



Marine Management Organisation

Marine Licensing
Lancaster House
Hampshire Court
Newcastle upon Tyne
NE4 7YH

T +44(0)300 123 1032
F +44 (0)191 376 2681
www.gov.uk/mmo

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Our Planning Inspectorate

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The Planning Inspectorate
National Infrastructure Directorate

[By Email only]

22 February 2019

Dear Mr Morgan,

THE PLANNING ACT 2008 - SECTION 89 AND THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010: LAKE LOTHING THIRD CROSSING, LOWESTOFT ORDER – DEADLINE 5, ISSUE SPECIFIC HEARING 1

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 this project because the development includes the construction of a new highway comprising a carriageway and cycleway over Lake Lothing, with associated licensable activities occurring both over and within the marine environment. The DCO application includes a Deemed Marine Licence (DML) under Section 65 of the Marine and Coastal Access Act 2009 (MCAA 2009) and, should consent be granted for the project, the MMO will be responsible for monitoring compliance and enforcement of DML conditions.

The MMO attended the Examining Authority's (ExA) Issue Specific Hearing 1 on 13 February 2019, held at the Ivy House Country Hotel (Ivy Lane, Oulton Broad, Lowestoft NR33 8HY). In accordance with the deadlines specified under the Examination Timetable for the proposed Lake Lothing Third Crossing, I am writing to provide the MMO's response to the ExA's Deadline 5.

Deadline 5 consists of:

- Written summaries of oral submissions put at any hearings held between 13 and 15 February 2019
- Applicant's second revised draft DCO (dDCO)
- An updated version of the Compulsory Acquisition Negotiations Tracker [**APP-010**]
- An updated Statement of Common Ground (SoCG) Report [**AS-007**]
- An updated Application Document Tracker



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- Comments on any further information requested by the ExA and received to Deadline 4
- Any further information requested by the ExA under Rule 17 of the Exam Rules

Of these items, the MMO considers the following relevant for inclusion in this response:

- Written summaries of oral submissions put at any hearings held between 13 and 15 February 2019

1. Written summaries of oral submissions

1.1 The MMO attended the Examining Authority's (ExA) Issue Specific Hearing 1 on 13 February 2019, held at the Ivy House Country Hotel (Ivy Lane, Oulton Broad, Lowestoft NR33 8HY).

1.2 Under Agenda Item 1 of the hearing (Welcome, introductions and arrangement for the hearing), the MMO provided a brief introduction to those representatives present. Specifically, Miss Heather Hamilton and Dr Jamie Johnson were introduced as the Marine Licensing Case Manager and Officer representing the MMO with respect to the Lake Lothing Third Crossing proposed development, respectively.

1.3 During the Introduction, the MMO provided a brief overview of the MMO's current position on the dDCO (including the DML, **Schedule 12** of the DCO), as submitted to the ExA by Suffolk County Council (the Applicant) under Deadline 4 of the examination process [**REP4-008**]. A summary of this overview is provided below.

1.3.1 The MMO welcomed continued engagement with the Applicant during the examination process with respect to the drafting of the DCO, but noted that the DML is not in line with the marine licensing process and that it is therefore not currently fit for purpose. The MMO expressed its intent to pursue further dialogue with the Applicant in order to resolve any outstanding issues.

1.3.2 Further to **paragraph 1.3.1** of this deadline response, the MMO expressed its concerns over the current wording of the existing conditions within the DML. Specifically, the MMO raised serious concerns related to the inclusion of an arbitration clause within the DML (**Part 5, Article 25**).

1.3.3 The MMO noted that the points raised during their Introduction were summary in nature only, and that further detail would be provided under the relevant agenda item (**Agenda Item 7 – DML**).

2. Written summary of intended oral statement

2.1 With 15 minutes of the hearing remaining within which to cover the remaining items on the programmed agenda, both the Applicant and the MMO agreed that productive conversation would not be possible, with respect to the MMO's position on the current dDCO.

