

THE PROPOSED A122 (LOWER THAMES CROSSING) DEVELOPMENT CONSENT ORDER

**Written submissions of oral comments
made at ISH5 ISH7 and CAH1
submitted on behalf of the Port of London Authority**

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1. Introduction

- 1.1. This is a written submission made on behalf of the Port of London Authority (**PLA**) in respect of oral submissions made at:
 - 1.1.1. Issue Specific Hearing 5 on tunnelling, held 7 September 2023 (**ISH5**);
 - 1.1.2. Issue Specific Hearing 7 on the draft Development Consent Order, held 11 September 2023 (**ISH7**); and
 - 1.1.3. Compulsory Acquisition Hearing 1 held 15 September 2023 (**CAH1**).

2. Summary of oral submissions made by the PLA at ISH5 – Tunnelling

Agenda item 3 a) – Limits of deviation

i The Applicant is asked to justify the limits of deviation.

ii Vertical limits of deviation including consideration of protection zones, dredging, and scour protection.

- 2.1. The PLA wishes to acknowledge the work undertaken by the Applicant in respect of vertical limits of deviation, in the context of ongoing engagement with the PLA. The PLA notes the effort made by the Applicant to provide more information, and that there has been progress in discussions in this regard. However, there are still certain elements with which the PLA remains concerned.
- 2.2. The PLA appreciates the Applicant's production of the Tunnel Depth Report (**TDR**) (REP3-146), but notes that there are certain matters within the report, such as on scour and references to the draft Development Consent Order (dDCO) which do not appear to accurately reflect what the dDCO provides for. Further, whilst the PLA welcomes the findings presented in the TDR, it remains a technical report rather than a document which imposes commitments on the Applicant. Similarly, certain assumptions are made in the TDR which the PLA is not certain are secured in the dDCO. Notwithstanding which, the PLA's updated position at ISH5 in respect of tunnelling matters is predicated on its acceptance of the high level information provided in the TDR.
- 2.3. The PLA's ongoing concerns regarding tunnelling may be presented by means of three general themes:
 - 2.3.1. Constructability – that is, whether or not the tunnel is actually capable of being constructed in accordance with the information provided by the Applicant;
 - 2.3.2. Approvals – there is a difference in opinion between the Applicant and the PLA as to what approvals are required from the PLA under the dDCO; and
 - 2.3.3. Mitigation of construction risks.

Constructability

- 2.4. The PLA's previous submissions have focussed on its primary concern that the tunnel might not be able to be constructed, in the context of the interaction between the exercise of vertical limits of deviation, tunnel protection zones, an agreed dredge depth of 12.5m

CD plus 0.5m overdredge and potential scour protection. At the time of making previous submissions, the PLA's concerns about the tunnel's constructability were rooted in a number of gaps and inconsistencies in the information which formed part of the application.

- 2.5. In light of information included in the TDR, and the Applicant's revised assessment of the tunnel cover which will be required, the PLA is much more reassured that it will be possible to construct the tunnel whilst preserving the required level of cover. However, there remain some matters which the PLA needs to resolve through further discussion and clarification with the Applicant, in particular in relation to scour.

Approvals

- 2.6. The Applicant has made statements in respect of the approvals from which the PLA benefits, which the PLA does not believe are correct. Further, even if the PLA and the Applicant were to agree on the relevant wording in the dDCO, there is a difference between what each of the parties think the wording achieves. This is particularly in light of the PLA's experience with other tunnels (and Development Consent Orders) which resulted, amongst other things, in the PLA on one project not being aware that tunnelling was commencing until the promoter made a public announcement that tunnelling was actually taking place.
- 2.7. The Applicant during ISH5 referred to paragraph 99 of Part 8 of Schedule 14 to the dDCO (**PLA's protective provisions**) (REP3-078), stating that it provides protection for the PLA and "there is an escalation process that provides for approval of the tunnel design".
- 2.8. The Applicant has also stated (in its Comments on Written Representations (WRs) Appendix A - Statutory Environmental Bodies - REP2-046) that the PLA has approval over the design of the tunnel, but that is not correct. Paragraph 98 of the PLA's protective provisions, which provides for the PLA's approval of detailed design specifically states that the PLA's approval is not required for any tunnelling works. Paragraph 99 of the PLA's protective provisions which deals to a limited extent with design of tunnelling works, provides only for a dredging depth of 12.5 CD plus 0.5m and to ensure channel depth can be maintained. It does not provide for any wider approval of the tunnel design or tunnel construction methodology. In addition, paragraph 99 only allows the PLA to go directly to arbitration in the limited circumstances that the tunnel design does not allow for the agreed dredge depth. The "arbitration or nothing" option gives no real opportunity for dialogue.
- 2.9. The PLA, therefore, supports the Examining Authority's (**ExA**) suggestion of a standing technical working group to resolve and reconcile any issues between the parties or an alternative which would achieve the same goal. As at the date of the submission of this document, we are in discussions with the Applicant regarding their proposed alternative and will update the ExA at the next available opportunity.

