

SILVERTOWN TUNNEL

Volume 8

Development Consent Order Application

Response to ExA's First Written Questions:

8.5 Principal Issue: Marine Ecology

The Infrastructure Planning (Examination Procedure)

Rules 2010

November 2016

Silvertown Tunnel

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Marine Ecology

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Development Consent Order Application Response to ExA's First Written Questions: Marine Ecology

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Silvertown Tunnel

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Silvertown Tunnel

Response to ExA's First Written Questions:

Marine Ecology

ME MARINE ECOLOGY

ME.1 Question not for the Applicant

ME.2 Question

- (a) Please can the MMO/NE give the anticipated timescales for designation of the Thames Estuary recommended Marine Conservation Zone (rMCZ) and comment on whether the Silvertown tunnel development could delay any such designation?
- (b) Please can the MMO/NE/Applicant provide a view to the ExA on how the rMCZ should be weighted as part of the planning examination?
- (c) Please can the MMO/NE explain the process and timescale for the designation of the MCZ and whether it is possible that the designation would not occur?

Response

- ME.2.1 The Scheme Order Limits fall within the boundary of the Thames Estuary recommended Marine Conservation Zone (rMCZ) which stretches from Richmond to the wider mouth at Southend and Grain. Four subtidal and intertidal habitats and two species are under consideration for designation in this zone. The habitat features are: intertidal mixed sediments (note: intertidal mud or saltmarshes are considered to be sufficiently protected by other designations), subtidal coarse sediment, subtidal sand and subtidal mud. The species are: tentacled lagoon worm (*Alkmaria romijni*) and European smelt (*Osmerus eperlanus*).
- ME.2.2 This rMCZ was not among the first or second tranches of MCZs designated in 2013 and 2016 respectively. Designation of the recommended site is currently on hold as Defra has indicated a need to better understand the implications of the designation of the site for potential developments within the estuary. A formal MCZ assessment is consequently not required at this time as per the MMO Guidance *Marine conservation zones and marine licensing. MMO, April 2013 (attached as Appendix A)*.
- ME.2.3 As such, the Thames Estuary is not a designated MCZ, and is not protected by the provisions of the Marine and Coastal Access Act 2009 (such as the need for decision making authorities to refer assessments to the JNCC where there could be effects to protected features). It is therefore considered that little or no weight can be applied to it.

ME.2.4 Furthermore, even if the site was a designated MCZ, it is considered that the habitats would be of moderate importance (i.e. nationally designated) though this would be reduced to low due to the highly impoverished nature of the benthic community within the study area (as discussed in the ES). Species observed would also be expected to have a relatively rapid recovery rate. Even if the level of importance of the habitats cited within the rMCZ were to be raised to high, it is considered that this would increase the significance of the effects to minor adverse at worst, and would not materially change the conclusions of the assessment as presented in Chapter 10 Marine Ecology of the ES (APP-031).

ME.3 Question

The ES at paragraph 10.3.8 refers to Drawing 10-1 [APP-037] for the study area, although the study area is not clearly delineated on this drawing. Please can the Applicant provide a revised drawing 10-1 showing the boundary of the study area?

Response

ME.3.1 Drawing 10-1 [APP-037] has been amended to show the boundary of the study area and has been submitted at deadline 1.

ME.3.2 The following paragraphs of the ES [APP-031] should be read in accordance with the updated Drawing title: *Study Area and Marine Mammal Sightings Compiled as Part of the Thames Marine Mammal Sightings Survey (2004 to 2015)*:

- Paragraph 10.3.8
- Paragraph 10.4.73
- Paragraph 10.4.78
- Paragraph 10.4.82

ME.4 Question

Table 10-4 of the Habitats Regulation Assessment (HRA) [APP-064] is labelled 'receptor importance'.

(a) Please explain the meaning of this (if different to that set out in table 10-3) and confirm whether this is different to significance levels.

(b) Please clearly explain the approach to defining significance?

Clarification

It is assumed that table 10-4 referenced in Question ME4 is located in ES [APP-031] and not the Habitat Regulation Assessment (HRA) [APP-064] as stated above.

