Marine Management Organisation

Lancaster House
Newcastle Business Park
Newcastle upon Tyne
NE4 7YH

T +44 (0)300 123 1032
info@marinemanagement.org.uk
www.gov.uk/mmo

National Infrastructure Planning,
Temple Quay House,
2 The Square Bristol,
BS1 6PN

Your reference: EN020022
Our reference:
DCO/2018/00016

aquind@planninginspectorate.gov.uk

[by Email only]

21 December 2020

Dear Mr Mahon,

The Planning Act 2008, AQUIND Limited, proposed AQUIND Interconnector Project

Deadline 6 Response

On 6 January 2020, the Marine Management Organisation (the "MMO") received notice under section 56 of the Planning Act 2008 (the "2008 Act") that the Planning Inspectorate ("PINS") had accepted an application made by AQUIND Limited (the "Applicant") for a development consent order (the "DCO Application") (MMO ref: DCO/2018/00016; PINS ref: EN020022).

The DCO Application seeks authorisation to construct and operate an electricity interconnector with a net transmission capacity of 2000 megawatts between France and the UK (the "Project").

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

This document comprises the MMO comments in respect of the DCO Application submitted in response to Deadline 6.

The MMO submits the following:

1. **Summary of Oral Cases made during Issue Specific Hearing 1 (ISH 1) – The Draft DCO and Issue Specific Hearing 3 (ISH 3) – Environmental Matters**
2. **Comments on additional information/submissions received prior to Deadline 6**

This written representation is submitted without prejudice to any future representation the MMO may make about the DCO Application throughout the examination process. These transcripts are 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 sincerely,

Daniel Walker
Marine Licensing Case Officer

D 0208 225 8573
E daniel.walker@marinemanagement.org.uk

1. Summary of Oral Cases made during Issue Specific Hearing 1 (ISH 1) – The Draft DCO and Issue Specific Hearing 3 (ISH 3) – Environmental Matters

1.1 ISH1

1.1.1 - Agenda Item 6.1

MMO confirmed that it is wholly against being subject to the arbitration and appeals process. MMO confirmed that additional information will be provided with its response to DL6.

1.1.2 - Agenda Item 10.2

The MMO confirmed that it had received additional information from the applicant the evening of the 8th December. The MMO confirmed it will be working to respond to the applicant by DL6.

1.2 ISH3

1.2.1 - Agenda Item 5

(a) The Deemed Marine Licence

- *Can the Marine Management Organisation (MMO) and Natural England confirm if the methods of non-burial protection for the cable are acceptable and adequately secured in the DCO and Deemed Marine Licence? Following the Applicant's response at Deadline 2, do you still consider that further detail needs to be added to the design parameters to confirm maximum amount of cable protection required?*

  Originally the MMO's main concerns were regarding the use of grout bags. The MMO welcomes the applicant's explanation that the MMO will be required to approve the deployment of cable protection (during construction and operation) as per licence conditions in the DML including Part 2, Condition 4 Cable Burial and Installation Plan and Cable Burial Management Plan in Condition 11 respectively. The MMO will review these conditions again internally with respect to this and will provide confirmation at DL6 as to whether we are content. In addition to this, The MMO had requested that a condition ensuring data no older than 5 years to be presented before post construction cable protection is approved is included within the DML. The applicant provided the MMO with draft wording for a condition on the 8th November. Whilst the MMO appreciates that it covers data being no more than 5 years, the MMO would still like to see the condition secure the need to provide descriptions of the seabed habitat and information regarding what cable protection has been laid to date. This is to ensure that the presence of ephemeral species that may not have been present at baseline surveys is identified.

- *MMO previously noted that it was unclear and had concerns about the purpose of proposed Deemed Marine Licence Part 1, 4(5) that permits 'any other works as any be necessary or expedient.' Is there any progress to report on achieving common ground on this matter? If not, what is the basis of outstanding differences?*

The MMO received an email from the applicant on the 8th December and understands that Part 1, 4(5) will be removed.

