From:	Russell Dunham
To:	NorfolkVanguard@pins.gsi.gov.uk
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Subject:	Norfolk Vanguard Offshore Wind Farm Application - Written Submission to Examining Authority for Deadline 6
Date:	05 April 2019 10:35:36
Attachments:	Letter Deadline 6.pdf

Dear Sir / Madam

EN: 0010079

Identification No. 20011687

Written Response to Examining Authority for Deadline 6 following ISH 5 on the Draft Development Consent Order

Please attached Trinity House's response dated 5 April 2019 in respect of the Norfolk Vanguard Offshore Wind Farm Project.

Kind Regards

Russell

TRINITY HOUSE

5 April 2019

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

Your Ref: EN010079
Identification No. 20011687

The Norfolk Vanguard Offshore Wind Farm
Written Submission to Examining Authority for Deadline 6
following ISH 5 on the Draft Development Consent Order
on 28 March 2019

Dear Sir / Madam

We refer to the above application for development consent.

Trinity House ("**TH**") attended and made oral submissions at Issue Specific Hearing 5 into the draft Development Consent Order ("**dDCO**") on Thursday 28 March 2019 ("**the ISH**"). This letter provides a written summary of the oral submissions made by TH at the ISH and sets out responses to actions requested from TH by the Examining Authority ("**the ExA**") following the ISH.

For the avoidance of doubt, references to the dDCO in this letter are to the tracked changes version of the Order submitted to the examination by the Applicant at Deadline 4, which is dated March 2019.

ExA – ISH 5 Action Point 2: Proposed arbitration procedures

The Examining Authority ("**ExA**") invited comments from interested parties on the changes to the arbitration procedures in article 38 of the dDCO which had been proposed by the Applicant.

Article 38(1) of the dDCO

In relation to the revised wording at article 38(1) of the dDCO, TH made an oral submission confirming that it was content with the wording now proposed by the Applicant. TH noted that, whilst the wording was different to that suggested by TH in its written submissions following Issue Specific 3 on 7 February 2019 ("**ISH3**") (enclosed at Appendix 1 of this

letter), the Applicant's drafting had substantially the same effect and so TH did not propose to pursue this point further.

TH did nevertheless stress that the amendments to article 38 which it had proposed following ISH3 were the same as those which it has advocated for the inclusion of in other Orders for offshore wind farm applications which are currently under examination, specifically the Thanet Extension and Hornsea 3 Offshore Wind Farm applications. Whilst emphasising that it was content with the Applicant's revised drafting proposal at article 38(1), TH did therefore wish to point out that there may be scope for inconsistency to arise between the article 38 of the dDCO and equivalent provisions in other Orders currently under consideration.

To that end, the ExA requested that, as part of its Deadline 6 submissions, TH should provide an update on the wording of the arbitration provisions in respect of the Thanet Extension and Hornsea 3 applications. A summary of the latest position now follows.

Thanet Extension Offshore Wind Farm ("TEOWF")

TH made written submissions in relation to the proposed arbitration procedures contained in article 36 (arbitration) of the draft TEOWF Order by letter to the Inspectorate dated 4 March 2019. That letter set out TH's proposed amendments to article 36 of the draft TEOWF Order, which are included at Appendix 2 of this letter.

A revised draft of the TEOWF Order was published by the Inspectorate on 29 March 2019, subsequent to the ISH. The revised draft TEOWF Order includes amendments to article 36 (arbitration). Article 36 of the TEOWF Order (as amended) is set out at Appendix 3 of this letter.

TH notes that the amendments to article 36 of the draft TEOWF Order – specifically the addition of the words *"subject to article 41 (saving provisions for Trinity House)"* at the beginning of that article – are indeed consistent with the wording proposed by the Applicant at article 38(1) of the dDCO. TH has yet to formally comment on this amendment to article 36 of the draft TEOWF Order, but in principle this is acceptable to TH.

No further changes to article 36 of the draft TEOWF Order have been made at this stage, thus TH's further proposed amendments to that provision (set out at Appendix 2 of this letter) are still to be addressed. As noted, TH is still to respond formally in relation to the changes to the latest version of the draft TEOWF Order, but will continue to advocate for the inclusion of its further proposed amendments as part of any forthcoming response.

