From: [redacted]
To: Immingham Eastern Ro-Ro Terminal
Cc: Robbins, Lily
Subject: Immingham Eastern RoRo Terminal - TR03007
Date: 25 January 2024 22:11:12
Attachments: [redacted]

Dear Lily,

I attach a letter addressed to Mr Gould, on behalf of the Applicant, providing its final Further Submissions in relation to the Immingham Eastern RoRo Terminal development.

Best regards,

Brian

Brian Greenwood
Partner | Clyde & Co LLP
Direct Dial: [redacted] | **Mobile:** [redacted]

The St Botolph Building | 138 Houndsditch | London EC3A 7AR | UK
Main +44 207 876 5000 | **Fax** +44 207 876 5111 | [redacted]

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London
EC3A 7AR
United Kingdom
Telephone: +44 20 7876 5000
Facsimile: +44 20 7876 5111
DX: 160030 Lime Street 5
[redacted]
[redacted]
Dir Line: [redacted]

By Email

Mr Grahame Gould
Lead Member of the Panel of Examining Inspectors
The Planning Inspectorate
National Infrastructure Planning
Temple Quay House
2 The Square
Temple Quay
Bristol
BS1 6PN

Our Ref	Your Ref	Date
BG/10276966	TR030007	25 January 2024

Dear Mr Gould,

Planning Act 2008

Application by Associated British ports for an Order Granting Development Consent for the Immingham Eastern Ro-Ro Terminal

The Applicant's Response to Interested Parties' Representations Submitted on 25 January 2024

I write on behalf of the Applicant, Associated British Ports, in relation to the above proposal.

1. I should at the outset apologise for what is an extremely late submission, made as it is on the last day of the Examination. The Applicant notes, however, that some of the Interested Parties, notably CLdN and IOT Operators, have taken the Examining Authority's ("ExA's") Rule 17 Letters dated 22 January 2024 and addressed to the Applicant and CLdN as an opportunity to submit new material into the Examination.

2. The ExA will appreciate that the Applicant has, therefore, had very limited time to consider them and is prejudiced in consequence. This is a reply that is submitted in the time available, but without the benefit of sufficient time for further reflection.

3. In the light of those submissions, however, which were presumably made yesterday on 24 January and published this afternoon, the 25 January, the Applicant considers that it would be placing itself in an invidious position if it did not respond to a number of the submission that have been made which it to considers to be either unsubstantiated or misleading. Although in some cases the points that are being made are simply incorrect and suggest in some cases to a failure to have actually read the submissions made by the Applicant throughout the examination process. This will at least aid brevity in that a number of the issues raised can be dealt with shortly by refence to evidence already before the ExA.

In view of the Applicant's concerns, summarised above, I respectfully request on behalf of the Applicant, that the ExA exercises its discretion to accept these further submissions as a response to the additional submissions now made by CLdN and the IOT Operators.

1 CLdN's Response to the ExA's Rule 17 Letter dated 22 January addressed to CLdN

CLdN and Stena

1.1 The Applicant believes that ideally, Stena Line would have been best placed to comment on the new information that has today been provided by CLdN although unfortunately, this has not been possible by reason of lack of time and availability. The Applicant has, however, had the opportunity to speak briefly with the representatives of Stena so to understand the position.

1.2 The first point to be made is that not only do Stena consider the overview of the relationship provided by CLdN to be a gross misrepresentation – but the comments made by CLdN have in any case already been rebutted in Stena's previous submissions at **[RR-021, REP2-065, REP9-029].**

1.3 The clear indication given by CLdN is that a key part of the reason for the termination of the Europoort contract was '*Stena's refusal to accept and abide by the specified ground slot arrangements* ….' (paragraph 2 of page 3 of the submission). Irrespective of whether such behaviour is unreasonable (as CLdN claim) the analysis provided by CLdN confirms a key element of the need which has been identified and explained by the Applicant – namely that CLdN cannot provide for Stena's needs at the Port of Killingholme.

1.4 In the brief discussion that it has been possible to have with Stena this afternoon, they have asked us to emphasise that they are extremely disappointed to read how CLdN have sought to mischaracterise Stena Line's behaviour during the discussions reported and strongly refute such claims. By way of example, Stena have explained to the Applicant that at no point during the discussions were they looking for '*guaranteed unlimited space and dwell times*' as CLdN now, for the first time, suggest (paragraph 6 on page 2 of the CLdN submission).

1.5 Stena have also asked the Applicant to confirm that in their view – leaving aside the mischaracterisation point – the CLdN response demonstrates that CLdN cannot provide for Stena Line's needs at the Port of Killingholme.

1.6 The final sentence of this part of the submission from CLdN, namely that *'the commercial decisions and preferences of one operator do not equate to a need case under the National Policy Statement for Ports*' has not only been responded to previously by the Applicant but represents an ongoing fundamental misunderstanding of this matter by CLdN. The ExA's attention is drawn specifically to **[RE7-023]**

1.7 As explained in the Applicant's closing submissions, Stena Line – in accordance with the fundamental policy contained within the NPSfP at paragraph 3.3.1 – has made a judgement on the basis of commercial factors operating within a free market environment that it needs the IERRT facility as now being sought by means of this application – and that it is unable to operate, for the reasons rehearsed on numerous occasions during the course of the Examination, at the Port of Killingholme.

