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By email only

16 August 2018

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 7 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 7 consists of:

- Responses to comments on the Panel's draft DCO or schedule of proposed changes (if one was required),
- Responses to comments on the RIES (if one was prepared),
- Responses to information requested by the Panel,
- Final updated documents from the Applicant in relation to Compulsory Acquisition or any other changed or updated matters,
- Any revised or updated SoCGs,
- Final dDCO to be submitted by the Applicant in the SI template with the SI template validation report.

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

- Responses to comments on the Panel's draft DCO,
- Responses to comments on the RIES,
- Responses to information requested by the Panel,
- Additional comments to deadline 6 documents,
    - Operation Management Plans V3,
    - Ecological Mitigation and Compensation Plan,
    - ES non-technical summary,
    - Natural England's Deadline 6 Response,
- Any revised or updated SoCG.

1. Responses to comments on the Panel's draft DCO or schedule of proposed changes

1.1. The MMO has provided comments on the draft DCO in their deadline 5 and 6 responses. There are new matters and some outstanding matters, where changes have not been made. For the benefit of the Panel, these changes and associated updates are detailed below:

1.1.1. With regard to Part 2 paragraph 2 the last four digits of the MMO Pollution Response Team contact number outside of office hours has been incorrectly changed. The correct number should be 0345 051 8486.

1.1.2. The MMO comments regarding the Marine WSI and latest revision of the draft DML can be found in section 3 paragraph 3.2 of this response.

1.1.3. With regard to 2.5.1.1 of the MMO's deadline 6 response on 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.

1.1.4. With regard to 2.6. of the MMO's deadline 6 response - 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.

Following extensive discussions with the Applicant. The MMO now understands that the Applicant will amend Part 3, paragraph (c) (vi) to '*construct, place and maintain works and structures including piled fenders, protection piles and cofferdams but not including groynes*'. Providing this amendment is made the MMO are satisfied that their concerns regarding this matter have been addressed.

1.1.5. 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.

1.1.5.1. 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.

1.1.5.2. 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.

1.1.5.3. 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.

1.1.5.4. 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.

1.1.5.5. 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.

1.1.5.6. 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.

1.1.5.7. 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.

1.1.5.8. 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.

1.1.5.9. 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.

1.1.5.10. 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.

1.1.6. The MMO has requested that Part 1 1(3) is amended to "subject to condition 3(4), the grid co-ordinates within the UK marine area within which the licence holder may carry out a licenced activity are specified below". Following this change the MMO request that the definition of mean high water springs is removed and instead the definition of "UK marine licencing area" is changed to "UK Marine Area" as defined under section 42 of the 2009 Act. This is in line with previous DCOs.

1.1.7. The MMO requests that amendments are made to show the entire order limits in the document Work Plans V3 [POTLL/T2/EX/195]. An updated version of this document was not provided as part of the deadline 6 responses.

2. Responses to comments on the RIES:

2.1. With regard to paragraph number 4.12 – The MMO refers to section 1.1.4 above regarding the installation of groynes requiring a separate marine licence. The MMO welcomes the Applicant intent to amend the DML as described. Due to the references in the REIS, the MMO still wish to highlight that as part of the HRA process if an AEOI cannot be ruled out then alternative solutions must be considered, and then if there are no alternative solutions then the next stage of the derogations must be considered, compensation (Article 6(4) of the Habitats Directive and regulation 64 of The Conservation of Habitats and Species Regulations 2017 and regulation 29 of the Conservation of Offshore Marine Habitats and Species Regulations 2017 respectively). The creation of new saltmarsh habitat is compensation not mitigation. Compensation is undertaken to maintain the coherence of the Natura 2000 network. The implementation of mitigation means that an AEOI can be ruled out. As compensatory measures are required the applicant cannot conclude no that the activities will have no AEOI. The Applicant may wish to contact Natural England to discuss this aspect further.

2.2. With regard to paragraph number 4.27 and 4.30 – The MMO reiterates it deadline 6 response. Natural England are yet to approach the MMO to discuss the

conditioning of the DML regarding these timing restrictions. 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.

2.3. With regard to the Note on ecological impacts and proposed mitigation (June 2018) – the document references mitigation for the loss of saltmarsh habitat. As detailed in section 2 paragraph 2.6 of the deadline 6 response and section 1.1.4 of this response the creation of a new habitat to replace one that has been lost is a compensatory measure. This is line with the ruling by the Court of Justice of the European Union on the interpretation of the Habitats Directive in the case of '*Briels and Others v Minister van Infrastructuur en Milieus (2014)*' and '*Hilde Orleans and others v Vlaams Gewest (2016)*'.

