

Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

By email to - imminghameasternrorroterminal@planninginspectorate.gov.uk

Dir Line: [REDACTED]

Our Ref
BG/10276966

Your Ref
TR030007

Date
23 July 2024

Dear Sir/Madam

Planning Act 2008 and the Infrastructure Planning (Examination Procedure) Rules 2010

Application by Associated British Ports (“the Applicant”) Seeking Development Consent for the Proposed Immingham Eastern Ro-Ro Terminal Project (“the Proposed Development”)

Applicant’s Response to Call for Comments from The Applicant, Natural England and Interested Parties

We write on behalf of our client, Associated British Ports (the “Applicant”), in response to the Secretary of State’s letter dated 9th July 2024 in which she posed a number of questions regarding our client’s Proposed Development.

Responding to the questions in order -

1 Habitats Regulations Assessment (“HRA”)

1.1 The Secretary of State, through the Department, has directed the questions below to Natural England -

“Does Natural England consider that adverse effects on integrity in-combination with other plans and projects would still occur if IGET is excluded from the assessment of such effects?”

‘If not, does Natural England agree that compensatory measures would only be required if IGET were granted consent and details of such measures should therefore be confirmed as part of the assessment of the application for consent for the IGET project?’

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- 1.2 Whilst the Applicant appreciates that Natural England will be submitting a formal response to the question raised, the Secretary of State should be aware that constructive discussions between the Applicant and Natural England are continuing, and indeed a Teams meeting between the parties took place on Friday 19th July 2024. As a consequence, with a view to assisting the Secretary of State, the Applicant has provided in the following paragraphs a brief update, albeit from the Applicant's perspective, as to what it understands to be the current position.
- 1.3 Question 1 references both the IERRT development and the IGET development and it is the Applicant's understanding from discussions with Natural England that the in-combination assessment undertaken for the IERRT development and included within the Habitats Regulations Assessment ("HRA") Report **[REP8-014]** is accepted by Natural England as being robust and comprehensive.
- 1.4 In this context, the Applicant would emphasise that no third party, including Natural England, has identified any plans or projects that have not been considered as part of the IERRT assessment. The potential in-combination effects of all identified plans and projects have similarly been assessed and as far as the Applicant is aware, verified and agreed by all interested parties.
- 1.5 In their response at Deadline 9 to EXQ4 **[REP9-018]**, Natural England, taking what the Applicant acknowledges was an entirely understandable precautionary approach, did query whether an Adverse Effect on Integrity ("AEOI") could actually be ruled out in-combination with other plans and projects for the mudflat and sandflats feature. That said, the Secretary of State should be aware that the intertidal habitat loss figure quoted by Natural England in raising this query relates only to what Natural England perceived to be the combined losses attributed to IGET and IERRT - not other plans or projects where losses were described by the Applicant as being either *de minimus* and ecologically inconsequential or already being compensated for under the Habitats Regulations.
- 1.6 As far as the IERRT development is concerned, constructive ongoing discussions with Natural England have included with respect to the IGET development an in-combination assessment including the potential of cumulative and in-combination effects of the IERRT development proposals – albeit entirely in tandem with all other relevant plans and projects.
- 1.7 On the basis of the additional information provided to the IGET examination **[REP4-014]** (IGET Examination document reference), Natural England has recently, through their IGET examination Deadline 5 submission **[REP5-058]** (IGET Examination document reference), confirmed that in relation to identified nature conservation issues within its remit, there is no reason why the IGET project should not be permitted. Natural England have confirmed that based on the updated assessments provided by the IGET applicant, they can agree with the conclusions of the in-combination assessment for physical loss of (or change to) habitat.
- 1.8 The Secretary of State should be aware that, entirely consistent with the evidence presented by the Applicant at the IERRT examination, the Applicant remains of the view that any in-combination losses between and with any other plan or project (including IERRT) would not result in an AEOI.

1.9 It is hoped that the brief summary above of the status of ongoing discussions with Natural England in the context of both the IERRT and IGET proposals (and it should be noted that the environmental consultancy instructed by the Applicant for both the IERRT and IGET projects is the same company thereby ensuring consistency of approach) assists in providing a degree of context as to the current position.

