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To Whom It May Concern,

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

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

On 30 July 2018, the Marine Management Organisation (MMO) received notice under section 56 of the Planning Act 2008 (the "PA 2008") that the Planning Inspectorate ("PINS") had accepted an application made by Vattenfall Wind Power Limited (the "Applicant") for a development consent order (the "DCO Application") (MMO ref: DCO/2016/00003; PINS ref: EN010084), for the construction, operation and maintenance of the proposed Thanet Extension Offshore Wind Farm (TEOWF).

This document forms the MMO's deadline 8 submission, comprising:

- Comments on the Applicant's response to the ExA's 'Rule 17' Letter Detailing Final Written Questions.

- Comments on TEOWF Response to Interested Parties Comments on the ExA's dDCO commentary.

This written representation is submitted without prejudice to any future representation the MMO may make about the DCO Application throughout the examination process. This representation is also submitted without prejudice to any decision the MMO may make on any associated application for consent, permission, approval or any other type of authorisation submitted to the MMO either for the works in the marine area or for any other authorisation relevant to the proposed development.

Yours faithfully

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1. Comments on the Applicant's response to the ExA's 'Rule 17' Letter Detailing Final Written Questions

1.1 R17Q4.1.2 Potential Construction Noise Effects on Fish: submissions and evidence from the Applicant

1.1.1 The MMO notes the Applicant's comments on this question and considers that the MMO's response provided at deadline 6, and further information within the deadline 7 submission, provide full commentary in response to the points raised.

1.1.2 The MMO notes the Applicant's comments and has nothing substantive to add. The MMO refers the ExA to its position set out at deadline 7 (REP7-0XX) in response to this question which provide commentary on the matters raised by the Applicant.

1.2 R17Q4.1.4 Other Fishing and Fisheries Interests

Interested Parties with interests in fishing and fisheries are invited to comment on the matters raised in questions R17Q4.1.1, 2 and 3 at Deadline 7 and on the responses provided to these questions at Deadline 8. The MMO and the Applicant are invited to respond to any responses to this question at Deadline 8.

1.2.1 Noting no further responses from interested parties (IPs), the MMO has no further comment on this matter.

2. Comments on TEOWF Response to Interested Parties Comments on the ExA's dDCO commentary

2.1.1 Please note responses and corresponding reference numbers are provided with respect to the Applicant's *'Appendix 3 – Responses to IPs Comments on the ExA's dDCO Commentary'*.

2.2 Ref 21. – (Comment no. 5) – Interpretation "commence"

2.2.1 Please see the MMO's deadline 7 response on this matter which is now considered resolved.

2.3 Ref. 23-26 (Comment no. 23-26) - Matters associated with Arbitration, Deemed Approval and Appeals Mechanisms

Arbitration

2.3.1 As noted at deadline 7, the MMO's position on arbitration, deemed approval and other 'appeals mechanisms' that may be provided for, remains unchanged and the ExA is directed to full commentary provided at deadline 6 (REP6-0XX).

2.3.2 Notwithstanding, the MMO notes the Applicant's further comment at Ref. 3. (Arbitration) in relation to Tilbury 2. The Applicant is of the view that this decision can be *"distinguished"* because the project is *"…of a wholly different scale to an offshore*

windfarm", further adding that because the project is an energy project *"special considerations should apply"*.

2.3.3 Firstly, the MMO would highlight that its arguments against arbitration are robust and wholly justified in their own right and not reliant on the decisions made on other DCOs. Nonetheless, the MMO recognise that PINS has an interest in maintaining consistency and reflecting on precedents when considering the need for certain provisions, hence previous references made to the decisions made on Tilbury 2 and Hornsea 3 projects.

2.3.4 Based on the above, the MMO would like to draw the ExA's attention to its previous recommendation report on Tilbury 2, which found in favour of the MMO:

"…The MMO stated that it strongly opposed the inclusion of such a provision, based on its statutory role in enforcing the DML. According to the MMO, the intention of the PA2008 was for DMLs granted as part of a DCO in effect to operate as a marine licence granted under the MCCA2009. There was nothing to suggest that after having obtained a licence it should be treated any differently from any other marine licence granted by the MMO (as the body delegated to do so by the SoS under the MACAA). [Emphasis added].

2.3.5 The ExA continue, adding that they find in favour of the MMO in this matter ***"…for the reasons stated in the paragraph above"***. That is, the ExA clearly accepted the principles of argument put forward by the MMO, and did not base its decision on indicative scale of the project or its complexity. This is contrary to the Applicant's inference for why the decision should be distinguished.

2.3.6 Secondly, whilst the MMO maintains its argument that arbitration is opposed to due to the MMO's statutory role in enforcing the DML, the MMO would like to highlight that Hornsea Project 3 (HOW3) is considerably more complex than TEOWF. HOW3 is anticipated to comprise 160-300 turbines (approximately five times that of TEOWF), 6 offshore substations and may impact on 4 Marine Protected Areas. Nonetheless, the ExA on HOW3 amended arbitration in its schedule of changes in favour of submissions made by the MMO.

2.3.7 The Applicant's assertion then that scale, complexity and indeed the very notion of being an energy project should afford them "special consideration" is wholly misguided. There is no compelling evidence as to why the Applicant should be an exception to the rule and treated differently to any other marine licence holder.

Deemed Approval

2.3.8 The MMO considers deemed approval wholly inappropriate and provided full commentary on this at deadline 7.

Appeals Mechanisms

2.3.9 The MMO maintain its position on the newly introduced appeals mechanisms as expanded on at deadline 7 and emphasise there is no precedent or identified need for the provisions put forward by the Applicant at this late stage.

2.3.10 The MMO acknowledges in the case of the Norfolk Vanguard offshore wind farm a suite of differing provisions have been discussed and formulated into a 'Position Statement'. This is enclosed as an Annex 1 to this submission for completeness.

2.3.11 The MMO highlights that these 'options' have materialised and evolved in response to the specific nuances of Examination on Vanguard and following questions from the ExA. They are not equally comparable to the evolution of the dDCO and Examination process on TEOWF. **Nonetheless, the resounding and final MMO position on both Vanguard and TEOWF is that appropriate remedy already exists in the form of judicial review.**

2.3.12 The MMO's position then remains that its decisions ought not to be made subject to any arbitration process nor should there be any appeal process based on a modified version of the 2011 Regulations be included within the DML. The appropriate public law challenge to these issues remains judicial review.

2.3.13 The MMO has stated above and in previous representations that these proposals go against the statutory functions laid out by parliament. The removal of this decision–making function and their placement into the hands of a private arbitration process, appeal process or a deemed approval process is inconsistent with the MMO's legal function, powers and responsibilities.

2.4 Ref. 27 (Comment no. 40) – DML security for offshore design parameters

2.4.1 The MMO provided full comment on this matter at deadline 7.

2.5 Ref. 28 (Comment no. 44) – Construction monitoring: noise measurements and cessation of piling

2.5.1 The MMO provided full comment on this matter at deadline 7, noting the Applicant had acceded to the request from the ExA. The MMO welcomes the amendment made by the Applicant.

2.6 Ref. 29 (Comment no. 45) – Construction monitoring: noise measurements

2.6.1 As noted above, the MMO provided full comment on this matter at deadline 7 however recognise the Applicant has now acceded to the request from the ExA.

