

Outer Dowsing Offshore Wind

Clarification Note:

Use of 'best endeavours' in the context of Policy Paper: Reducing Marine Noise

Deadline 4a

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Table of Contents

1	Introduction.....	4
2	The meaning of a contractual obligation to use “best endeavours”	5
3	Application of those principles to the commitments made in the DCO application	8
4	Conclusion	10

1 Introduction

1. This Note responds to Hearing Action Point 6 arising from Issue Specific Hearing 6 (ISH6) on Thursday 13 February 2025: *“Provide a note to clarify the meaning of the use of ‘best endeavours’ in regard to the updated wording provided in paragraph 42 of [REP4-084] and paragraph 30 of [REP4-086].”*
2. Following publication of the recent *Policy Paper: Reducing Marine Noise* (the “**Guidance**”), the Applicant committed to use best endeavours to deliver noise reductions through the use of primary and/or secondary noise reduction methods, with this commitment secured through the submission of an updated Outline Marine Mammal Mitigation Protocol for Piling Activities (REP4-084) and In-Principle Southern North Sea Special Area of Conservation Site Integrity Plan (REP4-086) at Deadline 4. A further minor update to the oMMMP for Piling Activities (8.6.1) to clarify the wording of this commitment has been submitted at Deadline 4a.
3. Condition 13(1)(f), Part 2, Schedules 10 and 11 of the DCO require a marine mammal mitigation protocol in accordance with the oMMMP for Piling Activities to be submitted to the MMO for approval at least six months prior to the commencement of piling activities. Condition 11(1)(e), Part 2, Schedules 12-15 of the DCO require a marine mammal mitigation protocol in accordance with the oMMMP for Piling Activities to be submitted to the MMO for approval at least four months prior to the commencement of piling activities. Condition 22, Part 2, Schedules 10 and 11 of the DCO require a Southern North Sea Special Area of Conservation Site Integrity Plan (SNS SAC SIP), which accords with the In-Principle SNS SAC SIP to be submitted to the MMO for approval no later than six months prior to the commencement of piling activities. Condition 15, Part 2, Schedules 12-15 of the DCO require a SNS SAC SIP, which accords with the In-Principle SNS SAC SIP to be submitted to the MMO for approval no later than four months prior to the commencement of piling activities.
4. The relevant passage from the Guidance states:
“From January 2025, given the expected increase in noise levels over the coming years, and the above outlined policy commitments, we expect that all offshore wind pile driving activity across all English waters will be required to demonstrate that they have utilised best endeavours to deliver noise reductions through the use of primary and/or secondary noise reduction methods in the first instance.”
5. The Guidance does not define or provide examples as to what primary and/or secondary methods of noise reduction would demonstrate that a given wind farm has used *“best endeavours”*.
6. The term *“best endeavours”* has a particular meaning in the context of contractual interpretation, which has been the subject of a significant amount of judicial consideration by the courts.
7. This Note has been prepared to comment upon:
 - the scope of a contractual *“best endeavours”* obligation under English law; and
 - how that applies to the commitment made by the Applicant in the DCO application.

2 The meaning of a contractual obligation to use “best endeavours”

Context of “endeavours”: absolute and qualified obligations

8. Under English contract law, obligations are primarily absolute in nature. As a consequence, a failure to meet the obligation (and thereby render full performance) would be a breach of contract entitling the innocent party to damages.
9. Parties may agree that performance of a specified obligation, or a series of obligations, may instead need to be qualified. This approach may be adopted where a party needs to:
 - obtain consents, approvals or guarantees from a third party and therefore cannot guarantee that third party’s compliance;
 - take a step or action which may not be capable of a known standard or level of performance; or
 - to procure the services of another party (which may or may not be forthcoming).
10. In such circumstances, parties may qualify the performance obligation through the use of a form of “endeavours” clause. Such clauses take different forms which will attempt to specify the efforts the obligor needs to take in order to satisfy the qualified obligation. The most common examples are for a party to agree to use:
 - “reasonable endeavours”;
 - “all reasonable endeavours”; or
 - “best endeavours”
 to perform the relevant obligation(s).
11. Given the drafting of the Guidance and the commitment made by the Applicant, this Note covers the interpretation of the third option.

“Best endeavours”

12. The particular meaning of a given “best endeavours” clause is subject to the normal rules of contractual interpretation. Therefore, its meaning should be assessed at the time the obligation is made by reference to the:
 - terms of the clause;
 - other provisions within the agreement;
 - purpose of the agreement; and
 - surrounding context and commercial common sense.
13. In England, the extent of “best endeavours” clauses have been litigated for well over a century.¹ This means that the broad guiding principles concerning interpretation, and what a “best endeavours” clause requires, are well defined.

¹ For example, see *Sheffield District Railway Co v Great Central Railway Co* [1911] 27 TLR 451.

14. Succinctly, it requires the obligor to take such steps that, in the relevant circumstances, a reasonable party would take seeking to achieve the result including if it is required to incur costs to do so.
15. In terms of particular actions that may be required to fulfil the obligation, these may be summarised as follows:

Obligation may require expenditure by the obligor

16. A commitment to use best endeavours may require the obligor to spend money or incur a loss to seek to fulfil the obligation.
17. For example, Blackpool Airport was required to open outside of its normal operating hours, and thereby incur a loss, on the basis of a “*best endeavours to promote*” obligation it had made in an agreement with Jet2.com Limited, an airline.²
18. However, as expressed in the *Blackpool Airport* decision, the obligor is entitled to have regard to its own financial interest depending upon the nature and terms of the agreement. This follows a well-established principle that using best endeavours would not require action that leads to the “*certain ruin of the company...or utter disregard for the interest of shareholders.*”³

Obligation may require the obligor to litigate

19. Depending upon the circumstances, the courts have held that an obligor may be required to litigate or appeal a decision in order to satisfy a “*best endeavours*” obligation. However, it would not be required to do so if taking such action would be ‘doomed to failure’ or unreasonable in the specific circumstances.⁴

Obligation may require provision of information

20. Common with other “*endeavours*” obligations, the use of “*best endeavours*” may require the obligor to notify the other party if it encounters difficulties in achieving the particular objective⁵ or a wider duty to report on progress.

