THE INFRASTRUCTURE PLANNING (EXAMINATIONS PROCEDURE) RULES 2010

FIVE ESTUARIES OFFSHORE WIND FARM DEVELOPMENT CONSENT ORDER

PINS REFERENCE EN010115

DEADLINE 8: PORT OF LONDON AUTHORITY'S RESPONSE TO THE APPLICANT'S DOCUMENT 10.62 "NOTE ON DDCO DRAFTING – APPLICANT'S POSITION ON PROTECTIVE PROVISIONS"

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Set out below are the Port of London Authority's comments on "10.62 Note on DDCO Drafting – Applicant's Position on Protective Provisions section 9 PLA (offshore) (REP7-090).

Paragraph	Applicant's comment	Port of London Authority Response:
9.1	No part of the authorised development is within the PLA jurisdiction. The cable works in the deep water routes are 'at sea' and the PLA is not the regulator for any activity in that area. The MMO is the appropriate regulator and enforcement authority in this area. The PLA argue that they require to 'control' approaches to the Port, that is not the view of Parliament or the Port of London Act would give them jurisdiction in this area; that act does not give them such jurisdiction. If the Applicant were seeking a marine licence directly from the MMO rather than deemed through the DML, the PLA would not have any approval or control over any aspect of the works under that licence. That underlying position is not changed by the licence being deemed, the PLA is seeking to control works outside their jurisdiction and outside their statutory undertaking.	The PLA is not suggesting that it is a regulator nor that it needs to "control" the seaward approaches to the Port of London, but it would wish to approve key documents that will control the delivery of the authorised works in the Deep Water Routes ("DWRs") ahead of approval by the MMO. The PLA's position is not unreasonable given the Order Limits include the northern approaches for deeper draughted vessels into the Port of London (i.e the DWRs through which deeper draughted vessels must pass through to get into the Port of London) and the Port of London (the largest port in the UK) accounted for 12% of all UK major port tonnage traffic handled in 2023. The Order Limits also include the Sunk Pilot Diamond and pilotage is compulsory for large vessels within the London Pilotage District. The approaches and boarding and landing of pilots takes place in the general vicinity of the Sunk Pilot Diamond rather than at a specific point. This is in addition to the onshore navigational equipment which is currently covered by the onshore protective provisions.
9.2	There can be no serious detriment to the PLA statutory undertaking from work carried on outside its jurisdiction, controlled by another regime, enforced by another regulator and over which the PLA would normally have no control or responsibility. The PLA have provided the London Gateway Harbour Empowerment Order (HEO) as the sole example of protective provisions for approvals to support its request for approval outside its area of jurisdiction, however London Gateway port is within the PLAs statutory harbour limits and the PLA has not provided any examples of approvals given outside its jurisdiction.	As explained at Deadline 7, it is naturally the case that the majority of DCO's that the PLA have been involved in relate to projects located within the Port of London Act 1968 limits. It is also natural that there are a limited number of exceptions to this and there have until VE been no projects advanced through the DCO process which specifically affect the DWRs. The Thanet Offshore Windfarm Extension Development Consent Order was outside the PLA's statutory limits but as the PLA had fundamental concerns about the extension (which ultimately led to the refusal of the application) no discussions took place regarding protective provisions for the PLA. The impact of the proposed project on marine navigation, shipping and ports was the principal issue generating most attention and contention from interested and other parties throughout the examination. The Examining Authority ("ExA") and the Secretary of State agreed with the PLA and other interested parties that the Applicant had failed to demonstrate sufficient mitigation of risks to safety of navigation to make them As Low As Reasonably Practicable