Mitigation of construction risks

- 2.10. As set out above, and in light of additional information provided by the Applicant, the PLA is reassured as to the constructability of the tunnel. What remains, therefore, for the PLA are the concerns attendant on the level(s) of risk associated with construction of the tunnel, and how they may be addressed.
- 2.11. The PLA considers construction risks to sit under three headings:
- 2.11.1. Scour and the need for protection;

- 2.11.2. Geology; and
- 2.11.3. Limits of deviation.

Scour and the need for protection

- 2.12. Tunnels require a certain amount of cover above them. In addition, the level of the riverbed (and therefore the amount of cover) can change due to planned actions such as dredging or through the natural movement of the riverbed. The PLA has requested that the Applicant consider scour protection as it is becoming increasingly common for the owners of existing tunnels under the river Thames to request, post-construction, the placement of scour protection to protect their assets. If the potential for scour protection has not been considered in the design phase, the solution presented to the PLA is often one where scour protection is placed on the bed of the river, reducing the depth of water available for vessels to navigate. An example of a road tunnel that has scour protection placed above it is the Rotherhithe Tunnel.
- 2.13. The TDR, whilst clear that no scour protection is needed and that the Applicant is not seeking consent for scour protection, has considered how scour protection could be placed. Whilst the PLA has not had sight of the scour protection assessment carried out by the Applicant, the PLA is in discussion with the Applicant about further provision in the TDR in relation to scour protection.

Geology

- 2.14. With reference to Annex A of the TDR, the PLA notes the geology along the tunnel alignment and how it varies from an alluvial deposit to the chalk formation. The TDR makes reference to the assessed cross section which is at the northern bank of the river at 'Divers Shoal'. The PLA agrees with the Applicant's assessment in the TDR of this as a critical area for two reasons, as (i) it is not only the location with the lowest cover above the tunnel, but (ii) it is the point where the ground conditions, i.e. the material above the crown of the tunnel, are most inconsistent, being made up of chalk with overlying River Terrace Deposits and alluvium.

Limits of deviation

- 2.15. So far as the PLA is concerned, the limits of deviation (particularly the upper bound), represent the worst case, with the application allowing the tunnel to be constructed at a shallower level beneath the riverbed than assumed in the reference design.
- 2.16. The PLA's initial position was that the inconsistencies in the Applicant's information regarding the level of cover above the tunnel gave rise to concerns over the constructability of the scheme. However, new information presented in the TDR, summarised in table 3.1 has demonstrated that the design is buildable and the constructability – but not the construction – risks have been addressed. This represents, therefore, a credible design worst case and not a construction worst case. A credible design worst case for flotation has been assessed, being the tunnel at the uppermost bound of the limits of deviation and the maximum dredge level achieved at Diver's Shoal.
- 2.17. However, as a design-based report, the PLA would note that there are residual risks around the construction aspects of the tunnel. The PLA's sole means of approval for construction matters is the Design Manual for Roads and Bridges Volume 1 Section 1 Part 1 BD2/12 (**BD/12**), in which, the two relevant provisions are at paragraph 3.11, which requires the Applicant to demonstrate risks and hazards considered for design,

execution, maintenance and demolition, and section 8, relating to the tunnel support system and construction method. In the PLA's view, these are not sufficient to close out risks involved with construction. It also appears that BD/12 has been superseded, and we will query with the Applicant whether the dDCO should refer to the latest alternative document. Consequently, the PLA is seeking to strengthen the relevant wording in the PLA's protective provisions to increase the focus on construction risk.