Response

ME.4.1 (a) Table 10-4 of the ES [APP-031] has been incorrectly labelled and should be titled 'Significance levels'. The label has been amended and the revised Chapter 10 Marine Ecology will be submitted at Deadline 1.

ME.4.2 (b) The assessment has been completed in accordance with the principles of the Chartered Institute of Ecology and Environmental Management's (CIEEM) Guidelines for Ecological Impact Assessment in the UK and Guidance on Impact Assessment in Marine and Coastal Environments.

ME.4.3 Clarification on the four steps used to define significance can be found in ES paragraphs 10.3.13 to 10.3.18 [APP-031], and further detail on this is provided below.

Step 1

ME.4.4 The first stage of the process is to identify the potential environmental changes resulting from the Scheme and the features of interest/receptors. These together are referred to as the impact pathway.

ME.4.5 As part of this stage the magnitude of change needs to be considered in spatial and temporal terms (including duration, frequency and seasonality), and against the background environmental conditions in a study area. The probability of environmental change occurring has also been considered at this stage. The magnitude and probability have been combined to define the level of exposure.

Step 2

- ME.4.6 The nature of the likely environmental changes in terms of the overall exposure has been considered as part of Stage 2. At this stage of the assessment, sensitivity of the specific receptors has also been considered. Sensitivity can be described as the intolerance of a habitat, community or individual of a species to an environmental change and essentially considers the response characteristic of the feature.

Step 3

- ME.4.7 Where the exposure and sensitivity characteristics overlap then vulnerability exists and an adverse effect may occur. The importance of a feature, as defined in Table 10.3 of the ES (APP-031), was also considered at this stage of the assessment.

- ME.4.8 An evaluation of the importance and vulnerability of the ecological receptors has been undertaken as a basis for assessing the significance of an impact. Those impacts that are assessed as being moderate or above are considered to be significant for the purpose of this marine ecology assessment.

Step 4

- ME.4.9 The final stage identified marine ecology impacts on receptors that were assessed as being of moderate and/or major adverse significance and that might therefore require mitigation measures to be applied to reduce residual impacts, as far as possible, to environmentally acceptable levels. Within the assessment procedure, the use of mitigation measures to alter the risk of exposure and hence the level of significance of the effect has been assessed and the ultimate residual effect identified.

ME.5 Question

The MMO, in their RR [RR-335] note the presence of mudflat habitat (a Biodiversity Action Plan (BAP) priority habitat) in the area of the proposed works below mean high water springs. This does not appear to be covered in the ES.

(a) Please provide a response to the MMO's RR.

(b) Please provide an assessment of the impact of the project on this BAP priority habitat?

(c) Following that assessment, should it be necessary, please set out details of any mitigation and/or compensation required and explain how this work would be secured in the dDCO?

Response

ME.5.1 (a) The Phase 1 Intertidal Habitat Survey, as reported in paragraph 1.3.4 of ES Appendix 10.B Marine Ecology Survey Report [APP-067], recorded the mudflat habitat in the study area to be limited in extent and highly impoverished with a low diversity of species. The mudflat in the study area is therefore considered to be of low ecological value (paragraph 10.4.20 and 10.4.21 of the ES [APP-031]).

ME.5.2 (b) Consideration of the importance and condition of this BAP priority habitat has been made when undertaking the marine ecology assessment (see Section 10.6 of the ES [APP-031]). Any loss of habitat will be temporary and the overall impact has been assessed as Negligible, and therefore no mitigation is required.

ME.5.3 It is noted that the Environment Agency RR (SL/2016/115920/01-L02) states:

We are pleased to note that the proposed jetty will be temporary. If plans change and a permanent jetty is proposed, the applicant will need to make an assessment of the long term biodiversity impacts and if necessary, propose suitable mitigation.

ME.5.4 (c) Section 10.6 of [APP-031] indicates that no mitigation is required.

ME.6 Question

Paragraph 10.6.38 of the ES [APP-031] states the maximum area of habitat to be disturbed by the installation of piles for the new temporary jetty is 22m². This area, whilst limited predominantly to the sub-tidal zone is considered to be temporary, as the piles would be removed or cut off 1m above bed level during the decommissioning of the jetty.

