Immingham Eastern Ro-Ro Terminal

Closing Submissions

Associated Petroleum Terminals (Immingham) Limited and Humber Oil Terminals Trustee Limited

Planning Inspectorate Ref: TR030007

24 January 2024

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1 EXECUTIVE SUMMARY

1.1 ABP has submitted an unprompted closing statement **[AS-083]** to the ExA which was published on 23 January 2024 – within 48 hours of the expected close of examination. The IOT Operators have reviewed this closing statement and are extremely concerned to see that the Applicant is introducing new material to the examination, is criticising the IOT Operators' conduct in proceedings, and has misrepresented their arguments and positions.

1.2 The IOT Operators appreciate that there has been disagreement but do not consider that the wording of ABP's closing submissions is an appropriate way to put forward ABP's discontent with objections to its development proposal.

1.3 Fundamentally though, the bombardment of substantial additional legal authority (which could have been provided in response to the IOT Operators' earlier submissions on EIA and other matters from Deadlines 7 **[REP7-069]** and 8 **[REP8-057]**) requires an opportunity to respond as a matter of fairness. The IOT Operators' therefore respectfully ask that the ExA exercises its discretion to accept these submissions as a response to the Applicant's late submissions (also accepted at its discretion).

1.4 Given the time remaining in examination, there submissions are naturally curtailed in length. The IOT Operators were not aware, until mid-morning on Tuesday 23 January, that any final "closing" submissions were expected from the Applicant.

1.5 The specific submission points which the IOT Operators seek to clarify relate to the assertions made by the that Applicant as to:

(a) **Supposed commercial motivations**: that the IOT Operators are commercially motivated, specifically by trying to seek betterment to their infrastructure through the DCO process;

(b) **Statements of the Stena Master at the December Simulations**: in light of the various inconsistent accounts made to the ExA;

(c) **Independence**: The independence issues featured throughout.

(d) **The Rochdale Envelope approach** to the assessment of the Design Vessel.

(e) **Agent of Change Principle**: ABP consider that there are no unreasonable restrictions arising from a significant adverse effect requiring suitable mitigation.

(f) **The IOT Operators' sNRA**: ABP has mischaracterised the IOT Operator's sNRA in the assertion that it should not hold any weight; and

(g) **The IOT Operators' Position**: ABP has misstated the IOT Operators' position on the DCO.

2 COMMERCIAL MOTIVATIONS

2.1 The IOT Operators have no commercial interests in the development and are concerned with protecting the status quo in which they are able to operate safely and efficiently with a degree of certainty which ABP has not established despite its efforts at this examination. The IOT Operators' concerns are solely with the safe continuity of their current operations and ABP's assertion that the IOT Operators are commercially motivated in their requests for appropriate impact protection measures is further evidence of a failure to approach the significant safety concerns raised with a proper level of seriousness. These unfair and incorrect comments are also ironic given that the DCO application is driven by ABP's own commercial interests which it has not even subject to a cost benefit analysis (see earlier submissions).

2.2 Additional impact protection measures beyond those proposed by ABP are necessary to make the development acceptable from a safety perspective and mitigate against the risk

of allision or contact taking place with the IOT Trunkway and IOT Finger Pier. These measures in no way add a commercial benefit, advantage or betterment to the IOT Operators. If anything, the disruption likely to be caused by works associated with those measures would be a net disbenefit.

2.3 The IOT Operators gain no benefit from the IERRT proposals but have been put to considerable expense and effort as a result of ABP's failure to approach its task responsibly and properly.

2.4 The Applicant also appears keen to characterise the IOT Operators' position as one of escalating demands throughout the examination process. That is manifestly false. The ExA is invited to review the IOT Operators response to the statutory consultation for the project [**REP2-063**], where substantively the same issues and mitigations that are advanced by the IOT Operators today (nearly two years later). ABP seeks to cover its own failures to grapple with the IOT Operators concerns expressed throughout and it is perverse for ABP to allege failures by consultees and objectors who have struggled to get ABP to engage with their genuine concerns and to provide reasonable information on a number of issues either in a timely fashion or in some cases, at all. The elements of this have been rehearsed on several occasions.

2.5 The Applicant advances unfounded and perverse assertions of a commercial motivation. In the absence of credible foundation, those submissions should be rejected.

3 STATEMENTS OF THE STENA MASTER

3.1 Following the ExA's requests for further information dated 12 January 2024 **[PD-028; PD-029 and PD-030]**, multiple submissions were made in relation to the Stena Master's statements at the December Simulations.

3.2 The account of the Stena Master's conduct set out in the IOT Operators' Deadline 8 Submissions **[REP8-057]** aligns with the recollection and contemporaneous notes taken by two separate participants, who were in the room when the conduct occurred, and the IOT Operators simply disagree with the retrospective explanations and descriptions of events put forward by ABP, Stena Line and the HMH.

