

Vattenfall Wind Power Ltd

Thanet Extension Offshore Wind Farm

Appendix 24 to Deadline 6 Submission:
Applicant's comments on the ExA's preferred
dDCO or dDCO commentary

Relevant Examination Deadline: 6

Submitted by Vattenfall Wind Power Ltd

Date: May 2019

Revision A

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Date of Approval:	May 2019
Revision:	A

Revision A	Original document submitted to the Examining Authority

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THANET EXTENSION OFFSHORE WIND FARM: EXAMINING AUTHORITY'S COMMENTARY ON THE DDCO: 7 MAY 2019

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
1.	All provisions	[None]	<p>Numbering</p> <p>Please review numbering of and cross-referencing in text between all provisions and ensure that numbering changes at or before Deadline 5 have not left any that are wrong, or cross refer to wrongly numbered or removed provisions as a consequence of the addition of or deletion of provisions at any point in the dDCO.</p>	<p>The Applicant has updated numbering and cross referencing throughout the dDCO submitted at Deadline 6. A full review of the numbering and cross referencing will be undertaken prior to Deadline 7</p>	<p>Cross referencing has been updated throughout the dDCO. A full review of the numbering and cross referencing will be undertaken prior to Deadline 7.</p>
2.	All provisions	[None]	<p>Format and SI Template validation</p> <p>Prior to submission of a preferred dDCO, please ensure that all formatting is consistent with the SI Template and that a validation check has been carried out.</p>	<p>The dDCO submitted at Deadline 7 will be validated and a validation certificate will be submitted at that deadline.</p>	<p>No amendments to the dDCO are required.</p>
3.	Pre-amble	<p>The Secretary of State in exercise of the powers conferred by sections 114, 115, 120, and 149A of the 2008 Act the Secretary of State makes the following Order”</p>	<p>Typographic error</p> <p>Delete the second reference to the Secretary of State.</p>	<p>The Applicant notes the representation and has updated the dDCO submitted at Deadline 6 accordingly.</p>	<p><i>The Secretary of State in exercise of the powers conferred by sections 114, 115, 120, and 149A of the 2008 Act the Secretary of State makes the following Order—</i></p>
4.	Art 2	“commence” (a) in relation	<p>Interpretation: “commence”</p>	<p>The Applicant notes the representation and has</p>	<p>“commence” <i>means</i> (a) in relation to works seaward of</p>

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		to...	(typographic error) Add the word "means" and a colon after "commence" and before "(a)".	updated the dDCO submitted at Deadline 6 accordingly.	MHWS...
5.	Art 2	"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, pre-construction surveys and monitoring, and seabed preparation and clearance (b) in respect of any other works comprised	<p>Interpretation: "commence"</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) In the marine environment: 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 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"> • 8: (aids to navigation and the need for any notice to and 	<p>As drafted, the dDCO carves out the more substantive elements of the works permitted prior to formal commencement and defines these as "pre-commencement works".</p> <p>The requirements then seek to ensure that sufficient information is submitted to the relevant discharging authority in relation to the pre-commencement works before they are carried out.</p> <p>The Applicant has considered each condition and requirement listed by the ExA in turn:</p> <p>Condition 8 – the listed activities are not pre-commencement works, so there is no direct risk of these works being undertaken without suitable plans in place.</p> <p>Condition 13 – lists pre-commencement plans and</p>	<p>"pre-commencement works" means archaeological investigations, remedial work in respect of any contamination or other adverse ground conditions, the erection of any temporary fencing or temporary means of enclosure, seabed preparation and clearance, <u>site clearance, demolition work and diversion and laying of services, temporary structures or hard standing.</u></p> <p>Insertion of new requirement in Schedule 1 Part 3</p> <p><u>Pre-commencement works</u></p> <p><u>(1) No pre-commencement works may commence until all details relevant to the pre-commencement works required by Requirements 14, 17, 18, 19, 21, 22, 23, 24 and 25 in Schedule 1 Part 3 of this Order have been submitted to and approved</u></p>

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			<p>direction on these by Trinity House); and</p> <ul style="list-style-type: none"> • 13: (submission and approval of any pre-construction plans or documents) • 20: (the fisheries liaison and co-existence plan) <p>b) In the terrestrial environment: 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> <ul style="list-style-type: none"> • R14 (access management); • R17 (highway access); • R18 (Construction Environmental Management Plan); • R19 (temporary fencing); • R21 (Contaminated land and groundwater plan); • R22 (Construction noise and vibration management plan); • R23 (Construction traffic management plan); 	<p>documentation requirements. The Applicant accepts that part of this condition may need discharging before the pre-commencement works start.</p> <p>Condition 20 – requires compliance with fisheries liaison and coexistence plan, this plan is a certified document and therefore will be in place before any works begin.</p> <p>R14 – it is unlikely any of the pre-commencement works will interfere with the connection works in Pegwell Bay Country Park.</p> <p>R17 – there may be a need for temporary highway accesses as a result of pre-commencement works such as laying of services</p> <p>R18 the applicant acknowledges the fact that certain aspects of the CEMP may apply to pre-commencement works</p> <p>R19, 21 and 24 – these requirements acknowledge</p>	<p><u>by the discharging authority.</u></p> <p><u>(2) In addition to sub-section (1):</u></p> <p style="padding-left: 40px;">a. <u>the undertaker may submit,</u> <u>and</u></p> <p style="padding-left: 40px;">b. <u>the discharging authority may request</u></p> <p><u>any additional information deemed necessary to ensure adequate mitigation is secured in relation to the pre-commencement works.</u></p> <p><u>(3) The details required pursuant to sub-sections (1) and (2) may be submitted separately and in advance of the details required to discharge the requirement in advance of commencement.</u></p> <p>Insertion of new condition in Schedule 11 and 12</p> <p><u>(1) No pre-commencement works may commence until all details relevant to the pre-commencement works</u></p>

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			<ul style="list-style-type: none"> • R24 (Onshore archaeological written scheme of investigation); and/ or • R25 (Landscape and Ecological Mitigation plan)? <p>c) Generally: as a consequence of drafting in Art 2, are there any remaining proposals for pre-commencement works that are not (for reasons that must be stated) subject to appropriate control in the dDCO?</p> <p>IPs and Other Persons are requested to respond by Deadline 6 with the Applicant making a final response at Deadline 7.</p>	<p>the need for certain details to be submitted and approved for the pre-commencement works</p> <p>R22, 23 and R25 – the applicant acknowledges the fact that certain aspects of these plans may apply to pre-commencement works</p> <p>The key point that the Applicant has made previously is that the plans that would be submitted as part of any pre-commencement work would include all necessary information to satisfy the discharging authority that all relevant matters that could affect such works had been properly considered. The discharging authority is also able to request further information, in order to ensure that this is the case. Nonetheless, in order to address any overlap and ensure that sufficient mitigation is secured for any works carried out prior to formal commencement, the Applicant has done two things:</p> <p>1.updated the definition of</p>	<p><u>required by [Condition 13/Condition 11] in [Schedule 11/Schedule 12] of this Order have been submitted to and approved by the MMO.</u></p> <p><u>(2) In addition to sub-section (1):</u></p> <ul style="list-style-type: none"> a. <u>the undertaker may submit,</u> and b. <u>the MMO may request</u> <p><u>any additional information deemed necessary to ensure adequate mitigation is secured in relation to the pre-commencement works.</u></p> <p><u>(3) The details required pursuant to sub-sections (1) and (2) may be submitted separately and in advance of the details required to discharge the condition in advance of commencement.</u></p>

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				<p>"pre-commencement works" in the DCO to ensure it includes all works which could have likely significant effects and therefore require mitigation.</p> <p>2. inserted a new requirement in Schedule 1 and a new condition in each DML in relation to pre-commencement works. The requirement and conditions secure the submission and approval of any relevant information required pursuant to the various requirements or conditions listed above in relation to the pre-commencement works before they can begin.</p> <p>A catch all provision has also been included to allow the discharging authority to request and the undertaker to supply voluntarily any other additional information required in relation to mitigation for the pre-commencement works, not listed in the specific requirements and conditions.</p> <p>The wording makes it clear</p>	

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				that the pre-commencement works can be carried out without having to discharge each of the requirements in full, only the information that is relevant to those early stage works needs to be approved before works can start.	
6.	Art 2	the distance between the lowest point of the rotating blade of the wind turbine generation and MHWS”	Interpretation: “draught height” Replace “generation” by “generator”.	The Applicant notes the representation and has updated this article in the dDCO submitted at Deadline 6 accordingly.	<i>“draught height” means the distance between the lowest point of the rotating blade of the wind turbine generation generator and MHWS.</i> <i>Equivalent definition in Schedule 11 Part 1 para 1 also amended to reflect this correction - “draught height” means the distance between the lowest point of the rotating blade of the wind turbine generation generator and MHWS;</i>
7.	Art 5 (3) and (9)	(3) The undertaker must 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 must	Benefit of the Order: deadlines on SoS processes and decisions As currently drafted, the article seeks to: <ul style="list-style-type: none">• Impose a 4-week deadline on the SoS to respond to receipt of a notice (Art 5(3)); and	The revised article relating to the Benefit of the Order has been included in more recently drafted – but not yet made, development consent orders. This includes Hornsea Project 3 Offshore Wind Farm at	The Applicant proposes to amend Article 5(3) so that the time limit is increased to eight weeks as follows: <i>(3) The undertaker must consult the Secretary of State before making an application for consent under this article by</i>