Capacity and Expansion at Killingholme

1.8 Within this section of the CLdN response, the ExA is again being asked to accept at face value a number of unsubstantiated points, including:–

(a) The claimed 2023 capacity at Killingholme,

(b) The ability to expand that capacity to 807,931 units by 2025 (without the need for an additional consents – see the fourth paragraph on page 7 of the CLdN response); and

(c) The ability to '*incrementally increase*' the capacity at Killingholme to 1,373,120 units by 2050 involving only minor modifications which only '*may*' require additional consents.

1.9 The ExA will note that no substantive evidential detail has been provided – and, indeed, has not been provided during the course of the Examination – in support of these claims by CLdN. This despite requests for such information from the Applicant.

1.10 In effect, CLdN are now claiming (having regard to the Table on page 9 of its submission) that Killingholme can, through only (albeit undetailed) '*minor modifications*' for which additional consents '*may be required*' (see page 10 paragraph 2), handle 1,373,120 unaccompanied Ro-Ro units – an additional 1 million unaccompanied units more than it actually handled in 2023 (see page 6 of the submission).

1.11 This is simply <u>not</u> a feasible nor credible scenario having regard to the correct application of planning law, as has been set out in detail by the Applicant in its submissions (see for example: **[APP-019], [REP4-009]** and Appendix 1 o**f [REPA5-032]**. All of the other implications of such an expansion which the Applicant has raised in evidence are again not considered in the CLdN submission.

1.12 The Applicant would also point out that CLdN's submissions – consistent with the limited approach it has taken throughout the examination – looks at landside capacity only and does not explain the implications of other factors that will impact upon the overall capacity of the facility.

1.13 For example, CLdN do not appear to have considered the fact that if three Stena related services were to operate from three berths at Killingholme (irrespective of whether the berths could be extended as claimed) then this would significantly limit CLdN's own shipping lines ability to expand its services due to a lack of available berths.

Transport

1.14 The Applicant notes that CLdN, in an attempt avoid a direct response to the transport question, have stated that it - *"would anticipate that accommodating IERRT at Killingholme would likely lead to highways impacts of a broadly similar magnitude to those identified in the Applicant's Transport Assessment Addendum [REP7-013, Annex J]. It is acknowledged that CLdN has not undertaken any such highways assessments relating to this (which would involve modelling of the specific scenarios requested). In the event that any such highways impacts should arise, they would be assessed, monitored and mitigated appropriately (including discussions with the relevant highway authority).*"

1.15 This raises a number of points, but for the sake of brevity, dealing with just, the Applicant would comments as follows.

1.16 First, the highway impact points have already been discussed in the Applicant's own submission to the ExA's CLdN Rule 17 letter **[AS-086].** Having regard to that submission, the position now being expressed by CLdN in terms of the magnitude of highway impacts is clearly wrong, unevidenced and not credible given that all of the traffic from Killingholme would need to use the A160 corridor, not just a lower proportion that was considered in the Applicant's Transport Assessment Addendum.

1.17 Second, CLdN accept (as the Applicant considers they have to) that mitigation would be required. This concession given in this part of the CLdN submission supports the position clearly made by the Applicant (as set out in **REP5-032**) that formal consents would be required for the increase in capacity at Killingholme and the significance of considering highway impacts in this regard.

1.18 This is in contrast to the Applicant's sensitivity assessments which envisage up to 15% **[AS-008]** of traffic generated by the IERRT using Immingham Dock's West Gate and, subsequently, the A160. Despite considering 15% to be a robust assessment the Applicant has also, at the request of CLdN and DFDS, undertaken sensitivity tests of 60% of traffic using the A160, although it does not consider this to be a realistic (or indeed credible) scenario **[REP7-013]**. Either way, traffic impacts of expansion at the Port of Killingholme would lead to far greater impact on the A180 than the IERRT development.

1.19 Meanwhile, CLdN in accepting that the expansion of Killingholme would necessitate highways mitigation measures have failed, however, to detail how it is that these mitigations would be secured.

1.20 Whilst CLdN have accepted that *"additional consents <u>may be</u> required"* (*<u>emphasis added</u>*) that statement actually suggests that their case continues to be that no consents are in fact required. If that were the case, there would be no mechanism for securing the necessary highways mitigations.

1.21 As a result, expansion at Killingholme would result in significant and unmitigated highways impacts; clearly an unacceptable outcome.

Need for Additional Consents

1.22 The Applicant notes that no substantive evidential detail has been provided by CLdN regarding the need for additional consents. Indeed, the information that has been provided, albeit extremely limited, does appear actually to "downplay" the consent position – despite the Applicant's numerous attempts to .

1.23 The Applicant notes that (within the first sentence on page 10 of the submission) - "*CLdN is already considering applications for consents to enable the extensions to berths at Killingholme*". Having regard to the position which CLdN has taken on need related matters within the IERRT Examination, the Applicant waits with interest to see how CLdN will seek to explain to the relevant decision-maker why those extensions are needed in circumstances where they have indicated to the IERRT Examination that DFDS has realisable spare Ro-Ro capacity within the Port of Immingham.

