From: West, Richard [mailto:Richard.West@marinemanagement.org.uk]
Sent: 08 February 2019 16:27
To: Hornsea Project Three
Cc: Brown, Emma; Felicity Browner; Gibson, Alan; Southwood, Lisa
Subject: Hornsea Project Three deadline 6 submissions

Dear Kay

Please find attached the MMO's submissions to the Planning Inspectorate for Deadline 6 of the Hornsea Project Three offshore wind farm examination. Please get in touch if you have any issues opening the attached documents.

Thanks

Richard

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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

08 February 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 6. 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:

1 Written Representation on Environmental Matters

1.1 Coastal Processes

1.1.1 Scour and Cable protection

The MMO has previously raised a number of concerns in relation to scour and cable protection within the array area associated with the silty sediments and deeper structure locations either in Outer Silver Pit or Markham's Hole. Following a number of clarification notes provided by the Applicant during Examination, the MMO seeks assurance that the scour assumptions and processes in these areas are robust and appropriate to the design selected for construction. At present, the assessment that the applicant has provided is incomplete and not site specific, since potential scour depths for each foundation structure have not been identified. The Applicant has highlighted that the required information may not be available until closer to the construction date, therefore the MMO proposes the reintroduction of swath bathymetry monitoring of scour pits at the sites with high mud fractions to offset this uncertainty. This requirement can be secured in the DML conditions or included in the In Principle Monitoring Plan.

1.2 Site Integrity Plan

The MMO welcomes the submission of an In Principle Site Integrity Plan. This is recognised to be a working document which would be revised post-consent to include updated design parameters following award of Contract for Difference electricity generation capacity. The MMO has the following preliminary comments to make on the In Principle Site Integrity Plan (version 2.0) submitted by the Applicant at Deadline 4.

The MMO recommends that agreement of the final Site Integrity Plan should take place at least 6 months prior to commencement of any activities likely to impact upon the Southern North Sea Site of Community Interest (SNS SCI) unless otherwise agreed in writing. Mitigation to limit the risk of impacts upon harbour porpoise should be explicit and detail how mitigation measures would work to reduce such impacts, with suitable evidence to support such conclusions. The developer is encouraged to liaise with all relevant industries undertaking noise inducing activities within the SNS SCI to ensure that potential in-combination effects are effectively mitigated.

It is acknowledged that an unexploded ordnance (UXO) clearance campaign would be expected to form part of a separate marine licence once detailed information is available post-consent. Assessment of UXO underwater noise impacts would be carried out as part of the determination process for such a licence following validation.

1.3 Hornsea Three Noise Clarification – Herring Spawning

In our Section 56 response, the MMO questioned whether the proposed underwater noise modelling presented in the ES reflected the worst – case scenario in light of concurrent

piling being discussed as a potential option. Following extensive discussions with the Applicant, a clarification note has been provided on herring spawning which was submitted at Deadline 4. Please see the MMO's comments below.

The MMO requested further information on concurrent piling from the Applicant in our Deadline 3 response. Following the review of the clarification note, the MMO is content that all requested information has been provided.

The MMO is content that the clarification note reflects the worst-case pilling scenario. The modelling was based on a stationary fish receptor and assumes two monopiles being installed simultaneously using a maximum design scenario for hammer energy of 5,000kJ in the north-west corner of the Hornsea Three array area.

The MMO is content that the updated noise modelling has addressed our previous concerns. Based on the predicted SELss received levels at Flamborough Head the modelling provides reassurance that the risk of significant impact on spawning herring from concurrent piling operations is likely to be low.

The MMO can confirm that based on the current design scenario as assessed in the ES, no piling restriction to reduce potential impacts on herring spawning would be required.

1.4 In Principle Monitoring Plan

1.4.1 Minimum monitoring requirements

The MMO's position remains as outlined in our Deadline 5 response that the minimum monitoring requirements of 3 years should be made explicit within the IPMP.

1.4.2 Monitoring of Sandeel habitat

The MMO has now reviewed the Applicants proposed methodology for the monitoring of preferred sandeel habitat. Please see our comments below:

In principle, the MMO support the monitoring of preferred sandeel habitats using geophysical surveys and associated monitoring of sandwave clearance activities. The MMO request further clarification from the Applicant as to whether all preferred sandeel habitats, as identified in the Hornsea Project Three baseline characterisation surveys, will be monitored or just sandwaves along the offshore cable corridor.

