

(ABP: 2 of 5 – DL5)

Proposed Lake Lothing Third Crossing (TRO10023)

Associated British Ports (20013261)

**Summary of oral submissions made by ABP at the examination hearing held
on Wednesday 13 February 2019**

Draft Development Consent Order and Indemnity

This post examination hearing note summarises the submissions made by Associated British Ports ("ABP") at the LLTC examination hearing held on Wednesday 13 February 2019 in relation to:

- The second revised draft Development Consent Order R2 (Document Reference: SCC/LLTC/EX/64);
- The rationale for the indemnity requested by ABP; and
- Chapter 10 of the Impact of the Scheme on the Port of Lowestoft Report (Document Reference: SCC/LLTC/EX/59) ("Impact Report"), which sets out the Applicant's position in respect of the draft DCO and indemnity.

As these issues are linked, this summary is split into two parts – Part 1 dealing with issues relating to the draft DCO and Part 2 dealing with issues relating to the indemnity.

Where appropriate, these responses are cross-referenced to ABP's Written Representations and other submissions made by ABP for Deadline 4 and Deadline 5.

PART 1 – SECOND REVISED DRAFT DEVELOPMENT CONSENT ORDER

1. Submissions in respect of the draft revised DCO (R2)

- 1.1 At the hearing on 13 February 2019, ABP raised a number of outstanding matters relating to the draft revised Development Consent Order, which supplement the detailed submissions made by ABP in Section 22 of its Written Representations (in

respect of the original draft DCO) and at Deadline 4 (in respect of the first revised DCO, R1).

1.2 These outstanding matters are set out in further detail below.

2. Article 3 – Disapplication of legislation, etc

2.1 The Applicant has failed to address ABP's concerns regarding the disapplication of Bylaw 36 of the Lowestoft Harbour Bylaws 1993, set out in Article 3(1)(a). ABP's concerns regarding the Applicant's proposed disapplication remain as stated in ABP's Deadline 4 submission (ABP: 4 of 5 – DL4).

2.2 As explained by Mr Goatley (on behalf of ABP), the disapplication of these bylaw means that the Applicant's contractors will not need to obtain permission from the Harbour Master to dive within the Port. This disapplication is unacceptable. The Harbour Master must know in advance and be in a position to authorise any person who wishes to dive within the Port prior to this occurring. The requirement for permission is necessary if the Harbour Master is to comply with its statutory functions, to regulate the safe and appropriate movement of vessels within the Port, and ensure the safety of all users of the Port – including those diving within the harbour.

2.3 ABP notes the Applicant's response (provided by Mr Robbie Owen), which in summary stated that Paragraph 54 of ABP's Protective Provisions requires prior approval of plans for works within the harbour, and on that basis, will inevitably include consideration of requirements for diving associated with construction of the relevant works. The Applicant considers that ABP could provide permission to dive under bylaw 36 at the same time that ABP approves the plans for construction. Consequently, the Applicant considers that bylaw 36 should not be removed from the scope of Article 3.

2.4 The request for prior approval under Paragraph 54 of ABP's Protective Provisions must be submitted by the Applicant 56 days in advance of such works commencing and approved by ABP within 30 days. Importantly, the permission to dive cannot be issued in advance, as vessel movements are often not known by the Harbour Master until the relevant day in question. As such, even though ABP welcomes such notice in advance of any the requirement to dive within the harbour, it will still require such persons to obtain permission to dive on the particular day in question. The process of obtaining such permission to dive is a simple and quick process, which is undertaken at the Port Office on the day that the relevant diver requires access to the harbour, so

that vessel movements are known and can be appropriately regulated on the day. Overall, ABP considers that the Applicant's resistance on this issue demonstrates a lack of understanding of safe diving operations in an operational port.

3. Article 20 – Temporary suspension of navigation within Lake Lothing in connection with the authorised development

3.1 ABP is concerned by the involvement of the Navigation Work Group ("NWG"), both within this Article and other articles in the draft DCO (for example, Article 40). ABP also questioned the NWG's status in its Deadline 4 submissions.

