



Marine Management Organisation

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

T +44 (0)300 123 1032
www.gov.uk/mmo

Lower Thames Crossing Case Team
National Infrastructure Planning
Lowerthamescrossing@planninginspectorate.gov.uk

(By email only)

MMO Reference: DCO/2015/00001
National Infrastructure Planning Reference: TR010032

31 October 2023

Dear Sir or Madam,

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

Deadline 6 Submission

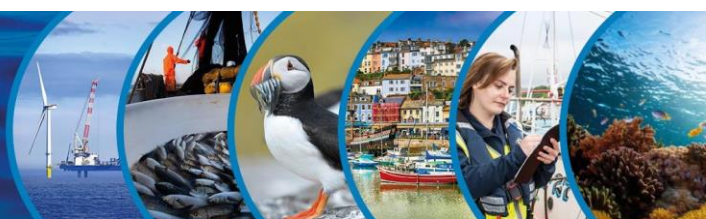
On the 28 November 2022, the Marine Management Organisation (“MMO”) received notice under Section 56 of the Planning Act 2008 (the “2008 Act”) that the Planning Inspectorate (“PINS”) had accepted an application made by National Highways (the “Applicant”) for determination of a Development Consent Order for the construction, operation and maintenance of the proposed Lower Thames Crossing (the “DCO Application”).

The MMO received the Rule 8 letter on 27 June 2023. In response to this letter, the MMO submits the following which can be viewed in Annex 1:

For receipt by the ExA of:

- Responses to Examiners Questions
- MMO comments on the Transfer of provisions (article 8) and Paragraph 24 of the Deemed Marine Licence (DML)

This written response is submitted without prejudice to any future representation the MMO may make about the Application throughout the examination process. This response is also submitted 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,



Gregg Smith
Marine Licencing Case Officer

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



Annex 1

1 Responses to Examiner's questions

- 1.1 The MMO has reviewed the Examiner's questions [PD-040] which were published on 10 October 2023 and provides its response to those questions directed to the MMO below.
- 1.2 **Question 7.1.1**
The MMO reiterates its comments from ISH5 regarding the Tunnel Boring, that the activities associated with the construction or operation of a bored tunnel carried out under the seabed are exempt from requiring a marine licence under article 35 of the 2011 Exempted Activities Order.
- 1.3 **Question 7.1.2**
The MMO has reviewed the Deemed Marine Licence in dDCO [REP5-024] and the Code of Construction Practice [REP5-049] and believes the controls are adequate for vibration.
- 1.4 **Question 7.1.3**
The MMO has reviewed the Tunnel Depth Report [REP3-146] and has no further comments to make, as outlined above the construction and operation of a bored tunnel carried out under the seabed are exempt from requiring a marine licence under article 35 of the 2011 Exempted Activities Order.
- 1.5 **Question 7.1.4**
The MMO has reviewed the controls/commitments in GS024, RDWE017, 018a and 018b. Providing the use of ground protection tunnels does not fall under the criteria set out under section 66 of the Marine and Coastal Access Act 2009 the MMO has no further comments to make.
- 1.6 **Question 7.1.5**
Following a review of the existing controls the MMO have no additional or updated controls in respect of the tunnelling works.

2 MMO comments on the Transfer of provisions (article 8) and Paragraph 24 of the Deemed Marine Licence (DML)

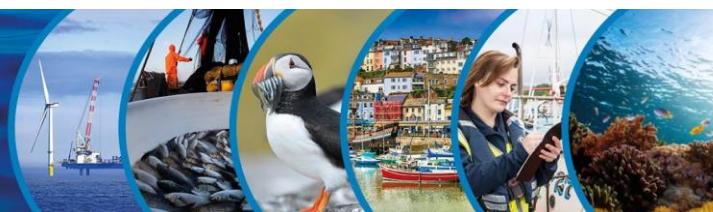
- 2.1 This response relates to the note dated 10 October 2023, which followed the meeting with the MMO and representatives of National Highways' (NH), Lower Thames Crossing project (LTC) (the Note). The Note was drafted by the LTC team with the described goal of assisting the MMO in interpreting the transfer provisions of the LTC Development Consent Order (DCO) alongside the provisions of s.72 of the Marine and Coastal Access Act 2009 (MCAA).



