

Great Yarmouth Third River Crossing Order 202[*]

Document NCC/GY3RC/EX/057: Response to Written Submissions made by the Marine Management Organisation at Deadline 4

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Infrastructure Planning

The Infrastructure Planning (Examination Procedure) Rules 2010

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Glossary of Abbreviations and Defined Terms

DCO	Development Consent Order
dDCO	Draft Development Consent Order
DML	Deemed Marine Licence
dDML	Draft Deemed Marine Licence
ISH	Issue Specific Hearing
NCC	Norfolk County Council
MMO	Marine Management Organisation
The Applicant	Norfolk County Council (in its capacity as Highway Authority and promoter of the Scheme).
The Council	Norfolk County Council
WSI	Written Scheme of Investigation

1 Introduction

1.1 Purpose of this Report

1.1.1 This report, submitted for Deadline 5 of the Examination, contains the Applicant's responses to Written Submissions made by the Marine Management Organisation ('MMO') (REP4-010) at Deadline 4, 11 December 2019.

1.1.2 The report provides the Applicant's response to the issues raised by the MMO, thereby providing a reference document for all interested parties and the Planning Inspectorate.

2 Marine Management Organisation Response to Deadline 4

2.1 Key Issues and Applicant's Response

Key Issue

Description of the works

- 2.1.1 The MMO suggested that work numbers (e.g. Work No. 6A) and development description terminology used in Schedule 1 is used, as necessary, in the dDML, under 'Details of licensed marine activities,' so it is clear which elements of the development are within the marine area and licensable. This change has not been made, however the applicant has confirmed it is being progressed.
- 2.1.2 Design parameters of key components within the marine area should be added to DML. These changes have not been made, however the applicant has confirmed it is being progressed.

Applicant's Response

- 2.1.3 The Applicant is continuing to work with the MMO to formulate a revised description of the details of licensed marine activities, a revised draft of which has been shared with the MMO in advance of Deadline 5, with a view to reaching agreement at Deadline 6. In the course of ongoing discussions with the MMO, the Applicant understands that the reference to 'design parameters' relates to securing within the DML the key parameters of the activities that would be licensed which are reflected in the limits of deviation described in article 6 of the draft DCO. Discussions with the MMO are progressing towards agreeing the detailed drafting.

Key Issue

Dredging

- 2.1.4 The MMO suggested that articles/paragraphs from dDCO/dDML that infer the undertaker can undertake capital dredging activities that will result in disposal to sea and/or maintenance dredging, for example Article 49 (1) (b) of the dDCO, should be amended or deleted.
- 2.1.5 The MMO notes that the Applicant has added paragraph 19 in the dDML, which states 'This licence does not permit any dredging carried out under article 49(1)(b) (subsidiary works and operations in the river Yare) of the Order.'

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- 2.1.6 The Applicant has advised, on a telephone call 05.12.2019, it is their preference to retain reference to specific activities, for example 'improve the bed of the river Yare' in the dDCO, but clarify in the dDML that a separate marine licence is required prior to the commencement of any works considered dredging. The reason for this is, should it be necessary for the undertaker to carry out any dredging activities that will result in disposal to sea, the applicant will only need to apply for a new marine licence; not an amendment to the DCO.
- 2.1.7 Currently, the MMO does not support the applicant's preferred method to address dredging in the marine area in the dDCO/dDML and wishes to highlight that it can take over 6 months to apply for a marine licence to dredge. A conference call with the applicant will be arranged to discuss this matter further.

Applicant's Response

- 2.1.8 The Applicant has previously responded in its Deadline 4 Submission to a substantively similar point (see the Applicant's Responses to Written Representations submitted by Interested Parties at Deadline 3, at paragraphs 6.1.5 to 6.1.8 of NCC/GY3RC/EX/045, Planning Inspectorate Reference REP4-002). In summary, it remains the Applicant's position that dredging is not required for the construction of the Scheme. In terms of maintenance dredging, for the foreseeable future it is anticipated that the Great Yarmouth Port Company will continue to operate its dredging regime to maintain the navigation.
- 2.1.9 However, over the 120+ years lifetime of the Scheme, the possibility of the Applicant being required to carry out maintenance dredging cannot be excluded. As a local authority, the Applicant is a creature of statute and it is prudent to ensure that, in the unlikely event that it is required to carry out dredging, it has a clear statutory footing upon which to do so. Condition 19 of the deemed marine licence (see paragraph 19 of Schedule 13 of revision 3 of the draft DCO (Applicant's reference NCC/GY3RC/EX/049, Planning Inspectorate Reference REP4-006) ensures that such dredging could not be carried out under the marine licence deemed to have been granted by the Order and it would therefore require a new marine licence.
- 2.1.10 The Applicant has discussed this issue further with the MMO and understands that it is considering the position further.

