



## TRINITY HOUSE

4 March 2019

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

Your Ref: EN010084

Identification No. 20012441

### **The Thanet Extension Offshore Wind Farm Project**

Dear Sir / Madam

We refer to the above application for development consent.

Trinity House attended and made submissions at the Issue Specific Hearing 7 on the draft Development Consent Order on Thursday 21 February 2019 (“**the ISH**”).

A written summary of the case made by Trinity House at the ISH is set out at Appendix 1 of this letter.

For completeness, we have also included within the written summary at Appendix 1 a brief description of the statutory functions performed by Trinity House. Though not forming part of Trinity House’s oral submissions at the ISH, these are included to provide further context to Trinity House’s case at the ISH, particularly in relation to its concerns regarding the applicant’s proposed approach to arbitration in article 36 of the draft Order.

Trinity House has recently made oral and written submissions in relation to its statutory functions at the Issue Specific Hearing on the draft Development Consent Order for the Norfolk Vanguard Offshore Wind Farm Project, which was held on 7 February 2019. Trinity House therefore considers it appropriate to adopt a consistent approach in relation to its submissions across the different Projects which it is asked to comment on.

In the list of action points arising from the ISH which was published by the Inspectorate on 25 February 2019, Trinity House is also asked to consider:

1. submitting suitable alternative form of words regarding the arbitration provision with reference to draft provisions in the Norfolk Vanguard dDCO; and
2. the appropriateness of maintaining platform level lighting as an aide to manoeuvring small fishing vessels.

In respect of point 1 above, Trinity House's revised drafting proposal for article 36 of the draft Development Consent Order is enclosed at Appendix 2 of this letter. Trinity House confirms that this drafting is in the same form as that submitted to the Inspectorate following the Issue Specific Hearing on the draft Development Consent Order for the Norfolk Vanguard Order. This was published on the Inspectorate's website on 18 February 2019.

Trinity House also confirms that, in the context of the Norfolk Vanguard application, it has previously sought the views of the Marine Management Organisation on to its preferred drafting of the arbitration provision. Trinity House notes that, in its post hearing submissions in respect of the Norfolk Vanguard application, which were also published on the Inspectorate's website on 18 February 2019, the MMO has confirmed that it supports Trinity House's proposed wording.

As a matter of courtesy, Trinity House has sent its preferred drafting to the MMO in advance of submission to the Inspectorate in relation to the Thanet Extension Offshore Wind Farm Project.

Finally, Trinity House can confirm that it will seek to liaise directly with the Applicant regarding the issue of platform level lighting (point 2 above) and will provide its response by Deadline 4, in accordance with the Examining Authority's request.

Please address all correspondence regarding this matter 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,

A large black rectangular redaction box covers the signature area, obscuring the name and any handwritten notes or dates.

Russell Dunham ACH  
Legal & Risk Advisor

Email: [Russell.dunham@thls.org](mailto:Russell.dunham@thls.org)

## APPENDIX 1

### EXTENSION OFFSHORE WIND FARM ORDER 202X ("THE DRAFT ORDER")

#### ISSUE SPECIFIC HEARING 7 INTO THE DRAFT DCO ON THURSDAY 21 FEBRUARY 2019 ("THE ISH")

#### TRINITY HOUSE'S POST HEARING SUBMISSIONS INCLUDING WRITTEN SUBMISSION OF ORAL CASE

##### 1 Trinity House

- 1.1 Though not forming part of oral submissions made at the ISH, the following summary of the statutory functions performed by Trinity House is provided in order to provide further context to the case made generally by Trinity House at the ISH, particularly in relation its concerns regarding the Applicant's proposed approach to arbitration in article 36 of the draft Order (see paragraph 3 of these post-hearing submissions).
- 1.2 The Corporation of Trinity House ("**Trinity House**") was constituted under a Royal Charter by Henry VIII and 14 subsequent charters or grants. Trinity House is therefore a Chartered Corporation.
- 1.3 In addition to powers under the Charters, Trinity House 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**").
- 1.4 Under section 23 of the Pilotage Act 1987, Trinity House is authorised to grant certificates for deep sea pilots. The senior members of Trinity House also undertake the role of Nautical Assessors in the Admiralty Court.
- 1.5 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.
- 1.6 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.