1.24 In addition, the Applicant has read with some surprise the reference also in the first paragraph on page 10 that the purpose of such berth extensions would be, amongst other things, '*is to pre-empt market demand and to enhance resilience*'. Having regard to the submissions CLdN has made on the subject of need and resilience used against the IERRT, this statement is simply a contradiction of their own case.

2 IOT Operators' Closing Submissions dated 24 January 2024

Introductory comments

2.1 As noted above, these closing submissions have only been provided to the Applicant on the afternoon of 25 January 2024, very shortly before the Examination is due to close. The Applicant has therefore had very limited time to consider them and is prejudiced in consequence. This is a reply that is submitted in the time available, but without the benefit of sufficient time for further reflection.

2.2 For the reasons outlined below, the Applicant considers that the IOT Operators do not substantiate their residual objection to the Proposed Development. The Applicant is very concerned that the IOT Operators' Closing Submissions principally involves making various assertions which are not reflective of the evidence or legal principle. It is not possible in the time available to identify each and every such assertion (examples are illustrated below). The Applicant necessarily relies on its much fuller representations and evidence to the Examination to date for refutation of such assertions.

2.3 By way of introduction, the IOT Operators refer to ABP as having submitted an "unprompted" closing statement. They seek to justify the timing of their Closing Submissions by reference to this; and they then criticise the Applicant for what is alleged to be "bombardment" of legal authority, with an apparent suggestion that the Applicant could have provided such authority or its Closing Submissions earlier. These criticisms are unjustified.

2.4 As the Examining Authority will be aware (although the IOT Operators make no mention of this) the IOT Operators submitted further material at Deadline 9 relating to navigation issues. Both DFDS and CLdN also submitted "umprompted" Closing Submissions at Deadline 9. In consequence of the further material submitted by the IOT Operators, the Examining Authority issued a further Rule 17 request which the Applicant has addressed. The Applicant was clearly not in a position to submit Closing Submissions whilst these processes have been continuing and before receipt of those from DFDS and CLdN. The IOT Operators chose not to submit any at that time.

2.5 It is therefore very strange and unfair that the IOT Operators are now criticising the Applicant for submitted Closing Submissions, or the timing of them. That is particularly where it is well-established as a matter of fair procedure that an applicant in this sort of situation is entitled to have the opportunity for final comment, which the timing of the IOT Operators' Closing Statement frustrates.

2.6 IOT Operators also appear to be criticising the Applicant for referring to legal authorities which reinforce the well-established *Gateshead* principle in the NPPF. Again, these criticisms are not justified either. In fact, the Applicant has consistently referred to and relied upon this principle articulated in the NPPF (reflective of the *Gateshead* principle). Indeed, it referred to this at the first ISH dealing with navigation matters. The Applicant has continued to make submissions throughout the examination as to the application of that principle in the context of navigation and navigational safety and the regulatory controls.

2.7 The legal authorities which confirm the principle must be well-known to the legal team of the IOT Operators, as well as other objectors. It has only been necessary to refer to those authorities in addition to the principle itself in light of the continuing unprincipled attack that has been made by the IOT Operators, DFDS and CLdN in their Closing Submissions, about the navigational regulatory controls exercised by the navigation

authorities, including the HHM and Dock Master. This sort of point featured heavily again in the DFDS Closing Submissions, to which the Applicant was responding, but there has been a complete failure by the objectors to deal with the principle or any of the underlying legal authority that reinforces it.

2.8 To the contrary, neither the IOT Operators, nor DFDS nor CLdN have identified any legal authority to contradict its application here. The IOT Operators attempt to do so in their Closing Submissions does not withstand scrutiny (as addressed below). Identification of legal authorities in response to the DFDS and CLdN closing submissions, including the latest request for a restriction on vessels to use the IERRT facility (which further ignores the *Gateshead* principle) cannot properly be criticised, nor can it fairly be described as "bombardment"

2.9 Paragraph 1.2 of the IOT Operators' Closing Submissions refer to the fact that there has been disagreement, but they suggest that they do not consider the wording of the Applicant's closing submissions to be an appropriate way to put forward its response to those objections. It is not clear that wording is in fact being criticised. The Applicant's Closing Submissions respond to all three of the objectors' cases. It is considered that they do so in an appropriate way.

2.10 Paragraph 1.3 of the IOT Operators' Closing summarise specific submissions points they make. For ease of reference only, these submissions will respond using those headings.

Commercial Motivation

2.11 The Applicant acknowledges that the IOT Operators are concerned with the safe continuity of their current operations (as noted at para 2.1 of the IOT Operators' Closing Submissions). It is disappointing that the IOT Operators have failed refused to recognise that this has also been the Applicant's primary focus throughout the examination.

2.12 As set out in the Applicant's Closing Submissions [**AS-083**], the Applicant has acknowledged that the IOT Operators' operations do not involve direct competition with the Ro-Ro trade and those Closing Submissions make clear that ABP has no interest in inhibiting the IOT's operations. Indeed, any detriment to the continuity of operations would also be felt by ABP as the owner and operator for the Port of Immingham. It would be strongly against ABP's interests and indeed statutory responsibilities as Duty Holder for the SHA and under the PMSC to introduce any risk that would compromise its strong track record of safe and efficient management of navigation.

