

(ABP: 1 of 4 – DL10)

Proposed Lake Lothing Third Crossing (TRO10023)

Associated British Ports (20013261)

**Summary of oral submissions made by ABP at the examination hearing held
on Tuesday 14 May 2019**

Comments on the draft Development Consent Order (Revision 4)

This post examination note sets out the submissions made by Associated British Ports ("ABP") at the LLTC examination hearing held on Tuesday 14 May 2019 in relation to the draft Development Consent Order R4 (Document Reference SCC/LLTC/EX/109) ("dDCO"), including ABP's views on amendments made by the Applicant during the third revision of the dDCO.

This post examination note also incorporates ABP's:

- further expanded submissions in relation to ABP's current position in respect of the dDCO; and
- proposed amendments to the drafting of key dDCO provisions, for consideration by the Applicant and the ExA.

It will be appreciated that these comments are without prejudice to ABP's objections to the Scheme itself and should be read accordingly.

On 17 May 2019, the Applicant provided ABP with proposed further changes to Article 40 (**attached**) and Requirement 11 (set out in paragraph 11.1 below). In order to assist the ExA with its consideration of the dDCO provisions, ABP has provided its below comments on proposed revised Article 40 and Requirement 11 provided by the Applicant, rather than the drafting currently contained in Revision 4 of the dDCO.

As advised by ABP at the examination hearing, these comments on the dDCO were provided to the Applicant and the Lowestoft Cruising Club on Monday 20 May 2019, in order to provide these parties with sufficient time to consider ABP's comments and proposed amendments ahead of Deadline 10. This ensures that the ExA is provided with the most up to date position between the parties regarding the dDCO at Deadline 10.

Where appropriate, these responses should be read in conjunction with ABP's Written Representations and other submissions made by ABP in relation to the dDCO, in particular:

- Section 22 of ABP's Written Representations;
- ABP's Comments on the First Revised Draft Development Consent Order R1 (REP4-031); and
- ABP's Summary of oral submissions made by ABP at the examination hearing held on Wednesday 13 February 2019 – Draft Development Consent and Indemnity (REP5-021).

1. **Article 5 – Limits of Deviation**

1.1 As the port operator and SHA, ABP cannot accept the addition of new Article 5(8), which in essence provides that the Applicant must not carry out any dredge to a depth lower than:

- a) 6.4m below chart datum in respect of the authorised development (except for Work No. 7); and
- b) 2.2 below chart datum in respect of Work No. 7 (i.e. the new pontoon within Lowestoft Harbour),

unless the Applicant has demonstrated, and the MMO has agreed in writing, that dredging to a depth lower than specified would not give rise to any materially new or different environmental effects.

1.2 **Article 5(8)(a)** – There are two pipelines and a tunnel containing cables that cross the Port at depths of 5.8m and 5.9m below ACD, which could potentially be impacted by the level of dredging authorised by this Article. Although these cables are assets of other statutory undertakers, if they were damaged by the dredging regime and require reinstatement, this would adversely impact on the Port.

1.3 In addition, North Quay is dredged to a level of approximately 3.7m below ACD. If the Applicant were to undertake a greater dredge than this within close proximity to North Quay, it has the potential to undermine the structural integrity of the quay.

1.4 As such, although ABP acknowledges that the Applicant will need to undertake dredging activities to facilitate construction of the authorised development, it is imperative that the Applicant first provide ABP with the details of the location and depth of any dredging activities before they are undertaken, and that such dredging

cannot be undertaken without the consent of ABP (not to be unreasonably withheld or delayed), in order to ensure ABP protects its statutory assets.

- 1.5 **Article 5(8)(b)** – ABP considers that 2.2m is an unrealistically low limit on dredging from a maintainability and indeed practical able perspective, as the dredge bed leveller would not be able to access the area to dredge over all states of tide. In practice, this would adversely impact on the flexibility to undertake dredging operations, and over time, this will require more frequent dredging campaigns to be undertaken in order to maintain the waiting pontoon. This proposal by the Applicant again underlines its worrying lack of understanding of marine matters and port operations.
- 1.6 Further, the types of dredgers currently deployed for dredging in the Port are too large to dredge to 2.2m, and consequently, the Applicant will not be able to rely on the availability of a dredger currently deployed at the Port to undertake this dredge. As such, ABP considers that dredging to a level of approximately 3.0m below ACD would be more appropriate and practicable, as it would enable dredging to be undertaken by existing dredgers, provide greater flexibility for maintenance and provide a safer depth for the deeper leisure vessels wanting to use the waiting pontoon.

Proposed Amendments to Article 5(8)

- 1.7 ABP considers that its concerns with, and practical observations in relation to, Article 5 could be satisfactorily addressed if an amendment was made as follows:

- "(8) The undertaker must not carry out any dredge to a depth lower than—*
- (a) 6.4m below chart datum in respect of works comprised in the authorised development in Lake Lothing except Work No.7; and*
 - (b) 3.0m below chart datum in respect of Work No.7,*
- unless the undertaker has demonstrated to the MMO and the MMO has agreed in writing that dredging to a depth lower than those depths set out in subparagraphs (a) and (b) would not give rise to any materially new or materially different environmental effects than those assessed in the environmental statement.*
- (9) The undertaker must not carry out any dredging pursuant to this Order unless it has first:*
- (a) provided all specifications and details of the proposed location and depth of any dredge to the Harbour Authority; and*

(b) obtained the prior written consent of the Harbour Authority (not to be unreasonably withheld or delayed), which may attach reasonable conditions to any consent."

2. Article 8 – Construction and maintenance of new, altered or diverted streets and other structures

2.1 The Applicant has added a provision requiring the undertaker and any street authority to 'act reasonably' when agreeing the date of completion of any works under Article 8(8). It is unclear as to why this addition is required given that the agreement of a street authority must always be given 'reasonably', pursuant to Article 60(1). As such, ABP considers that this addition is unnecessary and of no relevance.

Proposed Amendments to Article 8

2.2 ABP considers that its concerns with Article 8 could be satisfactorily addressed if an amendment was made as follows:

"(8) The date of completion of any works to a street which is not and is not intended to be a highway pursuant to this article 8 is to be agreed by the undertaker and the street authority, ~~acting reasonably.~~"

3. Article 11 – Temporary stopping up and restriction of use of streets

3.1 **Temporary diversion:** The ExA should be aware that Article 11 does not authorise the diversion of Commercial Road at the Port. Whilst Article 11 does authorise the temporary closure of Commercial Road with the consent of ABP, as street authority, it does not authorise its diversion.

3.2 As previously acknowledged by the Applicant, any temporary diversion of Commercial Road which requires an alternative route to be created between Shed 3 and Lake Lothing can only be undertaken in one of two ways:

- a) by the Applicant obtaining consent for the diversionary route from ABP, as the owner of the land affected by the proposed route, or
- b) temporary possession powers to enable the Applicant to impose the diversionary route are authorised by the dDCO.

