

# IMMINGHAM EASTERN RO-RO TERMINAL



Written Summary of the Applicant's Oral Submissions at Issue Specific Hearing 4

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# 1 Executive Summary and Purpose

- 1.1 Issue Specific Hearing 4 ('ISH4'), during which consideration was given to the issue specific topic of the **Draft Development Consent Order (dDCO)**, was held on the afternoon of Thursday 28 September 2023. In the Examination Timetable as appended to the Rule 8 Letter, the Applicant is required to prepare written submissions of oral cases made during ISH4.
- 1.2 At **Table 1** below, this document provides a summary of the submissions and responses made by Associated British Ports as the Applicant ('the Applicant') during ISH4 to questions – which centred on the drafting of the dDCO – which were raised by both the Examining Authority ('the ExA') and those interested parties which were present at the hearing.
- 1.3 At **Table 2** below, this document provides a summary of the action points arising from ISH4 which are due at Deadline 4 only and, where these action points fell to the Applicant, how these have been addressed. The Applicant has removed those action points due at Deadline 5 from Table 2 and will provide a response to these at Deadline 5.

## 2 Table 1: Summary of the Issue Specific Hearing 4

Item	ExA Question / Context for discussion	Applicant's Response
<b>Agenda Item 1 – Welcome, Introductions and arrangements for the hearing</b>		
1.	The ExA opened the hearing, introduced themselves and invited those parties present to introduce themselves.	Mr James Strachan KC and Mr Brian Greenwood introduced themselves as acting on behalf of the Applicant.
<b>Agenda Item 3 – Discussion of the draft Development Consent Order (dDCO), involving the Applicant, other Interested Parties and the Statutory Harbour Authority for the Humber/Humber Harbour Master</b>		
2.	The ExA asked the Applicant about the use of the term 'Company' as opposed to 'undertaker' when referring to the Applicant in the dDCO.	<p>Mr James Strachan KC, on behalf of the Applicant, stated that the terminology is not a critical point. There are three reasons for the Applicant's use of the term 'Company':</p> <ol style="list-style-type: none"> <li>1) to reflect that the Applicant is a company;</li> <li>2) to avoid confusion between 'undertaker' and 'statutory undertaker'; and</li> <li>3) precedent in the Tilbury 2 DCO.</li> </ol> <p>Mr Strachan KC accepted that there is a clear preference from the ExA for the use of the term 'undertaker' to refer to the Applicant in the dDCO. He suggested that if the Applicant decides to pick up these changes, that it may be helpful to do so in draft form first.</p> <p>Mr Angus Walker, on behalf of DFDS, and Mr Robbie Owen, on behalf of CLdN, added that the difference between 'Company' or 'undertaker' does not carry legal effect.</p>

3.	<p>The ExA invited the Applicant to respond to a number of general drafting points raised by DFDS and CLdN.</p>	<p>Mr Brian Greenwood, on behalf of the Applicant, welcomed feedback from the interested parties. He noted that the drafting of the dDCO is an evolving process, and that the Applicant will take comments constructively.</p> <p>Mr James Strachan KC, on behalf of the Applicant, stated that it is helpful if suggestions to the wording of the dDCO are accompanied by specific examples.</p> <p>Mr Strachan KC stated that the Applicant will take on a general ‘nuts and bolts’ review of the articles and requirements within the dDCO for Deadline 5. He noted that the discussions at ISH4 would further assist the Applicant in doing this.</p>
4.	<p>The ExA asked the Applicant to respond to DFDS’s comments regarding the ambit of the definition of ‘construction’ within the dDCO.</p>	<p>Mr James Strachan KC, on behalf of the Applicant, stated that this has been noted and will be reviewed.</p>
5.	<p>The ExA, asked the Applicant to review the provisions that are incorporated from the Harbours, Docks and Piers Clauses Act 1847 (the 1847 Act) under Article 4 of the dDCO, with a focus on:</p> <ol style="list-style-type: none"> <li>1) Ensuring that the incorporated provisions are still extant; and</li> <li>2) Providing a justification of why these provisions are incorporated.</li> </ol>	<p>Mr Brian Greenwood and Mr James Strachan KC, on behalf of the Applicant, thanked the ExA for picking up on this point, and stated that the Applicant will review Article 4 for Deadline 5.</p>

