Immingham Green Energy Terminal

9.40 Applicant's Comments on D1 Submissions from Marine Management Organisation

Infrastructure Planning (Examination Procedure) Rules 2010

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Chapter **Pages**

1. Introduction

Overview

1.1 This document has been prepared to accompany an application made to the Secretary of State for Transport (the "Application") under Section 37 of the Planning Act 2008 ("PA 2008") for a Development Consent Order ("DCO") to authorise the construction and operation of the proposed Immingham Green Energy Terminal ("the Project").

1.2 The Application is submitted by Associated British Ports ("the Applicant"). The Applicant was established in 1981 following the privatisation of the British Transport Docks Board. The **Funding Statement [APP-010]** provides further information.

1.3 The Project as proposed by the Applicant falls within the definition of a Nationally Significant Infrastructure Project ("NSIP") as set out in Sections 14(1)(j), 24(2) and 24(3)(c) of the PA 2008.

The Project

1.4 The Applicant is seeking to construct, operate and maintain the Project, comprising a new multi-user liquid bulk green energy terminal located on the eastern side of the Port of Immingham (the "Port").

1.5 The Project includes the construction and operation of a green hydrogen production facility, which would be delivered and operated by Air Products (BR) Limited ("Air Products"). Air Products will be the first customer of the new terminal, whereby green ammonia will be imported via the jetty and converted on-site into green hydrogen, making a positive contribution to the United Kingdom's ("UK's") net zero agenda by helping to decarbonise the UK's industrial activities and in particular the heavy transport sector.

1.6 A detailed description of the Project is included in **Environmental Statement ("ES") Chapter 2: The Project [APP-044]**.

Purpose and Structure of this Document

1.7 The purpose of this document is to provide a summary position with respect to the information provided by the Marine Management Organisation ("MMO") at Deadline 1, including:

- Written Representation **[REP1-081]**
- Responses to the Examining Authority's First Written Questions **[REP1-080]**
- Responses to Relevant Representations (Cover Letter) **[REP1-078]**
- Responses to Relevant Representations **[REP1-079]**
- Draft Development Consent Order, including consolidated tracked changed version **[REP1-077]**

2. Applicant's Comments on the Written Representation from Marine Management Organisation

Underwater Noise Mitigation
4.4.6 and 4.4.8
Response
The Applicant can confirm that the contingency period will be for a period of 60 minutes. This is based on a maximum of three piles being driven in a 24-hour period, and the need for 20 minutes soft start per pile.
4.4.7
Response
The contingency period has been defined in the updated **draft Development Consent Order ("dDCO")** submitted at Deadline 1 **[**REP1-016**]**. The reporting protocol and contingency has been provided as part of **Condition 15** of the Deemed Marine Licence included in **Schedule 3** of the **dDCO**.
Underwater Noise Appendix
4.7.8, 4.7.9, 4.7.12, 4.7.14, 4.7.15, 4.7.16-4.7.22, 4.7.24, 4.7.27, 4.7.28, 4.7.31, 4.7.32
Response
The technical observations made by the MMO (and Cefas) relate to the data and assumptions used to inform the underwater noise modelling. The Applicant can confirm that the parameters used within the underwater noise assessment for the Project **[**APP-187**]** already represent a worst case scenario with respect to piling parameters. The conclusion of this assessment being that there is the potential for significant adverse effects as a result of underwater noise in the absence of mitigation. A comprehensive package of mitigation is therefore being developed and agreed with the MMO to reduce all effects to minor adverse significance at worst. Therefore, the technical

observations made by the MMO (and Cefas) do not change any of the conclusions reached with respect to the assessments or the effectiveness of the proposed mitigation measures.

