

ISH4 Part 1

0:02

Well, good afternoon, everybody. It's now 3:00 or a minute past

0:09

and this issue specific hearing issue specific hearing 4.

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0:15

Is now open. Can I just confirm that everybody in the room can hear me?

0:21

Yeah. And and we have some online attendees. Could one of you please indicate that you can hear

0:29

if you can use the raise hand function when you turn the camera on?

0:36

Ohh, Yep.

0:38

Thank you very much.

0:42

Can I confirm with the case team that the live streaming and recording has commenced?

0:47

Yep. Thank you.

0:51

I'd like to welcome everyone to this hearing which concerns the application by Associated British Ports for an order granting development consent for the proposed Immingham railroad terminal. My name is Graham Gould. I'm a chartered town planner and an examining inspector with the Planning Inspectorate. I've been appointed by the Secretary of State for Transport to be the lead member of the panel that comprises the examining authority for this application and now turn to Mr Bradley to introduce himself.

1:22

Stephen Bradley, retired Chocolate chartered Architect and Examining Inspector, appointed as a panel member of this XA.

1:32

Mr Bradley,

1:35

Good afternoon. My name is Mark Harrison, chartered town planner and examining inspector, appointed as a panel member of this ex A.

1:52

The examining authorities role is to examine the application and then ultimately to report to the Secretary of State for Transport with a recommendation as to whether or not the Development Consent Order should be made.

2:05

And at this point I'd also like to introduce the Planning Inspectorate case team colleagues who who are here with us today.

2:16

You'll have already spoken and and or seen online Lily Robbins who's the case manager and Jessica Wetherby who is the case officer. In addition,

2:29

we have some audio visual technicians from the company that's been contracted by the applicant Spark. Those the two gentlemen here, they are purely here to help facilitate.

2:42

Umm,

2:44

the the audio visual side of things in terms of what's happening in the hearing room as well as the online

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participation. If for any reason we get involved in some sort of technical difficulty and there is a discussion with either of those two gentlemen from Spark that involves the examining authority, it will solely be to deal with whatever that technical issue is

3:12

and some very brief housekeeping matters for those in the room. In particular, before I hand on to colleagues, I think we probably know where the toilets are, but they're out through the door to my right, And if for any reason the fire alarm sounds this afternoon as we understand it, that will not be a test and therefore we will need to evacuate the venue,

3:34

await instructions from the hotel staff for when it's safe to resume. In terms of online participants, you will no doubt hear the Bell Ring will vacate and then we'll rejoin you at the earliest opportunity.

3:58

And I would ask that both everybody present in the room as well as online you you turn off notifications on your phones, computers and any other device so as we don't get

4:14
bells or whatever interrupting

4:18
when we everyone's talking.

4:21
And for those of you who are online, can you please make sure your microphones are turned off if you're not actually actively participating at any stage?

4:40
A recording of today's hearing will be available shortly after the conclusion of the hearing, and that will be available available via the web page for this project on the Planning Inspectorates National Infrastructure website.

4:59
With that in mind, would everybody Please ensure that you speak clearly into a microphone? And when speaking, on each and every occasion, will you state your name and the party that you're representing before you start speaking?

5:16
I doubt this is going to apply this afternoon for those in the room,

5:20
but if for any reason

5:22
you're participating and are not close enough to a microphone, there is a roving mic in the room which can be made available.

5:41
If anyone wishes to use social media, report, film or record today's hearing, you may do so. But we do ask that you do so in a manner that does not interrupt the proceedings.

5:55
We will aim to keep the hearing focused so that it's conducted efficiently.

6:03
I'm I'm going to briefly turn to the General Data Protection Regulations

6:13
and in essence I'd ask everybody just to bear in mind that whenever you're speaking

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that you remember that things are being recorded and that you try and avoid saying anything in public that you would wish not to be

6:30

recorded and then published as part of the video and or transcript. That will then go onto the inspector's website.

6:39

Um, that material, The recordings

6:42

and the transcripts will be held for five years, as is standard practise,

6:48

before they are destroyed.

6:56

The only official record of of today's hearing will be the material that is published on the inspectors web page.

7:09

Mr Harrison, if you'd like now to take over on the introductions, I've got his name right this time.

7:16

Thank you, Mr Gould.

7:19

I'm going now to ask those of you who are planning to speak at today's hearing to introduce yourselves. And could you please introduce yourself stating your name and who you represent. I think as we've only got 1 substantive agenda item, no need to indicate which agenda item for this ISH you'll wish to speak on.

7:43

And

7:45

so could we start with the applicants and its advisors please? If we could hear first from whoever will lead the submission to this ISH, and then from others who are intending to make regular contributions, please

8:05

good afternoon, says James Strawn of Kings Council. I'm instructed by Brian Greenwood of Clyde and Co, who will now introduce himself because he'll also be participating.

8:19

Good afternoon, Sir. Brian Greenwood on behalf of ABP. And I'm not sure how regular my contributions will be, but I'm sure I will be saying something.

8:33

Thank you.

8:35

So if we can move on to other interested parties who intend to speak again, if you please introduce yourself and if maybe we go left to right. So starting with the harbour master. Good afternoon, Sir. My name is Victoria Hutton of council. Mrs Hutton instructed by Mrs Jane Wycombe who says to my left. And it may be that Captain Furman, the Harbour Master, also speaks. And he's sitting on my right.

9:07

Thank you

9:10

for IT. So David Elvin, Casey for IoT at with me Mr Alex Menhenick of Burgess Salmon.

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I'm not sure we'll contribute very much, but if we if we do, it'll be one of us because there's nobody else left.

9:30

Thank you

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for CLDN.

9:35

Good afternoon, Mr Harrison. My name is Robbie Owen. I am a solicitor and partner at Pinsent Masons, the law firm, and I'll be leading today for CLDN. Sitting on my right is Rose Grogan of Council, who may also be a participating as well. Thank you. Thank you

9:58

for DFDS. Good afternoon, Sir. My name is Angus Walker, partner at BDB Pitmans representing DFS this afternoon. I anticipate I'll be the only one doing any speaking on their behalf this afternoon.

10:14

Thank you.

10:17

Before I go online, is there anybody else in the room who is intending to speak during this hearing?

10:29

OK. Not not seeing anybody there. So

10:34

turning virtually and I believe online we have Yara represented by Mr Breeze.

10:47

Could you just be able to turn a camera on and wave so that we can check you are fully participating and perhaps you know, let us know if if you sort of indicate if you feel you want to

11:04

verbally participate or whether you're listening in,

11:09

that will be listening in. I'm also joined by Alison Gibson.

11:15

Thank you. Well, if if at any point you wish to contribute, if you use the raised hand function, we'll we'll keep an eye on the screen.

11:30

Thank you.

11:32

If anyone else decides that they wish to speak during the course of the hearing, for example to make comments in response to representations made by other parties, you may do so. Please raise your hand either physically or using the function within Microsoft Teams if you wish to speak.

11:51

And with that I will now hand over to my colleague Mr Bradley.

11:57

Thank you. Gender Item 2. Purpose of the meeting. Could we please have the agenda displayed on screen?

12:06

Will be generally following the agenda as issued on the PINS website on 20th of September.

12:13

You'll see the hearing guidance noted in the agenda document for expediency. I'd like to take that as read, but I will make some elaborating remarks for the benefit of those who've joined online. Whilst the examination of this ENSIP application is primarily conducted in written form as explained in detail at the preliminary meeting, the purpose of today's hearing is for the XA to raise questions concerning the drafting and provisions of the Draught Development Consent Order

12:43

having regard to the amendments made to the DCO in Rep 1005 and Rep 3002

12:54

and the written submissions made by interested in other parties at deadlines 1-2 and three.

13:02

So this will help the XA2 get clarification and to assist understanding of the cases being made by the parties to this examination

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and to discuss actions required following this hearing.