2.13 The Applicant strongly disagrees that it has failed to approach its task responsibly and properly. There is no substance behind this accusation from the IOT Operators and the Applicant has made numerous attempts to engage with the IOT Operators to reach a mutually acceptable position – despite this being without prejudice to the Applicant's principal position.

2.14 Examples of this include the Applicant's agreement to conduct numerous additional simulations in conditions and circumstances that are considered to be so remote as to be implausible, whilst at all times acknowledging and incorporating the conditions requested by the IOT Operators into the run plans. The Applicant has attempted to engage with the IOT Operators on engineering designs for impact protection measures, hosting a series of design workshops and producing technical reports to respond to the queries raised by the IOT Operators. The Applicant has also committed to providing enhanced operational controls that go above and beyond those measures that would reasonably be required to ensure any risks to the IOT Infrastructure are tolerable and

ALARP - as identified by the Applicant's NRA (which in turn was fully informed by the contributions from highly experienced marine personnel representing a diverse range of stakeholders).

2.15 As summarised in the Applicant's Closing Submissions, both from the outset, and throughout this process, the Applicant has been assiduous in assessing and ensuring that the IERRT facility can be operated safely. It has conducted detailed assessments of exactly that. Moreover, where matters of concern have been raised by others (such as the IOT operators), it has investigated those concerns in detail (as set out in more detail in the Applicant's Closing Submissions). There is an obvious difference between the Applicant concluding that the further concerns are not justified (on analysis) and the unjustified allegation that the Applicant has disregarded such concerns.

2.16 The IOT Operators do not address this, beyond making unfair and irresponsible claims that ABP has placed reliance on the judgment of the HMH "*in its disregard to the safety concerns raised.*" This sort of baseless assertion appears throughout the Closing Submissions. Even if the IOT Operators do not agree with ABP or, the Harbour Master Humber, it is unhelpful and misleading to suggest that there has been any disregard of safety concerns. That is patently not the case. ABP and separately the HMH (who has been separately represented throughout) have considered in detail all safety concerns raised. They have satisfied themselves, through many rigorous processes, that the operations can take place safely with the identified controls in place. It is very disappointing to read the IOT Operators continuing to misrepresent not just the actions of ABP, but also those of the HMH in this way.

2.17 As to the interests of the IOT Operators in the safety of continued operations, the Applicant has also pointed out in detail that its own interests are fully aligned with those interests. Indeed, ABP has an even greater interest in ensuring such safe operations can take place given the impact on the Port of Immingham and the River Humber if that were not the case.

2.18 Having set this point in detail, the IOT Operators offer no response to it. Instead, the only comment made is in paragraph 2.1 is a reference to ABP's "commercial interests". But as already pointed out, ABP's commercial interests are necessarily ones that require safe operations. It would be directly contrary to ABP's commercial interests for safety to be compromised. The IOT Operators offer no refutation of that point.

2.19 The Applicant has fully addressed any issue of safety and continued operations in the assessments they have done (even if the IOT Operators may not agree). In addition, has also gone beyond this in proposing Enhanced Operational Controls (dealt with in detail elsewhere). These render any continued request for the sort of impact protection measures and restrictions even more unjustified.

2.20 The Applicant notes that the IOT Operators do not provide any substantive response to what the Applicant has demonstrated in relation to the Enhanced Operational Controls or the Closing Submissions about them. They add a further level of extra safety beyond what is required which goes beyond that applicable to any existing vessel operations in the vicinity of the IOT Terminal. They are also supported by detailed simulations.

2.21 By contrast to the legitimate interests in safety of continued operations (something not only shared, but fully addressed by the Applicant), the Applicant has correctly pointed out that the IOT Operators do have a commercial interest in securing enhancements, or betterment, to their existing facility in consequence of the Proposed Development. That is obviously the case.

2.22 The Applicant has experienced this in its dealings with the IOT Operators, when seeking to arrive at some sort of pragmatic design response to allay their concerns. Even though the Applicant has already identified that there was no safety requirement to do more than it was proposing, it explored potential changes to address the IOT Operator's concerns over the finger pier. It has been explained in detail by Mr Hodgkin, who was directly involved in those discussions, that having arrived at what appeared to be an agreed illustrative design for an amended finger pier, in the subsequent discussions the IOT Operators advanced a series of requirements that made any such change disproportionate, unnecessary and unfeasible. Moreover, those requirements would have resulted in significantly enhanced and new facilities at the finger pier for IOT operations that are simply not required to address the operations of the IERRT facility. The suggestion that the IOT Operators demands escalated in that process is not "manifestly false" (as now claimed). It is specifically evidenced in the correspondence and evidence provided by Mr Hodgkin who participated in those discussions.