Key Issue

Written Scheme of Investigation (WSI)

- 2.1.11 The MMO suggested compliance with the WSI is conditioned in the dDML. This change has not been made.

Applicant's Response

- 2.1.12** The Applicant noted in its Responses to Written Representations submitted by Interested Parties at Deadline 3 (see paragraph 6.1.18 of document reference NCC/GY3RC/EX/045, Planning Inspectorate Reference REP4-002) that it was considering the MMO's suggestion that compliance with the archaeological Written Scheme of Investigation ought to also be secured by a condition of the deemed marine licence. Having considered the matter further, the Applicant considers that the imposition of such a condition would not be justified.
- 2.1.13** The Borehole Log Review and Deposit Modelling Report (Document Reference 6.2, Planning Inspectorate Reference APP-125) confirmed that there is low in-river potential for marine archaeology. This is notably as a result of the presence of Modern Alluvium in the boreholes located within the River Yare channel and directly adjacent to its margins (the marine environment). Elsewhere across the terrestrial Principal Application Site Made Ground comprises the uppermost deposits (Page ii of the Borehole Log Review and Deposit Modelling Report). Collectively, these deposits have low geoarchaeological potential, although the Made Ground could include any near-surface archaeological features or layers (outside of the River Yare channel and within the terrestrial environment) (Page ii of the Borehole Log Review and Deposit Modelling Report). Taking into account construction activities and the location of the buried resource – in particular the Breydon Formation – it is likely the only impacts of significance would be associated with the construction of the road network to the west of the River Yare. Even here, unless construction impact penetrates more than five metres below current ground level, deposits should be unaffected (Page ii of the Borehole Log Review and Deposit Modelling Report).
- 2.1.14** It is on this basis that the Applicant does not intend to include a requirement relating to a marine Written Scheme of Investigation ('WSI') in the draft Deemed Marine Licence ('dDML'). A WSI has been produced which addresses the requirements for archaeological investigations in order to understand and determine mitigation measures for heritage assets and palaeoenvironmental resource in the terrestrial environment (Document Reference 6.2, Planning Inspectorate Reference APP-180).
- 2.1.15** The Applicant has engaged with Historic England who have confirmed that reference to a marine WSI is not considered to be required in the dDCO / dDML. This is consistent with Historic England's Written Representation (Planning Inspectorate Reference REP1-011) in which it both welcomed and confirmed the results and recommendations of the Borehole Log Review and Deposit Modelling Report (Paragraph 4.8 and 4.9). Historic England has also confirmed it is satisfied with the proposed methodology for further palaeoenvironmental assessment (Paragraph 4.13) which is set out in the

WSI, which outlines the work required within the terrestrial setting (Document 6.2, Planning Inspectorate Reference APP-180).

Key Issues

Monitoring

- 2.1.16 Within the Fisheries Memorandum the applicant has proposed to monitor underwater noise levels throughout the in-river piling activities. The MMO has identified aspects of the paper that need further consideration. Although monitoring is generally encouraged, the MMO will confirm whether they consider it to be necessary once additional information has been provided. Should it be agreed that monitoring of works in the marine area is necessary, a suitable condition will need to be added to the dDML.

Comments on any additional information / submissions received by D3

- 2.1.17 The MMO noted in their D3 response that Norfolk County Council (NCC) have also recommended that the applicant considers specific species (River lamprey, European eel, Smelt) further in the ES. The MMO has reviewed the applicant's D3 response to NCC's Local Impact Assessment marine environment comments and agrees that discussions concerning fish and underwater noise have occurred, however these have not been concluded. As summarised in paragraph 3.3.1, the MMO has reviewed the applicant's Fisheries Memorandum (version 3) and identified aspects of the paper that need further consideration. It should be noted that the MMO are content that significant impacts to European eel are unlikely to occur providing no in-river piling works are undertaken between 19:00 and 07:00 as this species is known to undertake nocturnal migration.
- 2.1.18 The MMO has reviewed Document NCC/GY3RC/EX/038: Written summaries of oral submissions made at Issue Specific Hearing 2 on the draft Development Consent Order (ISH2) held on 20 November 2019. The MMO has responded in above to the proposed changes regarding arbitration (article 67) and dredging (article 49 (1) (b)).
- 2.1.19 The MMO has reviewed Document NCC/GY3RC/EX/035: Deadline 3: Applicant's comments on submissions received at Deadline 2, including Responses to Written Representations and Interested Parties' Responses to ExA's First Written Questions and have the following comments:
- 2.1.20 In response to paragraph 2.1.10, the MMO has reviewed the applicant's Fisheries Memorandum (version 3) and identified aspects of the paper that need further consideration. The necessary changes have been sent to the applicant and are summarised below:

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- state the month that the referenced Environment Agency fisheries surveys were undertaken in;
 - correctly identify Caister beach on the provided map;
 - provide appropriate units to present the fisheries survey data;
 - provide an indication of the type and the number of the piles required for the development;
 - provide an indication of the expected energy levels generated by piling activity, along with a discussion on the expected noise propagation using examples from similar projects where noise levels have been recorded, to establish the likelihood of noise generating an acoustic barrier to fish movement;
 - consider including a condition in the dDML preventing in-river piling activities to be undertaken during the sensitive spawning season of smelt (February to April inclusive); and
 - If considered necessary, submit an appropriate monitoring proposal for review.

2.1.21 In response to paragraph 2.1.11, the MMO is yet to receive the evaluation of the scour conditions that could arise as a result of climate change.

2.1.22 In response to paragraphs 2.1.16 and 2.1.17, the MMO has provided comments on the dDCO/dDML above in section 1.

2.1.23 In response to paragraphs 2.1.25 to 2.1.27, the MMO confirmed in the D3 response that the MMO had no further comments regarding marine planning considerations, did not deem it necessary to include any further conditions in the dDML as a result of other IP concerns/comments, and acknowledged that it is unlikely the scope of the development will be amended.

Applicant's Response

2.1.24 Further to the Applicant's Response to the Written Representations (Document Reference NCC/GY3RC/EX/016, Planning Inspectorate Reference REP2-002), discussions on fisheries have been ongoing with the Marine Management Organisation.

2.1.25 Alongside these discussions, the Applicant has produced two memoranda to address the additional queries raised by the Marine Management Organisation. The memoranda were submitted to the Marine Management Organisation on 25th November 2019 and 20th December 2019.

2.1.26 The Applicant understands that the Marine Management Organisation is currently reviewing the latest memorandum and is seeking advice from Cefas.

The Applicant will continue to work with the Marine Management Organisation and Cefas on this matter to agree a resolution.

- 2.1.27 A summary of the Applicant's engagement with the Marine Management Organisation to date will be presented in a Statement of Common Ground which is proposed to be submitted at Deadline 6 of the Examination.

Key Issue

MCMS

- 2.1.28 The applicant has replaced 'by email' with 'using the MMO's marine case management system web portal' in Part 1 Article 2 (3) of the dDML. The MMO is satisfied with this change; no further action is required.

Applicant's Response

- 2.1.29 The Applicant welcomes the MMO's confirmation.

Key Issue

Navigation conditions

- 2.1.30 As detailed in the MMO's D3 response, it was noted in Issue Specific Hearing 1 that navigation of the river Yare will be temporarily suspended on up to three occasions for a maximum of 72 hours. The MMO suggested that an additional sub-condition is added to the dDML requiring the licence holder to issue a notice to mariners 21 days prior to navigation of the river Yare being suspended.
- 2.1.31 The applicant has advised, on a telephone call 05.12.2019, it is their preference to address this request by adding a sub-condition to the dDML requiring the licence holder to notify MMO local office each time navigation of the river Yare being suspended. It is suggested that the licence holder notifies the MMO local office before navigation of the river Yare is suspended and should also confirm notice to mariners has been issued in accordance with Article 23 of the dDCO.

Applicant's Response

- 2.1.32 As noted in the Applicant's Responses to Written Representations submitted by Interested Parties at Deadline 3 (see paragraphs 6.1.25 and 6.1.26 of document reference NCC/GY3RC/EX/045, Planning Inspectorate Reference REP4-002) the Applicant is considering this matter but has some reservations as to the necessity and appropriateness of duplicating in the deemed marine licence matters that are addressed in article 23 of the draft DCO. The Applicant has discussed the point further with the MMO and has shared additional

drafting in advance of Deadline 5, with a view to reaching agreement at Deadline 6.