- *Are all the necessary Deemed Marine Licence conditions in place to satisfy the MMO that all of the mitigation required for the Proposed Development can be secured?*

The MMO confirmed that its position stands that it requests a condition securing Herring mitigation. The MMO have taken a pragmatic approach based on the best available data and recommend wording for conditions which would prevent work from taking place at a specific location of the cable between 15th December and 15th January. MMO have endeavoured to be proportionate in our recommended mitigation. We have recognised that not all of the cable route is suitable as a herring spawning ground. We have used the PSA data and IHLS data to enable us to propose the mitigation spatially. We were also able to refine the mitigation temporally by interrogating each of the three data sets (December, Early January and Late January IHLS surveys) in order to establish the peak of larval densities for the cable route area. We have also recognised that, the cable laying activities will be a single event of disturbance, rather than the continuous one associated with aggregate extraction.

With regards to noise, the MMO can confirm that Cefas has been consulted on the revised assessment which we received from the applicant on the 26th November and will be providing a full response at Deadline 6.

- *Further to the Deadline 2 submissions from the parties, have the Applicant and MMO progressed discussions over the outstanding differences between them in relation to the assessment of the AQUIND Interconnector/ Atlantic Crossing interaction and protection? If not, what are the implications if agreement cannot be reached?*

The MMO and the applicant have come to agreement that the length and area of the Atlantic cable crossing will be included. Further, the Applicant is content to amend Part 2, Condition 11 to include provision for details of scour/erosion around the Atlantic Cable Crossing, and the justification for any additional protection which may be required. The MMO will work with the applicant to agree this wording.

(b) Marine Habitats and Assessments

- *Whilst it is stated that a precautionary approach was taken to determine the study areas for the baseline, could the Applicant provide reassurance that Figure 8.1 does*

not need updating to reflect the regional boundaries used in the ES? Are the MMO and Natural England content with the extent of the study area?

MMO is content with the study area.

- With reference to the Applicant's answer to question ME1.10.6, could Natural England and the Marine Management Organisation confirm they are satisfied that the most appropriate and up-to-date environmental information has been used to inform and influence the definition of the Zone of Influence relating to benthic receptors?

The MMO has consulted with its Benthic advisers at Cefas thoroughly for this application and this has not been raised as a concern, therefore the MMO is content that the most appropriate and up-to-date environmental information has been used.

2. Comments on additional information/submissions received prior to Deadline 6

As discussions have taken place with the Applicant via email and telephone since Deadline 5, the MMO has grouped its comments into subject paragraphs for ease of reading.

2.1 Underwater Noise

2.1.1 Following submission of the Statement of Common Ground with Marine Management Organisation at Deadline 4, the Applicant issued an assessment on 26 November 2020 in relation to underwater noise as requested by the MMO. The assessment considered the cumulative noise exposure from vibro-hammering in accordance with NOAA 2018 guidance as requested by MMO. Having reviewed this document, MMO believe that the Applicant has now presented sufficient evidence to support their assessment and conclude that the risk of significant impact from this activity is likely to be low.

2.2 Contaminated Sediment

2.2.1 Following submission of the Statement of Common Ground with Marine Management Organisation at Deadline 4, the applicant requested further justification for the proposed DML condition below (referred to in section MMO 4.1.1 of the SoCG):

"*Should dredging at the HDD location not be conducted by 2022, the licence holder must obtain sediment sampling advice from the MMO at least 6 months prior to the end of 2022, to determine whether new sediment analysis is required to dredge from XXX 2023 onwards.*

Reason: To ensure material remains suitable for disposal at sea."

