From:	Noble, Ellie Noble
To:	NorfolkVanguard@pins.gsi.gov.uk
Subject:	FW: EN010079 - Norfolk Vanguard Submission for deadline 8
Date:	30 May 2019 18:24:10
Attachments:	EN010079 DL8 V2 20190524 (003) Final.pdf EN010079-003000 Rule 17 MMO Comments Deadline 8 Final.pdf

Apologies. this was sent to Norfolk Boreas in error… resending within deadline to NorfolkVanguard@pins.gsi.gov.uk

From: Noble, Ellie Noble
Sent: 30 May 2019 18:19
To: norfolkboreas@pins.gsi.gov.uk
Subject: EN010079 - Norfolk Vanguard Submission for deadline 8

Identification number 20012773

Hello
Please find attached to this email the MMO's Submission for deadline 8 and the MMO's response to the examiners questions for Norfolk Vanguard examination process. (EN010079)
.
I would very much appreciate a confirmatory email that you have received these submissions. Thank you once again for your help on this matter.

Best wishes

Ellie Noble
Marine Licensing Case Manager
Her Majesty's Government - Marine Management Organisation
Lancaster House, Hampshire Court, Newcastle Upon Tyne, NE4 7YH
Tel: 02082 257929
Web: www.gov.uk/mmo
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Enabling sustainable growth in our marine area

From: Norfolk Vanguard [mailto:NorfolkVanguard@planninginspectorate.gov.uk]
Sent: 30 May 2019 15:58
To: Noble, Ellie Noble <Ellie.Noble@marinemanagement.org.uk>
Cc: Sian Evans <SIAN.EVANS@planninginspectorate.gov.uk>; Norfolk Vanguard <NorfolkVanguard@planninginspectorate.gov.uk>
Subject: RE: Deadline 8 submission

Dear Ellie,

The Panel have confirmed that you can have an extension to Deadline 8 until 11:59, Friday

31 May 2019.

Thanks

Tracey Williams
Case Manager
National Infrastructure Planning
The Planning Inspectorate,Temple Quay House,Temple Quay, Bristol BS1 6PN
Direct Line: 0303 444 5085
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Email: Tracey.Williams@planninginspectorate.gov.uk

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Web: www.gov.uk/government/organisations/planning-inspectorate (The Planning Inspectorate)
Twitter: @PINSgov

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Please view our Privacy Notice before sending information to the Planning Inspectorate.

From: Noble, Ellie Noble <Ellie.Noble@marinemanagement.org.uk>
Sent: 30 May 2019 14:05
To: NorfolkVanguard@pins.gsi.gov.uk
Subject: Deadline 8 submission

Hello,
I am the case manager at the MMO responsible for the submissions to the Norfolk Vanguard examination process.
I am currently planning to submit the Deadline 8 response by midnight tonight however due to holiday and sickness I am concerned regarding the ExA questions/further information which I believe has the same deadline of midnight tonight. I am requesting an extension of 24 hours for submission of this document.

Is this at all possible?
Many thanks

Ellie Noble
Marine Licensing Case Manager
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Enabling sustainable growth in our marine area

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Norfolk Vanguard Case Team
Planning Inspectorate
(Email only)

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

30 May 2019

Dear Sir or Madam,

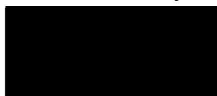
Planning Act 2008, Vattenfall Wind Power Limited, Proposed Norfolk Vanguard Offshore Wind Farm
Deadline 8 Submission

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 180 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 8. 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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Marine Licensing Case Officer

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1. The Examiners (ExA) Report on the Implications for European Sites (RIES)

1.1 MMO Comments

1.1.1 The MMO defers comments to Natural England on the REIS.

2. The MMO comments on the ExA draft DCO Schedule of Changes

2.1 Article 2

2.1.1 The MMO does not agree with the inclusion of an appeals procedure. This has been discussed further in section 5.5 of this document.

2.2 Requirement 2 (1) (e) and 2 (2) (a and b)

2.2.1 The MMO supports this amendment.

2.3 Requirement 3 (1)

2.3.1 The MMO supports this amendment.

2.4 Deemed Marine Licence (DML) Part 1

2.4.1 The MMO supports this removal, however would highlight that overall does not support the inclusion of any appeals procedure. This has been discussed further in section 5.5 of this document.

2.5 DML Part 4 Condition 9 (11)

2.5.1 The MMO supports this amendment.

2.6 DML Part 4 Condition 9 (12)

2.6.1 The MMO supports this amendment.

2.7 DML Part 4 Condition 14 (1)

2.7.1 The MMO supports this amendment.

2.8 DML Part 4 Condition 14 (1) (e)

2.8.1 The MMO agrees to the inclusion of this sub condition. The MMO would suggest for consistency it is stated as a new paragraph as Condition 14 (1) (e) (i) rather than (ee) as suggested by the ExA. The MMO are satisfied this amendment and the updated Table 1 within the Outline Scour Protection and Cable Protection Plan elevates the concerns and require no further action from the applicant.

2.9 DML Part 4 Condition 15 (1)

2.9.1 The MMO supports this amendment.

2.10 DML Part 4 Condition 15 (5)

2.10.1 The MMO welcomes the removal of the regulators ability to ask for additional information at any time throughout the determination period as this was a major concern to the MMO decision process as regulators. This is summarised within Section 5 of this document.

2.10.2 The MMO does not agree with the amendment from the 6 month to 4 month timescale for determination and believes this should still be 6 months with the ability for agreement in writing with the applicant shorter timescales as required. The MMO has included further comments on timescales within section 5 of this document along with previous responses summarised in REP7-071 Appendix 1.

2.11 DML Part 4 Condition 15 (8)

2.11.1 The MMO supports this amendment.

2.12 DML Part 4 Condition 18

2.12.1 The MMO supports this amendment.

2.13 DML Part 4 Condition 20

2.13.1 The MMO supports this amendment.

2.14 DML Part 5 Procedure for Appeals

2.14.1 The MMO does not support the amendment made by the ExA and has fundamental concerns regarding any procedure of appeals. This has been discussed further in section 5.5 of this document.

