From:	Brown, Emma (NE)
To:	Hornsea Project Three
Cc:	Burton, Louise (NE)
Subject:	Natural England Deadline Three Submission for Hornsea Project Three
Date:	14 December 2018 19:16:02
Attachments:	EN 10080 NE Hornsea Project three Deadline 3 Submission - ISH 4.pdf EN 10080 NE Hornsea Project three Deadline 3 Submission - ISH 1 (002).pdf EN 10080 NE Hornsea Project Three Deadline 3 Submission - ISH 2 PART 1 - Ornithology.pdf HP00066_101_HOW03_HiDef_Method_statement_20160401.pdf EN 10080 NE Hornsea Project Three Deadline 3 Submission - ISH 2 PART 2 - Benthic.pdf EN 10080 NE Hornsea Project Three Deadline 3 Submission - ISH 2 PART 2 - Benthic Annex 2.2B Response on REP2-004.pdf EN 10080 NE Hornsea Project Three Deadline 3 Submission - ISH 3 .pdf

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Hello,

Please find attached Natural England's Deadline Three Submission.

This includes the following documents:

- EN 10080 NE Hornsea Project Three Deadline 3 Submission - ISH 1
- EN 10080 NE Hornsea Project Three Deadline 3 Submission - ISH 2 PART A – Ornithology
- HP00066_101_HOW03_HiDef_Method_statement_20160401 (Submitted as appendix 5 of ISH 2 Part 1)
- EN 10080 NE Hornsea Project Three Deadline 3 Submission - ISH 2 PART 2 – Benthic
- EN 10080 NE Hornsea Project Three Deadline 3 Submission – ISH 2 PART 2 – Benthic Annex 2.2A – Review of Applicant's response to IP response to ExA Questions – Benthic Ecology
- EN 10080 NE Hornsea Project Three Deadline 3 Submission – ISH 2 PART 2 – Benthic Annex 2.2B – Response on REP2-004
- EN 10080 NE Hornsea Project Three Deadline 3 Submission - ISH 3
- EN 10080 NE Hornsea Project Three Deadline 3 Submission - ISH 4

Kind regards,

Emma

Emma Brown
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Please note I currently work Monday - Thursday

http://www.gov.uk/naturalengland

We are here to secure a healthy natural environment for people to enjoy, where wildlife is protected and England's traditional landscapes are safeguarded for future generations.

within the Natural England systems, we can accept no responsibility once it has left our systems. Communications on Natural England systems may be monitored and/or recorded to secure the effective operation of the system and for other lawful purposes.

THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

HORNSEA PROJECT THREE OFFSHORE WIND FARM

Planning Inspectorate Reference: EN010080

NATURAL ENGLAND

WRITTEN SUBMISSION FOR DEADLINE 3 – Issue Specific Hearing 3

Dated 14th December 2018

Contents

1. INTRODUCTION

1.1 This submission follows the 1st Issue Specific Hearing (ISH) on The Draft Development Consent Order for Hornsea Project 3 which took place at Mercure hotel Norwich, on the 6th December 2018 and details the oral responses to questions asked of Natural England during that hearing.

1.2 This submission consists of responses from Natural England to questions raised at the Issue Specific Hearing on Thursday 6th December 2018 and further written clarification in relation to our comments on the revisions to the DCO, and our comments and suggested revisions to Schedule 13.

2. WRITTEN SUBMISSION OF THE ORAL ANSWERS PROVIDED TO QUESTIONS AT THE ISSUE SPECIFIC HEARING ON TUESDAY 4th DECEMBER 2018.

Representing Natural England: Alan Gibson, Charles Forrest, Emma Brown.

2. Purpose of the ISH

Mr. David Prentis (The Examiner) stated that this hearing will focus upon the effectiveness and justification of the DCO.

3. Consistency with ES

a) Consistency between the ES and the draft DCO regarding the areas and volumes of materials – identify any remaining areas of uncertainty [Rep 1, 127]

1. Natural England noted that there was a disparity between the volumes of disposal given in the ES and DCO, against the volume assessed in the site characterization report. This was noted as over a 200,000 m^3 difference. However, noting the lesser figure is that given on the consent Natural England has less concerns with it being included. However, wished the applicant to confirm they have used the correct figure to avoid potential variations at a later date. In addition to our comment during the hearing Natural England notes in the applicant's response to the ExA they provided a breakdown of how the disposal figure was reached. This breakdown did not include boulder removal, which is an act of disposal they are applying for. Therefore, Natural England has concerns the figures are still incorrect.

