From:	Reed, Rebecca (MMO)
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Cc:	Noble, Eleanor (MMO)
Subject:	FW: Norfolk Vanguard Deadline 7 MMO response
Date:	02 May 2019 21:50:34
Attachments:	EN010079 Deadline 7_ISH 7_Action Point 4_MMO Position Statement_FINAL.pdf EN010079 Post hearing submission including written submission of oral cases DL7_MMO_FINAL.pdf

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Dear Norfolk Vanguard Project Team,

Please find enclosed the Marine Management Organisation's (MMO) submission for Deadline 7, comprising:

1. MMO Post hearing response
2. Appendix 1

I would be grateful if you could respond to this e-mail confirming safe receipt.

Kind Regards
Rebecca

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Norfolk Vanguard Case Team
Planning Inspectorate
(Email only)

MMO Reference: DCO/2016/00002
Planning Inspectorate Reference: EN010079
Identification Number: 20012773

2 May 2019

Dear Sir or Madam,

Planning Act 2008, Vattenfall Wind Power Limited, Proposed Norfolk Vanguard Offshore Wind Farm
Deadline 7 Post Hearing Submission

On 26 June 2018, the Marine Management Organisation (the "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 Norfolk Vanguard Limited (the "Applicant") for determination of a development consent order for the construction, maintenance and operation of the proposed Norfolk Vanguard Offshore Wind Farm (the "DCO Application") (MMO ref: DCO/2016/00002; PINS ref: EN010079).

The DCO Application seeks authorisation for the construction, operation and maintenance of Norfolk Vanguard offshore wind farm, comprising of up to 200 wind turbine generators together with associated onshore and offshore infrastructure and all associated development ("the "Project").

This document comprises the MMO comments in respect of the DCO Application submitted in response to Deadline 7. 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

[redacted]

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Contents

The MMO Post Hearing Submissions including Written Submission of Oral Cases

1. Summary of Oral Cases made during the Environmental Issues Specific Hearing 6 (ISH)

1.1 Offshore Ornithology

1.1.1 Update to project design review

The applicant provided an update on the changes to the project design review which revised the worst case scenario. The change limited the number of turbines placed in Norfolk Vanguard West or Norfolk Vanguard East. The Examining Authority (ExA) asked the applicant on how this would be secured during the examination and in the Development Consent Order (DCO) and Deemed Marine Licences (DML). The applicant advised this is under discussion on the exact wording.

The MMO were asked for comments and advised that, as long as the changes were clear on the DCO/DML, this would be sufficient.

1.2 Benthic Ecology

1.2.1 Progress on the Haisborough, Hammond and Winterton (HHW) Special Area of Conservation (SAC) Site Integrity Plan (SIP)

The MMO welcomed the engagement so far and understand the uncertainties the applicant has in relation to the cable route and location on Annex 1 habitat.

As stated in the MMO deadline 6 (REP6-030) the MMO believe there is a fundamental difference in the need for a SIP between the impact alone within the HHW SAC and for the in-combination noise impact within the Southern North Sea (SNS) SAC. The MMO clarified that when a project has been assessed regarding impacts of noise in the SNS SAC, project impacts alone can be clearly identified, assessed and the possible mitigation to be used described, which all parties can have confidence in. The only uncertainty within the SNS SAC is the in combination impacts with other projects. The SIP was specifically utilised for that type of uncertainty.

The MMO highlighted concern regarding a lack of comprehensive descriptions of the worst case scenario and proposed mitigation possible with different scenarios. The MMO considers uncertainty regarding the approach to avoid all areas of reef or reef treated as reef is inadequately detailed. The MMO envisages a possibility where the full cable corridor width is covered by reef, or areas to be treated as reef, and micro-siting is not possible. No other mitigation is proposed in this situation. The MMO feels this needs to be dealt with pre consent and therefore there are still outstanding concerns.

The MMO understood the applicant's comments on how the East Anglia 3 Offshore Wind Farm SIP was introduced and what the objectives were and how they mirror the objectives for the HHW SIP. The MMO advised that there should still be an assessment of the worst case scenario at this moment in time, acknowledging this could change, as this would show all possible mitigation put forward by the applicant, building confidence.

The MMO would not welcome such uncertainty regarding the inability to rule out adverse effect on integrity (AEoI) of the project alone and delaying the decision

process post consent to manage this risk. The MMO would prefer this to be dealt with pre consent and if it the project is unable to rule out AEoI this needs to be dealt with at the time of examination.

The MMO reiterates that confidence in the mitigation proposed is a necessary requirement for consent without which there is a burden of risk, the consequences of which is not felt by the developer alone. The MMO believe if the worst case scenario is set out at this moment and any mitigation adequately described for this scenario this would alleviate some concerns regarding confidence in possible mitigation. The MMO believe this confidence is necessary to comply with regulations and to aid in the consenting of this project.

1.2.2 HRA Habitats Regulations Assessment considerations, including any potential AEOI finding

The MMO acknowledge the applicants comments in relation to if the Secretary of State (SoS) could not conclude no AEoI, then the next steps could be imperative reasons of overriding public interest (IROPI). The MMO questioned if this was concluded for another feature (e.g. ornithology) and the HHW SIP was put in place, to deal with the cable route uncertainties, there could be considerable impacts associated with a consented windfarm going through IROPI twice.

1.3 Proposed Bye-law areas

1.3.1 DEFRA Bye-law area

The MMO advised there is no further update that the information provided within deadline 6 (REP6-030) response. The MMO advised that due to the political sensitivity the outcome would not likely be completed within the consenting process.

1.4 Scour Protection

1.4.1 Scour protection per individual structure

The MMO welcomed the amendment to condition 14(1)(e) to include 'distribution'. The MMO provided confirmation that this did not alleviate concerns and the MMO still request the individual structure scour protection volumes and areas are highlighted within the text of the DCO/DML's.

The MMO advised that although the figures are within the Scour Protection and Cable Protection Plan this did not provide enough clarity.

The MMO has asked that the DML explicitly states the maximum areas of scour footprint, for the individual structures, so that it is clear to the applicant and any subsequent undertaker exactly what is permitted. This allows the applicant to understand if there is a need to apply for a variation, should there be a need for works outside what is assessed. It reduces the risk of miss-interpretation of what will be permitted by the MMO on application of such documents and assists in a smoother pre consent sign off process.

The ExA asked for where the MMO would like the scour protection figures to be within the DCO/DML. The MMO took this away to provide an update in Issue Specific Hearing (ISH) 7: DCO. Please refer to comment 2.3.1.