ANNEX 1 - Norfolk Vanguard Position Statement

Introduction

1. Norfolk Vanguard Limited (the Applicant) is proposing to develop the Norfolk Vanguard Offshore Wind Farm (OWF). The OWF comprises two distinct areas, Norfolk Vanguard (NV) East and NV West ('the OWF sites'), which are located in the southern North Sea, approximately 70km and 47km from the nearest point of the Norfolk coast respectively. The location of the OWF sites is shown in Chapter 5 Project Description Figure 5.1 of the Application. The OWF would be connected to the shore by offshore export cables installed within the offshore cable corridor from the OWF sites to a landfall point at Happisburgh South, Norfolk. From there, onshore cables would transport power over approximately 60km to the onshore project substation and grid connection point near Necton, Norfolk (the Project).

Background engagement between the parties

2. The Marine Management Organisation (the MMO) and the Applicant (together, the parties) are in regular dialogue and this has been the case throughout the pre-application process, both in terms of informal non-statutory engagement and formal consultation carried out pursuant to Section 42 of the Planning Act 2008, and has continued post submission of the Application, particularly during the Examination process.

3. An updated Statement of Common Ground between the Applicant and the MMO will be submitted at Deadline 9. It is anticipated that at that point, the majority of outstanding points will be agreed between the parties. However, there is one significant difference which it is anticipated will remain outstanding between the parties at the close of examination. This relates to the appropriateness of including a mechanism to deal with disputes under the Deemed Marine Licences (DMLs), specifically in relation to refusal or non-determination of approvals for the discharge of DML conditions.

Current position of the parties

4. The parties have prepared this joint position statement to explain to the Examining Authority (ExA) their respective positions in relation to this area of disagreement.

5. In summary, the current position of the MMO is that any matter in relation to the DMLs should not be subject to arbitration or appeal. The MMO's position is that the Applicant should rely on judicial review as a means to challenge any decision of the MMO. The MMO recognise that the Applicant would like greater certainty regarding the timeframe for discharge of conditions, and have proposed that the DMLs are drafted to give rise to a deemed refusal if not determined within a specified period. The MMO also propose, that any non-determination could be subject to an internal escalation process if the applicant requested this. Full details of the MMO's submissions are set out in the MMO's response of 30 May 2019 (REP8-102).

6. In summary, the current position of the Applicant is to expressly exclude the MMO from the arbitration article in the draft DCO (dDCO), but only on the basis that an appeal mechanism is included within the DMLs for the refusal or non-determination of the discharge of the DML conditions. This is reflected in the dDCO submitted at Deadline 8 and the Applicant considers that this approach reflects the guidance within the Planning Inspectorate's Advice Note 15 (Good practice point 3) which states that:

   "It is recommended that a mechanism for dealing with any disagreement between the Applicant and the discharging authority is defined and incorporated in a draft DCO Schedule. For example, including arrangements for when the discharging authority refuse an application made pursuant to a DCO Requirement, or approve it subject to conditions or fail to issue a decision within a prescribed period. The mechanism could also address the fees payable for discharging the Requirements."

7. In relation to the Applicant's view on the Planning Inspectorate's Advice Note 15 (Good practice point 3) the MMO's position is that a DCO Requirement is not the same as conditions as these are on the DML, although the Applicant notes that a DCO Requirement is only given in the Advice Note as an 'example'.

Background to arbitration article

8. Section 120 of the Planning Act 2008, by reference to part 1 of Schedule 5, prescribes that *"The submission of disputes to arbitration"* may be included in a DCO (see paragraph 37 of Part 1, Schedule 5). Section 120 is not qualified or conditioned and does not exclude any party.

9. The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (Model Provisions), whilst no longer in force, included an arbitration article which applied to any difference and all parties under the DCO. Article 42 of the Model Provisions states:

   Arbitration

   42. Any difference under any provision of this Order, unless otherwise provided for, shall be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) by the [insert appropriate body].

10. The Planning Inspectorate's revised Advice Note AN13 (version 3) issued in February 2019 states the following in relation to the Model Provisions:

    "Model provisions"

    2.11 Model provisions were set out in the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (SI 2009/2265). They included provisions which could be common to all NSIPs, others which relate to particular infrastructure development types, in particular railways and harbours, and model provisions in respect of requirements. The Localism Act 2011 removed

the requirement for the decision-maker to have regard to the prescribed model provisions in deciding an application for development consent.

2.12 Model provisions were intended as a guide for developers in drafting orders, rather than a rigid structure, but aided consistency, and assisted developers to draft a comprehensive set of lawful provisions.

2.13 There is no longer a requirement to submit a tracked changed version of the draft DCO which compares the wording against The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009.

11. Following Model Article 42, numerous DCOs have applied the concept of arbitration, including offshore wind farm projects which contain deemed marine licences (DMLs), by including an arbitration article in the same form as that contained in the Model Provisions.

12. However, there is disagreement between the parties as to whether the arbitration article in this form is effective against the MMO in relation to determinations made under DMLs. As the arbitration article refers to 'any difference', the MMO's position is that 'a determination' (including a non-determination) is not caught by the arbitration article, as this would not amount to a 'difference'.

13. As a matter of principle, the MMO's position is that arbitration should not apply to the MMO. In summary, the MMO's concerns relate to the private nature of the arbitration process which does not align with the public functions and duties of the MMO. The MMO consider that the removal of the MMO's decision–making function and its placement into the hands of a private arbitration process is inconsistent with the MMO's legal function, powers and responsibilities, which was never intended by Parliament in enacting the Planning Act 2008 or the Marine and Coastal Access Act 2009 (MCAA 2009). The MMO also consider that arbitration would not be consistent with p.4 of Annex B of the PINS Guidance Note 11, which states that *"the MMO will seek to ensure wherever possible that any deemed licence is generally consistent with those issued independently by the MMO"*. Including a mechanism for determination of disputes in respect of DMLs would not be consistent with Marine Licences issued independently by the MMO.

14. The Applicant's position is that arbitration (or an alternative mechanism) is necessary to provide a swift, clear and open process for resolution of disputes under DMLs in respect of Nationally Significant Infrastructure Projects (NSIPs). The Applicant's view is that the "wherever possible" (Guidance Note 11) indicates that there is scope for DMLs (as they have done previously) to depart from those issued independently by the MMO and, in the case of renewable energy NSIPs, it is appropriate to distinguish DMLs from Marine Licences in this respect.

15. It is the MMO's position that the scale and importance of NSIPs mean that sufficient time is required to make a correct decision and that decision should be made by the public body tasked with doing so, not a private third party.

16. In seeking to apply a mechanism to resolve matters of disagreement between the parties, the Applicant's position is that this will not remove the MMO's decision making powers, because the MMO will still be able to make a decision within the timescales defined for determination. In this respect, the Applicant considers that the MMO would have a reasonable period to consider the issues in dispute and to reach a conclusion on their position. The Applicant considers that the proposal for a mechanism to deal with DML disputes will not have the effect of dis-applying statutory provisions in this regard. It should also be noted in this context that arbitration is applied to statutory undertakers such as National Grid and Network Rail who both have important public duties to discharge including the safe operation of electricity apparatus and railways.

17. However the MMO does not agree with this. The MMO is concerned that key statutory functions may be exercised by private third parties, who are not susceptive to judicial review or the same statutory requirements as the MMO. This will remove from both parties the right of appeal.

18. It is also the MMO's position that providing for disagreements to be resolved by arbitration in private sits uneasily with the general presumption regarding transparency and public participation in environmental decision making.