	The ExA suggested further that the Applicant redraft Article 4 in the reverse, so as to specify the provisions that are to be incorporated rather than excluded.	
6.	<p>The ExA asked the Applicant to clarify whether the intention is for Stena Line to be in sole occupation of the proposed development.</p> <p>The ExA asked for particular clarification in the context of Article 22 of the dDCO and section 33 of the 1847 Act.</p>	<p>Mr James Strachan KC, on behalf of the Applicant, stated that although the development aims to address a need that has been identified by Stena Line, the development is not for their exclusive use. He noted that where additional capacity arises it can be met by other operators.</p> <p>Mr Strachan KC, on behalf of the Applicant, stated that section 33 of the 1847 Act is distinct from the powers in Article 22. He added that the Applicant will amend the Explanatory Memorandum to clarify this at Deadline 5.</p>
7.	<p>The ExA asked, with respect to the maintenance powers within the dDCO, whether the Applicant is intending for full renewal powers or maintenance as necessary.</p> <p>The ExA clarified further that the key point of contention is the use of the term ‘reconstruct’ in the definition of maintenance within the dDCO.</p>	<p>Mr James Strachan KC, on behalf of the Applicant, confirmed that the maintenance powers are not intended to give rise to reconstruction of the works as a whole, but rather refer to ‘maintenance’ within its ordinary meaning. He added that maintenance would only take place where necessary.</p> <p>Mr Angus Walker, on behalf of DFDS, stated that Article 6.2 of the dDCO limits the maintenance powers to what has been assessed within the Environmental Statement.</p> <p>Mr Strachan KC confirmed that Mr Walker’s assessment of Article 6.2 is correct.</p>
8.	The ExA asked how the Environmental Statement has assessed the correlation between Article 6 and the future	Mr James Strachan KC, on behalf of the Applicant, emphasised that Article 6.2 of the dDCO serves to limit future maintenance to works that

	maintenance powers within the Deemed Marine Licence (DML).	have been assessed in the Environmental Statement. He added that the Applicant will provide a written response at Deadline 5.
9.	The ExA invited the Applicant to respond to CLdN's submissions regarding the limits of deviation within Article 7.	Mr James Strachan KC, on behalf of the Applicant, confirmed that the Applicant will review this.
10.	The ExA invited the Applicant to respond to CLdN's submissions regarding the extent to which maintenance has been assessed in the Environmental Statement.	Mr James Strachan KC, on behalf of the Applicant, stated that the full scheme has been assessed in the Environmental Statement. He confirmed that the Applicant will review the Environmental Statement in light of these comments for Deadline 5.
11.	The ExA asked the Applicant to justify the purpose of the tailpiece in Article 21 of the dDCO.	Mr James Strachan KC, on behalf of the Applicant, explained that the maximum capacity of Ro-Ro units in the dDCO is provided at Article 21(1).  He further explained, on behalf of the Applicant, that Article 21(2) of the dDCO serves to govern the number of passengers that can depart from the development, which is qualified by Article 21(3) of the dDCO.  For these reasons, he explained that none of these provisions can be correctly qualified as a 'tailpiece'.
12.	The ExA clarified their question and asked the Applicant to explain the operation of the tailpiece in Article 21(2) in relation to HES's decision to not object to the application.	Mr James Strachan KC, on behalf of the Applicant, stated that the Applicant will review this provision for Deadline 5 in light of the ExA's comments.
13.	The ExA invited the Applicant to respond to DFDS's submissions regarding the daily	Mr James Strachan KC, on behalf of the Applicant, stated that the daily cap of 660,000 is used as a 'worse case' for the purposes of assessing the environmental impact of the proposed development. If the actual



	<p>cap provided within Article 21(1) of the dDCO.</p>	<p>throughput is lower than this, then there would be no adverse environmental effects.</p> <p>Mr Strachan KC added that the Applicant’s current position is that a daily limit is not necessary as it is possible for there to be daily fluctuations without material adverse consequences. This will be a subject of discussion in the Highways Statement of Common Ground being settled with CLdN and DFDS.</p>
<p>14.</p>	<p>The ExA invited the Applicant to respond to CLdN’s further comments regarding the wording ‘subject to obtaining all necessary consents and approvals’ within Article 21(2) of the dDCO.</p>	<p>Mr James Strachan KC, on behalf of the Applicant, noted that the Applicant will consider this when reviewing Article 21 more generally.</p>
<p>15.</p>	<p>The ExA invited the Applicant to respond to CLdN’s comments regarding the purpose of Article 28 and the justification of Article 29.</p>	<p><b>Article 28</b> – Mr James Strachan KC, on behalf of the Applicant, confirmed that there is a Section 278 agreement that is contemplated in respect of the works to the East Gate. The Applicant confirmed that this has been explained within the Explanatory Memorandum.</p> <p><b>Article 29</b> – Mr Strachan KC stated that there is wide precedent for this in other DCOs that have been approved by the Secretary of State for Transport. The provision itself reflects the National Policy Statement for Ports (NPSfP) at paragraph 4.14.1 that an applicant will have a defence to statutory nuisance where it cannot be reasonably avoided.</p> <p><b>Post-Hearing Submission</b></p> <p>The Explanatory Memorandum submitted at Deadline 1 [REP1-0006] states at paragraph 9.16 that ‘Article 28 has been drafted so as to provide the Applicant authority to enter into a section 278 agreement with the</p>

