

East Anglia THREE  
Offshore Windfarm

East Anglia THREE

# Applicant's Response to Consultation Questions

Document Reference – Deadline 7/ Applicant's  
Response to Consultation Questions

**Options for Outline Draft Protective or Balancing Provisions**

**Between the Undertaker and Eni UK Limited**

**Applicant's Response to Consultation Questions: Annex A and Proposal 3 Questions**

The Applicant has noted the ExA's comments in Annex A (Issues for consideration) and the options and sample drafting set out (Proposal 1, Proposal 2 and Proposal 3). Notwithstanding these comments, the Applicant has submitted further detailed comments on Eni's Deadline VI Submission to the Examination of East Anglia Project THREE.

The Applicants' responses to the consultation questions are set out below.

1. **Do the Applicant and Eni UK Limited view the options and sample drafting set out in this Annex as providing a means whereby a resolution to concerns expressed on both sides might be approached?**
  - 1.1 The Applicant is broadly supportive of Proposal 2 set out in Annex A.
  - 1.2 The Applicant has noted the ExA's views that
    - 1.2.1 Policy NPS EN-1 (paragraph 2.2.21), NPS EN-3 (paragraphs from 2.6.176–188) and the East Inshore and Offshore Marine Plans (policy GOV 2) are supportive of early attempts to engage the Applicant and Eni in agreeing the terms of possible coexistence
    - 1.2.2 NPS EN-3 is also clear that an Examining Authority should be satisfied that discussion between the parties should have progressed as far as possible, and advises that provisions including those providing for mitigation and engaging arbitration in instances of dispute, can be appropriately included in an Order
    - 1.2.3 The absence of protective provisions in the DCO, and reliance only on the oil and gas clause in the Crown Lease for the wind farm appears to generate undue uncertainty for both the undertaker and Eni UK Limited and this does not appear to respond sufficiently to NPS EN-1 paragraph 2.2.21. Nor does it address NPS EN-3 Guidance on the timing for agreement, the provision of mitigation or the operation of arbitration as a means to remove or minimise avoidable conflict, whilst maximising oil and gas production
    - 1.2.4 A traditional protective provision (which provides primacy over the proposed development for a known and pre-existing interest) for the benefit of Eni UK Limited would be inappropriate. Such a provision could provide Eni with a **block over the implementation of the generating station of uncertain justification or duration**, which would appear to be **unreasonable in circumstances where it is not yet known if there is a feasible oil and gas prospect, and if so, how much sea area would be required for exploration and/or exploitation activities**. It would appear to provide no incentive to Eni to expedite its initial investigations of its prospect or to take **reasonable and early steps to better define, mitigate or remove its adverse effects on the generating station development** (our emphasis)
    - 1.2.5 A mechanism is needed to ensure that once there is greater certainty about the potential siting design and commencement of either development, the relevant party has a duty to disclose that to the other party and a means to trigger the best design response in the other scheme
    - 1.2.6 It may also be valuable to enable binding arbitration as a means to resolve any dispute about the content or timing of such an agreement

- 1.3 The Applicant would not disagree with any of these comments. As such the Applicant supports an approach which
- Encourages early engagement on possible co-existence (see 1.2.1 above)
  - Encourages discussion to be taken as far as possible (see 1.2.2 above)
  - Engages arbitration in instances of dispute (see 1.2.3 above)
  - Provides suitable mitigation while maximising oil and gas production (see 1.2.3 above)
  - Provides an incentive for Eni to expedite its initial investigations of its prospect (see 1.2.4 above)
  - Provides an incentive for Eni to take reasonable and early steps to better define mitigate or remove its effects on EA3 (see 1.2.4 above)
  - Ensures that once there is greater certainty about either development the other party offers a design response (see 1.2.5 above)
- 1.4 In broad terms therefore the Applicant considers that Proposal 2 and sample drafting provide a means of achieving this approach.
2. **What aspects of the options and sample drafting are supported and why?**
- 2.1 All the above aspects of Proposal 2 and sample drafting are supported by the Applicant.
3. **What aspects of the options and sample drafting are not supported and why?**
- 3.1 The Applicant considers that
- 3.1.1 Proposal 3 should not be pursued – it is not considered that MMO, as a marine licensing body, is a suitable body to take on the role of approval of a proximity plan and to weigh the competing interests of oil and gas exploration and production with development of an offshore wind farm, with or without backstop arbitration or with or without expert assessors. From initial discussion with MMO the Applicant understands MMO takes the same view
- 3.1.2 There is a need for greater clarity in Proposal 1 with regard to timescales for appointment of the arbitrator and intended timing for the arbitrator's determination, and this should be included in Part 7 of Schedule 8, rather than Article 33 of the draft Order
- 3.1.3 There is a need for greater clarity in Proposal 2 that EA3 should be allowed to proceed where there still remains uncertainty not only as to whether there is a feasible oil and gas prospect, but also where there is insufficient detail of the nature and location of the Licensees' Works or of how much sea area would be required for exploration and/or exploitation activities. This is in order not to provide "a block over implementation of a generating station of uncertain justification or duration" (see 1.2.4 above). While the sample drafting in Proposal 2 suggests this approach in paragraph 5 (as a matter which the arbitrator may include as a determination) the Applicant considers this should be made explicit in the operative paragraphs of Part 7 of Schedule 8
4. **Particularly, would the preparation of a "proximity agreement" as a private legal agreement but subject to arbitration, or a "proximity plan" with the MMO as decision maker, appear to offer a means of resolving the current concerns?**
- 4.1 The Applicant agrees that the preparation of a proximity agreement subject to arbitration offers a means of resolving these concerns.