1.10 In the context of the two questions raised by the Secretary of State, the Applicant understands that Natural England is comfortable with the Applicant's position to the effect that any potential for physical loss of (or change to) intertidal habitat caused by the IERRT development proposals is *de minimus* and negligible and does not, as a consequence, amount to AEOI. On this basis compensation for the IERRT scheme is not required regardless of whether IGET or any other plans/projects are progressed.

2 Third Party Representations

2.1 The Applicant has the following comments in response to the representations received in response to the Secretary of State's consultation letter dated 9th May 2024.

2.2 **Natural England** - the Applicant has noted and taken fully into account the representations submitted by Natural England in their response to the Secretary of State's questions dated 9th May 2024. It is hoped that the clarification provided above, which as the Secretary of State will appreciate is very much an evolving process, is sufficient as far as a commentary on Natural England's representations dated 23rd May 2024.

2.3 **Associated Petroleum Terminals (Immingham) Limited and Humber Oil Terminal Trustees Limited ("the IOT Operators") and DFDS Seaways Plc ("DFDS")**.

2.4 Both of the above bodies submitted responses to the Secretary of State's questions in his letter of 9th May 2024. As both responses are strikingly similar in tone and content – and as both are repetitive of points that have already been made during the course of the IERRT examination the Applicant does not intend to add unnecessarily to the Secretary of State's time by commenting on each representation separately.

2.5 Instead, the Secretary of State's attention is drawn to the Applicant's Closing Submissions to the ExA [AS-083] which if anything, anticipates and answers the points now being repeated by the IOT Operators and DFDS.

2.6 There are, however, a number of additional general points that the Applicant should make which the Secretary of State may find of assistance.

2.7 **The legal obligations of the Port of Immingham SHA** - The Applicant, as well as being the owner and operator of the Port of Immingham, also fulfils the independent function of Statutory Harbour Authority for the Port of Immingham. That statutory role carries with it prescribed statutory responsibilities, duties and obligations. As such, the Applicant, as legislated by Government, is the ultimate body required by law to oversee the safety of navigation at the port – and the liability for failing to fulfil those duties and obligations responsibly falls to the Applicant.

2.8 Whilst the Maritime and Coastguard Agency ("MCA") as an executive agency of the Department for Transport ("DfT") undertakes the role of UK Maritime Regulator, in terms of overseeing the safety of navigation within UK territorial waters, this role does not extend to areas of water under the jurisdictional control of the SHA.

- 2.9 The MCA does, however, assist with regard to the SHA's navigational responsibilities by providing guidance through the vehicle of DfT's *Port Marine Safety Code's* ("PMSC") companion document, *A Guide to Good Practice for Port Marine Operations* ("GtGP"). The PMSC has a three yearly requirement for duty holders to submit statements of compliance. This requirement has always been met by the Applicant as part of its compliance exercises.
- 2.10 **Risk assessment** - The Secretary of State will appreciate that any port-related activity brings with it an element of risk – as is the case with airport and railway infrastructure and any other similar business operation. Legislation governs how an organisation should respond to risk, but a fundamental component in understanding and evaluation risk is risk assessment. A risk assessment exercise will lead to the production of a risk rating which will be a combination of likelihood and severity. Whilst mitigation measures can be used to influence both elements so as to reduce the risk rating there will be occasions when a degree of residual risk remains. In such a situation it is incumbent upon the given organisation – and in the case of the Applicant as SHA a statutory requirement - to determine whether the risk has been reduced to as low as it can reasonably – or practicably – be and is as a consequence acceptable.
- 2.11 Port operators and SHA's have to contend with situations every day where large merchant vessels are manoeuvring close to their marine infrastructure. This is inevitable and unavoidable.
- 2.12 The question remains, therefore, whether in terms of any given marine infrastructure the risk of vessel allision/collision is acceptable or not – both in terms of new infrastructure but also older established infrastructure dating from a time when these risks may have been viewed differently. The legislature has given the responsibility of answering that question to the SHA – not to other users of the Port who may not be impartial as a result of their own competitive and commercial status.
- 2.13 **Impact protection measures** - The SHA has viewed all of the potential risks as presented by the Applicant that may arise as a consequence of the construction and operation of the IERRT from vessel allision and the risks to other port infrastructure, including the IOT Operators' Immingham Oil Terminal. Having undertaken a navigational risk assessment, the Applicant, as the Duty Holder, has concluded any risks arising to be acceptable. If anything that conclusion has been enhanced by the Applicant's agreement to the suggestions made by the Secretary of State in his 9th May 2024 letter in terms of amendments to the draft DCO in relation to impact protection measures.
- 2.14 Whilst DFDS is a valued customer of the Applicant at the Port of Immingham, the company conduct a Ro-Ro ferry and terminal operation with trade routes across the North Sea. It follows that in the context of the Applicant's proposal to construct an additional Ro-Ro facility at the Port, DFDS cannot be viewed as an impartial voice.
- 2.15 Certainly the Applicant does not accept the picture DFDS is seeking to paint as to the 'catastrophic consequences' it alleges from 'compounded events' where '*a single incident that leads to contacting the finger pier could lead to multiple vessel breakaways which result in multiple knock-on risks to the trunkway – both directly from the IERRT vessel and indirectly from breakaway IOT vessels*' – arguing that both impact protection measures be delivered in tandem – being '*inherently required in order to minimise the potential for catastrophic consequences*'. This ignores the realities of the navigational risk assessment exercise which was undertaken by the Applicant and the legal responsibilities of both the Applicant and both SHA's.