2.23 It is likewise very disappointing to read yet again mischaracterisation of the Applicant's attempts to explore such a without prejudice solution. Paragraph 2.4 the IOT Operators submissions assert that it was a result of ABP's "*own failures to grapple with the IOT Operators concerns*". This remains an assertion without any merit. The Applicant has engaged with the IOT Operators throughout the NRA process, and then through the Examination. There has been no "*failure to grapple*" with concerns expressed, but the opposite – it has dealt with them directly. In responding, the Applicant has explained where it and its experts disagree with those concerns and why. The HMH agrees. Despite this, the Applicant went further in its without prejudice discussions to see if a pragmatic solution could be found. It is very disappointing to find these efforts mischaracterised in such an aggressive and unjustified way.

2.24 The IOT Operators now contend (para 2.2-2.3) that the sort of measures that they have been requesting in terms of alterations to the finger pier or impact protection measures "*in no way add a commercial benefit, advantage or betterment to the IOT Operators*". That is simply not correct. Moving the finger pier and so rebuilding it with new facilities or rearranging it in the way the IOT Operators have demanded would be a significant betterment of the existing facility. Similarly installing impact protection measures along the trunkway to provide protection against all vessels, including IOT's own vessels, but where there is no risk from IERRT vessels which is considered to require this, would similarly be a betterment of the IOT's facilities. The IOT refer to "disruption" from such works resulting in a net disbenefit, but that is clearly not the case given the terms of the Protective Provisions which they have sought.

2.25 Regardless of all of this, and however the IOT Operators choose to characterise or mischaraterise the position, the fundamental point is that the Applicant and its experts and the HMH, have rigorously tested and ensured that the safety and continuation of the IOT operations will not be compromised by the IERRT development with its controls. Nor would be there be any reason or interest in the Applicant or the HMH in allowing anything different.

2.26 The Applicant has also extensively reviewed the further information presented by the IOT Operators' sNRA and communicated this to the HAS Board to allow it to reconsider the position reached with regard to tolerability. The Applicant has disclosed all relevant minutes and meeting documentation to ensure full transparency.

2.27 For the reasons stated above, it is simply wrong to suggest that the Applicant has not engaged with the concerns and failed to provide reasonable information.

2.28 The Applicant is, therefore, extremely disappointed by the tone of the IOT Operators' comments and particularly their dismissal of the Applicant's position on this matter of impact protection measures and their claims that the Applicant is advancing '*unfounded and perverse assertions of a commercial motivation'* and in '*the absence of credible foundation, those submissions should be rejected'*.

2.29 The Applicant has summarised its case clearly in its Closing Statement [AS-083] as to why it considers IOT Operators' objection to the Proposed Development to be unjustified and commercially interested, pursuing an objection which would amount to betterment of their facilities in that, the Applicant's NRA **[APP-089]** demonstrates that impact protection measures are not required and as such, the provision of any impact protection measures in circumstances where they are not considered necessary for the Proposed Development, will result in betterment (as set out in the **[REP6-028]**).

Statement of the Stena Master

2.30 The Applicant does not understand the characterisation by the IOT Operators that - '*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)'.* The Applicant does not consider this to be indicative of any difference in judgement and, in fact, this substantiates the position recorded in the Applicant's NRA that embedded and applied controls are entirely appropriate and routine to ensure any risk to the IOT infrastructure is tolerable and ALARP. The applicant's position is set out in [**REP10-020**].

2.31 The Applicant is confused by the IOT Operator's submissions, as on the one hand, the IOT Operators' have been insistent on the need to simulate the most extreme conditions and on the other hand, now criticise a Stena Master for becoming frustrated when in reality, the manoeuvre being tested would have been delayed for a small amount of time (with no consequential impacts on the IOT Operations) to allow for those most extreme conditions to pass. It is hardly credible to criticise an experienced Master of a vessel who decides to put into action safe navigational procedures. One has to question the logic of the IOT Operators' assertions.

2.32 The IOT Operators say that the account "*aligns with the recollection and contemporaneous notes taken by two separate participants, who were in the room"*. Those individuals are not identified. The notes are not provided. By contrast, Stena has responded specifically as has HR Wallingford. Given that the IOT Operators' own NRA shows that there is little benefit associated with the cost of installing impact protection for low-speed allisions [**REP2-064**], any action which would reduce the vessel speed or bring it to a stop would weaken the IOT Operator's case that impact protection is required.

2.33 It is also entirely unreasonable for the IOT Operators to state (para 3.3) that the procedural controls are not adequately understood. The Applicant has been clear on its proposals for enhanced operational controls as evidenced in numerous submissions including [**AS-070** – Section 3.3], [**REP7- 025**], [**REP7-030**], [**REP8- 029**], **[REP8-031]**, [**REP9-011**]. This is all meaningless assertion of the type identified above. All of those things have been done and simply asserting that they have not goes nowhere.

2.34 As a general point, the IOT Operators work within their own procedural controls for their own berths today, which are recorded in its own 2019 APT (Immingham) Terminal Information and Jetty Regulations Manual. Furthermore, the Pilotage Handbook [**AS-085 –** Appendix 4]. Incidentally, the CLdN Marine Procedures Manual for Killingholme

[**AS-086** – Appendix 1], have similar provisions prescribing limiting conditions for berthing.

