From:	Russell Dunham
To:	HornseaProjectThree@pins.gsi.gov.uk
Cc:	Navigation
Subject:	Written Representation to Examining Authority's following ISH 9 – 8 March - Registration number 20010148
Date:	11 March 2019 11:10:56
Attachments:	Letter ISH 9.pdf

Dear Sir

EN010080

Registration number 20010148

Written Representation to Examining Authority's following ISH 9 (Part II the Draft DCO) – 8 March 2019

Please attached Trinity House's written submission dated 11 March 2019 to the ExA following ISH 9 (Part II the Draft DCO) in respect of the Hornsea Three Offshore Wind Farm.

A hard copy of the attached letter will also be sent by post.

Kind Regards

Russell

TRINITY HOUSE

11 March 2019

The Planning Inspectorate
Temple Quay House
Temple Quay
Bristol
BS1 6PN

Your Ref: EN010080
Identification No. 20010148

Hornsea Project Three Offshore Wind Farm Project
Post Hearing Submissions to ISH 9 - 8 March 2019

Dear Sir

We refer to the above application for development consent.

Trinity House ("**TH**") attended and made oral submissions at Issue Specific Hearing 9 into the draft Development Consent Order ("**dDCO**") on Friday 8 March 2019 ("**the ISH**"). This letter and the annex to it constitute Trinity House's post-hearing submissions.

TH will, incidentally, make **separate** submissions in relation to its attendance at ISH 8 (Aviation, shipping and effects on oil and gas operations.) held on 7 March 2019.

ISH 9 - Post Hearing Submissions

Article 37 (arbitration)

The Examining Authority ("**ExA**") invited comments from interested parties on its suggested changes to article 37 of the dDCO. TH made oral submissions on this point at the ISH, highlighting its concerns regarding both the current drafting and comments made by the Applicant in previous submissions to the effect that this provision should apply to all parties, including Trinity House. Further details of the oral submissions made by TH at the ISH are set out below.

The ExA also invited TH to set out its proposed amendments to article 37 in its post-written submissions, to address the concerns raised by it at the ISH. TH respectfully submits that the following changes (shown in red) to the wording proposed by the ExA in advance of the ISH, should form part of the dDCO:

Arbitration

'(1) Any difference under any provision of this Order, other than matters within paragraph (2) or unless otherwise provided for, shall be referred to and settled in arbitration in accordance with the rules at Schedule 13 of this Order, by a single arbitrator to be agreed upon by the parties, within 14 days of receipt of the notice of arbitration, or if the parties fail to agree within the time period stipulated, to be appointed on application of either party (after giving written notice to the other) by the Secretary of State.
(2) Any matter for which the consent, or approval of the Secretary of State, or the Marine Management Organisation is required under any provision of this Order or any matter relating to Trinity House in the exercise of its statutory functions shall not be subject to arbitration.
(3) Should the Secretary of State fail to make an appointment under paragraph (1) within 14 days of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.'

A summary of why TH considers these changes to be expedient and necessary is set out at the end of this letter.

TH can confirm that, whilst differing in their form, these suggested changes to the dDCO would have substantially the same effect as those which it has formally requested in respect of the draft Norfolk Vanguard and the draft Thanet Offshore Wind Farm applications, which are currently under examination.

TH can also confirm that, following submissions which it made in relation to the Wylfa Newydd Project DCO application, which is currently under examination, article 78 (arbitration) of the latest draft Order for that scheme now includes an amendment which is in substantially the same terms as the amended paragraph (2) which TH considers should be incorporated in article 37 of the dDCO.

TH's oral submissions at the ISH

As noted, TH made oral submissions in relation to the ExA's suggested changes to article 37 of the dDCO, as well as the Applicant's approach to arbitration more generally, at the ISH.

TH noted that its concerns regarding the provisions which relate to arbitration are very similar to those raised by the Marine Management Organisation ("**MMO**") throughout the examination. In spite of the changes to article 37 of the dDCO suggested by the ExA in advance of the ISH, TH submitted that, since it remains the Applicant's position that the arbitration procedures should apply to all parties, including TH, the drafting of this article remains fundamentally misconceived.

TH submitted that it may be helpful to explain to the ExA some of the important statutory functions which it performs and the expertise which it brings to bear on matters relating to safety of navigation at sea, so as to provide context to its concerns in relation to article 37 of the dDCO. A separate note dealing with these matters, part of which was communicated during the ISH, is included in the appendix to this letter.