Sandeel preferred habitat characterisation information presented in the ES shows that the habitats which are likely to support sandeels are most likely to be located within the northern half of the array area. The proposed sandwave clearance monitoring presented in the IPMP does not appear to cover this location.

Given the lack of proposed sandwave clearance monitoring within the array area, the MMO recommends that any benthic monitoring programme for the array should be aligned

with monitoring of preferred sandeel habitat and utilise PSA and grab data to monitor sandeel habitats and presence. Potential disturbance, temporary smothering/covering of suitable sediments from construction activities and installation of turbine foundations together with any associated potential recovery/return of the original suitable sandeel habitat and associated sediments within the array would not be identified by the proposed monitoring.

The MMO acknowledges that the ES demonstrates some correlation between sandwave locations and suitable sandeel habitat within the array area and the value in monitoring preferred sandeel habitat within the export cable corridor.

2 Written Representation on the revised Development Consent Order (DCO) and the Deemed Marine License (DML) submitted at Deadline 4

2.1 Schedules 11 and 12 – Deemed Marine License

2.1.1 Appeals process

The MMO thanks the Applicant for the early opportunity to comment on the modified Appeals process in the Marine Licensing (License Application Appeals) Regulations 2011 put forward by the Applicant to the Examining Authority on a 'without prejudice' basis for submission at Deadline 6. The MMO received the proposed Appeals modifications via email on 31 January 2019 (see Annex 1).

The MMO would like to reiterate our position as set out in our Written Representation at Deadline 3 on the previously proposed arbitration provisions, schedule and determination timescales. The MMO remains unclear as to the need for the arbitration provision as currently set out in the DCO or this amended appeals process. The MMO is not aware of any detailed explanation other than what was included in the explanatory memorandum which sets out a cogent argument as to why the provisions (arbitration and the Appeal process modification) are necessary. The MMO is aware of the Applicant's intention to propose a process to deal with matters of dispute in a timely manner to prevent unnecessary delays, however it remains unclear how this process could apply to situations where the MMO would be minded to refuse or withhold their approval. Additionally, as the Applicant is persistent in their argument that a 4 month timescale provides a sufficiently long period to get approval for pre-construction documentation due to their commitment to undertake extensive pre-submission engagement, it is unclear to the MMO where this concern regarding delays has originated from. Furthermore, no such requirement was considered to have been necessary for other projects such as Hornsea Project One or Two.

Following review of the proposed modified appeals process, the MMO questions the necessity to extend an appeal route which is not intended to apply to decisions of this

nature. The MMO does not agree that this process would provide a more timely process than a Judicial Review (JR), given that the JR process requires that a timetable would be followed by the claimant and the defendant. Any decision of the Court would be dependent on court availability which is out of the control of either party in the JR process, but the same situation would apply with any other appeals process. Any claimant can apply to the Court to have the JR application given urgent consideration, together with an explanation as to why the case is required to be determined within a certain time scale.

Having reviewed the proposed amendment to the MMO Appeal process set out in Annex 1, the MMO does not agree that this proposal would provide a more timely route than a JR. Additionally, the MMO considers that the amended appeals process is unnecessary given there is an established route by which the MMO's decision can be challenged and to date, such a process has not been required for the discharge of pre-construction documentation.

The MMO does not consider that a set four month time limit for application determinations as described in Annex 1 would be appropriate, given that the time taken to discharge conditions is a factor of the quality of such documents received from the licence holder and the resolution of any arising issues from relevant stakeholders. Holding post-consent document approval processes to a fixed timescale has the potential to pressure the regulator into accepting sub-standard reports within an entirely arbitrary timescale or face the potential of an appeal. Should the Secretary of State choose to adopt the Applicant's proposed Schedule 13 of the draft DCO, this would come with the potential of costs being awarded against a public sector body with known financial constraints and could create additional pressure on the regulator to accept condition discharge documents prior to the appropriate resolution of any issues arising from them.

2.1.2 Condition 2 – Cable protection

Following the MMO's oral representation during ISH 5 and 6, the MMO requested further explanation as to whether the draft DMLs permitted a maximum of 10% of cable protection to be only deployed during construction or to be deployed also during the operational phase of the OWF. The MMO would expect to be consulted on additional cable protection measures following the completion of each construction phase, in the event that the deployment of additional cable protection was required. Since the operational lifetime of a project can be 25 years or longer, it is not possible to assess the impacts of cable protection on designated sites and the marine environment this far in the future. As such the impact of new cable protection on the environment should be reassessed if additional cable protection is likely to be required.

