From: Brown, Emma [mailto:Emma.Brown@naturalengland.org.uk]
Sent: 08 February 2019 17:22
To: Hornsea Project Three
Subject: Hornsea Project Three Deadline 6 Submissions

Good Afternoon,

Please find Natural England's Written Submissions for Deadline 6 of the Hornsea Project Three Offshore Windfarm examination attached.

This includes our written summaries of the Offshore Ecology and DCO Issue Specific Hearings, along with several Annexes which are provided in response to requests made by the Examiner.

Please note Natural England are not providing a response to the Examiners' questions relating to Markham's Triangle MCZ within this submission.

Natural England has reviewed the relevant documents in consultation with JNCC and have prepared a response but we have subsequently received an email from the Applicant offering further clarification. Unfortunately it has not been possible for us to consider this new information in time for today's deadline, but we intend to give this further consideration and provide a response in due course.

Kind regards,

Emma

Emma Brown
Marine Senior Adviser
Yorkshire & Northern Lincolnshire
Natural England

Lateral, 8 City Walk, Leeds, LS11 9AT
T: 02080268543 M: [redacted]

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.

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 6

Natural England's Written summary of Representations made at ISH6 DCO Hearing

Dated 07th February 2019

Hornsea Project Three
ISH 6: DCO 30th January 2019
Written Summary of Natural England's Representations.

AGENDA ITEM 6. Schedules 11 and 12- Deemed Marine Licences

b) Paragraph 10- whether it is appropriate for decisions of the MMO to be subject to arbitration – consideration of alternative appeal mechanisms

With reference to the two statutory appeal mechanisms summarised on page 4 of the Marine Management Organisation's (**"MMO"**) deadline 5 submission, Natural England (**"NE"**) noted that neither applies to decisions by the MMO in relation to approvals under conditions. One cannot appeal against such a decision and the remedy in such circumstances is judicial review. The Applicant confirmed this is correct.

NE highlighted two matters for consideration on this point.

First, it would circumvent the intention of the Secretary of State who made the relevant regulations and Parliament which positively approved them that no appeal would lie from an approvals decision under a condition.

It was not being argued by the Applicant that the failure to include such a decision in either appeal mechanism was due to a mistake. Indeed this would be highly unlikely because, as stated by NE, in making these Regulations the Secretary of State and Parliament were required to have regard to very few sections of the Marine and Coastal Access Act 2009: essentially sections 71-73 and 90-92 which contain the licensing powers from which an appeal can lie. For the Secretary of State and Parliament to inadvertently overlook an approval under condition decision would be a glaring error that, absent any evidence or indication in support, cannot be reasonably sustained. Both intended for such approval decisions not to be subject to appeal and that should not be frustrated by this DCO/DML.

Second there is no need for an appeal mechanism because there is judicial review (which incidentally has never actually been required because, as stated by the MMO on p4 of its deadline 5 submissions, all cases have been successfully resolved).

Submissions have been made previously about judicial review in ISH3 and NE's corresponding deadline 3 submission.

An alternative appeal mechanism is a new point raised by the Applicant and the details have not been circulated. Accordingly NE reserves the right to make any additional submissions once that has taken place.

c) Condition 2 – new limits on number of cable crossings and on works within Markham's Triangle

Natural England highlighted that Markham's Triangle was now a recommended 'r' MCZ, rather than a pMCZ.

Natural England were unable to confirm the likely timescales for the designation (or otherwise) of the latest tranche of MCZs and highlighted that this was a Defra led process.
The MMO suggested that the decision may be made by Summer 2019, but that this was not confirmed and subject to change.

Natural England also referred back to discussions held on the previous day (ISH 5) and Natural England's question as to whether the volume of cable protection permitted would reduce if few cables were installed.
[N.B. Natural England's concern is that the volumes of rock protection are calculated the total possible length of the cable, rather than 10% of each individual cable. This could in theory mean that more than 10% of an individual cable could be protected, and in a build scenario fewer cables were ultimately installed, then in theory, cable protection could be placed along significantly more than 10% of an individual cable length. Natural England is concerned that the implications of this (such as barrier effects) may not have been captured in the current WCS assessment.]

The applicant advised that they would be providing further clarification relating to areas and volumes of scour and cable protection at Deadline 6.

h) Condition 18 – (Construction monitoring) whether provision should be made for piling to stop if noise exceeds predictions

Natural England continues to advocate for the inclusion of this provision.

