TRINITY HOUSE

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The Planning Inspectorate
Temple Quay House
Temple Quay
Bristol
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Your Ref: EN010084

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The Thanet Extension Offshore Wind Farm Project
Written Responses to the Examining Authority for Deadline 6

This letter sets out Trinity House's ("**TH**") responses at Deadline 6 to:-

(i) the Examining Authority's ("**ExA**") third suite of written questions.

(ii) The ExA's commentary on the draft Development Consent Order ("**dDCO**") published by the Inspectorate on 1 May 2019, at Deadline 5 in the examination timetable.

For the avoidance of doubt, references to the dDCO in this letter are to the tracked changes version of the dDCO dated April 2019 (Revision E), which is the version of the dDCO to which the ExA's commentary refers. TH notes that a Revision F of the dDCO also appears to have been published by the Inspectorate on 1 May 2019, at Deadline 5 in the examination timetable, however it is not clear what the status of this Revision is, given that, as noted, the ExA's commentary refers to Revision E of the dDCO. TH would welcome confirmation from the Applicant/ExA in this regard.

• TH's responses to the ExA's third suite of written questions

TH is asked to respond to a number of the ExA's third suite of written questions. TH's responses to these are as follows:

Question 3.12.5

Status of the "inshore route" and route to the north of the existing Thanet Offshore Wind Farm (TOWF)

The Applicant has argued strongly that the current route between the TOWF and the Kent coast is not designated as a 'sea lane' in the meaning attributed by NPS EN-3. Further in

[REP5-18] at point 43, the Applicant makes the case that being outside harbour limits, the area of routes surrounding the TOWF "is better described as an area of open sea."

In its D5 submission, MCA [REP5-063] argues that the "...area of sea to the west of the existing Thanet windfarm...is not an IMO designated routing measure" but goes on to state "...in an operational sense, the area of sea should be treated as a recognized sea lane" and that " there is no formally designated or charted inshore route or route immediately to the north of the project. There is nothing in the Pilot Books to indicate that (either) is an important route to be followed when route planning..."

Would the IPs please clarify for the avoidance of doubt:

a) whether MCA intends "the area of sea" in its [REP5-063] submission referred above in both instances to mean the space used for general navigation, transit by commercial vessels and pilot transfer between the southerly extent of VTS control as shown on charts and the NE Spit Racon buoy; and

b) whether THLS agrees with the Applicant that being outside the controls exercised within the limits of Port of London Authority, the area of sea including around the TOWF should be described as "an area of open sea" as argued by the Applicant in the [REP5-018] submission; and

c) whether THLS agrees with the Applicant's case at [REP5-018] as referred above that:

i. there "is no formally designated or charted inshore route..." or

ii. there "is no formally designated ...route immediately to the north of the project" or

iii. "there is nothing in the Pilot Books to indicate that (the route around the TOWF) is an important route to be followed when route planning".

TH's response:

a) TH has no comment.

b) As stated in our previous written and verbal statements TH consider this to be an area of general navigation. We would not describe it as "an area of open sea" as there are numerous navigational hazards in the area such as the sandbanks, coast and a lot of other marine users.

c i) This is a correct statement.

c ii) This is a correct statement.

c iii) Admiralty Pilot Book NP28 4.66 1 states ***"The Downs and Gull Stream form a passage bounded to the W by coastal banks and to the E by Goodwin Sands. Vessels of a suitable draught en-route from the Channel to the Thames Estuary generally use it in preference to the route E of Goodwin Sands."*** As this route brings vessels to the Goodwin Knoll lightbuoy the next waypoint on their course is likely to be the Elbow Buoy bringing them to the west of the existing windfarm.