2.15 Inconsistencies within the Schedule of changes

2.15.1 The MMO notes the ExA changed condition 15 (5) from a 6 month timescale to a 4 month timescale. The MMO has concerns over the inconsistencies of the amendments proposed by the ExA in the schedule of changes. Condition 15(4) timescales has been changed to 4 months however condition 15 (3) still advises the applicant must submit the documents for approval submitted for approval at least 6 months prior to the intended commencement of licensed activities:

> *15 (3) Each programme, statement, plan, protocol or scheme required to be approved under condition 14 must be submitted for approval at least six months prior to the intended commencement of licensed activities, except where otherwise stated or unless otherwise agreed in writing by the MMO*.

2.15.2 The MMO has two interpretations for the reason of this inconsistency:

The first interpretation is that condition 15(2) should be changed to 6 months to ensure consistency.

The second interpretation is that condition 15(2) remains at 6 months and the MMO has 4 month to make the determination then it would go to the appeal process as currently worded.

The MMO maintains that it requires 6 months to review and consult upon all discharge documentation, but will always endeavour to process documentation in as short a time period as possible to assist the applicant.

3. Response to ExA requests under Rule 17

3.1 MMO responses the ExA further information and Written comments

3.1.1 Please find the table including the MMOs response to the ExA further information request in the following document EN010079-003000 Rule 17 MMO comments Deadline 8_MMO_Final, enclosed with this letter.

4. MMO comments on Applicant's deadline 7 submissions

4.1 Timescales within all documents

4.1.1 The MMO has reviewed the current documents and has noticed inconsistencies between the timescale of submission of documents (6 vs 4 months) or that they are not mentioned at all. Due to the ongoing discussions between the applicant and the MMO relating to the 6 vs 4 months for submission (discussed in section 5 of this

document) the MMO understands the applicant is reviewing this to come to an alternative wording.

4.1.2 The MMO would like consistency between all the documents, whether this is specifying the time scale or referring to the specific condition within the DMLs. The MMO will review the proposed outcome by the applicant.

4.2 REP7-019: Outline Operations and Management Plan (OOMP)

4.2.1 The MMO welcome the changes the applicant has made to the OOMP. The MMO has discussed the following points with the applicant and looks forward to reviewing the updated version of the plan.

4.2.2 The MMO has requested the applicant to amend the section within Appendix 1, Realistic Worst Case assessed in the Environmental Statement for cables

1 x Interconnector cables (assume a few hundred metres subject to repair)

The MMO requires the specific figures to be added and not state 'a few hundred'.

4.2.3 The MMO questions on what the 'additional cable laying' is classified as within appendix one of the document. The current MMO view is that no additional cable should be laid once construction is complete, the O&M should only include repair or reburial.

4.2.4 The MMO questions on what the 'Additional scour protection around foundations' is classified as within Appendix 1 of the document. The MMO believes the worst case scenario figures need to be clear within the OOMP.

4.3 REP7-021: Offshore In Principles Monitoring Plan (IPMP)

4.3.1 The MMO discussed the IPMP with the applicant as part of ongoing issues with the SoCG and has no further comments once these are updated.

4.4 REP7-023: Outline Project Environmental Management Plan (OPEMP)

4.4.1 The MMO have no further comments on the OPEMP.

4.5 REP7-025: Outline Scour Protection and Cable Protection Plan

4.5.1 The MMO has discussed the following points with the applicant and looks forward to reviewing the updated version of the plan.

4.5.2 The MMO has agreed with the inclusion of the sub condition proposed by the ExA and suggest it goes as Condition 14 (1) (e) (i) rather than (ee). This will need to be updated within the plan.

4.5.3 The MMO has suggested a change of wording to condition 22 within the DML in section 6.2 of this document. This will need to be updated in the plan.

4.5.4 The MMO welcomes the amendments to Table 1 of the document as this provides clarity to all on the amount of scour protection per individual structure.

4.5.5 The MMO highlight that within Table 1: Worst case scenario for scour protection, the 20MW turbine total scour protection figure is 21,205,750m^3. If you sum all the figures within the table the figure when rounding up would be 21,205,751m^3. The MMO require the applicant to clarify or amend the figure accordingly.

4.5.6 The MMO highlight that within Table 1: Worst case scenario for scour protection, the total scour protection (based on 10MW) figure is 53,195,398m^3. If you sum all the figures within the table and take into account the changes the total figure is

27,418,759m³. The MMO require the applicant to clarify or amend the figure accordingly.

4.6 REP7-026: Outline Norfolk Vanguard Haisborough Hammond and Winterton (HHW) Special Area of Conservation (SAC) Site Integrity Plan (SIP)

4.6.1 The MMO welcomes the updates to the document and recognises that it is a much better attempt to describe a worst case scenario and potential action arising from that. The MMO retains considerable concerns regarding the use of a Site Integrity Plan for benthic impacts described below however we feel this document is much improved from the previous version and wish to acknowledge the hard work undertaken.

4.6.2 The MMO remains concerned that throughout the document the applicant states the explicit risk of a conclusion of no adverse effect on site integrity (AEoI) not being agreed with the MMO in consultation with Natural England being borne by the developer. In this scenario, construction cannot commence and the onus would be on Norfolk Vanguard Limited to consider alternative solutions, in consultation with Natural England and the MMO. The applicant states if a solution cannot be agreed, Norfolk Vanguard Limited would need to consider a DCO variation application or a Marine Licence application.

The MMO would like clarity on this statement as it is not clear what would be done at this stage. From discussions with the applicant the MMO understand the possibilities within this statement are numbered but the applicant feels it is premature to detail all possible options.

The MMO could have the decision as a regulator to review the MLA or variation. The MMO would like to understand what would be the outcome or conclusion of going through this process. Considering AEoI cannot be ruled out at this stage (see 4.6.3), the MMO would still be in the uncomfortable position of potentially having to refuse works on an already consented and part developed project.

