



THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES  
2010

**Thanet Extension Offshore Windfarm**

Planning Inspector Reference: EN010084

**Natural England's Responses to the Examining Authority's dDCO Commentary.**

28<sup>th</sup> May 2019

| Comment No. | Part of DCO | Relevant extract from DCO   | Commentary   | Response sought from   | Response  |
|-------------|-------------|---|--|--|---|
| 5           | Art 2       | <p>“commence” (a) in relation to works seaward of MHWS, the first carrying out of any licensed marine activities authorised by the deemed marine licences, save for archaeological investigations , <u>pre-construction surveys and monitoring</u>, and seabed preparation and clearance (b) in respect of any other works comprised in the authorised project, any material operation (as defined in section 155 of the 2008 Act) forming part of the authorised project other than operations consisting of <u>site clearance, demolition work</u>, environmental surveys, investigations for the purpose of assessing ground conditions, diversion and <u>laying of services, temporary structures or hard standing</u>, the temporary display of site notices or advertisements and the words “commencement” and “commenced” will be construed accordingly; ...</p> | <p><b>Interpretation: “commence”</b></p> <p>The definition of commence retains scope for some substantial operations relevant to environmental effects to take place in both the marine and terrestrial environments before the formal commencement of the authorised development and the discharge of relevant requirements and/ or DML conditions.</p> <p>a) <b>In the marine environment:</b> are there circumstances in which the nature or scale of any of the pre-commencement works shown underlined in column 3 might lead them to have significant effects that should be taken into account prior to the finalisation of relevant plans or strategies and in decisions to discharge any of the following DML conditions (nb – where conditions are repeated in</p> | <p>Applicant, MMO, Natural England, Historic England, Thanet District Council (LPA), Dover District Council (LPA), Kent County Council, Trinity House, Maritime and Coastguard Agency, Thanet Fishermen’s Association.</p> | <p>The definition of commence is currently unacceptable. The exclusion of Seabed Preparation works and clearance from the definition of commence means that the impact to the benthic marine environment will be able to proceed without sufficient regulatory oversight.</p> <p>a) By the very nature and size of these works they are likely to lead to impacts that have significant effect on the environment. These works encompass the vast majority of the environmental impacts to the seabed and must be appropriately mitigated. The required mitigation must be appropriately regulated and secured through a condition.</p> <p>The applicant’s proposed condition 23 does take some steps to secure</p> |

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|  |  |  | <p>both Sch 11 and Sch 12, the reference here to a condition to Sch 11 shall be taken to refer also to a condition for the same purpose in Sch 12):</p> <ul style="list-style-type: none"> <li>• 8: (aids to navigation and the need for any notice to and direction on these by Trinity House); and</li> <li>• 13: (submission and approval of any preconstruction plans or documents)</li> <li>• 20: (the fisheries liaison and co-existence plan)</li> </ul> <p>b) <b>In the terrestrial environment:</b> are there circumstances in which the nature or scale of any of the pre-commencement works shown underlined in column 3 might lead them to have significant effects that should be taken into account prior to the finalisation of relevant plans or strategies and in decisions to discharge any of the following requirements:</p> |  | <p>mitigation by submission of methodology for approval. However, the condition refers to the biogenic reef mitigation plan which is currently expected 4 months prior to commencement and is unlikely to be approved until much nearer to commencement. This would seem to specifically contradict the intent of the new definition and condition i.e. it doesn't extradite preparation works from the pre-construction commencement documentation / conditions and timings.</p> <p>Additionally, there is little definition of what that methodology would contain and the only mitigation secured is the biogenic reef plan and Archaeological plans. There are many other mitigations / plans that might need to be included depending on the works proposed. Furthermore, the</p> |
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|  |  |  | <ul style="list-style-type: none"> <li>• R14 (access management);</li> <li>• R17 (highway access);</li> <li>• R18 (Construction Environmental Management Plan);</li> <li>• R19 (temporary fencing);</li> <li>• R21 (Contaminated land and groundwater plan);</li> <li>• R22 (Construction noise and vibration management plan);</li> <li>• R23 (Construction traffic management plan);</li> <li>• R24 (Onshore archaeological written scheme of investigation); and/ or</li> <li>• R25 (Landscape and Ecological Mitigation plan)?</li> </ul> <p>c) Generally: as a consequence of drafting in Art 2, are there any remaining proposals for precommencement works that are not (for reasons that must be stated) subject to appropriate control in the dDCO? IPs and Other Persons are</p> |  | <p>condition has no proposed time for when the methodology needs to be submitted, or how long the regulator can expect to consider the information provided.</p> <p>The condition needs to be amended to ensure that all mitigation required for the pre-commencement works is secured. Additionally, a reasonable time period must be given within the condition for submission, review and approval of this information. However, it is questionable if this can be achieved due to the need to cross reference much of the mitigation with the requirements of condition 13.</p> <p>Previously developers, and regulatory bodies have used the wording at condition 13 (1) to avoid this issue: <i>The licensed activities or any part of those activities must not commence until the</i></p> |
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|    |         |  | requested to respond by Deadline 6 with the Applicant making a final response at Deadline 7.  |  | <p><i>following (as relevant to that part) have been submitted to and approved in writing by the MMO.</i></p> <p>The pre-construction works have been considered as their own part of construction, and documentation that is submitted for them need only be relevant to that part. This has worked for all previous DCO offshore wind projects and Natural England, therefore, questions if there is a real necessity for the proposed change.</p> |
| 20 | Art. 36 | Subject to Article 39 (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 9 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) | <p><b>Arbitration: application to determinations by statutory and regulatory authorities</b></p> <p>As currently drafted, Art 36 might apply to “any difference under any provision of this Order” which concerned a statutory/ regulatory body or public authority. There are multiple examples of this, affecting consents or approvals to be given by street authorities (Art 8(3) and</p> | Applicant, Thanet District Council (LPA), Dover District Council (LPA), MMO, Maritime and Coastguard Agency, Trinity House, Kent County Council, Environment Agency, Natural England, Historic England and any other relevant public authority, statutory or regulatory body | Natural England has no further comment regarding this comment currently.   |