1.5 Marine Mammals

1.5.1 SNS SAC from proposed site to formal site

The ExA asked both the applicant and the MMO if the formal recommendation of the SNS SAC would affect the assessed impacts within the ES. The applicant advised that the assessment was conducted as if the site was fully designated so could not see any possible changes. The MMO agreed that as soon as a site is classed as a potential site it is treated as designated and the MMO do not see any possible changes to the assessment notwithstanding new conservation objectives.

1.5.2 Long term monitoring and management of multiple activities

The MMO advised that there was no further update than deadline 6 (REP6-030) response in relation to the Southern North Sea cSAC underwater noise regulator group.

The MMO advised that any updates will be added as additional information in the future deadlines.

2. Summary of Oral Cases made during the DCO/DML Issues Specific Hearing 7 (ISH)

2.1 Proposed Arbitration Procedures

2.1.1 Arbitration

The MMO are satisfied with the change of wording under Article 38 to remove the MMO from the arbitration procedure.

The MMO note that the applicant has amended Article 38 on the premise that the addition of deemed discharged process in condition 15 is met. The MMO feel this is not acceptable and the deemed discharge condition should be removed. Further information can be found in section 2.2.

If Article 38 was to be reinstated to the original wording where the MMO were subject to arbitration, the MMO would reiterate the previous comments in representations REP1-084, REP3-046 and REP4-059).

2.2 Proposed Condition 15 amendments and Timescales

2.2.1 MMO Position

The MMO outlined the following concerns in relation to the changes to condition 15 associated with the amendment to Article 38 (Arbitration) at the Issue Specific Hearing 5.

The MMO notes the changes proposed to condition 15 relate to the removal of arbitration, and the inclusion of condition 15 (4) and 15 (5). The MMO have major concerns relating to these conditions and object to their inclusion within the deemed marine licences.

The MMO questioned why the applicant feels the need for the introduction in the deemed approval approach and what is the comparative precedent to introduce such an approach. The MMO would like to highlight that there are multiple ongoing issues and proposals across new offshore wind farm projects going through the PINS process, and always endeavours to provide or enable appropriate resolution.

The MMO has summarised the comments made at the ISH 7 below and as requested by the ExA, an updated position statement is provided in Appendix 1.

2.2.2 Condition 15 (4), 15 (5) and timescales of documents

The MMO agreed with Trinity House's comments on the objection of the deemed approval condition. As per the MMO deadline 6 (REP6-030) response the MMO considers this addition inappropriate, and not commensurate with current marine licensing practice. The discharge documentation covers a wide range of mitigation that should be applied due to significant environmental and navigational safety risks. This documentation can be highly technical and require full expert analysis to assist in mitigating against such risk. Any imposed time limits which could result in expert consultation being rushed to meet the suggested agreed timescales are considered as a fettering of the MMO's authority to effectively discharge licence conditions under the requirements of the Marine and Coastal Access Act 2009 (MCAA). In this respect the deemed approval of such documents after a set timescale is completely unacceptable to the MMO.

The ExA asked Trinity house if the discharge of conditions process would work if changed from 4 months to 6 months. Trinity House advised yes however deferred to the MMO to confirm. The MMO agree with the change from 4 months to 6 months and in addition to previous responses (REP1-084, REP3-046, REP4-059, REP6-030) the MMO comments are below:

The documents in question require in depth analysis by both MMO staff and statutory consultees. There needs to be as much time as practically possible to allow this practice to take place.

For example the time scale of one in depth plan (such as the SNS SIP) could potentially follow this path:

1. 4 weeks to acknowledge and review the document within the MMO
2. External consultation of this documentation could take up to 6 weeks
3. Once consultation is closed the MMO has to review the response and possibly ask for additional information from the applicant. At this stage the MMO and the applicant would be in discussion to agree on an approach to the responses. This could be for up to 4 weeks
4. The MMO could then request further information from the applicant, which dependent on the level of detail, could represent a further significant time period of for example 4 further weeks
5. Once this is returned by the applicant, the MMO would begin the consultation process again. .
6. It is noted from the above that, even if discharge documentation were to follow the current timescales, and no further communication was required from the applicant (which is highly unlikely) the current turnaround equates to 18 weeks, which is longer than the 16 weeks suggested by the applicant. It should also be noted that the above timescale applies to only one relatively small document, when in reality, the number of in-depth discharge requirements could far exceed 30 in total.

The MMO understanding currently is that the applicant wants to ensure there is a specific time scale by which a decision is made, and that the decision does not continue without resolution. The MMO understand that this is due to the potential impact of delays, whether they be of a commercial or scheduling nature to the applicant.

The MMO are currently as flexible as possible with developers in the signing off of required documentation, flexibility is born from the fact that the remit is to enable sustainable development within our seas without obstruction. If the MMO were to

reduce this flexibility in the future then the applicant may be subjected to enforcement actions if the MMO agreed the suggested formal timescale approach, should the applicant deliver discharge documentation late or in a phased format closer to construction.

The MMO have the legal capacity to undertake enforcement action in such an event unless the extensions have been agreed beforehand in writing. The MMO is reluctant to utilise these powers and would prefer utilising flexibility in meeting unforeseen complications and enable sustainable development.

Also, If the proposed amendments to the 4 month timescale and deemed approval proceed then the MMO could have less capacity to respond in a flexible manner, as our resource would be statutorily obliged to meet approaching deadlines regardless of wider considerations. It should be noted that the applicant may find their own priorities are hampered in future should the MMO be forced to meet these obligations for other windfarm developments applications.

The ExA asked if it was possible for early submission of documents. The MMO advised that they would welcome this in as much was conveniently possible for the applicant, i.e. submissions earlier then the required 6 months.

The MMO stated that it understood the needs of the applicant for definitive timescales and suggested that the MMO would be willing to move away from the previously successful, flexible approach, and could agree to a timescale of 6 months for submission of all discharge documents with an automatic deemed refusal caveat should a decision not have been made within this period.

The MMO highlighted that this mirrors other planning and environmental licence legislation.

The planning permissions under the Town and County Planning Act 1998 and associated regulations, the Local Planning Authority has 8 weeks in which to decide an application (this is extended to 13 weeks for ‘major developments’ or 16 weeks where an environmental statement is required) and an application is ‘deemed refused’ if these timescales are not met unless the timescale is extended with written agreement of the applicant.

There are similar provisions in the Environment Permitting Regulations (England and Wales) 2016, the Environmental Agency has 4 months in which to determine applications received unless this is extended with the applicant’s written agreement. Where the EA fails to meet the timescale and no agreement is given by the applicant, then applicant is able to serve a notice on the EA after which the licence is ‘deemed’ to have been refused and the applicant can then appeal this decision.