2.2 Whilst the MMO welcomes the ExA's acknowledgement in the hearing of the fact the DML has yet to be agreed, as the Organisation was not afforded the opportunity to present its current position on the dDCO a full statement is provided below.

2.3 Development Consent Order

2.3.1 Under **Part 2(5)** of the DCO, reference is made to the "Limits of Deviation". The MMO notes that this article does not appear to reference the limits of the dredging area. Specifically, the limits of deviation do not appear to account for, or reference, intended depths to which material will be dredged. The MMO advises that this information must be presented for dredging activities to be undertaken, under the DCO.

2.3.2 Under **Part 2(21)** of the DCO, reference is made to the removal of sunken vessels. The MMO wishes to advise that the removal of sunken vessels constitutes a licensable activity under MCAA (2009) and may therefore require a separate marine licence, in the event that the activity is not captured within the DML.

2.3.3 Under **Part 5(48)** of the DCO, reference is made to the 'transfer of benefit of Order, etc'. In the event that this Article applies to the DML, the MMO wishes to advise that it must be revised to ensure that appropriate consultation of, and notification to, the MMO is provided.

2.3.4 The MMO wishes to highlight inaccuracies in the numbering of the paragraphs under **Schedule 1** of the DCO. The MMO's preferred format would be for the ancillary works to all be labelled alphabetically, restarting at (a) for each discrete Work Numbers.

2.3.5 The MMO wishes to highlight that any intended ancillary and maintenance activities to be undertaken within the UK marine environment, as referenced under **Part 4(42)** of the DCO, should be clearly captured within **Schedule 1** of the DCO, as well as within the DML.

2.4 Deemed Marine Licence

2.4.1 The coordinates presented within the 'Interpretation' section of the DML **Part 1(1)** follow a different format than those presented elsewhere within the DML. The MMO advises that all coordinates presented within both the DCO and DML be in a consistent format. The MMO's preferred format for coordinates is decimal degrees.

2.4.2 Further the points raised under **paragraphs 2.3.2** and **2.3.5** of this deadline response, the MMO considers that details of all marine aspects of the proposed development must be accurately captured within **Part 1(3)** of the DML. This will ensure that it is abundantly clear which elements of the works are licensed under the DML. To this end, the MMO considers that **Part 1(3)** of the DML should be revised to detail all Work Numbers, as defined under **Schedule 1** of

the DCO, and any other ancillary works to be undertaken within the UK marine environment, as detailed in **Section 42** of MCAA (2009).

- 2.4.3** There are a number of aspects contained within **Parts 2, 3, and 4** of the DML which the MMO considers to be unnecessarily repetitive, with respect to content of method statements and associated conditions. The MMO considers that it would be most appropriate to merge the method statement conditions under a single section of the DML which covers all intended purposes.
- 2.4.4** The MMO considers that the timeframes specified under **Parts 2, 3, 4 and 5** of the DML are not consistent with standard Marine Licensing processes. The MMO wishes to highlight to the ExA that discussions with the Applicant on matters concerning timescales for the submission of documents for approval are still ongoing. The MMO provided the Applicant with suggested revisions to the DML ahead of this deadline (date provided: 19 February 2019).
- 2.4.5** The MMO welcomes the inclusion of a condition for works to be undertaken in accordance with a Scheme-wide Written Scheme of Investigation (WSI) under **Part 4(13)** of the DML. However, the MMO considers that this condition must be reworded so as to reference the relevant section of the DCO under which the WSI is detailed.
- 2.4.6** Under **Part 4(15 and 16)**, the MMO does not consider the relevant conditions to be appropriate in their current form. The Applicant is therefore advised that further redrafting of these conditions is required with to 'disposal at sea'. The MMO provided the Applicant with suggested re-wording for these conditions ahead of this deadline (date provided: 19 February 2019).
- 2.4.7** Coordinates for the TH005 Lowestoft Circular North offshore disposal site are presented under **Part 4(18)** of the DML. Whilst these coordinates have been provided in an agreeable format, the MMO considers that they would be most appropriately presented within **Part 1** of the DML. The Applicant is therefore requested to amend the DML, accordingly.
- 2.4.8** The MMO notes that the DML contains a notice of determination clause under **Part 5(24)** of the DML. This clause is different to previously observed conditions of this type and whilst we understand the thoughts behind such a condition, the MMO considers that this clause should be removed from the DML completely.
- 2.4.9** Whilst it is recognised that the inclusion of timescales for determination, under **Part 5(24)** of the DML, may provide some comfort to the Applicant, it must be highlighted that the condition will result in unnecessary and forced pressure being placed on the MMO to determine the outcome of a document. If the MMO is forced to make such a determination under the timescales specified, it would ultimately have to refuse the application, if it was not in a position to issue an approval in accordance with the provisions of the DML and MCAA 2009. The MMO considers that this outcome would not be helpful to either party.
- 2.4.10** Whilst **Part 5(24(3))** sets out that extensions to notices of determinations can be agreed between parties, the MMO also wishes to highlight that it does not

