

## By Email

Lily Robbins

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Date  
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Dear Ms Robbins

## Immingham Eastern Ro-Ro Terminal - Applicant's Response to DFDS Letter dated 23 January 2024

We write on behalf of the Applicant, Associated British Ports.

We have noted that a letter submitted by DFDS on 23 January 2024 has been accepted into the Examination **[AS-084]** ("the DFDS Letter") by the Examining Authority.

The DFDS Letter suggests alternative drafting of the requirement put forward by the Applicant, on a without prejudice basis, in **[REP10-020]** regarding –

- (i) a requirement restricting vessel size for the IERRT; and
- (ii) a requirement for the installation of impact protection measures.

– submitted in response to the Examining Authority's Rule 17 request dated 12 January 2024 **[PD-029]**.

The Applicant is disappointed that DFDS has submitted such a letter at this late stage in the process particularly so bearing in mind that the Applicant has provided a full response to the ExA's Rule 17 request in **[PD-029]**, the principles of which are ignored in DFDS's letter. The Applicant considers the contents of the DFDS Letter to be without merit for the reasons already given and further summarised below.

For the avoidance of any doubt, the Applicant remains firmly of the view that the imposition of a requirement limiting the use of the proposed berths to Stena T-class vessels is neither appropriate nor necessary for the reasons already recited, including the fact that: (a) any use of the proposed berths (just like use of any such facility within the Port including that which DFDS use) is already subject to the regulatory control of the statutory harbour authorities; and (b) the numerous simulations and assessments that have been undertaken over the past two years

already establish in principle the safe use of the IERRT berth for larger vessels within the design envelope, including the Jinling vessel. The navigational controls will apply to the operation of IERRT through the existing statutory regime that governs the powers and duties of the Harbour Master Humber (“HMH”) and Immingham Dock Master as well as ABP in its capacity as statutory harbour authorities.

The Applicant reiterates:–

- (a) As has been explained to the Examination a number of times, simulations have not been limited to the Stena Transit vessel but have also specifically modelled the Jinling class vessel, being of a similar size in terms of length and beam as the design vessel dimensions (see, for example **[REP7-020]** and the Applicant’s ISH5 evidence) and the G9 as a “dead vessel” so the factual premise for DFDS’s suggestion is wrong;
- (b) Notwithstanding this, any vessel that operates at the IERRT will first be subject to the strict controls and assessments that, as has been explained, apply to the operation of every new vessel which wishes to operate at the Port of Immingham. As the ExA is aware, these controls have been comprehensively explained during the examination and are exercised by the HMH and the Dock Master. To suggest that the relevant navigational authorities will not comply with their statutory duties and obligations so as to require a restriction as suggested by DFDS is nonsensical. That principle is the same for all infrastructure be it the IOT Terminal or DFDS’s facility at the IOH (as demonstrated by DFDS having introduced the Jinling vessel and the application of assessment and controls through that process). The imposition of a specific restriction for IERRT would be anomalous and unnecessary;
- (c) The size and type of vessel that will be operating at the IERRT in the future within the design vessel parameters over the course of the lifetime of the IERRT is likely to be different to the Stena T-class vessel that will initially be operating from Immingham when the new Terminal has opened – there is nothing surprising about that, but as noted in (b) above, as and when other vessels are proposed for use, they will be subject to that regulatory process identified;
- (d) The Applicant, therefore, firmly repeats the representations made at paragraphs 3.27 – 3.30 of its closing submissions **[AS-083]** in response to the unjustified argument put forward by DFDS that a requirement in the terms suggested in the DFDS Letter is required. Amongst other things:–
  - (i) There is no evidential foundation to attack the independence of either the HMH or the Dock Master – a suggestion that they would compromise their statutory and professional requirements to ensure navigational safety is unfathomable and baseless. The Applicant deprecates such unreasonable criticisms and notes they have been separately fully refuted by the HMH himself consistently during the Examination;
  - (ii) There is a very disappointing implicit criticism (with no evidential foundation) of the professionalism with which those responsible for safety approach their task – which, is in fact undertaken objectively and on a day-to-day basis over many years, applying detailed knowledge and experience of the River Humber and the Port of Immingham to safeguard its safe operation. DFDS – and indeed no other party to the Examination – has explained how or why it would be in the interests of any such person, or ABP as SHA or ABP as a port owner and operator to operate a port environment with an

intolerable risk or a risk which had not been reduced to ALARP given the importance to those individuals of ensuring such safe operations; and