2.2.2 This requirement for sampling is added to all similar applications where analysis of results have been provided and there may be a considerable gap between permitting and construction/implementation/dredging. As results are a snapshot in time, the need for additional sampling always needs to be considered on a case by case basis and at relative time scales to ensure protection of the marine environment. Therefore, unless requested by the Examining Authority, the MMO will not be providing examples of other licences where this condition is included, as every licence is different and the MMO makes decisions on a case by case basis. However, the MMO can confirm that where there is considerable lag (3-5 years) or opportunity for contamination of material to occur (spills, anthropogenic input etc.), additional sampling and analysis are often required to ensure decisions made are still properly supported.

2.2.3 A low-volume dredge/disposal can be discounted from repeat sediment analysis when it falls under the 500 m^3 exemption threshold. The Applicant's argument

that a low-volume dredge (which is not under 500 m^3) should be discounted from repeat sediment analysis on the basis that it is low volume does therefore not follow. The purpose of repeat sediment analysis is to ensure that decisions are not made using outdated data so as to account for any changes or new inputs into the surrounding environment. The OSPAR guidance gives a threshold for repeat sediment analysis of 3 – 5 years, therefore the proposed condition is already at the furthest end of the date range. Further, contaminant levels obtained previously would have to have indicated that the contamination was below the limit of detection or extremely low for the repeat sediment analysis requirement to be considered for removal.

2.2.4 In the MMO's opinion, the contaminant levels presented do not fit these criteria. It may be worth noting that this condition is not being recommended for the offshore sediments the applicant plans to dredge. The difference between the HDD location sediments and those offshore is that certain assumptions can be made about the offshore sediments, notably, that particle size data have confirmed that they are coarse in nature. This is sufficient justification to remove the requirement for repeat sediment analysis in those areas, and assumptions about the likely risk to the marine environment can be appropriately made. The proposed works at the HDD location and the sediments in that area are the focus of the repeat analysis as they do not hold the same assumptions and underlying justification as that of the material being relocated offshore.

2.2.5 To reiterate comments made previously, the proposed condition is a necessary part of a risk-based approach. Such an approach can be changed according to local context or an individual project's components, however, sufficient justification and/or evidence must be presented to warrant such a change. The MMO are not convinced that the evidence that has been proposed for the HDD works is sufficient justification to warrant such a change. All previous comments with regard to this condition should be regarded. Whilst contaminant levels did not preclude the material from disposal at sea at the time of the original assessment, repeat sediment analysis will be considered if deemed necessary due to a lag between the consent and the implementation of the project after five years. Based on this, MMO consider that not stipulating the proposed condition would be inappropriate.

2.3 Cable Protection

2.3.1 As per email correspondence on 8th December, the Applicant now proposes the definition of cable protection to be amended to;

"*cable protection" means physical measures for the protection of cables including rock, rock bags and gravel placement, concrete or frond mattresses, tubular protection and grout bags"*

The MMO is content with the proposed definition.

2.3.2 In terms of the temporary use of grout bags, the Applicant has highlighted that the MMO will be required to approve the deployment of cable protection (during

construction and operation) as per licence conditions in the DML including Part 2, Condition 4 Cable Burial and Installation Plan and Cable Burial Management Plan in Condition 11 respectively. The MMO acknowledges the Applicant's explanation regarding the approval of cable protection. The MMO would appreciate the applicant highlighting exactly which part of condition 4 and condition 11 will enable the MMO to approve the deployment of cable protection. Providing this is made clear, the MMO is in agreement.

2.3.3 The MMO raised concerns at the Issue Specific Hearing 3 that there was not a condition securing data to be presented that is less than 5 years old before cable protection is placed. The Applicant now proposes the following wording to secure 5 year data timescales used to inform the justification of the requirement for additional cable protection within the DML as requested by the MMO although the location of this wording within the DML will be confirmed by the Applicant in due course;

"…*details and justification for the installation of any additional cable protection to be informed by survey data less than 5 years old, unless agreed with the MMO, in the location/s where the laying of additional cable protection is proposed;"*

The MMO appreciates this wording, however recommends the following wording to ensure a description of habitat is secured:

"*details and justification, including a description of the seabed habitat and information regarding what cable protection has been laid to date, for the installation of any additional cable protection to be informed by survey data less than 5 years old, unless agreed with the MMO, in the location/s where the laying of additional cable protection is proposed."*

The MMO is content for this condition to be placed where the applicant sees fit, providing we are in agreement that its purpose is to ensure that if additional cable protection is required, data less than 5 years old must be provided along with a description of the seabed habitat and justification for the cable protection.