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		<p>provide a response within four weeks of receipt of the notice.</p> <p>... [and]</p> <p>(9) The Secretary of State must 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>	<ul style="list-style-type: none"> • Impose an 8-week deadline on the SoS to determine an application (Art 5(9)). <p>Reference is made in the Explanatory Memorandum (para 7, commentary on Art 5) to similar wording being proposed in a current DCO application and to the need to define a procedure in the absence of a statutory procedure. However, such wording has not previously been accepted by a SoS. Nor is it clear what if any particular harm, delay or cost the Applicant is seeking to control by the insertion of this wording.</p> <p>Whilst the ExA has no concluded view on this matter, it is not clear that the current drafting will be acceptable to the SoS.</p> <p>In these circumstances, the Applicant is asked to consider and respond to the following possible alternative provisions:</p> <p>a) In Art 5(3), replace the text "within four weeks of receipt of the notice" by "as soon as reasonably practicable".</p> <p>b) Replace A5(9) by "The Secretary of State must determine an application for consent made under this article as soon as reasonably practicable".</p> <p>If the Applicant seeks to sustain</p>	<p>Article 5.</p> <p>For any project of national significance, it is important to ensure expediency of process when obtaining any necessary approvals under the Order. The transfer of benefit article, as with many other requirements and conditions contained within the dDCO, should necessarily be subject to reasonable timeframes by which the Secretary of State should grant such an approval. For any approval required for key requirements and conditions, that too is subject to an approval mechanism – with appropriate timescales. The approval of the Secretary of State allows the transfer of the order is a necessary part of that process.</p> <p>As to the harm or delay the Applicant is seeking to control, absent any reasonable timeframes, there is no ability for the Applicant to control when the benefit of the Order may be transferred and</p>	<p><i>giving notice in writing of the proposed application and the Secretary of State must provide a response within four eight weeks of receipt of the notice.</i></p> <p>Due to submissions raised by National Grid, the Applicant has agreed with National Grid and created a new Article 5(9) such that the Secretary of State must consult National Grid on every application for consent under the Article, as follows</p> <p><i>(9) The Secretary of State must consult National Grid before giving consent to the transfer or grant to a person of any or all of the benefit of the provisions of this Order (excluding the deemed marine licences referred to in paragraph (2) above).</i></p> <p>These changes, driven in part by submissions by National Grid and Cadent, are explained below and in the EM.</p> <p>The former Article 5(9) is now Article 5(10) and reads as follows:</p> <p><i>(10) The Secretary of State must determine an application for consent made under this article</i></p>

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			<p>the existing drafting, it is requested to provide more detailed evidence of the particular harms that the drafting seeks to address.</p>	<p>there is no legal imperative – or incentive – for the Secretary of State to approve the same. As the Examining Authority will be aware, if the Applicant (or any Applicant for an offshore wind farm project) wanted to transfer the project to another company, expediency and timing is absolutely critical in ensuring that the sale can properly take place. Any delay in being able to transfer (and therefore sell) such an entity can affect bankability, commercial attractiveness and ultimately the value of the project as a whole. Any such delay can then, in turn, impact on any contracts for difference bidding process.</p> <p>The Applicant acknowledges that, as part of the transfer of benefit of the development consent order, consultation may be required and that perhaps – without wishing to second guess concerns the Secretary of State may</p>	<p><i>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.</i></p>

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				<p>have – that four weeks may not be enough time to carry out that consultation exercise.</p> <p>The first point the Applicant would make in response is that it is completely in the interests of the Applicant to have liaised in advance with any potentially affected consultees, such as statutory undertakers, and provided them with certain information in advance of any formal consultation exercise taking place. The Applicant would take a proactive and positive stance in assisting the Secretary of State during such a consultation process.</p> <p>Secondly, the Secretary of State has a number of other timescales, processes and commitments that have to be adhered to on a daily basis. To cite one example, in the submission of Supply Chain Plans for CFD, the Secretary of State endeavours to respond to such plans within a thirty</p>	

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				<p>day period. In the numerous commitments that the Secretary of State has – which the Applicant acknowledges – if there is a commitment to approve or review documentation with no timescale attached, as opposed to internal or external deadlines in other documentation, simply citing "as soon as is reasonably practicable" means that priority will undoubtedly be given to those matters containing some form of timescale.</p> <p>Thirdly, acknowledging the current timings and approval process as set out in Schedule 10 of the dDCO, the Applicant would be content to amend Article 5(3) to allow for an eight-week consultation period.</p> <p>In total, this allows the Secretary of State sixteen weeks to consult on, and approve, the transfer. This allows certainty to the Applicant but also affords the Secretary of State a reasonable amount of time to ensure that the transfer</p>	

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				can take place with the resources that are available, both within BEIS but also when considering the response time of other consultees.	
8.	Art 5(4)	(4) If the undertaker transfers any of all of the benefit of the provisions of this Order pursuant to paragraph (1) and the transferee is a special purpose vehicle entity specifically created for the purpose of implementing and constructing the authorised development ...	<p>Benefit of the Order: guarantee on transfer to a special purpose vehicle</p> <p>This provision would only activate the requirement to provide a guarantee in very specific circumstances: where the transferee is a) a special purpose vehicle entity and b) specifically created for the purpose of implementing and constructing the authorised development.</p> <p>If (for example) the transferee was to be an existing special purpose vehicle originally created for another purpose, it would appear that no guarantee would be required.</p> <p>Whilst the ExA has no concluded view on this matter, the Applicant is asked to consider and respond to the following possible alternative drafting with the intention to ensure retention of a guarantee:</p> <ul style="list-style-type: none"> • Replace “specifically created for” by “with the”. 	The Applicant is content to amend Article 5(4) to remove the wording "and the transferee is a special purpose vehicle entity specifically created for the purpose of implementing and constructing the authorised development". This will be reflected in the dDCO submitted at Deadline 6.	<p>The final proposed form of Article 5(4) is as follows:</p> <p>(4) If the undertaker transfers any or all of the benefit of the provisions of this Order pursuant to paragraph (1), and the transferee is a special purpose vehicle entity specifically created for the purpose of implementing and constructing the authorised development, then other than when the transferee is an offshore transmission operator, the transferee must not begin to exercise the powers provided within Parts 3, 4, 5 and 6 of this Order in relation to any land unless it has first put in place either:</p> <p>a. a guarantee, which may be given by the transferring undertaker, in respect of the liabilities of the undertaker to pay compensation under this Order in respect of</p>

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			<p>If the Applicant seeks to sustain the current drafting, it is requested to explain how it can assure the SoS that the intended guarantee will be applied in all necessary circumstances.</p>		<p>the exercise of the relevant power of compulsory acquisition or temporary possession in relation to that land; or</p> <p>b. an alternative form of security, including a funding agreement between the transferring undertaker and the transferee or the transferee and a third party, for that purpose which has been approved by the Secretary of State.</p> <p>Please note that certain other amendments have been made to Article 5, and these are addressed in full below and in the Explanatory Memorandum.</p>
9.	Art 5	(10) 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	<p>Benefit of the Order: application of arbitration to SoS processes</p> <p>What is the justification for seeking to impose an arbitration procedure which would appear to inappropriately fetter the discretion of the SoS?</p> <p>Is it necessary to apply an arbitration procedure to the SoS,</p>	The Applicant firstly refers the Examining Authority to the response provided for relating to Article 5 above (Item 7) in explaining rationale for the process in the transfer of benefit provision as it stands, which also assists in providing context for	No amendments are required save that other, unrelated amendments within the Article mean that this sub-paragraph is now Article 5(11).