19. The MMO considers that the practical result of allowing the arbitration process in Article 38 to expressly apply to the MMOs decisions would be establishing a new procedure and would replace the review of the MMOs decision making on conventional public law grounds (via the process of judicial review) (for discharge of conditions under an expressly granted licence) with a merits review undertaken by an arbitrator.

20. The MMO's position is that this is a fundamental departure from what Parliament intended, and the MMO can see no justification whatsoever for such a fundamental change – particularly where the purpose of the deemed licence regime under the Planning Act 2008 is intended to remove the need for a separate application for a licence alongside or following the making of the Order and not to fundamentally change the regulatory regime that applies.

21. The MMO draws the ExA's attention to the clear and well-established principle that the Courts will be very slow to conclude that an "expert and experienced decision-maker assigned the task by statute has reached a perverse scientific conclusion": Mott v Environment Agency [2016] 1 W.L.R. 4338 (CA). In light of this, the MMOs view is that it would require clear and compelling evidence as to why it is necessary and appropriate (and/or what had been intended by Parliament) to conclude that that heightened level of discretion given to decisions of a statutory body in the technical/environmental field be displaced by a decision, on the merits, by a private third party arbitrator.

22. To entrust the final decision in the event of a dispute to an arbitrator, who is not susceptible to the same public scrutiny (not just by the MMO and Applicant but affected members of the public) or appeal is in the MMO's opinion inconsistent with the objectives of the 2008 Planning Act and MCAA 2009.

23. The Applicant's position is that arbitration in the Model Provisions is expressly referenced in respect of the determination of technical disputes, for example regarding consents or licences, and/or disputes which involve the public interest. For instance, paragraph 31 of Schedule 1 of the Model Provisions makes application for arbitration in the context of statutory undertakers (and this mechanism is adopted in the agreed form protective provisions with statutory undertakers at Schedule 16 of the Applicant's dDCO (document reference 3.1). It is the Applicant's position that if Parliament had intended to exclude the MMO from arbitration, it would have included a saving provision (or similar) accordingly. It is also the Applicant's view that the provisions of the Arbitration Act 1996 ("AA 1996") would apply to an arbitration under the DCO by virtue of section 94(2), which provides that "the provisions of Part 1 apply to every arbitration under an enactment …subject to the adaptations and exclusions specified in sections 95 to 98 [AA 1996] [which the Applicant does not consider are relevant in these circumstances]" and here "enactment" includes orders (and other forms of subordinate legislation) by virtue of section 94(3)(a) AA 1996 and the Interpretation Act 1978.

24. In addition, the Applicant considers that including an appeal mechanism for the MMO is no different to the inclusion of an appeal mechanism for other public bodies who determine applications, such as the Local Planning Authority, who have similar public functions and statutory duties. The Applicant sees no reason why the MMO should be treated any differently in this respect.

25. The MMO believe that any additional appeal route should be provided for though legislation and applied evenly across the marine licensing regime. The appeals route should not be applied to individual NSIPs via the DCO/DML, as to do so would mean inconsistency to the MMO customers.

DCO precedents in relation to arbitration

26. The application of the arbitration provision has been considered in previous offshore wind farm DCO decisions, specifically in the context of its application to Natural England and the MMO.

27. In relation to the Triton Knoll Offshore Wind Farm Order 2013 and the Burbo Bank Extension Offshore Wind Farm Order 2014, the Secretary of State considered that it was appropriate for the arbitration article to apply to Statutory Nature Conservation Bodies (SNCBs). It should be noted that the SNCBs were in this situation acting as consultees rather than a regulator (the MMO is acting as a regulator in relation to DMLs).

28. Paragraph 7.3 of the Secretary of State's decision letter for Triton Knoll Offshore Wind Farm states:

"The Panel also asked the Secretary of State to consider whether SNCBs should be removed from the provisions for arbitration covered by Article 12 of the draft Order at Appendix E (headed "Arbitration") [ER 5.11.20]. To maintain consistency with other offshore wind farms approved under the Planning Act 2008 since the close of the Panel's Examination, the Secretary of State has decided that the arbitration provisions should apply to SNCBs and has therefore modified the article in the Order accordingly."

29. Natural England had been excluded from the arbitration article in the dDCO for the Burbo Bank Extension Offshore Wind Farm, but following the Secretary of State's decision that Natural England should not be excluded from the arbitration article in the Triton Knoll Offshore Wind Farm Order; this exclusion was subsequently removed.

30. In his Report to the Secretary of State, the Examiner appointed to examine the Burbo Bank Extension Offshore Wind Farm Order stated at paragraph 7.45 and 7.46:

Article 13 - Arbitration

"This draft article provides for the appointment of an arbitrator if a dispute arises in respect of any provision of the DCO. Early draft DCOs excluded NE from the operation of the provision, pursuant to an opinion provided by NE to the Triton Knoll Offshore Wind Farm Examining Authority that the exercise of its statutory powers should not be subject to arbitration and should only be adjudicated upon by the court. However, the Secretary of State in the Triton Knoll decision decided not to exclude NE from the arbitration provision in that DCO, on the basis that all issues and parties should be equally subject to arbitration on the same basis.

I proposed to delete the exclusion of NE from the arbitration provision in my draft DCO. The applicant and NE did not object to this revision which was sustained in the applicant's draft DCO Version 6 [APP-099]. I am content with the current drafting of this article."

31. However, in contrast to the position with Natural England, the MMO's position is that the Triton Knoll applicant accepted that the MMO were not subject to arbitration during the Triton Knoll Issue Specific Hearing held on 8 November 2012, where the audio of the hearing (at Part 2 from approx. 7 minutes 50 seconds) records:

"As far as the MMO is concerned, we will probably come on to this later with their letter, but it seems to me that the way the way DCO is drafted is to make it clear that the deemed licence is drafted under the 2009 Act, the Marine and Coastal Access Act, and therefore by implication the provisions of that act apply in respect of the marine licence, and that would apply to resolution of disputes and to such things as splitting orders and splitting licences."

32. The MMO believes that this shows that the applicant for Triton Knoll accepted that the DMLs were not subject to arbitration. This is also noted as the MMO's position within the Examining Authority's report for Triton Knoll at paragraph 5.11.20 which states:

"……The MMO pointed out that in relation to the DML separate provisions under the Marine and Coastal Access Act applied……"

33. The application of arbitration to the MMO was also considered in the recent Tilbury 2 Order. The MMO was not expressly excluded from the arbitration article, which states:

"Arbitration

60. Except where otherwise expressly provided for in this Order and unless otherwise agreed in writing between the parties, any difference under any provision of this Order (other than a difference which falls to be determined by the tribunal) must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) by the President of the Institution of Civil Engineers."

34. However, the Examining Authority for Tilbury 2 recommended that an express condition applying arbitration in the DML should be removed, and this was not included in the final Tilbury 2 Order. The express condition stated as follows:

"Arbitration

27.—(1) Subject to condition 27(2) any difference under any provision of this licence must, unless otherwise agreed between the MMO and the licence holder, be referred to and settled by a single arbitrator to be agreed between the MMO and the licence holder or, failing agreement, to be appointed on the application of either the MMO or the licence holder (after giving notice in writing to the other) by the President of the Institution of Civil Engineers.

(2) Nothing in this condition 27 is to be taken, or to operate so as to, fetter or prejudice the statutory rights, powers, discretions or responsibilities of the MMO."

