

(ABP: 1 of 2 – DL11)

Proposed Lake Lothing Third Crossing (TRO10023)

Associated British Ports (20013261)

Response to the Applicant's Deadline 10 submissions and the Examining Authority's draft Development Consent Order

This document sets out submissions made by Associated British Ports ("ABP") in relation to the Applicant's Deadline 10 submissions and the Examining Authority's draft Development Consent Order.

To assist the ExA, this document is split into the following parts:

- **Part 1** – ABP's comments on the Examining Authority's draft Development Consent Order ("dDCO"), which also incorporates ABP's response to:
 - a) revision 6 of the dDCO, submitted by the Applicant at Deadline 10 (REP10-070); and
 - b) comments made by the Applicant in relation to ABP's proposed changes to the dDCO submitted by ABP at Deadline 10, which are set out in Section 2 of the "*Summary of Applicant's Oral Submissions Hearings of 14 May and Responses to Interested Parties' Deadline 9 Submissions*" (REP10-080);
- **Part 2** – ABP's comments on the "*Summary of Applicant's Oral Submissions Hearings of 14 May and Responses to Interested Parties' Deadline 9 Submissions*" (REP10-080);
- **Part 3** – ABP's comments on the "*Scheme of Operation for the new bridge – Revision 1 – tracked*" (REP10-075) and the further revised Scheme of Operation, Revision 2 (Doc Ref SCC/LLTC/EX/199, which was provided to ABP by the Applicant on 4 June 2019);
- **Part 4** – ABP's comments on the "*Compulsory Acquisition Negotiations and Objections Tracker – Revision 5*" (REP10-073);
- **Part 5** – ABP's comments on the "*Interim Code of Construction Practice – Tracked – Revision 3*" (REP10-079); and

- **Part 6** – ABP's comments on "*Document 7.5, Design Report - Appendix 11 – Fender Design Report*" (APP132-b).

In addition, **Annex 1** to these representations is a copy of the letter (and attachments) sent by ABP to the Secretary of State on 31 May 2019, in respect of the LLTC Scheme and Section 127 of the Planning Act 2008.

Where appropriate, these responses should be read in conjunction with ABP's Written Representations and other submissions made by ABP.

In submitting these representations, the ExA should be in no doubt as to the continuing strength of ABP's objection to the LLTC Scheme as presently promoted. As confirmed in ABP's closing submissions, ABP does not object to the principle of a third crossing of Lake Lothing – it does, however, strongly object to a crossing of Lake Lothing being constructed through the middle of ABP's operational Inner Harbour.

ABP has made it very clear throughout the examination process is that it cannot accept the bridge in the location proposed by the Applicant unless the serious detriment, which the bridge will clearly cause to the Port, is genuinely mitigated.

In addition, ABP is not able to accept the introduction of what will clearly be a hazard built across the Inner Harbour, unless the Applicant is prepared to indemnify ABP for the risks and potential losses that it will be introducing in perpetuity.

In light of the above, ABP is firmly of the view that any decision to approve the LLTC Scheme as promoted would be unreasonable on the facts and in law. This is particularly so bearing in mind that in terms of process, and whilst ABP acknowledges, with thanks, the time made available by the ExA for consideration of the issue of "serious detriment" as applied by the Planning Act, the examination process has, as far as ABP is concerned, been less than effective as a result of the means employed by the Applicant to promote their case.

The Applicant's basic approach throughout the process, including during negotiations, at the oral examination sessions and in their written representations, has seemingly been to assume that as the Secretary of State has been persuaded by them that the LLTC project merits NSIP status, they no longer need to satisfy conventional standards of proof to substantiate their case.

As a consequence, whilst ABP has substantiated its case against the location of the LLTC Scheme by the provision of expert evidence, the Applicant has proceeded from the basis that, with a section 35 Direction behind it, the normal rules of evidence do not apparently apply to

it. As a consequence, oral examination sessions and the written representation stages have not really proceeded on the basis of a genuine mutual exchange of professionally substantiated evidence. Rather, it has been more a case of ABP providing the evidence and then the Applicant, rather than rebutting ABP's case with meaningful external evidence, simply employing what can, at best, be termed as "spoiler" tactics – i.e. raising questions and making statements with a view to requiring ABP to return to its consultants to produce yet further evidence to rebut what has often proven to be spurious points raised by the Applicant.

The ExA are already aware of ABP's concern that the Applicant has not attempted, at any time, to produce evidence based on genuine knowledge of Port operations. For the Applicant to produce at the penultimate deadline a list of curriculum vitae of individuals, some 50 pages in length, alleging marine experience and input during the examination process is a somewhat senseless exercise. ABP has not sought to question the expertise that may be available within the Applicant's various consultant companies. It does, however, question whether that expertise has actually been called upon in relation to this project and in this context. Further, ABP considers that it is telling that when the Applicant previously produced curriculum vitae identifying the individuals in the Applicant's team with a genuine knowledge and understanding of practical port operations, details of the individuals now being identified at Deadline 10 were singularly absent.

The ExA will understand, therefore, that whilst ABP has attempted to assist the examination by explaining its very real concerns in relation to the LLTC Scheme and its potential impact on the Port, those concerns have essentially been placed in a vacuum, as far as any substantive evidence in response from the Applicant is concerned.

It is a result of the Applicant's failure to produce any meaningful evidence, to support its stated view that the construction of a bridge through the middle of an operational port will not cause serious detriment, that ABP has had no choice but to write directly to the Secretary of State asking him to exercise his powers under the Act not to approve the compulsory acquisition of part of ABP's statutory port estate. A copy of that letter is attached to these representations as Annex 1 and full reference is also made to this letter in ABP's closing submissions.