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		<p>paragraph (9), the undertaker may refer the matter for determination in accordance with article 36 (arbitration)</p>	<p>when a decision of the SoS can be challenged by way of Judicial Review?</p> <p>How can the SoS can be satisfied at the time of making the Order that the rights of those persons subject to CA under the order will be sufficiently protected upon any transfer of the benefit of CA provisions if the arbitration procedure applies?</p> <p>Whilst the ExA has no concluded view on this matter, it is not clear that the current drafting will be acceptable to the SoS.</p> <p>In these circumstances, the Applicant is asked to consider and respond to the following possible alternative provisions:</p> <ul style="list-style-type: none"> • Delete Art 5(10) and renumber remaining paragraphs, including affected cross-references. <p>If the Applicant seeks to sustain this drafting, it is requested to provide more detailed evidence of the reasons for it and the particular harms that the drafting seeks to address.</p>	<p>response to this Item 9.</p> <p>The Applicant has provided a Legal Opinion of Counsel, alongside a summary of legal submissions, at Deadline 5. This clearly sets out – and explains – why public bodies and governmental bodies would not be inappropriately fettered. Whilst the opinion focuses on Trinity House and the MMO, it also is clear at paragraph 9 that the operation of the arbitration provision applies to concerns raised by others through the Examination process. This would include the Secretary of State. In order to provide the Examining Authority with comfort, the Applicant has liaised with Counsel further and they explicitly content to confirm this view.</p> <p>The Applicant does not propose to repeat all of the previous submissions made; however it is important to note that arbitration is widely acceptable in a statutory context and it also allows</p>	

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				<p>authorities and decision makers to be subject to specific arbitration. It is not novel and is well established. It is also subject to the provisions of the Arbitration Act 1996, which contain several statutory principles that guide arbitration and how it operates.</p> <p>An important point to note, in this regard, is that arbitration is a mechanism for independently and expediently resolving matters that cannot be agreed – or are not approved – under the development consent order process. It is no different to the appealing of a decision for refusal of non-determination, to the extent that it allows another independent body the opportunity to review and decide what the decision should be. The difference in relation to arbitration is that, in fact, it allows for more flexibility as a process. It allows parties to seek to resolve matters and, if certain matters should not be</p>	

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				<p>subject to arbitration, that is considered and taken into account by the independent body chosen to arbitrate.</p> <p>In addition, the process does not prevent a party from taking a specific course of action – it does not stop bodies taking actions that operate as a matter of law. Such legal operations are expressly considered as part of any arbitration then being undertaken.</p> <p>As the Applicant has explained previously, it cannot be correct – and certainly wouldn't have been intended by Parliament – that an approval of a request to the Secretary of State within the order to discharge an obligation can only be dealt with by way of judicial review. Judicial review is a statutory Court process and whilst would of course be an appropriate mechanism in challenging the granting of development consent (for example), the holding up</p>	

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				<p>of the transfer, sale, construction and operation of a nationally significant infrastructure project for months, potentially years, over a decision of transfer, is wholly disproportionate. Some sort of mechanism must exist in order to ensure that there is an efficient way to reach a resolution by an independent and expert body capable of reaching a reasonable and robust consent, taking into account representations made by both parties.</p> <p>Section 1(b) of the Arbitration Act 1996 recognises that disputes are subject to any safeguards that is necessary in the public interest. Put another way, parties subject to arbitration must be aware that a public interest test exists. The Applicant refers the Examining Authority to sections 26 to 30 inclusive of the Legal Opinion. As such, if arbitration for any reason, as a principle, was considered incompatible</p>	

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				with compulsory acquisition, this can be demonstrated fairly and reasonably. It does not prevent the taking of any action under the Order and neither does it in some way serve to in anyway affect, alter or diminish the compulsory acquisition powers contained within the draft Order and the way in which they operate.	
10.	Art 5(14) and (15)	[None]	Benefit of the Order: (format errors) Correct the formatting of subparagraphs Art 5(14)(b)(i) to (ii) and Art 5(15)(b)(i) to (v), Art 5(14)(a)(i) to (v) (see comment above).	The Applicant has reviewed Article 5 and has corrected any formatting and cross numbering, as is required.	The Applicant has reviewed Article 5 and has corrected any formatting and cross numbering, as is required.

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11.	Part 3 Arts 8 - 13 Sch 3 R14	[None]	<p>Access management</p> <p>Kent County Council is asked to undertake a final review by Deadline 6 of Part 3 (Arts 8 – 3) and Sch 3 R14 and to advise whether it is now content that appropriate management of the following issues is secured:</p> <p>a) Access to Pegwell Bay Country Park; and</p> <p>b) Utilisation by the public and plant crossing of the Sustrans National Cycle Route.</p>	The Applicant notes the representation is directed at Kent Country Council and will await any further comments.	No drafting amendments required.
12.	Art 15(4)	<p>(4) No trial holes may be made under this article—</p> <p>(a) in land held by or in right of the Crown without the consent of the Crown</p>	<p>Authority to survey and investigate the land onshore: (format error)</p> <p>Reformat to remove the “— (a)” forming a sub-paragraph which is not required, whilst leaving the words in place (see comment 2 above).</p>	The Applicant notes the representation and has updated this article in the dDCO submitted at Deadline 6 accordingly. The formatting area only related to spacing.	<i>(4) No trial holes may be made under this article in land held by or in right of the Crown without the consent of the Crown.</i>
13.	Art 16	[None]	<p>Public rights of navigation: justification for extinguishment of rights</p> <p>The Applicant’s attention is drawn to Deadline 5A submissions by Trinity House [REP5A-006] to the effect that it is not necessary or desirable to include a general power to extinguish public rights of navigation in the dDCO. Trinity House asserts that the Applicant</p>	The Applicant would like to highlight that equivalent articles have been included in many recent offshore wind farm DCOs including The Walney Extension Offshore Wind Farm Order 2014, the Burbo Bank Extension Offshore Wind Farm Order 2014, the Rampion Offshore Wind Farm Order 2014 and the	<p><i>(1) Subject to paragraph (2), (4) and (5), the rights of navigation over the places in the sea where any of the permanent structures are located within territorial waters will be <u>extinguished suspended</u>.</i></p> <p><i>(5) Subject to the undertaker</i></p>

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			<p>has not provided a sufficiently compelling reason for a provision that would have significant effects.</p> <p>a) Please respond to these submissions fully by D6.</p> <p>b) Why is this provision needed in its current form?</p> <p>c) What would be the effect if the dDCO did not provide the extinguishment sought?</p> <p>Trinity House, Maritime and Coastguard Agency and (to the extent that this issue affects its interests) Port of London Authority are invited to comment on the Applicant's response at Deadline 7.</p>	<p>Galopper Wind Farm Order 2013. This article is not novel and where the wording differs within the dDCO and other made Orders, this is because of amendments made following dialogue with Trinity House. Indeed, the drafting inserted into the latest Article 16 was provided by Trinity House for inclusion.</p> <p>The Article clarifies that at the exact locations of the permanent structures, where it would not be physically possible for one to pass through, public rights of navigation are extinguished. This Article does not relate to the waters surrounding the permanent structures, as the Applicant has previously explained.</p> <p>Article 16(6) of the dDCO also makes clear that such rights would resume after decommissioning.</p> <p>(c) Without having any necessary power of extinguishment contained within a dDCO, this would create a legal irregularity,</p>	<p><i>complying with paragraph (4), 14 days prior to the commencement of the works, the public right of navigation over the places of the sea where the plan indicates each permanent structure is to be located will be <u>extinguished</u> <u>suspended</u>.</i></p>

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				<p>to the extent that a right existed for navigation, which the Applicant had then obstructed and prevented a mariner from navigating within that area of sea. Whilst clearly such navigation would not take place – and a safety zone would exist in any event – in the same way that one must extinguish necessary rights onshore, the same exists for offshore wind turbine generators and associated structures. The rights therefore have to cease to exist in some form for the lifetime of the development.</p> <p>In this regard, what the Applicant has been prepared to consider – and it is not entirely clear from stakeholder responses whether this is the primary issue of concern –whether "extinguishment" or "suspension" should be the correct and most robust terminology in the removal of public rights of navigation over wind turbine generator locations.</p> <p>The Applicant's view is that it would be more</p>	

