From:	Opel, Laura (MMO)
To:	Hornsea Project Three
Cc:	West, Richard (MMO); Stephenson, Paul (MMO)
Subject:	EN010080 - Hornsea Project 3 Deadline 3 submission
Date:	14 December 2018 12:22:06
Attachments:	EN010080 - Annex A - MMO guidance on MCZ assessments.pdf EN010080 - Annex B - MMO comments on In Principle Monitoring Plan.pdf EN010080 - Annex C -MMO comments on Herring Noise Contours.pdf EN010080 - Example MMO MCZ screening document.pdf EN010080 - Example MMO MCZ Stage 1 Assessment.pdf EN010080 - Hornsea Project Three - Deadline 3 - MMO Post Hearing Submission.pdf

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Good afternoon,

Identification Number: 20010662

Please find attached the MMOs Deadline 3 submission for Hornsea Project 3. The following documents have been attached:

- Post hearing submission including written submission of oral cases and comments on the revised draft DCO
- Annex A – MMO guidance on MCZ assessment
- Annex B – MMO comments on In Principle Monitoring Plan
- Annex c – MMO comments on Herring Noise Contours
- Example MCZ screening document
- Example MCZ Stage 1 assessment

Please let me know if you have any questions.

Kind regards,
Laura

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Hornsea Project Three Case Team
Planning Inspectorate
(Email only)

MMO Reference: DCO/2016/00001
Planning Inspectorate Reference: EN010080
Identification Number: 20010662

14 December 2018

Dear Sir or Madam,

Planning Act 2008, Orsted Hornsea Project Three Limited, Proposed Hornsea Project Three Offshore Windfarm Order

On 14th 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 Orsted Hornsea Project Three Limited (the "Applicant") for determination of a development consent order (the "DCO Application") (MMO ref: DCO/2016/00001; PINS ref: EN010080).

The Development Consent Order Application includes a draft development consent order (the "DCO") and an Environmental Statement (the "ES"). The draft DCO includes, at Schedule 11 and 12 a draft Deemed Consent under Part 4 (Marine Licensing) of the Marine and Coastal Access Act 2009 (the "Deemed Marine Licence" (DML)).

The DCO Application seeks authorisation for the construction, operation and maintenance of Hornsea Project Three ("Hornsea Three") offshore wind farm, comprising of up to 300 wind turbine generators together with associated onshore and offshore infrastructure and all associated development ("the "Project").

This document comprises the MMO's 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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Content:

The MMOs Post Hearing Submissions including Written Submission of Oral Cases

1 Post Hearing Clarifications as discussed at the Issues Specific Hearings (ISH)

1.1 MMO guidance for the Assessment of Marine Conservation Zones

1.1.1 Marine Conservation Zones and Marine Licensing

Section 126 of the Marine and Coastal Access Act (MCAA) (2009) places specific duties on the MMO relating to Marine Conservation Zones (MCZs) and marine licence decision making. This is because s.126 applies where;

(a) a public authority has the function of determining an application (whenever made) for authorisation of the doing of an act, and

(b) the act is capable of affecting (other than insignificantly) -

(i) the protected features of an MCZ;

(ii) any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependent.

In determining how to apply s.126 in undertaking its marine licensing function, the MMO has introduced a MCZ assessment process that is integrated into existing marine licence decision making procedures. This applies to all new marine licence applications and is relevant to MCZs proposed by Defra (together with their proposed features and proposed conservation objectives) until the point of designation. From the point of designation it is the designated MCZs (together with features and conservation objectives) which will be relevant.

MCZ sites and features identified as possible candidates for designation in future tranches are not be subject to the MCZ assessment process. However, the MMO will consider the evidence base associated with those sites in its decision making. The assessment process also addresses the general duties placed on the MMO in s.125 of the MCAA with respect to furthering the conservation objectives of MCZs.

Please find the MMOs guidance on MCZ assessments under Annex A and an example for an MCZ screening and Stage 1 assessment with this submission.

1.1.2 The MMO's position on the MCZ assessment undertaken by the Applicant

Following our review of the Applicant's MCZ assessment, the MMO can confirm that the assessment was undertaken in line with the MMO's guidance for MCZ assessments. The MMO recommends that the Secretary of State performs their own independent MCZ assessment in line with the provided MMO guidance to ensure that, in the exercise of its functions to manage any Deemed Marine Licences post-consent, the MMO can be assured that due process has been followed to assess the impacts of licensable activities within the boundaries of current and proposed marine conservation zones within the Hornsea Project Three area.