- 3.3 The Applicant appears to have rather missed the point. The Applicant mistakenly believes that the diversionary route can be appropriately secured through compliance with the 'interim CoCP', which requires it to ensure that Port access is maintained to the west of the construction compound (see submissions made by the Applicant in REP9-010). There is in fact, however, no requirement on ABP to agree to the imposition of the diversionary route over its land simply to enable the Applicant to comply with the CoCP.
- 3.4 Indeed, as previously stated on a number of occasions, ABP cannot guarantee that it would be able, as landowner, simply to provide consent for the Applicant to impose the diversionary route as and when required by the Applicant. As the ExA is aware, as explained at during the course of the examination process, this is because any diversion through the Port estate has the potential to disrupt and interrupt port operations and customers within that part of the port estate. Significantly, such a diversion will also introduce serious health and safety concerns in terms of a roadway and pedestrian walkway immediately adjacent to the edge of the quay.
- 3.5 The reality is that the Applicant has failed to identify the need to settle access issues before it submitted the DCO application. That error now raises questions as to the ability of the Applicant actually to implement the Scheme – again underlining a stark failure by the Applicant to make any genuine attempt to understand the practicalities of port operations.
- 3.6 The Applicant is not in a position to impose a "reasonableness" test on ABP. The Applicant is attempting, through the back door, to recover its mistake. The reality, however, is that as ABP's private property rights would be infringed by the diversionary route, it has every right to refuse consent for the diversionary route if it considers necessary to do so, for example, on the basis of an inability to agree lease terms with the Applicant, or inadequate health and safety risk assessments, or such assessment indicating irresolvable health and safety concerns.
- 3.7 The Applicant has maintained that it is unable to justify including powers relating to the temporary possession of the area subject of the proposed diversionary route, as it would encompass "land powers to the whole of the north bank" (REP8-007) or "the vast majority of the North Quay" (REP9-010), and such large swathe of Port land would cause "more concern to ABP" (REP7-005). It is self-evident to ABP that the Applicant has either deliberately misrepresented to ABP (and the ExA) the extent of the impact of the specified works on the Port or, alternatively, made an error in its

drafting of the dDCO and the powers required to authorise the Scheme, including the Environmental Statement accompanying the Application, particularly as this fails to consider the impacts of the close of Commercial Road during the construction phase of the Scheme and consequently, downplays the overall impact of the Scheme on the Port. Whilst it is of no practical benefit to speculate on which of these possibilities is the case, in any event, the Applicant appears to have seriously understated the impact of the Scheme on the Port – again demonstrating that the Applicant is not in a position to assert that the Scheme will not cause serious detriment to the Port.

- 3.8 As such, the ExA should be aware that the proposed diversionary route, which is required to be implemented by the Applicant to facilitate access to the Port at all times whilst Commercial Road is closed, can only be secured by negotiation with ABP.
- 3.9 **Article 11(4) – Temporary closure:** The Applicant has amended Article 11(4) to provide that the undertaker cannot temporarily close Commercial Road without the consent of ABP (as relevant street authority), and such consent "*must not be unreasonably withheld or delayed.*" As drafted, however, the amendment does not make sense, as it actually says that the street authority must not be unreasonably withheld, rather than its consent.
- 3.10 Notwithstanding what appears to be rather careless drafting, the amendment appears to be intended to impose constraints on ABP's ability to give consent by imposing a test of reasonableness, but actually it adds nothing, because the requirement for ABP not to unreasonably withhold consent (as the relevant street authority) is already included in Article 60(1). As such, the wording is unnecessary and inappropriate, and is not agreed by ABP.

Proposed Amendments to Article 11

- 3.11 ABP considers that its concerns with Article 11(4) could, in part, be satisfactorily addressed if an amendment was made as follows:

"(4) *The undertaker must not temporarily stop up, alter or divert any street for which it is not the street authority without the consent of the street authority, which may attach reasonable conditions to any consent. ~~but must not be unreasonably withheld or delayed.~~*"

4. Article 40 – Operation of the new bridge

- 4.1 On 17 May 2019, the Applicant provided ABP with proposed further changes to Article 40 (see **attached**). In order to assist the ExA with its consideration of the dDCO provisions, ABP has provided its below comments on proposed revised Article 40 provided by the Applicant, rather than the drafting currently contained in Revision 4 of the dDCO, so that the Applicant is able to consider these proposed amendments ahead of Deadline 10. This will provide the ExA with the most up to date position between the parties.
- 4.2 **Involvement of the Navigation Working Group ("NWG")** – As previously discussed at the examination hearings and within various submissions, ABP questions 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, with no formal remit and, as such, should not be referenced in a statutory document. ABP considers that the NWG should not be given any particular status, simply by virtue of its inclusion in the dDCO.
- 4.3 ABP is also concerned that the NWG will run in parallel to Port Marine Security Code ("PMSC") Stakeholder Group, which is run by ABP in its capacity as Statutory Harbour Authority as part of ABP's duty to consult on navigation safety matters under the Port Marine Safety Code. In particular, section 2.17 of the PMSC places a duty on the SHA "*to develop a consensus on safe navigation*". Given the significant amount of cross-over between the two groups, there is a risk that consideration of identical issues undertaken by two separate groups would dilute and confuse the situation in respect of navigational matters.
- 4.4 As such, ABP considers that it would be more appropriate for 'Navigational Working of the LLTC' (or similar) to be an agenda item on the PMSC Stakeholder Group meetings, and any necessary consideration and recommendation of changes to the Scheme of Operation ("SoO") could be considered by this group. The membership of the PMSC Stakeholder Group comprises a large range of commercial, fishing and leisure interests, including vessel owners and operators, statutory consultees and port tenants. Relevantly, it already includes all existing members of the NWG, other than the Applicant, and indeed, it contains a broader range of interested parties than the NWG. In the context of any issues relating to the Scheme, the Applicant would have the right to attend the meetings and understand and contribute to any feedback from

the Stakeholder Group on the SoO. This addresses concerns raised by the Applicant that proposed changes to the SoO would be made 'unilaterally' by ABP, which as a statutory authority subject to consultation requirements, is clearly not the case.