The MMO feel 6 months deemed refusal is a suitable alternative to allow the applicant the ability to take the decision to Judicial Review (JR).

2.2.3 Applicant’s reasoning behind proposed processes

The Applicant responded to the points raised by both Trinity house and the MMO advising that the background was that in previous DCO's the applicant had taken the position that the MMO was subject to arbitration but this was not discussed in detail at the time. The applicant noted the MMO take a different position on the wording 'difference' stated within Article 38. The applicant made the arbitration clause clearer and this is where the discussions began. The applicant wants to find a way to ensure timely decisions. The ExA questioned why the changes were made

to remove arbitration and add in deemed approval provisions. The Applicant advised that the applicant requires some change in order of arbitration, an appeal process or deemed discharge to ensure the process moves along smoothly. The applicant had previously covered why the JR procedure is not suitable as the MMO need to make a decision in order for the applicant to revoke that mechanism and the JR process does not question the decision made just the process on how the decision was made.

The MMO understand the points raised by the applicant and the risks to Contract for Difference timelines, however the MMO reiterated that it was important not lose sight of the environmental and navigational safety risks introduced by the suggestion of a quicker process for the applicant.

The applicant advised that deemed refusal would fall at the bottom of the list of proposals and would agree to deemed refusal with an appeal process. The MMO advised that there is a process in place in JR and the suggested 6 months with a deemed refusal would offer the ability for this. The MMO would also note that any resolution that has not been reached in an acceptable time to the applicant in the past, has been resolved by informally escalating the issue to director level of the involved organisations and reaching a conclusion through high level discussion and concession from both parties. If the applicant could accept an approach which formalises this process to meet their overall requirements for an appeals mechanism, then this would be something the MMO could investigate for feasibility.

A supplementary point to this is that if the wind farms going forward are requesting the rigid timescales for response the flexibility raised earlier would be limited as the MMO would prioritise through the timescales rather than turning round discharge of conditions in reduce timescales due to the developers last minute changes. The MMO highlighted that there is a danger that requests for shorter turnarounds of discharge of conditions would not be agreed. This could provide difficulties for the applicant.

The MMO has provided a position statement in Appendix 1.

2.3 Schedule 1, Part 3, Requirements

2.3.1 Scour Protection

The MMO position remains that the individual structure volumes and areas should be included within the face of the DCO, the MMO suggested the table from the Scour Protection and Cable Protection Plan could be added to the design parameters within the DML.

The MMO highlighted the reason for this is when parameters are assessed in the Environmental Statement (ES) these should be stipulated within the DML. This makes it clearer in the MMO compliance role of enforcement and monitoring. This request ensures that any change to the worst case scenario can be fully reviewed through the variation process and this can be widely shared and advertised to ensure all users of the sea can comment through the consultation process.

The applicant advised that the figures are within the Outline Scour Protection and Cable Protection plan and that it is not necessary for the figures to be within the text of the licence as this is a certified document and will be agreed by the SoS. The MMO have further comments in relation to this please see comment 6.1.1.

2.3.2 Cable Protection through the life time of the project

The MMO have discussed with the applicant the concerns regarding the implication that cable protection works are considered to be licenced for deployment at any time during the operation of the works. The MMO understand the applicant has agreed that the deployment of cable protection during the operation is not permitted and a separate marine licence will be required for cable protection. Cable protection already deployed may be moved or extended within a small extent to be assessed and defined within the application.

The MMO requests that it is made explicit within the DCO that cable protection may only be deployed during construction, and deployment at any other time during the operational lifespan is approved through separate licence applications. The MMO would like to be confident and ensure that there is no confusion in the future and make it clear to any undertaker what is licensable in the text of the DCO rather than in a plan. The MMO understand the applicant is reviewing this and look forward to ongoing discussions.

2.3.3 Cable Protection Volumes within HHW SAC

The MMO believe the cable protection volumes and areas need to be shown in the text of the DCO and reiterated comments within the MMO deadline 6 response (REP6-030)

The MMO believe the specific amounts (area and volume) of cable protection within the SAC needs to be included in the DCO/DML. This is to enable the MMO to ensure the amount of disposal and works within the SAC remains within those assessed and approved.

The Applicant has advised that a Site Integrity Plan for the Haisborough, Hammond and Winterton (HHW) SAC would be submitted at Deadline 7 and this would include details of the maximum area and volumes of cable protection proposed to be used within the HHW SAC.

As per section 2.3.1 and 2.3.2 the MMO would like to ensure that there is no confusion in the future and make it clear that any undertaker what is licensable in the text of the DCO rather than in a plan.

The MMO note the applicant concerns that the parameters would need to be split in the table on page 172 of the DCO as the figures have elements in both works 4a and 4b and this may over complicate matters. The MMO understand the applicant is reviewing this and look forward to ongoing discussions.

2.3.4 Cable Protection Report - Hornsea Offshore Wind Farm 3 (HOW3)

The MMO have had ongoing discussions with the applicant relating to deadline 6 response of the HOW3 condition. The MMO advised that the following condition should be added to the DML:

Reporting of cable and scour protection

23.—(1) Not more than 4 months following completion of the construction phase of the project, the undertaker shall provide the MMO and the relevant SNCBs with a report setting out details of the cable protection used for the authorised scheme.

(2) The report shall include the following information—

(a) location of the cable protection;

(b) volume and area of cable protection; and

(c) any other information relating to the cable protection as agreed between the MMO and the undertaker.

(a) location of the scour protection;

(b) volume and area of scour protection; and

(c) any other information relating to the scour protection as agreed between the MMO and the undertaker.

The MMO note that condition 14(1)(e) could possibly duplicate the requirement for the submission. The MMO advised the applicant that this condition could be amended to remove the section in red:

14 (1)(e) A scour protection and cable protection plan providing details of the need, type, sources, quantity and installation methods for scour protection and cable (including fibre optic cable) protection, which must be updated and resubmitted for approval if changes to it are proposed following cable laying operations.

3. Action Point from the Environmental Issue Specific Hearing 6 (ISH)

3.1 Action Point 27: Position statements on any areas not agreed in SoCGs. .

3.1.1 Statement of Common Ground (SoCG)

The MMO have discussed and signed off the SoCG highlighting the ongoing issues:

- Arbitration
- Timescales
- Deemed Discharge Provisions
- Maximum parameters on the DML
- HHW SIP
- In Principle Monitoring Plan

The MMO are still in discussion with the applicant and will continue throughout the examination period.

