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Subject: MMO Hornsea Three deadline 5 submission
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Attachments: [EN010080 - Hornsea Project Three - MMO Deadline 5 submission.pdf](#)

Dear Sir/Madam

Please find attached the MMO's submission for the Planning Inspectorate's review of the proposed Hornsea Project Three offshore wind farm intended for deadline 5. I would be grateful if you could accept our response as a late submission, we were unable to meet the 23 January 2019 deadline date due to staff sickness.

Thank you.

Richard West

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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

23 January 2019

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 5. 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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1 Outstanding Clarifications as discussed at the Issues Specific Hearings (ISH)

1.1 Appeals Process

1.1.1 In response to a request made to the MMO at Issue Specific Hearing 3, the appeals process for MMO decisions is as follows;

There are two statutory appeals processes for decisions the MMO makes for marine licence granted under Part 4 of the Marine and Coastal Access Act (MaCAA). One system runs via the Planning Inspectorate (PINS), the other via the First Tier Tribunal.

Under the Marine Licensing (Licensing Appeals) Regulations 2011, an applicant can appeal against a decision of the MMO made under section 71 of MaCAA.

Those are decisions involving conditions the MMO attaches to any licence it grants, the rejection of a licence application, the inclusion in any licences of a period after which the licence is to expire or a requirement in the licence which serves to make the licence persist indefinitely or to persist for a specified period, or any conditions attached under section 71(5) which are to bind on those persons set out in within section 71(5) of the Act. This appeal route is initiated by the person determined to hear these appeals via the Secretary of State, through PINS.

Under the Marine Licensing (Notices of Appeals) Regulations 2011, there is an appeal route via the First Tier Tribunal for those on whom the following notices have been served:-

- a notice under section 72 of MaCAA to vary/suspend/revoke a licence,
- a notice under section 72(5) of MaCAA to extend the period of a suspension,
- compliance notices,
- remediation notices,
- stop notices, and
- emergency safety notices.

After a DML is granted, a refusal by the MMO to discharge a condition does not fall into either of these statutory appeals routes because they are not within the type of decision to which these regulations apply. In the absence of these statutory appeal routes, the options for a licence holder to challenge MMO decisions are via the complaints route, or via the judicial review process because this would be a challenge to a decision of a public authority not to discharge the condition.

The MMO would again like to emphasise that, since the organisation was vested in 2009, no judicial reviews have been instigated on a refusal to discharge DML conditions. The MMO has in all cases been able to successfully resolve issues between licence holders and the relevant stakeholders relating to condition



discharges.

2 The MMOs outstanding issues on the dDCO and dDMLs submitted at deadline 4 including comments on ExA Written Questions

2.1 Schedule 1 Development Consent Order

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

At deadline 3 the MMO made further comments regarding 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 for generation assets and transmission assets respectively. Here, the DCO should reflect the total volume, length and area of cable protection to be used within each designated site.

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 this is made explicit in the DCO, setting out the maximum volumes for each as highlighted in deadline 3.

The MMO welcomes the design specifications within the Markham's Triangle proposed Marine Conservation Zone (pMCZ) in schedule 11. The MMO recommend that similar information should be provided for the Special Areas of Conservations (SAC) within schedule 12. Furthermore, it is the MMO's understanding that works authorised under schedule 12 do not fall within the Markham's Triangle and its reference can be removed from schedule 12.

2.2 Schedules 11 and 12 – Deemed Marine License

2.2.1 Condition 9 – Amendments and Variations to the DML

The MMO recommend the condition wording is amended to remove the phrase 'or that other person that the subject matter of the agreement sought' from the condition. The MMO is unclear as to who this phrase makes a reference to and would like to emphasise that, as the regulator of any granted DML, it is only in the power of the MMO to grant non-material amendments or variations to the DMLs. As such, the MMO recommend that this phrase should be removed to avoid confusion.

2.2.2 Condition 10 – Arbitration (ExA Q2.13.1 and Q2.13.14)

In addition to our response submitted at deadline 3 to the matter of arbitration (which remains valid for this submission), the MMO would like to make the following additional comments.



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 an inappropriate form of binding arbitration as set out in Article 37 and Schedule 13.

The necessity for condition 10 within both schedules 11 and 12 remains unclear to the MMO as the MMO considers that Article 37 sufficiently set out the applicant's proposed arbitration process. The MMO questions why the applicant considers that there is a requirement to make it explicit that the arbitration provision shall apply to works within the marine environment in condition 10, when there appears to be no such requirement for terrestrial works.

2.2.3 Part 2 (13) (1) (h) (ii) (page 148) – Pre – construction plans and documentations

The MMO recommend the condition should be updated to make it explicit that any monitoring proposals must be submitted within the monitoring timeframes and not the pre-construction timeframes.

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

Condition 14 (1) sets out the requirement for the Applicant to submit all pre-construction documentation at least 4 months 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 commencement of works. The MMO highlighted that a 4 month pre-construction submission date would be inappropriate and even counterproductive, since the pre-construction sign off process is not always straight forward. From experience, the MMO highlighted that it is common for documents to require multiple rounds of consultation to address stakeholder concerns. This process can be very time consuming and the proposed four month submission time would not account for the additional time that the developer may require to update documents throughout the process. Despite the fact that the developer would endeavour to undertake front-loaded engagement and consultation with the relevant statutory and other consultees, in many cases significant issues remain to be resolved after submission, e.g. as a result of the developer deciding not to act on received advice from the MMO or other consultees. Additionally, front-loaded engagement prior to any submission is solely dependent on the willingness of the developer to engage with the MMO and the relevant stakeholders.

