



Application by Orsted Hornsea Project Three (UK) Ltd for an Order granting Development Consent for the proposed Hornsea Project Three Offshore Wind Farm

The Examining Authority's schedule of changes to the draft Development Consent Order

Issued on 26 February 2019

Ref	ExA's suggested changes	ExA's comments
Articles		
5(3) to 5(6)	<p>(3) The undertaker shall consult the Secretary of State before making an application for consent under this article by giving notice in writing of the proposed application and the Secretary of State shall provide a response within four weeks of receipt of the notice.</p> <p>(4) The Secretary of State shall consult the MMO before giving consent to the transfer or grant to another person of the whole or part of the benefit of the provisions of the deemed marine licences.</p> <p>(5) The Secretary of State shall determine an application for consent made under this article within a period of eight weeks commencing on the date the application is received by the Secretary of State, unless otherwise agreed in writing with the undertaker.</p> <p>(6) Where the Secretary of State is minded to refuse an application for consent made under this article and notifies the undertaker accordingly, or the Secretary of State fails to determine the application for consent under this article within the period prescribed in paragraph (5), the undertaker may refer the matter for determination in accordance with article 37 (arbitration).</p> <p><i>Subsequent sub-paragraphs renumbered accordingly</i></p>	<p>The issue of whether it would be appropriate for a decision of the Secretary of State relating to the transfer of the benefit of the Order to be subject to arbitration has been explored in the examination. The ExA has sought evidence in relation to the justification for the approach suggested by the Applicant.</p>
37	<p>(1) Any difference under any provision of this Order, other than matters within (2) or unless otherwise provided for, shall be referred to and settled in arbitration in accordance with the rules at Schedule 13 of this Order, by a single arbitrator to be agreed upon by the parties, within 14 days of receipt of the notice of</p>	<p>The issue of whether it would be appropriate for</p>



	<p>arbitration, or if the parties fail to agree within the time period stipulated, to be appointed on application of either party (after giving written notice to the other) by the Secretary of State.</p> <p>(2) Where the referral to arbitration under paragraph (1) relates to a difference with the Secretary of State, in the event that the parties cannot agree upon a single arbitrator within the specified time period stipulated in paragraph (1), either party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator. Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration.</p> <p>(3) Should the Secretary of State fail to make an appointment under paragraph (1) within 14 days of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.</p>	<p>a decision of the Secretary of State relating to the transfer of the benefit of the Order to be subject to arbitration has been explored in the examination. The ExA has sought evidence in relation to the justification for the approach suggested by the Applicant. The amendment reflects submissions made by the MMO.</p>
38(4)	<p>(4) Where the MMO refuses an application for approval under condition 13 of Part 2 of Schedule 11 or condition 14 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 paragraph (5).</p>	<p>The question of whether it would be appropriate for conditions under these DMLs to be treated differently from conditions under other marine licences which are not subject to an appeal mechanism under the 2011 Regulations has been explored in the examination.</p>