4. Action Points from the Draft DCO Issue Specific Hearing 7 (ISH)

4.1 Action Point 4: Submission of joint position statement in relation to timescales, deemed discharge and potential appeal process including suggested wording

4.1.1 Position Statement

The MMO and the applicant are currently not in agreement with any of the processes, however are continuing discussions. The MMO have set out a position statement in Appendix 1.

4.2 Action Point 8: Justification for, and draft requirement, in relation to the layout/configuration of turbines.

4.2.1 Draft Requirement

The MMO understands the applicant is updating the wording within the Draft DCO for deadline 7 and will review the DCO and comment for deadline 8.

5. Summary of Clarifications on DCO/DML Issues as discussed at the Issues Specific Hearing 7 (ISH)

5.1 Schedules 9, 10, 11 and 12 – Deemed Marine Licences

5.1.1 Consistencies in DML's between Hornsea 3 and Thanet Extension DCO's

The MMO acknowledge the concern the applicant expressed about inconsistencies across the current DCO's undergoing examination and the MCA, Trinity House and MMO requests for amendments to the DCO/DMLS. The MMO have had a joint discussion with MCA and Trinity House and have provide potential updates to the DCO/DMLs in red below (This refers to Schedule 9 but will relay to the conditions in other schedules):

Notifications and inspections

9… - (8) A notice to mariners must be issued at least ten working days prior to the commencement of the licensed activities or any part of them advising of the start date of Work No. 1 (wind turbine generators or other offshore construction activities including array cables and fibre optic cables) and the expected vessel routes from the construction ports to the relevant location. Copies of all notices must be provided to the MMO and UKHO within five days.

(9) The notices to mariners must be updated and reissued at weekly intervals during construction activities and at least five days before any planned operations and maintenance works and supplemented with VHF radio broadcasts agreed with the MCA in accordance with the construction and monitoring programme approved under condition 14(1)(b). Copies of all notices must be provided to the MMO, MCA and UKHO within five days…

… (12) In case of exposure of cables on or above the seabed, the undertaker must within three days following the receipt by the undertaker of the final survey report from the periodic burial survey, notify mariners by issuing a notice to mariners and by informing Kingfisher Information Service of the location and extent of exposure. Copies of all notices must be provided to the MMO and MCA within three days.

Pre-construction plans and documentation

Reviewing the DMLs from Norfolk Vanguard, Thanet Extension and Hornsea 3 the MMO understands the MCA have requested the inclusion of additional plans. In addition to this MCA/TH will need to be named as consultees within the DML. The following wording in red needs to be used within condition 14 on the plans mentioned below advised by MCA.

14 - 1- (a) A design plan at a scale of between 1:25,000 and 1:50,000, including detailed representation on the most suitably scaled admiralty chart, to be agreed in writing with the MMO in consultation with Trinity House and the MCA which shows—

The Proposed plans where this needs to be updated within condition 14 are:

- Construction Method Statement
- Development Specification and Layout Plan
- Vessel Management Plan
- Cable Plan
- Lighting and Marking Plan
- Construction Programme – This would be for MCA information only, unlikely to comment.
- Design Statement - This would be for MCA information only, unlikely to comment.

- Operation and Maintenance Programme -This would be for MCA information only, unlikely to comment.

Pre-construction monitoring and surveys

The following condition needs to refer MCA requirements for Hydrographic surveys, as per MGN 543 annexes. This should include submission to MCA, MMO and UKHO.

18… - 2 - (b) a full sea floor coverage swath-bathymetry survey that meets the requirements of IHO S44ed5 Order 1a, and side scan sonar, of the area(s) within the Order limits in which it is proposed to carry out construction works;

6. The MMO remaining DCO/DML comments not discussed at the ISH

6.1 Schedules 9, 10, 11 and 12 – Deemed Marine Licences

6.1.1 Scour Protection

The applicant advised that the figures are within the Outline Scour Protection and Cable Protection plan and that it is not necessary for the figures to be within the text of the licence as this is a certified document and will be agreed by the SoS.

The applicant has advised that the condition advises that the Final Scour Protection and Cable Protection Plan required for condition 14(1)(e) states that this will be *'in accordance with the outline scour protection and cable protection plan'.* The MMO would highlight that the purpose of "certifying" a document is simply a tool of identification, it essentially marks out the document which was the correct version of the plan on which the licencing decision was made. 'Certification' serves only to establish that any plan before you is the exact version referred to in the DCO, the certification's purpose is to prevent misunderstandings, and to make enforcement easier years down the line, when you are trying to show something is outside of the plan as the document was at the time the DCO was granted. The MMO feel that this plan can still be amended.

The MMO would stress that if the applicant wanted to undertake an activity beyond what was considered in their Outline Scour Protection and Cable protection plan or Environmental statement then the process requires a variation to the 'regulatory decision' which triggers the MMO to reconsider whether the ES remains valid, and the variation must be considered and decided in light of the information in and the conclusions from the ES. If any amendments are requested that are out with the maximum parameters assessed, then these should correctly be requested through a variation to the DML. Through the DML variation process, the proposed amendment will be afforded the appropriate level of scrutiny and MMO has the opportunity to undertake further public or direct consultation as it deems appropriate.

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Norfolk Vanguard Case Team
Planning Inspectorate
(Email only)

MMO Reference: DCO/2016/00002
Planning Inspectorate Reference: EN010079
Identification Number: 20012773

2 May 2019

Dear Sir or Madam,

Planning Act 2008, Vattenfall Wind Power Limited, Proposed Norfolk Vanguard Offshore Wind Farm
Deadline 7 Appendix 1
Issue Specific Hearing & DCO Action Point 4: Submission of joint position statement in relation to timescales, deemed discharge and potential appeal process including suggested wording.

The Marine Management Organisation (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 Deemed Marine Licence (DML) conditions.

The Examining Authority requested a joint position statement on the timescales, deemed discharge and potential appeal process including suggested wording. The MMO and the applicant are currently not in agreement with any of the proposed processes, however are continuing discussions. The MMO have provided comments as a position statement alone on each process below.

Yours faithfully

[redacted]

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Appendix 1:

Issue Specific Hearing & DCO Action Point 4: Submission of joint position statement in relation to timescales, deemed discharge and potential appeal process including suggested wording.

The MMO understand that timescales, arbitration, deemed discharge processes and the potential appeal process are all linked together. The MMO's fundamental position is that we do not agree with any of the proposed processes and these should be removed from the DCO/DMLs. The MMO would request that all timescales should be six months prior to construction. The MMO has collated all responses from the previous representations into this document to ensure all information is available.

