

(ABP: 1 of 1 – DL9)

Proposed Lake Lothing Third Crossing (TRO10023)

Associated British Ports (20013261)

**Comments on the Applicant's Response to ABP's Summary of Case at 8
March Hearing and to Second Written Questions 1.11 to 1.13**

These Written Representations are submitted on behalf of Associated British Ports ("ABP") for Deadline 9.

As previously indicated by ABP at Deadline 8, ABP does not intend simply to repeat submissions already made at earlier Deadlines, although it is becoming increasingly concerned that a large number of the issues that it is raising with regard to the LLTC Scheme are either being ignored by the Applicant – or simply not understood. ABP's concerns are accentuated by the fact that a great deal of the points being raised by ABP are contained in inter-party correspondence, which is not being seen by the ExA, and the ExA is thereby being given a less than accurate view of the current position between the parties by the Applicant. A case in point is the Applicant's "Port Impact Paper" Document Reference: SCC/LLTC/EX/102) noted below.

As such, therefore, ABP wishes to make clear at the outset that it does not agree with the Applicant's - '*Response to ABP's Summary of Case at 8 March Hearing and to Second Written Questions 1.11 to 1.13*' (Document Reference SCC/LLTC/EX/99), submitted by the Applicant at Deadline 8.

To assist the ExA for Deadline 9, however, ABP has sought only to respond to the key points at issue between the parties, with a view to establishing ABP's position and to clarify essential points of inconsistency and misunderstanding.

In the interests of brevity, ABP has also sought to direct the ExA to where ABP has previously addressed the issues raised by the Applicant so as to avoid unnecessary duplication. Where appropriate, therefore, the responses made by ABP for Deadline 9 consist simply of cross-references to ABP's previous Written Representations and submissions.

These Deadline 9 Submissions also comprise the following:

- **Below** - ABP's comments on the Applicant's response to ABP's Summary of Case at 8 March Hearing and to Second Written Questions 1.11 to 1.13;
- **Annex 1** - The Port of Lowestoft Master Plan, Consultation Draft (April 2019);
- **Annex 2** - A Peer Review and Assessment of the Applicant's pNRA, ABPmer (April 2019);
- **Annex 3** - ABP's comments on the Applicant's Port Impact Paper, which were passed to the Applicant on 10 April 2019, but largely ignored by the Applicant in the version of the Port Impact Paper submitted to the ExA for Deadline 8; and
- **Annex 4** – ABP's Comments on the Applicant's Oral Submission at the Issue Specific Hearing on Navigation Matters of 1 April 2019.

Reference	The Applicant's Comment	ABP's Response
Legal Side Agreements	<ul style="list-style-type: none"> • The conditional consent under the dDCO, whereby ABP is required to consent to the Applicant's use of compulsory acquisition powers, would, in essence, be ABP's 'deal' that would enable the acquisition to take place. • Since 'no deal' assumes ABP has sought to impose unreasonable restrictions, it is not a scenario that the Applicant considers should be given much weight.' 	<ul style="list-style-type: none"> • The Applicant has seriously misunderstood the purpose and rationale for the proposed Legal Side Agreements and in this context, the ExA should note that even at this late stage in the process, ABP is still waiting to receive from the Applicant's lawyers a complete set of draft documentation – which of itself leads ABP to question the genuine intent of the Applicant to actually resolve the issues between the parties. • The sole rationale for ABP being prepared to even contemplate entering into any legal agreement with the Applicant is to give the Applicant an opportunity to provide the necessary measures of mitigation sufficient to offset the serious detrimental impact of the Scheme on the Port. • A 'no deal' scenario assumes that the Applicant has not been able to address and adequately mitigate ABP's fundamental objections to the Scheme through the medium of the Legal Side Agreements. As a result, ABP in light of its statutory obligations and duties will not have been able to enter into those legal agreements and as a consequence, will not be able to withdraw its objections to the

