



Immingham Green Energy Terminal

9.93 Applicant's Responses to Documentation Received at
Deadline 6

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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 Immingham Green Energy Terminal, 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 UK’s net zero agenda by helping to decarbonise the United Kingdom’s (UK) industrial activities and in particular the heavy transport sector.
- 1.6 A detailed description of the Project is included in **Chapter 2: The Project** of the **Environmental Statement (“ES”)** [AS-069].

Purpose and Structure of this Document

- 1.7 This document contains the Applicant’s responses to documentation submitted by Interested Parties at Deadline 4.

1. Applicant's Responses to Documentation Received at Deadline 6

Marine Management Organisation
<u>REP6-029</u>
Response
<p>Introduction</p> <p>The Applicant has made submissions on why the deemed marine licence ("DML") should in this case be transferrable either alongside the remainder of the Development Consent Order ("DCO"), of which the DML is part, pursuant to Articles 46(10), (12), (13) and (14) of the draft DCO ("dDCO") submitted (most recently) at Deadline 7 [TR030008/APP/2.1 (9)] or pursuant to Section 72 of the Marine and Coastal Access Act 2009 (the "2009 Act"). Those submissions are more particularly set out:</p> <ul style="list-style-type: none">• In the Applicant's comment on the Marine Management Organisation's ("MMO's") response to Q1.18.3.16 of the ExA's First Written Questions [REP2-012], see page 6• At Paragraph 6.1 of the Applicant's Summary of Issue Specific Hearing 4 (ISH4) [REP3-070]• At page 2 of the Applicant's Responses to Documentation Received at Deadline 4 [REP5-049] in response to the MMO's Deadline 4 Submission [REP4-052] <p>The MMO has responded to the latter submission at Section 1 of the MMO's Comments on the Examining Authority's Proposed Schedule of Changes to the Draft Development Consent Order [REP6-029]. There remains nothing in the MMO's responses to date which alters the</p>

analysis that the transfer mechanism proposed is necessary, straightforward, well-precedented and has no disadvantages from the perspective of the public interest.

It is important context that the MMO's Deadline 4 Submission **[REP4-052]** described applications under the 2009 Act for the transfer of a marine licence as "*essentially a purely administrative act to ensure that the licence contains the name of the person with the benefit of the licence*". The MMO noted that "*as far as the MMO is concerned it has never refused an application for a transfer*" and agrees that the Secretary of State is an "*entirely capable arbiter of who should benefit from the Deemed Marine Licence*".

Article 46(13) of the **dDCO** already provides that the MMO must be informed as and when any transfer occurs before it can take effect and the Applicant is content to require such notice to be given at least 28 days in advance as requested in the MMO's most recent response **[REP6-029]** (see further below). That MMO response still does not identify any way in which allowing the Secretary of State to authorise transfer would give rise to any practical difficulties for the MMO in carrying out its functions under the 2009 Act, to ensure the public interest is protected, particularly after its request for a minimum notice period of the transfer taking effect is accommodated.

Advice Note 15

The MMO suggests that Paragraph 28.3 of Advice Note 15 implies that there could be "*operational difficulties*" with the Applicant's proposed approach. This is not the case. That paragraph simply notes that the 2009 Act does not make provision for transferring the benefit of part of a marine licence, whereas DCOs are empowered by the Planning Act 2008 to enable this for DMLs, and "*there **may be** operational difficulties with such an approach including monitoring compliance and taking enforcement action*" (emphasis added). The **dDCO** would allow the transfer of part of the DML. It is more likely to be transferred as a whole but the possibility cannot be excluded. Even so, as more particularly set out by the Applicant in **[REP5-049]**, the mechanism proposed (in keeping with long-standing precedent) ensures that the MMO will be clear on what the conditions attached to any transferred part of a DML are and against whom they are enforceable. The DML conditions have been drafted, and agreed by the MMO, so that it is clear what conditions apply to which works, so there is no scope for ambiguity. **Article 46(13)** of the **dDCO** ensures that the MMO is clear against whom the transferred part of the DML is enforceable and the provisions to be transferred. **Articles 46(16)** and **(17)**, in the usual manner, take precedence over the terms of any transfer and provide that all applicable restrictions, liabilities and obligations pass to the person gaining the temporary benefit of the DCO provisions, so as to prevent any 'cherry picking'. This is exactly the same approach as applies to the transfer of part of every made DCO. There will thus be no operational difficulties in these circumstances.

Obligation on the Secretary of State

The MMO has proposed the following additional underlined wording in **Article 46(12)**:

“[An undertaker with the benefit of any provision of the deemed marine licence may pursuant to this sub-paragraph, with the consent of the Secretary of State—

- (a) transfer to any person any or all of the benefit of the provision and such related statutory rights as may be agreed between the undertaker and that person;*
- (b) grant to any person for a period agreed between the undertaker and that person any or all of the benefit of the provision and such related statutory rights as may be so agreed between the undertaker and that person,*

but the Secretary of State must consult the MMO [and have due regard to any response received] before giving such consent to the transfer or grant to another person of the benefit of the provision and such related statutory rights.”

The Applicant notes that Examining Authorities tend to be highly resistant to including obligations of any nature on the Secretary of State in DCOs, which are pieces of legislation. The term ‘due regard’ fetters the Secretary of State’s discretion. ‘Due regard’ is not simply ‘regard’. Section 104(2)(a) of the Planning Act 2008, for example, requires the Secretary of State only to “*have regard*” to national policy statements in deciding DCO applications. The MMO is seeking a higher level of obligation on the Secretary of State in a manner which substantially substitutes an MMO decision on transfers for that of the Secretary of State. The Applicant resists this proposed change. The wording as it stands without the MMO proposal provides sufficient scope for the Secretary of State to have the lawful regard to MMO responses they deem appropriate. The MMO proposal is included in square brackets in the **dDCO** submitted at Deadline 7 with a footnote setting out why it should be deleted in any made DCO.