(a) Where in the ES is there mitigation proposed for this temporary loss of this sub-tidal habitat?

(b) How is the removal of the piles secured in the dDCO?

Response

- ME.6.1 (a) As stated in the Applicant's response to ME5 (b), currently no mitigation is proposed for the temporary loss of mudflat habitat as the impact is considered to be negligible. As stated in ES paragraph 10.6.39 and 10.6.40 [APP-031], the habitat is of low ecological/ conservation value, impoverished in terms of species diversity and the loss is temporary. As stated in the Applicants response to ME5 (c), although Section 10.6 of [APP-031] indicates that no mitigation is required, enhancement measures such as the clearing of rubble/rubbish on BAP priority habitat within the study area could be undertaken.
- ME.6.2 (b) The removal of the piles is secured by virtue of the conditions of the DML contained in Schedule 12 to the dDCO and the protective provisions for the benefit of the Port of London Authority ("PLA") contained in Schedule 13 to the dDCO. Both require the removal of any temporary structures, or the cutting off of the piles if they cannot be removed in a straightforward manner. The Applicant understands both the MMO and PLA to be content with this.
- ME.6.3 The CoCP has also been amended and submitted at Deadline 1 to refer to the need for the steel piles supporting the temporary jetty to be either removed, if necessary using hydraulic vibratory methods, or if this cannot be achieved, to be cut 1 metre below bed level, to be consistent with the ES.

ME.7 Question

The EA, in its RR [RR-299] identifies a discrepancy between the information provided in the CMS [APP-046] in relation to the techniques to be used in piling and those described in paragraph 10.6.69 of the ES [APP-031]. The EA also makes a request for a piling method statement to be secured through the dDCO.

(a) Can the Applicant please confirm the techniques to be used for piling, including providing a map showing the location and duration at each piling site;

(b) Should this be different to that assessed in the ES, the Applicant is requested to provide a revised assessment; and

(c) Do the IPs consider that there should be a piling method statement secured through a Requirement in the dDCO or condition in the dDML which identifies piling methods, locations, duration (number of days and hours per day), seasonal limitations on piling and where/how soft start procedures would be implemented?

Response

ME.7.1 (a) As described in paragraph 4.4.71 of the CMS [APP-046] the envisaged construction of the temporary jetty will require steel tubular piles being driven into the river bed. The final construction methodology will be developed by the Contractor at the detailed design stage; this will be in accordance with the conditions of the CoCP and the dDML. Envisaged Temporary Jetty Details are shown on Drawing ST150030-ATK-ZZZ-ZZ-DR-CE3151 Rev P01 within Appendix B of the CMS (APP-046) and Engineering Section Drawings & Plans Envisaged Temporary Jetty Regulations 5(2) (o) & 5(2)(p) & 6 (2) Sheet 23 of 23, ST150030-ATK-ZZZ-ZZ-DR-CE-3036 Rev P01 (APP-011). As set out in paragraph 10.6.69 of the ES [APP-031], for the purposes of the assessment of any potential impacts it has been assumed a most likely scenario, i.e. soft start vibro piling will be used for the burial of the first 12.5 metres and percussive piling will be used to achieve the final 12.5 metres depth. It is proposed that the piling work will take place up to 12 hours per day over approximately eight weeks.

ME.7.2 (b) Piling methodology will be controlled through the dDCO as it will form part of the construction plans and method statements which will need to

be submitted to the PLA and MMO pursuant to the Protective Provisions and dDML.

ME.8 Question

The EA in their RR [RR-299], request that further timing restrictions are applied to the percussive piling.

(a) What are the Applicant's views on this?

(b) Can these timing restrictions be agreed between the EA and the Applicant and included in a piling method statement which is secured through a Requirement or condition in the dDML?

Response

ME.8.1 (a) The Applicant is happy to incorporate the EA's comments on further timing restrictions for the percussive piling.

ME.8.2 The revised CoCP submitted for Deadline 1 includes a number of updates, in particular those set out in paragraph 8.1.1. The further timing restrictions requested by the EA in their RR [RR-299] are incorporated.