35. In the Examining Authority's recommendation Report (page 233) to the Secretary of State (SoS). The Examining Authority found in favour of the MMO noting:

"…The MMO stated that it strongly opposed the inclusion of such a provision, based on its statutory role in enforcing the DML. According to the MMO, the intention of the PA2008 was for DMLs granted as part of a DCO in effect to operate as a marine licence granted under the MCCA2009. There was nothing to suggest that after having obtained a licence it should be treated any differently from any other marine licence granted by the MMO (as the body delegated to do so by the SoS under the MACAA).

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

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

The Applicant's position is that the Tilbury 2 decision can be distinguished. This is because it is of a wholly different scale of project to an offshore wind farm. The Tilbury 2 project is for the development of a new port terminal and associated facilities. Offshore, only new berthing facilities are proposed. There is a 6 week period for the discharge of plans under the DML, which clearly emphasises the difference in scale and complexity of the schemes, given the 6 month period sought by the MMO for discharge of plans for offshore wind farm projects. Finally, the project is a transport project, not an energy project for which the Applicant considers that special considerations should apply as set out below.

36. The MMO's position is that the complexity of the scheme further supports the arbitration provisions not being applicable to the DML. In complex schemes it is often the case that difficult and complex decisions need to be made. The considerable and long lasting impacts of large development, such as a new port terminal and associated facilities, will be felt by a wide range of individuals for a long time to come. In order to make the correct decision there needs to be sufficient time to deal with all issues. In the MMO's opinion, allowing such important decisions to be made by a private third party in any event is inappropriate, but especially after the imposing of an arbitrary time period. In the MMO's opinion, given the lack of an appeal route for the MMO against the decisions of an arbitrator, this would be very concerning and insufficient justification has been put forward to justify such a fundamental change in the regime.

37. It is also the MMO's view that the content of previous DMLs do not determine the content of future DMLs. In reality the different approaches mentioned above have not been tested, because the MMO works collaboratively with applicants in a timely and flexible manner. However it is the MMO's opinion that if there is a time when a dispute arises it is likely to have the potential for significant consequences (both on users of the infrastructure and the environment). The appropriate body to make decisions in the circumstances is the MMO, with scrutiny from the courts by a judicial review, if necessary.

Approaches to arbitration in dDCOs for Hornsea Project Three and Thanet Extension

38. In relation to approaches to arbitration on other development consent applications for offshore wind farms currently or recently at examination, various approaches have been taken.

39. In relation to Hornsea Project Three, the Applicant in Hornsea Project Three has set out that it is their preference for the MMO to be subject to the arbitration provision set out at Article 37 of the dDCO and this is reflected in the final version of the dDCO submitted by the Applicant as part of the Hornsea Project Three examination. However, the Applicant in Hornsea Project Three has also inserted alternative drafting into the dDCO which, in the event that arbitration is not recommended by the Examining Authority, will include within the DML an alternative

appeal route for dealing with differences between the parties that may arise in the discharging of conditions, which is based on a modified version of the 2011 Regulations but with shortened timeframes; and, in the further alternative, apply a deemed approval mechanism.

40. The MMO does not agree with the approach being put forward by the Applicant in Hornsea Project Three and has made the same submissions as to why what is proposed in Hornsea Project Three is not appropriate or acceptable.

41. In the case of Thanet Extension, the Applicant's preferred approach is that the MMO is made subject to the arbitration provision included at Article 37 and if necessary to amend the wording of that article to make it clear that it extends to the MMO. Whilst this is Thanet Extension's preferred approach, they have, as an alternative, proposed that an appeal mechanism be incorporated into the DMLs as Part 5 of the DML, this appeal is not an appeal mechanism based around a modified version of the 2011 Regulations, but is a bespoke appeal process involving the Secretary of State. The applicant has also proposed a deemed approval process should apply where the MMO fails to determine an application to discharge a condition of the DML within the timescale required. This provision does not extend to plans for securing mitigation to avoid adversely affecting the integrity of an European site. The MMO are aware of the provisions the applicant proposes for inclusion in Thanet Extension and have resisted their inclusion for the same reasons as are explained in this summary.

42. The parties agree that there is merit in ensuring that appropriate provisions relating to arbitration and/or mechanisms for appeal/deemed discharge in the DMLs, are applied consistently across any offshore wind farm DCOs granted in the future.

43. The MMO would also highlight that during the examination period for Hornsea Project Three the ExA schedules of changes to the draft DCO showed that the ExA were inclined to amend Article 37 to exclude the MMO from the arbitration process, noting:

    "…Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration."

44. The applicant in Hornsea Project Three, however, resisted this change and considers that the MMO should be subject to arbitration as demonstrated by the final draft of the Hornsea Project Three Development Consent Order.

Appeals under the marine licensing regime

45. An appeals process already exists in respect of Marine Licences granted under Part 4 of the Marine and Coastal Access Act 2009 (MCAA 2009). The appeals process is set out in the Marine Licensing (Licence Application Appeals) Regulations 2011 (the 2011 Regulations). However, the appeals process does not apply to any non-determination or refusal to approve conditions under a Marine Licence (or DML) and, under Regulation 4 of the 2011 Regulations, is limited to appeals concerning:

- the grant of a marine licence subject to conditions;
- refusal to grant a marine licence;
- the time period for which activities are authorised; and/or
- the applicability of the licence conditions to transferees.

46. Therefore, the parties agree that the 2011 Regulations will not automatically apply to non-determination or refusal to discharge conditions under the DMLs, and would need to be expressly applied in the DMLs to take effect. To the extent that the 2011 Regulations are applied, the Applicant's position is that some modifications to the 2011 Regulations will be required, particularly to provide clearly defined timeframes within which the appeal process will need to be commenced and completed.

47. The Applicant also suggests that a bespoke appeals mechanism, which does not adopt the process contained in the 2011 Regulations, could be included within the DMLs. The Applicant suggests that this could take a similar approach to the bespoke appeals process for discharge of Requirements under the dDCO which is included in Schedule 16 of the dDCO (as applied by article 39 of the dDCO).

48. The MMO does not consider it necessary to introduce such an appeals mechanism into the DMLs. This is because it will create a separate process, which differs from the process for Marine Licences issued by the MMO outside of the DCO/DML process. In addition there is the availability of judicial review which ensures that public bodies reach rational decisions that are based upon following the correct process.

49. It is also the MMO's position that an appeals process is unacceptable and not necessary as the MMO works closely with applicants to resolve issues in a timely fashion. Since its inception the MMO has undertaken licensing functions on ~130 DCOs[1] comprising some of the largest and most complex renewable energy operations globally. The MMO is not aware of an occasion whereby any dispute which has arisen in relation to the discharge of a condition under a DML has failed to be resolved satisfactorily between the MMO and the applicant, without any recourse to an 'appeal' mechanism.

50. It is the MMO's position that if an appeals procedure is required this should be considered by Parliament and introduced by way of statutory instrument. This will allow all stakeholders to have their views known and the wider impacts considered. It should be noted that when introducing the 2011 Regulations Parliament decided not to extend the appeal provisions to the discharge of conditions.

51. The MMO would also raise that introducing an appeals process out with that intended under the MCAA 2009 will open up the possibility of further Judicial Reviews from our other

1 MMO (May 2019), figures obtained from the Marine Case Management System.

stakeholders. These stakeholders have a legitimate expectation that our decision making will be transparent, fair and use a consistent process for all applicants.

