer, which bases fees on the level of complexity and number of issues a project may have. Ultimately, in accordance with Public Finance principles, it is not intended to

profit or make a loss on the determination of generating station applications. While this is likely to result in a rise in fee for smaller schemes, such schemes would not be charged unfairly for the level of service received.

- 5.4 A summary of the consultation responses is available at:
<https://beta.gov.wales/changes-approval-infrastructure-development>

6. Regulatory Impact Assessment

6.1 Three options have been considered:

- **Option 1** – Do Minimum. Use the fee structure set out in the Electricity (Offshore Generating Stations) (Applications for Consent) Regulations 2006.
- **Option 2** – Make provision for a fee structure which aligns with fees specified by the Scottish Government.
- **Option 3** – Provide for a three-stage structure for the setting of fees, similar to the Developments of National Significance (“DNS”) structure. This is the preferred option.

6.2 Impacts on Local Planning Authorities (“LPA”) and Communities / Interested Parties have not been considered as part of this Regulatory Impact Assessment as their involvement in the application process will remain the same for each option and they will not be affected by any proposed fee changes.

6.3 A ‘do nothing’ option has not been considered in this instance. Were the Welsh Ministers to do nothing, there would no longer be the requirement for the applicant to pay a fee in relation to an application to the Welsh Ministers under section 36 of the Electricity Act 1989 as Schedule 8 to the Electricity Act 1989 and the Electricity (Offshore Generating Stations) (Applications for Consent) Regulations 2006 will not apply to the Welsh Ministers from 1 April 2019. This is seen as a highly unlikely alternative.

Option 1 – Do Minimum. Use the fee structure set out in the Electricity (Offshore Generating Stations) (Applications for Consent) Regulations 2006.

Description

6.4 Fees for applications under section 36 (together with section 36A) of the Electricity Act 1989 are currently set out in the Electricity (Offshore Generating Stations) (Applications for Consent) Regulations 2006 (“the 2006 Regulations”) in Wales and England, specifically regulation 9.

6.5 This option will use the same fee levels and structure currently prescribed in the 2006 Regulations through Wales only Regulations.

Costs

Welsh Ministers

6.6 The costs attributed to the Welsh Ministers are based on the time taken to process, examine and determine section 36 applications, coupled with staff costs for undertaking these tasks.

- 6.7 Since 2005, there have been 2 applications submitted for offshore generating stations in Welsh Waters between 1MW – 350MW; an average of approximately 0.2 per annum. Both applications were for the construction and operation of an offshore generating station with an installed generating capacity of 1.2MW and 240MW respectively.
- 6.8 As these types of applications do not have prescribed time limits for determination, it is not possible to quantify how long examining and determining an application should take. However, evidence from the Scottish Government¹ sets out a 9 month target to, where possible, determine section 36 applications, although this period is dependent on the submission of a complete, fit for purpose, non-contentious application which fully addresses all issues raised during a pre-application process. This is similar to the examination period for DNS applications to the Welsh Ministers.
- 6.9 In processing an application, it is estimated to cost the Welsh Ministers approximately £15,350 and approximately £14,700 to determine an application, totalling £30,050. This is based on existing costs for determining DNS applications. However, the costs for examination will vary on a case-by-case basis and may require different examination procedures, although it is reasonable to assume, based on the two previous applications, the majority of cases will be dealt with by way of written representations or hearings.
- 6.10 Evidence from the DNS process estimates an 8 day examination period for written representations and hearings and 12 days for inquiries. However, as DNS thresholds for generating stations do not extend beyond 50MW and the Wales Act 2017 devolves responsibility to Wales for up to 350MW, we can assume the number of days will likely increase, given the potentially larger, more nationally significant projects brought forward as part of these arrangements.
- 6.11 DNS also sets out a daily rate for examination, depending on the examination procedure and prescribes a £870 fee per day for written representations and £920 per day for a hearing or inquiry.
- 6.12 In the two previous examples, the 1.2MW generating station was determined by way of written representations and the 240MW scheme was determined by way of a hearing. In estimating these schemes would be considered for an average of 16 days, this will result in an estimated average examination fee of between £13,900 - £14,700, an average of £14,300.
- 6.13 This results in total estimated costs to the Welsh Ministers of £44,350 per application and £8,870 per annum (based on an average 0.2 applications per year).
- 6.14 Of the two applications submitted for offshore generating stations within Welsh waters, one had an installed generating capacity of 1.2MW and the

¹ [Scottish Government – Offshore wind, wave and tidal energy applications: consenting and licensing manual \(paragraph 2.11\)](#)

other, 240MW. Based on the existing fees prescribed in the 2006 Regulations, the Welsh Ministers would receive £5,000 for the smaller scheme and £12,000 for the larger scheme (or £1,000 and £2,400 based on 0.2 applications per year, an average of £1,700), leaving a true cost deficit of approximately £7,170 per annum.