ME.8.3 (b) The dDML at Schedule 12 to the dDCO has also been redrafted based upon stakeholder comments to include a provision whereby the Applicant cannot commence activities licensed by the dDML(including piling) until a method statement has been agreed in writing by the MMO. The redrafted dDCO (which includes this provision in the dDML) has been submitted at Deadline 1.

ME.9 Question

Table 10-15 of the ES [APP-031] identifies the use of cowling and reflectors and a lighting management plan as required mitigation.

This is not set out in the CoCP. The ExA therefore requests that the Applicant review this and any other inconsistencies in relation to mitigation for marine ecology interests and makes amendments to the dDCO or CoCP accordingly.

Response

- ME.9.1 The CoCP has been revised and submitted for Deadline 1 and includes a number of updates, including revisions to address the points in respect of lighting raised in ME9.
- ME.9.2 Section 12.2 of the updated CoCP now includes the use of cowling and reflectors outlined in Table 10-15 of ES [APP-031].
- ME.9.3 The obligation to prepare a Lighting Management Plan remains a requirement of the CoCP.

Appendix A. Marine conservation zones and marine licensing. MMO, 2013



Marine Management Organisation



Marine conservation zones and marine licensing

April 2013



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MMO duties in relation to marine conservation zones and marine licensing

Section 126 of the Marine and Coastal Access Act (MCAA) (2009) places specific duties on the MMO relating to marine conservation zones (MCZs) and marine licence decision making. This is because s.126 applies where;

- (a) a public authority has the function of determining an application (whenever made) for authorisation of the doing of an act, and
- (b) the act is capable of affecting (other than insignificantly)—
 - (i) the protected features of an MCZ;
 - (ii) any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependent.

In determining how to apply s.126 in undertaking its marine licensing function, the MMO is introducing a new MCZ assessment process that will be integrated into existing marine licence decision making procedures. This will apply to all new marine licence applications with immediate effect and is relevant to MCZs proposed by Defra (together with their proposed features and proposed conservation objectives) until the point of designation. From the point of designation it is the designated MCZs (together with features and conservation objectives) which will be relevant.

MCZ sites and features identified as possible candidates for designation in future tranches will be NOT be subject to the MCZ assessment process. However, the MMO will consider the evidence base associated with those sites in its decision making.

The assessment process also addresses the general duties placed on the MMO in s.125 of the MCAA with respect to furthering the conservation objectives of MCZs.

Principles of approach

The MMO is committed to the principles of Better Regulation. In designing and implementing an MCZ assessment process we will ensure compliance with those principles by taking an approach that is proportionate, accountable, consistent, transparent and targeted.

Proposed MCZ assessment process for marine licensing

The process has three sequential stages; screening, stage 1 assessment and stage 2 assessment (see figure 1). Although the MCAA does not stipulate that a staged process is required, the approach is designed to ensure that the MMO will have available to it the necessary information by which it can fulfil its duties in relation to marine licensing in accordance with s.126 of the MCAA. This approach will maintain proportionality for applicants by helping guide them to supply the correct information to accompany their marine licence application.

In making determinations with respect to MCZs at each stage in the process, the MMO will always consider the feature(s) for which the MCZ(s) has been designated, the current status of those features and the conservation objectives against each feature.

The assessment process runs alongside other relevant legislative regimes, including those set out in Part 4 of the MCAA and other requirements such as those under the Habitats Directive or the EIA Directive, but is not a substitute for those.

The MCZ assessment will be carried out during the application determination window (our target is 13 weeks). It is anticipated that, in line with the approach taken by the MMO across all licensing decisions, much of the work to support this assessment for complex projects would be done in pre-application. This allows for the iterative process of developing an application to be applied. At times, it may be appropriate for information used in the MCZ assessment to be included in consultation with other bodies, for example, during EIA scoping.

The process

The MCZ assessment process is summarised in figure 1. More detail is provided in the sections below.

Screening

All marine licence applications will be screened to determine whether s.126 should apply to the application. It will apply if it is determined through the course of screening that;

- the licensable activity is taking place within or near an area being put forward or already designated as an MCZ; and
- the activity is capable of affecting (other than insignificantly) either (i) the protected features of an MCZ; or (ii) any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependant

The MMO will use a risk based approach when determining the 'nearness' of an activity with respect to MCZs. This will include applying an appropriate buffer zone to the MCZ features under consideration as well as a consideration of risks which lie in activities further removed from features.