- 2.18. In addition, the PLA considers that the risks outlined ought to be set in the context of the cover-diameter ratio of the dDCO scheme – that is, the level of cover above the tunnel and the ratio between the cover and diameter of the tunnel (**C/D ratio**). The C/D ratio of the dDCO scheme is at the upper level of existing technology, requiring what would be the largest tunnel boring machine (**TBM**) yet used in the UK.

iii Economic and social effects related to the potential effects on river traffic.

- 2.19. The Port of London (**Port**) is the country's largest port, and the UK's busiest inland waterway. The Port handled 57.7m tonnes of goods in 2022, and 79% of vessel arrivals to the river were to berths upstream of the dDCO scheme. Clearly if there are issues with the tunnel, there is likely to be an economic effect in the Port. The PLA has explained in some detail the potential economic effects on the PLA: at ISH1 (REP1-271) and in its Written Representation (REP1-269).
- 2.20. The PLA does not anticipate any routine effects on river traffic as a result of construction of the dDCO scheme, so long as its construction goes as planned. However, there is the possibility of effects on river traffic if the risks described at item 3 a) i) above were to materialise during operation of the dDCO scheme – see item 5 a) ii) below relating to unexpected incidents.
- 2.21. The PLA has set out its concerns in respect of scour above; if these concerns are not addressed, then the potential for economic effects remains. The economic effects are addressed in greater detail in the Ports' Joint Statement (REP3-196) submitted at Deadline 3.
- 2.22. The PLA has made submissions that so long as it is able to dredge to the agreed depth – and the TDR now shows that the limits of deviation are feasible alongside dredging – and the outstanding issues relating to scour and scour protection are satisfactorily addressed in an updated TDR then the PLA does not envisage any routine effects on river traffic. The PLA confirms that the agreed dredge depth will be sufficient for the future needs of the Port. However, the PLA still needs to agree drafting of the relevant provisions of the dDCO to ensure that there are no unintended consequences arising from the drafting (e.g. at paragraph 99 of the PLA's protective provisions) to ensure those protections are fully engaged.

iv Monitoring, remedial works and future maintenance.

- 2.23. The PLA recognises that there are elements of the PLA's protective provisions which deal with protective action to be taken by the Applicant. As noted, construction risks associated with the tunnel are high impact low probability (**HILP**), and the extent to which they are covered in the PLA's protective provisions is largely sufficient. However, the PLA has experience with ground investigation equipment being left in the river by the Applicant and not licensed despite repeated requests. Consequently, the PLA is

particularly concerned with circumstances where, when not before the ExA, there is less impetus for the Applicant, or its contractors, to progress the works and be seen to meet the requirements within the dDCO or outside of them as part of a separate authorisation process.

- 2.24. The C/D ratio quoted in the TDR is 0.57, with the flotation calculations ‘passing’ at this level, (noting the conservatism within the report). 0.57 is a low C/D ratio, though the PLA acknowledges that this is presented as a worst case scenario.
- 2.25. In terms of diameter, the size of the tunnel is pushing the boundaries of UK experience. Up until the Silvertown tunnel, which has recently completed boring of the main tunnels, the largest TBM driven tunnel was 8.8m – the Lee tunnel in East London. This was driven using a slurry TBM. Silvertown represents the largest TBM driven tunnel undertaken in the UK, with an external diameter of the TBM of 11.91m which represents a C/D ratio of 0.62. The TBM required for the dDCO scheme will ranked in the top five in the world from a size perspective.
- 2.26. The PLA concerns about the construction risks would be defined in risk management terms as HILP. They are principally around the risks of improper control of the excavation operation leading to blow out of the riverbed, also known as a daylighting event, and the resulting impact on the river and its users. The risk is usually controlled by the parameters in which the TBM is operated. The PLA’s concern here is that given the large magnitude of ‘D’ and the small magnitude of ‘C’ that the margin of error would be small, and with such a large machine, low cover adds a further degree of sensitivity.
- 2.27. This is not purely a perceived risk. During the construction of the 4th Elbe Tunnel in June 1998, where a large diameter slurry TBM was being used with an approximate C/D ratio of 0.5 beneath the River Elbe, there was a cutter head intervention during which there was collapse of ground into the cutter head which led to a chimney, (a narrow hole or ‘daylight’) forming up to the river bed. Subsequently the rock armour, which was being placed to make good the ‘chimney,’ cascaded through the hole and blocked the cutter head. This demonstrates that the risks discussed are very real.
- 2.28. In addition, in terms of the Applicant’s reference to the use of hollow spokes in the cutter-head of the TBM as a mitigation measure, the PLA notes that this TBM will be going through chalk which has a high degree of wear on the cutter head and it is not possible to rule out the possibility of having to carry out an intervention under the river with the degree of wear that can be expected. If there is wear on the cutter head itself (which is likely given the nature of the geology - chalk) then access to the front of the TBM via hyperbaric means could still be needed.