Question 3.12.6

Sea Room at NE Spit Racon buoy
Would the IPs comment on the following:

a) Do they consider that the distance of 2.5nm (effectively 1.5nm plus 1nm buffer at the narrowest point) between NE Spit Racon buoy and the proposed TEOW as currently proposed by the Applicant would be a "distance that is acceptable for continued safe pilot transfer operations" in the context of the uses of this sea space.

b) Would the embedded risk control of the SEZ as proposed be sufficient in combination with other risk controls proposed by the Applicant to reduce all of the perceived risks to shipping and navigation to As Low As Reasonably Practicable (ALARP) in their opinion.

c) Is it appropriate for the 1nm safety buffer to be reduced for short durations by the net effect of a 500m "rolling" safety zone.

d) Can relevant sea space between NE Spit Racon buoy and the proposed TEOW reasonably be defined as the zone between the inner limit of an amended Structures Exclusion Zone in an arc around the NW sector of the windfarm, extending from a line due west of the SW corner of the SEZ to the currently charted no-anchorage line and from the line of the North Foreland sector light as extended through the NE Spit Racon buoy?

TH's response:

a) TH has no comment.

b) TH are of the opinion that the mitigation suggested would reduce the perceived risks to what the applicant considers ALARP. However the NRAA only identifies a limited amount of general risks and we cannot categorically state that "all" risks to shipping and navigation have been reduced to ALARP as this concept also has a commercial element involved for the applicant.

c) Any reduction in the available sea room for a short period of time will have an adverse effect on the risk posed whilst navigating the area. It is also not apparent how long a "short duration" would be as turbine maintenance could last numerous days.

Question 3.12.14

Effects on visual navigation

Please would THLS comment on the following statements in the NRA:

a) the NRA summary that "the positioning of the wind farm is not considered to have a significant effect on visual navigation…" [APP-089] NRA p129 para 17.

b) the conclusions of the NRA that "markings of the arrays may diminish the effectiveness of the major navigational lights adjacent to the site"? [APP-089] NRA p93 para 7.8.2.

c) [REP1-012] Applicant's Response to [RR-044] ESL-4 Para. 7.8.2 "…Offshore wind farms provide landmarks for vessels and are used as part of the general navigation toolkit." and Para 7.9.6 "A review of previous studies undertaken and discussions with stakeholders on the impacts of the existing wind farm have not identified any significant adverse impacts which may increase the risk of an accident to [sic] shore based or ship board communications, radar or positioning systems."

TH's response:

a) TH consider the proposed extension would not obscure the major light in the area at North Foreland. However, there could be the possibility that the buoys in the area would take longer to be seen and identified when approaching from the East. This could be compensated by the presence of the windfarm itself and any aids to navigation installed on the turbines.

b) TH agree with this statement and the fact that the effectiveness of major navigational lights can be diminished by the presence of a windfarm array. This can be from physical obscuration or from additional lights on the array being confused with aids to navigation.

c) TH cannot disagree with the applicants RR-044 ESL-4 Para 7.8.2 as it is extremely general. Para 7.9.6 can also be taken as a general statement depending on the perception of the term "significant adverse impacts". Studies have shown windfarms to have an adverse effect on systems like radar and radio with varying degrees of severity. This was shown by the radar pictures presented by the London Pilots at ISH8 however we were all unaware of the radars setup at the time the picture was taken. This is down to the knowledge and experience of the operator which comes back to our previous submissions that not all mariners operating in the area have the same levels of competency.

Question 3.12.19

Embedded and additional risk controls in NRA and NRAA

In [REP5-012] D5 Appendix 7 para 81 the Applicant states that "the embedded and additional risk controls identified as part of the Addendum NRA do not need managing by the PLA" and at paras 82 and 90 commits to 2 lines of orientation that would ordinarily be left to later confirmation with MCA and TH.

Would the PLA, MCA and THLS comment on:

a) whether they agree with this statement; and

b) whether it addresses the concerns raised in earlier representations; and

c) whether there are other considerations of involvement by IPs in maintaining the effectiveness of such embedded or additional risk controls that should be considered by the ExA; and

d) whether the commitment made by the Applicant to 2 lines of orientation (thereby proposed as embedded rather than additional mitigation) changes the IPs' view on the "double-counting" of embedded and additional mitigation?

TH's response:

TH state that the lines of orientation are ordinarily agreed post consent by both ourselves and the MCA before the MMO have the final sign off for the DML. This is normally achieved through post consent meetings where the lighting and marking are also agreed by all parties for Maritime Search & Rescue operations. This also includes Identification marking requirements as discussed with the Fishermen at ISH8.

