

**Infrastructure Planning
Planning Act 2008
The Infrastructure Planning (Examination Procedure) Rules 2010**

Immingham Eastern Ro-Ro Terminal DCO Application

**Issue Specific Hearing 6 (ISH6) on the Development Consent Order
Post Hearing Submissions (including written submissions of oral case)
of
CLdN Ports Killingholme Limited**

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1. **INTRODUCTION**

- 1.1 This document summarises the main oral submissions made by CLdN Ports Killingholme Limited (**CLdN**) at Issue Specific Hearing 6 (**ISH6**) dealing with the draft Development Consent Order (**dDCO**) held on 23 November 2023, in relation to the application for development consent for the Immingham Eastern Ro-Ro Terminal (**IERRT** or the **Proposed Development**) by Associated British Ports (the **Applicant**).
- 1.2 ISH6 was attended by the Examining Authority (**the ExA**), the Applicant and a number of Interested Parties (**IPs**), including CLdN.
- 1.3 This document does not purport to summarise the oral submissions of parties other than CLdN, and summaries of submissions made by other parties are only included where necessary in order to give context to CLdN's submissions in response.
- 1.4 The structure of this document generally follows the order of items as they were dealt with at ISH6 set out against the detailed agenda items published by the ExA on 14 November 2023 [**EV11-001**] (the **Agenda**). Numbered items referred to are references to the numbered items in the Agenda. Where post hearing notes have been added, those notes are prefixed with "Post Hearing Note" and set out in italics for clarity.

2. WRITTEN SUMMARY OF CLDN'S ORAL SUBMISSIONS

Agenda Item	Applicant's Response
Item 1	
Welcome, introductions and arrangements for the Issue Specific Hearing 6 (ISH6)	Robbie Owen, for CLdN , did not make any submissions in relation to this agenda item.
Item 2	
Purpose of the Issue Specific Hearing	Robbie Owen, for CLdN , did not make any submissions in relation to this agenda item.
Item 3	
<p>Discussion of the draft Development Consent Order (dDCO), involving the Applicant, other Interested Parties and the Statutory Harbour Authority for the Humber/ Harbour Master Humber.</p> <p>a) The drafting and provisions of the Articles, including consideration of:</p> <ul style="list-style-type: none"> Article 33 and Schedule 6 (Certification of plans and documents etc) – the documents to be cited for certification 	<p><u>Article 2(1) – definition of ‘maintain’</u></p> <p>Robbie Owen, for CLdN, explained that the Applicant's position in respect of article 2(1) and, by extension, article 6(1), remained unclear. Mr Owen referred to paragraphs 1 to 7 of Appendix 1 of CLdN's submissions at Deadline 6 [REP6-036] in relation to the issue of maintenance in article 6 and the definition of ‘maintain’ in article 2(1). Mr Owen noted that article 2(1) clearly includes ‘reconstruct’ and ‘alter’ in the definition of ‘maintain’. Mr Owen emphasised that the Applicant had not considered the environmental impact of the full extent of maintenance as defined in article 2(1), including the environmental impact of the term ‘reconstruct’ which, taking article 2(1) and article 6 together, would permit works without any further approvals.</p> <p>Mr Owen explained that it was not unusual to include the term ‘reconstruct’ in a power to maintain, but noted that the Applicant must appropriately assess that power if it seeks it.</p> <p>Mr Owen then stated that it did not assist the Applicant to refer to other DCOs on this matter. Mr Owen explained that whilst the other DCOs to which the Applicant referred (including the Port of Tilbury (Expansion) Order 2019 (the Tilbury Order) and the Able Marine Energy Park Development Consent Order 2014 (the Able Order)) may contain the term ‘reconstruct’ in the corresponding article, CLdN's concern is whether the Applicant, in this case, has justified the power it is seeking by including it within the scope of the assessment it has carried out, i.e. the assessment of the effects of reconstruction. Mr Owen referred to paragraph 6 of Appendix 1 of CLdN's submissions at Deadline 6</p>

[REP6-036] for CLdN's further consideration of this matter – in those submissions, CLdN noted that the environmental statement for another project had no bearing on the examination of the Proposed Development.

In those submissions, **Mr Owen** added, CLdN had also explained that in any event, the extract of the environmental statement referenced highlighted the Applicant's inconsistency on the issue. That extract noted that the exercise of the power to 'maintain' in the Tilbury Order would be subject to measures contained in an operational management plan. The Applicant has proposed no such measure in this examination.