		<p><i>Council in relation to proposed improvements to the East Gate, pursuant to Work No. 12.'</i></p>
<p>16.</p>	<p>The ExA asked for further elaboration to be provided within the Explanatory Memorandum, particularly with respect to Articles 4 and 29 of the dDCO.</p>	<p>Mr James Strachan KC, on behalf of the Applicant, stated that the Applicant will review the Explanatory Memorandum further to ensure that it is as helpful as possible.</p> <p><b>Article 29</b> – Mr Strachan KC stated that the Applicant is not required under the NPSfP to justify the inclusion of the defence to statutory nuisance. Instead, the NPSfP asks applicants seeking to remove the defence to justify why it is to be removed.</p> <p><b><u>Post Hearing Submission</u></b></p> <p>Section 4.14 of the NPSfP provides as follows:</p> <p><i>'4.14.1 Section 158 of the Planning Act 2008 confers statutory authority for carrying out development consented to by, or doing anything else authorised by, a development consent order. Such authority is conferred only for the purpose of providing a defence in any civil or criminal proceedings for nuisance. This would include a defence for proceedings for nuisance under Part III of the Environmental Protection Act (EPA) 1990 (statutory nuisance), but only to the extent that the nuisance is the inevitable consequence of what has been authorised. The defence does not extinguish the local authority's duties under Part III of the EPA 1990 to inspect its area and take reasonable steps to investigate complaints of statutory nuisance and to serve an abatement notice where satisfied of its existence, likely occurrence or recurrence. The defence is not intended to extend to proceedings where the matter is 'prejudicial to health' and not a nuisance.</i></p>

		<p><i>4.14.2 It is very important that, at the application stage of an NSIP, possible sources of nuisance under section 79(1) of the 1990 Act and how they may be mitigated or limited are considered by the decision-maker so that appropriate requirements can be included in any subsequent order granting development consent.</i></p> <p><i>4.14.3 The decision-maker should note that the defence of statutory authority is subject to any contrary provision made by the decision-maker in any particular case in a development consent order (section 158(3)). Therefore, subject to paragraph 4.14.1, <u>the decision-maker 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 nuisance is an inevitable consequence of the development.</u></i></p> <p>[Applicant’s emphasis]</p>
<p>17.</p>	<p>The ExA invited the Applicant to respond to CLdN’s comments regarding exceptions to working hour restrictions contained within Requirement 4(2).</p> <p>The ExA invited the Applicant to respond to CLdN’s comments regarding the extent to which dredging activities in Requirement 6 have been assessed.</p>	<p><b>Requirement 4</b> – Mr James Strachan KC, on behalf of the Applicant, explained that the proposed construction hour requirements and their exceptions have been considered by North East Lincolnshire Council, the local authority, with no objections.</p> <p>Mr Strachan KC, on behalf of the Applicant, noted that the Applicant will review Requirement 4 for Deadline 5 but is of the preliminary view that the exceptions within Requirement 4(2) do not give rise to practical implications as suggested by CLdN.</p> <p><b>Requirement 6</b> – Mr Strachan KC stated that the powers to dredge have been subject to both assessment in the Environmental Statement and discussion with Natural England and the MMO for the purpose of determining restrictions. The Applicant will provide written responses regarding the assessment of this at Deadline 5.</p>

<p>18.</p>	<p>The ExA asked the Applicant if the MMO has looked at the dDCO in its entirety, or just at the provisions of the DML.</p>	<p>Mr Brian Greenwood, on behalf of the Applicant, confirmed that the Applicant has regular meetings with the MMO, and is making constructive progress with them. He confirmed further that the Applicant would raise this with the MMO at the next meeting, and in any event, before Deadline 5. He will ask the MMO to confirm that they are happy with the dDCO in its entirety.</p>
<p>19.</p>	<p>The ExA asked the Applicant about the extent to which the overlap between construction and operation has been assessed in the Environmental Statement.</p>	<p>Mr James Strachan KC, on behalf of the Applicant, stated that the overlap between construction and operation has been assessed in the Environmental Statement. He stated further that the Applicant would provide the ExA with the references for this or update the Environmental Statement, as necessary. The Applicant will provide further detail at Deadline 5.</p> <p>Mr Strachan KC referenced the following documents, which evidence that the local highway authorities were satisfied that the overlapping impact of construction and operation has been considered:</p> <ul style="list-style-type: none"> <li>• <b>[REP2-025]</b> &amp; <b>[REP2-026]</b> are both representations from the local highway authorities confirming that they were satisfied about overlapping construction and operational effects;</li> <li>• Section 4 of <b>[REP3-008]</b>, which explains that the ‘worst case’ of overlapping construction and operation has been used for the purposes of the traffic assessment; and</li> <li>• Chapter 10 of the Environmental Statement <b>[APP-046]</b>, which assesses partial construction and operation in the navigation context.</li> </ul>

