

PROPOSED FIVE ESTUARIES OFFSHORE WIND FARM DEVELOPMENT CONSENT ORDER

PINS REFERENCE EN010115

LONDON GATEWAY PORT LIMITED (IP REF 20049288)

RESPONSE TO APPLICANT'S "10.62 NOTE ON DDCO DRAFTING – APPLICANT’S POSITION ON PROTECTIVE PROVISIONS" SUBMITTED AT DEADLINE 7

At Deadline 7 the Applicant submitted a document: "10.62 Note on DDCO Drafting - Applicant's Position on Protective Provisions" which provided (in section 7) a commentary on LGPL's submissions at Deadline 6 in REP6-080. As invited by the ExA we now make comments on that document by way of response for Deadline 8.

Comment	Response
7.1 London Gateway Port at Deadline 6 has sought amends to the dDCO and the protective provisions [REP6-080]. The Applicant had not been made aware before this was submitted that LGP was seeking such amends. As far as the Applicant was aware before this deadline, LGP were satisfied with the protective provisions set out in the Application.	We have set out a full explanation as to why the amendments to the protective provisions are required [REP6-080] . The proposed amendments to the dDCO flow from the ExA's request to consider appropriate wording for a Requirement. The amendments proposed to the protective provisions relate to that change or are of an incidental nature – they do not change in principle the position that has largely been settled between the parties, but they are necessary.
7.2 The Applicant wishes to be very clear that the PPs were first proposed to protect the ability of LGP in the future to dredge the Sunk deep water route to a depth not currently allowed only. The Applicant does not and has never accepted that there is any other potential impact on the port which could cause serious detriment and which requires to be addressed through PPs.	We do not propose to reiterate the evidence on impacts.
7.3 The dDCO does not (and does not seek or purport to) disapply any existing control of the harbour empowerment order in place for the port. The inclusion of any such provision would require the consent of LGP under section 145 of the Planning Act 2008. No such provision is included.	We note that there is no express disapplication of powers under the London Gateway Port Harbour Empowerment Order 2008 (the HEO). However, the powers in the dDCO, could be construed as a fetter on, or in some other way a limitation on, the exercise of the powers of LGPL under the HEO. We have included express provision to make it clear that it does not do so (see further in relation to para 7.20 below).
7.4 The current harbour empowerment order allows dredging to 17m. The future ambition to dredge to 22m to accommodate potentially larger vessels in the future has been allowed for by the Applicant, and as at Deadline 6, has been secured in the dDCO as a requirement in the offshore parameters. Given that, the Applicant does not agree that any of the other provisions sought, including the creation of a new requirement 3A which would unnecessarily duplicate controls already secured, are necessary or justified	<p>We have not proposed that the 22m provision be included in 2 separate requirements, that would be nonsensical.</p> <p>LGPL welcomes the Applicant's acceptance in principle for the need for a requirement as now included in the current dDCO [REP7-008]. Of the two forms of drafting proposed for the relevant requirement, LGPL prefers the wording as set out in our document REP6-080 (referred to as "requirement 3A").</p> <p>The Applicant's version set out as requirement 2(3) of the current dDCO [REP7-008] reads:</p> <p>"(3) Any part of Work No.2(c), any associated development or ancillary works located within the Sunk and Trinity Deep Water Routes, as shown shaded yellow on the Deep Water Route Cable Installation Area (Future Dredging depths) plan must be installed and maintained at a level which would not impede the dredging of those parts of the Sunk and Trinity Deep Water Routes:</p> <p>(a) shown shaded in yellow and outlined in a bold black line (and labelled Sunk Area A (22m CD)) to a level of 22 metres below Chart Datum;</p> <p>(b) shown shaded in yellow and outlined in a blue dotted line (and labelled Trinty (22m CD)) to a level of 22 metres below Chart Datum; and</p>

