

From: [Russell Dunham](#)
To: NorfolkVanguard@pins.gsi.gov.uk
Cc: [Navigation](#)
Subject: FW: The Norfolk Vanguard Offshore Wind Farm - Written Submissions to Examining Authority following ISH on 7 February
Date: 13 February 2019 16:31:47
Attachments: [Updated Letter.pdf](#)

Dear Sir / Madam

Identification No. 20011687

The Norfolk Vanguard Offshore Wind Farm

Re: written submissions to the Examining Authority following Issue Specific Hearing on 7 February.

Further to my email earlier today (as below), concerning the above, further pertinent information has today come to the attention of Trinity House which we consider would be of importance to the Examining Authority.

With apologies we would, therefore, respectfully request to submit a slightly revised submission as per the attached letter – in substitute to the letter emailed earlier today. The change is this regard being reflected at paragraph 2.7 of Appendix 1 to the letter and which we consider are relevant to this application.

We had not, incidentally, dispatched our earlier hard copy by post so the posted copy will reflect this very latest submission.

Kind Regards

Russell

From: Russell Dunham
Sent: 13 February 2019 08:43
To: 'NorfolkVanguard@pins.gsi.gov.uk' <NorfolkVanguard@pins.gsi.gov.uk>
Cc: Navigation <Navigation.Director@thls.org>
Subject: The Norfolk Vanguard Offshore Wind Farm - Written Submissions to Examining Authority following ISH on 7 February

Dear Sir / Madam

EN010079

Identification No. 20011687

The Norfolk Vanguard Offshore Wind Farm

Please find attached Trinity House's written submissions to the Examining Authority following

Issue Specific Hearing on 7 February.

A hard copy will be sent by post.

Kind Regards

Russell Dunham



Russell Dunham ACII

Legal & Risk Advisor

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TRINITY HOUSE

13 February 2019

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

Your Ref: EN010079

Identification No. 20011687

The Norfolk Vanguard Offshore Wind Farm Project

Dear Sir / Madam

We refer to the above application for development consent.

Trinity House attended and made submissions at the Issue Specific Hearing into the draft Development Consent Order on Thursday 7 February 2019 (**"the ISH"**). In accordance with the Examining Authority's timetable, we now enclose at Appendix 1 to this letter a written summary of the oral case made by Trinity House at the ISH.

During the ISH, Trinity House was also asked by the Examining Authority to propose such amendments to the arbitration provision at article 38 of the draft Order as it considered necessary to address the concerns which it raised at the ISH. Following the ISH, Trinity House has given considered thought to this request and now encloses at Appendix 2 to this letter its proposed amendments to article 38 of the draft Order.

Trinity House emphasises that the proposed amendments to article 38 of the draft Order are necessary to address the concerns which it raised at the ISH in relation to the arbitration procedures.

Please address all correspondence regarding this matter to myself at russell.dunham@thls.org and to Mr Steve Vanstone at navigation.directorate@thls.org

Russell Dunham ACII
Legal & Risk Advisor

Email: Russell.dunham@thls.org

APPENDIX 1

THE NORFOLK VANGUARD OFFSHORE WINDFARM ORDER 201X ("THE DRAFT ORDER")

ISSUE SPECIFIC HEARING INTO THE DRAFT DCO ("THE ISH")

