

**THE PROPOSED ASSOCIATED BRITISH PORTS (EASTERN RO-RO TERMINAL)
DEVELOPMENT CONSENT ORDER**

DEADLINE 5

Response to IOTT's comments on independence of ABP, harbour master and dockmaster
at page 42 of REP4-035

(IOTT's comments on D3 submissions, responses to ExQ2 and other ISH3 questions)

submitted on behalf of Captain Firman, Harbour Master, Humber

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1. IOT made the following assertions:

9. Comments on independence of ABP, harbour master and dock master.

9.1. There can be no basis on which it can be said that the ABP team or the HMH or DM is independent since they are all employees or members of ABP group companies and they are line managed by senior ABP staff. Regardless of the discharge of statutory functions, they remain employees who are retained and remunerated by ABP. The Designated Person is a member of the ABP Board so the person advising the ABP Board is a member of the board. It should be remembered in this context that the existence of a statutory duty does not guarantee independence. The audit is entirely an internal process therefore without independent scrutiny. Independence simply does not exist.

9.2. For there to be independence a person or body must be independent of government and the parties. For example, in the article 6 ECHR jurisprudence PINS is not fully independent of the Government (Bryan v UK (1996) 21 E.H.R.R. 342 and the Alconbury litigation [2003] 2 AC 295), housing review boards lack independence from their local authorities (Tsfayo v UK [2007] H.L.R. 19) and the Gaming Board is not independent (Kingsley v UK (2001) 33 E.H.R.R. 13). The Tsfayo judgment is included as an appendix to this document.

9.3. While this does not mean that these persons cannot be involved in the DCO process it does mean that with a lack of independence any evidence produced must be subject to more than usual careful scrutiny and their differences from the experts employed by IOT Operators (and other IPs) approached with caution especially where there are significant disputes with other experts and where information has not been provided which is properly transparent.

2. HMH cannot help but conclude that these comments are mischief-making on the part of IOT Operators as objector to the proposed jetty. They have no evidential basis for the assertions and when one looks at the legal background, including the case law relied on by IOTT in support of its contentions, they have no legal basis either. HMH has worked with the operators of the IOT on virtually a daily basis over the course of many years and they will be aware that HES is an independent voice on the river, funded by conservancy dues and pilotage charges, and concerned only with the transit of all vessels using the Humber, whatever their ownership or destination.

3. HMH participates in these proceedings as an “Other Party” who can provide assistance to the ExA in relation to the matter for which he has both statutory responsibility and considerable experience and expertise; namely ensuring safety of navigation in the river Humber. HMH participates in these proceedings independently of ABP in its capacity as operator of the Port of Immingham and promoter of the IERRT DCO and is equally independent in his day to day activities, as is HES.
4. It is worth noting that ABP as conservancy authority and HMH as harbour master have entirely different functions to ABP as port operator. As successor to the original conservancy commissioners and subsequent conservatory board, they are responsible for the safe navigation of the entire Humber SHA which includes both commercial and recreational traffic on the Humber and parts of the rivers Ouse and Trent traveling to and from multiple destinations. ABP as successor to the British Transport Docks Board as a dock operator is owner and operator of a number - but not all – of the commercial ports on the Humber. These are very distinct responsibilities with different statutory lineage.
5. HMH is an employee of ABP purely in its capacity as successor to the former statutory Humber Conservancy Board. HMH is not concerned with the principle of whether or not the port of Immingham (or any other commercial operation on the Humber) should be further extended to introduce new port infrastructure. Rather, his role as part of HES is to consider any proposed tidal works, whoever brings them forward and wherever they are in the Humber, purely from the perspective of ensuring the safety of vessels using the river Humber, regardless of their destination, ownership, or other commercial interests.
6. The dual nature of ABP’s role on the Humber reflects the fact that, due to the size of the Humber, there are a number of different statutory harbour authorities within the Humber estuary, all of which are served by HES.
7. As a general legal principle, it is not unusual for a single body to operate in separate and distinct statutory capacities. This is demonstrated in the realm of hybrid Bills approved by Parliament. For example, the Phase One and 2a High Speed Rail Acts follow well-established precedent by providing for the promoter of the legislation who is also the Minister with responsibility for the railways or his appointee to act as the adjudicator on issues arising out

of the protective provisions for highways authorities in those Acts. See for example, paragraph 17 of Part 1 of Schedule 33 to the High Speed Rail (London – West Midlands) Act 2017:

“Any dispute arising between the nominated undertaker and the highway authority under this Part is to be determined by arbitration if—

(a) the parties agree, or

(b) the dispute relates to the amount of any sum payable under this Part,

but must otherwise be determined by a person appointed by the Secretary of State.

