

**THE PROPOSED ASSOCIATED BRITISH PORTS  
(EASTERN RO-RO TERMINAL) DEVELOPMENT CONSENT ORDER  
DEADLINE 7**

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ISH5 – Action Point 5 – Joint Note – Separation of functions  
submitted on behalf of the Applicant and Captain Firman, the Harbour Master, Humber

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## **Purpose of this note**

- This note seeks to explain the division of responsibility in practice between the River Humber statutory harbour authority (the Statutory Conservancy and Navigation Authority – “SCNA”), the Port of Immingham statutory harbour authority, the Harbour Master, Humber and Immingham Dock Master, and how their respective functions would be exercised in respect of the construction and ongoing operation of the proposed IERRT facility with reference to relevant legislation. It also notes any consultation requirements relating to those functions.
- The note also considers whether it is open to the Examining Authority as a matter of law to make a recommendation that there is a need for the recommendation as to whether or not Impact protection measures are required to be made by a third party such as the MMO or Secretary of State for Transport on grounds of alleged lack of independence of the SCNA and sets out why it is considered appropriate to have a recommendation to construct protective works in Requirement 18 rather than a requirement.
- In light of the information set out below regarding the division of responsibilities and presumption of legality, the note considers whether or not the Examining Authority should make any recommendations that the DCO should impose any controls over the management of vessels in the Humber and/or Port of Immingham.
- Finally, the note expresses the joint opinion of the Applicant and HMH as to consultation on the CEMP, any overlap between the CEMP and the protective provisions for the SCNA, and why it is considered there is no need for separate protective provisions for the Port of Immingham or the DM.

### ***Part 1 – Functions and responsibilities of:***

- ***the harbour authority for the River Humber (i.e. the SHA and conservancy element of SCNA)***
- ***the Competent Harbour Authority for the purposes of pilotage (i.e. CHA element of SCNA)***
- ***Harbour Master, Humber (HMH)***
- ***the statutory harbour authority for the Port of Immingham (ABP)***
- ***the Immingham Dockmaster (DM)***

#### ***The harbour authority for the River Humber (SCNA)***

1. The series of Humber Conservancy Acts created the River Humber Conservancy Commissioners and conferred powers upon them relating to the maintenance and improvement of the channel and navigation of the River Humber.
2. The Humber Conservancy Act 1899 conferred powers on the Commissioners to licence works, such licences to be effective once consented to by the Board of Trade.
3. An Act of 1907 dissolved the Humber Conservancy Commissioners and replaced them with the Humber Conservancy Board.
4. In due course, the Humber Harbour Reorganisation Scheme 1966 Confirmation Order 1967 dissolved the Humber Conservancy Board and transferred all its statutory functions to the British Transport Docks Board.

5. The British Transport Docks Act 1972 (the 1972 Act) made provisions for the appointment of the Harbour Master, Humber and for issuing of general and special directions (see more on this, below).
6. By virtue of section 5(1) of the Transport Act 1981, the British Transport Docks Board was reconstituted as a statutory body named Associated British Ports (ABP).
7. The Associated British Ports Act 1987 made provision for byelaws to be made in respect of the Humber. These were introduced as the Humber Navigation Byelaws 1990. The conservancy functions of ABP are carried out by Humber Estuary Services (HES) led by the HMH reporting to the Harbour Authority Board.
8. Under section 6 of the 1972 Act, the SCNA has the statutory power to make general directions for the purpose of promoting or securing conditions conducive to the ease, convenience or safety of navigation in the Humber. Prior to issuing a general direction, the Board must consult with the “specified bodies”, namely: British Waterways Board (now the Canal and River Trust); the Chamber of Shipping of the United Kingdom (now UK Chamber of Shipping), the National Coal Board (since dissolved) and Trent River Authority (now part of Severn Trent Water Authority). These general directions may be issued to all vessels or to a class of vessels and may apply to the whole or only part of the Humber at all times or at designated times. In practice, such directions are made at the instigation of HMH.
9. For the reasons explored below, it is rarely necessary to issue a general direction; however they can be made when required, although it takes some time to complete the process. HMH would expect new guidance to be related initially through Notices to Pilots and PECs as well as VTS and Dockmaster Standard Operating Procedures. It would also be included in Pilot Handbook in due course.