2. Natural England requested that the volumes of sandwave clearance and disposal, boulder clearance and cable protection required within designated sites are clarified and stated individually on the DCO/DMLs. Natural England confirmed that this related to North Norfolk Sandbanks and Saturn Reef SAC as well as the Wash and North Norfolk Coast SAC.

3. For clarity, this should also apply to Cromer Shoal Chalk Beds MCZ and Markham's Triangle MCZ, and volumes of scour prevention within Markham's Triangle should also be stated.

4. The Examiner asked should these be controlled via licenses. Natural England can confirm that they believe all disposal volumes must be detailed within the licenses. This is a legal requirement under the OSPAR convention. In addition this is needed to ensure the impacts to designated sites remain within the assessments provided.

5. Natural England confirmed that the volumes of rock armour for cable protection, scour prevention, and areas of seabed preparation (such as sandwave levelling) consented for the works should be controlled by licence, where the length, volume and area should be stated. There have been issues in the past where only volume was known leading to an impact of much greater area than assessed. It must be clear as to what is permitted within designated sites and these figures must be given within the consent to ensure adherence to the assessment.

   The Applicant confirmed that they would include these figures.

4. Articles

The Examiner explained that all these articles relate to Articles within the first iteration of the DCO, However the tracked changes version of the DCO provided in REP1-127 was used throughout the examination.

c) Article 5 (6) – whether appropriate to apply arbitration to a decision of the Secretary of State on the transfer of the benefit order

6. Natural England stated that arbitration is relevant to Natural England (e.g. see Article 36 of the DCO and in relation to the DML where MMO decisions can be informed by Natural England advice) and they would provide further comment alongside the MMO's representation.

6. Schedule 1, Part 3 – Requirements

a) R2 (Offshore Design Parameters) – rationale for introducing a limit of 9km² for the total swept area

7. Natural England would like to know how the 9km² figure was obtained. Natural England stated that they need to confer with their ornithologists and would therefore return to this point. The Applicant's description is probably acceptable but there are factors (e.g. how rotors are spaced) that need to be clarified with the ornithologists.

   (After conferring with the ornithologists, Natural England would welcome further discussion on this point)

8. The Applicant stated that Table 5.8 in chapter 5 of ES will clarify details.

9. The Examiner asked if the swept area is fed into the band model.

10. Natural England confirmed that the swept area is fed into the band model.

11. The Applicant agreed to provide further detail to explain how the 9km² figure was obtained.

b) R6 (Phasing) – whether it would be appropriate to limit the number of phases to two in the interests of clarity and certainty

12. Natural England outlined that based on their experience of previous offshore wind farm projects, it supports the Applicant's points on sub-phasing, but notes the applicant needs to address how it's defined within Deemed Marine Licences, as well as how it links to certain requirements. In previous projects the intertidal works commenced a year before the rest of the offshore works and was deemed a separate phase. Thus pre-construction plans and documentation were submitted for it, but limited to as relevant for that phase of construction. If the project is limited to just 2 phases this could not apply and it could cause issues during pre-construction sign off. In our written rep Natural England also asked for a requirement to provide notification when all phases have been constructed and the project was entering the operations and maintenance phase.

7. Schedules 11 and 12 – Deemed Marine Licences

Note: the references are to Schedule 11 (generation assets) unless otherwise indicated

a) Paragraph 10 – whether it is appropriate for decisions of the MMO to be subject to arbitration

13. These submissions related to the principle of arbitration.

14. The MMO delegation stated that only the Secretary of State or the government can transfer their authority granted under primary legislation. Natural England were one of the very few statutory bodies who can receive transfer of function / responsibility (i.e. it may not be possible to transfer those functions to an arbitrator). However, they also advised; it would be inappropriate for a public body to attend private hearings. That would not be legally practical or workable. Their functions were fixed by Parliament and they must be transparent in the application of those functions.

15. Natural England supported the submissions made by the MMO (whose decisions can be informed by Natural England advice) including the points made about an MMO decision not constituting a "difference" under a DML and the importance in transparent, accountable, public decision making.

16. Natural England stated that this is not only a matter of important principle, but also of potentially considerable practical consequence in this application because of the number of matters which have been left to the post-consent stage and in relation to which there may be disagreement.

17. Parliament's intention, in Natural England's opinion, is that the expert regulatory and advisory bodies it created and to whom it gave functions in the fields of that expertise should be the bodies which ultimately make decisions in the carrying out those functions and are publicly accountable for doing so. This should not be circumvented by arbitration where an expert body could be bound by the findings or judgment of an arbitrator inconsistent or wholly at odds with its own. If there are any exceptions to this self-evident intention, it would not be in cases such as this given the scale of the project and its potential environmental and ecological impacts.