3.2 At the examination hearing, ABP raised its concerns regarding the purpose and function of NWG, as it appears to be a group that is consulted by the Applicant, is maintained solely for the purposes of the dDCO and its membership can be varied by the Applicant. In short, it appears to be a curious *ad hoc* group to be referenced in a statutory document. ABP considers that the NWG should not be given a particular status, simply by virtue of its inclusion in the draft DCO.

3.3 ABP's concerns with the NWG are made not with a view to saying there should not be any consultation under the dDCO – the current practice is actually the reverse. ABP regularly undertakes wide consultations with stakeholders - indeed with a wider group of consultees than those forming part of the NWG. As such, ABP considers it is best placed to carry out any consultation required under the dDCO, and reference to the NWG in the dDCO is unnecessary and inappropriate.

4. Article 21 – Removal of vessels

4.1 This article is not agreed, as ABP considers that the Harbour Master must have a right of approval before any vessels are removed or relocated within the harbour, including those located within the Order limits. This is important for efficient functioning of the harbour in accordance with the Harbour Master's statutory duties and obligations, which would be impacted by Article 21, as currently drafted.

4.2 In this regard, the Applicant has failed to address ABP's submissions in respect of this article at Deadline 4. In particular, ABP is concerned that the current wording, as proposed, lacks clarity.

- 4.3 ABP considers its concerns with Article 21 could be satisfactorily addressed if an amendment was made to Article 21(1) as follows:

"(1) If it appears to the undertaker necessary or convenient to do so for the purposes of the construction or maintenance of the authorised development it may, having first obtained the approval of the Harbour Master (such approval not to be unreasonably withheld or delayed), remove from within the Order limits, any vessel that is-

(a) Sunk, stranded or abandoned; or

(b) Moored or laid up (whether lawfully or not),

and relocate it to such place outside the Order limits, and if relocated within Lowestoft Harbour, to such place as is directed by the Harbour Master, where it may without injury to the vessel be moored or laid."

- 4.4 This amendment overcomes the Applicant's primary concern regarding ABP's requested changes to this Article, namely, that it would have to wait for harbour authority consent to move a vessel.

5. Article 40 – Scheme of Operation

- 5.1 ABP raised its ongoing concerns regarding this Article at the examination hearing, but also noted the interrelationship with the Scheme of Operation and other wider issues regarding navigational safety and serious detriment. As such, ABP deferred its detailed submissions regarding this article until such time as it could be discussed in the context of the wider issues at hand. ABP notes that the ExA agreed with this position and suggested this could occur on either 7 or 8 March.

- 5.2 In this regard, ABP refers to its ongoing concerns regarding the drafting of Article 40, and its detailed comments regarding the draft Scheme of Operation, both of which were submitted at Deadline 4.

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

- 6.1 ABP accepts that its position with regard to this Article has changed since its agreement of the first SoCG – although its concerns are not substantial. Essentially ABP is concerned to ensure that it, or other relevant bodies, will have the ability to access the water between the bridge pier and the quay side in time of emergency – accident, pollution etc.
- 6.2 These concerns may well be addressed within the draft DCO and ABP's position is therefore simply included for the record.

7. Article 44 – Protection against dredging

- 7.1 ABP acknowledges that it indicated at Deadline 4 that this Article was agreed; however this position has now changed.
- 7.2 ABP's concerns simply relate to matters of practicality and timing, to ensure the SHA is able to comply with its statutory functions. ABP considers that the 28 day approval requirement is not practical for how the Harbour Master carries out its functions for dredging. ABP is often provided with very limited notice that dredging contractors (UKD) are able to undertake dredging within the harbour, and if ABP is unable to accept and undertake the dredging when notified, it could have consequences for subsequent dredging campaigns.
- 7.3 In addition, it is not possible for ABP to undertake a dredging campaign within the harbour, without including parts of the harbour within the limits of dredging. Accordingly, the 28 day approval require could potentially risk the dredging campaign for the whole of the Port. Relevantly, ABP is only required to provide the MMO (the relevant statutory regulator) with 5 days' notice (where it is able) that such dredging will take place.
- 7.4 Further, in simply practical terms, there will be occasions when ABP will require dredging to be undertaken at short notice for operational reasons. ABP cannot be expected to put it commercial port operations on hold whilst it waits for a response from the Applicant.
- 7.5 As such, ABP does not believe that it is not necessary to obtain prior approval from the Applicant to dredge. It is, however, prepared to notify the Applicant of any required dredging in line with the MMO notification requirements – currently around five days although even that notice period can on occasion be shortened.. ABP is willing to

