



The Gate Burton Energy Case Team
National Infrastructure Planning
gateburtonsolar@planninginspectorate.gov.uk
(Email only)

MMO Reference: DCO/2022/00015
Planning Inspectorate Reference: EN010131
Identification Number: GABE-SP022

01 September 2023

Dear Sir or Madam,

Planning Act 2008 – Application by Gate Burton Energy Park Limited, for an Order Granting Development Consent for the Gate Burton Energy Park

Deadline 3 Submission

On 27 February 2023, notice was given that the Secretary of State had accepted an application by Gate Burton Energy Park Limited (company number 12660764) of Stirling Square, 5-7 Carlton Gardens, London, United Kingdom, SW1Y 5AD (“the Applicant”) for a Development Consent Order (DCO) under the Planning Act 2008. The Application (Reference No. EN010131) was submitted by the Applicant to the Secretary of State c/o the Planning Inspectorate on 27 January 2023 and was accepted on 22 February 2023.

The Marine Management Organisation (MMO) received a copy of the Rule of 8 letter and requests for comments as part of Deadline 2 on 12 July 2023.

The Applicant seeks authorisation for the construction, operation and maintenance and decommissioning of a solar photovoltaic (PV) electricity generating facility and energy storage facility, based in Lincolnshire, with a total capacity exceeding 50 megawatts (MW) and export connection to the National Grid (“the “Project”).

This document comprises the MMO’s Deadline 3 response in respect to the above DCO Application. This is without prejudice to any future representation the MMO may make about the DCO Application throughout the examination process. This is also without prejudice to any decision the MMO may make on any associated application for consent, permission,



approval or any other type of authorisation submitted to the MMO either for the works in the marine area or for any other authorisation relevant to the proposed development. The MMO reserves the right to modify its present advice or opinion in view of any additional matters or information that may come to our attention.

Yours faithfully



Poppy Philipps
Marine Licensing Case Officer

D [REDACTED]
E [REDACTED] [@marinemanagement.org.uk](mailto:[REDACTED]@marinemanagement.org.uk)

Copies to:

Mark Qureshi, (MMO) – Case Manager: [REDACTED] [@marinemanagement.org.uk](mailto:[REDACTED]@marinemanagement.org.uk)

Amy Trakos (MMO) – Senior Case Manager: [REDACTED] [@marinemanagement.org.uk](mailto:[REDACTED]@marinemanagement.org.uk)



Contents

The MMO's role in Nationally Significant Infrastructure Projects (NSIPs)	4
MMO's Position on the DML	4
Issue Specific Hearing 2	8
Conclusion	11



1. The MMO's role in Nationally Significant Infrastructure Projects (NSIPs)

1.1. The MMO was established by the Marine and Coastal Access Act 2009 (the "2009 Act") to make a contribution to sustainable development in the marine area and to promote clean, healthy, safe, productive and biologically diverse oceans and seas. The responsibilities of the MMO include the licensing of construction works, deposits and removals in English inshore and offshore waters and for Northern Ireland offshore waters by way of a marine licence. Inshore waters include any area which is submerged at mean high water spring ("MHWS") tide. They also include the waters of every estuary, river or channel where the tide flows at MHWS tide. Waters in areas which are closed permanently or intermittently by a lock or other artificial means against the regular action of the tide are included, where seawater flows into or out from the area.

In the case of NSIPs, the Planning Act 2008 (the "2008 Act") enables DCO's for projects which affect the marine environment to include provisions which deem marine licences. As a prescribed consultee under the 2008 Act, the MMO advises developers during pre-application on those aspects of a project that may have an impact on the marine area or those who use it. In addition to considering the impacts of any construction, deposit or removal within the marine area, this also includes assessing any risks to human health, other legitimate uses of the sea and any potential impacts on the marine environment from terrestrial works.

Where a marine licence is deemed within a DCO, the MMO is the delivery body responsible for post-consent monitoring, variation, enforcement and revocation of provisions relating to the marine environment. As such, the MMO has a keen interest in ensuring that provisions drafted in a deemed marine licence ("DML") enable the MMO to fulfil these obligations.

2. MMO's Position on the DML

2.1. Licensable Activities

As confirmed by the Applicant within the latest draft DML [REP-027], and during Issue Specific Hearing 2 (ISH2) on 23 August 2023, the MMO notes that the Applicant has removed the following activities from the DML:

- i. *'(b) laying down of internal access tracks, ramps, means of access, footpaths, crossing of watercourses, roads, including the laying and construction of drainage infrastructure, signage and information boards; and'*
- ii. *'(c) construction compounds, including site and welfare officer and areas to store materials and equipment.'*

The MMO welcomes the removal of these activities from the DML, which have been removed because they do not take place within the marine area. Therefore the only activity to be considered in the DML [REP2-027] is:



‘Works to lay electrical cables including one 400 kilovolt cable circuit connecting Work No. 4A to Work No. 4C including tunnelling, boring and drilling works for trenchless crossings;’.

