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Your ref: **20012643**

Our ref: Thanet Extension Offshore
Windfarm Project (EN010084)

6th June 2019

Dear Sir/Madam

**Thanet Extension Offshore Windfarm Project (EN010084) - Deadline 7
Submission**

Thank you for the opportunity to provide a written submission at Deadline 7. The Maritime and Coastguard Agency's (MCA) responses to the remaining Examining Authority's Commentary on the dDCO items can be seen in the attached table.

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.

Yours faithfully,

Helen Croxson
OREI Advisor
Maritime and Coastguard Agency



HM Coastguard

Thanet Extension Offshore Windfarm Project (EN010084)

MCA Deadline 7 Response

Ref	Questions	MCA Response
	RULE 17 Letter remaining Action	
4.12.7	<p>Responses to Applicant's new evidence and concluding remarks at D6</p> <p>The Applicant has submitted a new body of evidence relevant to shipping and navigation at Deadline 6. Please review this evidence and provide all concluding remarks in relation to it at Deadline 7. The Applicant may make closing submissions on responses to this question at Deadline 8. In responding to this request and without excluding a general capacity to comment on other matters, IPs and OPs are asked to provide observations on whether the following have addressed previously expressed concerns:</p> <p>a) Appendix 22 responds to ExA questions on hazard scoring by HAZMAN2 software, provides additional information on expert credentials and Marico QA/QM procedures.</p> <p>b) Appendix 26 Annex C provides Applicant analysis of commercial impact to pilot services. It is not evident that IPs / OPs have been consulted.</p> <p>c) Appendix 38 sets out the specification and potential providers for a Simulation Study.</p>	<p>The MCA has no further comments to make in addition to its deadline 6 and 6A submissions.</p>

	<p>d) Appendix 41 provides new animations of selected vessel tracks with commentary by the Applicant's experts.</p> <p>Appendix 42 provides new Collision Risk Modelling (CRM) post SEZ by a new consultancy. How does this compare with the Collision Risk Modelling within the Application produced by Marico? In this last respect, the Applicant is asked to provide a tabulated comparison between the Marico CRM and the new CRM.</p>	
	<p>Examining Authority's Commentary on the dDCO</p>	
<p>Comment no. 5. Art 2</p>	<p>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.</p> <p>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 (nb – 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):</p>	<p>MCA has no comments to add.</p>

	<ul style="list-style-type: none"> • 8: (aids to navigation and the need for any notice to and direction on these by Trinity House); and • 13: (submission and approval of any preconstruction plans or documents) • 20: (the fisheries liaison and co-existence plan) 	
13. Art 16	<p>Public rights of navigation: justification for extinguishment of rights</p> <p>The Applicant's attention is drawn to Deadline 5A submissions by Trinity House [REP5A-006] to the effect that it is not necessary or desirable to include a general power to extinguish public rights of navigation in the dDCO. Trinity House asserts that the Applicant has not provided a sufficiently compelling reason for a provision that would have significant effects.</p> <p>a) Please respond to these submissions fully by D6. b) Why is this provision needed in its current form? c) What would be the effect if the dDCO did not provide the extinguishment sought?</p> <p>Trinity House, Maritime and Coastguard Agency and (to the extent that this issue affects its interests) Port of London Authority are invited to comment on the Applicant's response at Deadline 7.</p>	<p>In its deadline 5 submission, the MCA questioned why the extinguishment of the rights of navigation was 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.</p> <p>DfT Legal: The concern with article 16 remains the automatic extinguishment of the rights of navigation after 14 days of a submitted plan. DfT are of the view that article 16 ought to be amended to make it clear that the rights of navigation may only be extinguished once the area has been marked to the reasonable satisfaction of Trinity House. DfT would expect the extinguishment of such navigation rights to then be communicated to interested parties such as the MCA so that mariners can be informed.</p>
15. Art 16	<p>Public rights of navigation: additional security for navigation safety in construction</p> <p>Port of Tilbury London Ltd., London Gateway Port Ltd. have requested [REP5A-001] that Art 16 be</p>	<p>MCA has no further comments to make.</p>