provide copies of dredging plans. ABP is also willing to ensure that safe margins for dredging in close proximity to Scheme structures are maintained and included in any dredging plans or instructions to the dredging contractors – this addresses the Applicant's concern stated in the Impact Report. Ultimately, however, for reasons relating to timing and practicality, ABP cannot agree to this article, as currently drafted.

8. Article 45 – Byelaws

- 8.1 ABP does not agree with the drafting of Article 45, as stated in ABP's Deadline 4 submissions, as these concerns have not been addressed by the Applicant.
- 8.2 In particular, ABP objects to Article 45(6), which provides that ABP cannot amend its bylaws (i.e. the Lowestoft Harbour Byelaws 1993) in certain circumstances without consent of the Applicant. This would act as a fetter upon ABP's statutory functions to make byelaws. As such, prior qualified approval by the Applicant of changes to ABP's byelaws should not be dealt with in Article 45.
- 8.3 ABP does not know the rationale for any future changes which may be required to the byelaws, but if they do arise due to the operations of the port and how it is controlled, those changes will be promoted and considered, in line with the existing statutory process. Matters will only be brought forward where ABP think there is a rationale and requirement for such changes to be made.
- 8.4 ABP cannot issue, amend or revoke bylaws without the confirmation of the Secretary of State for Transport, which provides the Applicant with a statutory entitlement to object to any change to the Lowestoft byelaws, before determination of the confirmation is made by the Secretary of State. This provides the Applicant with a statutory right, and an appropriate opportunity, to have its objections considered and it for the Secretary of State to decide whether any such changes are confirmed. The Applicant is not oppressed by statutory process. It is unclear, therefore, why the Applicant considers that this existing statutory process is not sufficient.
- 8.5 ABP considers that the existence of the new LLTC bridge is no different to the position relating to the existing A47 Bascule Bridge – i.e. Highways England is the statutory body responsible for the bascule bridge, but it does not have powers which fetter ABP's ability to changes its byelaws. Accordingly, if ABP were to make a byelaw that would detrimentally impact the A47 Bascule Bridge, Highways England would have the opportunity to object that byelaw as part of the existing statutory process before it is

determined by the Secretary of State. As such, it is unclear why the Applicant considers that the existing precedent which applies in respect of the A47 Bascule Bridge should not apply to the LLTC Scheme, given that both Highways England and the Applicant are responsible for similar statutorily authorised undertaking.

9. Requirements – Schedule 2

- 9.1 **Requirement 3(1)(a)** – The drafting of this requirement, which requires the authorised development to be designed in general accordance with general plans, it inappropriately general in terms of a statutory document. This drafting is wide, vague and non-specific, and ABP considers it requires tightening.
- 9.2 **Requirement 3(1)** – The design of the authorised development must be tied to the environmental statement ("ES"). The ES forms an important and significant part of the statutory process, and the DCO authorised is underpinned by this document. In addition, the ES is a blunt instrument, with which compliance is required.
- 9.3 **Requirements 4 and 6** – The Code of Construction Practice and Surface Water Drainage System must be subject to consultation by ABP (as SHA) and the Harbour Master, prior to approval by the county planning authority. This is due to the fact that both documents will have a bearing on the way the SHA and Harbour Master exercises and discharges its statutory functions. As such, the SHA and Harbour Master must be part of the consultation process. ABP does not consider that this matter is dealt with under ABP's Protective Provisions.
- 9.4 **Requirement 7** – Similarly, the written scheme of highways lighting must be subject to consultation with the ABP (as SHA) and the Harbour Master, prior to approval by the county planning authority. If the highway lights are not appropriately placed, there is a risk they can cause glare, glitter, refraction, etc, which could result in the potential for confusion and/or difficulty for a ship master to navigate within the harbour. As the lighting scheme has the potential to affect adversely the passage of vessels in the Port, the SHA and Harbour Master must be part of the consultation process to ensure vessel masters are not placed in difficulty. ABP does not consider that this matter is dealt with under ABP's Protective Provisions.
- 9.5 **Requirement 11** – ABP raised its concerns regarding the drafting of this Requirement, but also stated that these concerns relate to how the entire Navigation Risk Assessment matter is dealt with. As such, ABP considers this matter should be