The ExA asked TH to explain its specific concerns regarding the current drafting of article 37 of the dDCO. TH confirmed that its concern is that article 37 of the dDCO fails to include a specific exception for TH or indeed to bodies exercising regulatory functions on behalf of the Secretary of State. It was submitted that, like the MMO, TH performs statutory functions on behalf of the Secretary of State and that it was wholly inappropriate for the dDCO potentially to transfer responsibility for the performance of those functions to a commercial arbitrator.

It was submitted that even if TH was included in addition to the MMO, this would not address TH's concerns, since TH does not perform approval or consenting functions under the dDCO. Instead, it was noted that TH performs either direction making functions, such as those referred to at condition 8 of the deemed marine licence in Schedule 11 of the dDCO ("**the DML**"), or consultative functions, for example in relation to the plans and other matters to be submitted by the Applicant for the approval of the MMO under Condition 13 of the DML. TH therefore confirmed that the exception to arbitration in article 37(2) of the dDCO, which in any event covers only consents or agreements required directly from the Secretary of State or from the MMO, would not extend to these matters.

The ExA indicated that it had proceeded on the basis that the normal saving provision included in article 40 of the dDCO would apply to directions made and similar functions performed by TH so as to render irrelevant the provision made for arbitration in article 37 of the dDCO. TH made an oral submission on this point, noting that, in its view, the position needed to be further clarified by amending article 37 of the dDCO to make expressly clear that the arbitration procedures should not apply to matters falling within the scope of the saving provision for TH in article 40.

TH considers that this need for clarity is underscored by the fact that, in its written summary of case dated 8 February 2019 following the second issue specific hearing on the dDCO, the Applicant made no reference to the special status afforded to TH by article 40 of the dDCO and appears instead to suggest that TH, like any other body, should be subject to arbitration. At paragraph 6.4 of its written summary, the Applicant stated:

> *"... most disputes arise between the Applicant and non-determining bodies involved in condition discharge (such as the **Maritime and Coastguard Agency and Trinity House). The arbitration process should still apply to these bodies** in order for such decisions to be concluded where there are differences of opinion." Emphasis added.*

Thus the Applicant does not appear to acknowledge that the effect of article 40 of the dDCO would be to place directions made and other statutory functions performed by TH beyond the scope of the arbitration procedures in the dDCO. TH has therefore suggested changes to article 37, set out at the beginning of this letter, which would provide clarity on this matter.

TH would also make two further comments regarding the Applicant's comments at paragraph 6.4 of its written summary of case dated 8 February 2019. First, the Applicant says that most disputes arise between itself and non-determining bodies, such as TH. TH cannot comment on other non-determining bodies, but is certainly not aware of any disputes having arisen between itself and the Applicant previously.

Second, the Applicant says that the arbitration process should apply to bodies where there are differences of opinion. This reveals a fundamental misunderstanding of the statutory powers conferred upon TH. Where, for example, TH makes directions in relation to aids to navigation, there is no question that the Applicant's opinion, has any formal weight or fetters TH's powers in any way. TH's direction making powers are just that; binding instructions to act or to refrain from acting in a certain way in the paramount interests of providing for safety at sea.

This is important, because TH must be able to exercise its statutory powers in the manner which it considers to be calculated to preserve the safe navigation of vessels at sea. This position might be compromised if TH were permanently subject to the prospect that the exercise of its statutory powers might be referred to arbitration, simply because the Applicant disagrees with a decision reached, or advice given, by TH. There is no reason to think that, in passing s. 120 of the Planning Act 2008, or any other provision which the Applicant purports

to rely upon as authority for its assertion that the arbitration process should apply to TH, Parliament intended that Orders granting development consent might properly seek to erode TH's powers.

At the ISH, representatives for the Applicant commented that it was disappointing that TH was only appearing before the ExA now to raise points of principle in relation to the dDCO, when extensive representations had been made on this matter throughout the examination. The Applicant again referred to the decision letters in respect of the Triton Knoll and Burbo Bank applications, where the Secretary of State, in the context of submissions made by Natural England that it should be excluded from arbitration, had confirmed that the arbitration provisions should apply to all parties.

The Applicant also submitted that TH's role under the dDCO is very limited. As such, the Applicant considered that, in all probability, the cost and time involved in taking TH to arbitration would likely far outweigh the benefits of doing so.

In response, TH submitted that it was fundamentally wrong for to seek to characterise TH's functions as similar to those of Natural England. This much is evident from the inclusion of the saving provision for TH in article 40 of the dDCO. TH submitted that it was vital that its direction-making powers are not subject to an inappropriate arbitration process. TH also notes that written submissions by the MMO dated 8 February 2019 serve to illustrate that the Secretary of State's decisions on the Triton Knoll and Burbo Bank applications should not be taken out of context. The Secretary of State's comments appeared to have been directed in the narrow sense towards SNCBs, not to statutory bodies more generally.