52. The Applicant does not agree with the MMO's position in this regard. Under section 120 of the Planning Act 2008, Development Consent Orders may:

    (a) apply, modify or exclude statutory provisions;

    (b) amend, repeal or revoke statutory provisions of local application; and

    (c) include any provision that appears to the Secretary of State to be necessary or expedient for giving full effect to any other provision of the order.

53. The draft Development Consent Order is drafted as a Statutory Instrument, which itself has involved in-depth consultation and scrutiny from stakeholders, and already seeks to modify and dis-apply certain statutory provisions, as set out at article 7, article 23, and Schedule 7 of the dDCO. To the extent that this is a concern, additional drafting could be included in the dDCO at article 7 to apply the modified 2011 Regulations (as set out in Part 5 of the DMLs) or a bespoke appeals process could be used, such that the 2011 Regulations are not modified. In any event, including an appeal mechanism for the DMLs within the dDCO does not alter the Marine Licensing process, or the way that decisions are determined under that process. The MMO's stakeholders have no legitimate expectation in how DMLs are dealt with and, as is agreed between the MMO and the Applicant, it is proposed that a consistent approach is taken in respect of all future offshore wind farm DCOs/DMLs in this respect.

Judicial Review

54. To the extent that the MMO are excluded from arbitration, and there is no express inclusion of an appeal process for the discharge of conditions under the DMLs, the only recourse available to the Applicant would be to challenge any decision made by the MMO by way of judicial review.

55. As set out above, the Applicant and the MMO disagree as to whether judicial review is a suitable remedy in such circumstances.

56. The Applicant has a number of concerns in relying on the judicial review process in this regard, including that:

    - Judicial review can only be brought once a decision has been made. It cannot be brought in relation to the MMO's non-determination of an application to discharge a condition. This leaves the Applicant in a state of limbo and unable to move matters forward where there is no determination of a discharge application.

    - Even if a decision has been made to refuse to discharge a condition, and which is therefore capable of judicial review, the court would not be able to consider the merits of the determination but only the extent to which the decision had been lawfully made. Even

if the Applicant was successful in judicially reviewing the MMO's decision, the remedy would be only to remit the decision back to the MMO for its re-determination. To be effective, the Applicant considers that a process is required in which the merits of a decision can also be considered and a determination made as part of that process.

- The judicial review process is time consuming and costly for all parties. The Applicant's position is that this is not appropriate for NSIPs, and particularly for offshore wind projects in the context of meeting Contract for Difference (CfD) milestones. The Applicant is already in the early stages of engaging key partners in the supply chain for the anticipated construction programme for the Project. The offshore construction work for the Project has to be agreed with suppliers well in advance of construction to deliver the scale of work required. In practice, as a result of the timings required for pre-construction surveys and other requirements relating to the discharge of conditions, the Applicant will have a short window to seek to discharge the DML conditions. If the timeframes for discharge are unreasonably extended, this could have a significant knock-on effect to the construction programme, providing uncertainty and risk for construction contracts (leading to significant cost implications) and also for the timely delivery of the project and to meet CfD milestones.

57. In relation to the Applicant's position on judicial review as set out above, the MMO do not agree with the Applicant that judicial review is not available as a remedy in the case of non-determination. In these circumstances, the MMO consider that it is open to the Applicant to write to the MMO explaining the concerns and request the MMO to make a determination by a specific date. Should the MMO fail to make the decision then the applicant would be able to judicially review that failure to make a decision. The MMO would also note that although remitting a decision for re-determination is the most likely, it is not the only one. There are a variety of remedies that could include, for example, prohibiting orders, mandatory orders, a declaration, an injunction and damages.

58. The MMO considers that judicial review is an appropriate remedy. Judicial review is the main way that the courts supervise bodies exercising public functions to ensure that they act lawfully and fairly. It is the MMO's position that in relation to DML's there is nothing in the current matter which justifies removing the safeguards of judicial review.

59. It is the MMO's positon that it is required to make a lawful decision pursuant to the DML. It has been given this function by Parliament. If the Applicant considers that the MMO has not made a lawful decision then it may challenge that decision by way of judicial review. If it disagrees with the decision of the High Court, it can ultimately progress to the Supreme Court. The same option is available to the MMO. This is appropriate, especially considering the scale and importance of NSIP projects.

60. However, the Applicant notes that including an appeal mechanism does not remove the ability for the Applicant, the MMO or interested third parties to judicially review any decision

following determination of the appeal. In addition, the appeal process itself would be a public process and open to third parties to participate in.

61. The Applicant considers that the judicial review process is timely and costly and should be used as a last resort rather than as an alternative to appeal proceedings, even noting that the planning court may expedite significant cases. The Applicant is also concerned about the effect that delays can have on the delivery of projects.

62. The MMOs view is that the appeal mechanism put forward by the Applicant is likely to take longer and be more costly as they require a consideration not only of the lawfulness of the decision, but the merits of the decision.

63. The MMO note the Applicant's concerns but also consider it important to ensure that projects of this scale and importance are implemented not just quickly but correctly as per the statutory functions with the aim of protecting the environment and other legitimate users of the sea.

64. As set out above, it is also the MMO's position that as the judicial review process also applies to discharge of conditions under a Marine Licence, there should not be a system in which DMLs and Marine Licences operate differently.

65. In order to address the Applicant's concerns the MMO is prepared to include deemed refusal after a certain time period. This would make the start of the judicial review period clear, and would set clear timeframes for making decisions, however wouldn't force the MMO to make a decision if it wasn't in a position to make the correct decision.

Internal Escalation Procedure

66. The MMO has also proposed an internal escalation procedure in the event of non-determination, followed by a deemed refusal if no decision is subsequently made within the timescales set out. The MMO considers that this would enable the Applicant to engage with the decision makers within the MMO to review whether (and how) any disagreement between the parties might be resolved within reasonable timescales.

67. The MMO note the applicant has put forward potential wording for this proposal within Appendix 4. The MMO do not accept that this internal escalation process should be included within the DCO any more so than should the detail.

68. The Proposal is set out below:

- MMO fail to make a determination by a specific date.
- Applicant sends a notice to the case team advising they require a decision within 2 months.
- Delegated Director is chosen and makes contact with the applicant.
- Initial meeting is set up to discuss the concerns.

- Delegated director reviews the documents from all interested parties.
- Meeting with interested parties and further information requested.
- Final resolution meeting by the final week of the 2 month time frame

69. Once this decision was made the applicant would be able to challenge the refusal or decision via the JR process.

70. In its Deadline 6 submissions, the MMO acknowledged that the undertaker is likely to incur significant costs in the event that there are delays to determination of conditions. It is the Applicant's view that, in the case of energy applications, these costs may ultimately be borne by the consumer through the cost of energy. This is because any risk to delivery will need to be reflected in the Applicant's CfD bid price. Given this, as well as the national benefits in relation to security of energy supply, the Applicant considers that it is appropriate that DMLs for nationally significant energy projects are treated differently to Marine Licences and that a mechanism other than judicial review is therefore included within the DMLs.

71. The MMO disagrees with this position, as although it does not anticipate delays, if on a project, especially an NSIP, the MMO requires more time to make a lawful and considered decision, then this should be allowed. This is especially true in environmental matters, where the cost of a poor decision could have long reaching effects.