- 2.16 **Safety of manoeuvres** - Much time during the Examination was spent comparing vessel manoeuvring styles and routes – or ‘swept paths’. All berths and approach channels to any port, anywhere in the world, will operate within unique localised conditions. It is for the SHA to consider whether a given manoeuvre for a particular vessel should be deemed safe to the extent where residual risk is deemed tolerable.
- 2.17 In this context, it is contradictory for DFDS to claim that is acceptable for DFDS vessels to manoeuvre into and around the Immingham Outer Harbour, past sensitive port infrastructure whilst arguing at the same time that movements to and from IERRT would be unsafe – particularly bearing in mind their involvement in the comprehensive marine navigation simulations undertaken by the independent consultancy HR Wallingford.
- 2.18 Both the IOT and the IERRT are surrounded by sensitive infrastructure – which is not unusual in any working commercial port environment across the world. All vessels approaching or departing from the Port – and that includes DFDS vessels - require precise manoeuvring decisions to be taken in order to avoid collision/allision.
- 2.19 The Applicant, as SHA, has assessed the risk of vessel allision/collision at the IOH as part of its Marine Safety Management System (“MSMS”) and has concluded that any risks arising to be acceptable with appropriate safeguards.
- 2.20 In addition, the navigational risk assessment undertaken and the normal further risk review work which will be undertaken as the development is constructed and then operated will inform the iterative update of the MSMS when IERRT becomes operational.
- 2.21 As a matter of course, the SHA would not – and statutorily could not - permit a vessel to enter the SHA’s limits unless it was satisfied that it was capable of safely manoeuvring within its port’s static infrastructure.
- 2.22 **Limitation of vessel size** - It has been suggested by the interested parties that the size of vessels able to operate from the IERRT should be limited. Only the SHA is legally authorised to permit a vessel to enter its SHA area, and only the SHA is authorised to make judgements regarding the acceptability of vessel dimensions. This overriding statutory duty and obligation and consequent liability is supplemented by the parallel powers and obligations of the Competent Harbour Authority for Pilotage operating through the person of the Harbour Master Humber. It should also be noted that Ro-Ro vessels are in fact highly manoeuvrable with a consequential greater level of control than many other types of vessels and are perfectly capable of moving at all states of the tide.
- 2.23 **Commercial delays** - As far as purported delays to vessel departures, a point still being raised by DFDS, the Applicant would draw the Secretary of State’s attention to the response provided by the Applicant in its Closing Submissions **[AS-083]** generally and specifically to paragraphs 4.34 to 4.37 and 4.74 to 4.91
- 2.24 Many vessels visit the Humber Estuary every day – of all shapes and sizes of varying tonnages and with averting cargoes. The Humber is one of the busiest commercial seaways in the UK. The Humber Estuary sees in excess of 34,000 shipping movements per year. The Port of Immingham itself is the UK’s largest port by tonnage handling around 46 million tonnes of cargo every year.
- 2.25 A proposal to provide an additional three Ro-Ro berths in the Humber sits entirely comfortably within the realms of natural variation and fluctuation of the commercial needs of the Humber and as such, responds to delivering the needs of the UK economy.