2.3.4 With regards to the Atlantic Cable Crossing cable protection, the Applicant has proposed that rather than include this item in Part 2, that additional text is added to Part 1, Paragraph 4(1) as follows;

(1) cable protection, including the Atlantic Cable Crossing cable protection (pre-lay berm, 100 m x 30 m and post-lay berms of approximately 600 m x 30 m) covering a maximum footprint of 37,800 m^2.

Furthermore, the Applicant has confirmed they are content to amend Part 2, Condition 11 to include provision for details of scour/erosion around the Atlantic Cable crossing, and the justification for any additional protection which may be required. The Applicant proposes the following wording to be included in Condition 11 as subparagraph:

(c) details of scour/erosion around the Atlantic Cable crossing described in Schedule 15, Part 1, Paragraph 4(1)….

The MMO is content with this.

2.4 HAB1.8.10 - HRA

2.4.1 The Examining Authority questioned whether the worst-case construction programme assumed in the HRA should be secured through the DML. The MMO is in agreement with the applicant on this issue and is content that the plan does not reference the HRA.

2.5 Part 1, 4 of the DML

2.5.1 The Applicant has confirmed that they will remove paragraph 4(5), as the minor development to which it may relate is considered to already be captured by paragraph 4 which confirms that such other works as may be necessary or expedient for the purposes of or in connection with the relevant part of the authorised development and which fall within the scope of the work assessed in the environmental statement is permitted. With regards to Part 1,4(5), the MMO welcomes its removal.

2.5.2 However, the MMO would appreciate an explanation on what Part 1, 4 is intended for. It is the MMO's understanding that this is intended to 'authorise' any licensable marine activities which are not undertaken in relation to works Nos. 6 and 7 but which would be further associated development. However, the wording does not appear to create or deliver that authorisation. The MMO recommend that this is reviewed.

2.6 Part 1, 10 of DML

2.6.1 The MMO wishes to gain clarity on the purpose of Part 1, 10 of the DML. As per the Statement of Common Ground which the MMO understand the Applicant will be submitting, the Applicant has advised that the following wording was used in the Norfolk Vanguard Offshore Wind Farm Order 2020 as follows:

Any amendments to or variations from the approved plans, protocols or statements must be minor or immaterial and it must be demonstrated to the satisfaction of the MMO that they are unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement.

2.6.2 The MMO note the wording from Norfolk Vanguard Offshore Windfarm Order 2020 (Vanguard). However, this wording was referring to the plans, protocols and statements that are put to the MMO for approval under condition 14 which are the pre-constructions plans and monitoring plans. Vanguard does not refer to the 'approved details' but plans, protocols and statements. The term 'approved details' is not defined in the DML and it is a term used in the main body of the order to refer to the specification of the wider project design. The DML is authorising the carrying on of the 'licensable marine activities' (as per the definition in s66 of MCAA, deposits, removals etc) that are required in relation to the overall construction authorised through the DML and which is to be carried out in accordance with the 'approved design'. If changes are

made to the approved details of Works No 6 and 7, but this is not mirrored in the main body of the Order, this could be problematic. The MMO suggest that the applicant reviews this and would appreciate an explanation as to what the applicant is trying to achieve through the inclusion of this phrase and what is intended to be amended and varied.

2.7 Arbitration, Appeals and Deemed Approval

2.7.1 The MMO strongly objects to be subject to arbitration and requests that Part 7 Article 45 states explicitly that this provision does not apply to the MMO. The MMO requests amendments to the drafting that make it explicit that the MMO is not subject to the provision through inclusion of the following wording:

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.