- 2.2 The Note does not alter the MMO's position that the transfer provisions as drafted in article 8 of the DCO and para 24 of the DML are not agreed.
- 2.3 Section 72(7)(a) of MCAA already permits a licence holder to make an application for a marine licence to be transferred, and where such an application is approved for the MMO to then vary the licence accordingly (s. 72(7)(b)). This power should be retained and used in relation to the DML granted under the DCO. Any attempt to create a parallel or hybrid transfer regime in its place is resisted for the reasons set out below.
- 2.4 MMO's preferred drafting is set out below in the appendix to this note.
- 2.5 Section 3: Article 8 (Consent to transfer the benefit of the Order) & 4. Part 6 (Changes to the Deemed Marine Licence) of the Deemed Marine Licence**
- 2.6 We note the argument made in para 3.3, 4.2 and 5.3 of the Note that previous DCOs have included paragraphs similar to the currently drafted article 8. We recognise this to be the case but do not consider this a persuasive reason why the MMO should change its current position.
- 2.7 The MMO is not bound to follow the final drafting agreed in previous DMLs, but rather each DML should be considered each on its facts. Furthermore, the DCO regime is relatively new and the drafting, agreeing and operation of each DCO is an iterative process, each informs best practice and more optimal future drafting.
- 2.8 It is the MMOs established and current position not to accept these transfer provisions.
- 2.9 Relationship between the above provisions**
- 2.10 Paragraph 5.1 of the Note states that the provisions of article 8, Part 6 of the DML and s.72 of MCAA are intended to be read together. We understand this and recognise that the drafting is internally coherent. This is not the MMO's concern.
- 2.11 The crux of the MMO's concern (unresolved by the Note) is that condition 24(4) explicitly disapplies sections 72(7) and (8) of MCAA 2009, which would otherwise govern transfer procedures. This conflicts with the MMOs stated position that the DML granted under a DCO should be regulated by the provisions of MCAA 2009, and specifically by all provisions of section 72.
- 2.12 Dealing now with the points made in para 5.2 of the Note in detail.
- *In accordance with para 24(3) of the DML, section 72 continues to apply to the DML*
- 2.13 This is only partially correct since para 24(3) contains the specific exclusion that s.72 won't apply where article 8 applies, and article 8 includes DMLs which are governed by s.72 of MCAA. The MMO rejects any circumstances in which transfers can operate outside the MCAA.



- *However, all transfers of the DCO are not captured by MCAA*
- 2.14 It is unclear what is meant here. It is correct in that transfers of parts of the DCO covered by other legislative regimes are not captured by MCAA. However, the sentence appears to misunderstand the relationship between the DCO and the DML. Although the DML is granted as a part of the DCO process, it remains a stand-alone licence regulated by the MMO and subject to MCAA 2009. For example, under the DCO regime, it remains possible for developers (undertakers) to seek consent for a marine licence directly with the MMO (rather than having a DML integrated into the DCO).
- 2.15 This flexibility underlines the fact that the DCO process simply integrates the existing mechanism for granting a marine licence. It should not therefore be used as a vehicle to alter or distort established process and procedures, such as those for the transfer of a marine licence. Provisions which operate to override the provisions within MCAA that apply to DMLs (as these do) are therefore not accepted by the MMO.
- *Where article 8 applies (e.g. NH seek to transfer the DCO or part of it) the provisions of s.72(7) and (8) do not apply, but the Secretary of State still needs to consult the MMO in accordance with article 8(8)*
- 2.16 Again, the MMO understands what the drafting is attempting to do here, but does not accept the result, which is a disapplication of s.72(7) and (8).
- a) With regard to the transfer in 8(1)(a) the mechanism for transferring the benefits of a marine licence is set out in MCAA and the regime should not be duplicated;
 - b) With regard to the leasing in 8(1)(b) a marine licence cannot be 'leased', since there are no provisions (either in the DCO or in MCAA) for the licence to 'revert' to the licence holder after the agreed lease period.
- 2.17 The MMO also rejects the attempt to make the Secretary of State (SoS) rather than the MMO the decision maker for the following reasons:
- a) The MMO is the regulatory authority for marine licences and should be the body considering the merits of any application for a transfer;
 - b) It is unclear what criteria the SoS would be taking in determining whether to approve any transfer, and how this would differ from a consent granted by the MMO under the existing 2009 Act regime;
 - c) There is no statutory power for the licence holder or the SoS to vary any terms of a marine licence, and this has not been created by the wording in article 8. It would therefore still fall to the MMO to take steps to vary a marine licence to reflect that it has been transferred to another entity. This creates an unnecessary duplication;
 - d) The MMO also remains responsible for enforcing all marine licences, which should be clear and enforceable. Consistency is key, and this is best achieved by ensuring that the MMO has full responsibility for the marine licence process, rather than involving a third party and a hybrid process.