Mr Owen stated that the ExA does not have the environmental statements before them that were prepared for the Tilbury Order and the Able Order, but that it did not assist the ExA for the Applicant to refer to these in such general terms. **Mr Owen** emphasised that the key question is what is being assessed in each case to justify the powers that are being sought for that scheme. The inescapable conclusion is that the Applicant has not assessed the full extent of the powers it is seeking in article 6 of the dDCO. **Mr Owen** stated that it seemed to CLdN, therefore, that the ExA had no choice but to recommend that the power to 'maintain' cannot include reconstruction, because this element of the power has not been assessed. **Mr Owen** noted that it was insufficient for the Applicant to claim that 'reconstruct' falls within the same envelope as 'construction'; instead, the Applicant must present evidence that the environmental effects of reconstruction as well as construction have been considered.

Schedule 6

Mr Owen suggested that the layout of Schedule 6 to the dDCO required clarification to demonstrate that the entire Environmental Statement (**ES**) was captured, rather than just the five substitutions detailed in (a) to (e) in that Schedule. Returning to article 6(2), **Mr Owen** noted the importance of this clarification, given that the power to maintain does not authorise any works that have not been assessed in the ES. In asking itself what the ES consists of, the ExA is taken to Schedule 6 to the dDCO, but it is not clear from Schedule 6 that it is capturing the entirety of the ES, including the Navigational Risk Assessment (**NRA**). **Mr Owen** asked the Applicant to address this request.

Post Hearing Note:

*CLdN refers to its previous submissions in relation to article 6(2) of the dDCO, which at the Hearing the Applicant also prayed in aid of its position that there should be no concerns relating to the power to maintain. CLdN does not consider that the proviso of article 6(2) assists the Applicant. In Issue Specific Hearing 4, Mr Owen said the following (see page 5 of **[REP4-018]** – **emphasis added**):*

"Clarity is needed in the ES as to precisely what the maintenance works are (i.e. those covered by article 6(2)). Article 6(2) does not answer the point CLdN is making, because it is not clear from the ES what maintenance has actually been assessed. CLdN has made it clear from the beginning that its concern is surrounding the wider environmental effects, not just habitats."

