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By email only

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Dear Panel,

RE: TILBURY2 – SECTION 89 AND THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010: EXAMINING AUTHORITY'S "RULE 8 LETTER"

The Marine Management Organisation (MMO) has reviewed the Examining Authority's (ExA) 'Rule 8 Letter' dated 26 February 2018 and the following constitutes the MMOs formal response to deadline 6 as set out in this letter.

The 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 received notification on 29 November 2017 that the Planning Inspectorate (PINS) (on behalf of the Secretary of State for Business, Energy and Industrial Strategy) had accepted an application from Port of Tilbury London Limited (the Applicant), for a DCO for the Tilbury2 port development.

The redevelopment of the Tilbury2 site itself will comprise the development of a new harbour facility in the form of an operational port. A number of key components are proposed within the port, with the two principal proposed uses being a Roll on Roll off (RoRo) terminal, located south of Substation Road, and a Construction Materials and Aggregates Terminal (CMAT) to the north of Substation Road.

The MMO has an interest in this project because the development contains the improvement and extensions to the existing river jetty and dredging of the River Thames within the tidal extent. The DCO application includes a deemed marine licence (DML) under Section 65 of the Marine and Coastal Access Act 2009 (the 2009 Act) and should consent be granted for the project, the MMO will be responsible for monitoring, compliance and enforcement of DML conditions. The DCO application also includes provisions

changing the powers or duties of a harbour authority. Under section 145(5) of the Planning Act 2008 (as amended) (the 2008 Act), a DCO may include provisions in relation to a harbour authority, in particular, (a) any provision which could be included in a harbour revision order under section 14 of the Harbours Act 1964 (the 1964 Act) by virtue of any provision under Schedule 2 of the 1964 Act. The MMO have delegated responsibility for harbour orders under the 1964 Act and as such will also provide comments on these aspects.

Deadline 6 consists of:

- Comments on the Panel's dDCO or the Panel's schedule of proposed changes (if either was required).
- Comments on the Report on Impacts to European Sites (RIES) (if one was prepared).
- Comments on responses to information requested by the Panel.
- Comments on responses on post hearing submissions including written submissions of oral case from the June 2018 hearings.

Of these items, the MMO considers the following relevant matters in relation to:

- Examining Authority's response to the Applicant's Draft dDCO Revision 4.
- Comments on the RIES.
- Comments on responses on post hearing submissions including written submissions of oral case from the June 2018 hearings.

In this response the MMO has included the outstanding matters raised by the MMO in deadline 5 and any relevant additional comments.

1. **Comments on the Examining Authority's response to the Applicant's Draft dDCO Revision 4.**

   1.1 The MMO notes items 5.8.10 and 5.8.25 within the document and welcomes the Panel's comments. The MMO awaits the Applicant's response to these in deadline 6.

2. **Comments on the RIES:**

   2.1 With regard to section 4.24 – The MMO is aware of the concerns raised by Natural England and notes the response of the Applicant to these concerns. The MMO is aware that the Applicant does not agree with the additional suggested restrictions by Natural England and have already imposed a daily non-piling window. If the decision is made to include these additional restrictions then the MMO must be informed before the DCO is determined as it will form a condition under the DML.

   2.2 With regard to section's 4.25 and 4.28– The MMO is aware of the concerns raised by Natural England and notes that the Applicant does not agree. If the decision is made to include this then the MMO must be informed before the DCO is determined as it will form part of the DML. As the maintenance dredge activities, should the DCO be

granted, fall under the section 75 exemption of the 2009 Act, any conditions in the DML for dredging would only apply to the capital dredge activities.

2.3 The MMO raises concerns on the additional timing restrictions suggested by Natural England as they leave a limited operational window. Any unforeseen delays could lead to the activities being delayed by a year if the operational window is missed. Natural England are yet to approach the MMO to discuss the conditioning of the DML regarding these timing restrictions. The MMO are aware that the Applicant does not agree with the suggested timing restrictions.

