



# Triton Knoll Offshore Wind Farm Limited Triton Knoll Electrical System

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**Appendix 31: Response to  
Internal Drainage Board's  
representations on form of  
Restrictive Covenant**

**Date: 5<sup>th</sup> January 2016**

**Appendix 31 of the Applicant's  
response to Deadline 4**

Triton Knoll Offshore Wind Farm Limited

## Triton Knoll Electrical System

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Date: 5<sup>th</sup> January 2016

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## 1. Introduction

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1.1 This note sets out Triton Knoll Offshore Wind Farm Limited's ("the Applicant's") response to the submissions made by Black Sluice Internal Drainage Board, Lindsey Marsh Drainage Board, and Witham Fourth Internal Drainage Board (collectively "the IDBs") for Deadline 3 (30<sup>th</sup> November 2015) ("the IDBs' Submissions") regarding the proposed imposition of restrictive covenants along the Triton Knoll Electrical System ("TKES") cable route.

## 2. The proposed restrictions

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2.1 The Applicant is seeking rights which will restrict the way in which parties with an interest in the land can use it or carry out certain activities. The proposed restrictions will bind anyone with an interest in the land at the date that they are imposed (including freehold owners and lessees) and will 'run with the land', i.e. will bind successors in title to those owners and other interests.

2.2 The restrictions sought are set out in Schedule 5 of the draft Development Consent Order ("the Order") (Revision D), and are proposed to be imposed on the parcels of land which are listed in the corresponding column of that table (please see the first rows of the tables in Schedule 5 of the draft DCO submitted as Appendix 15 of the Applicant's response to Deadline 4 (pages 50 and 58 to 59) [REP3-043]).

## 3. Identification of Land interests

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3.1 The Applicant understands that neither Black Sluice Internal Drainage Board, nor Lindsey Marsh Drainage Board, has any interest in land forming part of the cable route. Witham Fourth Internal Drainage Board has advised the Applicant that it has land interests in the following plots which will be bound by the restrictive covenant: 21/04, 22/04, 22/07, 22/12, 22/16, 22/18, 22/19, 22/21, 22/22, 23/01, 25/09, 26/06, 26/07, 26/09, 30/15, 30/17, 30/18, 32/03, 32/09, 32/10, 32/11, 32/12, 33/13, 33/14, 33/15, 35/07, 36/06 and 36/07.

3.2 The IDBs explain, at paragraph 3.3 of their submission to Deadline 3, that there are a certain number of watercourses which are maintained by the IDBs under permissive powers but which are on land that is not in their ownership. This includes land which is proposed to be bound by the restrictive covenant.

3.3 Furthermore, the IDBs have indicated that they may in the future need to take responsibility for and maintain other watercourses which are on land that is proposed to be bound by the restrictive covenant.

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- 3.4 Paragraph 4.9 of the IDBs' submission to Deadline 3 states that the Applicant's Book of Reference incorrectly identifies one or other of the IDBs as an owner or reputed owner of land to be subject to the restrictive covenant. The purpose of the Book of Reference is to identify all potential land interests to ensure that every person whose land may potentially be affected by compulsory acquisition is served with relevant statutory notices and can take part in the Examination if they wish to do so. Where the Applicant has not had clarity as to ownership, it has taken a precautionary approach and noted parties as reputed owners/occupiers to ensure that any potential owners/occupiers of the relevant land parcel are notified.
- 3.5 The IDBs cite plot 02/07 as an example, in which there is a drain which is maintained by Lindsey Marsh IDB. The Applicant noted Lindsey Marsh IDB in the Book of Reference as a reputed owner. The IDBs have now confirmed that Lindsey Marsh IDB does not own land or have an interest in land in plot 02/07; however the IDBs also explain that their land ownership is being checked (see paragraph 4.10 and footnote 4 to the IDBs' submission to Deadline 3). Until such time as the IDBs have substantiated their land interests the Applicant considers it prudent to retain the IDBs' entries in the Book of Reference.
- 3.6 It is important to note that restrictive covenants can only bind interests in land. If the IDBs do not in fact have any interest in the land proposed to be the subject of the restrictions, there is nothing to be bound. It is also important to note that the restrictive covenant will only bind land once the Development Consent Order is made and the powers of compulsory acquisition included in it are exercised. Identification of a potential land interest in the Book of Reference has no bearing on this as this merely records assumed owners at a particular snapshot in time.