		("ALARP"). The concerns included the effect of the project on navigational safety of shipping traffic in immediately adjacent waters, the resilience of facilities and services accessed by that traffic, and in this context, the degree to which the proposed development was policy compliant.
9.3	Any works within London Gateway port affecting the works within the river would necessarily be within PLAs jurisdiction, and works outside (i.e. works onshore adjacent to the) could reasonably directly impact the river which is within the PLAs jurisdiction. Crucially the part of the HEO which extends out from the area around London Gateway port and outside of the PLAs jurisdiction (and overlaps with the export cable corridor for this development) is the line permitting maintenance dredging. Maintenance dredging. Maintenance dredging is excluded from the PLAs right of approval. The example therefore does not provide the precedent claimed by the PLA as marine works outside their jurisdiction are not subject to the PLA's approval.	The London Gateway Harbour Empowerment Order ("HEO") has been provided because not all of the area affected by the HEO is within the jurisdictional limits of the Port of London yet the protective provisions provide that they apply whether in or out of the PLA's jurisdictional limits. Naturally some of the protective provisions are tied to specific works but that is no different to here. The PLA only have concern with certain works but that is not a factor of its jurisdictional limits but its operations.
9.4	The Applicant does not accept that the PLA have liability for the 'approaches' to the Port. The PLA cannot have liability for something over which they have no power or control, that is clearly an unsustainable position which lacks credibility.	See response to 9.1
9.5	The Applicant understands that the PLA is interested in the works in this area and that is reasonable and collaborative for them to be consulted and notified of such works, but it fundamentally disagrees that the PLA in any way needs a right of approval over such works. The Applicant submits that in line with general DCO drafting guidance, the ExA should be satisfied that regulators will do their jobs competently in this case the MMO as the regulator of the DML will undertaker that role competently. That role includes determining approvals of the plans to be submitted under the DML conditions.	The PLA is not asking to be final arbiter but asking for the same powers that have, for example, been given to London Gateway Port Limited. To suggest that the PLA have a lesser interest of concern or relevance to that of London Gateway due to the "jurisdictional limits" of the Port of London Act 1968 is disingenuous and open to challenge by way of judicial review were the Secretary of State to follow such an approach.

9.6	The Applicant objects to the addition of an unnecessary layer of approval outside of a statutory body's jurisdiction and with no mean of resolving any dispute should the PLA seek something that the MMO will not approve. There are clear disadvantages and uncertainties created by having multiple approvers of documents, particularly where there is a clear regulator.	The MMO will be the final approver of the plans and details. These concerns are not being raised against the London Gateway Port Limited's approvals. To suggest also that there is no means of resolving disputes is equally disingenuous as the protective provisions do include a dispute resolution clause which is agreed between the Applicant and the PLA (paragraph 123 of Part 10 of Schedule 9 of the dDCO (REP7-089).
9.7	The Applicant wishes to note that original basis on which protective provisions were being discussed was that the PLA wished to ensure that the offshore cable would not impeded future (not planned or consented) dredging ambitions in the deep water routes to allow use by vessels of 20m draught. That cable level commitment has been made in the CSIP for some time and is also included the dDCO as a parameter in the requirements. The core issue which was the original trigger for discussing PPs is therefore now secured elsewhere in the dDCO.	The concerns of the PLA go much further than the cable depth as has been consistently noted since the PLA's Relevant Representation and as acknowledged by the Applicant through the protective provisions which the Applicant is offering to the PLA. The PLA notes and agrees with the Applicant's Response to the Examining Authorities Third Written Questions ("ExA's ExQ3") in relation to a question directed at Harwich Haven (DCO.3.10) that the core purpose of protective provisions is to prevent serious detriment arising to statutory undertakings from exercise of DCO powers. This is exactly what the PLA is seeking to achieve through its protective provisions.
9.8	The offshore protective provisions are not agreed on the following points.	-
9.9	The multiple addition to the scope of the PPs sought through the addition of "within or may affect the Area of Interest" are rejected. The drafting is too uncertain and subjective. What 'may affect' the Area of Interest may be very different in the view of the Applicant and the PLA. The Applicant requires certainty over when the PPs will apply and this addition would materially undermine that certainty.	References to works which "may affect" an area or "may affect" property are consistently found in other protective provisions. The definition of "specified work" in Network Rail's Protective Provisions in the dDCO submitted at Deadline 7 [REP7-089], for example, uses "may affect" is in the definition of specified works: "specified work" means so much of any of the authorised development as is situated upon, across, under, over or within 15 metres of, <u>or may in any way adversely affect,</u> railway property, and for the avoidance of doubt, includes the maintenance of such works under the powers conferred by article 6 (power to maintain the authorised development) in respect of such works" (our emphasis). The protective provisions for electricity, gas, water and sewerage undertakers in the dDCO in Part 1 of Schedule 9 also includes references to "may affect" as does the definition of specified work in the Protective Provisions for drainage authorities in Part 4 of Schedule 9 of the dDCO.