The criteria laid out in Para 134 & 135 as embedded and additional risk control measures cause TH concern especially Para 135.

The "**Enhanced Promulgation of Information**" is only what we would expect to see and is nothing different to that currently being promulgated by any other windfarm including the existing Thanet OWF.

It is not apparent what obligations will be put on participants involved in the "**Shipping and Navigation Liaison Group**". As this is derived from the Shipping and Navigation Plan suggested at previous hearings would this be considered a statutory body with implications on all IP's?

The "**Enhanced Optimisation of TEOW line of orientation and symmetry**" and commitment to two lines of orientation means very little unless it is written into the DCO/DML as this is subject to post consent deliberations and MCA guidance through MGN543. TH acknowledge and welcome this commitment if it becomes binding on the applicant.

TH do not consider it appropriate for the applicant to be promoting the "**likely relocation of Drill Stone"** as this is a TH asset and subject to our requirements and assessment of the maritime traffic in the area in conjunction with the risks acceptable to ourselves.

Question 3.12.20

Textual changes to the NRAA made at deadline 5
Would the IPs comment on the recent textual changes in regard to traffic projections made at Deadline 5 to the NRAA (rev B) [REP5-039] insofar as relevant to this DCO application:

a) Para 121: "...slightly downward trend in chargeable ship arrivals over recent years..." albeit "...PLA figures do not include other estuary ports...";

b) Para 122: "...precautionary 10% uplift in hazard likelihood has been applied...in line with other OWF NRA assessments...and is reflected in the Tilbury 2 NRA...";

c) Para 123: "...It is important to note ...[that the MMO] future analysis for the region assumed that overall freight tonnage would increase, by between 1% and 2% per [sic] the trend for larger vessels would continue, and that the Thanet Extension OWF would be consented."

d) Para 124: downward or static trend for recreational and fishing activity; and

e) Para 125: additional WSV (traffic) associated with the TEOW; "WSV engaged on other projects within the Thames Estuary and transiting through the study area are anticipated to remain largely the same...based on consultation."

TH's response:

a) TH has no comment.

b) TH has no comment.

c) TH has no comment.

d) TH has no comment.

e) TH has no comment.

Question 3.12.21

Additions to the NRAA made at deadline 5

Would the IPs comment on the recent textual changes in regard to risk assessment made at Deadline 5 to the NRAA (rev B) [REP5-039]:

a) Para 135: Additional Risk Control: Enhanced promulgation of information (redrafted); Shipping and Navigation Liaison Group Terms of reference (redrafted); Post-consent Monitoring (redrafted); Enhanced optimisation of TEOW line of orientation etc (redrafted); Aids to Navigation etc (redrafted);

b) Paras 141 to 144 and Table 19: New insertion in rev B;

c) Para 145: "…the assessment of cost benefit in the original NRA remains valid."

d) Para 146: Summary results of the hazard workshop (New Annex C to Deadline 5 submission) "…ID's 4-18 [sic]…were updated based on IP comments…";

e) Ranked Hazard list (now Table 20) changed to omit columns for individual baseline and inherent risk scoring with colour grading; the highest inherent risk score now being 4.80 (previously 4.34); residual risk scores added to rev B.

f) Para 147: hazards with baseline risk ALARP-rated now seven in number (previously four in number);

g) Paras 152-154: New paras on hazard likelihood including a return rate for all commercial vessel collisions of 1 in 10 years to reflect stakeholder concerns;

h) Para 157: hazards with inherent risk ALARP-rated now eight in number (previously four in number);

i) Paras 158-160: New text on residual risk assessed;

j) Paras 169-173: New Text on Risk Control Validation;

k) Para 174: Added conclusions text on hazard consequence scores provided by PLA/ESL at D4C "…which has been used to update some hazard consequence scores."

l) Para 178: Added text on feedback from DPWLG on risk consequence scores; and

m) Para 184: New text varying the Recommendations made in the revA NRA Addendum.