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		<p>Scheme.</p> <ul style="list-style-type: none"> • Until such time as a complete set of draft Legal Side Agreements have been provided to ABP and then negotiated and approved by both parties, ABP has no choice, if it is to protect its statutory undertaking and comply with its statutory obligations and duties, but to proceed on the basis that a worst case scenario (i.e. a 'no deal' scenario) will be the unfortunate, but inevitable, conclusion. Certainly based on the current state of the draft documentation provided by the Applicant's lawyers, ABP cannot see how such a result can be avoided. • The Applicant's assertion that a "no-deal" scenario "<i>assumes that ABP has sought to impose unreasonable restrictions</i>" simply underlines the underlying and fundamental concern that ABP has drawn to the ExA's attention consistently throughout the examination process – and before – that the Applicant has made no attempt at any time in the process to understand and recognise: <ul style="list-style-type: none"> ○ the importance of the Port of Lowestoft; ○ the complexity of port operations; ○ the value of the Port to the local economy; ○ the naivety in proposing the construction of a low bridge through the middle of an operational port; and ○ the serious detriment that the LLTC scheme will cause to the statutory undertaker's statutory undertaking. • The Applicant's assertion is simply further evidence of the Applicant's arrogant approach to this Scheme. • As such, the ExA will understand that the conditional consent contained in the dDCO is not a 'deal' that would render the Scheme acceptable to ABP in the absence of an agreed position between the parties, comprising genuine mitigation and an satisfactory indemnity, formally encapsulated in the Legal Side

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<p>Permanent acquisition of land and Extent of Compulsory Acquisition Powers</p>	<ul style="list-style-type: none"> The Applicant is seeking a permanent transfer of land within the Port, rather than a long leasehold proposition requested by ABP, as the Applicant does not want any fetter on its ability to exercise its powers as highway, street and traffic authority over the land and airspace involved, including in relation to the interaction of ABP with the bridge structure within the Port estate. 	<p>Agreements.</p> <ul style="list-style-type: none"> The long leasehold requested by ABP, whereby ABP would provide the Applicant with all necessary rights over the bridge and highway structure for the life of the Scheme, with an under-lease granted back to ABP to provide ABP with rights and access to the spaces under the bridge structure, provides the Applicant with all necessary powers to act as the highway, street and traffic authority over the part of the Scheme that over-sails the Port, without any fetter on its powers by ABP. In the light of the Applicant's response, ABP queries whether the Applicant has actually understood the legal process. This position has been accepted by Welsh Government in respect of its statutory duties relating to the M4 Motorway that interacts with the Port of Newport. As such, it is unclear why this position is unacceptable to the Applicant?
<p>Permitted Development Rights</p>	<ul style="list-style-type: none"> The Applicant considers that, if it had to decommission the bridge in the future and dispose of the land within the Port estate to ABP, that disposal would enable ABP to use the land for its undertaking, and thus its PD rights would be able to be utilised. The Applicant also considers that loss of permitted development rights is not a 'ground' of alleged serious detriment, and even though this land is lost to ABP, it should not be 'double counted' in a decommissioning scenario. 	<ul style="list-style-type: none"> This response by the Applicant merely evidences further the Applicant's lack of understanding of the legal process, which in the context of these proposals, ABP finds extremely worrying. ABP is unable to simply 'regain' its permitted development rights ("PD rights") rights once the Applicant has disposed of the impact parts of the Port estate to ABP in the future. The PD rights that ABP currently benefits from can only be conferred on ABP by way of a parliamentary process, and it would be all but impossible for ABP to obtain the necessary parliamentary powers to reinstate those rights at a future date. The loss of PD rights, as well as ABP's loss of interest in its statutory Port estate, both form part of the overall serious detriment caused by the Scheme. These are separate and discrete issues and the Applicant is being disingenuous to suggest that there is any element of 'double counting' when considering both

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		<p>the immediate and long-term impacts of the loss of this land.</p> <ul style="list-style-type: none"> • Further information regarding ABP's loss of PD rights is set out in ABP's Deadline 8 Submissions (ABP: 3 of 3 – LD8)
<p>Vehicular Access and Commercial Road</p>	<ul style="list-style-type: none"> • Instead of arbitrarily applying land powers to the whole of the north bank, the Applicant recognised that arrangements would need to be made for a diversion as a condition of any consent for the Applicant's exercise of the limited extent of temporary possession powers sought. • The Applicant acknowledges that it needs to take additional steps to ensure a diversion of Commercial Road can be implemented and, taken with ABP's proposed Protective Provisions, it is clear that the Applicant would always be required to work with ABP to facilitate a diversion taking place 	<ul style="list-style-type: none"> • As ABP has pointed out, and as the Applicant is unsurprisingly reluctant to admit, in failing to understand the actuality of port operations, the Applicant has failed to identify and consequently legislate, in terms of legal process, so as to ensure the deliverability of the Scheme. • As the Applicant has conceded, the location of the proposed diversionary route between 3 Shed and Lake Lothing is not deliverable under the terms of the current DCO application. • As the proposed diversionary route is located across port operational land (i.e. private land not subject to any temporary possession powers), the Applicant cannot implement such a route without both the street authority and the landowner's consent. • Given the seriously detrimental impact that the proposed diversionary route will have on port operations and the Applicant's failure to carry out any health and safety risk assessment of the adequacy of its proposal, despite repeated requests by ABP, the ExA should note that at this stage that ABP is not minded to grant consent for use of its port estate for the proposed diversionary route during construction of the proposed crossing. • Furthermore, the ExA should be aware that despite representations and evidence provided by ABP at the examination in writing, the Applicant has to date failed to respond meaningfully to the practical difficulties that will arise in relation to HGV marshalling for the Dudmans operations.
<p>Paragraph 53 of ABP's Protective Provisions</p>	<ul style="list-style-type: none"> • It is the Applicant's position that ABP would not be able to unreasonably veto the use of compulsory acquisition powers over its land, once the 	<ul style="list-style-type: none"> • At the examination hearing on 8 March 2019, the Applicant dismissed ABP's concerns regarding the compulsory acquisition powers sought by the Applicant

