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Cc:	Gibson, Alan (NE)
Subject:	Norfolk Vanguard Deadline 3 MMO response
Date:	14 February 2019 16:30:25
Attachments:	EN010079 Post hearing submission including written submission of oral cases MMO_Final.pdf

Dear Norfolk Vanguard Project Team,

Please find the MMO's post hearing response for Deadline 3.

Kind Regards
Rebecca

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Norfolk Vanguard Case Team
Planning Inspectorate
(Email only)

MMO Reference: DCO/2016/00002
Planning Inspectorate Reference: EN010079
Identification Number: 20012773

14 February 2019

Dear Sir or Madam,

Planning Act 2008, Vattenfall Wind Power Limited, Proposed Norfolk Vanguard Offshore Wind Farm

On 26 June 2018, the Marine Management Organisation (the "MMO") received notice under section 56 of the Planning Act 2008 (the "PA 2008") that the Planning Inspectorate ("PINS") had accepted an application made by Norfolk Vanguard Limited (the "Applicant") for determination of a development consent order for the construction, maintenance and operation of the proposed Norfolk Vanguard Offshore Wind Farm (the "DCO Application") (MMO ref: DCO/2016/00002; PINS ref: EN010079).

The DCO Application seeks authorisation for the construction, operation and maintenance of Norfolk Vanguard offshore wind farm, comprising of up to 200 wind turbine generators together with associated onshore and offshore infrastructure and all associated development ("the "Project").

This document comprises the MMO comments in respect of the DCO Application submitted in response to Deadline 3. This written representation is submitted without prejudice to any future representation the MMO may make about the 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.

Yours faithfully

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The MMO Post Hearing Submissions including Written Submission of Oral Cases

1. Summary of Oral Cases made during the Offshore Environmental Issues Specific Hearing 2 (ISH)

1.1 Shipping and Navigation

1.1.1 SAR checklist

The MMO would defer to the Maritime and Coastal Agency (MCA) and Trinity House on navigational safety requirements. The MMO are in agreement in principle with the Search and Rescue (SAR) checklist being included within the Development Consent Order (DCO)/Deemed Marine Licence (DML) conditions but are in discussion with the MCA in relation to the exact wording of the condition.

1.2 Marine Mammals

1.2.1 Cumulative Impacts – Site Integrity Plan

In relation to comments on the wildlife trust not agreeing with the Statutory Nature Conservation Bodies (SNCB's) approach and assessment of the Southern North Sea Site of Community Interest (SCI) are of 10% and 20% thresholds the MMO defer to the SNCB guidance on the impacts and appropriateness of the guidance used to inform the Site Integrity Plan (SIP) and how this is enforced and assessed. The MMO note that this has been used successfully elsewhere within the industry.

1.2.2 Review of Consents

The current update on the review of consent is that there is an ongoing consultation on the proposed method of mitigation which is due to close at the end of February. The MMO do not have a timeline on the next steps as this is controlled by Department for Business, Energy and Industrial Strategy (BEIS).

1.2.3 Consultation with The Wildlife Trust (TWT)/Whale and Dolphin Conservation (WDC)

The MMO note that both TWT and WDC are included within the SIP and MMMP as consultees and the MMO support consultation with these interested parties. The MMO preference would be for the consultation with TWT and WDC to be before they received the final copy of the plan as this will reduce time within the consultation process. The MMO will consult who it deems appropriate when reviewing returns and this can include WDC/TWT or any other body that the MMO believe can assist. The MMO note Natural England (NE) are not named as consultee within the licence however the MMO always consult the relevant SNCB as part of the consultation process.

1.2.4 Underwater Noise Levy

The MMO support the principles of strategic monitoring and the benefits this can bring. We would encourage the applicant and others to consider progressing this work outside of the requirements of their consent. The MMO will leave NE, as the relevant SNCB to advise on what monitoring is required for marine mammals. However, the MMO notes that the proposed approach is not secured through condition of the licence and that strategic monitoring is an approach which may not meet the 5 tests of a condition.

1.2.5 Multiple construction activities at once

The MMO are current in discussion internally and externally on the process of the management of scheduling of all the offshore environment. As the regulator for offshore licences the MMO know the activities that are taking place within the offshore environment and the time frames these are proposed for. The MMO are in discussions and working with BEIS to ensure oil and gas activities are included.

