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To Whom It May Concern,

Planning Act 2008, Vattenfall Wind Power Limited, Proposed Thanet Extension Offshore Wind Farm

The MMO is an interested party for the examination of Development Consent Order (DCO) applications for Nationally Significant Infrastructure Projects (NSIPs) in the marine area. Should consent be granted for the project, the MMO will be responsible for monitoring, compliance and enforcement of Deemed Marine Licence (DML) conditions.

On 30 July 2018, the Marine Management Organisation (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 Vattenfall Wind Power Limited (the "Applicant") for a development consent order (the "DCO Application") (MMO ref: DCO/2016/00003; PINS ref: EN010084), for the construction, operation and maintenance of the proposed Thanet Extension Offshore Wind Farm (TEOWF).

The MMO attended Issue Specific Hearings (ISH) on 19 and 21 February 2019. This document comprises the MMO comments in respect of the DCO Application submitted in response to Deadline 3 and consists of the following:

1. Written submission of oral cases from ISH3 on Environmental matters, Ecology, HRA, physical, construction and other matters.
2. MMO response to action points arising from ISH3.
3. Written submission of oral cases from ISH7 on the draft Development Consent Order (dDCO).
4. Comments on the Site Integrity Plan (SIP) submitted by the applicant at Deadline 2.

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

A solid black rectangular box used to redact the signature of Adam Suleiman.

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1. Written submission of oral cases from the ISH3 on Environmental matters, Ecology, HRA, physical, construction and other matters

Agenda Item 5 - Biodiversity and Habitats (HRA) Considerations

1.1 Natural England (NE) revised wording for condition 16(3)

1.1.1 The MMO was asked to comment on Natural England's proposal for inclusion of additional wording to condition 16(3) in respect to the cessation of piling if observed noise levels exceed those in the Environmental Statement (ES).

1.1.2 The MMO supports the inclusion of the additional wording suggested by Natural England. The MMO suggested that further discussion with the applicant is undertaken with a view to establish further provision in the noise monitoring plans and/or marine mammal mitigation protocol (MMMP); to ensure mitigation remains fit for purpose in order that piling can continue. The MMO advised this is relevant to the wider ES and not just specific to Habitats Regulation Assessment (HRA).

1.1.3 In addition, the MMO was asked to comment on the applicant's position that the MMO has powers to stop works and as such the requirement to make such wording explicit on the deemed marine licence (DML) is not required. Please see section 2.1 below for additional information.

1.2 Goodwin Sands aggregate dredging marine licence application

1.2.1 Kent Wildlife Trust raised concerns over the potential temporal and spatial interaction between activities related to TEOWF and the Goodwin Sands aggregate dredging activities. The MMO was asked if they could provide further clarification on potential timings of activities. This information is provided in section 2.2 below.

1.3 Site Integrity Plan (SIP)

1.3.1 The MMO was asked to comment on the Site Integrity Plan (SIP) and confirmed it would provide a response at deadline 3. This information is provided in section 2.3.

1.3.2 The MMO welcomed inclusion of the SIP condition in the DML, noting that consultation for the Southern North Sea review of consents is open and discussion is ongoing on other projects undergoing examination. The MMO may provide further comment on specific wording through the course of examination. Whilst DML drafting is considered on a case by case basis, the MMO will endeavour to standardise wording across projects as much as possible.

1.3.3 The MMO confirmed its agreement to be named as consenting body for the SIP.

1.4 Outstanding points in the MMO Relevant Representation

1.4.1 The MMO noted that there were outstanding points raised in its Relevant Representation in regards to longer term impacts on benthic ecology and underwater noise impacts on spawning herring. The MMO agreed these matters will be progressed directly with the applicant through the SoCG.

2. MMO response to action points arising from ISH3

The action points that were directed to the MMO for a response are summarised in the table below, with reference to the section of this response where they have been addressed:

No.	Action	Party	Reference
11	<p>Draft Site Integrity Plan Updated Statements of Common Ground (SoCG) with NE and MMO to include coverage of matters relating to the draft Site Integrity Plan (SIP). MMO to advise on preferred wording for DML conditions relating to the SIP.</p>	NE, MMO and the Applicant	Please see section 2.3 below and the SoCG submitted by the applicant.
14	<p>Goodwin Sands pMCZ and consented dredging activities The MMO is to review the marine licence (ML) position on timing and location of Dover Western Docks Revival Project (Goodwin Sands dredge)</p> <p>Applicant to submit a plan of the pMCZ showing the location of the Dover Western Docks Revival Project dredging area relative to the application site.</p> <p>MMO and the Applicant SOCG to address the question of any likely temporal or geographical interface with the Dover Western Docks Revival Project works and can any cumulative effect be excluded?</p>	MMO and the Applicant	Please see section 2.2 below and the SoCG submitted by the applicant.
16	<p>Cessation of piling – noise levels The Applicant is to confirm its position that there is a general power available to the MMO to control / cease piling where noise levels are exceeded. MMO - what is the power? Is it the case that no provision is required in the dDCO?</p>	Applicant, MMO	Please see section 2.1 below.
17	<p>Applicant and MMO SoCG Please continue to refine and document positions on long term effects on the benthic environment and herring spawning in the SoCG.</p>	Applicant, MMO	Please see the SoCG submitted by the applicant.