4.6.3 The MMO do not agree with the statement highlighted in red below. The MMO defer the conclusions to Natural England in regards to AEoI, however query the conclusion implied in this statement. The situation as the MMO sees it is that at this stage AEoI CANNOT be ruled out.

The Applicant has therefore taken a conservative approach in the assessment, (e.g. by assessing a contingency for cable protection) in accordance with advice from Norfolk Vanguard Offshore Wind Farm 8.20 Page 8 Natural England and the MMO during the Evidence Plan Process, to avoid the need for post consent variations, whilst also making a firm commitment through the SIP (as required by Condition 9(1)(m) of the Transmission DMLs) to agree all works in the HHW SAC with the MMO in consultation with Natural England. This allows a conclusion of no AEoI at the consenting stage on the basis that works cannot commence until the MMO is satisfied that there would be no AEoI.

4.6.4 The MMO have concerns in relation to the need for a SIP in this circumstance, in addition to the MMO previous comments (REP6-030, REP7-071) the MMO believe the inclusion of a SIP for an individual project on that projects worst case scenario alone could set precedent in future projects which would make the consenting process increasingly difficult.

The MMO do not want to be in a scenario in the future where multiple wind farms are consented with SIP documents for the same marine protected area on their project

alone as there is a possibility that the associated risk and in combination impacts could not be assessed fully.

The MMO would prefer that the concept of a SIP for a single project be rejected and these impacts known via a worst case scenario dealt with at the time of consent through a benthic plan clearly describing possible mitigation for known scenarios. The MMO are concerned on the large increase in the figures from the SIP provided to the MMO on the 3 April 2019 and the document submitted in deadline 7. The figures rise from 26000m² to 32,000m² and from 15,400m³ to 20,800m³. The MMO would like clarity on this change.

4.7 REP7-029: Development Principles

4.7.1 The MMO would ask the applicant what is the reasoning and purpose of this document. Why these details cannot be entered within the text of the dML. This point is also referenced in the response to examiners questions attached to this documents.

5. Position Statement on Proposed Additional Mechanism Procedures

5.1 Summary

5.1.1 The MMO understand that timescales, arbitration, deemed discharge and the appeal process put forward by the applicant are all linked. The MMO fundamental position is that we do not agree with any of the proposed processes and these should be removed from the DCO/DMLs. The MMO would request that all timescales should be 6 months prior to construction.

5.1.2 During Issue Specific Hearing 8 the MMO proposed:

- A 6 month determination period where the MMO can request information throughout the 6 months
- No restriction on requesting information
- After the 6 month it would be deemed refused rather than deemed approved

Whilst the above proposal is an attempt to meet the applicants need for certainty, it is still the MMO’s general positon that a default deemed refusal or specific deadlines are not necessary and that there are already procedures in place to provide certainty. Further clarity has been provided on our internal escalation process and the MMO has provided throughout this document our detailed comments on the legal position and implications on changing existing procedures. (See 5.6)

The MMO has already made submissions at previous representations in deadline 7 response (REP7-071) and has highlighted the main concerns and reasoning for the objections below with additional information on the appeals process.

5.2 Arbitration

5.2.1 The MMO understands the background behind the amendments to the arbitration concept as the applicant set out in their deadline 7 submission (REP7-040) along with the applicant's earlier reasoning for departing from the model provision and for including the extended clause was that "this approach will provide a more bespoke and relevant arbitration process. This follows the approach which has been taken on the draft Hornsea Three Offshore Wind Farm Order". However, The MMO still strongly maintains the arbitration Article 38 and accompanying Schedule 14 should not apply to the MMO or any determination of any matter under the DMLs in particular. The MMO consider the process to be inappropriate and unacceptable therefore recommend to be removed from the DCO and the DMLs with reasons stated below.

5.2.2 The MMO does not believe the reasons for the extension of the arbitration process to its decisions and determinations has been properly justified. . Since its inception the MMO has undertaken licensing functions on ~130 DCOs[1] comprising some of the largest and most complex renewable energy operations globally. The MMO is not aware of an occasion whereby any dispute which has arisen in relation to the discharge of a condition under a DML has failed to be resolved satisfactorily between the MMO and the applicant, without any recourse to an 'appeal' mechanism.

5.2.3 The MMO is an open and transparent organisation that actively engages with and maintains excellent working relationships with industry and those it regulates. The MMO discharges its statutory responsibilities in a manner which is both timely and robust in order to fulfil the public functions vested in it by Parliament. The scale and complexity of an NSIP creates no exception in this regard and indeed it follows that where decisions are required to be made, or approvals given, in relation to these developments of significant public interest only those bodies appointed by Parliament should carry the weight of that responsibility. There is no compelling evidence as to why the applicant should be an exception to the rule and treated differently to any other marine licence holder.

5.2.4 The MMO sees no reason why it should be subject to a provision for which there no clear precedent and which is unnecessary. If there were a problem to resolve, and its resolution would be solved by extending the arbitration provisions to decisions/determinations to be taken/made by the MMO then what the applicant proposes would be more readily understood. The practical result of the ExA allowing the arbitration process in Article 38 to expressly apply to the MMOs decisions would be the ExA establishing a new procedure and recourse for this applicant to address an issue which has not as yet, ever arisen. No clear or convincing justification has

[1] MMO (May 2019), figures obtained from the Marine Case Management System.

been put forward by the applicant as to why the discharge of conditions under a deemed marine licence should be subject to arbitration nor has the applicant explained why they should be able to avail themselves of a dispute mechanism around the determinations the MMO will make in relation to the discharge of conditions under a licence deemed to have been granted via the NSIP process in circumstances where the holder of a licence granted directly by the MMO under Part4 the 2009 Act will not have any such dispute mechanism.