- 4.5 Therefore, ABP considers that the creation of a duplicative consultation group with no formal remit simply for the purposes of the dDCO is unnecessary and inappropriate, and that any navigational issues arising in the context of the Scheme are more appropriately considered and dealt with by the existing statutory group – the PMSC Stakeholder Group - that already has responsibility of considering all navigational matters within Lowestoft Harbour.
- 4.6 For clarity – ABP confirms that this position applies to the whole of the dDCO, not just references to the NWG contained in Article 40. As such, all references to the 'Navigation Working Group' within the dDCO should be replaced by references to the 'PMSC Stakeholder Group'.
- 4.7 **Article 40(2)** – ABP welcomes the changes to this provision proposed by the Applicant, which requires it to consider changes to the SoO requested by ABP. As the statutory harbour authority, and the likely LLTC bridge operator, there are likely to be circumstances in the future which necessitate an amendment to the SoO. ABP, however, considers that any requests for such changes to the SoO should be subject to a reciprocal formal process. This means any changes proposed by either the Applicant or ABP requires consent of the other party, such consent not to be unreasonably withheld or delayed.
- 4.8 **Article 40(3)** – Once the Scheme is operational, the NRA relating to the bridge must form part of ABP's NRA for the whole of the Port, which is 'owned' and managed by ABP as SHA. This is the appropriate process, given ABP is the SHA for Lowestoft Harbour and is responsible for maintaining navigational safety throughout its whole jurisdictional area, of which the new bridge will only form one discrete component. It is imperative that any such navigational issues are considered as a whole, and as such, it would be inappropriate for the discrete NRA relating to the bridge to be maintained and compliance monitored, by the Applicant, as 'Highway Authority'. As such, any review of the NRA should be undertaken by ABP, as SHA, in consultation with the Applicant and the PMSC Stakeholder Group. ABP also considers that the Applicant should be responsible for reimbursing ABP for any costs incurred in respect of undertaking such a review – as this would not currently be covered by ABP's Protective Provisions (although ABP notes that proposed changes to the indemnity

provisions have been made in this regard). In addition, it may be that certain changes to the SoO do not require a review of the NRA, but instead some other form of formal risk assessment may be more appropriate. The current drafting of this article is somewhat unclear that this is the case.

- 4.9 **Article 40(4)** – It is unclear why this provision has been removed by the Applicant in the latest proposed drafting. ABP considers it is imperative that the PMSC Stakeholder Group is provided with the latest information regarding any navigational risks arising from any proposed changes to the SoO, and must be provided with any revised NRA as part of the consultation requirements. As such, ABP considers that this provision must be reinstated. It is also imperative that the parties consider, in good faith, any representations made by the PMSC Stakeholder Group in relation to the proposed changes to the SoO, prior to providing their consent to such changes.
- 4.10 **Article 40(5)** – The timescale specified under Article 40(5) is inappropriately short. ABP is responsible for operating a Port, which takes a significant amount of time, effort and resources, and as such, it may not always be practicable for ABP to comply with such a limited timescale. As such, it may not be practicable to ring-fence staff to prioritise matters to comply the timescales specified. ABP notes that Article 40(5)(b) provides the Applicant with the ability to grant an extension of time for ABP to give its consent. Firstly, ABP considers that such consent to grant an extension to consider a revised SoO should not be *'unreasonably withheld or delayed'* – this is necessary due to the practical and varying operational requirements of ABP. Secondly, this must be a reciprocal provision, which enables either party to request any extension to provide consent to consider amendments to the SoS, if necessary given the circumstances at the time.
- 4.11 **Articles 40(5) to (7)** – ABP is firmly of the view that proposed amendments to the SoO to be referred to the Secretary of State under Article 40(5), and determined under subsequent articles. The dDCO contains a robust arbitration process, set out in Article 59, which would be more appropriate to address any failure by either party to provide consent under Article 40(5), or disagreements between the parties, in respect of the any changes to the SoO – it is unclear why the Applicant considers that such existing dispute resolution process is inapplicable to this matter. The arbitration process would allow a decision to be made by an appropriately qualified arbitrator, who would be experienced to provide an independent decision in respect of navigational matters (i.e. any amendments to the SoO), in a timely matter. Conversely, ABP is concerned that the Secretary of State may not be the appropriate adjudicator of any such dispute, and

as there are no timescales relating to obtaining a determination from the Secretary of State, there is a real risk that pressing issues may be subject to a protracted process of resolution.

Proposed Amendments to Article 40

4.12 ABP considers that its concerns with Article 40 could be satisfactorily addressed if amendments were made as follows:

- "(1) *The undertaker must operate the new bridge in accordance with the Scheme of Operation.*
- (2) *The Scheme of Operation may be varied or replaced by the undertaker at any time—*
- (a) *on the undertaker's own volition, with the consent of the harbour authority (such consent not to be unreasonably withheld); or*
 - (b) *following receipt of a request by the harbour authority for the undertaker to vary or replace the Scheme of Operation, which the undertaker must not unreasonably refuse to agree to, or then delay in proceeding under this article.*
- (3) *Before varying or replacing the Scheme of Operation under paragraph (2) the undertaker must request that the harbour authority takes the following sequential steps –*
- (a) *consider in accordance with Requirement 11 if the most recent version of the navigation risk assessment prepared by the undertaker and approved under Requirement 11 needs to be updated on account of the proposed variation to or replacement of the Scheme of Operation, or whether any other form of formal risk assessment is required to be undertaken;*
 - (b) *if the undertaker harbour authority considers in accordance with Requirement 11 that the navigation risk assessment does need to be updated on account of the proposed variation to or replacement of the Scheme of Operation, the undertaker harbour authority must update the navigation risk assessment and obtain approval of it under Requirement 11; and*
 - (c) *consult the Navigation Working Group PMSC Stakeholder Group on the proposed variation to or replacement of the Scheme of Operation. and have regard to any representations received by the undertaker harbour*

~~authority from the Navigation Working Group PMSC Stakeholder Group.;~~
~~and~~

~~(d) obtain the consent of the harbour authority (which must not be unreasonably withheld) or, in accordance with paragraph (4), the consent of the Secretary of State, to the undertaker's proposed variation to or replacement of the Scheme of Operation.~~

- (4) When consulting the PMSC Stakeholder Group under paragraph (3)(c):
- (a) the harbour authority must provide to the PMSC Stakeholder Group information relating to the outcome of the review of the navigation risk assessment or other formal risk assessment carried out by virtue of paragraph (3) including (if applicable) the updated navigation risk assessment; and
 - (b) the parties must have regard to any representations made by the PMSC Stakeholder Group in relation to the proposed variation to or replacement of the Scheme of Operation, prior to the undertaker or the harbour authority providing consent under paragraph (2)(a) or (b) (as applicable).
- (5) If the consent of the ~~harbour authority~~ either party required under paragraph (2) is not given—
- (a) within 28 days of the submission to the other party of an application to vary or replace the Scheme of Operation ~~by the undertaker to the harbour authority under paragraph (3)(d) for its consent to the undertaker's proposed variation to or replacement of the Scheme of Operation;~~ or
 - (b) before the expiration of any extended deadline for that consent agreed to by the party proposing the amendment, the grant of such extension not to be unreasonably withheld or delayed,
- then the proposed variation to or replacement of the Scheme of Operation must be submitted by the parties to an arbitrator for determination and settled by arbitration under Article 59 (Arbitration).~~undertaker to the Secretary of State for approval.~~
- (6) Any submission ~~by the undertaker to the Secretary of State~~ an arbitrator under paragraph (5) must also include a report setting out any representations of the ~~Navigation Working Group PMSC Stakeholder Group and the harbour authority~~

given in response to the ~~undertaker~~ proposed ~~ng-a~~ variation to or replacement of the Scheme of Operation under paragraph (2).

