Section 3

Legislative Context and Regulatory Requirements

3 LEGISLATIVE CONTEXT AND REGULATORY REQUIREMENTS

3.1 INTRODUCTION

This section outlines the principal consents, approvals and licences sought for the Humber Gateway Offshore Wind Farm and their legislative contexts. *Figure 3.1* shows in simple terms the relationship between the various key consents required for the project, noting the inter-relationship between the relevant consents required for the onshore and offshore components of the development and their coverage.

3.2 CONSENTING REQUIREMENTS

3.2.1 INTRODUCTION

The principal consents, approvals and licences required for the offshore elements of the Humber Gateway project are summarised below in terms of both the commonly used shorthand as well as the legislative context:

- FEPA Licence – *Food and Environmental Protection Act 1985*.
- Section 36 Consent – Section 36 *Electricity Act 1989*.
- Section 36A Declaration – Section 36A *Electricity Act 1989.*
- CPA Consent – Section 34 *Coast Protection Act 1949.*

Other permissions potentially needed by the project and for which further applications may be needed include, but are not limited to:

- FEPA Disposal Licence – *Food and Environmental Protection Act 1985*.
- Safety Zones – Section 95 *Energy Act 2004.*

More information on these consents is given below.

The onshore elements of the Humber Gateway project, that is all works above Mean High Water Springs, are dealt with through separate applications under the *Town and Country Planning Act 1990* under the jurisdiction of the local planning authority, East Riding of Yorkshire Council. These applications will cover both the underground cable route from landfall at Easington to a connection point into the national transmission system at Salt End North, and a new electricity substation at Salt End.

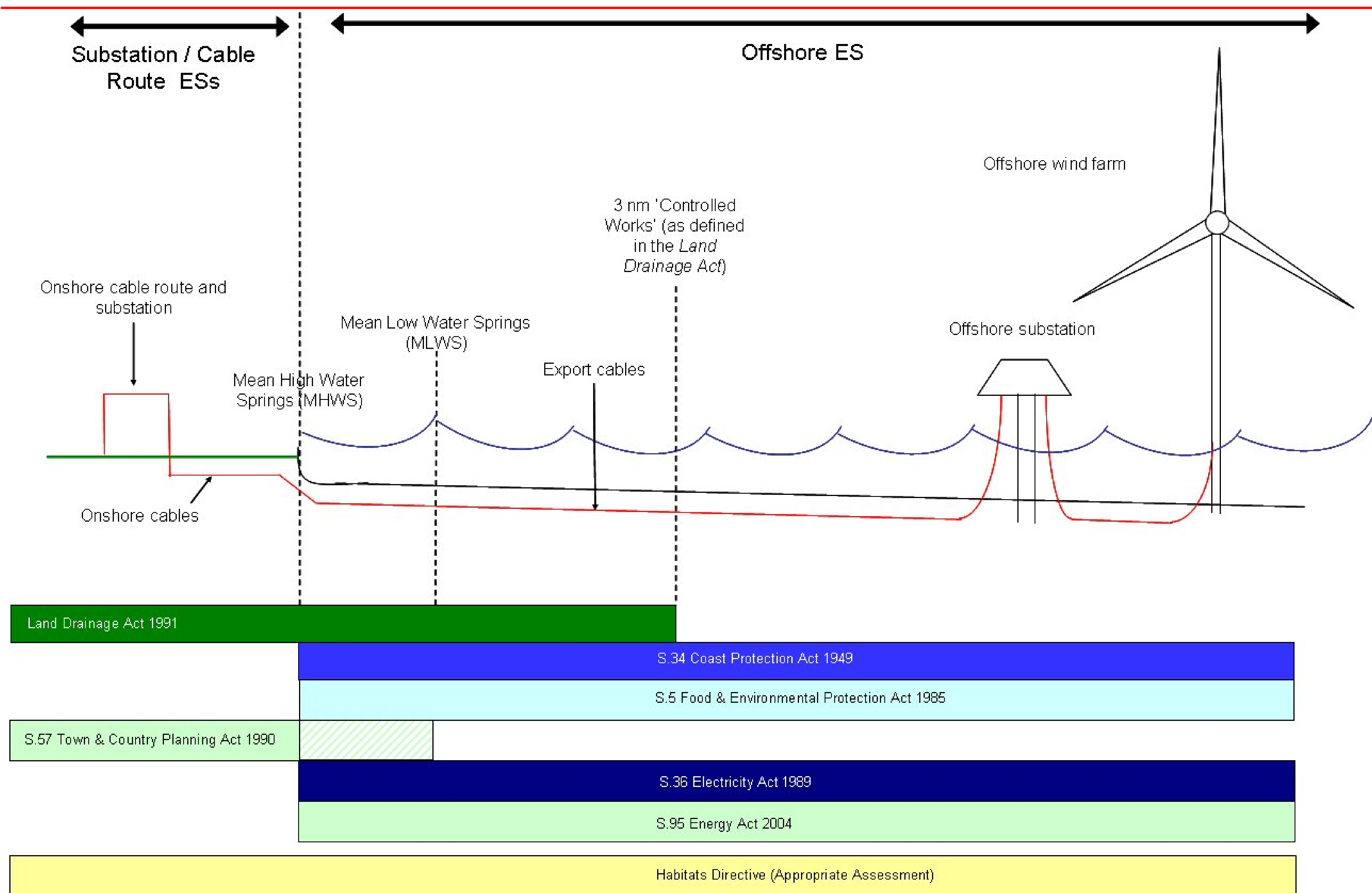
3.2.2 FEPA LICENCE (DEPOSITS AT SEA)