The MMO understand the applicant would like to come to a pragmatic solution to their concerns and have provided without prejudice comments in section 1 of this document.

The MMO has considered the examining authority's request to prioritise our acceptability of the different scenarios presented, however, we are unable to provide this exact response due to our objections concerning legal, principle and practical matters.

1. The MMO without prejudice comments

1.1 The MMO has highlighted below the without prejudice comments on the proposals.

1.2 The MMO believe that deemed approval (condition 15(5)) is not appropriate and this fundamentally goes against the parliamentary powers relayed through Marine and Coastal Access Act 2009 (MCAA2009) and this could not be amended to overcome the comments raised in section 6 of this document.

1.3 The MMO believe that arbitration is not appropriate and this fundamentally goes against the parliamentary powers relayed through MCAA2009 and this could not be amended to overcome the comments raised in section 2 of this document.

1.4 The MMO believe that the deemed discharge process is unreasonable alone as per the comments within section 4. The MMO believe the timescale of within 4 months is unreasonable, as per the comments in section 3, and 6 months is a more suitable timeline.

1.5 The MMO believe that the request for additional information or documents needs to be throughout the period of the 6 months and not limited to a timeframe as per comments in section 5.

1.6 The MMO have reviewed the proposals and could request that instead of the deemed approval condition, a condition could be agreed which would be a deemed refusal, with the timescales of 6 months on submission of a complete document unless otherwise agreed in writing. The proposed wording of the condition would be:

> ***15.***—*(1) Any archaeological reports produced in accordance with* ***condition 14(h)(iii)*** *are to be agreed with the statutory historic body.*
> *(2) Each programme, statement, plan, protocol or scheme required to be approved under* ***condition 14*** *must be submitted for approval at least six months prior to the intended commencement of licensed activities, except where otherwise stated or unless otherwise agreed in writing by the MMO.*
> *(3) 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.***
> *(4) 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 six months commencing on the date the application is received in full by the MMO.
*(5) 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 (4), the programme, statement, plan, protocol or scheme is deemed to be refused by the MMO.*
*(6) The licensed activities must be carried out in accordance with the plans, protocols, statements, schemes and details approved under **condition 14** or deemed to be refused under sub-paragraph (5) above, unless otherwise agreed in writing by the MMO*.

1.7 The MMO could offer an internal appeal process. This would include the decision being escalated for discussion at director level with the aim for resolution within two months of said appeal date.

1.8 The MMO are aware that the applicant has offered a possible appeal solution. The MMO are currently in internal discussions relating to a formal appeal process and will comment on this once provided formally by the applicant in detail

1.9 The MMO do not agree with any other possible proposal than the applicant sets out in comments 1.6 and 1.7 of this document.

2. Arbitration

2.1 Schedule 14 of the DCO details the process for arbitration, which is supported by Article 38. This proposes that any difference shall be referred to and settled in arbitration in accordance with the rules at Schedule 14. In comparison to previously used articles for arbitration, the process sets out significantly different conditions and timeframes, which the MMO consider to be inappropriate and unacceptable therefore recommend to be removed from the DCO and the DMLs.

2.2 Article 38 proposes that any difference shall be referred to and settled in arbitration in accordance with the rules at Schedule 14 of the DCO. In comparison to previously used articles for arbitration, Article 38 sets out significantly different conditions and timeframes, which the MMO consider to be inappropriate and therefore recommend should be amended or removed from the DCO and DMLs.

2.3 The applicant's reasoning for departing from the model provision and for including the extended clause is that "this approach will provide a more bespoke and relevant arbitration process. This follows the approach which has been taken on the draft Hornsea Three Offshore Wind Farm Order".

2.4 It is the MMO's opinion that the proposal goes beyond providing greater relevance. Arbitration provisions tend to follow model clauses and be confined to disputes between the applicant/beneficiary of the DCO and third parties e.g. in relation to rights of entry or rights to install/maintain apparatus. The MMO strongly questions the appropriateness of any regulatory decision or determination to be made subject to any form of binding arbitration as set out by Article 38 and Schedule 14.

2.5 It is the MMO's opinion that Article 38 and Schedule 14 would shift the MMO's decision-making responsibility from the hands of the regulator with primary responsibility for administering the marine licensing regime to an independent arbitrator. This would be contrary to the intention of Parliament set out in the Marine and Coastal Access Act 2009 (MCAA2009) and would potentially usurp the role of the MMO as a regulator.

2.6 When the MMO was created by the Parliament to manage marine resources and regulate activities in the marine environment, the Secretary of State delegated his/her functions to

the MMO under the MCAA2009. As both the role of the Secretary of State in determining DCO applications and the role of the MMO as a regulator for activities in the marine environment are recognised by the PA 2008, the responsibility for the DML passes from the Secretary of State to the MMO once granted. Here the MMO is responsible for any post consent enforcement actions, any post consent monitoring, and any variations, suspensions or revocations associated with the DML.

2.7 In doing so, it was not the intention of Parliament to create separate marine licensing regimes following different controls applied to the marine environment. In fact, one of the aims of the PA 2008 is the provision of a 'one stop shop' for applicants seeking consent for a national significant infrastructure project. The new regime allows for the applicant to choose whether to include a DML issued under MCAA within the DCO provision, or apply to the MMO for a standalone licence covering all activities in the marine environment. In any case, it is crucial that consistency is maintained between DMLs granted through the provision of a DCO and licenses issued directly by the MMO independent of the process.

2.8 As previously stated it is the MMO's opinion that the referral to arbitration in situations where 'difference' may arise, goes against what was intended by Parliament. Looking at the draft DMLs, the MMO feels that the 'difference' to which arbitration would be applied are those situations in which the MMO is required to give further consent or approval. These situations appear to arise when small re-determinations of aspects of the marine license process have to take place. A specific example here are situations where the applicant proposes changes to the way in which the already authorised activities will be carried out and effects have not been considered as part of the ES. Generally, these are technical determinations and the MMO feels that the MMO is better placed to make technical determinations than an arbitrator appointed under the DCO. Furthermore, in the case of any disagreement which may arise between the applicant and the MMO throughout this process, the existing appeal routs i.e. via the MMOs complaint procedure, by complaint to the Ombudsman, or ultimately via Judicial review should be taken. It is inappropriate for the DCO to apply arbitration to these decisions.