These representations for Deadline 11 should, therefore, be read in conjunction with the comments above and the ExA should be aware that, whilst ABP is submitting its response in relation to both the Applicant's summary document and the draft DCO, they should be in no doubt that ABP continues to be of the view that the LLTC Scheme and the DCO as currently proposed are together fundamentally flawed and will remain so unless the Applicant is prepared to mitigate the serious detriment that its scheme will cause to the Port and provide a

meaningful indemnity to protect ABP in terms of the operational risks that will be introduced into the Port by the LLTC scheme.

In the context of the above, ABP makes the following submissions: –

PART 1 – ABP'S COMMENTS ON THE EXAMINING AUTHORITY'S DRAFT DCO

1. Article 2 – Interpretation

1.1 ABP welcomes the deletion of references to the "Navigation Working Group", and replacement by "the PMSC Stakeholder Group" within the dDCO. Relevantly, however, the new definition of "the PMSC Stakeholder Group" should refer to the "*Port Marine Safety Code*", not the Port Marine Security Code, as this is the relevant national standard document that governs port marine safety.

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

2.1 ABP is pleased that the Applicant has addressed its concerns with this Article and adopted the amendments proposed by ABP. As such, this Article is agreed by ABP, subject to the following qualification.

2.2 ABP reiterates that this Article does not authorise the diversion of Commercial Road at the Port, proposed to be created between Shed 3 and Lake Lothing. As such, the Applicant is unable to undertake the temporary diversion of Commercial Road without the consent of ABP, as the owner of the land affected by the proposed route.

2.3 Relevantly, this consent is not subject to the requirements of Article 61, as ABP would be required to provide such consent in its capacity as owner of the land impacted by the diversionary route, not as the relevant 'street authority' for Commercial Road. As such, as previously stated, it may be that ABP is unable to provide consent for the diversionary route, 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. **Article 20 – Temporary suspension of navigation within Lake Lothing in connection with the authorised development**

3.1 Article 20(3)(a) includes a reference to the 'Navigation Working Group'. Relevantly, however, all references to the Navigation Working Group in the dDCO were deleted by the Applicant in Revision 6 of the dDCO and replaced by references to the "PMSC Stakeholder Group".

3.2 As such, ABP requests that Article 20(3)(a) is amended as follows, to ensure consistency with the rest of the dDCO provisions:

"(3)...

(a) *inform the PMSC Stakeholder Group and the operators of all marinas located on Lake Lothing of the nature of the proposals including when they are intended to take effect and their anticipated duration...*"

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

4.1 ABP acknowledges that the Applicant has largely adopted ABP's proposed amendments to Article 40 of the dDCO, however ABP notes that the Applicant has not addressed ABP's concerns regarding appeals of the Scheme of Operation to the Secretary of State, rather than determination of disputes by arbitration.

4.2 It is unclear why the Applicant considers that it would be *"inappropriate as a matter of public policy"* for anyone other than the Secretary of State to consider this issue and ABP questions what 'public policy' is the Applicant referring to in this context.

4.3 ABP remains of the view that an appropriately qualified arbitrator, who would be experienced to provide an independent decision in respect of navigational matters, is the most appropriate person to determine any issues of dispute between the parties regarding whether or not the Scheme of Operation should be varied or replaced, given the very specialised nature of the matters impacted by the Scheme of Operation.

4.4 The Applicant appears to consider such an arbitrator would be unable to resolve disputes regarding the Scheme of Operation, given such disputes would involve a *"key provision of the statutory regime governing the new crossing"*. ABP, however, does not consider that this has any bearing on the dispute resolution process given the independent nature of the arbitration process. Further, ABP notes that the dDCO contains all of the relevant statutory provisions governing the new crossing, save that

the arbitration process is dis-applied in respect of this single article. As such, it is clear that the Applicant considers it is adequately robust to determine any other dispute that may arise in the context of the dDCO and its current position is, therefore, inconsistent.

- 4.5 Overall, any disputes regarding variations or replacements of the Scheme of Operation that are referred to the Secretary of State would be extremely difficult and very time consuming to resolve, which means there is a real risk that pressing issues may be subject to a protracted process of resolution. As such, ABP considers that the robust arbitration process set out in Article 59 of the dDCO is the most appropriate dispute resolution process applicable to this article.
- 4.6 ABP requests that the ExA reconsider the proposed amendments to Article 40 submitted by ABP at Deadline 10, in respect of dispute resolution process under this article.

5. **Article 45 – Byelaws**

- 5.1 ABP is disappointed that its concerns regarding Article 45(6) have not been addressed, as this provision would act as a fetter upon ABP's statutory functions and powers to make byelaws and as such is unacceptable.
- 5.2 ABP refers to its previous submissions made regarding this article, set out in:
- a) section 6 of REP4-031;
 - b) section 8 of REP5-021; and
 - c) section 6 of REP10-081.
- 5.3 ABP considers that Article 45(6) is not a "mirror" to Article 45(3), as it specifically impacts on ABP's Lowestoft Harbour Byelaws 1993 – not byelaws that are imposed by the Applicant.
- 5.4 Further, ABP also disagrees with the Applicant's view that its requirement for consent is "actually stronger" than that required by ABP, due to the potential impact on provisions of the dDCO. This view appears to be particularly perverse, given that the Applicant appears to consider that its role as Highway Authority for the LLTC is more important than ABP's role as Statutory Harbour Authority, i.e. whereby ABP is responsible for maintaining navigational safety within its area of jurisdiction, which is unduly impacted by the imposition of the LLTC.

5.5 Overall, ABP requests that the ExA reconsider the proposed amendments to Article 45(6) submitted by ABP at Deadline 10, in respect of changes to the Lowestoft Harbour Byelaws 1993.

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

6.1 ABP acknowledges that Applicant has addressed the majority of its concerns with this Requirement. It is imperative, however, that ABP is provided with all information relating to contaminated land and groundwater within the Port as soon as reasonably practicable (including scheme of investigation and risk assessments, reports on findings of the scheme, remediation works, etc), to ensure ABP can take appropriate action to ensure that any issues relating such contamination does not adversely impact on tenants and other users of the Port.