delay the determination of applications unnecessarily and must rely on the best available evidence. Under some circumstances best available evidence may only be made available right at the end of any required consultation.

2.4.11 Finally, with respect to **Part 5(24)**, the MMO notes that a marine licences issued under standard application procedures would not contain a clause containing rigidly prescriptive timescales for the determination of applications, or returns.

2.4.12 The MMO notes that the DML contains an Arbitration clause under **Part 5(25)** of the DML. The MMO acknowledges that Arbitration may be appropriate for settling private disputes. However, the MMO considers that the “shoe-horning” of this confidential arbitral process onto the MMOs existing public law regulatory functions gives rise to a number of issues, both legally and practically.

2.4.13 Firstly, the inclusion of an Arbitration clause goes against **p4 of Annex B to PINS guidance note 11** that states the following:

“The MMO will seek to ensure wherever possible that any deemed marine licence is generally consistent with those issued independently by the MMO”.

Given the statement above, the MMO considers the DML would be inconsistent with marine licences issued independently by the MMO, should it be granted in its current form. Indeed, the MMO note that a marine licence issued under standard application procedures would not contain such a clause due to the existence of appropriate appeals/challenge routes, in the case of post consent decisions this would be a Judicial Review.

2.4.14 Whilst **Part 5(25(2))** of the DML states that nothing in the preceding subparagraph should fetter or prejudice the statutory rights, powers, discretions or responsibilities of the MMO, by including an Arbitration clause, the MMO’s decision-making function, as vested by parliament under public law functions, is effectively removed and placed in the hands of a private arbitration procedure that is inconsistent with the MMOs legal functions, powers and responsibilities.

2.4.15 Given the points raised under **paragraphs 2.4.12 to 2.4.14** of this deadline response, the MMO strongly recommends the complete removal of the Arbitration clause from the DML.

3. Concluding comments

3.1 The MMO wishes to express its willingness to continue working with the Applicant on the establishment on further revisions of the dDCO and its associated DML. Any progress will be captured within future revisions of the Statement of Common Grounds between the Applicant and the MMO.

3.2 Due to the inability of the MMO to fully present its position on the dDCO to the ExA during Issue Specific Hearing 1, if the ExA deems it necessary to hold a further hearing on matters related to the DCO, the MMO would request that sufficient time is made available early in the agenda to discuss matters directly related to the DML.

3.3 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.

If you would like to discuss any specific matter further or require additional clarity, please do not hesitate to contact me directly.

Yours sincerely,



Dr Jamie Johnson
Marine Licensing Case Officer

Direct line: 0208 225 8951

Email: jamie.johnson@marinemanagement.org.uk

Copies to:

Jethro Watson (MMO): jethro.watson@marinemanagement.org.uk

Paul Kirk (MMO): paul.kirk@marinemanagement.org.uk