20.	The ExA asked the Applicant to review Chapter 20 of the Environmental Statement in relation to the impact of the IGET development.	Mr James Strachan KC, on behalf of the Applicant, reiterated that the Applicant will review this and consider any necessary amendments to the Environmental Statement.
21.	The ExA asked the Applicant to fully address the drafting points on the dDCO raised by CLdN and DFDS in their written representations.	Mr James Strachan KC, on behalf of the Applicant, stated that the Applicant would do this for Deadline 5.
22.	The ExA asked the Applicant to clarify whether the Construction Environmental Management Plan (CEMP) is considered to be an outline or final version of the document.	Mr James Strachan KC, on behalf of the Applicant, stated that the CEMP is currently drafted as a final version.  However, in light of the ExA's comments, the Applicant will consider whether this should be redrafted to provide for an outline CEMP that requires subsequent approval pursuant to a Requirement in the dDCO. The Applicant will undertake this exercise for Deadline 5.
23.	The ExA asked the Applicant to consider the reference to 'blasting' with the CEMP.	Mr James Strachan KC, on behalf of the Applicant, confirmed that he is not aware of any intention for blasting. The Applicant will review this as part of the wider review of the CEMP.
24.	The ExA asked the Applicant to consider compliance responsibilities within the CEMP, particularly in Table 3.4.	Mr James Strachan KC, on behalf of the Applicant, confirmed that the Applicant will review this for Deadline 5.
25.	The ExA asked the Applicant about the enforcement of Requirement 10.	Mr James Strachan KC, on behalf of the Applicant, stated that the purpose of Requirement 10 is to ensure that noise insulation is offered to Queens Road residents prior to the commencement of the works.  Requirement 10(2) provides that the noise insulation will only be provided upon agreement by the resident.

		<p>He clarified further that this requirement does not provide any discretion to the Applicant, but rather hinges on approval by the residents of Queens Road. As such, there is no enforcement needed as the Applicant would be obliged to provide it under the dDCO at the election of the resident.</p>
<p>26.</p>	<p>The ExA requested that the Applicant provide further clarification on the operation of Requirement 10 in the Explanatory Memorandum.</p> <p>The ExA further asked the Applicant about whether drafting needs to contemplate a dispute resolution process.</p>	<p><b>Explanatory Memorandum</b> – Mr James Strachan KC, on behalf of the Applicant, stated that the Applicant will update the Explanatory Memorandum to clarify that Requirement 10 simply creates an obligation on the Applicant to offer noise insulation to the residents of Queens Road. The Applicant will do this for Deadline 5.</p> <p>Mr Strachan KC, on behalf of the Applicant, expressed that the enforcement mechanism is straightforward on the basis that the Applicant does not have any discretion over this requirement.</p> <p><b>Dispute Resolution</b> – Mr Strachan KC stated that the Applicant will consider whether a specific provision for disputes arising out of the content of the noise insulation package needs to be included in Requirement 10.</p>
<p>27.</p>	<p>The ExA requested clarification between the separate references to the CEMP in Requirements 8 and 15.</p>	<p>Mr James Strachan KC, on behalf of the Applicant, agreed that Requirements 8 and 15 replicate one another. He added further that Requirement 13 also makes a similar reference.</p> <p>Mr Strachan KC stated that, for the avoidance of doubt, the intention in the drafting is that the development is constructed ‘in accordance’ with the CEMP, rather than in ‘general accordance’.</p> <p>He noted that the Applicant will amend this for Deadline 5.</p>

