

THE PROPOSED A122 (LOWER THAMES CROSSING) DEVELOPMENT CONSENT ORDER

**Responses to Examining Authority's Commentary on the draft Development Consent Order
submitted on behalf of the Port of London Authority**

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Comments on Examining Authority’s Commentary on the draft Development Consent Order (ExA’s dDCO Commentary) submitted by the Port of London Authority (PLA)

Reference	Question	PLA comments
QD2	Do any IPs have any submissions to make on the structure or broad function of the provisions in the dDCO?	<p>The PLA has no substantive comments on the structure or broad function of the provisions in the dDCO but there are some housekeeping matters which require attention. These include:</p> <ul style="list-style-type: none"> - The contents pages in the dDCO refer to 67 Articles however there are 68 Articles in the dDCO “<i>Interface with waste operation permits</i>” not being included in the contents pages; - Numbered page 4 in the dDCO includes protective provisions for 10 undertakers but there are 11 sets of protective provisions – the protective provisions for the local highways authorities has not been included on numbered page 4; and - Article 55(1)(m) on numbered page 58 of the dDCO should refer to the “Channel Tunnel <u>Rail</u> Link Act” and not the Channel Tunnel Link Act”.

<p>QD6</p>	<p>Should the REAC be individually identified in Schedule 16 (certified documents)?</p>	<p>Given the importance of the Register of Environmental Actions and Commitments (REAC), the PLA considers that it would be helpful for the REAC to be a separate Schedule 16 document to be certified by the Secretary of State.</p> <p>In the PLA’s view the REAC is currently buried within the Code of Construction Practice (CoCP). The reader has to know where to find it (6.3 Environmental Statement Appendices Appendix 2.2 – Code of Construction Practice, First Iteration of Environmental Management Plan v7.0 (Clean) [REP7-122]) and arguably only anyone that has been heavily involved with the examination process will know where to look. A search of the PINS document library would not for example signpost a member of the public to the REAC. A standalone reference in Schedule 16 would assist because it would allow easier identification of the document which is arguably necessary to understand how the project is authorised. As a key document the REAC should be certified in its own right by the Secretary of State.</p> <p><i>This matter was raised by the PLA in oral submissions at ISH12 as summarised in its written submissions of oral comments made at ISH12 and ISH14.</i></p>
<p>QD13- QD16</p>	<p>QD13: The Applicant is requested to explain more fully the inter-relationship between this provision, A27, Schedule 2 R1 and R2. Is there an argument for a simplified and harmonised approach to the relevant time limits for development and for CA?</p> <p>QD14: The Applicant is asked to explain more fully why it is necessary to employ a definition of ‘begin’ as opposed to the more conventional approach of defining ‘commence’ with a carve-out for ‘preliminary works’.</p> <p>QD15: The Applicant is requested to review the basis for and the relationship between the definitions of</p>	<p>Whilst noting that questions QD13 – QD16 are questions for the Applicant, the PLA has concerns about Article 2 including a definition of “begin”, but not “commence”.</p> <p>In particular, the PLA is concerned that as currently drafted the dDCO only requires that development begin not less than 5 years after the DCO comes into force. The PLA has suggested an amendment to Requirement 2, namely that there should also be a requirement that the dDCO scheme should be commenced within that same 5 year period. Without that amendment, if the Applicant begins preliminary works, even minor ones, such as GI, or digging a trench, the DCO will have effect indefinitely. The Applicant would then be able to commence the development at any future time. This leaves the PLA uncertain as to when the authorised development will be carried out. The dDCO therefore seems to be giving the Applicant an unusually wide leeway as to when it might actually</p>

	<p>'begin' in A2 and 'commence' and 'preliminary works' in Schedule 2 R1, to assure the ExA that apparent circularity has been removed. Could re-basing these definitions on s155 PA2008 assist this task?</p> <p>QD16: What would be the effect for the Proposed Development of a return to the more conventional drafting approach of defining 'commence' with a carve-out for 'preliminary works' in A2, with all subsequent references in the dDCO amended as necessary?</p>	<p>commence its proposed development and may well result in blighting land unnecessarily.</p> <p>The PLA has raised its concerns in its submissions at Deadline 1 [REP1-269], Deadline 2 [REP2-091], Deadline 4 [REP4-345] and Deadline 7 [REP7-225], and would welcome the more conventional drafting approach that is very clearly set out in the ExA's dDCO Commentary. The PLA does not consider that the flexibility afforded by its current drafting – which comes at a cost to the interested parties – is really necessary.</p> <p><i>This matter was raised by the PLA in oral submissions at ISH14 as summarised in its written submissions of oral comments made at ISH12 and ISH14.</i></p>
<p>QD19</p>	<p>The Applicant and the PLA are asked to clarify the latest position on the drafting of the upwards limits of deviation for tunnelling beneath the Thames.</p>	<p>Article 6 is subject to paragraph 99(1) of Part 8 of Schedule 14 (protective provisions). The PLA was unable to agree the wording of Article 6(p) until the drafting of paragraph 99 had been substantially settled. Because Article 6(p) makes reference to paragraph 99(1) of the protective provisions, any amendments to paragraph 99(1) or additions to paragraph 99 might have prompted the need to refer to other paragraphs or sub-paragraphs of the PLA's protective provisions within Article 6(p). We can now confirm that no such amendments are needed.</p> <p>At Deadline 7 the Applicant and the PLA reached substantive agreement on paragraph 99: the issue preventing agreement on paragraph 99 relates to the Applicant's ability to override the arbitration process if it so chooses by instead referring a disputed tunnelling decision to the Secretary of State. This approach by the Applicant is unprecedented, and unacceptable.</p> <p><i>This matter was raised by the PLA in oral submissions at ISH14 as summarised in its written submissions of oral comments made at ISH12 and ISH14, and the PLA has proposed a solution to this in its submission at Deadline 8 on the Arbitration Schedule.</i></p>