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				proportionate – and factually (legally) correct – to refer to "suspension", rather than "extinguishment". The Applicant is therefore content to amend this wording accordingly in the dDCO submitted for Deadline 6.	
14.	Art 16(2)	(2) The Applicant will submit a plan showing the precise locations of each permanent structure to Trinity House, the MCA, the MMO and the Secretary of State; (a) in the case of Trinity House, no later than ten weeks prior to the commencement of the works; (b) in all other cases, no later than eight weeks	<p>Public rights of navigation: notification of Port of London Authority</p> <p>The Port of London Authority and Estuary Services Ltd. have requested [REP5A-002] that the Port of London Authority be added to this provision, on the basis that it provides VTS (vessel traffic services) in the area and this would enable it to issue notice to mariners and advise pilots in advance of the construction of new permanent structures. This request has been justified on the basis that it is necessary to (without prejudice to other submissions) reduce navigational risk to ALARP.</p> <p>The Applicant is requested to either:</p> <p>a) Make the change sought; or</p> <p>b) Provide a final explanation why such drafting is not warranted.</p>	Whilst the Applicant does not agree that such notification will necessarily reduce navigational risk to ALARP, the Applicant is content to add the Port of London Authority to Article 16(2). This will be reflected in the dDCO submitted for Deadline 6.	<i>The undertaker will submit a plan showing the precise locations of each permanent structure to Trinity House, the MCA, the MMO, <u>the Port of London Authority</u> and the Secretary of State;</i>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			Port of London Authority and Estuary Services Ltd. are asked to make concluding submissions on this point at Deadline 7.		
16.	Art 17	<p>“the Crown Estate for which includes”</p> <p>[and]</p> <p>“and provide the Secretary of State”</p>	<p>Compulsory acquisition (CA) of land: (typographical errors)</p> <p>Remove superfluous “for”.</p> <p>Replace “provide” with “provided” to give effect to apparent drafting intention.</p>	The Applicant notes the representation and has updated the dDCO submitted at Deadline 6 accordingly.	<i>(3) The undertaker must not exercise any powers of compulsory acquisition authorised by this Order until it has acquired a legal estate in the seabed in the form of an Agreement for Lease from the Crown Estate for which includes the offshore wind turbine generating station comprised in Work No. 1 and <u>provided</u> the Secretary of State with written evidence of such interest.</i>
17.	Art 19	“the undertaker shall not exercise”	<p>Compulsory acquisition (CA) of rights: (current drafting practice)</p> <p>Replace “shall not” with “must not”.</p>	The Applicant notes the representation and has updated the dDCO submitted at Deadline 6 accordingly.	<i>In exercising compulsory acquisition of rights the undertaker shall <u>must</u> not exercise Right E...</i>
18.	Art 25	[None]	<p>Temporary use of land for carrying out the authorised project (TP)</p> <p>While the reasons set out in the EM (para 7, commentary on Art 6) for excluding the provisions of the Neighbourhood Planning Act 2017 (NPA 2017) are noted, although the relevant parts of this statute have not yet commenced, the provisions of the statute have now been clear</p>	The Applicant notes that the NPA 2017 was enacted on 27 th April 2017, and that over two years later there is no timetable for the relevant provisions here (part 2 (sections 18 to 23)) coming into force. The regulations required to provide more detail on the operation of the regime have not yet been	No amendments to the dDCO are proposed.

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			<p>for some time.</p> <p>Given the parliamentary approval to the temporary possession regime under the NPA 2017, which was subject to consultation and debate before being enacted, could the current wording be modified to more closely reflect the incoming statutory regime where possible?</p> <p>Specifically:</p> <p>a) The notice period that will be required under the NPA 2017 Act is 3 months, substantially longer than the 14 days required under article 25(2). Whilst existing made Orders have removed the effect of the NPA 2017, this has in summary terms been argued on a transitional basis - that pre-application consultation and project design commenced at a point when there was no prospect of provisions in the NPA 2017 coming into effect and so these were not planned for by the Applicants in these cases. It is not clear that that was the case for this Application. Other than prior precedent in drafting, what is the justification for only requiring 14 days' notice in this case?</p> <p>b) Under the NPA 2017, the notice would also have to state the period for which the acquiring authority is to take possession. For the same reasons, should such a requirement</p>	<p>ade.</p> <p>The Applicant therefore maintains that for certainty and clarity, it is appropriate to continue to apply the temporary possession regime as it has been included in numerous DCOs and Orders made under the Transport and Works Act 1992 to date.</p> <p>The Applicant further understands that the wording within the dDCO as currently drafted is consistent with the equivalent articles in recent made Orders including Article 3 of the Port of Tilbury (Expansion) Order 2019 and Articles 27(13) and 28(12) of the Millbrook Gas Fired Generating Station Order 2019.</p> <p>Other than prior precedent, it is possible that a 14-day short timescale will be required in order to adhere to both the Applicant's construction programme, and the need to implement pre-construction ecological activities while accounting for fishing seasons, shooting seasons, bird breeding seasons or other key ecological</p>	

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			<p>be included in this case?</p> <p>c) TP powers are sometimes said to be justified because they are in the interests of landowners, whose land would not then need to be acquired permanently. The NPA 2017 Act provisions include the ability to serve a counter-notice objecting to the proposed temporary possession so that the landowner would have the option to choose whether temporary possession or permanent acquisition was desirable. Should this article make some such provision – whether or not in the form in the NPA 2017?</p> <p>The Applicant is asked to respond by Deadline 6.</p>	<p>"windows" for species relocation.</p> <p>The Applicant will not know exactly what will be required until after the Order is granted and detailed requirements are agreed with the local planning authorities.</p> <p>Some of these works will be temporary in nature, and it will not be appropriate or possible to use permanent compulsory acquisition powers to enter the land.</p> <p>While the Applicant considers that it is probable that most landowners will have entered into voluntary agreements at this stage, it is possible some will not, and temporary possession powers will be required. The Applicant considers it to be appropriate and proportionate to seek the maximum available flexibility within the law as it currently stands, subject to past DCO precedent.</p> <p>b) The Applicant considers it good practice to provide landowners with reasonable information as</p>	

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				<p>to the likely duration of works. The Applicant will liaise with landowners on its programme of works as early as reasonably possible, and will certainly provide landowners with advance warning, and an opportunity to respond, and with an estimate of the duration of the works to be carried out.</p> <p>The Order as it is drafted does provide landowners with some certainty, as the right to remain in temporary possession of the land will expire after 1 year from the completion of works in the part of the project that has been subject to temporary possession, unless otherwise agreed with the landowner or unless the Applicant has exercised permanent compulsory acquisition powers in respect of the land.</p> <p>Landowners will, in all cases, be compensated for the impact on their land and operations under Article 25(6) and Part 1 of the Land Compensation Act 1961.</p> <p>Accordingly, the Applicant</p>	

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				<p>does not consider that it would be necessary, or appropriate, to require the Applicant to provide a fixed period for the temporary possession of land to be drafted into the Order.</p> <p>c) The dDCO does not provide a counter-notice procedure in relation to the exercise of temporary possession powers. As explained at (a) above, those provisions of the Act are not in force so are not considered appropriate to apply to the dDCO.</p> <p>1. The Applicant is in discussions with all landowners and relevant occupiers to negotiate property agreements, which will include access provisions to allow for the surveying of land upon giving notice to the landowner; this should also reduce or eliminate the need for counter-notices.</p> <p>The Applicant considers that while the relevant provisions of the NPA 2017 have been debated and consulted upon,</p>	

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				<p>it has, to date, not been the will of Parliament to bring them into force.</p> <p>Consequently the Applicant considers that dDCO should remain as it stands in this respect.</p>	
19.	Art 34	subject to a tree preservation order which was made after July 2017	<p>Trees subject to tree preservation orders</p> <p>Why has July 2017 been chosen here?</p>	July 2017 refers to the date on which the relevant surveys to establish trees subject to tree preservation orders were present.	No amendments to the dDCO are proposed.
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) by the Centre for Effective	<p>Arbitration: removal of SoS' backstop power of appointment</p> <p>At paragraph 7.1 of the Applicant's oral submissions to ISH7 [REP3-020], the Applicant acknowledges that the arbitration provisions set out in this dDCO are novel (in that whilst they have been proposed in other dDCOs for NSIP applications that have not yet been decided by the SoS, no equivalent provision can be found on the face of any made Orders). There are outstanding concerns about the approach taken in this provision.</p> <p>Multiple made Orders contain arbitration provisions that, in default of an agreement between the</p>	The Applicant's reason for removing the backstop appointing power of the Secretary of State is as described in their written summary of oral case put at Issue Specific Hearing 7 (REO3-020). It is not asserted by the Applicant that this power could result in excessive costs or administrative difficulties. The Applicant has removed this power because the Secretary of State could be directly affected by, or in some way an interested party to, the difference which is being arbitrated. The Applicant was concerned that a conflict of	<p>Update to Article 5(11)</p> <p>(11) 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 (10), the undertaker may refer the matter for determination in accordance with article 36 (arbitration) or appeal the decision in accordance with Schedule 14 (procedure for appeals).</p>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
		Dispute Resolution.	<p>parties on appointment, empower the SoS to appoint the arbitrator. In summary, the purpose of this backstop is to ensure that the public purpose of the arbitration process and the fitness of the arbitrator can (in cases of dispute) be assured by the SoS.</p> <p>The Applicant has set out reasons why it seeks to vary this otherwise well preceded approach. However, the ExA remains unclear as to the underlying reasons why this backstop role for the SoS has been removed and the evidenced benefits that would flow from this reform.</p> <p>a) If the Applicant seeks to sustain a backstop power to appoint an arbitrator that is held by a person who is not the SoS, it is requested to provide a clear explanation and evidence of the administrative difficulties, avoidable costs, delays or other harms that a back-stop appointment by the SoS has given rise to in any case and that is sought to be avoided by this drafting.</p> <p>b) Alternatively, would the Applicant be content to reinstate the backstop appointing role of the SoS?</p>	<p>interest could be created In this scenario.</p> <p>If the Secretary of State is comfortable it wouldn't be conflicted as acting in some capacity as part of the decision making process, the Applicant is content that the Secretary of State is inserted as the backstop appointing role for specific provisions outwith the Transfer of Benefit arrangement or matters on which the Secretary of State determines specific provisions under the Order.</p> <p>The Applicant has considered very carefully both the role of the Secretary of State, and indeed the MMO, in relation to the draft Order. It is clear to the Applicant that clear concerns remain in respect of both parties, in addition to Natural England and other specific stakeholders, depending on their role as relevant authority or indeed consultee.</p> <p>The Applicant would like to make explicitly clear that the purpose of seeking this arbitration provision originates in the following key principles:</p>	