addressed in full at the Issue Specific Hearing. In this regard, ABP refers to its ongoing concerns regarding the drafting of Requirement 11, and its detailed comments regarding the NRA process, which were submitted at Deadline 4.

PART 2 – INDEMNITY

10. The Applicant's assessment of the indemnity in the Impact Report

- 10.1 The Impact Report includes an assessment by the Applicant of the indemnity included in the draft DCO (i.e. Paragraph 62 of ABP's Protective Provisions) and consideration of the indemnity requested by ABP in its various submissions and Written Representations.
- 10.2 The Applicant has maintained throughout the dDCO process that the wording employed in their offered indemnity is relatively standard and is well-precedented by other similar projects which they identify.
- 10.3 ABP's response is that whilst accepting that the wording in the offered DCO indemnity is indeed fairly standard – and indeed ABP have not been over-critical of that wording in its response to the draft DCO – ABP has made clear that due to the "unique" circumstances of this case, the offered indemnity is "not fit for purpose".
- 10.4 This is because the standard indemnity is not designed to accommodate the type of fundamental risk and hazard which the Applicant now proposes to introduce into the middle of the operational statutory undertaking. The standard wording does not indemnify ABP for those new risks and hazards – as detailed below – and which extend to the potential actions or failures of not just the Applicant but a wide variety of third parties. Without an indemnity, ABP could find itself corporately liable for the actions of others over whom it has no control. Indeed, as well as providing the indemnity as requested, ABP will also require the Applicant to put in place adequate insurance to cover the risks.
- 10.5 The indemnity is, therefore, required in summary because:
- a) Despite comments to contrary from the Applicant (see below), there is no other bridge constructed at such a height through the middle of an operational port;

- b) No NSIP has ever been promoted for consent to construct a low bridge through the middle of an operational port so the wording of the indemnity can hardly be precedented;
- c) The nearest precedent (M4) almost collapsed by reason of the serious detriment that it would cause;
- d) None of the precedents cited by the Applicant are in fact precedents; and
- e) The reality is that the Applicant is introducing a hazard in to the Port which did not previously exist and ABP is acting entirely reasonably in requiring the Applicant to indemnify it against the risks now being introduced – and to put in place adequate insurance..

10.6 Taking this step by step –

10.7 **Introduction of a "hazard"** – The Applicant claims that the LLTC does not result in the introduction of a new 'safety hazard' into the Port, resulting in an 'increased risk' to the operational of the Port (Paragraph 10.4.2 of the Impact Report). It is unclear how the Applicant can actually sustain this position, as the construction of a low-level bridge through the Port with restrictions on its operation is self-evidently a safety hazard that did not previously exist in the Inner Harbour.

10.8 Its construction and operation will clearly result in an increased navigational risk within the Inner Harbour that will have to be managed by ABP in perpetuity.

10.9 It is telling that the Applicant does not actually provide any reasons for this assertion, but merely refers to "reasons given elsewhere in this paper" (Paragraph 10.4.2 of the Impact Report) – which ABP has not, as yet, located.

10.10 **"Unique"** – The Applicant also claims that the LLTC scheme is not 'unique' (being a bridge crossing through the middle of a port) (Paragraph 10.4.3 of the Impact Report). In addition, the Applicant has also cited as precedents a number indemnities which have been provided on other schemes that "*have involved the crossing of a bridge over an operational port, including the Mersey Gateway Bridge, the Gateshead Baltic Millennium Bridge and the Dartford Crossing*" (Paragraphs 10.4.4 of the Impact Report). Further examples provided by the Applicant include the Twin Sails Bridge (Poole) and the Hungerford Bridge (Paragraph 10.4.5 of the Impact Report).