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Our questions will be directed either to the applicant, to other IP's or potentially to the Harbour Master Humber, with other parties being given the opportunity to comment on the answers given to those questions. For that reason we may wish to inquire in greater or lesser detail and indicated on the agenda or indeed inquiry into new matters as stated in the agenda. Any lack of discussion on a particular issue does not preclude further examination, including further written questions.

13:47

It will be noted that there will be some overlap between the questions we ask during this hearing and in the second written questions which were issued on 15th September. And that's deliberate and it's intended to provide some focus for the parties in responding to the written questions as well as highlighting the sort of matters that we are pursuing this afternoon.

14:13

When the applicant and indeed other IP's are answering the excess questions, we will be looking for succinct answers and we will be expecting. I'm just going to cut short the the normal script here because it's very familiar to everybody around the room.

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I'm going to pass on to

14:43

the next point, which is that there's likely there will be action points for various attendees arising from the answers given during the course of this hearing.

14:53

Is that

14:56

somebody from the applicants team who'd be prepared to take action points? Again? As before, thank you and we'll aim. If it looks like we're going to be sitting for over 2 hours, we'll aim for a break at around

15:11

4:30,

15:13

but we'll see how we get on.

15:16

Are there any comments or questions about procedure

15:21

in particular from anybody online? But first Mr. Walker? Thank you, Sir. I have one or two points

15:31

which I would like to put in under item three.

15:35

Would it be appropriate if you if you want to hear those or. But if you just want to it to be your questions, then of course that's fine. And should I put my hand up when I have a point on

15:47

article that is not listed in the agenda that is in sequence? Is in the right sequence. If you say something

15:57

we'll we'll see how it goes

16:00

this the identification of matters for discussions is of this this afternoon has been a bit selective

16:08

remembering that there are written questions out there to be answered. The fact that we have not identified an article or a requirement for that or any other part for discussion doesn't mean to say that we're we're we're settled in our own minds as to how we think that needs to be examined and how we might deal with it later in the examination. But yeah, if you're content to to to work on that basis that, Yep, stick your hand up as I, because I'm going to be leading on most of this. Go from article to article. If there's

16:40

a big jump, but you've got something to raise on one of the intervening ones, then Yep. And I'm guessing, Mr Owen, you're nodding heads similarly. Yeah.

16:50

So I'm seeing no hands up from anybody online. So that concludes item 2, back to Mr Gold to continue.

17:03

Thank you.

17:07

I'd like to 1st

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explore the use of company, which was a matter that we we touched on in the first issue, specific specific hearing, one which was also a DCO hearing. I've seen the representations that the applicant made in response that your preference is to keep company in versus the view the examining authority

takes that undertaker should be used throughout the order. Note the point that you've raised that there is the potential for confusion between statutory undertaker

17:44

visa as an alternative

17:48

where there is reference to statutory undertakers and provisions or protect protective provisions. But certainly orders that have been made by the Secretary of State for Transport and I think we have in the written question that also touches on this point highlighted that national Hwy schemes which there are quite a number that go through the process probably the Department for Transport's most regular customer. I think throughout all of those orders undertaker has been used, notwithstanding the fact that

18:20

that that national highways are a company,

18:26

Mr Strawn or Mr Greenwood. Any observations as to the view of the examining authority that the phrase should be undertaker

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James drawn for the applicant, Sir, Yes, we note your views obviously and the E in the event the terminology or the precise identification. At the moment, my own view is that it's not

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critical in the sense that it nothing hinges or turns upon the terminology,

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but we have used the term company to reflect the fact that the applicant is a company.

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We have also used the term company to avoid any potential confusion of the type you just identified

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and we have also used the term company because there is precedent in orders made by the Secretary of State for Transport in this particular context

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for using the term company. I think you have seen, for example the Tilbury Tilbury Two order made by the Secretary of State, where similarly the applicant also could have been an undertaker but was described and approved by the Secretary of State in in that description.

19:54

That's the term company

19:56
and that

19:59
distinguish it from national highways.

20:03
Orders.

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But

20:07
so that's that's our that's our view. As I said, I'm not at the moment unless you're unless the examining authority suggests otherwise, aware that it would in fact make him a a legal difference as to whether one describes the applicant as a company or an undertaker.

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20:47
Yes, I the way the sorry just add that the way the question that's been put to us you you asked me for a view now but the way the question has been put to us from examining authority is rather more mandatory in its expression. So although you've you've although you've invited me to engage in a a discussion it's not putting that way in the in the question. So we're we're obviously balance between lawn and engaging with your discussion but there is probably quite a

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a clear steer from the way we think maybe the wording ought to go.

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If you

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feel you you you want to take the country view, that's fine, we'll, you know, we'll we'll take on board your representations.

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But don't be surprised if there isn't a change before we publish our version of the order for comment and that each and every time the company were to appear in that version had been changed to Undertaker.

21:56
But we've before we sort of maybe leave the point. Is there anything Mr Ian?

22:04

Thank you Sir Robbie Owen for CLDN. I wonder if I can make a couple of points in response to the the first on this particular point is that I don't think it particularly matters whether the drafting uses the term, the company or the undertaker. But what does matter is that the drafting needs to be clear, particularly in relation to who has the benefit of the order and the transfer of benefit provisions. And I don't think at the moment

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with with respect to the applicant that the drafting does work because if you look at the definition of the company in Article 2,

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it refers it says the company means ABP who has the benefit of this order in accordance with section 156 and Article eight.

22:52

Well so far that's correct. And Article 9:00, well it it doesn't have the benefit of Article 9 because Article 9 refers to transferring the benefit to somebody else. So normally you would if if this definition were a definition of the undertaker, it would refer to in effect the applicant and any other person having the benefit of the order pursuant to a transfer made under Article 9. So I I think we we don't mind whether the

23:18

draught, whether the DC refers to the company or the undertaker, but the drafting I think does need to tie up and work together. So this this definition and the drafting of articles 8:00 and 9:00 and I don't think at the moment it quite gets there.

23:34

The, the, the second point I wanted to make by way of opening, if I may, it's a short point and I think what I've just said illustrates the point I want to make, which is that we've we've reviewed the draught ECO, the revised draught ECO submitted by the applicant both at deadline one and a deadline 3. But we do retain really very serious concerns regarding the lack of precision in the drafting throughout, which we consider prevents a clear determination

24:05

of the proposed developments parameters and the controls on it should consent be granted. We set those out in full in our written representation and appendix too. And

24:17

we we we remain particularly concerned by the lack of precision in the drafting of a number of the articles, most of which remain unchanged since issue specific hearing one in July, without any satisfactory explanation from the applicant. And we also remain particularly concerned by the failure to secure the controls set out in the application documents. And that failure

24:41

just ignores the basic principle, the very basic principle of getting a consent with conditions requiring discharge of controlled documents before commencement of works. And it it comes across to us as if the applicant considers that the scale and complexity of the application gives them a a a reason for bypassing that basic principle. So I'm afraid I'm going to sound like a crack record throughout most much of this afternoon because our concerns remain largely the same as they were

25:14
two months ago

25:16
in relation to drafting of aspects of the order throughout.

25:20
Thank you,

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Mr. Walker. Very, very brief point on this company issue. I agree that it makes no legal difference what word is used.

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But if I like to have an analogy of a sudoku, which

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it doesn't matter whether you use digits or symbols or anything because everyone uses digits, that makes it much easier to understand. So

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it would make sense to use the same term that is in the vast majority of other DC O's for

26:00
purposes of general understanding.

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Mr Straw or Mr Greenwood didn't response to particularly what Mr Owen said about tightening of drafting.

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I mean,

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I'm still in particular working my way through articles and requirements.

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You'll see also in the written question I've been into some of the protective provisions where also there seems to be

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a slackness of wording. Maybe his best way of of describing

26:58
there are issues with a number of

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articles and requirements, certainly in terms of their tightness. Is any further review ongoing on the applicant side at the moment to look at some of that wording?