2.26 **MV . Dali incident, 26 March 202**

2.27 Both the IOT Operators and DFDS reference the allision between the container ship Dali and the Francis Scott Key Bridge that occurred at the Port of Baltimore in the USA on 26th March 2024. Both DFDS and IOT Operators cite details of that incident but apply an incorrect analysis of parallels to the proposed IERRT development.

2.28 The Applicant would point out that any attempt to provide an analysis of parallels would be inappropriate and dangerous in so far as the formal investigation into the incident is still ongoing and indeed, DFDS themselves recognise this by stating that their - *'analysis of parallels with Immingham [are] necessarily limited because the effects and an investigation into the causes of the collision are both ongoing'*.

2.29 The circumstances leading to the *Dali* allision with the Francis Scott Key Bridge are fundamentally different to the marine operations that will be undertaken within the Port of Immingham once the IERRT is operational. That fact alone should point to the inappropriateness of any comparison between the two.

2.30 The *Dali*, which it should be noted is a very large container vessel simply not capable of even being accommodated within the Port of Immingham, was attempting to pass under the bridge at a speed necessary to maintain vessel control.

2.31 Ro-Ro/Ro Pax vessel will on the other hand be undertaking controlled, low speed manoeuvres when entering or departing from the IERRT berths. There can be no sensible comparison.

2.32 The reality is that a vessel of the type of the *Dali* would never attempt, nor be allowed by either the Harbour Master Humber or the Port of Immingham SHA to access the IERRT berths.

2.33 In addition, the significantly lower mass and inbuilt design manoeuvrability of the Stena Ro-Ro class of vessel that will be operated at the IERRT is able to provide significantly more manoeuvring and stopping capability than the *Dali* had, prior to any identified power and propulsion failure when she intended passing under the bridge. The Stena Ro-Ro vessels will have twin independent engines, twin independent generators and twin independent anchors. The *Dali*, by contrast, had none of these.

2.34 The Applicant has instructed its independent consultants to review and assess the assertions made by DFDS and the IOT Operators in the context of the Baltimore incident. In light of the fact that any attempt to make a sensible comparison between the two scenarios is simply unrealistic, the Applicant is content to rest on the observations made above.

3 **Compulsory Acquisition**

3.1 The Applicant has been asked whether Volkswagen Group United Kingdom Limited ("VWG") have withdrawn their objection to the powers of compulsory acquisition of VWG's land interests at the port of Immingham – and which fall within the boundary of the proposed IERRT development.

3.2 At the time of responding VWG have not yet withdrawn their objection to the Applicant's proposed compulsory acquisition – but that said, the Applicant would not expect them to do so at this juncture. As the Applicant indicated in its formal response of 23rd May 2024 to the Secretary of State's letter dated 9th May 2024, VWG are valued tenants of