#### *Pilotage*

10. The Humber Conservancy Act 1907 dissolved the then pilotage commissioners for the river Humber and made the Humber Conservancy Board the pilotage authority for the Humber. This function also transferred to the British Transport Docks Board under the 1967 Order and then to ABP in its capacity as successor statutory conservancy authority.
11. Day to day pilotage functions are carried out by HES under the leadership of HMH. Section 7 of the Pilotage Act 1987 provides that if a CHA considers it in the interests of safety that it should issue pilotage directions, it can do so, and pilotage will then be compulsory for the area concerned. Before giving pilotage directions, the CHA must consult the owners of ships which customarily navigate the area to which the proposed direction would apply and any other persons who carry on harbour operations within the harbour of the CHA (i.e. the Humber). Thus interested parties including ABP, APT, DFDS and CLdN will all be consulted in advance of new pilotage directions being issued.

#### *Harbour Master Humber*

12. Section 5 of the British Transport Docks Act 1972 provided for the appointment by the British Transport Docks Board of a harbour master, the definition of which includes his deputies and assistants (at HES).
13. Although HMH is an officer of the SCNA, he also has his own powers under section 7 of the 1972 Act to make special directions to vessels in the Humber. Parliament has seen fit to give him the discretion to issue directions in any reasonable manner he

considers appropriate (section 10). HMH is not required to consult prior to exercising this discretion. A special direction may be given for the following purposes:

- (a) requiring a vessel to comply with a requirement made in or under a general direction;
- (b) regulating or requiring for the ease, convenience, or safety of navigation the movement, mooring, or unmooring of a vessel;
- (c) regulating for the sake of navigation the manner in which a vessel takes in or discharges cargo, fuel, water or ship's stores.

It is noted that (b) above would cover any soft start arrangements for the IERRT berths that the HMH sees fit to impose. Further, and as explained at the ISH5 hearing, if HMH concluded that the berth was unsafe, he could – and would - issue special directions to prevent vessels berthing there. It is his power to make such decision subject to judicial review.

- 14. In addition to his other harbour master powers, HMH can remove from or prevent entering into the harbour any vessel if that vessel might involve grave and imminent danger to any person or person or property, or put the functioning of the harbour at risk, under section 1 (Directions by harbour master concerning dangerous vessels etc) of the Dangerous Vessels Act 1985. There is no requirement for consultation, although he does have to give reasons.
- 15. HMH may also prohibit the entry, require the removal, or regulate the handling, movement or position within the harbour area of dangerous goods, freight container, receptacle, vehicle, vessel, portable tank or other mode of transport handling, and position of any vessel if, taking into account all relevant circumstances, the condition of the dangerous goods, or their containers, or matters related to the dangerous goods create a risk to the health and safety of any person in, or in the vicinity of the vicinity of the harbour area. which in the harbourmaster's opinion carries a dangerous substance so as to create a risk to any person or property (regulation 7 of the Dangerous Goods in Harbour Areas Regulations 2016). Under paragraph (5) of Regulation 7, where the harbour master intends to give a direction requiring the dangerous goods to be removed by land from the harbour area, the harbour master must consult any police force through whose area the dangerous goods are to be moved.