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|  |  | <p>by the Centre for Effective Dispute Resolution.</p> | <p>Art 10(3), highway authority (Art 11), owners of watercourses (Art 14(3)), etc. The arbitration procedure would not apply to differences between the Applicant and any of the relevant bodies concerned by the requirements listed in Art 37(2) (those bodies covered by Sch 10, where an appointed person appeal procedure is set out). This is because Art 36 only applies “unless otherwise provided for”, and Art 37 would be such an alternative provision.</p> <p>However, as currently drafted, this provision and Art 37 mean that there could be differences between how some disputes would be handled, even between the same parties. For example, a difference with a highway authority under a requirement in Art 37(2) (such as R17) would be handled in accordance with Sch 10, but a difference with a highway authority under Art 11(1)(b) would appear to be handled under the arbitration provisions.</p> |  |  |
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|  |  |  | <p>a) Are potential differences of this nature intended and are the mechanics and effect of these differences well understood?</p> <p>b) If so, is it sufficiently clear as to whom (particularly to statutory/ regulatory bodies or public authorities) and when (in what particular circumstances) the arbitration provisions should apply and whether the cut-off between arbitration and a Sch 10 process is sufficiently clear and justified?</p> <p>There is an argument that if these distinctions are to be retained, they need to be made explicit on the face of the dDCO, in the same way that the matters to be dealt with by way of an appeal to an appointed person has been listed in Art 37(2). The Applicant is requested to set out a form of words that add additional clarity.</p> |  |  |
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| 24 | Art 36         | [As above] | <p><b>Arbitration:</b> application to determinations under Requirements (Schedules 1 and 10) and Conditions (Schedules 11 and 12) Is it sufficiently clear and, if not, is any further drafting required to place beyond doubt that the provisions of Art 36 do not apply to determinations under, discharges or appeals in relation to Requirements (Schs 1 and 10) or to determinations under and discharges of Conditions in the DMLs (Schs 11 and 12)?</p> | <p>Applicant, Thanet District Council (LPA), Dover District Council (LPA), MMO, Maritime and Coastguard Agency, Trinity House, Kent County Council, Environment Agency, Natural England, Historic England and any other relevant public authority, statutory or regulatory body</p> | <p>Natural England notes that the article 36 wording states: <i>any difference under any provision of this Order, unless otherwise provided for.</i></p> <p>Is this wording intended to mean provided for within the order (which is not made explicit) or provided for elsewhere, such as through other legislation or Judicial Review?</p> <p>Natural England considers that if the requirements (Schedules 1 and 10) and determinations under and discharge of conditions in Schedules 11 and 12 are to be excluded from arbitration, then the current wording does not make this sufficiently explicit.</p> |
| 33 | R26 and others | [none]     | <p><b>Seasonal restriction</b></p> <p>The Applicant amended the DCO at Deadline 5 to insert a provision applying seasonal restrictions on construction</p>   | <p>Natural England</p>  | <p>It is clear at condition 26 there is a seasonal restriction in place between the 1<sup>st</sup> October and the 31<sup>st</sup> March for works 3A and 3B. These works are primarily</p>   |