- 4.2 Attached at Annex A is the Applicant's draft Protective Provision which maintains the principles of, but builds on, the ExA's sample drafting for Proposal 2 (with brief footnotes explaining the changes). It is not considered that a specific arbitration requirement to deal with any difference arising under Schedule 8 Part 7 needs to be included as Article 33(2) (see Proposal 1). Article 33(1) already provides for "any difference...unless otherwise provided for...[to] be referred to...a panel of three arbitrators...". Specific arbitration provisions should be included in Part 7 of Schedule 8, and Article 33 should be left unamended.
- 4.3 Also attached at Annex B is the draft Protective Provision with suggested amendments proposed by Eni. In the margin are the Applicants' comments where those amendments are not agreed. In particular the Applicant cannot on any account agree any amendments to the draft Protective Provision which would
- Define "Licensees' Works" as infrastructure which "may be installed" at some uncertain time in the future (see paragraph 2). This would prevent the Applicant taking these works into account in its design of the Undertakers' Works at the time when the design of the Undertakers' Works needs to be finalised.
  - Require the Undertaker to serve notice under paragraph 4 within 24 months of the intended commencement date; the Applicant will need the flexibility to seek certainty in their design of the Undertakers' Works more than 24 months before commencement.
  - Remove from paragraph 5 the explicit provision, reflecting the ExA's comments, that to the extent that the Plan of the Licensees' Works provides insufficient detail, the Applicant should be able to proceed without a Proximity Agreement.
  - Amend paragraph 6(v) in a way which does not make it clear, reflecting the ExA's comments, that the Proximity Agreement shall take account of the date by which the Licensees will (not intend to) seek to commence exploitation or at which works of exploration will (not are intended to) cease.
  - Introduce the concept of commercial viability of exploitation of oil and gas into paragraph 6(x)
- 4.4 Since receipt of Eni's draft Protective Provision (Annex B) Eni have, shortly before Deadline VII, submitted a further draft Protective Provision incorporating further amendments in response to the Applicants' comments (Annex C). These amendments are still under discussion between EATL and Eni with a view to agreeing a Protective Provision, if possible. The final position will be notified to the ExA at Deadline VIII.
- 4.5 With regard to the Proposal 3 questions, for the reasons set out at 3.1.1 above, the Applicant does not support Proposal 3, with or without backstop arbitration, or with or without expert assessors.

**ANNEX A**

**Draft Protective Provision for holders of Licence P1965**

**PART 7**

**FOR THE PROTECTION OF OIL AND GAS LICENSEES**

**Application**

1. For the Protection of the Licensees from time to time of United Kingdom Petroleum Production Licence P1965<sup>1</sup>, unless otherwise agreed in writing between the Undertaker and the Licensees the provisions of this part of this Schedule shall have effect.

**Interpretation**

2. In this Part of this Schedule

"Applicable Laws<sup>2</sup>" means applicable laws, rules, orders, guidelines and regulations, including without limitation, those relating to health, safety and the environment and logistics activities such as helicopter and vessel operations;

"Good Offshore Wind Farm Construction Practice<sup>3</sup>" means the application of those methods and practices customarily used in construction of wind farms in the United Kingdom Continental Shelf with that degree of diligence and prudence reasonably and ordinarily exercised by experienced operators and contractors engaged in the United Kingdom Continental Shelf in a similar activity under similar circumstances and conditions;

"Good Oilfield Practice<sup>2</sup>" means the application of those methods and practices customarily used in good and prudent oil and gas field practice in the United Kingdom Continental Shelf with that degree of diligence and prudence reasonably and ordinarily exercised by experienced operators engaged in the United Kingdom Continental Shelf in a similar activity under similar circumstances and conditions;

"Guidance<sup>2</sup>" means the 'Oil and gas clause in Crown Estate leases, Guidance on procedures for independent valuation where necessary' published by the then Department of Energy and Climate Change in June 2014, or any similar supplementary or replacement policy;

"Licence<sup>2</sup>" means United Kingdom Petroleum Production Licence P.1965;

"Licensees<sup>2</sup>" means the licensees from time to time of the Licence;

"Licensees' Works<sup>3</sup>" means any infrastructure to be installed owned and occupied or maintained by or on behalf of the Licensees or exploration, appraisal, development and decommissioning activities (and associated logistics activities), by the Licensees in connection with the Licence within the Protected area;

"Ministerial Statement<sup>2</sup>" means the written statement given by the then Secretary of State for Energy and Climate Change to the UK Parliament regarding Crown Estate Leases for Offshore Renewables Projects on 12 July 2011, or any similar supplementary or replacement policy;

"Plan of the Licensees' Works<sup>3</sup>" means an exploration and development programme and details and location of Licensees' Works and minimum requirements such as exclusive zones in accordance with Good Oilfield Practice and Applicable Laws to enable the Licensees to, as applicable, explore, appraise, develop and/or decommission hydrocarbon resources within the Protected area;