27:15

I I deliberately held off being too pernickety with questions because there could have been lots of them written questions. I could probably have populated another table with some of those sort of drafting points.

27:31

Mr. Green, are you leading on the drafting or Mr Drawn, do you want to comment?

27:38

Brian Greenwood for AP, Yes, certainly it's an evolving process. So the the view we're taking any comments received are are gratefully received and

27:48

so please do not hold back from from a detailed comments which are taken on board. It is moving and you will get a an updated Co as and when you require it.

28:01

Can I just

28:03

ohh wait, I'm just add in relation to company or undertaker.

28:11

If we reflect on what you said and the more

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stringent steer in the in the question of the of your views and it may be that it would make sense if we are going to revert to the term undertaker that we seek to do that as a draught first. If we do because we will feed through and we can pick up any

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of the the sort of drafting point that's just been made about Article 81, Article 9 if there's a point there. So I've just made that so I I didn't

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know how you want to deal with things. I'd really. I'd emphasise that that the we do receive comments on the drafting in a constructive fashion. That's part of the process that we're engaged with. But I didn't. I don't know whether it's necessary to respond to the sort of generic criticism of all articles, because that doesn't

29:13

help you, and it doesn't help us to have that sort of

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sweeping criticism made of all articles without knowing what the specifics are. And that's it. It's not very helpful. It's very, it's expressed in that way. I think the important thing for articles or for that matter requirements, is that for each and every one

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where there is in effect a sequence of things that have to happen within it. Particularly where you get a scenario where something has to be submitted, something has to be approved, then has to be implemented in accordance with

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and or potentially where you've got the scenario of something having to be retained as approved.

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So in in effect the basic anatomy, I think each article and each requirement needs to be checked that it's got that sort of anatomy. There are some and we probably can come onto those in a bit. The Construction Environmental Management Plan springs to mind. Where it it's a bit woolly as to where you've got a document,

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how are you going to comply with it? Who's is ultimately going to sign off

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the the approval of what might be a final version and then in fact being the enforcing authority?

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Umm.

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Having done quite a lot of appeal work, I spend quite a lot of time in the round table condition session at a hearing or an inquiry,

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having to spend a lot of time

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in effect redrafting or discussing the redrafting, which does get a little bit tiresome.

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If if this were an inquiry, for instance, and I had enough time, I would probably have produced my own rewritten version of the drastic conditions with track changes all over it, which would give the prompt for each and every condition that needed some additional work on it. Haven't done that yet, Was hoping that I wouldn't necessarily need to get that. So I think you know on this general point we would ask the applicant to go away and do a review. As I say, as we go through the questions this afternoon, some of those points are definitely going to get

31:24

picked up because they're on the list to do requirement 18 hours was although requirement 18 impact protection measures may be going in a completely different direction. Was one such condition.

31:37

Sorry requirement. I know the noise one is another one which I'm gonna come back to requirement 10 and where there are still some loose ends. But as a general point

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suspected Mr Greenwood, you're leaning on the the drafting of of the order. I think it does need review

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and rather than the examining authority spending a lot of time going through

32:04

some of that, it would assist if the applicant took that on

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and then at the next iteration we will then go through again with our final two tooth code. If there's anything in there that we still think on anatomy type points need picking up, we would definitely highlight because at that point we will be getting very close to publishing what we consider should be a version of the order. Mr Owen,

32:32

Robbie Owen for CDN, Sir, Thank you. That's very helpful guidance from you. And if I could just very briefly come back on what the applicant said we very much welcome what Mr Greenwood was saying in terms of asking us not to hold back was the word he the phrase he used

32:51

but but but just respond, I think it's a strong pertaining Inspector. Actually if you look back at the transcript well we we will nevertheless not hold back ourselves because the the the the main point that the main point I wanted to raise in response to what Mr Strawn said was that he I took what he said as a direct criticism and effect of what I had said about general comments. But as I mentioned, we have with great detail set out in our written representation Appendix 2,

33:21

lots of detailed comments on the articles and the requirements and in effect the revised draught ECO we've had since the last hearing have not really moved anything on at all. And therefore that that's why I raised it as a broader issue because at the moment we're not seeing any movement from the applicant in terms of improving the standard of the drafting, the DCO and we're almost halfway through the examination and we, we, we, we do really need to see a change in approach here please. Thank you,

33:58

Sir James Jones. And I'm not going to rise because it's not going to help you. But what I've taken from, from your observations is you'd like a general review of those, if I can call it nuts and bolts type

clauses or standard mechanisms at which we will certainly do. And there we're also going to have I know some discussion on particular requirements

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articles and certainly Sir if it's obvious that there are ones that you've already got your mind on or I'm sure they'll crop up today, that also helps us to ensure that our review

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doesn't omit anything.

34:42

You you mentioned both the CMP and the noise requirements and I'd like to come back to those because we've got some observations to make about those, but we'll we'll certainly carry out the general review you've indicated,

35:05

right. Well, I I'd now like to head to Article 4 unless Mr. Walker wants to come in earlier.

35:13

Thank you Sir Angus Walker for beating the FDS. Just one small point on Article 2. The very next item matter item is the definition of construct,

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which we did raise this I SH one

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as being too wide because it includes things like replace and

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the way the works like work. Number one

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is defined as the construction of the three peers. So that definition would suggest they could be replaced

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and I think that is still an outstanding issue that we're concerned about.

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It doesn't it? It is not yet limited

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to the assessment and the environmental statement like some various other powers are. Thank you,

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Mr Strong, anything to observe on that point. Yeah. So I we've we've already noted that observation

and we're we're looking into it and but I'm I think it's better if we come back and in writing on that. Yeah. OK,

36:29

OK. Now we hopefully head to Article 4.

36:33

Umm. First thing I'm going to highlight is in asking our written question DCO 2.3

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36:47

Pink. As far as the applicant is concerned in responding to that written question, you can ignore items B&C because that arises from a a misinterpretation on my part in that I took. I think there's a London, a London clause or something as being one of the

37:06

elements to be incorporated. It's not. When you read the wording of Article 4, it's in it's. It's an excluded

37:16

section,

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but as we highlighted in the written question, we still require you to answer part A, which is the justification for each of the sections that you do want incorporated.

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And just touching on that, having spent a little bit of time rereading Article 4, then going back to the 1847 Act,

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which is quite a quaint document. It appears that amongst the listed sections for incorporation, and these are just a few examples, I I I lost the will to live after sort of looking at that 12 sections, there are a number

38:05

of repealed sections that you're seeking for incorporation.

38:12

I think 6. Section 24 is repealed. Section 30 is repealed.

38:20

I'm sorry, I was Section 26, Section 24, I think is repealed.

38:28

Section 30 is repealed. Section 47 is repealed. There may be others as you say, having spotted a few other and decided that's enough for me.

38:41

So there does need to be a further review within Article 4 of precisely what it is

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that you do want incorporated, and to make sure that those bits are still extant.

38:58

Brian Greenwood for AVP so thank you for that. There's clearly an error in our drafting because we did carefully go through everything. I don't quite understand how you've managed to catch us out, but you have, Sir. I apologise and that will be corrected, but I've caught you out if I'm reading the article correct. I mean, it might be that an easier way to draught that article is rather than in effect trying to

39:22

discipline bits of it, is to actually write it in the reverse to make it clear which bits you do want incorporated. And then in in doing that, it might be easier than to run through and decide which are extant verses which are repealed.

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And I think section 26, which is extant

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but is one of these very quaint ancient provisions because it actually requires in effect sign off of a completed scheme by a magistrate.

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Quite how that works in modern times I am not too sure.