#### *Port of Immingham*

- 16. The difference of purpose between the Humber Conservancy and the Immingham Port Authority can be seen from their initial enabling legislation. Unlike the conservancy legislation, which was concerned with the improvement and navigation of the river for the benefit of all users, the enabling legislation for the Port of Immingham is concerned with the port and its docks and jetties. The Humber Commercial Railway and Dock Act 1904 authorised the construction of a dock near the village of Immingham, including the Eastern and Western approach jetties. Upon completion, the whole operation was leased to the Great Central Railway for 999 years. The South Killingholme Jetty Empowerment Order 1968 authorised the National Coal Board to build the jetty at Killingholme which was transferred to the British Transport Docks Board by an Act of 1971. The Humber Commercial Railway and Dock Company (the owners of the docks) and the Great Central Railway Company (the operators) became merged into the London and North Eastern Railway Company in 1921, which was then vested in the British Transport Commission under the Transport Act 1947. A number of further developments in the Humber have been authorised by other legislation over the years as operations on the Humber continue to evolve and adapt.
- 17. The Port of Immingham SHA was transferred to the British Transport Docks Board when nationalised transport undertakings were reorganised under the Transport Act

1962. As explained above, by virtue of section 5(1) of the Transport Act 1981 the British Transport Docks Board was reconstituted as a statutory body re-named "Associated British Ports". Paragraph 2 of Schedule 3 (Powers of Associated British Ports) to the Transport Act 1981 confers powers on ABP to operate its harbours and to provide port facilities at them.

18. For the avoidance of doubt, as owner and operator of the Port of Immingham, ABP acts in a discrete statutory capacity distinct from the SCNA. The later public listing of the ABP holding company does not affect the status, as statutory bodies, of either the commercial port or the SCNA. There are no general powers to license third party works in the Immingham local legislation.
19. It should also be noted that there is no legal distinction between ABP as the Applicant and ABP as the statutory body with responsibility for the Immingham SHA. They are one and the same.
20. ABP has powers to make general directions within the Immingham docks under section 8 of the 1972 Act for the purposes not only of ensuring safety of vessels at the docks but also securing the efficient conduct of the business carried out at the docks. For the purposes of this section, "docks" includes the piers, jetties and other places comprising ABP's undertaking at Immingham. In addition, the Port of Immingham is a designated harbour authority under paragraph 5 of the Schedule to the Harbour Directions (Designation of Harbour Authorities) (No.2) Order 2015 for the purposes of sections 40A to 40D of the Harbours Act 1964 (as amended by section 5 (harbour directions of the Marine Navigation Act 2013), with powers to give general directions in respect of ships entering or leaving the harbour, the movement of ships, mooring or unmooring, equipment (including nature and use) and the manning of ships. Before making a general direction, ABP must consult such representatives of other users of the port as it thinks fit and must publish its proposed direction.
21. Section 23 of the 1972 Act provides that not less than three months before giving a general direction that may affect the operators of the IOT terminal at Immingham, the Board must consult the operators on its terms. The operators have a right of appeal to the Secretary of State on the grounds that a general direction is prejudicial to their operations or rights and the Secretary of State shall, having regard to the interests of ease, convenience of safety of navigation in the Humber, have power, by order, to amend the direction or, as the case may be, to annul the amendment or revocation. The "Board" in this context is the Board for the purposes of section 4, which is now the SCNA. If a general direction is given pursuant to the Harbours Act 1964, there is no statutory right of appeal, but the PoI has given an undertaking to the Secretary of State as a pre-requisite to Immingham being made a designated harbour authority to consult and that undertaking sets out a process by which an objector to a direction can obtain an adjudication. This is described in the Explanatory Memorandum to the said Harbour Directions (Designation of Harbour Authorities) (No.2) Order 2015 which states at paragraphs 9.1 and 9.2:

*"9.1 The Department issued Harbour Directions Guidance in November 2013. This is non-statutory guidance, but is aimed at providing assistance to harbour authorities as to the requirements of the Secretary of State before an authority is included in a harbour directions designation order.*

*9.2 In addition, a National Directions Panel (NDP) was set up comprising the representative organisations of both harbour authorities and harbour users. The NDP issued Supplementary Guidance: Code of Conduct on Harbour Directions in November 2013 to coincide with the issue of the Departmental guidance. Under the Code, harbour*

*authorities wishing to be designated with the power to give harbour directions are asked to sign an Assurance Statement that they will abide by the Code of Conduct and both ABP and Peel Ports have done so - this included an undertaking to set up an appropriate Port User Group. The Code sets out a recommended process of consultation with port users, provides model directions for harbour authorities, and sets out a dispute resolution process.”*

22. As both the SCNA and ABP have powers to issue general directions, either one could make general directions in respect of the construction and/or operation of the IERRT development; in practice, however, it would be the HMH and HES in collaboration with the Immingham Dock Master who would determine what instructions are appropriate and HMH would arrange for them to be made.