(7) Following submission of the proposed variation to or replacement of the Scheme of Operation to the ~~Secretary of State arbitrator~~ for approval under paragraph (5), the ~~harbour authority relevant party~~ may still grant its consent to the proposed variation to or replacement of the Scheme of Operation at any time prior to the ~~arbitrator's~~ determination, but if the ~~harbour authority relevant party~~ does so it must on the same day inform the ~~undertaker other party~~ and the ~~Secretary of State arbitrator~~ of its consent.

(8) The undertaker must take such steps as it considers appropriate to publish details of the Scheme of Operation not less than 21 days prior to the new bridge opening for public use or, in relation to any variation to or replacement of the Scheme of Operation under paragraph (2), at such times and with such prior notice as the undertaker considers appropriate in consultation with the harbour authority.

~~(8) Article 59 (arbitration) does not apply to any dispute arising under this article other than any dispute arising under paragraph (2)(b).'~~

4.13 The 'PMSC Stakeholder Group' is defined as follows:

"the PMSC Stakeholder Group" means the group maintained and consulted by the harbour authority in accordance with its duties under the Port Marine Security Code, which is responsible for the consideration of navigational issues arising in respect of the dDCO, including under Article 40 and Schedule 2, for which the undertaker is a member as the highway authority for the new bridge"

5. Article 44 – Protection against dredging by the harbour authority

5.1 Amendments to this Article relating to a capital dredge, as set out in subparagraphs (1) to (3), are agreed by ABP.

5.2 The only remaining issue relates to the 7 day notification period specified in Article 44(4) – ABP's concerns simply relate to matters of practicality and timing, to ensure the SHA is able to comply with its statutory functions. In purely practical terms, there

will be occasions when ABP will require dredging to be undertaken at short notice for operational reasons.

- 5.3 As previously discussed at the examination hearing, ABP is only required to provide the MMO (the relevant statutory regulator) with 5 days' (not working days) notice (where it is able) that such dredging will take place. ABP has requested a reciprocal notification period in respect of the Applicant (i.e. 5 days), and cannot accept the 7 day notice period proposed by the Applicant. It is unclear why the Applicant requires 2 additional days' notice over and above that required by the MMO.
- 5.4 ABP understands from the examination hearing on 14 May 2019 that the Applicant, in principle, does not object to a 5 day notification period – this position is welcomed.

Proposed Amendments to Article 44

- 5.5 For the avoidance of doubt, ABP considers that its concerns with Article 44 could be satisfactorily addressed if amendments were made as follows:

"(4) The harbour authority must notify the undertaker at least 5 days before undertaking any maintenance dredge in Lake Lothing within the limits of dredging."

6. Article 45 – Byelaws

- 6.1 ABP objects to Article 45(6), which provides that ABP cannot amend its byelaws (i.e. the Lowestoft Harbour Byelaws 1993) in certain circumstances without consent of the Applicant. ABP's submissions regarding this Article are set out in section 6 of REP4-031 and section 8 of REP5-021. In short, this provision would act as a fetter upon ABP's statutory functions and powers to make byelaws.
- 6.2 Clearly, at present, 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.
- 6.3 ABP cannot issue, amend or revoke byelaws 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. If for some reason ABP requests new

or varied byelaws which the Applicant takes issue with, this existing statutory provides the Applicant with a statutory right, and an appropriate opportunity, to have its objections considered and it is for the Secretary of State to decide whether any such changes are confirmed. The existing statutory process does not, as was incorrectly asserted by the Applicant at the examination hearing on 14 May 2019, provide ABP with an opportunity to "unilaterally" change the byelaws. It is unclear, therefore, why the Applicant considers that this existing statutory process is not sufficient. As such, the introduction of this provision provides an unnecessary consenting approach – a prior 'second stage' to the process – which is unnecessary and unwarranted. There is no deficiency in the existing statutory approach, which requires it so be remedied or supplemented by some other process.

- 6.4 ABP considers that the existence of the proposed 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 to that byelaw as part of the existing statutory process before it is determined by the Secretary of State. As such, ABP consider that the existing precedent which applies in respect of the A47 Bascule Bridge should apply to the LLTC Scheme, given that both Highways England and the Applicant the relevant Highway Authorities responsible for similar a statutorily authorised undertaking over the Port.
- 6.5 Therefore, given the seriously detrimental impact that the introduction of a bridge into a statutory harbour will have on ABP's statutory powers, and following precedent relating to the A47 Bascule Bridge, ABP does not agree that Article 45(3) should not be deleted by the Applicant as some sort of quid pro quo, as was alluded to by the Applicant at the examination hearing on 14 May 2019.

Proposed Amendments to Article 45

- 6.6 ABP considers that its concerns with Article 45 could be satisfactorily addressed if amendments were made as follows:

~~"(6) The harbour authority must not~~

~~(a) amend or revoke the byelaws inserted into the Lowestoft Harbour Byelaws 1993 by paragraph (5); or~~

~~(b) — make byelaws which affect the new bridge, the new bridge infrastructure or impede operation of the new bridge in accordance with the Scheme of Operation, without first obtaining the consent of the undertaker, such consent not to be unreasonably withheld."~~

7. Requirement 4 (Schedule 2) – Code of Construction Practice

7.1 The final Code of Construction Practice ("CoCP") 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 the CoCP 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 notes that the Environment Agency is already included as a consultee under this requirement, and ABP considers that it should have reciprocal rights.

7.2 ABP also does not consider that all matters arising in respect of the CoCP are dealt with under ABP's Protective Provisions, as such, a separate consenting provision is required.

Proposed Amendments to Requirement 4

7.3 ABP considers that its concerns with Requirement 4 could be satisfactorily addressed if amendments were made as follows:

*"4.— (1) No part of the authorised development may commence until a code of construction practice for that part of the authorised development has been submitted to the county planning authority by the undertaker following consultation with the Environment Agency, **the Harbour Authority** and the local planning authority and the submitted code of construction practice has been approved by the county planning authority."*

8. Requirement 6 (Schedule 2) – Surface Water Drainage System

8.1 Similarly to the above, ABP also considers that the Surface Water Drainage System must be subject to consultation by ABP (as SHA) and the Harbour Master, given the potential significant detrimental impacts that surface water drainage may have on the

Port and consequently, on ABP's ability to undertake its statutory duties – particularly in circumstances where potentially contaminated surface water may enter the harbour.

Proposed Amendments to Requirement 6

- 8.2 ABP considers that its concerns with Requirement 6 could be satisfactorily addressed if amendments were made as follows:

"6.— (1) No part of the authorised development which comprises any part of a surface water drainage system must commence until written details of that surface water drainage system have been submitted to the county planning authority by the undertaker following consultation with the Harbour Authority and the local planning authority and the surface water drainage system has been approved in writing by the county planning authority."