28.	The ExA asked the Applicant to clarify whether the NRA should be referred to in Requirement 15.	Mr James Strachan KC, on behalf of the Applicant, stated that the Applicant will consider the role of the NRA within Requirement 15, and provide writing submissions on this at Deadline 5.
29.	<p>The ExA asked the Applicant to consider the potential implications of the Applicant's agreement with IOT Operators on Requirement 18.</p> <p>Currently, Requirement 18 is drafted on the assumption that there is no agreement between the Applicant and the IOT Operators. The current drafting requires some amendments, particularly with regard to the running order.</p> <p>The ExA asked the Applicant to consider incorporating a requirement into Requirement 18 for an authorising body to approve the design of the Impact Protection Measures. The ExA suggested the Secretary of State for Transport as the appropriate body for this.</p>	<p>Mr James Strachan KC, on behalf of the Applicant, stated that the Applicant will consider the appropriateness of appointing the Secretary of State for Transport as the approving body.</p> <p>He observed that it is possible for an authorising body to have an association with the company, provided that they have other statutory duties which they perform conscientiously and diligently, as is the case with the Applicant.</p> <p>Mr Strachan KC clarified that the protective measures are requested by the IOT Operators due to risks that the latter considers could arise during the operational phase of the facility. Therefore, it does not follow that these measures need to be built out before the construction of the marine works.</p> <p>Mr Strachan KC noted that the Applicant will review Requirement 18 for Deadline 5.</p>
30.	The ExA further asked that the Applicant give regard to what will replace Requirement 18 if an agreement is reached between the Applicant and IOT Operators.	Mr David Elvin KC, on behalf of the IOT Operators, stated that if an agreement is reached between the Applicant and the IOT Operators then Requirement 18 would not be required from the IOT Operators' perspective. Instead, the impact protection measures could be dealt with by way of protective provisions in Schedule 4.

<p>31.</p>	<p>The ExA asked the Applicant if there are any outstanding drafting concerns held by the MMO with respect to the DML.</p>	<p>Mr Brian Greenwood, on behalf of the Applicant, confirmed that there are no significant outstanding issues, reiterating that ongoing conversations between the MMO and the Applicant are very constructive. The Applicant expects to have a full draft of the DML in the near future.</p>
<p>32.</p>	<p>The ExA asked the Applicant for a general update with respect to protective provisions.</p>	<p>Mr Brian Greenwood, on behalf of the Applicant, stated that the protective provisions are largely on track, with some exceptions.</p> <p><b>Cadent Gas</b> – Mr Greenwood explained the Applicant met with Cadent Gas last week, with further meetings between the parties planned.</p> <p><b>IOT Operators</b> – Mr Greenwood expressed his hope that this protective provision will be resolved following the agreement between the parties.</p> <p>Mr David Elvin KC, on behalf of the IOT Operators, confirmed that the drafting of the protective provisions will substantially mirror the terms of the agreement as set out in the joint letter submitted between the Applicant and the IOT Operators to the ExA regarding impact protection.</p> <p><b>DFDS</b> – Mr Greenwood confirmed that it is the Applicant’s intention to provide DFDS with a draft protective provision.</p> <p><b>CLdN</b> – Mr Greenwood stated that the Applicant does not consider that CLdN merits a specific protective provision. CLdN have particularly requested that the Applicant gives them a protective provision with respect to railways.</p> <p>The ExA further clarified that it is of the opinion that CLdN does not require a protective provision with respect to rail, on the basis that the Applicant is not proposing to carry out any works relating to rail outside of the Port of Immingham.</p>



***Hearing closed at 17:38***

### 3 Table 2: Action Points

Action	Description	Action by	Deadline	Applicant's Comment/where has the action been answered
12	Each party to submit a signposting document identifying the dDCO drafting concerns raised in its Relevant Representations and subsequent written Examination submissions.	CLdN and DFDS	D4	
21	Provide update on negotiations on Protective Provisions.	Applicant	D4	Please see updated <b>10.2.11 Protective Provision Tracker</b> submitted at Deadline 4.
22	Provide submissions explaining the need for Protective Provisions in favour of CLdN in any made DCO, including a detailed explanation as to why Protections Provisions concerning the railway line connection with the Port of Killingholme are considered necessary.	CLdN	D4	

## 4 Glossary

<b>Abbreviation/ Acronym</b>	<b>Definition</b>
CEMP	Construction Environmental Management Plan
CLdN	CLdN Ports (Killingholme) Limited
dDCO	Draft Development Consent Order
DFDS	DFDS Seaways Plc
DML	Deemed Marine Licence
ExA	Examining Authority
HES	Humber Estuary Services
HOTT	Humber Oil Terminal Trustees Limited
IOT	Immingham Oil Terminal
IP	Interested Party
ISH4	Issue Specific Hearing Four
MMO	Marine Management Organisation
NPSfP	National Policy Statement for Ports
NRA	Navigational Risk Assessment