Agenda item 4 a) – Tunnel boring methodology

i To what extent should the DCO should allow for flexibility in terms of the tunnel construction methodology:

- *Should the type of Tunnel Boring Machine (TBM) be secured through the DCO.*
- *Should the DCO allow for the potential use of either a single or 2 TBMs and the associated impacts of these approaches.*

- 2.29. The PLA agrees that the dDCO should retain flexibility in terms of the type of TBM to be used, up to the point of it being a closed-face TBM. Limiting the choice of TBM at this stage implies a level of knowledge of the scheme which does not yet exist. However, the PLA does not agree that a slurry-based TBM necessarily represents the worst case and would want to understand how the impact of the different types of TBM has been taken into account. The PLA notes that in assessing flotation of the tunnel, construction effect has not been taken into account.
- 2.30. From a technical tunnelling point of view, the PLA has no objection to use of either one or two TBMs. However, the PLA notes that operating two TBMs introduces potentially additional risk than the operation of one, and so, if two TBM are to be used, the PLA would like to see how that risk is to be managed by the contractor.

Agenda item 5 – monitoring

i The approach to monitoring, reporting and remediation.

ii The approach to risk management with particular regard to dealing with unexpected incidents.

- 2.31. There is the possibility of effects on river traffic if the risks described under agenda items 3 a) i, ii and iv above materialize during operation, or construction, of the dDCO scheme. The PLA does not agree with the Applicant that these risks are addressed in the PLA's protective provisions. There are two ways of managing the risk for unexpected incidents. First, to make sure that the risk does not materialise; secondly, to make sure that if the risk materialises, it is dealt with. On the first, the Applicant states in the TDR, that the PLA can approve the tunnel design to resolve the fact that risks might materialise. That is not correct. The Applicant is not committed to involving the PLA in ensuring that tunnelling risks do not materialise. On the second, the remediation provisions of the PLA's protective provisions do not seem to include the tunnelling works, so there is no provision for the PLA to be involved in such works.
- 2.32. The PLA would like this to be addressed by two means: ongoing construction monitoring and involvement in emergency response planning. The Code of Construction Practice (CoCP) (doc ref APP-336) provides at para 6.9.1 that emergency procedures will be produced with engagement with the emergency services and other relevant stakeholders, but does not specifically mention the PLA.
- 2.33. From the PLA's point of view, its level of involvement in risk management is not sufficient. For example, on another tunnelling scheme, the Applicant wanted to put a cofferdam in the river as mitigation if the risk of daylighting materialised. The implications of placing a cofferdam in the middle of the navigational channel, would be severe.
- 2.34. There is a Joint Code of Practice for the Risk Management of Tunnelling Works¹, an ongoing theme of which is consultation with third parties. The PLA does not believe that the approval in principle mechanism has sufficient detail to address its concerns, as it does not contain a specific section for mitigation and involvement in emergency response planning. It contains a section on tunnelling methodology, but in terms of managing construction risk, the PLA considers it does not go far enough. The PLA

¹ A document produced jointly by the British Tunnelling Society and the Association of British Insurers, (BTS and ABI).

would like to have sight of operational risk identification, how those risks are managed on a day to day basis and ongoing involvement so it can take a view on the risks.