The MMO consider this activity exempt under Article 35 “Bored tunnels”, of the 2011 Exempted Activities Order (as amended) :

‘Bored tunnels

35.— (1) Article 4 applies to a deposit or works activity carried on wholly under the sea bed in connection with the construction or operation of a bored tunnel.

(2) Paragraph (1) is subject to conditions 1 and 2.

(3) Condition 1 is that notice of the intention to carry on the activity must be given to the licensing authority before the activity is carried on.

(4) Condition 2 is that the activity must not significantly adversely affect any part of the environment of the UK marine area or the living resources that it supports.

(5) But article 4 does not apply to any such deposit carried on for the purpose of disposal’.

2.2. Additional Information to Assess Impacts

The MMO thanks the Applicant for their email of 3 August 2023, which provided signposting to the project Framework Construction Environmental Management Plan [EN010131/APP/7.3] and Outline Design Principles [EN010131/APP/2.3]. These documents provided further detailed information on the project methodology.

Further, the MMO thanks the Applicant for providing Geographic Information System (GIS) data (in the form of KML files) on 16 August 2023 which included the location coordinates as set out in the DML. These, together with a supporting statement from the Applicant, confirmed that the entry and exit points of the bored tunnel will be above mean high water springs and therefore outside the marine area. The MMO notes that this is achieved by the presence of avoidance areas as referenced in the Outline Design Principles [REP2-008].

The Applicant has also confirmed that the bored tunnel will be below the marine substrate (the minimum depth of drilling 2m and the maximum 25m) and that they do not consider there to be any significant effects on the UK marine area or living resources.

Regarding an assessment of marine impacts, the MMO acknowledges that on 16 August 2023 the Applicant, in response to our previous requests, provided signposting to the project Construction Environmental Management Plan and the Operational Environmental Management Plan. The MMO has reviewed these documents and cannot find reference to an assessment of marine impacts.



Therefore, as set out in our Deadline 2 response [REP2-063], the MMO reiterates that we can see no direct reference within the Environmental Statement (ES) or any supporting documents provided by the Applicant, to the impacts of the proposed works on the marine environment. It is standard practice for an environmental statement to include a marine environment chapter and the ES should be updated to include this chapter. The Environmental Statement Marine Environment Chapter should assess the impact of the worst-case scenario.

The MMO must stress that an assessment of marine impacts is necessary as this would then inform the need for specific conditions to be included in any DML, so that any activities are suitably controlled.

2.3. Licence Conditions

If a DML was to be included in the DCO, conditions would need to be secured on the licence. The MMO can confirm that conditions are used to promote economically and socially beneficial activity, while minimising adverse effects to the environment, human health and other users of the sea. Standard conditions are included on all licences, such as notification of the activities commencing being given to our local office within a set time period, and notification of vessels and contractors being used. Bespoke conditions can also be added to a licence to ensure compliance with the assessed proposal, and to secure mitigation. A condition must pass the following five tests before it can be imposed on a licence:

- 1) The condition must be necessary.
- 2) The condition must relate to the activity or development for which a marine licence is sought.
- 3) The condition must be enforceable.
- 4) The condition must be precise.
- 5) The condition must be reasonable.

The MMO currently considers that if a DML was included in the Gate Burton Energy Park DCO, the relevant conditions secured would not meet Criteria 1: 'The condition must be necessary'. The conditions secured on the DML would be in regard to the bored tunnel. However, as the bored tunnel is considered exempt, and the Applicant has stated there is no significant adverse impact to the marine environment, the MMO does not consider a DML and any subsequent conditions are necessary.

2.4. Summary of MMO's Position

The MMO's current position remains as it is set out in our Deadline 2 response [REP2-063].

Our position, based on the information that has been provided to date, is that a DML is not required.



The MMO's Deadline 2 response [REP2-063] stated that we held this position as there was insufficient information to determine if the DCO application contained marine licensable activities or marine licensable exempted activities, or to assess the impacts of the proposed works on the marine environment. The MMO asked the Applicant to provide clarity on the proposed works that fall under Section 66 of the Marine and Coastal Access Act by amending the DML to confirm whether they consider the proposed marine licensable activities will not significantly adversely affect any part of the marine environment. The MMO also requested the Applicant provide a Marine Environment Chapter in the Environmental Statement assessing possible impacts.