TRINITY HOUSE'S POST HEARING SUBMISSIONS INCLUDING WRITTEN SUBMISSION OF ORAL CASE

1 Trinity House

- 1.1 Trinity House opened its oral submissions in relation to the proposed arbitration procedures in the draft Order by providing a brief summary of its history and the statutory functions which it performs.
- 1.2 The Corporation of Trinity House ("**Trinity House**") was constituted under a Royal Charter by Henry VIII and 14 subsequent charters or grants. Trinity House is therefore a Chartered Corporation.
- 1.3 In addition to powers under the Charters, Trinity House is empowered by Part VIII and section 193(1) of the Merchant Shipping Act 1995 (as amended) ("**MSA 1995**") to carry on a public undertaking as a General Lighthouse Authority ("**GLA**"), a role it has had since 1854. Its principal role, which is shared with the GLAs for Scotland and the whole of Ireland, who respectively have responsibility for their areas, is to deliver a cost effective service to meet the requirements for aids to navigation ("**AtoN**") of all classes of mariner in the waters of the United Kingdom ("**UK**").
- 1.4 Under the International Maritime Organisation ("**IMO**") Safety of Life at Sea Convention 1974 ("**SOLAS**"), contracting Governments have responsibility for the provision of adequate AtoN in and around their respective areas for the safe navigation of shipping according to the degree of risk and the volume of traffic.
- 1.5 By virtue of Part VIII of MSA 1995, the Secretary of State has largely been able to delegate his responsibilities under SOLAS to the GLAs as set out in the Framework Document between the Department for Transport and the GLAs.
- 1.6 The UK Government participates in navigation matters at an international level as a Member of the IMO, which is coordinated in the UK by a Safety Navigation Committee ("**UKSON**"). The GLAs provide advice to their governments on AtoN issues through a Joint User Consultative Group and the GLAs are normally invited to send representatives to UKSON meetings.
- 1.7 The GLAs therefore play a key role in supporting the Secretary of State in the provision, review and maintenance of AtoN, consistent with the government's responsibilities under international conventions.
- 1.8 MSA 1995 confers specific duties, functions and powers on the GLAs. Materially, the GLAs have superintendence and management of all lighthouses, buoys and beacons within their respective areas (see section 195). That power is subject to the powers and rights of any local lighthouse authority (essentially the relevant statutory harbour authorities within the area) and

the provisions of Part VIII of MSA 1995 (which provide further detail as to the GLA's powers and how they are exercised).

1.9 By section 197(1), Trinity House is empowered within its area to:

1.9.1 erect or place any lighthouse;

1.9.2 to add, alter or remove any lighthouse;

1.9.3 to erect or place, alter or remove any buoy or beacon; and

1.9.4 to vary the character of any lighthouse buoy or beacon.

1.10 A "lighthouse" includes any floating or other light exhibited for the guidance of ships. "Buoys or beacons" includes all other marks and signs of the sea. Under an order-making power, the Secretary of State may make, and has made various, Orders providing that references to buoys and beacons includes references to equipment intended as an AtoN. These include electronic AtoN systems and satellite-based navigation systems.

1.11 As regards local AtoN within its lighthouse area, MSA 1995 provides that:

1.11.1 Trinity House may with the sanction of the Secretary of State direct a local lighthouse authority as respects AtoN;

1.11.2 a local lighthouse authority may not lay down AtoN without the consent of Trinity House; and

1.11.3 Trinity House must inspect AtoN and communicate to each local lighthouse authority the results of the inspections and report annually to the Secretary of State. In practice, Trinity House inspects over 10,000 local AtoN each year.

1.12 Trinity House, along with the other GLAs, also has a separate statutory duty to mark, and if necessary remove, wrecks constituting a danger to navigation. In so doing it discharges the Secretary of State's obligation to ensure that the UK complies with its obligations under the International Wrecks Convention as respects locating and marking wrecks.

1.13 Trinity House, along with the other GLAs, is therefore subject to various statutory responsibilities for which it has conferred upon it by statute specific powers in order to discharge.

1.14 In addition, Trinity House is a consultee on AtoN in respect of marine matters when a licence is required under the Marine and Coastal Access Act 2009 ("**MCAA 2009**"), advises the Secretary of State on navigational marking in relation to applications for electricity works for which consent is required under Part 4A of the Electricity Act 2004 and is also entitled to take part in examinations for development consent under the Planning Act 2008 ("**PA 2008**").

1.15 Trinity House emphasised that these and indeed other examples serve to show the level of expertise that the GLAs bring to bear in discharging their functions under MSA 1995 in respect of AtoN.

1.16 It is also important to note that Trinity House, along with the other GLAs, is funded primarily through contributions made by ship owners (light dues) into a fund called the General

Lighthouse Fund (“GLF”). What may be paid into and out of the GLF is prescribed by section 211 of MSA 1995. The GLF is under the stewardship of the Department for Transport (“DfT”), which takes on day to day management of the GLF. The GLF, along with the lighthouse accounts of Trinity House are subject to audit by the Comptroller and Auditor General.