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	<p>Secretary of State has determined that powers should be granted over the full extent of it, and therefore would not be able lawfully to use the consent mechanism in the protective provisions to frustrate implementation of the Scheme.</p> <ul style="list-style-type: none"> The focus of the consent of the Protective Provisions is therefore on the 'how' of the powers being used, not the 'what' or the 'where'. 	<p>over the Port estate, as it considered that these could be addressed at a later stage of the NSIP process, by virtue of paragraph 53 of ABP's protective provisions.</p> <ul style="list-style-type: none"> The purpose of the examination process is for the Applicant to consider, explain and address ABP's concerns regarding the Scheme before the application is determined by the Secretary of State. The examination process is not an opportunity for the Applicant to defer these issues until such time as it is too late for them to be considered or addressed by the Applicant in any meaningful way. As such, if ABP's concerns remain unacknowledged or unaddressed by the Applicant, then ABP considers it would not be unreasonable for it to refuse to provide consent for all or part of the Applicant's exercise of compulsory acquisition powers over the Port.
<p>Serious Detriment</p>	<ul style="list-style-type: none"> The Applicant agrees that the serious detriment test includes consideration of both current and future operations, but in respect of future operations, the ExA and SoS will also need to ascertain what those future operations will be in order to make the judgement as to whether there is serious detriment to those operations - in other words, identifying the future operations underpins identifying the detriment caused, and its level of seriousness. Whether matters being made a little less 'efficient' or not 'best fit' in the Port (such terms that were used by ABP in the 1 April hearing) or that a new bridge is regarded by ABP as 'undesirable' should not, in the Applicant's view, be judged as either a 'detriment' or 'serious'. The Applicant makes reference to the Able Marine Energy Park Project DCO, (AMEP) where it states that ABP made similar objections to this Scheme in relation to the proposed compulsory acquisition of a triangular piece of land 	<ul style="list-style-type: none"> ABP's ongoing concerns regarding the serious detriment that will be caused by the Scheme have been dealt with in numerous previous written submissions made by ABP, and are not duplicated here. In light of the Applicant's failure to make any attempt to address the legal test of serious detriment, ABP at this stage in the process, believes it has no choice but to make its case to the Secretary of State in accordance with the provisions of section 127 of the Planning Act 2008. The ExA should record that the Applicant has again deliberately mischaracterised the serious detriment test, by attempting to impose a limit on what future operations may be considered in the context of the test that is not encapsulated in either statute or case law. It is patently not a legal requirement for specific future operations to be identified in order for the SoS to undertake an assessment of the proposed detriment caused. Conversely, it is sufficient that the SoS is satisfied that the proposed compulsory acquisition will significantly