Flexibility for discharge applications

72. The MMO is willing to work with undertakers to determine conditions in timescales appropriate to their construction programmes and considers that there are significant benefits of being able to adapt flexibly, which may be lost in the event that a more rigid timetable for determination of conditions is applied.

73. The Applicant is concerned that if the MMO's resources become constrained, the MMO may not be able to offer the levels of flexibility which a project may require. In any event, the Applicant's position is that the imposition of clear timescales can allow effective programming for both the Applicant and the MMO, and promotes a clear and fair process for all users of the MMO's service. In the Applicant's view this is considered preferable to the uncertainty of the existing approach.

74. The Applicant's proposed drafting also refers to refusals and non-determination (as opposed to a deemed refusal) which allows the parties to agree an extension of time for the MMO to determine conditions if and where appropriate to do so.

75. The MMO maintains that experience in discharging conditions for consented wind farms have informed the MMO's position that unexpected operational situations lead to change requests to post consent documentation regularly. If this precedent is adopted across the board, the

resulting restriction in flexibility to respond to such requests will prove problematic for all parties.

76. The MMO always endeavours to allocate resource to meet the needs to our applicants and there has been no general situations where a wind farm has not been consented nor significant delays encountered because of resources or staff issues. Resource constraints are parameters all parties have to work within as a matter of course and the imposition of restrictive timescales would, as this is incorporated into more DCO's, provide an advantage to no one.

Timescales

77. The MMO believe the timescales for both submission of documents and any determination timescales needs to be 6 months and not 4 months. The MMO believe that a 4 month pre-construction submission date is unrealistic and even counterproductive, as the pre-construction sign off process is not always straight forward.

78. The MMO has made it clear on their reasoning for this request. Due to:

    - the nature of the detailed documents,
    - the size of the wind farms coming forward; and
    - the possibility that substandard final documents are provided to the MMO

    could lead to multiple amendments required by an applicant which in turn leads to multiple rounds of consultations. The 4 month timescale could not account for these additional rounds of consultation and queries with an applicant.

79. The MMO believes by giving the MMO and its consultees 6 months as a matter of course for determination, there is more time to reach a conclusion, and less risk of any need for extension or delay. The MMO will always make any determination as soon as is reasonably practicable in any event, and if it is able to determine the application to discharge a condition more quickly then it will do so.

80. The Applicant has concerns over a 6 months' time frame and proposes that the timescales remains at 4 months. For the reasons previously outlined during the course of examination, in particular in response to ExA WQ 6.8 at Deadline 1 (document reference ExA; WQ; 10.D1.3) and ExA WQ 20.135 and 20.139 at Deadline 4 (document reference: ExA; FurtherWQ; 10.D4.6), the Applicant's position is that four months is well-established as an appropriate timeframe for offshore wind farm schemes and one that ensures a balance is struck between the expedient discharge of the relevant conditions attached to the DML whilst allowing a reasonable period of time for consideration by the MMO and relevant consultees.

81. This four month time period is contained on a number of other offshore wind farm DCOs (including The East Anglia Three Offshore Wind Farm Order 2017, Hornsea Two Offshore Wind Farm Order 2016, and the final draft of the Hornsea Project Three Order), and a swift decision making process is vital in order to minimise delays and allow the Applicant to meet key

Contracts for Difference milestones (as explained further in response to WQ 20.135 (ExA; FurtherWQ; 10.D4.6).

82. The Applicant therefore considers that a 4 month timescale, which is also subject to extension by agreement, is acceptable as this maintains flexibility, is consistent with existing/ previous decisions and provides certainty for all parties.

Ranking of dDCO drafting preferences

83. The Applicant's order of preference for the options proposed during the Examination process is set out in the table below, and the MMO's response in relation to each of these options is set out against each option.

Preference	Applicant's position	MMO's response
First	Inclusion of an appeal process for non-determination/ refusal to discharge DML conditions (see drafting at Appendix 1a in relation to application of the modified 2011 Regulations, as included in the dDCO submitted at Deadline 8, and Appendix 1b in relation to the application of a bespoke appeals process)	The MMO position is that judicial review is the appropriate remedy. The MMO does not believe the inclusion of appeal process for non-determination/ refusal to discharge DML conditions is appropriate (as stated throughout the document and highlighted in comment 84 & 85)
Second	Inclusion of arbitration provisions, which expressly apply to DMLs (see drafting at Appendix 2)	The MMO position is that judicial review is the appropriate remedy. The MMO does not believe the inclusion of arbitration provisions, which expressly apply to DMLs are appropriate (as stated throughout the document and highlighted in comments 84 & 85)
Third	Deemed approval of DML conditions (see drafting at Appendix 3)	The MMO position is that judicial review is the appropriate remedy. The MMO does not believe the inclusion of deemed approval of DML conditions is appropriate (as stated throughout the document and highlighted in comment 84 & 85)

Last	Deemed refusal of DML conditions following an internal escalation process (Appendix 4)	The MMO position is that judicial review is the appropriate remedy. However in order to address the hypothetical concerns of the Applicant (no current issues have been identified) the MMO is willing to accept deemed refusal of DML conditions following an internal escalation process, this process should not be set out in the DML. (Appendix 4).

84. For the reasons outlined above and during the course of the examination, the Applicant's preference is that there should be a clear and transparent appeals procedure as included in the final version of the draft of the DCO, and attached at Appendix 1a.

85. The MMO position remains that its decisions ought not to be made subject to any arbitration process (whether through a general arbitration provision or via an arbitration condition set out in the DML) nor should there be any appeal process based on a modified version of the 2011 Regulations be included within the DML. The appropriate public law challenge to these issues remains judicial review.

86. The MMO has stated above and in previous representations that these proposals go against the statutory functions laid out by parliament. The removal of this decision–making function and their placement into the hands of a private arbitration process, appeal process or a deemed approval process is inconsistent with the MMO's legal function, powers and responsibilities.

87. However, the Applicant does not agree that an appeal mechanism is inconsistent with the MMO's legal function, powers and responsibilities because it does not remove the MMO's decision making powers.

88. In the event that the ExA is minded to include within the DCO a deemed refusal process (which is not the Applicant's preference), the Applicant's position is that the deemed refusal should only occur where a resolution cannot be found following a defined internal escalation process. Clear timescales for determination would need to be set, and for the internal escalation process to be completed where these timescales have not been met, before the deemed refusal occurred. In this case, the Applicant's position is that the internal escalation process must be set out in the DMLs so that it is not subject to change.

89. The parties agree that whichever mechanism is chosen, it is essential that there is certainty and clarity as to the approach to be adopted in the event that there is non-determination or refusal to discharge DML conditions, so that the construction and operation of nationally

significant energy projects is not unreasonably or unnecessarily delayed, and that a consistent approach is adopted across all future made DCOs.

APPENDIX 1A: APPEALS UNDER THE (MODIFIED) MARINE LICENSING REGULATIONS 2011

Interpretation

—a) In this Order—

[…]

"the 2011 Regulations" means the Marine Licensing (Licence Application Appeals) Regulations 2011(**2**);

Arbitration

23.— (1) Subject to Article 41 (saving provisions for Trinity House), any difference under any provision of this Order, unless otherwise provided for, must be referred to and settled in arbitration in accordance with the rules at Schedule 14 of this Order, by a single arbitrator to be agreed upon by the parties, within 14 days of receipt of the notice of arbitration, or if the parties fail to agree within the time period stipulated, to be appointed on application of either party (after giving written notice to the other) by the Secretary of State.