3. Applicant's Comments on Marine Management Organisation's Responses to the Examining Authority's First Round of Written Questions

Q1.5 Biodiversity	
Q1.5.2.2	
Question	**Interested Party's Response**
Clarification of proposed piling times MMO provides [RR-016, Paragraph 4.4.11] a proposed condition that "No marine piling of any kind is to be carried out between the hours of 07.00 and 19.00 during winter months and from sunrise to sunset during summer months" a) MMO, correct these times in line with the body of your representation. b) Applicant - Provide an update of the Table shared at ISH3 [EV5-006] [EV5-007] showing the proposed temporal and seasonal restrictions. c) Applicant – From this Table, signpost where the ">200m" information is provided within the ES. d) Applicant – With this Table, include a pictorial description of the limits of the "Jetty Head" and "Approach Jetty".	The MMO requested in our Relevant Representation that the timings of sunrise and sunset should be defined by the Applicant. However, we recommend that the time of sunrise and sunset should be in accordance with office data, for example from HM Nautical Almanac Office. The MMO and the Applicant had a meeting on Friday 23 February 2024, where the approach to mitigation was discussed. Following the meeting, we have further reviewed the proposed measures and have provided further comments regarding this in Section 4 below.

e) Applicant and MMO – confirm whether the limits shown on this table have been agreed.	
Applicant's Comment	
The Applicant can confirm that the time of sunrise and sunset will be set in accordance with HM Nautical Almanac Office data.	
Q1.5.2.3	
Question	**Interested Party's Response**
Use of bubble curtain MMO recommends [RR-016, paragraph 4.4.19] that the Applicant investigates the implementation of noise abatement measures such as a bubble curtain. a) MMO, provide the coverage referred to (relating to the South Shields Regeneration Project) to the Applicant and ExA. b) Applicant, If it is decided not to implement this mitigation, please provide your reasoning. c) Applicant, Confirm whether any other sound/vibration dampening mitigation is proposed.	The company responsible for the deployment of bubble curtains for the South Shields Regeneration Project is Frog Environmental. Their website provides a case study page on the project: South Shields Regeneration - Bubble Curtains I Frog Environmental. The MMO suggests that the Applicant contact Frog Environmental to request their noise monitoring data, and to discuss the feasibility of using bubble curtains for the IGET project. If bubble curtains were suitable for use at the IGET site, and providing existing data demonstrated that noise levels could be adequately reduced to a level that would not cause significant harm to marine receptors, then it is possible that piling work at IGET could be carried out without the need for temporal piling restrictions.
Applicant's Comment	

A bubble curtain is not considered appropriate to implement for the Project (see response to Written Question Q1.5.2.3 **[REP1-026]**). Overall, given the high level of uncertainty in their effectiveness in attenuating noise in the high tidal flow environment of the Humber Estuary, and also specifically in reducing disturbance to fish, a bubble curtain is not considered appropriate to implement for the Project. In addition, the Applicant has already committed to temporal piling restrictions to mitigate the effects of underwater noise. Engagement with Frog Environmental is therefore considered unnecessary.

Q1.18 Development Consent Order

Q1.18.3.16

Question	Interested Party's Response
Article 46 j) MMO, identify specifically the parts of the Article that could restrict your operations?	The MMO has reviewed the updated draft DCO provided by the Applicant and has included further comments below in Section 3 regarding Article 46.

Applicant's Comment

Paragraphs 3.1 – 3.15 of the MMO's Deadline 1 Submission set out its position that any marine licence ("DML") deemed to be granted under a DCO should be transferrable solely pursuant to section 72 of the Marine and Coastal Access Act 2009 (the "2009 Act") and not alongside the remainder of the DCO, of which the deemed marine licence is part, pursuant to Articles 46(12) and (13) of the draft DCO.

The Applicant welcomes its constructive relationship with the MMO in its separate capacities as a decision-maker under the 2009 Act and as a critical consultee to decisions of the Secretary of State under the 2008 Act. Nothing in these submissions undermines those two important but differing roles of the MMO and the Applicant will continue to work with the MMO in both capacities.

However, the MMO's representation suggests it does not consider that the Secretary of State should have any role in the transfer of DMLs in DCOs which the Secretary of State has made, is not properly placed to have that role (including where the MMO acts as a consultee) and that all control in such matters should rest with the MMO alone.

The Secretary of State has not accepted the MMO's view on this subject in the past, including with the examples given below. Ultimately, it is for the Secretary of State to determine whether they accept the MMO's view on this occasion or agree with the Applicant's submission that (1) there is no reason to depart from established precedent in this case, which carries no disadvantages and (2) there is every reason to facilitate determination of transfer of the DML as part of expediting delivery of this nationally significant infrastructure project, as has been the case in the above made DCOs (recognising that though there are no proposals at this stage to transfer the DML, it would be imprudent not to make standard provision in this regard).