- 1.17 Light dues are charged on ships calling at UK and Irish ports based on their tonnage. The Secretary of State sets the rate of light dues annually by Regulations made under section 205(5) of MSA 1995 so as to meet the approved and contingency funding requirement of the lighthouse service. Thus light dues are a direct charge for the provision of AtoN paid for by the user.
- 1.18 This arrangement adds to the unique status of the GLAs. Trinity House is not an Executive Agency of the DfT nor strictly a Non-Departmental Public Body, because the primary source of its income is by means of user charges in the form of light dues paid by the private sector shipping industry.
- 1.19 This is important because the resources available to Trinity House (and the other GLAs) are subject to the strict controls imposed on what may be paid into and out of the GLF and are based on the provision of AtoN to the user. It does not allow for expenditure on other activities.
- 1.20 In order to protect its ability to discharge its functions, statutory Orders conferring powers on Undertakers for specific projects or developments, for example Orders under the Transport and Works Act 1992, the Harbours Act 1964 and PA 2008, always include a provision “saving” or protecting the statutory rights and duties of the GLAs in the context of the relevant Order. Article 41 of the draft Order is an example of such a provision. It provides that “*Nothing in this Order prejudices or derogates from any of the rights, duties or privileges of Trinity House.*”

2 The Proposed Arbitration Procedures in the draft Norfolk Vanguard DCO

- 2.1 Trinity House advised the Examining Authority (“ExA”) that it had made written submissions in respect of the proposed arbitration procedures in the draft Order as part of its comments more generally on the application, at Deadline 1 in the ExA’s examination timetable.
- 2.2 In those written submissions, Trinity House confirmed that it had:
 - 2.2.1 expressed concern that the exercise of its statutory functions to provide for safety of navigation, including the requiring of the marking and lighting of potential obstructions during the construction, operation, maintenance and possible decay of the works authorised by the draft Order, might be regarded as being subject to the arbitration provisions;
 - 2.2.2 noted that the “saving” provision in its favour in article 41 of the draft Order is clearly intended to preserve its ability to exercise its statutory functions and that nothing in the draft Order should fetter its statutory powers to give directions in terms of AtoN and for the prevention of danger to navigation;
 - 2.2.3 also noted that in performing any advisory and consultation function on safety of navigation matters with the Marine Management Organisation (“MMO”) pursuant to MCAA 2009, should not be subject to the arbitration provisions in the draft Order;

- 2.2.4 considered that it was imperative that there was clarity that the "saving" provision in its favour in article 41 of the draft Order is not subject to any other provision in the draft Order, including the Deemed Marine Licences ("DMLs") which form part of the draft Order; and
- 2.2.5 requested that article 38 and Schedule 14 of the draft Order be amended to make clear that functions performed by Trinity House under the draft Order, including the DMLs, are not subject to the arbitration provisions in the draft Order.
- 2.3 Trinity House noted that both the MMO and the Maritime and Coastguard Agency ("MCA") have expressed similar concerns in relation to the proposed arbitration procedures in the draft Order. Trinity House drew particular attention to, and endorsed, the following written submissions of the MMO at Deadline 1, which also formed part of oral submissions made by the MMO at the ISH:
- 2.3.1 *"The MMO strongly questions the appropriateness of any regulatory decision or determination to be made subject to any form of binding arbitration as set out by Article 38 and Schedule 14."*
- 2.3.2 *"It is the MMO's opinion that Article 38 and Schedule 14 would shift the MMO's decision making responsibility from the hands of the regulator with primary responsibility for administering the marine licensing regime to an independent arbitrator. This would be contrary to the intention of Parliament set out in [MCAA 2009] and would potentially usurp the role of the MMO as a regulator."*
- 2.3.3 *"...the MMO feels that the MMO is better placed to make technical determinations than an arbitrator under the DCO."*
- 2.3.4 *"... in the case of any disagreements which may arise between the applicant and the MMO ... the existing appeal routes i.e. via the MMO's appeals procedure, by complaint to the Ombudsman, or ultimately via Judicial review should be taken. It is inappropriate for the DCO to apply arbitration to these decisions."*
- 2.4 Trinity House therefore highlighted that there is a general consensus amongst interested parties which exercise important regulatory functions in respect of the offshore marine environment that the arbitration procedures currently proposed by the applicant in the draft Order are both inappropriate and unacceptable.
- 2.5 Trinity House noted that the applicant had responded to its, and indeed the MMO's and MCA's, submissions at Deadline 2 in the ExA's examination timetable. These provide, so far as relevant for present purposes, as follows:
- 2.5.1 *"the Applicant considers that the arbitration procedure should apply to any dispute under the Order, as would have been the case under Model Provision Article 42";*
- 2.5.2 *"the Applicant does not consider that the ability to apply for arbitration in the event of non-determination or unreasonable refusal under the Order is contrary to Article 41 or any of Trinity House's rights, duties or privileges."*