## 4. IDBs statutory powers and duties

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- 4.1 The IDBs' submission to Deadline 3 sets out the statutory powers and duties of the IDBs. Paragraph 2.1 of the submission to Deadline 3 explains that the IDBs have an overarching duty in relation to the drainage of land within their districts by virtue of section 1 of the Land Drainage Act 1991 ("the 1991 Act"). Subsection (2) of section 1 provides that:

*"An internal drainage board shall-*

*1.1 exercise a general supervision over all matters relating to the drainage of land within their district; and*

*2.1 have such powers and perform such other duties as are conferred or imposed on internal drainage boards by this Act."*

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3.8 Paragraph 2.2 of the IDBs' submission to Deadline 3 explains that the IDBs have a number of statutory powers, notably those in section 14 of the 1991 Act, and which are exercisable over all watercourses within their respective districts, with the exception of main rivers and their banks. Section 14(2) provides power to:

*“(a) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work;*

*“(b) to improve any existing works, that is to say, to deepen, widen, straighten or otherwise improve any existing watercourse or remove or alter mill dams, weirs or other obstructions to watercourses, or raise, widen or otherwise improve any existing drainage work;*

*“(c) to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act (other than an act referred to in paragraph (a) or (b) above) required for the drainage of any land.”*

- 4.2 IDBs can only enter land of another without notice in order to maintain existing works. Otherwise, the IDBs must rely on the powers of entry contained within section 64 of the 1991 Act to exercise their section 14 powers. Those powers of entry must, except in the case of an emergency, be exercised after having given notice of intended entry to the occupier of the land, which, in the case of residential land, or where the demand is for admission with heavy equipment, at least 7 days prior notice must be given (section 64(3) of the 1991 Act).
- 4.3 The Applicant notes therefore that for some of the land along the proposed TKES cable corridor, in which the IDBs do not have any land interests, the IDBs do not have an automatic right to access watercourses on land owned by third parties. Rather, the IDBs would need to request that a landowner gives access to the IDBs to carry out their functions, and/or, were that request to be denied by the landowner, the IDBs would need to enforce entry pursuant to their statutory powers. The proposed restrictions sought by the Applicant in the DCO will not alter that basic premise as they will not bind the IDBs where they do not have a land interest. Nor does the restrictive covenant dis-apply or vary the IDBs' statutory powers in any way. Notwithstanding, and for the avoidance of any possible doubt, the Applicant agrees to vary the terms of the proposed restrictive covenant to make it clear that it does not prevent the exercise of the IDBs' statutory powers and does not therefore prevent landowners for allowing the IDBs access for that purpose. This will address paragraph 4.11 of the IDBs' submission to Deadline 3.
- 4.4 The IDBs' statutory powers in the 1991 Act are not unrestricted. Notably, they are restricted by section 67(1) of the Land Drainage Act 1991, which sets out protective provisions for particular undertakings in connection with the carrying out of works and other activities by the IDBs under the Act.

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- 4.5 The undertakings which are afforded protection from works that are carried out by the IDBs, are those listed in Schedule 6 of the 1991 Act. Paragraph 1(1)(f) of Schedule 6 expressly refers to: *“the undertaking of any person authorised by a licence under Part I of the Electricity Act 1989 to generate, [supply or participate in the transmission of] electricity”*.
- 4.6 As the holder of an electricity generation licence, the Applicant (and subsequently the OFTO) will be protected by the provisions of Schedule 6 once the Triton Knoll Electrical System is installed.
- 4.7 The nature of the protections which will be afforded to the Applicant and other undertakings are set out in Schedule 6, and include:
- (Paragraph 2): a restriction on the IDBs’ ability to do anything which prejudices the exercise of any statutory power, authority or jurisdiction from time to time vested in or exercisable by other undertakers; and
  - (Paragraph 3): a restriction on the IDBs’ ability to do any work, without the consent of the undertaker which interferes with:
    - the works or any property which is vested in, or under the control of, the persons carrying on that undertaking, in their capacity as such; or
    - with the use of any such works or property, in such a manner as to affect injuriously those works or that property or the carrying on of that undertaking.
- 4.8 Consent can be given by the Applicant (and other undertakings) to the IDBs to any of those matters in paragraphs 2 and 3 above, subject to reasonable conditions, but shall not be unreasonably withheld (see paragraph 5 of Schedule 6 to the 1991 Act).
- 4.9 The 1991 Act therefore acknowledges the need for protection for the assets of undertakings such as the Applicant. The principle of protecting nationally significant infrastructure assets such as TKES from interference/damage by the IDBs is therefore firmly established in the 1991 Act.