(1) Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration.

Should the Secretary of State fail to make an appointment under paragraph (1) within 14 days of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.

***Deemed Marine Licences**: Part 4, Condition 15, Part 5 (Schedules 9-10) and Part 4, Condition 10 and Part 5 (Schedules 11-12)*

15.

…

(3) Each programme, statement, plan, protocol or scheme required to be approved under condition 14 must be submitted for approval at least *[four]* months prior to the intended commencement of licensed activities, except where otherwise stated or unless otherwise agreed in writing by the MMO.

(4) No licensed activity may commence until for that licensed activity the MMO has approved in writing any relevant programme, statement, plan, protocol or scheme required to be approved under condition 14 or approval has been given following an appeal in accordance with sub-paragraph (6).

(5) Unless otherwise agreed in writing with the undertaker, the MMO must use reasonable endeavours to determine an application for approval made under condition 14 as soon as practicable and in any event within a period of *[four]* months commencing on the date the application is received by the MMO.

(6) Where the MMO fails to determine an application for approval under condition 14 within the period referred to in sub-paragraph (5) or refuses the application for approval, the undertaker may appeal to the Secretary of State in accordance with the procedure in Part 5 of this licence.

PART 1

Procedure for appeals

1. Where the MMO refuses an application for approval under condition 14 and notifies the undertaker accordingly, or fails to determine the application for approval in accordance with condition 15 the undertaker may by notice appeal against such a refusal or non-determination and the 2011 Regulations shall apply subject to the modifications set out in paragraph 2 below.

(2) S.I. 2011/934

2. The 2011 Regulations are modified so as to read for the purposes of this Order only as follows—

(a) In regulation 6(1) (time limit for the notice of appeal) for the words "6 months" there is substituted the words "4 months".

(b) For regulation 4(1) (appeal against marine licensing decisions) substitute—

"A person who has applied for approval under condition 15 of Part 4 of Schedule 9; condition 15 of Part 4 of Schedule 10; condition 10 of Part 4 of Schedule 11; or condition 10 of Part 4 of Schedule 12 to the Norfolk Vanguard Offshore Wind Farm Order 201[ ] may by notice appeal against a decision to refuse such an application or a failure to determine such an application."

(c) For regulation 7(2)(a) (contents of the notice of appeal) substitute—

"a copy of the decision to which the appeal relates or, in the case of non-determination, the date by which the application should have been determined; and"

(d) In regulation 8(1) (decision as to appeal procedure and start date) for the words "as soon as practicable after" there is substituted the words "within the period of 2 weeks beginning on the date of".

(e) In regulation 10(3) (representations and further comments) after the words "the Secretary of State must" insert the words "within the period of 1 week"

(f) In regulation 10(5) (representations and further comments) for the words "as soon as practicable after" there is substituted the words "within the period of 1 week of the end of".

(g) In regulation 12(1) (establishing the hearing or inquiry) after the words "("the relevant date")" insert the words "which must be within 14 weeks of the start date".

(h) For regulation 18(4) substitute— "Subject to paragraphs (1) and (3), each party should bear its own costs of a hearing or inquiry held under these Regulations."

(i) For regulation 22(1)(b) and (c) (determining the appeal—general) substitute—

"(b) allow the appeal and, if applicable, quash the decision in whole or in part;

(c) where the appointed person quashes a decision under sub-paragraph (b) or allows the appeal in the case of non-determination, direct the Authority to approve the application for approval made under condition 15 of Part 4 of Schedule 9; condition 15 of Part 4 of Schedule 10; condition 10 of Part 4 of Schedule 11; or condition 10 of Part 4 of Schedule 12 to the Norfolk Vanguard Offshore Wind Farm Order 201[ ]."

(j) In regulation 22(2) (determining the appeal—general) after the words "in writing of the determination" insert the words "within the period of 12 weeks beginning on the start date where the appeal is to be determined by written representations or within the period of 12 weeks beginning on the day after the close of the hearing or inquiry where the appeal is to be determined by way of hearing or inquiry".

APPENDIX 1B: BESPOKE APPEAL PROCESS

Interpretation

2.—b) In this Order—

[…]

"the appeal parties" means the MMO, the relevant consultee and the undertaker;

"business day" means a day other than Saturday or Sunday which is not Christmas Day, Good Friday or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971;

Arbitration

38.— (1) Subject to Article 41 (saving provisions for Trinity House), any difference under any provision of this Order, unless otherwise provided for, must be referred to and settled in arbitration in accordance with the rules at Schedule 14 of this Order, by a single arbitrator to be agreed upon by the parties, within 14 days of receipt of the notice of arbitration, or if the parties fail to agree within the time period stipulated, to be appointed on application of either party (after giving written notice to the other) by the Secretary of State.

(2) Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration.

(3) Should the Secretary of State fail to make an appointment under paragraph (1) within 14 days of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.

***Deemed Marine Licences**: Part 4, Condition 15, Part 5 (Schedules 9-10) and Part 4, Condition 10 and Part 5 (Schedules 11-12)*

15.

…

(3) Each programme, statement, plan, protocol or scheme required to be approved under condition 14 must be submitted for approval at least *[four]* months prior to the intended commencement of licensed activities, except where otherwise stated or unless otherwise agreed in writing by the MMO.

(4) No licensed activity may commence until for that licensed activity the MMO has approved in writing any relevant programme, statement, plan, protocol or scheme required to be approved under condition 14 or approval has been given following an appeal in accordance with sub-paragraph (6).

(5) Unless otherwise agreed in writing with the undertaker, the MMO must use reasonable endeavours to determine an application for approval made under condition 14 as soon as practicable and in any event within a period of *[four]* months commencing on the date the application is received by the MMO.

(6) Where the MMO fails to determine an application for approval under condition 14 within the period referred to in sub-paragraph (5) or refuses the application for approval, the undertaker may appeal to the Secretary of State in accordance with the procedure in Part 5 of this licence.

PART 2

Procedure for appeals

1. The undertaker must submit to the Secretary of State, a copy of the application submitted to the MMO and any supporting documentation which the undertaker may wish to provide ("the appeal documentation").

2. The undertaker must on the same day provide copies of the appeal documentation to the MMO and any relevant consultee.

3. As soon as is practicable after receiving the appeal documentation, but in any event within 20 business days of receiving the appeal documentation, the Secretary of State must appoint a person and forthwith notify the appeal parties of the identity of the appointed person and the address to which all correspondence for that person's attention should be sent.

4. The MMO and any relevant consultee must submit written representations to the appointed person in respect of the appeal within 20 business days of the date on which the appeal parties are notified of the appointment of a person under paragraph 3 and must ensure that copies of their written representations are sent to each other and to the undertaker on the day on which they are submitted to the appointed person.

5. The appeal parties must make any counter-submissions to the appointed person within 20 business days of receipt of written representations pursuant to paragraph 4 above.

6. The appointed person must make his decision and notify it to the appeal parties, with reasons, as soon as reasonably practicable. If the appointed person considers that further information is necessary to enable him to consider the appeal he must, as soon as practicable, notify the appeal parties in writing specifying the further information required, the appeal party from whom the information is sought, and the date by which the information is to be submitted.

7. Any further information required pursuant to paragraph 6 must be provided by the party from whom the information is sought to the appointed person and to other appeal parties by the date specified by the appointed person. Any written representations concerning matters contained in the further information must be submitted to the appointed person, and made available to all appeal parties within 20 business days of that date.