(2) Any person appointed by the Secretary of State under sub-paragraph (1) must, in determining any dispute arising under this Part, have regard to such matters as may be specified by the Secretary of State on making the appointment.”

8. Protection for the individual against partisan decision-making is afforded by the particular statutory process followed and the ability of an aggrieved person to challenge it. Clearly, the statutory capacity in which HMH is acting in this examination is far removed from the example of a Minister promoting a hybrid Bill. Indeed, here there is clear statutory separation between HMH and ABP as the company. ABP must act, in each of its separate statutory capacities, in accordance with the relevant statutory framework. Were it to do otherwise; for example, in the case of ABP as port operator, by putting pressure on the HES Board or line managers to act in a certain way or, in the case of HES, in succumbing to such pressure, each would be acting unlawfully, and their actions would be susceptible to judicial review.
9. The same principle applies to the HMH in his individual capacity. Whilst he is an employee of ABP as statutory conservancy and navigation authority, he can only operate within the statutory framework under which he is appointed. In the event – which he stresses is not the case – that he was to act under the direction of ABP as port operator, such action would be outside his statutory powers and would be both unlawful and susceptible to judicial review. In practice, HMH has not felt under pressure from ABP in either of its capacities to compromise the safety first ethos attaching to his role. The Examining Authority has had the opportunity to hear from and make their own assessment of Captain Firman. Were there to be any conflict between commercial expediency and safety, he would always put safety first. Not only does HMH have the requisite statutory powers to put safety first, but he also confirms that he has always been supported by ABP in each of its capacities to do so.

10. A synopsis of each of the cases referred to by IOT Operators is provided in the Appendix to this note. It will be apparent to the Examining Authority that, whilst these cases do demonstrate that a direct connection between relevant parties means that they are not necessarily structurally or practically independent of one another, they also clearly demonstrate the principle that fairness is nevertheless achieved through particular processes being followed and the ability of an aggrieved person to challenge the decision-making through judicial review, and that although the High Court may not be able to re-determine the merits of a particular case on its facts, it can set aside a decision if it was unsupported by the evidence or was otherwise unreasonable. Contrast this with the position on the Humber where there is structural independence through the different statutory frameworks under which each part of ABP exists and a route for decisions of the conservancy authority, Harbour Master, Humber, port operator and, indeed, the Immingham Dock Master, to be reviewed by the High Court.

11. The Bryan case demonstrates that even where there is a lack of independence and impartiality, the right to a fair trial is preserved by the ability of an aggrieved person to challenge a decision by means of judicial review following a particular statutory process in deciding a planning appeal. Although the High Court could not have substituted its own findings of fact for those of the planning inspector, the court has power to satisfy itself that the inspector's findings of fact are neither perverse nor irrational.

12. Unlike a planning inspector, HMM does not stand in the shoes of ABP but has his own statutory powers and responsibilities which cannot be withdrawn or recovered by ABP. HMM has no "reporting" obligation to ABP as port operator and, notably, cannot be directed by ABP as to how he carries out his statutory functions. HMM's responsibility as part of the conservancy and navigation authority for the approval and conditioning of tidal works is not subject to the consent of any port operator on the Humber but is subject to the requisite consent being provided by the MMO (in this case by the deemed marine licence should the DCO be made). If HMM were to take into account any extraneous matters such as ABP's commercial interests, his personal relations with ABP management or his own job security, HMM would be acting unlawfully.

13. The points made above on behalf of the HMM are supported by the Alconbury case. In particular, that judicial review would act as a remedy if an inspector had been subject to improper pressure. Similarly, in Alconbury, it was determined that the jurisdiction of the High Court by way of judicial review following an inquiry conducted by an inspector was sufficient

to comply with Article 6(1) in respect of arguments of impartiality on grounds that the Ministry of Defence had a financial interest in the Alconbury development, and that Department of Transport had promoted the road improvement scheme.

14. The facts in the Tsfayo case are very different to the situation on the Humber where there is clear structural independence evidenced by the distinct statutory frameworks by which ABP has become the statutory conservancy and navigation board on the one hand and operator of various – but not all - the ports on the Humber on the other hand. Contrast also the fact that the HBRB was staffed by non-specialists.
15. Finally, the Gaming Board in the Kingsley case was never acting in two legally structurally separate and distinct capacities, as is the case with HMH and employees of HES. In particular, the role of the Designated Person as part of the ABP Board is specifically to provide independent advice regarding the operation of the marine safety management systems within which ABP operates its ports on the Humber and matters of marine safety and includes passing back lessons learned to the Board. In the view of HMH, the fact that this role is afforded sufficient importance to merit membership of the ABP Board demonstrates the importance of impartial, independent safety advice to the Board.
16. As far as HMH is concerned, the assertions about his lack of independence (and that of HES) are baseless and do not reflect either the law or the practical reality of the Humber.

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