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Your ref: **20012643**

Our ref: Thanet Extension Offshore  
Windfarm Project (EN010084)

2<sup>nd</sup> May 2019

Dear Sir/Madam

**Thanet Extension Offshore Windfarm Project (EN010084)**  
**Deadline 5A Deadline for receipt of: Comments on any revised dDCO**  
**submitted by the Applicant at Deadline 5**

Thank you for the opportunity to provide a written submission at Deadline 5A on the applicants revised Development Consent Order, which has now been considered by both MCA and The Department for Transport's (DfT) legal representative. The MCA's remit for offshore renewable energy development is to ensure that safety of navigation is preserved, and our search and rescue capability is maintained, whilst progress is made towards government targets for renewable energy.

**Development Consent Order**

The DfT's legal representative has perused through previous legal advice on this matter, and reviewed the draft DCO, and agrees that the MCA should be aligned with the MMO and Trinity House ("TH") with regards to Arbitration, DML conditions and Public Rights of Navigation. DfT would specifically like to highlight the following:

1. Thanet: Arbitration: Article 36

Article 36 currently reads:

**Arbitration**

**36.**— Subject to Article 41 (Saving provisions for Trinity House), 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 Centre for Effective Dispute Resolution.



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It is considered sensible for the MCA to endorse the MMO's approach in regards to Arbitration as the MMO is the relevant regulator, and licensing and consent body. The significant point to note is that arbitration is typically limited to disputes between the scheme promoter and 3<sup>rd</sup> parties (e.g. regarding rights of entry or to install apparatus). We understand that MMO's concerns about being drawn into Arbitration on matters for which there are already appeal routes (such as licensing) have been raised following the outcome of recent ExA hearings. We think these concerns could be adequately addressed by inserting the amendment proposed by TH in their representations dated 4<sup>th</sup> March 2019. However, we also include below an alternative suggestion for consideration:

**36(2) For the avoidance of doubt, any matter which the consent or approval of the Secretary of State is required, including any consent or approval delegated to or taken by the MMO is not to be subject to arbitration.**”

## 2. Thanet: Public Rights of Navigation: Article 16

The MCA would like to question why the extinguishment of the rights of navigation is considered necessary by the applicant, how it will be enforced and the reasons behind its inclusion which is not seen in other DCO/DMLs. Until we receive compelling reason or justification, we do not support its inclusion at present.

Article 16 currently reads:

### **Public rights of navigation**

**16.—**(1) Subject to paragraph (2), the rights of navigation over the places in the sea where any of the permanent structures (wind turbine generators, meteorological mast or offshore substations, including their foundations) are located within territorial waters will be extinguished.

(2) The extinguishment of the rights of navigation over the places identified in paragraph (1) will take effect 14 days after the undertaker has submitted a plan to the Secretary of State, Trinity House, the MCA and the MMO showing the precise locations of the foundations of each of any relevant wind turbine generators, meteorological mast, and offshore substations to be constructed as part of the authorised project within territorial waters.

(3) The plan submitted in accordance with paragraph (2) will be submitted to the Secretary of State, Trinity House, the MCA and the MMO eight weeks prior to the commencement of construction of the first individual wind turbine generator, meteorological mast or offshore substation.

(4) Trinity House will be notified of any extinguishment of the rights of navigation over the places identified in paragraph (1) at least eight weeks prior to that extinguishment taking place.

(5) In respect of the location of any individual wind turbine generator, meteorological mast or offshore substation, paragraph (1) will cease to have effect as soon as that wind turbine generator, meteorological mast or offshore substation has been decommissioned and permanently removed, and the relevant rights of navigation will resume.

(6) The plan submitted in accordance with paragraph (2) will be published by the undertaker as required by the Secretary of State.

Trinity House's representations regarding Article 16 are set out at paragraph 2 of their written submissions dated 4 March 2019. We agree with TH that:

- The extinguishment of the public rights of navigation should not take place until the construction site has been marked to the satisfaction of TH and the authorisation of the works is due to commence;
- As currently drafted, the public rights of navigation could be extinguished under Article 16 solely on the basis of a plan being submitted to the Secretary of State;
- As per the current draft, the public rights of navigation could be extinguished even though there is no imminent prospect of construction works being commenced by the Applicant;
- This could set a potential precedent for offshore windfarm applications in the future.

The MCA have had the same concerns hence our question regarding the background and the need for justification for its inclusion.

## **SCHEDULE 11 and SCHEDULE 12 Part 4 Conditions of the DML:**

### **3. Pre-construction plans and documentation**

The MCA requests that the following paragraph:

(4) No part of the authorised scheme may commence until the MMO, in consultation with the MCA, has given written approval of an Emergency Response Co-operation Plan (ERCoP) which includes full details of the plan for emergency response and co-operation for the construction, operation and decommissioning phases of that part of the authorised scheme in accordance with the MCA recommendations contained within MGN543 "Offshore Renewable Energy Installations (OREIs) – Guidance on UK Navigational Practice, Safety and Emergency Response Issues", and has confirmed in writing that the undertaker has taken into account and, so far as is applicable to that part of the authorised scheme, adequately addressed all MCA recommendations contained within MGN543 and its annexes.

Is replaced with:

No part of the authorised project may commence until the MMO, in consultation with the MCA, has confirmed in writing that the undertaker has taken into account and, so far as is applicable to that stage of the project, adequately addressed all MCA recommendations as appropriate to the authorised project contained within MGN543 "Offshore Renewable Energy Installations (OREIs) – Guidance on UK Navigational Practice, Safety and Emergency Response Issues" and its annexes.

Although the ERCoP is an important document which MCA must approve, it is a working document throughout the lifetime of the development. The purpose of this revision is to ensure the applicant discusses the requirements of MGN 543, which includes a SAR checklist to demonstrate all aspects have been addressed including the ERCoP.

#### 4. Notifications and inspections condition 6

The MCA requests that clause (11):

11) In case of damage to, or destruction or decay of, the authorised scheme seaward of MHWS or any part thereof the undertaker must as soon as possible and no later than 24 hours following the undertaker becoming aware of any such damage, destruction or decay, notify MMO, MCA, Trinity House and the UK Hydrographic Office.

Is amended to include the following, to ensure that the MMO and MCA receives notification of any cable exposure.

In case of exposure of cables on or above the seabed, the undertaker must within three days following identification of a cable exposure, notify mariners by issuing a notice to mariners and by informing Kingfisher Information Service of the location and extent of exposure.

#### 5. Pre-construction plans and documentation

The MCA would expect to see the following pre-construction plans submitted as part of the DML, which at present we believe are missing from the current draft:

Lighting and Marking plan  
Operation and Maintenance Programme

#### 6. Post construction

In article 15, the MCA would also expect to see 'post-construction traffic monitoring' in accordance with an outline plan, including the provision of reports on the results of that monitoring periodically as requested by the MMO in consultation with the MCA.

Yours faithfully,

Helen Croxson  
OREI Advisor  
Maritime and Coastguard Agency