3. Comments on responses on post hearing submissions including written submissions of oral case from the June 2018 hearings:

3.1. The MMO are aware of discussions between the Applicant and Historic England and note the approach proposed by Historic England. The MMO are aware of the updated Marine Written Scheme of Investigations (WSI) and the response from Historic England dated 25 July 2018. The approach should be agreed between Historic England and the Applicant and the MMO contacted for any conditions to be agreed on the DML, however, on this occasion the MMO is aware that an agreement might not be reached before the end of the examination period. The MMO therefore offer its position on the matter:

3.1.1. The MMO agree that the Marine WSI provided is a high level document and any 'approval' or 'formal agreement' can only be made through the regulatory authority in accordance with the conditions on the DML. If the Marine WSI is certified under the DCO, the MMO agrees that the current wording in condition 14 of the DML is acceptable. This is providing that the Marine WSI clearly states the mechanisms and timescales for documents to be submitted to the MMO in order for approval to be granted. For example, if method statements are required to be approved by the MMO as part of the WSI then there should be a condition within the DML requiring these documents to be submitted at least 6 weeks before the works commence. If the Marine WSI is not to be certified then the DML will need to be revised to include additional conditions that reflect the requirements for submitting detailed archaeological method statements to the MMO for consultation and approval.

3.1.2. The Marine WSI makes several references to unexploded ordinance (UXO). The MMO reiterates the point made to the Applicant that the DML does not licence the removal and/or detonation of UXO's. Should the removal and/or detonation of the UXO be required in the future then these activities will require a separate consent from the appropriate licensing authority. The MMO wish to highlight to the Applicant that a European Protected Species (EPS) licence may be required to disturb or injure any EPS in relation to the UXO activities.

4. Comments on the MMO's deadline 5 submission:

4.1 The MMO provided comments on the DML in their deadline 5 response. The MMO acknowledges that some of the suggested amendments have been made, however there are some matters outstanding. The MMO request that the outstanding matters to be reflected in the next version. For the benefit of the Panel, these changes are detailed below and the paragraph numbers relate to those within the deadline 5 response dated 06 July 2018:

2.4.1. Interpretation:

2.4.1.1. "mean high water springs" - the MMO requests the standard definition given in all other marine licences is used “means the average throughout the year of the heights of two successive high waters during those periods of 24 hours when the range of the tide is at its greatest”.

2.4.3. Under section 3(4) of the DML, we recommend replacing the wording “No water injection dredging” with “ No hydrodynamic dredging”, as the supporting documents, including the Construction Environmental Management Plan (CEMP), do not state that water injection dredging is the only method of dredging that will be undertaken outside the exclusion zone.

2.4.4. The MMO acknowledges the inclusion of the WSI as a certified document. Please refer to section 3.1 of this document for the MMO’s comments.

2.4.5. Condition 15(2) – The MMO acknowledges the amendment to include the wording "…where practicable…”. The MMO would highlight that the DML has been further amended to state “…the licence holder must site concrete and cement mixing and washing areas at least 20m away…" when in deadline 5 the MMO stated a distance of 10m away. This 10m distance is in line with standard marine licence conditions and the MMO recommend the Applicant amend the distance in line with standard condition wording.

2.4.7. Condition 17(b) – “condition 2” should be replaced with “paragraph 2(2)”.

2.4.8. The MMO acknowledges that disposal of dredged material has been added as a licensable activity within the DML, therefore Conditions 19, 20, 21 and 22 do not need to be removed as previously requested as this is now a licensed activity and the conditions control how disposal activities are undertaken.

2.5.1. Article 43

2.5.1.1. Para 3 – The MMO acknowledges the change of "on the bed of the river Thames" to "within the UK marine licensing area", however as requested this should be “within the UK marine area” to avoid deposit of dredged material anywhere at sea without a marine licence. This is in line with the current wording of similar provisions within Harbour Empowerment and Harbour Revision Orders.

2.6. Q3.2.1 – Whilst the MMO does not have a direct input into the methods to be used to install the timber groynes, which are required to make new intertidal habitat for mud and saltmarsh, it appears to the MMO that these groynes will be required to be installed below MHWS and as such will be a licensable activity under the 2009 Act.