- 1.7 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.
- 1.8 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.
- 1.9 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).
- 1.10 By section 197(1), Trinity House is empowered within its area to:
- 1.10.1 erect or place any lighthouse;
  - 1.10.2 add, alter or remove any lighthouse;
  - 1.10.3 erect or place, alter or remove any buoy or beacon; and
  - 1.10.4 vary the character of any lighthouse buoy or beacon.
- 1.11 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.
- 1.12 As regards local AtoN within its lighthouse area, MSA 1995 provides that:
- 1.12.1 Trinity House may with the sanction of the Secretary of State direct a local lighthouse authority as respects AtoN;
  - 1.12.2 a local lighthouse authority may not lay down AtoN without the consent of Trinity House; and
  - 1.12.3 Trinity House 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, Trinity House inspects over 10,000 local AtoN each year.

- 1.13 Trinity House, 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.
- 1.14 Trinity House, 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.
- 1.15 In addition, Trinity House is a consultee to the Marine Management Organisation ("**MMO**") 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 ("**the 2008 Act**").
- 1.16 Trinity House emphasises that these and indeed other 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.
- 1.17 It is also important to note that Trinity House, 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 Trinity House are subject to audit by the Comptroller and Auditor General.
- 1.18 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.
- 1.19 This arrangement adds to the unique status of the GLAs. Trinity House 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.
- 1.20 This is important because the resources available to Trinity House (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.

1.21 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 the 2008 Act, always include a provision “saving” or protecting the statutory rights and duties of the GLAs in the context of the relevant Order. Article 39 of the draft Order 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.*”

## **2 Article 16 (public rights of navigation) of the draft DCO**

2.1 Trinity House made oral submissions regarding the Applicant’s proposed amendments to article 16 of the draft DCO at the ISH.

2.2 Trinity House noted that the revised drafting proposed by the Applicant at Deadline 2 in the Examining Authority’s (“**ExA**”) examination timetable failed to deal with its concerns that the extinguishment of the public rights of navigation should not take place until the construction site has been marked to the satisfaction of Trinity House and the construction of any of the authorised works is due to commence.

2.3 Trinity House noted that, as currently drafted, public rights of navigation could be extinguished under article 16 solely on the basis of the plan submitted to the Secretary of State, even though no physical marking indicating to mariners where navigation remains safe and permissible, has been laid out by the Applicant.

2.4 Trinity House is also concerned that public rights of navigation might be extinguished under article 16 of the draft DCO even though there is no imminent prospect of construction works being commenced by the Applicant.

2.5 In Trinity House’s view, an amendment to article 16 of the draft DCO is therefore necessary to make clear that the extinguishment of public rights of navigation should only take effect once the Applicant has marked the area within which construction works are to be undertaken, to the reasonable satisfaction of Trinity House.

2.6 Trinity House also considers that this marking requirement should be complied with no less than six weeks and no more than eight weeks prior to the commencement of construction activities. In Trinity House’s experience, this is normal practice for other offshore developments; provides enough time for Trinity House to inspect the marking undertaken by the Applicant and consider its appropriateness prior to the commencement of any works; and ensures that public rights of navigation are only extinguished at such time as construction works are reasonably imminent.

### 3 The Proposed Arbitration Procedures in the draft DCO

- 3.1 The Applicant also made brief oral submissions at the ISH in relation to the Applicant's approach to arbitration, which is set out in article 36 and Schedule 9 of the draft DCO. However, for the purposes of this note, Trinity House has also sought to elucidate more fully its concerns in respect of the proposed arbitration procedures, as well as to respond to written submissions made by the Applicant at Deadline 2 in the ExA's examination timetable, in order to provide greater context to its request that article 36 of the draft DCO should be amended.
- 3.2 Trinity House made written submissions in respect of the proposed arbitration procedures in the draft DCO, as part of its comments more generally on the Applicant's proposals, at Deadline 1 in the ExA's examination timetable.
- 3.3 In those written submissions, Trinity House:
- 3.3.1 expressed concern that the exercise of its statutory functions to provide for safety of navigation, including the requiring of the marking and lighting of potential obstructions during the construction, operation, maintenance and possible decay of the works authorised by the draft DCO, might be regarded as being subject to the arbitration provisions;
  - 3.3.2 noted that the "saving" provision in its favour in article 39 of the draft DCO is clearly intended to preserve its ability to exercise its statutory functions and that nothing in the draft DCO should fetter its statutory powers to give directions in terms of AtoN and for the prevention of danger to navigation;
  - 3.3.3 also noted that in performing any advisory and consultation function on safety of navigation matters with the MMO pursuant to MCAA 2009, should not be subject to the arbitration provisions in the draft DCO;
  - 3.3.4 considered that it was imperative that there was clarity that the "saving" provision in its favour in article 39 of the draft DCO is not subject to any other provision in the draft DCO, including the Deemed Marine Licences ("DMLs") which form part of it; and
  - 3.3.5 requested that article 36 of the draft DCO be amended to make clear that functions performed by Trinity House under the draft DCO, including the DMLs, are not subject to the arbitration provisions in the draft DCO.
- 3.4 Trinity House also notes that the MMO has expressed similar concerns in relation to the proposed arbitration procedures in the draft DCO. Trinity House draws particular attention to, and endorses, the submissions of the MMO contained in its relevant representation dated 12 September 2018, in this respect.