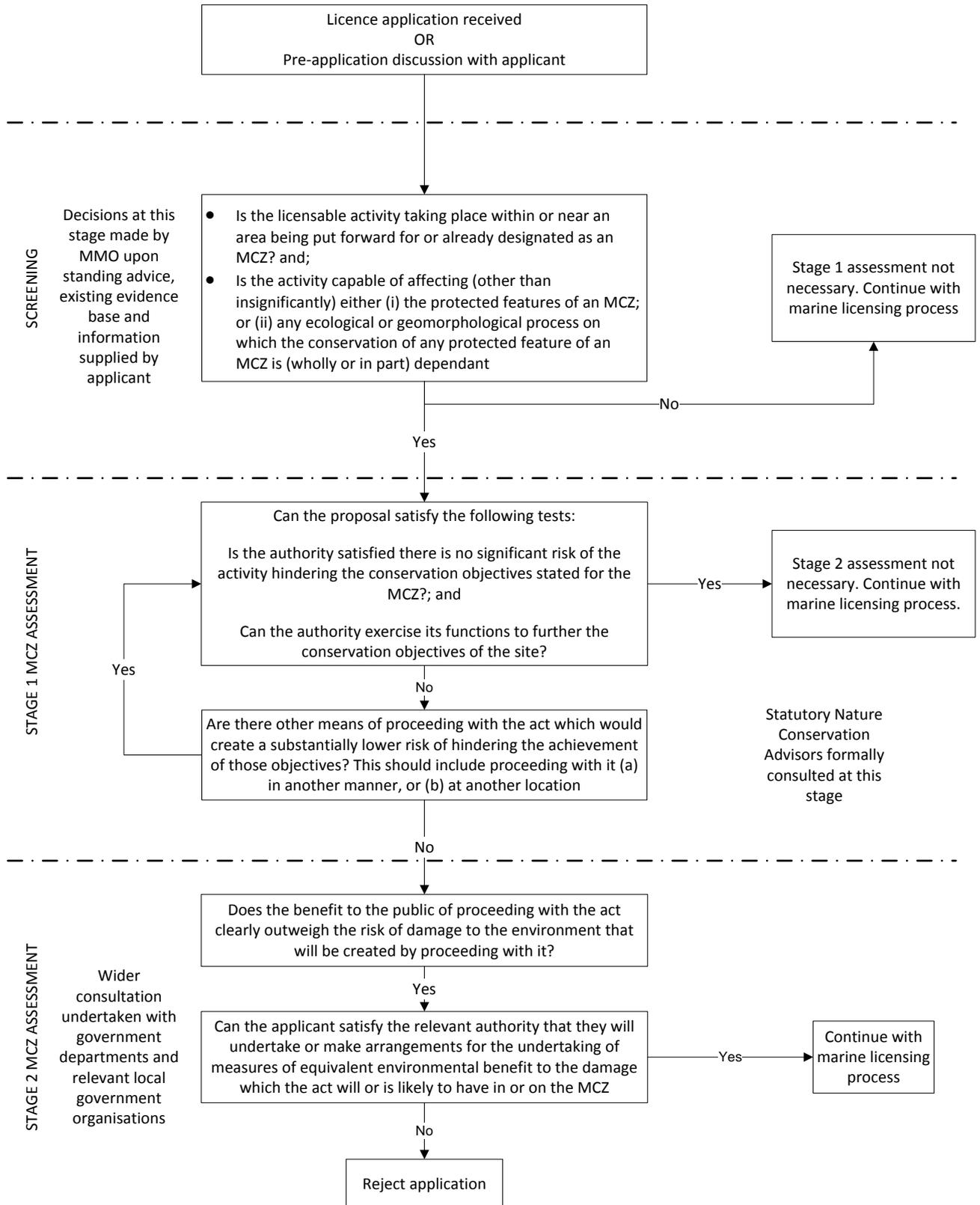
In determining 'insignificance' the MMO will consider the likelihood of an activity causing an effect, the magnitude of the effect should it occur, and the potential risk any such effect may cause on either the protected features of an MCZ or any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependant.