2.5.3 *"the Applicant understands the importance of Trinity House's duties, and the appointed arbitrator would have regard to the submissions and standing of Trinity House when considering the matter in question."*

2.6 Trinity House also referred to the following responses by the applicant to submissions made by the MMO and the MCA:

2.6.1 *"the Applicant understands the importance of the MMO's statutory duty, and the Applicant is not seeking to dis-apply statutory provisions in this regard."*

2.6.2 *"the arbitration provisions would apply equally to the MMO as they do to all parties under the DCO; and the appointed arbitrator would have regard to the submissions and standing of the MMO when considering the matter in question."*

2.6.3 *"the Applicant is not seeking to remove the MMO's decision making powers and the Applicant recognises the MMO's important statutory function, but the applicant is instead seeking to introduce a practical way forward in the (unlikely) event of the parties not reaching agreement through the approval process associated with the Order (particularly the conditions within the deemed marine licences)."*

2.6.4 *"the Applicant considers that the ability to refer non-determination or refusal under Article 6(5) to arbitration reflects the guidance within the Planning Inspectorate's Advice Note 15."*

2.7 Trinity House noted that substantially the same issues were currently under discussion and remain unresolved in relation to the examination of the Hornsea Project Three Offshore Wind Farm Order. Indeed, Trinity House is aware that the MMO has now made written submissions at Deadline 6 of that examination, which were published on the Inspectorate's website on 11 February 2019, which are highly relevant to the issues under consideration in this application.

3 Trinity House's submissions at the ISH in respect of the proposed arbitration procedures

3.1 Against that backdrop, Trinity House outlined its concerns at the ISH in relation to the applicant's approach to arbitration set out in article 38 and Schedule 14 of the draft Order.

3.2 Trinity House confirmed that it remains of the view that the proposed arbitration procedure is inappropriate and submitted that a change to the draft Order is required to make it clear that, in performing its functions under the draft Order, including the DMLs, Trinity House will not to be subject to arbitration.

3.3 Trinity House provided its responses to what it considers to be the Applicant's main comments at Deadline 2 in the ExA's examination timetable.

The Applicant's comment

"the Applicant considers that the arbitration procedure should apply to any dispute under the Order, as would have been the case under Model Provision Article 42"

Trinity House's response

- 3.4 Trinity House expressed some doubt as to whether it was the intention of the arbitration procedure provided for in Model Provision 42 to apply to matters of this nature. Trinity House notes, for example, that Model Provision 42 made no reference to differences between the Secretary of State and the applicant.
- 3.5 In Trinity House's view, Model Provision 42 was more properly aimed at disputes between the promoter and third parties under, for example, the protective provisions, where frequent references to arbitration are made, as opposed to regulatory decisions and directions made by bodies in the exercise of their statutory functions.
- 3.6 Trinity House also questions why, if Model Provision 42 operated in the manner suggested by the Applicant, it was thought necessary to depart from the drafting of that provision in such a significant way.
- 3.7 Trinity House submits that there are very good reasons why the arbitration procedure provided for in the draft Order should not apply to it. It cannot be correct or desirable that responsibility for the exercise of statutory powers in relation to the safety of navigation at sea might be placed into the hands of an independent arbitrator.
- 3.8 Parliament has seen fit to provide that Trinity House should have exclusive responsibility for the exercise of these statutory powers. This principle remains true both as to directions made by Trinity House itself and to advice given by it in relation to navigation, where consulted by the MMO on a matter falling to be determined under the DMLs. To include in the draft Order an arbitration procedure which could effectively be used by the Applicant to override the duties and powers conferred upon Trinity House by statute would therefore be contrary to the intentions of Parliament.
- 3.9 Trinity House also advised that it shares the views expressed by the MMO at the ISH that the words "any difference" in article 38 of the draft Order have a specific meaning. In Trinity House's view as well, they refer to a situation in which parties are unable to come to an agreement on a particular matter and so a difference arises. By contrast, where Trinity House is exercising a direction making power or advising the MMO on a matter falling to be determined under the DMLs, it does so not with a view to reaching agreement with the Applicant, but to discharging its statutory functions.
- 3.10 In Trinity House's view, the Applicant's interpretation is also incompatible with the special provision made for Trinity House under the saving provision in article 41 of the draft Order. That provision has a long history; it appears in substantially the same form in s. 102 of the Harbours, Docks and Piers Clauses Act 1847. The rights, duties or privileges of Trinity House to which it refers now find their principal expression in MSA 1995.
- 3.11 In this respect, Trinity House expressed its apprehension that any provision made for the Applicant to refer to arbitration matters which relate to the performance of statutory powers which Trinity House alone has been charged with performing, will plainly derogate or prejudice its rights, duties or privileges in terms of article 41 of the draft Order.
- 3.12 Trinity House also notes the position expressed by the applicant at the ISH that section 120 PA 2008 authorises an Order to include provision for arbitration and that no party is excluded from the remit of that provision. Though not forming part of Trinity House's oral submissions

