Vattenfall Wind Power Ltd

Thanet Extension Offshore Wind Farm

Annex A to Appendix 15 to Deadline 5 Submission: Submissions made in the examination proceedings of Norfolk Vanguard and Hornsea Project Three, in relation to arbitration

Relevant Examination Deadline: 5

Submitted by Vattenfall Wind Power Ltd

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Revision A

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Revision A	Original document submitted to the Examining Authority

Contents

Norfolk Vanguard: Summary of Oral Submissions at Second DCO Hearing

Topic	Applicant's summary of oral submissions
Matters arising from the Applicant's revised approach as set out in Articles 6 and 38 and Schedule 14 of the latest revised dDCO, and further responses. Progress made regarding Arbitration.	The Applicant referred to its previous submissions in relation to arbitration, and noted that the Applicant's position had not changed in this respect. However, the Applicant is seeking a workable and fair solution for all parties to enable prompt decision making for nationally significant infrastructure projects. In removing the MMO from the arbitration provisions, the Applicant had sought to include a deemed discharge provision in the DMLs. The MMO submit that judicial review is the only remedy available if the Applicant is not satisfied with the MMO's decision. However, in order to bring judicial review proceedings this would require the MMO to reach a decision in the first instance. The Applicant's position is that arbitration or appeal should be permitted, but at the very least a mechanism should be included which requires the MMO to reach a decision to enable, if necessary, judicial review proceedings to be brought. The Applicant is not aware of any other DML which has adopted a deemed discharge approach, however this may not have previously been considered given that the MMO had only recently raised concerns that they should be excluded from the arbitration article. The Applicant noted the particular concerns raised by the MMO in relation to deemed discharge but felt this could be dealt with through the precise drafting of the deemed discharge condition. In particular: (1) The timetable for the MMO to consult at condition 15(4) (Schedule 9-10, and condition 10(4) Schedule 11-12) could be extended to allow 2 months instead of 1 month for consultation. In addition, the Applicant had agreed with the MMO to consider whether the discharge period for certain plans could be extended to 6 months for the more complex plans, or retained at 4 months for the more standard plans. The Applicant is willing to discuss this further with the MMO and to revise the drafting accordingly. The Applicant also noted that it is willing to engage with Historic England on the Written Scheme of Investigation (WSI) two months prior to submitting the plan to the MMO for approval, which the Applicant understood would address Historic England's concerns. (2) Condition 15(4) (of Schedule 9-10, and the associated condition 10(4) of Schedule 11-12) allowed the timetables to be extended subject to agreement between the parties. This would avoid the situation where a refusal was issued unnecessarily to avoid a deemed discharge. The Applicant is seeking only to avoid a situation where the discharge process continues endlessly. (3) The deemed discharge would not operate for approval of plans which sought to avoid adverse effects on integrity of European sites (as per the wording at condition 15(5) of Schedule 9-10 and condition 10(5) of Schedule 11-12). The Applicant is willing to consider the inclusion of any other exclusions considered necessary or appropriate by the MMO (or Trinity House). (4) Whilst the arbitration provision had been removed from the Tilbury DCO without inclusion of a deemed discharge provision, the Applicant is not aware that the option of a deemed discharge had been considered for Tilbury. In addition, the Tilbury DML is for an entirely different scale of development than that required for the Project (and offshore wind developments in general), and