The MMO will not routinely consult SNCBs at this stage in the process although they will be notified of our screening determination and will have the opportunity to comment on that determination (and supply further information or advice as necessary) when we consult them either when the application is considered under the relevant legislative regime or when a stage 1 assessment is made.

Where it has been determined through screening that s.126 should apply to the licence application, the MMO will assess the application further to determine which subsections of s.126 should apply to the application. This will be done in two stages; stage 1 assessment and stage 2 assessment.

Figure 1 – a summary of the MCZ assessment process to be used by the MMO in marine licence decision making

N.B. This process will be integrated into the marine licensing process



Stage 1 assessment

The stage 1 assessment will consider whether the conditions in s.126(6) can be met. In doing so the MMO will use information supplied by the applicant with the licence application, advice from the SNCBs and any other relevant information to determine whether;

- there is no significant risk of the activity hindering the achievement of the conservation objectives stated for the MCZ; and
- the MMO can exercise its functions to further the conservation objectives stated for the MCZ (in accordance with s.125(2)(a))

If the condition in s.126(6) cannot be met the stage 1 assessment will also consider whether the condition in s.127(7)(a) can be met. In doing so the MMO will determine whether;

- there is no other means of proceeding with the act which would create a substantially lower risk of hindering the achievement of the conservation objectives stated for the MCZ. This should include proceeding with it (a) in another manner, or (b) at another location

In undertaking a stage 1 assessment the MMO will formally consult with SNCBs for a period of 28 days unless the SNCB notifies the MMO that it need not wait or MMO determine that there is an urgent need to grant authorisation (in accordance with s.126(2)).

Within this stage of assessment 'hinder' will be considered as any act that could, either alone or in combination:

- in the case of a conservation objective of "maintain", increase the likelihood that the current status of a feature would go downwards (e.g. from favourable to degraded) either immediately or in the future (i.e. they would be placed on a downward trend); or
- in the case of a conservation objective of "recover", decrease the likelihood that the current status of a feature could move upwards (e.g. from degraded to favourable) either immediately or in the future (i.e. they would be placed on a flat or downward trend).

Similarly 'further' will be considered as any act that could:

- in the case of a conservation objective of "maintain", increase the likelihood that the current status of a feature would be maintained either immediately or in the future; or
- in the case of a conservation objective of "recover", increase the likelihood that the current status of a feature could move upwards (e.g. from degraded to favourable) either immediately or in the future.

When considering whether an activity can further or hinder the conservation objectives of a site, the MMO will consider the direct impact of an activity upon a feature as well as any applicable indirect impacts. Such an indirect impact could include the changing the effectiveness of a management measure put in place to further the conservation objectives.

The applicant should be able to demonstrate that 'other means' reduces the risk such that the act no longer has a significant risk of hindering the conservation objectives of the site.

Stage 2 MCZ assessment

The stage 2 assessment will consider whether the conditions in s.126(7)(b) and (c) can be met. In doing so the MMO will use information supplied by the applicant with the licence application, advice from the SNCBs and any other relevant information to determine whether;

- the benefit to the public of proceeding with the act clearly outweigh the risk of damage to the environment that will be created by proceeding with it; and, if so, then whether
- the applicant can satisfy the MMO that they will undertake or make arrangements for the undertaking of measures of equivalent environmental benefit to the damage which the act will or is likely to have in or on the MCZ.

The above determinations will be addressed in sequence, that is, if the public benefit test is not 'passed' then a consideration of measures of equivalent benefit would not be made as the application would be rejected.

As well as consulting with the SNCBs a wider consultation with other advisors may also be undertaken at this stage, in particular to provide additional and specific advice on socio-economic matters. For example, consultees could include Local Authorities, Local Enterprise Partnerships and central Government departments (such as the Department for Business Innovation and Skills, Department for Communities and Local Government, Department for Energy and Climate Change or Department for Transport) that may have relevant expertise to offer. All advice received by the MMO will be considered in the decision making process in the normal manner.

In determining 'public benefit' the MMO will consider benefits at a national, regional or local level. Applications for activities that are of solely private benefit would not be considered to deliver a benefit to the public.

