

(ABP: 4 of 5 – DL4)

Proposed Lake Lothing Third Crossing (TRO10023)

Associated British Ports (20013261)

Comments on the First Revised Draft Development Consent Order R1

This documents sets out Associated British Ports ("ABP") comments on the Applicant's first revised draft Development Consent Order R1 (Document Reference: SCC/LLTC/EX/12) and the Explanation of changes to the draft DCO (Document Reference: SCC/LLTC/EX/13), both of which were submitted by the Applicant at Deadline 3 (8 January 2019).

Where appropriate, these responses are cross-referenced to ABP's Written Representations and other submissions made by ABP for Deadline 4.

1. Article 3 – Disapplication of Legislation, etc

The Applicant's Brief Description and Explanation:

Changes have been made to this article following discussions with ABP. Discussions between the parties are continuing in relation to the disapplication of bylaw 36; however it is understood that all other elements of this article are agreed between the parties.

ABP's Comment:

- ABP agrees with the majority of the amendments proposed by the Applicant in respect of this Article.
- It does not, however, agree with the proposed disapplication of Byelaw 36, in that its disapplication would create serious navigational safety issues in the Inner Harbour and could result in the endangerment of construction workers associated with the LLTC scheme as well as users of the Port.
- Bylaw 36 of the Lowestoft Harbour Bylaws 1993 provides that:

"No person shall dive or swim in the waters of the harbour without a permit issued by the harbour master."

- The Applicant has suggested that requiring any person engaged in construction work to first obtain a permission (i.e. an ABP Permission to Dive, issued by the Harbour Master) to dive/swim to be impracticable and likely to inhibit contractors from carrying out operations in a timely and efficient manner.
- In so suggesting, the Applicant is failing to recognise ABP's overriding statutory duties. It is imperative that the Harbour Master is at all time fully aware of any diving or swimming taking place within the Port. This requirement goes as much to the health and safety of individuals as to matters of navigational safety, avoidance of collision, impact with the bridge, etc.
- The process of obtaining a permission to dive or swim is a very simple and quick process, which is undertaken at the Port Office. As such, ABP does not understand the Applicant's reluctance to agree to the deletion of the disapplication of Byelaw 36, particularly considering the potentially serious safety implications that may arise for construction workers associated with the LLTC scheme.
- Further information regarding ABP's concerns with Article 3 is set out in **Paragraphs 22.2 to 22.4 of ABP's Written Representations.**

2. **Article 21 – Removal of vessels**

The Applicant's Brief Description and Explanation:

This article has been amended following discussions with ABP, but the wording is not yet fully agreed with ABP.

ABP's Comment:

- ABP does not accept the current wording of this article, as it considers that any removal or relocation of vessels must be first agreed in advance by the Harbour Master.
- It is acknowledged that the Applicant has attempted to address this issue, but ABP considers that the current wording, as proposed, lacks clarity. For example, if the Applicant only has the power to relocate vessels outside of the Order limits, what is meant by "*if elsewhere within Lowestoft Harbour*"?
- ABP is also concerned that the powers sought by the Applicant will impact on ABP's ability to comply with its statutory duties and obligations.

- ABP, as the Statutory Harbour Authority, already possesses these statutory powers and will cooperate by exercising these powers, when so requested by the Applicant, where it is reasonable and safe to do so.

3. **Article 40 – Operation of the new bridge**

The Applicant's Brief Description and Explanation:

This article has been substantially amended following further work by the Applicant in developing a draft Scheme of Operation and following discussions with ABP and the Navigation Working Group.

The article now refers to a Scheme of Operation which will be certified if the Order is made; and sets out the mechanisms by which this scheme will be able to be varied or replaced, including its relationship with any revised NRA required as a result.

This wording is not yet agreed with ABP.

ABP's Comment:

- Article 40, as drafted, is unacceptable. It is overly prescriptive and underlines the serious detriment that the proposal to construct a low bridge through the middle of an operational port will have on the Inner Harbour.
- Article 40 (2) should provide that the Scheme of Operation may be varied by the harbour authority, albeit with the approval of the highway authority – presumably the undertaker – such approval not to be unreasonably refused.
- As the Applicant has made clear to ABP, the role of the Navigational Working Group is only as an informal advisory group and certainly has no standing as far as the operation of the LLTC is concerned. Any changes in operation, therefore, can only be agreed between the Harbour Master and the highway authority, after appropriate stakeholder consultation.
- The ExA should note that in terms of consultation, ABP is under a duty to consult on navigation safety matters in accordance with the Port Marine Safety Code.
- Indeed, ABP queries whether the Secretary of State should have any formal role in this process - the normal arbitration provisions as provided in the Order seemingly being more appropriate.