<p>b) The drafting and provisions of the Requirements in Schedule 2, including:</p> <ul style="list-style-type: none"> • Requirement's 7 (external appearance etc), 9(1) (surface water drainage), 11 and (environmental enhancement/WEMP) – the need for the approval method to fully specified and/or the inclusion of explicit compliance clauses further to the approval of details (anatomy points) • Requirement 8 (Construction Environmental Management Plan [CEMP]), including: <ul style="list-style-type: none"> ○ Consistency between the proposed procedure for the approval of an entire CEMP by the Council under Requirement 8 and the approval of a CEMP pursuant to condition 11 of the deemed Marine Licence 	<p><u>Requirement 7</u></p> <p>Robbie Owen, for CLdN, noted that CLdN had previously raised concerns in the context of article 7 and the power to deviate vertically from the levels shown on the engineering sections, drawings and plans, specifically that it was not clear from the plans what those levels were. Mr Owen requested the Applicant to clarify this.</p> <p><u>Requirement 9(1)</u></p> <p>Mr Owen did not make any submissions in relation to this agenda item.</p> <p><u>Requirement 11</u></p> <p>Mr Owen did not make any submissions in relation to this agenda item.</p> <p><u>Requirement 8</u></p> <p>Mr Owen welcomed the statement by the Applicant that it was willing to prepare two separate Construction Environmental Management Plans (CEMP). This avoided the issue, Mr Owen stated, of (for example) the single CEMP being approved by the Council under Schedule 2 to the dDCO, but not by the Marine Management Organisation under Schedule 3 to the dDCO.</p> <p>Mr Owen then requested an update on the status of the skeleton CEMPs that the ExA had asked for, given that Schedules 2 and 3 to the dDCO currently provide that any CEMP submitted and approved must be in accordance with the outline CEMP. Mr Owen requested that the Applicant consider augmenting the wording in paragraph (2) of this requirement, and the same wording in paragraph 11(2) of Schedule 3, to refer to these skeletons in each case as well as to the outline CEMP.</p> <p>Mr Owen added that CLdN had set out, at paragraphs 15 and 16 of Appendix 1 of its Deadline 6 submissions [REP6-036], the inappropriateness of the addition of a tailpiece to this requirement, currently included within paragraph 8(3). Mr Owen explained that CLdN also held the same concern in relation to paragraph 11(2) of Schedule 3 to the dDCO.</p> <p><u>Requirement 15</u></p> <p>Mr Owen noted that this requirement did not include the works plans and the engineering sections, drawings and plans, which were the drawings referred to in article 7 of the dDCO and therefore the status of these was unclear. Mr Owen added that this was not a deviation point, which was dealt with in article 7, and that many other DCOs contained an obligation, subject to the power to deviate, to build the scheme with reference to the key plans and other drawings, both laterally and vertically. Mr Owen submitted that consideration should be given by the Applicant to adding the works plans and the engineering sections, drawings and plans to this requirement, in order to clarify</p>
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<p>(Schedule 3) by the Marine Management Organisation (MMO);</p> <ul style="list-style-type: none"> ○ the absence of any consultation with any Statutory Harbour Authority (SHA); ○ the interplay with any construction works approvals to be issued by the MMO, or any SHA or the Competent Harbour Authority; and ○ the potential need for separate CEMP to address onshore and marine works <ul style="list-style-type: none"> • Requirement 15 (Construction and operational plans and documents), including: 	<p>their status, given that these plans also provided other key details which the Applicant should be tied to, rather than solely covering lateral and vertical positioning under article 7.</p> <p>Post Hearing Note:</p> <p><i>CLdN acknowledges the Applicant's initial response to this request, in that it thinks this is unnecessary, but notes that the Applicant agreed to take this point away to consider. CLdN looks forward to the Applicant's submissions in relation to this issue.</i></p> <p><u>Requirement 16</u></p> <p>Mr Owen did not make any submissions in relation to this agenda item.</p> <p><u>Requirement 18</u></p> <p>Mr Owen referred to the request the ExA made of the Applicant on Day 1 of Issue Specific Hearing 5, regarding the production of a note on congestion, which is to cover operations as well as construction. Mr Owen requested that this note capture the relevant points made by IPs in relation to Requirement 18 during ISH6.</p> <p>Mr Owen then requested clarification on the status of the NRA. In previous drafts of the dDCO, Mr Owen noted, the NRA was listed in requirement 15 as one of the documents that had to be complied with. Mr Owen noted that the ExA had been told earlier in ISH6 that the NRA was part of the ES, and that this was therefore included in Schedule 6 to the dDCO. However, Mr Owen noted that there was no general obligation in the dDCO to construct and operate the Proposed Development in accordance with the ES. Mr Owen stated that this was concerning to CLdN, given its interest in maintaining timely passage to and from the Port of Killingholme, and the fact that delays caused by the Proposed Development would have an unacceptable commercial impact on CLdN.</p> <p>Mr Owen also noted that CLdN did not accept the Applicant's submissions to the ExA in relation to current practice regarding DCOs securing NRAs. Mr Owen stated that there were clear provisions in the Tilbury Order, namely requirement 11 (which is the equivalent to requirement 15 in this dDCO) in Schedule 2, which stated that the authorised development must be constructed and operated in accordance with a number of documents, including (as listed) the NRA. Mr Owen noted that such provisions were common in other DCOs. Mr Owen emphasised that this was an evolution of best practice for securing the output of an EIA process. Mr Owen noted that the river Thames had a statutory conservancy authority (the Port of London Authority) which was entirely separate to the developer of the Tilbury Order – there was, therefore, complete structural independence. If it had been felt necessary in that case to have a clear requirement to operate and construct the authorised development in accordance with the NRA, then in relation to this application (where there was just one body, in law, performing those different functions, i.e. the Applicant) there was a clear case for the NRA to be reflected and included in requirement 15.</p> <p>In response to the ExA's question as to what independent oversight would look like in relation to this matter, Mr Owen stated that for something of such importance as this, where all of the Ro-Ro and passenger ferries on the</p>