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	<p>that ABP proposed to be used as a deepwater jetty ('WDJ').</p> <ul style="list-style-type: none"> The Applicant notes the parallels of Able Marine with the Scheme, particularly the reliance on an unpublished Masterplan to evidence the future scenario, and that the use proposed for the land affected could be undertaken elsewhere – a jetty in that case, berthing in this case, and that ABP was not able to convince that ExA that the loss of that particular piece of land would cause an inability for the jetty to be built elsewhere. The Applicant would suggest that there are parallels with those judgements made in the case of the AMEP scheme with the LLTC Scheme when considering the future scenario to which any detriment would be caused, particularly when one comes to consider actually how many berths will be used in the future compared to the loss created by the Scheme. Furthermore, the Applicant notes that even ABP recognised, at the 1 April hearing, that impacts on the port's business will only 'potentially' occur (1:22:10 of EV-16) and that it would be more 'difficult' to market Lowestoft (1.23:34 of EV-16) with some disadvantages. Mr. Harston of ABP concluded his remarks at the hearing by stating that the new bridge would create 'increased difficulties, increased risk and challenges in marketing and operating the Port' (1.36.25 of EV-16). Whilst the Applicant has made its case in this document and elsewhere that even these impacts are either mitigated or can be managed, it is apparent from the words used by ABP itself, that the 'detriment' is not set out as 'serious' or anything approaching that. 	<p>impair essential operational flexibility, which will in turn, constrain both current and future operations, as was the case in <i>Hinckley</i>. It is disappointing that in order to further their case; the Applicant has simply ignored the legal precedent.</p> <ul style="list-style-type: none"> The Applicant's less than subtle attempt to diminish ABP's case by referencing specific words used by ABP at the ISH on 1 April 2019 out of context does the Applicant and its team little credit. ABP finds it extremely worrying that the Applicant is prepared to treat the NSIP examination process with such flagrant disregard. As the ExA will be only too aware, the phrases quoted were made by ABP in the specific context of providing the ExA with an explanation as to how the Port allocates vessels to particular berths to maximise utility within the Port, and how the Applicant's vessel survey does not provide a correct baseline analysis for berth utilisation at the Port. The Applicant's attempt to assert that these comments, taken out of context, constitute ABP's position regarding the serious detriment caused by the Scheme is both unprofessional and misleading. The Applicant's comments should be disregarded. The Applicant's assertion that the Able Marine Energy Project DCO ("AMEP") is 'parallel' to the Scheme is wholly incorrect. ABP finds it astonishing that the Applicant could be attempting to draw upon alleged precedents that in reality have no bearing on this Scheme whatsoever. The weakness in this strategy has already been demonstrated by ABP in the context of the Applicant's attempt to rely on Silvertown and Thames Tideway DCOs as being somehow relevant precedents. As far as the AMEP DCO on the Humber is concerned, ABP finds it difficult to draw any comparisons. That project concerned an application to construct a new port

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		<p>facility for the off-shore wind energy market on an area of land adjacent to ABP's Port of Immingham. To implement the AMEP project, the applicant in that case sought the compulsory acquisition of an area of land – owned by ABP but physically separate from the Port. The site was the subject of an application for a new ABP terminal – which ABP has been unable to replicate elsewhere. As the ExA will appreciate, there are absolutely no legitimate comparisons to be made between the two projects and the Applicant's suggestion can be safely disregarded.</p> <ul style="list-style-type: none"> • As the ExA will have noted, ABP has submitted the draft Master Plan to the ExA at Annex 1 (ABP 1 of 1 – DL9). The document produced is in fact an advance copy of the consultation draft – formal consultation upon which will commence during the week commencing 29 April. • The ExA should note, in anticipation of the inevitable criticism from the Applicant, that the delay in publication of the draft Master Plan has been simply due to the fact that, as ABP indicated at the commencement of the examination process, Ports operate in a rapidly evolving market and the Port of Lowestoft, probably more than many, over the last 24 months, bears positive witness to the vicissitudes of that market. • ABP is very conscious that as the market continues to evolve, with new commercial opportunities opening up on a regular basis – Petersons, aggregates, new offshore wind energy fields etc. – the current consultation draft of the Master Plan may itself require further updating before it can be formally adopted by ABP. • To respond directly to the Applicant's assertion, however, that the activities undertaken by ABP at the Port, both current and future, are simply justified by an 'unpublished Masterplan' – ABP would point out that it has submitted a considerable amount of expert evidence to support its position.