TH's response:

a) See response to 3.12.19. With reference to Post Consent Monitoring, TH welcome the proposal and suggest provision is made for inclusion within the appropriate DMLs.

b) The risk control effectiveness table is the applicants own assessment and was not debated with IP's at any of the workshops or other forums. As such it is still our opinion that much of the risk mitigation suggested is reliant on other parties changing their operations and procedures. Whilst this should be expected to a certain degree by all involved, the overlying question is will these changes be made enforceable through legislation and are they accepted by those organisations? These commitments again should be assessed alongside the

applicant's statement in [REP5-012] D5 Appendix 7 para 81 as some require management by ESL and PLA.

c) TH accepts that an NRA carried out using the ALARP principle will have a cost benefit consideration included. We do not comment on cost implications to any party concerned.

d) TH were involved in the workshop identifying potential risks and agree the applicant has taken note of these deliberations.

e) TH agree that the scoring system adopted by the applicant has shown an increased final figure although still within the ALARP range. The omission of the columns does not make a fundamental impact on the final score.

f-h) It should be noted that all of the figures and highlighted risks were derived from a workshop where only 4 risks were discussed. The scoring from these risks was reached by general consensus and not agreement. The remaining risks were scored by the applicant's team post workshop and they have decided to highlight what could be considered the major risks.

The improved return rate shown of 1 in 10 from what was shown in the original NRA of 1 in 4.5 is, in our opinion, caused purely by the reduction of the original red line boundary and subsequent introduction of the SEZ as there appears to be no additional mitigation measures suggested.

i-l) TH note these statements but have no comment additional to our verbal and written representations previously submitted.

m) See response to 3.12.19 as this section only summarises previous statements throughout the NRAA.

Question 3.12.23

Decrease of navigational risk since 1997

Would THLS comment on the Applicant's statement in [REP2-014] para 49 "... navigational risk has decreased locally and internationally since 1997 (for instance due to new technology)..."?

TH's response:

TH do not agree with this statement. Whilst there has been an increase in the technologies available to the marine user (eg electronic charting and satellite navigation devices) not all mariners are equipped with these devices to the same level, and it has been shown that not all make full use of the equipment available to them. There are still numerous vessels with a reliance on traditional navigation methods. The introduction of AIS systems to the marine user has had an impact on navigation for those mariners with access to it but this also has limitations. There are still numerous incidents globally, some extremely serious, every year involving navigational errors and poor risk management.

Question 3.12.40

Final recommendation from competent maritime authorities

MCA's D5 submission [REP5-063] recommends that in order to mitigate risks to as low as reasonably practicable in the ALARP range, the Applicant should consider "increasing the sea room between the NE Spit buoy and the SEZ boundary to a distance that is acceptable for continued safe pilot transfer operations".

The ExA wishes to note that there is no longer any time remaining in the Examination timetable for further material change to the application nor for additional mitigation involving alteration of pilot transfer locations (which may need further simulation to demonstrate feasibility of safe navigation and pilot transfer operations in limit-state conditions and in any case could not be recommended to the Secretary of State as risk mitigation without additional Navigation Risk Assessment).

Therefore, the ExA seeks a final recommendation from the MCA and THLS on the overall acceptability of the NRA, the NRAA and the application (subject to the SEZ and other proposed risk controls as they currently stand) from the perspective of shipping and navigation safety in all MetOcean Conditions in which PLA pilot operations are able to operate at present. On the basis of the project as proposed, including the NRA, NRAA and other submitted evidence, what is the final recommendation of the MCA and THLS to the ExA/SoS in respect of the acceptability of the proposed development in navigation safety terms?

TH's response:

TH note the MCA statement and are of the opinion that any future increase in sea room would be welcome.

However, with the inclusion of the SEZ and the knowledge that turbines could not be placed outside of the stated boundary allows us to know the maximum extent of surface structures to the west, as such we consider the proposed area acceptable for surface navigation when there are no structures within the SEZ. It is still not apparent how structures like Jack Ups and other construction/maintenance equipment installed in the SEZ temporarily are to be mitigated for.