10.11 ABP has examined all of the examples provided by the Applicant to date and confirms that none of them involve the construction of a bridge through the middle of a port.

ABP's response to this effect was made in its Written Representations submitted to the ExA for Deadline 4 (Annex 2, ABP: 2 of 5 – DL4). As far as ABP is concerned, none of the precedents cited by the Applicant are credible and cannot be relied upon.

10.12 **"Comparable" Schemes** – The Applicant is also of the view that the indemnity that it has provided in the DCO is adequate because it covers general damage to property, and accords with previous "comparable schemes" that include an indemnity - which are identified as:

- a) Able Marine (greenfield shore-line port development);
- b) Hornsea One and Hornsea Two (offshore wind farms); and
- c) Swansea Bay Tidal Lagoon Swansea (proposed off-shore facility adjacent to the navigational channel for ABP's Port of Swansea).

10.13 None of the above identified schemes (which ABP's solicitors acted on two of them) involved the construction of a bridge over an operational port and, as a consequence of which, one has to query their relevance.

10.14 It is just a little worrying that the Applicant *"questions why this Scheme should be considered differently to these projects"* (Paragraphs 10.4.8 of the Impact Report). If that is a genuine question, then it demonstrates a serious lack of understanding of ABP's statutory undertaking, the operation of the Port, and the consequential impact that the construction of a bridge through the middle of the Port will have on both current and future operations. If the Applicant is simply attempting to downplay ABP's criticism, then the ExA should be in no doubt as to the true position.

10.15 **Compensation Code** – The Applicant has suggested that the potential liability ABP may suffer as a result of the LLTC *"would be matters that could be compensated under the Compensation Code or already covered in the general law"* (Paragraph 10.4.13 of the Impact Report).

10.16 Again, this demonstrates that the Applicant does not understand the nature of ABP's statutory undertaking in that simply relying on the Compensation Code does not address the impact the LLTC will have on ABP's ability to carry out its statutory undertaking in circumstances where ABP may incur losses first, which far exceed the loss in value or disturbance to its property which actually falls within the remit of the Compensation Code and secondly, losses which are not even contemplated by the Compensation Code.

10.17 In simple terms, ABP cannot be expected to be responsible for and bear liability for the risks that will follow if the bridge is constructed and operated by the Applicant – both as statutory undertaker and landowner.

11. Bascule Bridge Agreement Precedents

11.1 The Applicant has referred to the indemnity contained in the "1970 Agreement", which is an agreement between the British Transport Docks Board and the Minister of Transport relating to the transfer of the A47 bascule bridge to ABP. The Applicant is of the view that the 1970 Agreement remains extant.

11.2 The 1970 Agreement contained an indemnity which stated that:

"8. The Minister shall indemnify the Board against all suits actions claims and demands brought or made against the Board which arise out of the fault design or construction of the Temporary Bridge or the New Bridge or failure to maintain the same as aforesaid or failure to replace defective parts thereof PROVIDED that the Board shall not have settled or admitted the same and the Board shall similarly indemnify the Minister in respect of any wilful damage or negligence by the Board or any of their employees servants agents in the operation of those bridges."

11.3 ABP also entered into a Bridge Maintenance Agreement with the Secretary of State for Transport on 22 January 1990, whereby ABP agreed to maintain the operational components of the bascule bridge and ancillary components.

11.4 The 1990 Agreement contained the following provision:

"7. ABP shall comply with any particular or general directions the Secretary of State may give from time to time as to the materials to be used, acceptance of tenders, terms of contracts to be entered into and the manner in which any work is to be carried out. The Secretary of State shall indemnify ABP and keep ABP indemnified fully and effectively from and against all losses damages claims liabilities costs expenses and proceedings incurred or suffered by ABP (including without limitation such of the same as shall arise out of any damage to property or injury including fatal injury to any person and whether attributable to negligence or otherwise) caused by or arising directly or indirectly out of ABP or its employees contractors consultants or agents complying with such directions."