3.3 The IOT Operators' point remains that the procedural controls relied upon by the Applicant have not been adequately understood, tested, developed or committed to by ABP. The reason the Stena Master's statements were mentioned, was to illustrate the apparent difference in professional mariner judgement between those maritime conditions considered safe by ABP (the Applicant), and Stena's Master (the likely operator of the facility).

4 INDEPENDENCE

4.1 The Applicant characteries criticism of the role proposed for HMH by the Applicant as an arbiter of safe operation of the Proposed Development as improper.

4.2 ABP places significant reliance on the judgement of the HMH in its disregard to the safety concerns raised and the necessity of impact protection. The IOT Operators have raised this issue several times, last summarised in their Deadline 9 submissions **[REP9-028]**. Submissions concerning the impendence of the HMH were first made in ISH5 –[**REP7-070**].

4.3 The points remain that the HMH is making judgments that align with ABP without having undertaken any independent or transparent written assessment being provided to the Examination. In those circumstances, it is entirely proper that the independence of any regulatory safeguard should be considered and tested. This is also a development, placing large ferries in close proximity to an oil terminal, which is unprecedented in the UK and it calls for a more considered approach than the HMH' provided. The consequences of failing to undertake a transparent and robust assessment are potentially catastrophic.

5 ROCHDALE ENVELOPE – THE DESIGN VESSEL

5.1 The claims that in essence ABP's environmental assessment was a proper one and was acceptable as a matter of judgment (relying on ***Blewitt***) is patently flawed. It's flaws are not corrected by reference to ***Gateshead MBC v Sec of State for Environment*** [1994] Env LR 37 or to the roles of other regulatory processes when the robustness and transparency of those processes are not established and their ability to deal with the project which purported to be assessed are unknown. The ***Gateshead*** principle, in its various manifestations, requires confidence that the issues are known and can be appropriately resolved by another regulator which is not the case here.

5.2 Moreover, and more fundamentally, ABP obfuscates the position and fails to answer a number of simple questions which have already been the subject to submissions so will not be repeated in detail:

(a) Regardless of ABP's explanations, or the ***Gateshead*** principle, it cannot escape from the simple fact that it has not assessed the project as described in the application and in the ES itself since it has not undertaken the ***Rochdale*** exercise of assessing the effects (which include impacts on navigational safety) either in terms of its failure to assess the maximum parameters created by the characteristics of the Design Vessel (which is a failure to address the likely effects of the project in terms of navigation risk since the DV was not included in the assessment) or through its failure to apply the very test it set itself in its ES;

(b) The ***Gateshead*** principle is not a reason for not undertaking appropriate and lawful ES of the project put forward for examination. The lack of written or transparent assessment or examination by the other regulators (e.g. the HMH) fortifies this submission. There is a hole in the ES which no one in the ABP team has filled;

(c) Lengthy criticisms of the engagement by the objectors overlooks that fundamental failure which it did not address even when the issue was set out in plain terms. It is not in any event the duty of objectors or other third parties to carry out ABPs assessment.

(d) The NRA exercises carried out by the IOT Operators and others were not part of the ES and given the lack of important data/information (for which complaint was made by IOT Operators and others on many occasions) ABP cannot fairly complain that those NRA documents were provided when they were. Indeed, it was a substantial and costly exercise for objectors to undertake the work and, given that ABP had to revise its own NRA, it is not surprising that they were not provided other than they were. In any event, complain or not, it does not get ABP over the fundamental failure to assess the project as required by ***Rochdale***.

(e) The fact that ABP did consider it necessary to include the NRA as part of its ES shows that it was considered to be relevant and remains obviously relevant to the grant of consent.

(f) It is not the job of the objectors to undertake the assessment work for ABP though their own representations may form part of the EIA process. In any event, the pointing out of the failure by ABP did not result in an ES Addendum or further assessment comparable with what was in the NRA for smaller vessels and the fact remains that the maximum parameters of the project have not been assessed and it is not lawful to grant consent.

6 AGENT OF CHANGE

6.1 ABP provide a detailed response to concerns regarding the agent of change principle, raising the new argument that the agent of change principle has been misapplied by the objectors. This is submitted with a substantial legal submission that has not been put before the ExA or the objectors previously.

6.2 ABP assert that it must be assumed that the existing separate processes for controlling navigational safety will operate effectively, and that there is no reason at all to displace that assumption. ABP rely on several case law authorities in bringing this argument, but none adequately support the Applicant's position that the development of a nationally significant infrastructure project affects these existing safety controls.

6.3 Without sufficient time to appropriately address the new legal submissions from ABP, the IOT Operators note various immediate concerns with the cases presented.

6.4 In ***Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government*** [2012] Env LR 34, paragraphs 30,34 and 38 are cited as being relevant as they concern emissions regulated by the Environment Agency and the absence of a need for an Appropriate Assessment under the HRA.