- (iii) DFDS's position in this respect ignores the satisfaction that has been expressed with the IERRT facility subject to those controls by the relevant navigation authorities ((supported by extensive simulations involving masters and tug operators) simply because it does not fit the objectors' position of objection, where it is the objectors who have commercial conflicts of interest. There is no logical basis for seeking to impose the requirement suggested given the controls identified above.
- (iv) Moreover, even if a Requirement were to be imposed (notwithstanding the points made by the Applicant) it is clear that imposition of a Requirement in the form suggested by DFDS as compared with that proposed by the Applicant is unnecessary, inappropriate and illogical. This can be illustrated by simple example. Under DFDS's wording the requirement would prevent any vessel operating at the IERRT facility which exceeded any one of the dimensions proposed, but even if the dimensions of the vessel in question (by reason of its design, propulsion, rudders, thrusters etc) proposed for use actually made it more manoeuvrable than a vessel of the dimensions that DFDS are identifying. Thus, for example, a vessel might be proposed for use that might have a significantly shorter length than the dimensions in DFDS's wording, but have a marginally wider beam (e.g. 26.71m) or a marginally greater draught (e.g. 6.31m), but as a result of its particular design (for example, hull shape, propulsion mechanisms, thrusters or rudder or any combination) it might in fact be far easier to use than a vessel falling within the dimensions specified by DFDS. As the Applicant has pointed out, the use of any such vessel which is easier to use would necessarily be tested and assessed by the relevant navigation authorities through the process of regulatory controls that already exists (as summarised above). However, the imposition of such a requirement from DFDS would have the practical consequence of making it significantly more difficult in practice to introduce the use of such a vessel (even where the navigation authorities had been satisfied of the benefits of doing so) as it would additionally require a change to the Requirement to be made through the Planning Act 2008, regardless of the testing and assessment work that had been underdone. This would have the perverse result of delaying the introduction of a vessel that was actually easier to use simply to allow a change to the Requirement to be sought. This illustrates not just the absurdity of ignoring the point that the regulatory controls are sufficient in themselves to address this issue without a Requirement being imposed, but also the absurdity of the DFDS wording of the Requirement. The DFDS wording does not build in any ability for the responsible navigation authorities to address and adjust the controls directly in light of their own assessment of navigational safety even if the proposed vessel is considered more beneficial to navigation than an existing one falling within such dimensions. This further emphasises how unprincipled this approach from DFDS would be. By contrast, even if it is thought necessary to impose a Requirement, it is clear that the Applicant's proposed wording does not build in such an absurd outcome. It allows the safety of any vessel to be assessed to the satisfaction of the relevant harbour authorities before use, but it does not unnecessarily and arbitrarily seek to fix the dimensions of a vessel which would not necessarily reflect its navigational characteristics.

- (v) Linked to the preceding point, seeking to impose dimensional requirements of this kind and arrogating the functions of the navigational authorities on navigational safety to the Planning Act process of modifying an existing requirement would place not just a burden on the Secretary of State and officials in having to deal with such changes as and when they come to be made, but would put the Secretary of State and officials in the place of the navigational authorities – and they would have to make such safety decisions (with all the consequential liabilities which would flow from that) and in circumstances where the relevant navigation authorities, including specifically the HMH and Dock Master with their knowledge and experience, would be far better placed to make such decisions and indeed already have that function under the statutory scheme. Needless to say, as has already been pointed out, any decision by the statutory navigation authorities to permit any vessel to use the IERRT facility whether under the existing controls, or the type of Requirement suggested by the Applicant (if any Requirement is deemed necessary), is susceptible to challenge by way of judicial review if it were to be exercised unlawfully, including irrationally, but there is no good reason to think it would be.
- (vi) Furthermore, the imposition of a Requirement of this kind makes no sense in the context of the Port of Immingham as a whole or indeed the principles of competition articulated in the NPSfP, other than artificially to constrain the position. It is already clear that the current regulatory controls applicable to the Port operate effectively and rigorously to ensure that any new vessels using any existing facility which fall outside any previously assessed parameters will be subject to such regulatory controls properly exercised. That is exactly the situation that applied to the IOH when DFDS proposed the use of the Jinling class, but without any equivalent condition or restriction existing or being required to ensure that happened. That position continues to apply now. No new vessels can operate at the IOH if they were to be proposed by DFDS or any other operator without such regulatory controls applying (again without the need for this to be identified in any planning permission condition or DCO restriction). Neither DFDS nor any person has suggested that absent such planning conditions or planning restrictions being applicable to the IOH (or indeed any other existing facility at the Port of Immingham) there is any unacceptable risk which is not properly controlled by the existing regulatory controls that exist which justifies the need for an additional Requirement to be imposed for the IERRT facility, let alone in the form of wording now being suggested by DFDS. This appears to be yet another attempt to impose another hurdle on the use of such a facility which can only be explained as a commercial competitive objection, rather than an objection which has any sound or logical basis in law.

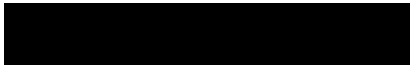
Taking the above into account, the DFDS wording is inappropriate, illogical and unnecessary for any Requirement if one were to be imposed. The wording continues to involve an unjustified and unprincipled attack on the professionalism and integrity of the HMH and the Port of Immingham Dock Master in contending that a requirement in the terms couched in the DFDS Letter is required to gainsay concerns about the independent exercise of his statutory functions (as dealt with more fully by the Applicant in its other submissions).

As to the proposed insertion of additional wording in respect of any requirement in respect of the impact protection measures, the proposed insertion is clearly inappropriate in principle. It purports to require the works themselves to be agreed, whereas the works have already been

identified in the DCO so there is nothing further to be subject to agreement in this respect. It is only the principle of when they would be provided that is in issue in respect of the proposed requirement. Moreover, any requirement to have to agree the works with other parties (so detracting from the principle of the consent that is being sought and granted if a requirement is imposed) would be inappropriate in any event.

The DFDS Letter is without merit and the Applicant invites the Examining Authority and, indeed, the Secretary of State to reject the suggestion.

Yours sincerely

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Brian Greenwood  
Clyde & Co LLP