2.9 It remains unclear to the MMO, why Vanguard would like to apply arbitration to 'differences' which may arise post-consent between itself and either the Secretary of State or the MMO. It is recognised in the explanatory memorandum to the draft order, that the wording in Article 38 is a departure from the model provision. It is stated that the aim for this amendment is to provide a more bespoke and relevant arbitration process, however the MMO feel that the wording goes much further than simply providing relevance. It appears that the arbitration clause included allows a more widely application than in the case if the model clause were to be used. The model clause is set out to introduce arbitration in situations where differences arise between the applicant and any third parties who could be affected by the development, for example situations where third parties premises will be required. The model clause do not extend the use of arbitration to differences which could arise between the applicant and the Secretary of State or the MMO as a regulator for the granted DML. It is the MMO's view that this was not intended on the proper construction of the PA 2008 and the MCAA 2009.

2.10 The arbitration schedule as set out in Schedule 14 describes a private process and require the agreement that all discussions and documentation will be confidential and not disclosed to third parties without written consent. The MMO would like to highlight that the regulatory decisions should be publically available and open to scrutiny. In many cases, members of the public and Non-Governmental Organisations may make representations in relation to post-consent matters. Ordinarily, their views would be considered by the MMO and would be

able to follow and challenge the decision making. A private arbitration to resolve post consent disputes would cut out the public and reduce transparency and accountability.

2.11 As a public body, the MMO not only has a number of specific statutory powers and duties, it also has a responsibility to act in the interest of the public and ensure that activities are undertaken in the public's interest which are invariably subject to public scrutiny and public engagement.

2.12 A range of statutory mechanisms are prescribed in MACAA (2009) which outlines regulations for achieving those functions, and also includes appeal route set out against decisions the MMO takes to PINS and to the First Tier tribunal. These appeal routes are transparent and rigorous public processes which operate in a way that ensures that justice is done in a transparent manner, which is fundamental to the way the MMO discharges its functions and obligations. Furthermore, the MMO is required by a series of legislative obligations to be transparent and even positively engage with members of the public in decision making. All information discussed in an arbitration process of this kind must be susceptible to disclosure to the public under the Freedom of Information Request and Environmental Information Request regimes. Additionally, on the requirement at 7 within Schedule 14 for private hearings, it would be wholly inappropriate for a public body like the MMO, discharged with public planning and regulatory protocols, to attend hearings in private. For the tracked change amendment to the proposed arbitration schedule to include the caveat of 'save for compliance with legislative rules, functions or obligations on either party' proves this point further.

2.13 The MMO further highlighted that there were serious legal and practical issues in trying to artificially a confidential arbitration process onto the MMO's existing public law regulatory functions. The emphasis lies on the fact that Parliament has vested the public law functions such as discharging marine licence conditions upon the MMO. The removal of this decision–making function and their placement into the hands of a private arbitration process is inconsistent with the MMO's legal function, powers and responsibilities. Furthermore, there was no indication that Parliament ever considered that in passing the 2008 Planning Act it would be authorising this kind of usurpation of public functions.

2.14 Section 2 of MACAA 2009, which came into power after the 2008 Planning Act, sets out a series of broad statutory purposes and functions vested onto the MMO to achieve certain environmental objectives in the discharge of activities and to take certain matters into account in a consistent and coordinated way. None of those obligations would bind an arbitrator, which is a serious issue for the MMO as Chapter 3 of Part 1 in MACAA 2009 itself contains a provision on how the functions the MMO performs can only be delegated to eligible parties under s.16 with the agreement of the Secretary of State.

2.15 Furthermore, p.4 of Annex B of the PINS Guidance Note 11 states that 'the MMO will seek to ensure wherever possible that any deemed licence is generally consistent with those issued independently by the MMO'. In the event that the proposed DMLs are granted, the MMO emphasised that the licenses would be inconsistent from those issues by the MMO directly. The guidance (same page) also emphasises that it is the MMO which is responsible for enforcing, varying, suspending or revoking marine licenses, whether they are deemed or not. The MMO therefore consider that transferring that function to an external body would be entirely inconsistent with this guidance, which in practice reflects the provisions of the 2009 Act.

2.16 A number of parties have been able to identify both DCOs containing and not containing arbitration clauses. Here, the MMO highlighted that no party to date was able to identify a DCO decision which contained a reasoned discussion of the issue or cases where the MMO

has been subject to arbitral proceedings. As a result, the MMO emphasised that previously granted DCOs cannot assist the Secretary of State with any reasoning in the inclusion or not of such provisions.

2.17 The MMO notes that the applicant relies on previous decisions which pertained to Natural England, but there are important distinctions between NE – a statutory consultee – and the MMO which has a suite of regulatory and decision-making functions.

2.18 In the event that a decision were made against the MMO's position, and it was found that the word 'difference' is capable of representing a refusal to discharge a condition, the MMO highlighted further concerns as the currently drafted DCO wording could be arguably extended to include suspension, variation, revocation, transfer or even enforcement, which are currently covered by other provisions under MACAA and for which appeal routes are already in place. These appeal routes have been prescribed by Parliament and depending on the nature of the decision under MACAA being appealed, actions lie either to PINS or to the Upper Tribunal.

2.19 The MMO notes concerns on the appropriateness of judicial review (JR), the process may be – but is not always slow. The MMO has never been subject to JR proceedings for failure to discharge a condition because the position has always been satisfactorily managed. The MMO believe the JR procure has the benefit of being entirely public, transparent and respects the will of Parliament.

2.20 The MMO note that the arguments raised within this response were accepted in the Tilbury 2 determination, with a decision being made such that the arbitration clause didn't apply to any approval required under the DMLs.

2.21 The ExA's Recommendation Report (page 233) to the Secretary of State (SoS) found in favour of the MMO for reasons stated in its submissions, 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."

2.22 The MMO would also point the applicant to the recent Hornsea project 3 ExA schedules of changes to DCO. The ExA have amended 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."

2.23 The MMO note that there has been reference to the Triton Knoll 2013 decision. The MMO have reviewed the Triton Knoll Issue Specific Hearing 8.11.12 and would like to highlight the Hearing recording Part 2 from approx. 7 Minutes 50 seconds. In relation to the arbitration concerns raised by Natural England.

"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 implications 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."

The MMO believes that this shows that the applicant in Triton Knoll accepted that the DMLs were not believed to be included within the arbitration provision. This is noted as the MMO's position within the Triton Knoll examiners recommendation report (comment 5.11.20).

2.24 For the reasons outlined above, the MMO strongly refutes the application of arbitration to its discharge of deemed marine licence conditions. In the event that it is thought right to maintain the applicability of the arbitration clauses to the MMO, the MMO recommended that the wording should be amended to make it clear that decisions on variations, suspensions, revocation, transfer and enforcement would fall outside the scope of the arbitration clause.