TH have previously submitted that the original NRA was a valid document but we disagreed that the increased risk was acceptable. With the introduction of the NRAA it is not easily apparent what document is relevant during construction. As such the NRAA was completed in a limited time period but does highlight the improved risk levels during the operational phase with the introduction of the SEZ.

"On the basis of the project as proposed, including the NRA, NRAA and other submitted evidence", TH are content, with some reservations, that the project would be acceptable. We are still concerned that available searoom can be reduced with the introduction of "temporary" structure within the SEZ which, depending on their location, could have an effect on the marine operations in the area. We are also aware that any safety zones established will also reduce the space available.

As has been stated by Captain Barker (TH) in his verbal submissions at ISH5 & ISH8 the proximity of the development to the coast and the range of marine activity in the area, mean the consequences of an incident in this location could be extremely severe.

All phases of the project must be considered and not just the operational phase highlighted in the NRAA when assessing the project.

TH are of the opinion that the aids to navigation established at this windfarm, if consent is granted, may need to be in excess of what is our current policy.

TH are also aware that the proposed development will have an impact on pilotage operations in the area and there will be a commercial and safety impact on these operators. It is outside of our remit to comment on these.

- **TH's responses to the ExA's commentary on the dDCO**

Comment No. 5

Interpretation: "commence"

The definition of commence retains scope for some substantial operations relevant to environmental effects to take place in both the marine and terrestrial environments before the formal commencement of the authorised development and the discharge of relevant requirements and/ or DML conditions.

a) In the marine environment: are there circumstances in which the nature or scale of any of the pre-commencement works shown underlined in column 3 might lead them to have significant effects that should be taken into account prior to the finalisation of relevant plans or strategies and in decisions to discharge any of the following DML conditions (n.b. – where conditions are repeated in both Sch 11 and Sch 12, the reference here to a condition to Sch 11 shall be taken to refer also to a condition for the same purpose in Sch 12):

- *8: (aids to navigation and the need for any notice to and direction on these by Trinity House);*
- *13: (submission and approval of any pre-construction plans or documents)*
- *20: (the fisheries liaison and co-existence plan)*

b) In the terrestrial environment: are there circumstances in which the nature or scale of any of the pre-commencement works shown underlined in column 3 might lead them to have significant effects that should be taken into account prior to the finalisation of relevant plans or strategies and in decisions to discharge any of the following requirements:

- *R14 (access management);*
- *R17 (highway access);*
- *R18 (Construction Environmental Management Plan);*
- *R19 (temporary fencing);*
- *R21 (Contaminated land and groundwater plan);*
- *R22 (Construction noise and vibration management plan);*
- *R23 (Construction traffic management plan);*
- *R24 (Onshore archaeological written scheme of investigation); and/ or*
- *R25 (Landscape and Ecological Mitigation plan)?*

c) Generally: as a consequence of drafting in Art 2, are there any remaining proposals for pre-commencement works that are not (for reasons that must be stated) subject to appropriate control in the dDCO?

IPs and Other Persons are requested to respond by Deadline 6 with the Applicant making a final response at Deadline 7.

TH's response:

TH has no comments other than to state that this is standard wording.

Comment No. 23

Arbitration: application to determinations by statutory and regulatory authorities

As currently drafted, Art 36 might apply to "any difference under any provision of this Order" which concerned a statutory/ regulatory body or public authority. There are multiple examples of this, affecting consents or approvals to be given by street authorities (Art 8(3) and Art 10(3), highway authority (Art 11), owners of watercourses (Art 14(3)), etc..

The arbitration procedure would not apply to differences between the Applicant and any of the relevant bodies concerned by the requirements listed in Art 37(2) (those bodies covered by Sch 10, where an appointed person appeal procedure is set out). This is because Art 36 only applies "unless otherwise provided for", and Art 37 would be such an alternative provision.

However, as currently drafted, this provision and Art 37 mean that there could be differences between how some disputes would be handled, even between the same parties. For example, a difference with a highway authority under a requirement in Art 37(2) (such as R17) would be handled in accordance with Sch 10, but a difference with a highway authority under Art 11(1)(b) would appear to be handled under the arbitration provisions.