	<p>amended to extend the navigation safety measures for permanent structures to cover temporary construction works. It flags that similar measures enabling Trinity House to give directions for the lighting and marking of works are a standard provision in Ports DCOs and Harbour Orders.</p> <p>The Applicant is requested at Deadline 6 to either:</p> <p>a) Propose relevant changes; or b) Provide an explanation why such drafting is not warranted.</p> <p>The relevant IPs and Other persons are asked to make concluding submissions on this point at Deadline 7.</p>	
22. Art 36	<p>Arbitration: proposed role for the Centre for Effective Dispute Resolution</p> <p>At paragraph 7.1 of the Applicant’s oral submissions to ISH7 [REP3-020], the Applicant undertook to ‘seek confirmation that the inclusion of the Centre for Effective Dispute Resolution is an appropriate body to adjudicate in matters pertaining to arbitration’.</p> <p>a) If this body is to remain on the face of the dDCO, the ExA requests the Applicant to provide a letter of remit and consent from it, demonstrating that it has the relevant expertise to perform the remit provided in this provision and agrees to perform the statutory function that the dDCO would place upon it.</p> <p>b) Alternatively, if it is argued that a backstop other than the SoS should be retained, is there</p>	<p>DfT legal do not envisage any problems with having the Centre for Effective Dispute Resolution “CEDR” as the body to adjudicate in matters pertaining to arbitration. It is a reputable independent non-profit organisation and a registered charity specialising in skills in effective dialogue and solution based outcomes. CEDR is recognised by both the Law Society and the Bar Council as an organisation capable of delivering continuing professional development in mediation skills training. However, it is noteworthy that the body that is usually referred to in Arbitration clauses in other DCO’s is the “Institute for Civil Engineers.”</p> <p>Counsel’s opinion in relation to the arbitration clause was sought by the Applicant in April 2019 and is available on the PINS website. DfT legal maintain the same views as previously submitted, that the “unless otherwise provided for” in Article 36 allows for the MMO to argue that there is already a process by which approval or consent under the marine licence is</p>

	<p>any other relevant body that might discharge the role provided for the Centre for Effective Dispute Resolution?</p> <p>c) Do any other IPs / Other Persons have final views to put to the ExA on the suitability of the Centre for Effective Dispute Resolution, any other relevant body or the SoS to perform the backstop appointment of an arbitrator?</p>	<p>resolved. This view also seems to be supported by Counsel when he states, “The arbitration provision does not restrict the MMO or TH’s powers in the first instance, rather the arbitration provision is only engaged in the event of a dispute arising” [para 36(a)].</p> <p>Counsel also opines that a public body such as the MMO is not precluded from arbitration by virtue of being a public body [para 14]. In contrast, it is whether the subject matter of the dispute is arbitrable which is key; “It is important to recognise that the arbitration provision will only apply to disputes which fall within its scope” [para 18]. Counsel concludes that the MMO is still able to consult Trinity House on matters relating to safety at sea and an arbitrator would be able to consider any consultation responses via Trinity House. Notable that although Counsel thinks that the saving provision in article 39 is “not necessary”, he nonetheless concludes, “I see no reason why the saving provision could not be retained as it appears to provide comfort to TH and it may be relevant to other provisions in the DCO” [para 38].</p> <p>Ultimately, DfT legal understands that the MCA should support the MMO’s stance on this matter. The way in which certain issues arising under the DCO (whether by arbitration / appeal / otherwise) ought to be made explicit on the draft DCO.</p>
23. Art 36	<p>Arbitration: application to determinations by statutory and regulatory authorities</p> <p>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</p>	<p>No further comments to add.</p>

	<p>street authorities (Art 8(3) and Art 10(3), highway authority (Art 11), owners of watercourses (Art 14(3)), etc..</p> <p>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.</p> <p>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.</p> <p>a) Are potential differences of this nature intended and are the mechanics and effect of these differences well understood?</p> <p>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?</p>	
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	<p>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.</p>	
<p>24. Art 36</p>	<p>Arbitration: application to determinations under Requirements (Schedules 1 and 10) and Conditions (Schedules 11 and 12)</p> <p>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)?</p>	<p>No further comments to add.</p>