18. Natural England submitted that it is no answer to the above that:
    a) the MMO/Natural England has a 'say' in the appointment of the arbitrator because that is only a 'say'; or
    b) that the MMO/Natural England has an opportunity under Schedule 13 to put its case because that is only an opportunity to put a case not to take the decision; or
    c) that an arbitrator with specific technical expertise could be appointed because the MMO/Natural England are more than capable of carrying out their own functions.

In relation to a decision under s.71 (3) (a) Marine and Coastal Access Act 2009 to refuse approval under a condition attached to a marine licence, the Applicant does have a route of redress if it disagrees with such a decision: judicial review. This is not a quick route, but it is arguably quicker than ever with the inception of the Planning Court and significant planning court claims. Contrary to what is contemplated by the Applicant, the Applicant need not exhaust any ombudsman or complaints procedure before making a judicial review claim- it can just get on with it.

19. Natural England also noted that this DCO has Deemed Marine Licences attached, but that the project as a whole will also require separate Marine Licences e.g. in relation to UXO. If the decision of the MMO is appropriate for the latter, then it stands to reason it is the same for the former.

20. It is true that in previous DCOs it has been decided that Natural England be subject to arbitration (Triton Knoll Offshore Wind Farm DCO 2013 and the Burbo Bank Extension Offshore Wind Farm DCO 2014). However, these decisions do not bind this Examining Authority or Secretary of State both of whom must exercise their own judgment. Further neither decision (including the underlying examination report) provided a reasoned justification for causing Natural England to be subject to arbitration, instead both included the provision on the basis of consistency. Consistency is a consideration, but Natural England respectfully invite the Examining Authority and Secretary of State to look at this issue in full and on its merits and, for the reasons given, not cause Natural England or the MMO to be subject to arbitration in respect of Hornsea Three if this DCO is consented.

21. It should also be said that none of the previous arbitration provisions have been exercised so we have no evidence of arbitration working effectively in practice in this context.

22. Natural England does not agree with the comparison the Applicant made to Section 106 Agreements for the same reasons stated by the MMO including the fact that in such cases the LPA agrees to be bound by an arbitrator.

c) 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 to approach on archaelogical exclusion zones

23. Natural England drew attention to the fact that the reference to micro-siting within the ES implies it will occur where possible, whereas the DML indicates it will definitely happen. The latter is welcome, however, it means that there is a difference between the assessment and what is stated within the actual licence.

24. Natural England also mentioned that ornithology and marine-mammal monitoring conditions 13 (1) (k) and (l) should be cross-referenced to Conditions 17, 18 & 19; and timings under condition 14 (1) should not be linked to 4 months prior to commencement.

25. The Applicant agreed that was reasonable and will make the necessary changes.

d) Condition 14 – timescale for MMO decisions

26. Natural England supports the MMO's position that the timescale for pre-construction documentation should be greater than 4 months and that it should be 6 months at least.

27. Natural England noted that there is a new provision that allows for extensions, but explained that experience has shown that extending the time scales often proves problematic. The Applicant will likely be ready for construction in line with the original timescales, so further extension will add significantly to their costs. Therefore, they are unlikely to agree an extension as is required under the current draft condition for an extension to be granted.

    (Therefore the recommendation would be to allow a longer time frame, rather than rely on extensions)

28. The Applicant highlighted that onshore, EIAs tend to bring similar conditionality and LPAs need to consult with bodies such as Natural England in eight weeks.

29. Natural England clarified that the significant difference between the onshore and offshore environment. The onshore impacts are better understood and easier to predict, whereas the offshore environment is always changing and our understanding of impacts is still evolving. In this particular case, Natural England has highlighted data gaps. This means that as things stand we won't be able to consider the full impact of the development until the pre-construction surveys, and consequently mitigation will not be defined until after consent. Discussions around mitigation are likely to be highly complex in some areas and may therefore require an extended time frame. In retrospect, Natural England would also note that the uncertainties of the offshore environment also lead to a wider Rochdale envelope for the offshore assessments. In addition that plans such as the SIP may require further HRA with additional consultation. This was not the case for the round 1 developments that the original 4 months timeframe was created for.

e) Conditions 17 to 23 - approach to surveys and monitoring

30. Natural England will respond, but are largely content with the updates from a conditional perspective.

31. Condition 18 (3), Noise Monitoring during Construction: Natural England asked for this requirement, so are pleased to note its inclusion. However Natural England also requested that this condition to state that if the impact is significantly more than the assessment in the ES then piling should stop until the impacts can be assessed and appropriate mitigation or licences secured. Natural England referred to experience of a recent project, in which the noise monitoring report indicated higher noise levels than those predicted in the modelling and there was no in built mechanism to stop the work or a clear process for addressing the issue.