> *a) Are potential differences of this nature intended and are the mechanics and effect of these differences well understood?*
>
> *b) If so, is it sufficiently clear as to whom (particularly to statutory/ regulatory bodies or public authorities) and when (in what particular circumstances) the arbitration provisions should apply and whether the cut-off between arbitration and a Sch 10 process is sufficiently clear and justified?*

There is an argument that if these distinctions are to be retained, they need to be made explicit on the face of the dDCO, in the same way that the matters to be dealt with by way of an appeal to an appointed person has been listed in Art 37(2). The Applicant is requested to set out a form of words that add additional clarity.

TH's response:

TH notes that this question is directed principally towards those bodies which perform approval functions in relation to the requirements in Part 3 of Schedule 1 to the dDCO. TH is not one of those bodies.

In relation to point (b), however, TH emphasises the point made in previous submissions that, in its view, it is currently not sufficiently clear that the arbitration procedures provided for do not apply to considering the appropriateness of determinations made by public bodies

exercising regulatory functions on behalf of the Secretary of State. This is especially relevant in the context of decisions on the discharge of conditions under the Deemed Marine Licences ("**DMLs**") in Schedules 11 and 12 of the dDCO, which TH is an important contributor to, in a number of instances, both in its own right and as one of the Marine Management Organisation's ("**MMO**") statutory consultees.

TH does not consider that it should be open to the Applicant to seek to refer to arbitration questions as to the appropriateness, or otherwise, of determinations made by the MMO (in consultation with its statutory consultees) or other public bodies under the DMLs. There is plainly no provision made for any form of arbitration in relation to conventional marine licences granted under the Marine and Coastal Access Act 2009 ("**the 2009 Act**") and no indication that Parliament intended, in passing the Planning Act 2008, that marine licences deemed granted under Orders granting development consent should be treated differently.

TH notes that, when this question arose in the context of the recently made Port of Tilbury (Expansion) Order 2019 ("**Tilbury 2**"), the Examining Authority, in its report and recommendations to the Secretary of State dated 20 November 2018, found in favour of the MMO. This view was subsequently adopted by the Secretary of State. The relevant extract from the Examining Authority's report and recommendations reads as follows:

> *'The Applicant stated that an arbitration clause should be included in the DML, as detailed in its closing statement [REP7-036, paragraph 6.9]. The MMO maintained that this clause should not be included [REP7-033].*
>
> *The arbitration clause, paragraph 27, was included in the DML in the Applicant's final submitted draft DCO [AS-089]. The Applicant asserted that the principle of the PA2008 was to ensure a "one stop shop" regime, and that the MMO's position in general was not prejudiced, since the proposed clause made it clear that it was not to be taken, or to operate, so as to fetter or prejudice the statutory rights, powers, discretions or responsibilities of the MMO.*
>
> *In the MMO's submission at Deadline 7 [REP7-033], the MMO stated that it strongly opposed the inclusion of such a provision, based on its statutory role in enforcing the DML. According to the MMO, the intention of the PA2008 was for DMLs granted as part of a DCO in effect to operate as a marine licence granted under the MCCA2009. There was nothing to suggest that after having obtained a licence it should be treated any differently from any other marine licence granted by the MMO (as the body delegated to do so by the SoS under the MCAA).*
>
> *Having considered the arguments of the Applicant and the MMO, the Panel finds in favour of the MMO in this matter for the reasons stated in the paragraph above.*
>
> ***Accordingly, the Panel recommends that paragraph 27 is deleted from the DML at Schedule 9 of the draft DCO.'***

TH does not, therefore, consider that the Applicant's previous submissions to the effect that determinations made by the MMO (in consultation with its statutory consultees) and other public bodies, such as TH, under the DMLs should be arbitrable is tenable in the light of the Secretary of State's decision on the Tilbury 2 application.

TH notes that the Applicant has obtained a legal opinion which purports to provide confirmation that decisions reached by public bodies, including those reached by the MMO (in consultation with its statutory consultees) under the DMLs, should be referable to arbitration. A written opinion to this effect was included in the Applicant's Deadline 5A submissions and **TH's detailed response to it will follow shortly upon Deadline 6**.