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|  |  |  | <p>activities (including piling) in respect of non-breeding waterbirds.</p> <p>Is Natural England now content with the scope and duration of security for the seasonal restriction on construction activities? If any additional provisions are required to give effect to it, these should be identified at Deadline 6 and the Applicant should provide final wording or reasons to make no change at Deadline 7.</p> | <p>within the intertidal and saltmarsh area and Natural England welcome these restrictions.</p> <p>However, we would like to draw the ExA's attention to the latest OLEMP (Revision B), in particular paragraphs 5.3.18 to 5.3.21. Here, the applicant also states "<i>In addition, all driven/ percussive piling within <b>Pegwell Bay Country Park</b>, if required, would also be subject to a timing restriction and would not take place during the period October to March inclusive.</i>" Further still the applicant states "<i>Any works <b>within 250 m</b> of intertidal habitats (i.e. any works to the east of the black dashed line shown in Figure 4) that are in <b>direct line of sight of intertidal habitats</b> (e.g. works on the TJBs) would only take place during the period October to March following the erection of screening fencing to avoid visual disturbance to non-breeding waterbirds.</i>"</p> |
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|    |  |   |   |                            | This mitigation outlined above is required to rule out any AEol on the SPA. As a result, Natural England advises that this mitigation is included in the DCO to ensure the Applicant carries out the necessary actions. |
| 43 | Schedules 11 and 12 (Deemed Marine Licences)<br><br>Condition 13(1)(k) Sch 11<br>Condition 11(1)(l) Sch 12 | (k) A site integrity plan, which must be approved in writing by the MMO in consultation with Natural England prior to the commencement of operation of the licensed activities and which must accord with the outline site integrity plan (as certified in accordance with article 35). | <b>Pre-construction plans and documentation: site integrity plan</b><br><br>Natural England has welcomed its addition as a consultee on the preparation of a site integrity plan (SIP) for the Generation Assets DML [REP5A005]. It has requested that the same amendment be made to the parallel provision in the Export Cable System DML at Condition 11(i)(l) of Sch 12 which currently provides only for the MMO to approve the SIP. The Applicant is requested to review Condition 11(1)(l) of Sch 12 and present its final wording and reasoning at Deadline 6. | Applicant, Natural England | Natural England agree that the same amendment should be made to the parallel provision in the Export cable System DML at condition 11(i)(l).  |

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| 44 | <p>Schedules 11 and 12 (Deemed Marine Licences)</p> <p>Condition 17(3) Sch 11</p> <p>Condition 16(3) Sch 12</p> | <p>(3) The results of the initial noise measurements monitored in accordance with subparagraph (1) 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.</p> | <p><b>Construction monitoring: noise measurements and cessation of piling</b></p> <p>Natural England [RR-053][REP2-045] and the MMO [REP5-062][REP5A-003] have requested a mechanism within DML conditions 17(3) (Generation Assets: Sch 11) and 16(3) (Export Cable System: Sch 12) for piling to cease quickly in a situation where construction noise monitoring confirms there is a significant adverse effect. (This relates to noise effects from piling on marine mammals and fish.)</p> <p>The ExA heard submissions for the Applicant at ISH5 that such a limitation is not required in the dDCO because the MMO already have a statutory power enabling it to control piling in this way. However, we are not currently clear that the MMO's statutory powers do already provide for this eventuality and hence the matter of the adequacy of control in the dDCO remains unresolved.</p> | <p>Applicant, Natural England, MMO</p> | <p>Natural England is still of the opinion that the condition regarding the cessation of piling is still required. The MMO is better positioned to provide a drafting of this condition, however we are happy to work alongside them and the applicant to get the best outcome.</p> <p>With regard to the ExA's final point regarding AEoI, securing this condition would not make any difference to the current conclusion of AEoI. As stated above, the condition regarding cessation of piling is requested to ensure that if the construction noise monitoring demonstrates the piling works are significantly louder than assessed in the EIA, they can be stopped from continuing until further mitigation and/or monitoring can be agreed and implemented. This issue is not related to the SIP and our current advice</p> |
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|    |   |   | <p>Could the Applicant by Deadline 6 please either accede to this request and propose drafting or alternatively provide further justification for its position that this provision is not necessary. Natural England and the MMO may comment and provide drafting by Deadline 7, with final Applicant comments at Deadline 8 if required.</p> <p>In framing final drafting, parties are requested to clarify whether or not, in their view, the amended wording would be necessary to secure a conclusion of No Adverse Effect on Integrity in relation to the Harbour Porpoise feature of the Southern North Sea SAC.</p> |                            | regarding AEoI on the SNS SAC.  |
| 48 | Schedule 12 (Export Cable System Deemed Marine Licence) | <p>(2) The pre-construction surveys referred to in sub-paragraph (1) to be undertaken, unless otherwise agreed by the MMO, are—</p> <p>(a) appropriate surveys to determine the location and extent of any biogenic reef features (<i>Sabellaria spinulosa</i>) inside the area(s) within the Order limits in which it is proposed to carry</p> | <p><b>Pre-construction monitoring and surveys</b></p> <p>Natural England advises [REP5A-005] that although pre-construction ground-truthing is provided for in the Biogenic Reef Mitigation Plan (BRMP), it is of sufficient importance to merit being</p>   | Applicant, Natural England | Natural England has no further comment beyond what was stated at Deadline 5 / 5A. |