Hornsea 3 Offshore Wind Farm ("Hornsea 3")

TH attended and made oral submissions at Issue Specific Hearing 9 into the draft Hornsea 3 Order on 8 March 2019.

In advance of that Issue Specific Hearing, the Examining Authority published its schedule of proposed amendments to the draft Hornsea 3 Order, which included changes to the arbitration procedures at article 37 (arbitration). These changes are set out at Appendix 4 of this letter.

At the Issue Specific Hearing, TH made oral submissions advocating that further changes to article 37 of the draft Hornsea 3 Order should be made, principally to address its concerns that TH should fall outside the scope of any arbitration procedures provided for by the Order. TH confirmed its position in writing by letter to the Inspectorate dated 11 March 2019. That

letter included TH's proposed amendments to the version of article 37 contained in the Examining Authority's schedule of changes and is set out at Appendix 5 of this letter.

The applicant for Hornsea 3 has now produced a final draft of the Hornsea 3 Order, which was published on the Inspectorate's website on 2 April 2019. Article 37 of the final draft Order is set out at Appendix 6 of this letter.

TH notes that the applicant for Hornsea 3 has not incorporated any of the changes to article 37 proposed by either the ExA, TH or other interested parties. The wording presented in the final draft Order therefore appears to be the same as that originally proposed by the Applicant at article 38 of the Norfolk Vanguard Order.

It remains to be seen whether the ExA, or indeed the Secretary of State, will seek to make changes to article 37 of the draft Hornsea 3 Order as part of the decision making process for that application. TH has, in any event, written to the Inspectorate on 2 April 2019 to reaffirm its position that, as drafted, article 37 of the Order remains unacceptable.

Article 38(2) of the dDCO

In relation to the revised wording at article 38(2) of the dDCO, TH made an oral submission at the ISH to confirm that it agreed with the Applicant's amendments to this provision. As one of the Marine Management Organisation's ("**MMO**") statutory consultees in relation to matters falling to be determined under the Deemed Marine Licences ("**DMLs**"), TH is of the view that decisions made by the MMO, which may in a number of instances be based on considered advice provided by the its statutory consultees, should be excluded from the scope of arbitration.

However, TH notes the Applicant's position, set out at Reference 8 of its schedule of changes to the dDCO published at Deadline 4 and reiterated in oral submissions at the ISH, that the amendments to article 38 of the dDCO are proposed "*subject to acceptance of a deemed discharge provision in the Deemed Marine Licences, included at Condition 15 of the Generation DMLs and Condition 10 of the Transmission DMLs.*"

TH opposes the Applicant's proposal to include a deemed discharge provision in the DMLs and endorses the submissions made by the MMO and Natural England at the ISH in this respect.

TH also confirmed in oral submissions that it was specifically concerned by the inclusion of a deemed consent provision in the DMLs because it performs a consultative function in relation to a number of the plans, schemes and strategies, which would take subject to that deemed consent provision. Indeed, as regards the Aids to Navigation Management Plan, TH leads in performing the approval function in relation to that plan, though the MMO is ultimately the approving body.

TH submitted that there was an important public interest in ensuring that the plans, schemes and strategies, which are not being scrutinised during this examination but which the Applicant must submit for the approval of the MMO under the DMLs prior to the commencement of licensed activities, are subject to proper scrutiny at that time.

In many cases, the documents to be submitted by the Applicant for approval under the DMLs perform a vital function in securing the mitigation provided for in the Applicant's Environmental Statement. As regards the Aids to Navigation Management Plan, that plan seeks to secure that the authorised development can be constructed and operated in a manner to ensure the marine navigational risk presented can be satisfactorily mitigated. There are, therefore, important safety considerations as well.