6.2 ABP is concerned, therefore, that it may not be provided with such information in a timely manner, as it will only be provided with such information from the county planning authority during consultation, which may be up to 8 weeks after such information is available. As such, ABP requests that where any contaminated land, including groundwater, is found within Lowestoft Harbour, the Applicant must provide ABP with copies of all relevant information at the same time as the County Planning Authority, to ensure it can act on such information in a timely manner.

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

7.1 ABP is pleased that the Applicant has addressed many of its concerns with this Requirement and has adopted some of the amendments proposed by ABP. There are, however, a few outstanding issues that ABP, as SHA, simply cannot accept.

7.2 **Requirement 11(3)** – ABP cannot accept that its approval of the updated NRA "*must not be unreasonably withheld*". As SHA, ABP is ultimately responsible for ensuring navigational safety is maintained within the Port, and it cannot accept this fetter on its statutory functions. ABP has repeatedly demonstrated throughout the NSIP process that it always acts in accordance with its statutory duties and obligations and within its statutory powers – despite inferences to the contrary by the Applicant. As such, the Applicant's insinuation that ABP may refuse consent under this requirement for

"spurious reasons" in order to delay construction of the LLTC is wholly inappropriate and objected to in the strongest terms.

7.3 The process for applications made to a discharging authority for consent under a requirement is already appropriately dealt with under Requirement 17. In particular, Requirement 17(3) provides that:

"(3) In determining any application made to the discharging authority for any consent, agreement or approval required by a requirement contained in Part 1 of this Schedule, the discharging authority may—

(a) give or refuse its consent, agreement or approval; or

(b) give its consent, agreement or approval subject to reasonable conditions,

and where consent, agreement or approval is refused or granted subject to conditions the discharging authority must provide its reasons for that decision with the notice of the decision."

7.4 As such, ABP considers that it is entirely inappropriate for the Applicant to impose an additional obligation on ABP, from other discharging authorities, to ensure that its consent under Requirement 11 "*must not be unreasonably withheld*".

7.5 Further, the Applicant's comment that 'the wording is not unusual in DCOs' is clearly inapplicable in these circumstances, and that the additional obligation imposed by the Applicant is not required to ensure ABP "*acts both reasonably and in compliance with its statutory obligations*".

7.6 As such, ABP requests that Requirement 11(3) is amended as follows:

"(3) Following the update of the preliminary navigation risk assessment 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.~~"

7.7 **Requirement 11(6)** – It is unclear why the Applicant considers that reference to the arbitration procedure under Article 60 is required, given that all requirements are subject to an appeals process, under Requirement 19 of Schedule 2. As above, it is unclear why the Applicant considers that ABP should be subject to a different dispute resolution process, rather than relying on the appeal mechanism which applies to other discharging authorities.

8. **ABP's Protective Provisions (Part 5 of Schedule 13)**

8.1 **Paragraph 53 (Definition of "Plans")** – This definition is accepted by ABP.

8.2 **Paragraph 54** – This paragraph is accepted by ABP. ABP is disappointed, however, that the Applicant considers that ABP may use such a provision "*as a way to frustrate the Scheme by continually refusing approval of the detail*". ABP always has, and will continue to, act reasonably and in compliance with its statutory obligations. As such, the Applicant's inference that it would act in any other way in order to purposefully utilise this provision to cause mischief to the Scheme is strongly objected by ABP.

8.3 **Paragraph 55** – This paragraph is not accepted by ABP, as this is still a 'deemed approval' provision under paragraph 55(4). As previously stated, 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.

8.4 ABP notes, however, that it appears from the Applicant's comments in REP10-080 that it intended for this to also be a 'deemed refusal' provision. It may simply be a drafting error that not all of ABP's proposed amendments have been picked up in the latest draft of the dDCO.

8.5 As such, ABP requests that Paragraph 55(4) is amended as follows:

*"(4) If the harbour authority fails to express its disapproval refusal or approval 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 which the undertaker has granted, acting reasonably, it is deemed to have **refused approved** them."*

8.6 **Paragraph 63 (Indemnity)** – ABP remains of the view that the indemnity in the Protective Provisions is inadequate in the context of the proposed Scheme. In responding to the Applicant's specific comments set out in REP10-080, ABP submits as follows:

a) **Paragraph 63(1)(c)** – This provision should not be confined simply to changes to the NRA required as a result of variation or replacement of the Scheme of Operation. There are a myriad of other reasons why future changes to the NRA may be required over the life of the bridge apart from those arising as a consequence of the Scheme of Operation, and it is only reasonable that any updates to the NRA should be borne by the Applicant. As such, ABP requests

that the ExA adopts the amendments proposed to this provision by ABP at Deadline 10.

- b) **Paragraph 63(1)(d)** – This amendment is accepted by ABP.
- c) **Paragraph 63(1)(e)** – The statutory regime for the NSIP imposes a large range of additional consent and consultation requirements on ABP, only some of which will be specifically requested by the Applicant, as others are required by the dDCO. ABP considers that it is inappropriate that it should bear the time and expense of these consultations, whether or not specifically requested by the Applicant. As such, ABP considers that the phrase "*by the undertaker*" should be deleted from this provision.
- d) **Paragraphs 63(1)(f) and (g)** – The Applicant's failure to include indemnity for the "operation" of the Scheme is totally unacceptable. ABP's position on this matter is as follows:
 - i. It is clear that the indemnity is not "very wide ranging", as is incorrectly asserted by the Applicant. There are in fact innumerable future circumstances directly related to the operation of the bridge which may give rise to liability by ABP, which will clearly not be covered by the current indemnity provisions. The inference that the indemnity covers 'all losses...however caused' and 'all claims and demands arising' is incorrect, as the indemnity only relates to those losses, claims and demands specifically relate to specified circumstances (primarily relating to the construction, maintenance or failure of a specified work). It is clear, therefore, that liability arising as a direct result of the operation of the LLTC will not be covered by the indemnity and it is disappointing that the Applicant is being so deliberately misleading bearing in mind that Counsel for the Applicant at the last oral examination specifically stated that the Applicant was refusing to give an indemnity to ABP for losses incurred and risks arising during the operation of the LLTC.
 - ii. The Applicant's attempt to justify indemnifying the Environment Agency for liability resulting from the 'operation' of the LLTC, but not ABP, is both wholly unsatisfactory and entirely unsustainable. In particular, the Applicant's rigid reliance on what it considers to be appropriate 'precedents' from other statutory schemes/statutory undertakers is tiresome, and in conflict with its comments regarding the Environment