#### *Immingham Dockmaster*

23. ABP may from time to time appoint and remove such Harbour Masters as it considers necessary, under section 51 (Appointment of harbour master (including dock or pier master) of the Harbours, Docks and Piers Clauses Act 1847 as incorporated into the local legislation for the Port of Immingham.
24. Section 52 of that Act (Powers of Harbour, Dock or Pier Master) provides that the Dock Master may give special directions for, inter alia, regulating in time and manner the entry and exit of vessels from the harbour, and their mooring and positioning within it. It is important to note that the powers of the Port of Immingham Dock Master under section 52, as applied by relevant local legislation, extends only to a defined distance from the particular jetty or other work that has been authorised. This reflects the reality that, unlike the Humber, say, the Port of Immingham is not a single harbour area but is a number of jetties/facilities each with its own area, which collectively comprise the Port of Immingham SHA. It is noted that (general) directions issued pursuant to the power conferred by section 40A of the Harbours Act 1964 are specifically subject to (special) directions made (by the Dock Master) under section 52 of the 1972 Act (see section 40A(5) HA 1964) and a SHA must not give a (general) direction that conflicts with an enactment (see section 40A(6)).
25. Also, under section 8(2) of the 1972 Act, the Dock Master has power to give a special direction, including requiring the removal from the dock of a vessel in certain circumstances (e.g. where it is on fire, making an improper use of the dock, or removal is necessary to enable maintenance or repair work to be carried out or to require a vessel to comply with a general direction). Section 8 is limited to vessels entering or about to enter the dock and vessels leaving or just having left a dock.
26. Under section 8(4) of the 1972 Act, a dockmaster may give a (special) direction to a vessel at a dock for any of the purposes for which the Pol may give a (general) direction under section 8(1) or to require a vessel to comply with a general direction.
27. The Dock Master has the same powers as HMH in respect of dangerous vessels within the harbour limits and also has powers under section 58 (Powers of harbour master as to mooring of vessels in harbour) of the Harbours, Docks and Piers Clauses Act 1847 as incorporated so that, if a vessel has not moored as the DM has directed, the DM may cause the vessel to be moored, unmoored, placed or removed as he sees fit, and may unloose, cast off, cut etc. any ropes or chains as he sees fit providing that, in the event of the vessel being unmanned, he has put sufficient people aboard to protect the vessel's safety.
28. With regard to tugs, byelaw 18 of the Immingham Dock Bye-laws 1929 provides that no tugs, other than those owned by ABP, shall ply for hire within the dock or at the

jetties unless licensed to do so by the dockmaster. Byelaw 13 provides that no person may moor, anchor, or place, or load, or unload any vessel within the dock contrary to the directions of the dockmaster. This provision (signed off by the Secretary of State), reinforces the absence of any need for, and the inappropriateness of, other controls or processes being imposed by the DCO – at least without some compelling reason which does not exist here.)

