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The Planning Inspectorate
National Infrastructure Directorate
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Your reference: EN010053
Our reference:
DCO/2013/00013

10 August 2015

Dear Sir or Madam,

PROPOSED HORNSEA PROJECT TWO OFFSHORE WIND FARM ORDER RESPONSE TO EXAMINATION DEADLINE 2

The Marine Management Organisation (MMO) is an interested party for the examination of Development Consent Order (DCO) applications for Nationally Significant Infrastructure Projects (NSIPs) in the marine area.

The MMO has an interest in the construction and operation of up to 360 wind turbine generators and associated development within English waters. The DCO application includes four deemed marine licences (DMLs) under Section 65 of the Marine and Coastal Access Act 2009 (MCAA09). Should consent be granted for the project, the MMO will be responsible for the monitoring, compliance and enforcement of the DML conditions.

Following the DCO issue specific hearing (ISH) at The Humber Royal Hotel, Grimsby on 30 July 2015, the MMO summary of its oral representations is below.

1. Agenda item 2.1 'Ownership, undertaker and liability'

The Examining Authority (ExA) raised concerns about the high degree of flexibility intrinsic to the draft DCO. In response, the applicant stated that the worst case scenarios are assessed and as such the 'Rochdale Envelope' approach to the project at this stage is valid.

The MMO stated that its primary concern relates to its ability to discharge its duties as the post-consent compliance and enforcement body, and noted that co-operation between undertakers was scheduled to be discussed at agenda item 2.8. The MMO's summary of this issue is at agenda item 5 below.

2. Agenda item 2.2 'Definitions'

- a. The ExA raised the issue of maintenance and asked whether the MMO was satisfied with the current definition and provisions within the DCO



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considering its representations on this issue to date.

The MMO summarised its previous concerns stating that only activities that have been assessed in the Environmental Statement (ES) should be permitted under the DCO/DMLs.

The MMO reminded the ExA of the background, that it had concerns with the definition of 'maintain' in the Interpretation sections of the DCO and individual DMLs. This definition would permit the undertakers to 'inspect, repair, adjust, alter, remove, reconstruct and replace any of the authorised development'. Article 7 'Maintenance of the Authorised Project' states that maintenance works required to be assessed under Environmental Impact Assessment (EIA) that have not been so in the project ES are not permitted.

The MMO had raised its concerns to the applicant that there may be activities that are not subject to EIA that are considered to be licensable activities. Such activities either need to be outlined in the current application for consent or could require a separate marine licence to be undertaken. The MMO suggested that the applicant provide a schedule of foreseeable maintenance activities prior to any consent decision, in order to sign-post where activities have been assessed in the ES and identify potential activities that may not have been assessed. The applicant's initial view was that it was open to this idea but reluctant to undertake this work prior to a consent decision. The applicant suggested that sign-posting information can be provided in the offshore project maintenance plan, which is required under condition 10(2)(i) of the DMLs to be approved by the MMO prior to construction.

The MMO is content with the applicant's commitment to ensuring that proposed maintenance activities, and where these may or may not be assessed in the ES, are signposted in the offshore project maintenance plan.

- b. The ExA asked whether 'completion' should be defined within the 'interpretation' sections of the DCO.

MMO stated this has not been raised before on other similar projects as far as it is aware. When considering phasing and maintenance this may be difficult to define as a stand-alone term. Following further consideration and review in context of the DCO, 'completion' does not appear to be used in isolation in any of the DCO provisions i.e. it is always used in conjunction with an activity, therefore the MMO does not see a benefit to its definition within the DCO.

3. Agenda item 2.11 'Transfer of Benefit of Order'

The ExA asked for the MMO's view on Article 35 'Transfer of Benefit of Order' in relation to the potential for partial transfer of DMLs. The MMO raised this as an issue in the MMO's representation for examination deadline 1 dated 15 July 2015.

The MMO stated that it fundamentally disagrees with the partial transfer of DMLs due to the practicalities of ensuring compliance across multiple undertakers and parties as the post-consent enforcement body.

The MMO has discussed the issue with the applicant in pre-application but did not raise it as an issue at relevant representation stage because the consent decision for Hornsea Project One detailed that partial transfer was permissible. However, to ensure that the ExA and interested parties remained aware of the MMO's continued position on this issue, it was noted in the MMO's response to examination Deadline 2.

During the DCO ISH the MMO committed to providing a detailed representation on this subject in its summary provided at examination Deadline 2. As such, please see Appendix 1 to this summary for full details of the MMO's position.

4. Agenda item 2.8 'Requirements'

- a. The ExA referred to the MMO's representation regarding Requirement 21 'Co-operation' and asked whether the MMO would still like to see this extended to include wording to ensure similar co-operation with Hornsea Project One.

The MMO stated it remained concerned that, given Projects One and Two are adjacent to each other and the array cable for Project Two is proposed to run through Project One, there would be no conditioned mechanism for co-operation between at least five undertakers across Project One and Project Two. In its relevant representation the MMO raised concerns about how co-operation could be secured with the multiple undertakers for Project One, but this issue has not yet been resolved with the applicant. The MMO is currently awaiting a clarification note from the applicant to explain how co-operation would work in practice with Project One if not secured through the DCO.

It should be noted that the applicant raised concerns during early Statement of Common Ground discussions on this issue stating that amending Requirement 21 to include the need for Project Two to co-operate with Project One would not be practical as the Project One DCO does not contain this provision. The MMO notes that section 72(3) of the MCAA09 provides the capacity to vary, suspend or revoke a marine licence (or deemed marine licence).