The MMO recommends that DML conditions including references to cable protection should be amended to explicitly confirm the maximum volume of the 10% cable protection, the maximum volume of the 25% cable protection replenishment, and that reference is made to a maximum of 10% cable protection which may only be deployed during the

construction phase unless otherwise agreed by the MMO.

2.2 Schedule 13 – Arbitration Schedule

Government guidance on the NSIP pre-application process for the Planning Act 2008[1] states that early engagement with statutory consultees includes benefits such as helping *'the applicant identify and resolve issues at the earliest stage which can reduce the overall risk to the project further down the line',* therefore '*enabling potential mitigating measures to be considered and, if appropriate, built into the project before an application is submitted'*. The guidance also reminds applicants that '*Many proposals will require detailed technical input, especially regarding impacts, so sufficient time will need to be allowed for this'*. The MMO notes that the Examination process for the project has highlighted a number of areas where consultation advice from stakeholders has not been acted upon and potential mitigation measures have yet to be agreed. Important document detailing impacts of the proposed development have been submitted by the Applicant only in the application and examination process, in some cases with insufficient time available to review and consult upon the reports prior to Issue Specific Hearings.

The inclusion of a Schedule detailing such a prescriptive process for resolution of potential issues post-consent in a draft DCO and DMLs administered by the MMO is unprecedented. The MMO questions why such an issue resolution process should be required in an application process intended to seek issue resolution and the agreement of in-built mitigation measures to address potential impacts of an NSIP prior to application submission.

In both Issue Specific Hearings relating to the draft DCO, the Applicant has claimed that the current appeals process for Judicial Review of DML condition discharge disputes would be a potentially long process for the project which could lead to unacceptable delays incurring significant financial costs to the construction of the wind farm. The MMO notes that it has administered deemed marine licences for a number of offshore wind farm projects within its jurisdiction since the organisation was vested in 2009. Within that time, the MMO has a 100% record of managing to resolve issues relating to condition discharges for offshore wind farm deemed marine licences through negotiation between relevant stakeholders and licence holders without recourse to its exiting appeal mechanism. The MMO again questions why the Applicant considers that such a prescriptive process should be necessary.

Any disputes on decisions relating to the discharge of duties of a public body are intended to be resolved in a fair, open, and transparent manner and to provide relevant stakeholders with an opportunity for their opinions to be heard. The existing process for

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418009/150326_Pre-Application_Guidance.pdf. DCLG, March 2015.

Judicial Review of MMO decisions relating to the discharge of conditions on deemed marine licences has been designed to meet these requirements and, for the reasons outlined above and in previous written representations in the Examination process, the MMO does not consider that there is a need to change such a process for this or any other NSIP project Applicant.

The Applicant has asked on a number of occasions if the MMO would provide comments on the proposed Arbitration Schedule (Schedule 13 of the draft DCO) on a 'without prejudice' basis. Notwithstanding the comments above regarding the appropriateness of such a Schedule in the draft DCO, the MMO puts forward the following comments on the Schedule proposed. The MMO has clearly set out its reasons why the proposed timescales within the Schedule are considered to be inappropriate in previous written representations. No further progress on timescale issues has been made between the MMO and the Applicant since the representations were submitted, therefore discussion on timescales for decision making and the arbitration process have not been repeated here.

Paragraph 1(2) of the Schedule sets out an internal process through which '*The Parties will first use their reasonable endeavours to settle a dispute amicably through negotiations undertaken in good faith by the senior management of the Parties*.' This describes the process through which disputes are currently considered by both the MMO and licence holders and the MMO does not consider it necessary for the Schedule to explicitly refer to this internal escalation protocol.

Paragraph 2(1) of the Schedule includes weekends in the measurement of timescales. The MMO advises however that public bodies including the MMO, Natural England, the Centre for Fisheries and Aquaculture Science (Cefas) are not available to provide advice to applicants outside of their weekday operating hours. Set timescales in terms of the number of working days would be more appropriate here.

Paragraph 2(2)(b) states that an Arbitrator would be selected by the Secretary of State. The MMO seeks assurance that such an Arbitrator would have the necessary legal powers and relevant skills and experience to act as a decision maker for deemed marine licence condition discharge issue resolution.

Paragraph 4(1) sets out that '*no single pleading, witness statement or expert report will exceed 30 pages of A4*'. In the MMO's experience, condition discharge documents are often necessarily complex to ensure that the evidence or data presented are clear, thoroughly examined and appropriately referenced. The MMO does not consider that such a restriction in document size would be appropriate given the complexity of post-consent issues requiring condition discharge on deemed marine licences.

