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(Email only)

MMO Reference: DCO/2015/00001  
Planning Inspectorate Reference: TR010032

17 February 2023

Dear Sir or Madam,

### **Planning Act 2008, Application by National Highways for an Order Granting Development Consent for the Lower Thames Crossing**

On the 28 November 2022, the Marine Management Organisation (“MMO”) received notice under Section 56 of the Planning Act 2008 (the “2008 Act”) that the Planning Inspectorate (“PINS”) had accepted an application made by National Highways (the “Applicant”) for a Development Consent Order (the “DCO Application/DCO”) (MMO ref: DCO/2015/00001; PINS ref: TR010032).

The DCO Application includes a draft DCO and an Environmental Statement (the “ES”). The draft DCO includes, at Schedule 15, a draft Deemed Consent under Part 4 (Marine Licensing) of the Marine and Coastal Access Act 2009 (the “Deemed Marine Licence/DML”).

The DCO Application seeks authorisation for the construction, operation and maintenance of the Lower Thames Crossing (LTC) (the “Project”), a new road crossing connecting Kent, Thurrock and Essex. Approximately 23 kilometres in length, it will connect to the existing road network from the A2/M2 to the M25 with two tunnels (one southbound and one northbound) running beneath the River Thames. The tunnel will be built using tunnel boring machinery and will be approximately 4.25km long. Tunnelling work will start from the north and work southwards under the River Thames.

The scheme also includes improvements to the M25, A2 and A13, where the scheme connects to the road network, new structures and changes to existing ones (including bridges, buildings, tunnel entrances, viaducts, and utilities such as electricity pylons) along the length of the new road and a free-flow charging system.



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

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 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 DML enable the MMO to fulfil these obligations.

Further information on licensable activities can be found on the MMO's website [here](#). Further information on the interaction between the Planning Inspectorate ("PINS") and the MMO can be found in our joint advice note 11 Annex B [here](#).

### Relevant Representation

This document comprises the MMO's initial comments in respect of the DCO Application in the form of a relevant representation.

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.

Yours faithfully,



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## 1. General comments on the project / DCO application

### 1.1 Comments

- 1.1.1 The MMO notes that the need for a temporary jetty is no longer a requirement. In addition it has been established that scour protection is no longer required to maintain the stability of the riverbed with the Project's tunnel protection zone over the 120-year design life of the project.
- 1.1.2 It is the MMO's understanding that the Applicant considers the boring of the tunnels to be exempt from the requirement of a marine licence as per article 35 of The Marine Licensing (Exempted Activities) Order 2011. In such a case, a notification of the intention to carry out the activity must be submitted to the MMO.
- 1.1.3 The Applicant should demonstrate that they have considered whether the project adheres to all relevant marine plan policies. The relevant marine plan policies that should be met can be identified using the Explore Marine Plans tool and policy information on the MMO's website:

[Explore marine plans - GOV.UK \(www.gov.uk\)](https://www.gov.uk/explore-marine-plans)

## 2. Development Consent Order (DCO) and Deemed Marine Licences (DMLs)

### 1.2 Comments

- 1.2.1 The MMO was given the opportunity to view and provide comments on the draft DML prior to submission to PINS. The MMO provided comments on 12 September 2022. While a number of concerns raised in our response to the Applicant on 12 September 2022 have been addressed, the MMO has flagged where any new or outstanding issues remain. The MMO has not previously reviewed the wider DCO.
- 1.2.2 The MMO notes that there are three key issues, further details of which can be found at sections 1.3 of this document:
- Timeframes proposed.
  - DCO Article 8, Consent to transfer benefit of the Order.
  - DCO Article 64, Arbitration.

### 1.3 DCO Interpretations, Articles and Requirements. Comments

- 1.3.1 The MMO is unclear how article 8 of the DCO interacts with the interpretation of "undertaker" at paragraph 1(1) of the DML. The MMO's position is that the DML should be regulated using the powers in the 2009 Act including transfer of the order (section 72 of the 2009 Act).