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<ul style="list-style-type: none"> ○ which strategies and plans should be named as certified documents under Schedule 6 and would need to be listed in Requirement 15; and ○ how mitigation for navigational risks during the operational phase is secured; <ul style="list-style-type: none"> • Requirement 16 (contaminated land) – the means by which any need for undertaking additional ground investigations would be identified • Requirement 18 (impact protection measures for the Immingham Oil Terminal [IOT]) including how it is intended that the Requirement would operate and the relationship between this requirement with 	<p>Humber arrive within a short time window and the Proposed Development condenses them in a small area at Immingham, this should be a matter for the Secretary of State – i.e. to approve the developed NRA before construction, let alone any operations, could commence. Mr Owen noted that the requirement of obtaining further approvals from the Secretary of State was often seen in DCOs.</p> <p>Following further submissions by the Applicant and the Harbour Master Humber on this issue, Mr Owen noted that if the dDCO were to be made and were to include a requirement for approval by the Secretary of State of a further, developed, NRA, this would simply constitute an extension to the functions that the Secretary of State would already be performing in making the DCO. This is because the ExA would include, with its report to the Secretary of State, all of its views and recommendations on the various assessments, including the NRA. Mr Owen noted that the Secretary of State, on making its decision as to whether to make the DCO, would clearly be looking at the NRA, meaning there would be no practical difference between what the Secretary of State would be doing on receipt of the ExA's report and what it would be doing in relation to the discharge of a requirement relating to the developed NRA. Mr Owen noted that the Secretary of State had expertise available to it and, for example, it would be perfectly possible for this requirement to provide for the Maritime and Coastguard Agency to advise the Secretary of State on these matters.</p> <p>Mr Owen added that the ExA had been told by Ms Victoria Hutton, for the Harbour Master Humber, that the Harbour Master Humber was an independent body as a matter of law and fact. Mr Owen highlighted that there was a fundamental inconsistency in what the Applicant had said in relation to this matter. Mr Owen directed the ExA to the document submitted at Deadline 1 by the Applicant [REP1-014], which set out the Applicant's understanding of the regulatory regime applying to navigation on the Humber. The Applicant had noted, at paragraph 8.1, its functions as: (1) owner and operator of Immingham and the statutory harbour authority; (2) the statutory conservation and navigation authority and Humber statutory authority; and (3) the competent harbour authority. Mr Owen reminded the ExA that the Applicant had stated that <i>"it would be somewhat disingenuous to suggest that each component, whilst falling under the corporate umbrella of ABP, undertakes its obligations and carries out its functions separately and distinct from the other"</i>. Mr Owen added that the Applicant confirmed, at paragraph 10.2.3 of the same document, that the ABP Harbour Authority Safety Board, whilst being a separate board from the main ABP board, comprised the same membership. Therefore, Mr Owen pointed out, not only were these boards within the same corporate body, but that the same people carried out the functions of both boards. Mr Owen noted that it seemed to CLdN, from the Applicant's own submissions, that it was admitting that there was no structural independence. Mr Owen flagged that CLdN had set out in its submissions after Issue Specific Hearing 4 [REP4-018] the particular importance that functional separation has been given by the courts, including referring the ExA to <i>London Historic Parks and Gardens Trust v Secretary of State for Housing, Communities and Local Government</i> [2020] EWHC 2580 where the Secretary of State's handling arrangements were found to be inadequate.</p> <p>In relation to the <i>Grampian</i> requirement discussed during ISH6, Mr Owen was agreeable to this in principle, but queried what would happen in the event of a disagreement between the Harbour Master Humber and the IPs in terms of the nature of the control measures. Mr Owen noted that any such requirement would require an element of independence to be written into it, to safeguard the interests of CLdN and the other IPs.</p>
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<p>Protective Provisions for IOT Operators.</p>	<p>Mr Owen added that the Applicant could not rely on judicial review as a remedy for such concerns, as this constituted too high a bar and the court cannot disagree with matters of judgement in relation to factual issues (as judicial reviews are solely concerned with matters of law), which Mr Owen emphasised would be the concern here.</p> <p>Mr Owen emphasised that CLdN's concern was not solely the independence matter, i.e. CLdN considered that there should be a proper independent process to test the Applicant's and/or Harbour Master Humber's judgement in respect of operational controls developed after the DCO had been made. CLdN was also concerned that the ExA was contemplating a scenario of postponing a judgement on the acceptability in principle of operational controls until after the DCO had been made, which could not be right. The ExA would therefore need to be satisfied both with the NRA submitted <i>and</i> that the DCO contained sufficient safeguards in relation to the development and testing of operational controls.</p>
<p>c) Deemed Marine Licence (Schedule 3), including the duration of piling works having regard to written submissions made by the Marine Management Organisation and the drafting of licence conditions.</p>	<p>Robbie Owen, for CLdN, did not make any submissions in relation to this agenda item.</p>
<p>d) Drafting of Protective Provisions (Schedule 4) including consideration of which statutory bodies the Statutory Conservancy and Navigation Authority would have to consult and an update on the position with respect to negotiations concerning all the other proposed Protective Provisions.</p>	<p>Robbie Owen, for CLdN, noted that CLdN had written to the Applicant with CLdN's submissions in relation to Protective Provisions on 9 October 2023 and was pleased to hear, per Brian Greenwood, for the Applicant's, submissions that CLdN would receive a response to that letter during the course of the evening of ISH6 (23 November 2023) or early the following day (24 November 2024).</p> <p>Mr Owen noted that CLdN had set out its full reasoning for why it felt the Protective Provisions set out in its letter to the Applicant on 9 October 2023 were necessary, but that it was important to clarify that these were not solely to protect CLdN's business. Mr Owen noted that CLdN is a statutory undertaker, which was therefore the main justification for the Protective Provisions it was seeking, as CLdN had a statutory interest in ensuring that the harbour facilities at the Port of Killingholme remained open and available for use (not solely by CLdN, but also by other operators, currently including Stena). Mr Owen also noted that the Protective Provisions in the Able Order contained provisions relating to non-interference, which the Applicant appeared to be resisting in this case. Mr Owen also noted that whilst this application did not propose railway works, CLdN remained concerned about the Applicant's use of permitted development rights in the future and the effect they could have on CLdN's railway access.</p> <p>Mr Owen added that in Part 1 of Schedule 4 to the dDCO (the Protective Provisions for the Statutory Conservancy and Navigation Authority for the Humber), paragraph 3 contained a requirement to consult with the Environment Agency (which may now be augmented to also refer to the Marine Management Organisation) before approving certain plans. Mr Owen noted that both the Environment Agency and the Marine Management Organisation were</p>