- Additionally, there can be no limit on whether the harbour authority can withhold consent for proposed changes to the Scheme of Operation, as proposed by Article 40(2) of the draft DCO.
- ABP has separately commented on the draft Scheme of Operation submitted by the Applicant at Deadline 4.

4. **Article 41 – Extinguishment of right of navigation within Lake Lothing in connection with authorised development**

The Applicant's Brief Description and Explanation:

A change has been made to paragraph (6) of this article, following discussions with ABP who are concerned that vessels carrying out dredging of the harbour, and other vessels subject to the Harbour Master's direction, should not require the consent of the undertaker to traverse the areas set out in paragraph (2) of this article.

The Applicant has sought to deal with this issue in the wording provided in paragraph (6), but this wording is not yet fully agreed.

ABP's Comment:

- The amendments proposed by the Applicant are agreed.

5. **Article 44 – Protection against dredging**

The Applicant's Brief Description and Explanation:

This article has been amended following discussions with ABP. It is understood that this wording is agreed between the parties.

ABP's Comment:

- The amendments proposed by the Applicant are agreed.

6. Article 45 – Byelaws

The Applicant's Brief Description and Explanation:

Following discussions with ABP, this article has been amended to reflect matters agreed between the parties, to deal with the consequences of byelaws needing to be approved by ABP as harbour authority post the granting of the DCO, and to ensure consistency across the DCO. The wording of this article is not yet agreed with ABP.

ABP's Comment:

- In respect of the proposed amendment to Article 45(3), ABP considers that this should not be geographically confined to byelaws which control navigation and mooring "*in the limits of dredging*" only, but must apply to the whole of the Port estate in order for ABP to carry out its statutory functions.
- In relation to proposed byelaw 37A(b), it is unclear what is meant by "*in the vicinity of the new bridge*" – this is geographically unclear and imprecise.
- ABP opposes the inclusion of Article 45(6), which purports to restrict ABP's ability to amend or revoke the byelaws inserted into the Lowestoft Harbour Byelaws 1993, or make other byelaws within its statutory estate.
- Generally, ABP must be able to amend its own harbour byelaws without the consent of another person, as to place such a restriction on ABP would be an unacceptable fetter on the exercise of its statutory responsibilities. The managing of navigation on an ongoing basis is a statutory function and the sole responsibility of the harbour authority. As such, ABP must both be free to amend its harbour byelaws and to have the right to agree byelaws made by other which perform this function.
- ABP's power to issue, amend and revoke byelaws is subject to confirmation by the Secretary of State for Transport. Accordingly, if the Applicant does not agree with any changes made by ABP to its own harbour byelaws, the Applicant has the ability to object to the confirmation of such a byelaw and the matter would be determined by the Secretary of State. This would provide the Applicant with suitable protection against ABP arbitrarily changing its harbour byelaws, without placing an unacceptable fetter on ABP's statutory powers and duties – as is currently proposed by Article 45(6).
- Further information regarding ABP's concerns with Article 3 is set out in **Paragraphs 22.14 to 22.18 of ABP's Written Representations.**

7. Schedule 2, Requirement 11 – Navigation Risk Assessment

The Applicant's Brief Description and Explanation:

This requirement has been amended to reflect discussions between the Applicant, ABP and the Navigation Working Group; and seeks to make clear that the NRA is a live document which will change over time.

ABP's Comment:

- ABP cannot, in its capacity as the Statutory Harbour Authority, accept Requirement 11 as drafted by the Applicant.
- The LLTC proposal must be made subject to a formal and properly undertaken navigation risk assessment ("NRA"). This is a requirement that has singularly not been fulfilled by the Applicant to date – despite the very clear instructions from ABP as the responsible harbour authority.
- Until this exercise has been properly completed, ABP is not in a position to approve the Applicant's NRA.
- In addition, the ExA should note that ultimate legal responsibility for the safety of navigation in the Port falls to ABP as the Statutory Harbour Authority. ABP, therefore, fails to understand what role the Applicant believes the Navigation Working Group can fulfil in this respect, apart from as a statutory consultee in respect of the Port Marine Safety Code. In order for such consultation to be effective, the Applicant must take into consideration all of the points raised by the NWG.
- Accordingly, ABP remains of the view that a risk assessment, to the fullest extent that can be carried out given that the level of design of the works at this stage is preliminary at best, is necessary to inform the Secretary of State's decision on the LLTC DCO.
- The Applicant has advised ABP that its approach in relation to the preliminary NRA is well precedented for a DCO application, and cited the Silvertown Tunnel, Thames Tideway, Tilbury 2 and Able Marine projects to support its position. ABP is somewhat amused that the Applicant is founding its justification for its proposed NRA methodology on these four projects, bearing in mind that: –