29. ABP no longer owns any tugs, but it remains the Dock Master who has responsibility for organising towage, working closely with HES. In practice, HMH and the DM work closely together in all matters relating to ensure the safety of vessels, including specifying the pilotage and towage requirements for vessels wishing to use the port's facilities.
30. HMH's power to issue special directions to individual vessels in the river as he considers appropriate would apply regardless of any general direction made by ABP and, ultimately, if the HMH considered a decision of the DM as to towage to be unsafe, HMH could prevent vessels entering the jurisdiction of the Dockmaster. In reality, this would not happen as both would collaborate to ensure the safe and effective management of vessel movements.
31. The DM is in a different position to HMH. Both are officers of ABP in their different capacities but whilst HMH is the harbour master for the entirety of the river Humber with all its different operators and users, the DM's powers are concerned solely with shipping using the commercial Port of Immingham.
32. Historically, Harbour Orders do not treat an applicant's harbour masters as separate bodies requiring protective provisions in legislation authorising further port infrastructure, and there is no reason for this DCO to do so. On the other hand, the protective provisions in the DCO provide a streamlined approvals process for works in the Humber that would – but for the disapplication of Section 9 of the 1899 Act - be subject to licensing by the SCNA.

*Other provisions in the 1972 Act relating to directions that apply to the SHAs, HMH and the DM*

33. Section 9 of the 1972 Act requires that, save in the event of an emergency, new general directions are to be published as soon as practicable in Lloyds List and Shipping Gazette or some other newspaper specialising in shipping news with details of where copies of the direction can be inspected and purchased. (However, section 10 provides that special directions may be given in any reasonable manner considered appropriate.)
34. Section 12 makes non-compliance by a ship's master with a general or special direction a criminal offence, albeit punishable only with a fine. Importantly, section 13 provides that without prejudice to any other remedy, HMH or the DM may enforce non-compliance with special directions by putting persons aboard the vessel to carry out the direction or otherwise cause the vessel to be handled in accordance with the direction.

*Byelaws*

35. The Humber Navigation Byelaws 1990 set out various general duties of the masters of vessels when using the Humber. They have no effect on the statutory powers of HMH and the DM and would not be affected by the construction and operation of the IERTT development.

36. It is worth mentioning byelaw 12, by which the Master of a vessel within the dock or the statutory harbour limits of Immingham shall not cause or permit such vessel to be moved or propelled in such a way as to be dangerous to any property of the company, or to any other vessel, or to impede or interrupt the loading or unloading of any other vessel in the harbour limits. This just reinforces that the responsibilities for safety and mutual co-operation extend to all users of Immingham (including, e.g. IOT and DFDS) and not just the statutory bodies.

*Immingham port operating manual*

37. This sets out the procedures particular to Immingham that are considered necessary to ensure the safe operation of the port.

**Part 2 - Structural independence from ABP of HMH and DM**

*Harbour Master, Humber*

38. As explained above, and unlike the DM, HMH is employed by and is an officer of ABP in its different capacity as the statutory harbour authority for the River Humber only – not as port operator. He also has his own discrete statutory powers. In the exercise of his own powers, he acts independently of his employer and – just as the SCNA would be susceptible to challenge by judicial review - HMH is subject to judicial review. The SCNA has a discretion to remove HMH from office, but whoever it appointed in his place would be appointed under the same provision and thus with identical independent statutory powers. Further, HMH is in charge of 200 marine professionals including the team at HES and the Humber pilots. HMH has no doubt that these seasoned professionals would not hesitate to speak up if they considered that what they were being asked to facilitate or do was unsafe. It is perhaps worth adding that in imaginary circumstances where HMH/SCNA were minded to allow pilots or PECs to make unsafe passages to and from the IERRT (or any other facility) during construction or operation, HMH would expect the pilots and PECS to refuse to do so. He also points out that the ships' masters have their own responsibilities towards their vessels and crews and the ultimate discretion not to attempt a manoeuvre.
39. As an employee and officer of ABP in its capacity as SCNA, HMH is under the functional authority of the Head of Marine and Regional Director for the administrative and financial management of HES and the SCNA and CHA functions, duties and responsibilities.

*Dockmaster*

40. The Dock Master is in a similar position to HMH in principle. The distinction – as explained above – is that the Dock Master's statutory functions are limited to prescribed areas around the various facilities that form the port of Immingham.