Sections 72(7) and (8) of the 2009 Act provide that on an application made by a licensee, the licensing authority which granted the licence (i.e. the MMO) may transfer the licence from the licensee to another person and if it does so, must vary the licence accordingly. Those sections further provide that a licence may not be transferred except in this manner. A transfer pursuant to these sections would therefore require an application to the MMO and an approval from it with a varied licence.

Article 46(12) of the draft DCO provides that an undertaker with the benefit of any provision of the DML may transfer it to any person permanently or grant it to any person for a temporary period, as with any other provisions of the draft DCO except it can only be with the consent of the Secretary of State following consultation with the MMO. Such transfers and grants are effected by way of transfer deeds between the transferor and transferee. Nothing except a letter of approval is required from the Secretary of State. So Article 46(15) makes clear on the face of the draft DCO that the exercise by a person of any benefits or rights conferred in accordance with any transfer or grant is subject to the same restrictions, liabilities and obligations under the draft DCO as would apply if those benefits or rights were exercised by the transferor or grantor (i.e. no terms of the DML could be avoided). Article 46(14) provides that where such a transfer or grant has been made references to the undertaker include the transferee or grantee. So, there is no need for the Secretary of State, or indeed the MMO, to make any changes to the DML upfront for it to benefit the transferee or grantee. At the end of any short-term grant, no changes to the DML are needed either because the grantee simply would be no longer be taken to be included as an undertaker.

Article 46(12) of the draft DCO makes clear that the undertaker can transfer the DML either by way of section 72(7) of the 2009 Act or by way of Article 46(12) the draft DCO.

This well-established approach has been followed by the Secretary of State in many made DCOs which contain DMLs, including the following recent examples of which we are aware:

Article 9(3) of The Sizewell C (Nuclear Generating Station) Order 2022

Article 5(4) of The East Anglia ONE North Offshore Wind Farm Order 2022

Article 6(5) of The Norfolk-Vanguard Offshore Wind Farm Order 2022

Article 6(5) of The Norfolk Boreas Offshore Wind Farm Order 2021

Article 51(6) and (7) of The Port of Tilbury (Expansion) Order 2019

The purpose of these provisions applies to the Project for the same reasons it applied to the made DCOs above: (1) If the draft DCO were to be transferred as a whole it would prevent having to apply separately for consents for specified provisions from both the Secretary of State and the MMO, avoiding duplication; (2) If only the DML were to be transferred it would provide certainty in circumstances where this nationally significant infrastructure project must be delivered, and delivered expeditiously, and there is no appeal against an MMO refusal under section 72(7) of the 2009 Act (as the MMO can decide not to issue a notice to transfer a marine licence, allowing no appeal to the First-tier Tribunal under that Act).

There can be no reasonable suggestion that the Secretary of State is not an entirely capable arbiter of who should benefit from any part of a DCO, having determined the original application for the draft DCO, especially given that they will have regard in the usual manner to any consultation responses of the MMO.

The above approach is legally robust, in the same way as it has been in the made DCOs which have included it to date. Articles 46(14) and (15) (summarised above) mean that once the Secretary of State has approved the transfer of a DML (following consultation with the MMO) there is nothing further for the MMO to do to effect that transfer. There would also be no issue with fixed period transfer (leasing) of the DML as suggested by the MMO, if it were required. At the end of the period Article 46(14) would operate no longer to include the temporary grantee but would still include the original undertaker.

Nothing in the above approach makes what is on the face of the DML inconsistent with a marine licence issued for activities which do not involve nationally significant infrastructure. The provisions relate to the transfer of the DML and not its substance.

Nothing in the above approach undermines the MMO's enforcement responsibilities. There is no suggestion that the Secretary of State be substituted for that role.

For the reasons above, the Applicant does not propose adding the following wording requested by the MMO on this occasion: "For the avoidance of doubt article 46 does not apply to the MMO and sections 72(7) and (8) of the 2009 Act shall continue to apply to all parts of the deemed marine licence."

Paragraphs 3.17 – 3.22 of the MMO's Deadline 1 Submission set out its position that its discharge of DML conditions should not be subject to timescales and its decisions not subject to any appeal to the Secretary of State. The MMO therefore seeks to be excluded from Schedule 17 (Procedure regarding certain approvals, etc.) of the draft DCO.