Agency's indemnity provisions, which have "*arisen and evolved over the years*". It is clear that development consent orders are flexible statutory instruments that are required to respond to the specific issues arising as a result of the NSIP in question. As such, it is necessary for the Applicant to specifically consider and respond to those issues, rather than trying to simply impose provisions relating to other projects and undertakers.

- iii. That said, ABP considers that the Applicant has in any case failed adequately to justify why the Environment Agency should be provided with an indemnity for the operation of the LLTC, and not ABP. It is entirely possible that once the LLTC has been constructed and is operational, circumstances may occur that may give rise to liability against ABP that is not expected by the Applicant. In particular, these circumstances may not "*be considered the fault of the Applicant*", but ABP may nevertheless be liable - for example, where dust, smoke or other emissions from vessels, cargo or other general port operations, cause an accident, collision or other type disruption on the LLTC or within the vicinity of Lowestoft Harbour due to reduced visibility. If this occurs, it is entirely inequitable that ABP should bear any costs, losses, etc associated with such claims, simply because the Applicant chose to construct and operate the LLTC through the middle of an operational port – against ABP's strongest objections. As such, the indemnity must cover all claims, losses, etc which ABP would not have otherwise suffered, caused and/or incurred but for the construction, location and/or operation of the LLTC.
- iv. In respect of any liability arising from the 'operation' of the LLTC, ABP would only be indemnified to the extent that such claims, etc, are able to be brought against ABP in the first place (as is agreed by the Applicant in REP10-080). Despite ABP providing at Deadline 10 a detailed list of circumstances which are not currently covered by the indemnity – to which the Applicant has singularly failed to respond – it appears that the Applicant considers that such claims are unlikely to occur. For example, the Applicant has merely referred to one limited example - of a driver suffering a heart attack and driving off the bridge into a warehouse on Port land – to justify its reasoning that such an event is "inherently unlikely" to occur and in any event, the Applicant considers ABP would not be liable. If this is the Applicant's view in respect of all possible future

scenarios relating to the operation of the bridge in perpetuity (aside from those limited circumstances covered by the indemnity, such as incidents caused through the fault of the Applicant), then it is unclear why the Applicant still refuses to indemnify ABP for its liability incurred as a result of the operation of the LLTC throughout the life of the scheme.

- 8.7 Overall, ABP strongly maintains the view that, given the circumstances of the LLTC scheme and in the context of ABP's statutory duties and obligations in terms of safety and navigation, there can be no justification for requiring ABP to be responsible for, and bear liability for, the risks that will arise in perpetuity as a result of the introduction of a hazard into an operational port by a third party. Without an adequate indemnity in place, ABP could find itself corporately liable for the actions of others over whom it has no control.
- 8.8 As such, requests that the ExA reconsider the proposed amendments to Paragraph 63 of ABP's protective provisions submitted by ABP at Deadline 10, in respect of changes to the indemnity.

PART 2 – ABP'S COMMENTS ON THE SUMMARY OF APPLICANT'S ORAL SUBMISSIONS HEARINGS OF 14 MAY AND RESPONSES TO INTERESTED PARTIES' DEADLINE 9 SUBMISSIONS

9. Legal Side Agreements

- 9.1 The discussions between the parties relating to the Legal Side Agreements are still at a very early stage and Heads of Terms have not yet been agreed between the parties.
- 9.2 ABP disagrees with the Applicant's view that "*ABP's approach appears to be that unless the Applicant 'gives' on the 'big ticket' mitigation items, it is not willing to negotiate the side agreement and associated property*". Such an assertion is a worrying misrepresentation of the actual position designed, it can only be presumed, to mislead the ExA. In fact, ABP's inability to advance negotiations between the parties has been exacerbated by the fact that ABP has been waiting on a response from the Applicant in respect of the basis for negotiations regarding the proposed Legal Side Agreements, including cost undertakings, head of terms, etc. ABP only received a response from the Applicant in respect of these matters on the morning of 4 June

2019. As such, it has been unable to make any substantive progress regarding these negotiations prior to this time.

9.3 ABP also considers that the available evidence clearly demonstrates that the Scheme will cause serious detriment, and that mitigation measures requested by ABP are necessary in order to address some of the detriment caused by Scheme. Although the Applicant asserts that it has "*sought to engage with ABP on further measures that could be taken to meet or allay its concerns*", ABP considers that the Applicant's negotiations to date have not been undertaken with a genuine intent to address ABP's concerns – despite ABP providing the Applicant with a myriad of information regarding the requested proposed mitigation measures.

9.4 It is clear that ABP will be unable to reach an agreed position with the Applicant in respect of any potential Legal Side Agreements prior to close of the examination. It may be that negotiations will extend beyond the conclusion of the examination in an effort to continue to resolve outstanding matters, however at this stage, ABP is not confident that such a position will be able to be reached between the parties.

10. **Permanent acquisition of land and extent of compulsory acquisition powers**

10.1 The Applicant has not requested any detailed proposals from ABP regarding the long leasehold proposition prior to its comments made at Deadline 10.