- 3.5 Trinity House therefore highlights that there is a general consensus amongst interested parties which exercise important regulatory functions in respect of the offshore marine environment that the arbitration procedures currently proposed by the applicant in the draft DCO are both inappropriate and unacceptable.
- 3.6 The Applicant responded to Trinity House's Deadline 1 submissions at Deadline 2 in the ExA's examination timetable. These provide, so far as relevant for present purposes, as follows:
- 3.6.1 *"The Applicant has developed [Model Provision 42] in order to give it real effect and to make it more appropriate for use by either party, by providing effective timeframes and detailed guidance."*
- 3.6.2 *"The proposed arbitration is the only mechanism to resolve disputes within the DMLs and therefore it is an important inclusion in order to provide a fair, impartial and final award on substantive difference between parties."*
- 3.6.3 *"The Applicant also notes that other Projects further along the examination process have included a similarly drafted Arbitration provision and have not encountered the same concerns from Trinity House."*
- 3.7 The Applicant also made reference to its position regarding the arbitration procedures contained in its Deadline 1 submissions.
- 3.8 Whilst emphasising that only brief submissions were made on these points at the ISH, Trinity House has, in the interests of completeness, sought to respond to each of the Applicant's Deadline 2 comments in this post-hearing note. These are set out below.

The Applicant's comment

*"the Applicant has developed [Model Provision 42] in order to give it real effect and to make it more appropriate for use by either party, by providing effective timeframes and detailed guidance,"*

Trinity House's response

- 3.9 Trinity House reiterates comments which it recently made at the Issue Specific Hearing in respect of the Norfolk Vanguard DCO application. In Trinity House's view, the arbitration provisions contained in Orders made under the 2008 Act and similar consenting regimes are more properly aimed at disputes between the promoter and private third parties under, for example, the protective provisions, where frequent references to arbitration are made, as opposed to regulatory decisions and directions made by bodies in the exercise of their statutory functions.



- 3.10 Fundamentally, though, Trinity House is less concerned with the changes to Model Provision 42 which the Applicant proposes, than it is to seek express confirmation that those procedures should not apply to Trinity House and other regulatory bodies exercising functions on behalf of the Secretary of State.
- 3.11 Trinity House submits that there are very good reasons why the arbitration procedure provided for in the draft DCO should not apply to it. It cannot be correct or desirable that responsibility for the exercise of statutory powers in relation to the safety of navigation at sea might be placed into the hands of an independent arbitrator.
- 3.12 Parliament has seen fit to provide that Trinity House should have exclusive responsibility for the exercise of these statutory powers. This principle remains true both as to directions made by Trinity House itself and to advice given by it in relation to navigation, where consulted by the MMO on a matter falling to be determined under the DMLs. To include in the draft DCO an arbitration procedure which could effectively be used by the Applicant to override the duties and powers conferred upon Trinity House by statute would therefore be contrary to the intentions of Parliament.
- 3.13 In Trinity House's view, the Applicant's interpretation is also incompatible with the special provision made for Trinity House under the saving provision in article 39 of the draft DCO. That provision has a long history; it appears in substantially the same form in s. 102 of the Harbours, Docks and Piers Clauses Act 1847. The rights, duties or privileges of Trinity House to which it refers now find their principal expression in MSA 1995.
- 3.14 In this respect, Trinity House wishes to express its apprehension that any provision made for the Applicant to refer to arbitration matters which relate to the performance of statutory powers which Trinity House alone has been charged with performing, will plainly derogate or prejudice its rights, duties or privileges in terms of article 39 of the draft DCO.