**Part 3 - Why the SCNA is best placed to recommend whether Work No. 3 is required in the interests of navigational safety in the River Humber and why it is appropriate for there to be a recommendation by the SCNA rather than a requirement**

41. As explained above, the SHA for the Port of Immingham is the Applicant for the DCO. The DCO would give ABP the discretion to construct IERRT, including discretion to construct the Impact Protection Measures as described in Work No. 3 and assessed in the Environmental Statement of which the Navigational Risk Assessment is part. ABP would exercise this discretion of its own volition if it considered it appropriate to do so. However, regardless of this, no works for the construction of Work No. 3 may commence until ABP has consulted with the SCNA, APT and MMO as to the detailed



design of Work No. 3 and has had regard to their representations. Thus, as currently drafted, Requirement 18 is entirely consistent with how operations are customarily managed in the Humber. If safety of berthing and unberthing at the new infrastructure was considered unsafe by the body with statutory responsibility for the river as a whole, which would be determined by the HMH and his team of experienced mariners, the narrow starting operating parameters (simulations, pilotage, multiple tug support, benign conditions, ebb tide etc.) would not be widened and could be narrowed even further. If it were not practicable to use the IERRT safely at all, vessels would be prohibited from berthing there until such time as adequate protective measures had been implemented.

42. It would not be appropriate for the SCNA to have a power to force ABP to construct any particular works. That is ultimately a decision for the port owner and operator. However, the SCNA has the power to prevent operations in the absence of satisfactory measures overall. The SCNA could make the recommendation that Impact Protection Measures be constructed if it considered that they were required for navigational safety reasons. In making such a recommendation, the SCNA would be taking into account its responsibility for the safety of navigation over the entirety of the river Humber for the benefit of any and all vessels traveling to the ports and other facilities that the river supports. It has no obligation to, or power to favour, the commercial or operational interests of any particular user, whether ABP or anyone else. The SCNA is clearly the body with the most accumulated knowledge of the Humber as a whole and best placed to identify – through HMH and his team – whether physical impact protection measures are required in addition to other available operational controls identified in the three NRAs.
43. The SCNA and HMH can impose directions to control vessel movements, including directions that would allow the IERRT to operate only in certain conditions, but it is no part of their normal functions – and never has been - to require someone to construct particular infrastructure. Having said that, were such a recommendation to be given by the body with statutory responsibility for the safety of the river but a decision was made by ABP not to act upon it, not only would the commercial operations of the user of IERRT be affected by any constraints placed upon its use by SCNA in any event, but such decision would be capable of being challenged by judicial review.
44. As the Competent Harbour Authority is a harbour authority solely for pilotage functions, there is no statutory or functional basis upon which it would be responsible for determining a requirement for protective works.

***Part 4 - whether it is open to the Examining authority to make a recommendation to the Secretary of State that there is a need for the decision as to whether or not Impact protection measures are required to be made by a third party such as the MMO or Secretary of State for Transport on grounds of lack of independence of the SCNA.***

45. Parliament has decided that ABP is a fit and proper body both to exercise the functions relating to its various operations and there is a presumption that ABP will act in accordance with the relevant applicable statutory framework. As stated by Lord Irvine in the case of Boddington v British Transport Police 1999:  
*“Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively. That would be a conclusion inconsistent with the authorities to which I have referred. In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful but is then recognised as never having had any legal effect at all. The burden in such a case is on the defendant to establish on a balance of probabilities that the subordinate legislation or the administrative act is*

*invalid: see also Reg. v. Inland Revenue Commissioners, Ex parte T.C. Coombs & Co. [1991] 2 A.C. 283.”*

46. It follows that it is not appropriate in law to approach the DCO on the basis that it needs to cater for ABP (as port authority or conservancy) acting ultra vires.
47. It must be assumed that ABP will give proper consideration to any recommendation received from the SCNA and that it will not unreasonably refuse to implement the works.
48. It is therefore unnecessary and inappropriate to make some external body – whether the Secretary of State, MMO or other entity – responsible for the decision as to whether ABP should be required to construct impact protection measures. SCNA is best placed to identify whether such measures are needed and ABP is best placed to determine in light of that recommendation whether or not to build them. SCNA will retain the power to control operations over the Humber in the way described above.
49. It should be noted that in addition to control over decisions by judicial review – were the SCNA through HMH and his team at HES (including the pilots for which he is responsible) to recommend the construction of Impact Protection Measures, this would be in the context that other operating controls were inadequate to ensure safe vessel manoeuvres in the vicinity of the IERRT and/or Immingham Oil Terminal. In those circumstances vessels would either be prevented from berthing at IERRT altogether or the operating parameters would be reduced until they are ALARP.