2.25 The MMO have welcomed the applicants amendment to Article 38 in the draft DCO at deadline 4 (REP4-028) and are satisfied with the change of wording to remove the MMO from the arbitration procedure.

2.26 The MMO note that the applicant has amended Article 38 on the premise that if the MMO was removed from the arbitration provision or the provision was removed from the DCO then it would be replaced with deemed discharged conditions in condition 15 instead. The MMO feel this is not acceptable and the deemed discharge condition should be removed further information can be found in sections 3, 4 and 5 of this document.

3. Timescales

3.1 The proposed timescales conditioned in the DMLs required a response period of four months following receipt of all post-consent documentation and all pre-construction documentation and plans to be submitted for approval 4 months prior to the commencement of any licensed activity. Considering the increased size and complexity of the newer OWFs, the MMO considered that a timeframe of 6 months would be more appropriate to address such issues for all documentation.

3.2 The MMO believe that a four month pre-construction submission date is unrealistic and even counterproductive, as the pre-construction sign off process is not always straight forward. The MMO note the 4 month timescale was deemed appropriate for round 1 developments, which were smaller, closer to shore and with fewer complex environmental concerns.

3.3 From experience the MMO note is very common that documents require multiple rounds of consultation to address stakeholder concerns. This process alone can be very time consuming and the proposed four month submission time would not account for the additional time that the Applicant may require to update documents throughout the process. The MMO noted that some documents require additional assessment processes, for example the SIP which may require post consent HRA considerations to be made. In many cases the Applicant could be working towards a very tight time schedule post consent, and a delay in document sign off could lead to project delays, significant cost implications and frustration when not enough time has been committed for this process.

3.4 The documents in question require in depth analysis by both MMO staff and statutory consultees. There needs to be as much time as practically possible to allow this practice to take place.

3.5 For example the time scale of one in depth plan (such as the SNS SIP) could potentially follow this path:

- 4 weeks to acknowledge and review the document within the MMO
- External consultation of this documentation could take up to 6 weeks

- Once consultation is closed the MMO has to review the response and possibly ask for additional information from the applicant. At this stage the MMO and the applicant would be in discussion to agree on an approach to the responses. This could be for up to 4 weeks
- The MMO could then request further information from the applicant, which dependent on the level of detail, could represent a further significant time period of for example 4 further weeks
- Once this is returned by the applicant, the MMO would begin the consultation process again. .
- It is noted from the above that, even if discharge documentation were to follow the current timescales, and no further communication was required from the applicant (which is highly unlikely) the current turnaround equates to 18 weeks, which is longer than the 16 weeks suggested by the applicant. It should also be noted that the above timescale applies to only one relatively small document, when in reality, the number of in-depth discharge requirements could far exceed 30 in total.

3.6 The MMO note the applicant advised that condition 15 (2) gave the opportunity to vary the timing of notification periods. The MMO believe that there is no experience to vary the timing by an extension and that this condition could only be used by reducing the time period. The MMO note that the agreement to amend the timescale would be in writing. The MMO feel they would have no control over the agreement as the applicant may appeal or not grant the extension due to the burden and commercial impact of an extension. The MMO believe the possibility of the extension later down the line stretches credulity and is unreasonable due to the possible cost to the applicant.

3.7 The MMO notes additional comments from the applicant advising that they would seek to engage with the MMO and other bodies prior to this and we welcome this proposal. However, there is no facility within the licence to enforce this kind of engagement. If the applicant decides later not to, or if the project is sold to another undertaker who decides not to engage, then the MMO and our consultees again face a four month deadline with no reasonable ability to extend.

3.8 The MMO consider it is important to note the actual practicalities of these kinds of sign-off as well as the wording within the consent. If the works are submitted at 4 months prior to the construction start date then by this point the applicant already has contracts with vessels, and the construction and transport of components will be underway. If there are delays then the applicant will face significant costs from vessels sitting idle and the potential need to resource storage areas for wind farm infrastructure components that should have been installed. It is therefore very likely that the applicant will apply all pressure it can on the MMO and its consultees to adhere to a faster timeframe. This often leads to resource being drawn from other areas in order to try and facilitate a quicker turn around. By giving the MMO and its consultees 6 months there is more time to reach a conclusion, and less risk of any need for extension or delay.

4. Deemed Discharge Condition Part 1

4.1 This condition related to the section in red of the condition below:

15.—*(1) Any archaeological reports produced in accordance with* ***condition 14(h)(iii)*** *are to be agreed with the statutory historic body.*
(2) 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.*

No licensed activity may (3) 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 deemed in accordance with sub-paragraph (5).*
(4) 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 or if the MMO reasonably requests further information to determine the application for approval, within a period of* ***two*** *months commencing on the date that the further information is received by the MMO. For the purposes of this paragraph (4), the MMO may only request further information from the undertaker within a period of* ***two*** *month****s*** *from receipt of the application for approval.*
(5) 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 (4), the programme, statement, plan, protocol or scheme is deemed to be approved by the MMO.*

4.2 The MMO considers it inappropriate to put a timeframe on decisions of such a nature. As outlined in response to other issues, such as arbitration, a Deemed Marine Licence should be treated equal to a marine licence and the conditions imposed should be equivalent to those that would be granted on a marine licence. The MMO would not willingly seek to constrain our ability to make an appropriate decision on post consent sign off of plans and documentation, we would never include such a restriction on any other consent.

4.3 The MMO previously raised concerns regarding the complexity of documentation and the need for these timeframes to be longer, indicating that there is likely to be insufficient time to consider all the relevant issues and seek appropriate feedback from statutory bodies. With such tight restrictions, the MMO is more likely to refuse an application for discharge. This would increase the risk to the development because, if these works were not granted discharge, the undertaker would have to provide updated documentation which would restart the process and potentially cause unnecessary delay.

4.4 The MMO acknowledge there is the ability to request an extension from the applicant through agreement. This extension explicitly requires their agreement, The MMO would note that within the applicant's own response to deadline 4 second round of examiners questions, question 20.139 they have confirmed that, because of Contract for Difference (CfD) timeframes they cannot grant an extension to the 4 month timeframe. The MMO believe it is not possible to have confidence that extensions could be agreed upon within condition 15 (4) and that any restarting of the 4 month period would not be a desirable outcome for either party.

4.5 The MMO understanding currently is that the applicant wants to ensure there is a specific time scale by which a decision is made, and that the decision does not continue without resolution. The MMO understand that this is due to the potential impact of delays, whether they be of a commercial or scheduling nature to the applicant.