As far as the timing of TH's engagement in relation to this application is concerned, TH would point out that, whilst it was unable to attend the second Issue Specific Hearing into the dDCO on 30 January 2019, TH's written submissions dated 28 January 2019 in advance of that hearing made clear the nature of its concerns in relation to article 37 of the dDCO. TH notes that the Applicant has provided no formal response to those written submissions.

TH also confirmed that it had recently appeared and made substantially the same submissions at two recent issue specific hearings on the Norfolk Vanguard and Thanet Offshore Wind Farm applications. TH noted that, at those hearings, the examining authorities dealing with the applications had taken on board the concerns raised by TH and had invited TH to suggest such alternative wording as would address the concerns which it raised in respect of the arbitration provisions as drafted.

In respect of the Norfolk Vanguard application, TH also noted that the applicant for that Order has now retreated from its original position that any alleged dispute or difference of opinion involving TH should be capable of being referred to arbitration in the same way as any other dispute or difference which might arise under the Order. TH referred the ExA to the applicant's written summary of case dated February 2018, in connection with issue specific hearing 3 of the Norfolk Vanguard application, in which the Applicant had confirmed:

> *"The Applicant confirmed that as [Trinity House's direction making powers under the deemed marine licence conditions] related to Trinity House's duties to prevent navigation these matters would not be subject to arbitration by virtue of saving provision at article 41 … The Applicant confirmed that it was willing to consider additional drafting suggested Trinity House to clarify the application of the arbitration provision to Trinity House in this respect."*

As regards the Applicant's comments that TH's role under this dDCO is very limited and that the likelihood of it being taken to arbitration is therefore very small, TH would respond that its role in relation to this and similar Orders is a vitally important one, extending to both the

construction and operational phases of these projects. TH seeks certainty on the face of the dDCO that its position will not be compromised; that is true whether TH's role is characterised by the Applicant as a small one or not.

TH's suggested changes to the dDCO

TH has set out its suggested changes to article 37 of the dDCO at the beginning of this letter.

TH has suggested a change to paragraph (1) to make clear that the relevant cross-reference is to paragraph (2), which reflects the approach to drafting adopted elsewhere in the dDCO.

TH has also suggested that amendments be made to paragraph (2) to clarify that, in addition to consents and approvals required from the Secretary of State and the MMO, arbitration will not apply to TH in the exercise of its statutory functions. In TH's view, this change is necessary in order to give full effect to the saving provision in article 40 of the dDCO and to preserve TH's position as outlined in these submissions.

We trust that these post-hearing submissions are helpful and would ask that all correspondence regarding this matter is addressed to myself at russell.dunham@thls.org and to Mr Steve Vanstone at navigation.directorate@thls.org

Yours faithfully

[redacted]

Russell Dunham ACII
Legal & Risk Advisor

Email: Russell.dunham@thls.org

APPENDIX 1

1 Trinity House

1.1 The Corporation of Trinity House ("**TH**") was constituted under a Royal Charter by Henry VIII and 14 subsequent charters or grants. TH is therefore a Chartered Corporation.

1.2 In addition to powers under the Charters, TH is empowered by Part VIII and section 193(1) of the Merchant Shipping Act 1995 (as amended) ("**MSA 1995**") to carry on a public undertaking as a General Lighthouse Authority ("**GLA**"), a role it has had since 1854. Its principal role, which is shared with the GLAs for Scotland and the whole of Ireland, who respectively have responsibility for their areas, is to deliver a cost effective service to meet the requirements for aids to navigation ("**AtoN**") of all classes of mariner in the waters of the United Kingdom ("**UK**").

1.3 Under section 23 of the Pilotage Act 1987, TH is authorised to grant certificates for deep sea pilots. The senior members of TH also undertake the role of Nautical Assessors in the Admiralty Court.

1.4 Under the International Maritime Organisation ("**IMO**") Safety of Life at Sea Convention 1974 ("**SOLAS**"), contracting Governments have responsibility for the provision of adequate AtoN in and around their respective areas for the safe navigation of shipping according to the degree of risk and the volume of traffic.

1.5 By virtue of Part VIII of MSA 1995, the Secretary of State has largely been able to delegate his responsibilities under SOLAS to the GLAs as set out in the Framework Document between the Department for Transport and the GLAs.