Since Deadline 2, the Applicant has updated the DML [REP-027] to remove activities 2b and 2c in Schedule 9, Section 3, indicating they wish for only the following activity, "*works to lay electrical cables including one 400 kilovolt cable circuit connecting Work No. 4A to Work No. 4C including tunnelling, boring and drilling works for trenchless crossings*" to be considered. The Applicant has also provided confirmation that the entry and exit of the bored tunnel will be above mean high water springs and they do not consider there to be adverse effects on the marine environment. However, the Applicant has not provided a Marine Environment Chapter in the ES to evidence this position.

Following these updates, MMO maintains that the activities as described are exempt from requiring a marine licence under Article 35 'Bored tunnel' of The Marine Licensing (Exempted Activities) Order 2011 (as amended). The MMO can only provide advice based on current legislation and this legislation is not likely to change during the examination period.

The MMO cannot predict whether or not this exemption will apply in future and can only provide advice on the legislation as it is currently written, which the MMO consider the best available evidence to inform our advice. Should the legislation change between now and the time the works are required, the Applicant can apply for a standard marine licence.

The MMO understand this may incur cost and delay should Article 35 of The Marine Licensing (Exempted Activities) Order 2011 (as amended) change, however the Exemptions were designed to ease regulatory burden and provide scope for activities to be carried out in a streamlined way.

The MMO strongly advise that a DML is not included for the activities within the DCO as the MMO does not consider that Article 35 of The Marine Licensing (Exempted Activities) Order 2011 (as amended) can be disapplied for the potential convenience of an operator at a future point in time.

In the absence of an ES chapter, at this point the MMO consider that the activity meets Condition 2 in Article 35 of the 2011 Exempted Activities Order (as



amended), i.e., to not significantly adversely affecting a part of the UK marine area of the living resources that it supports. Therefore, the exemption still applies.

3. Issue Specific Hearing 2

The MMO did not attend ISH2 due to capacity issues within our organisation. We confirmed the reasons for our non-attendance in a letter to the ExA on 18 August 2023. We also confirmed that we maintained our position that with the information we have been provided to date, we do not consider a DML is required for this DCO, as the proposed activity of a bored tunnel falls under Article 35 of The Marine Licensing (Exempted Activities) Order 2011 (as amended).

However, the MMO monitored the proceedings via the livestream function. The MMO offers the following comments relating to matters discussed during the hearing.

3.1. MMO's Position on the need for a DML

The MMO noted the Examiner's and Applicant's comments in ISH2 that both parties were unclear on the MMO's position regarding the inclusion of a DML within the DCO and considered the MMO's view on this project has been changeable. The MMO must clarify that we have not changed our position, which is that we consider a DML does not need to be included in the DCO, throughout engagement with either the Planning Inspectorate (PINS) or the Applicant.

The MMO informed PINS prior to Deadline 1 that we do not consider a DML to be required for this DCO, as the proposed activity of a bored tunnel, falls under Article 35 of The Marine Licensing (Exempted Activities) Order 2011 (as amended). We also confirmed our position with the Applicant.

In our Deadline 1 [REP-058] response, we confirmed that our position had not changed as we were yet to receive any information from the Applicant which indicates that a DML is required for this DCO. The MMO did however confirm that we would continue to engage with the Applicant, in particular regarding further information they would be providing including updated description of the works, detailed methodology and clarification on what they consider to be licensable activities.

The MMO's Deadline 2 response [REP2-063] confirmed that we maintained our position that a DML was not required. We confirmed that our reason for holding this position was based on the information we have received to date, the works have the potential to be an exempt activity and therefore would not require a marine licence.

Following the latest updates from the Applicant, the MMO's position has not changed. The Applicant has provided further clarity to state that the entry and exit sites of the bored tunnel will be above mean high water springs and that they do not consider there to be any significant effects on the UK marine area or living



resources. Therefore, there is insufficient evidence to determine that the exemption would not apply to the works. Please see Sections 2.1, 2.2 and 2.4 of this letter for the MMO's detailed comments on the updated information.

The MMO also noted the Applicant's comment during ISH2 that there have been changes in MMO case team personnel. The MMO acknowledge that there have been some changes to case team personnel due to internal movements, however, the MMO must clarify that our position regarding the need for a DML has not changed throughout the process. The MMO has maintained the position that a DML does not need to be included as the proposed activity of a bored tunnel falls under Article 35 of The Marine Licensing (Exempted Activities) Order 2011 (as amended).

3.2. Future regulatory requirement of the Bored tunnel Exemption

The MMO noted the Applicant's suggestion in ISH2 that the MMO could advise at the time of the works commencing, whether the Bored tunnel activity is still considered an exempted activity. Please be advised that the onus is on anyone undertaking works to check they have the correct permissions in place to do so.

The MMO can only provide advice on the legislation as it is currently written, which the MMO consider the best available evidence to inform our advice. Should the legislation change between now and the time the works are required the Applicant can apply for a standard marine licence.