		<p>Given that substantive agreement has now been reached and the specific outstanding point of disagreement on this provision relates to the Applicant's ability to override the arbitration process, the PLA is content that Article 6(p) need only refer to paragraph 99(1) and is therefore content to agree the drafting of Article 6(p).</p>
<p>QD24</p>	<p>The Port of London Authority (PLA), Port of Tilbury London Ltd (PoTLL), DP World London Gateway Port (LGP) and any other IP operating vessels on the Thames are asked for final positions on this drafting.</p>	<p>The PLA is content that the drafting of Article 18 (as at Deadline 7) is appropriate. In particular, as discussed with the Applicant:</p> <ul style="list-style-type: none"> - Article 18 does not apply to the public right of navigation, only any private rights of navigation; - Article 18 is subject to Schedule 14 (protective provisions); subparagraph 105(3) of the PLA's protective provisions limits the power of Article 18(1)(e) (interference with the relevant navigation or watercourse) to its being exercised only where it relates to: Work No. 5A; Work No 5X; ground investigation works; and any other activity approved in writing by the PLA - Paragraph 106 of the PLA's protective provisions limits the powers of temporary possession and rights and imposition of restrictive covenants above the riverbed of the river Thames in connection with the temporary outfall, permanent outfall, new water inlet with self-regulating valve and ground investigation works, such that they are restricted to what is reasonably necessary to construct the authorised development - Article 18(5) was amended at Deadline 6 to limit the scope of the article further: i.e. to within the Order limits or which may be affected by the authorised development. <p>The Higham Bight anchorage is located within the Order Limits and amendments were made to Article 48 at Deadline 4 to change the point at which the licence ceases to have effect from the date of the making of the Order to the date on which Work No. 5A or Work No. CA5 is commenced.</p>

		<p>Article 18 also needs to be considered alongside other articles in the dDCO which could impact on users of the river and river trade . In particular:</p> <ul style="list-style-type: none"> - under Article 35(11) temporary possession cannot be taken of the surface of the tunnel plots (plots 15-10, 15-11, 15-12, 16-42 and 16-43) for carrying out the authorised development; - under Article 36(11), temporary possession cannot be taken of the surface of the tunnel plots (plots 15-10, 15-11, 15-12, 16-42 and 16-43) for maintaining the authorised development; and - Article 33(8) prevents the acquisition of easements or other new rights or the imposition of restrictive covenants on, over or under the river bed of the river for the protection of the tunnels.
<p>QD25</p>	<p>The Applicant is asked to identify whether this power actually does or could apply to a houseboat mooring. Could a caveat to the power be added to limit its effect on a residential mooring and what would the effect of such a change be?</p>	<p>The PLA can confirm that there are no houseboats located within the Order Limits.</p> <p>This area of the river is subject to a significant tidal range (in the order of approximately 7m) and, along with significant wash from passing vessels, this makes it an area that is not suitable for the location of houseboats. The mooring of any houseboat would require the PLA’s consent (as well as planning permission).</p> <p>From just downstream (east) of Tower Bridge, houseboats are generally offline (i.e. in creeks or basins). The nearest houseboats to the Order limits are located within Embankment Marina (an offline marina with lock access to the river).</p> <p><i>This matter was raised by the PLA in oral submissions at ISH14 as summarised in its written submissions of oral comments made at ISH12 and ISH14.</i></p>
<p>QD27</p>	<p>The Applicant and any prospective consenting bodies are asked whether the deemed discharge</p>	<p>The PLA’s consent would be required under Article 19. This is reflected in paragraph 102 of the PLA’s protective provisions which prohibits the undertaker from exercising the powers conferred by Article 19 without the consent of the PLA. Paragraph 102 allows for deemed consent if a decision is not made within</p>