Save that such an indemnity shall not extend to any such losses damages claims liabilities costs expenses or proceedings as aforesaid to the extent that the same are caused by or arise directly or indirectly from any negligence by ABP or its employees contractors consultants or agents. IF ABP find it necessary to close the Bridge to road traffic to enable it to carry out maintenance operations in pursuance of this Agreement ABP shall so far as practicable restrict such closures to the off-peak road traffic times and shall at least eight weeks before the event, advise the Secretary of State, the County Council of Suffolk, the Waveney District Council and the Police of such intention and ABP shall comply with any particular or general directions the Secretary of State may reasonably give. Except that in emergency when it is impracticable to give such prior advice ABP shall be entitled to close the bridge to road traffic in accordance with such arrangement as shall have been previously agreed by the Secretary of State to deal with emergency and in such event ABP shall within 14 days or as soon as reasonably practicable thereafter give full particulars to the Secretary of State concerning work carried out.”

- 11.5 The indemnity provided above differs substantially from that offered by the Applicant.
- 11.6 In addition, the circumstances are entirely different in that historically, the Port of Lowestoft effectively grew "through" the bridge, ie the crossing was there first and for Lake Lothing to gain access for the sea, port traffic had to pass under the existing crossing.
- 11.7 That scenario bears no similarities with the present proposal to construct a third crossing across an existing operational port.

12. Inadequacies of the draft indemnity

Draft Indemnity

- 12.1 The draft indemnity offered by the Applicant is set out in Paragraph 62 of ABP's Protective Provisions.
- 12.2 The terms of the offered indemnity, ABP considers that it does not cover the specific risks introduced by the LLTC, for which ABP will be liable. These inadequacies are considered in further detail below, on a specific issues basis.

Incidents resulting from the LLTC

- 12.3 **No general entitlement** – The Applicant's starting position is that "*there is no general entitlement to compensation arising from the use of public works. As such, persons affected by issues arising from use of those works and can pursue civil law remedies where appropriate*" (page 57 of the Impact Report). The Applicant considers this is a matter of 'public policy', which in principle is the concept whereby the promoter of a public infrastructure project will not have imposed liability for the use of that infrastructure (i.e. a highway authority would not normally expect to be liable, in the absence of negligence on its own part, for the use of that highway by the public).
- 12.4 Relevantly, in context of the requested indemnity, ABP is not a 'person' who is 'using a public work'. ABP is a statutory undertaker who is responsible for complying with a myriad of duties and responsibilities within its statutory harbour area. The issues for which ABP requires indemnification do not relate to its 'use' of the bridge (i.e. ABP is not using the highway as a member of the public to cross between North and South Lowestoft) – it relates to liability for issues that arise by virtue of ABP undertaking its normal port operations (i.e. operation that would have been undertaken in absence of the bridge) but with the imposition of the LLTC bridge through the middle of its statutory port estate. As such, the Applicant's starting position relating to 'public policy' is wholly inapplicable to ABP.
- 12.5 As stated above, this is a very unusual case and, due to the extraordinary risk created by the LLTC bridge in the location proposed, the general 'public policy' position should be qualified, particularly as the civil law remedies the Applicant refers to above (i.e. primarily relating to negligence) are not appropriate to address the risks introduced in this case. In this regard, as the Applicant is introducing a safety hazard within the middle of an operational port, ABP considers that the Applicant must indemnify it for any loss, damage, etc suffered by ABP which would not have otherwise occurred but for the construction, location and/or operation of the LLTC.
- 12.6 **Limitations of DCO indemnity** - The indemnity proposed by the Applicant is extremely limited. For example, it only covers qualified occurrences/circumstances which may arise after the LLTC is constructed and operational (as set out in paragraph 62(c) above). As currently drafted, the proposed indemnity covers costs, losses, damages, etc relating to:
- a) The construction, maintenance or failure of the bridge;