5.2.5 The inclusion of such a provision as drafted will create inconsistency with decisions made under DMLs and those made in relation to those marine licences issued directly by the MMO. This will create a 2-tier licensing approach. The MMO reiterates in the strongest possible terms that DMLs granted as part of a DCO should not be treated differently to a marine licence granted directly by the MMO under the Marine and Coastal Access Act 2009 (MACAA). This will lead to disparity between licence holders, and an uneven playing field across a regulatory regime.

5.2.6 There is no indication, under either the Planning Act 2008 or the Model Clauses provisions that this is what was intended by Parliament or the Secretary of State: namely, that licences or consents deemed granted by reference to a specific provisions of another enactment, and which required further approvals by a named body, should be subject to a different regime in the event of the applicant being dissatisfied by the outcome of that further approvals than would be the case for a licence expressly granted under the same provisions of the same enactment. Such a suggestion would also seem inconsistent with the guidance set out in PINS Guidance Note 11, namely that: *"the MMO will seek to ensure wherever possible that any deemed licence is generally consistent with those issued independently by the MMO"*.

5.2.7 This could also result in different processes applying to different licences relating to the same project: see, in this regard, Article 4(2) of the draft Order which envisages a situation where the applicant could need to apply for a further licence under MCAA, not deemed granted by Article 30, there will be no arbitration process applied in relation to any licence granted for this development, directly by the MMO, in the future.

5.2.8 This issue has already been considered very recently by other ExA's in the applications for development consent in the cases of Tilbury 2 and Hornsea 3 and in both cases the ExA found in favour of the MMO on this issue. Whilst the MMO understand each case is examined on its own merit, it equally understands that the PINS recognises the importance of consistency in its recommendations to Secretaries of State. As such, the MMO highlights that in the case of Tilbury 2 port facility the ExA's Recommendation Report to the Secretary of State found in favour of the MMO for reasons stated in its submissions, noting:

"The MMO stated that it strongly opposed the inclusion of such a provision, based on its statutory role in enforcing the DML. According to the MMO, the intention of the PA2008 was for DMLs granted as part of a DCO in effect to operate as a marine licence granted under the MCCA2009. There was nothing to suggest that after having obtained a licence it should be treated any *differently from any other marine licence granted by the MMO (as the body delegated to do so by the SoS under the MACAA).*

"Having considered the arguments of the Applicant and the MMO, the Panel finds in favour of the MMO in this matter for the reasons stated in the paragraph above.

Accordingly, the Panel recommends that paragraph 27 is deleted from the DML at Schedule 9 of the draft DCO."

5.2.9 Similarly, the MMO notes that on 26 February 2019, the ExA for the Hornsea 3 offshore wind farm published its schedule of changes to the dDCO amending arbitration in favour of submissions made by the MMO. They proposed the following:

"Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration."

The MMO would like to see the same wording included within this DCO.

The MMO recognises that there may be circumstances where the applicant submits documents/plans to the MMO for approval and the MMO will decline to approve the documents/plans as submitted. Disputes arising in relation to this are almost always resolved by discussion between the MMO and the applicant and where agreement cannot be reached the applicant can seek to challenge this using the established public law process of judicial review. It is the MMOs position that the applicant, in trying to introduce arbitration provisions, is attempting to resolve a problem that does not exist.

5.2.10 The MMO also recognises that there may be circumstances where the applicant submits documents/plans to the MMO for approval and the MMO will not determine whether or not to approve the documents/plans as submitted within the timescales the applicant would wish. The MMO does not unnecessarily delay such decisions, these matters are complex and require views to be sought from other statutory consultees, all of which takes time. Again any disputes arising in relation to how long the MMO takes to determine an application to discharge a condition of a DML can almost always resolved by discussion between the MMO and the applicant, but if the MMO 'fails' to make its determination within a timescale the applicant feels is reasonable again the applicant can seek to challenge this 'failure to make a decision' using the established public law process of judicial review.

5.2.11 As a public body, the MMO has a number of specific statutory powers and duties, and a responsibility to act in the public's interest. The MMO is therefore rightly subject to public scrutiny on the decisions it makes which often fall to be taken only after public consultation. Article 38 in the dDCO applies to 'differences' which arise under the provisions in the Order. The MMO maintains its position that such an approval is a regulatory decision, it is not 'agreeing' or 'disagreeing' with the applicant so that a divergence of views can properly be characterised as a 'difference'. 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.

5.2.12 The MMO is able to make other decisions in relation to the DMLs once the order is granted, these include decisions to vary licences, revoke licences, transfer licences. The MMO also makes decisions around enforcement in the event that the provisions of marine licences are not complied with. If the 'decisions' of the MMO are to be made subject to the arbitration provisions, then any 'differences' between the MMO and the applicant around enforcement would also be made subject to the arbitration

process. Whilst it seems this would be an inadvertent extension of the arbitration process, it is a practical consequence of extending Article 38 to decisions made by the MMO. This is again unnecessary, is not justified in the submissions made on behalf of the applicant, and is unacceptable.

5.2.13 As mentioned above, the MMO does not consider that there is an issue with the current process as the vast majority of disputes are resolved by way of discussion between the MMO and the applicant. In addition it should be noted that in relation to Town & Country planning, provisions in relation to the discharge of conditions have been considered by Parliament and are contained in statutory instruments. No cogent reasons have been put forward to suggest why further restrictions (over and above those placed on all public bodies by way of judicial review) on the MMO's decision-making ability are required in this instance or why if they are needed they shouldn't be introduced by way of statutory instrument.

5.2.14 The MMO considers there are serious legal and practical issues in trying to implement an 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.

5.2.15 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 given that 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.

5.2.16 The MMO questions the suitability of using arbitration in resolving issues concerning technical considerations such as disagreements about the type or production of evidence. Such examples are technical decisions which fall correctly on the MMO to take. The MMO questions whether an independent arbiter with no technical background would be best placed to make such a decision on evidence requirements.

5.2.17 Nonetheless, an arbitration mechanism involving the MMO would in practice only be related to an approval process. Since Parliament has vested the public-law functions regarding discharging marine licence conditions in the MMO, removing its decision-making functions and placing them into the hands of a private arbiter is inconsistent with the MMO's responsibilities.