The MMO understand this may incur cost and delay should Article 35 of The Marine Licensing (Exempted Activities) Order 2011 (as amended) change, however the Exemptions were designed to ease regulatory burden and provide scope for activities to be carried out in a streamlined way.

The MMO strongly advise that a DML is not included for the activities within the DCO as the MMO does not believe Article 35 of The Marine Licensing (Exempted Activities) Order 2011 (as amended) can be disapplied for the potential convenience of an operator at a future point in time.

3.3. Updates to the DML

The MMO notes that the Applicant confirmed in ISH2 the update to the DML [REP-027] to remove activities 2b and 2c in Schedule 9, Section 3. The MMO and Applicant are in agreement that these activities are not licensable and should be removed from the DML.

Also, the MMO notes that the Applicant confirmed they had provided Geographic Information System (GIS) data (in the form of KML files) on 16 August 2023 which included the location coordinates as set out in the DML. These, together with a supporting statement from the Applicant, confirmed that the entry and exit points of the bored tunnel will be above mean high water springs and therefore outside the marine area.



3.4. Cleve Hill Solar Park Development Consent Order

The MMO notes the Applicant's comments in ISH2 regarding Cleve Hill Solar Park Development Consent Order as an example of a previous DCO where an exemption did not apply. The MMO can confirm that we discussed this with the Applicant in a previous meeting (13/07/2023). In our meeting we advised that the Cleve Hill Solar Park DCO could not be used as an example, due to the different circumstances.

For the Cleve Hill Solar Park DCO application, the applicants had requested that an exemption within the Marine Licensing (Exempted Activities) Order 2011 (as amended) for carrying out maintenance works on behalf of statutory authorities (in this case the Environment Agency) be extended to private companies, i.e. the applicants. The exemption related to Section 19: 'Maintenance of coast protection, drainage and flood defence works'.

The MMO did not support this approach and it was subsequently agreed by all parties that the exemption did not apply and that a DML would be required to control the licensable activities.

The MMO has since requested the Applicant to confirm which elements of the Cleve Hill Solar Park DCO reflected the Gate Burton Energy Park DCO application but has received no response on this matter. The MMO welcomes any further engagement with the Applicant regarding this matter.

3.5. Comments on 'without prejudice' positions

The MMO notes the Applicant's comments in ISH2 that the MMO has previously provided 'without prejudice' positions in other DCO applications, in particular for Renewables-related DCO applications.

The MMO also notes the Examiner's comment that a 'without prejudice' position on the DML from the MMO would be acceptable and a step forward.

The MMO is grateful for the opportunity provided by the Examiner. The MMO can confirm that for other DCOs on matters where we have disagreed with applicants on a point of principle, we have been content to provide a 'without prejudice' position.

An example of this is the East Anglia One North Offshore Windfarm DCO application. In this instance, the MMO disagreed with the applicants on how preparatory Unexploded Ordnance (UXO) clearances should be controlled.

The MMO must highlight that both parties agreed that the activity was licensable. However, the applicant considered that the activities should be included and controlled via conditions within the DML, whereas the MMO considered that the activities should be the subject of a separate marine licence application closer to the time of the actual activity. This was so that a more up to date assessment of environmental activities could take place at the right time. This did not prevent the



MMO on providing a 'without prejudice' position on the relevant draft conditions within the DML and any other supporting documents.

The MMO considers that the above example cannot be applied to the Gate Burton Energy Park DCO application. We do not consider that we are disagreeing on 'a point of principle'. The fact that we consider that an exemption applies for the only marine licensable activity is fundamental to our position.

As set out earlier in this letter, an assessment of marine impacts is necessary to inform the need for specific conditions to be included in any DML, so that any activities are suitably controlled. As we stated in this letter and in our previous responses, the MMO has reviewed all documents signposted by the Applicant, and we have not yet been able to find any reference to an assessment of marine impacts. The MMO requests that the Applicant update the ES to include an assessment of marine impacts.

4. Conclusion

The Applicant has updated the DML [REP-027] at Deadline 2 to remove the activities 2b and 2c in Schedule 9, Section 3, indicating they wish for only the following activity, "*works to lay electrical cables including one 400 kilovolt cable circuit connecting Work No. 4A to Work No. 4C including tunnelling, boring and drilling works for trenchless crossings*" to be considered.

The Applicant has also provided confirmation that the entry and exit of the bored tunnel will be above mean high water springs and they do not consider there to be significantly adverse effects on the marine environment.

Following this, the MMO maintains its position that the activities as described are exempt from requiring a licence under Article 35 of The Marine Licensing (Exempted Activities) Order 2011 (as amended).

The MMO requests that the Applicant update the ES to include an assessment of marine impacts and looks forward to further engagement with them on this application.

