

**From:** Russell Dunham

**Sent:** 30 May 2019 15:06

**To:** 'NorfolkVanguard@pins.gsi.gov.uk' <[NorfolkVanguard@pins.gsi.gov.uk](mailto:NorfolkVanguard@pins.gsi.gov.uk)>

**Cc:** Navigation <[Navigation.Director@thls.org](mailto:Navigation.Director@thls.org)>

**Subject:** Representations to Examining Authority - Norfolk Vanguard Offshore Wind Farm Project for Deadline 8

Dear Sir / Madam

**EN: 0010079**

**Identification No. 20011687**

**Representations to Examining Authority - Norfolk Vanguard Offshore Wind Farm Project for Deadline 8**

Please see attached Trinity House's representations dated 30 May 2019 in respect of the Norfolk Vanguard Offshore Wind Farm Project.

Kind Regards

Russell



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## TRINITY HOUSE

30 May 2019

The Planning Inspectorate  
Temple Quay House  
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Bristol  
BS1 6PN

Your Ref: EN010079  
Identification No. 20011687

### **The Norfolk Vanguard Offshore Wind Farm Written Submission to Examining Authority for Deadline 8 on the Draft Development Consent Order**

Dear Sir / Madam

We refer to the above application for development consent.

Trinity House (“**TH**”) would like to make submissions in relation to the Examining Authority’s (“**ExA**”) schedule of changes to the draft Development Consent Order (“**dDCO**”) issued on 9 May 2019. It is TH’s understanding that the ExA’s schedule of changes relates to the dDCO dated 2 May 2019 which was published by the Inspectorate following Deadline 7 in the examination timetable.

#### **Proposed arbitration procedures**

TH notes in particular the ExA’s suggested changes to article 2 (interpretation) and Part 5 of Schedules 9 to 12 of the dDCO. TH also notes the ExA’s related comment that these changes are to provide for an appeal procedure for the discharge of Deemed Marine Licence (“**DML**”) conditions which is broadly consistent with existing statutory processes and is consistent with similar DCOs.

TH has previously confirmed that any process for the discharge of DML conditions under the dDCO is of relevance to it, as one of the Marine Management Organisation’s (“**MMO**”) statutory consultees in respect of applications for approval under those conditions. TH therefore wishes to make the following submissions in relation to the ExA’s suggested changes to Part 5 of the DMLs and in relation to the proposal to include an appeals process for the discharge of DML conditions more generally:

- it is acknowledged that there is a settled, statutory process for appeals against licensing decisions set out in s. 73 of the Marine and Coastal Access Act 2009 (“**the 2009 Act**”) and regulations made under that section;
- however, although the refusal of a marine licence, or grant subject to conditions, is the subject of a statutory appeal procedure, there is no statutory right of appeal in relation to decisions made by the MMO on the discharge of DML conditions. Any challenge would therefore be required to be brought by way of judicial review;
- the draft appeals process which is proposed to be included in Part 5 of the DMLs is accordingly a novel process which has no current legislative (primary or secondary) basis, as far as TH is aware. That position is true of both the Applicant and the ExA’s suggested drafting;
- the result of this drafting would therefore be to place the Applicant for this Order in a different, and seemingly more advantageous, position than an applicant for a marine licence pursuant to the 2009 Act. In this regard, TH notes that, in respect of the recent Tilbury 2 – Proposed Termination at Former Tilbury Power Station DCO, the Examining Authority accepted an argument by the MMO that, once a DML has been granted, there was nothing in the Planning Act 2008 that suggested that an applicant for a DCO should be treated any differently from any other marine licence holder, and that the MMO’s ordinary powers should therefore be maintained (see pages 233 – 234 of the Examining Authority’s Report and Recommendations to the Secretary of State);
- it is also relevant to note that the appropriateness of the statutory appeal procedure in cases of refusal of a marine licence, or grant subject to conditions, has been subject to detailed Parliamentary scrutiny. In TH’s view, it is problematic to seek to rely (subject to modifications) upon a process which has been tailored to very different circumstances to those in which it is now sought to be deployed in the context of this Order; and
- further, the effect of the Applicant’s drafting proposals in Part 5 of the DMLs (and subsequently forming part of the ExA’s suggested changes to that Part) is to place strict time limits on the process for appeals which relate to decisions made by the MMO on the discharge of conditions (see amendments to reg. 22(2) of the Marine Licensing (Licence Application Appeals) Regulations 2011 at subparagraph 2(j) of the ExA’s schedule of changes). Similarly, other drafting proposals impose strict time limits within which the Secretary of State must make a decision (see, for example, the amendments to regs 8 and 10 of the 2011 Regulations at subparagraph 2(d), (e) and (f)). In TH’s view, such drafting is likely to be ill-suited to this and similar Orders, given the complex nature and range of issues which may arise on the discharge of DML conditions, engaging as they do important matters of public interest. As one of the MMO’s statutory consultees on decisions relating to the discharge of DML conditions, TH is concerned that its expert view may not be capable of full and reasoned consideration within these restrictive timeframes.

For the above reasons, TH considers that it would be inappropriate for this Order to seek to include a right of appeal in relation to the discharge of conditions under the DMLs. TH reiterates its view that the mechanism available to the Applicant to challenge a decision, or non-decision, is judicial review. Notably, that view also appears to accord with recent DCO precedent.

**For the avoidance of doubt, and for the reasons expressed in earlier submissions, TH also equally remains fundamentally opposed to the inclusion of any provision which would authorise decisions made by the MMO on the discharge of DML conditions to be referred to arbitration.**

We trust that these comments are helpful and would ask that all correspondence regarding this matter is addressed to myself at [russell.dunham@thls.org](mailto:russell.dunham@thls.org) and to Mr Steve Vanstone at [navigation.directorate@thls.org](mailto:navigation.directorate@thls.org)

Yours faithfully,

*Russell Dunham*

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Legal & Risk Advisor

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