5.2.18 Another consideration is that allowing the MMO's statutory functions to be undertaken by an arbitrator removes the ability of both the MMO and the applicant to appeal decisions that they disagree with on public law grounds. The judicial review procedure has been created to ensure public scrutiny of decisions. This strikes a balance of allowing the public body charged with making the decision to make its

decision, whilst ensuring that decisions made by public bodies are made correctly and are susceptible to public scrutiny. If either party disagrees with the decision of the High Court then this can be appealed to the Court of Appeal and ultimately the Supreme Court. NSIPs are some of the most important projects in the country. It is essential that they are undertaken correctly. To entrust the final decision in the event of a dispute to an arbitrator, who is not susceptible to the same public scrutiny or appeal is in the MMO's opinion inconsistent with the objectives of the 2008 Planning Act.

5.2.19 The MMO recognises the intention of the arbitration provision to resolve disputes between the applicant and third parties, however maintains that this provision should not be used to remove the decision making powers from the MMO (as the regulator delegated by Parliament to take such decisions) and place this in the hands of an independent arbiter.

5.3 Condition 15(2) and 15 (4)

5.3.1 The MMO acknowledges that any delays to the determination of conditions could cause significant costs to the applicant. The Applicant stated in REP7-041:

In the case of energy applications, these costs are ultimately borne by the consumer in the cost of energy given that any risk to delivery will be reflected in a bid for contracts for difference. Given this, as well as the national benefits in relation to security of energy supply, it is therefore considered appropriate that nationally significant energy projects are treated differently to other marine licence applications.

5.3.2 The MMO does not think it is appropriate that nationally significant energy projects are treated differently to other marine licence applications. The purpose of a marine licence is for the applicant to be legally bound to adhere to enforceable conditions and therefore cannot be treated differently whether deemed through the DCO process or through a direct licence application. This has been discussed within section 5.2.6 of this document.

5.3.3 The MMO acknowledges the applicant's main concern is that the current process does not place any rigid timescales in which the MMO must make its determination and the applicant has set out some additional concerns around the MMO and statutory consultees possible future resources which it says could be limited and could impact on timescales for these determinations. The MMO does not delay its determination unnecessarily. The MMO acknowledged this and reiterate that the MMO does everything in its power to sign off documents before the construction start date.

5.3.4 The MMO require 6 month for sign off of documents and determinations rather than 4 month throughout the examination process (These are collated in REP7-071) and throughout the other examinations going on such as Hornsea Offshore windfarm 3 and Thanet Extension.

5.3.5 The main concern for the stance across the MMO to increase the submission of documents from 4 month to 6 month is that 4 month pre-construction submission date is unrealistic and even counterproductive, as the pre-construction sign off process is not always straight forward.

5.3.6 The MMO has made it clear on their reasoning for this request. Due to:

- the nature of the detailed documents,
- the size of the wind farms coming forward; and
- the possibility that substandard final documents are provided to the MMO

could lead to multiple amendments required by the applicant which in turn leads to multiple rounds of consultations. The 4 month timescale could not account for these additional rounds of consultation and queries with the applicant.

5.3.7 The MMO provided an example timeline of 1 document and this showed, in an absolute best case scenario that it would take a minimum of 18 weeks to undertake the necessary consultation and to make an informed decision whether or not to approve the documentation, which is outside of the 4 month timescale the applicant proposes. An approximate overview of the decision making process for discharged documents is outlined as follows:

1. 4 weeks to acknowledge and review the document within the MMO
2. External consultation of this documentation could take up to 6 weeks
3. Once consultation is closed the MMO has to review the response and possibly ask for additional information from the applicant. At this stage the MMO and the applicant would be in discussion to agree on an approach to the responses. This could be for up to 4 weeks.
4. The MMO could then request further information from the applicant, which dependent on the level of detail, could represent a further significant time period of for example 4 further weeks
5. Once this is returned by the applicant, the MMO would begin the consultation process again.

5.3.8 It is noted from the above that, even if discharge documentation were to follow the current timescales, and no further communication was required from the applicant (which is highly unlikely) the current turnaround equates to 18 weeks, which is longer than the 16 weeks suggested by the applicant. It should also be noted that the above timescale applies to only one document, when in reality, the number of in-depth discharge requirements could far exceed 30 in total.

5.3.9 The request for 6 months also reflects the increasing complexity of existing OWF projects due to HRA, case law, an increasing volume of documents and a rise in in-combination issues associated with other projects. Of particular note is the anticipated growth in the UK offshore wind sector – noting an additional 8 proposed extension projects and the Crown Estate's round 4 leasing underway.

5.3.10 The MMO does sometimes deal with applications for the discharge of conditions which cannot be done within the 18 weeks and particularly so where the outline planes require multiple rounds of review and consultation before the final draft can be submitted for approval. Where this happens, the time taken for the determination can increase beyond the 18 weeks. However, as described above, the MMO does not delay unnecessarily in processing submitted documents. The timelines above show that even in the best case scenario, determinations generally take 18 weeks. 4 months is simply not a realistic determination period.

5.3.11 The MMO believes by giving the MMO and its consultees 6 months as a matter of course for determination, there is more time to reach a conclusion, and less risk of any need for extension or delay.

5.3.12 The MMO considers it inappropriate to put a timeframe on decisions of such a nature. The time taken to make such a determination depends on the quality of the application made, the complexity of the issues and the amount of consultation the MMO is required to undertake with other organisations. It is unhelpful and inappropriate to apply a strict timeframe in the dDCO in which the MMO must make its determination. As previously described putting a timescale on our decision making would lead to a disparity between licence issued under DMLs and those issued directly by the MMO. This would create an un-level playing field across the regulated community and is unhelpful and contrary to what Parliament intended.