<sup>1</sup> The Protective Provision should benefit Licensees of Licence P1965 rather than Eni UK Limited (Eni) personally

<sup>2</sup> Other definitions (from earlier drafts of the protective provision) have been provided for "Applicable Laws", "Good Oilfield Practice", "Guidance", "Licence", "Licensees", "Ministerial Statement", "Protected Area", "Protective Provisions Plan" and "Table of Coordinates"

<sup>3</sup> New definitions are provided

"Plan of the Undertakers' Works<sup>3</sup>" means a construction programme and details of location of the Undertakers' Works and minimum requirements such as safety and exclusion zones in accordance with Good Offshore Wind Farm Construction Practice and Applicable Laws to enable the Undertaker to construct and operate the Undertakers' Works within the Protected area;

"the Protected area<sup>2</sup>" means the area coloured green on the Protective Provisions Plan (that area coloured green being delineated by a line drawn between the points in the Table of Co-ordinates);

"the Protective Provisions Plan<sup>2</sup>" means the plan entitled Protective Provisions Plan and certified as the Protective Provisions Plan for the purposes of this Part of this Schedule;

"Proximity Agreement<sup>4</sup>" means an agreement between the Undertaker and the Licensees to reconcile and protect the interests of the parties as are known at the time to secure the implementation of the Undertakers' Works and the Licensees' Works, taking account of the matters in paragraph (6);

"the Table of Co-ordinates<sup>2</sup>" means the following table

Area	Label Point	Latitude X (European Datum 1950 UTM Zone 31N)	Longitude Y (European Datum 1950 UTM Zone 31N)
1	A	483,799.57	5,834,052.15
	B	494,193.52	5,830,959.70
	C	490,468.86	5,823,847.11
	D	483,750.96	5,823,832.51
2	E	500,000.00	5,846,795.24
	F	502,637.55	5,847,084.40
	G	500,000.00	5,842,047.75

"Undertakers' Works<sup>3</sup>" means the works permitted in this Order within the Protected area

**Proximity Agreement**

3. <sup>5</sup>Save as provided in paragraphs (5) and (7) no part of the Undertakers' Works shall commence until either
  - (i) A Proximity Agreement has been concluded between the Undertaker and the Licensees in respect of that part of the Undertakers' Works; or
  - (ii) The Undertaker and the Licensees shall have agreed in writing that no Proximity Agreement is required in respect of that part of the Undertakers' Works
4. Preparation of a Proximity Agreement must commence when the Undertaker serves notice on the Licensees of the Undertakers' intention to commence any part of the Undertakers' Works (which notice must be provided within no less than 12 months of the intended commencement date of that part of the Undertakers' Works), together with a Plan of that part of the Undertaker's Works and a request to the Licensees to produce a Plan of the Licensees' Works, and once preparation

<sup>4</sup> A new definition is provided for "Proximity Agreement"

<sup>5</sup> Paragraph (3) is shortened and clarified by use of defined terms

of the Proximity Agreement has commenced must be concluded within 3 months of receipt by the Licensees of the relevant notice.

5. <sup>6</sup>Paragraph (3) shall not apply insofar as the Plan of the Licensees' Works produced pursuant to paragraph 4 provides

- (a) insufficient evidence of a realistic oil and gas prospect within the Protected area and/or
- (b) insufficient detail of the nature and location of the Licensees' Works in order to enable the Undertaker to define or mitigate the effects of the Undertakers' Works on the Licensees' Works
- (c) any area of sea required for the Licensees' Works having been minimised in light of (a) above

to enable a Proximity Agreement to be concluded which contains ongoing limitations on the programming siting design construction or operation of the Undertakers' Works or the Order works.

6. <sup>7</sup>The Proximity Agreement shall take account of

- (i) The nature and location of the Licensees' Works on any Plan of the Licensees' Works as known at that time
- (ii) The location and extent of sea required for the Licensees' Works (including all applicable exclusive zones) on any Plan of the Licensees' Works as known at that time
- (iii) All such evidence as is available at the time to support the existence of an oil and gas prospect within the Protected area
- (iv) The ability of the Licensees to reduce or remove its sea area requirement under (ii) above in light of evidence at (iii) above, whether with immediate effect or at a specified later date
- (v) The dates by which the Licensees will commence Licensees' Works , and by which such Licensees' Works will cease
- (vi) The siting and design of the Undertakers' Works on any Plan of the Undertakers' Works as known at that time
- (vii) The minimum feasible exclusive zones, buffer zones or safety zones required for safe construction and operation between the Undertakers' Works and the Licensees' Works
- (viii) Protocols protective of navigation communication and use of the sea by third parties
- (ix) Possible future transfer of the benefit of the Order or of the Licence

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<sup>6</sup> EATL has noted the ExA's comments that a traditional protective provision for the benefit of Eni could (a) provide a block over the implementation of the generating development of uncertain justification or duration (b) be unreasonable in circumstances where it is not yet known if there is a feasible oil and gas project, and if so how much sea area would be required for exploration and/or exploitation activities (c) provide no incentive to Eni to expedite its initial investigations of its prospect or to take reasonable and early steps to better define mitigate or remove its adverse effects on the generating station development. EATL has accordingly amended paragraph 5 to make clear that without sufficient evidence, justification, detail, definition or mitigation, no proximity agreement is required before the Undertakers' Works can commence

