

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

DEADLINE 7

Harbour Master, Humber's response to Action Points 6, 7, 12 and 13 from ISH6.

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1. Introduction

1.1. In this document Harbour Master, Humber (HMH) addresses the following Action Points from ISH6:

- 1.1.1 Action Point 6 – Establish and advise on which of the Statutory Harbour Authorities (SHAs) would need to be consulted with respect to matters covered by the marine CEMP.
- 1.1.2 Action Point 7 – R18 (Impact protection Measures): Advise on the role, if any, that the Dock Master, as distinct from the HMH, would have in the operating and discharging of this Requirement.
- 1.1.3 Action Point 12 – With respect to Protective Provisions (PP) in favour of the Statutory Conservancy and Navigation Authority (SCNA), consider whether arbitration by the President of the Institution of Civil Engineers (PICE) would be appropriate (Article 35 and paragraph 18 of Part 1 of Schedule 4) and identify an alternative arbitrator if the PICE is considered to be inappropriate.
- 1.1.4 Action Point 13 – Consider for the purposes of PP paragraph 3(4) of Part 1 of Schedule 4 whether the MMO should be a consultee? Should Port of Killingholme as a Statutory Harbour Authority also be a consultee as submitted by CLdN?

2. Action Point 6 - Establish and advise on which of the Statutory Harbour Authorities (SHAs) would need to be consulted with respect to matters covered by the marine CEMP.

- 2.1. Action Point 6 is addressed in Part 6 of the joint note prepared on behalf of the Applicant and HMH in response to Action Point 6 from ISH5 (Joint Note).
- 2.2. As explained in the Joint Note, the Applicant is the SHA for the Port of Immingham, meaning that it would be wrong to treat the SHA as a separate entity from the developer.
- 2.3. The SCNA is a separate SHA from the Port of Immingham SHA. It will be appropriate for the SCNA to be consulted on the marine aspects of the CEMP, or on the marine CEMP if there are separate plans for the landside and marine construction works. However, as was pointed out in the Joint Note:
 - 2.3.1. the protective provisions for the SCNA provide for the marine aspects of the development to be subject to approval by the SCNA;
 - 2.3.2. it will be in the Applicant's own interest to ensure that the SCNA has the opportunity to provide input into the draft CEMP to ensure that such approval will be forthcoming;
 - 2.3.3. in the unlikely event that the draft CEMP has not been shared, the SCNA is able to require sight of the CEMP prior to granting such approval.
- 2.4. In passing, it is noted that the SCNA is the SHA for the Humber. The Competent Harbour Authority (CHA) is a designation for purposes of pilotage only. It would not be appropriate to treat the CHA as a separate SHA for the purposes of the DCO.

2.5. The Port of Killingholme SHA is at some distance from the proposed tidal works and would not be affected by them. Absent the DCO, CLdN would not be formally consulted ahead of the grant of a licence to carry out tidal works that do not directly affect the SHA, although information would be imparted and discussed as part of the usual stakeholder liaison.

3. Action Point 7 - R18 (Impact Protection Measures): Advise on the role, if any, that the Dock Master, as distinct from the HMH, would have in the operating and discharging of this Requirement.

3.1. HMH is aware when responding to this Action Point that the ExA has suggested changes to Requirement 18 and the introduction of a new Requirement 18A. The proposed amendments are addressed in HMH 29 entitled "*Submissions on behalf of the Harbour Master Humber regarding: Amendments to the protective provisions for the benefit of the SCNA suggested by HMH following ISH5 and ISH6 and comments on the ExA's proposed changes to Requirement 18 and introduction of Requirement 18A*". Requirement 18 as currently drafted would require the undertaker (i.e. ABP in its capacity as the owner and operator of the Port of Immingham SHA) to give due consideration to any recommendation from the SCNA that Work No. 3 is requires in the interests of navigational safety. HMH addresses in HMH 29 the reasons why he does not consider it appropriate for the SCNA to direct the Applicant to construct Work No. 3.

3.2. The Joint Note produced in collaboration with the Applicant in response to Action Point 5 of ISH5 explains that the Immingham Dock Master is a statutory appointee of the Applicant for the DCO with the power to make special directions within the limits around each element of the port that have been prescribed in their enabling legislation. In accordance with the Immingham Dock Bye-laws, he is also responsible for licensing tugs to operate in the SHA.