5.3.13 As outlined in response to other issues, such as arbitration, a DML should be treated equal to a marine licence and the conditions imposed should be equivalent to those that would be granted on a marine licence. The MMO would not willingly seek to constrain our ability to make an appropriate decision on post consent sign off of plans and documentation, we would never include such a restriction on any other consent.

5.3.14 In condition 15(4) the applicant has proposed the MMO can only request further information within 2 months of receipt of the document. The MMO strongly disagrees with this proposal. In matters of potential environmental, social and economic risk the MMO should not be fettered in its ability to request further information as and when required.

5.3.15 The applicant has advised that this has been amended from one month to two months as requested by the MMO. The MMO would like to clarify that this was during discussion on possibilities of agreement, without prejudice, and after further review, has concluded that there should be no timescales set for reasons set out above.

5.3.16 The MMO note the applicant had changed the document timescales to 6 months. The MMO understand the EXA Schedule of changes show amendments to condition 15(4) from 6 months to 4 months with the time restraint to request for information section of the condition removed. The MMO still request that it should be a 6 month timescale as this is favourable to all parties. The MMO welcome the removal of the restraint to request for information section by the ExA.

5.3.17 The MMO notes the ExA changed condition 15 (5) from a 6 month timescale to a 4 month timescale. The MMO has concern over the inconsistencies of the amendments proposed by the ExA in the schedule of changes. Condition 15(4) timescales has been changed to 4 months however condition 15 (3) still advises the applicant must submit the documents for approval submitted for approval at least 6 months prior to the intended commencement of licensed activities:

> *15 (3) Each programme, statement, plan, protocol or scheme required to be approved under condition 14 must be submitted for approval at least six months prior to the intended commencement of licensed activities, except where otherwise stated or unless otherwise agreed in writing by the MMO*.

5.3.18 The MMO have two interpretations for the reason of this inconsistency:

The first interpretation is that condition 15(2) should be changed to 6 months to ensure consistency.

The second interpretation is that condition 15(2) remains at 6 months and the MMO has 4 month to make the determination then it would go to the appeal process as currently worded.

The MMO maintains that it requires 6 months to review and consult upon all discharge documentation, but will always endeavour to process documentation in as short a time period as possible to assist the applicant.

5.4 Condition 15(5)

5.4.1 In the applicants deadline 4 draft DCO (REP4-028) condition 15(5) included the clause for documents to be deemed approved, the MMO considers this inappropriate, and not commensurate with current marine licensing practice. The MMO raised comments within REP7-071. The MMO note that the applicant amended the wording for this condition from deemed approval to going to an appeals process in the deadline 7 draft DCO (REP7-004). The MMO welcomes this development and reiterates that if the Examiner were minded to adopt a default position (and the MMO maintains this is not necessary nor appropriate for reasons explored above) then deemed refusal is necessary to protect the environmental and other legitimate users of the sea. A deemed approval would represent a risk to the whole purpose of the marine licensing regime and is contrary to the will of Parliament. The MMO acknowledge the applicant's positon that any deemed refusal would have to be coupled with an appeal process, the MMO does not agree with this beyond the described internal escalation process as there is already a JR process in place should that escalation process fail. (see 5.6)

5.5 Appeals Process

5.5.1 The applicant highlighted the MMO are subject to an appeals process in respect of specific aspects of Marine Licences granted under Part 4 MACAA 2009. Section 73 of the MACAA provides an appeals process for applicants of Marine Licences by way of the Marine Licensing (Licence Application Appeals) Regulations 2011 (the Appeal Regulations).

The MMO is aware that the applicant wants some form of appeal mechanism to be available in the event that the MMO either fails to make a determination within the time period set out in the dDCO or to a decision to refuse to approve the documentation, this is already available to the applicant in the form of an escalated internal procedure and judicial review and therefore including any appeal mechanism in the order is simply unnecessary.

The MMO notes that the ExA is considering in its schedule of proposed changes to include within the dDCO, at Part 5 of the DML, an appeals process which is a modified version of that which is set out in the Appeals regulations. The MMO notes the ExA's explanation that this 'would allow the applicant an appeals route which is 'broadly consistent' with existing statutory processes. The MMO believes this constitutes a misunderstanding of when the appeal regulations applies. The 2011 regulations apply a statutory appeals process to the decisions the MMO takes regarding whether to grant or refuse a licence or conditions which are to be applied to the licence. However they do not include an appeals process to any decisions the MMO is required to give in response to an application to discharge any conditions of a marine licence issued

directly by us. Therefore, if the DCO were to be granted with the proposed appeals process included, this would not be an appeal procedure broadly consistent with existing statutory processes. The ExA would be introducing and making available to this specific applicant a new enhanced appeals process which is not available to other marine licence holders. This would not be broadly similar to the normal appeals process within the marine licensing regime. It would be entirely inconsistent with it.

This is 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. Had parliament intended the appeal process to extend to these decisions to these decisions (whether in relation to NSIPs or the marine licence granted directly by MMO, then the wording of the regulations would have been drafted diffThe MMO intends to submit a joint position statement for Deadline 9 of the examination process in conjunction with Norfolk Vanguard, setting out clearly our positions and the differences between them with specifc references to arbitration, timescales and appeals processerently.

5.5.2 In addition, the effect of the proposed change, in this case, would be to replace the review of the MMOs decision making on conventional public law grounds (via the process of judicial review) (for discharge of conditions under an expressly granted licence) with a merits review by an arbitrator. This is a fundamental departure from what Parliament intended, and the MMO can see no justification whatsoever for such a fundamental change – particularly where the purpose of the deemed licence regime under the Planning Act 2008 is to essentially to remove the need for a separate application for a licence alongside or following the making of the Order and not to fundamentally change the regulatory regime that applies.

5.5.3 The MMO notes that the Planning Act 2008 which set out the regime for DCOs doesn't have any 'statutory' appeals process either, it works on the basis that the applicant and those with an interest in the application work with the ExA to agree the terms of the order but it is for the SoS ultimately to decide on the terms of the order. The way to appeal against the decisions of the SoS to grant the order as made, or refuse the order, as is provided for in the Act is via the JR process and not by way of an appeal to PINS or to a tribunal.

