



TRINITY HOUSE

29 April 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 Written Representations to the Examining Authority following ISH 9 for Deadline 5

Dear Sir / Madam

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 Thursday 18 April 2019 ("the ISH"). This letter summarises submissions made by TH at the ISH and sets out responses to actions requested from TH by the Examining Authority ("the ExA") following the ISH.

For the avoidance of doubt, references to the dDCO in this letter are to the tracked changes version of the Order submitted to the examination by the Applicant at Deadline 4B, which is dated April 2019.

Article 16 Public Rights of Navigation: approvals

TH made oral submissions in relation to article 16 (public rights of navigation) of the dDCO, confirming that it has fundamental reservations about the drafting which is currently proposed by the Applicant. In particular, TH notes that:

- no connection is currently made between subparagraphs (2), (3) and (4) of article 16. In TH's view, the extinguishment provided for in subparagraph (2) must only take effect if the Applicant has complied with its obligations in subparagraphs (3) and (4) of that article;
- it is not clear how, if at all, the Applicant's duty to notify TH of the proposed extinguishment of any rights of navigation under subparagraph (4) is distinct from the duty to submit a plan to TH and other bodies under subparagraph (3); and

- the article still makes no reference to any extinguishment of public rights of navigation being strictly conditional upon the Applicant complying with directions made by TH as to the marking of the area of the sea which is to be subject to extinguishment of rights of navigation.

In accordance with the ExA's request set out at item 3 of the list of hearing action points, TH has given further consideration to the drafting of article 16 following the ISH. An alternative form of wording has been drafted and sent to the Applicant for consideration. TH understands that this wording will feature in the draft Order to be submitted by the Applicant at Deadline 5.

TH therefore further considers that it will be necessary for it, and potentially other interested parties, to consider further the draft wording in relation to article 16 and to provide further comments to the ExA **at Deadline 5A** in light of the applicant's revised draft DCO to be published at Deadline 5.

Proposed arbitration procedures

The Examining Authority ("**ExA**") invited comments from interested parties on the changes to the arbitration procedures in article 36 (arbitration) of the dDCO which have been proposed by the Applicant.

TH confirmed that it was only partially content with the revised approach to the drafting of this article. First, TH agrees with the intent behind the inclusion of the following words in article 36 of the dDCO:

"Subject to Article 41 (saving provisions for Trinity House) ..."

However, TH notes that article 36 refers in error to article 41 (saving provisions for Trinity House). The correct reference is article 39 (saving provisions for Trinity House) and this should be reflected in the next iteration of the draft Order to be prepared by the Applicant.

Second, TH also considers that article 36 needs to go further to exclude public bodies which exercise statutory duties or functions from the scope of the arbitration procedures in the dDCO. TH's proposed amendments to article 36 of the dDCO, which would address this concern, were submitted to the Inspectorate at Deadline 3 and are set out again at Appendix 1 of these submissions, for ease of reference.

In summary, TH believes that these further drafting changes are justified for the following reasons:

- it would be unconscionable for important functions performed by statutory bodies, which are subject to a range of duties in the interests of the general public, to be performed by a private arbitrator;
- the Applicant is seeking to include a mechanism to refer matters to arbitration in circumstances where there is no existing statutory mechanism to that effect. In fact, as regards matters which relate to marine licensing under the Marine and Coastal Access Act 2009 ("**the 2009 Act**"), there is a statutory appeal mechanism already provided in relation to decisions to grant or refuse applications for a marine licence. There is no reason to suspect that this mechanism could not apply to the Deemed Marine Licences ("**DMLs**") contained at Schedules 11 and 12 of the dDCO, or at least the Applicant has failed to provide any compelling reasons why that appeal mechanism could not apply in those circumstances; and

- TH notes that, in respect of the Hornsea Three Offshore Wind Farm application, the examining authority advocated for the inclusion of further wording in the draft Order which would have substantially the same effect as that proposed by TH. A copy of this wording, which was contained in the examining authority's schedule of changes to the draft Hornsea Order issued on 26 February 2019, is set out at Appendix 2 of these submissions.

For these reasons, TH remains of the view that article 36 of the dDCO should be amended further by the Applicant, to exclude decisions made or advice given by statutory bodies in the exercise of their statutory functions from the scope of the arbitration procedures contained in the dDCO. To that end, TH continues to advocate for the inclusion of the words (or substantially the same words) set out at article 36(5) of its proposed wording submitted at Deadline 3 (a copy of which is included Appendix 1 of these submissions).

TH is aware that the Applicant is asked to consider further the rationale for its current approach to the drafting of this article and to submit any further written information for TH's and the ExA's consideration at Deadline 5. TH will consider this information and provide any response at Deadline 6 (TH notes the following text in the list of actions (at point 5), in relation to this issue: "TH to review and submit further representations at D5". TH believes that this is an error, since the information which it is asked to consider is being presented by the Applicant at Deadline 5. TH considers that this reference should therefore be to "D6" instead. As noted, TH will provide a response at Deadline 6).

Structure Exclusion Zone ("SEZ") activities

TH notes that the Applicant is asked to provide further information regarding, amongst other things, the intended purpose of the SEZ. TH will, as requested at point 6 of the list of actions arising from the ISH, consider the SEZ provisions in the dDCO, in the light of any further information provided by the Applicant, and submit any comments on those provisions at Deadline 6.

