Marine
Management
Organisation

Marine Licensing
Lancaster House
Hampshire Court
Newcastle upon Tyne
NE4 7YH

T +44 (0)300 123 1032
F +44 (0)191 376 2681
www.gov.uk/mmo

The Sizewell C Project Case Team
National Infrastructure Planning
sizewellc@planninginspectorate.gov.uk
(By email only)

16 September 2021

Planning Inspectorate Reference: EN010012
Our Identification Number: 20025459

Dear Sir or Madam,

Planning Act 2008 – Application by NNB Generation Company (SZC) Limited for an Order Granting Development Consent for The Sizewell C Project

Submission in lieu of attendance at Issue Specific Hearing 14 ("ISH14") on the Development Consent Order, Deed of Obligation and allied documents

Thank you for the invitation from the Examining Authority ("ExA") for the Marine Management Organisation ("MMO") to speak at ISH14. In the interests of efficient team resource management, the MMO will not be attending ISH14. This is due to capacity issues faced by the MMO at present.

However, the MMO has reviewed the detailed agenda provided, and further notes the question posed to the MMO in ExQs3 DCO.3.3, and provides our comments on these within this submission. Additionally, we are happy to address any further points in writing as part of any future Written Questions from the ExA, and we will continue to provide written representations at each future deadline until such time as the examination comes to a close.

This written response is submitted without prejudice to any future representation the MMO may make about the Development Consent Order ("DCO") Application throughout the examination process. This representation is also submitted without prejudice to any decision the MMO may make on any associated application for consent, permission, approval or any other type of authorisation submitted to the MMO either for the works in the marine area or for any other authorisation relevant to the proposed development.

1. ISH 14 Detailed Agenda

1.1 The MMO notes that the detailed agenda for ISH 14 'Development Consent Order, Deed of Obligation and allied documents' does not include the Deemed Marine Licence Appeals Procedure which is contained within Schedule 20A of the draft Development Consent Order.

1.2 The MMO would like to highlight that there is still a significant disagreement between the Applicant and the MMO in relation to the Appeals procedure, as the Appeals process proposed remains unacceptable to the MMO. The MMO's position on Appeals is outlined within our responses referenced as follows: sections 2.1.2 – 2.1.7 of REP2-140; sections 2.1.5 – 2.1.14 of REP2-144; sections 1.1.7 – 1.1.22; and section 6 of REP6-039. The MMO discusses our comments on Appeals further, under section 2 of this submission.

2 ExQs3, DCO.3.3:

2.1 Within ExQs3, under the reference DCO.3.3, the following question is posed by the ExA:
"Please see MMO's REP6-039, paras 1.1.7 -22
(a) Please will the Applicant explain why it must have Sch 23 for DML conditions refusals /
deemed refusals? Why is this case different from Hornsea 3 and Norfolk Vanguard?
(b) MMO – are the considerations which apply to wind farms really the same for a single
phase, time critical project with little flexibility over siting?"

2.2 Whilst the MMO notes that (a) is directed to the Applicant, the MMO understands that Article 83 of the Order is intended to apply the approvals process set out in Schedule 23 to any approval required of the *discharging authority* under the Order. The MMO is not the *discharging authority* under the Order. The MMO understands that the Applicant's intention is that Article 83 and Schedule 23 will not apply to any approval required of the MMO under a condition of the DML, the Applicant intends for the MMO approvals to be subject to the modified Appeals process currently set out in Schedule 20A of the Order. Having reconsidered the wording of Article 83 in light of the ExA's question the MMO observes that Article 83 might benefit from being further amended so it clearly excludes any approval of the MMO that is required under a condition of the DML from its application.

2.3 In relation to part (b) of the question the MMO can see no reason why this applicant and this project should be treated any differently from any applicant for a windfarm project, or indeed an applicant for any other standalone marine licence. The MMO's view is that the considerations to which the ExA refers, that being single phase, time critical projects with little flexibility over siting, apply equally to windfarms (and other applications) as they do to nuclear new builds. The MMO take the view that should this application have been frontloaded and assessed to a further extent prior to submission to examination, then the risk of these considerations would have been greatly reduced. Furthermore, windfarms are nationally significant infrastructure projects which are critical for delivering the Governments commitments on climate change, they too are time critical projects with little flexibility over siting and the MMO's position is that the considerations that apply in this case are analogous to those which apply to windfarms. The MMO can see no reason why the Applicant in this case should, by virtue of the project being proposed, be treated significantly differently to the applicants for other DCOs.