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		<ul style="list-style-type: none"> • The ExA will have noted that this is in stark contrast to the evidence, or rather lack of evidence, produced in response by the Applicant. The Applicant's strategy seems to have been either to attempt to attack ABP's submitted evidence on a somewhat haphazard basis without producing any expert evidence to support its assertions or simply to refer to alleged precedents, which on analysis have been shown to be entirely irrelevant. • Indeed, the lack of genuine evidence produced by the Applicant to rebut ABP's case should be fully taken into account by the ExA. It does perhaps underline a theme that has unfortunately run through the entire examination process, namely that as the project is being taken forward as an NSIP as a result of a section 35 Direction made by the Secretary of State – it cannot fail, no matter how weak the actual case.
<p>ABP's Statutory Undertaking</p>	<ul style="list-style-type: none"> • In terms of understanding the extent of ABP's undertaking, the Applicant has recognised the extent of the undertaking since the application, as set out in the Statement of Reasons. It recognises that ABP's statutory and commercial undertakings are holistic but that section 127 does not extend to the success or failure of specific tenants within ABP's undertaking, as set out in the Applicant's Deadline 7 submissions. 	<ul style="list-style-type: none"> • The Applicant has taken a very narrow interpretation of ABP's statutory undertaking in the Statement of Reasons by reference only to the Transport Act 1981. ABP's statutory undertaking comprises a myriad of legislative instruments. ABP is pleased, however, to see the Applicant has now accepted that ABP's statutory undertaking incorporates both statutory and commercial undertakings. • ABP's statutory undertaking must be considered in the broadest sense. For example, the Port undertaking includes the future as well as the current position - i.e. the direct impact of the compulsory acquisition of land and also the direct and indirect impact upon business, both existing and future, and anything that affects the port undertaking. As such, it is imperative that the serious detriment test includes commercial operations undertaken or contracted by ABP at the Port as a statutory undertaker. To assert the contrary is simply unsustainable in fact and law and it is disappointing that the

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		Applicant's legal team even attempted to take that line when addressing the ExA.
Extent of Serious Detriment	<ul style="list-style-type: none"> • ABP claims serious detriment will occur from three broad issues: <ul style="list-style-type: none"> ○ the detriment that is caused due to the direct loss of berth space – both at that specific location and what that means for vessel berthing at that location and the consequential impact on the amount of berth space available across the Port in both the current and future scenario; ○ the detriment that is caused by the bridge's physical presence in terms of navigational risk and safety; and ○ the operation of the bridge in terms of the timing restrictions in the Scheme of Operation and the number of vessels that would require an opening due to their height - the delay this would cause and thus the consequential reduction in attractiveness of the Port of Lowestoft in the future to vessels who may be affected by those restrictions (e.g. as an offshore hub). • For each of those topics, the Examining Authority and the Secretary of State will need to determine whether the effect of the Scheme is a detriment, and in so doing, consider what current and future scenarios will that detriment be caused to, to ascertain its seriousness. • The Applicant considers that the serious detriment test is not engaged when considering the impacts of the temporary possession of that land - in that instance the Examining Authority and the Secretary of State must just determine whether the Applicant should be granted the proposed powers over the temporary possession plots. • The 'wider effects' which the Applicant agrees must be considered when considering the serious detriment test are those that flow from the compulsory acquisition of ABP's land, i.e. that a 	<ul style="list-style-type: none"> • The serious detriment test requires a holistic approach, not a consideration of whether discrete elements are 'detrimental' in isolation. As such, the serious detriment is not only confined to the specific issues identified by the Applicant. • Further, detriment caused by the loss of berthing is not solely linked to the 'direct' loss of berth space – size is not a determining feature when assessing significant or importance in terms of serious detriment. The impact of the berthing loss must be considered in terms of both direct and indirect impacts on Port operations as a whole, including for example, berth utilisation across the Port, impact on tenants and perception of future occupiers/users of the Port. • The ExA are fully aware in this context that ABP, as part of the Applicant's mitigation measures, has asked the Applicant to provide adequate replacement berthing space in another area part of the Port - a request which ABP was initially led to believe was being genuinely considered by the Applicant, but which now turns out not to have been the case • The Applicant's assertions in relation to the temporary possession of land are clearly not correct in law. The test goes to the impact on port operations. ABP does not believe that it has to repeat, yet again, its views on these points, which will in due course, be addressed elsewhere.

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	<p>bridge structure will exist and operate, potentially causing the issues set out above.</p> <ul style="list-style-type: none"> • Separate powers are applied for in relation to the temporary possession of land, and the consequences of them relate to that power, not the power of compulsory acquisition. 	
<p>Other Serious Detriment Issues</p>	<ul style="list-style-type: none"> • The Applicant accepts that the size of an area of land taken is not necessarily determinative (in that a small area of land could, depending on its location, have critical functional importance) but the size and extent of land taken is, nonetheless, a relevant factor. • The Applicant also considers that the likelihood of future activities taking place is relevant to how much weight they should carry in any assessment of 'serious detriment'. 	<ul style="list-style-type: none"> • Size is not a determining feature when assessing significance or importance in terms of serious detriment. It was accepted by the ExA and the Secretary of State in <i>Hinkley</i>. The ExA needs to look at the Port as a whole, not just the size of the impact. • There is no statutory requirement or precedent which provides that the likelihood of future activities taking place is relevant to how much weight it should be given when assessing serious detriment. As noted above, these issues have already been addressed by ABP and will be put formally to the Secretary of State.