2.35 This approach is an evidently well-tested means of managing a safe harbour which is adopted at numerous Humber terminals. The Applicant has also published a proposed update that the Immingham Dock Master would incorporate into the Immingham Marine Operations Manual which would enforce the implementation of such measures **[REP10-021**]. The Applicant has tested these extensively, as explained in its response to the IOT Operators at [**REP9-011]** and, as the owner and operator of the Port, has every confidence in them.

Independence

2.36 Paragraphs 4.1-4.3 appears to return to the illogical and unsusbstantiated assertion that the HMH lacks independence. In fact, it is no longer clear what is being alleged. Whatever it is, the IOT Operators have singularly failed to respond to the detail of the Closing Submissions that point out that neither ABP (whether as port owner or harbour authority), nor HMH as a statutory harbour master responsible for safe navigation on the River Humber, nor the Dock Master have any reason to do anything other than continue to ensure the safe operations of those areas within their jurisdiction, as they have done for many years. No answer at all is provided to this basic point

2.37 The Applicant – and the Harbour Master Humber (HMH) – have made numerous representations in respect of the independence and judgment of the HMH. To state that the HMH "*is making judgments that align with ABP without having undertaken any independent or transparent written assessment being provided to the Examination"* is simply incorrect and without foundation.

2.38 The HMH has been independently represented throughout the Examination and has made several written representations to the Examination – the Applicant does not propose to repeat each reference here as it is plain to see from the Examination Library – as well as participating orally at issue specific hearings.

2.39 In summary, however, the IOT Operators have not raised any matters which have not already been raised and addressed in the evidence given over the course of the Examination, save in respect of their comments at paragraph 6.11 in response to which the Applicant would comment that the HMH has put his case on his experience, statutory responsibilities, independence and how he would risk assess the use of the IERRT by specific vessel classes ahead of operation.

2.40 At paragraph 4.3 the IOT Operators' criticism of the HMH now appears to be one of him not undertaking "*any independent or transparent written assessment*" which has been provided to the Examination. So far as the Applicant is aware this is the first time that the criticism has been articulated in this way. But whether or not it is the first time does not affect that there is no merit in it as a criticism.

2.41 To the contrary, the HMH has been involved from the outset in the NRA process, participating in the Hazid workshops and then in the simulation process, in providing his own independent judgments about identification of hazards, identification of risks and judgments about what measures and applied controls are required or not required to address those risks. The HMH has provided his judgments in writing in the many written representations to the Examination, but also provided direct oral evidence to the Examination, explaining his judgments, as well as the comprehensive experience, knowledge and expertise in managing safety on the River Humber for many years, and the support and experience he has of pilots and tug operators. It is difficult to

understand what more the IOT Operators are now suggesting is required. There is certainly nothing further that could rationally be required.

2.42 Finally, as to the proximity of operation of ferries to an oil terminal, that has been separately addressed and both the Applicant and its experts and HMH himself have expressly reminded the IOT Operators that all of their assessments recognise that. It has also been pointed out (but again ignored) that large ferries already operate in this proximity, and in conjunction with other facilities (such as the Western Jetty). The detail of those points is not repeated again here

Rochdale Envelope – The Design Vessel

2.43 Section 5 of the IOT Operators' Closing Submissions are confused and confusing in conflating various concepts and then referring to legal authority cited by the Applicant on the *Gateshead* principle, but in a way which simply endorses the points the Applicant is making. The Applicant refers back to its previous representations which deal with all of the issues previously raised and simply adds the following.

2.44 The suggestion that the environmental assessment is "patently flawed" is absurd. This suggestion is based on repeated conflation of different concepts, namely an ES, the consultation on it, and the resulting environmental information which is to be taken into account by the Secretary of State (see Regulation 5 of the EIA Regulations and the principles in *Blewett* (cf not *Blewitt* as in para 5.1 of the IOT Operators' submissions). Section 5 then repeatedly asserts that the Applicant has not undertaken assessment work in relation to navigation, but that is obviously not correct. This is just an assertion that because the IOT Operators do not agree with the assessment, it is not an assessment at all. This is a completely illogical claim.

2.45 The Applicant's ES includes an NRA which examines the capability in principle of operations of the IERRT facility for Ro-Ro vessels with the applied controls. As part of that process, the facility has been designed physically to accommodate a vessel of the Design Vessel size in a way which fully satisfies any concern over the *Rochdale* envelope given the nature of the DCO. The maximum dimensions of the Design Vessel form the basis for considering and assessing what works are required, such as the amount of dredging, the length of the length of pier, width of berths, space between them and other infrastructure etc. The DCO fixes that form of development.

2.46 In addition, various simulations have been undertaken to demonstrate that different types of vessel that currently exist close to the Design Vessel parameters can operate at the berths, namely the Stena Transit, the Jinling generally, and the G9 for the Enhanced Operational Control simulations for Berth 1. There is no way simulating a notional Design Vessel beyond that for all the reasons identified by HR Wallingford.

2.47 By contrast, the IOT Operators have mistaken the different point that can arise in respect of a *Rochdale* envelope that does not arise here. That different point as to the use of a *Rochdale* envelope relates to specific concern about outline planning permission and their scope. In the *Rochdale* case permission was originally granted for an outline form of development (an industrial park), and where an illustrative masterplan had been assessed through EIA, but there were no limits on the outline planning permission to require that the development would come forward in accordance with the masterplan. This was addressed in the second *Rochdale* case by imposing a planning condition requiring that development to be substantially in accordance with the masterplan. The concern arose because of the absence of control that would otherwise exist from an outline permission without such a condition.