	consent period of 28 days under A19 is appropriate and, if not, what an appropriate period might be.	25 business days which is a slightly longer period of time than that specified in Article 19 itself. The PLA has no issue with the 25 business days for a decision as set out in its protective provisions.
QD32	Does any IP have any concern that the draft provisions unreasonably or inappropriately seek to disapply or modify other applicable legislative provisions? If so, what changes are sought to this provision or the dDCO more generally and why?	<p>The PLA had concerns about the drafting of Article 53, and in particular Article 53(4) which disapplied the requirement to obtain a works licence under s66 of the Port of London Act 1968 (PLA 1968) for anything done within any structure forming part of the authorised development, in connection with the operation or maintenance of the authorised development, or any other function of the undertaker in its capacity as a highway authority.</p> <p>There was a concern that this would allow, for example, utilities' telecoms to be placed in the tunnel, bypassing the normal requirement for a river works licence under PLA 1968. At Deadline 7 the PLA and the Applicant agreed revised wording in relation to Article 53 to make it clear that the disapplication of s66-73 of PLA 1968 does not apply when utility works are proposed in the tunnel which are not required directly or solely in connection with the construction, operation and maintenance of the highway that forms part of the authorised development.</p>
QD41	Do IPs have any further and final observations on the drafting of this Schedule including on the description of the individual numbered Works and their relationship with the Works Plans?	<p>From its review of Application documentation, the PLA considers that dredging is proposed, as defined in PLA 1968; however, the Applicant has repeatedly said that dredging is not proposed as part of the dDCO scheme.</p> <p>This matter was raised by the PLA in oral submissions at ISH14 and at ISH14 the Applicant confirmed that it would be willing to make an amendment to the PLA's protective provisions to make it clear that the definition of "specified work" at paragraph 97 of the PLA's protective provisions includes dredging, and consequently any dredging would be subject to consent through the PLA's protective provisions. The PLA awaits this update to the dDCO which would resolve the concerns that it has.</p>

QD43	Local Planning and Highway Authorities, Port Authorities and Operators, Natural England, the Environment Agency and the Marine Management Organisation as asked whether the REAC commitments are sufficiently secured. If not, what specific additional references to the REAC are required in any of the existing draft Requirements, or are any additional Requirements sought (and if so reasons for their inclusion and drafts should be provided)?	No comments
QD44	Local Planning and Highway Authorities, Port Authorities and Operators, Natural England, the Environment Agency and the Marine Management Organisation as asked whether the other CDs are sufficiently secured? If not, what specific additional references to specific CDs are required in any of the existing draft Requirements, or are any additional Requirements sought (and if so reasons for their inclusion and drafts should be provided)?	No comments
QD78 & QD81	<p>QD78: Are the named beneficiaries of the Protective Provisions content that the provisions drafted for their benefit are appropriate and correct? If not, please explain why not.</p> <p>QD81: Are there any other requests for amendments to Protective Provisions? If so what changes are sought and why?</p>	<p>The PLA is answering QD78 and QD81 as the second question (QD81) naturally flows from the first (QD78)</p> <p>Paragraph 99 deals with consulting the PLA in relation to design of the tunnelling works. Sub-paragraph 99(4) allows the PLA, in the event of a dispute, to refer certain matters to arbitration if agreement cannot be reached between the parties. Sub-paragraph 99(5) provides that if a matter is referred to arbitration, tunnelling work should not begin until the dispute is settled.</p> <p>The issue the PLA takes is that this process and protection is significantly weakened by sub-paragraph 99(6), which provides that if a matter proceeds to</p>

		<p>arbitration, the Applicant can unilaterally decide at any point to override the arbitration to refer the matter to the Secretary of State (SoS), and the arbitrator must then make a decision that is consistent with that of the SoS. In the hypothetical scenario that there is a dispute, it would go to an arbitrator with the relevant expertise to consider the dispute. In the event that it looks to the Applicant as though things are not going the way it would like them to, there is the option to refer the matter to the SoS in the hope of getting a more favourable decision. This process could be perceived as though it is a means for the Applicant to get a second bite at the cherry.</p> <p>There is no need for such a provision. There are plenty of examples across this dDCO where matters are referred to arbitrators; in none of those is it deemed necessary for a central Government department to be kept as a back-up option for the Applicant. The Applicant's argument is that referring a matter to the SoS rather than an arbitrator is quicker. The PLA contends that there is no evidence for this. Furthermore, the Applicant has stated that the reason for needing this provision is to obtain certainty about the timing of the arbitration process. This is a common problem for Applicants and the accepted way of dealing with this is to include the highly standardised Arbitration Rules within the DCO. The PLA has made a separate submission in relation to the Arbitration Rules at Deadline 8, where it sets out its proposed drafting to solve this problem in the way that is now commonly accepted for DCOs, rather than the novel and unjust approach proposed by the Applicant.</p> <p>Paragraph 104 of the PLA's protective provisions deal with remedial works where there is a material change to the river bed. The PLA has raised with the Applicant the need for the reference to "material" to address the fact that what is material in the context of the river may be different from what is material in the context of the dDCO scheme as a whole and that, from the PLA's point of view, paragraph 104 should deal with materiality so far as the river is concerned.</p> <p><i>This matter was raised by the PLA in oral submissions at ISH14 as summarised in its written submissions of oral comments made at ISH12 and ISH14.</i></p>
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QD85	<p>Do any IPs have any final submissions to make on the CDs and their content?</p> <ul style="list-style-type: none">• Is there superfluous content that could be removed?• Is there additional content that should be added?• Are there any other documents that should be certified and should form part of the CDs? <p>Any responses to this question should be accompanied by an explanation of the changes sought and the reasons for them.</p>	No comments
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