The Applicant highlighted that the MMO have the power to stop construction activity but that they would give this suggestion further consideration. In addition to the representations given at the hearing, Natural England notes that, on the example we gave Natural England asked the MMO to stop the piling. However, the MMO did not stop the piling, and one of the reasons they provided for their decision was that the condition was not worded as such that the piling should be stopped if the noise levels were exceeded.

f) Schedule 12 (Transmission Assets), Condition 14 (1) - whether a layout in accordance with the development principles set out in the ES should be subject to approval

32. Natural England agree with Condition 14.

33. Natural England commented on past cases involving a four-month timescale and how it was extremely difficult to get everything signed-off in that period. Natural England also highlighted that projects do get 'sold on' so there is no guarantee that the applicant will be bringing the project forward, or that those currently involved in discussions will be involved in the next phase, therefore it is important to ensure that the DCO/DMLs are clear and that the envelope of the consented project is clearly stated.

8. Other DCO Matters

a) Schedule 13 (Arbitration Rules) – approach to costs and confidentiality

34. The Examiner: With reference to the internal consistency of paragraph 6, sub-section 4 on Page 169, the Applicant suggested we remove Schedule 13 detail (re: the arbiter) in light of those differences discussed earlier.

35. Natural England in agreement with the Applicant and MMO.

36. The applicant requested parties to share comments on the DCO revisions prior to the next round of hearings which we have now provided in the Annexes below.

ANNEX 1: NATURAL ENGLAND'S COMMENT AND PROPOSED REVISIONS IN RELATION TO SCHEDULE 13.

1. These revisions and tracked comments are made pursuant to the Applicant's invitation to other parties at the Hornsea Three ISH3 to submit to the Applicant its written comments in respect of Schedule 13 Arbitration Rules in the Revised Draft DCO tracked changed [REP1-127]

2. Natural England's comments are made without prejudice to its principled objections to arbitration applying to Natural England and the MMO as contained in its representations and also its submissions at ISH3.

SCHEDULE 13 Arbitration Rules

Primary objective

1.—(1) The primary objective of these Arbitration Rules is to achieve a fair, impartial, final and binding award on the substantive difference between the parties (save as to costs) within 4 months from the date the Arbitrator is appointed pursuant to article 36 of the Order.

(2) The Arbitration shall be deemed to have commenced when a party ("the Claimant") serves a written notice of arbitration on the other party ("the Respondent").

Time periods

2.—(1) All time periods in these Arbitration Rules will be measured in days and this will include weekends, but not bank or public holidays.

(2) Time periods will be calculated from the day after the Arbitrator is appointed which shall be either:

. (a) the date the Arbitrator notifies the parties in writing of his/her acceptance of an appointment by agreement of the parties; or
. (b) the date the Arbitrator is appointed by the Secretary of State.

Timetable

3.—(1) The timetable for the Arbitration will be that set out in sub–paragraphs (2) to (4) below unless amended in accordance with sub–paragraph 5(3).

(2) Within 14 days of the Arbitrator being appointed, the Claimant shall provide both the Respondent and the Arbitrator with:

- (a) a written Statement of Claim which describes the nature of the difference between the parties, the legal and factual issues, the Claimant's contentions as to those issues, the amount of its claim and/or the remedy it is seeking;
- (b) all statements of evidence and copies of all documents on which it relies, including contractual documentation, correspondence (including electronic documents), legal precedents and expert witness reports.

(3) Within 14 days of receipt of the Claimant's statements under sub–paragraph (2) by the Arbitrator and Respondent, the Respondent shall provide the Claimant and the Arbitrator with:

. (a) a written Statement of Defence responding to the Claimant's Statement of Claim, its statement in respect of the nature of the difference, the legal and factual issues in the Claimant's claim, its acceptance of any element(s) of the Claimant's claim, its contentions as to those elements of the Claimant's claim it does not accept;
. (b) all statements of evidence and copies of all documents on which it relies, including contractual documentation, correspondence (including electronic

Commented [CF1]: Whilst it is recognised that this process is intended to be quick, this is too little time to accomplish all the required material. 21 days would be a better compromise and might save time later in the process as best possible cases are put forward and issues narrowed as much as possible. Where there is no hearing the 4 month time limit will definitely not be compromised.