	<p>bodies with statutory functions, and so he queried why CLdN (also as a body with statutory functions) should not also be consulted under this provision. Mr Owen stated that this was an example of the Applicant mischaracterising CLdN's position, which was precisely why CLdN considered that Protective Provisions were needed.</p> <p>Post Hearing Note:</p> <p><i>CLdN is disappointed to have only received a response from the Applicant on 29 November 2023 in relation to the Protective Provisions proposed by CLdN in its letter of 9 October 2023. This is especially the case given Mr Greenwood's submissions during ISH6, in which he clearly stated that the Applicant would respond during the course of the evening of ISH6 (23 November 2023) or early the following day (24 November 2024). CLdN is concerned with the Applicant's approach and lack of expediency at this late stage of the examination, given that it failed to provide this response within the promised timeframe and, in any event, that the response was provided more than 7 weeks after CLdN's letter. CLdN is considering the Applicant's response and will respond by 8 December 2023.</i></p> <p><i>Further, CLdN disagrees with the Applicant's submissions during ISH6 in regard to the Applicant's refusal to provide undertakings in relation to non-interference with passage to the Port of Killingholme, on the basis that this would fall to the Harbour Master Humber. It is the Applicant, not the Harbour Master Humber, who would be building the project. Therefore, the Applicant does have control over construction, even though the Harbour Master Humber has to approve 'plans' under his Protective Provisions (which incidentally do not appear to extend to matters of programming and scheduling). In any event, the separation of functions is a legal fiction. All of the statutory powers (i.e. those of the dDCO, those regarding the Port of Immingham, and those relating to the Humber Conservancy) are and will be vested in the same legal entity, i.e. the Applicant, even though they are exercised by different individuals. It is therefore not understood why the Applicant is unable to agree to provide the Protective Provisions requested by CLdN in relation to non-interference with passage to the Port of Killingholme. CLdN will respond in further detail once it has had an opportunity to review the Applicant's response received on 29 November 2023.</i></p>
Item 4	
Any other matters relating to the purpose of ISH6	<p>Robbie Owen, for CLdN, emphasised that CLdN had submitted, in its Written Representations at Deadline 2, a full list of issues with the dDCO [REP2-031]. He also confirmed that CLdN's concerns set out in its post hearing submissions for Issue Specific Hearing 4 [REP4-018] and in its Deadline 6 submissions [REP6-036] all still stood. Mr Owen commended those submissions to the ExA in so far as they had not been covered during ISH6 and therefore overtaken, whilst the ExA considered what changes to the dDCO it may want to suggest.</p>
Item 5	
Review of matters and actions arising	<p>Robbie Owen, for CLdN, did not make any submissions in relation to this agenda item.</p> <p>Post Hearing Note:</p>

<p>The ExA will discuss how any actions arising from the discussion during ISH6 are to be addressed by the Applicant, IPs or Other Persons following this hearing and whether there is any need for procedural decisions about additional information or any other matters arising. A written action list will be published if required.</p>	<p><i>CLdN has reviewed the Applicant's draft actions list and provided comments.</i></p>
<p>Close</p>	