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Peter Robottom  
National Infrastructure Directorate  
The Planning Inspectorate  
(via e-mail only)

Your ref: TR030002  
Our reference: DCO/2014/00002

21 August 2015

Dear Mr Robottom,

**PROPOSED YORK POTASH HARBOUR FACILITIES  
RESPONSE TO EXAMINING AUTHORITY'S WRITTEN QUESTIONS (ExQ – Deadline I)**

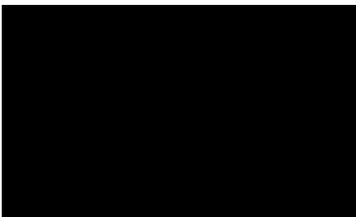
The Marine Management Organisation (MMO) is an interested party for the examination of Development Consent Order (DCO) applications for Nationally Significant Infrastructure Projects (NSIP) in the marine area. The MMO received the Examining Authority's written questions on 27 July 2015.

The MMO's responses to the relevant written questions are presented within Appendix 1 attached to this letter.

Following a meeting with the applicant and their representatives on 15 July 2015, Appendix 2 contains further comments from the MMO relating to the drafting of the currently submitted DCO/DML.

Please note that the MMO reserves the right to make further comments on this application throughout the examination process and to modify its present advice or opinion in view of any additional information that may come to our attention.

MMO confirm that they will be attending the 'Issue specific hearing', on the draft DCO, on Friday 25 September 2015.



Adam Chumbley  
Marine management Organisation

CC:  
Jayne Griffiths – MMO  
Joe Wilson – MMO  
Morag Thomson – Marrons Shakespears



**INVESTORS  
IN PEOPLE**



**Appendix 1 MMO Response to the Examining Authority’s written questions**

(2)	Question to	Question	MMO Response
Panel Ref.			
DCO 1.9	Marine Management Organisation (MMO)	Are the bodies responsible for maritime licences and navigational safety satisfied with the these provisions, that there are no conflicts between the draft Deemed Marine Licence and the remainder of the draft DCO and that the various provisions are correctly located within articles or the deemed Marine Licence?	<p>MMO are content that the provisions do not contradict but would like the Examining Authority (ExA) to note that the MMO would defer to Trinity House (TH) and the Maritime and Coastguard Agency (MCA) regarding any navigational/markings requirements.</p> <p>Under the Marine and Coastal Access Act 2009 (MCAA) the MMO have greater powers than those under the 2008 Planning Act regarding any activities being undertaken below Mean High Water Springs (MHWS). For this reason the MMO would request that any conditions relating to works below MHWS are located within the deemed marine licence (DML).</p>
DCO 1.14	Statutory consultees	<p><i>Schedule 2: Requirements – Definition of Phases 1 and 2</i></p> <p>Do not Phases 1 and 2 need defining at the outset, together with provision of a phasing plan in order for the generality of the Requirements to be enforceable? The phasing of the construction period is described in paragraph 3.1.86 of the ES onwards. The construction of Phase 2 of the development is predicted to be within 6 years following the completion of Phase 1 (ES paragraph 3.1.91 <b>Doc 6.4</b>). The</p>	<p>MMO consider that if considerable time occurs between phases 1 and 2 then an addendum to the ES should be undertaken to reflect any changes in baseline against potential impacts of the works.</p>

construction of the proposed development is anticipated to commence in January 2017 (ES paragraph 3.1.91 **Doc 6.4**). Paragraph 3.1.92 of the ES confirms that both phases of the proposed development are anticipated to require a 17 month construction period. Based on the above information, is it assumed that the construction of Phase 2 will overlap with the operation of Phase 1. However, the applicant is asked to clarify how the overlapping construction and operation periods have been assessed in the ES on a worst case basis.

If Phase 2 is significantly in the future, does there not need to be a Requirement to ensure that the Environmental Statement is updated to take account of the change in the future baseline due to construction and operation of Phase 1?