The Applicant needs to ensure that the Project can be carried out efficiently and speedily following the making of the DCO. It is anticipated that ammonia will be available in Europe in 2027. There is therefore the urgent imperative of the hydrogen production facility needing to be operational as soon as possible in that year. Requirement 5 (Phasing) in Schedule 2 (Requirements) of the draft DCO provides that the ammonia storage tank and the hydrogen production units must not be brought into operational use until the jetty forming part of Work No. 1 is first available for use. The Applicant must therefore consider all appropriate ways of maintaining an expeditious construction programme for delivery of the jetty. This will include expeditious discharge of DML conditions and recourse to the Secretary of State in the event that this does not occur. The DML conditions are terms of the draft DCO as much as the Requirements which are the subject of Schedule 17. There is no reason why both should not be included in the scope of that Schedule.

The Applicant values its longstanding and constructive relationship with the MMO. The Applicant welcomes the assurances in the MMO's representation that it would determine DML discharge applications in as timely manner as possible. The Applicant notes that the MMO has an escalated internal procedure in the event of dissatisfaction by licensees, which the MMO itself administers, and scope for judicial review to the High Court if an error of law can be identified by a licensee in legal proceedings. However, a project of national significance operating to a critical deadline such as the Project must rely on the certainty of established timescales for decision-making and recourse to the Secretary of State, who can entertain the technical merits of a decision and not only very limited public law errors as the Courts may do.

This approach has longstanding precedent in another very significant time-sensitive DCO scheme, namely The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014. Its Schedule 17 (Procedure for discharge of requirements etc. and appeals) applied to all "discharging authorities", which was defined as "the body responsible for giving any consent, agreement or approval required by a

requirement included in this Order or protective provision set out in Schedule 16 to this Order, or further to any document referred to in any requirement, or any licence condition in the deemed marine licence set out in Schedule 15 (deemed marine licence), or the local authority in the exercise of functions set out in sections 60 or 61 of the Control of Pollution Act 1974" (emphasis added – see Article 2 (Interpretation)). It would therefore be inaccurate to describe the drafting as "novel", established as it has been for a decade.

Nothing in the above approach makes the substance of what is on the face of the DML inconsistent with a marine licence issued for activities which do not involve nationally significant infrastructure. The provisions relate to the timescales for the discharge of DML conditions and scope for appeals to the Secretary of State. The urgency of nationally significant infrastructure, and the imperative for expeditious delivery of this Project, are reasons why such discharges should be handled differently to marine licences issued under the 2009 Act.

The Applicant and the MMO will recognise that it will be for the Secretary of State to decide whether it agrees with the Applicant that the DML should be subject to Schedule 17 in the same way as it was for the purposes of the Thames Tideway Tunnel.

Paragraph 3.23 of the MMO's Deadline 1 Submission sets out a concern that paragraph 5 (Anticipatory steps towards compliance with any requirement) of Schedule 17 is drafted broadly and could cause confusion and ambiguity which may undermine the MMO's regulatory role. There is no scope for paragraph 5 causing such confusion and ambiguity. Paragraph 5 does not relate to the DML but is stated only to apply to Schedule 2 (Requirements). It is a standard provision common in made DCOs, which clarifies that a relevant planning authority can be comfortable in taking into account steps taken before a DCO is made to discharge a Requirement even though the discharge confirmation can only be issued following the making of the DCO. This is because promoters of time-sensitive DCOs, like the Project (see above), will prudently not wait until the DCO is made to start working on assessments or documentation needed to discharge Requirements. It remains, of course, wholly a matter for the authority as to how it takes those steps into account once an application is made to discharge the Requirement in question. Nothing in the paragraph binds the authority to find the steps satisfactory. There would thus be no reason for this provision to list exhaustively what the anticipatory steps would be. It is intentionally broad. That breadth, however, provides the DCO promoter and relevant planning authority alike with comfort that nobody can challenge the admissibility of such work in the discharge of Requirements. Nothing in the provision will undermine the MMO's regulatory role. If the MMO agrees, it appears sensible to the Applicant to clarify that it applies to the MMO's determination of marine licence conditions as well, in respect of which work to discharge conditions is also likely to commence before the DCO is made (if it is the decision of the Secretary of State to do so). This can be further discussed as part of the ongoing discussions between the Applicant and the MMO in respect of the DML.