		It will be a matter of fact as to whether specific works may affect the Area of Interest and the Applicant will be able to judge this as its proposals develop.
9.10	The PLA has sought to insert a new definition to extend the scope of the PPs to include the operation and maintenance plan (O&M plan) and the added drafting seeking approval of that plan to paragraph 3. The Applicant rejects this extension. The O&M Plan will not specify cable repair or replacement operations (which is the issue the PLA have advised they are interested in). It will focus more on the things like routine turbine maintenance. The Applicant amended the DML drafting to provide that in so far as they are relevant, the principles secured in the outline cable installation and specification plan (CSIP) must be applied in the O&M plan in order to ensure that the commitments made in the outline CSIP are still applicable.	The PLA acknowledged at deadline 7 in the response to the ExA's ExQ3 questions [REP7-113] that it has since deadline 6 added in a requirement to approve the operation and maintenance plan ("O&MP") (paragraph 3(c)). This is as a result of the comments of London Gateway Port Limited at deadline 6 (REP6-080) which highlighted that maintenance of the authorised development also falls within the scope of the O&MP and that maintenance works that are covered by that plan include cable remedial burial; cable repairs and replacement and cable protection replenishment. The PLA must have certainty that whatever plan the applicant is working to that the necessary requirements in relation to the DWRs are being met. The outline offshore operations and maintenance plan [APP-248] provides an outline of reasonably foreseeable offshore maintenance activities. The outline plan considers cable repair and replacement to be a reasonably foreseeable offshore maintenance activity (para 2.1.4 and Appendix A) and projects that there will be nine offshore export cable repairs over the project lifetime (table 2.1). It cannot be said therefore that the O&MP will not specify cable repair or replacement operations when clearly cable repairs and replacement is envisaged over the lifetime of VE.
9.11	There is no planned maintenance on the export cable. The outline O&M plan makes it clear that it will only cover activities as far as they have been assessed in the ES. The ES does not assess cable replacement, only cable repair (and in that case limited by the MDS) and even then will not specify the methods, locations of any cable repair because this will not be known. As has been repeatedly explained to the PLA, a new marine licence would be required for cable replacement and they would have the opportunity to make representations on the application for that in the normal way.	The entries on page 13 of the outline offshore operations and maintenance plan [APP-248] record potential offshore maintenance activity as: cable repair/replacement; new cable protection, replacement or addition to cable protection and cable reburial all of which are said to be assessed in the Environmental Statement. The Schedule 11 deemed Marine Licence ("DML") also includes for maintenance of the authorised development. As set out at (4)(2) Maintenance works include but are not limited to (e) cable repairs and replacement.
9.12	Further the drafting proposed in paragraph 3 would require the approval (which is objected to as a principle) of the O&M plan prior to commencement of the cable installation, however that plan will not be available at that time. It is required to be submitted to the MMO 6 months prior to operation, not	The PLA only require that it has an opportunity to approve the O&MP prior to the draft plan being submitted to the MMO. The drafting can be updated to reflect this.