The MMO consider the construction plans will be known significantly before construction takes place. The applicant and other applicants, following conclusion of the review of consents, will all have similar requirements to produce a SIP. This will allow for review of the actual worst case scenario prior to approval of any works. The SIP would be expected to highlight these cases and provide sufficient mitigation to ensure there is no Adverse Effect on Integrity (AEoI) of the SCI. The MMO Notes that the risk is to the applicant if sufficient mitigation cannot be provided within the SIP. This requirement will be applied to all relevant licences and deemed marine licences, thus giving a very strong imperative for all offshore developers to work together and share information on timing to minimise risk to their projects.

The MMO will provide an update in response to the action point for deadline 4.

1.2.6 Timescales

During the Issue Specific Hearing the MMO outlined its position on our request for the revised timescales of condition 15 (2) to increase from 4 months to 6 months prior to construction. The MMO highlighted that this was for all documentation including condition 14 (1) not just the Written Scheme of Investigation.

Conditions 14 (1) and 15 (2) set out the requirements for the Applicant to submit all preconstruction documentation at least 4 month prior to the commencement of the construction works. The MMO position remains that it does not agree that a 4 month timescale provides sufficient time for the post consent documentation to be considered prior to the start of commencement of works. The MMO highlighted that a four month pre-construction submission date was unrealistic and even counterproductive, as the pre-construction sign off process is not always straight forward. The 4 month timescale was deemed appropriate for round 1 developments, which were smaller, closer to shore and with fewer complex environmental concerns.

From experience, the MMO highlighted that it is very common that documents require multiple rounds of consultation to address stakeholder concerns. This process alone can be very time consuming and the proposed four month submission time would not account for the additional time that the Applicant may require to update documents throughout the process. The MMO noted that some documents require additional assessment processes, for example the SIP which may require post consent HRA considerations to be made. In many cases the Applicant could be working towards a very tight time schedule post consent, and a delay in document sign off could lead to project delays, significant cost implications and frustration when not enough time has been committed for this process.

In response to the applicants comment that the timings could be changed with written agreement of the MMO the MMO notes first of all that the condition implies this is for the applicant to request and the MMO to agree. It is far more likely that the applicant will ask the MMO to reduce timescale for certain documents, as has been the MMO's experience thus far. Additionally, it is unlikely that the applicant would agree to a change later in the day as their construction schedule will be set

and delays of up to two months to those schedules would have significantly excessive cost implications.

The MMO therefore recommends that the timescales should be set at least 6 months to allow sufficient time for repeat rounds of stakeholder consultation if required. Please see point 4.1.2 for additional comments.

2. Summary of Oral Cases made during the DCO/DML Issues Specific Hearing 3 (ISH)

2.1 Consistency with the Environmental Statement

2.1.1 Cable Crossings

The MMO will discuss internally and with the applicant if the cable crossings should be included within the DCO/DML and provide an update for deadline 4.

2.1.2 SAC Specific Volumes

The MMO believe the specific amounts (area and volume) of sandwave clearance and disposal within the SAC needs to be included in the DCO/DML. This is to enable the MMO to ensure the amount of disposal and works within the SAC remains within those assessed and approved.

2.2 Proposed Arbitration Procedures

2.2.1 Arbitration

The MMO outlined the following concerns in relation to arbitration at the Issue Specific Hearing.

As a public body, the MMO not only has a number of specific statutory powers and duties, it also has a responsibility to act in the interest of the public and ensure that activities are undertaken in the public's interest which are invariably subject to public scrutiny and public engagement.

The MMO highlighted that in the event that the MMO decides whether or not to discharge a condition, the MMO does 'agree' or 'disagree' with the applicant such that the decision could be a refusal and therefore characterised as a 'difference'. It is the MMO's interpretation that the meaning of 'difference' is when parties have to come to an agreement on something, but cannot do so. It is the MMO's opinion that the discharge of conditions does not amount to a 'difference' on a point which parties are supposed to agree. When discharging a condition, the MMO is making a decision as a public body in response to an application, taking account of the broad sweep of its statutory responsibilities.

