



TRINITY HOUSE

6 June 2019

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

Your Ref: EN010084
Identification No 20012441.

Thanet Offshore Wind Farm Extension Project Written Representations at Deadline 7

Dear Sir / Madam

We refer to the above application for development consent.

This letter sets out Trinity House's ("TH") further written representations to the Examining Authority ("ExA") at Deadline 7, Thursday 6 June 2019.

This response refers to the draft Development Consent Order ("dDCO") (Date May 2019 Revision F) published at Deadline 6 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 May 2019 (Revision F).

Schedule 11 Part 4 - Post construction: vessel traffic monitoring

Trinity House requested at Deadline 5A [REP5A-006] that Condition 18 of Schedule 11 Part 4 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.

Trinity House note that whilst the applicant has provided for such reports (as per the latest version of the DCO Rev. F at Deadline 6) for construction traffic monitoring to be submitted to TH this is not provided in the case of *post construction* traffic monitoring reports. Accordingly Trinity House requests that an appropriate amendment is made to Condition 18(1)(4).

Arbitration

For the reasons expressed in earlier submissions, both written and oral, Trinity House remains fundamentally opposed to the inclusion of any provision in the dDCO which would authorise decisions made by the MMO on the discharge of DML conditions to be referred to arbitration. Throughout Trinity House has argued, consistent with the MMO's position that the application of the arbitration provision to Trinity House and the MMO is inappropriate.

In this regard TH enclose with this response an Opinion by Rebecca Clutten of Counsel which responds to the Counsel's Opinion obtained by Vattenfall Wind Power Limited (the Applicant), in relation to arbitration. That Opinion had been sought by Vattenfall over concerns raised by TH and the MMO as to the operation of the arbitration provision in this dDCO. It was submitted by the Applicant at Deadline 5 of the examination process.

The Opinion of Rebecca Clutten, in response to the Vattenfall Counsel's Opinion, concurs with TH's concern about the appropriateness of the arbitration provision applying to TH and the MMO.

Appeals mechanism

Trinity House notes with concern the very late inclusion in the dDCO of an Appeals mechanism, at new Part 5 to Schedules 11 and 12 and new Schedule 14 to the dDCO including very late amendments to Arbitration provision (Article 36). Trinity House is very concerned that it and other Interested Parties have not had sufficient opportunity to respond to this late inclusion and is prejudiced by this.

Similar provisions have been included, again at a late stage, in the draft Norfolk Vanguard Offshore Wind Farm Order, also at the late stages of examination.

TH reiterates its view which it has consistently expressed in the examination process for the draft Norfolk Vanguard OWF that any process for the discharge of DML conditions under the dDCO is of relevance to it, as one of the Marine Management Organisation's ("**MMO**") statutory consultees in respect of applications for approval under those conditions. Trinity House's concerns on the draft of the dDCO as now very recently revised are as follows-

- it is acknowledged that there is a settled, statutory process for appeals against licensing decisions set out in s. 73 of the Marine and Coastal Access Act 2009 ("**the 2009 Act**") and regulations made under that section;
- however, although the refusal of a marine licence, or grant subject to conditions, is the subject of a statutory appeal procedure, there is no statutory right of appeal in relation to decisions made by the MMO on the discharge of DML conditions. Any challenge would therefore be required to be brought by way of judicial review;
- the draft appeals process currently included in Part 5 of the Schedules containing the DMLs is accordingly a process which departs from the established statutory regime. It has no current legislative (primary or secondary) basis, as far as TH is aware. It would not be consistent with existing statutory processes;
- as drafted, the Applicant for this Order would be placed in a different, and more advantageous position than an applicant for a marine licence pursuant to the 2009 Act. The Applicant would have an advantageous appeal process which is not available to other marine licence holders. This would lead to an un-level playing field between

those who obtained a marine licence direct from the MMO under the 2009 Act and those who obtained a licence under the Planning Act procedure. This would create the potential for serious inconsistency in conflict with the existing statutory regime put in place by Parliament.

- We draw the ExA's attention in respect of the recent Tilbury 2 – Proposed Termination at Former Tilbury Power Station DCO, to the fact that the Examining Authority accepted an argument by the MMO that, once a DML has been granted, there was nothing in the Planning Act 2008 that suggested that an applicant for a DCO should be treated any differently from any other marine licence holder, and that the MMO's ordinary powers should therefore be maintained (see pages 233 – 234 of the Examining Authority's Report and Recommendations to the Secretary of State);
- the appropriateness of the statutory appeal procedure in cases of refusal of a marine licence, or grant subject to conditions, has been subject to detailed Parliamentary scrutiny and enacted in the 2009 Act. As previously submitted, in Trinity House's view, it is inadvisable to seek to rely (subject to modifications) upon a process which has been tailored to very different circumstances to those in which it is now sought to be deployed in the context of this Order;
- further, the effect of the drafting changes in Part 5 of the Schedules containing of the DMLs is to place strict, potentially unrealistic, time limits on the process for appeals which relate to decisions made by the MMO on the discharge of conditions. Similarly, the revised drafting imposes strict, potentially unrealistic, time limits within which the Secretary of State must make a decision. In TH's view, such drafting is likely to be ill-suited to this and similar Orders, given the complex nature and range of issues which may arise on the discharge of DML conditions, engaging as they do important matters of public interest. As one of the MMO's statutory consultees on decisions relating to the discharge of DML conditions, TH is concerned that its expert view may not be capable of full and reasoned consideration within these restrictive timeframes and the quality of the licence in safety of navigation terms vitiated as a result.

For these reasons, TH considers that it would be inappropriate for this Order to confer a right of appeal in relation to the discharge of conditions under the DMLs. Trinity House's view is that the mechanism available to the Applicant to challenge a decision, or non-decision, is judicial review. Notably, that view also appears to accord with recent DCO precedent.

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

Yours faithfully,

Russell Dunham

Russell Dunham ACII
Legal & Risk Advisor

Email: Russell.dunham@trinityhouse.co.uk