	commencement. Preventing commencement due to wanting to approve a plan which will not yet exist is not reasonable.	
9.13	The addition of the O&M plan to paragraph 8 is also rejected.	The PLA would want the reburial of the cable to be the subject of an updated CSIP and therefore agree that paragraph 8 should not refer to the O&MP as per the PLA's preferred Protective Provisions included as Annex 1 to the PLA's Response to the ExA Third Written Questions [REP07-113].
9.14	The PLA is seeking a right of approval of the cable installation and specification plan (CSIP). This plan is secured by the DML and will be approved by the MMO.	The PLA's preferred wording would see the PLA approve the CSIP and NIP before they are submitted to the MMO for approval. The PLA acknowledge that the CSIP and NIP will be approved by the MMO.
9.15	The final CSIP will set out: (a) The technical specification of the cables; (b) A detailed cable laying plan; (c) Proposals for the volume and area of cable protection; and (d) Proposals for monitoring the offshore cables.	-
9.16	The PLA are not cable installation specialists and, with respect, do not have the expertise or qualifications to approve or refuse to approve the technical detail of this plan.	The PLA accept that they are not cable installation specialists, in the same way that they are not tunnelling experts. The PLA could obtain the services of a cable installation specialist to assist in its review if it was considered necessary which it does in relation to tunnelling schemes. The PLA will be able to assess whether the final detail raises concerns regarding adherence to the dredging parameter and the passage of vessels through the DWRs. The PLA suspects that the MMO as the approving body also do not have the expertise or qualifications to approve the technical detail of the plan but nevertheless there appears to be no objection from VE to the MMO approving the same plan. Equally there is no objection to London Gateway Port Limited approving the draft plan prior to submission to the MMO.
9.17	The PLA is not the regulator for works in the cable corridor, they are not the SNCB; they are simply interested in when and how the works will be carried out and that this will not preclude future dredging ambitions (which is already secured through the	The PLA is not asking to be the regulator. It is asking for the same approval in relation to the CSIP which has been given to London Gateway in the dDCO i.e approval before any application for approval is submitted to the MMO.

	requirement and the outline CSIP). None of those matters requires them to have approval of this plan. The Applicant agrees to provisions to ensure that suitable notice is given to shipping interests of works in the deep water routes but that is not a matter for this plan. The PLA continues to seek a right of approval of the Navigation Installation Plan (NIP).	Until Deadline 7 the outline CSIP had stated that "*insofar as it relates to the crossing of the Deep Water Route areas (DWRs) defined in Figure 2, the CSIP will be submitted for approval by the Port of London Authority under the relevant protective provisions secured in the DCO*". Moreover the Applicant has noted in Document 10.62 that there are matters which the Applicant is seeking to leave to be determined in the CSIP such as the over dredge allowance referenced in paragraph 9.19 below. As noted at Deadline 7 outline documents have been submitted to the examination and it is concerning that as currently drafted the DML – Transmission Assets (Schedule 11) of the dDCO [REP7-008] only requires the CSIP to accord with the principles of the oCSIP and the NIP to accord with the principles of the oNIP (Condition 13(1)(g) and (j) of the DML). There is the potential therefore for the final documents to change and for those changes to detrimentally impact the Port of London either temporarily or permanently
9.18	Matters of safety for shipping are dealt with through the Navigational Risk Assessment (NRA) not this plan. The PLA have agreed with the NRA undertaken for this stage. The carrying out of a NRA requires the involvement of all the ports. The NIP sets out the mechanism for managing concurrent working involving the Applicant's vessels and to minimise impacts on shipping and navigation in the deep water roues and around the sunk precautionary areas and pilot boarding station. The PLA is not responsible for regulating shipping in these areas and is therefore not responsible for the matters regulated by this plan.	The PLA is not asking to be the regulator.
9.19	The PLA has added a new item to paragraph 4(a) *and in all cases (i) to (iii) makes allowance for an 'over-dredge' tolerance of 0.5 metres in addition to the stated depths attributable to standard dredging methodology.*	This is standard wording which can be found in development consent orders and in the PLA's protective provisions where dredging is involved (see for example paragraph 35 of Part 3 of Schedule 13 of The Silvertown Order 2018). The wording reflects the practicalities of dredging
9.20	This has already been accounted for the previous items the drafting of which reflects the DCO parameter. It had been explicitly agreed with the PLA not to add this detail here given	The PLA had discussed with the Applicant not amending the drafting in relation to the depth i.e. not changing the references to 22m below CD to 22.5m below CD in the Schedule 2 Requirement and in all of the examination