40:02

Ohh, so

40:05

James Strong for the applicant. So certainly we'll look into that although it's still fairly common for magistrates to have very wide unusual jurisdictions having appeared in front of them in relation to the licencing of fruit machines in kebab shops in my early years. So and they so we're but we'll we'll check that but but it may be that although seemingly quaint is still operable and of course in reviewing

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particularly Article 4 and

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perhaps doing a weeding exercise and justifying why they need to be there which will be the territory

of the explanatory memorandum. That might also help in the in the process because if somebody is actually writing the justification

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in the modern age it might deter assist in making a decision as to whether or not it really does need to be there

41:05

anything from anybody else on Article 4. Mr Irvin,

41:10

Robbie Owen for CDM Ports. So if I may just raise one point, which is the intention to incorporate section 33 of the 1847 Act. And we await with interest

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the statements you've just asked for from the applicants to explain why each and every provision of the Act to be incorporated is to be incorporated. Because in relation to Article Section 33, rather we

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understand from the applicant that they seek to incorporate it whilst also preserving the power under Article 22

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to appropriate

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all or part of the facility the DCO seeks to authorise,

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which is therefore sort of a derogation from the open port duty that Section 33 embodies. And

42:04

I think it would be helpful just to understand

42:07

given what we've heard in this examination so far, particularly in issue specific hearing 3 yesterday that the purpose of this application is to provide a facility facility facility for sustainer. Why it is therefore that and how it is consistent with with doing that and incorporating a Section 33? Because if the facility is to be used entirely by Stainer, then it's fundamentally incompatible with that for the open port duty to apply to it pursuant to the incorporation of section 33 of the 1847.

42:40

So it would just help us to understand what is in the mind of the applicant here. Because if the facility is intended to serve, as we are told, just a single operator, then why is the open port duty contained in section 33 proposed to be incorporated at all? And the applicants response to action .12 that was submitted at deadline one and the updated explanatory memorandum that they submitted then

doesn't assist with these concerns. So if I can just put that down as a marker that we are particularly interested in understanding the justification for

43:14

this incorporation of Section 33 when taken with Article 22 and the power to appropriate and therefore to derogate in whole or in part from the open port duty. Thank you.

43:27

Thank you. Mr And you have in part preempted a question that was coming

43:33

in relation to Article 22. So we'll we'll deal with it now

43:38

because

43:40

the applicant in your deadline, 3 submissions in response to Stenner's submissions have indicated I think for the first time,

43:50

um, that there is potential for the proposed development to be used by other parties when not fully utilised by Stenner,

44:01

which does

44:05

I think assist with the open port side of things. But that came certainly I think from the examining authorities perspective having read all the application documents

44:16

as something new IT it wasn't clear certainly up until that point that other parties might be using the births.

44:27

So

44:28

can we be clear as to whether the intention is primarily used in our operation or open port or a bit of both

44:40

James drawn for the applicant. So it's a bit of both. It's primarily, obviously, when I say a bit of both, it's prime the as you've heard and indeed there's plenty of evidence before the examination.

44:54

It's there to address a need that's been identified by Stenner.

45:00

But there is of course no reason in principle why the facilities they're not used to therefore extend or indeed in the future by sterner couldn't be used by other operators.

45:13

And the the well the orders obviously to provide for for infrastructure rather than a infrastructure for a individual or named person in the normal way.

45:27

And therefore in dealing with the Article 22, it gives the power to appropriate. We'll, we'll respond in a bit more detail on the ACT. That Section 33 of course is slightly different. It's Section 33 is about the ability in part to charge rates on payment of rates to create a

45:53

public dock or pier open to all persons et cetera. They're not mutually exclusive. They sit in, in parallel. Yeah, but I think in the explanatory memorandum Article 22 does need some work to explain that because certainly if you read the application documents you get one clear ish picture which is not quite so clear. Now Mr Owen Robbie on for CD and if I can just clarify one thing. Section 33 isn't at all concerned with and doesn't confer any power.

46:25

The charge that is a power that the applicant will have of this facility is approved by reason of the Harbours Act of 1964. All Section 33 says is that is that upon payment of rates and dues that are that are properly chargeable and payable then the facility is open to all. Section 33 does not confer any power to charge, just to be clear about that.

46:52

47:13

Mr Trump

47:15

Well, so

47:16

I could have a debate about what Section 33 does. Now I as I've already indicated, we're going to provide you with it a a written explanation as you've asked in relation to the Harbours Act and as I've pointed out, well, I won't repeat myself.

47:33

The two parts powder appropriate in Article 22 and Section 33 are not counterpoints or mutually exclusive provisions and are I'll as necessary. We can set it out for you in the written response. Thank you.

47:52

I think the the the general comment therefore on Article 4 is there's needs quite a bit of further scrutiny.

48:03

Umm.

48:05

And also in relation to Article 22, there's a bit of work to be done there and explanation certainly needs to be beefed up in the explanatory memorandum.

48:18

And because if that document is read freestanding of anything else that's come into the application, it needs to be clear about what that article is all about.

48:34

Anything else in relation to Article 4 or for that matter Article 22? Because I suspect Mr. Walker might have something in between one and 21.

48:46

It is Article 21. That's in fact. What shall I?

48:50

Yeah. So you -2 penny foot first and then yeah, please go. Yeah,

48:55

you're the boss.

49:00

Yes.

49:11

So I'm just gathering my thoughts as

49:20

Mr Mr Owen did I notice you had your hand up did did you have a point somewhere between Articles 4 and 21. I'm afraid I did Sir. Thank you. Let's let's go back and then we'll come forward. They're they're fairly Robbie Owen for CDN. They're they're fairly brief points, but I had one on on Article 6, which is to do with maintenance of the authorised Development And

49:45

whilst the definition of maintain which we find in Article 2 may well be

49:50

well preceded, it's not clear from the environmental statement that the applicant has assessed the full scope of the power to maintain that it is seeking.

50:00

For example, if you look at paragraphs 3, point 2.22

50:04

to 3 point 2.25 of chapter three of the Environmental Statement, Those paragraphs, excuse me,

50:13

provide some interesting background on how renewal projects have extended the lifetime of infrastructure originally installed in the late 60s and 70s. But it's not clear from this chapter how the applicant has assessed, or indeed whether the applicant has assessed the likely significant environmental effects or indeed the habitats effects arising from future renewal projects of

50:39

this development for which it is now seeking development consent, including a power to maintain. So it's a, it's an ES and HR. A point in a in in effect in terms of what's been assessed compared with what are compared with the powers that are being sought

50:53

and if. Whilst I'm

50:56

speaking, I also deal with the second point which is relating to the following Article 7

51:02

in relation to limits of deviation

51:05

and we we consider and and I. We did raise this point I SH one that there is a lack of clarity in relation to the vertical limits of deviation in this article,

51:16

and that's because the reference point from which the power to deviate may be exercised is said to be the levels shown on the engineering sections, drawings and plans.

51:26

However, those levels are marked as indicative in quotes and there is no clear labelling telling the reader the maximum height of the structures or clarifying whether the levels are to be scaled from existing or proposed ground levels. Put simply, there is no firm point of reference to determine the starting point of the two metres upwards limited deviation and therefore, consequently, as drafted, there is no confidence that the development that would be authorised by the order, if it's made, will be within the parameters of the environmental

52:00

impact assessment and therefore whether this is all enforceable. And again, the applicant's response to action .11

52:08

submitted at deadline one that does not address this concern.

52:14

Thank you,

52:21

Mr Strong. Mr Agreement. In terms of the maintenance point,

52:27

is the applicant envisaging in effect total renewal

52:33

or in effect repair as necessary?