5.5.4 The MMO request the removal of the appeals process stipulated in part 5 of the DML as the MMO considers it is wholly inappropriate for the dDCO to replace the existing appeals process (Judicial Review) with a modified version of the appeals route set out in the 2011 regulations for the reasons already set out above.

5.5.5 The MMO would like to highlight if the DCO provisions were to remain without the deemed approval mechanism and without any arbitration provision, should the MMO fail to make a determination within what the applicant considers to be a reasonable timescale then there is already certainty, and the applicant can already be confident of a reliable and consistent approval process.

5.5.6 The current mechanism the applicant has available would be to write to the MMO explaining this and requiring the MMO to make a determination by a specific date and should the MMO fail to make the decision then the applicant would be able to judicially review that failure to make a decision. If the MMO were to make the

determination, but decided to refuse to approve the documents, then again the applicant would be able to challenge that refusal via JR.

5.6 Internal Escalation Process

5.6.1 In addition to the proposed procedure for determination, the MMO highlighted within the deadline 7 response (REP7-071) that there is an internal escalation process in place currently, this has been expanded below.

5.6.2 The MMO would note this is an internal process and cannot be included within the text of the DCO/DML due to possible internal amendments.

- MMO fail to make a determination by a specific date.
- Applicant sends a letter to the case team advising they require a decision within 2 months.
- Delegated Director is chosen and makes contact with the applicant.
- Initial meeting is set up to discuss the concerns.
- Delegated director reviews the documents from all interested parties.
- Meeting with interested parties and further information requested.
- Final resolution meeting by the final week of the 2 month time frame.

Once this decision was made the applicant would be able to challenge the refusal or decision via the JR process.

5.7 Consistency across Offshore Wind Farm DCOs

5.7.1 In the applicants deadline 7 response (REP7-041) the approach to other offshore wind farm DCOs was discussed.

5.7.2 The MMO agree with the applicants understanding that Hornsea Project Three have sought arbitration as a preferred option in the final version of the dDCO submitted as part of the Hornsea Project Three examination, which the Applicant has submitted at Deadline 7 (REP7-057). The MMO understand Hornsea Project Three have inserted alternative drafting for the event that arbitration is not recommended by the Examining Authority. The alternative approaches apply the Appeal Regulations under Article 38 of the Hornsea Project Three DCO but with shortened timeframes; and, in the further alternative, apply a deemed approval mechanism similar to the Applicant's drafting in Condition 15 (Schedule 9-10) of version 4 of the dDCO. The MMO provided comments in line with comments in section 5.5 of this document to fundamentally disagree with the proposal.

5.7.3 The MMO are aware that the Thanet Extension project has arbitration as a preferred approach within the dDCO submitted. The MMO understand that the applicant has put forward the same information that the Thanet Extension project have recently submitted in the form of a counsel's legal opinion as to why DMLs should be subject to the principles of arbitration and why the MMO should not be excluded from the operation of the arbitration article (REP7-065). The MMO acknowledge the reason for this additional submission and in addition to the comments laid out in REP7-071 position statement and in section 5.2 of this document have provided further information on the document specifics (5.2.7 – 5.2.8)

5.7.4 The MMO recognises that the current drafting of Article 38 may encompass within it a situation where the applicant submitted documents/plans to the MMO for approval and the MMO declined to approve the documents/plans as submitted.

5.7.5 The MMO considers there is a material risk that a Court (or, as a preliminary issue, the arbitrator) would interpret Article 38 as extending to a disagreement between the applicant and the MMO as to whether a condition should be discharged on the basis of the documentation/plan prepared and submitted by the applicant.

5.7.6 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. Article 38 in the dDCO applies to 'differences' which arise under the provisions in the Order. The MMO believes that 'differences' only arise when the MMO is to provide further approval, for example in the discharging of conditions around pre-construction documentation and monitoring plans. The MMO maintains that such an approval is a regulatory decision, it is not 'agreeing' or 'disagreeing' with the applicant so that a divergence of views can properly be characterised as a 'difference'. 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.

5.7.7 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 is further concerned that 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.

5.7.8 The MMO does not dispute that public authorities are, in principle capable of being a party to arbitration as discussed in the applicant's advice from Counsel (REP5-023). However, the MMO does not agree that that the cases cited at §23 of Counsel's Opinion are directly applicable to the question here. This is not a case where the parties have entered into an agreement providing for arbitration and the question is whether the Court should conclude that the subject matter of the dispute are not capable of settlement by agreement. The question here is a logically prior question: whether the Order, if confirmed, should provide for disagreements relating to the discharge of conditions under the deemed marine licence to be subject to arbitration. That is a rather different scenario to the circumstances at issue in Fulham Football club (1987) Ltd v Richards [2011] EWCA Civ 855[2] and Assaubayeve v Michael Wilson Partners Ltd [2014] EWCA Civ 1491[3]

5.7.9 Furthermore, the MMO does not agree that the wider analysis set out at §25-26 as to the matters supports the conclusion that there is no principled reason why matters left to the approval of the MMO could not be properly left to an expert arbitrator, for the reasons set out below.

5.7.10 The MMO emphasise in this regard that the analysis at §25-36 is clearly premised on the presumption that arbitration is an appropriate (or available) – the question being whether exclusion of the subject matter from arbitration is "a safeguard…necessary in the public interest". As set out above, that is not the starting point here. What has to be considered in this case is whether the Order should provide for the discharge of conditions to be subject to arbitration in the event

[2] The FAPL rules provided that membership of the FAPL was deemed to constitute an agreement between the FAPL and the members clubs and between the members clubs to be bound by, and comply with, (inter alia) the FAPL rules and FA Rules. Both the FA rules and FAPL rules provided for arbitration.

[3] Arbitration was provided for as one means the parties could choose to resolve disputes arising under a retainer for legal services.

of a refusal by the MMO when decisions as to discharge of conditions under a licence granted, rather than deemed granted, under the 2009 Act would be subject only to review by a Court on judicial review grounds.