	that the parameter itself is the key restriction and this detail is properly considered in the outline CSIP not a PP. The Applicant is therefore very disappointed to see this drafting included without any discussion. The Applicant does not agree that this addition is necessary or helpful.	documents because it was considered that this might be un-necessarily confusing for the ExA and other Interested Parties particularly given how little time there is until the close of the examination and that the need to allow for over dredge had been accepted by the Applicant some time ago. As set out above this wording is standard for the PLA's protective provisions.
9.21	The Applicant also notes as a point of principle that the correct reference for the cable burial is 'level' not 'depth'. This is an important distinction for the cable as the level is the agreed parameter, not a depth.	The PLA has no objection to the drafting being updated to read: "*and in all cases (i) to (iii) makes allowance for an 'over-dredge' tolerance of 0.5 metres in addition to the stated levels attributable to standard dredging methodology*"
9.22	The addition sought to paragraph 4(c) is also rejected. *Additional cable burial depths required or any other forms of cable protection proposed including type, volume and locations.*	The PLA is unclear why the Applicant rejects this wording when the wording has been adapted from the London Gateway protective provisions and in particular paragraph 89 which requires the draft cable specification and installation plan that is submitted to London Gateway to set out: - The proposed cable burial depths - The proposed cable burial methods - Any cable protection proposed including type, volume and anticipated locations; and - The proposed programme of work for cable burial For absolute consistency it could be reworded to: *"Cable burial depths, cable burial methods and any cable protection proposed including type, volume and locations and the proposed programme of work for cable burial*."
9.23	This wording simply does not make any sense. The Applicant's engineering and offshore consenting specialists both advise that they do not understand what it is seeking or what the additional wording means. It is not reasonable to seek to the Applicant to a non-sensical obligation. The insertion has accordingly been rejected.	As above the PLA would be content for the drafting to be reworded.

9.24	The addition sought to paragraph 4(c) is also rejected on the grounds of lacking intelligibility. *(f) The programme and methodologies for monitoring and the arrangements for and the results of these surveys or other construction evidence being made available to the PLA within 10 business days of the undertaker receiving reports of the survey results or evidence to demonstrate compliance with the depths referred to in sub paragraph a) of this paragraph.*	The PLA wish to understand the programme and proposed methods for monitoring and how the evidence of that monitoring or other construction related evidence will be made available to the PLA to demonstrate that requirements of paragraph 4(a) have been achieved. There may be instances where there is evidence directly from the construction method that the target burial has not been reached and while this may be confirmed by subsequent surveys the PLA would want to know at the earliest opportunity
9.25	The insertions sought make no sense and the Applicant cannot accept it. It would have been of assistance if the PLA had proposed such wording before this drafting was issued on 26 February as this could have been discussed. In the circumstances the Applicant is unclear what the PLA consider this to achieve.	The purpose of the addition is explained above.
9.26	The addition sought to paragraph 5 is rejected. *If following the results of any geophysical surveys carried out using multi-beam echo sounder survey (MBES), it is confirmed that cable exposure or reduction in navigable depth has occurred within the Area of Interest, the undertaker will notify the PLA as soon as reasonably practicable and in any event no later than 2 business days after the undertaker confirms any exposure has occurred.*	Paragraph 5 as proposed by the Applicant does not make sense. The wording included in the Deadline 7 Preferred Protective Provisions is as follows: "*If following the results of any geophysical surveys carried out using multi-beam echo sounder survey (MBES), it is confirmed that cable exposure which has resulted the cables has occurred within the Area of Interest, the undertaker will notify the PLA as soon as reasonably practicable and in any event no later than 2 business days after the undertaker confirms any exposure has occurred.*"
9.27	A reduction in navigable depth could be caused by any number of factor not the cables and the Applicant cannot be made responsible for it. Navigable depth will reduce after cable installation, because the cables are installed at a level below existing seabed, which will backfill and therefore 'navigable depth' will reduce. It is the Ports role to manage this, i.e. through dredging. A reduction in navigable depth from that at the completion of installation is therefore to be expected following cable installation and is not a matter which is to be reported or remediated. The parameter that the cables must be	Paragraph 5 is dealing with monitoring not remediation. There is to be on-going monitoring and if there is evidence that the cable has become exposed the Applicant agrees that notice should be given to the PLA. The reference to a reduction in navigable depth was included because the PLA would want to know urgently if burial had failed and the cable was therefore causing a reduction in water depth.