The MMO have discussed this with the Applicant, who is of the opinion that these works would not require a separate marine licence as it can be undertaken under Part 1, 3 (e) and (f) of the DML. However, the installation of the groynes is to create habitat in order to 'compensate' for the loss of saltmarsh habitat. Part 1, 3 (e) (ii) references 'works to mitigate any adverse effect' the MMO do not interpret paragraph e (ii) as applying to the groyne installation as this activity would not be considered as mitigation but rather compensation. The MMO interpret 'mitigation' in relation to the Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC[1] produced by the European Commission, whereby mitigation measures in the broader sense, are those measures which aim to minimise, or even cancel, the negative impacts on a site that are likely to arise as a result of the implementation of a plan or project. These measures are an integral part of the specifications of a plan or project. This guidance also states that compensatory measures *sensu stricto*: are independent of the project (including any associated mitigation measures). They are intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 Network is maintained. Therefore, the MMO is of the opinion that a separate marine licence will be required in order to carry out the habitat creation/groyne installation.

With regard to this, the MMO request that the 'Interpretation' section of the DML is updated to define mitigation. This will remove any ambiguity for all relevant parties involved.

> 'Mitigation' has the meaning giving measures which aim to minimise, or even cancel, the negative impacts on a site that are likely to arise as a result of the implementation of a plan or project.

Under paragraph (f) the MMO do not consider that the installation of groynes falls under the activities described as it is not an integral part of the authorised development. The installation of the groynes was not included in the Environmental Statement submitted by the Applicant for the Environmental Impact Assessment. Therefore the potential impacts have not been considered and assessed. The MMO has not been able to consult with their technical advisors at Cefas, and given the limited time left before the deadline the MMO is not able to conduct further consultation. It would be wholly inappropriate to have a DCO in place which authorises this activity when the potential impacts have not been fully assessed and understood. For the avoidance of any doubt this activity should be excluded from the DML and a separate marine licence should be sought from the MMO.

[1] http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

5. Additional comments from the MMO in response to the dDCO (revision 4):

5.1 Part 3 paragraph 27 of the DML contains an arbitration clause:

> *27. (1) Subject to condition 27(2) any difference under any provision of this licence must, unless otherwise agreed between the MMO and the licence holder, be referred to and settled by a single arbitrator to be agreed between the MMO and the licence holder or, failing agreement, to be appointed on the application of either the MMO or the licence holder (after giving notice in writing to the other) by the President of the Institution of Civil Engineers.*
>
> *(2) Nothing in this condition 27 is to be taken, or to operate so as to, fetter or prejudice the statutory rights, powers, discretions or responsibilities of the MMO.*

The MMO strongly opposes the inclusion of such a provision for the reasons discussed below.

5.1.1 The 2008 Act introduced a new regime for granting development consent for nationally significant infrastructure projects, and one of the aims of this new regime was to provide a comprehensive regime which considered applications in the round and which provided a 'one stop shop' for those seeking consent for national significant infrastructure projects.

5.1.2 The MMO was created by Parliament to manage marine resources and to regulate activities within the marine environment. Once the MMO was established, the Secretary of State delegated his/her functions under the 2009 Act to the MMO.

5.1.3 The 2008 Act recognises both the role of the Secretary of State in determining applications for DCO's and the role of the MMO as regulator for activities to be carried out in the marine environment. For any activity which would, or is likely to affect the marine environment, the MMO is a statutory consultee during the pre-application stage and an interested party during the examination stage. The responsibility for the DML once the DCO granted passes from the Secretary of State to the MMO and it is the MMO that is responsible for any post consent enforcement activity associated with the deemed marine licence, any post consent monitoring, and any variations, suspensions or revocations of the licence that are required.