28 days’ notice

The MMO has requested that **Article 46(13)** include a minimum of 28 days’ notice to the MMO prior to the date on which the transfer or grant will take effect. The Applicant is content to include wording to that effect, as set out below, which would provide the MMO with a minimum of 28 days to update its records as to the person with whom the benefit of the DML provisions in question reside:

“(13) Any transfer or grant under paragraph (12) does not take effect until the undertaker has given notice to the MMO stating—

- (a) the name and contact details of the person to whom the benefit of the provision will be transferred or granted;*

(b) *the date on which the transfer or grant will take effect (which must be at least 28 days after the date on which the notice is given);*
and

(c) *the provision to be transferred or granted,*

and providing a copy of the consent given by the Secretary of State to the transfer or grant and a copy of the transfer or grant itself; and the MMO may update its records in respect of the deemed marine licence accordingly.”

Administrative burden

Nothing in the MMO's paragraph entitled 'Administrative burden' can be taken to suggest reasonably that the mechanism at **Articles 46(10), (12), (13) and (14)** is administratively burdensome. It involves a letter to the Secretary of State, consultation of the MMO, a response from the Secretary of State and a notice to the MMO. The MMO incorrectly suggests that it must then carry out "*the necessary administrative tasks to effect the transfer*". The transfer is effected by the transfer deed between the transferor and transferee, taking effect on the notice to the MMO. It need not be effected by any act of the MMO, as might be the case under the 2009 Act. The MMO need only update its records, and has the 28 days it requested to do so. This is in the wider context of what the MMO has itself described as the "*purely administrative decision*" as to who is benefitting from the DML even under the 2009 Act. In any event, the MMO does not grapple with any administrative burden involved being, in any event, preferable in the public interest to the alternative, which would require one application being made to the Secretary of State for the transfer of certain non-DML provisions of the DCO and a second application being made to the MMO for DML provisions of the DCO.

Precedent

The MMO's paragraph entitled 'Precedent' states that "*it is quite possible with the passage of time and increased understanding and practical experience in the regulation of both marine licences and deemed marine licences that issues come to the fore which has not previously attracted specific focus or scrutiny*". The Applicant submits that the spectre of 'unknown unknowns' should not suddenly be taken as a reason to depart from a mechanism for the transfer of DMLs which has been in numerous made DCOs since The Galloper Wind Farm Order 2013 over a decade ago.

Conclusion on transfer mechanism

The issues raised by the MMO about monitoring and enforcement derive entirely from the concerns about record keeping, and therefore fall away once that has been addressed by **Article 46(12)**. There can therefore be no reasonable objection to a mechanism allowing for

such uncontroversial and straightforward applications being made under the DCO with Secretary of State approval, following MMO consultation.

Updated table

The Applicant takes this opportunity to update the table provided further to DCO 2.8 of WQ2 to assist the ExA in determining what amends to make to the provision depending on the view it takes on the matter. See the new underlined matter in respect of **Paragraph 12 of Article 46** below:

Article/Paragraph No.	Applicant's Approach	MMO's Approach
Article 46 (Benefit of the Order)	Retention of Paragraphs 12 – 15 as currently presented in square brackets in the current draft DCO submitted at Deadline 7 <u>except for “and have due regard to any response received” in Paragraph 12 which should be deleted.</u>	Deletion of Paragraphs 12 – 15 as currently presented in square brackets in the current draft DCO submitted at Deadline 7.
	Deletion of Paragraph 16 as currently presented in square brackets in the current draft DCO submitted at Deadline 7.	Retention of Paragraph 16 as currently presented in square brackets in the current draft DCO submitted at Deadline 7.
Article 63 (Procedure regarding certain approvals, etc.)	Deletion of sub-paragraph (b) of Paragraph 5. Moving “or” to the end of sub-paragraph (a) of Paragraph 7, after its semi-colon.	Retention of sub-paragraph (b) of Paragraph 5.
Schedule 3, Part 3 (Procedure for the discharge of certain conditions)	Deletion of Paragraphs 24 – 27 as currently presented in square brackets in the current draft DCO submitted at Deadline 7.	Retention of Paragraphs 24 – 27 as currently presented in square brackets in

		the current draft DCO submitted at Deadline 7.
	Retention of Paragraph 28 as currently presented in square brackets in the current draft DCO submitted at Deadline 7.	Deletion of Paragraph 28 as currently presented in square brackets in the current draft DCO submitted at Deadline 7.
Schedule 17 (Procedure regarding certain approvals, etc.)	Retention of the text shown in square brackets within sub-paragraph (1) of Paragraph 3 in the current draft DCO submitted at Deadline 7.	Deletion of the text shown in square brackets in the current draft DCO within sub-paragraph (1) of Paragraph 3.
General	Deletion of all footnotes in square brackets beginning [Note to the Examining Authority...].	

MMO refinements to certain DML conditions

The Applicant is content to make the amendments requested by the MMO at Part 2 of Section 1 of its Comments on the Examining Authority's Proposed Schedule of Changes to the Draft Development Consent Order **[REP6-029]** in relation to **Paragraphs 8(1), 12(1)(a) and 16(6)**. The amendments can be seen in the **dDCO** submitted at Deadline 7 **[TR030008/APP/2.1 (9)]**.

MMO confirmation of satisfaction otherwise with the dDCO

The Applicant notes that the MMO confirms in Section 2 of its Comments on the Examining Authority's Proposed Schedule of Changes to the Draft Development Consent Order **[REP6-029]** that other than the matters set out in the above table the remainder of the DCO, including the DML, is satisfactory as far as it is concerned.