	at the level which allows the future dredging ambition is the appropriate control on the cable level, not this drafting.	
9.28	The PLA is seeking a very wide indemnity including: *all financial costs, charges, damages losses or expenses which may be incurred reasonably or suffered by the PLA by reason of:* *(a) the construction or operation of Work no 2(c), any specified work or its failure or a failure to adhere to the requirements of the provisions in this part [ ] of schedule [ ];* *(b) any act or omission of the undertaker, its employees, contractors or agents or others whilst engaged on the construction or operation of a specified work or Work no 2(c) or with any failure, and the undertaker must indemnify the PLA from and against all claims and demands arising out of or in connection with a specified work, Work no 2(c) or any such failure, act or omission or any failure to adhere to the requirements of the provisions in this part [ ] of schedule [ ].*	As explained in its Deadline 7 submissions the PLA would wish to have the same indemnity that has been in the protective provisions for the PLA for Thames Tideway Tunnel, Silvertown Tunnel, the draft Lower Thames Crossing (TR010032) and the draft Cory Decarbonisation Project (EN010128). The Applicant's position on indemnity is at odds with other DCO's that the PLA has been involved in and with other VE interested parties. It cannot be right that the Port of London Authority has to absorb the costs, charges, damages, losses or expenses that it incurs as a result of the Applicant's scheme including in reviewing or responding to submitted plans or details. The PLA would expect the Applicant to meet any costs or claims to which the PLA is required to meet as a consequence of the Applicant's scheme. The Applicant asserts that there are no credible claims that could be brought but why should the PLA have to cover that risk. As noted at Deadline 7, the PLA would draw the ExA's attention to the burial hierarchy as shown in Figure 4.1 of the in the Margate and Long Sands SAC Benthic Mitigation Plan (REP5-028) and in particular the caveat that if burial or the required DoL is not achieved it may be necessary to protect through other means. This emphasises the need for the PLA to have an appropriate indemnity clause as reburial may not be technically feasible.
9.29	The works authorised by the Order are entirely outside the Port. There can be no direct damage to any port asset from such works.	The PLA has consistently explained throughout the examination how there can be damage to the Port as a result of the works authorised by the Order. There is important navigational equipment on the land which could be impacted by the proposed development and which requires protective provisions in order to ensure no such impact occurs. The works also have the potential to impact on the ability of vessels to enter and exit the port. As noted by the Applicant the PLA would expect any indemnity to apply to both the onshore and offshore works.