9. Requirement 7 (Schedule 2) – Highways Lighting

- 9.1 ABP also considers that the written scheme of highways lighting must be subject to consultation with ABP (as SHA), 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, reflection, etc, which could result in the potential for confusion and/or difficulty for a ship master to navigate safely within the harbour. As the lighting scheme has the potential to affect adversely the safe 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.

- 9.2 Although ABP notes paragraph 61 of ABP's Protective Provision provides that the undertaker must comply with the harbour masters direction in regard to lighting to ensure there is no hazard to navigation, it appears prudent that ABP is consulted in respect of the initial highways lighting scheme before it is implemented, in order to identify, address and avoid future potential lighting issues that may impact on navigation, which would otherwise need to be retrospectively dealt with under paragraph 61.

Proposed Amendments to Requirement 7

- 9.3 ABP considers that its concerns with Requirement 7 could be satisfactorily addressed if amendments were made as follows:

"7.— (1) No part of the authorised development may commence until a written scheme of the proposed highway lighting to be provided for that part of the authorised development has been submitted to the county planning authority by the undertaker following consultation with *the Harbour Authority and the local planning authority* and the written scheme of the proposed highway lighting for that part of the authorised development has been approved in writing by the county planning authority.

10. Requirement 8 (Schedule 2) – Contaminated land and groundwater

10.1 ABP, as SHA, has statutory responsibility for any contamination of land or groundwater at the Port, which could adversely impact on tenants and other users of the Port. As such, it is imperative that ABP is notified of any contaminated land or groundwater within the Port as soon as reasonably practicable, and that such contaminated land and/or groundwater is appropriately investigated, remediated and verified by the Applicant, in consultation with ABP.

Proposed Amendments to Requirement 8

10.2 ABP considers that its concerns with Requirement 8 could be satisfactorily addressed if an addition is made as follows:

"(9) In this paragraph, where any contaminated land, including groundwater, is encountered within Lowestoft Harbour, or has the potential to enter into or impact on Lowestoft Harbour, the undertaker must –

- (a) report the contaminated land, including groundwater, to the Harbour Authority as soon as reasonably practicable; and*
- (b) in addition to seeking approval from the county planning authority under sub-paragraphs (3), (4), (5) and (7), seek approval from the Harbour Authority."*

11. Requirement 11 (Schedule 2) – Navigation Risk Assessment

11.1 Similarly to the above, on 17 May 2019, the Applicant provided ABP with proposed further changes to Requirement 11(4) and (5), as follows:

"(4) Following construction of the new bridge the undertaker must ensure that the updated navigation risk assessment produced pursuant to sub-paragraph (2) is

kept under review and further updated as the undertaker considers circumstances require.

(5) In updating the navigation risk assessment the undertaker must consult the Navigation Working Group in any case where material changes are proposed to be made by the undertaker, and the undertaker must submit the updated navigation risk assessment to the harbour authority for its approval, which must not be unreasonably withheld."

11.2 In order to assist the ExA with its consideration of the dDCO provisions, ABP has provided its comments below on proposed revised Requirement 11 provided by the Applicant, rather than the drafting currently contained in Revision 4 of the dDCO, so that the Applicant is able to consider these proposed amendments ahead of Deadline 10. This will provide the ExA with the most up to date position between the parties.

11.3 Overall, ABP cannot, in its capacity as SHA, accept Requirement 11.

11.4 ABP does not agree to Requirements 11(3) & (5), which requires ABP's approval of the NRA to "*not be unreasonably withheld*". As SHA, ABP is ultimately responsible for ensuring navigational safety is maintained within the Port, as it cannot accept this fetter on its statutory functions. Further, it is unclear why this fetter on ABP's approval has been included, as there appears to be no reason why ABP, as a discharging authority, should be subject to any additional test from other discharging authorities referred to within the requirements.

11.5 All requirements are intended to be subject to an appeals process, under Requirement 19 of Schedule 2. If the Applicant does not agree that ABP's decision to withhold consent under Requirement 11, it is able to utilise the existing appeals process – this is the proper process for addressing any discharging authorities' refusal of consent under a Requirement.

11.6 ABP disagrees with the Applicant's view that the NRA must remain as the Applicant's NRA – this is wholly inappropriate and would fetter ABP's statutory duties and legal obligations. Once the NRA has been finalised and approved by ABP, it must be incorporated into ABP's wider suite of navigational risk assessments relating to its statutory area. As the SHA, ABP has ultimate responsibility and liability regarding navigation safety within its statutory area, and for that reason, it must be the relevant statutory authority that is responsible for the ongoing monitoring of compliance with the

NRA and where required, review and update of the NRA, due to changes in future circumstances. It would be inappropriate for the Applicant, as Highways Authority, to retain responsibility for these functions which have been granted to ABP by statute.

- 11.7 As such, it is important that any future updates to the NRA are made by ABP, in consultation with the Applicant and the PMSC Stakeholder Group. As stated above, this is particularly relevant as section 2.17 of the PMSC places a duty on ABP "*to develop a consensus on safe navigation*".
- 11.8 The ExA should also be aware that it would not be appropriate for any future changes to the NRA to be 'approved' by the Applicant, as this would fetter ABP's statutory functions. However, the Applicant's views regarding any proposed changes to the NRA would of course be considered by ABP in determining whether an update of the current NRA is necessary. If the Applicant considers that its views are not appropriately considered by ABP in the context of such a review, it would be able to utilise the appeals process, set out in Requirement 19 of Schedule 2.
- 11.9 As discussed above, ABP does not consider that the NWG should be given any statutory authority by virtue of the dDCO. ABP considers that it would be more appropriate for any issues relating to the Navigation Risk Assessment to be an agenda item at the PMSC Stakeholder Group meetings, and any necessary consideration and recommendation of approval of the final NRA and any subsequent changes to the approved NRA could be considered by this group. In the context of any issues relating to the Scheme, the Applicant would have the right to attend the meetings and understand and contribute to any feedback from the Stakeholder Group on the SoO. This addresses concerns raised by the Applicant that proposed changes to the SoO would be made 'unilaterally' by ABP, which as a statutory authority subject to consultation requirements, is clearly not the case.

Proposed Amendments to Requirement 11

- 11.10 ABP considers that its concerns with Requirement 11 could be satisfactorily addressed if an addition is made as follows (these amendments also fully work in the context of the amendments to Article 40, specified above):

"(1) Prior to commencement of construction of the new bridge and following consultation with the harbour authority, the undertaker must undertake a vessel simulation which takes account of the final design of the new bridge.