Paragraph 6 on Costs states that '*the Arbitrator will award recoverable costs on the general principle that each party should bear its own costs'*. The MMO considers that any benefit of an expedient arbitration process would only be felt by the Applicant.

The MMO is, regardless of any proposed changes to its decision appeal processes, bound by the Marine and Coastal Access Act 2009 to administer the discharge of marine licence conditions. There would be no benefit to the MMO in calling for arbitration on a dispute raised on such a matter. Given that the entire benefit of calling for arbitration would be upon the licence holder in seeking a faster route through dispute resolution, the MMO considers that it would be appropriate for the Applicant to bear the costs of such a process.

The MMO concurs with the statement made by Natural England in their representation to ISH6, namely that '*Bearing in mind the relative disparity in resources between the parties, the fact that public bodies are publicly funded, and the fact any arbitration would be a relative benefit for the Applicant (apparently said to be saving it time and money compared with the judicial review procedure) fairness requires that the Applicant should bear these costs'*. The only acceptable caveat to such a situation would be that parties bear their own costs where a party has behaved unreasonably and that unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense. The MMO recommends that the terms 'unreasonably' and 'unreasonable behaviour' should be clearly defined and agreed by all parties bound by any such Schedule.

In terms of confidentiality (Paragraph 7 of the Schedule), the MMO remains uncomfortable with 7(2) which states '*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*.' This has the potential to be contrary to the requirement for open and transparent decision making in the regulatory process of Government bodies. The MMO would be content for commercially sensitive information to be redacted from documentation submitted to and subsequently published by the Arbitrator, subject to the requirements for commercial confidentiality in the Freedom of Information Act 2000. The assumption that hearings should be held in public with appropriate representation from relevant stakeholders is, however, considered to be an important principle of open government decision making.

Annex 1:

"2011 Regulations" means the Marine Licensing (Licence Application Appeals) Regulations 2011

Requirements, appeals, etc.

[Where the MMO refuses an application for approval under condition **Error! Reference source not found.** of Part 2 of Schedule 11 or condition **Error! Reference source not found.** of Part 2 of Schedule 12 and notifies the undertaker accordingly, or the MMO fails to determine the application for approval within four months commencing on the date the application is received by the MMO, the undertaker may by notice appeal against such a refusal or non-determination and the 2011 Regulations shall apply subject to the modifications set out in sub–paragraph 0.

The 2011 Regulations are modified so as to read for the purposes of this Order only as follows—

For regulation 4(1) (appeal against marine licensing decisions) substitute—

"A person who has applied for approval under condition **Error! Reference source not found.** of Part 2 of Schedule 11 or condition **Error! Reference source not found.** of Part 2 of Schedule 12 of the Hornsea Three Offshore Wind Farm Order 20[ ] may by notice appeal against a decision to refuse such an application or a failure to determine such an application."

For regulation 7(2)(a) (contents of the notice of appeal) substitute—

"a copy of the decision to which the appeal relates or, in the case of non-determination, the date by which the application should have been determined; and"

In regulation 8(1) (decision as to appeal procedure and start date) for the words "as soon as practicable after" there is substituted the words "within the period of [2] weeks beginning on the date of".

In regulation 10(3) (representations and further comments) after the words "the Secretary of State must" insert the words "within the period of [1] week"

In regulation 10(5) (representations and further comments) for the words "as soon as practicable after" there is substituted the words "within the period of [1] week of the end of".

In regulation 12(1) (establishing the hearing or inquiry) after the words "("the relevant date")" insert the words "which must be within [14] weeks of the start date".

For regulation 22(1)(b) and (c) (determining the appeal—general) substitute—

"(b)allow the appeal and, if applicable, quash the decision in whole or in part;

(c) where the appointed person quashes a decision under sub-paragraph (b) or allows the appeal in the case of non-determination, direct the Authority to approve the application for approval made under condition **Error! Reference source not found.** of Part 2 of Schedule 11 or condition **Error! Reference source not found.** of Part 2 of Schedule 12 of the Hornsea Three Offshore Wind Farm Order 20[ ]."

In regulation 22(2) (determining the appeal—general) after the words "in writing of the determination" insert the words "within the period of [12] weeks beginning on the start date where the appeal is to be determined by written representations or within the period of [12] weeks beginning on the day after the close of the hearing or inquiry where the appeal is to be determined by way of hearing or inquiry".]