

Immingham Eastern Ro-Ro Terminal

Response to Second Secretary of State Consultation Letter

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

Planning Inspectorate Ref: TR030007

22 July 2024

1 INTRODUCTION

- 1.1 These comments are filed on behalf of Associated Petroleum Terminals (Immingham) Limited and Humber Oil Terminal Trustees Limited (the “**IOT Operators**”) in response to the Secretary of State’s consultation letter dated 9 July 2024, which requests comments on the Secretary of State’s first Consultation Letter 9 May 2024, as well as an update on discussions in respect of Protective Provisions for the benefit of the IOT Operators.
- 1.2 The IOT Operators have had no further engagement from the Applicant in respect of any of the concerns raised with the proposed IERRT development or in respect of Protective Provisions for the benefit of the IOT Operators. The Applicant has consistently failed to engage following the end of the Examination as set out in the IOT Operators previous response dated 22 May 2024 (TR030007).
- 1.3 The Applicant has continuously failed to address the significant safety concerns raised with an appropriate level of seriousness. 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 EXAMINATION CONTEXT

- 2.1 As set out in the IOT Operators’ Closing Submissions [**AS-091**], the IOT Operators have no commercial interests in the development and are only concerned with protecting the status quo in which they are able to operate safely and efficiently with a degree of certainty. The mitigation requested by the IOT Operators was first identified in their response to the statutory consultation for the project in February 2022 [**REP2-063**] and has remained unchanged since that time.
- 2.2 The Relevant Representation [**RR-003**], Written Representation [**REP2-062**], and various submissions through to their Deadline 9 submissions [**REP9-028**] submitted by the IOT Operators set out the importance of the IOT and the refineries to UK energy security. This has been emphasised by the recently designated NPS EN-1 and in the UK Government’s recent Energy Security Plan which is clear that notwithstanding the move to net zero, security of energy supply from fossil fuels will remain crucial.
- 2.3 The IOT and the refineries form a critical national resource with the refineries making up approximately 27% of the UK’s refining capacity and around 45% of UK’s marine oil going through the IOT – percentages which are expected to increase with the imminent closure of the Grangemouth refinery in 2025. Issues such as shipping and navigation and its potential impact on the IOT Operators’ Control of Major Accident Hazards safety case is an important consideration.
- 2.4 The Applicant does not dispute that the IOT Operators’ facilities are of national significance to UK energy security. The IOT and the refineries form a strong countervailing need to the claimed demand for the IERRT and the risks to the IOT operations should be approached with particular care and caution on the basis of the agent of change principle.
- 2.5 The context for considering the DCO and mitigation measures also includes the fact that there are no comparable facilities advanced by the Applicant which involve the operation of a large ferry terminal in such proximity to an oil terminal and associated infrastructure. It is critical that sufficient mitigation is secured for the benefit of the nationally significant the IOT Operators’ facilities (the oil terminal and the two refineries which depend on it) and their important contribution to energy security within the UK. This provides a strong countervailing need to the claimed demand for the IERRT and adds to the need for a significant precautionary approach to be adopted towards the proposals and mitigation.
- 2.6 The need for sufficient mitigation – comprising fixed impact protection – has been set out by the IOT Operators in various submissions throughout the examination, and their position was summarised at the close of Examination in their Deadline 9 Submissions [**REP9-028**] and in their Closing Submissions [**AS-091**].