	<p>(c) shown shaded in yellow and cross hatched in orange (and labelled Sunk Area B (19m CD)) to a level of 19 metres below Chart Datum."</p> <p>This wording has limitations that render it unsatisfactory:</p> <ul style="list-style-type: none"> it refers to "any part of Work No.2(c), any associate development or ancillary works located within the Sunk and Trinity Deep Water Routes" – this is inappropriately narrow. The DWRs must be protected from the Applicant's works wherever they may take place. For example, the Applicant might do something pursuant to the Order outside the DWRs, but adjacent thereto, that would nevertheless impede the dredging of the DWRs to the depth stated; LGPL is pleased that the D7 version of the dDCO now includes reference to "maintained" where previously it did not, but we would suggest it still not sufficient – the formula we proposed of "designed, implemented, operated and maintained" is more accurate and complete; and it does not deal with the point regarding boulders and archaeology with which we deal further below in relation to para 7.7.
7.5 The Applicant objects to the proposed new requirement 3A set out in REP6-080 regarding the securing of cable burial levels in the offshore parameters. The Applicant provided LGP for its proposed requirement wording before submission of the dDCO at deadline 6 [REP6- 009] but never received any comment on that from LGP. The LGP drafting is unnecessary given the addition made to requirements to secure the cable level. The LGP drafting would require the unnecessary creation of new definitions.	<p>See comment above. Our understanding was that LGPL received the wording for the requirement indirectly via the PLA only a few days before Deadline 6 and after it had already formulated the more comprehensive alternative wording we provided as Requirement 3A.</p> <p>Our wording includes definitions for efficiency given that proposed Requirement 3A also includes further provision regarding boulders and archaeological finds and the definitions save repetition of the references to the shading on the plans etc.</p>
7.6 The Applicant rejects the suggestion made by LGP that the offshore works plans should be amended to try and show the deep water routes. That is not the purpose of the works plans. In addition, the deep water route area are referenced in the DML and in other documents and it makes sense to have one plan showing this restriction in the context of those multiple references than to try and make a plan which has another purpose add this detail.	<p>The DWRs need to be shown on a plan that is a certified document. Given that the boundaries of the DWRs to be specified are delineated in part by the boundary of the works powers under the Order, we had suggested amending the Offshore Works Plans – this was purely for efficiency and to avoid creating a new plan to be certified.</p> <p>However, LGPL has no objection to the areas instead being shown on a new plan, being the Deep Water Route Cable Installation Area (Future Dredging depths) plan that REP7-008 now refers to.</p>
7.7 The addition of sub-paragraph 3 of the LGP proposed requirement 3A: (3) The undertaker must not relocate any boulders or archaeological finds to the Deep Water Routes or the Deep Water Routes Buffer. is entirely unnecessary and demonstrates that LGP has not properly accounted for the commitments already made elsewhere in the Application in proposing this drafting. The Applicant has already committed to not relocating archaeological finds in the deep water routes in the outline WSI (not that it ever had intention of doing so). It has also committed to not relocating boulders into these routes in the CSIP (again not that there was ever any intention to do so). These commitments are in addition to committing to not reducing under keel clearance in these areas in the DML which would also preclude such relocation.	<p>We have considered the commitments made elsewhere in the Application, but those commitments on this point are weak. For LGPL, the point is a sufficiently fundamental one that it merits being captured in a requirement as we had proposed in REP6-080. We set out in REP6-080 the lack of certainty in relying now on principles in outline plans that future plans yet to be written and approved under the DML will 'accord' with.</p> <p>The Applicant refers to the outline marine WSI. It is true that that document was amended at Deadline 4 [REP4-026] to include a statement that "<i>Where any archaeological relocations are deemed necessary the Trinity and Sunk Deep Water Routes (DWR), utilised for shipping and navigation, will not be used for relocation sites to ensure the navigable depth is not reduced in these areas and also there will be no disruption to traffic movements.</i>"</p> <p>What the DWRs are for the purposes of the outline WSI [REP4-026] is not defined in that document. There is no reference to the relevant plan. It is not clear whether or not it includes all of the areas now referenced in the Applicant's Requirement 2(3) [REP7-008]. Further, this is only a third hand commitment – the DML at Schedule 11 requires at condition 13(2) that a WSI be submitted and approved by the MMO prior to each relevant stage of the licensed activities.</p>

