

THE PROPOSED A122 (LOWER THAMES CROSSING) DEVELOPMENT CONSENT ORDER

**Written submissions of oral comments
made at CAH3 and ISH8
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. Compulsory Acquisition Hearing 3 on Site Specific Matters and Individual Objections held 17 October 2023 (**CAH3**);
 - 1.1.2. Response to Examining Authority CAH3 Action Point 4; and
 - 1.1.3. Issue Specific Hearing 8 on Construction and Operational Effects, held 19 October 2023 (**ISH8**).

2. Summary of oral submissions made by the PLA at CAH3

Agenda item 3. - Individual Site-Specific Representations. For each Affected Person, the ExA will ask:

i. For an outline of the current scope of objections, taking account of any progress in negotiations with the Applicant

- 2.1. The Applicant has included compulsory acquisition powers within the dDCO (REP5-025) and proposes to use those to acquire the land required for the tunnels. Whilst the PLA recognises why those powers have been included within the Order, such powers are supposed to be used as a matter of last resort. However, that does not appear to be the Applicant's intention, as the PLA has attempted to have discussions with the Applicant about entering into a property agreement through which the Applicant would acquire the land for the tunnels but there has been no real negotiation between the parties on this matter.
- 2.2. The PLA acknowledges that whilst compensation is not a matter for the Examining Authority (**ExA**) to consider, the progress of the PLA's negotiation with the Applicant with regards to this DCO cannot be considered without reference to it. The PLA has proposed to the Applicant the headline terms under which the subsoil for the tunnel could be acquired, and the Applicant's response has been simply that it will not accept any figure above £50 as being the market value for the subsoil. Unless the PLA accepts this figure – a figure that is starkly inconsistent with any previous subsoil acquisition under the river Thames (**river**) – the Applicant will not progress negotiations on matters other than compensation in relation to acquisition. Consequently, there are no ongoing negotiations, and no scope for discussion.

ii. Whether CA and or TP powers (or both) are objected to and (with reference to the statutory tests and applicable guidance) why?

Compulsory acquisition

- 2.3. In respect of compulsory acquisition (**CA**), the PLA objects to CA powers in principle – on the basis that, as a statutory undertaker, and given its particular role in managing and conserving the river, its land ought not to be subject to compulsory acquisition. (The PLA confirms that it considers that the land over which the Applicant is seeking CA powers –

that is the subsoil – to be statutory undertakers' land for the purposes of section 127 of the Planning Act 2008 (**PA 2008**), and the Applicant has agreed with this assessment.)

- 2.4. However, on the basis that CA powers over the PLA's land are included in the dDCO, Paragraph 25 of PA 2008 Guidance related to the procedures for compulsory acquisition (Sept 2013) (**Guidance**)¹ states:
Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail.
- 2.5. The Guidance also states that the Applicant must be able to demonstrate that all reasonable alternatives to CA have been explored (paragraph 8). The PLA considers that there has not been a reasonable attempt to acquire the relevant interests by agreement: the Applicant will not engage in discussions until the PLA agrees a nominal compensation figure. The PLA objects to the compulsory acquisition of its land, particularly where no reasonable attempt has been made by the Applicant to acquire it by way of agreement.

Temporary possession

- 2.6. The PLA has been in discussion with the Applicant about the drafting relating to temporary possession (**TP**) in the dDCO. Amendments to the drafting of the relevant provisions has been discussed by the parties and, subject to those agreed amendments being submitted to the Examination, the PLA anticipates that it will no longer have an issue with TP in the dDCO. First, this is because the Order now excludes TP of the tunnel plots. Secondly, in respect of the point raised by the PLA in previous hearings, that of the issue of temporary possession being taken and retained in the event of a delay to the project with the land remaining unused, the Applicant and the PLA have agreed drafting in the protective provisions for the benefit of the PLA, at Part 8 of Schedule 14 to the dDCO, to impose conditions under which TP may be taken which address this matter to the PLA's satisfaction.
- 2.7. Subject to the amendments to the dDCO as discussed being made, the PLA anticipates that its issues with temporary possession will be resolved.

iii. What relief is sought?

- 2.8. The PLA would expect to enter into a property agreement with the Applicant for the acquisition of the land sought. Ordinarily, by this point of an Examination, the PLA would have expected either to have reached agreement or to be close to it. However, in current circumstances, the parties are far from that point and, unless there is a substantial shift in the Applicant's approach, the PLA cannot see how agreement is to be reached and the PLA may remain in the position of maintaining its objection to CA.
- 2.9. Further, and notwithstanding that the parties are not in agreement as to the quantum of compensation due for the PLA's land otherwise subject to CA, that ought not to preclude the negotiation of other matters which would be governed by a property agreement. The PLA notes that a property agreement of this nature is not merely concerned with the quantum of consideration due.