- the Silvertown and Thames Tideway projects were both tunnels under the river; whilst
- Tilbury 2 and Able Marine Energy Park were projects involving shore based harbour works – not major and permanent obstructions across the middle of an operational harbour.
- As such, the Applicant's justifications are misconceived and if anything, underline the defect in process that has been adopted by the Applicant. Put simply, to attempt to construct a bridge through the middle of an operational port – a bridge which at present, has not been designed and as a consequence has not been risk assessed both in terms of users of the bridge and users of the Port – is at its lowest level, questionable.
- Rather more appropriately, the ExA's attention is drawn to two rather more relevant proposals.
- In South Wales, Welsh Government proposes to construct a relief road for the M4 through the middle of the Port of Newport. As the ExA are aware, in that instance, Welsh Government has accepted that their proposal will cause serious detriment to the Port and have as a consequence, agreed a package of mitigation measures.
- Of particular relevance, however, is the fact that before the proposal completed its passage through the public inquiry, the impact of the scheme was subjected to a formal Navigation Risk Assessment – which was approved by the SHA and indeed assisted in the identification of required safety measures.
- Similarly, the Tidal Lagoon Swansea Bay project, an NSIP, involved the proposed construction of a Tidal Lagoon immediately adjacent to the approach channel and entrance to the Port of Swansea. As such, the project had the potential to impact upon the operation of the port and ABP's statutory undertaking, thereby giving rise to navigational safety issues.
- As ABP has indicated on countless occasions to the Applicant, it is firmly of the view that the Secretary of State will be unable to determine the LLTC proposal unless he has before him a formal Navigation Risk Assessment, approved by ABP as the responsible harbour authority. Without a completed assessment, any decision made by the Secretary of State would be open to legal challenge.
- If the Secretary of State is of the view that he has no choice but to proceed to determination of the LLTC application prior to the finalisation and approval of the Navigation Risk Assessment, then in terms of the draft DCO, ABP considers that the only approach that he can adopt is that suggested by ABP and the Promoter of the Tidal

Lagoon Scheme and accepted by the ExA as part of the examination process, as noted below.

- In short, the Promoter in that instance agreed that no marine works relating to the project could be commenced until a scheme for safe navigation has been approved by ABP and that the authorised development of the project must be carried out in accordance with the approved scheme.
- To this end, an Article was specifically included in the Development Consent Order for the Swansea Tidal Lagoon, which stated the following:

"Safety of navigation 23.

- (1) No marine works comprised in the authorised development are to be commenced until a scheme to secure safety of navigation has been submitted to and approved in writing by the harbour authority for the Port of Swansea in consultation with Trinity House, the Maritime and Coastguard Agency, the harbour authority for the Port of Neath and the City and County of Swansea Council.*

- (2) The approved scheme must make provision for—*
 - (a) the promulgation of notice to mariners;*
 - (b) additional aids to navigation;*
 - (c) retention of safety vessels during construction;*
 - (d) the installation of protective dolphin piles comprised in Work No. 2c;*
 - (e) the relocation of any pilot station affected by the authorised development;*
 - (f) reasonable marine access to be maintained into and out of the rivers Neath and Tawe including for small craft at high tides;*
 - (g) the circumstances where Her Majesty's Coastguard should be notified of any matter; and*
 - (h) an emergency response and co-operation plan.*

- (3) The authorised development is to be carried out in accordance with the approved scheme except to the extent that a variation to the approved scheme is agreed by the harbour authority for the Port of Swansea after consulting the persons mentioned in paragraph (1)."*

- Relevantly, the Examination Report for the Tidal Lagoon Swansea Bay project states that:

"No final SOCG has been concluded between the applicant and ABP which the Panel feel is not unreasonable considering that the results of the ship simulation are not yet known. However, once the results of the study are known, the HM for the Port of Swansea in fulfilling his statutory duty will devise a scheme for the safety of navigation. This is formally incorporated in the DCO as Article 24 which confirms that no marine works are to take place until a scheme has been approved and that the development will be carried out in accordance with it.