Commented [CF2]: Could the Applicant please clarify in what circumstances will the remedy be anything other than non-financial such as an approval?

Commented [CF3]: See time limit comment above

documents), legal precedents and expert witness reports;

. (c) any objections it wishes to make to the Claimant's statements, comments on the Claimant's expert report(s) (if submitted by the Claimant) and explanations for the objections.

(4) Within 7 days of the Respondent serving its statements sub–paragraph (3), the Claimant may make a Statement of Reply by providing both the Respondent and the Arbitrator with:

(a) a written statement responding to the Respondent's submissions, including its reply in respect of the nature of the difference, the issues (both factual and legal) and its contentions in relation to the issues;

(b) all statements of evidence and copies of documents in response to the Respondent's submissions;

(c) any expert report in response to the Respondent's submissions;

(d) any objections to the statements of evidence, expert reports or other documents submitted by the Respondent;

(e) its written submissions in response to the legal and factual issues involved.

Procedure

4.—(1) The parties' pleadings, witness statements and expert reports (if any) shall be concise. No single pleading will exceed 30 single-sided A4 pages using 10pt Arial font.

(2) The Arbitrator shall make an award on the substantive difference(s) based solely on the written material submitted by the parties unless the Arbitrator decides that a hearing is necessary to explain or resolve any matters.

(3) Either party may, within 2 days of delivery of the last submission, request a hearing giving specific reasons why it considers a hearing is required.

(4) Within 7 days of receiving the last submission, the Arbitrator will notify the parties whether a hearing is to be held and the length of that hearing.

(5) Within 10 days of the Arbitrator advising the parties that he will hold a hearing, the date and venue for the hearing will be fixed by agreement with the parties, save that if there is no agreement the Arbitrator shall direct a date and venue which he considers is fair and reasonable in all the circumstances. The date for the hearing shall not be less than 35 days from the date of the Arbitrator's direction confirming the date and venue of the hearing.

(6) A decision will be made by the Arbitrator on whether there is any need for expert evidence to be submitted orally at the hearing. If oral expert evidence is required by the Arbitrator, then any expert(s) attending the hearing may be asked questions by the Arbitrator.

(7) There will be no process of examination and cross-examination of experts, but the Arbitrator shall invite the parties to ask questions of the experts by way of clarification of any answers given by the expert(s) in response to the Arbitrator's questions. Prior to the hearing the procedure for the expert(s) will be that:

- (a) At least 28 days before a hearing, the Arbitrator will provide a list of issues to be addressed by the expert(s);
- (b) If more than one expert is called, they will jointly confer and produce a joint report or reports within 14 days of the issues being provided; and

- (c) The form and content of a joint report shall be as directed by the Arbitrator and must be provided at least 7 days before the hearing.

(8) Within 14 days of a Hearing or a decision by the Arbitrator that no hearing is to be held the Parties may by way of exchange provide the Arbitrator with a final submission in connection with the matters in dispute and any submissions on costs. The Arbitrator shall take these submissions into account in the Award.

(9) The Arbitrator may make other directions or rulings as considered appropriate in order to ensure that the parties comply with the timetable and procedures to achieve an award on the substantive difference within 4 months of the date on which he/she is appointed, unless both parties otherwise agree to an extension to the date for the award.

(10) If a party fails to comply with the timetable, procedure or any other direction then the Arbitrator may continue in the absence of a party or submission or document, and may make a decision on the information before him/her attaching the appropriate weight to any evidence submitted beyond any timetable or in breach of any procedure and/or direction having regard to the reason(s) for any lateness or breach..

(11) The Arbitrator's award shall include reasons. The parties shall accept that the extent to which reasons are given shall be proportionate to the issues in dispute and the time available to the Arbitrator to deliver the award.

Arbitrator's powers

5.—(1) The Arbitrator has all the powers of the Arbitration Act 1996, including the non-mandatory sections, save where modified by these Rules.

(2) There shall be no discovery or disclosure, except that the Arbitrator shall have the power to direct the parties to produce such documents as are reasonably requested by another party no later than the Statement of Reply, or by the Arbitrator, where the documents are manifestly relevant, specifically identified and the burden of production is not excessive. Any application and orders should be made by way of a Redfern Schedule without any hearing.