2.1 Action point 16: Natural England (NE) revised wording for condition 16(3)

2.1.1 The MMO has recently received reports on offshore wind farm developments under construction which suggested observed noise levels were greater than predicted, calling into question whether the mitigation secured in the Marine Mammal Mitigation Protocol (MMMP) was fit for purpose. Should underwater noise exceed the modelled levels in the ES, the impact ranges could be much greater than predicted, and therefore the assumptions on which the mitigation secured in the MMMP may no longer be correct. The developer could potentially be committing an offence if piling continued without securing a European Protected Species (EPS) licence.

2.1.2 The MMO's enforcement powers lie primarily under 2 mechanisms:

- Notice to stop activity causing serious harm etc ('Stop' notice)

A stop notice in accordance with section 102 of the Marine and Coastal Access Act 2009 (MACAA 2009) can be issued if the continuation of a licensable activity is causing, or is likely to cause serious harm to the environment, serious harm to human health, or serious interference with legitimate uses of the sea.

- Suspension of the licence

A licensing authority may by notice vary, suspend, or revoke a licence granted if it appears to the authority that there has been a breach of any of its provisions. In this example however, condition 16(3) as currently worded, requires that in order to comply with the condition, the undertaker must carry on noise monitoring. It does not make clear that any further compliance is required in the event that noise levels are observed to be greater than predicted.

2.1.3 Without this clarification the MMO's power is limited to instructing on the need for additional monitoring only, with no remit to instruct cessation of piling whilst this is explored. The MMO does have the power to stop works if it is determined there is a danger to human health or the environment. However, this broader instruction as currently defined would require the cessation of all licensable activities, not piling only, and therefore would not allow the developer to continue to undertake other construction activities that do not generate significant levels of impulsive noise whilst the mitigation is reviewed.

2.1.4 In the event that the monitoring reports indicate the failure of mitigation measures as set out in the MMMP, the proposed amendment would require the undertaker to cease piling until further appropriate mitigation actions have been agreed which would mitigate noise impacts sufficiently for piling to recommence. The MMO consider that this recommendation is justified, considering the location of the project in proximity to the Southern North Sea candidate Special Area of Conservation (cSAC) and the potential impacts of the project on harbour porpoise as a qualifying feature of the cSAC and an EPS.

2.1.5 Furthermore as currently drafted, the condition requires the Undertaker to submit noise monitoring six weeks following the installation of the first four piled foundations. This could potentially allow for six weeks of piling to be undertaken that exceeds the predicted noise values before the report is submitted to the MMO. The MMO may then require review and consultation of the report before it can determine that observed noise was in fact greater than predicted. The MMO seeks to ensure that it is notified as soon as possible of any issues that indicate noise levels may be greater

than predicted in order to agree any potential additional monitoring or mitigation measures in a timely manner. Similar recommendations have been made for the Norfolk Vanguard and Hornsea 3 OWF draft DCO representations. Indeed, the ExA's schedule of changes to the dDCO for Hornsea 3 issued on 26 February 2019 includes the amended condition wording as follows:

*“(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.**”*

With the amendment being justified *“In the interests of protecting the integrity of the Site of Community Interest.”*

2.2 Action point 14: Goodwin Sands aggregate dredging marine licence application

2.2.1 At present the MMO is in a position to advise only that the programme of works are to be carried out as detailed on the marine licence application (MLA/2016/00227), provided to the Examining Authority (ExA) at Deadline 1 ('04 EN010084 – Thanet Extension – Deadline 1 – Response to ExA Questions Annex 1). That programme of works is provided as follows:

The dredging programme is required to tie into the Dover Western Docks Revival (DWDR) scheme's construction stages. It is anticipated that dredging will take place in one or more distinct campaigns between September 2019 and September 2020, corresponding to the relevant DWDR construction stages for which aggregate is required. Dredging may be undertaken 24 hours per day, seven days per week.

The licence start date is 26 July 2018 and end date is 31 December 2022.

2.3 Action point 11: Site Integrity Plan (SIP)

2.3.1 Point 3 in the SIP details the applicant's proposed timescales for review, citing *“first review/update four months prior to pre-construction geophysical surveys...”* The MMO advises that this is not concurrent with the DML conditions in Schedule 11 14(1) and Schedule 12(1) which state pre-construction plans and documentation should be submitted at least four months prior to the intended commencement of licensed activities. The MMO considers that proposed timescales for submission of the SIP on the DMLs should be reviewed and clarified.