	<p>The WSI needs only to be "in accordance with" the outline WSI. That gives LGPL no guarantee that this commitment in the same or as strong terms will ultimately be included.</p> <p>The Outline Cable Specification and Installation Plan [REP7-040] states at para 4.2.5 that "Boulders will not be relocated within the DWR areas." DWR areas are defined in that document as being "<i>Areas within the ECC relating to the Sunk and Trinity DWRs as shown Figure 2.1</i>". As is the nature with plans such as these, that lacks specificity – for example it is not clear what "areas relating to" means or whether all of the coloured areas on Figure 2.1 are included.</p> <p>Again, as with the outline WSI, this is a third hand commitment – the DML at Schedule 11 of the dDCO requires at condition 13(g) that a cable specification and installation plan (CSIP) be submitted and approved by the MMO prior to each relevant stage of the authorised development. That CSIP must be "in accordance with the principles of" the outline CSIP – that is weaker again as a requirement and gives LGPL no guarantee that the clear requirement not to relocate boulders to the defined DWRs will in fact be secured by the MMO.</p> <p>These are further reasons why we prefer the approach in our Requirement 3A with its clear definitions [REP6-080].</p> <p>Lastly we note that the Applicant states that "These commitments are in addition to <u>committing to not reducing under keel clearance in these areas in the DML which would also preclude such relocation</u>". That final statement (as underlined) misses the point – LGPL's concern regarding the relocation of archaeological finds and boulders is not so much that they would in themselves reduce under keel clearance, but rather that their relocation to the DWRs would make further dredging activity to maintain the DWRs more difficult.</p>
7.8 The Applicant accepts the changes sought to the definition of 'London Gateway' in REP6- 080;	Noted.
7.9 The Applicant does not accept that changes sought to paragraphs 3 and 4, not [nor] the insertion of new paragraph 5: Approvals 3.	Noted. LGPL maintains the changes proposed are require, subject to what is said in relation to para 7.11 below.
7.10 The operation and maintenance plan (O&M plan) will not specify cable repair or replacement operations. 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.	<p>The amendment to condition 4(4) of the DML at Schedule 11 the new dDCO [REP7-008] is welcomed.</p> <p>However, the Applicant's explanation on these issues does not make sense. In condition 4(2) of the DML it is clear that "Maintenance works include but are not limited to- ..(d) cable remedial burial; (e) cable repairs and replacement; (f) cable protection replenishment.". Condition 4(4) states that "All operation and maintenance activities must be carried out in accordance with the approved plan." How therefore can it be appropriate for the operation and maintenance plan not to specify cable repair or replacement operations? As permitted activities of maintenance, they must be covered by the plan.</p>
<p>7.11 There is no planned maintenance on the export cable. The outline O&M plan makes it clear</p> <p>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. A new marine licence would be required for cable replacement and LGP would have the opportunity to make representations on the application for that in the normal way.</p>	<p>As above, the Applicant's explanation does not make sense. We have set out above that Condition 4 of the DML at Schedule 11 expressly permits works of cable maintenance. If it is the Applicant's case that the Applicant would not, or could not, carry out works of cable maintenance then Condition 4(2) must be amended accordingly to remove paragraphs (d) to (f). It is highly inappropriate from a regulatory point of view to grant a licence expressly authorising something that it is simultaneously argued could not be done under that licence. We would be surprised if the MMO considered this an appropriate approach.</p> <p>If the Applicant removes paragraphs (d) to (f) from condition 4(2) of the DML then in the protective provisions in [REP6-080] the amendments to paragraphs 3 and 4 referring to the operation and maintenance plan, and all of paragraph 5, will not be necessary.</p>
7.12 The O&M plan must accord with the cable level commitments in the outline CSIP. Operation would not cause the cable to interfere with LGP and they do not require to control that activity. The offshore requirement parameters will also still apply to any maintenance works. It is not possible for the maintenance of the cables to reduce the cable burial level.	See responses above. If LGPL's role in the CSIP is accepted in the Protective Provisions (which it appears it is), then logically it should extent to the O&M Plan unless the changes referred to in the row above are made to the DML.