Under Section 5 FEPA 1985, a licence is required from the Secretary of State for the Environment, Food and Rural Affairs for:

- the placement of materials or structures in UK waters, either in the sea or under the seabed during construction, and related actions; and
- the disposal of waste at sea (primarily dredged material including its use for beneficial purposes).

FEPA 1985 applies to deposits made in the UK territorial waters and on the UK continental shelf.

Figure 3.1 Framework to be used for Humber Gateway Consents and Licences



Note that the *Town and Country Planning Act* is applicable to development down to MLWS but, in this instance, Section 36 of the *Electricity Act* has been adopted as the mechanism for project approval in the area between MHWS and MLWS.

3.2.3 Section 36 Consent (Generating Stations)

Under Section 36 *Electricity Act 1989*, consent is required from the Secretary of State for Business Enterprise and Regulatory Reform to construct, extend or operate a generating station with a capacity of more than 50 MW unless otherwise exempted. The requirement was extended on 1 December 2001 by means of a Statutory Order (SI2001/3642) to cover all offshore wind and water driven developments of above 1 MW capacity.

The *Electricity Act* extends not only to UK territorial waters around England and Wales but also to the Renewable Energy Zone (REZ) now designated by UK Government outside the territorial waters under the *Energy Act 2004*. Once granted, there is no power for the Secretary of State to vary the terms of a Section 36 consent although he has power to attach conditions requiring further approvals.

The proposal in a Section 36 application may also include associated onshore works such as an electrical substation. However, E.ON is confining its Section 36 application for the Humber Gateway project to offshore works below the Mean High Water Mark, and will apply separately for planning permission for onshore works, namely the underground cable route and onshore electricity substation.

Under Section 36B of the *Electricity Act,* the Secretary of State may not grant a Section 36 consent where the generating station, whether in the territorial seas or in the REZ, would interfere with "*recognised sea lanes essential to international navigation*". In carrying out this duty the Secretary of State must take into account how he intends to exercise his powers in relation to any application for a declaration to extinguish public rights of navigation and any application for a safety zone.

3.2.4 Section 36A Declaration (Rights of Navigation)

Where a consent is granted by the Secretary of State for the construction or operation of a wind farm within territorial waters, he may at the same time make a declaration under Section 36A in respect of rights of navigation.

A declaration under Section 36A (1) declares that the rights of navigation specified or described in it are extinguished, suspended for a specified period or a period as determined under the declaration, or are to be exercisable subject to specified restrictions or conditions (Section 36A (3)).

3.2.5 Coast Protection Act Consent (Safety of Navigation)

To ensure that works do not endanger the safety of navigation, consent is required from the Secretary of State for Defra under Section 34 of the *Coast Protection Act* for:

- the construction or improvement of any works on, under or over any part of the seashore or seabed lying below the level of Mean High Water Springs (MHWS);
- the deposit of any object or materials on any part of the seashore or seabed below the level of MHWS; and
- removal of any object or materials from the seashore seabed below the level of MHWS (e.g. dredging).

No consent under Section 34 is required for offshore generating activities for which a consent under Section 36 has been granted (Section 99 (4) *Energy Act 2004*).

Section 34 consent will, however, be required for cables within the area of a Section 36 application.

3.2.6 Safety Zones

Where a wind farm is either proposed to be, or is in the process of being constructed, extended, decommissioned or operated, and the Secretary of State considers it appropriate for safety reasons, he may issue a notice declaring that specified areas are to be safety zones. This may happen either following an application made to him or on his own initiative.

Such zones are intended to secure the safety of individuals in or around the installation, vessels in the vicinity and individuals on such vessels as well as the safety of the wind farms or other installations themselves.

A notice under Section 95 of the *Energy Act 2004* may:

- provide for the safety zone to vary;
- specify prohibited activities;
- provide for vessels being permitted to enter the zone; or
- confer discretions on named persons.