at the ISH, for completeness Trinity House now makes the following written submissions in response:

- 3.12.1 section 120(3) and Schedule 5 of PA 2008 confirm that an Order granting development may make provision for the submission of *disputes* to arbitration (*emphasis added*). For the reasons expressed by Trinity House at the ISH, Trinity House does not consider that determinations or directions made by it on matters falling to be determined by it are matters which give rise to a dispute or disagreement referable to arbitration;
- 3.12.2 in Trinity House's view, Parliament cannot have intended, in enacting section 120(3), for existing regulatory functions of a public nature performed by bodies like Trinity House, particularly where those functions include direction-making powers so as to provide for navigational safety, sometimes in urgent circumstances, to be referred to private (and potentially lengthy) arbitration proceedings; and
- 3.12.3 there is nothing to indicate that the saving provision for Trinity House is fettered by either section 120(3) or Schedule 5 of PA 2008.

The Applicant's comment

"... the Applicant does not consider that the ability to apply for arbitration in the event of non-determination or unreasonable refusal under the Order is contrary to Article 41 or any of Trinity House's rights, duties or privileges."

Trinity House's response

- 3.13 Trinity House emphasised its view that the Applicant's ability to apply for arbitration in respect of matters which fall to be determined by Trinity House is contrary to article 41 of the draft Order. In Trinity House's view, if the Applicant is authorised to challenge through arbitration directions made or advice given by Trinity House in relation to matters of navigation, then a clear prejudice or derogation from its rights, duties and privileges arises for the purposes of article 41 of the draft Order.
- 3.14 Trinity House also observed that, in its submissions at Deadline 2, the Applicant appeared to give a restrictive meaning to the words "any difference" in article 38 of the draft Order, as a reference to cases of non-determination or unreasonable refusal by Trinity House. Trinity House made the following submissions in response:
 - 3.14.1 this narrow interpretation is not reflected in the express wording of article 38 of the draft Order, which still refers in general terms to "any difference" between parties;
 - 3.14.2 it is not clear to Trinity House in which specific circumstances under the draft Order it might fail to determine or unreasonably refuse its consent to a matter. Indeed, the Applicant was unable to conceive of any such circumstances when this question was put to it at the ISH; and
 - 3.14.3 in any event, there is no reason to suspect that Trinity House, subject as it is to important statutory duties, will fail to determine or withhold consent unreasonably.

- 3.15 Notwithstanding the narrow interpretation of differences capable of being referred to arbitration which the Applicant now appears to adopt, the provision made for arbitration in the draft Order therefore remains unacceptable to Trinity House.

Applicant's comment

"the Applicant understands the importance of Trinity House's duties, and the appointed arbitrator would have regard to the submissions and standing of Trinity House when considering the matter in question."

- 3.16 This fails to address Trinity House's fundamental concern that an arbitrator would not be bound to direct itself in accordance with any particular statutory duties in the same way that Trinity House is. An arbitrator may even decide to depart from Trinity House's expert view, thus bringing the Arbitrator's office and the regulatory functions of Trinity House into direct conflict. It is Trinity House's view that it cannot have been the intention of Parliament in passing the 2008 Act that such a tension with the important functions which it performs might arise.

BDB Pitmans LLP
13 February 2019

APPENDIX 2

Arbitration

38.—(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 14 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 41 (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.