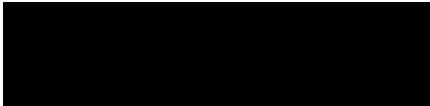
the Applicant and, as VWG indicated in their own response dated 23rd May 2024 - “VWG wish to relocate that part of their vehicle storage area currently in the port of Immingham to the adjacent Port of Grimsby where it can be operated in tandem with a VWG storage facility already in place at that Port”. The negotiations required to secure the move for VWG from the Port of Immingham to the Port of Grimsby are understandably taking time bearing in mind the need to accommodate all legal, procurement and property issues and whilst those negotiations are proceeding extremely positively and amicably, it would seem likely that an agreement for lease will now not be completed until the early part of Quarter 1, 2025. It is not anticipated, however, that this timescale will cause the Applicant any difficulty in terms the implementation of the IERRT DCO in that VWG occupy what is known, as far as the IERRT development is concerned, as the “Western Storage Area” - and on the assumption that the Secretary of State approves the Applicant’s application for the IERRT DCO, development works will be concentrated initially on the provision of the Northern and Central Storage Areas. In conclusion, as far as the Applicant is concerned, both parties remain committed to securing an amicable solution and whilst the Applicant sees no reason why this should not be achieved in a reasonable timescale, the Secretary of State will understand that in the meantime, in order to protect their respective commercial interests, the Applicant is unable to withdraw its ability as currently provided in the draft DCO to acquire that part of the statutory port estate compulsorily and similarly VWG is not yet in a position to withdraw its objection to those powers of compulsory acquisition.

4 **Protective Provisions**

- 4.1 As the Secretary of State will appreciate, Associated Petroleum Terminals (Immingham) limited/Humber Oil Terminal Trustees Limited (together the “IOT Operators”) are long standing and highly valued customers of the Applicant within the Port of Immingham. Any conflict or disagreement between the Applicant and the IOT Operators is both unfortunate and undesirable and simply disturbs the ongoing commercial relationship between the parties and is to be avoided if at all possible.
- 4.2 Throughout the IERRT Examination, however, the IOT Operators have maintained what the Applicant considers to be an unnecessarily intransigent and in the circumstances unreasonable position in the face of the facts and the evidence presented to the ExA – which has been predicated by the Applicant principally on the basis of ensuring the continuing protection and safety of the IOT operations when the IERRT berths are being constructed and when they are operational. To this end, however, whenever the Applicant during the course of the Examination attempted to negotiate the terms of the protective provisions, the IOT Operators merely responded with increasingly unrealistic and, in the Applicant’s view, increasingly unreasonable demands – to such an extent that those demands eventually amounted to the betterment of the IOT Operators’ facilities - at the cost of the Applicant.
- 4.3 The Applicant’s position with regard to navigational safety in the context of the IERRT project is well-documented in evidence presented to the Examination. Significantly, the fact that the Applicant has had imposed upon it by the legislature strict legal duties and obligations in terms of the safe operation of the Port — has not been tested or denied by any of the interested parties at the Examination. Just as significant is the fact that the Competent Harbour Authority – through the Harbour Master Humber – is entirely in agreement with the conclusions reached by the Applicant and the steps that it has proposed, as noted in the Applicant’s response of 23rd May 2024 to the Secretary of State’s suggestions regarding the draft DCO.

- 4.4 The Secretary of State will not be surprised to learn that the Applicant will not promote an infrastructure project that could in any way endanger or put at risk the operations of any of its tenants. Indeed, the Secretary of State will understand that in light of the Applicant's statutory and legal duties and obligations the Applicant simply could not promote an infrastructure project that would have the potential to put at risk the safe operations of a marine operator at the Port. To suggest otherwise would be to do so in the face of common logic, the facts and the law. It is within that context that the Applicant has provided the IOT Operators with a set of protective provisions which it considers provides the protections required by the IOT Operators bearing in mind the obligations and duties already falling upon the Applicant in its function as Statutory Harbour Authority. Those protections have if anything been enhanced by the Applicant's agreement to the changes to Requirement 18 as noted in the Applicant's response dated 23rd May 2024 to the Secretary of State's questions dated 9th May 2024.
- 4.5 In that response, the Applicant stated that it *"believes the terms of the protective provisions – together with the proposed Requirement 18 – that it has offered to the IOT Operators is entirely reasonable and provides all of the necessary protections sought"*. It continued, that in the light of this *"it is hoped that a more constructive dialogue with the IOT Operators can now take place"*.
- 4.6 That remains the Applicant's position today. The Applicant remains open to any discussion which the IOT Operators may wish to pursue, but at present, all avenues in this respect seem, unfortunately, to be closed. That said, the Applicant will be making every attempt to meet with the IOT Operators to discuss the issues arising and the Secretary of State will be kept fully informed as to any progress made in that respect.

Yours faithfully



Partner

Clyde & Co LLP