3 COMMENTS ON RESPONSES TO FIRST CONSULTATION LETTER – EXTENT OF MITIGATION MEASURES

- 3.1 The Applicant agreed early on in the examination [AS-020] that protective provisions would be provided “substantially in accordance” with the provisions submitted by the IOT Operators in August 2023 [REP1-039] which would have required extensive impact protection to be in place. However, despite the indication that such matters would be addressed alongside the Applicant’s change request in October 2023 (the “**Change Request**”), the Applicant instead put forward an alternative set of proposed mitigation measures which were insufficient to adequately address the concerns raised by the IOT Operators and did this without reference to the IOT Operators.
- 3.2 The IOT Operators subsequently wrote to the Applicant setting out a detailed commentary on the inadequacy of the proposed mitigation measures and provided an updated set of protective provisions [REP6-046] which were then submitted to the examination as the IOT Operators’ preferred provisions [AS-043]. The Applicant opposed these preferred provisions and the commentary subsequently submitted by the Applicant [AS-044] provided no reasoned justification for the refusal to provide the protective provisions sought. The Applicant then stated in a draft Statement of Common Ground [REP7-070] that:
- “ABP and its experts do not consider the scheme now required by IOT Operators to be feasible due to navigational, engineering, environmental and scheme viability reasons”.*
- 3.3 The Applicant did not initially point to viability as a basis for failing to provide the impact protection measures (amongst others) identified by the IOT Operators as being necessary to ensure the risks of the Proposed Development are as low as reasonably practicable, and the assertion that the requested physical protection measures were too expensive is impossible for the Applicant to justify in the absence of its own cost benefit analysis to which the costs of mitigation can be fairly related. Indeed, viability suggestions by the Applicant should not be entertained in the absence of its failure (despite requests from objectors) to provide any proper costs benefit analysis or viability appraisal of its scheme. It would be neither fair nor reasonable to accept the Applicant’s assertions on this topic [see e.g. REP7-069, §§5-7].
- 3.4 The IOT Operators set out their concerns in their Deadline 7 Submissions and appended a table justifying the IOT Operators’ preferred provisions [REP7-069] and [REP7-070]. Those would have required fixed impact protection measures beyond those put forward by the Applicant in its Change Request. These measures are necessary to adequately mitigate the risk of a potentially catastrophic allision between vessels associated with the IERRT and the IOT as a top tier COMAH site and would in no way add a commercial benefit, advantage or betterment to the IOT Operators. They simply protect it (and its personnel) from a potentially catastrophic major accident.
- 3.5 The Applicant has chosen to continue to promote its scheme without sufficient physical infrastructure within its proposals to provide the necessary level of mitigation. It remains the case that no viability evidence has been adduced by the Applicant, compared to the clear costs benefit analysis conducted by the IOT Operators’ sNRA [REP2-064] which reinforces the justification for the mitigation measures they seek.
- 3.6 Additional impact protection measures beyond those proposed by the Applicant 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, particularly as the Applicant’s impact protection measures are not designed to withstand the size and displacement of vessels that will visit the IERRT as anticipated by the design vessel specified in the Applicant’s own ES [APP-038].
- 3.7 The IOT Operators consider that mitigation measures included in the protective provisions offered by the Applicant and referred to in the Secretary of State’s first Consultation Letter 9 May 2024 would **not** amount to adequate mitigation of the identified risks and concerns.

That position was outlined in the IOT Operators' Deadline 7 submissions [REP7-069] and restated in their Deadline 9 submissions [REP9-028].

- 3.8 It is important to stress that the level of impact protection that is included by the Applicant in its proposals would remain inadequate even if all mitigation the subject of draft requirements 18 and 19 (as identified in the Secretary of State's first Consultation Letter 9 May 2024) were implemented in full.

4 COMMENTS ON RESPONSES TO FIRST CONSULTATION LETTER – DISCHARGING AUTHORITY

- 4.1 In response to the Secretary of State's first Consultation Letter 9 May 2024 the Applicant opposed the inclusion of a mandatory requirement for certain impact measures on the basis that those protections would be mandatory. The Applicant said the impact measures would be required (paragraph 5.9):

“regardless of the view of the Statutory Conservancy and Navigation Authority (i.e., the Statutory Harbour Authority for the Humber) or the dock master (i.e., the Statutory Harbour Authority for the Port of Immingham) as to whether such a protection is actually necessary – effectively fettering the discretion – and indeed statutory powers and duties - of both Statutory Harbour Authorities”.

- 4.2 With this suggested approach, the Harbour Master Humber is responsible for deciding whether impact protection is necessary. His position repeated during the examination process is that no impact protection is necessary. However, as the IOT Operators pointed out [REP7-069], this position has been reached without a written risk assessment having been carried out by the Harbour Master Humber and in the context of a flawed NRA as set out in earlier IOT Operator's representations.¹ That position appears to continue to inform the latest submissions of the Applicant in response to the Secretary of State's first Consultation Letter 9 May 2024.²

- 4.3 The IOT Operators (along with other interested parties) have consistently raised the issue of the lack of functional independence, contrary to the Applicant's reliance on the claimed independence of the relevant statutory authorities, particularly the independence of the Harbour Master Humber [REP9-028, also raised earlier e.g. in [REP4-035]. The simple fact is that all of the claimed independent operators are all closely connected with the Applicant itself and cannot be considered to be independent either functionally or in law. This is why objections, including the IOT Operators, suggested that at the very least there should be a process for determination by a truly independent third party such as the Secretary of State,

- 4.4 The Applicant provided a clarification of the relevant statutory roles and jurisdictions in respect of the proposed IERRT development [REP1-014], confirming that Associated British Ports would hold each of the following roles:

- (a) **Applicant and proposed undertaker** seeking development consent;
- (b) **Owner and Operator** of the Port of Immingham;
- (c) **Statutory Harbour Authority for the Port of Immingham** as the port Owner and Operator, led by ABP's own Dock Master;
- (d) **Statutory Harbour Authority for the Humber Estuary** as the Statutory Conservancy and Navigation Authority for the River Humber;
- (e) **Competent Harbour Authority** in respect of the pilotage of vessels in the Humber, again led by the Humber Harbour Master.