38(5)	<p>(5) The 2011 Regulations are modified so as to read for the purposes of this Order only as follows —</p> <p>(a) For regulation 4(1) (appeal against marine licensing decisions) substitute — “A person who has applied for approval under condition 13 of Part 2 of Schedule 11 or condition 14 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.”</p> <p>(b) 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”</p> <p>(c) 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”.</p> <p>(d) 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”</p> <p>(e) 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”.</p> <p>(f) 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”.</p> <p>(g) 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 13 of Part 2 of Schedule 11 or condition 14 of Part 2 of Schedule 12 of the Hornsea Three Offshore Wind Farm Order 20[].”</p> <p>(h) 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”.]</p>	<p>The question of whether it would be appropriate for conditions under these DMLs to be treated differently from conditions under other marine licences which are not subject to an appeal mechanism under the 2011 Regulations has been explored in the examination.</p>
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41	<p>41.—(1) Nothing in this Order affects prejudicially any estate, right, power, privilege, authority or exemption of the Crown and in particular, nothing in this Order authorises the undertaker or any licensee to take, use, enter upon or in any manner interfere with any land or rights of any description (including any portion of the shore or bed of the sea or any river, channel, creek, bay or estuary)—</p> <p>(a) belonging to Her Majesty in right of the Crown and forming part of The Crown Estate without the consent in writing of the Crown Estate Commissioners;</p> <p>(b) belonging to Her Majesty in right of the Crown and not forming part of The Crown Estate without the consent in writing of the government department having the management of that land; or</p> <p>(c) belonging to a government department or held in trust for Her Majesty for the purposes of a government department without the consent in writing of that government department.</p> <p>(2) Paragraph (1) does not apply to the exercise of any right under this Order for the compulsory acquisition of an interest in any Crown land (as defined in the 2008 Act) which is for the time being held otherwise than by or on behalf of the Crown.</p> <p>(3) A consent under paragraph (1) may be given unconditionally or subject to terms and conditions; and is deemed to have been given in writing where it is sent electronically.</p>	<p>It is not possible to “take” Crown land and the DCO cannot authorise this. The word is therefore superfluous and potentially confusing.</p>
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Ref	ExA's suggested changes	ExA's comments
Requirements		
8	<p>8.—(1) No phase of the connection works may commence until for that phase a written landscape plan and associated work programme (which accords with the outline landscape plan and outline ecological management plan) has been submitted to and approved by the relevant planning authority in consultation with the relevant SNCBs and the Historic Buildings and Monuments Commission for England.</p> <p>(2) The term commence as used in requirement 8(1) shall include any onshore site preparation works.</p> <p>(3) The landscape plan must include an implementation timetable and must be carried out as approved. The landscape plan must include details of— (a) surveys, assessments and method statements as guided by BS 5837 and the Hedgerows Regulations;</p>	<p>Amendment reflects suggestion made by NNDC, BDC and SNDC.</p>



	<p>(b) location, number, species, size and planting density of any proposed planting;</p> <p>(c) cultivation, importing of materials and other operations to ensure plant establishment;</p> <p>(d) existing trees and hedges to be retained with measures for their protection during the construction period;</p> <p>(e) implementation timetables for all landscaping works.</p> <p>(4) The landscape plan must be carried out as approved.</p>	
9	<p>9.—(1) All landscape works must be carried out in accordance with the landscape plans approved under requirement 8 (provision of landscaping), and in accordance with the relevant recommendations of appropriate British Standards.</p> <p>(2) Any tree or shrub planted as part of an approved landscape plan that, within a period of five-ten years after planting, is removed by the undertaker, dies or becomes, in the opinion of the relevant planning authority, seriously damaged or diseased must be replaced in the first available planting season with a specimen of the same species and size as that originally planted unless otherwise approved in writing by the relevant planning authority.</p>	To reflect likely timescales for planting to become established in this locality.
17(1)	<p>(1) No phase of the any works landward of MLWS may commence until for that phase a code of construction practice (which must accord with the outline code of construction practice) has been submitted to and approved by the relevant planning authority, in consultation with the Environment Agency, the relevant SNCBs, the relevant highway authority and, if applicable, the MMO.</p>	To ensure that nature conservation interests are fully considered in the CoCPs.
23	<p>23.—(1) Within three months of the cessation of commercial operation of the connection works an onshore decommissioning plan must be submitted to the relevant planning authority for approval unless otherwise agreed in writing by the relevant planning authority.</p> <p>(2) The relevant planning authority must provide its decision on the The onshore decommissioning plan required under requirement 23(1) shall be approved by the relevant planning authority within three months of submission of such plan unless otherwise agreed in writing by the relevant planning authority and the undertaker.</p> <p>(3) The decommissioning plan must be implemented as approved unless otherwise agreed in writing by the relevant planning authority.</p>	Amendment seeks to avoid pre-judging the decision of the relevant planning authority.