It is not necessary or appropriate for LGP to seek to control maintenance activities given the level commitment is already made.	
7.13 The Applicant objects to the change from 'within the jurisdiction' to 'within the limits of deviation for dredging' as defined by of the London Gateway HEO. The harbour limits are the extent of the jurisdiction of LGP and are known and understood. They are the appropriate definition of the area for these purposes.	The Applicant misunderstands the nature of the area of jurisdiction of LGPL under the HEO. LGPL has express powers under the HEO to carry out works which are beyond its area of jurisdiction. Work No 2 of the dDCO [REP7-008] is not within LGPL's area of jurisdiction, but it is within the area within which LGPL has express powers to carry out works under the HEO (specifically under article 13 of the HEO (SI 2008/1261)). The changes we have proposed in REP6-080 in this regard must therefore be made.
7.14 The Applicant strongly objects to insertion of sub-paragraph (e): (e) details of how any impacts on shipping to and from London Gateway Port will be minimised so far as reasonably practicable during the carrying out of the works covered by the draft cable specification and installation plan.	Noted.
7.15 It is not appropriate or reasonable for the impact on LGP to be given priority over all other impacts. The delivery of the authorised development will require the balancing of impacts across parties and receptors and LGP cannot be given under priority in that balance. This insertion demonstrates why the Applicant is very uncomfortable having multiple parties who are not the regulator seeking to approve a plan as, with each looking only to their own interests, it becomes impossible for the Applicant to accommodate conflicting requests. The Applicant cannot minimise impacts on LGP to the unfair detriment of other sea users, including other Ports, a reasonable balance must be struck. The Applicant also cannot minimise impacts on LGP by increasing impacts on other environmental receptors, a subtle balance must always be found. It is unclear to the Applicant how the issue would be resolved if minimising impacts on LGP meant increasing impacts on another port and that port objected eg if the PLA was also given approval as it seeks and felt that the impacts were too balanced against it.	<p>We have never suggested that the impact on London Gateway Port be given priority over all other impacts. We have sought only that the Applicant should specify how impacts on shipping to and from the Port will be minimised <i>as far as reasonably practicable</i>. That is a reasonable request. The outline CSIP already currently provides: "<i>The potential impacts on shipping cannot be wholly avoided through cable routing and will therefore be managed through engagement with the relevant stakeholders and the measures contained in management plans including the CSIP and the NIP.</i>" (para 2.2.2) [REP7-040]. The inclusion of paragraph (e) in the protective provisions is simply to ensure that the actual CSIP does in fact set out the relevant measures and establish a principle for them.</p> <p>There is not the conflict between / with other parties as the Applicant seeks to suggest – measures which minimise impacts on London Gateway Port will equally minimise impacts on other users of the Thames Estuary and equally there is no reason to suppose that such measures would disfavour Harwich Haven – the DWRs are not used by traffic to and from the Haven.</p> <p>However, to meet the apparent concerns expressed, we would be content for the wording to read</p> <p><i>" details of how any impacts on shipping to and from the Thames estuary will be minimised so far as reasonably practicable during the carrying out of the works covered by the draft cable specification and installation plan".</i></p> <p>LGPL does not agree that taking measures to minimise impacts on shipping equates to greater impacts on environmental receptors, and in any event, if it were the case that a measure that reduced impacts on shipping had a material impact on environmental receptors then it clearly would not comprise a <i>reasonably practicable</i> measure.</p>
7.16 New paragraph 10, amends to paragraphs 11 and 12 10.	-
7.17 The Applicant considers the changes sought unnecessarily restrictive and liable to cause delay in circumstances where the dispute between the parties is fundamental and cannot be resolved by amending the plan. In such circumstances there would no utility in resubmitting an amended plan for a second refusal and the delay caused by that is unnecessary. The Applicant accordingly rejects the amendments to paragraph 10 and 12.	The amendments are important to ensure that the Applicant genuinely engages with LGPL's comments, rather than simply invoking arbitration straight away.
7.18 The Applicant rejects the amendment in paragraph 11 from deemed approval to deemed refusal. As with discharge of requirements, delivery of a CNP NSIP should not be delayed by deemed refusal simply because the LGP do not deal with an application timeously given that the cable burial level is already secured and the subject matter of the CSIP should not therefore be contentious.	Noted.
7.19 New paragraph 13: Protection of London Gateway powers	-

7.20 This insertion is entirely unnecessary and serves no useful purpose. In stating what is already the position it is only liable to cause confusion that there is some provision in the dDCO which could be read as having some effect on the HEO, there is no such provision. The dDCO does not (and does not seek or purport to) disapply any existing control of the harbour empowerment order in place for the port. The inclusion of any such provision would require the consent of LGP under section 145 of the Planning Act 2008, that consent has not been sought as there is no provision which would trigger requiring it. The Applicant rejects the amendment.	We note that there is no express disapplication of powers under the HEO. However, the powers in the dDCO, could be construed as a fetter on, or in some other way a limitation on, the exercise of the powers of LGPL under the HEO. LGPL will in the future exercise its powers under the HEO in the area of the DWRs and it is important to LGPL to be certain that nothing in this dDCO will be argued at that point in time as constraining LGPL's powers, notwithstanding the effect the exercise of those powers by LGPL might have on any equipment that the Applicant may have laid on or under the seabed at that point in time. This is an important provision to safeguard LGPL's powers.
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Addleshaw Goddard LLP
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