<sup>7</sup> In Paragraph (6) a further consideration is included at (i) – the nature and location of Licensees' Works as known at that time

- (x) The desirability of co-existence and the ongoing commercial viability of the authorised development permitted under the Order together with exploration for and commercial exploitation of oil and gas within the Protected area

#### **Arbitration<sup>8</sup>**

7. If no Proximity Agreement is concluded or the parties shall not have agreed whether paragraph (5) applies within the period specified in paragraph (4) the outstanding matters in dispute must be referred to an arbitrator and the Undertakers' Works must not commence until the determination of the arbitrator has been made and must only be implemented in accordance with the arbitrator's determination which is final and binding on the parties (save for manifest or legal error)
  - (i) The arbitration shall be decided by a sole arbitrator whose appointment shall be agreed by the parties
  - (ii) The arbitrator shall be a person (including one who has retired) with not less than ten years' experience of offshore oil and gas development and offshore wind farm development or as a lawyer or other professional advisor serving those industries
  - (iii) Where the parties fail to agree to appoint an arbitrator within 28 days of the delivery of a notice of arbitration, then upon application the Secretary of State will appoint an arbitrator within 28 days. At any time prior to the appointment by the Secretary of State the parties may make an appointment
  - (iv) The intention of the parties is that, so far as is practical, the arbitrator should make a determination within 3 months of appointment
  - (v) The seat of arbitration shall be London

#### **Provision of information**

8. Without prejudice to any other rights or obligations under this Part of the Schedule the Licensees and the Undertaker shall from time to time keep each other informed of relevant activities such that the Licensees and the Undertaker may seek to agree solutions to allow the Undertakers' works and the Licensees' works to successfully co-exist as far as reasonably practicable or if later until completion of activities required under any statutory decommissioning plan required under the Petroleum Act 1998 in relation to the Licence and taking place within the Protected area

#### **Compensation<sup>9</sup>**

9. Nothing in this Part of the Schedule shall affect any rights or obligations or assessment of compensation in accordance with the Ministerial Statement and the DECC Guidance (as applicable)

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<sup>8</sup> Specific arbitration provisions have been included to clarify appointment, timescale and terms of reference. No amendment to Article 33 of the Order is then required.

<sup>9</sup> A saving clause has been included (as in earlier drafts of the protective provision) in respect of compensation under the DECC Guidance

ANNEX B

Draft Protective Provision for holders of Licence P1965 (~~29-1 December~~ November 2016)

PART 7

FOR THE PROTECTION OF OIL AND GAS LICENSEES

Application

1. For the Protection of the Licensees from time to time of United Kingdom Petroleum Production Licence P1965<sup>1</sup>, unless otherwise agreed in writing between the Undertaker and the Licensees the provisions of this part of this Schedule shall have effect.

Interpretation

2. In this Part of this Schedule

"Applicable Laws<sup>2</sup>" means applicable laws, rules, orders, guidelines and regulations, including without limitation, those relating to health, safety and the environment and logistics activities such as helicopter and vessel operations;

"Good Offshore Wind Farm Construction Practice" means the application of those methods and practices customarily used in construction of wind farms in the United Kingdom Continental Shelf with that degree of diligence and prudence reasonably and ordinarily exercised by experienced operators and contractors engaged in the United Kingdom Continental Shelf in a similar activity under similar circumstances and conditions;

"Good Oil-field Practice<sup>2</sup>" means the application of those methods and practices customarily used in good and prudent oil and gas field practice in the United Kingdom Continental Shelf with that degree of diligence and prudence reasonably and ordinarily exercised by experienced operators engaged in the United Kingdom Continental Shelf in a similar activity under similar circumstances and conditions;

"Guidance<sup>2</sup>" means the 'Oil and gas clause in Crown Estate leases, Guidance on procedures for independent valuation where necessary' published by the then Department of Energy and Climate Change in June 2014, or any similar supplementary or replacement policy;

~~"Interacting works<sup>3</sup>" means interaction of the Licensees' Works and the Undertakers' Works;~~

"Licence<sup>2</sup>" means United Kingdom Petroleum Production Licence P.1965;

"Licensees<sup>2</sup>" means the licensees from time to time of the Licence;

"Licensees' Works<sup>3</sup>" means any infrastructure ~~to~~ which may be installed owned and occupied or maintained by or on behalf of the Licensees or exploration, appraisal, development and decommissioning activities (and associated logistics activities), by the Licensees in connection with the Licence within the Protected area;

"Ministerial Statement<sup>2</sup>" means the written statement given by the then Secretary of State for Energy and Climate Change to the UK Parliament regarding Crown Estate Leases for Offshore Renewables Projects on 12 July 2011, or any similar supplementary or replacement policy;

<sup>1</sup> The Protective Provision should benefit Licensees of Licence P1965 rather than Eni UK Limited (Eni) personally

<sup>2</sup> Other definitions (from earlier drafts of the protective provision) have been provided for "Applicable Laws", "Good Oil-Field Practice", "Guidance", "Licence", "Licensees", "Ministerial Statement", "Protected Area", "Protective Provisions Plan" and "Table of Coordinates"