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
				<p>(a) an arbitration provision already exists within the development consent orders made to date (b) nationally significant infrastructure projects must be constructed expediently and delivered effectively (c) judicial review only is not an appropriate recourse for questioning the determination (or lack thereof) of specific plans and provisions within an order, much in the same way that an applicant for a planning permission wouldn't simply judicially review the approval of a condition – they would be entitled to appeal it.</p> <p>The Applicant has liaised with the Norfolk Vanguard Team and has of course reviewed the Hornsea Project 3 final submitted draft Order. The Applicant has, as such, included an appeal mechanism, in addition to an arbitration mechanism, on the face of the latest version of the draft Order submitted at Deadline 6 for decisions made pursuant to article 5 and Schedule 11 Conditions 13 and 14 and Schedule 12 Conditions 11 and 12.</p>	

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
				<p>The appeal mechanism provides an alternative to arbitration and so would apply for determination or non-determination of decisions. If the Secretary of State's decision is appealed, it would defer to the Law Society who would appoint the appropriate legal expert to deal with that appeal if the transfer of benefit provision was not determined within the correct timescales. As such, the Secretary of State would not be the appropriate body, in the view of the Applicant, to determine the appointment of such an independent person. This also explains why timescales are required (in addition to all of the other reasons provided for in this document).</p>	
21.	Art 36	[As above]	<p>Arbitration: application to the SoS generally</p> <p>As currently worded, Art 36 appears to apply to disputes</p>	<p>As to item (a), there is no specific provision in a made Order for development consent, however the Legal Opinion provides clear</p>	<p>Please see item 20 for relevant amendments.</p>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			<p>relating to the consent to be given by the SoS to any transfer of the benefit of the order (Art 5(10)).</p> <p>a) The ExA is not aware of any precedent / equivalent provision in a made Order that would have the same effect. If such precedent exists, please draw attention to it.</p> <p>b) It is a possible effect of the current drafting of Art 36 that this could enable a transfer of benefit decision to be taken out of the SoS' hands (which could ultimately mean that development consent had been granted to a party not approved by the SoS). (In this respect, the drafting could also fetter the SoS' discretion.)</p> <ul style="list-style-type: none"> • If that is the intended purpose, the Applicant is requested to provide a clearer explanation as to why it is considered necessary and appropriate. • If that is not the intended purpose, drafting should be prepared to address this point, excepting transfer of benefit from the operation of Art 36. <p>c) It is a possible effect of the current drafting of Art 36 that it might be argued to circumvent the need for the SoS to be satisfied when making the Order that a person ultimately granted</p>	<p>examples where a statutory body subject to determination of a specific mechanism or approval has been subject to arbitration provisions. As to (b) and (c), the Applicant has responded to this point in Item 9.</p> <p>As to point (d), as drafted it is possible for the refusal of Article 19 and Requirement 8 to be subject to arbitration. As with an appeal process, this would be deferred to an independent arbitrator with the necessary experience to preside over such a determination (assuming a refusal occurs). The Applicant has provided an explanation as to rationale previously for the need to have some sort of mechanism of review, that results in an necessarily expedient determination of matters that would prevent the construction and building out of a nationally significant infrastructure project. Preventing the transfer, for example, of such rights to a statutory undertaker, could have the effect of preventing the construction of the entirety of a project at a critical stage in construction. If the only</p>	

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			<p>development consent pursuant to a decision by an arbitrator has the required funding to secure CA compensation.</p> <ul style="list-style-type: none"> • If that is the intended purpose, the Applicant is requested to provide a clearer explanation as to why it is considered necessary and appropriate. <p>If that is not the intended purpose, drafting should be prepared to address this point, providing that nothing in the operation of Art 36 can prevent the need for the SoS to be satisfied of the transferee's capability to fund compensation.</p> <p>d) The arbitration clause may also implicitly apply to "any difference under any provision of this Order" (Art 36) which concerns the SoS. So, it could also apply to other provisions in respect of which the SoS' consent/ approval is required including:</p> <ul style="list-style-type: none"> • Art 19(6) (SoS' consent for power to acquire rights to be transferred to a statutory undertaker). Could circumstances arise where the SoS was not satisfied that the power should be transferred for any reason but could be overruled by the arbitrator? • R8 (Any refusal by the SoS to approve a decommissioning 	<p>recourse is judicial review, this could be awaiting some form of judgment for months, even years, which could postpone – potentially indefinitely if causing financial harm (and ultimately affected viability to a point where a project could be cost ineffective). The Applicant in addition refers the Examining Authority to the response set out at Item 21.</p>	

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			<p>scheme). Again, it appears possible that an arbitrator decision could result in approval being given for a scheme of which the SoS disapproves.</p> <ul style="list-style-type: none"> • If that is the intended purpose, the Applicant is requested to provide a clearer explanation as to why it is considered necessary and appropriate. • If that is not the intended purpose, drafting should be prepared to address this point, providing that nothing in the operation of Art 36 can apply to identified consent provisions exercised by the SoS and ensuring that in any matter in respect of which the SoS requires to be satisfied, the SoS' actual satisfaction cannot be over-ruled by an arbitrator. <p>In responding to these comments, it should be noted that whilst the ExA has no firm view on the merits of the currently proposed drafting, it is by no means demonstrated that Art 36 as currently drafted would be deemed acceptable by the SoS.</p> <p>If the Applicant seeks to sustain this drafting, then additional evidence of the need for and beneficial effect of this approach will be required.</p>		

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
22.	Art 36	[As above]	<p>Arbitration: proposed role for the Centre for Effective Dispute Resolution</p> <p>At paragraph 7.1 of the Applicant's oral submissions to ISH7 [REP3-020], the Applicant undertook to 'seek confirmation that the inclusion of the Centre for Effective Dispute Resolution is an appropriate body to adjudicate in matters pertaining to arbitration'.</p> <p>a) If this body is to remain on the face of the dDCO, the ExA requests the Applicant to provide a letter of remit and consent from it, demonstrating that it has the relevant expertise to perform the remit provided in this provision and agrees to perform the statutory function that the dDCO would place upon it.</p> <p>b) Alternatively, if it is argued that a backstop other than the SoS should be retained, is there any other relevant body that might discharge the role provided for the Centre for Effective Dispute Resolution?</p> <p>c) Do any other IPs / Other Persons have final views to put to the ExA on the suitability of the Centre for Effective Dispute Resolution, any other relevant body or the SoS to perform the backstop appointment of an arbitrator?</p>	<p>The Applicant has liaised with CEDR and explained via telephone the context of the arbitration provision and its function within the dDCO. CEDR were also provided with a copy of the arbitration provision, which was reviewed internally by a managing director. CEDR then confirmed that they are comfortable that they have the resource and knowledge to arbitrate within this context and accordingly confirmed that they are content to be included on the face of the Order. The Applicant has provided written confirmation of this correspondence and CEDR's position at Annex A to this document.</p>	<p>No amendments to the dDCO are proposed.</p>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
23.	Art 36	[As above]	<p>Arbitration: application to determinations by statutory and regulatory authorities</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 Art 10(3), highway authority (Art 11), owners of watercourses (Art 14(3)), etc.</p> <p>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</p>	<p>Article 36 has been updated to refer to "any dispute or decision" rather than any difference. Dispute is established terminology in the use of arbitration and is considered more appropriate than "difference".</p> <p>Arbitration is included in all DCOs and relates to any provisions which do not rely on the procedure for the discharge of requirements – the drafting in this DCO is no different and it is considered appropriate that arbitration would be used to deal with a dispute which arises in relation to Article 8(3) or Article 10(3).</p> <p>Article 37(2) relates to those requirements which involve the submission of further details for approval ie those which need discharging. Any decisions made by a discharging authority can be appealed</p>	<p>Subject to Article 39 (Saving provisions for Trinity House), any dispute or decision 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</p>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			<p>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> <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>	<p>to the Secretary of State in accordance with Schedule 10. The Applicant agrees that arbitration will not apply to any decisions made pursuant to these requirements.</p> <p>a) The nature of a consent required under an Article is considered very different to an approval of further details required under a Requirement and therefore the Applicant considers it appropriate that the two decisions are dealt with differently.</p> <p>b) Article 37 is clear when Schedule 10 applies, in all other situations (unless expressly stated otherwise) Article 36 will apply. The Applicant considers this is clear in the drafting.</p>	
24.	Art 36	[As above]	Arbitration: application to determinations under Requirements (Schedules 1 and 10) and	The Applicant has submitted previously – and considers – that the	<u>(2) The procedures in subsection (1) does not apply to the discharge of requirements</u>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			<p>Conditions (Schedules 11 and 12)</p> <p>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>arbitration provision must apply to Schedules 11 and 12. The Applicant however is content to amend the dDCO to make clear that Article 36 does not apply to Schedule 10 and has amended the dDCO accordingly to reflect this.</p>	<p><u>under Schedule 10.</u></p>
25.	Art 36	[As above]	<p>Arbitration: application to the MMO and DMLs</p> <p>In relation to the MMO, SI provisions for appeal in the Marine Licensing (Licence Application Appeals) Regulations 2011 relate to appeals against the refusal or grant subject to conditions of an application for a marine licence under the MCAA2009, and so it is accepted that these would be an 'alternative provision' for the purposes of Art 36. The ExA is not aware of a SI applicable to a refusal or non-determination by the MMO of an application to discharge a condition of a marine licence and there is no specific provision in the MCAA2009 regarding this matter. Arguably, therefore, the effect is that the Applicant is asking the ExA to recommend imposing the arbitration process from Art 36 on the MMO in relation to applications</p>	<p>a) The Applicant is stating that arbitration should apply to Schedules 11 and 12, but has also included the option to use an appeal procedure in relation to the approval of details (akin to the discharge of requirements) under Conditions 13 and 14 in Schedule 11 and Conditions 11 and 12 in Schedule 12.</p> <p>b) The Applicant has set out at length in previous submissions why it is necessary to insert some form of mechanism in order to ensure that delay, non-determination or refusals have a mechanism and recourse. This is entirely necessary for a whole host of reasons relating to the need to ensure that nationally significant infrastructure</p>	<p>Schedule 11 Condition 15 (mirrored in Schedule 12 Condition 13)</p> <p><u>(3) The MMO must determine an application for approval made under conditions 13 and 14 within a period of four months commencing on the date the application is received by the MMO, unless otherwise agreed in writing with the undertaker.</u></p> <p><u>(4) Save in respect of any plan which secures mitigation to avoid adversely affecting the integrity of a European site, where the MMO fails to determine an application for approval under conditions 13</u></p>