## **5. How the relationship between the Applicant and the IDBs is proposed to be governed**

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- 5.1 The IDBs will have the benefit of protective provisions in Schedule 8 to the draft Order, which will control how the Applicant carries out the proposed authorised works pursuant to the Order that have the potential to interfere with the IDBs’ maintained watercourses or the exercise of the IDBs’ functions. These protective provisions apply
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regardless of whether or not the IDBs have a land interest and it is not appropriate or necessary to seek to link the compulsory acquisition of rights in the manner proposed at paragraph 4.12 of the IDBs' submission to Deadline 3.

- 5.2 Where the IDBs need to exercise their own statutory functions, schedule 6 to the 1991 Act contains statutory restrictions on the IDBs' ability to exercise functions that could injuriously affect TKES. Those restrictions are not dissimilar in approach to the protective provisions to be provided to the IDBs in Schedule 8 to the draft Order, however, they are less detailed and potentially wide in scope.
- 5.3 Where the IDBs are a landowner, the IDBs' ability to carry out works to the land is, as landowner, unlimited, and there is at present nothing to prevent that land from being used for any purpose, by either the IDBs or their tenants, and for purposes which would engage the protections in Schedule 6 to the 1991 Act. It is possible therefore, that unless restrictions are imposed, the IDBs or their tenants could carry out works which could damage/interfere with TKES. For this reason, the Applicant needs to ensure that such works are only carried out with its consent, hence the imposition of the restrictive covenant. It is also important that the activities of any occupiers are similarly controlled.
- 5.4 The proposed terms of the restrictive covenant are more detailed, but narrower in scope, than the statutory restrictions in schedule 6 to the 1991 Act. Furthermore, following consultation with the IDBs, and in acknowledgement of their concerns, the Applicant proposes to make amendments to the current form of restrictive covenant so as to provide additional comfort that (1) it does not restrict the exercise of statutory powers, and (2) to clarify a number of activities which can be carried out without requiring the Applicant's consent. These are set out in section 6 below.

## 6. Proposed modifications to the form of restrictive covenant

### Paragraph (a)

Concern raised	Proposed Modification
Witham Fourth IDB raised concerns that paragraph (a) would appear to prohibit any works upon its land	Covenant re-worded to prohibit specified activities <i>unless</i> The Applicant's consent is obtained
As above	Prohibition on "works of any kind" limited to intrusive works such as the construction of foundations and footings

## Paragraph (b)

Concern raised	Proposed Modification
Concern raised by farmers that this paragraph would prevent the repair of existing farm access tracks, and the laying or re-laying of hard core surfaces, without the Applicant's consent	Covenant amended to make it clear that it does not relate to existing hard surfacing or works consisting of the laying or re-laying of hard core surfaces/tracks that do not involve manholes, access chambers or other access points on the surface of the land
Inclusion of reference to expense is not appropriate.	Reference to expense removed- <i>"materially more difficult or expensive to maintain the authorised project"</i> changed to <i>"materially more difficult to access or maintain the authorised project"</i>

## Paragraph (c)

Concern raised	Proposed Modification
The IDBs raised concerns that paragraph (c) would prevent them from carrying out their statutory functions	Works reasonably required to be carried out by a body exercising its statutory functions or statutory rights specifically excluded
Concerns raised by farmers that paragraph (c) would prevent them from draining their land and carrying out day-to-day agricultural activities without obtaining the Applicant's prior consent	Activities specified, which will not jeopardise the physical integrity of the proposed development, which may be undertaken without the need to obtain the Applicant's prior consent