Obligation does not override other duties

21. Because “*best endeavours*” clauses are to be interpreted in context, it can be that it would be overridden by other duties that the obligor is under. For example, directors of a company who were required to use their “*best endeavours*” to pass a resolution were not held to therefore be required to give bad advice to shareholders and recommend the resolution once the directors formed the view that it was not in the company’s interests.⁶

² *Jet2.com v Blackpool Airport Ltd* [2012] EWCA Civ 417.

³ *Terrell v Mabie Todd and Co Ltd* [1952] 69 RPC 234.

⁴ *Malik Co v Central European Trading Agency Ltd* [1974] 2 Lloyd’s Rep 279.

⁵ *Yewbelle Ltd v London Green Developments Ltd* [2007] EWCA Civ 475.

⁶ *Rackham v Peek Food* [1990] BCLC 895.

How can a best endeavours obligation be breached?

22. There are two ways that the courts have determined a “best endeavours” obligation may be breached.⁷ These are if the obligor:

- has not been genuine in its efforts to achieve the obligation; and
- even if acting in good faith, has failed to do everything that it reasonably could have done.

23. As the most onerous of the qualified “endeavours” obligations, an obligation to use “best endeavours” is a significant commitment on the obligor which it must be able to demonstrate it has genuinely attempted to achieve and taken all steps or actions that a reasonable party would have taken in the circumstances.

⁷ *Kea Investments Ltd v Watson* [2020] EWHC 2599.

3 Application of those principles to the commitments made in the DCO application

24. Like the meaning of “best endeavours” in the contractual context, the ordinary and natural meaning of the expression in the context of the Outline Marine Mammal Mitigation Protocol for Piling Activities (REP4-084) and In-Principle Southern North Sea Special Area of Conservation Site Integrity Plan (REP4-086) requires the Applicant to take all steps or actions that a reasonable party would have taken in the circumstances. It therefore sets a high bar for the Applicant to meet in discharging this commitment.
25. As explained in paragraphs 16 to 18 above, compliance with a “best endeavours” obligation may require expenditure by the obliger. This is reflected in the Guidance which states, in the context of applying for European Protected Species licences, (emphasis added):
- “Thorough consideration of noise reduction methods should therefore be undertaken by the applicant, including justification as to why applying noise reduction methods to your activity may not be considered a satisfactory alternative. **The additional cost of a noise reduction system is unlikely to be a sufficient justification on its own merit to discount a satisfactory alternative, unless the cost renders the project financially unviable.** Any additional justification such as lack of supply chain, contractual obligations, financial milestones, or technological incompatibility should be provided to explain why noise reduction systems are not a satisfactory alternative. Note that as technology develops and the supply chain improves, these arguments are likely to become less valid. This should be submitted to the relevant licensing authority for their consideration when undertaking a review of any application for a wildlife licence.”*
26. As set out in paragraph 12 above, any contractual commitment to use best endeavours to achieve a particular outcome must be read in the context of the text in the remainder of the relevant documentation, the purpose of the document and the surrounding context.
27. The same principles apply to the interpretation of the commitment to use best endeavours in the context of the DCO and there are therefore limits on its extent. The context of the Guidance is therefore key to identifying the actions that may be required to satisfy the “best endeavours” obligation.

28. The Overarching National Policy Statement for Energy (NPS EN-1) identifies offshore wind as being Critical National Priority infrastructure⁸ and that substantial weight should be given to the overarching need case for this type of energy infrastructure⁹. In doing so, NPS EN-1 identifies the need for new low carbon sources of energy to be deployed at “speed and scale”¹⁰. That key duty and critical context is not changed by the characterisation of the obligation to use “best endeavours”. It is clear from the terms of the Guidance that its purpose is to promote appropriate mitigation to reduce the impact of underwater noise whilst allowing the rapid deployment of offshore wind. The two must therefore be allowed to co-exist and it would be an unreasonable reading of the “best endeavours” obligation to require the selection of a particular noise reduction technology or for a project to incur delays at the expense of the speedy deployment of offshore wind.
29. Therefore, whilst the commitment to use “best endeavours” is a high threshold to meet, it is to be distinguished from an absolute obligation. The “best endeavours” obligation does not require developers to commit to achieving the greatest possible noise reduction nor to a particular type of noise reduction technology. That is neither the purpose or intention of the Guidance, nor the way in which the commitment is framed.

⁸ Section 4.2

⁹ Section 4.2.6

¹⁰ Section 4.2.2

4 Conclusion

30. In summary an obligation to use “*best endeavours*” has been interpreted by the English courts as requiring the obligor to take such steps that, in the relevant circumstances, a reasonable party would take seeking to achieve the result, including if it is required to incur costs to do. It is therefore a significant commitment.
31. Applying those principles to the commitment made by the Applicant in the Outline Marine Mammal Mitigation Protocol for Piling Activities (document reference 8.6.1 submitted at Deadline 4a) and In-Principle Southern North Sea Special Area of Conservation Site Integrity Plan (REP4-086), the Examining Authority and the Secretary of State can be confident that the obligation to use best endeavours to deliver noise reductions through the use of primary and/or secondary noise reduction methods results in mitigation for the impacts arising from underwater noise being sufficiently secured.