1.2 Comments on the Clarification Note for Cable Protection

1.2.1 As part of our Written Representation, the MMO has asked for a number of points to be addressed within the clarification note for cable protection. The MMO consider that the 10% allocation for cable protection measures is appropriate given the historical data used to inform the report. The MMO would like to highlight however that the operator or trenching tool may change, or insufficient geotechnical data may have been collected and thus rates of cable protection may vary in the future.

The MMO requested that clarification should be provided as to why the literature review of potential impacts of cable protection is restricted to Orsted operations. For instance, rock armouring at the Thanet windfarm was extensive (>200km) in an active sediment transport zone.

In response to this, the Applicant provided an explanation that the asset integrity surveys that were used to support the report are typically not publicly available.

The MMO would like to highlight in response that information is available that the Thanet Offshore Windfarm required over 200km of post burial cable protection due to failure to meet the burial depth minimums. Furthermore, the MMO would suggest that Plan Windfarm developer agreements under the Trade Association Renewables UK would allow the exchange of information to encourage sharing of design installation techniques and monitoring strategies to enable best practice associated with cable protection.

1.3 Appeal Process

The MMO is currently in the process of obtaining further information on its appeal process via the Planning Inspectorate and will provide further information on this by Deadline 4.The intention is to highlight the process to the Secretary of State for appeals available to developers to resolve issues relating to the discharge of DML conditions. The MMO notes, however, that since the organisation was vested in 2010, the MMO has never been called upon to resolve any issues relating to DCOs or DMLs through the appeals process and has always managed to resolve issues between the organisation, its stakeholders and developers through internal discussions.

2 Summary of Comments on the revised Development Consent Order (DCO) and Deemed Marine License (DML) submitted by Deadline 1

2.1 Summary of Oral Cases made during the Issue Specific Hearings

2.1.1 Consistency with the Environmental Statement

The MMO has highlighted the following outstanding concerns regarding areas and volumes of material that are presented within the ES and the DCO.

There is remaining uncertainty regarding the assessment of a further 200,000m^3 of disposal volumes within the site characterisation in comparison to the ES or the DCO and further explanation is required. Additionally, the MMO recommended that the figures for disposal volumes should be made more explicit in the DCO and DMLs and should include the maximum volumes of sand, boulders, drill arising etc.

The MMO further recommended that the same is applied to cable protection and cable crossings. Here the volume and area of cable protection should be made more explicit in the DMLs and between the DMLs (i.e. maximum volumes for each DML should be provided). In addition, the MMO recommended that the DCO should make reference of the total number of cable crossings required and the maximum volume and area of cable protection required for each crossing.

2.1.2 Schedule 1, Part 1 – the authorised development

The MMO has confirmed its preference for the maximum generation capacity to be referenced within the DCO, however the decision is left for the Secretary of State to determine.

2.1.3 Schedules 11 and 12 – Deemed Marine License

2.1.3.1 Paragraph 10 – Arbitration

The MMO outlined the following concerns in relation to Paragraph 10 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 (1) within Schedule 13 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 'where disclosure is required under any legislative or regulatory requirement' 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.

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.

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.

2.1.3.2 *Condition 13 (Pre-construction plans) – consider the scope for micro-siting and any effects that may have; whether a layout in accordance with the design principles should be subject to approval; update on approach to archaeological exclusion zones*

The MMO highlighted its confusion regarding the updated wording presented in the draft DCO regarding the requirement of the MMO's approval of the Design Plan. The MMO highlighted that it had previously been agreed with the Applicant, that the Design Plan would be submitted to and approved by the MMO. This is reflected in the Statement of Common Ground submitted by the applicant at Deadline 1. The Applicant confirmed their intention to submit a Design Plan for approval to the MMO as agreed and confirmed that typographic errors in the draft dML schedules and response to Written Representations document would be changed to reflect this.

2.1.3.3 *Condition 14 - Timescale for MMO decisions*

The MMO outlined its position on the revised timescales of 4 months for documentation submission and the MMO's decisions during the Issue Specific Hearing.