Is the Council and all statutory Consultees satisfied that their interests will be sufficiently protected by these Requirements? Requirement 6 (Construction Environmental Management Plan) (CEMP)

The applicant is requested to revise draft Requirement 6 to include a provision that the CEMP must identify and deliver the mitigation provided in the ES and a

certified copy of the Governance Tracker which should be referenced in Article 38. This might be achieved by requiring a certified copy of the final CEMP within the list within Article 38 and by ensuring that every mitigation measure to be delivered through the final CEMP is listed in the in the Governance tracker, a final copy of which should also be certified under Article 38. It is also noted that draft Requirement 6(2) allows for the CEMP to be varied subject to agreement with the LPA, but does not restrict any such variations to what has been assessed and relied upon for mitigation in the ES. The applicant is requested to also amend the wording of Requirement 6(2) to state that the CEMP may be subject to alteration by approval in writing of the local planning authority, provided that the alterations have been assessed within the ES. The CEMP is stated to include details about temporary fencing and temporary lighting arrangements. However, the mechanism of the CEMP is being relied upon in the Governance Tracker to deliver both temporary (construction) and permanent (operational) mitigation, in relation to noise and visual disturbance to waterbird species. Please can the applicant explain

why the CEMP is the appropriate mechanism for delivery of *operational* mitigation?  
The LVIA states that mitigation relating to lighting and relevant to marine & coastal ornithology and terrestrial ecology would be secured through the Construction & Environmental Management Plan (CEMP), Requirement 6 in the DCO. However, the measures referred to in requirement 6 refer to temporary lighting, whereas chapter 9 (9.6.22) states that the mitigation principles to minimise the potential significant effects on water birds also apply in operation. Please can the applicant clarify how such operational lighting mitigation measures will be secured through the DCO and whether Requirement 6 (CEMP) is the appropriate mechanism in relation to securing and delivering operational mitigation?  
Requirement 9 (Ecology)  
As an outline Ecological Management Plan (EMP) has not been provide, it is unclear what specific measures the applicant intends to deliver through the EMP or what it has relied upon in assessment terms.  
The applicant is requested to provide for Deadline 1 an outline EMP identifying the mitigation to be delivered through the EMP, having regard to the mitigation

		<p>identified in the ES and the Governance Tracker. The applicant is requested to provide a revised draft Requirement 9, requiring the EMP to deliver mitigation which is in accordance with the principles set out in an outline EMP and to include a provision that the EMP must identify and deliver the mitigation provided in the ES and in a certified copy of the Governance Tracker.</p> <p><i>Relationship between Requirement 9 in Schedule 2 to the draft DCO and paragraph 7 of Part 2 in the DML</i></p> <p>Requirement 9 in Schedule 2 in the draft DCO includes reference to measures which form part of the Bran Sands Lagoon Mitigation and Monitoring Strategy (MMS). However, the wording in Requirement 9 expressly excludes the lagoon enhancement works which are to be licenced under the draft DML in Schedule 5 (Part 2, Paragraph 7). Please clarify, as paragraph 7 the draft DLM in Schedule 5 requires an ecological management plan to be in place before the lagoon enhancement works commence. It is not clear whether the ecological management plan referred to in the draft DML (Schedule 5, paragraph 7) is the same as the ecological management plan</p>	
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referred to in the draft DCO (Schedule 2, Requirement 9). Please can the applicant clarify? Please update the DCO so that there is no doubt as what approvals are required with cross-references as necessary so that an integrated submission can be made to Natural England and the MMO.

Please can the applicant clarify when the lagoon enhancement works are required to be commenced (in relation to the authorised development) and how they will be maintained throughout the operation of the proposed development? Please indicate how your answer would be governed by the provisions of the draft DCO/DML.

*Requirement 11 (Decommissioning)*

A description of the works envisaged to be required during decommissioning is provided in Section 3.2 of the ES, which states that there are no plans to decommission the terminal, so decommissioning of the port element of the development has not been considered in the ES. However, Table 3-10 provides a summary of the decommissioning works anticipated to be required for the conveyor systems, which would involve the complete removal of site infrastructure. The