(3) Any time limits fixed in accordance with this procedure or by the Arbitrator may be varied by agreement between the parties, subject to any such variation being acceptable to and approved by the Arbitrator. In the absence of agreement, the Arbitrator may vary the timescales and/or procedure:

. (a) if the Arbitrator is satisfied that a variation of any fixed time limit is in the interests of justice; and

. (b) only for such a period that is necessary to achieve fairness between the parties.

(4) On the date the award is made, the Arbitrator will notify the parties that the award is completed, signed and dated, and that it will be issued to the parties on receipt of cleared funds for the Arbitrator's fees and expenses.

~~**Costs**~~

~~**6.** (1) The costs of the Arbitration shall include the fees and expenses of the Arbitrator, the reasonable fees and expenses of any experts and the reasonable legal and other costs incurred by the parties for the Arbitration.~~

~~(2) Where the difference involves connected/interrelated issues, the Arbitrator will consider~~

~~the relevant costs collectively.~~

~~(3) The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.~~

~~(4) The Arbitrator will award recoverable costs on the general principle that each party should bear its own costs follow the event, having regard to all material circumstances, including such matters as exaggerated claims and/or defences, the degree of success for different elements of the claims, claims that have incurred substantial costs, the conduct of the parties and the degree of success of a party.~~

~~**Confidentiality**~~

~~**7.** (1) The parties agree that any hearings in this Arbitration shall take place in private.~~

~~(2) The parties and Arbitrator agree that any matters, materials, documents, awards, expert reports and the like are confidential and shall not be disclosed to any third party without prior written consent of the other party, save for any application to the Courts or where disclosure is required under any legislative or regulatory requirement.~~

Commented [CF4]: These are both re-drafted below

Costs

6.

(1) Subject to sub-paragraph 3, the Undertaker shall bear the reasonable fees and expenses of the Arbitrator

(2) Subject to sub-paragraph 3, the general principle is that each party shall bear its own costs of the arbitration (such as the fees and expenses of any experts and any legal costs)

(3) The Arbitrator has the power (on application by one of the parties) to make a costs award against a party which has behaved unreasonably during arbitration and this unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense. An award may include the reasonable fees and expenses of the Arbitrator (or any part thereof) and/or the reasonable and proportionate costs of the innocent party (or any part thereof)

Commented [CF5]: Flexible on how the Applicant is referred

Commented [CF6]: Because 1) NE incurs very high (and usually unrecoverable) post consent costs which the costs of arbitration would only increase; 2) See Appendix 1 of PINS Advice Note 15 where in the appeal procedure the 'undertaker' bears these costs subject to the same exception as here ; and 3) of the polluter pays principle

Commented [CF7]: In these circumstances there is no need for the arbitrator to 'fix' or 'award' any costs or for any costs to be recoverable- the parties just bear their own

Confidentiality

7.

(1) Subject to sub-paragraphs (2) and (3), any arbitration hearing and documentation shall be open to and accessible by the public.

(2) The Arbitrator may direct that the whole or part of a hearing is to be private and/or any documentation to be confidential where it is necessary in order to protect commercially sensitive information

(3) Nothing in this paragraph shall prevent any disclosure of a document by a party pursuant to an order of a court in England and Wales or where disclosure is required under any

enactment

Commented [CF8]: The reasons for this overlap with arguments against the principle of arbitration. If there absolutely must be an arbitration procedure it (and the position of public bodies) must be open, transparent, and accountable/open to scrutiny

ANNEX 2: NATURAL ENGLAND'S COMMENTS ON THE REVISIONS TO THE DCO

Green- Change made, Natural England supports this change and considers the matter closed