<sup>3</sup> ~~New definitions are provided for "Interacting Works", "Licensees' Works", and "Undertakers' Works"~~

**Comment [CR71]:** Not agreed. The ExA's comments make clear that it is Licensees' Works which are to be (and not may be) installed which may warrant EATL taking these into account in its design of the Undertakers' Works

"Plan of the Licensees' Works<sup>4</sup>" means an exploration and development programme and details and location of Licensees' Works and minimum requirements such as exclusive zones in accordance with Good Oil-field Practice and ~~applicable~~ Applicable laws-Laws to enable the Licensees to, as applicable, explore, appraise, ~~and/or~~ develop and/or decommission hydrocarbon resources within the Protected area;

"Plan of the Undertakers' Works<sup>3</sup>" means a construction programme and details of location of the Undertakers' Works and minimum requirements such as safety and exclusion zones in accordance with Good ~~offshore~~ Offshore wind-Wind farm-Farm construction-Construction practice-Practice and Applicable Laws to enable the Undertaker to construct and operate the Undertakers' Works within the Protected area;

"the Protected area<sup>2</sup>" means the area coloured green on the Protective Provisions Plan (that area coloured green being delineated by a line drawn between the points in the Table of Co-ordinates);

"the Protective Provisions Plan<sup>2</sup>" means the plan entitled Protective Provisions Plan and certified as the Protective Provisions Plan for the purposes of this Part of this Schedule;

"Proximity Agreement<sup>5</sup>" means an agreement between the Undertaker and the Licensees to reconcile and protect the interests of the parties as are known at the time to secure the implementation of the Undertakers' Works and the Licensees' Works, taking account of the matters in paragraph (6);

"the Table of Co-ordinates<sup>2</sup>" means the following table

Area	Label Point	Latitude X (European Datum 1950 UTM Zone 31N)	Longitude Y (European Datum 1950 UTM Zone 31N)
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	D	483,750.96	5,823,832.51
2	E	500,000.00	5,846,795.24
	F	502,637.55	5,847,084.40
	G	500,000.00	5,842,047.75

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"Undertakers' Works<sup>3</sup>" means the works permitted in this Order within the Protected ~~Area~~ area

**Proximity Agreement**

3. <sup>6</sup>Save as provided in paragraphs (5) and (7) no part of the Undertakers' Works shall commence until either
  - (i) A Proximity Agreement has been concluded between the Undertaker and the Licensees in respect of that part of the Undertakers' Works; or

<sup>4</sup> New definitions are provided for these plans

<sup>5</sup> A new definition is provided for "Proximity Agreement"

<sup>6</sup> Paragraph (3) is shortened and clarified by use of defined terms

- (ii) The Undertaker and the Licensees shall have agreed in writing that no Proximity Agreement is required in respect of that part of the Undertakers' Works

4. Preparation of a Proximity Agreement must commence when either

(i) The Undertaker serves notice on the Licensees of the Undertakers' intention to commence any part of the Undertakers' Works (which notice must be provided within no less than [24] months and no more than [24] months of the intended commencement date of that part of the Undertakers' Works), together with a Plan of that part of the Undertaker's Works and a request to the Licensees to produce a Plan of the Licensees' Works; or

(ii) The Licensees serve notice on the Undertaker of the Licensees' intention to commence any part of the Licensees' Works (which notice must be provided within no less than [ ] months of the intended commencement date of that part of the Licensees' Works) together with a Plan of that part of the Licensees' Works and request to the Undertaker to produce a Plan of the Undertakers' Works.

4. and once preparation of the Proximity Agreement has commenced must be concluded within 3 months of receipt by the Licensees or the Undertaker (as the case may be) of the relevant notice.

5. Paragraph (3) shall not apply insofar as to the extent that the Plan of the Licensees' Works produced pursuant to paragraph 4(i) provides insufficient detail of

- (a) any the existence of an realistic oil and gas prospect within the Protected area and/or
- (b) the nature and location of the Licensees' Works in order to enable the Undertaker to define or mitigate the effects of the Undertakers' Works and/or
- (c) any area of sea required for the Licensees' Works having been minimised in light of (a) above

to enable a Proximity Agreement to be concluded which contains ongoing limitations on the programming siting design construction or operation of the Undertakers' Works or the Order works, the Licensees must promptly provide such additional detail to the Undertaker.

6. The Proximity Agreement shall take account of

- (i) The nature and location of the Licensees' Works on any Plan of the Licensees' Works as known at that time
- (ii) The location and extent of sea required for the Licensees' Works (including all applicable exclusive zones) on any Plan of the Licensees' Works as known at that time
- (iii) All such evidence as is available at the time to support the existence of an oil and gas prospect within the Protected area

<sup>7</sup> EATL has noted the ExA's comments that a traditional protective provision for the benefit of Eni could (a) provide a block over the implementation of the generating development of uncertain justification or duration (b) be unreasonable in circumstances where it is not yet known if there is a feasible oil and gas project, and if so how much sea area would be required for exploration and/or exploitation activities (c) provide no incentive to Eni to expedite its initial investigations of its prospect or to take reasonable and early steps to better define mitigate or remove its adverse effects on the generating station development. EATL has accordingly amended paragraph 6(vi) to make clear that without sufficient evidence, justification, detail, definition or mitigation, no proximity agreement is required before the Undertakers' works can commence

<sup>8</sup> In Paragraph (6) a further consideration is included at (i) – nature and location of Licensees' Works as known at that time

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**Comment [CR72]:** Not agreed. EATL will need the flexibility to seek certainty on their design more than 24 months before commencement.