- 1.3.2 As set out in in Advice Note Eleven, Annex B – Marine Management Organisation | National Infrastructure Planning ([planninginspectorate.gov.uk](http://planninginspectorate.gov.uk)) where a developer chooses to have a marine licence deemed by a DCO, we, the MMO, “will seek to ensure wherever possible that any deemed licence is generally consistent with those issued independently by the MMO.” As you are aware developers can seek consent for a marine licence directly with the MMO, reinforcing that in respect of marine licences the DCO process is nothing more than a mechanism for granting a marine licence – it is not a vehicle to amend established process and procedures, such as those for the transfer of a marine licence.
- 1.3.3 As the guidance further sets out, we, the MMO are responsible for enforcing marine licences regardless of whether these are ‘deemed’ by a DCO or consented independently, and it is therefore fundamental that all marine licences are clear and enforceable, and consistency is a key element in achieving this.
- 1.3.4 In considering the proposed provisions of Article 8 DCO, these provisions no longer require the licence holder (undertaker) to make an application for a licence to be transferred it is simply their decision to make the transfer – this is a clear departure from MCAA 2009. Further the newly introduced process involves the Secretary of State providing consent to the transfer, rather than the MMO as the regulatory authority for marine licences considering the merits of any application for a transfer.
- 1.3.5 Article 8(1)(a) specifies the transfer of the whole of a deemed marine licence and Article 8(1)(b) specifies a grant to a lessee for an agreed period. There is however no mechanism either in the DCO or indeed in MCAA 2009 for a marine licence to be ‘leased’, specifically there is no provision for the licence ‘reverting’ to the licence holder after the agreed lease period – in practical terms it would be necessary to vary the licence to change the details of the licence holder at the beginning of the agreed period and then again at the end of the agreed period.
- 1.3.6 Clarification is required of your position in respect of the application of Section 72 MCAA generally to Schedule 15, the Deemed Marine Licence and specifically in relation to sections 72(8) and (9) MCAA 2009.
- 1.3.7 The MMO is unclear how article 64 of the DCO interacts with paragraph 23 of the DML. As previously noted within the MMO’s Statement of Common Ground, the MMO requested that paragraph 23 be removed from the draft DML and, should an arbitration clause such as that at article 64 of the DCO be included, this should clearly state that arbitration does not apply to any decision, difference, determination, approval or permission required by or under any provision of the deemed marine licence in Schedule 15.
- 1.3.8 The MMO should be considered to be the overall decision-maker in disputes regarding licensable activities in the marine area. As such, the MMO strongly disputes the requirement for an arbitrator for matters under which the MMO are the enforcing body for its statutory functions via the DML. The MMO’s position is that any matter in relation to the DML should not be subject to arbitration.



## DML Schedule 15. Comments

### Part 1 introductory

1.3.9 1(1) states:

*“buried pipeline” means the pipeline to be built from the northern portal work area with an approximate length below the mean high water springs of 400m and a maximum diameter of 1000mm.”*

While the MMO appreciates that exact details may not be known until the detailed design stage, it is appropriate to state the maximum length rather than use the word “approximate.” Furthermore, it is essential that this maximum length has been considered within the ES. In addition, for consistency, units of measurement should be the same where possible and appropriate. In this case the sentence should state “400m” and “1m” rather than 1000mm.

1.3.10 The definition for “intertidal zone” should be amended to state that this is the area between the normal tidal limit and 1 nautical mile.

1.3.11 “Marine Noise Register” should be amended to “Marine Noise Registry.”

1.3.12 1(1) states:

*“undertaker” means National Highways Limited (Company No. 09346363) whose registered office is at Bridge House, 1 Walnut Tree Close, Guildford, Surrey, GU1 4LZ or any transferee under article 8 (consent to transfer benefit of Order) of the Order and includes and any agent, contractor or sub-contractor acting on its behalf.”*

The MMO’s position is that the DML should be regulated using the powers in the 2009 Act including transfer of the order (section 72 of the 2009 Act).

### Part 2 Licensable marine activities

1.3.13 Paragraph 5(1)(a) refers to a “northern portal work area”. The MMO requests clarification as to where this is.

1.3.14 As previously noted above, the measurements given at paragraph 5(1)(a)(i) should be the maximum measurements, as considered within the ES, not an approximate. Furthermore, specific reference should be given to length, width, etc.