8. On an appeal the appointed person may—

(1) allow or dismiss the appeal; or

(2) reverse or vary any part of the decision of the MMO (whether the appeal relates to that part of it or not), and may deal with the application as if it had been made to the appointed person in the first instance.

9. The appointed person may proceed to a decision on an appeal taking into account only such written representations as have been sent within the time limits prescribed, or set by the appointed person, under this paragraph.

10. The appointed person may proceed to a decision even though no written representations have been made within those time limits, if it appears to the appointed person that there is sufficient material to enable a decision to be made on the merits of the case.

11. The decision of the appointed person on an appeal is final and binding on the parties, and a court may entertain proceedings for questioning the decision only if the proceedings are brought by a claim for judicial review.

12. If an approval is given by the appointed person pursuant to this Schedule, it is deemed to be an approval for the purpose of Part 4 of Schedule 9 as if it had been given by the MMO. The MMO may confirm any determination given by the appointed person in identical form in writing but a failure to give such confirmation (or a failure to give it in identical form) may not be taken to affect or invalidate the effect of the appointed person's determination.

13. Save where a direction is given pursuant to paragraph 14 requiring the costs of the appointed person to be paid by the MMO, the reasonable costs of the appointed person must be met by the undertaker.

14. On application by the MMO or the undertaker, the appointed person may give directions as to the costs of the appeal parties and as to the parties by whom the costs of the appeal are to be paid. In considering whether to make any such direction and the terms on which it is to be made, the appointed person must have regard to the Planning Practice Guidance on the award of costs or any guidance which may from time to time replace it.

APPENIDX 2: ARBITRATION

Arbitration

38.—(1) Subject to Article 41 (saving provisions for Trinity House), any difference, dispute or decision under any provision of this Order, unless otherwise provided for, must be referred to and settled in arbitration in accordance with the rules at Schedule 14 of this Order, by a single arbitrator to be agreed upon by the parties, within 14 days of receipt of the notice of arbitration, or if the parties fail to agree within the time period stipulated, to be appointed on application of either party (after giving written notice to the other) by the Secretary of State.

(2) Any matter for which the consent or approval of the Secretary of State is required under any provision of this Order must not be subject to arbitration.

(3) Should the Secretary of State fail to make an appointment under paragraph (1) within 14 days of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.

Deemed Marine Licences *Part 5 – Condition 15 and 23 (Schedules 9-10) and Condition 10 and 18 (Schedules 11-12):*

15

…

(5) Unless otherwise agreed in writing with the undertaker, the MMO must determine an application for approval made under condition 14 within a period of *[four]* months commencing on the date that the application is received.

(6) Where the MMO fails to determine the application for approval under condition 14 within the period referred to in sub-paragraph (5), the undertaker may refer the matter to arbitration in accordance with condition 23.

23. (1) Subject to condition 23(2), any difference, dispute or decision under any provision of this licence must, unless otherwise agreed between the MMO and the licence holder, be referred to and settled by a single arbitrator to be agreed between the MMO and the licence holder following the process set out in article 38 and schedule 14 of this Order.

(2)Nothing in this condition 23 is to be taken, or to operate so as to, fetter or prejudice the statutory rights, powers, discretions or responsibilities of the MMO.

APPENDIX 3: DEEMED APPROVAL

Articles

Arbitration

38.— (1) Subject to Article 41 (saving provisions for Trinity House), any difference under any provision of this Order, unless otherwise provided for, must be referred to and settled in arbitration in accordance with the rules at Schedule 14 of this Order, by a single arbitrator to be agreed upon by the parties, within 14 days of receipt of the notice of arbitration, or if the parties fail to agree within the time period stipulated, to be appointed on application of either party (after giving written notice to the other) by the Secretary of State.

(2) Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration.

(3) Should the Secretary of State fail to make an appointment under paragraph (1) within 14 days of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.

Deemed Marine Licences *Part 4 – Condition 15 (Schedules 9-10) and Condition 10 (Schedules 11-12):*

15 (5) Unless otherwise agreed in writing with the undertaker, the MMO must determine an application for approval made under condition 14 within a period of *[four]* months commencing on the date that the application is received.

(6) Save in respect of any plan which secures mitigation to avoid adversely affecting the integrity of a relevant site, where the MMO fails to determine the application for approval under condition 14 within the period referred to in sub-paragraph (5), the programme, statement, plan, protocol or scheme is deemed to be approved by the MMO.

(7) The licensed activities must be carried out in accordance with the approved plans, protocols, statements, schemes and details approved under condition 14 or deemed to be approved under sub-paragraph (5) above, unless otherwise agreed in writing by the MMO.

APPENDIX 4: MMO'S INTERNAL ESCALATION PROCEDURE

Arbitration

38.— (1) Subject to Article 41 (saving provisions for Trinity House), any difference under any provision of this Order, unless otherwise provided for, must be referred to and settled in arbitration in accordance with the rules at Schedule 14 of this Order, by a single arbitrator to be agreed upon by the parties, within 14 days of receipt of the notice of arbitration, or if the parties fail to agree within the time period stipulated, to be appointed on application of either party (after giving written notice to the other) by the Secretary of State.

(2) Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration.

(3) Should the Secretary of State fail to make an appointment under paragraph (1) within 14 days of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.

***Deemed Marine Licences**: Part 4, Condition 15, Part 5 (Schedules 9-10) and Part 4, Condition 10 and Part 5 (Schedules 11-12)*

15.

…

(3) Each programme, statement, plan, protocol or scheme required to be approved under condition 14 must be submitted for approval at least *[four]* months prior to the intended commencement of licensed activities, except where otherwise stated or unless otherwise agreed in writing by the MMO.

(4) No licensed activity may commence until for that licensed activity the MMO has approved in writing any relevant programme, statement, plan, protocol or scheme required to be approved under condition 14 or approval has been given following the MMO's internal escalation procedure in accordance with sub-paragraph (6).

(5) Unless otherwise agreed in writing with the undertaker, the MMO must use reasonable endeavours to determine an application for approval made under condition 14 as soon as practicable and in any event within a period of *[four]* months commencing on the date the application is received by the MMO.

(6) Where the MMO fails to determine an application for approval under condition 14 within the period referred to in sub-paragraph (5), the undertaker may invoke the MMO's internal escalation procedure in Part 5 of this licence.

PART 3

Procedure for internal escalation

[Notwithstanding that this is the Applicant's least preferred approach, in the Applicant's view this procedure would need to be secured in the DMLs in order to ensure consistency and to avoid a unilateral withdrawal of the internal escalation procedure post-consent. The MMO, however, consider that the procedure should not be secured in the DMLs as it is subject to change.]

1. (1) Where the MMO fails to determine an application for approval under condition 14 within the period referred to in paragraph 15(5), the undertaker may notify the MMO case team requesting a decision within 2 months from the date of such notification.

(2) On receipt of the undertaker's notification under sub-paragraph 1, the MMO must, as soon as practicable, arrange a meeting with the undertaker to discuss the non-determination, at which a director of the MMO must be present and, as soon as practicable following the meeting must provide the undertaker with the MMO's decision on the application including its reasons for the decision.

(3) Unless otherwise agreed between the parties, in the event that the MMO fail to determine the application within 2 months from the date of the undertaker's notice under sub-paragraph (1) the application is deemed to be refused by the MMO.