- (2) *Prior to commencement of construction of the new bridge and following consultation with the harbour authority and the ~~PMSC Stakeholder Group Navigation Working Group~~, the undertaker must update the preliminary navigation risk assessment to take account of the final design and construction methodology of the new bridge and, in doing so, must use the results of the vessel simulation carried out under sub-paragraph (1).*
- (3) *Following the update carried out pursuant to sub-paragraph (2), the Applicant must submit the updated navigation risk assessment to the harbour authority for its approval, ~~which must not be unreasonably withheld.~~*
- (4) *Following construction of the new bridge, ~~the harbour authority must incorporate the updated navigation risk assessment into the wider navigational risk assessments relating to Lowestoft Harbour. the undertaker must ensure that the updated navigation risk assessment produced pursuant to sub-paragraph (2) is kept under review and further updated as the undertaker considers circumstances require.~~*
- (5) *The harbour authority must ensure that the updated navigation risk assessment approved pursuant to sub-paragraph (3) is kept under review and further updated if:*
 - (a) *the harbour authority considers that an update is necessary; or*
 - (b) *a request is made from the undertaker, the harbour authority considers that circumstances require it.**~~In updating the navigation risk assessment the undertaker must consult the Navigation Working Group in any case where material changes are proposed to be made by the undertaker, and the undertaker must submit the updated navigation risk assessment to the harbour authority for its approval, which must not be unreasonably withheld.~~*
- (6) *Where material changes are proposed to be made to the navigation risk assessment by the harbour authority under sub-paragraph (5), it must first consult with the PMSC Stakeholder Group.*
- ~~(7) *Any navigation risk assessment updated by the undertaker pursuant to sub-paragraph (5) must be submitted to the harbour authority for its approval, which must not be unreasonably withheld.*~~

(7) The construction and operation of the new bridge must be carried out in accordance with the recommendations of the updated navigation risk assessment produced pursuant to sub-paragraph (2) or any further updated navigation risk assessment produced pursuant to sub-paragraph (5)."

11.11 The 'PMSC Stakeholder Group' is defined as follows:

"the PMSC Stakeholder Group" means the group maintained and consulted by the harbour authority in accordance with its duties under the Port Marine Security Code, which is responsible for the consideration of navigational issues arising in respect of the dDCO, including under Article 40 and Schedule 2, for which the undertaker is a member as the highway authority for the new bridge"

12. Schedule 12, Deemed Marine Licence ("DML")

- 12.1 ABP has a number of concerns with the DML, particularly in respect of matters relating to dredging and disposal and the potential for these matters to impact on ABP's own marine licence.
- 12.2 **Paragraph 3(2)(i)(cc)** – Minor drafting error – the word 'situation' should be substituted by the word 'siltation'.
- 12.3 **Paragraph 3(2)(i)(ee)** – This provide the Applicant the right to remove/relocate moored vessels etc. It is important that this power is subject to Article 21 of the dDCO.
- 12.4 **Paragraph 8(3) (Marine Pollution Contingency Plan)** - This provision requires the Applicant to consult with ABP on a Marine Pollution Contingency plan. In this context, ABP notes that a scale of charges for undertaking this work will need to be agreed in advance with the Applicant.
- 12.5 **Paragraph 10 (Concrete and Cement)** – ABP, as SHA, will need to monitor any concrete or cement activities that are undertaken within the Port estate, to ensure these matters do not enter harbour waters.
- 12.6 **Paragraph 15 (Disposal at Sea)** – ABP is concerned about the impact on this condition on ABP's marine licence to dispose dredged material at sea, as both marine licenses will utilise the only licensed disposal ground in this area, TH5. In particular, there has not been any assurance provided that the Applicant's dredge arisings will not

be counted against ABP's permitted disposal limit of 200,000 tonnes per year. This is important, given that there is no disposal quantity specified in the DML. If the Scheme means that ABP's existing marine licence area disposal area is fully utilised, it could potentially limit ABP's ability to conduct its own maintenance dredging.

12.7 **Consultation** – ABP has not been consulted by the MMO or the Applicant in respect of the DML, which ABP considers is unacceptable, given that it is the SHA for the area within which the works will be undertaken. The MMO often undertake consultation with the relevant SHA where a marine licence application falls within its area of jurisdiction, particularly where the proposed licensable works could have a significant environmental effect.

12.8 ABP also notes that the DML requires the licence holder to undertake consultation with the Environment Agency in respect of a number of conditions applying to the DML. In this case, it is unclear why ABP, as the SHA, should not be included as part of consultation requirements under the DML, particularly as any effects are likely to be greater to the SHA functions than those of the Environment Agency.

12.9 As such, ABP requests that reciprocal consultation and approval with the 'Harbour Authority' is included in the following conditions of the DML:

- a) Condition 4 – Construction Method Statement;
- b) Condition 6 – Maintenance Dredging Method Statement;
- c) Condition 8 – Marine Pollution Contingency Plan;
- d) Condition 10 – Concrete and Cement; and
- e) Condition 11 – Coatings and Treatments.

13. **Paragraph 53 (ABP Protective Provisions) - Definition of "Plans"**

13.1 ABP considers that this definition should not include references to "*any navigation risk assessment updated under Requirement 11(2) or 11(4)*". As stated above, once the NRA is finalised by the Applicant and approved by ABP, it must be incorporated within the existing risk assessments relating to the Port, and ABP, as SHA, will be responsible for managing and maintaining that risk assessment. As such, the process relating to the update of the NRA should be confined to the mechanism set out in

Requirement 11 – as amended above – to ensure that there is no future confusion regarding the approval mechanism for review and updates to the NRA.

- 13.2 In addition, the inclusion of the NRA in the definition of 'Plans' means that it would be subject to the requirements of Paragraph 55(2)(a) – whereby any approval of an updated NRA "*must not be unreasonably withheld*" by ABP. This is wholly inappropriate, as this is a fetter on ABP's SHA duties and obligations.

Proposed Amendments to Paragraph 53

- 13.3 We understand this position is agreed by the Applicant, however to ensure there is no doubt, ABP considers that its concerns with Paragraph 53 could be satisfactorily addressed if an addition is made as follows:

“plans” includes sections, descriptions, drawings, specifications, ~~any navigation risk assessment updated under Requirement 11(2) or 11(4)~~, proposed method statements and hydraulic information, including but not limited to information as to the discharge of water and materials;

14. Paragraph 54(5) (ABP Protective Provisions)

- 14.1 It is wholly inappropriate for ABP to be subject to a 'deemed approval' requirement, given the impact of the powers conferred by the dDCO on the Port and ABP's statutory undertaking. In addition, the 30 day timescale specified under Paragraph 54(5) is inappropriately short. ABP is responsible for operating a Port, which takes a significant amount of time, effort and resources, and as such, it may not always be practicable for ABP to comply with such a limited timescale. In those circumstances, it is not appropriate that ABP's consent is simply 'deemed' to have been provided.
- 14.2 Alternatively, ABP considers that this provision is more appropriately termed as a 'deemed refusal' requirement, whereby if ABP fails to express its approval for a request within 30 days, the request is deemed to have been refused. This is necessary due to the practical and varying operational requirements of ABP. Relevantly, in respect of the EA, Paragraph 19(3) of Schedule 13 provides for a deemed refusal provision – it is clear the 'deemed refusal' mechanism has already been accepted by the Applicant and has precedent. As a similar statutory body with a range of important functions and duties with which it is statutorily required protect, ABP requests a reciprocal provision.

