

Hornsea Offshore Wind Farm

Project Two

The Applicant's position in relation to the transfer of the benefit of a DML

Appendix L to the Response submitted for Deadline V

Application Reference: EN010053

12 November 2015

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The Applicant's position in relation to the partial transfer of DMLs

1. Section 156 of the Planning Act 2008 (PA 2008) provides that, unless otherwise specified, where a DCO is made in respect of any land, it has effect for the benefit of the land and all persons for the time being interested in the land. It is the Applicant's view that section 156 of the PA 2008 not only makes it clear that a DCO (and, by virtue of its inclusion within a DCO, a deemed marine licence (DML)) can operate for the benefit of more than one party, but that section 156 can also be taken to apply to the transfer of a DML in the absence of specific provision to the contrary.
2. Schedule 6 to the PA 2008 which specifies the mechanisms by which subsequent modifications can be made to a DCO is qualified by a restriction that this does not apply to a DML. No such qualification applies to the operation of section 156. The Applicant therefore submits that had the intention of parliament been for section 156 not to apply to DMLs then there would be express provision in the PA 2008 stating that.
3. The Applicant's interpretation of Section 156 of the PA 2008 is in accordance with the MMO's interpretation as stated in relation to the Thames Tunnel proposal:

"... section 156(1) of the Planning Act 2008 ("2008 Act") does allow the benefit of a DCO to rest with multiple parties. As section 149A of the 2008 Act does not make any further contrary provision regarding the scope of section 156(1) the MMO accept that there is no reason in principle why the benefit of a deemed marine licence ('DML') granted as part of a DCO could not be partially transferred so that the benefit of the DML was effectively 'split' between more than one person."

4. The Applicant notes that Article 5 of the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 provides specimen wording for a DCO which permits it to be transferred in whole or in part to a third party either on a permanent basis (effecting a "transfer") or on a temporary basis (putting into place a "lease"). The wording provided in the Model Provisions does not exclude the DMLs from such transfer powers:

(1) The undertaker may, with the consent of the [specify person or body]:

(a) transfer to another person ("the transferee") any or all of the benefit of the provisions of this Order and such related statutory rights as may be agreed between the undertaker and the transferee; or

(b) grant to another person ("the lessee") for a period agreed between the undertaker and the lessee any or all of the benefit of the provisions of this Order and such related statutory rights as may be so agreed.

(2) Where an agreement has been made in accordance with paragraph (1) references in this Order to the undertaker, except in paragraph (3), shall include references to the transferee or the lessee.

(3) The exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) shall be subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker.

5. Such provision falls within the matters authorised by paragraph 34 of Schedule 5 to the PA 2008, i.e. the transfer or leasing of undertakings.
6. The Applicant has included similar transfer provisions at Article 35 of the draft DCO.
7. The definitions of “undertaker” within the DMLs forming part of the draft DCO include any person to whom the benefit of specific provisions of the Order have been transferred by operation of Article 35. Any party with the benefit of the relevant part of the DCO would therefore automatically be the relevant undertaker for the purposes of the DML. The Applicant submits therefore that Section 72 of the Marine and Coastal Act would not be engaged by any transfer under the DCO (as any transferee or grantee will automatically fall within the definition of undertaker within the DMLs).
8. On this basis the Applicant would submit that there is no conflict between the operation of the DCO and Section 72 of the Marine and Coastal Access Act.
9. The Applicant would note that the following Orders, granted by the Secretary of State, all permit the partial transfer of a DML:
 - The Dogger Bank Teesside A and B Offshore Wind Farm Order 2015;
 - The Dogger Bank Creyke Beck Offshore Wind Farm Order 2015;
 - The Hornsea One Offshore Wind Farm Order 2014;
 - The Galloper Wind Farm Order 2013;
 - The Triton Knoll Offshore Wind Farm Order 2013; and
 - The Kentish Flats Extension Order 2013.
10. The Applicant is therefore of the view that the partial transfer of DMLs under the Planning Act regime is lawful.
11. The Applicant acknowledges that the MMO did raise concerns around the transfer of benefit provision during Section 42 consultation however following discussions with the MMO between July 2014 and March 2015 the Applicant understood that this matter had been agreed. This agreement was based on the fact that there was a notification procedure under paragraph (6) of Article 35 to ensure that the MMO was provided with adequate information in relation to any transfer to enable the MMO to exercise their powers of enforcement in relation to the DMLs as transferred.
12. The Applicant acknowledges that one of the key concerns of the MMO is ensuring that there are clear lines of responsibility in the event of a transfer. However, as noted above, Article 35 requires a notice to be provided to the MMO clearly setting out the following information:
 - a. the name and contact details of the person to whom the benefit of the powers will be transferred or granted;
 - b. the date on which the transfer will take effect;
 - c. the powers to be transferred or granted;
 - d. the restrictions, liabilities and obligations that will apply to the person exercising the powers transferred or granted;
 - e. where relevant, a plan showing the works or areas to which the transfer or grant relates; and

- f. a copy of the document effecting the transfer or grant signed by the undertaker and the person to whom the benefit of the powers will be transferred or granted.

13. The Applicant therefore submits that it will be clear who the undertaker is in all circumstances due to the definition of 'undertaker' in the DCO and DMLs and by virtue of the notice provisions contained within Article 35.