A range of statutory mechanisms are prescribed in MACAA (2009) which outlines regulations for achieving those functions, and also includes appeal route set out against decisions the MMO takes to PINS and to the First Tier tribunal. These appeal routes are transparent and rigorous public processes which operate in a way that ensures that justice is done in a transparent manner, which is fundamental to the way the MMO discharges its functions and obligations. Furthermore, the MMO is required by a series of legislative obligations to be transparent and even positively engage with members of the public in decision making. All information discussed in an arbitration process of this kind must be susceptible to disclosure to the public under the Freedom of Information Request and Environmental Information Request regimes. Additionally, on the requirement at 7 within Schedule 14 for private hearings, it would be wholly inappropriate for a public body like the

MMO, discharged with public planning and regulatory protocols, to attend hearings in private. For the tracked change amendment to the proposed arbitration schedule to include the caveat of 'save for compliance with legislative rules, functions or obligations on either party' proves this point further.

The MMO further highlighted that there were serious legal and practical issues in trying to shoe-horn a confidential arbitration process onto the MMO's existing public law regulatory functions. The emphasis lies on the fact that Parliament has vested the public law functions such as discharging marine licence conditions upon the MMO. The removal of this decision–making function and their placement into the hands of a private arbitration process is inconsistent with the MMO's legal function, powers and responsibilities. Furthermore, there was no indication that Parliament ever considered that in passing the 2008 Planning Act it would be authorising this kind of usurpation of public functions.

Section 2 of MACAA 2009, which came into power after the 2008 Planning Act, sets out a series of broad statutory purposes and functions vested onto the MMO to achieve certain environmental objectives in the discharge of activities and to take certain matters into account in a consistent and coordinated way. None of those obligations would bind an arbitrator, which is a serious issue for the MMO as Chapter 3 of Part 1 in MACAA 2009 itself contains a provision on how the functions the MMO performs can only be delegated to eligible parties under s.16 with the agreement of the Secretary of State.

Furthermore, p.4 of Annex B of the PINS Guidance Note 11 states that 'the MMO will seek to ensure wherever possible that any deemed licence is generally consistent with those issued independently by the MMO'. In the event that the proposed DMLs are granted, the MMO emphasised that the licenses would be inconsistent from those issues by the MMO directly. The guidance (same page) also emphasises that it is the MMO which is responsible for enforcing, varying, suspending or revoking marine licenses, whether they are deemed or not. The MMO therefore consider that transferring that function to an external body would be entirely inconsistent with this guidance, which in practice reflects the provisions of the 2009 Act.

A number of parties have been able to identify both DCOs containing and not containing arbitration clauses. Here, the MMO highlighted that no party to date was able to identify a DCO decision which contained a reasoned discussion of the issue or cases where the MMO has been subject to arbitral proceedings. As a result, the MMO emphasised that previously granted DCOs cannot assist the Secretary of State with any reasoning in the inclusion or not of such provisions.

The MMO notes that the applicant relies on previous decisions which pertained to Natural England, but there are important distinctions between NE – a statutory consultee – and the MMO which has a suite of regulatory and decision-making functions.

In the event that a decision were made against the MMO's position, and it was found that the word 'difference' is capable of representing a refusal to discharge a condition, the MMO highlighted further concerns as the currently drafted DCO wording could be arguably extended to include suspension, variation, revocation, transfer or even enforcement, which are currently covered by other provisions under MACAA and for which appeal routes are already in place. These appeal routes have been prescribed by Parliament and depending on the nature of the

decision under MACAA being appealed, actions lie either to PINS or to the Upper Tribunal.

The MMO notes concerns on the appropriateness of judicial review (JR), the process may be – but is not always slow. The MMO has never been subject to JR proceedings for failure to discharge a condition because the position has always been satisfactorily managed. The MMO believe the JR procure has the benefit of being entirely public, transparent and respects the will of Parliament.

For the reasons outlined above, the MMO strongly refutes the application of arbitration to its discharge of deemed marine licence conditions. In the event that it is thought right to maintain the applicability of the arbitration clauses to the MMO, the MMO recommended that the wording should be amended to make it clear that decisions on variations, suspensions, revocation, transfer and enforcement would fall outside the scope of the arbitration clause.

Please see point 4.1.1 for additional comments.

2.3 Schedule 1, Part 3, Requirements

2.3.1 Requirement 29

The MMO took this away to consider please see section 3.1.1 for further information.

2.4 Schedules 9, 10, 11 and 12 – Deemed Marine Licences

2.4.1 Cooperation between DML's

The MMO confirmed the wish for the inclusion of a cooperation condition please see point 4.2.1 for the wording of the condition.

2.4.2 Condition 12(5) of Sch. 9 and 10, and Cond 7(5) of Sch. 11 and Sch. 12.

The MMO explained the intention of the condition and the material may for screened to remove debris prior to disposal.