In that context, the Applicant's proposed inclusion of a deemed consent provision under the DMLs is plainly unacceptable, since it presents a risk that plans, schemes and strategies which are submitted by the Applicant for approval but which are unsatisfactory and may need to be changed by the Applicant in a significant way to meet with approval of the MMO and its statutory consultees, may become valid and applicable as a matter of law simply by the effluxion of time. In this respect, the need for certainty and speed in decision making cited by the Applicant must be balanced against the overarching public interest in ensuring that any plans, schemes and strategies proposed by the Applicant are fit for purpose.

TH advised that it was not aware of any precedent for the deemed consent provision proposed by the Applicant. TH noted that the Examining Authority in respect of the Hornsea 3 application had proposed that changes should be made to article 37(2) of that Order, which would have substantially the same effect as the changes proposed by the Applicant at article 38(2) of the dDCO, but had not considered it necessary to include a deemed consent provision in the DMLs to compensate for the narrowing in the scope of the arbitration provision.

It would appear, therefore, that the ExA is being presented with unprecedented wording, with which interested parties have fundamental concerns. It would also appear to subvert the statutory scheme set out in the Marine and Coastal Access Act 2009.

Aside from these points of principle, TH noted that the mechanics of the deemed consent provision proposed by the Applicant failed to recognise the importance that the MMO's statutory consultees, including TH, bring to bear in the process of approving the plans, schemes and strategies pursuant to the DMLs.

The Applicant proposes that the deemed consent provision would take effect four months from the date that an application for approval is received by the MMO, unless the MMO requests further information within one month of that date, in which case the deemed consent period is 4 months from the date that the further information is received by the MMO. This presents significant practical concerns.

If TH, or indeed any of the MMO's statutory consultees, only learns that an application has been submitted for approval by the Applicant after the initial one month period for requesting further information has elapsed, then there is no mechanism within the Applicant's proposed drafting for extending the deemed consent period to enable full consideration of the application, within a reasonable timeframe.

This is not simply a theoretical concern. Delays in the transmission of information are inevitable. The MMO has made clear the operational constraints which it works within. TH works within similar constraints. For this application alone, the Applicant is required to submit a formidable range of plans, schemes and strategies for approval under the DMLs, many of which are complex in subject matter and so frequently require extensive review by and consultation between the statutory bodies before a decision on approval can be reached. This application is one of a number of development consent proposals for offshore wind farm projects that TH, the MMO and other statutory bodies are engaged on. TH also advises on proposals under numerous other consenting regimes, including the Harbours Act 1964 and the Transport and Works Act 1992.

This leads to a closely related point. One simple way in which the Applicant could reduce the risk of delay which it has cited extensively throughout the examination would be to amend the DMLs so as to require it (the Applicant) to submit the plans, schemes and strategies for approval under the DMLs earlier than the four month period currently provided for. TH agrees with the MMO that this would not be an onerous requirement.

In TH's view, it is reasonable to expect the Applicant to take all necessary steps to secure the approval of any documents required to deliver its scheme in a timely manner, rather than to expect the MMO and its statutory consultees to fall into line with the Applicant's programme. Extending the timeframes from submission of the plans, schemes and strategies under the DMLs would be a straightforward way of reducing the risk of delays to the Applicant's proposals.

For these reasons, TH opposes the inclusion of any deemed consent provision in the DMLs and considers that the changes proposed by the Applicant to article 38(2) of the dDCO, which TH supports, should not be contingent upon their inclusion.

ExA ISH 5 Action Point 9: Schedules 9, 10, 11 and 12 – Deemed Marine Licences

Changes requested (Trinity House) to Part 4, Conditions 19(4), 20(2)(d) – marine traffic monitoring strategy

TH made an oral request at the ISH that Conditions 19(4) and 20(2)(d) of the DMLs at Schedules 9 and 10 of the dDCO should be amended to ensure that, in addition to the Maritime and Coastguard Agency, TH is consulted on the construction and post-construction traffic monitoring provided for in those conditions.

It was explained that these reports are of importance to TH, since the nature of traffic movements both during and post-construction of the authorised development are a significant factor in determining whether the provision of aids to navigation and other risk mitigation measures installed in connection with the authorised development remain appropriate and/or whether further intervention may be necessary.