Ref	ExA's suggested changes	ExA's comments
Deemed Marine Licences		



	<i>The following paragraph and condition numbers refer to Schedule 11. Where there are equivalent provisions in Schedule 12 the same amendments would apply.</i>	
Paragraph 10	<p>10.—(1) Any difference under any provision of this licence, unless otherwise provided for, shall be referred to and settled in arbitration in accordance with the rules at Schedule 13 of the Order, by a single arbitrator to be agreed upon by the parties, within 14 days of receipt of the notice of arbitration, or if the parties fail to agree within the time period stipulated, to be appointed on application of either party (after giving written notice to the other) by the Secretary of State.</p> <p>(2) Where the referral to arbitration under paragraph (1) relates to a difference with the Secretary of State, in the event that the parties cannot agree upon a single arbitrator within the specified time period stipulated in paragraph (1), either party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.</p> <p>(3) Should the Secretary of State fail to make an appointment under paragraph (1) within 14 days of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.</p>	The amendment reflects submissions made by the MMO.
Condition 7(11)	(11) In case of damage to, or destruction or decay of, the authorised project seaward of MHWS or any part thereof including the exposure of cables the undertaker must as soon as possible and no later than 24 hours following the undertaker becoming aware of any such damage, destruction or decay, notify MMO, MCA, Trinity House, the Kingfisher Information Service of Seafish and the UK Hydrographic Office.	Amendment seeks to mitigate safety risks to fishing operations.
Condition 14(2)	<p>(2) The design plan required by condition 13(1)(a) shall be prepared by the undertaker and approved determined by the MMO in accordance with the Development Principles, save where a material change in circumstances requires amendment of one or more of them, in which case—</p> <p>(a) the undertaker or MMO may amend the relevant Development Principle(s) following consultation with the MCA and Trinity House; and</p> <p>(b) an application for approval of the design plan shall be determined in accordance with the amended Development Principles—</p> <p>(i) as agreed between the MMO and undertaker; or</p> <p>(ii) determined in accordance with [article 37 (arbitration) OR article 38 (requirements, appeals, etc.)] of the Order.</p>	The Development Principles are important to navigational safety and to the effectiveness search and rescue operations. If they are relied upon by the Secretary of State in deciding whether to confirm the Order, it may be inappropriate for them



		to be changed subsequently. Amendment seeks to avoid pre-judging the decision of the MMO.
Condition 14(4)	<p>(4) Where the MMO is minded to refuse an application for approval made under condition 13 and notifies the undertaker accordingly, or the MMO fails to determine the application for approval under condition 13 within the period prescribed in sub-paragraph (3), the undertaker may refer the matter for determination in accordance with [article 37 (arbitration) OR article 38 (requirements, appeals, etc.)] of the Order.</p> <p><i>Subsequent sub-paragraph renumbered accordingly</i></p>	The amendment reflects submissions made by the MMO.
Condition 14(5)	<p>(5) The licensed activities must be carried out in accordance with the approved plans, protocols, statements, schemes and details approved under condition 13, unless otherwise agreed in writing by the MMO.</p>	The ExA seeks confirmation that the approved plans and protocols etc would apply during the operational phase of the development.
Condition 18(3) and (4)	<p>(3) The results of the initial noise measurements generated in accordance with condition 18(2)(a) must be provided to the MMO within 6 weeks of the completion of installation of the fourth foundation of each foundation type for the MMO to determine whether any further noise monitoring shall be required. OR</p> <p>(4) The results of the initial noise measurements monitored in accordance with condition 18(2)(a) 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 environmental statement or failures in mitigation, all piling activity must cease until an update to the MMMP and further monitoring requirements have been agreed.</p>	In the interests of protecting the integrity of the Site of Community Interest.



Ref	ExA's suggested changes	ExA's comments
Schedule 13 – Arbitration Rules		
6	<p>(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.</p> <p>(2) Subject to sub-paragraph (3), the Arbitrator will award recoverable costs on the general principle that each party should bear its own costs.</p> <p>(3) The Arbitrator may depart from the general principle in sub-paragraph (2) and make such other costs award as it considers reasonable where a party has behaved unreasonably as defined within the National Planning Practice Guidance or such other guidance as may replace it.</p> <p>(1) Subject to sub-paragraph 3, the Applicant/Undertaker shall bear the reasonable fees and expenses of the Arbitrator.</p> <p>(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).</p> <p>(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).</p>	Amendment reflects suggestions made by NE.

End of schedule