	did not have the imperative of meeting Contracts for Difference (CfD) milestones. As such, Tilbury is not comparable to the Norfolk Vanguard DCO application and should not be considered to set any precedent in this respect. (5) The Applicant noted the MMO's comment that, as a Government body, it would use best endeavours to determine any application in sufficient time for project start dates. Given this, the Applicant considers that there is no in principle reason why the MMO should not agree to a deemed discharge provision. The Applicant considers it entirely reasonable that the MMO be required to focus resource on nationally significant infrastructure projects (where there is a lack of resource or changes in personnel) and the deemed discharge provision would encourage the MMO to do so, and allow the timely unlocking of nationally significant infrastructure. In addition, there is currently no wording in the DML which requires the MMO to use best endeavours to determine the application for approval as soon as reasonably practicable, and the DMLs could also be amended to include this. The Applicant also explained the importance of timely decision making during the construction process. The Applicant explained that it was already in the early stages of engaging key partners in the supply chain for the anticipated construction programme. The offshore construction work for the Project represents a major project that would have to be agreed with suppliers well in advance of construction to deliver the scale of work required. The Applicant explained that certain details could not be submitted more than 12 months in advance of construction, including those details which are reliant on pre-construction surveys which in line with Natural England's advice must be completed no later than 12 months in advance of construction. This therefore leaves the Applicant with a short window to seek approval of plans. The Applicant's aim is to seek approval in good time, but there is no certainty that the MMO would discharge the conditions in a timely manner. If the timeframes for discharge were extended beyond the agreed period this could have a significant knock on effect to the construction programme, providing uncertainty and risk for construction contracts and also for the timely delivery of the project and to meet CfD milestones. In relation to submissions made by Natural England, the Application responded: (1) As set out in previous submissions, that the Applicant did not envisage a situation where Natural England would be subject to arbitration given that the MMO was the decision maker under the DMLs. (2) The deemed discharge provision would not operate for plans which were required to avoid adverse effects on integrity of European sites, and this was expressly excluded from Condition 15(5) (Schedule 9-10) and Condition 10(5) (Schedule 11-12). (3) That the Site Integrity Plans (pursuant to Condition 14(1)(m), Schedule 9-10, and Condition 9(1)(l), Schedule 11-12) contain detailed timetables for engagement with relevant consultees prior to submission of the plans for approval by the MMO.

Norfolk Vanguard: Response to Further Written Questions

PINS Question Number	Question is addressed to:	Question:	Applicant's Response:
20.119	Applicant	Please consider and comment briefly on the additional wording provided by Trinity House related to Article 38, as set out in [REP3-062], in particular the circumstances in which it would accept the wording including any amendment thereto which it considers expedient to make.	The Applicant has considered the amendments suggested by Trinity House (**TH**) and proposes the following wording (with additional text in red): ***Arbitration*** *38.—(1) Subject to Article 41 (saving provisions for Trinity House), any difference under any provision of this Order, unless otherwise provided for, must be referred to and settled in arbitration in accordance with the rules at Schedule 14 of this 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…* The intention of this amendment is to make it clear that the arbitration Article (at Article 38) does not overrule TH's saving provision (at Article 41). This therefore means that the arbitration article cannot be relied upon by the Applicant against TH if it would prejudice or derogate from any rights, duties or privileges of TH. The Applicant has amended the dDCO submitted at Deadline 4 in this respect. It should also be noted that the Applicant has amended Article 38 in light of the MMO's submissions at Issue Specific Hearing 3 and Deadline 3. The Applicant explains the rationale and implications of these changes further within Q.20.139 below.
20.139	Applicant	Conditions 14 (1) and 15 (2) set out the requirements for the Applicant to submit all preconstruction documentation at least 4 months prior to the commencement of the construction works. The MMO has provided detailed reasoning [REP3-046] in particular at points 1.2.6 and 4.1.2, as to why the timescales should be set at least 6 months to allow sufficient time for repeat rounds of stakeholder consultation if required.	The Applicant notes NE's and the MMO's comments. The Applicant, however, believes that the four month time frame conditioned within the DMLs is appropriate and proportionate to allow the MMO, in consultation with NE where relevant, sufficient time for stakeholder consultation and the provision of comments, whilst ensuring no unnecessary delay to the commencement of development and completion of construction works. This four month time period is contained on a number of other OWF DCOs (including The East Anglia Three Offshore Wind Farm Order 2017 and Hornsea Two Offshore Wind Farm Order 2016) which are not dissimilar in size and principle to Norfolk Vanguard. Four months is well-established as an appropriate time frame for OWF schemes and one that ensures a balance is struck between the expedient discharge of the relevant conditions attached to the DML whilst allowing a reasonable period of time for consideration by the MMO and relevant consultees. The importance of minimising delays post consent for offshore wind projects in the context of meeting Contract for Difference milestones is explained in more detail in response to q20.135.