1.3.15 MMO understands the developer’s preference to continue the use of ancillary works such as those set out within paragraph 5; however, the MMO requires further information and reassurance that the impacts of such ancillary works have been considered within the ES.

1.3.16 “Tunnel operation” and “northern tunnel portal site”, as referred to within paragraph 5(1)(b)(ii), should be defined.

1.3.17 “Coal House Point”, as referred to within paragraph 5(1)(c), should be defined.

1.3.18 It would be helpful for each of the sets of coordinates for each of the work areas at 5(2)(a)-(c) referenced the relevant provisions at 5(1)(a)-(c).



- 1.3.19 The word approximately as used within paragraph 5(2)(a) should be removed or the parameters of the word “approximately” should be defined.
- 1.3.20 Paragraph 5(2)(a) refers to “drainage pipeline and outfall.” It is unclear if this is the subtidal outfall structure at 5(1)(a). Confirmation is required. Furthermore, the MMO requests that the language used is consistent to prevent confusion.
- 1.3.21 It is unclear how do the terms used under “Work area” at 5(2) relate to the provisions. Clarification is required.
- 1.3.22 Is the “outfall” referred to at 5(2)(b) the same as the “drainage discharge” referred to at 5(1)(b) or the “outfall structure” referred to at 5(1)(b)(i)? Clarification is required.

#### **Part 4 Conditions**

- 1.3.23 To ensure consistency, the MMO suggests that the use of “working days” at paragraph 9(3)(b) be changed to “business days.”
- 1.3.24 The MMO does not agree with the proposed timescales for returns as currently set out in articles 10(1) and 11(1) of the draft DML. In order for the MMO to fulfil its obligations post consent, sufficient time must be given to enable full consideration and consultation with relevant stakeholders where required. The MMO appreciates that in many cases the Applicant could be working towards tight post-consent time schedules, and a delay in document sign off could lead to project deadlines slipping, cost implications and frustration. Consequently, it is crucial to manage the Applicant’s expectations and enable forward planning by ensuring that sufficient has been allocated for the approval process. As such, the MMO requests that the timeframes at 10(1) and 11(1) of the DML are amended to 13 weeks. The MMO will endeavour to approve documents as soon as possible.
- 1.3.25 The condition at paragraph 13 should end at “marine environment” to bring this in line with conditions included in licences issued under the 2009 Act.
- 1.3.26 Paragraph 15 refers to a “water management pipeline”. It is unclear which works of the authorised development at paragraph 5 this relates to. Clarification is required.
- 1.3.27 Minor wording amendment are required at paragraph 18 to ensure consistency with marine licences issued under the 2009 Act. As such, this sentence should read, “The undertaker must inform the MMO in writing of the completion of the last marine activity no more than 10 business days following the completion of the said activity.”





1.3.28 For coastal process impact prevention, the DML should contain provisions guaranteeing flood defence monitoring (ES Chapter 14, paragraph 14.15.10g) and a construction drainage plan (ES Chapter 14, paragraph 14.5.10f.) to be in place. The MMO believes the latter to be covered under paragraph 8(1) and 8(2) (surface and foul water drainage) but we are uncertain as to the provisions regarding the flood defences (possibly covered in paragraph 117 (a) and 117 (b) under Part 9 of the draft DML. The MMO notes, however, this within the remit of the Environment Agency and we defer to their comments in this respect.

### **Part 5 Procedure for the Discharge of conditions**

1.3.29 The MMO does not agree that the lack of a request for further information by the MMO after 6 weeks indicates it can be 'deemed' that the MMO have sufficient information. Restricting and/or preventing the flow of information or preventing the MMO making a determination after 6 weeks will slow the process and/or prevent the MMO making a determination due to lack of information. In this instance the return would be rejected. As such, the MMO recommends that this paragraph 20(2) be removed.

1.3.30 In addition, the MMO does not agree with article 22(1) and (2) of the DML. As noted above, this does not provide sufficient time for the MMO to fulfil its post consent obligations and therefore requests that this is also amended to 13 weeks.

1.3.31 Paragraph 13 of the draft DML refers to arbitration. Please see MMO comments at 1.3.1 of this document in relation to this.