The provision with the condition 'unless otherwise stated or unless otherwise agreed in writing with the MMO' could provide additional flexibility around the submission deadline. In some cases however, the developer may 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 unless otherwise agreed with the MMO to allow sufficient time for repeat rounds of stakeholder



consultation if required.

Condition 14 (2) sets out the timescales for the MMO to make a determination. The MMO would like to highlight that it is their view that they should not be required to give make a determination of documentation submitted under condition 13 within a 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, and the MMO considers that the inclusion of such a condition is inconsistent with other DCOs. The MMO aims to make a determination for approval of pre-construction documents within agreed timescales, taking into consideration the developer's timescales for the commencement of construction and the agreement of appropriate stakeholders.

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, in the event that the MMO were unable to make its determination within the defined timescales, an extension between the MMO and the Applicant would need to be agreed or the MMO would be required to withhold its approval.

In summary, the MMO recommends that submission timescales are set at 6 months prior to the commencement of works and that condition 14 (2) is removed. This would allow sufficient time for the Applicant to design a construction programme that is fit for purpose, with sufficient contingency time to deal with unexpected complications during the authorisation process.

2.2.5 Part 2 (18) (3) (page 145) – Construction noise modelling (ExA Q2.13.23)

The MMO recommends that the following condition is 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 request for condition 18 to be amended has arisen from concerns around the condition wording previously used in DMLs being fit for purpose. The MMO is of the opinion that there is the potential for situations where a stop to piling could be required when impacts through monitoring are found to be greater than those assessed in the ES. A stop would therefore be required to ensure that the Applicant is compliant with current legislation, which may require a new European Protected Species licence for disturbance or damage to be obtained under such circumstances. As such, the MMO considers that the DML condition should be amended to enable this, mindful of the project location 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.

3 In Principle Monitoring Plan (IPMP)

3.1 The MMO acknowledges the Applicant's comments on the IPMP. The MMO's position remains however that the minimum monitoring requirements should be made explicit within the IPMP. As such, the MMO recommends that post-construction monitoring timescales should be clearly set out and include a requirement to carry out a minimum of three years post-construction monitoring unless otherwise agreed with the MMO.

The MMO advises that this recommendation is a standard approach. We acknowledge that in some cases less monitoring may be required, however this should be decided based on the results of the initial monitoring reports. To accommodate this, the MMO is content to include the phrase 'unless otherwise agreed with the MMO' to allow for this flexibility.

The MMO would like to highlight that sandwaves are a designated feature and monitoring of their recoverability must be appropriately secured in the IPMP. If the monitoring shows that the impacts are in excess of those that were expected, or if recoverability is less than anticipated, it may be that further mitigation/management measures are required or that further monitoring surveys could be required to validate the assumptions in the ES.

The MMO is currently reviewing the IPMP to confirm that the approach as set out therein is suitable for the recommended monitoring of sandeel habitat. Please see section 4.2.1 for further information.



4 Outstanding Environmental Matters

4.1 Benthic Ecology

- 4.1.1 Discussions on monitoring requirements for Benthic Ecology as set out in the IPMP have been ongoing. The Applicant submitted a response to the MMO's comments on the 9th January 2019. The Applicant confirmed that the IPMP will ensure pre-construction monitoring encompasses areas of Annex I habitat that may be at risk of secondary effects.

The Applicant has updated the post construction commitment within the IPMP to encompass monitoring for secondary effects on known reef features, which addresses comments on the IPMP submitted at deadline 3.

The updated IPMP is currently under review by the MMO.

4.2 Fish and Shellfish Ecology

- 4.2.1 In our Written Representation, the MMO 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 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 particular relevance 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 currently reviewing the IPMP to confirm whether this approach is acceptable. The MMO intends to provide further comment by deadline 6.



4.3 Underwater noise modelling and Fish Ecology

- 4.3.1 The MMO requested further underwater noise modelling based on the scenario of concurrent piling. Additional noise contours were provided by the Applicant, for which the MMO requested further clarifications. As a result the Applicant has provided a Herring Spawning Clarification Note which is currently under review. Following this review, the MMO will provide comments at the deadline 6.
- 4.3.2 It is noted that a fleeing animal model has been used for both marine mammals and fish (Subsea Noise Technical Report, paras 3.2.2.5 and 3.2.2.8), however the MMO requests that the Applicant presents further evidence to support the use of such a model. The Applicant provided a clarification note on 9 January 2019 which included updated underwater noise modelling on concurrent piling based on a stationary receptor. This clarification note is currently under review with the MMO.
- 4.3.3 Para 6.3.1.5 of Subsea Noise Technical Report: the MMO requested further explanation as to why the linear fit was considered to give a worst-case estimate, as shown in Figure 6.1., with examples of alternatives to the linear fit to support the conclusion that a linear fit represented the worst case. The Applicant provided further clarification at deadline 2 which is currently under review by the MMO.
- 4.3.4 Para 6.3.1.6 of Subsea Noise Technical Report: The MMO requested further clarification on what was meant by 'extrapolation' in the report. Furthermore, the Popper *et al.* (2014) criteria for continuous sources were based on the SPL rms metric (not SELcum as suggested in the report). Following a response from the Applicant, the MMO pointed out that the predicted source level for the 170 m rotor diameter is 158.5 dB re 1 µPa (RMS) at 1 m (as per Table 6.2). This is actually above the TTS threshold (of 158 dB rms for 12 h) for fish with swim bladders involved in hearing, although the potential risk of a species remaining close to the source for 12 hours to experience TTS would be low. It was clear to the MMO from the report that the predicted values were extrapolated as SELcum values, however the meaning of 'extrapolation', remains unclear. The Applicant provided further clarification at deadline 2 which is currently under review.



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