5.1.4 One of the purposes of the 'one stop shop' approach is Applicant convenience. The Applicant has a choice as to whether to include within the DCO provisions which deem a marine licence to have been issued under Part 4 of the 2009 Act or it can apply outside of the DCO process to the MMO for a standalone marine licence for any licensable activities, in accordance with the 2009 Act. It was not the intention of Parliament to create a separate marine licensing regime with different controls applied to activities in the marine environment, had this been the intention the 2008 Act would not be drafted as is. The 2008 Act deems a marine licence to have been granted under the 2009 Act and then passed back all

responsibility for the DML to the MMO post issue for it to be treated as any other marine licence issued by the MMO. 5.1.5 The MMO's view is that a deemed marine licence should be treated in the same way as a marine licence granted by the MMO, as was intended by Parliament, and it is fundamental to the effective running of the marine licensing regime that there is consistency between DMLs granted through the provisions of a DCO and marine licences issued directly by the MMO. A failure to ensure this leads to an inconsistency of approach across the regulated community. The MMO does not include arbitration clauses in any of the marine licences granted by it under Part 4 of the 2009 Act. To require any decision or approval required by the MMO under the conditions of a DML to be subject to arbitration, usurps the MMOs role as regulator for DMLs and subjects the MMOs decisions to arbitration in a manner which is inconsistent with the 2009 Act.

5.1.6 The Arbitration clause at Condition 27 applies to any 'differences' between the Applicant and the MMO that may arise under any provision of the DML. It seems to the MMO the most likely situations in which 'differences' may arise under the provisions of the DML are those situations where the further approval of the MMO is required under a condition of the DML or where an issue of interpretation arises or where enforcement actions may follow. It is the MMO position that it is wholly inappropriate to subject its regulatory decisions to arbitration, for the reasons set out below, and that any differences to be resolved should fall to be resolved either through statutory appeal routes or via complaints to the MMO, complaints to the ombudsman, or ultimately via judicial review. Furthermore, MMO position is to do so goes against what was intended by Parliament when it created the MMO and delegated to it, regulatory responsibility for activities within the marine area, and serves as to usurp the MMO's role as regulator.

5.1.7 It seems to the MMO that 'differences' between the Applicant and the MMO are perhaps most likely to arise where under Conditions 10 and 11 the Applicant is required to submit a construction method statement, and where necessary a sediment sampling plan, to the MMO prior to the commencement of any licensed activity for the MMO to approve. These 'approvals' must be provided before the licensed activities can begin, and 'differences' could clearly arise where the MMO does not give its approval.

5.1.8 It is open to the Applicant to provide detailed construction plans and sediment sampling plans at the application stage and where this is done the MMO will assess the plans, and the conditions of the DML will require the works to be carried out in accordance with those documents. This approach can be quite rigid, and it can be difficult for an Applicant to provide accurate construction methodologies at application stage given things may need to change before the works begin, and where changes are required, then a formal variation to the licence will be required before the works can be undertaken.

5.1.9 The purpose of condition 10 and 11 is to allow the Applicant some flexibility. It allows the Applicant to agree the construction methods to be used with the MMO as

close to the project being undertaken as possible. Because the MMO has not been able to assess these plans at application stage, as would ordinarily be the case, it is both right and proper that the MMO must approve these works before they can continue, or where appropriate refuse to give its approval, or grant conditional approval as it sees fit as regulator for the marine environment. These approvals, are to all intents and purposes, small re-determinations of aspects of the marine licencing process. They are technical determinations which fall properly to the MMO to take.

5.1.10 Any disagreements which arise between the Applicant and the MMO during these 're-determinations' should be resolved by the appeal routes which already exist, i.e. via the MMOs complaint procedure, by complaint to the Ombudsman, by the statutory appeal routes where they apply, or ultimately via Judicial review. To apply arbitration to any regulatory decisions made by the MMO in its role as regulator for the DML undermines the MMOs role as regulator, is wholly unacceptable, and creates inconsistency with marine licences granted outside of the DCO process which are not subject to arbitration.

5.2 The Extended Port Limits Plan V3 [POTLL/T2/EX/153] does not show the entire order limits area. In order to prevent any future misunderstanding, the Applicant should zoom out on the plans so the perimeter of the order limits area is shown.

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

Yours Sincerely,

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