## **Environmental Statement (ES)**

### **1.4 Chapter 1 - Introduction**

1.4.1 Section 1.3 of this chapter covers the legislative and policy frameworks associated with the Project. While the Project includes a number of activities which require a licence under the 2009 Act, this chapter makes no reference to the 2009 Act, nor does it refer to other important marine related policies such as the Marine Plans (see previous comments at 1.1.3 of this document).

### **1.5 Coastal Processes**

1.5.1 In providing these comments the MMO has reviewed the following documents:

- Chapter 1 - Introduction
- Chapter 2 - Project Description
- Chapter 4 - EIA methodology
- Chapter 14 - Road Drainage and the Water Environment
- Chapter 16 - Cumulative Effects



- 6.3 Environmental Statement Appendices 1.2 Summary of Section 42 comments and National Highways Responses.
- 1.5.2 The MMO believes the general description of coastal process impacts to be accurate.
- 1.5.3 The MMO notes that, in accordance with previous agreements that modelling or sampling was not required to assess hydrodynamics and sediment transport in the Thames, coastal process impacts are agreed to be minimal and to be largely scoped out. A number of project design mitigation measures have been included (ES chapter 14, paragraph 14.5.2) to minimise potential impacts. Furthermore, consideration for essential mitigation has also been considered (ES chapter 14, paragraph 14.5.12).
- 1.5.4 With respect to the mitigation, MMO note that it is considered agreed with MMO but also 'would be' designed as stated, meaning the mitigation is not confirmed on the basis of a final design. However, MMO have no major concerns given the generally low impacts anticipated e.g., paragraph 14.5.11a notes that outfall headworks would be set back from the banks of any receiving watercourses to avoid scour and hydrodynamic impacts.
- 1.5.5 The DML should contain provisions guaranteeing flood defence monitoring (ES Chapter 14, paragraph 14.15.10g) and a construction drainage plan (ES Chapter 14, paragraph 14.5.10f.) to be in place. However, the MMO defer to the Environment Agency in relation to this.
- 1.5.6 With regards to the description of potential cumulative and inter-related impacts and effects on the physical and biological environment, it is noted that there is no formal guidance on these therefore an expert-judgement led methodology has been developed in Chapter 16 of the ES. The MMO is of the opinion that the method applied (and the list of projects assessed as per Chapter 16, paragraph 16.3.98) is detailed and sufficient for coastal process assessments.

## 1.6 Benthic Ecology

- 1.6.1 In providing these comments the MMO has reviewed the following documents:
- Chapter 2 - Project Description
  - Chapter 9 - Marine Biodiversity
- 1.6.2 Given the limited spatial area of potential impacts of the project on marine ecological receptors, the MMO considers the high-level description of the types of habitats that might be affected at the biotope level to be satisfactory.
- 1.6.3 The impact pathways of the two project elements which impact marine ecology receptors (construction/operation of the North Portal construction drainage pipeline and outfall and the construction of the Coalhouse Fort water inlet valve), and the rationale for statements regarding overall significance of such impacts are suitable.



## 1.7 Fish ecology

1.7.1 In providing these comments the MMO has reviewed the following documents:

- Chapter 2 - Introduction
- Chapter 2 - Project Description
- Chapter 4 - EIA Methodology
- Chapter 8- Terrestrial Biodiversity
- Chapter 9 - Marine Biodiversity
- Chapter 14 - Road Drainage and Water Environment
- Chapter 16 - Cumulative Effects Assessment
- Chapter 17 - Summary
- 6.3 Environmental Statement Appendices Appendix 1.2- Summary of Section 42 comments and National Highways responses, Document Ref: TR010032/App/6.3, version 1
- 6.4 Environmental Statement Non-Technical Summary (NTS), Document Ref; TR010032/APP/6.4 Version 1

1.7.2 The MMO notes that an in-depth and thorough description of the physical and biological environment of the proposed site has been given. Important intertidal habitat features, such as salt marshes and mud flats, have been identified and description of fish receptors is appropriate and adequate to inform the assessment.