¹ As stated on behalf of the Harbour Master Humber by their representative at ISH6 (Line 753 of the ISH6 Part 3 Transcript [EV11-007]).

² See the Applicant's "caveat" to the proposed Requirement 19 at para 5.6 onwards of its 29 May 2024 letter – which has the effect of the need for impact protection being determined solely by the Harbour Master Humber.

4.5 That clarification document then noted (at 6.3) that:

With a view to maintaining a transparent separation of powers, duties and obligations, ABP in its overall role as SHA for the Humber, established with a view to ensuring both transparency and impartiality in terms of regulation of the Humber, separated the role of SHA for the Port of Immingham from that of the role of SHA for the Humber – which has the trading name of Humber Estuary Services (HES)...

4.6 It follows that if the SHA for the Humber is to be separated from the SHA for the Port of Immingham for impartiality – that should also be the case for ABP as a developer within the SHA's jurisdiction, and the relevant SHA (in this case the Statutory Conservancy and Navigation Authority (i.e. the Harbour Master Humber).

4.7 The Harbour Master Humber confirmed in his Written Representation **[REP2-054]** that he was appointed by, and is employed by, the Applicant in its capacity as the Statutory Harbour Authority and as the Competent Harbour Authority to ensure that the responsibilities of the Statutory Harbour Authority and Competent Harbour Authority are met in respect of conservancy and navigation and that the powers are used appropriately.

4.8 Since the close of examination there have been a series of personnel changes which cast yet further doubt on practical separation and independence of these roles, confirmed by ABP at the Port Liaison Group Meeting held at Port Office, Grimsby on 19 June 2024:

(a) Paul Bristowe has moved from the Head of Marine at ABP Humber to the Chief of Staff at ABP - a central ABP function with a position on its Executive Team;

(b) Meanwhile, and understood to be as an interim measure, Captain Andrew Firman has taken on Mr Bristowe's previous role as Head of Marine for ABP Humber;

(c) Captain Firman also retains his position as the Harbour Master Humber.

4.9 This arrangement, interim or otherwise, further underlines significant concerns with functional independence between the ABP roles that have been present throughout the examination. Captain Firman is simultaneously appearing to act as both Head of Marine for ABP Humber and as the Harbour Master Humber. He would be acting as the regulated and the regulator, or DCO undertaker and DCO requirement discharging authority. He may wear different hats, but is in truth a single individual would have directly conflicting priorities around any decisions to be made regarding the discharge of DCO requirements if – as the Applicant suggests – the Statutory Conservancy and Navigation Authority (i.e. the Harbour Master Humber) performs that role under DCO requirements. This provides still further weight to the concerns raised by the IOT Operators (and others) throughout the examination in respect of the functional independence of the Statutory Conservancy and Navigation Authority (i.e. the Harbour Master Humber).

4.10 Decisions by such persons/bodies could not be fair or impartial, since it is suggested, and at least there would be an obvious appearance of bias if they were asked to undertake such a determinative role. It cannot be in the public interest for this to be entertained.

5 CONCLUSION

5.1 The Applicant has continued to fail to engage and develop the mitigations to an adequate level during the examination and has made no attempt to engage with the IOT Operators on protective provisions, or in any other way in respect of the IERRT, since the close of examination.

5.2 The IOT Operators' primary case, as summarised in their Deadline 9 Submissions **[REP9-028]**, is that development as proposed remains inadequate due to its adverse impacts outweighing its benefits. The IOT Operators also consider the proposed development to be in breach of the EIA Regs and therefore unlawful due to the failure to undertake an ES fit to assess the likely significant effects of the Design Vessel proposed. The IOT Operators accordingly submit that the DCO must be refused.

- 5.3 Should the development be found to be acceptable such that the DCO is granted, and without prejudice to their primary case, the IOT Operators set out in their Deadline 9 submissions that the scheme should be subject to at least both of the following:
- (a) Protective provisions, requiring the delivery of appropriately designed vessel impact protection offered by ABP in its change request;
 - (b) Additional operational controls, secured together with those other protective provisions sought by the IOT Operators; and
 - (c) If any subsidiary procedures are to be provided for to deal with the resolution of disputes, they should be made the decisions of legally and functionally independent persons, such as the Secretary of State, and not parties employed by or closely connected to the Applicant as is currently suggested.