Agenda item 5 - Unexploded ordnance

i Whether the approach to dealing with unexploded ordnance is sufficient

- 2.35. The PLA is concerned about the potential impact that unexploded ordnance (**UXO**) may have on dredging, and the limitations the dDCO places on the PLA's ability to deal with UXO. The Unexploded Ordnance Desk Study and Risk Assessment (APP-433) reports that potential sources of UXO have been identified on parts of the dDCO site, including the river. This study assigns a moderate UXO hazard level to the river and advises that the main anticipated ordnance hazard is from air-dropped UXO and unexploded anti-aircraft shells. The Applicant's proposed risk mitigation plan for the river is set out on page 15 of the report and the general preference is for mitigation by avoidance.
- 2.36. This approach is very similar to that taken for the Silvertown tunnel scheme, but has had the undesirable result of leaving UXO in situ very close to the tunnel, creating a risk for any dredging vessels, other port traffic and tunnel users, as well as to the tunnel itself. Using an example from the Silvertown tunnel scheme, surveys carried out prior to tunnelling occurring identified 252 significant anomalies; 9 of which were considered to be potential UXO. The mitigation decided by the developer placed a 5m exclusion zone around targets and therefore because none of the anomalies were within 5m of the tunnel they have been left in situ. Consequently, the mitigation for the UXO on that scheme is to leave it where it is. Such an approach is on the basis - from the undertaker's perspective - that the risk is acceptable for the tunnel. However, it does not take into account effects on the PLA, particularly effects on dredging.
- 2.37. Knowing that specific potential UXOs exist, any future dredging of the navigational channel must take this risk into account, not only the consequence to the dredger and port traffic but also to the tunnel and its users, leading to the potential for conflict between the different parties.
- 2.38. The PLA wishes to avoid such conflict on the Lower Thames Crossing, particularly given the volume of river traffic is greater and future dredging requirements are deeper and wider in this location. The PLA would like to see a commitment to consult the PLA on decisions on how to deal with UXO and to take into account the risk to river activity, not just the risk to the tunnel.

3. Summary of oral submissions made by the PLA at ISH7 – draft Development Consent Order

Agenda item 3 a) –Changes proposed to the dDCO since ISH2

- 3.1. The PLA endorses submissions made by other parties at ISH7 – in particular, Kent County Council – in respect of the interpretation of “begin” at Art. 2 and in Schedule 2 to the dDCO and has raised this matter in a previous submission (REP2-091).
- 3.2. The PLA notes that the ExA has an obligation to provide the best possible version of the dDCO to the Secretary of State. By way of context, the PLA made an application for a harbour revision order² (**HRO**) to substantially modernise the powers and duties of the Port under the Port of London Act 1968 (**PLA 1968**) and other relevant local legislation. The application was made in April 2020, and remains with the Marine Management Organisation (**MMO**) for consideration.
- 3.3. Art. 2 of the dDCO is drafted to provide in the alternative for the new permitting regime which will be instituted by the HRO, and is in relation to the definitions of river works licence; river dredging licence and river mooring permission. The HRO application has been with the MMO for some time, and, whilst the HRO may be made before the dDCO is granted, it is not a given. Consequently, the PLA wishes to draw to the ExA’s attention that - when it comes to providing a version of the dDCO to the Secretary of State – the Applicant should make clear which wording is to be removed, because if words relating to the HRO are not removed, they will refer to a permitting regime which does not yet exist.
- 3.4. A copy of the draft HRO is submitted to the examination by the PLA alongside these submissions at Deadline 4.
- 3.5. The PLA welcomes the Applicant’s amendment to Art. 18(1)(e) at deadline 2. This amendment limits the Applicant’s ability to interfere with rights over the river to those that are reasonably necessary, which is helpful.
- 3.6. However, the drafting provides that such interference can still occur anywhere within the river. From the PLA’s understanding about the activity in the river, there is no need for interference to be so extensive. The Applicant’s reason for including this Article was to prevent mooring from occurring within the dDCO limits between now and when the dDCO is made. As currently drafted, Art, 18 does not reflect that position and, in the PLA’s view, this power should be limited to within the dDCO limits.

²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1010936/PLA_HRO.pdf

4. Further written submissions

- 4.1. The PLA identified a number of matters during ISH7 and CAH1 which it would address in written submissions. Matters which the PLA wishes to raise but which were not raised in the PLA's oral submissions are dealt with below.