		<p>surge bins and shiploaders are stated to be 'likely to be decommissioned and removed off site'.</p> <p>The Applicant is asked to identify what elements of the proposed development would be decommissioned and removed fromsite and what is proposed to remain in situ. [See also DCO 1.3]</p>	
DCO 1.16	Marine Management Organisation	<p><i>Schedules 5 and 6</i></p> <p>Should Schedule 6 be included in Schedule 5?</p>	MMO considers that schedule 5 should contain schedule 6. The DML should clearly define the boundaries of the marine works.
SEM 1.2	The Applicant	<p><i>Navigational safety</i></p> <p>Having regard to the Relevant Representations from PD Teesport, the Tees Port Authority (RR-002), Trinity House (RR-001) and the MCA (RR-008), please indicate the intended action to allay concerns of these bodies with their wider responsibilities for the safety of shipping in the River Tees estuary, including amendments to the wording of the DCO and its Protective Provisions and Requirements intended to be included within the DCO.</p>	Under the MCAA the MMO have greater powers than those under the 2008 Planning Act regarding any activities being undertaken below Mean High Water Springs (MHWS). For this reason the MMO would request that any conditions relating to works below MHWS are located within the DML. This drafting alteration may allay the concerns of TH, MCA and the Tees Port Authority; although the MMO would defer to both TH and MCA on any safety of shipping concerns.
HWF 1.1	The Applicant, The EA, Northumbria Water, the IDBs	<p><i>Water resource consents, permits and licences</i></p> <p>The Mitigation section of the Environmental Statement</p>	<p>MMO wish to note that a pipe below MHWS would require a marine licence and, should consent for the pipeline be part of the applicants current application, then consideration should have been detailed within their current ES.</p> <p>Any pipeline consent being sought now should be included within the DML, if any part of the structure</p>

		<p>references the need to secure consents from other bodies such as the Environment Agency and the relevant Internal Drainage Boards (IDBs).</p> <p>Confirm whether a) discussions on such consents been on going and b) whether there is any known impediment to the granting of these consents.</p> <p>In particular provide details of any licences or protective provisions that would be required in relation to works within or adjacent to the Bran Sands waste disposal site to ensure that there is no harm to ecological interests or human health.</p>	<p>falls below MHWS.</p> <p>It should be noted that the MMO licence the physical structure but do not licence the water flowing out of the pipe.</p>
HWF 1.3	The EA, local planning authorities, Marine Management Organisation	<p><i>Disposal of contaminated sediments from capital dredging</i></p> <p>Paragraph 3.1.42 of the ES (<b>Doc 6.4</b>) confirms that some of the capital dredged material would be contaminated and would require specific management. The proposed approach to waste management is described in Appendix 3.1 of the ES (<b>Doc 6.5</b>). The management of dredged material and contaminated excavated material on land is provided in Sections 5.1-5.4 of Appendix 3.1 (<b>Doc 6.5</b>). The draft DCO (<b>Doc 4.1</b>) does not specify that a waste management strategy must be agreed in advance with</p>	<p>MMO note the methods for dredging already expressed in the DML for the prevention of release of contaminants.</p> <p>MMO have no comments on the material that is disposed of above MHWS.</p> <p>MMO has discussed with the applicant the need for a condition detailing that only material from the uncontaminated layer/depth can be disposed of to sea; and await the applicant's proposals to secure this via the DML.</p>

		<p>the relevant body or bodies. Do the relevant body/bodies wish to amend the requirements to provide that a waste management strategy must be agreed in advance with the relevant body/bodies? Does the applicant have a view on whether such an amendment would be required? The Environmental Statement refers to the expectation that contaminated sediments that cannot be disposed of at sea would be deposited at appropriate licensed disposal sites. Provide details of the particular site or sites that would/might be used and of the means of transport envisaged. How has this been taken account of in the transport assessment and how would this be secured in the DCO or via relevant licensing. More generally, how would the alternative dredging mechanisms be secured in the Deemed Marine Licence given that options are referred to.</p>	
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## Appendix 2 Comments on DCO/DML

Following the submission of section 56, and further discussions with the applicant, the MMO has further additional comments, listed below. It should be noted that the reference numbers relate to the original references in MMO section 56 response, dated 8 June 2015.

