



## TRINITY HOUSE

3 May 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 5A**

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"). Following the ISH Trinity House submitted its representations to the Examining Authority on 29 April 2019 for Deadline 5 and stated that it intended to make further submissions at **Deadline 5A**.

TH has now had opportunity to review the applicant's tracked changes version of the dDCO submitted to the examination by the Applicant at **Deadline 5** (dated April 2019). TH therefore wishes to make further representations to the ExA on the most recent iteration of the applicant's draft DCO for Deadline 5A.

#### **Article 16 Public Rights of Navigation**

TH notes that the Applicant has incorporated, without modification, the revised wording of this article which was proposed by TH in advance of Deadline 5. TH is grateful for this confirmation.

Whilst this proposal now addresses some of the reservations expressed by TH in relation to the drafting of this provision in earlier submissions, TH does wish to emphasise its concerns more generally about the appropriateness of including within the dDCO of a provision extinguishing public rights of navigation.

TH has and continues to make representations in respect of two other applications for development consent in respect of offshore wind farm proposals. Notably, the draft Orders for those applications make no express provision for the extinguishment of public rights of navigation in the manner proposed by the Applicant. TH does not understand it to be necessary, as a matter of law, for the dDCO to make specific provision for the extinguishment

of public rights of navigation, in circumstances where the dDCO self-evidently authorises the construction of works below high-water mark in a manner which is capable of interfering with the public's right of navigation. As submitted orally at the recent ISH, the statutory authority to construct the infrastructure conferred by the DCO is the authority for interfering with the public rights of navigation by the structures so authorised.

TH is concerned that the inclusion of such a provision in the dDCO may give rise to unintended consequences. This is underscored by the fact that the extinguishment of rights is stated to take effect 14 days prior to the construction of any works. It is not inconceivable, therefore, that construction works may be delayed, or even abandoned, yet the public right of navigation will have been extinguished by operation of this article. That result would be wholly inappropriate.

TH does not consider that the Applicant has provided any compelling justification for the inclusion of this provision within the dDCO.

TH understands that the Maritime & Coastguard Agency (“MCA”) will also be making written submissions in relation to this issue at Deadline 5A in the examination timetable and echoes the comments made by the MCA in those submissions.

**For those reasons, and whilst acknowledging that the revised form of drafting goes some way to addressing TH's concerns, TH remains opposed as a matter of principle to the inclusion of this provision in the dDCO.**

#### **Article 36: arbitration**

TH notes the amendment to this provision to correct the cross-reference to its saving provisions at article 39 of the dDCO. TH welcomes this correction.

For the reasons set out in TH's deadline 5 submissions, TH maintains its view that article 36 of the dDCO should be amended by the Applicant to clarify that the appropriateness of decisions or determinations made by a body exercising regulatory functions on behalf of the Secretary of State shall not be capable of consideration by any arbitrator appointed under article 36 of the dDCO.

TH has now received from the Applicant a copy of Counsel's written opinion dated 29 April 2019, which purports to provide a justification for retaining article 36 of the dDCO in the form in which it is currently drafted. A copy of Counsel's written opinion was also published by the Inspectorate on 1 May 2019. TH is considering the contents of that opinion and intends to respond in due course.

#### **Schedules 11 and 12**

TH wishes to raise some minor points in relation to the drafting of the Deemed Marine Licences (“DMLs”) at Schedules 11 and 12 of the dDCO:

- TH notes and is content with the substantive effect of the additional wording now proposed by the Applicant at condition 7(11) of Schedule 11 and condition 6(11) of Schedule 12. However, TH suggests that, as a matter of good drafting practice, this wording is set out in a separate sub-paragraph, in each case;
- TH welcomes the additional wording at condition 17(4) in relation to vessel traffic monitoring. In addition to the MMO and the MCA, however, TH requests that it is added to the list of recipients of any monitoring reports required to be submitted under that condition; and

- TH considers that, as part of the post-construction requirements set out in Condition 18, provision needs to be made for vessel traffic monitoring in the same terms as condition 17(4). TH wishes to be included in the list of recipients of any post-construction monitoring reports which are required to be submitted by the Applicant under this condition.

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,

  
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