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**Comment [CR73]:** Not agreed. In view of the criticality of timing in the process and the need for EATL to have a final determination (whether by Proximity Agreement or by arbitrator's determination) this should be 3 months.

**Comment [CR74]:** Not agreed. The reference to realistic should be retained as with the ExA's suggested draft Protective Provision in Annex A.

**Comment [CR75]:** Not agreed. To the extent that the Plan of the Licensees' Works provides insufficient detail, it must be clear from this paragraph that EATL should be able to proceed without a Proximity Agreement, rather than merely asking for additional detail and leaving the position open ended. That reflects the ExA's comments and the summary of those comments in footnote 6.

- (iv) The ability of the Licensees to reduce or remove its sea area requirement under (ii) above in light of evidence at (iii) above, whether with immediate effect or at a specified later date
- (v) The dates by which the Licensees will ~~intend~~ seek to commence ~~exploitation~~ Licensees' Works, ~~or and at which by which such Licensees' Works of exploration, will be intended to cease~~
- (vi) The siting and design of the Undertakers' Works on any ~~plan~~ Plan of the Undertakers' Works as known at that time
- (vii) The minimum feasible exclusive zones, buffer zones or safety zones required for safe construction and operation between the Undertakers' Works and the Licensees' Works
- (viii) Protocols protective of navigation communication and use of the sea by third parties
- (ix) Possible future transfer of the benefit of the Order or of the Licence
- (x) The desirability of co-existence and the ongoing commercial viability of the authorised development permitted under the Order together with exploration for and ~~commercially viable~~ exploitation of oil and gas within the Protected area

**Comment [CR76]:** Not agreed. The ExA's comments make clear that it is the date by which the Licensees will (not intend to) seek to commence exploitation or at which works of exploration will (not are intended to) cease.

**Comment [CR77]:** Not agreed. The ExA's comments make clear that it is the date by which the Licensees will (not intend to) seek to commence exploitation or at which works of exploration will (not are intended to) cease.

**Comment [CR78]:** Not agreed. The issue of commercial viability of exploitation of oil and gas is a business specific issue. It is the viability of the authorised development permitted under the Order which is the key consideration: see the ExA's comments on the potential "block over the implementation of the generating development".

#### Arbitration<sup>9</sup>

7. If no Proximity Agreement is concluded or the parties shall not have agreed whether paragraph (5) applies within the period specified in paragraph (4) the outstanding matters in dispute must be referred to an arbitrator and the Undertakers' Works must not commence until the determination of the arbitrator has been made and must only be implemented in accordance with the arbitrator's determination which is final and binding on the parties (save for manifest or legal error)
  - (i) The arbitration shall be decided by a sole arbitrator whose appointment shall be agreed by the parties
  - (ii) The arbitrator shall be a person (including one who has retired) with not less than ten years' experience of offshore oil and gas development or offshore wind farm development or as a lawyer or other professional advisor serving those industries
  - (iii) Where the parties fail to agree to appoint an arbitrator within 28 days of the delivery of a notice of arbitration, then upon application the Secretary of State will appoint an arbitrator within 28 days. At any time prior to the appointment by the Secretary of State the parties may make an appointment
  - (iv) The intention of the parties is that, so far as is practical, the arbitrator should make a determination within 3 months of appointment
  - (v) The seat of arbitration shall be London
  - (vi) ~~Costs?~~

**Comment [CR79]:** Costs of the arbitration and allocation of these costs will be covered by Section 63 (the recoverable costs of the arbitration) Arbitration Act 1996

#### Provision of information

8. Without prejudice to any other rights or obligations under this Part of the Schedule the Licensees ~~and the Undertaker~~ shall from time to time keep ~~the Undertaker~~ each other informed of its ~~relevant~~ activities ~~in relation to the Licence~~ such that the Licensees and the Undertaker may seek to agree solutions to allow the Undertakers' works and the Licensees' works to successfully co-exist as far as reasonably practicable or if later until completion of activities required under any

<sup>9</sup> Specific arbitration provisions have been included to clarify appointment, timescale and terms of reference. No amendment to Article 33 of the Order is then required.

statutory decommissioning plan required under the Petroleum Act 1998 in relation to the Licence and taking place within the Protected ~~Area~~area

<sup>10</sup>**Compensation**

9. Nothing in this Part of the Schedule shall affect any rights or obligations or assessment of compensation in accordance with the Ministerial Statement and the DECC Guidance (as applicable)

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<sup>10</sup> A saving clause has been included (as in earlier drafts of the protective provision) in respect of compensation under the DECC Guidance

ANNEX C

Draft Protective Provision for holders of Licence P1965 (16 December 2016)

PART 7

FOR THE PROTECTION OF OIL AND GAS LICENSEES

**Application**

1. For the Protection of the Licensees from time to time of United Kingdom Petroleum Production Licence P1965<sup>1</sup>, unless otherwise agreed in writing between the Undertaker and the Licensees the provisions of this part of this Schedule shall have effect.