- 1.1.1. The MMO requested clarity on who would be responsible for the capital/maintenance dredging. The MMO still await clarification on this point. The Tees Port Authority will currently be subject to marine licence conditions that limit their dredging strategy. An additional quantity of material is likely to have to be applied for by Tees Port (via a variation request) and the MMO, at this stage, are unable to guarantee that any variation to a 3<sup>rd</sup> party marine licence will be approved as part of the applicants current proposals. The MMO would advise that drafting of the DCO/DML is conditioned in such a way so approval for dredging is secured under this marine licence and is secured within this consent alone (if approved).
- 1.3.1 The MMO requested the applicant provided calibration reports on the actual model of hydrophone used. The Bruel & Kjaer certificate was not attached to the further correspondence so, therefore, request this again.
- 1.3.2 The developer has yet to provide sufficient information to assess whether the 'modelling' is appropriate. As stated in Section 2.3 of Appendix 8.2, the INSPIRE 'model' is semi-empirical, i.e. based on a fit to measured data. No explanation has been given of how this fit was made. The INSPIRE model is a black box as far as the MMO are concerned, we are not aware that this model is used by any other contractor, nor is the physical basis of the modelling explained. As we state in our original comment, based on Figure 4.1, we suspect that the contractor has simply fit a straight line to some measured data by eye to derive the model parameters, which gives us very little confidence in its predictive power. We await the applicant's response as to how this 'model' functions and how it was fit to the measured data.
- 1.3.4 If the developer wishes to include dBht (Species) within the report, then they must also include appropriate unweighted metrics. The salient point here is that behavioural responses were discussed in dBht only. Furthermore, all conclusions and discussions should be presented in terms of the unweighted metrics also.

Although some potential impacts have been appropriately assessed, I do not think that that an adequate assessment has been made regarding the potential behavioural responses of marine mammals to impact piling and dredging. Furthermore, the assessment of the potential behavioural responses of fish to dredging is inadequate. The report simply states (section 6.2 on page 26) that 'the source levels for the noise from dredging operations,

using a backhoe dredger was estimated to be 165 dB re 1  $\mu$ Pa @ 1 m (SPLRMS) and for a suction dredger was estimated to be 183 dB re 1  $\mu$ Pa @ 1 m (SPLRMS). These source levels are all below the criteria discussed above in relation to impact piling'. The MMO expect that dredging will have much less of an impact on fish than piling activities; however, a greater effort should be made to determine the potential impacts on animal behaviour for the different noise sources.

The MMO take on board the applicant's comment that the Parvin criteria is more conservative. However, this criteria for 'marine receptors' is very generic. No distinction is made between animal groups (i.e. fish and marine mammals) which have different hearing abilities and may respond in very different ways to noise exposure.

The final comment was specifically made with regard to the use of the FHWG (2008) criteria - the Popper guidelines are more up-to date and in keeping with the latest scientific advances in the field. We accept that the Popper guidelines were published after the work on this assessment was completed, but going forward, it is expected that these guidelines are considered for injury criteria.

To conclude, the MMO consider the need for unweighted metrics to be included as DBHt has not been peer reviewed.

- 2.1 The applicant have committed to producing a post-construction monitoring plan to be agreed with MMO prior to completion of construction. This needs to be secured in the DML, along with any other "plans" for the project that are to be submitted at a later date, such as an Environmental Management Plan etc.
- 2.3 The MMO position on 'transfer of benefit' remains unchanged, see appendix 3.
- 2.4 The applicant has confirmed that they will consult the MMO on the decommissioning plan and that they will include the wording provided by the MMO in the next draft of the DCO.
- 2.8 Page 32 – Schedule 5 – Part 4 – Conditions – 17. The applicant has acknowledged the request for change; however the applicant has an issue with an outcome occurring at a specific time. The drafting will be amended accordingly but a mechanism which ensures there is a response from the MMO to be included. The MMO are reluctant to allow a timeframe to be included as we must be sure the parameters assessed in the ES are not being exceeded. MMO require further clarification to address this matter.
- 3.1 Force Majeure – the applicant has accepted the inclusion of this into the DCO, so the MMO would request this to be in the DML.

- 3.6 The applicant has committed to producing a post-construction monitoring plan to be agreed with MMO prior to completion of construction. This will need to be secured within the DML along with any other “plans” for the project that are to be submitted at a later date.
- 4.3 The MMO has provided the applicant with supplementary navigational conditions agreed between MMO, MCA and TH. The applicant is reviewing these to be included in the DCO. The MMO requests all marine navigation conditions are secured via the DML.