2.7.2 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. As a public body, the MMO has a number of specific statutory powers and duties, and a responsibility to act in the public's interest. The MMO is therefore rightly subject to public scrutiny on the decisions it makes which often fall to be taken only after public consultation. The MMO consider that the removal of the MMO's decision–making function and its placement into the hands of a private arbitrator 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. Since Parliament has vested the public-law functions regarding discharging marine licence conditions in the MMO, removing its decision-making functions and placing them into the hands of a private arbitrator is inconsistent with the MMO's responsibilities.

2.7.3 Article 45 in the dDCO applies to 'differences' which arise under the provisions in the Order. The MMO maintains its position that such an approval is a regulatory decision, it is not 'agreeing' or 'disagreeing' with the applicant so that a divergence of views can properly be characterised as a 'difference'. When discharging a condition, the MMO is making a decision as a public body in response to an application, taking account of the broad sweep of its statutory responsibilities.

2.7.4 The MMO is able to make other decisions in relation to the DMLs once the order is granted, these include decisions on varying, revoking and transferring of licences. The MMO also makes decisions around enforcement in the event that the provisions of marine licences are not complied with. If the 'decisions' of the MMO are to be made subject to the arbitration provisions, then any 'differences' between the MMO and the applicant around enforcement would also be made subject to the arbitration process. Whilst it seems this would be an inadvertent extension of the arbitration process, it is a practical consequence of extending Article 45 to decisions made by the MMO. This is again unnecessary, is not justified in the submissions made on behalf of the applicant and is unacceptable.

2.7.5 It is noted that the Applicant stated during Issue Specific Hearing 1 on the Draft DCO that they do not believe that the MMO should be subject to arbitration. Consequently, the suggested wording should be included into the dDCO to make those intentions clear.

2.7.6 The DCO, as drafted, states in Schedule 15 Part 3 that where the MMO "*refuses an application for approval under conditions 3, 4, 10, 11 and 13 (…) or fails to determine the application for approval in accordance with any of those conditions*", appeals process will be available to the Applicant. Schedule 15 Part 2 of dDCO also contains deemed approval mechanism for Pre-construction surveys which are not determined within the stipulated timescales. The MMO strongly object to inclusion of the proposed appeal process and any deemed approval provisions.

2.7.7 An appeal process already exists in respect of Marine Licences granted under Part 4 of the Marine and Coastal Access Act 2009. The appeals process is set out in the Marine Licensing (Licence Application Appeals) Regulations 2011 (the 2011 Regulations). However, this appeal process does not apply to any non-determination within a particular timeframe 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.

2.7.8 The 2011 regulations do not include an appeal process to any decisions (or timescales) the MMO is required to give in response to an application to discharge any conditions of a marine licence issued directly by the MMO. Consequently, the MMO maintains that it is not content with the appeal route in Part 3 of dDCO. In addition, the marine licences issued by the MMO under Marine and Coastal Access Act 2009 do not contain any deemed approval provisions.

2.7.9 The current mechanism the applicants have available would be to write to the MMO in relation to their application to discharge any conditions of a licence and require 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. If the MMO were to make the determination, but decided to refuse to approve the documents, then again the applicant would be able to challenge that refusal via judicial review.

2.7.10 If the DCO were to be granted with the proposed appeal process included, this would not be an appeal procedure broadly consistent with the existing statutory processes. This amendment would be introducing and making available to this specific Applicant a new and enhanced appeal process along with deemed approval provision which are not available to other marine licence holders. Consequently, this would lead to a clear disparity between those licence holders who obtained their marine licence directly from the MMO and those who obtained their marine licence via the DCO

process. This would lead to an inconsistent playing field across the regulated community.