***Part 5 - whether the Examining Authority can properly make a finding that the DCO should impose any controls over the management of vessels in the Humber and/or Port of Immingham***

50. There are two aspects to this – the first is whether the ExA can recommend such controls as a matter of law and the second is whether it would be desirable to do so for the safety of the IERRT and the other port infrastructure in the vicinity of IERRT, including the COMAH site. Specific comments on the ExA’s schedule of proposed changes to the draft DCO are dealt with as a separate submissions by the Applicant and HMH (see HMH 29).
51. Section 145 of the Planning Act 2008 provides that:
  - (2) An order granting development consent may include provision changing the powers or duties of a harbour authority only if—
    - (a) the development to which the order relates is or includes the construction or alteration of harbour facilities, and
    - (b) the authority has requested the inclusion of the provision or has consented in writing to its inclusion.
52. Clearly, this application relates to the development of harbour facilities as described in section 145(2)(a). The issue is whether the imposition of any of all of the following: operational controls, restrictions on the commencement of operation of the requirement or a new right of appeal affecting the SHAs, would amount to a change to the statutory powers or duties of ABP or the SCNA. If it does, then section 145(2)(b) explicitly requires consent of the SHA concerned
53. If operational controls are imposed through the DCO – whether by a Grampian-style condition or some other framework – there is the potential for a conflict with the existing powers and/or duties of the SHAs. This will be the case whether the condition is itself the direction, requires a direction to be made or confers a new power to issue a

direction for a new purpose (i.e. to construct impact protection measures) relating specifically to the IERRT. Also, there are no other bodies that are capable of publishing and enforcing general harbour directions. In other words, the effect of a condition in respect of the making of a direction by a SHA would be to require such general direction to be enforced by that SHA. Thus, any such condition would affect their functions and impose a duty on the statutory harbour authority concerned to enforce a direction that it was not previously required to issue or enforce. Thus it would be implicitly or explicitly adding to their duties, which amounts to a change. Similarly, a requirement that empowers an SHA, as a pre-requisite to operational use of the IERRT, to issue general directions, a notice or guidance would amount to a change to the statutory powers or duties of the Immingham SHA. This is explored further in HMH 29 (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 Paragraph 22 and, introduction of Requirement 18A.) Therefore, it is respectfully submitted that Requirements 18 and 18A in the forms proposed by the ExA could only be made with the consent of the harbour authorities.

54. Another important question is whether there would be any practical benefit achieved by the introduction of controls within the body of the DCO. The Planning Act 2008 contains provisions that allow for changes to the powers or duties of the statutory harbour authority with their consent but includes no provision allowing the DCO to alter the powers of HMH or the DM to issue vessel-specific special directions. Special directions are issued to individual vessels and could be issued regardless of the DC) if considered necessary for any of the purposes for which special directions may be given – which includes (for HMH) the ease, convenience or safety of navigation and for the DM, ensuring the safety of vessels at the docks, preventing injury to persons at, or to property at, or forming part of the docks or of securing the efficient conduct of the business at the docks. Any general directions would be subject to directions issued by those entrusted by Parliament with the power to make special directions for the safety of the navigation and the docks. It would be dangerous for the DCO to seek to disapply or impose practical limitations on any of these powers, given the need for both HMH and the DM to respond quickly to whatever situations may arise on the river from time to time.
55. Finally on this point and as alluded to above, the SHAs and their appointed harbour masters have been given these flexible and discretionary powers for an important reason. Parliament considers them the bodies best placed to make decisions about operating controls for port facilities in the river. Parliament has determined that the bodies concerned are fit and proper persons to exercise these powers at that they can be trusted to do so at their discretion. At present, HMH has stated his own independent view, based on his experience and expertise, that the construction and operation of the IERRT can be managed safely, acknowledging the consequences of any interference with the IOT finger pier or IOT trunkway. That will be further tested during detailed design and the slow start to ensure safe operating parameters. Objectors to the DCO scheme have put forward no evidence to suggest that the IERRT would be operated irresponsibly so as to put other port operations, property, lives or wider interests at risk.
56. If the ExA considered it appropriate to include a Grampian-style condition setting out a minimum control of 1 tug at berth 1, whilst that could be done in principle, it is submitted that the DCO ought also to allow for exceptions to be made where that is reasonably required and bearing in mind that it is not possible to bind the hands of the HMH or DM.