Condition 14 (1) set out the requirement for the Applicant to submit all pre-construction documentation at least 4 month prior to the commencement of the construction works. The MMO's 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. 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. 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. The MMO therefore recommends that the timescales should be set at 6 months to allow sufficient time for repeat rounds of stakeholder consultation if required.

Condition 14 (2) set out the timescales for the MMO to make a determination. As set out in our previous point, the MMO does not agree that the timescales of 4 months are sufficient to make a determination. The MMO strongly questioned the requirement of a determination timescale due to the following reasons. As set out above, the determination process for post-consent sign off can be very complex and is not always solely dependent on the MMO. Here the MMO referred to the quality of submitted documentation as an example. The MMO highlighted that in some cases the documents submitted are not initially fit for purpose and may require significant amendments which can reduce the timescales for the MMO to undertake the consultation process. Please see point 2.2.5 below for the MMO's updated position.

2.2 MMOs remaining comments not discussed at the ISH

Schedule 1 Development Consent Order

2.2.1 Part 1 (1) Works no. 15 (page 31) – Cable protection and disposal volumes

During the issue specific hearing the MMO made further comments that there is the requirement for cable protection to be made more explicit in the DMLs. Each DML should explicitly indicate the maximum cable protection to be used within the generation asset and the transmission asset. Here, the DCO should reflect the total volume, length and area of cable protection to be used within each designated site. In addition, the MMO recommends that the DCO should make reference of the total number of cable crossings required and the maximum volume and area of cable

protection required for each crossing.

The MMO has previously highlighted that the volumes for disposal material assessed do not match between the site disposal characterisation report and the DCO. Following that, the Applicant has confirmed that the difference in volume is the difference in volume between the construction of the HVDC converter substation and the seabed preparation for the HVAC booster substation. The MMO recommend for this to be made explicit in the DCO, setting out the maximum volumes for each as highlighted during the Issue Specific Hearing.

Schedule 11 Deemed Marine License – Generation Asset

2.2.2 Part 1 (10) (page 134) – 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 36 and Schedule 13. The MMO notes the Applicant's reasoning for setting out a more defined arbitration process within the DCO, however the MMO highlights that such explicit conditions, as set out in schedules 11 and 12, have not been included within the schedules setting out the onshore works.

2.2.3 Part 2 (4) (page 136) - Phased development

The MMO recommend that the condition setting out the requirements for phased development should be expanded to specify the requirement for all phases to be completed within 7 years of the commencement of the first phase. This should also be included for Schedule 12.

2.2.4 Part 2 (14) (2) (page 140) – MMO determination timescales

Further to the MMO's points raised during the Issue Specific Hearings under point 2.1.3.3, the MMO would like to highlight that it is their view that the MMO should not be required to give an approval to documentation submitted under condition 13 to make its determination within any specific time period. Acting in its role as the enforcing body, it has previously been within the MMO's remit to determine timelines for pre-construction documentation sign off. The MMO aims to make a determination for approval of pre-construction documents within the agreed timelines, taking into consideration the developer's timescales for the commencement of construction and the agreement of appropriate stakeholders.

As explained previously, the sign off within the anticipated timescale (previously 4 months) is in many cases not possible as generally the timely approval of pre-construction documentation can in many situations be out of the MMO's control. The approval of documents is dependent on a number of factors, including the

quality of the documents submitted, the conservation status of the areas affected and the willingness of the developer to engage with the MMO and compromise with relevant stakeholders. The MMO therefore does not consider that the inclusion of such a condition is necessary or appropriate.

Whilst the MMO appreciate that it may give the applicant some comfort to add in a timescale within which the MMO must determine whether to approve a document or not, in reality it serves little purpose. If a decision timescale were to be included (whether that is 4 months or 6 months), in the event that the MMO were unable to make its determination within the timescales set out, then either the MMO and the Applicant would need to agree to an extension of time (if the DCO provides for this) or the MMO would be required to withhold its approval.

As explained previously, developers may be working to very tight timescales post-consent. For example, materials and vessels are required to be ordered and booked a significant time period prior to the commencement of construction. In the event that the MMO were not able to make a determination within the anticipated timescale and no precautionary buffer was included in the project programme, any delay could have significant cost implications for the developer who would in return not be inclined to grant an extension for document approvals.