Development Industry

- 6.15 Developers bear the cost of preparing their proposed scheme and using the planning system to obtain planning permission. Applications usually require the payment of a fee (or fees) to the relevant consenting authority.
- 6.16 Although developer costs will vary according to the size of a development, it is estimated the cost of preparing an application is £128,700².
- 6.17 Developers will also be required to submit a fee to the Welsh Ministers with their application, which will vary depending upon the type of application and the threshold. Table 1 below sets out the existing fees prescribed in the 2006 Regulations.
- 6.18 Based on the 2 applications previously submitted within Wales which fall within the maximum 350MW threshold, the developer would be required to submit a fee of £5,000 for the examination and determination of the first application (a 1.2MW offshore energy project) and £12,000 for the second application (a 240MW offshore energy project). This is an average of £8,500.
- 6.19 With an average of 0.2 applications submitted per year, the estimated cost to developers above their preparation costs would be approximately £1,700 per annum.
- 6.20 Further additional costs may be incurred by developers, however, as seeking pre-application services is discretionary and not a mandatory requirement, we are unable to quantify the financial costs for these services.

² Developments of National Significance – Explanatory Memorandum and Regulatory Impact Assessment (2015)

Table 1 – Existing fees in England and Wales for section 36 applications

Subject matter of application for consent	Fee
Construction of an offshore generating station not exceeding 200MW	£5,000
Construction of an offshore generating station exceeding 200MW but not exceeding 500MW	£12,000
Construction of an offshore generating station exceeding 500MW	£20,000
Construction and operation of an offshore generating station not exceeding 200MW	£5,000
Construction and operation of an offshore generating station exceeding 200MW but not exceeding 500MW	£12,000
Construction and operation of an offshore generating station exceeding 500MW	£20,000
Operation of an offshore generating station not exceeding 200MW	£5,000
Operation of an offshore generating station exceeding 200MW but not exceeding 500MW	£12,000
Operation of an offshore generating station exceeding 500MW	£20,000
Extension of an offshore generating station	£1,000
Extension and operation of an offshore generating station not exceeding 200MW	£5,000
Extension and operation of an offshore generating station exceeding 200MW but not exceeding 500MW	£12,000
Extension and operation of an offshore generating station exceeding 500MW	£20,000

Benefits

Welsh Ministers

6.21 This option provides no benefits to the Welsh Ministers as the fee levels prescribed without amendments do not accurately reflect full cost recovery.

Development Industry

6.22 As the existing fee levels prescribed in the 2006 Regulations do not represent full cost recovery for Welsh Ministers examining and determining applications for offshore developments, developers are benefiting from receiving a service for which they are not paying a reflective fee.

Option 2 – Provide for a fee structure which is in line with fees specified by the Scottish Government.

Description

- 6.23 This option proposes to make provision in line with proposals specified by the Scottish Government in their “Fees charged for applications under the Electricity Act 1989” consultation paper, issued in February 2018.
- 6.24 The fee proposals set out by the Scottish Government proposed increasing existing fee levels to reflect their costs of processing each application. A government response to the consultation was published in December 2018 and set out the final fees which are to be implemented (see Tables 2, 3 and 4).

Table 2

Fees to be implemented for applications under section 36 or 36C of the Electricity Act 1989 – electricity generation stations (EIA)

Threshold (MW)	0-10	10-50	50-100	100-300	300+
S36 EIA construction or extension	£7,000	£35,000	£125,000	£180,000	£280,000
S36C EIA variation	£5,250	£26,250	£93,750	£135,000	£210,000

Table 3

Fees to be implemented for applications under section 36 or 36C of the Electricity Act 1989 – electricity generation stations (non EIA)

Threshold (MW)	0-10	10-50	50-100	100-300	300+
S36 non EIA construction or extension	£6,500	£25,000	£70,000	£100,000	£150,000
S36C non EIA variation	£4,875	£18,750	£52,500	£75,000	£112,500

Table 4

Fees to be implemented for applications under section 36 or 36C of the Electricity Act 1989 other than for construction or extension of generating capacity

Application type	Section 36 application	Section 36C variation
Extension of nuclear generating station by retrofitting of emission control equipment	£35,000	£26,250
Any other extension of a generating station	£25,000	£18,750
Operation only or change to manner of operation of a generating station	£25,000	£18,750

Costs

Welsh Ministers

- 6.25 As discussed in Option 1, the true average cost for Welsh Ministers examining and determining applications is approximately £44,350 per application.
- 6.26 For the two applications relevant to Wales (a 1.2MW project and a 240MW project), this option would see the Welsh Ministers receive fees of £7,000 and £180,000 respectively. This is based on the assumption EIA is required in all cases.
- 6.27 Although this is a small sample size, we can assume from the information available, the average fee would therefore be £93,500 per application, and an annual average of £18,700 based on 0.2 applications per year.
- 6.28 This will result in a cost benefit to the Welsh Ministers of £49,150 per application. Based on an average of 0.2 applications per year, this equates to a cost benefit to the Welsh Ministers of £9,830.