Amber- Change made, however issue not fully resolved/further amendments needed

Red- change made, Major issues remaining

DCO ref	Natural England Comment	

Part 1 2, Interpretations commencement	This is a change Natural England strongly asked for. This amendment is appropriate and we support it.	
Part 1 2, Interpretations Site integrity plan	NE asked for the SIP to be included and for an in-principle SIP to be provided. We support this wording, though we have outstanding issues requiring resolution on the draft SIP	
Part 1 2, Interpretations Joint Bay	No Issues	
Part 1 2, Interpretations Removal of offshore Preparation works	This is linked to the change to remove offshore preparation works from the definition of commencement. Natural England does not believe this phrase was used elsewhere in the DCO/DML and therefore have no issues with its removal.	
Part 1 2, Interpretations Onshore Preparations works	No Issues	
Part 1 2, Interpretations SNCB	Natural England requested to only be referred to as SNCB, this definition is a result of that request. NE have no issues with the wording provided.	
Part 1 2, Interpretations Transition Joint Bay	This change was made in response to NE pointing out a consistency error. Change accepted	
Part 2, article 5 (11)	No issues.	
Part 5, article 18	No issues.	
Part 5, article 19	No issues	
Part 5, Articles 20	No issues	
Part 5 articles 21-23	No issues	
Part 5, article 25	No issues	
Part 5, article 33 and 34	This links to a question raised by the ExA about the original wording giving too much latitude and asking if this should be linked to a need to conduct ecological surveys. Mature trees may have ecological value to bats species so NE would expect surveys to be undertaken to determine this and EPS licences sought as appropriate, prior to the commencement of works.	
Part 5, article 35	No issues	
Part 5, Article 36	This issue has not advanced and remains a significant area of concern. NE has provided further comment on this issue within our oral representation and in Annex 1.	
Part 5, article 42	No issues	
Schedule 1		
Part 1, 1	MMO have requested a maximum generating capacity to help minimise post consent issues etc. NE would support this change.	
Part 1, 1 works 2 and 3 (d)	The DCO definition of cable circuits states that each circuit can be up to 3 cables that may be bundled or installed separately. With the works here allowing 6 cable circuits, this would equate to up to 18 export cables. ES has assessed up to a maximum of 6 and this should be the limit.	

	Additionally the number of cable crossings assessed is 44, yet the description of works describes one or more, this does not limit the crossings to the maximum number assessed. Cable crossings include the installation of cable armouring and it is, therefore, important that they be limited to the extent of impact assessed within the ES.	
Part 1 works 15	NE have provided our concerns on the disposal volumes. They need to be split by type of disposal and the figures do not add up. Applicant's clarification did not provide detail needed. Natural England also requests that the locations of disposal are defined and that a sandwave levelling assessment document provided and agreed prior to construction. This should be a conditioned requirement of the DMLs.	
Part 3, Requirement 2 (1)	NE advises that the parameters defined in the DCO/DMLs should clearly relate to the parameters assessed within the ES. Total rotor swept area is not a parameter in the collision risk modelling, therefore Natural England requests further clarification and would welcome further discussion on this point.	
Part 3, requirement, 2 (3)	No issues	
Part 3, requirement 3 (1)	We had asked for clarification. The applicant explained that the additional 2 structures were subsea structures along the export cable. After review of the ES project description Natural England is willing to accept this explanation.	
Part 3, requirement 5 (1)	No issues	
Part 3, requirement 6	Natural England had asked for the relevant SNCB to be named as a consultee on this document. Natural England welcomes the proposal to limit phases but would suggest further consideration is given to the appropriate number and terminology used. As detailed in our written summation of oral presentation above.	
Part 3, requirement 7 (1)	No issues	
Part 3, requirement 8	Change we requested, no issues	
Part 3, requirement 10 (1)	Change we requested, no issues	
Part 3, requirement 10 (2)	No issues	
Part 3, requirement 11	No issues	
Part 3, requirement 15	No issues	
Part 3, requirement 16	No issues	
Part 3, requirement 17	No issues	
Part 3, requirement 18	No issues	
Part 3, requirement 19	No Issues	
Part 3, Requirement 20	No issues	
Part 4, Requirement 21	No issues	
Schedules 11 and 12 (schedule 11 condition numbers used		