2.3.2 The MMO questions whether the timescales set out in figure 2 are sufficient to allow for discussion and agreement of additional mitigation measures in the event that the project parameters of in-combination assessment have changed. It is also noted in point 21 that the applicant considers *“there is no requirement to consider the need for additional mitigation measures...”* The MMO seeks further clarity on how

formal submission of the SIP fits into the flow process described in figure 2; and noting that the purpose of a SIP is to ensure no risk to Adverse Effect on Integrity (AEoI), MMO seek clarity on how it will be demonstrated that the project will stay within the thresholds and conclusions in the HRA. The MMO would welcome further discussion with the applicant through the SoCG.

2.3.3 Point 19, bullet one in the SIP, and Table 1 include geophysical works to take place by the end of March 2019. The MMO queries whether this is correct, given that this time will have passed before the end of examination.

3. Written submission of oral cases from ISH7 on the draft Development Consent Order (dDCO)

3.1 Interpretation of commence

3.1.1 The MMO does not consider the interpretation of 'commence' and 'pre-commencement' on the dDCO is suitable as currently drafted. The MMO is concerned that by excluding seabed preparation activities from the definition of commence, the activities will not be subject to approval of all the necessary pre-construction documentation/monitoring requirements. Furthermore that activities would not be required to provide all the relevant notifications (such as notices to mariners) to alert other sea users and ensure safety of navigation. The MMO noted the applicant's response that there is no intention to bypass such approvals and that dialogue will continue between the MMO and the applicant to reach a satisfactory outcome.

3.2 Proposed Arbitration Procedures

3.2.1 The MMO outlined its concerns in relation to the arbitration provision in article 36 of the DCO. The MMO considers that it is not appropriate that differences relating to approvals of documents by the MMO under the DMLs following reasons:

- The provision undermines MMO's public regulatory function;
- Arbitration is a private process which is fundamentally inconsistent with the duty of a public body, whose decisions should be public and open to scrutiny; and
- DMLs granted as part of a DCO should not be treated differently to a marine licence granted by the MMO under MACAA. The provision creates inconsistency with decisions made under DMLs and those made under marine licences - resulting in a 2-tier licensing approach.

Following review of the oral cases MMO has the following additional comments to make.

3.2.2 As a public body, the MMO not only has a number of specific statutory powers and duties, it also has a responsibility to act in the interest of the public and ensure that activities are undertaken in the public's interest which are invariably subject to public scrutiny and public engagement. It is the MMO's interpretation that the meaning of 'difference' is when parties have to come to an agreement on something, but cannot do so. It is the MMO's opinion that the discharge of conditions does not amount to a 'difference' on a point which parties are supposed to agree. When discharging a condition, the MMO is making a decision as a public body in response to an application, taking account of the broad sweep of its statutory responsibilities.

3.2.3 In the event that a decision were made against the MMO's position, and it was found that the word 'difference' is capable of representing a refusal to discharge a condition, the MMO is further concerned that the currently drafted DCO wording could be arguably extended to include suspension, variation, revocation, transfer or even enforcement, which are currently covered by other provisions under MACAA.

3.2.4 Furthermore, the MMO is required by a series of legislative obligations to be transparent and even positively engage with members of the public in decision making. All information discussed in an arbitration process of this kind must be susceptible to disclosure to the public under the Freedom of Information Request and Environmental Information Request regimes. It would be wholly inappropriate for a public body like the MMO, discharged with public planning and regulatory protocols, to attend hearings in private.

3.2.5 The MMO considers there are serious legal and practical issues in trying to implement a confidential arbitration process onto the MMO's existing public law regulatory functions. The emphasis lies on the fact that Parliament has vested the public law functions such as discharging marine licence conditions upon the MMO. The removal of this decision-making function and their placement into the hands of a private arbitration process is inconsistent with the MMO's legal function, powers and responsibilities. Furthermore, there was no indication that Parliament ever considered that in passing the 2008 Planning Act it would be authorising this kind of usurpation of public functions.

3.2.6 Section 2 of MACAA 2009, which came into power after the 2008 Planning Act, sets out a series of broad statutory purposes and functions vested onto the MMO to achieve certain environmental objectives in the discharge of activities and to take certain matters into account in a consistent and coordinated way. None of those obligations would bind an arbitrator, which is a serious issue for the MMO as Chapter 3 of Part 1 in MACAA 2009 itself contains a provision on how the functions the MMO performs can only be delegated to eligible parties under s.16 with the agreement of the Secretary of State.