9.30	The Applicant has repeatedly asked, given that the works are outside the Port of London and some distance away from any asset of the Port's, what this indemnity is needed to cover. The PLA has been unable to provide a realistic and credible answer, the answers received are 'claims regarding interruption to shipping' and an example where an authority was allegedly[1] held liable for the negligent actions of pilots they had trained.	As set out in the PLA's Deadline 7 preferred protective provisions the PLA expect to be indemnified for the following: i) the PLA's proper and reasonable legal costs, professional fees and disbursements incurred in connection with reviewing the details submitted to the PLA pursuant to the onshore and offshore protective provisions; ii) financial costs, charges, damages losses or expenses which may be incurred reasonably or suffered by the PLA by reason of the construction or operation of Work no 2(c), any specified work or the Applicant's failure to adhere to the requirements of the onshore and offshore protective provisions; iii) against all claims and demands arising out of or in connection with a specified work, Work no 2(c) or any such failure, act or omission or any failure to adhere to the requirements of the onshore and offshore protective provisions.
9.31	The Port has provided absolutely no legal basis for any person being able to claim against it for a loss arising from interruption to shipping due to the Applicant's works and the Applicant submits that is because no such basis exists. The use of the sea for navigation is a public right, not a facility the PLA is providing. There is no reasonable path of causation for a claim arising which would be payable by the PLA and which should be recouped from the Applicant. That the Port Marine Safety Code puts duties (not responsibilities) on ports which may extend to an extent outside of their statutory harbour limits does not mean they have regulatory responsibility or liability for what happens in those waters. In the area around the Deep Water Routes and the Sunk pilot boarding station many ports would also have those duties, not only the PLA and an argument that they are somehow liable for shipping delays in this areas is not supported by the code.	The Applicant is introducing works into the northern approaches for deeper draughted vessels into the Port of London through which deeper draughted vessels must pass through to get into the Port of London. The Order Limits also include the Sunk Pilot Diamond. The Applicant's argument for a lack of an indemnity seems to be as follows: • the PLA has no obligation to keep the DWRs available; • the Port Marine Safety Code places duties not responsibilities on the PLA and • no claim could be brought against the PLA due to delays experienced in the DWRs. As noted above the indemnity is seeking to ensure that any cost it is put to as a consequence of the scheme is met by the Applicant, which could be defending a claim which has no legal basis but has been brought about because of the Applicant's activities.

1 The Applicant has no knowledge of this case and cannot comment on the facts and circumstances.

9.32	An indemnity would not provide recompense where a Port, or its employees or agents were negligent and it would not be reasonable or justifiable for the PLA to seek payment in such circumstances. In the example given to the Port to the Applicant where a pilot, who would not be employed or contracted by the Applicant, acted negligently, it is entirely correct that the person employing or contracting that person is liable, not the Applicant. It is not a reasonable position to claim that an indemnity is necessary to protect against the negligent actions of a person not employed, contracted or under the control of the Applicant. The Applicant would not agree to pay an indemnity in such circumstances as the loss would not be attributable to its action, works or failure. That the indemnity would not even cover the example of when the PLA claim it would be needed demonstrates the lack of necessity for it.	The PLA is not seeking recompense where it has been negligent. The example quoted on behalf of the PLA is the case of the Sea Empress which struck rocks whilst entering Milford Haven Port spilling 72,000 tones of oil. Milford Haven Port Authority received a record fine of £4 million plus £825,000 costs in an indictment brought under Section 85(1) of the Water Resources Act 1991. The relevant part of Section 85 is as follows: "*a person contravenes this section if he causes…any…polluting matter to enter any controlled waters*". It was agreed by both parties that waters at Milford Haven and the South West Wales Coast are "controlled waters" for the purposes of Section 85 and Section 85 is a strict liability offence. Section 85 is a strict liability offence and was considered by the House of Lords in Empress Car Company (Abertillery) Limited -v- National Rivers Authority (1998). Following this case, Hon. Mr Justice David Steel stated the following: • "if the charge is "causing", the prosecution must prove that the pollution was caused by something which the defendants did, rather than merely failed to prevent; • thus there must have been some positive act by the defendants. <u>But that positive act need not have been the immediate cause of the escape.</u> The only question was whether something which the defendant had done, whether immediately or antecedently, had caused the pollution; • thus, for instance, maintaining a tank of diesel is doing something; if diesel escapes, it solely remains to consider whether the necessary causal connection is established; • the only question which has to be asked for the purposes of Section 85(1) is "did the Defendant cause the pollution?" <u>The fact that for different purposes or even for the same purpose one could also say that someone or something else caused the pollution is not inconsistent with the Defendant having caused it</u>; • if the Defendant did something which produced a situation in which the polluting matter could escape but a necessary condition of the actual escape which happened was also the act of a third party, the court should consider whether that act should be regarded as a normal fact of life or something extraordinary. If it was, in the general