52:39

It's the latter,

52:41

James. From the applicant, it's the latter. So

52:45

then one just then maybe we need to look at the wording to make that clear. May maybe we'll think about that the the the Habitat regulations point is is not a correct point because of course under the Habitat regulations and indeed the original directive, the any plan or project which does in fact have effects would need to be subject to appropriate assessment regardless of the source of the power. So insofar as anyone doing anything under an existing power which triggered Habitat

53:18

Regulations assessment, there would be a set freestanding legal requirement in pursuing any such plan or project. It doesn't require the

53:28

anything more, but I don't think it's actually arises in in relation to the intention behind that Article 6 and as to the

53:39

Article 7. So the set the point about levels and sections is to be addressed in deadline 4 by the submission of sections which make remove any ambiguity in that respect

53:57

point of clarification there. I'd like to just check. Mr Owen were you referring to habitat regulations or were you referring to EIA regulations, Robbie Owen for CDN, I was referring to both. The the key point is we think there's possibly a mismatch between what has been assessed both in the environmental statement and in the shadow habitat regulations assessment and the powers sought by the order to maintain because there should be parity between the two. And we're not

54:26

that convinced there is. And so it's not just the habitats point and we need to consider what Mr Straw has said in that respect because I'm not at all sure that is correct statement to the law. It is a broader point and what's been assessed and it's a fundamental principle that the powers sought in the DC O in this and in all other respects should be the same as the project that's been assessed in terms of construction, operation and maintenance. It's a very basic point and it's one that we would like some clarity on, please. Thank you.

55:05

Because just quickly looking at the maintenance definition, I think the word that's potentially causing particular concern is reconstruct

55:16

because that could mean total rebuild rather than something more akin to repair

55:29

Robbie Owen for CDN. So yes, that is a particular concern. I mean that wording in the definition of maintaining is not at all unusual. That's not the point I'm making. The point I'm making is we haven't seen the evidence from the environmental impact assessment and the habitat regulations assessment that the full breadth of this power has been assessed. And yet that's the key point that we would like to see some further details on from the applicant.

55:56

James Strahan for for the applicant, I'm not entirely clear about that. The

56:04

We've already made our point about what's behind the the wording and the intention. But if there's a concern,

56:11

if I if I've understood Mr earns observations correctly, there's a concern that reconstruct enables you to do something undefined. Additional then I'm not quite sure what he's saying should or even could be assessed

56:28

Robbie Robbie for CDN. I I'm not sure I can be frankly any clearer Sir in terms of it's it's not just that word reconstruct it's the the whole scope of the power to maintain. We wish to understand and receive clarity as to whether that has all been assessed. It's a perfectly common principle that you have to assess the full scope of the power to operate and maintain and construct, of course. And it's not clear to us from looking at the oral statement, looking at what the applicant has provided,

57:00

that the applicant has assessed the full scope of the power it is seeking in terms of the impact of maintaining in all of its variations, repair adjusts or to remove or reconstruct. That is a very straightforward point and I'm not understanding why it's it's it's one that the applicant can't just say, well, we understand what you say, we'll take it away and come back with some details. Thank you

57:35

James Storm for the applicant, Sir.

57:38

That didn't provide an answer to my question. We will respond in writing. As I said there's I'm finding it difficult if you if you're finding it easier to understand what it is that it said we haven't assessed in the ES which should be assessed, then please don't hesitate to tell us. We have assessed the scheme, the proposed development. There is a power retained here under the article as as is pointed out in a conventional way to which is retained under

58:10

under the article to maintain. Yeah and I'm what I I'm struggling I'm I'm keen to to progress. I think if there's something we have omitted then then we need to know what it is. Yeah. I I think to assist the the point that Mister Owen is making is that when you read the relevant section in the ES,

58:29

it is not entirely clear what works of maintenance when you look at the words of maintenance in the draught order have actually been assessed.

58:42

Um,

58:44

now minor works. Have repair?

58:47

Almost certainly not an issue.

58:50

Umm,

58:51

but as you then start to look at things like removing and or reconstructing

58:58

what has actually been looked at in the ES to decide whether or not

59:06

removing half of birth 3 for argument and then reconstructing whether that has been assessed in the ES.

59:19

I think in essence that's the that's the point Robbie, over CD. And so that is the point and it's not, it's not good enough for the applicant to say, well, you tell us what we've missed. The applicant is being asked to and in my submission should supply evidence that it has assessed the full scope of the power

to seeking. That is the the very simple point I'm making and it's for the applicant to answer. It's not for interested parties to point out what the applicant may may have missed in my submission. Thank you,

59:50

said James Strahan for the

59:56

James Strong for the applicant. So you're what you've just observed is about.

1:00:02

Reconstruction, which is what I said I thought it was about. We were then told no, it's wider than that. I will take it away and consider whether there's anything wider than that. And I'd already answered you about reconstruction,

1:00:19

but that's why I was exploring it. But I doubt we're going to get make any more useful progress than than what you've observed. But I think what what will be useful is yes, you make some written submissions in response to the discussion we've had at the hearing. In doing that, there is a need to go away and review what is actually said in the Environmental Statement to make sure there is consistency between whoever authored that section of the ES and what has ended up in the the

1:00:50

the draught order, because sometimes there can be a mismatch. Mr. Walker. So in contrast to the comment I made about construct in Article 2, Article 62 does limit the maintenance power to what has been assessed in the Environmental Statement. So surely

1:01:10

by definition

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it's not so much of A worry because they they can't do anything if they haven't assessed it

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in the environmental statement like reconstruct the whole thing, whereas the definition of construct is not so limited and uses words like replace.

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So James Strong for the applicant. Thank you for Mr Walker's

1:02:02

intervention, which is entirely right.

1:02:07

The concern that I think we still have here is that the the DML goes only so far. And I think that the correlation between this article and the DML needs to be reviewed and explained.

1:02:25

And indeed at which point is additional licencing required from the the MO for works that may or otherwise be, if you like, within the authority of the port itself. Now I think that's the crossover that we don't understand. And I think also it's unclear

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certainly in aspects of environmental impact such as marine physical processes, just how much has been assessed

1:02:58

in terms of future maintenance and future indeed possibly replacement and and reconstruction.

1:03:05

Does that help

1:03:07

So well, we'll take that away. I I if it's about the DML, so be it. I, I,

1:03:17

I, I, I think we can respond in writing as I think there's a pretty clear answer to that. I certainly needs some thinking and time to to respond, yeah. But the point is it's not just about the DOL, it's about the correlation between the article and the DML.

1:03:33

The understand the correlation between the two I, I and and point taken about that I was addressing what I took down as Habitat regulations assessment works. First of all, I was then corrected that it was about EIA

1:03:51

but but in respect to the DML. We can come back to that in writing. But as I've just observed the

1:03:58

the there is a basic restriction under Article 6/2. As Mr Walker's pointed out,

1:04:06

you can't actually do anything if it is going to have like the significant difference. But I think there also needs to be clarity with within the ES as to precisely what

1:04:18

um those maintenance works are.

1:04:22

I what has been scoped within the years and assessed under the banner of maintenance because yes you come back to Article 6, but if you haven't actually in the US set out what it is maintenance wise,

then again Article 6 will kind of hang in the air because where whoever is enforcing won't know where the beginning of the and and the end of that compliance with the environmental statement is. Was that the point that

1:04:54

Mister Owen, you're hoping to make? Thank you, Sir Robbie. And CDN ports that that that's exactly right. So just very briefly, I mean of course I'm aware of Article 6 two, it's a standard provision, but it doesn't answer the point we're making because it's just not clear from looking at the environmental statement quite what has been assessed in terms of maintenance. And I I, I I started by referring broadly to the maintenance. I wasn't just referring to renewal, as Mr Strawn said and I made it very clear from the beginning our concerns was our concern in relation to environmental effects

1:05:27

and habitats. So it's not just a habitats point. So that's the breadth of our concern and our our point simply is in a few years time when one is looking at this order if it's made and understanding what is the scope of the power to maintain, it just will not be clear as things stand at the moment quite what the ES did assess,

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we've had quite a lot of debate about the point. I think the applicant

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has got the point or hopefully has got the point. There is some work particularly in terms of

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the ES and making it clear as to what maintenance means in its terms.