5.7.11 As highlighted within section 5.2 the MMO considers there are serious legal and practical issues in trying to implement an 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.

6. The MMO remaining DCO/DML comments outstanding from Deadline 7

6.1 Summary of Position

6.1.1 The MMO and the applicant are still in discussions with the following topics:

- Arbitration
- Timescales for documents
- Deemed discharge procedures
- Appeal process
- HHW SAC SIP

The MMO intends to submit a joint position statement for Deadline 9 of the examination process in conjunction with Norfolk Vanguard, setting out clearly our positions and the differences between them with specific references to arbitration, timescales, appeals process and internal escalation process.

6.2 Condition 14 (1) (d) (vi)

6.2.1 The applicant has proposed a red throated diver condition. The MMO are satisfied with the wording of this condition.

6.3 Scour Protection individual structures

6.3.1 The MMO is satisfied the amendment to condition 14 (1) (e), recommended by the ExA and the updated Table 1 within the Outline Scour Protection and Cable Protection Plan. The MMO withdraws concerns on the need for the scour protection per individual structures within the text of the DML.

6.4 Scour Protection plan Condition 22

6.4.1 The MMO requested the addition of condition 22 to the DML. Upon review of the condition, concerns remain with the wording and the MMO considers scour protection needs to be included. The MMO is currently in discussions with the applicant on the wording of this condition.

6.5 Cable Protection maximum parameters within the HHW SAC

6.5.1 The MMO requested the maximum parameter for cable protection within the HHW SAC to be specified within the cable protection table within Schedule 11 and Schedule 12 design parameters. The MMO and the applicant have agreed on the location and wording of this inclusion, this will be in condition 3 (1) (f).

6.6 Statutory Nature Conservation Body within the DML

6.6.1 The MMO questions whether the definition of the SNCB needs to be included within Part 1 of the DMLs and not just the DCO, this will ensure consistency throughout the document.

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Norfolk Vanguard Case Team
Planning Inspectorate
(Email only)

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

30 May 2019

Dear Sir or Madam,

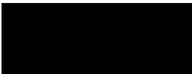
Planning Act 2008, Vattenfall Wind Power Limited, Proposed Norfolk Vanguard Offshore Wind Farm
Responses to the Examining Authority's (ExA) Further Information Request

The Marine Management Organisation (MMO) is an interested party for the examination of Development Consent Order (DCO) applications for Nationally Significant Infrastructure Projects (NSIPs) in the marine area. Should consent be granted for the project, the MMO will be responsible for monitoring, compliance and enforcement of Deemed Marine Licence (DML) conditions.

The MMO received the ExA's further information request on 21 May 2019 for the proposed Norfolk Vanguard Offshore Wind Farm (Ref EN010079). Please find the MMO's response to the ExA's further information request below for your consideration.

In order to ensure clarity, who the question/further information was directed to and the question/further information to which the answer has been provided has been incorporated in this response.

Yours faithfully



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Marine
Management
Organisation

EN010079 – Norfolk Vanguard – The Examining Authority's request for further information or written comments.
Issued on 21 May 2019 for submission at Deadline 8.

Ref	Request to:	Information or Written comments requested:	MMO Comments
1	**Policy/project design/ecology/Habitats Regulations Assessments**		
FQ 1.3	Applicant, NE and MMO	Please set out whether an increase in turbine draught height of 5m, from 22m to 27m above MHWS would have any implications for any other matters assessed in the Environmental Statement, and if so, explain what you consider these would be?	The MMO would defer to Natural England in this regard. The MMO considers that the main impact of an increase in draught height would be ornithological in nature. The MMO would like to see the increase in turbine height considered when agreeing post consent ornithological modelling and monitoring.
FQ 1.11	MMO	Having regard to the 'Harbour porpoise Special Area of Conservation: Southern North Sea Conservation Objectives and Advice on Operations, March 2019' document, submitted at deadline 7 [REP7-052], please comment on the acceptability of Condition 14(1)(m) of Schedules 9 and 10, and Condition 9(1)(l) of Schedule 11 and 12 of the draft DCO.	The MMO are satisfied with the current wording of the condition and therefore deem this acceptable to be included within the DMLs. The MMO believes the condition provides the best mechanism at this time to adhere to the conservation objectives put forward in the REP7-052 document. The MMO would like to highlight the ongoing Review of Consents being undertaken by the Department of Business, Energy and innovation strategy (BEIS) and which is not yet complete. Therefore, the MMO would like to highlight that whilst

			recognising the appropriateness of the conditions some changes regarding mitigation may be required post consent as a result of a completed Review of Consents. It is recognised within the site integrity plan itself that best practice and best scientific knowledge will be employed at the time.
FQ 1.12	MMO	(1) What is your view on whether, and if so how, enforcement action against a breach of the Development Principles [REP7-029] could be undertaken unless they were made a specific condition of an eventual approved Design Plan? (2) What matters, if any, in the Development Principles should be elevated to a clear mandatory status by for example specifying them alongside other design parameters set out in the DCO/DMLs. For example, would the design rule that all structures (not just the turbines as set out in the DCO design parameters) should have a minimum separation distance of 760m, be better located in the DCO/DML Requirements if this is seen as critical to SAR and other navigational safety needs?	The MMO is still unclear regarding the rationale for the need for this document. Considering that the document uses terms such as "as far as practicable" then there would be difficulties in attempting meaningful enforcement action. Some of the wording as it standing does not meet the criteria for conditions or statements in methodologies which could be enforceable. With this in mind, it is always advisable to have important parameters stipulated explicitly within the DCO. Anything that is critical to Search and Rescue (SAR) and navigational safety should be set out in the DCO design parameters. Also the development principles seem to meet the requirement of some 1n principle design parameters which without linking to an agreed specific design plan could be problematic to enforce.

			The MMO would wish to discuss this document with the applicant and investigate whether the MCA and Trinity House have responded to its contents.