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			<p>to discharge conditions of DMLs, as these could be “differences” under a provision of the Order (Art 13 grants the licences with their conditions).</p> <p>The consequent effect of this appears to be that the Applicant is asking for the establishment of a new procedure and recourse, which a licence holder of a marine licence that had been granted directly under the MCAA2009 (i.e. not a DML) would not have.</p> <p>The Applicant and the MMO are asked for their observations at Deadline 6.</p> <p>a) Is such an effect intended?</p> <p>b) If it is, what are the reasons for it and is it justified?</p> <p>c) Is it necessary because the marine licences in this case apply to NSIP development, or is something specific about this project which necessitates the application of this procedure?</p> <p>d) Is it relevant that this could establish a precedent for DMLs under the Planning Act to be treated differently from MLs granted under the MCAA2009?</p> <p>e) Are the implications of this procedure, including the distribution of new benefits, costs and burdens</p>	<p>projects get built, the fact that arbitration is already an appropriate provision within a development consent order and the fact no such mechanism already exists. The Applicant submitted rationale for the approach relating to arbitration at Deadline 5 in the Counsel's Legal Opinion.</p> <p>c) The Applicant agrees that this approach is necessary primarily because the marine licences relate to an NSIP, however also acknowledging that the deemed marine licences are predicated upon the Order to which it relates, which in itself contains a number of mechanisms relating to approval mechanisms. As such, the construction and operation of the project must be capable of being consented in accordance with the indicative programme and the Applicant considers that offshore matters should not be absent any sort of clear review process, which onshore matters obviously are. The MMO has responsibility for offshore matters, the relevant planning authority onshore</p>	<p><u>and 14 within the period referred to in sub-paragraph (3) the programme, statement, plan, protocol or scheme is deemed to be approved by the MMO.</u></p> <p><u>(5) Where the MMO is minded to refuse an application for approval made under conditions 13 and 14 and notifies the undertaker accordingly, or the MMO fails to determine the application for approval under condition 13 within the period prescribed and sub-paragraph (4) does not apply, the undertaker may appeal to the Secretary of State in accordance with the procedure in Part 5 of this licence.</u></p>

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			<p>on the MMO and the public fully understood?</p>	<p>matters. The Applicant sees no reason at all as to why the MMO shouldn't be subject to arbitration, or appeal. It is fair, proportionate, entirely legally possible and accountable.</p> <p>d) The Applicant hopes and anticipates that through Norfolk Vanguard, Hornsea Project 3 and the proposed development that a robust and effective mechanism is provided for in development consent orders going forward and sees no reason as to why certain deemed marine licences cannot have in then an appropriate arbitration and appeal mechanism.</p> <p>e) The alternative to any failure to determine, or refusal, would be judicial review, which is lengthier, more expensive, more burdensome and contains exposure to substantial costs. The Applicant considers any such process to be entirely beneficial in the circumstances.</p>	

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26.	Art 36	[None]	<p>Arbitration: general appropriateness of provision: effects on statutory authority duties etc.</p> <p>The question of the general appropriateness of the provision in Art 36 in relation to the enabling of an arbitration process to subsume the discharge of specific statutory duties placed on public authorities was argued orally at ISH9. Since then, the Applicant has provided:</p> <p>a) Submissions on the approaches taken in respect of a similar provision in the Norfolk Vanguard and Hornsea Three Examinations [REP5-022]; and</p> <p>b) An additional Counsel's Written Opinion on DCO drafting in relation to arbitration [REP5-023].</p> <p>Public authorities whose determinations might be subject to arbitration and who have expressed concerns about the proposed approach are requested to review these documents and to make final written submissions on their preferred approach at Deadline 6.</p>	The Applicant notes that this representation is directed towards interested parties.	No amendments to the dDCO are proposed.
27.	Art 37(2)	Schedule 10 (procedure for discharge of requirements) has effect in relation to all agreements or approvals	<p>Procedure in relation to certain approvals</p> <p>Please review the list of requirements set out in Art 37(2)</p>	a) b) c) The Applicant has reviewed this Schedule and updated the cross references accordingly.	<i>Where an application has been made to a discharging authority for any agreement or approval</i>

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		granted, refused or withheld in relation to requirements 7, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25 and 26 in Part 2 of Schedule 1 (requirements)	<p>where an agreement or approval is required.</p> <p>a) Is it clear that these are the correct provisions?</p> <p>b) If not, what provisions should be added and what provisions should be removed?</p> <p>c) Has renumbering over recent deadline submissions affected the referencing?</p> <p>Any public authority which considers that it does not benefit from this procedure but that it should do is requested to:</p> <p>d) set out the purpose and reason(s) for which it should be included in this provision; and</p> <p>e) frame a preferred means of drafting to address its request.</p> <p>The Applicant is requested to comment on any such requests at Deadline 7.</p>	These are the correct provisions and no further provisions need to be added. The Examining Authority can now treat this as final.	<i>required pursuant to requirements 9, 11, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 28 and 29 7, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 30 in Part 3 of Schedule 1 (requirements) of this Order</i>
28.	Art 40	[None]	<p>Crown rights: (format errors)</p> <p>Please reformat to make the current (2) into (1)(a), make the current (2)(a) to (c) into (1)(a)(i) to (iii), make the current (2)(d) into (1)(b), and renumber the current (3) as (2).</p>	The Applicant has reformatted this Article as recommended in the revised dDCO submitted at Deadline 6.	

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
29.	Schedule 1, Parts 1 and 3 and/or Schedule 8 (Protective Provisions) Schedule 11	[None]	<p>Structures Exclusion Zone and navigation risk mitigation</p> <p>Without prejudice to any more general oral and written submissions about the effect and extent of the Structures Exclusion Zone (SEZ) and other controls in the dDCO which aim to reduce navigation risk to ALARP, all relevant IPs and Other Persons are requested to make final submissions on additional drafting to provide for the SEZ by Deadline 6. The submitted drafting should be prepared on the basis that, if the SoS was minded to make the Order, it would in their view bring risk as close to ALARP as can be achieved. If it remains their view that risk could be reduced further within an ALARP "band", this should be made clear in their submission.</p> <p>Drafting proposals are sought that the relevant parties consider are best able to manage-down risk and are most likely to amend or augment provisions relevant to the Authorised Development and the SEZ (Sch 1 Part 1), the Requirements (Sch 1 Part 3), Protective Provisions (Sch 8) and/or conditions to the Generation Assets DML (Sch 11).</p> <p>The Applicant is requested to</p>	The Applicant notes the representation and will respond at Deadline 7 as required.	N/A

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			respond to all such drafting requests at Deadline 7 and in doing so, if it remains resolved not to adopt requested changes, to explain why these are not necessary.		
30.	Schedule 1 Part 3 Possible New Rqt.	[None]	<p>Navigation safety and shipping impact mitigation plan</p> <p>Port of Tilbury London Ltd. and London Gateway Port Ltd. (the Ports) [REP5A-001] highlight that whilst Sch 11 Condition 13 (Generation Assets DML) provides an approval to the MMO for a construction programme and monitoring plan to include “details of the works to be undertaken within the structures exclusion zone; and [...] the proposed timetable for undertaking of such works within the structures exclusion zone...” it would be desirable for this or an equivalent plan to be approved by the Maritime and Coastguard Agency. The Ports suggest that for this to be secured, a new Requirement should be provided, translating the effect of the plan approval requirement in Sch 11 Condition 13 into the body of the DCO for approval by the Maritime and Coastguard Agency.</p>	The Applicant notes that this response is to be provided by other parties but considers that such a requirement is unnecessary, principally because the MMO is responsible for the enforcement of marine licences.	No amendments to the dDCO are proposed.