10.2 As stated above, ABP is still awaiting a response from the Applicant in relation to the basis for negotiations regarding the proposed Legal Side Agreements, of which a long leasehold proposition and commitment to dedicate the relevant land as highway may potentially form part. Once this position and the Heads of Terms have been agreed between the parties, ABP will be able advance this matter further with the Applicant.

11. **Permitted development rights**

11.1 As the LLTC has a limited 'life' of 120 years, after which time the bridge could potentially be decommissioned, ABP considers it is wholly relevant to consider the potential impact to its long term permitted development rights.

11.2 ABP disagrees with the Applicant's position in respect of future permitted development rights, and in this regard, rather than simply reiterate points, ABP relies upon

submissions it has previously made in respect of this matter, including submissions set out in REP8-010 and REP9-011.

12. **Vehicular access and Commercial Road**

- 12.1 Relevantly, the only "reasonableness" test in respect of consent required to be provided by ABP under Article 11 relates to the ABP's consent required to temporarily divert Commercial Road as the relevant Street Authority (by virtue of Article 63). Conversely, there is no "reasonableness" test imposed in respect of ABP's need to provide consent, as landowner of the port estate, for the Applicant to utilise private land outside of the dDCO limits in order to facilitate the diversionary route.
- 12.2 Further, if ABP is not able to consent, as landowner, to the imposition of the diversionary route over its land, the Applicant will be unable to utilise the arbitration provisions set out in Article 62 of the dDCO, as the land in question falls outside the dDCO limits and would not constitute a 'difference under a provision of the Order'. As such, the issue of consent for the imposition of a diversionary route over port land (as opposed to the temporary diversion of Commercial Road) is an entirely private matter between ABP (as landowner) and the Applicant, that falls outside the statutory powers of the scheme.
- 12.3 The Applicant has set out "*a number of mitigation measures which could be explored with ABP at the relevant time*", but as the Applicant has noted, full details of the construction stage are not yet available. As such, there is little sense in ABP giving detailed consideration to such measures at this stage, as these measures may become inapplicable and/or irrelevant. At a high level, however, ABP notes that none of the measures identified by the Applicant would secure the imposition of the diversionary route over the port estate.

13. **Paragraph 53 of ABP's Protective Provisions**

- 13.1 ABP relies on its previous submissions made in respect of this issue, in particular comments made in REP7-007 and REP9-011.

14. **Serious Detriment**

- 14.1 ABP notes that the Applicant's further comments made in respect of serious detriment at Deadline 10 merely repeat points previously made by the Applicant in previous submissions. As such, ABP does not intend to specifically respond to these issues.
- 14.2 Instead, in respect of issues relating to serious detriment, ABP relies on the letter sent to the Secretary of State on 31 May 2019, a copy of which is provided at **Annex 1** to this document. ABP also relies upon its numerous previous submission made in respect of serious detriment throughout the examination process.
- 14.3 As ABP has previously advised on a number of occasions (in particular, in Annex 4 to REP7-007), the M4 Relief Road project in Wales is the only relevant precedent in respect of the LLTC Scheme proposed by the Applicant, given that it represents the only other scheme whereby a road is proposed to be located through the middle of an operational port.
- 14.4 As the ExA is aware, a public local inquiry in relation to the M4 Scheme was held between February 2017 and March 2018 before independent inspectors, who considered the impact of the scheme on Newport Docks and ABP, and in particular, considered whether the scheme would result in serious detriment to the undertaking of the Port of Newport.
- 14.5 By way of update, the Inspectors Report relating to the M4 Relief Road Scheme (Ref APP/16/516215) was publically released by Welsh Government on 4 June 2019. In short, the Inspectors Report concluded that the proposed M4 relief road would cause serious detriment to the Port of Newport. Relevantly, Paragraph 8.195 of the Inspectors Report provides as follows:

"The proposals as originally envisaged in the initial publication of the draft Schemes and Orders would have been seriously detrimental to the undertaking of the Port of Newport in terms of the restriction on shipping and the inadequate provision to accommodate displaced vessels in the South Dock. The impact that the scheme would have had on the businesses of the tenants of ABP would also have been severe and the structural security of the proposed viaduct would have been threatened." (our underlining for emphasis)

- 14.6 The Inspector also concluded that all of the mitigation works proposed by the Applicant, Welsh Government, were required to mitigate the serious detriment that

would otherwise be caused to the Port of Newport by the M4 Relief Road scheme. In this respect, Paragraphs 8.196 *et seq* of the Inspector's Report provides as follows:

"Following the redesign of the scheme adjacent to the proposed viaduct and binding letters of agreement between the parties, the objection from ABP, the Newport Harbour Commissioners, the Port Security Authority and most tenants of ABP have been withdrawn. I draw attention to those agreements, and conclude that they confirm a most satisfactory potential way forward for all concerned, either separately or individually.

I further conclude that all the accommodation works agreed by the parties within the Docks are necessary to avoid the otherwise serious detriment to the undertaking of the Port. Any particular disadvantages to tenants could be met by the consideration of compensation.

I have studied the proposed engineering measures to offset and prevent the potential ship/viaduct collision and I am satisfied that these proposals, when taken together, would reduce the probability of an incident occurring to reasonably acceptable levels. The on-going monitoring and management of these facilities is so important that they should constantly be kept under review."

(our underlining for emphasis)

- 14.7 As such, it is clear that without the provision of all mitigation works agreed between ABP and Welsh Government, part of which included a comprehensive indemnity, supported by commercial insurance that indemnified ABP against all or any damage or losses caused by the existence of the bridge, the M4 Scheme would have resulted in serious detriment to the port and the Welsh Ministers could not, in law, have approved the proposed compulsory purchase.
- 14.8 Relevantly, the First Minister of Wales, the Rt Hon Mark Drakeford has accepted the Inspector's Report and conclusions, but has ultimately decided that the Scheme should not proceed due to the *"affordability of the project in the context of the Welsh Government's overall capital budget"* (paragraph 5.2 of the M4 Relief Road Decision Letter dated 4 June 2019).
- 14.9 As such, the Inspector's decision in the *M4 Relief Road* case provides the ExA with the most specific, relevant and contemporaneous precedent in respect of serious detriment that is equally applicable to the LLTC Scheme. In light of the evidence submitted during the examination in respect of the LLTC Scheme, it is abundantly

clear that the compulsory acquisition of land and rights, together with the construction and operation of a highway through the middle of an operational port, is seriously detrimental to the undertaking of the Port of Lowestoft.