		run of things, a matter of ordinary occurrences, it will not negative the causal effect of the Defendant's act, even if it was not foreseeable that it would happen to that particular defendant or take that particular form; • the distinction between ordinary and extraordinary is one of fact and degree to which the court must apply its common sense. The Hon. Mr Justice David Steel further opined that "the Port Authority did something which caused pollution", namely: • "the Authority operated the port; • it was compulsory for inward bound vessels such as the Sea Empress to carry a pilot; • the Port Authority trained and supervised the pilots; • a pilot was allocated to the Sea Empress in accordance with the rota system; • the grounding, whilst attributable to the negligent navigation of the pilot, was a normal fact of life not something extraordinary; • the subsequent loss of further crude oil and fuel oil was attributable to bad weather and the general uncertainties of any salvage operation both of which factors are normal not extraordinary incidents of life.
9.33	The PLA has also, for the first time shortly before deadline 7 and without discussion, sought to extend the indemnity drafting in the offshore PPs to apply to the onshore PPs. That drafting is entirely inappropriate and is rejected by the Applicant. The onshore PPs have been agreed for some time and there is no indemnity in those. Seeking to create an indemnity in a separate set of PPs for separate interests is unreasonable. That the PLA agreed the onshore PPs with no indemnity properly reflects the interaction of the authorised development and the PLA, where there is no direct interaction with PLA assets and therefore no reasonable pathway for them to suffer loss.	The PLA's assumption has been that the on and offshore provisions would be combined and that through the settlement of the offshore protective provisions an indemnity would be secured that would be applicable to the combined protective provisions. The inclusion of indemnity is standard practice as noted above. No other interested party has separate protective provisions. If for ease the protective provisions remain separate then we would request that the following wording is incorporated into the onshore protective provisions in Schedule 9 Part 9: **Indemnity** [113]. (1) The undertaker will pay to the PLA its proper and reasonable legal costs, professional fees and disbursements incurred in connection with reviewing the details submitted to the PLA pursuant to this Part 9 of Schedule 9.

		(2) The undertaker is responsible for and must make good to the PLA all financial costs, charges, damages losses or expenses which may be incurred reasonably or suffered by the PLA by reason of a failure to adhere to the requirements of this Part 9; (3) The undertaker must indemnify the PLA from and against all claims and demands arising out of or in connection with any failure to adhere to the requirements of the this Part 9 of Schedule 9. (4) The fact that any act or thing may have been done— (a) by the PLA on behalf of the undertaker; or (b) by the undertaker, its employees, contractors or agents in accordance with plans or particulars submitted to or modifications or conditions specified by the PLA, or in a manner approved by the PLA, or under its supervision or the supervision of its duly authorised representative, does not (if it was done or required without negligence on the part of the PLA or its duly authorised representative, employee, contractor or agent) excuse the undertaker from liability under the provisions of this paragraph. (5) The PLA must give the undertaker reasonable notice of any such claim or demand as is referred to in sub-paragraphs (2) and (3) and no settlement or compromise of it is to be made without the prior consent of the undertaker.

9.34	The differences in drafting sought by the PLA are shown as tracked changes in the attached appendix. The Applicant does not agree that any of the changes shown are necessary or justified and objects to the inclusion of all of them.	In terms of the PLA amendments which the Applicant does not specifically address we would draw the ExA 's attention to our Deadline 7 submissions as follows: **Surveys** Paragraph 3(2) the addition of "proposed activities" is inserted as the PLA are to be consulted on activities and programme and therefore it follows that the PLA ought to be able to recommendations on both proposed activities and programme. Paragraph 3(3) the change seeks to use the same language in paragraph 3(2) i.e the PLA is notified of the final programme for the matters it has been consulted upon pursuant to paragraph 3(2). **Unexploded Ordinance** Paragraph 3(4) The Applicant has agreed to consult the PLA on any application for marine licensing for the disposal of unexploded ordnance within the Area of Interest. As noted above this should also relate to unexploded ordinance that may affect the Area of Interest. The PLA would also wish for "disposal" to refer to "clearance" as we are dealing with clearance of unexploded ordnance from the Area of Interest not the disposal of unexploded ordnance into the Area of Interest.