Key Issue

Arbitration

- 2.1.33 Following review of Article 67, the MMO highlighted that the applicant had agreed 20 March 2019 to delete the arbitration clause from the dDML. The MMO highlighted at the Issue Specific Hearing 2 and in their D3 response that Article 67 should be amended to clarify that it is not applicable to the MMO. since sent an alternative DCO arbitration clause to the applicant.
- 2.1.34 Within Document NCC/GY3RC/EX/038: Written summaries of oral submissions made at Issue Specific Hearing 2 on the draft Development Consent Order (ISH2) held on 20 November 2019, the Applicant has stated 'to exclude the operation of article 67 to the deemed marine licence...a new paragraph 20 [has been introduced] to Schedule 13.' Paragraph 20 of the dDML states 'The provisions of article 67 do not apply to any difference arising under any provision of this licence.' Although the MMO welcomes inclusion of such an exclusion provision, the MMO has worked with developers as well as internal stakeholder to agree the following provision. The MMO strongly suggest that this provision is included within the DCO immediately after Article 67. If included, paragraph 20 in Schedule 13 is not required and can be deleted. 'Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration.'
- 2.1.35 The applicant suggested, on a telephone call 05.12.2019, that a condition is added to the dDML requiring the licence holder to submit details of the expected location, start and end dates of impact pile driving to the Marine Noise Registry prior to the commencement of activities within the marine area which involve impact piling. The MMO supports the inclusion of such a condition.
- 2.1.36 The MMO welcomes inclusion of essential mitigation measures in the dDML and notes the applicant has added a paragraph regarding break periods in piling activities. As noted in paragraph 1.1.6, the MMO has reviewed the applicant's Fisheries Memorandum (version 3) and identified aspects of the paper that need further consideration. The mitigation measures associated with the in-river piling activities may need to be amended after discussions have concluded.

Applicant's Response

- 2.1.37 As noted in the Applicant's Responses to Written Representations submitted by Interested Parties at Deadline 3 (see paragraph 6.1.4 of document

reference NCC/GY3RC/EX/045, Planning Inspectorate Reference REP4-002) the Applicant accepts that the arbitration article should not apply to the deemed marine licence. To give effect to this the Applicant included in the deemed marine licence condition 20 which expressly excludes the application of the arbitration article (see paragraph 20 of Schedule 13 to revision 3 of the draft DCO (document reference NCC/GY3RC/EX/049, Planning Inspectorate Reference REP4-006)). Article 67 is clear that it applies "Except where otherwise expressly provided for in this Order" and condition 20 is a clear and express exclusion of its effect. It is therefore very clear that condition 20 is effective at excluding the application of arbitration under article 67 to the deemed marine licence and that no further amendments to article 67 are necessary or appropriate to achieve that mutually desired outcome.

2.1.38 The Applicant has considered the MMO's proposed amendments to article 67 and acknowledges that the MMO has agreed an approach to arbitration with other DCO promoters, predominantly private sector offshore wind farm developers. The Applicant, as a local authority promoting a highway scheme, does not consider it appropriate to apply wording agreed in the context of private sector offshore wind farms to the consent that it seeks for a highway scheme. As a local authority the Applicant carries out public functions under a diverse range of statutory regimes (e.g. highway authority under the Highways Act 1980, street authority under the News Roads and Street Works Act 1990, traffic authority under the Road Traffic Regulation Act 1984 to name a few) and exists in a very different statutory context to private sector energy developers. The Applicant is concerned that the MMO's proposed wording could lead to unintended consequences in this different statutory context. In contrast, the Applicant's preferred wording for article 67 is closely based on the equivalent model provision and has been included in substantially the same form in many highways DCOs, reflecting a 'tried and tested' approach. As condition 20 of the deemed marine licence is effective at excluding the application of arbitration under article 67, the Applicant does not propose to amend article 67 as requested by the MMO.

2.1.39 The Applicant is discussing the detail of drafting for conditions relating to the Marine Noise Registry and piling with the MMO.

Key Issue

Comments on revised SoCG

2.1.40 The applicant has stated, in Document NCC/GY3RC/EX/034: Statement of Commonality for Statements of Common Ground at Deadline 3, that the MMO SoCG submitted at Deadline 1 has not been updated; matters remain outstanding.

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- 2.1.41 Proposed amendments to the dDCO/dDML and a summary of comments regarding the Environmental Assessment are to be recorded in the MMO SoCG.

Applicant's Response

- 2.1.42 As noted above, the Applicant continues to engage with the MMO in relation to a number of the matters raised by the MMO in its Deadline 4 submission. The Applicant is intending to update the Statement of Common Ground with the MMO in the light of this ongoing engagement, with the aim of incorporating this into an updated Statement of Commonality for Statements of Common Ground at Deadline 6 of the Examination.