Part 1, 1 (1) interpretations	As per our response on DCO interpreations.	
Part 1, 2 (1) (a)	The reason provided in the supporting document states this is due to the ExA request to ensure sandwave material cleared within the SAC would be deposited within the SAC. Natural England is unclear as to how the proposed change secures this. NE's concerns relating to disposal volumes remain unchanged. The change here appears to simply move some wording from 1(e) to include it within 1(a) it does not specify that material extracted for sandwave levelling must remain within the SAC. (the change in schedule 12 is the same and does not address this concern).	
Part 1, 3	No issues	
Part 1, 6	Change requested by Natural England, no issues	
Part 1, 7-10	No issues	
Part 1 10	Natural England has provided further comment on Arbitration within our Oral Representation and in Annex 1	
Part 2, 2 (9)	This change addresses Natural England's concerns relating to scour volume. No Issues	
Part 2, 3, (1)	NE requests that all cable crossings required in the offshore array works are detailed here (if any). The maximum across both licences must total no more than 44.	
Part 2, 4	No Issues	
Part 2, 5 (3)	NE suggested this change. No issues	
Part 2, 6	This does not resolve NE's concerns relating to pre-construction timing. However, the chance to vary the time frames later is welcomed.	
Part 2, 7-12	No issues	
Part 2, condition 13 (1) (a)	In the Applicant's response to NE's comments they had stated they would change this to require MMO consultation. However, this change makes it clear MMO consultation is still not required now for **both** DMLs not just one. In the hearing the applicant confirmed further changes have been made and will be as per their agreements with Natural England and the MMO in the next version.	
Part 2 condition 13 (1) (f)	Links to condition 17 only, should also cross link to condition's 18 and 19 for during and post construction monitoring.	
Part 2 condition 13 (1) (h) (ii)	No issues	
Part 2 condition 13 (1) (k) (l)	Natural England advises that these conditions can be accepted, subject to the approval of the draft in principle monitoring plan. However, they should be linked to conditions 17-19 similar to condition (f) and the timing of submission should be around 18 months pre construction minimum, rather than the 4 months indicated by condition 14 (1).	
Part 2 condition 13 (2) and new (3)	No issues	
Part 2 condition 13 (5)	NE support the revised wording, subject to agreement on the draft outline site integrity plan	
Part 2 condition 13 (6)	No Issues.	
Part 2 condition 14 (1)	Note that new conditions 13 (1) (k) and (l) both have pre construction monitoring and should also not be limited to 4 months prior to construction (see above).	

Part 2 condition 14 (1)	Natural England have asked this to be amended to a minimum 6 months, based on experience of post consent sign off we believe this is a more realistic timescale for sign off of these documents. We are willing to engage in further discussion with the applicant and the MMO to identify a pragmatic approach and way forward.	
Part 2 condition 14 (2)	Four months is a realistic time to expect a decision on a preconstruction document. However, experience has shown that often this process requires the document to be updated and resubmitted multiple times.	
Part 2 14 condition (3)	Arbitration discussions. Experience shows documents often get sent back for amendments several times. This could lead to arbitration, rather than the document being corrected. Natural England has provided further comment on Arbitration in our oral representations and in Annex 1.	
Part 2 condition 14 (4)	No issues	
Part 2 condition 17	The condition has added marine mammal monitoring and secures ornithological and benthic annex I baseline surveys. Subject to our agreement on the IPMP. NE have no issues with the current wording, except that it refers only to condition 13 (f) when it should also cross reference to 13 (k) and (l) for the marine mammal and ornithological monitoring.	
Part 2 condition 18	1) Natural England finds the wording mostly acceptable with two exceptions: Cross referencing should also include 13 (k) and (l), as those plans may include some during construction monitoring. 2) Natural England are pleased to note the inclusion of the six week deadline we asked for on the noise monitoring. However, we reiterate our request to include reference to the need to halt piling if the monitoring shows a significant issue. See our written summation of the oral representation for further details. See the	
Part 2 condition 19	The benthic post construction condition implies only one survey may be conducted. In the event of impact to Annex I features then monitoring of recovery may be required for a number of years post consent. The IPMP and the condition should allow for this eventuality. Sandwave monitoring pre and post works is needed to validate the recovery of these Annex 1 features..	
Part 2 condition 20	No issues	
Part 2 condition 21	No issues	
Part 2 condition 22	No issues	
Part 2 condition 23	This implies that a single report will be provided after the full construction is complete. If the project is built in phases then it should be one report per phase, where cable protection is laid in that phase.	
Part 2 conditions 18-20 Schedule 12	NE notes that there is a disparity between the monitoring conditions in Schedule 11 and 12 and would welcome further discussion on this. As an additional point, there should be monitoring of sandwave recovery secured within this condition.	
Schedule 13		
Section 6 (4)	While this makes it clearer that costs of the developer are unlikely to be put on MMO or Natural England, this does not address our concerns. Under the polluter pays principle the public should not be expected to pay	

	the costs of arbitration. Natural England has provided our own wording for this provision in Annex 1.	
Section 7	The changes made to note our regulatory requirements to release information are acceptable. However, in order to promote good transparent environmental decision making this section should be amended to limit the requirement for confidentiality only to matters and materials that are commercially sensitive. Natural England have provided our own wording for this provision in annex 1 above.	
Matters not addressed in the updated DCO		
1	We raised in our Written representation the need for a new DCO condition to notify the regulators and SNCB once all phases of construction were complete and the project has entered the O&M phase.	
2	We asked in our written representation for the IPMP to include a requirement to re-run ornithological models as the first step in post consent monitoring. The ornithological monitoring conditions may need a minor amendment to note monitoring and modelling	