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And and certainly my recollection when I read that section was, which is quite some time ago,

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it was quite heavy on the the initial construction side of things. But as Mr Owen has highlighted, it is somewhat weaker on actually explaining

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what the maintenance side of things might be.

1:06:37

Mr Greenwood is certainly not his head as understanding the point and that will go back to the team for further review. I think then on week we can move on. Mr Owen, did you have anything before we get to Article 21?

1:06:53

Robbie Evans? CD imports? No, thankfully not for thank you.

1:07:08

Right. In terms of Article 21, in the middle of the article we've got a tail piece which when in effect allows some potential variation,

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but at deadline three in terms of throughput

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in response, I think it was probably to CDN's

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submissions. We see some explanation from the applicant that the intention is

1:07:40

certainly under normal circumstances that the facility would run at around 80% capacity and therefore have an annual output of around 525,000 units or thereabouts,

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albeit that the environmental statements and the wording of the of the draught order looks at an absolute maximum of 660,000 units. Given that, what purpose

1:08:09

would would that tail piece cause? Because you'll be aware tail pieces are generally of concern to examining inspectors, and for that matter, when inspectors are wearing other hats and dealing with appeals, tail pieces conditions are of concern.

1:08:23

1:08:28

Really that tailpiece shouldn't be there and given the the new evidence that we've got that actually the expectation is that for the bulk of the time the expectation is 80% capacity is where you normally be.

1:08:42

What's the justification for the tail piece?

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Sorry James from the applicant. Can I just check which tail piece your comments that direct start? Because

1:09:00

the

1:09:01

maximum capacity of

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row row units if I'm if I'm in the right weight is 21121.

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Two is to deal with the

1:09:15

question of passengers departing

1:09:19

and the three

1:09:22

is a qualification in relation to passenger numbers under 2.

1:09:26

But I maybe I've misunderstood the

1:09:30

question. So they're different.

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The what's described as the tail piece is, is actually dealing with the question of having an extra passengers, which is

1:09:42

a different issue in relation to the 660,000 row row units.

1:09:51

Yes, forgive me, you are right because when you read the wording it does

1:10:06

function of the indent. Yeah it it it's a it's a formatting issue certainly at the point that I've raised. But it maybe we talk has got something else to raise in a minute. Yeah, because you if you read it the way it's formatted actually that's the way I've taken it that it it it it applies across that article. Apologies. I think certainly it's intended to be applicable to the passenger numbers, but there is still a point

1:10:36

in terms of HSE having concern the the whole tenor of the HC. HSE comments up to this point are that they have taken the 100 to be the limit and that has an effect enabled them to say that they would not in effect raise objection to the to the throughput of 100 persons per day. Were that to change that wouldn't necessarily be the HSE's position.

1:11:16

Sorry sorry I'm just getting some say the it's the tail the simulation to the passengers that I think we've we've now established. I think he does belong to the past and not the the Roro unit element Mr Greenwood have yeah. So we'll we'll, we'll, I'm telling Mr. Green would say but we'll review the the need or reason for the any tail piece in that respect in light of the HSE's position and come back to you

1:11:45
in writing

1:11:46
Mr. Walker, I think you had a point on Article 21. I did. Thank you Sir Angus Walker for DFDS. This is on Article 21 one and relates to the discussion and our submissions on road transport discussion this morning and our other submissions

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that

1:12:07
the figure of 660,000 units a year

1:12:12
is based on

1:12:15
1800 units a day or when you divide it by 365 that's what you get and that but that is assessed as the

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highest number of units in the environmental statement, daily units.

1:12:29
So we would

1:12:31
and I think this was certainly considered by the group of transport consultants whether to include a daily limit of 1800 units,

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which would reassure us that

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the number of vehicles would not exceed that in any particular day.

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Or

1:12:53
I think we would also accept that lower annual figure based on the average number of daily units, not the peak.

1:13:01
I think you said 525,000 or whatever. It's a number around that

1:13:07
figure

1:13:09
because at the moment

1:13:11
the maximum allows the peak number to be,

1:13:15
uh,

1:13:17
to be processed every day

1:13:21
and

1:13:22
which is not really what the environmental statement is contemplating.

1:13:28
Thank you.

1:13:59
This is drawn in terms of the point that Mister Walker has just raised. So James Storm for the applicant. So the

1:14:06
a total cap maximum 660,000 is in there because that represents a ceiling on in effect the environmental activity generated by the facility. And certainly there's no basis for reducing it to a lower figure where the facility operates on Mondays day basis or on an annual basis at a lower figure. If that happens, of course there are no adverse environmental consequences that need to be

1:14:42
brought down to that level as opposed to the 660,000 as to a daily limit at the moment. That is the discussions in, I think discussions have been taking place in relation to the highways group. I think our current position is that there isn't a need for a daily limit because one can have fluctuations in daily limits which won't necessarily give rise to any material adverse consequences in our on the highway network. But

1:15:14
rather than give you any definitive answer about that, I'm happy for that to continue to be the subject of discussions in the

1:15:23

the highway statement of common ground transportation statement of common Ground and see what conclusions are reached by the respective parties. And then if it were necessary to revise revisit that in the context of Article 21,

1:15:53

just talk. Anything to add to that? Or are you content that

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that another pun that might be parked for the moment while the the the transport experts consider

1:16:07

and traffic implications and likely movements? Yes. Well, I'm Angus Walker for DFS. I'm pleased to hear that it is still under at least under consideration and I look forward to the outcome of that. We may make further submissions if

1:16:24

the result is something other than what we want.

1:16:28

Mr And you have a point to make

1:16:30

at Robbie Owen, CDM Ports. Thank you, Sir. 2 brief points, if I may. The 1st relates to what's just been discussed on Article 21. One, I think Mr Strawn has given the clarification that Mister Grogan was seeking this morning. I I think we would like Mr. Walker has just said, we will wait to see what comes out of the transport group discussions. But one point that we will want to look at is what is the maximum daily figure in a sort of a peaking scenario that has been assessed because that's obviously important to understand

1:17:04

of its more than 1800 for example.

1:17:08

The second point I wanted to make is on Article 21. Two I I was going to refer again as I did at issue specific hearing one to the presence of the tail piece which we don't think is acceptable. But the other point I wanted to make, which I'd ask the applicants to consider as they do think about whether this is necessary at all is what the words at the end of that tail piece mean in terms of subject to obtaining all necessary consents and approvals. It's not entirely, it's not at all clear to us

1:17:40

what these consents and approvals are alongside who will be granting them. And if this provision is to remain the tailpiece that is, then those further consents and approvals to which it's subject

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should be clearly specified in our opinion. Thank you.

1:18:00

1:18:35

Mr Greenwood or Mr Strong, James Strong, the applicant, yeah. So we'll treat that as part of our consideration of the tailpiece. Generally, I think the, the, the primary thing is the tailpiece needs to be reviewed because if it disappears, well matters go away. If it's to stay, you will need to expand on the justification so that there's greater clarity as to why it's there.

1:19:15

On my list I was going to then head off into requirements, but Mr. Walker or Mr Owen may have

1:19:21

something further on articles. Mr. Walker anything further on articles

1:19:26

I have one brief one is another point that was not that we raised IS H1 but has not changed his Article 25 one which

1:19:42

which I will just scroll to the right point And

1:19:48

so we said that it was not subject to the the controls in the deem marine licence in schedule 3

1:19:57

so arguably

1:19:59

can be done without being so controlled under 25 one.

1:20:05

I'm going in the wrong direction.

1:20:18

Yes, power to dredge

1:20:22

and it does say in accordance with the green licencing, I think maybe those words were added since they last

1:20:29

looked. So please withdraw that comment. Thank you was a a Rep three

1:20:38

amendment.

1:20:39

Thank you. I'm looking at the the Rep 3-1 but I must have been

1:20:43

looking at a previous version when I analysed this point. Apologies,

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that's right.