2.7.11 Had parliament intended the appeal process to extend to these decisions, whether in relation to Nationally Significant Infrastructure Projects or the marine licence granted directly by the MMO, then the wording of the Appeal Regulations would have been drafted differently. Consequently, this is a fundamental departure from what Parliament intended, and the MMO can see no justification for such a major change particularly where the purpose of the deemed licence regime under the Planning Act 2008 is essentially 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. The MMO also consider that such enhanced appeal process and deemed approval 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*".

2.7.12 Whilst the MMO appreciates the Applicant's desire for certainty, the MMO considers it entirely inappropriate to put a timeframe on decisions of such a nature. The time taken to make such a determination depends on the quality of the application made, the complexity of the issues and the amount of consultation the MMO is required to undertake with other organisations. In particular, any deemed approval mechanism could present a major risk of allowing impacts over and above what has been initially assessed. Whilst the MMO would be open to consider deemed refusal provision, it is the MMO's view that it is generally unhelpful and inappropriate to apply strict timeframes in the dDCO in which the MMO must make its determination.

2.7.13 The MMO is an open and transparent organisation that actively engages with and maintains excellent working relationships with industry and those it regulates. The MMO discharges its statutory responsibilities in a manner which is both timely and robust in order to fulfil the public functions vested in it by Parliament. The scale and complexity of an Nationally Significant Infrastructure Projects creates no exception in this regard and indeed it follows that where decisions are required to be made, or approvals given, in relation to these developments of significant public interest only those bodies appointed by Parliament should carry the weight of that responsibility. Since its inception the MMO has undertaken licensing functions on over 130 DCOs comprising some of the largest and most complex 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.

2.7.14 The MMO also notes position on Norfolk Vanguard Offshore Wind Farm DCO with ExA recommendation on Schedules 9 to 12, Part 5 – procedure for appeals concluding in para 9.4.42:

'*There is no substantive evidence of any potential delays to support an adaptation to existing procedures to address such perceived deficiencies. To do so would place this particular Applicant in a different position to other licence holders.'*

Similarly, Hornsea Three Offshore Wind Farm ExA Recommendation report states in 'Alternative dispute resolution methods in relation to decisions of the MMO under conditions of the DMLs' section in paras 20.5.27 – 20.5.29:

'We agree with the MMO on this point. The process set out in the Marine Licensing (Licence Application Appeals) Regulations 2011 does not cover appeals against decisions relating to conditions. Whilst it would be possible to amend those regulations under PA2008, the result would be to create a DML which would be different to other marine licences granted by the MMO. We recommend that the Applicant's alternative drafting in Articles 38(4) and 38(5) is not included in the DCO. (…)

We have commented above that the scale and complexity of the matters to be approved under the DMLs is a strong indicator that those matters should be determined by the appropriate statutory body (the MMO). In our view an approach whereby matters of this magnitude would be deemed to be approved as a result of a time period being exceeded would be wholly inappropriate. Notwithstanding the exclusion of European sites, this approach would pose unacceptable risks to the marine environment and navigational safety. We recommend that the Applicant's alternative drafting is not included in the DCO.'

2.7.15 To conclude, the position of the MMO is that any matter in relation to the DML should not be subject to arbitration, appeal or deemed approval. The MMO request that it is explicitly stated that the MMO will not be subject to arbitration along with the removal of any deemed approval provisions in Part 2 and the appeals process stipulated in Part 3 of the DML.

The MMO considers it is wholly inappropriate for the dDCO to replace the existing mechanisms. This would lead to a disparity between licence issued under DMLs and those issued directly by the MMO and create an unlevel playing field across the regulated community. The MMO has stated above and in previous correspondence that these proposals go against the statutory functions laid out by parliament. The removal of the MMO's decision–making function and its 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.

The MMO's position is that the Applicant should rely on judicial review as a means to challenge any decision of the MMO. There is no compelling evidence as to why the applicant in the case of Aquind should be an exception to the well-established rules and treated differently to any other marine licence holder. The MMO recognise that the Applicant would like greater certainty regarding the timeframe for discharge of conditions and can consider the DML with a deemed refusal provision if not determined within a specified period.