AGENDA ITEM 9. Other DCO Matters

a) Schedule 13 (Arbitration Rules)- update on discussions

NE noted that progress had been made since ISH3 through the Applicant accepting some of changes proposed by NE in Annex 1 of its ISH 3 deadline 3 submission.

[Incidentally, although NE does not consider it necessary to substantively respond to the Applicant's allegations against it of obstructionism made in ISH6, it notes the inconsistency shown by the Applicant's subsequent own comments that NE was the only interested party that proposed such 'without prejudice' changes following the Examining Authority's direction to do so at the end of ISH3.]

NE made the following two submissions in relation to the parts of Schedule 13 which are not agreed, for the most part this is paragraph 6 of Schedule 13 relating to arbitration costs.

First the Applicant should, subject to the exception to the general rule contained in NE's second submission, bear the costs of the arbitration (e.g. the reasonable fees and expenses of the arbitrator) because:

a) public bodies incur very high post consent costs (which for NE at least are unrecoverable) which the costs of the arbitration, above and beyond public bodies bearing their own costs, would unacceptably increase. 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

b) Appendix 1 of PINS Advice Note 15 (on which the Applicant relies for its own arbitration procedure) provides that the undertaker should bear the costs for the arbitration subject to the same exception which NE says should apply here. No good reason has been given for 'cherry picking' this out of the Appendix 1 procedure because the situations giving rise to an appeal in that appendix (see Paragraph 4 of Appendix 1 of PINS Advice Note 15) are the same we are contemplating here; and

c) of the polluter pays principle

Second, the inclusion of the catch-all phrase *"having regard to all material circumstances, including…"* means those parts of that sub-paragraph which the Applicant had seemingly agreed to exclude (see those crossed-out clauses in the draft DCO and also 'costs following the event' which has been deleted altogether in the draft DCO for deadline 4) could actually still be argued by the parties and taken into account by the arbitrator and the Applicant did not deny this at ISH6.

The only exception to the general rules that the Applicant bears the costs for the arbitration (reasonable fees and expenses of the arbitrator etc.) and the parties bear their own costs should be where a party has behaved unreasonably and that unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense.

This test is fair, certain, and familiar (it is taken from the Planning Practice Guidance and parties will be familiar with the types of behaviour- procedural and substantive- which will be held to be unreasonable). Also to commend it is the fact that it is referenced in Appendix 1 of PINS Advice Note 15 as a consideration to which a decision maker must have regard when determining costs.

In addition (this was not previously submitted at ISH3 because the exact terms of Schedule 13 was not dealt with in that hearing), NE submits that the reason why it is important that costs are not awarded on the basis of e.g. the degree of success of the Applicant is:

a) for the same reasons given above in relation to the costs of the arbitration; and

b) it would be wrong, subject to the exception of unreasonableness above, for a statutory body to be exposed to such cost risks when it is simply standing by good faith decisions taken in the public interest in the performance of its statutory functions conferred by Parliament, especially where the award would be made by a tribunal other than a court. This would not only have a punitive effect on public bodies, it might also have a 'chilling effect' on the exercise of those statutory functions[1]. This would not be in the public interest and would have the effect of undermining the protection of the environment, including those sites which it is incumbent on the UK to protect, preserve and enhance.

Below is how NE believes Schedule 13, paragraph 6 should be drafted (extract from Annex 1 of NE's deadline 3 submission in relation to ISH3):

"Costs

6.

—(1) Subject to sub-paragraph 3, the Applicant/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)"

AGENDA ITEM 8. Code of Construction Practice

f) Mechanism for approval of matters within the CoCP

Natural England highlighted that their remit in relation to the discharging of DCO/DML conditions and associate plans is an advisory one and it is the regulators responsibility to provide the necessary sign off/condition discharge. As the CoCP and the PFG mitigation plan are DCO requirements the Local

[1] It is recognised in other legal contexts that adverse costs awards should not be made in such circumstances, except where it would cause substantial financial hardship to the successful private party or where the public body has acted unreasonably (See *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] 1 WLR 1508 per Lord Neuberger at §71-76: *"... In a case where regulatory or disciplinary bodies…carrying out regulatory functions, have acted reasonably in opposing the grant of relief, or in pursuing a claim, it seems appropriate that there should not be a presumption that they should pay the other party's costs. ..."*

Planning Authority would usually discharge the condition, with advice from Natural England.

Natural England were unclear if there was a particular reason for this unusual approach and agreed to take this matter away for consideration and provide definitive comment at Deadline 6.

h) Onshore ecology and nature conservation

Natural England highlighted they were seeking feedback from their specialists on key areas of the CoCP and would provide comments at deadline 6.