- b) Any works undertaken by ABP to prevent or remedy any danger or impediment to navigation; and
 - c) Any damage to port land (defined as the land in Lowestoft Harbour) arising from the construction, maintenance or failure of the bridge.
- 12.7 The Applicant considers this would include circumstances such as a vehicle crashing through the barrier of the bridge onto Port land – but only provided it was shown that this resulted from a failure of a barrier. Similarly, the Applicant states that if the bridge were to get 'stuck' in a non-lifted position, any costs associated with vessels being unable to traverse under the bridge would be covered by the indemnity.
- 12.8 The limited examples provided by the Applicant in paragraph 62(c)(i) and (ii) (relating to dredging an damage to port land) do not address any of ABP's concerns with the draft indemnity, which have been reiterated to the Applicant on a number of occasions.
- 12.9 **Examples not covered** - It is clear that the indemnity proposed by the Applicant does not cover a range of occurrences/circumstances that may arise, for which ABP will be liable as a direct result of the construction and operation of the bridge. Examples of such incidents include the following:
- a) Vessel collisions, either with other vessels (due to the existence of the bridge) or with the bridge structure itself (including associated structures, parts of components).
 - b) Collisions or contact between cranes or other vehicles/equipment in the Port and the bridge (and associated structures).
 - c) Vehicles crashing through the barrier of the bridge, where there is no 'failure' of the measures put in place to prevent this occurring.
 - d) Dust, smoke or other emissions (i.e. funnel emissions and water vapour) from vessels, cargo or other Port operations, which cause an accident, collision or other type disruption on the LLTC bridge within the vicinity of the Port (i.e. due to reduced visibility).
 - e) Stoppage, disruption or delay to road, rail or marine traffic to, from and within the Port, including restrictions on accessing the Port.
 - f) An accident or emergency or other occurrence with in the vicinity of the LLTC, whether on land or water or both, which affects the operation of the LLTC or

vehicles using the LLTC or traffic or vessels in, or approaching, the Port or causes any stoppage or disruption or delay of road, rail (on the Port's rail network) or marine traffic.

- g) The dropping of objects from the LLTC.
- h) Pollution in and around the Port due to floating debris, or leakage of cargo or other contaminant.
- i) Disruption of Port radio communications by eg, LLTC bridge structure, malicious act of radio interference on LLTC, effect of contractors' radios.
- j) Disturbance or difficulty occasioned by background lights, e.g. LLTC carriageway lighting disrupting or conflicting with navigation lights, or causing glare to vessel masters.
- k) Terrorism and malicious acts – we note that THE APPLICANT is of the view that "*terrorism/malicious acts are not a likely event for this scheme*".
- l) Damage to the Port's railway lines passing under the Bridge and/or disruption to rail traffic on the Port's rail network.
- m) Lightning strike on the LLTC causing damage and/or electricity blackout.

12.10 The above incidents are examples of what could realistically occur as a result of the introduction of the LLTC to the Port and which are not covered by the currently proposed indemnity.

12.11 **Type of loss** - ABP also considers that the indemnity should clarify the types of losses or damages that would be caught by the indemnity, which include:

- a) Direct, indirect and consequential financial loss, including loss of profit, loss of use, loss of reputation, loss arising from business interruption.
- b) Loss of or damage to vessels, vehicles, equipment, plant, machinery and port infrastructure (including loss or damage to cargo and cargo transshipment costs) and loss or damage to the LLTC and costs of repair and/or reinstatement, including the costs of repair or reinstatement of port facilities, and/or the LLTC.
- c) Loss caused by delay.
- d) Loss caused by pollution.

- e) Loss of life.
- f) Personal injury.
- g) Occupier's liability.

12.12 We note that other DCOs that have been previously referenced by the Applicant in the context of the LLTC scheme as an appropriate 'precedent' contain provisions that are more widely drafted than the proposed LLTC DCO, as they encompass any liability relating to the 'operation' of the specified work.

12.13 In particular, we note the following examples:

- a) **Silvertown Tunnel** – (a) the construction or operation or maintenance of any specified works comprised within the authorised development or the failure of any such works comprised within them.
- b) **Thames Tideway** - (a) the construction or operation of the authorised project or the failure of any works comprised within it.

12.14 As such, there clearly is precedent for the scope of an indemnity provided to a harbour authority in a DCO to be amended in scope in order to address the specific risks arising from that project. It is clear that the Applicant must undertake a similar exercise in respect of the LLTC, instead of attempting to rely on precedents that are inapplicable to the development proposed.