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|    | Condition 15(2)(a)   | out construction works, as provided for in the Biogenic Reef Mitigation Plan...  | included within a more precise description of appropriate surveys secured on the face of this Condition. The Applicant is requested to either accede to this request at Deadline 6 or to explain why such an approach is not warranted.  |                            |  |
| 49 | Schedule 12 (Export Cable System Deemed Marine Licence)<br><br>Condition 15 (2)(b) | (i) cable protection is installed within the Goodwin Sands rMCZ, ground truthing of the geophysical surveys carried out in accordance with subparagraph (2)(c), using drop down video and to be focussed on the areas where cable protection has been installed to monitor epifaunal communities and inundation by sand, in the event that cable protection is installed within the Goodwin Sands rMCZ;<br><br>(ii) sandwave clearance is required within the Goodwin Sands rMCZ, interpreted geophysical monitoring to monitor changes in sediment type, in the event that sandwave clearance is required within the Goodwin Sands rMCZ | <b>Pre-construction monitoring and surveys: (good drafting and referencing error)</b><br><br>As currently drafted, the formatting of Condition 15(2)(b) (i) and (ii) appears that it would be more preferably drafted with 15(2)(b) (i) as a self-contained sub paragraph (b) and then 15(2)(b) (ii) as a self-contained sub paragraph (c), with sub paragraphs (c) to (e) re-lettered accordingly.<br><br>Is the reference “carried out in accordance with subparagraph (2)(c)” which calls up the Saltmarsh Mitigation, Reinstatement and Monitoring Plan (SMRMP) the correct reference? Natural England suggests not [REP5A-005]. The Applicant is requested to | Applicant, Natural England | In line the ExAs query is the reference to sub-paragraph 2C correct and appropriate? |

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|    |   |            | review its approach on these matters and present its final position at Deadline 6.  |                            |  |
| 50 | Schedule 12 (Export Cable System Deemed Marine Licence)<br><br>Condition 15(2)(b) | [As above] | <p><b>Pre-construction monitoring and surveys: “interpreted geophysical monitoring” and survey effort</b></p> <p>Can the Applicant please explain what “interpreted geophysical monitoring” means? Natural England suggests [REP5A-005] that the activity taking place pursuant to this drafting may require more precise definition on the face of the Condition. It also considers that ground-truthing needs to occur and to be secured at both preconstruction and post construction, with equal survey method and effort at both stages.</p> | Applicant, Natural England | Natural England would also welcome further information from the Applicant regarding this point which was raised by ourselves at Deadline 5 / 5A.   |
| 51 | Schedule 12 (Export Cable System Deemed Marine Licence)                           | [None]     | <p><b>Post construction</b></p> <p>Natural England highlights [REP5A-005] an unresolved action accepted by the Applicant to secure the post construction monitoring provided for in the Biogenic Reef Mitigation Plan (BRMP)</p>  | Applicant, Natural England | To reiterate, within the BRMP it is made clear that post-construction monitoring will be undertaken to validate the success of any micro-siting. However, there is no reference to this within condition 15, |

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|  | Condition 17 |  | on the face of this Condition. The Applicant is requested to review its approach on this matter and present its final position at Deadline 6. |  | and 17 of Schedule 11 Part 4. For completeness, it should explicitly state within this condition that this monitoring will be carried out. This will ensure a clear mechanism is there. Also, in line with the applicant's assertions that ground truthing data will be collected pre-construction for the BRMP this should be committed to post-construction to aid in determining the success of any micro-siting. |
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