In determining 'measures of equivalent environmental benefit' the types of compensatory measures that might be considered under the Habitats Directive would also be appropriate to put forward here, although consideration will not be confined to those.

The Defra MCZ consultation document states that;

There is a strong scientific case for an assessment of a marine protected area network to be based on biogeographic regions, rather than administrative regions. Defra considers that this should provide the basis for future designation of MCZs. As the network continues to develop, effective management will also remain a key factor in assessing an ecologically coherent marine protected area network, and further links to international commitments under OSPAR.

Given this policy position, and recognising that MCZs will be designated in tranches, the MMO will consider 'measures of equivalent environmental benefit' that are of relevance to

any of the commitments the UK has made on marine protected areas at a national and international level. The reasons why an affected MCZ was designated (in addition to the features it was designated for) is relevant in this context as this may offer a broader ecosystems context for the consideration of measures.

The MMO will work closely with applicants and the SNCBs in determining suitable measures. We may also seek additional policy advice from Defra during this stage in the process. The MMO will require commitment from an applicant 'measures of equivalent environmental benefit' can be secured and functioning before they can be 'satisfied' (in accordance with s126(9)).

Duties placed on applicants

The onus will be placed on the applicant to supply the relevant information to the MMO and its SNCBs in order to progress an application through the assessment process.

Potential overlap with other processes

Where another marine protected area or other spatial management measure overlaps an MCZ the MCZ assessment process will not be a replacement for other necessary tests (e.g. HRA) - it will sit alongside those. Where there are overlaps with other processes, a case by case approach will be taken. From September 2012, applicants of Nationally Significant Infrastructure Projects (NSIPs) located in England, or both England and Wales, are able to agree evidence plans with relevant SNCBs. The requirements with respect to assessing possible impacts on MCZs will be included in this process.

Cumulative Impact Assessment

The MCAA does not provide any legislative requirement for explicit consideration of in combination or cumulative impact assessment to be undertaken when assessing the impacts of licensable activities upon an MCZ. However, the MMO considers that in order to fully discharge its duties under section 69 (1) of the MCAA, in combination and cumulative effects must be considered.

Review of consents

The MCAA does not provide any legislative requirement for a review of consents when MCZs are designated.

Statutory nature conservation bodies (SNCBs)

The duties placed on SNCBs under Section 127 of the MCAA are a critical component in the MMO's ability to fulfill its duties in relation to Sections 125 and 126. The MMO must notify the relevant SNCB (such as NE or if the MCZ is outside the seaward limits of the territorial sea, the JNCC), wait 28 days until considering the application and have regard to any advice given. There is no need to wait 28 days if (i) the SNCB so notifies, or (ii) the situation is urgent.

In exercising its functions, the MMO must take account of any guidance that will be produced by the SNCB (under Section 127 of the MCAA).

Sites for consideration in future tranches

As set out in the Defra MCZ consultation document there are a number of sites and features that are not proposed for designation in the first tranche but which may be the subject of a further evidence gathering exercise such that they may be considered in future tranches. Neither these sites, nor the features will be subject to an MCZ assessment process. However, the enhanced evidence base associated with any such area will be relevant and material to any licensing decision by the MMO.

Moreover, any licensable activity will be subject to the licensing provisions of the Marine and Coastal Access Act and any relevant legislation, which could include the Marine Works (EIA) Regulations. Both of these pieces of legislation have provision within them to assess any impact on the environment, and in areas where there is an enhanced evidence base (e.g. where evidence either has been, or currently is being, gathered to support a future designation), this will be taken into account in the MMO's normal decision making processes. In recognising the ongoing evidence gathering process the MMO will take a judgement on the level of precaution it applies to such decisions by considering;

- the level of uncertainty associated with any supporting evidence;
- the risk associated with any proposed activity; and
- the likelihood for future designation.

The onus will be placed on the SNCBs to highlight to the MMO where a proposed licensable activity might affect a site that is subject to further evidence gathering, and provide specific advice which addresses the points above. As mentioned it is also imperative that the SNCBs provide up to date information regarding the evolving evidence base in a timely manner.