Acts/omissions of undertaker

12.15 Paragraph 62(d) of the indemnity states that costs arising from "*any act or omission of the undertaker or their servants or agents whilst engaged in the construction of a specified work*" are covered by the indemnity.

12.16 This provision is clearly too narrowly drafted, and does not accord with the precedents highlighted which the Applicant considers are particularly relevant to this scheme – i.e. the Twin Sails Bridge in Poole, the Hungerford Bridge in London, the Gateshead Millennium Bridge and the Silvertown Tunnel.

12.17 These schemes included a provision in the relevant indemnities relating to acts and omissions of the relevant undertaker (and its servants/agents) during the construction and operation (including maintenance or failure) of the relevant bridges. For example:

- a) **Poole** – (d) any act or omission of the [promoter] or its servants or agents whilst engaged in the construction or operation of any of the tidal works.
- b) **Hungerford** – (b) by reason of any act or omission of the undertaker or of any persons in its employ or of its contractors or agents or others whilst engaged upon the construction or maintenance of the authorised works or dealing with any the failure of such works.
- c) **Gateshead Millennium Bridge** – (d) any act or omission of the undertaker or its servants or agents whilst engaged in the construction or operation of any of the tidal works.
- d) **Silvertown Tunnel** – (c) any act or omission of TfL, its employees, contractors or agents or others whilst engaged on the construction or operation of a specified work or exercise of a specified function dealing with any failure of a specified work.

12.18 As such, the LLTC indemnity must include acts or omissions of the Applicant (and its servants/agents) during construction and operation of the LLTC.

Closure of the navigable channel

12.19 ABP had repeatedly requested that the Applicant provide compensation/indemnity for any costs associated with the closure of the navigable channel, and such closure will impact on a private right.

12.20 Of relevance in this context is the fact that this issue was included in the indemnity for the Mersey Gateway Bridge, which provides as follows:

- "(b) by reason of any planned closure of the Canals, as a result of the construction or failure of any specified work or a protective work, or of any closure which is not in accordance with the provisions of this Part of this Schedule;*
- (c) by reason of any planned closure of the Canals over-running, as a result of the construction or failure of any specified work or a protective work;"*

12.21 This is clearly a provision which has precedent - a precedent which the Applicant itself considers applies to the LLTC scheme. As such, the LLTC indemnity must include a provision indemnifying ABP for any costs, losses, etc relating to the closure of the navigable channel by the Applicant within Lowestoft Harbour, on a similar basis of the above precedent.

Insurance

- 12.22 It is imperative that the Applicant has sufficient commercial insurance in place in order to cover its potential liabilities under the indemnity. The Applicant considers they are unable to do so as "*the need for insurance is not only unprecedented in the DCOs and other statutory authorisations mentioned above.*" This point is irrelevant, as none of the DCOs or other statutory authorisations mentioned by the Applicant relate to the construction of a bridge over an operational Port.
- 12.23 Additionally, ABP has not requested that the requirement for such insurance form part of the DCO, and has instead requested that it form part of a stand-alone indemnity, designed to supplement the limited indemnity contained in the DCO. As such, there is no barrier to such a requirement forming part of a stand-alone indemnity with the Applicant.
- 12.24 The only precedent which does deal with this situation is the M4 Relief Road at Newport, where Welsh Government was subject to a requirement to provide an indemnity and put in place commercial insurance with a reputable insurer, in order to cover its potential liability arising as a result of the scheme.
- 12.25 At the examination hearing, Mr Bedford for the Applicant correctly pointed out that ABP had refused to provide the Applicant with a copy of the indemnity negotiated in the case of the Newport scheme.
- 12.26 Mr Bedford unfortunately omitted to explain to the ExA, however, that the Applicant is fully aware that ABP is bound by legal confidentiality not to release the Indemnity.
- 12.27 He also omitted to explain to the ExA that whilst ABP is not in a position to provide a copy of the Indemnity to the Applicant – it has nevertheless provided the Applicant with a detailed summary of its contents.
- 12.28 On the basis of the above, ABP's requirement for a formal Indemnity, supported by insurance, remains as previously and consistently indicated.