ISH7 – drafting of the dDCO

Agenda item 3 b) – Changes proposed to the dDCO since ISH2

- 4.2. Art 3(4) was introduced by the Applicant at Deadline 2 to address a concern raised by the Port of Tilbury London Limited. The PLA has no in principle issue with the introduction of Art 3(4) but its introduction does raise a new issue for the PLA as, in disapplying Art. 3(3), it introduces a level of uncertainty as to the continued effect of PLA 1968. Article 3(3) excludes PLA land, but then Article 3(4), which itself is an exception to sub-paragraph 3, also excludes PLA land, which layers exclusion upon exclusion upon exclusion. While at this point both parties know what is intended by the drafting, it could be unclear to future readers of the dDCO. The PLA therefore suggested that the words “(other than in order land comprising part of the river Thames outside of the order limits)” in Art. 3(3) are deleted as they do not work effectively alongside the new Art. 3(4), and notes that the Applicant indicated at ISH5 that it would make such an amendment.
- 4.3. Art. 6(p) was amended at both Deadlines 1 and 2 to make the exercise of the upwards limits of deviation subject to paragraph 99(1) of the PLA's protective provisions. The PLA in principle welcomes the amendment but has been clear in its representations and discussions with the Applicant that it needs to read Art. 6, paragraph 99 and the Tunnel Depth Report (REP3-146) in the round. The Applicant has indicated that it intends to make future amendments to paragraph 99; subject to which, the PLA cannot be certain whether further amendments will be required to Art. 6, that is, it might be necessary to make Art 6(p) subject to the further sub-paragraphs of paragraph 99 and not just paragraph 99(1).
- 4.4. Article 48(9) disapplies the explosives anchorage from the date of the dDCO. While the PLA is working with the Applicant and the Health and Safety Executive (**HSE**) to identify alternatives, doing so is proving difficult – there are not a plethora of locations along the river that meet the key criteria for an explosives anchorage, including being located sufficiently far from large dwelling areas. The PLA has requested a meeting with HSE to discuss alternative locations for an explosives anchorage instead of Higham Blight, and are awaiting a response.
- 4.5. Disapplying the explosives anchorage should only be necessary before the tunnelling works commence, and the disapplication of the current explosives anchorage should be as late as reasonably possible. The PLA note that the Applicant agreed in its oral submission at ISH7 to the PLA's proposed amendment to Art 48(9):
- “From the date that construction of the permanent elements of Work No. 5A or Work No. CA5 starts[...].”*
- 4.6. The PLA will comment further once its consultant has completed the first stage of work in relation to potential alternative locations for an explosives anchorage.

Agenda item 3 b) Changes not yet submitted but under consideration

- 4.7. In the TDR, the Applicant acknowledges that should the PLA dredge the navigable channel of the river prior to the dDCO coming into force, the Applicant may not, with the current drafting of Art. 33, be able to acquire the subsoil at the level required. An alternative approach is therefore set out at paragraph 5.2.5 of the TDR which would see the acquisition of the subsoil of the river determined from Ordnance Datum Newlyn (**OD**).
- 4.8. In principle the PLA has no issue with the use of OD in relation to the tunnel plots as it provides an absolute reference rather than the relative reference to riverbed level which may be subject to change. The PLA has been discussing the matter with the Applicant and expects a formal drafting amendment to be made to the ExA at a later deadline. The PLA has also been considering whether given the use of OD in Art. 33 it would be beneficial for the agreed dredge depth to be in OD rather than the current CD. The PLA has confirmed to the Applicant and the ExA that it has no objection to the use of OD. There may be benefits of converting the dredge depth to OD so that the same datum is used within the dDCO and certified plans.
- 4.9. The PLA and the Applicant have also been in discussions in relation to the issue of apparatus being placed in the tunnel, that is not required for the road. Usually, the PLA would grant a river works licence (**RWL**) under PLA 1968 for such installation.
- 4.10. Art. 53 would prohibit the PLA's normal river works licensing from being exercised. Helpful recent discussions with the Applicant have resulted in the Applicant confirming that it does not dispute the right for the PLA to demand a RWL from utilities wishing to place their apparatus in the tunnel. The PLA anticipates that wording to reflect this aligned position will be included in a later iteration of the dDCO.