In TH's preliminary view, however, the strength of the arguments put forward on behalf of the Applicant in the written opinion are substantially weakened by the absence of any reference to the Secretary of State's decision on the Tilbury 2 application or the principles which underscore that decision as set out in the Examining Authority's report and recommendation.

Whilst TH's full response to the Applicant's written opinion will, as noted, follow shortly, TH does not consider that the arguments advanced on behalf of the Applicant change its view regarding the arbitrability of determinations made by public bodies in the context of the dDCO. TH does not consider that those determinations should be capable of arbitration and accordingly wishes, in particular, to see express wording on the face of the dDCO to that effect.

Question 24

Arbitration: application to determinations under Requirements (Schedules 1 and 10) and Conditions (Schedules 11 and 12)

Is it sufficiently clear and, if not, is any further drafting required to place beyond doubt that the provisions of Art 36 do not apply to determinations under, discharges or appeals in relation to Requirements (Schs 1 and 10) or to determinations under and discharges of Conditions in the DMLs (Schs 11 and 12)?

TH's response:

As set out in the response to Question 24 above, TH considers that clarity is required on the face of the dDCO that article 36 must not apply to determinations made by the MMO (in consultation with its statutory consultees) or other public bodies under the DML conditions in Schedules 11 and 12 of the dDCO. In TH's view, this is the necessary consequence of the Secretary of State's decision on the Tilbury 2 application, which confirms that, once deemed granted under an Order granting development consent, any DML should operate in the same way as any other marine licence granted under the 2009 Act.

TH is aware that the Examining Authority's report and recommendations in relation to the Tilbury 2 application turned on the inclusion of an express arbitration clause within the DMLs. That is not in issue here. However, the same principle must apply, in TH's view, in relation to article 36, since the Applicant seeks to rely upon that article as the basis of its purported authority to refer to arbitration determinations under the DMLs.

TH also notes that there is no express wording in the Tilbury 2 Order (as made) clarifying that arbitration does not apply to determinations made by the MMO under the DMLs. TH would make two submissions in this respect. First, the principal issue under consideration in the context of the Tilbury 2 application was the inclusion of an express arbitration clause in the DMLs, which is not the case here. Second, TH considers that it is important, in the context of both this and other offshore wind farm Orders, in the interests of promoting legal certainty for all parties involved in those Orders and more generally, for it to be made clear that arbitration does not apply in the context of the DMLs.

For completeness, TH has previously suggested drafting which would address this concern and provide the clarity referred to above. This drafting can be found at Appendix 2 of TH's written submissions dated 4 March 2019, which is set out again in the appendix to these submissions for completeness.

Comment No. 26

Arbitration: general appropriateness of provision: effects on statutory authority duties etc.

The question of the general appropriateness of the provision in Art 36 in relation to the enabling of an arbitration process to subsume the discharge of specific statutory duties placed on public authorities was argued orally at ISH9. Since then, the Applicant has provided:

> *a) Submissions on the approaches taken in respect of a similar provision in the Norfolk Vanguard and Hornsea Three Examinations [REP5-022]; and*
>
> *b) An additional Counsel's Written Opinion on DCO drafting in relation to arbitration [REP5-023].*

Public authorities whose determinations might be subject to arbitration and who have expressed concerns about the proposed approach are requested to review these documents and to make final written submissions on their preferred approach at Deadline 6.

TH's response:

As noted, TH's detailed response to the recently received Counsel's Written Opinion will be submitted to the examination shortly. TH's preliminary observations in relation to that Opinion are set out in the responses to Comment Nos. 23 and 24 above.

TH remains of the view that, as a minimum, express wording needs to be included in the dDCO to make it clear that article 36 (Arbitration) does not extend to enabling an Arbitrator to consider the appropriateness of decisions made by the MMO (in consultation with its statutory consultees) or other public bodies, such as TH, under the DMLs. TH considers that the drafting set out at Appendix 2 of its written submissions dated 4 March 2019 (please see the appendix to these submissions) would be appropriate in this regard. This suggested drafting also aligns with that which TH has proposed should be included in both the Norfolk Vanguard and Hornsea Three Orders.