- 14.10 In respect of the Applicant's comments regarding port security and the "additional extended area (223 metres of quay) of the Port" that would be sterilized, in particular, the assertion that ABP "*have suggested that DfT has agreed with ABP's conclusions in this regard*", is a worrying misrepresentation of the discussions between ABP and DfT regarding the impact of the LLTC on port security.
- 14.11 To clarify, ABP suggested that a 'sterilization' area of 50m measured from the edge of the bridge deck/roadway is an appropriate and reasonable buffer to maintain port security, and that a figure of 220m (as opposed to the Applicant's figure of 223m quoted above) is applicable when it relates to larger commercial (ISPS) vessels that are over 70m (and would be closer than 50m to the Bridge Deck). DfT agreed to this position on two separate occasions:
- a) At a meeting between ABP and DfT at the Port on 22 August 2018; and
 - b) this view was set out in a note prepared by ABP on 'Statutory Security Implications Arising from the LLTC Proposal', dated 26 November 2018, which was provided to DfT on 30 November 2018 for review. On 3 December 2018, DfT again confirmed by way of email that they agreed with this view.
- 14.12 As such, the Applicant's assertion that "*DfT has not taken such an assertive position*" in relation to sterilization area required to maintain port security that has been previously advised by ABP is, in ABP's view, incorrect.
- 14.13 In terms of the Applicant's recent meeting with DfT, ABP is concerned that the Applicant has 'forced the hand' of the DfT in order to reduce the safety margin or 'sterilisation area' to 21m, as this clearly conflicts with previous agreements to the contrary provided by DfT to ABP.
- 14.14 ABP is also disappointed that the Applicant arranged a further meeting with DfT without advising or requesting any representation from the relevant Port Facility Security Officer. ABP also questions the accuracy of the meeting note provided by the Applicant at Appendix B, given it contains a number of inaccuracies, including the following:

- a) A TRA can be deemed a requirement for a vessel if the vessel has a higher security level than the port, or if there is a specific threat relating to that vessel, or if a TRA is deemed necessary following completion of a Declaration of Security between the vessel and the port (not only when the port security level is raised). I would suggest that these are more likely examples for a TRA to be established.
- b) The presumption that 500 gross tonne vessels are not regular visitors to the port is very inaccurate.
- c) The comparison of TRAs on berths adjacent to Commercial Road and a TRA adjacent to the LLTC crossing is not a reasonable one given the mechanical advantage that a raised deck would provide for propelling an object. Also there is no point where Commercial Road is even close to 21m from a commercial berth.

14.15 Overall, ABP considers that the meeting note provided by the Applicant at Appendix B is of little value and cannot be taken into account.

15. **Response to ABPmer's comments on the pNRA**

15.1 ABP acknowledges that the Applicant has provided a range of comments in response to ABPmer's peer review of the pNRA (REP9-013). Despite the Applicant's attempt to justify the suitability of the pNRA, ABP, as statutory harbour authority (SHA), remains of the view that the pNRA is wholly deficient, not fit for purpose and cannot be relied upon in relation to the identification and mitigation of navigation risks arising as a result of the Scheme. Given that ABP is the relevant statutory authority with responsibility for navigational risk within the area in which the Scheme is located, its views regarding the deficiencies of the pNRA ultimately take precedence over those of the Applicants – particularly as the Applicant is not an expert in navigational risk.

15.2 The fact remains that there are a number of key elements relating to the Scheme that are outstanding, such as the detailed bridge design and the fender design, which will have a significant effect on the navigational risk assessment. As such, the 'preliminary' nature of the NRA means that it cannot be considered more than a rough draft that should only be provided with very little weight (if any). The Applicant itself acknowledges the very preliminary nature of the pNRA, but considers that this is not an omission or a defect – ABP strongly disagrees with this view.

15.3 ABP notes that Requirement 11 of the dDCO provides that the Applicant is unable to commence construction of the new bridge until the pNRA has been 'updated' by the Applicant. Although ABP welcomes this protection, it considers that instead of a simple 'update', this process will require the Applicant to undertake a full and comprehensive navigational risk assessment, whereby all navigational risks must be properly and robustly assessed to ABP's satisfaction, before ABP (as SHA) will be able to provide its approval of the updated NRA in accordance with Requirement 11(3) of the dDCO.

16. **Appendix A – Technical Support to the Applicant at Examination**

16.1 ABP notes that the Applicant has finally provided a list of 'contributors' which it asserts have provided input into maritime and port matters at the examination. In this regard, ABP notes that the contributors listed by the Applicant are generally engineers, with the exception of Michael Nicolson who is a mariner. Although ABP is confident that the consultants listed by the Applicant are adequately qualified in their respective areas, ABP questions the level that these contributors have actually been involved in the LLTC scheme.

16.2 In this regard, ABP notes that when the Applicant previously produced CV's in March for the experts that it previously stated were involved in the examination process; the only relevant CV's provided in respect of maritime and port matters were for Stephen Horne and Michael Nicholson (REP7-004). Further, Mr Horne's CV stated that his role in relation to the LLTC is "*maritime lead managing assessments of port and navigation related aspects*" and that he has been "*supported by Captain Geoff Nicholson in relation to navigation matters*" - ABP assumes this is meant to be a reference to Michael Nicholson.