5. Agenda item 2.9 'Codes of Conduct and various Management Plans'

The ExA raised the In Principle Monitoring Plan (IPMP), which has been requested by both Natural England and the MMO through various representations and Statements of Common Ground. The ExA noted that the applicant did not want this to be secured through the DCO/DMLs.

The MMO stated that the aim of the IPMP is to set clear objectives for the post-consent monitoring in order to help with effective survey design and discharge of DML conditions. The MMO stated that from experience on

similar projects monitoring objectives have not always been clear, due to, for example, project and case teams changing personnel.

The MMO strongly recommends that this plan is secured through the DCO in order to ensure that any future undertakers are required to adhere to the objectives agreed. In addition, naming the IPMP in the DCO would provide a helpful reference for future case teams that may not have participated in examination but who are responsible for ensuring effective post-consent monitoring. The MMO notes that an appropriate place for the inclusion of the IPMP may be Article 40 of the DCO 'Certification of plans etc'.

6. Agenda item 2.10 'DCO/Deemed Marine Licences (DMLs) and Conditions'

The MMO noted that it had been in discussion with the applicant about including provisions within the DMLs to ensure that data is submitted to the Department for Environment, Food and Rural Affairs (Defra) Marine Noise Registry (MNR) managed by the Joint Nature and Conservation Committee (JNCC). Information about the MNR is provided in the MMO's response to examination Deadline 1 dated 15 July. The applicant is currently considering this request and how this may be reflected in the DMLs.

The above summarises, with context, the MMO's comments made in the DCO ISH and as such constitutes the MMO's current position on these matters. However, please note that the MMO reserves the right to make further comments on this application throughout the examination process and to modify its present advice or opinion in view of any additional information that may come to our attention.

Yours faithfully,



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Appendix 1

Transfer of Benefit of Order

The MMO is of the opinion that considering the relevant provisions of the Planning Act 2008 (PA08) and the Marine and Coastal Access Act 2009 (MCAA09) as well as the provisions of made development consent orders (DCOs) for other developments with marine elements, it does not consider the drafting of Article 35, 'Transfer of Benefit of Order', to be appropriate with respect to the transfer of deemed marine licences (DMLs).

The MMO recognises that the default effect of section 156 of the PA08, in the absence of a contrary provision as envisaged in section 156(2), is that more than one person can have the benefit of a DCO. Furthermore, as section 149A of the PA08 does not make any further contrary provision that would affect or otherwise limit the scope of section 156(1), it follows that a DML as part of a DCO can legally benefit more than one person at the same time.

However, while it may be legally possible to partially transfer or lease the benefit of a DML it is not necessarily desirable and the MMO retains serious operational concerns regarding the adequate monitoring of, compliance with, and any subsequent enforcement of, a DML, and any conditions of a DML where the benefits of a DML have been transferred partially under the provisions as drafted within Article 35, rather than whole as permitted by section 72(7) and (8) of the MCAA09.

There is no express provision within Part 4 of the MCAA09 that is on a par with section 156 of the PA08. The only similar provision is contained within section 71(5) of the MCAA 09. This subsection states that conditions can be attached to a licence in order *"to bind any person who for the time being owns, occupies or enjoys any use of the works in questions (whether or not the licence is transferred to that other person)"*. The existence of this provision requiring such an express step to be taken in order for the conditions to bind any such persons allows the MMO to draw the conclusion that, unlike the situation created by section 156(1) of the PA08, the benefit of a marine licence does not automatically lie with such persons because if it did the conditions would already apply without requiring section 71(5).

Moreover, while the provisions of Part 4 of the MCAA09 are drafted in a very general way, section 72(7) can be said to envisage the transfer of a licence from one single legal entity to another only. The Explanatory Note on this part of the act states: *"247. On receipt of an application from the licensee, the licensing authority may transfer a licence from one named person to another. Licensees themselves cannot transfer their licences"*.

It is of utmost importance that there is a clear identification of areas of responsibility and a mechanism allowing appropriate enforcement action to be taken as necessary. For this purpose the MMO's preferred position, reflecting and deriving from the consistent approach taken in relation to marine licences issued by the MMO in accordance with Part 4 of the MCAA09, continues to be that:

- There is a single identified licence holder for a DML;

- Any transfer of a DML for the licence holder to another single identifiable legal entity should be undertaken either by the MMO under section 72(7) of the 2009 Act or, where the transfer of benefit of the DML is to be undertaken in accordance with the transfer of benefit provisions in the main body of the DCO, as a single transfer of the whole benefit of the DML only from the licence holder (undertaker) to another single identified legal entity only on application to the Secretary of State, who will then consult the MMO prior to making a final determination; and
- Where it is identified at a pre-consent stage that particular identifiable parts of a development would be better suited to being undertaken by different persons, for the DCO to contain more than one DML that are governed independently in accordance with the principles set out above.

The MMO considers it reasonable to reach this view based on our interpretation of the 2008 Act and the 2009 Act and, in support of this position has regard to the comments of Lord Hunt of Kings Heath on behalf of the government of the day in the House of Lords debates on the Marine Bill:

“Those marine licences will operate as if the Marine Management Organisation had issued them. Importantly, the MMO will then be responsible for monitoring and enforcing them; it could also add conditions to deemed licences as new information came to light.”
 Hansard House of Lords debates for 23 February 2009: Column 63 (our emphasis added).

In operational practice, under the currently proposed wording, there is a risk that where the benefit of a DML lies with more than one legal entity the responsibility for complying with any particular condition or part of a DML would be significantly more problematic to determine. This consequently may interfere with the ability of the MMO to fulfil its statutory obligation to protect the environment, protect human health and protect interference with legitimate uses of the sea.