Comment No. 29

Structures Exclusion Zone and navigation risk mitigation

Without prejudice to any more general oral and written submissions about the effect and extent of the Structures Exclusion Zone (SEZ) and other controls in the dDCO which aim to reduce navigation risk to ALARP, all relevant IPs and Other Persons are requested to make final submissions on additional drafting to provide for the SEZ by Deadline 6.

The submitted drafting should be prepared on the basis that, if the SoS was minded to make the Order, it would in their view bring risk as close to ALARP as can be achieved. If it remains their view that risk could be reduced further within an ALARP "band", this should be made clear in their submission.

Drafting proposals are sought that the relevant parties consider are best able to manage-down risk and are most likely to amend or augment provisions relevant to the Authorised Development and the SEZ (Sch 1 Part 1), the Requirements (Sch 1 Part 3), Protective Provisions (Sch 8) and/ or conditions to the Generation Assets DML (Sch 11).

The Applicant is requested to respond to all such drafting requests at Deadline 7 and in doing so, if it remains resolved not to adopt requested changes, to explain why these are not necessary.

TH's response:

TH are content with the applicants draft wording submitted at DL5 in document EN010084-001860 page 35 & 36

Comment No. 30

Navigation safety and shipping impact mitigation plan

Port of Tilbury London Ltd. and London Gateway Port Ltd. (the Ports) [REP5A-001] highlight that whilst Sch 11 Condition 13 (Generation Assets DML) provides an approval to the MMO for a construction programme and monitoring plan to include "details of the works to be undertaken within the structures exclusion zone; and [...] the proposed timetable for undertaking of such works within the structures exclusion zone..." it would be desirable for this or an equivalent plan to be approved by the Maritime and Coastguard Agency. The Ports suggest that for this to be secured, a new Requirement should be provided, translating the effect of the plan approval requirement in Sch 11 Condition 13 into the body of the DCO for approval by the Maritime and Coastguard Agency.

By Deadline 6:

a) The Maritime and Coastguard Agency is requested to engage with Trinity House to consider whether such a provision would address their concerns and; if so

b) Whether it should secure consultation or approval by either one or the other body (which one) and

c) How such a provision might be drafted.

By Deadline 7:

d) The Applicant, Port of London Authority, Port of Tilbury London Ltd. and London Gateway Port Ltd. are to respond on the need for and form of any such provision.

It follows that a final response by the Applicant to drafting arising from this comment can be made at Deadline 8.

TH's response:

TH consider this style of provision would not deliver significant risk mitigation in addition to the existing provisions. If it does get included it would be for the MMO and MCA to approve as it would need to encompass post consent requirements.

Comment No. 46

Construction monitoring: vessel traffic monitoring

Trinity House has requested at Deadline 5A [REP5A-006] that it should be added to the bodies receiving monitoring reports.

The Applicant is to consider this request and by Deadline 6 is either to accede to it, or to provide reasons why it is not necessary to accede to it.

Is such data relevant to the provision of VTS (vessel traffic services) and notices to mariners by Port of London Authority?

TH's response:

TH remains of the view that it should be added to the bodies receiving monitoring reports but will await the Applicant's response at Deadline 6 before making further submissions (if any) in relation to this issue.

Comment No. 47

Post construction: vessel traffic monitoring

Trinity House has requested at Deadline 5A [REP5A-006] that Condition 18 should be amended to provide for operational vessel traffic modelling in similar terms to the construction vessel traffic modelling provided for in Condition 17. It has requested to be a recipient of monitoring reports.

The Applicant is to consider this request and by Deadline 6 is either to accede to it, or to provide reasons why it is not necessary to accede to it.

Is such data relevant to the provision of VTS (vessel traffic services) and notices to mariners by Port of London Authority, or to the provision of services by the Maritime and Coastguard Agency and/ or the MMO?

TH's response:

TH remains of the view that it should be added to the bodies receiving monitoring reports but will await the Applicant's response at Deadline 6 before making further submissions (if any) in relation to this issue.

We trust that these 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

[redacted]
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Legal & Risk Advisor

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Appendix
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.