2.4.3 Condition 14(b)(iv) of Sch. 9 and 10, Condition 9(b)(iv) of Sch. 11 and 12 – notification period.

The MMO highlighted that other consultees such as Natural England and Historic England have raised concerns relating to the notification period/timescales. The MMO have provided comments under 1.2.6 as discussed at ISH 2 and further comments at under 3.2.2 of this document.

2.4.4 Condition 14(f) of Sch. 9 and 10 – MMMP.

The MMO agree that the MMMP only applies to mitigating against auditory injury i.e. pile diving.

3. Summary of Clarifications on DCO/DML Issues as discussed at the Issues Specific Hearing 3 (ISH)

3.1 Schedule 1, Part 3, Requirements

3.1.1 Requirement 29

The MMO have reviewed the requirement and acknowledge the applicant wishes to incorporate the intertidal area within the requirement. The MCAA 2009 remit extends to MHWS, therefore, includes the intertidal area. The MMO note that there will still need permission from the MMO for the decommissioning stage and that a

marine licence will be required for decommissioning including the intertidal area. Therefore, the MMO are not suggesting a change to the requirement, this point is raised for note and no action is needed.

3.2 Schedules 9, 10, 11 and 12 – Deemed Marine Licences

3.2.1 Cooperation between DML's

The MMO wishes for inclusion of a cooperation condition within the Schedule 1, Part 3, Requirements with the following wording:

Offshore co-operation

(1) Before submitting the pre-construction plans and documentation required to be submitted to the MMO for approval under Schedule 9 and 10, Condition 14 and Schedule 11 and 12, Condition 9 of each of the deemed marine licences, the undertaker in respect of the relevant licence must provide a copy of the plans and documentation to the other undertaker under this Order.

(2) The other undertaker must provide any comments on the plans and documentation to the first undertaker within 14 days of receipt.

(3) Each undertaker must participate in liaison meetings with the other undertaker as requested from time to time by the MMO in writing in advance; and the meetings must be chaired by the MMO and must consider such matters as are determined by the MMO relating to the efficient operation of a deemed marine licence where it has an impact on the efficient operation of any other deemed marine licence.

4. The MMO remaining DCO/DML comments not discussed at the ISH

4.1 Schedules 9, 10, 11 and 12 – Deemed Marine Licences

4.1.1 Arbitration

In addition to the points raised by the MMO during the Issue Specific Hearing, the MMO would like to re-emphasise that our main concern regarding the arbitration clause is that it is attempting to make the MMO's regulatory decisions or determinations subject to a form of binding arbitration as set out in Article 38 and Schedule 14.

The MMO are aware Trinity House is proposing a change to the wording for Article 38, the MMO supports their proposed wording.

4.1.2 Timescales

The MMO note the applicant advised that condition 15 (2) gave the opportunity to vary the timing of notification periods. The MMO believe that there is no experience to vary the timing by an extension and that this condition could only be used by reducing the time period. The MMO note that the agreement to amend the timescale would be in writing. The MMO feel they would have no control over the agreement as the applicant may appeal or not grant the extension due to the burden and commercial impact of an extension. The MMO believe the possibility of the extension later down the line stretches credulity and is unreasonable due to the possible cost to the applicant.

4.1.3 Construction noise modelling

The MMO recommends the following addition to condition 19 (3);

Condition 19 (3) The results of the initial noise measurements monitored in accordance with sub-paragraph (1) must be provided to the MMO within six weeks of the installation of the first four piled foundations of each piled foundation type. The assessment of this report by the MMO will determine whether any further noise monitoring is required. If, in the opinion of the MMO in consultation with Natural England, the assessment shows significantly different impact to those assessed in the ES or failures in mitigation, all piling activity must cease until an update to the MMMP and further monitoring requirements have been agreed.

The MMO has recently received reports on offshore wind farm developments under construction which have cast doubt over the efficacy of soft-start mitigation measures. In the event that the monitoring reports indicate the failure of mitigation measures as set out in the MMMP, the proposed condition would require the undertaker to cease piling until further appropriate mitigation actions have been agreed which would mitigate noise impacts sufficiently for piling to recommence. The MMO consider that this recommendation is justified, considering the location of the project in proximity to the Southern North Sea candidate Special Area of Conservation (cSAC) and the potential impacts of the project on the harbour porpoise feature.