Agenda item 3 c) dDCO matters arising from other Issue Specific Hearings (ISHs 3 – 6)

- 4.11. In terms of oversight of tunnel design, tunnel construction methods and remedial works, the PLA is seeking a meaningful opportunity to feedback on tunnel design and construction and ensure that that feedback is taken into account so far as it affects the river and its users.
- 4.12. The Applicant has made submissions that it considers that the protection afforded by the PLA's protective provisions, and which the PLA considers is not correct, and consequently is seeking a more robust involvement in the tunnelling design process.
- 4.13. The PLA accepts that a certain amount of flexibility is required. However, the corollary of that is that the PLA will not have an understanding of tunnel design and construction methods at this stage. The PLA needs some level of approval.
- 4.14. The TDR states that "[PLA] protection is reinforced because under the PLA's protective provisions, approval will have to be provided in connection the tunnelling works" (para A.2.6). Separately, the Applicant has stated that the PLA has approval over the design of the tunnel, but that is not correct: Paragraph 98 of the PLA's protective provisions which provides for approval of detailed design specifically states that PLA approval is not required for any tunnelling works. The PLA's protective provisions do not provide for any involvement with the approval of tunnel construction methods.
- 4.15. Paragraph 99 of the PLA's protective provisions which deals with design of tunnelling works, states that the "detailed design provides for a dredging depth of 12.5 plus 0.5m and ensure channel depth can be maintained", and only allows the PLA to comment so

far as it concerns those dredging depths, or what paragraph 99 refers to as the “design requirement”.

- 4.16. The scope of the PLA’s involvement extends only to this design requirement. Paragraph 99 does not provide for approval of the tunnel design or for any approval of tunnel construction methods.
- 4.17. The Applicant is obliged to provide certain documents to the PLA under sub-paragraphs 99(2) and (3). The PLA’s only option if it has any views on the information provided or disagrees with the Applicant’s design and construction approach, is to refer the matter to arbitration under sub-paragraph 99(4). So, alongside the PLA’s very limited scope when it comes to the “design requirement”, this “arbitration or nothing” approach acts a strong deterrent for the PLA to make any comment on the Applicant’s submissions. In practice, this leaves the PLA with little to no meaningful input on the tunnel design or construction.
- 4.18. In addition, paragraph 99 relates only to the navigational channel which is only the central part of the river used by larger vessels, not the full width of the river. The PLA require that the drafting be extended to cover the entire extent of the river.
- 4.19. The PLA notes the ExA’s helpful suggestion of a working group in respect of tunnel design and tunnelling works, which would require clear terms of reference. The PLA will pursue this further with Applicant and hope to reach a solution as to a suitable level of input from the PLA when it comes to the tunnelling works.

CAH1

Agenda item 3 a) - The Applicant’s Case for the Compulsory Acquisition (CA) & Temporary Possession (TP) of Land and Rights

iii Consideration of reasonable alternatives to CA.

- 4.20. The PLA notes the general position that powers of compulsory acquisition are conferred, and ought to be used, only as a last resort. As a matter of principle, the PLA is opposed to the compulsory acquisition of its land and interests in land. This is a not an unusual position for a statutory undertaker to hold, and is somewhat analogous to the position of the Crown Estate.
- 4.21. The PLA has had limited interaction with the Applicant in respect of agreeing a sale of the subsoil of the river required for the dDCO scheme. The offer made by the PLA to the Applicant was rejected, with the only counter-offer being the Applicant stating it is unwilling to offer any sum above a nominal amount to acquire the land, the Applicant’s position has therefore remained unchanged from its initial proposal.
- 4.22. In light of its duties at paragraph 8 of Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land (September 2013) that:
“The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored” the PLA is not satisfied that there has been sufficient consideration of alternatives to compulsory acquisition of its affected land.