Further comments on the DCO/DML were mentioned to the applicant; however no discussion responses have been returned. MMO will continue to work with the applicant on these points.

#### Wording

Article 5, page 6, states ‘at any time maintain’ which the MMO does not consider to be suitable as it is not specific enough to be enforceable.

In articles 14(1) to (8), page 9, the wording such as ‘reasonably practical’ is used. This would not be considered to be suitable by the MMO as the meaning would be left open to interpretation.

Article 16, page 11, the applicant should clarify the meaning of ‘land’. In addition, all definitions should be included in the DML, e.g. ‘maintain on shore’ can include the removal of bushes/rocks etc.; however offshore this would be a licensable activity.

#### Ancillary works

Article 6(1), page 6, refers to ‘works ancillary to the authorised development’. If any of these works fall in or over the marine area, the applicant should note that a marine licence would be required unless they have been assessed within the Environmental Statement.

In articles 14(1) to (8), page 9, it is stated that outfall pipes will be required for the works. Such structures are licensable and would need to be assessed in the Environmental Statement.

#### Tidal works not to be executed without approval of Secretary of State

In reference to article 17, page 12, the MMO suggests that this should be carried out in consultation with the MMO.

#### Abatement of works abandoned or decayed

In reference to article 18, page 12, the MMO suggests that this should be carried out in consultation with the MMO.

#### Lighting

With reference to articles 19 and 21, page 13, it should be noted that lighting both during and after works is a requirement of Trinity House.

### Navigation

With reference to article 20, page 13, the provision against danger to navigation is a requirement of the Maritime and Coastguard Agency.

### Requirements

At present Schedule 2 - Requirements, page 24, only includes shore based works. If nothing is being undertaken in the marine environment then this can be removed.

### Ecology

The written ecological management plan referred to in article 9, page 26, should be submitted to the MMO, for approval, prior to the commencement of works.

### Conditions

With reference to article 27, page 33, the MMO Response Team's contact information should be updated, see corrected condition below:

*The Licence Holder must ensure that any oil, fuel or chemical spill within the marine environment is reported to the MMO, Marine Pollution Response Team.*

*Within Office hours 0300 200 2024*

*Outside Office hours 07770 977 825*

*Defra Duty Room (if no response at previous numbers): 0345 0818486*

*MMO emergency fax (not manned 24 hours): 0191 3762682*

*[dispersants@marinemanagement.org.uk](mailto:dispersants@marinemanagement.org.uk)*

### Protective provisions for the protection of the Tees Port Authority

Within Schedule 11, page 55, there are multiple references to the Tees Port Authority; however the MMO are responsible up to Mean High Water Springs. The defining boundaries should be included here to delineate responsibilities.

### Underwater noise in relation to the original Environmental Statement

In section 11.3.7 of the Environmental Statement, the MMO note that the dab audiogram has been used as a surrogate for the European eel, due to a similar frequency response between these species. It appears logical to use dab as a surrogate for other flatfish species (e.g. flounder and plaice) as dab is deemed the most sensitive flatfish to underwater sound. However, the MMO would question the use of dab as a surrogate for European eel, given the fundamental differences between these species i.e. the eel possesses a swim bladder whereas the dab does not. We also note that the European eel audiogram has in fact been published: 'Jerkø, H., Turunen-Rise, I., Enger, P. S., & Sand, O. (1989). Hearing in the eel (*Anguilla anguilla*). *Journal of Comparative Physiology A*, 165(4), 455-459'.