The detailed regulations on Safety Zones are contained in Statutory Instrument 2007 No 1984 *The Electricity (Offshore Generating Stations) (Safety Zones) (Application Procedures and Control of Access) Regulations 2007.*

3.3 OTHER RELEVANT LEGISLATION

3.3.1 HABITATS REGULATIONS

The *Habitats Regulations* transpose *Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (EC Habitats Directive*) into national law. The Regulations place a duty on the Secretary of State to propose a list of sites that are important for either habitats or species (listed in Annexes I and II of the *Habitats Directive,* respectively) to the European Commission. Once the Commission and UK Government have agreed that the sites submitted are worthy of designation, they are identified as Sites of Community Importance (SCIs). The UK Government must then designate these sites as Special Areas of Conservation (SAC) within six years.

The Regulations also require the compilation and maintenance of a register of European sites, to include Special Protection Areas (SPAs) classified under *Council Directive 79/409/EEC on the Conservation of Wild Birds (the Birds Directive*) and SACs. These sites form a network called Natura 2000.

Where a plan or project is considered likely to have significant effect on a European site, Regulation 48 sets out the requirements for an "*appropriate assessment*" of the implications for the site in view of the site's conservation objectives.

3.3.2 STRATEGIC ENVIRONMENTAL ASSESSMENT

The *Strategic Environmental Assessment (SEA) Directive (European Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment*), transposed into UK law in July 2002 ensures that environmental consequences of certain plans and programmes are identified and assessed during their preparation and before their adoption.

The DTI (now BERR) issued *Future Offshore*, a consultation document, in 2002. This set out a preferred strategy for additional rounds of offshore wind farm development. This document stated the UK Government's intention to undertake SEAs to inform the future offshore wind farm allocations ahead of the introduction of the SEA Directive in 2004.

The SEA for Round 2 offshore wind developments focussed on three strategic areas, namely the Greater Wash, the Thames Estuary and North West (Liverpool Bay).

The SEA considered two scenarios of offshore wind development by 2010, the "*most likely and the maximum credible*" of 4 GW and 7.5 GW respectively. The report concluded that the 7.5 GW scenario would only be achievable if uncertainties relating to certain environmental impacts could be resolved.

Studies to resolve many of the environmental impacts associated with offshore developments have been undertaken by the Collaborative Offshore Wind Research into the Environment (COWRIE) Group (led by the Crown Estate) and DTI Research Advisory Group (RAG). Where appropriate, the results of research carried out by these groups and others is mentioned in the relevant sections of this ES.

3.4 ENVIRONMENTAL IMPACT ASSESSMENT LEGISLATIVE FRAMEWORK

The legislative basis for the EIA is set by the *European Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment*, as amended by *Directive 97/11/EC.* The Directive requires an EIA to be undertaken in support of an application for development consent for specified types of projects or developments. Annex II of the Directive notes the Directive's application to the Humber Gateway development, stipulating the requirement for an EIA for *"… installations for the harnessing of wind power for energy production".*

The need for an EIA for electricity generation projects requiring consent under Section 36 of the *Electricity Act 1989* is provided for in England and Wales by *The Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2000.* These set out the statutory process and minimum requirements for the provision of adequate environmental information for an EIA.

No regulations applying the EIA Directive have been made under the *Food and Environment Protection Act 1985*. However, Section 8 of the Act requires applicants to provide the licensing authority with such information as it deems necessary to enable it properly to consider the application. The licensing authority's policy is that this information shall include the equivalent of a formal ES in support of all offshore wind farm projects to inform the process of impact assessment.

3.5 THE ROCHDALE CASE LAW

The cases of R v Rochdale MBC ex parte Tew and R v Rochdale MBC ex parte Milne are cited here for the guidance they provide on ensuring compliance with the EIA Directive and the Regulations which transpose it into UK law. This case law provided a clear steer to planning authorities and those conducting assessments on the approach they need to adopt when considering EIA in the context of an application in outline form (such as outline planning permission). The rulings of these cases subsequently informed the guidance note issued by the then Office of the Deputy Prime Minister, now Communities and Local Government, entitled *Note on Environmental Impact Assessment Directive for Local Planning Authorities.*

Both cases dealt with a legal challenge to a decision of the authority to grant outline planning permission for a business park. In both cases an ES was provided. In ex parte Tew, the Court upheld a challenge to the decision and quashed the planning permission. In ex parte Milne, the Court rejected the challenge and upheld the authority's decision to grant planning permission, making it clear that provided the EIA was addressed properly it was perfectly lawful to proceed on the basis of a permission which envisaged later detailed approvals.

Since the phasing and the final form or detailed design of the Humber Gateway project cannot be fully defined at this stage, the Humber Gateway EIA has considered the worst realistic case or scenario i.e. the scenario allowed within the defined envelope of the proposals that would lead to the worst levels of adverse environmental effects for that topic.

The EIA has therefore been undertaken within clearly defined parameters that will govern or define the full range of development possibilities, and hence the likely environmental impacts, which could flow from the grant of planning consent for Humber Gateway.