¹ https://assets.publishing.service.gov.uk/media/5a748a8ce5274a7f9902904a/Planning_Act_2008_-_Guidance_related_to_procedures_for_the_compulsory_acquisition_of_land.pdf

3. CAH3 – ExA Action Point 4 – Acquisition of Thames Subsoil Rights

Please provide an update on progress with negotiations on matters relating to CA of subsoil rights beneath the Thames, notwithstanding the lack of agreement on the quantum of any compensation. Quantum is a matter that is separately assessed and adjudicated and so agreement on it at this time should not be a pre-condition for progress on other matters for negotiation.

3.1. The PLA does not feel that the Applicant has or is making reasonable attempts to explore alternatives to compulsory acquisition of the PLA's land. Having first engaged with property representatives of the Applicant in July 2021 to discuss the proposed dDCO requirements and the acquisition of PLA land, the PLA notes that draft heads of terms for a proposed land agreement were received only on 26 October 2023. Notwithstanding the late receipt of the draft, and noting that the PLA has been asked to respond within two working days, i.e. by 31 October 2023, the PLA still requires a response to the specific proposals it sent to the Applicant on 20 September 2023. No effort has been made by the Applicant to address the proposals made by the PLA in the draft heads of terms. Nonetheless, the PLA will respond with comments on a proposed draft agreement as soon as it is able.

4. Summary of oral submissions made by the PLA at ISH8 – construction and operational effects

Agenda item 3 a) – Construction compound matters

i. Whether the approach to waste and material management is appropriate

4.1. The PLA is the statutory harbour authority for the river and its general functions include the promotion of the use of the river for freight transport and as an important and sustainable transport corridor. The PLA does not share the Applicant's view that it has a "robust and appropriate approach" to waste and material management. For some time, the PLA has been seeking from the Applicant:

- i. a clear commitment to the use of the river;
- ii. a sufficient commitment to the use of the river – taking into account the range of materials, plant and equipment that will be required for a project of this size; and
- iii. robust monitoring and reporting arrangements.

4.2. The PLA acknowledges that there has been some progress, particularly in relation to point iii where updates were made at Deadline 5 to various documents including the outline materials handling plan (**oMHP**) (REP5-051) and the outline traffic management plan for construction (**oTMPfc**) (REP5-057) to include for the production of monitoring reports; their submission to the traffic management forum and the creation of a traffic management forum sub group.

4.3. Notwithstanding the welcome nature of this progress, the PLA remains concerned that while the Applicant is making general statements of what it might do, actual commitments across the dDCO scheme are themselves limited, and the PLA is not convinced that those commitments which have been made go far enough.

4.4. The primary example of this relates to the Applicant's baseline commitment and better than baseline commitment as set out in the oMHP. The baseline commitment (as set out at paragraph 6.2.9 of the oMHP) is the utilisation of port facilities for at least 80% by weight of bulk aggregates to the north portal construction area. This constitutes, therefore, just one type of aggregate to one construction area. On the face of it, 80% appears to be a

positive number, but it is not representative of the use of port facilities by the dDCO scheme as a whole. There are specific definitions of 'bulk aggregates' and the 'north portal construction areas' in the oMHP, and, further, no commitment to utilising wharves on the south side of the river or to importing anything other than aggregates.

- 4.5. The better than baseline commitment as set out at paragraph 6.2.11 of the oMHP seeks for the contractor to proactively engage with suppliers, which is welcomed by the PLA. However, and once again, the text relates only to aggregates and to the north portal construction area. The PLA sees no reason why this baseline commitment should not be applied to a wider range of materials and to the southern compound. There are also further opportunities in the PLA's view to utilise the river for the transport of a wider range of materials and for the transport of plant and equipment, including potentially the tunnel boring machine(s).
- 4.6. The river could also be used to serve the northern tunnel entrance compound and the southern tunnel entrance compound, and it remains unclear to the PLA how full and proper consideration of river use would take place with the Applicant relying on the Materials Handling Plan (**MHP**) that is due to be produced by the appointed contractors in due course. The MHP is not available at the current time, but it must be substantially in accordance with the oMHP. The oMHP includes baseline and better than baseline commitments that relate only to aggregates and to the north portal construction area, the MHP is only required to provide the forecast quantity of bulk aggregate for the part of the works for which the MHP is being prepared, and the contractor is only monitoring the weight of bulk aggregates. Wharves should be considered as part of the better than baseline commitment, but the better than baseline commitment specifically relates to aggregates and the northern portal only. Consequently, it seems that all the contractors are required to explain in the MHP its approach to the movement of aggregates to the northern portal.
- 4.7. In addition, it is the view of the PLA that the better than baseline commitment also lacks teeth; proactive engagement is all that it requires, which is not a requirement to use the river. The PLA's experience on other schemes which engage the river is that, unless incentivised to do so - as was the case for the Thames Tideway Tunnel - contractors will work to what is required under the governing Order and associated documents. Consequently, in this scenario, it is the baseline commitment that the contractor will seek to comply with; they will be required to proactively engage but will not be compelled to develop use of the river.
- 4.8. It also needs to be clear what is being monitored and what actions will be taken if the contractor identifies further opportunities to use the river. If, for example, a contractor was able to utilise the river for the transport of cement - noting that three large cement import terminals exist already on the river – the forecast quantity of cement to be transported by river should be clearly set out in the MHP so that it can then be monitored and data subsequently included in the monitoring report provided to the Traffic Management Forum. All materials identified for transport by river should also be subject to the derogation process. That would ensure that all opportunities to use the river are not merely investigated, but that those which are practical are taken forward, monitored, reported on and committed to, not just the question of aggregates to the northern portal.
- 4.9. In the context of the above, the PLA does not agree that in the context of the dDCO scheme and its use of the river that the Applicant's approach is "robust and appropriate". We would welcome meaningful commitments to make further use of the river. The PLA has had discussions with the Applicant on this following ISH8 and will respond in more detail at Deadline 7.