4.6 The MMO are currently as flexible as possible with developers in the signing off of required documentation, flexibility is born from the fact that the remit is to enable sustainable development within our seas without obstruction. If the MMO were to reduce this flexibility in the future then the applicant may be subjected to enforcement actions if the MMO agreed the suggested formal timescale approach, should the applicant deliver discharge documentation late or in a phased format closer to construction.

4.7 The MMO have the legal capacity to undertake enforcement action in such an event unless the extensions have been agreed beforehand in writing. The MMO is reluctant to utilise these powers and would prefer utilising flexibility in meeting unforeseen complications and enable sustainable development.

4.8 Also, If the proposed amendments to the 4 month timescale and deemed approval proceed then the MMO could have less capacity to respond in a flexible manner, as our resource would be statutorily obliged to meet approaching deadlines regardless of wider considerations. It should be noted that the applicant may find their own priorities are hampered in future should the MMO be forced to meet these obligations for other windfarm developments applications.

4.9 The ExA asked if it was possible for early submission of documents. The MMO advised that they would welcome this in as much was conveniently possible for the applicant, i.e. submissions earlier then the required 6 months.

4.10 The MMO have welcome the additional wording to include 'the MMO must give notice of determination as soon as is reasonably practicable'. This would give further assurance these matters are treated with all due priority.

4.11 The MMO does not believe there is a need for this condition, however has provided a without prejudice comments and proposed an alternative timeframe in section 1.

5. Deemed Discharge Condition Part 2

5.1 This condition related to the section in red of the condition below:

15.—*(1) Any archaeological reports produced in accordance with* ***condition 14(h)(iii)*** *are to be agreed with the statutory historic body.*
(2) 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.*
No licensed activity may (3) 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 deemed in accordance with sub-paragraph (5).*
(4) 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 or if the MMO reasonably requests further information to determine the application for approval, within a period of* ***two*** *months commencing on the date that the further information is received by the MMO. For the purposes of this paragraph (4), the MMO may only request further information from the undertaker within a period of* ***two*** *month****s*** *from receipt of the application for approval.*
(5) 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 (4), the programme, statement, plan, protocol or scheme is deemed to be approved by the MMO.*

5.2 The MMO notes this condition seeks to restrict its ability to request further information to one month after submission. Again, this is incompatible with current licencing procedures. We would also note the timeframe given for this is entirely unreasonable. The applicant is aware that the MMO has service level agreements with many statutory consultees that requires a four week consultation period. The MMO may simply be unaware of a need for further

information until such time as the first round of consultation is complete. Our only option then would be to refuse discharge and to require resubmission, again risking further delay.

5.3 The MMO believes this timescale requirement should be removed.

6. Deemed approval

6.1 This condition related to the section in red of the condition below:

15.—*(1) Any archaeological reports produced in accordance with* ***condition 14(h)(iii)*** *are to be agreed with the statutory historic body.*
(2) 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.*
No licensed activity may (3) 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 deemed in accordance with sub-paragraph (5).*
(4) 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 or if the MMO reasonably requests further information to determine the application for approval, within a period of* ***two*** *months commencing on the date that the further information is received by the MMO. For the purposes of this paragraph (4), the MMO may only request further information from the undertaker within a period of* ***two*** *month****s*** *from receipt of the application for approval.*
(5) 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 (4), the programme, statement, plan, protocol or scheme is deemed to be approved by the MMO.*

6.2 With regard to condition 15 (5) the MMO considers this inappropriate, and not commensurate with current marine licensing practice. The documentation involved in discharge covers a wide range of mitigation and has been applied due to significant risks. For it to be considered discharged in such a manner could mean that important environmental or navigational safety mitigations are not adequate. The inclusion of this condition risks a refusal late in the process and a return to the submission of documents stage increasing the risk of delay to the project. The MMO would also consider this a fettering of our authority to discharge licence conditions under the Marine and Coastal Access Act 2009 (MCAA2009).

6.3 It is noted that these conditions have been added due to the removal of the arbitration provision against the MMO. The MMO would like to reiterate that the arbitration provisions were removed by the Secretary of State on the recent Tilbury 2 determination without the need for further controls placed on the regulatory body. The MMO question why such a restriction should be placed on the Vanguard project when it has not been deemed necessary or reasonable on any other deemed marine licence to date.

6.4 The MMO is a government body assigned powers and responsibilities by parliament to make these decisions and within that responsibility is a requirement to be reasonable. We have always been willing to work with both the applicants and our stakeholders to push for resolution to a timetable that is appropriate for all parties. We would never seek to delay making a decision unless there were significant concerns and issues to be addressed. The

MMO will always make best endeavours to sign off all documentation in time for the proposed start date.

6.5 The MMO stated that it understood the needs of the applicant for definitive timescales and suggested that the MMO would be willing to move away from the previously successful, flexible approach, and could agree to a timescale of 6 months for submission of all discharge documents with an automatic deemed refusal caveat should a decision not have been made within this period.

6.6 The planning permissions under the Town and County Planning Act 1998 and associated regulations, the Local Planning Authority has 8 weeks in which to decide an application (this is extended to 13 weeks for 'major developments' or 16 weeks where an environmental statement is required) and an application is 'deemed refused' if these timescales are not met unless the timescale is extended with written agreement of the applicant.

6.7 There are similar provisions in the Environment Permitting Regulations (England and Wales) 2016, the Environmental Agency has 4 months in which to determine applications received unless this is extended with the applicant's written agreement. Where the EA fails to meet the timescale and no agreement is given by the applicant, then applicant is able to serve a notice on the EA after which the licence is 'deemed' to have been refused and the applicant can then appeal this decision.

6.8 The MMO feel 6 months deemed refusal is a suitable alternative to allow the applicant the ability to take the decision to Judicial Review (JR).

6.9 The applicant advised that deemed refusal would fall at the bottom of the list of proposals and would agree to deemed refusal with an appeal process. The MMO advised that there is a process in place in JR and the suggested 6 months with a deemed refusal would offer the ability for this. The MMO would also note that any resolution that has not been reached in an acceptable time to the applicant in the past, has been resolved by informally escalating the issue to director level of the involved organisations and reaching a conclusion through high level discussion and concession from both parties. If the applicant could accept an approach which formalises this process to meet their overall requirements for an appeals mechanism, then this would be something the MMO could investigate for feasibility.

6.10 A supplementary point to this is that if the wind farms going forward are requesting the rigid timescales for response the flexibility raised earlier would be limited as the MMO would prioritise through the timescales rather than turning round discharge of conditions in reduce timescales due to the developers last minute changes. The MMO highlighted that there is a danger that requests for shorter turnarounds of discharge of conditions would not be agreed. This could provide difficulties for the applicant.