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

29 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 4 Submission

On 27 February 2023, notice was given that the Secretary of State has 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.

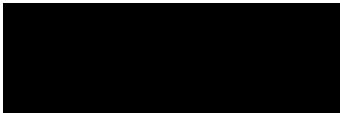
The Applicant seeks authorisation for the construction, operation and maintenance and decommissioning of a solar photovoltaic (PV) electricity generating facility and energy storage facility, based in Lincolnshire, with a total capacity exceeding 50 megawatts (MW) and export connection to the National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

This document comprises the MMO’s Deadline 4 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



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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 DCOs 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. Responses to the Examining Authority's Second Written Questions (WQ2)

Q2.6.3 [MMO] *Provide without prejudice comments on the draft Marine Licence included at Schedule 9, in the event that the Secretary of State considers it appropriate to include such in any Development Consent Order should one be forthcoming, so that I can be best placed to provide the most appropriate Licence in those circumstances.*

Detail why you consider it is not appropriate to provide for a dML in a scenario where it only becomes effective if particular circumstances arise and which seeks to afford certainty for a NSIP scheme?

2.1. MMO's current position on providing 'without prejudice' comments

The MMO is grateful for the opportunity provided by the Examiner for the MMO to provide without prejudice comments on the most recent DML [REP3-006]. However, the MMO's position remains as set out in our Deadline 3 submission [REP3-046], that we are unable to provide 'without prejudice' comments due to our position that



an exemption applies to the only marine licensable activity within the DML. As stated in our Deadline 3 response, in certain previous DCOs, when the MMO has disagreed with applicants on a point of principle, we have provided 'without prejudice' comments. However, this does not apply to the Gate Burton Energy Park DCO application as the fact that we consider an exemption applies for the only marine licensable activity is fundamental to our position.

In addition, for any conditions to be included in a DML they need to be considered necessary. Therefore, as an exemption applies for the only marine licensable activity and the Applicant states there is no significant adverse impact to the marine environment, the MMO does not consider a DML and any subsequent conditions are necessary. Therefore, we would be unable to provide 'without prejudice' comments on such conditions.

2.2. MMO's position on the appropriateness for a DML

The MMO acknowledges the Examiner's question regarding affording certainty for an NSIP scheme. However, the MMO maintains its position that the activities described in the latest draft DML [REP3-006], "*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*", are exempt from requiring a licence under Article 35 of The Marine Licensing (Exempted Activities) Order 2011 (as amended). The Applicant has confirmed that the entry and exit of the bored tunnel will be above mean high water springs and that they do not consider there to be adverse effects on the marine environment, supporting Condition 2 of Article 35 in 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'.*

Therefore, by applying the legislation as it is currently written, the MMO is able to consider the best available evidence to inform its decision and conclude that the inclusion of a DML is not appropriate as the only proposed marine licensable activity is considered exempt and therefore does not require a DML.



The MMO note the Applicant's comments in the Issue Specific Hearing 2 (ISH2) [REP3-026] held on 23 August 2023 regarding the possibility that the MMO's position on exemptions may change in the future. However, the MMO is only able to provide advice on the current legislation and apply the regulations as they are currently written. The MMO is not able to disapply an exemption on the basis that it may not apply in future years. In addition, the MMO is not able to predict whether this exemption will apply in the future, and as such the MMO is only able to consider the current exemption criteria, as detailed above, to inform our advice. However, as stated in our previous deadline response [REP3-046], if particular circumstances arise and the legislation changes between now and the time 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. As such, the MMO does not follow the practice that exemptions can be disapplied, including for the potential convenience of an operator at a future point in time.

Regarding impacts to the marine environment, the MMO notes the Applicant's response in their Deadline 3 Submission - 8.19 Response to Written Representation [REP3-033] that a separate Marine Environment chapter is not being included in the Environmental Statement (ES) as they consider there are no impacts on the marine environment. The MMO also notes that the Applicant has included a Water Environment Chapter [APP-018/3.1]. However, the MMO would like to highlight, that if a DML is included, it is standard practice for an ES to include a Marine Environment chapter that states how the Applicant has assessed any potential impacts. The Marine Environment chapter should also assess the impact of the worst-case scenario. Therefore, if the Applicant anticipates that a different methodology to the one described in the DML may be undertaken as a worst-case scenario that may potentially adversely impact the marine environment, the Marine Environment chapter would need to reflect this. The MMO would also expect this to be updated in the methodology.

Following this, the MMO requests the Applicant to update the ES to include a Marine Environment chapter. The MMO also requests that the Applicant confirms whether the current methodology described in the DML is the worst-case scenario and if not, the worst-case scenario methodology needs to be provided.

3. Conclusion

The MMO maintains its position that the activities as described in the latest draft DML [REP3-006], are exempt from requiring a licence under Article 35 of The Marine Licensing (Exempted Activities) Order 2011 (as amended). As such, the



MMO is unable to provide 'without prejudice' comments due to our position that an exemption applies to the only marine licensable activity.

The MMO requests that the Applicant update the ES to include a Marine Environment chapter that contains an assessment of marine impacts. Further to our email to the Applicant on 15 August 2023 where this was requested, the MMO acknowledges the Applicant's response signposting to the Construction Environmental Management Plan [REP2-033] and the Operational Environmental Management Plan [REP2-035]. However, the MMO stresses we are yet to see a Marine Environment chapter and would welcome the inclusion of one in the ES.

The MMO also requests that the Applicant confirms whether the current methodology is the worst-case scenario and if not, to provide an updated method statement.