2.48 None of that has any relevance in this context. Not only is this not an outline planning permission (rather a detailed DCO), but the development consent will be for the development with the parameters identified. There is no consent being granted which would enable development to come forward outside the scope of what has been assessed without any additional control. As to navigation and the use of IERRT facility, it is obviously wrong to suggest that there are no such additional controls. They clearly do exist and no one has disputed that. The *Rochdale* envelope issue therefore simply cannot and does not arise. No vessel can operate at IERRT without being subject to such navigational control and so there is no way in which activity could take place which would have a significant effect without being subject to that further regulatory control. Accordingly, the IOT Operators contentions are wrong in law.

2.49 The IOT Operators then confuse those contentions with points about the *Gateshead* principle. The *Gateshead* principle arises where there are other controls (as everyone accepts there are). By contrast, the *Rochdale* envelope issue can only arises where are not (which is not the case here).

2.50 Finally, the suggestion that the further exploration of the concerns expressed require an ES Addendum (see paragraph 5.2(f)) are clearly incorrect as well. Environmental information for consideration includes any further information emerges as the case law clearly establishes, without the need for an ES Addendum. This is a typical sort of criticism that seeks to use the EIA process as an obstacle course, rather than a beneficial tool, which the Courts have deprecated.

Agent of Change

2.51 Section 6 of the IOT Operators' submissions are devoted to comments on the Agent of Change principle, but then in fact revert to the *Gateshead* principle which is different. Various comments are made about the legal authorities identified by the Applicant, but none of those comments in fact dispute what the Applicant has said about them. To the contrary, at paragraph 6.8 the IOT Operators interpret the Court of Appeal in *An Taisce* as requiring the decision-maker to be satisfied that an outstanding issue (which may include detailed design changes) can and will be addressed by the regulatory process. Even if that were a correct summation of the position (the correct summation is in the Applicant's submissions), it is crystal clear that not only "can" the question of what vessels will be able to operate at the IERRT facility be addressed by the regulatory process of navigational control that applies to the River Humber and the Port of Immingham, but it "will" be addressed. Indeed, it has to be addressed as vessels cannot operate outside the control of the navigational authorities. So even on the IOT Operators' summation, the Applicant is correct in its submissions and there is no basis for the Secretary of State seeking to ignore, replace or supplant those regulatory controls.

2.52 At paragraph 6.9 the IOT Operators refer to making an informed judgment based on information and gaps in knowledge, but then insert their own test of not allowing for "serious shortcomings and failures of the regulator." This is a very strange addition - first, because it is not referenced from any authority and second, because there are no "serious shortcoming" or "failures of regulator", for example in respect of the HMH which are being identified.

2.53 At paragraph 6.11 the IOT Operators then seek to suggest that all the authorities 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"*. Save for the first comment - "*existing safety controls are well established*" - and, where this is

manifestly the case here on the River Humber and the Port of Immingham where such controls are statutory and have existed for many years, the other comments are patently misconceived. There is no requirement in the authorities that the existing controls must be "unchallenged".

2.54 To the contrary, in the authorities the adequacy of such controls were being challenged. In addition, it is obviously wrong to suggest that the authorities are not concerned with "extremely significant development". It is difficult to think of more "extremely significant development" than a nuclear power station and its risks. Finally, there is a comment about development having "*not been properly assessed under the existing regime"* – this is meaningless. It is not clear what is being suggested as not having been assessed under an "*existing regime".* The Proposed Development has, however, been assessed and it will continue to be subject to the regulatory controls anyway.

2.55 Paragraph 6.11 suggests that the HMH cannot address the "gaps" said to exist. It is not explained what "gaps" are being suggested. If this is simply a repeat back to the design vessel point, it is wrong for all the reasons previously given. It is also asserted by the IOT Operators that he has already formed the conclusion that no additional risk mitigation controls were necessary. The HMH's view of the work done to date is that there is no requirement for additional risk mitigation controls, given the NRA and the simulations and all the subsequent comments received. But the HMH has also made it clear that if additional risk mitigation controls are considered necessary as a result of the continuing assessment of risk and safety that will take place during construction and before any commercial operations commence – and then as it increases - then he will impose them. This is, in fact, the paradigm of regulatory control being exercised actively and thoroughly, reflective of the *Gateshead* principle, as one would expect given the history of these controls on the River Humber to date.

2.56 Paragraph 6.12 of the submission makes no sense at all and refers to the case of *Morge* and *Prideaux*, but it is not explained why. If reference is being made to the Secretary of State giving great weight to the views of the relevant regulator, that is the HMH, the Dock Master and ABP as SHAs and the Applicant agrees that great weight should indeed be given to their judgments, given their responsibilities, knowledge, experience and expertise of controlling safe navigation in this area

2.57 Paragraph 6.13 purports to restate the agent of change principle, but then ignores the wording of it addressed in the Applicant's Closing Submissions. The Agent of Change principle is concerned with significant impacts and unreasonable restrictions. No such impacts or restrictions will arise in consequence of the Proposed Development with its applied controls to the IOT operations and it is not explained how they would.