### Appendix 3 MMO Position on transfer of benefit

- 1.1 In formulating this position the MMO has considered the drafting of Article 8, and the relevant sections of the Explanatory. Moreover, we have also considered the relevant provisions of the Planning Act 2008 (“the 2008 Act”) and the Marine and Coastal Access Act 2009 (“the 2009 Act”) as well as the provisions of made DCOs for offshore developments.
- 1.2 The MMO is content that the default effect of section 156 of the 2008 Act, in the absence of a contrary provision as envisaged in section 156(2), is that, more than one person can have the benefit of a DCO. Furthermore, as section 149A of the 2008 Act does not make any further contrary provision which would affect or otherwise limit the scope of section 156(1) it follows that a DML as part of a DCO can legally benefit more than one person at the same time.
- 1.3 However, while it may be legally possible to partially transfer or lease the benefit of a DML it is not necessary desirable and the MMO retains serious operational concerns regarding the adequate monitoring of compliance with, and any subsequent enforcement of, a DML, and any conditions of a DML where the benefits of a DML have been transferred partially under the provisions as drafted within Article 8, rather than whole as permitted by section 72(7) and (8) of the 2009 Act.
- 1.4 There is no express provision within Part 4 of the 2009 Act which is on a par to section 156 of the 2008 Act. The only similar provision is contained within section 71(5) of the 2009 Act. This subsection states that a licence can state that conditions attached to it are *“to bind any person who for the time being owns, occupies or enjoys any use of the works in questions (whether or not the licence is transferred to that other person).”* The existence of this provisions requiring such an express step to be taken in order for the conditions to bind any such persons allows the MMO to draw the conclusion that, unlike the situation created by section 156(1) of the 2008 Act, the benefit of a marine licence does not automatically lie with such persons because if it did the conditions would already apply without requiring section 71(5).
- 1.5 Moreover, while the provisions of Part 4 of the 2009 Act are drafted in a very general way, section 72(7) can be said to envisage the transfer of a licence from one single legal entity to another only. The Explanatory Note on this part of the 2009 Act states:
- 247. On receipt of an application from the licensee, the licensing authority may transfer a licence from one named person to another. Licensees’ themselves cannot transfer their licence.*
- 1.6 The current drafting of Article 8 of the DCO allows the partial transfer of a DML. In operational practice, under the currently proposed wording, there is a risk that where the benefit of a DML lies with more than one legal entity the responsibility for complying with any particular condition or part of a DML would be significantly more problematic to determine and consequently may interfere with the ability of

the MMO to fulfil its statutory obligation to protect the environment, protect human health and protect interference with legitimate uses of the sea.

- 1.7 It is of utmost importance that there is a clear identification of areas of responsibility and a mechanism allowing appropriate enforcement action to be taken as necessary. For this purpose the MMO's preferred position, reflecting and deriving from the consistent approach taken in relation to marine licences issued by the MMO in accordance with Part 4 of the 2009 Act, continues to be that:

There is a single identified licence holder for a DML;

Any transfer of a DML for the licence holder to another single identifiable legal entity should be undertaken either by the MMO under section 71(7) of the 2009 Act or, where the transfer of benefit of the DML is to be undertaken in accordance with the transfer of benefit provisions in the main body of the DCO, as a single transfer of the whole benefit of the DML only from the licence holder (undertaker) to another single identified legal entity only on application to the Secretary of State, who will then consult the MMO prior to making a final determination.

Where it is identified at a pre-consent stage that particular identifiable parts of a development would be better suited to being undertaken by different persons, for the DCO to contain more than one DML which are governed independently in accordance with the principles set out above.

- 1.8 Moreover, the MMO considers it reasonable to reach this view based on our interpretation of the 2008 Act and the 2009 Act and in support of this position has regard to the comments of Lord Hunt of Kings Heath on behalf of the government of the day in the House of Lords debates on the Marine Bill:

***“Those marine licences will operate as if the Marine Management Organisation had issued them. Importantly, the MMO will then be responsible for monitoring and enforcing them; it could also add conditions to deemed licences as new information came to light.”*** Hansard House of Lords debates for 23 February 2009: Column 63 (our emphasis added).

- 1.9 The MMO also questions why the applicant feels as though partial transfer is required, and operationally desirable, given that East Anglia One, Rampion, Walney Extension and Navitus developments were content to transfer DMLs as a whole only.
- 1.10 The MMO, therefore, retains its objection to the current drafting of Article 8 and requests that the drafting is amended so as to permit the transfer of whole DMLs only from one legal entity to another, to be undertaken on receipt of an application by either the MMO or the Secretary of State, following consultation with the MMO.