5. Further written submissions

5.1. The PLA has identified a small number of matters in relation to matters raised at ISH8 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.

ISH8 – Agenda item 3 a) i)

- 5.2. It is unclear what attendance (if any) the PLA would have at any traffic management forum (**TMF**). Appendix E para E3.1 of the Outline Traffic Management Plan for Construction, (REP5-056) (**oTMPfC**) states that membership of the TMF would be by invitation and comprise the Traffic Manager, senior executive representatives from the Contractors, utility companies and those included in table 2.1 of the oTMPfC. While table 2.1 includes the local councils, the Port of Tilbury and DP London Gateway among others, the PLA is not identified in table 2.1. Paragraph E3.2 allows for attendance by "any other relevant stakeholders...when their participation is pertinent and relevant to the topics under discussion." If the PLA is not an automatic attendee of the TMF because it is not identified in table 2.1 of the oTMPfC then it would only be able to attend the TMF and raise its concerns when it is identified by someone as being 'pertinent and relevant' to have the PLA in attendance.
- 5.3. The Applicant's response as set out on numbered page 68 of the Applicant's Comments on IP submissions at Deadline 1 to 3 (REP5-088) states that "if the PLA or any other relevant stakeholder is not satisfied with the Contractor's approach, a challenge can be made with the avenues provided at the Traffic Management Forum (TMF), and escalated via the dispute resolution process." That does not address the point that the PLA is not included in the baseline list of consultees in table 2.1, despite the fact that the PLA may well have valuable input and views to share with the TMF with regards to construction traffic.
- 5.4. Paragraph E.4.19 of the oTMPfC (REP5-056) identifies a sub group: "a. Monitoring and management of derogation process related to the use of port facilities as set out in Section 6 of the outline Materials Handling Plan...The purpose of the group is to monitor the Project's supply of material delivered using port facilities and discuss derogation requests from the Contractor."
- 5.5. The Applicants response as set out on numbered page 68 of the Applicant's Comments on IP submissions at Deadline 1 to 3 (REP5-088) advises that 'For matters associated with the monitoring of the river use commitment, a subgroup that forms part of the TMF has been specified to which the PLA would form part of.' Whilst the PLA welcomes the identification of this specific sub group it is unclear to the PLA how its attendance at this sub group is to be secured.
- 5.6. New text at paragraphs 6.2.18 to 25 of the oMHP (REP5-051) sets out the process by which the contractor may seek a derogation from its commitments in respect of use of the river for material transportation to project sites. It is key that the PLA attends the TMF given that this is the forum at which derogations will be discussed. The appropriateness is questioned of a contractor making a decision to implement a derogation without consent and then seeking retrospective approval. Additionally, the oMHP does not specify a timeframe within which the retrospective approval must be sought and what may constitute an emergency. The penalty is that the baseline percentage commitment will

not be reduced but it is only in one specific circumstance that the baseline percentage is not reduced; for every derogation that is approved the baseline is then amended. This does not provide the public with good visibility of the Applicant's commitments at the application stage versus the reality of the ultimate scenario.

- 5.7. Finally, and in terms specifically of use of wharves on the south side of the river and the materials, plant and equipment that could be transported by water, the PLA and the Applicant have engaged in recent discussions, at which progress has been made and the PLA anticipates that once it has seen the results of the Applicant's actions from the meeting it will be able to comment on these to the ExA at Deadline 7.