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			<p>By Deadline 6:</p> <p>a) The Maritime and Coastguard Agency is requested to engage with Trinity House to consider whether such a provision would address their concerns and; if so</p> <p>b) Whether it should secure consultation or approval by either one or the other body (which one) and</p> <p>c) How such a provision might be drafted.</p> <p>By Deadline 7:</p> <p>d) The Applicant, Port of London Authority, Port of Tilbury London Ltd. and London Gateway Port Ltd. are to respond on the need for and form of any such provision.</p> <p>It follows that a final response by the Applicant to drafting arising from this comment can be made at Deadline 8.</p>		
31.	Schedule 1 Part 3 R8	No offshore works may commence until a written decommissioning programme in compliance with any notice that may be served upon the undertaker by the Secretary of State pursuant to section 105(2) of the 2004 Act has been submitted to the Secretary of State for	<p>Offshore decommissioning</p> <p>As this provision is currently worded, the decommissioning works can commence as soon as the decommissioning programme has been submitted.</p> <p>Does this reflect the drafting intention and, if so, for what purpose other than notice is the</p>	The intention is for the written decommissioning programme to be submitted and approved prior to decommissioning works commencing. Therefore, the suggested amendment has been applied.	<i>No offshore works may commence until a written decommissioning programme in compliance with any notice that may be served upon the undertaker by the Secretary of State pursuant to section 105(2) of the 2004 Act has been submitted to and approved by the Secretary of</i>

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		approval.	<p>offshore decommissioning plan to be submitted to the SoS?</p> <p>If the intention is to establish an approval mechanism, the Applicant is asked to replace “submitted to the Secretary of State for approval” by “submitted to and approved by the Secretary of State” or equivalent words.</p>		<i>State for approval.</i>
32.	R12	[None]	<p>Landfall works notification: “method statement”</p> <p>What is the “method statement” referred to? Should this be defined?</p>	<p>The purpose of Requirement 12 is to act as a mechanism for notification of the Relevant Planning Authority the specific option being undertaken at landfall. It is also to provide, as part of that notification, the predicted timescales for the implementation of those specific set of works. The Applicant has therefore amended the dDCO to make this purpose explicitly clear, rather than refer to a “method statement”.</p>	<i>The <u>method statement notification</u> must include the anticipated timing of the proposed works being undertaken.</i>
33.	R26 and others	[None]	<p>Seasonal restriction</p> <p>The Applicant amended the DCO at Deadline 5 to insert a provision applying seasonal restrictions on construction activities (including piling) in respect of non-breeding waterbirds.</p>	<p>The Applicant notes that this representation is directed at Natural England and will await further comments.</p>	No amendments to the dDCO are proposed.

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			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.		
34.	Schedule 8	[None]	<p>Protective Provisions</p> <p>The ExA draws attention to the need to ensure that all negotiation between the Applicant and relevant statutory undertakers on the form and content of Protective Provisions must be completed by Deadline 6, with final forms of drafting available for comment at Deadline 7 and Applicant's response at Deadline 8.</p> <p>If any commercial agreements are necessary to augment Protective Provisions in circumstances where the Applicant is seeking the withdrawal of a statutory undertaker objection relevant to ss 127 and/ or 138 PA2008, evidence that an agreement has been concluded must be provided no later than Deadline 6, on the basis that if agreements are not concluded, additional draft protective provisions can be submitted for Deadline 7 and commented on at</p>	<p>Protective provisions have been agreed with National Grid (including National Grid Gas), and inserted into the dDCO. A withdrawal letter from NGET was sent to PINS on 23rd May 2019. This was the only undertaker that required PPs to be inserted into the Order that differed from those provided at application.</p> <p>UK Power Networks (Operations) Limited has withdrawn its representation as of 24 May 2019 following successful discussions with the Applicant.</p> <p>Other private treaty negotiations are in substantially agreed or agreed form, and close to completion. None of these other parties have requested</p>	