3.3. Although, the SCNA and HMH have overall responsibility for navigational safety of the Humber, in practice the HMH and his team at the SCNA and the Immingham Dock Master work seamlessly together for the benefit of users of the Port of Immingham as a whole.

4. Action Point 12 - With respect to Protective Provisions (PP) in favour of the Statutory Conservancy and Navigation Authority (SCNA), consider whether arbitration by the President of the Institution of Civil Engineers (PICE) would be appropriate (Article 35 and paragraph 18 of Part 1 of Schedule 4) and identify an alternative arbitrator if the PICE is considered to be inappropriate.

4.1. HMH suggests that, on reflection, paragraph 18 of the PPs should be deleted.

4.2. Arbitration is a formal and legally binding dispute resolution process between separate parties. It is difficult to imagine how ABP could have a legal dispute between two parts of itself, notwithstanding that the two SHAs have separate statutory functions and duties, each of which can be independently challenged by third parties. In any event, the existing statutory framework provides the complete answer to any dispute.

4.3. Under the existing regime, the SCNA has responsibility for the safety of navigation on the Humber. It has the statutory powers to issue directions and, in the case of HMH, special directions that could be used to effectively override any arbitration decision as to the detail of the plans for tidal works by regulating vessel movements where this is considered necessary for any of the purposes prescribed in the British Transport Docks Act 1972. Given the separate statutory functions of the SCNA and the Applicant, there is no reason to interfere with the existing regime. If the SCNA were to act unreasonably in relation to its protective provisions, it would be vulnerable to legal challenge by third parties in the usual way.

- 4.4. It is noted that this provision in the draft DCO followed the precedent of the Able Marine Energy Park Development Consent Order 2014. Article 57 of that DCO was in the same terms as Article 35 of the draft DCO and paragraph 25 of the Protective Provisions for the benefit of the Conservancy Authority in that Order was in the same form as paragraph 18 of the proposed PPs for the SCNA. The distinction here, of course, is that the promoter of the DCO was a third party developer. Even so it is arguable that the provision for arbitration would be of little practical value. If there was a scenario in which the developer succeeded in an arbitration regarding the approval of detailed plans and specifications, there would be nothing to prevent directions being issued to mitigate the effects of that arbitration decision in the interests of the safety of the navigation.
- 4.5. The removal of the arbitration clause should be of comfort to third parties as it reflects the position that would occur normally where ABP as developer of the Port of Immingham would be unable to challenge a refusal by the SCNA to licence works.
- 5. Action Point 13 - Consider for the purposes of PP paragraph 3(4) of Part 1 of Schedule 4 whether the MMO should be a consultee? Should Port of Killingholme as a Statutory Harbour Authority also be a consultee as submitted by CLdN?**
- 5.1. The first part of Action Point 13 enquires whether the MMO should be a consultee for the purposes of approval by the SCNA of the Applicant's detailed designs for the development that will, at that stage, be authorised by the DCO and the subject of a deemed marine licence.
- 5.2. It is submitted on behalf of HMH that these protective provisions are effectively a streamlined approvals process in place of the section 9 licensing procedure that is disapplied by Article 3 of the DCO. With this in mind, it would not be appropriate for the provisions that are for the benefit of the SCNA to require the addition of a layer of consultation that would not be required under the usual procedure.
- 5.3. In the ordinary course of events, HMH would not consult the MMO before issuing a licence for tidal works because the MMO will already have given its consent. To add a further layer of consultation would be inappropriate. The MMO's functions are quite different from those of the SCNA in approving detailed plans etc. and it would not normally expect to be consulted. By this stage, the MMO will already have had input into the design of the IERRT to the appropriate extent through its input into the deemed marine licence, which covers all those aspects of the development that it is appropriate for the MMO to control. It cannot be appropriate to expect the MMO to have any further role in the approvals process once the deemed marine licence has been granted.
- 5.4. With regard to CLdN, the Port of Killingholme is at some distance from the IERRT and, in the opinion of HMH, there would be no reason for CLdN to be consulted directly on the design of the tidal works authorised by the DCO at Immingham.

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