1:20:53

Robbie Owen for CDN ports. Thank you. So I just have two articles that I will mention very briefly. We did raise them before at issue specific hearing one and in neither respect has the applicant subsequent response to action points and it's updated expansion Memorandum

1:21:14

address the issue. So I raised them again and we can put further detail in writing. The first concerns Article 28, and we're just not at all sure what this article is.

1:21:25

Therefore, whilst the drafting of the article is relatively standard and is included in numerous CEO's, it's not clear why it is necessary in this DCO because the only provision of the DC that contains powers in relation to streets is this article. So it's it's not, it's not clear what purpose what's in the applicant's mind in terms of what kind of agreements with a higher authority may be being contemplated. And I think this is important to understand

1:21:54

in the context of the applicant's ability to deliver the mitigation necessary for the project and and the adequacy of the environmental information in that respect. And therefore it would be helpful to understand from the applicant more detail as to what Article 28 is there for.

1:22:13

And the second point I wanted to make was the following Article 29, which confers A defence to the to proceedings in respect of statutory nuisance. And again we raised this at the last hearing and subsequent subsequently in our written representation. And we again aren't seeing the justification that we think needs to be produced to justify the quite draconian effect of this article that whilst in some particularly linear infrastructure projects it is precedented, it is not generally

1:22:45

standard DCO provision that the applicant says that it is. And if you look at the context of the precedents it cites then I think the point is expanding, self-explanatory. So it would be helpful to understand the justification for this Article 29 because with it in with it included, local environmental health officers will have their statutory powers to protect environmental health significantly curtailed and therefore self. Evidently,

1:23:18

such a provision shouldn't be included in a in a DDCO lightly and without careful scrutiny of the justification for it. And as I say, we don't see a response to action .14 at deadline one or in the updated exponential Memorandum, any justification for this provision. So I would like to see that please from the applicant. Thank you,

1:23:53

Mr Straw. I'm, I seemed certainly to remember in terms of Article 28, the highway is one. I think I raised a query as to why it was there given the nature because I think there is likely to be only one agreement with the highway authority which is in a relation to the works at the Eastgate. That's right, James Strong and that that is right and that's that Section 278 agreement contemplated in respect of the Eastgate works,

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hence the provision

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and I think there is reference to that in the

1:24:32

documentation. I can't lay my hands on it, but I've put it in writing for you

1:24:37

and

1:24:39

certainly she got another question about that. Can I turn to Article 29? Article 29 is preceded in DCO's

1:24:51

you you were referring a moment ago to numerous Secretary of State Transport Highway DCOS and I can give you 2 only because I was involved in myself. A 47 N Tuddenham and the M25 JCT 10 Wisley interchange. They appear. This provision appears in those TCA and deep many others, and the provision itself, defence to proceedings in respect of stature and use

1:25:24

is reflective of the commentary and the National Policy Statement in reports

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at paragraph 4.14.1, with reference to section 158 of the Planning Act 2008. And as a matter of principle, the provision of a defence to proceedings in respect of statutory nuisance in respect of authorised works for US statutory undertaker is commonplace

1:25:58

and for undertakers. And so the provisions of Article 29, As for other Secretary of State DCOS, comply with the principle as expressed in the Policy Statements. The caveats about

1:26:18

where a defendant shows a defence in respect of nuisance, for example, if it cannot reasonably be avoided in this wording 29 one a Roman numeral 2

1:26:39

it is also in high speed rail acts and transport and works Act orders. But you can look closer to home for precedence in Development Consent orders made by the Secretary of State for Transport

1:27:03

Brian Robbie Owen CDM ports Sorry, I'm not sure that very general response from Mr Strawn actually assists because I I did acknowledge that this provision is precedented and I referred to linear authorizations like high speed two and rail transport works Act orders and some development consent orders. But it it is not a standard DC provision and Mr Strahan gave no

1:27:29

justification in what he said in terms of why it is necessary in this de Co I I know very well it's precedented as I've said. And as I said earlier that's not the point. The point is why is it necessary in this DC O that is what the applicant needs to apply its mind to and we see no evidence that it has done so and that is what we seek from the applicant justification for why it's necessary and proportionate for this scheme. Thank you.

1:28:03

That point touches on a more general point, that we asked for the explanatory memorandum

1:28:10

to be reviewed following issue specific hearing. One, because there were concerns about some justification. Some elaboration has been provided, but there are still elements, and perhaps this is 1

1:28:26

where it's not clear why in this instance that article is necessary. In the same way, if I take it back to the discussion we had about Article 4 and the various bits of the 1847 at why

1:28:43

certain sections need to be there versus not needing to be there

1:28:50

there. There is a need and to be to be clear in terms of the justification in effect for each and every part of an order.

1:29:01

Umm,

1:29:06

sometimes that is in in cases dealt with better than others.

1:29:12

I have recently been doing some HS2 work and had to spend some time looking at its explanatory memorandum and didn't find it all that helpful for the particular point that was

1:29:25

that issue.

1:29:28

But yeah, I

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I think the point that Mister Owen makes is a fair one. And I suspect Mr. Walker might similarly make the point

1:29:38

that, yeah, there is a need to ensure that the explanatory memorandum does the job that it's supposed to do, which is elaborate on sort of what is often quite sort of bland wording in a piece of legislation. I a draught order or ultimately want might might become a made order,

1:30:00

so James Strong for the applicant. So the expansion memorandum you're referring to we can review and to as you observe whether it can be made more informative than that respect. Can I just point out that in relation

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to not only there being precedents for DCO's made for this defence to proceedings in respect of such a nuisance to be incorporated, indeed the presumption is the other way round. The defence is applicable under the Planning Act and identified in the national Policy Statement for ports,

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and the advice in the policy statement is the other way round.

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The decision making can disapply the defence of statutory authority in whole or in part, in any particular case, but in doing so should have regard to whether any particular nuisances and inevitable consequence of the development is not

1:31:03

the case of the

1:31:07

applicant seeking to justify inclusion of a special measure. It's more a case of the decision maker having to justify, justify, being the wrong word, but even seeking to remove the defence why it should be removed.

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And that's why I was a bit surprised when because I did refer to the policy statement itself and the provisions of the Planning Act

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that this is actually

1:31:40

that sorry, sorry, that this is actually the the presumptions the other way round, if I can put it that way. But as to the explanatory memorandum, we've noted your point and we'll come back to that in in writing and see if we can improve on that.

1:31:59

Thank you, Mr Strong.

1:32:03

Anything further from either Mr. Walker or Mr Owen Re articles? Otherwise we'll we'll move on to

1:32:11

Schedule 2.

1:32:15

Mr Ian,

1:32:16

anything on articles?

1:32:19

Robbie. OCD. No, thank you. I'm, I'm, I'm all done on the articles. Thank you, Sir.

1:32:24

1:32:45

Well, my first question or put observation is in relation to schedule 2. Has anybody got anything for schedule one before we get to schedule 2? No. OK.

1:32:56

1:32:58

And

1:33:02

my first question relates to requirement 8. Anybody earlier than requirement 8. Mr Owen

1:33:09

Robbie RNC LDN Ports

1:33:12

So we have a a a point in relation to requirements for and six

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requirement for delivered construction hours and and the the the. The point there is that

1:33:29

whilst the lack of

1:33:30

of a definition of associated development has now been remedied by the applicant. Of greater concern to CDN are the grounds listed in paragraph two of requirement 4, on which the company can disregard the working hours.

1:33:49

Paragraph 2A tells us that working hours can be ignored for works that can't be interrupted, but there's no corresponding duty on the company to endeavour to plan the works so as to respect the working hours restrictions.

1:34:05

Paragraph 2D tells us that working hours restrictions can be disregarded where noise levels do not exceed maximum permitted levels of noise at each agreed monitoring location, to be determined with reference to the ABC assessment method. But it's unclear who permits the maximum permitted levels of noise, nor with whom the monitoring locations are to be agreed at all. That's provided via another tail piece that the relevant local authority may agree to the company, ignoring those permitted levels at those monitoring

1:34:38

nations, whilst disregarding the working hours. And the expansion memorandum sheds no light on what is proposed with these exceptions, and neither does it include any justification for them.