16.3 In respect of the 'contributors', ABP further queries the following:

- a) Mr Horne is listed as the author of documents such as the pNRA and Vessel Survey Report, however ABP queries whether Mr Horne has sufficient experience in these areas. Further, if Mr Horne was supported by a further 4 contributors (in addition to Mr Nicholson), as is asserted in Appendix A, ABP queries why this was not highlighted by the Applicant during the examination process?

- b) ABP has been unable to find any evidence that Mr Harvey or Mr Tyler have actually authored or checked any documents. As such, ABP queries their actual level of involvement.
- c) Mr Haydarov does not appear to have any experience in the off-shore wind sector – his experience is predominately container-related. As such, ABP queries whether he is suitable qualified to provide assistance in respect to 'Future CTV business'?
- d) Mr Horne's CV (submitted at Deadline 7) stated that he was supported by Mr Nicholson in relation to navigation matters; however there is no evidence that Mr Nicholson was actually involved in the drafting of specific reports/submissions, and if he was involved, the extent of that involvement is unknown. For example:
 - i. Mr Nicholson is not listed as the author or the checker of any documents submitted by the Applicant.
 - ii. Mr Nicholson did not attend the meeting on port security held with DfT Marine Directorate on 25 April 2019.
 - iii. Mr Nicholson was only involved as an observer during the two of the vessel simulation exercises, and to the best of ABP's knowledge, had no further involvement in this respect.
- e) The Applicant's report on the 'Impact of the Scheme on the Port of Lowestoft' (REP4-015) does not have any author specified – how can ABP be sure that a suitably qualified expert was involved in the drafting of this report (and the subsequent updates)? The table at Appendix A asserts that there was 4 contributors to reports on the 'effect on port operations', but ABP has not been provided with any evidence to support this assertion.

16.4 As such, despite the Applicant providing a range of CV's at this very late stage of the examination process is quite extraordinary. ABP remains of the view that the Applicant has not obtained nor provided suitably qualified and independent expert evidence to support its submissions made in respect of maritime and port related matters.

PART 3 – ABP'S COMMENTS ON THE SCHEME OF OPERATION FOR THE NEW BRIDGE – REVISION 1 – TRACKED

17. Further revised draft Scheme of Operation (Revision 2)

17.1 On 4 June 2019, the Applicant provided ABP with further proposed changes to the draft Scheme of Operation ("dSoO"). Despite the Applicant providing these further revisions on the last possible day, in order to assist the ExA with its consideration of the latest position between the parties, ABP has endeavoured to review and provide its below comments on the revised dSoO, rather than the drafting currently contained in Revision 1 of the dSoO, submitted at Deadline 10 (REP10-075).

17.2 ABP is pleased that the Applicant has addressed many of its concerns with this Requirement and has adopted some of the amendments proposed by ABP. There are, however, a few outstanding issues that ABP, as SHA, simply cannot accept. These outstanding issues are as follows:

17.3 Paragraph 2 (Time Restrictions):

- a) ABP remains of the view that the peak hour restrictions specified in the dSoO should not be more restrictive than the current regime operated by ABP in respect of the A47 Bascule Bridge, as this will result in an in-combination impact arising from the increase in restricted periods and operation of the two bridges. As ABP has previously demonstrated, the 15 minute increase to the AM and PM restricted periods will result in additional delays to vessel transits and consequential time and cost implications for any operators located to the west of the LLTC. In this regard, ABP refers to its submissions set out in REP8-024 and REP10-085. As such, ABP considers that the restricted periods for the LLTC should mirror those that have been in operational in respect of the A47 Bascule Bridge for over 30 years.
- b) The current definition of "tidally restricted vessel" is unacceptable. Unfortunately, as the Applicant has failed to adopt all of ABP's amendments to the definition of "tidally restricted vessel", the definition is still overly restrictive and does not take into consideration the full range of vessels that may be adversely impacted by the proposed AM and PM restricted periods. The Applicant's attempt to restrict this definition to sailing draught conditions and not arrival is wholly unacceptable to the Harbour Master and ABP. In this regard,

ABP refers to its submissions set out in REP8-024 and REP10-085. ABP does query whether the Applicant actually understands the point?

- c) As such, ABP is of the firm view that the amendments to the definition of "tidally restricted vessel" set out by ABP at Deadline 10 must be adopted. In particular, for the avoidance of doubt, ABP considers that a 'tidally restricted vessel' must be defined as follows:

"For the purposes of this paragraph, a vessel is tidally restricted and thus may be given an opening during these hours if, due to its arrival or sailing draught or any other navigational or meteorological restriction, the safest time for it to enter or leave the Port coincides with a bridge restriction period."

17.4 Paragraph 4 (Scheduled Openings):

- a) The Applicant has adopted some, but not all, of ABP's proposed amendments. As a result, the Applicant has attempted to restrict the times that the scheduled openings can be amended as a result of the in-combination effect of the two bridges, to instances relating to "navigational safety". The Applicant's extent to narrowly fetter the Harbour Master's discretion under this paragraph is wholly unacceptable – particularly as variations will have to be made to the scheduled openings due to operational efficiency. As such, the current drafting of this paragraph is unacceptable.
- b) As such, ABP is of the strong view that the following amendments must be adopted:

"In addition to paragraph 3, and subject to prior notification to the LLTC Bridge Operator in accordance with publicised requirements of the harbour authority, small craft and yachts may request passage through the LLTC at the following times, provided that the scheduled LLTC Bridge opening sequence aligns with scheduled opening times of the A47 Bascule Bridge:

Note: the LLTC openings may be permitted before or after the specified times to the extent considered necessary ~~for navigational safety~~ by the Harbour Master, the LLTC Bridge Operator and/or the A47 Bascule Bridge Operator given the circumstances of each case, which will include consideration of factors relating to vessel transit direction, transit time(s), and other vessel movements."