...

ABP is of the view that Article 24 in the DCO should be sufficient in the circumstances to ensure the provision for such mitigation measures as may be identified from the above study will be included in the scheme for the safety of navigation.

...

In conclusion, therefore, the Panel is satisfied that the safety of navigation in the approach channels to the River Neath and the Port of Swansea has been satisfactorily addressed in so far as they can be at the close of the examination."

(NB: it appears that the references to Article 24 in the Examining Report are a mistake, and should refer to Article 23 – as extracted above)

- ABP considers that the above, whilst far from ideal, provides an appropriate precedent to adopt in terms of the finalisation of the NRA – central to which is the formal approval of ABP – and ABP alone.
- The above is subject to the proviso, that for a scheme that is in fact far from finalisation and thereby leaves a number of questions unanswered in terms of the safe passage of vessels and the safety of users of the bridge and the Port, ABP remains of the view that the examination of the scheme should not be closed until a formal NRA has been submitted to and approved by the Statutory Harbour Authority.

8. Schedule 12 – Deemed Marine Licence

The Applicant's Brief Description and Explanation:

The Deemed Marine Licence has been amended to reflect the most recent position agreed between the Applicant and the MMO, including the issues raised in its Relevant

Representation. Further discussions with the MMO are still on-going and consequently the wording of the DML is not yet fully agreed.

ABP's Comment:

- Paragraph 7(g) requires the Applicant to issue a notice to mariners. ABP considers that in both practical and operational terms this should in fact be issued to mariners by the Harbour Master, on behalf of the Applicant.
- Paragraph 14(b) requires the Applicant to notify the Marine Management Organisation of any spills within 12 hours. This proposed provision again demonstrates the Applicant's lack of understanding of port operations and the responsibilities falling to ABP both as operator of the port and Statutory harbour Authority. Put simply, if a spill occurs within the marine environment, the Harbour Master and the MCA must also be notified – this requirement to be secured either as part of the deemed marine licence, or elsewhere in the DCO. In this context, ABP also queries the timescale and suggests that notification should be immediate.

9. Schedule 13 (Protective Provisions), Part 5 – For the protection of the harbour authority

The Applicant's Brief Description and Explanation:

Part 5 of the protective provisions (for the protection of ABP as harbour authority) have been amended to reflect some of the discussions held and ongoing with ABP. ABP has not requested more changes to the protective provisions than those shown here, so it is considered that these can be considered as agreed.

Changes to the 'front-end' DCO articles are still under discussion with ABP.

ABP's Comment:

- The amendments proposed by the Applicant are agreed, subject to the following points:
- Paragraph 62 *et seq.* sets out the standard indemnity provisions required to protect the undertaking of a statutory undertaker. Whilst ABP is generally content with these provisions as drafted – they are not designed, however, as ABP has noted in its Written Representations submitted for Deadline 3, to meet the unique circumstances as contemplated by the LLTC proposal.

- Whilst ABP does not wish merely to duplicate the points that it has already made in its earlier Written Representations, it must state for the record that ABP will require a far wider indemnity, possibly to be provided as a stand-alone legal document, in which Suffolk County Council, as the promoter of the LLTC scheme, recognise that by introducing a hazard into the middle of an operational port it is incumbent upon them to indemnify ABP for any losses or damage that arise as a result of the existence of the bridge.
- The Applicant is fully aware of ABP's concerns in this respect and it is understood that ABP's proposals in respect of the required indemnity, as summarised in **Section 20 of ABP's Written Representations**, are being considered.

10. **Schedule 14 – Documents to be certified**

The Applicant's Brief Description and Explanation:

The list of Documents to be certified has been updated to reflect the latest set of drawings and other documents submitted at Deadline 3.

ABP's Comment:

- ABP considers that the Preliminary Navigation Risk Assessment and the Scheme of Operation should not be certified documents forming part of the DCO.
- The Navigation Risk Assessment and Scheme of Operation are both living documents that will need to be updated from time to time, as circumstances may dictate. If these documents are embodied within the Order, the process of amending them would be unnecessarily restrictive, and may impinge on ABP's ability to carry out its statutory duties if required changes cannot be made within a timely manner.
- Additionally, the revised draft Article 40 provides a partial means of amending the Scheme of Operation under paragraphs (2) to (6). It is unclear, however, whether these provisions are intended to override the normal process for amending a certified document forming part of a DCO.