**Interpretation**

2. In this Part of this Schedule

"Applicable Laws<sup>2</sup>" means applicable laws, rules, orders, guidelines and regulations, including without limitation, those relating to health, safety and the environment and logistics activities such as helicopter and vessel operations;

"Good Offshore Wind Farm Construction Practice" means the application of those methods and practices customarily used in construction of wind farms in the United Kingdom Continental Shelf with that degree of diligence and prudence reasonably and ordinarily exercised by experienced operators and contractors engaged in the United Kingdom Continental Shelf in a similar activity under similar circumstances and conditions;

"Good Oilfield Practice<sup>2</sup>" means the application of those methods and practices customarily used in good and prudent oil and gas field practice in the United Kingdom Continental Shelf with that degree of diligence and prudence reasonably and ordinarily exercised by experienced operators engaged in the United Kingdom Continental Shelf in a similar activity under similar circumstances and conditions;

"Guidance<sup>2</sup>" means the 'Oil and gas clause in Crown Estate leases, Guidance on procedures for independent valuation where necessary' published by the then Department of Energy and Climate Change in June 2014, or any similar supplementary or replacement policy;

"Licence<sup>2</sup>" means United Kingdom Petroleum Production Licence P.1965;

"Licensees<sup>2</sup>" means the licensees from time to time of the Licence;

"Licensees' Works<sup>3</sup>" means any infrastructure which may be installed owned and occupied or maintained by or on behalf of the Licensees or exploration, appraisal, development and decommissioning activities (and associated logistics activities), by the Licensees in connection with the Licence within the Protected area;

"Ministerial Statement<sup>2</sup>" means the written statement given by the then Secretary of State for Energy and Climate Change to the UK Parliament regarding Crown Estate Leases for Offshore Renewables Projects on 12 July 2011, or any similar supplementary or replacement policy;

"Plan of the Licensees' Works<sup>3</sup>" means an exploration and development programme and details and location of Licensees' Works and minimum requirements known at that time such as exclusive zones in

<sup>1</sup> The Protective Provision should benefit Licensees of Licence P1965 rather than Eni UK Limited (Eni) personally

<sup>2</sup> Other definitions (from earlier drafts of the protective provision) have been provided for "Applicable Laws", "Good Oilfield Practice", "Guidance", "Licence", "Licensees", "Ministerial Statement", "Protected Area", "Protective Provisions Plan" and "Table of Coordinates"

<sup>3</sup> New definitions are provided for these plans

accordance with Good Oilfield Practice and Applicable Laws to enable the Licensees to, as applicable, explore, appraise, develop and/or decommission hydrocarbon resources within the Protected area;

"Plan of the Undertakers' ~~Works~~<sup>4</sup>Works<sup>3</sup>" means a construction programme and details of location of the Undertakers' Works and minimum requirements known at that time such as safety and exclusion zones in accordance with Good Offshore Wind Farm Construction Practice and Applicable Laws to enable the Undertaker to construct and operate the Undertakers' Works within the Protected area;

"the Protected area<sup>2</sup>" means the area coloured green on the Protective Provisions Plan (that area coloured green being delineated by a line drawn between the points in the Table of Co-ordinates);

"the Protective Provisions Plan<sup>2</sup>" means the plan entitled Protective Provisions Plan and certified as the Protective Provisions Plan for the purposes of this Part of this Schedule;

"Proximity Agreement<sup>4</sup>" means an agreement between the Undertaker and the Licensees to reconcile and protect the interests of the parties as are known at the time to secure the implementation of the Undertakers' Works and the Licensees' Works, taking account of the matters in paragraph (6);

"the Table of Co-ordinates<sup>2</sup>" means the following table

Area	Label Point	Latitude X (European Datum 1950 UTM Zone 31N)	Longitude Y (European Datum 1950 UTM Zone 31N)
1	A	483,799.57	5,834,052.15
	B	494,193.52	5,830,959.70
	C	490,468.86	5,823,847.11
	D	483,750.96	5,823,832.51
2	E	500,000.00	5,846,795.24
	F	502,637.55	5,847,084.40
	G	500,000.00	5,842,047.75

"Undertakers' ~~Works~~<sup>3</sup>Works<sup>3</sup>" means the works permitted in this Order within the Protected area

**Proximity Agreement**

3. <sup>5</sup>Save as provided in paragraphs (5) and (7) no part of the Undertakers' Works shall commence until either
  - (i) A Proximity Agreement has been concluded between the Undertaker and the Licensees in respect of that part of the Undertakers' Works; or
  - (ii) The Undertaker and the Licensees shall have agreed in writing that no Proximity Agreement is required in respect of that part of the Undertakers' Works
4. Preparation of a Proximity Agreement must commence when ~~he~~the Undertaker serves notice on the Licensees of the Undertakers' intention to commence any part of the Undertakers' Works (which notice must be provided within no less than [12] months **and no more than [24] months** of

<sup>4</sup> A new definition is provided for "Proximity Agreement"