1.6 The UK Government participates in navigation matters at an international level as a Member of the IMO, which is coordinated in the UK by a Safety Navigation Committee ("**UKSON**"). The GLAs provide advice to their governments on AtoN issues through a Joint User Consultative Group and the GLAs are normally invited to send representatives to UKSON meetings.

1.7 The GLAs therefore play a key role in supporting the Secretary of State in the provision, review and maintenance of AtoN, consistent with the government's responsibilities under international conventions.

1.8 MSA 1995 confers specific duties, functions and powers on the GLAs. Materially, the GLAs have superintendence and management of all lighthouses, buoys and beacons within their respective areas (see section 195). That power is subject to the powers and rights of any local lighthouse authority (essentially the relevant statutory harbour authorities within the area) and the provisions of Part VIII of MSA 1995 (which provide further detail as to the GLA's powers and how they are exercised).

1.9 By section 197(1), TH is empowered within its area to:

1.9.1 erect or place any lighthouse;

1.9.2 add, alter or remove any lighthouse;

1.9.3 erect or place, alter or remove any buoy or beacon; and

1.9.4 vary the character of any lighthouse buoy or beacon.

1.10 A "lighthouse" includes any floating or other light exhibited for the guidance of ships. "Buoys or beacons" includes all other marks and signs of the sea. Under an order-making power, the Secretary of State may make, and has made various, Orders providing that references to buoys and beacons includes references to equipment intended as an AtoN. These include electronic AtoN systems and satellite-based navigation systems.

1.11 As regards local AtoN within its lighthouse area, MSA 1995 provides that:

1.11.1 TH may with the sanction of the Secretary of State direct a local lighthouse authority as respects AtoN;

1.11.2 a local lighthouse authority may not lay down AtoN without the consent of TH; and

1.11.3 TH must inspect AtoN and communicate to each local lighthouse authority the results of the inspections and report annually to the Secretary of State. In practice, TH inspects over 10,000 local AtoN each year.

1.12 TH, along with the other GLAs, also has a separate statutory duty to mark, and if necessary remove, wrecks constituting a danger to navigation. In so doing it discharges the Secretary of State's obligation to ensure that the UK complies with its obligations under the International Wrecks Convention as respects locating and marking wrecks.

1.13 TH, along with the other GLAs, is therefore subject to various statutory responsibilities for which it has conferred upon it by statute specific powers in order to discharge.

1.14 In addition, TH is a consultee on AtoN in respect of marine matters when a licence is required under the Marine and Coastal Access Act 2009 ("**MCAA 2009**"), advises the Secretary of State on navigational marking in relation to applications for electricity works for which consent is required under Part 4A of the Electricity Act 2004 and is also entitled to take part in examinations for development consent under the Planning Act 2008 ("**PA 2008**").

1.15 TH highlights that these examples serve to show the level of expertise that the GLAs bring to bear in discharging their functions under MSA 1995 in respect of AtoN.

1.16 It is also important to note that TH, along with the other GLAs, is funded primarily through contributions made by ship owners (light dues) into a fund called the General Lighthouse Fund ("**GLF**"). What may be paid into and out of the GLF is prescribed by section 211 of MSA 1995. The GLF is under the stewardship of the Department for Transport ("**DfT**"), which takes on day to day management of the GLF. The GLF, along with the lighthouse accounts of TH are subject to audit by the Comptroller and Auditor General.

1.17 Light dues are charged on ships calling at UK and Irish ports based on their tonnage. The Secretary of State sets the rate of light dues annually by Regulations made under section 205(5) of MSA 1995 so as to meet the approved and contingency funding requirement of the lighthouse service. Thus light dues are a direct charge for the provision of AtoN paid for by the user.

1.18 This arrangement adds to the unique status of the GLAs. TH is not an Executive Agency of the DfT nor strictly a Non-Departmental Public Body, because the primary source of its income is by means of user charges in the form of light dues paid by the private sector shipping industry.

1.19 This is important because the resources available to TH (and the other GLAs) are subject to the strict controls imposed on what may be paid into and out of the GLF and are based on the provision of AtoN to the user. It does not allow for expenditure on other activities.

1.20 In order to protect its ability to discharge its functions, statutory Orders conferring powers on undertakers for specific projects or developments, for example Orders under the Transport and Works Act 1992, the Harbours Act 1964 and PA 2008, always include a provision "saving" or protecting the statutory rights and duties of the GLAs in the context of the relevant Order. Article 40 of the dDCO is an example of such a provision. It provides that "*Nothing in this Order prejudices or derogates from any of the rights, duties or privileges of Trinity House.*"