- *If during that consultation, the Secretary of State is not satisfied that the MMO has received the information they require to transfer the licence, then it is likely that such consent would be refused.*
- 2.18 The addition of this clause does not alter the MMO's position. For the reasons set out above, a hybrid system whereby the SoS authorises but the MMO actions the transfer is unworkable. Moreover, it is highly irregular that the decision to transfer a licence should be awarded to the SoS rather than the statutory regulatory authority (the MMO).
- 2.19 Furthermore, since there is no obligation for the SoS to follow the MMO's response, this does not provide the MMO with the necessary controls provided by the MCAA regime, and is not considered an acceptable alternative.
- *In our view the above provisions should resolve the MMO's outstanding concerns, particularly because they have already appeared in other DCOs/DMLs*
- 2.20 For the reasons set out above the Note does not resolve the MMOs concerns.
- 2.21 We also note that the wording is inconsistent with the PINS Guidance on how DMLs should operate within a DCO. [Advice Note Eleven, Annex B – Marine Management Organisation | National Infrastructure Planning \(planninginspectorate.gov.uk\)](https://www.planninginspectorate.gov.uk/advice-note-eleven-annex-b-marine-management-organisation/) provides that where the undertaker chooses to have a marine licence deemed by a DCO, the MMO, "will seek to ensure wherever possible that any deemed licence is generally consistent with those issued independently by the MMO."
- 2.22 As explained at paragraph 2.7 – 2.10 above the MMO does not consider the appearance of these clauses in previous DCOs to be material to the decision whether they should be included in this DCO.
- *NH are however prepared to consider alternative drafting from the MMO*
- 2.23 The MMOs proposed alternative drafting is set out below in Appendix 1.



Appendix 1

Article 8 DCO

Consent to transfer benefit of Order

8.—(1) Subject to paragraph (4) and (5), the undertaker may—

(a) transfer to another person (“the transferee”) any or all of the benefit of the provisions of this Order (**excluding the deemed marine licence**) and such related statutory rights as may be agreed between the undertaker and the transferee; or

(b) grant to another person (“the lessee”) for a period agreed between the undertaker and the lessee any or all of the benefit of the provisions of this Order (**excluding the deemed marine licence**) and such related statutory rights as may be so agreed.

[...]

~~(8) The Secretary of State must consult the MMO before giving consent under paragraph (1) to the transfer or grant to another person of the benefit of the provisions of the deemed marine licence.”~~

Proposed changes to the draft DCO Schedule 15: Deemed Marine Licence, Part 6

CHANGES TO THE DEEMED MARINE LICENCE para 24.—

(1) In the event that the undertaker wishes to undertake the licensable marine activity contrary to the conditions of this licence, it must inform the MMO at the earliest opportunity and request a variation to the conditions of this licence.

(2) The undertaker must not carry out any licensable marine activity contrary to the conditions of this licence until a variation to the licence has been approved by the MMO pursuant to its powers under section 72(3) of the 2009 Act.

~~(3) The provisions of sections 72 (variation, suspension, revocation and transfer) of the 2009 Act apply to this licence except that the provisions of section 72(7) and (8) relating to the transfer of the licence only apply to a transfer not falling within article 8 (Consent to transfer benefit of Order).~~

(3) (4) The MMO must give notice to the undertaker of the determination of the variation request within 13 weeks from the day immediately following that on which the variation was requested, or as soon as reasonably practicable after that date, subject to the undertaker providing updated details of the licensable marine activity pursuant to paragraph 10 and adequately justifying the requested variation to the reasonable satisfaction of the MMO).