TH confirmed that a minor amendment to Conditions 19(4) and 20(2)(d) of Schedules 9 and 10 of the dDCO would suffice, by the addition of the words *"and Trinity House"* after *"MCA"* in each of these provisions. TH is grateful for the Applicant's confirmation at the ISH that it was content to add these words and understands that they will be incorporated into the next iteration of the Order.

TH did, in addition, ask the Applicant to confirm why the Conditions in relation to traffic monitoring were not included in Schedules 11 and 12 of the dDCO in respect of the transmission assets. TH understands that the Applicant will respond to this point as part of its submissions at Deadline 6.

Other dDCO matters

Schedules 9 and 10, Part 4, Condition 9(11) and Schedules 11 and 12, Part 4, Conditions 5(11)

TH observed that there appeared to be in inconsistency between the Applicant's proposed changes to these Conditions in the DMLs as described in its schedule of changes to the dDCO submitted at Deadline 4 and the dDCO itself.

TH understands that this was due to an administrative error and that the wording in the dDCO prevails. TH welcomes this confirmation.

TH did suggest that the additional wording proposed by the Applicant to these provisions, which TH is content with, might form the basis of a new subparagraph in the next iteration of the dDCO. TH understands that the Applicant agrees with this approach and that this will therefore be reflected in the next iteration of the Order.

We trust that these post-hearing 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,

[redacted]

Russell Dunham ACII
Legal & Risk Advisor

Email: Russell.dunham@thls.org

Appendix 1
Trinity House's proposed amendments to article 38 of the draft Norfolk Vanguard Offshore Wind Farm Order following Issue Specific Hearing 3 on 7 February 2019 and set out in Trinity House's letter to the Inspectorate dated 13 February 2019

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.

Appendix 2
Trinity House's proposed amendments to article 36 of the draft Thanet Extension Offshore Wind Farm Order following Issue Specific Hearing 7 on 21 February 2019 and set out Trinity House's letter to the Inspectorate dated 4 March 2019

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.

Appendix 3
The applicant's proposed amendments to article 36 (arbitration) set out in the revised draft Thanet Extension Offshore Wind Farm Order published on the Inspectorate's website on 29 March 2019 (no tracked changes version available)

Arbitration

36.— Subject to Article 41 (Saving provisions for Trinity House), 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 Centre for Effective Dispute Resolution.

Appendix 4
The Examining Authority's proposed amendments to article 37 (arbitration) of the draft Hornsea Project Three Offshore Wind Farm application set out in its schedule of changes to the Order published on the Inspectorate's website on 26 February 2019

Arbitration

37.–(1) Any difference under any provision of this Order, other than matters within (2) or unless otherwise provided for, shall be referred to and settled in arbitration in accordance with the rules at Schedule 13 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.~~ Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration.

(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.

Appendix 5
Trinity House's proposed amendments to article 37 (arbitration) of the draft Hornsea Project Three Offshore Wind Farm Order contained in the Examining Authority's schedule of changes to the Order published by the Inspectorate on 26 February 2019

Arbitration

37. –(1) Any difference under any provision of this Order, other than matters within paragraph (2) or unless otherwise provided for, shall be referred to and settled in arbitration in accordance with the rules at Schedule 13 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) Any matter for which the consent, or approval of the Secretary of State, or the Marine Management Organisation is required under any provision of this Order or any matter relating to Trinity House in the exercise of its statutory functions shall not be subject to arbitration.

(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.

Appendix 6
Article 37 (arbitration) as contained in the applicant's final version of the draft Hornsea Project Three Offshore Wind Farm Order published on the Inspectorate's website on 2 April 2019

Arbitration

37.—(1) Any difference under any provision of this Order, unless otherwise provided for, shall be referred to and settled in arbitration in accordance with the rules at Schedule 13 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.

N.B. in the interests of clarity, this drafting at Appendix 6 does not reflect the suggested changes to article 37 of the draft Order proposed by the Examining Authority (see Appendix 4 of these Appendices) or Trinity House (see Appendix 5 of these Appendices). The drafting contained in the applicant's final version of the draft Order is *not* therefore acceptable to Trinity House.