1.7.3 While the assessment of impacts assumes that fish are mobile so will be able to distance themselves from the source of impact, this assumption overlooks the various swimming capabilities and life stages of fishes or species which are sensitive to excessive fine sediments e.g., salmonids. However, when considering the scale of activities proposed, suspended sediments and soils caused by the proposed works are likely to be highly localised, therefore the MMO agrees with the conclusion that any impacts to fish are not likely to be significant.



## 1.8 Shellfish ecology

1.8.1 In providing these comments the MMO has reviewed the following documents:

- Chapter 8 - Terrestrial Biodiversity
- Chapter 9 - Marine Biodiversity

1.8.2 The MMO has no points to note in relation to shellfish ecology at this time.

## 1.9 Commercial Fisheries

1.9.1 In providing these comments the MMO has reviewed the following documents:

- Chapter 8 - Terrestrial Biodiversity
- Chapter 9 - Marine Biodiversity

1.9.2 The MMO is content that the assessment has identified and included small-scale fisheries, both commercial and recreational, that currently operate in or nearby to the Lower Thames water, and that appropriate evidence sources have been used.

## 1.10 Underwater Noise

1.10.1 In providing these comments the MMO has reviewed the following documents:

- Chapter 1 - Introduction
- Chapter 2 - Project Description
- Chapter 4 - EIA Methodology
- Chapter 12 - Cumulative Effects Assessment
- Chapter 9 - Marine Biodiversity
- 6.3 Environmental Statement Appendices: Appendix 1.2 - Summary of section 42 comments and National Highways response
- Appendix 9.1 - Assessment of ground-borne noise and vibration, and underwater noise from the boring machine at marine receptors
- Lower Thames Crossing, 3.1 Draft Development Consent Order, October 2022

### **Underwater noise effects associated with piling operations**



- 1.10.2 It is the MMO's understanding that installation of the northern tunnel entrance compound drainage pipeline and outfall on the northern shore of the River Thames would require sheet piling to facilitate excavation of the pipeline trench. Installation of the outfall structure may require the construction of a minor cofferdam, and the structure itself may be placed on top of small mono-piles for support or be connected to longer piles used for the cofferdam. Construction of the water inlet with self-regulating valve structure would also require sheet piling to construct a cofferdam. Furthermore, the gate structure itself may also require piling dependent on ground conditions.
- 1.10.3 The MMO notes that a high-level assessment only, with no noise modelling, has been undertaken regarding the potential effects of noise associated with piling operations. The assessment concludes that there would be neutral to slight adverse effects that are not significant, on the fish community. For marine mammals, the assessment concludes that the effects from underwater noise would be slight adverse and not significant.
- 1.10.4 The MMO agrees that the use of vibro-piling generally introduces less impact noise into the marine environment and welcomes the inclusion of paragraphs 15 and 16 in the draft DML.

## 1.11 Shipping and Navigation

- 1.11.1 The MMO defers to the Maritime and Coastguard Agency, Trinity House and the Port of London Authority on matters of shipping and navigation. The MMO will continue to be part of discussions relating to securing any mitigation, monitoring or other conditions.

## 1.12 Marine Archaeology

- 1.12.1 The MMO defers to Historic England on matters of marine archaeology. The MMO will continue to be part of discussions relating to securing any mitigation, monitoring or other conditions.

## 1.13 Seascape, Landscape and Visual Resources

- 1.13.1 The MMO defers to Natural England as the SNCB on matters of Seascape, Landscape and Visual Resources. The MMO will continue to be part of the discussions relating to securing any mitigation and monitoring or development of any plans/conditions on this matter.

## 2. Other Application Documents

### 2.1 General Comments

- 2.1.1 The MMO has undertaken a high level review of other relevant DCO application documents reserves the right to comment further.



### 3. Summary

- 3.1.1 The MMO has major concerns regarding timescales provided within the DML in relation to post consent activities and approvals.
- 3.1.2 The MMO has major concerns on DCO Article 8, Consent to transfer benefit of the Order.
- 3.1.3 The MMO note the removal of arbitration from the ML, however, there remains some inconsistency major concerns regarding the arbitration process.
- 3.1.4 The MMO reserve the right to request the inclusion of additional conditions.
- 3.1.5 We strongly recommend that the Applicant engage with the MMO throughout the examination process in order to ensure agreements can be reached.