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			<p>Deadline 8.</p> <p>In that context, where the relevant statutory undertaker is content, evidence should be provided at Deadline 6 that the statutory undertaker either does not request protective provisions or is content with those already found in the dDCO.</p>	<p>bespoke protective provisions to be inserted into the dDCO.</p> <p>The Applicant anticipates several more withdrawal letters before the close of examination including NEMO Link Limited, Southern Water Limited and Thanet OFTO Limited.</p>	
42.	<p>Schedules 11 and 12 (Deemed Marine Licences)</p> <p>Condition 7(11) Sch 11</p> <p>Condition 6 (11) Sch 12</p>	<p>(11) In case of damage to, or destruction or decay of, the authorised scheme seaward of MHWS or any part thereof 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 and the UK Hydrographic Office. In case of exposure of cables on or above the seabed, the undertaker must within five days following the receipt by the undertaker of the final survey report from the periodic burial survey, notify mariners by issuing a notice to mariners and by informing Kingfisher Information Service of the</p>	<p>DMLs: (drafting practice)</p> <p>Please review the underlined text and consider whether this should form another paragraph. (Note that Condition 7(11) of Sch 11 and Condition 6(11) of Sch 12 take the same form and the same amendment could be made to both.)</p>	<p>The Applicant notes the representation and agrees with the recommendation and has amended the formatting of this condition accordingly in both Schedule 11 and Schedule 12.</p>	<p><i>(11) In case of damage to, or destruction or decay of, the authorised scheme seaward of MHWS or any part thereof 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 and the UK Hydrographic Office.</i></p> <p><i>(44) (12) In case of exposure of cables on or above the seabed, the undertaker must within five days following the receipt by the undertaker of the final survey report from the periodic burial survey, notify mariners by issuing a notice to mariners and by informing Kingfisher Information Service of the location and extent of</i></p>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
		location and extent of exposure.			exposure.
43.	Schedules 11 and 12 (Deemed Marine Licences) Condition 13(1)(k) Sch 11 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).	Pre-construction plans and documentation: site integrity plan Natural England has welcomed its addition as a consultee on the preparation of a site integrity plan (SIP) for the Generation Assets DML [REP5A-005]. 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.	The Applicant notes the representation and has amended the wording of this condition within Schedule 12 for consistency with Schedule 11.	<i>A site integrity plan, which must be approved in writing by the MMO in consultation with Natural England prior to the commencement of the licensed activities and which must accord with the outline site integrity plan (as certified in accordance with article 35) and in accordance with the site integrity plan:</i> <i>(2) be approved in writing by the MMO in consultation with Natural England:</i> <i>(i) four months in advance of any geophysical surveys being undertaken; and</i> <i>(ii) a second time four months prior to the carry out of the next relevant noisy activity</i>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
44.	Schedules 11 and 12 (Deemed Marine Licences) Condition 17(3) Sch 11 Condition 16(3) Sch 12	(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>Construction monitoring: noise measurements and cessation of piling</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>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.</p> <p>Natural England and the MMO may</p>	The Applicant accedes and proposes additional wording as requested.	(3) The results of the initial noise measurements monitored in accordance with condition 17(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. <u><i>The MMO may request that further monitoring is undertaken, unless otherwise agreed in writing with the undertaker. 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.</i></u>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			<p>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>		
45.	<p>Schedules 11 and 12 (Deemed Marine Licences)</p> <p>Condition 17(3) Sch 11</p> <p>Condition 16(3) Sch 12</p>	[As Above]	<p>Construction monitoring: noise measurements</p> <p>The conditions conclude in the following terms: “[t]he assessment of this report by the MMO will determine whether any further noise monitoring is required.” This does not appear to be sufficiently clear that the MMO is exercising control or that additional monitoring can be required, in what terms, where and for what duration.</p> <p>The Applicant and the MMO are requested to review this drafting to provide greater clarity about the scope and effect of the determination to be made by the MMO under these conditions, by Deadline 6.</p>	<p>The Applicant is content to add to this condition that the MMO is able to request further noise monitoring measures as may be necessary.</p>	<p><i>The results of the initial noise measurements monitored in accordance with sub-paragraph (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. <u>The MMO may request that further monitoring is undertaken, unless otherwise agreed in writing with the undertaker. 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</u></i></p>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
					<i>failures in mitigation, all piling activity must cease until an update to the MMMP and further monitoring requirements have been agreed.</i>
46.	Schedule 11 (Generation Assets Deemed Marine Licence) Condition 17(4)	[None]	<p>Construction monitoring: vessel traffic monitoring</p> <p>Trinity House has requested at Deadline 5A [REP5A-006] that it should be added to the bodies receiving monitoring reports.</p> <p>The Applicant is to consider this request and by Deadline 6 is either to accede to it, or to provide reasons why it is not necessary to accede to it.</p> <p>Is such data relevant to the provision of VTS (vessel traffic services) and notices to mariners by Port of London Authority?</p>	The Applicant is content to add Trinity House to the bodies receiving such monitoring reports.	<i>Construction monitoring must include vessel traffic monitoring by automatic identification system for the duration of the construction period. A report must be submitted to the MMO, <u>Trinity House</u> and the MCA at the end of each year of the construction period.</i>
47.	Schedule 11 (Generation Assets Deemed Marine Licence) Condition	[None]	<p>Post construction: vessel traffic monitoring</p> <p>Trinity House has requested at Deadline 5A [REP5A-006] that Condition 18 should be amended to provide for operational vessel traffic modelling in similar terms to the construction vessel traffic modelling provided for in Condition 17. It has</p>	The Applicant is content to include wording in Condition 18(4) of Schedule 11, in order to allow for post construction traffic monitoring for a period of three years, as is standard practice. This has been updated in the dDCO	<i>(4) Post construction monitoring must include vessel traffic monitoring by automatic identification system for a duration of three years following the completion of construction of authorised scheme. A report must be</i>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
	18		<p>requested to be a recipient of monitoring reports.</p> <p>The Applicant is to consider this request and by Deadline 6 is either to accede to it, or to provide reasons why it is not necessary to accede to it.</p> <p>Is such data relevant to the provision of VTS (vessel traffic services) and notices to mariners by Port of London Authority, or to the provision of services by the Maritime and Coastguard Agency and/ or the MMO?</p>	submitted for Deadline 6.	<u><i>submitted to the MMO and the MCA at the end of each year of the three year period.</i></u>
48.	Schedule 12 (Export Cable System Deemed Marine Licence) Condition 15(2)(a)	<p>(2) The pre-construction surveys referred to in subparagraph (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 out construction works, as provided for in the Biogenic Reef Mitigation Plan...</p>	<p>Pre-construction monitoring and surveys</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 included within a more precise description of appropriate surveys secured on the face of this Condition.</p> <p>The Applicant is requested to either accede to this request at Deadline 6 or to explain why such an approach is not warranted.</p>	The Applicant has amended conditions 15 and 17 in order to explicitly state on the face of the dDCO that such surveys will be undertaken in accordance with the BRMP.	<u><i>(a) appropriate surveys (including ground-truthing of the bathymetry surveys required under Condition 15(2)(d)) to determine the location and extent of any biogenic reef features (Sabellaria spinulosa) inside the area(s) within the Order limits in which it is proposed to carry out construction works, as provided for in the Biogenic Reef Mitigation Plan;</i></u>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
49.	Schedule 12 (Export Cable System Deemed Marine Licence) Condition 15(2)(b)	<p>(b)In the event—</p> <p>(i) cable protection is installed within the Goodwin Sands rMCZ, ground truthing of the geophysical surveys carried out in accordance with sub-paragraph (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;</p> <p>(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</p>	<p>Pre-construction monitoring and surveys: (good drafting and referencing error)</p> <p>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.</p> <p>Is the reference “carried out in accordance with sub-paragraph (2)(c)” which calls up the Saltmarsh Mitigation, Reinstatement and Monitoring Plan (SMRMP) the correct reference? Natural England suggests not [REP5A-005].</p> <p>The Applicant is requested to review its approach on these matters and present its final position at Deadline 6.</p>	<p>The Applicant has reformatted this Article as recommended in the revised dDCO submitted at Deadline 6. The Applicant has also amended the reference to state 2(d), rather than 2(c).</p>	<p><i>(i) cable protection is <u>to be installed within the Goodwin Sands rMCZ (or as designated the Goodwin Sands MCZ) in accordance with condition 11(1)(b)</u>, ground truthing of the geophysical surveys carried out in accordance with sub-paragraph (2)(<u>ed</u>), 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;</i></p>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
50.	Schedule 12 (Export Cable System Deemed Marine Licence) Condition 15(2)(b)	[As above]	<p>Pre-construction monitoring and surveys: "interpreted geophysical monitoring" and survey effort</p> <p>Can the Applicant please explain what "interpreted geophysical monitoring" means?</p> <p>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 pre-construction and post construction, with equal survey method and effort at both stages. The Applicant is requested to review its approach on these matters and present its final position at Deadline 6.</p>	<p>Regarding the definition of "interpretation", this is recognised and established phraseology in relation to geophysical survey work. Ordinarily geophysical survey data gives an indication of obstructions, topography and other land form type but it can also be interpreted in addition to describe sediment type. Sandwaves being cleared could lead to a change from sands and gravels to coarser gravel, which would mean a net loss of sands and gravels from the MCZ. This approach has been established in the Walney MCZ (also designated for sediment (muds)) and allows the Applicant to more accurately review, analyse and interpret that data at an appropriate scale.</p> <p>The Applicant is content to explicitly make reference to ground-truthing of pre-construction data on the face of the dDCO.</p>	<p><i>15(b)(i) cable protection is <u>to be</u> installed within the Goodwin Sands rMCZ <u>(or as designated the Goodwin Sands MCZ) in accordance with condition 11(1)(b), ground truthing of the geophysical surveys carried out in accordance with subparagraph (2)(ed), 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;</u></i></p> <p><i><u>17(2)(a) appropriate surveys (including ground-truthing of the bathymetry surveys required under Condition 15(2)(d)) to determine the location and extent of any biogenic reef features (Sabellaria spinulosa) inside the area(s) within the Order limits in which it is proposed to carry out construction works, as provided for in the Biogenic Reef Mitigation Plan;</u></i></p>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
51.	Schedule 12 (Export Cable System Deemed Marine Licence) Condition 17	[None]	<p>Post construction</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) on the face of this Condition.</p> <p>The Applicant is requested to review its approach on this matter and present its final position at Deadline 6.</p>	The Applicant has provided post construction monitoring in the BRMP on the face of the Condition in the dDCO as submitted for Deadline 6.	<u><i>(a) appropriate surveys (including ground-truthing of the bathymetry surveys required under Condition 15(2)(d)) to determine the location and extent of any biogenic reef features (Sabellaria spinulosa) inside the area(s) within the Order limits in which it is proposed to carry out construction works, as provided for in the Biogenic Reef Mitigation Plan;</i></u>
52.	Schedule 13	[None]	<p>Documents to be certified: reference to Art 35</p> <p>Add reference to Art 35 in title.</p>	The Applicant notes the representation and has updated this Schedule within the dDCO submitted at Deadline 6.	<p>SCHEDULE 13</p> <p style="text-align: right;"><u><i>Article 35</i></u></p> <p><i>Documents to be Certified</i></p>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
53.	Schedule 13	[None]	<p>Documents to be certified: version control audit</p> <p>The Applicant is requested to carry out an audit of all documents to be certified and to ensure that the preferred dDCO submitted at Deadline 7 contains references all such documents correct at that time, with correct version numbers and dates. An accompanying table should record the ExA's EL unique reference for each document, assisting the final document checking process by the ExA.</p>	The Applicant notes the representation and has updated this Schedule within the dDCO submitted at Deadline 6.	
54.	Explanatory Note	A copy of the plans and book of reference referred to in this Order and certified in accordance with article 35 (certification of plans, etc.) of this Order may be inspected free of charge at the offices of [XX] Council at [XX].	<p>Hard copy inspection location</p> <p>In compliance with the General Data Protection Regulation (GDPR) (EU 2016/679), the Planning Inspectorate now limits the duration in which documents associated with a made Order and which also contain the personal information of data subjects (such as the BoR) are publicly available on the national infrastructure planning website. For this reason, it is important to be clear where these documents will be retained for public inspection at a known location within the vicinity of the proposed development.</p> <p>The Applicant is requested to nominate an inspection location by Deadline 6 and to provide a letter of</p>	<p>The Applicant can confirm that Thanet District Council has agreed to store hard copies for inspection for ten years at their office, Cecil Street, Margate, CX9 1XZ.</p> <p>The explanatory note within the dDCO has been amended to make clear that following the expiry of this period, electronic copies of the documentation will be available on request from the Applicant.</p> <p>An email of approval from Thanet District Council is provided at Annex B.</p>	<i>A copy of the plans and book of reference referred to in this Order and certified in accordance with article 35 (certification of plans, etc.) of this Order may be inspected free of charge at the offices of Thanet District Council at Cecil Street, Margate, CX9 1XZ.</i>

#	DCO reference	Relevant extract from DCO	ExA Commentary	Applicant's response at Deadline 6	Amendments made to the dDCO
			approval from the hosting body, demonstrating that it has agreed to the document hosting request.		