<sup>5</sup> Paragraph (3) is shortened and clarified by use of defined terms

the intended commencement date of that part of the Undertakers' Works), together with a Plan of that part of the Undertaker's Works and a request to the Licensees to produce a Plan of the Licensees' Works, and once preparation of the Proximity Agreement has commenced must be concluded within ~~6-3 months of receipt by following the issue of the Plan of the Licensees (as the case may be) of the relevant notice' Works~~

5. <sup>6</sup>To the extent that the Plan of the Licensees' Works produced pursuant to paragraph 4 provides insufficient detail of

- (a) the existence of ~~an a realistic~~ oil and gas prospect within the Protected area and/or
- (b) the nature and location of the Licensees' Works in order to enable the Undertaker to define or mitigate the effects of the Undertakers' Works on the Licensees' Works
- ~~(c) any area of sea required for the Licensees' Works having been minimised in light of (a) above~~

to enable a Proximity Agreement to be concluded which contains ongoing limitations on the programming siting design construction or operation of the Undertakers' Works or the Order works, ~~the Licensees must promptly provide such additional detail to the Undertaker, within 28 days of a request for same by the Undertaker, failing which paragraph (3) shall not apply~~

6. <sup>7</sup>The Proximity Agreement shall take account of

- (i) The nature and location of the Licensees' Works on any Plan of the Licensees' Works as known at that time
- (ii) The location and extent of sea required for the Licensees' Works (including all applicable exclusive zones) on any Plan of the Licensees' Works as known at that time
- (iii) All such evidence as is available at the time to support the existence of an oil and gas prospect within the Protected area
- (iv) The ability of the Licensees to reduce or remove its sea area requirement under (ii) above in light of evidence at (iii) above, whether with immediate effect or at a specified later date
- (v) ~~The dates date by which the Licensees intend to commence Licensees' Works, and by which such Licensees' Works are intended to cease will seek to commence exploitation, or at which works of exploration, will cease as known at that time~~
- (vi) The siting and design of the Undertakers' Works on any Plan of the Undertakers' Works as known at that time
- (vii) The minimum feasible exclusive zones, buffer zones or safety zones required for safe construction and operation between the Undertakers' Works and the Licensees' Works
- (viii) Protocols protective of navigation communication and use of the sea by third parties

<sup>6</sup> EATL has noted the ExA's comments that a traditional protective provision for the benefit of Eni could (a) provide a block over the implementation of the generating development of uncertain justification or duration (b) be unreasonable in circumstances where it is not yet known if there is a feasible oil and gas project, and if so how much sea area would be required for exploration and/or exploitation activities (c) provide no incentive to Eni to expedite its initial investigations of its prospect or to take reasonable and early steps to better define mitigate or remove its adverse effects on the generating station development. EATL has accordingly amended paragraph 6(vi) to make clear that without sufficient evidence, justification, detail, definition or mitigation, no proximity agreement is required before the Undertakers' works can commence

<sup>7</sup> In Paragraph (6) a further consideration is included at (i) – nature and location of Licensees' Works as known at that time

- (ix) Possible future transfer of the benefit of the Order or of the Licence
- (x) The desirability of co-existence and the ongoing commercial viability of the authorised development permitted under the Order together with exploration for and **commercially viable commercial** exploitation of oil and gas within the Protected area

#### Arbitration<sup>8</sup>

7. If no Proximity Agreement is concluded or the parties shall not have agreed whether paragraph (5) applies within the period specified in paragraph (4) the outstanding matters in dispute must be referred to an arbitrator and the Undertakers' Works must not commence until the determination of the arbitrator has been made and must only be implemented in accordance with the arbitrator's determination which is final and binding on the parties (save for manifest or legal error)
- (i) The arbitration shall be decided by a sole arbitrator whose appointment shall be agreed by the parties
  - (ii) The arbitrator shall be a person (including one who has retired) with not less than ten years' experience of offshore oil and gas development or offshore wind farm development or as a lawyer or other professional advisor serving those industries
  - (iii) Where the parties fail to agree to appoint an arbitrator within 28 days of the delivery of a notice of arbitration, then upon application the Secretary of State will appoint an arbitrator within 28 days. At any time prior to the appointment by the Secretary of State the parties may make an appointment
  - (iv) The intention of the parties is that, so far as is practical, the arbitrator should make a determination within 3 months of appointment
  - (v) The seat of arbitration shall be London
  - (vi) ~~Costs?~~

#### Provision of information

8. Without prejudice to any other rights or obligations under this Part of the Schedule the Licensees and the Undertaker shall from time to time keep each other informed of relevant activities such that the Licensees and the Undertaker may seek to agree solutions to allow the Undertakers' works and the Licensees' works to successfully co-exist as far as reasonably practicable or if later until completion of activities required under any statutory decommissioning plan required under the Petroleum Act 1998 in relation to the Licence and taking place within the Protected area

#### <sup>9</sup>Compensation

9. Nothing in this Part of the Schedule shall affect any rights or obligations or assessment of compensation in accordance with the Ministerial Statement and the DECC Guidance (as applicable)

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<sup>8</sup> Specific arbitration provisions have been included to clarify appointment, timescale and terms of reference. No amendment to Article 33 of the Order is then required.

<sup>9</sup> A saving clause has been included (as in earlier drafts of the protective provision) in respect of compensation under the DECC Guidance