#### The Applicant's comment

*"The proposed arbitration provision is the only mechanism to resolve disputes within the DMLs and therefore it is an important inclusion in order to provide a fair, impartial and final award on substantive difference between parties."*

#### Trinity House's response

- 3.15 Trinity House refers the ExA to the MMO's relevant representation dated 12 September 2018, the pertinent parts of which read:

*"... once the DCO is granted, the DML falls to be dealt with as any other Marine Licence, and any decisions and determinations made once a DML is granted fall into the regime set out in the MCAA 2009. Any decisions or actions the MMO carries out in respect of a DML should*

*not be made subject to anything other than the normal approach under the MCAA 2009. To do so introduces inconsistency and potentially unfairness across a regulated community. In the case of any disagreement which may arise between the applicant and the MMO throughout this process, there is already a mechanism in place within that regime to challenge a decision through the existing appeal routes under section 73 of MCAA 2009.”*

- 3.16 Trinity House does not therefore agree with the Applicant’s view that the proposed arbitration provision is the only mechanism to resolve disputes within the DMLs. MCAA 2009 already contains such a mechanism and there is no reason to suspect that Parliament intended, in passing the 2008 Act, for this mechanism to be usurped by Orders granting development consent.
- 3.17 For the avoidance of doubt, Trinity House confirms that it is specifically concerned by any drafting proposals that might enable the Applicant to refer matters relating to the discharge of conditions under the DMLs to arbitration, since it is required to perform a number of functions under the DMLs contained in Schedules 11 and 12 of the draft DCO.
- 3.18 It is therefore inevitable that Trinity House would be implicated in any arbitration proceedings, where directions made or advice given by Trinity House in respect of AtoN matters is at the root of the reference to arbitration.

Applicant’s comment

*“The Applicant also notes that other Projects further along the examination process have included similarly drafted Arbitration provisions and have not encountered the same concerns from Trinity House.”*

- 3.19 Trinity House refers the ExA to:
- 3.19.1 its written submissions in respect of the Hornsea Project Three Offshore Wind Farm Project on 29 January 2019; and
- 3.19.2 its written submissions in respect of the Norfolk Vanguard Offshore Wind Farm Project on 14 January 2019,
- in which it raised precisely the same concerns in relation to the arbitration procedures contained in those projects’ draft Development Consent Orders.
- 3.20 Trinity House also appeared at the Issue Specific Hearing on the draft DCO in respect of the Norfolk Vanguard Offshore Wind Farm on Thursday 7 February 2019, where it made oral submissions to the ExA on these matters. Trinity House was indeed invited by the ExA at the hearing to suggest such amendments to the arbitration procedures contained in that draft DCO as would satisfy its concerns.

3.21 Trinity House also highlights that other regulatory bodies, including the MMO and the Maritime & Coastguard Agency have made similar representations in relation to the proposed arbitration procedures for those schemes.

3.22 Trinity House also noted at the ISH that the applicants for the Wylfa Newydd Nuclear Power Station application currently under examination have, following representations made by Trinity House, amended the standard model clause arbitration provision (article 78 in that draft DCO) by adding the following words:

*'(2) This article must not apply to the provisions of the 1847 Act incorporated in this Order by article 43 or to Trinity House in the exercise of its statutory functions.' (our emphasis)*

3.23 The concerns raised by Trinity House in this application are therefore not new, as the Applicant suggests, but part of a more concerted and coordinated effort to ensure that its important regulatory functions are not adversely affected by the inclusion of an inappropriate arbitration provision in Orders granting development consent under the 2008 Act.

#### **4 Trinity House's proposed amendments to article 36 of the draft DCO**

4.1 In accordance with action point 10 of the list of actions arising from the ISH published by the Inspectorate, Trinity House encloses at Appendix 2 of this note its proposed amendments to article 36 of the draft DCO.

4.2 Trinity House has, as noted, shared its proposed amendments to article 36 of the draft DCO with the MMO and is not aware that the MMO, which confirmed that it was content with the same amendments proposed by Trinity House in respect of the Norfolk Vanguard application, has any concerns with them.

**BDB Pitmans LLP**

**1 March 2019**

**Arbitration**

**36.**—(1) Any difference under any provision of this Order, unless otherwise provided for, must be referred to and settled in arbitration in accordance with the rules at Schedule 9 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) Where the referral to arbitration under paragraph (1) relates to a difference with the Secretary of State, in the event that the parties cannot agree upon a single arbitrator within the specified time period stipulated in paragraph (1), either party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.

(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.

(4) This article is without prejudice to article 39 (saving provision for Trinity House).

(5) The powers of the arbitrator appointed under this article do not extend to considering the appropriateness of a decision or determination made by a body exercising regulatory functions on behalf of the Secretary of State under or pursuant to an enactment.