- 14.3 ABP notes that there may be circumstances where it is unable to comply with the strict 30 day timescale, for example, due to pressing operational requirements and lack of resourcing, but it is nevertheless committed to determining the request for consent as soon as possible. In such circumstances, ABP considers that it is appropriate for it to have the ability request an extension to the 30 day timescale from the Applicant in order to provide further time for ABP to provide its consent.
- 14.4 ABP considers that this flexibility to extend the timescale, where circumstances require it, coupled with the safeguard under paragraph 54(4) which requires ABP to not unreasonably withhold its consent, strikes the appropriate balance between adequately protecting ABP's statutory duties and providing the Applicant with sufficient assurance regarding the consenting process.

Proposed Amendments to Paragraph 54

- 14.5 ABP concerns with Paragraph 54 could be satisfactorily addressed if an addition is made as follows:

"(5) If the harbour authority fails to express its refusal or approval of any request for a consent under—

- (a) sub-paragraph (1) in respect of temporary possession powers;*
- (b) sub-paragraph (2); or*
- (c) sub-paragraph (3),*

within 30 days of such a request having been delivered to it, and the harbour authority has not requested an extension of time to give its consent from the undertaker prior to the expiration of the 30 days, such a request is deemed to have granted been refused by the harbour authority.

(6) If the harbour authority fails to express its approval of any request for a consent under this sub-paragraph (1), (2) or (3) at the expiration of the extension to time granted by the undertaker under sub-paragraph (5), such a request is deemed to have been refused by the harbour authority."

15. Paragraph 55(4) (ABP Protective Provisions)

- 15.1 Similarly to the above, it is not appropriate that ABP's consent is simply 'deemed' to have been provided in circumstances where it has been unable to respond to the Applicant within 30 days.

- 15.2 For the reasons stated above, ABP considers that this provision is more appropriately termed as a 'deemed refusal' requirement.

Proposed Amendments to Paragraph 55

- 15.3 ABP's concerns with Paragraph 55 could be satisfactorily addressed if an addition is made as follows:

*"(4) If the harbour authority fails to express its **refusal or disapproval** of any plans or arrangements within 30 days after they have been delivered to it under sub-paragraph (1), **and the harbour authority has not requested an extension of time to give its consent from the undertaker prior to the expiration of the 30 days, it is deemed to have ~~approved~~ refused them.***

*(5) **If the harbour authority fails to express its approval of any plans or arrangements delivered to it under sub-paragraph (1) at the expiration of the extension to time granted by the undertaker under sub-paragraph (4), such a request is deemed to have been refused by the harbour authority.***"

16. Paragraph 62 (ABP Protective Provisions)

- 16.1 Where any tidal work is abandoned or falls into decay, it is imperative that the Applicant is required to take steps to prevent a danger to navigation which are acceptable to the satisfaction of ABP, as SHA.

- 16.2 As such, ABP is concerned that this principle conflicts with paragraph 62(4), which states that this paragraph does not apply where the work is managed and operated in accordance with an approval given by ABP. All tidal works can only be constructed and managed by the Applicant with ABP's prior consent, pursuant to paragraph 55. Given the design life of the bridge, it is foreseeable that future circumstances may mean that tidal works may become a danger to navigation, even if they are being managed and operated in accordance with a consent provided by ABP many years' prior. For this reason, the restriction of powers set out in Paragraph 62(4) is wholly inappropriate and should be omitted.

- 16.3 Further, where the Applicant is required to take steps to prevent a danger to navigation and but does not do so to the satisfaction of ABP, it is unacceptable for the matter to have to wait until it can be settled by arbitration. Matters of navigation safety will require immediate response or become a potential impediment to the safety of the

harbour and its users. As such, ABP considers that it is inappropriate that any disputes should be settled by arbitration, as is envisaged by Paragraph 62(5). As the SHA with ultimate responsibility for the Port, the Applicant must be required to comply with all reasonable steps required by ABP – as it already provided for in Paragraph 62(1). For this reason, Paragraph 62(5) is wholly inappropriate and should be omitted.

Proposed Amendments to Paragraph 62

16.4 ABP considers that its concerns with Paragraph 62 could be satisfactorily addressed if a modification is made as follows:

~~"(4) This paragraph does not apply where any work is being managed and operated in accordance with any approval given by the harbour authority.~~

(4) ~~In the event of a~~ Article 59 (arbitration) does not apply to any difference or dispute between the undertaker and the harbour authority as to the necessity of any steps or works specified in a notice by the harbour authority under this paragraph., ~~such difference or dispute shall be determined by arbitration in accordance with article 59 (arbitration).~~"

17. Indemnity - Paragraph 63 (ABP Protective Provisions)

17.1 ABP considers that the indemnity in the Protective Provisions is inadequate in the context of the proposed Scheme. 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, liability, etc suffered by ABP which it would not have otherwise suffered, caused and/or occurred but for the construction, location and/or operation of the Scheme. Without a further specific indemnity to cover the hazards introduced, effectively in perpetuity, by the Scheme, ABP cannot agree the indemnity in the Protective Provisions, as currently proposed.

17.2 ABP does not repeat its previous submissions regarding the need and scope of the indemnity sought, but instead refers to the following:

- a) Section 20 of ABP's Written Representations (REP3-024);
- b) Issues number DCO3 of ABP's Comments on the Applicant's Response to ABP's Relevant Representations (REP4-029);

- c) Paragraph 9 of ABP's Comments on the First Revised Draft Development Consent Order R1 (REP4-031);
 - d) Part 2 of ABP's Summary of Oral Submissions at Draft DCO examination hearing on 13 February 2019 (REP5-021);
 - e) Supplementary Note on Serious Detriment, Annex 3 to Summary of Oral Submissions at the CA hearing on Friday 8 March (REP7-007)
 - f) Supplementary Note on the Port of Newport, Annex 4 to Summary of Oral Submissions at the CA hearing on Friday 8 March (REP7-007); and
 - g) 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 (REP9-011).
- 17.3 Relevantly, the indemnity for the Environment Agency, in Paragraph 27 of Schedule 13, does include a general indemnity in respect of the 'operation' of the specified works. It is unclear why the Applicant thinks it is appropriate to offer this to the EA, but not to the harbour authority. ABP requests that Paragraph 63(d) & (e) also includes references to the 'operation' of a specified work.
- 17.4 To assist with the ExA and the Applicant's understanding of the types of occurrences that ABP considers should be covered by the indemnity, ABP has previously provided (at paragraph 20.16 of its Written Representations and paragraph 12.9 of its oral submissions made at the examination on 13 February 2019) the following non-exhaustive list of occurrences and circumstances:
- a) Vessel collisions, either with other vessels (due to the existence of the specified work) or with the specified work (including associated structures, parts of components);
 - b) Collisions or contact between cranes or other vehicles/equipment in Lowestoft Harbour and the specified work (and associated structures);
 - c) Vehicles crashing through the barrier of the specified work, 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 specified work within the vicinity of Lowestoft Harbour (i.e. due to reduced visibility);