Audit of Grid Coordinates

TH made a written submission confirming that the positional data quoted under Latitude and Longitude in the tables at pages 32 and 112 of the dDCO are incorrect and should be rectified by reversing the Latitude and Longitude headings in those tables. TH notes that the Applicant is asked at point 8 of the list of actions arising from the ISH to amend these coordinates and undertake a further audit of all coordinates after review and insertion of the SEZ coordinates. TH welcomes this confirmation.

Notification to Kingfisher

TH recommended that condition 6(7) of the DML at Schedule 11 of the dDCO and condition 5(7) of the DML at Schedule 12 of the dDCO should be amended in each case to require the undertaker to give Kingfisher Information Service of Seafish at least 14 days' prior written notice of the commencement of offshore activities, for inclusion in the Kingfisher Fortnightly Bulletin. TH noted that this approach has been taken in other Orders, including the draft Norfolk Vanguard Order which is currently under examination.

TH notes that the Applicant is asked to amend the DMLs to reflect this recommendation and is grateful for this confirmation.

Construction monitoring

TH raised a concern that the DMLs do not currently make provision for the Applicant to undertake any monitoring of vessel traffic during or after the construction of the authorised development. This data is especially useful to TH in understanding how vessels are navigating in close proximity to the site of the works, whether any aids to navigation ("AtoN") constructed prior to the works are serving a useful purpose and/or whether any further AtoNs may be necessary in connection with the authorised development.

TH is aware that this provision is included in similar orders, for example condition 19(4) of the deemed marine licence at Schedule 9 of the draft Norfolk Vanguard Order. TH seeks to understand why the dDCO does not make provision for monitoring of vessel traffic in these terms.

TH notes that the Applicant is asked to take this issue up with TH and to propose a solution at Deadline 5. No discussions have taken place, as yet, however TH will bring this action point to the Applicant's attention and will endeavour to provide a response by Deadline 5a in the examination timetable, alongside its comments (if any) on the revised draft Order to be submitted by the Applicant at Deadline 5.

TH would also note that a number of references throughout the DML conditions refer to specific plans and programmes in condition 12. These will need to be updated to condition 12(1), in each case.

Please address all correspondence regarding this matter to myself at russell.dunham@thls.org and to Mr Steve Vanstone at navigation.directorate@thls.org

Yours faithfully,



Russell Dunham ACII
Legal & Risk Advisor

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Appendix 1

Proposed amendments to article 36 of the draft Order submitted by TH at Deadline 3

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.



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	<p>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.</p> <p>(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. 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.</p> <p>(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.</p>	<p>a decision of the Secretary of State relating to the transfer of the benefit of the Order to be subject to arbitration has been explored in the examination. The ExA has sought evidence in relation to the justification for the approach suggested by the Applicant. The amendment reflects submissions made by the MMO.</p>
38(4)	<p>(4) Where the MMO refuses an application for approval under condition 13 of Part 2 of Schedule 11 or condition 11 of Part 2 of Schedule 12 and notifies the undertaker accordingly, or the MMO fails to determine the application for approval within four months commencing on the date the application is received by the MMO, the undertaker may by notice appeal against such a refusal or non-determination and the 2011 Regulations shall apply subject to the modifications set out in paragraph (5).</p>	<p>The question of whether it would be appropriate for conditions under these DMLs to be treated differently from conditions under other marine licences which are not subject to an appeal mechanism under the 2011 Regulations has been explored in the examination.</p>



Application by Orsted Hornsea Project Three (UK) Ltd for an Order granting Development Consent for the proposed Hornsea Project Three Offshore Wind Farm

The Examining Authority's schedule of changes to the draft Development Consent Order

Issued on 26 February 2019

Ref Articles	ExA's suggested changes	ExA's comments
5(3) to 5(6)	<p>(3) The undertaker shall consult the Secretary of State before making an application for consent under this article by giving notice in writing of the proposed application and the Secretary of State shall provide a response within four weeks of receipt of the notice.</p> <p>(4) The Secretary of State shall consult the MMO before giving consent to the transfer or grant to another person of the whole or part of the benefit of the provisions of the deemed marine licences.</p> <p>(5) The Secretary of State shall determine an application for consent made under this article within a period of eight weeks commencing on the date the application is received by the Secretary of State, unless otherwise agreed in writing with the undertaker.</p> <p>(6) Where the Secretary of State is minded to refuse an application for consent made under this article and notifies the undertaker accordingly, or the Secretary of State fails to determine the application for consent under this article within the period prescribed in paragraph (5), the undertaker may refer the matter for determination in accordance with article 37 (arbitration). Subsequent sub-paragraphs renumbered accordingly</p>	<p>The issue of whether it would be appropriate for a decision of the Secretary of State relating to the transfer of the benefit of the Order to be subject to arbitration has been explored in the examination. The ExA has sought evidence in relation to the justification for the approach suggested by the Applicant.</p>
37	<p>(1) Any difference under any provision of this Order, other than matters within (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</p>	<p>The issue of whether it would be appropriate for</p>