3. Responses to information requested by the Panel

3.1. With regard to item number 5.8.10 – The MMO has had discussions with the Applicant and notes their response. The MMO is satisfied that the difference between the port and order limits has been explained sufficiently. The change to Article 43 was requested in order for the DCO to be in line with the current wording of similar provisions within Harbour Empowerment and Harbour Revision Orders. The MMO maintain their position on this matter.

3.2. With regard to item number 5.8.25 – The MMO is aware of the positions of Historic England and the applicant. The MMO has conducted further discussions with the Applicant and Historic England. The MMO refers to section 3.1, 3.11 and 3.1.2 of their deadline 6 response. For the benefit of the panel these are referenced below.

3.2.1. With regard to section 3.1.1 of the MMO's deadline response - The MMO agreed 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. The MMO suggested that 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.

3.2.2. Following extensive discussions with Historic England, the MMO now understand that the Marine WSI submitted at deadline 6 is sufficient to be a certified document in the DCO. The MMO suggest that a further condition should be added to the DML. This condition has been discussed and agreed with the Applicant. It is understood that the final version of the DML will include the following amendment:

14 Marine written scheme of archaeological investigation:

(1) the authorised development must be carried out in accordance with the marine written scheme of investigation.

(2) Archaeological method statements must be submitted to the MMO for approval in accordance with the provisions of the marine written scheme of investigation six weeks before any works to which the method statements relate commence.

3.2.3. The MMO are content that if the condition listed in section 3 paragraph 3.2.2 above is added to the DML then the MMO's concerns regarding the Marine WSI are satisfied. This is providing that section 8 of the Marine WSI is updated to include the following in the method statement:

(i) a protocol for archaeological discoveries,
(ii) any mitigation to be implemented (including where necessary archaeological exclusion zones),
(iii) a protocol for reporting/recording archaeological and historical material,
(iv) the archaeological method statement will be produced in consultation with and a report on the consultation carried out will be submitted to the MMO with the method statement.

3.2.4. With regard to section 3.1.2 of the MMO's deadline 6 response - 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.

Following further discussions with the Applicant, the MMO now understand that the Applicant agrees that a separate marine licence would be required for UXO activities that they undertake. It is understood that Part 1 3 (2) (c) (ii) will be amended to "*carry out excavations and clearance (excluding clearance or detonation of ordnance), deepening, scouring, cleansing, dumping and pumping operations*". Providing this change is made to the DML the MMO is satisfied that it's concerns have been addressed.

The Marine WSI should specifically set out the protocol for handling the moving and/or detonation of any UXO's, as well as who will undertake the actions.

4. Additional comments from MMO to deadline 6 responses

4.1 Operation Management Plans V3 – With regard to 9.3 the MMO welcome that maintenance dredging should be undertaken during the ebb tide only. The MMO ask for 'should' to be changed to 'must' as this ensures there is no ambiguity.

4.2 Ecological Mitigation and Compensation Plan - With regard to section 8 paragraph 8.24 the MMO reiterate their deadline 6 response (section 4 and 2.6) that the DML does not licence the installation of the groynes or the creation of the compensatory habitat. Please refer to section 1 paragraph 1.1.4 and section 2 paragraphs 2.1 and 2.3 in this response for further detail.

4.2.1 With regard to section 8 paragraph 8.25 and section 13 paragraph 13.3 the MMO wish to highlight that habitat creation is not mitigation. As noted in section 1 paragraph 1.1.4 of this response, the installation of the groynes is to create habitat in order to 'compensate' for the loss of saltmarsh habitat not to provide mitigation. Please refer to section 1 paragraph 1.1.4 and section 2 paragraphs 2.1 and 2.3 in this response for further detail.

4.3 ES non-technical summary – sections 3 paragraphs 3.63 and 3.64 references the use of mitigation will mean that there will be no significant residual effects on marine ecology, however a net loss of intertidal habitat has been referenced. The net loss of intertidal habitat means that an AEOI cannot be ruled out. This is line with the ruling by the Court of Justice of the European Union on the interpretation of the Habitats Directive in the case of People Over Wind and Sweetman vs Coillte Teoranta (2018). Please refer to section 1 paragraph 1.1.4 and section 2 paragraphs 2.1 and 2.3 in this response for further detail.

4.4 Natural England's deadline 6 response – The restrictions being suggested by Natural England are based on water quality. The MMO has not received any concerns regarding water quality from the Environment Agency. The MMO should be contacted if any restrictions are required to be added to the DML as conditions.

5. Any revised or updated SoCG

5.1. The SoCG will be updated to reflect the comments provided in this deadline response, and submitted at deadline 7 by the applicant.

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

Yours Sincerely,

[redacted]

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