3.2.7 Furthermore, p.4 of Annex B of the PINS Guidance Note 11 states that 'the MMO will seek to ensure wherever possible that any deemed licence is generally consistent with those issued independently by the MMO'. In the event that the proposed DMLs are granted, the MMO emphasised that the licenses would be inconsistent from those issued by the MMO directly. The guidance (same page) also emphasises that it is the MMO which is responsible for enforcing, varying, suspending or revoking marine licenses, whether they are deemed or not. The MMO therefore considers that transferring that function to an external body would be entirely inconsistent with this guidance, which in practice reflects the provisions of the 2009 Act.

3.2.8 Finally the MMO noted that these arguments were accepted in the Tilbury 2 decision, with a decision being made such that the arbitration clause didn't apply to any approval required under the DMLs. The ExA's Recommendation Report to the Secretary of State found in favour of the MMO for reasons stated in its submissions, noting:

"The MMO stated that it strongly opposed the inclusion of such a provision, based on its statutory role in enforcing the DML. According to the MMO, the intention of the PA2008 was for DMLs granted as part of a DCO in effect to operate as a marine licence granted

under the MCCA2009. There was nothing to suggest that after having obtained a licence it should be treated any differently from any other marine licence granted by the MMO (as the body delegated to do so by the SoS under the MACAA).

“Having considered the arguments of the Applicant and the MMO, the Panel finds in favour of the MMO in this matter for the reasons stated in the paragraph above.

Accordingly, the Panel recommends that paragraph 27 is deleted from the DML at Schedule 9 of the draft DCO.”

3.3 Maximum parameters on the DML

3.3.1 The MMO requested the licensed activities should be limited to the maximum parameters assessed within the ES, and these should be clearly defined on the DMLs. This should include maximum permitted cable protection and scour protection footprints, the number of cable crossings, maximum disposal volume/footprint for sandwave levelling and maximum hammer energy. This is to ensure the maximum impacts remain within those assessed and approved. If the applicant does not propose to exceed any of the maximum parameters assessed in the ES, this will result in no additional burden for the applicant from the inclusion of these parameters on the face of the DMLs, whilst providing greater clarity on what is permitted in order for the MMO to ensure compliance.

If, however, the applicant does wish to undertake activities that are outwith the maximum parameters assessed and considered under the original licence, the appropriate process for dealing with this would be through a request to vary the DML, whereby the MMO can evaluate whether the proposed changes can be permitted. Such practice ensures proper scrutiny and ensures accountable, transparent and public due process is applied. This approach is consistent with the process that is followed for standard marine licences granted by MMO. The MMO is continuing to engage with the applicant through the SoCG.

3.4 Timescales for approval of pre-construction plans and documentation

3.4.1 The MMO requested the timescale for submission of pre-construction plans and documentation is increased from 4 months to 6 months. The initial requirement for 4 months was established during the round 1 projects. Since then, round 3 projects have significantly increased in complexity (due to HRA, case law, volume of documents, and increasing issues with in-combination impacts with other projects). The MMO considers that a four month pre-construction submission date is therefore unrealistic potentially even counterproductive. This representation is consistent with representations made in the Norfolk Vanguard and Hornsea Project 3 examinations.

3.4.2 It is common that documents require multiple rounds of consultation to address stakeholder concerns. This process alone can be very time consuming and the proposed four month submission time would not account for the additional time that the Applicant may require to update documents throughout the process. The time taken to sign off pre-construction documents on the Race Bank OWF for example, ranged from 1 to 11 months, with 13 of 30 documents taking longer than 4 months.

3.4.3 The MMO has considered this further since the hearing. It recognises that there are some documents that typically have not experienced significant delays and therefore could potentially remain within the 4 month timeframe. The MMO therefore intends to provide a targeted list of documents that it considers are the most challenging to approve within the 4 month timeframe. The MMO is in the process of producing a standard list of documents that it will use to inform future projects, and will endeavour to provide a copy of this for deadline 4. The MMO is continuing to engage with the applicant through the SoCG.

4. MMO response to action points arising from ISH7

No.	Action	Party	Reference
10	Arbitration provision form of words: MMO and THLS to consider submitting suitable alternative form of words regarding arbitration provision with reference to draft provisions in the Norfolk Vanguard dDCO.	MMO and THLS	Please see section 4.1 below

4.1 Proposed Arbitration Procedures

4.1.1 As set out in ISH7, MMO maintains that the application of arbitration to its discharge of deemed marine licence conditions is not appropriate. The MMO therefore considers some additional text should be included to make it explicit that the arbitration provision does not apply to the DMLs.

4.1.2 The MMO understands Trinity House is proposing a change to the wording for Article 36 to this effect, and would support this approach.

4.1.3 Furthermore the MMO notes that on 26 February 2019, the ExA for the Hornsea 3 OWF published its schedule of changes to the dDCO amending arbitration in favour of submissions made by the MMO. They proposed the following:

“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.”

The MMO would be supportive of this wording.