Development Industry

- 6.29 This option will also require developers to pay the relevant fee when submitting their application. Based on the information discussed in Option 1, the estimated annual cost to developers will be £18,700, in addition to the cost of preparing their application, which would be the same in all instances.

Benefits

Welsh Ministers

- 6.30 The Welsh Ministers will benefit from this option by receiving larger fees to offset the costs associated with processing, examining and determining applications. However, the evidence suggests the proposed fees for this option go beyond cost recovery and are likely to result in the Welsh Ministers profiting from the submission of applications. This is not in the public interest. Under this option, it would not be appropriate to use the Scottish fee model as the process used in Scotland has diverged from the England and Wales procedures. Their costs cover activities which are not covered by the England and Wales process.

Development Industry

- 6.31 There are no identifiable benefits to developers, as this option would see a significant increase in fees which do not represent true cost recovery.

Option 3 – Provide for a three-stage structure for the setting of fees, similar to the Developments of National Significance fee structure.

Description

- 6.32 This option proposes to introduce a three stage fee structure, which will apply to all application types: the construction, extension, alteration, operation or a single application which combines any of these.
- 6.33 The proposed fee structure will be a combination of fixed and variable fees, similar to the existing fee structure for the Developments of National Significance (“DNS”) regime.

Costs

Welsh Ministers

- 6.34 The costs to the Welsh Ministers will be offset by the fees charged under this option (see proposed fees in Table 5).
- 6.35 The proposed fees set by this option take account of the varying nature of applications, given their differing size, scale and impacts by including both fixed and variable fees.
- 6.36 Option 1 specifies the total cost per application will be an estimated average of £44,350, or £8,870 based on 0.2 applications per annum. However, this cost will be recovered in its entirety by the proposed fee structure.

Table 5 – Proposed fees under Option 3

Activity	Fee level
Initial fees	
Fees for submission of application	£15,350
Examination fees	
(a) Daily rate for the Welsh Ministers examining the application by way of hearing or inquiry	£920 per day
(b) Daily rate in all other cases	£870 per day
Determination fee	
Fixed fee for the Welsh Ministers determining an application	£14,700

Development Industry

- 6.36 Under Option 1, the average cost for processing, examining and determining applications was estimated to be £44,350, or £8,870 per annum.
- 6.37 Developer fees will reflect these costs, in addition to their preparation costs which shall remain the same throughout. This would represent a very small percentage of the overall development costs for a project of the scale being considered.

Benefits

Welsh Ministers

- 6.38 The Welsh Ministers will benefit from this option by receiving appropriate fees to offset the costs associated with processing, examining and determining applications. However, unlike option 2, this option more accurately reflects cost recovery and prevents the Welsh Ministers profiting from undertaking the necessary work.

Developers

- 6.39 Although this option will see developers paying higher fees than are currently required, developers have benefited for a number of years from seeing no increase in fees to reflect the costs necessary to undertake necessary work. Therefore, this option aims to benefit all affected parties by increasing fees to cover costs, but refraining from allowing the consenting authority (i.e. the Welsh Ministers) to profit from examining and determining these applications.

Summary and preferred option

- 6.40 As fees for section 36 applications have remained the same since 2006, they no longer reflect true cost recovery in terms of the time taken and resources required to process, examine and determine these applications. The aim, therefore, is to ensure fees charged for applications help the consenting authority (i.e. the Welsh Ministers) recover their costs.
- 6.41 Option 1 represents the 'do minimum' and the fees set out in this option do not cover the necessary costs. Alternatively, option 2 sets out significantly higher fees than are currently prescribed. These are intended to follow the proposed fees in Scotland. However, it is noted the process for determining applications under section 36 in Scotland has diverged significantly from the process which will be devolved to Wales. Accordingly, while this isn't the case in Scotland, our evidence suggests this fee structure would result in the Welsh Ministers making a profit under this fee structure. This is not in accordance with public finance principles.
- 6.42 Option 3 strikes a fair balance and takes account of the varying nature of applications by incorporating variable and fixed fees which accurately reflect cost recovery, without profiting or being subsidised by the public purse. Therefore, option 3 is the preferred option.

Table 4: Costs per annum, without preparation costs

	Option 1	Option 2	Option 3
Welsh Ministers	-£7,170	£9,830	£0 (cost neutral)
Development Industry	-£1,700	- £18,700	-£8,870

ANNEX 1: COMPETITION FILTER

Question	Answer
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No