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In general terms, we feel that this requirement is lacking in the precision and certainty necessary to give confidence

1:35:00

to the requirement acting as an appropriate control for construction noise. And it's especially concerning when considered alongside what we've just been discussing, namely the applicants proposed protection from enforcement for statutory noise nuisance discussed in relation to Article 29.

1:35:19

It seems to us that a proportionate approach to any works outside of the defined working hours restrictions would be to define a scheme of noise control with necessary approvals and controls that could be notified, monitored and enforced. That would at least give the relevant local authority an appropriate degree of control and certainty if none can be provided by the applicant at this stage. And we think that's particularly important given what we've said about Article 29. So that's the concern with

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requirement for we think it contains significant flaws, undermine confidence in it being able to effectively serve the purpose which it is intended.

1:36:02

Requirement 6.

1:36:05

Dealing with piling and marine construction works restrictions,

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we see the applicant has revised this such that it wishes to be entitled to undertake capital dredging without restriction as to timing all day.

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And it's not clear whether the applicant has fully considered, considered and assessed

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either the environmental and habitats impacts of those activities on migratory species within the Humber estuary

1:36:37

or on the terrestrial environment

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or or the impacts of unrestricted works on navigational efficacy and safety and therefore gain. We would like to hear from the applicant on that point to give us assurance that the power it's seeking has been assessed properly.

1:36:57

Thank you,

1:37:25

Mr Straw. Any observations?

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James Storm for the applicant, Sir, and any observations are heard. What Mr Owen said. We'll look at the

1:37:39

UM requirement for but the initial reaction is that the

1:37:48

proposed construction hour requirements and exceptions to those have been considered by NE Lincolnshire Council responsible local authority who have now raised no concerns. And my initial views that the whilst noting and listening carefully to the concerns they don't give rise to the concerns in practise that have been raised. But we'll certainly consider that. Come back to you in writing. If we

1:38:16

take a different view

1:38:18

and in relation to you piling a marine construction works restrictions including the ability to dredge, that has been as you know and continues to be the subject both of it has been and subject to environmental assessment. And also consideration by both Natural England and the MMO in respect of where restrictions are required, having regard to effects on the environment very closely scrutinised,

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not aware of any concerns in that respect. But insofar as the question is, well, what about the assessment will provide some written response to that.

1:39:00

In terms of MMO's engagement in particular,

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do you know whether they are looking solely at the marine licence or have they been looking more widely

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at the whole of the order and therefore in effect ensuring in their own mind that there's no inconsistency within parts of the order outside Schedule 3 which is their primary interest.

1:39:30

Well. So I think James from the applicant, the answer is we'll we'll check but I've I'm pretty sure it's the

1:39:37

the former looking at the whole as well as of course Natural England as you're aware of but but but

1:39:44

we can check that. I think there may need to be a check and if it's not at all clear then we will ask MO at the next opportunity in terms of a question to make sure that they've looked and ensure there's no inconsistency or matters within other parts of the order outside the the deemed marine licence that might give rise to concern and or conflict.

1:40:10

So if I may, Brian Greenwood for AP. So just to assist, I am actually a part of the negotiating team with the MO on the DML as opposed to the other environmental issues. We have regular meetings. We're making very good constructive progress and I well at our next meeting specifically draw their attention to the rest of the order and ask them to check that they are satisfied with it, Sir.

1:40:41

Thank you, Mr Greenwood.

1:40:54

I think that then takes me to what was my question on requirement a Sir. Sir, I have couple of questions before requirement date, if I may Angus Walker for DFDS.

1:41:06

My first point is is not actually an existing requirement but as you as you know we are concerned that the environmental statement has not

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properly assessed overlapping construction and operation of the project

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and

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and that may have prompted your question

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about that. In your second round of questions, question BGBC G209 and in response to DFS's written representation, the applicant says

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I give you the reference. This is Rep 3008 paragraph 4.4. That

1:41:51

and assessing sequential construction and operation is a worst case assessment, but we simply

1:41:59

don't agree with that. If you do two things at once, that is worse than doing them one after the other

1:42:06

and so we think there should be until that is properly assessed or unless then a requirement should be added for bidding sequential simultaneous construction and operation.

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Second point is on requirement 7.

1:42:27

Umm.

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Curiously this requirement is UM

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headed

1:42:35

External appearance and height of the authorised development, but doesn't seem to actually deal with height,

1:42:41
UM

1:42:44
and point. We raised the issue specific hearing. One was that the applicant submitted a building schedule with the second time round. They made their application as a new document which states the heights of the buildings, but is not mentioned in the DCO and it would seem appropriate to refer to it in this requirement,

1:43:05
thus controlling the heights of the buildings.

1:43:08

1:43:39
May I just interrupt? I'm I think there's something that's coming in the revisions at Rep 14

1:43:47
that's previously the drafting referred to layout drawings and there's revised to general arrangement plans.

1:43:57
It may just be an inadvertent oversight here that that in so doing it, it takes away any information about Section.

1:44:14
Brian Greenwood for AP. Sorry, Sir, do you think you could just clarify

1:44:20
the the original drafting was more general, talking about drawings which should by

1:44:27
implication give not only plan information but sectional or relational information.

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And in this case, it's been revised to just general arrangement plans.

1:44:41
It's that may be the way to to address Mr Walker's concern on that one but I do think we should perhaps spend some time on the previous concern

1:44:52
the the the what might say is a a missing requirement the worst case it says we recently assessed James Strong for the applicant. Sir, we'll come back to you obviously in more detail if necessary. But our understanding is that the

1:45:08

overlap of construction and operation has been assessed

1:45:13

and hence why the ES deals with that and that's my understanding. But we'll get you the necessary

1:45:23

references or correct correction of That's wrong

1:45:27

And Angus Walker DFTS? Well, I'm afraid I disagree with that in about 8

1:45:32

chapters of the ES, which I think we quoted in some submission recently. And it literally says this chapter assesses the construction and subsequent operation of the development.

1:45:45

And in in explicit terms, there are some like navigation which do assess

1:45:53

them to being done simultaneously. But those are the exception rather than the rule

1:45:58

and particularly highway and the highway chapter doesn't, which is probably the one that we were most concerned about.

1:46:08

And that was part of the reason why there's the action to go away and review the cumulative and in combination effects. Because certainly within chapter 20

1:46:20

in terms of immune green terminal there are there there is clear reference to bits having not been assessed because that information was not available and therefore it wasn't possible to do an in combination type assessment.

1:46:43

So

1:46:45

I I think I've I'll come back to you and write about this because I think we're

1:46:50

we have a different views not from you from from Mr. Walker but let me investigate and come back to you in writing the the the other point about chapter 20

1:47:02

dealing with cumulative and in combination effects I think so you raised earlier but

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we said we'd come back

1:47:09

in response to that

1:47:23

conscious we've been sitting for

1:47:27

10 minutes short of of couple of hours

1:47:30

umm

1:47:32

I have a number of questions still to go. We've also got to be mindful

1:47:39

that we've got a compulsory acquisition hearing that will start at six.

1:47:46

Do people want to take a short adjournment or do you want to continue on? I think I've got something like 7-8 questions,

1:48:00

albeit that some of those are are more. Can we have an update as to where you are rather than

1:48:07

specific questioning?

1:48:09

Umm

1:48:10

from the applicant side, James Strong, the outcome. We're happy to press on.

1:48:16

Sir Angus Walker, the FS. I would appreciate a 5 minute adjournment.

1:48:22

Yeah. OK. I think then we'll actually take 10 minutes,

1:48:26

which will bring us back up. Five being hearing is therefore adjourned until 5:00. Thank you.