The IOT Operators' Shadow Navigation Risk Assessment

2.58 The Applicant disagrees that it is has misunderstood the purpose of the IOT Operators' 'shadow Navigation Risk Assessment (sNRA)'. The Applicant firmly repeats the representations made at paragraphs 3.24, 7.3 – 7.6 and 7.14 – 7.21 of its closing submissions **[AS-083]** in response.

2.59 This section repeat points about what the IOT Operators claim to be the shadow NRA. These paragraphs seem to acknowledge now that it cannot be an NRA. But regardless of this, these paragraphs ignore the fact that the shadow NRA has been thoroughly considered by the Applicant's experts who have addressed the flaws in it (including the use of COMAH methodology which is not the subject of any response from the IOT Operators), but provided to the ABP HAS Board responsible for safety to reach a fresh decisionIt also firmly rejects the assertion that the sNRA resulted in ABP's change

request that was formally submitted on 29 November 2023. No evidence is provided by the IOT Operators to support this baseless claim.

2.60 The assertion in paragraph 7.3 that the IOT Operators' sNRA "*resulted in ABP's change request" is nonsensical.* The Applicant's Change Request Report **[AS-072]**, states the following (our emphasis): –

"*2.28* ***The Applicant's Navigational Risk Assessment*** *– The DCO application for the Proposed Development was accepted for examination by the Secretary of State on 6 March 2023. One of the documents supporting the Applicant's application was a Navigational Risk Assessment (("NRA") – [APP-089]).*

2.29 Following a comprehensive assessment of the potential navigational risks arising either during the construction or operation of the IERRT which included a number of HAZID Workshops with stakeholders, navigation simulations conducted by HR Wallingford and the strict application of accepted NRA methodology, the conclusions reached following completion of the assessment were that that the navigation risks were tolerable and "As Low As Reasonably Practicable" ("ALARP") and that any additional Impact Protection Measures to act as barrier to protect existing marine infrastructure were not required.

2.30 The conclusions reached in the NRA were endorsed by both the Port of Immingham and the Humber Statutory Harbour Authorities ("SHA").

2.31 The draft NRA was then presented to the Applicant's Health and Safety Board ("HASB") in December 2022 and following a formal presentation to the Board, and detailed discussion and consideration, the Applicant's "Duty Holder" approved the conclusions reached.

2.32 Whilst that remains the position of the Applicant, it is also recognised that two of the objectors to the Proposed Development, namely the IOT Operators and DFDS have produced their own alternative NRAs which, as the ExA is aware, come to contrary conclusions to that of the Applicant's NRA, namely that impact protection measures should be included.

2.33 It is not the intention of the Applicant in this Change Request to rehearse arguments that have already been aired during the examination to date, but as the ExA is aware, notwithstanding and without prejudice to the conclusions reached in its NRA and the determination of the Duty Holder (in light of the expert advice that has been received) that additional impact protection measures are not required for the either the construction or operation of the Proposed Development, the Applicant has endeavoured to continue to engage with the IOT Operators, who occupy the IOT trunkway and finger pier on licence from ABP, to address the concerns that have been raised. [Emphasis added].

2.34 As a consequence, considerable time and attention has been given, in conjunction with the IOT Operators, to developing what was presented as a "high level" potential design for additional impact protection measures. This design was proposed by Beckett Rankine on behalf of the IOT Operators, as attached to the letter dated 28th September 2023 from the Applicant's solicitors to the Examining Authority [AS-020]."

The IOT Operators' Position

2.61 The Applicant does not accept that it has *'misstated the IOT Operators' position on the application as being that the DCO should be refused on the basis of concerns about navigational safety'*. It is the Applicant's clear position that mitigation measures in the

form of impact protection are not required for the safe operation of the IERRT and all likely significant effects have been properly assessed. The IOT Operators, however, continue to maintain as referenced by their comment at paragraph 8.2 of their letter that '*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' and at paragraph 8.3 'accordingly require refusal of the development consent*'.

2.62 The Applicant has, in the dDCO, applied appropriate controls in order to adequately mitigate the risk of an allision between vessels associated with the IERRT and the IOT as explained in its written submissions throughout . As the HMH has made clear, vessels will not be permitted to operate if it is concluded that it would be unsafe to do so and the HMH has the full range of powers to impose any controls that he considers necessary.

2.63 The IOT Operators are seeking "appropriate controls, requirements and protective provisions" to mitigate the risk of allision. The Applicant has already identified all such necessary controls requirements and provisions have been offered to address the risk which has been fully assessed and mitigated.

2.64 As explained at paragraphs 7.25 to 7.26 of the Applicant's Closing Statement **[AS-083]**, the Applicant has demonstrated that impact protection measures are not required but in recognition that safety is always a matter for continued review it is seeking the powers in the dDCO to provide such measures should they be deemed to be necessary for any reason at some time in the future.

In closing I should again apologise for the length of this Response but hope that the ExA will be prepared to accept this Response as an addition submission on behalf of the Applicant.

Yours sincerely

[redacted]

Brian Greenwood
Clyde & Co LLP