17.5 **Paragraph 8 (Height Clearance):**

- a) The Applicant has adopted some, but not all, of ABP's proposed amendments. In particular, the Applicant has attempted to stipulate that the air draft safety clearance (ADSC) should be 1m, without any provision for flexibility to enable the harbour authority change this clearance as necessary, following the provision of a full and comprehensive navigation risk assessment. It is wholly unacceptable and indeed irresponsible for the Applicant to impose a strict ADSC in a certified document, until such time as the full and comprehensive navigation risk assessment has been undertaken by the Applicant and approved by ABP. As such, ABP, as SHA, must have the discretion to amend the ADSC specified in the dSoO as necessary as a result of the findings of the approved navigation risk assessment.
- b) As such, ABP is of the clear view that the following amendments must be adopted:

""The LLTC has a clearance of 12 metres at Highest Astronomical Tide, which is subject to an air draft safety clearance of 1 metre (or other such minimum air draft clearance as is published by the harbour authority from time to time)."

17.6 For the avoidance of doubt, the remaining paragraphs of the dSoO (i.e. Paragraphs 1, 3, 5, 6, 7, 9, 10, 11 and 12) are acceptable to ABP.

17.7 On 4 June 2019, the Applicant also advised that, as the draft Scheme of Operation contains quite a few obligations on vessels and their masters, it intends to add a new byelaw under Article 46 of the dDCO. The proposed byelaw is as follows:

"Compliance with the Scheme of Operation
37G. A master of a vessel must comply with the Scheme of Operation."

17.8 The purpose of the Scheme of Operation is to set out how the LLTC will be operated, and it only imposes obligations on the Applicant, under Article 41(1) of the dDCO, not on third parties such as port users. As such, the proposed byelaw is unnecessary and does not make sense, particularly as the dSoO will be enforced by the Harbour Master, the LLTC Bridge Operator and the Applicant (as undertaker).

17.9 Although ABP acknowledges that the dSoO sets out commentary for vessel masters and also contains an obligation under paragraph 8 requiring port users to obtain permission prior to transiting under the LLTC (when closed), the proposed byelaw is

not the appropriate statutory route to enforce such obligations on third parties and cannot be accepted in practice or indeed in law.

- 17.10 The appropriate means of ensuring that the requirements of the dSoO are enforceable against port users, is for ABP, as SHA, to make a 'general direction' in due course (i.e. prior to the commencement of operation of the LLTC), which requires port users to comply with the requirements of the dSoO. The imposition of a general direction, which carries the force of law, is the most appropriate statutory process to lay down general rules for navigation (subject to certain constraints) and regulate the berthing and movements of ships (paragraph 1.10 of the Port Marine Safety Code).

PART 4 – ABP'S COMMENTS ON THE COMPULSORY ACQUISITION NEGOTIATIONS AND OBJECTIONS TRACKER – REVISION 5

18. ABP has reviewed the updates provided by the Applicant in relation to its negotiations with ABP, and considers that some clarifications are required:
- a) 24/05/10 – Despite receiving the draft SoCG at 16:10 the day before Deadline 10, ABP provided the Applicant with its comments on the SoCG for submission by the Applicant at Deadline 10.
 - b) 25/04/19 - The Applicant states they sent an email "requesting necessary information in advance of next meeting". ABP does not know what email this is referring to.
 - c) In respect of the ongoing discussions between ABP and the Applicant, the Applicant advised the ExA that "*an agreement is expected to be reached by or before the close of examination*". ABP considers this statement is very misleading, and it is of the strong view that an agreement will not be reached between the parties by or before the close of the examination. The inability to advance negotiations between the parties has been exacerbated by ABP waiting on a response from the Applicant in respect of the basis for negotiations in respect of the Legal Side Agreements, including cost undertakings, head of terms, etc. ABP only received a response from the Applicant in respect of these matters on 4 June 2019. As such, it has been unable to progress discussions prior to this time. It may be that negotiations will extend beyond the conclusion of the examination in an effort to continue to resolve outstanding matters,

however at this stage, ABP is not confident that such a position will be able to be reached between the parties.

PART 5 – ABP'S COMMENTS ON THE INTERIM CODE OF CONSTRUCTION PRACTICE – TRACKED – REVISION 3

19. The Applicant has inserted a new paragraph 2.9.4, which refers to communications with the "Navigation Working Group, as set up by the Applicant prior to the consent of the Scheme". Relevantly, all references to the Navigation Working Group previously included in the dDCO were deleted by the Applicant as part of Revision 6, and replaced by references to the "PMSC Stakeholder Group", an existing group that is maintained and consulted by ABP in accordance with its duties under the Port Marine Safety Code.
20. ABP considers that the interim CoCP should be updated to reflect the latest position in the dDCO – and that references to communications between the undertaker and the navigation community should be undertaken within the context of the PMSC Stakeholder Group meetings.

PART 6 – ABP'S COMMENTS ON THE FENDER DESIGN REPORT

21. ABP has serious concerns regarding the adequacy of the Applicant's proposed fender design of the LLTC – in particular, whether they would be robust enough to withstand a vessel collision without damage to the LLTC, the Port or other vessels/users of the Port.
22. In order to address these concerns, on 11 April 2019, ABP requested that the Applicant provide ABP with copies of the fender design specifications/drawings that have been used to inform the assessment set out in the Fender Design Report, to enable ABP to engage a fender engineer to assess the adequacy of the proposals.
23. On 12 April 2019, the Applicant advised that they were "starting the detailed design work on fender design" and would get in contact to provide ABP with further information once they develop the proposals. ABP has not, however, been provided with any further information from the Applicant, or its engineers, in this respect.

24. This is a serious omission. As such, ABP wishes to highlight to the ExA that it remains concerned about the adequacy of the proposed fenders and whether they would be sufficient to mitigate navigational risk with the Port.
25. This omission should be added to the fact that the ExA are being asked to report on a scheme which is promoting a bridge which has not yet been designed across a navigable channel without an acceptable and finalised Navigation Risk Assessment.