5. Summary of oral submissions made by the PLA at CAH1

v *The justification for land sought to be subject to TP.*

- 5.1. The PLA is content with the Applicant's justification for the land in the dDCO to be subject to temporary possession, with one significant caveat. This is in the operation of Art. 37 of the dDCO as currently drafted.
- 5.2. Art. 37 applies to any Order land belonging to statutory undertakers, which includes land which is to be acquired or used permanently or temporarily. It allows the Applicant to compulsorily acquire land, acquire and/or extinguish rights, and impose restrictive covenants over any Order land. Consequently, and regardless of the purpose for which the dDCO identifies land, the Applicant can acquire land and rights and impose restrictive covenants over it.
- 5.3. This has the effect that the Applicant could acquire land that is identified for temporary possession on a permanent basis.
- 5.4. The general principle of development consent orders or any instrument which authorises compulsory acquisition is that an applicant identifies the land it needs to construct and maintain its scheme, and the purpose for which it needs it. It applies for an order on that basis, the order is made, the applicant can acquire the land and rights which were specified in the order.
- 5.5. In this case, the Applicant identified the land it needs to construct and maintain the dDCO scheme, and the purpose for which it needs it. However, Art. 37 provides that any land belonging to a statutory undertaker, regardless of the ostensible purpose of that land in the dDCO scheme, the Applicant may take it. The PLA queries what particular aspect of statutory undertakers' land renders it more difficult to identify the purpose for which that land is required.
- 5.6. The PLA is a statutory undertaker and therefore notwithstanding the protections that the PLA had secured through the introduction of Art. 33(8); the Applicant could for example impose restrictive covenants on, over or under the river bed by means of Art. 37.
- 5.7. Whilst the wording of Art.37 may be preceded in an earlier DCO, the extent of its general application to all land of statutory undertakers is unprecedented. The effect about which the PLA is particularly concerned is that any land subject to temporary possession – which for the PLA is a much larger area than the area over which permanent powers are sought – can be compulsorily acquired. That very clearly extends the scope of the dDCO in a way which the PLA is not convinced is justified in *this* dDCO.
- 5.8. This provision effectively reduces statutory undertakers to second-class citizens when it comes to certainty about land use. It sets a very undesirable precedent.
- 5.9. The PLA has two requests in this context: first, can the Applicant justify why it needs this provision, and particularly why it has taken the unprecedented step of applying it to land identified for temporary possession? Secondly, if it can be justified, the PLA would ask that the exercise of the power to be restricted over the river in the

same way as the restriction in Article 33 (acquisition of subsoil and airspace) operates.

- 5.10. The Applicant has made various amendments to Art. 37 but has not to date incorporated the PLA's suggested amendment: that Article 37(1) is subject to Art. 33, which provides limitations on the acquisition of subsoil for the tunnel.
- 5.11. In addition, the PLA endorses the point raised by Port of Tilbury London Limited in CAH1 in respect of the intended protections of sections 127 and 138 of the Planning Act 2008 for statutory undertakers as persons who merited special protections under the legislation.

Agenda item 3 b) - Requests by the Applicant for additional land and/or rights

i Additional land or rights sought under the change request notified as [AS-083] and the application of the Infrastructure Planning (Compulsory Acquisition) Regulations 2010

- 5.12. The PLA confirms that it has no objection in principle to the Applicant's proposal to insert Ordnance Datum (Newlyn) as the reference point in the dDCO insofar as it relates to the extent of the plots to be acquired for construction of the tunnel within the riverbed.

Agenda item 4 a) - Statutory Undertaker's land and rights

ii The condition of negotiations, and whether there are unresolved concerns relating to statutory undertaker's land, rights and apparatus.

- 5.13. In terms of the PLA's protective provision, the PLA would suggest a new paragraph for *Temporary possession and acquisition of rights*.
- 5.14. The first reason for this is primarily a housekeeping one. The Applicant included at Deadline 1 a new paragraph 104(4) providing additional assurance about the exercise of powers of temporary possession and acquisition of rights and imposition of restrictive covenants. This provision is welcomed by the PLA. However, as the PLA has pointed out in previous submissions (REP2-091 and REP3-218), the issue is that sub-paragraph 104(4) does not form a coherent part of the remainder of paragraph 104. Sub-paragraph 4 is about temporary possession, not about facilities for navigation which is the subject matter of paragraph 104. Therefore, the PLA suggests having it as a separate paragraph under a separate header.
- 5.15. The second reason for including a separate paragraph in the PLA's protective provisions is more fundamental. There is an increasing tendency for major projects of this sort to be "paused" for some period of time. It has already been seen that the start of construction of the dDCO scheme will be delayed by two years. Where a project is paused, it can have a knock-on effect on affected landowners; for example, it could stop the PLA granting a temporary licence over land over which the Applicant has exercised powers but for which it has no immediate need.
- 5.16. The PLA has therefore proposed to the Applicant that a new sub-paragraph be added to the new paragraph (alongside existing sub-paragraph 104(4)) which

addresses powers of temporary possession, compulsory acquisition of rights and imposition of restrictive covenants, to provide that such powers shall be limited in time to a period from the Applicant last having carried out any activity in over or under the relevant land. The PLA is in discussions with the Applicant concerning a provision of this nature.