## Paragraph (d)

Concern raised	Proposed Modification
Paragraph (d) would appear to prohibit cutting vegetation within watercourses and along the bank tops	Covenant amended to make it clear that it does not relate to existing planting but prohibits new planting or growing without consent (including permitting such growth)
Inclusion of reference to expense is not appropriate	Reference to expense removed- <i>“materially more difficult or expensive to maintain the authorised project”</i> changed to <i>“materially more difficult to access or maintain the authorised project”</i>

- 6.1 The consolidated modified form of restrictive covenant, which has been provided to the IDBs for comment, is as follows (no changes are proposed to paragraph (e) of the covenant as it is essential that the Applicant can at all times comply with the relevant regulatory framework):

***A restrictive covenant over the land for the benefit of the remainder of the Order land to-***

*(a) prevent anything being done in or upon the land or any part thereof for the purpose of:*

- (i) the erection of any buildings; or*
- (ii) the construction, erection or works of any kind requiring foundations, footings or other supporting structures;*

*without the consent in writing of the undertaker (such consent not to be unreasonably withheld or delayed if the proposed building, erection, construction or works would not cause damage to the relevant part of the authorised project nor make it materially more difficult to access or maintain the authorised project);*

*(b) prevent anything to be done by way of hard surfacing of the land with concrete of any kind or with any other material or surface whatsoever without the consent in writing of the undertaker (such consent not to be unreasonably withheld or delayed if the proposed surfacing would not cause damage to the relevant part of the authorised*

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*project nor make it materially more difficult to access or maintain the authorised project) provided that the undertaker acknowledges that:*

*(i) the laying of new hard core access tracks will not require the consent of the undertaker where no manhole(s), access chamber(s) or other access points serving the authorised project are located on the surface of the land; and*

*(ii) the maintenance or repair of pre-existing hard surfacing, hard core surfaces or tracks with the same or equivalent surface or material will not require the consent of the undertaker where no manhole(s), access chamber(s) or other access points serving the authorised project are located on the surface of the land;*

*(c) prevent mole draining or the mudding out of dykes (i.e. the removal of silt sediment) or anything to be done by way of excavation of any kind or agricultural practices exceeding 0.6 metres in depth from the surface of the land or watercourse, land drain, ditch or agricultural field drain or river bed (a “Watercourse”) (as applicable) or any activities which increase or decrease ground cover or soil levels in any manner whatsoever without the consent in writing of the undertaker (such consent not to be unreasonably withheld or delayed if the proposed activity would not cause damage to the relevant part of the authorised project nor make it materially more difficult to access or maintain the authorised project, with such consent being subject to such reasonable conditions as the undertaker may require) PROVIDED THAT:*

*(i) the preceding restrictions in this paragraph (c) shall not apply to National Grid or any other body exercising statutory functions or statutory rights within the land;*

*(ii) ploughing and sub-soiling not exceeding 0.6 metres in depth from the surface of the land shall not require the consent of the undertaker;*

*(iii) flushing of land drainage systems, maintenance of outfalls and culverts of land drainage systems, clearance of vegetation (by use of machinery or by hand), and the operation of existing land drainage systems shall not require the consent of the undertaker;*

*(d) prevent the planting or growing (including permitting growth) within the land of any trees, shrubs or underwood without the consent in writing of the undertaker (such consent not to be unreasonably withheld or delayed provided that the proposed trees, shrubs or underwood would not cause damage to the relevant part of the authorised project nor make it materially more difficult to maintain or to access the relevant part of the authorised project) provided that the growing within the land of any pre-existing trees, shrubs or underwood will not require the consent of the undertaker;*

*(e) prevent anything being done in or upon the land or any part thereof which shall or may interfere with the exercise of the other rights set out in this Schedule 5 or the use of the authorised project or in any way render the authorised project or any part thereof in breach of any statute or regulation for the time being in force and applicable thereto.*

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- 6.2 The amendment to paragraph (c) (i) of the restrictive covenant will enable the IDBs to carry out all activities reasonably required to enable them to exercise their statutory duties and statutory rights, and will enable third party landowners to grant any necessary rights for those purposes. The amendment to paragraph (d) makes it clear that it does not prohibit cutting existing vegetation within watercourses and along bank tops, but prohibits new planting or growing without consent (including permitting such growth).