2.4 The MMO adds the following in support of our comments regarding the discussion on Appeals. In both Hornsea 3 and Norfolk Vanguard DCO's, the applicants advanced the need for the MMO's approvals to be made within a set determination period and that those decisions be subject to either an arbitration process or at least a modified Appeals process to be based on the Marine Licensing (Licence Application Appeals) Regulations 2011. In neither case, and on neither point, did the ExA, or indeed the Secretary of State, agree with the applicant.

2.5 In Vanguard, the ExA noted at 9.4.42 of its recommendation report[1] the need for evidence to justify the adapting of existing provisions regarding the discharge of conditions on DML's by the MMO in the exercise of its regulatory function. The ExA noted that it did not have such evidence before it, nor did it have before it any evidence of any previous delays occasioned by the MMO in the exercise of these functions so as to cause material harm to any marine licence holder. The MMO observes that there is no such evidence before the ExA in relation to this application.

2.6 In light of our comments made on the considerations of this application being any greater than for those of other applications, the MMO's position is that the Applicant does not appear to be advancing any justification over and above that advanced in Vanguard in relation to any need to adapt existing provision, nor is it advising any evidence of any current delays in the MMO providing any approvals under the conditions of this licence. The MMO cannot therefore see any need for the inclusion of the statutory Appeals process in relation to this application and this DML.

2.7 The ExA in Vanguard acknowledged that to apply an Appeals process as proposed, it would place the Applicant in a different position to other licence holders. The MMO's position was that to do so was problematic because it would lead to a clear disparity between those licence holders who obtained their marine licence directly from the MMO and those who obtained their marine licence via the DCO process, this would lead to an inconsistent playing field across the regulated community, and therefore falls against what parliament had intended within the wording of the Appeals regulations. Further, the Appeals Regulations do not apply to approvals required under the conditions of a licence.

2.8 The MMO's position for this application is that to include the Appeals process in schedule 20A within the DCO would put this Applicant in a different position to other licence holders for no clear cogent or robust reason. As the MMO has set out in its previous comments in relation to this application, there is already a clearly defined route to challenge the MMO over these approvals and this is through the MMO's internal complaints procedure and ultimately through Judicial Review. For the avoidance of doubt, to date, the MMO has never been judicially reviewed over the refusal, or a failure to refuse, an application for an approval under a condition of a licence. The MMO would suggest that the Applicant is attempting to fix an issue which isn't broken.

[1] Report available at: https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010079/EN010079-004268-Norfolk%20Vanguard%20Final%20Report%20to%20SoS%2010092019%20FINAL.pdf

2.9 The MMO remains concerned about the applicants proposed inclusion of a specified determination period in which the MMO must determine whether or not to grant any approval required under a condition of the DML. It is the MMO strongest view that it is inappropriate to put timeframes on complex technical decisions of this nature. The time it takes the MMO to make such determinations depends on the quality of the application made, and the complexity of the issues and the amount of consultation the MMO is required to undertake with other organisations. The MMO's position remains that it is inappropriate to apply a strict timeframe to the approvals the MMO is required to give under the conditions of the DML given this would create disparity between licences issued under the DCO process and those issued directly by the MMO, as these marine licences are not subject to set determination periods.

2.10 Whilst the MMO acknowledges that the Applicant may wish to create some certainty around when it can expect the MMO to determine any applications for an approval required under the conditions of a licence, and whilst the MMO acknowledges that delays can be problematic for developers and that they can have financial implications, the MMO stresses that it does not delay determining whether to grant or refuse such approvals unnecessarily it makes these determinations in as timely manner as it is able to do so. The MMO's view is that it is for the developer to ensure that it applies for any such approval in sufficient time as to allow the MMO to properly determine whether to grant or refuse the approval application.

2.11 The MMO observes that should the ExA be minded to recommend that the DML conditions do include defined determination periods, as the Applicant currently proposes, any determination period set out in the DML should be 6 months and the condition should be drafted using the same wording used in Vanguard or Hornsea Three, as detailed below:

"Unless otherwise agreed in writing with the undertaker, the MMO must use reasonable endeavours to determine an application for approval made under condition [x] as soon as practicable and in any event within a period of [x] months commencing on the date the application is received by the MMO."

Or

"The MMO shall determine an application for approval made under condition [x] within a period of four months commencing on the date the application is received by the MMO, unless otherwise agreed in writing with the undertaker."

Yours faithfully,

Luella Williamson
Marine Licensing Case Manager

[redacted]