In the event that the MMO was required to withhold its approval, should the arbitration clause remain, the Applicant would be able instigate arbitration. In the event that the MMO were not subject to arbitration, then the MMO's refusal would be challengeable via the current appeals process. Following the points as set out above, the MMO therefore recommends the removal of conditions 14 (2) from both DMLs.

2.2.5 Part 2 (18) (3) (page145) – Construction noise modelling

The MMO recommends the following condition should be added to Schedule 11:

Condition 15 (b) (iv) The results of the initial noise measurements monitored in accordance with sub-paragraph (i) 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.

2.2.6 Part 2 (17, 18, 19) (2) (page 144/5) - Condition wording

Condition 17/18/19 (2) refers to the outline of what the pre-construction surveys must comprise. The wording in the DMLs is as follows:

(2) Subject to receipt of specific proposals, so far as applicable, the post-construction survey plan or plans must include, in outline—

The MMO has reviewed this wording and recommends the removal of the phrase 'so far as applicable' from the conditions. The MMO does not agree that this phrase is required in this context as the monitoring outlined in conditions 17, 18 and 19 sets out the standard practise to validate predictions made in the ES, and also requirements that have been agreed during the pre-application stage.

Should it be decided that the arbitration clause were to remain within the DCO and the DMLs, the condition wording as it stands would give rise to further options for a 'disagreement' between the MMO and the Applicant and the subsequent settlement of such a disagreement through arbitration.

Schedule 12 – Deemed Marine License – Transmission Asset

3 In Principle Monitoring Plan

The MMO is generally content with the monitoring requirements as set out in the In Principle Monitoring Plan that was submitted by the Applicant at Deadline 1 with the exception of a few outstanding issues as set out below;

- The requirement to undertake a minimum of three years post construction monitoring should be made explicit in the IPMP. This can be accompanied with the phrase 'unless otherwise agreed with the MMO' to allow more flexibility for the developer.

- The MMO has made a number of recommendations in particular in relation to benthic monitoring.

The MMOs detailed comments can be found in Annex B.

4 Outstanding Environmental Matters

4.1 Fish and Shellfish Ecology

4.1.1 In our Written Representation, the MMO has confirmed that no specific fish monitoring surveys would be required. Given the size of Hornsea Three array area however, and as the substrate is considered to be largely 'preferred' sandeel habitat, the MMO has requested that the Applicant collects Particle Size Analysis (PSA) data from within the proposed array area to allow the monitoring and assessment of sandeel habitat.

In response, the Applicant has highlighted that the IPMP includes pre- and post - construction monitoring of the seabed sediments within the Hornsea Three cable corridor to assess recovery rates following cable installation activities such as sandwave clearance. The Applicant further highlighted that the monitoring in this area would be targeted at demonstrating recovery of the seabed, with sandwave clearance monitoring being of particularly relevant to sandeels. The monitoring proposed would therefore achieve the same objective, and the Applicant is willing to include this in the IPMP.

The MMO is not currently able to provide comments on the above proposal. The MMO has submitted general comments on the IPMP with this submission (Annex B). A major comment here was that a number of links that had been provided to set out methodologies were not accessible. As a result, the MMO was not able to review these methodologies.

Once the updated IPMP has been provided to the MMO, it would be content to review the methodologies included for the monitoring of the recoverability of sandwave clearance and provide further comments on the proposal above.

4.2 Underwater noise modelling and Fish Ecology

4.2.1 The MMO's Written Representation requested further underwater noise modelling based on the scenario of concurrent piling. The Applicant agreed to provide the information in the Statement of Common Ground and submitted additional noise counters to the MMO via email on 3rd December 2018.

Following the MMO's review of the submitted information, further information is required in order to assess whether any concurrent piling noise would attenuate to the known herring spawning grounds located off Flamborough Head. The MMO recommends that the following information is provided by the Applicant:

- The hammer energy profiles for the SELcum scenarios (including the number of piles installed in 24 hours, number of strikes, source level).
- The unweighted single strike SEL (SELss) received levels based on concurrent piling and a 5,000 kJ hammer energy (showing the contours and spawning habitats).
- The modelled received levels for SELcum based on concurrent piling, as has been done for the peak SPL (showing the contours and spawning habitats).

Please find Applicant's additional underwater noise modelling and the MMO's detailed response at Annex C.