- e) Stoppage, disruption or delay to road, rail or marine traffic to, from and within Lowestoft Harbour, including restrictions on accessing Lowestoft Harbour;
- f) An accident or emergency or other occurrence within the vicinity of the specified work, whether on land or water or both, which affects the operation of the specified work or vehicles using the specified work or traffic or vessels in, or approaching, Lowestoft Harbour or causes any stoppage or disruption or delay of road, rail or marine traffic;
- g) The dropping of objects from the specified work;
- h) Pollution in and around Lowestoft Harbour due to floating debris, or leakage of cargo or other contaminant from the specified work;
- i) Disruption of Lowestoft Harbour radio communications by eg, the specified work structure, malicious act of radio interference on the specified work, effect of contractors' radios;
- j) Disturbance or difficulty occasioned by background lights, e.g. the specified carriageway lighting disrupting or conflicting with navigation lights, or causing glare to vessel masters;
- k) Terrorism and malicious acts; and
- l) Lightning strike on the specified work causing damage and/or electricity blackout.

17.5 ABP is willing for the above list to be incorporated into the indemnity, if the Applicant considers it would assist with the statutory interpretation of the types of events, which give rise to liability by ABP that ought to be covered by the indemnity.

17.6 In the context of the indemnity, it is important to understand that ABP is subject to liability that arises by virtue of its statutory undertaking, which comprises both the commercial port operations that ABP carries on at the Port as the statutory port undertaker and the duties and obligations that fall to it as the SHA. ABP is one single corporate entity and as such, in the context of any indemnity claim, there is no distinction between liabilities arising as a result of ABP as commercial operator or statutory authority, as this all forms part of ABP's statutory port undertaking.

17.7 The ExA should be aware that ABP is also seeking contractual comfort from the Applicant in the form of a comprehensive Indemnity and Insurance Agreement. In

ABP's view, the provision of such contractual comfort does not in any way obviate the need for the dDCO to contain indemnity provisions covering the operation of the specified work – rather the two would complement each other with the contractual indemnity going into detail on, for example, minimum insurance requirements which clearly goes beyond the ambit of the dDCO.

Proposed Amendments to Paragraph 63

17.8 ABP's concerns with Paragraph 62 could be satisfactorily addressed if an addition is made as follows:

- "(1) Without limiting the other provisions of this Part, the undertaker is to be responsible for, and must make good to the harbour authority, all losses, costs, charges, damages and expenses however caused which may reasonably be incurred by or occasioned to the harbour authority by reason of or arising from or in connection with—*
- (a) the perusal of plans and navigation schemes and the inspection of a specified work by the harbour authority or its duly authorised representative;*
 - (b) the carrying out of surveys, inspections, tests and sampling within Lowestoft Harbour and the approaches to Lowestoft Harbour—*
 - (i) to establish the marine conditions prevailing prior to the construction of any of the tidal works in such area of Lowestoft Harbour as the harbour authority has reasonable cause to believe may subsequently be affected by any accumulation or erosion which the undertaker is liable to remedy under paragraph 58; and*
 - (ii) where the harbour authority has reasonable cause to believe that the construction of any of the tidal works is causing or has caused any such accumulation or erosion;*
 - (c) any update of the navigation risk assessment relating to ~~the whole of~~ Lowestoft Harbour to the extent that it is required ~~as a result of any updated navigation risk assessment approved by the harbour authority~~ under Requirement 11~~(3) or 11(5)~~;*
 - (d) any update of the Scheme of Operation required under Requirement 40;*
 - (e) any consultation required to be undertaken by the harbour authority in accordance this Order;*
 - (d) the construction, **operation**, maintenance or failure of a specified work, or the undertaking by the harbour authority of works or measures to prevent*

or remedy danger or impediment to navigation, or damage to port land arising from such construction, maintenance or failure, including but not limited to—

- (i) any additional costs of dredging incurred by the harbour authority as a result of contamination of the lakebed caused by the construction or maintenance of the specified work;
 - (ii) damage to any plant or equipment belonging to the harbour authority and located on port land, or to any port land or building on port land, that is caused by the construction, *operation*, maintenance or failure of a specified work; and
 - (iii) the failure of the opening mechanism of the new bridge; *and*
- (e) any act or omission of the undertaker or its servants or agents whilst engaged in the construction, *operation* or maintenance of a specified work or in the act of operating the opening mechanism of the new bridge, save where such acts or omissions are undertaken by the harbour authority; *and*
- (f) *any consultation or consent required to be undertaken or provided by the harbour authority under the Order.*

(2) *In sub-paragraph (1) -*

- (a) *"costs" include:*
 - (i) *expenses and charges;*
 - (ii) *staff costs and overheads; and*
 - (iii) *legal costs,*
- (b) *"losses" includes-*
 - (i) *Direct, indirect and consequential financial loss, including loss of profit, loss of use, loss of reputation, loss arising from business interruption;*
 - (ii) *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 specified work and costs of repair and/or reinstatement, including the costs of repair or reinstatement of port facilities, and/or the specified work;*
 - (iii) *Loss caused by delay;*
 - (iv) *Loss caused by pollution;*
 - (v) *Loss of life;*
 - (vi) *Personal injury; and*

(vii) Occupier's liability.

- (3) Without limiting the generality of sub-paragraph (1), the undertaker must indemnify the harbour authority from and against all claims and demands arising out of, or in connection with, such construction, operation, maintenance or failure or act or omission as is mentioned in that sub-paragraph.*
- (4) For the avoidance of doubt, sub-paragraphs (1) and (3) are intended to provide an indemnity to the harbour authority for:*
- (a) any form of losses of damages whatsoever without limitation suffered by the harbour authority; or*
 - (b) where any claims of whatsoever nature are made against the harbour authority, or*
 - (c) where the harbour authority incurs any form of liability to the undertakers or to any third parties whatsoever without limitation,*
- if the harbour authority would not have suffered that loss or damage or such a claim would not have been made or such liability not incurred but for the construction or the existence or the location or the operation or use of the specified work and whether the loss or damage or claim or liability was caused either directly or indirectly by the fact of and effects of the construction or the existence or location or the operation or use of the specified work.*
- (5) Nothing in this paragraph imposes any liability on the undertaker to the extent that any losses, costs, charges, damages, expenses, claims or demands referred to in sub-paragraph (3) are attributable to negligence on the part of the harbour authority or of any person in its employ or of its contractors or agents, including negligence in the course of operating the opening mechanism of the new bridge.*
- (6) The harbour authority must give to the undertaker notice in writing of any claim or demand for which the undertaker may be liable under this paragraph and no settlement or compromise of any such claim or demand may be made without the consent in writing of the undertaker."*