		Please review, including the representations about this matter by NE at Deadline 3, and confirm whether the timescales proposed are acceptable or list any of the points with which you take issue and explain why.	The MMO states, at paragraph 1.2.6 of their Deadline 3 submission, that it is very common that documents require multiple rounds of consultation to address stakeholder concerns. In this respect, the Applicant envisages that discussions will be held with the MMO, and NE where relevant, once the final Project design has been agreed and in advance of seeking formal discharge of conditions, which would reduce the need for multiple rounds of consultation post submission. The In Principle SIP (document reference 8.17) contains an indicative timeline for consultation and agreement of the SIP post-consent and includes several rounds of consultation with the MMO prior to the formal submission of the final SIP four months in advance of construction. It is expected that other key plans would follow a similar consultation and approval process. Furthermore, it will be in the Applicant's interest to engage the MMO, and NE, at an early stage in this way to ensure the discharge process is as efficient as possible. In practice the Applicant will have engaged in consultation activities with the MMO and NE well in advance of submission of the final version for approval; this means that the relevant stakeholders should be very inclusion of a deemed discharge provision in the DMLs, the Applicant will agree to remove the MMO from arbitration under the dDCO. This drafting has been reflected in article 38 (Arbitration) and conditions 15 (Generation DMLs) and condition 10 (Transmission DMLs) of the dDCO submitted at Deadline 4 to allow further discussion on this basis. It will be noted that in applying the deemed discharge period, the Applicant has sought to include drafting which ensures that the MMO is only required to determine the application once it has received all necessary information to do so. The drafting also allows the MMO to request further information from the Applicant within one month of receiving the application. This would extend the period to determination to at least 5 months, and longer once an allowance is made for the Applicant to prepare and provide the information sought. This is considered a reasonable and pragmatic approach given the points identified above.

Hornsea Project 3: Schedule of Changes to the draft DCO

DCO Reference	Comments from stakeholder	Amendment
Article 38 - Requirements, appeals, etc.	To provide an alternative to arbitration for the MMO provided without prejudice to the Applicant's position that arbitration under Article 37 should apply to the MMO.	(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 sub–paragraph (5). (5) The 2011 Regulations are modified so as to read for the purposes of this Order only as follows— (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." (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" (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". (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" (e) In regulation 10(5)

DCO Reference	Comments from stakeholder	Amendment
		(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”. (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”. (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[ ].” (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”.]

Hornsea Project 3: Applicant's comments on Written Representations and Responses at Deadline 7

IP Written Representation	Applicant's Response
1 Outstanding Issues on the Development Consent Order (DCO) and the Deemed Marine Licenses (DMLs) 1.1 Article 37 – Arbitration The MMO remains its position as set out in our Deadline 3 response [REP3 – 092]. The MMO welcomes the recommendation made by the Examining Authority to exclude the MMO from arbitration. The MMO would like to highlight that this recommendation is in line with the Tilbury 2 Application, which was determined by the Secretary of State (SoS) on the 20 February 2019. Within the decision of the SoS, the Examining Authority's recommendation regarding arbitration within the DCO/DMLs was accepted. For your information the recommendation is shown below: In the MMO's submission at Deadline 7 [REP7-033], 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 MCAA). 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. As such, the MMO feels that the recommendation made by the Examining Authority is consistent with the SoS decision.	The drafting set out by the ExA in its schedule of changes (dated 26 February 2019) did not constitute a recommendation. Rather, the ExA sought comments on whether the drafting proposed would be adequate *if* the ExA or SoS adopted the positions taken by IPs. As set out in previous representations on this point (such as the Applicant's responses to Q1.13.14 and Q1.13.61, and oral points during Issue Specific Hearing 3), the Applicant considers that, consistent with previous DCOs decided by the Secretary of State, that all parties should be subject to arbitration. Regarding Tillbury 2, the Applicant notes that whilst the Examining Authority for that application agreed to remove the arbitration provisions in the deemed marine licence, the equivalent provision for Article 37 does not provide expressly for the MMO not to be subject to Arbitration, and therefore the requested rewording is not in line with the wording of that Order. The decisions of the relevant planning authority in respect of the discharge of Requirements relating to onshore matters are subject to the TCPA 1990 appeal provisions as modified and transposed by Article 38 of the dDCO. This is a standard provision of made DCOs. By way of further example, the Applicant has also previously referred to the analogy of a S.106 Agreement in which LPAs regularly agree to their statutory duties and enforcement functions under such agreements being subject to dispute resolution mechanisms, including arbitration.

1.2 Article 38 – Requirements, Appeals, etc. The MMO retains its position as set out in our Deadline 6 response [REP6 – 072] regarding the newly introduced appeals process. The MMO welcomes the recommendation to remove the proposed appeals process as included in the Applicant's draft DCO submitted at Deadline 6. As highlighted in the MMOs deadline 6 response, it is still unclear to the MMO why there is the requirement for the inclusion of this appeals process. The MMO would like to further highlight that the reasoning that was used and agreed to for Tilbury 2 is similar to the reasoning the MMO provided for this application, and as such the MMO does not agree that this appeals process should be included in the DCO.	The Applicant repeats its submissions above