6.5 However, at paragraph 34 of the decision the Court of Appeal accepts that, while control of such emissions in this case was a matter for the Environment Agency, the overall planning judgement was one for the Secretary of State, and he was entitled to be guided on this issue by the agreed position of the two specialist agencies. It is this position that was considered to be consistent with the approach in ***Gateshead***. Indeed, this particular case focuses on the use of an unchallenged rule by the regulator and it is noted at [39] that "the Secretary of State could not simply rely on the Agency's guidance without further investigation".

6.6 In ***An Taisce (The National Trust for Ireland) v Secretary of State for Energy and Climate Change*** [2013] EWHC 4161 (Admin), paragraph 193 is cited in full after ABP notes that the case concerns the grant of a DCO for Hinkley Point C where various regulatory permits, licences and consents would be required outside the planning regime before the power station could be constructed, commissioned or operated.

6.7 Paragraph 46 of the Court of Appeal judgment is then cited as confirming the High Court's approach, and going further to consider that reliance upon current gaps in knowledge being filled by the fact of the existence of the regulator who will make future assessments on elements of the project still subject to design changes is equivalent to reliance upon a regulator applying controls that have been identified in the light of assessments which it has already undertaken on the basis of a scheme which has already been designed.

6.8 However, this judgment specifically includes the proviso that the planning authority must be satisfied that the outstanding design issues – which may include detailed design changes – can and will be addressed by the regulatory process.

6.9 The Court of Appeal here also states that the planning authority must make an informed judgment, on the basis of the information available to it and having regard to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant environmental effects. Whilst this position does allow for gaps in current knowledge it does not allow for serious shortcomings and failures of the regulator.

6.10 In ***R (Frack Free Balcombe Residents Association v West Sussex County Council)*** [2014] EWHC 4108 (Admin), ABP refer to a statement that the prospect of future control by a statutory body is just as capable of being material as what has happened already. This aligns with the previous cases including with the context that each question raised by objectors was dealt with in the officer's report with great thoroughness.

6.11 These authorities all share the requirement that the existing safety controls are well established and unchallenged and none account for where there is an extremely significant development being proposed which has not been properly assessed under the existing regime. This is exactly the issue that has been raised by the objectors. In particular, the HMH cannot address these "gaps" as he has already formed the conclusion that no additional risk mitigation controls were necessary- without having undertaken an independent risk assessment.

6.12 The presumption in Morge depended on the discharge by Natural England of its own duty under the Habitats Regulations. The position of the (undoubtedly independent) national statutory adviser on conservation matters (which the Courts have repeatedly said should attract great weight – see e.g. Lindblom J in ***R (Prideaux) v Buckinghamshire CC*** [2013] Env LR 32 at [116]) charged with licensing duties is not analogous to the position here.

6.13 The IOT Operators must restate that the agent change principle places the burden on the applicant to justify the impact which it has or may have on the IOT Operators and on energy security. Given the importance of the IOT and Refineries (see further below) the precautionary principle should be engaged with regard to assessing the level of risk caused and should be proportionate to the potentially major consequences of allision or collision on the operation of the IOT and the Refineries.

7 THE IOT OPERATORS' SHADOW NRA

7.1 ABP have misunderstood the purpose of the IOT Operators' shadow Navigation Risk Assessment (**"sNRA"**) submitted as part of the Deadline 2 Submissions **[REP2-064]**. ABP seems to take issue with whether the sNRA is a legitimate NRA and concludes that it cannot be due to a lack of input from ABP (as the duty holder).

7.2 In reality, due to a lack of acknowledgement from ABP of APT's concerns prior to submission of its application, the IOT Operators commissioned the shadow NRA as an independent assessment (which included a transparent and quantitative Cost Benefit Assessment), and a review of ABP's NRA. This independent review of ABP's NRA intentionally did not seek input from ABP until it had reached its own conclusions, but the assessment of qualitative risk did utilise baseline risk scoring judgements agreed in IERRT hazard workshops for its qualitative assessment of risk.

7.3 The sNRA was then shared with ABP and resulted in ABP's change request which was formally submitted on 29 November 2023 [**AS-045**] without any comments as to the legitimacy of the assessment. See further, comments above.

8 THE IOT OPERATORS' POSITION

8.1 ABP have misstated the IOT Operators' position on the application as being that the DCO should be refused on the basis of concerns about navigational safety.

8.2 As summarised in the IOT Operators' Deadline 9 submissions **[REP9-028]**, their position is that the mitigation measures they have consistently identified as being necessary for the safe operation of the IERRT must be secured in the DCO and properly assess the likely significant effects.

8.3 Failing that (i.e. without such adequate mitigation), the adverse impact of the proposed development would outweigh its benefits, and accordingly require refusal of the development consent.

8.4 The IOT Operators only seek the appropriate controls, requirements and protective provisions that would adequately mitigate the risk of a potentially catastrophic allision between vessels associated with the IERRT and the IOT.