57. Finally, on this point, if DCOs start to come forward with different operational controls imposed on the SHAs, over time this could risk introducing conflicts and/or unnecessary complexity to the management of navigation on the river.

**Part 6 - whether the SCNA, CHA, HMH, ABP as Pol or DM should be consulted on either or both of the following:**

- **a landside CEMP**
- **a marine CEMP;**
- **whether there is an overlap with the protective provisions for the SCNA; and**
- **why there is no need for separate protective provisions for the Port of Immingham or the DM.**

58. Paragraph 8 (Construction and environmental Management plan) of Schedule 2 (Requirements) to the draft DCO is a Grampian-style condition requiring (i) approval of the CEMP by the local authority following consultation with various interested statutory bodies; and (ii) construction of the IERRT to be in accordance with the CEMP). The draft DCO also requires the submission of a CEMP to the MMO under paragraph 11 of the deemed Marine Licence in Schedule 3 for approval after consultation with certain of the bodies referred to in Schedule 2. The deemed marine licence will provide, inter alia, for the capital dredge for the IERRT development to be carried out in accordance with the CEMP. From the viewpoint of HMH, given that the capital dredge concerns the SCNA and that there may well be other matters relating to the marine elements of the CEMP, it would be in the Applicant's own best interests to share the draft CEMP with HMH and his team. HMH is confident that this would happen in practice. Further, there is no need for the DCO to prescribe consultation with SCNA, CHA or HMH in the DCO as the SCNA is entitled to require sight of the CEMP prior to granting its approval for tidal works in accordance with paragraph 3 of its protective provisions in Part 1 of Schedule 4 to the draft DCO.

59. As alluded to in the previous paragraph, the protective provisions provide for the SCNA to have approval of the detailed design of any tidal works. This includes plans (as defined in paragraph 1 of the protective provisions) and "such further particulars" as the SCNA may reasonably require. Therefore, even if the CEMP is not submitted to the SCNA with the detailed plans, method statements etc., the SCNA may require sight of it as a pre-requisite to approving the tidal works described in the deemed marine licence.

60. Having said this, there could be a potential (hypothetical) conflict if the reasonable requirements imposed by the SCNA following consultation with the Environment Agency were to clash with the terms of the CEMP as approved by the Council and MMO. For this reason, it may be considered sensible for the DCO to include provisions for the SCNA to be consulted on the draft marine CEMP and to be given sight of consultation responses.

61. As the harbour authority for the Port of Immingham is the applicant for the Order, it would not be appropriate or necessary for the DCO to require ABP to consult with itself and its own DM on the content of the CEMP or for either or both of them to be the beneficiary of protective provisions. The points made earlier in this note to explain why the DM's position can be distinguished from HMH equally here. There is, so far as we are aware, no precedent in harbour legislation for making the applicant's own harbour master the beneficiary of protective provisions and it is difficult to see a justification for doing so.

62. Finally, there is no need to distinguish the CHA from the SCNA for the purposes of the DCO drafting.