



NORTH FALLS

Offshore Wind Farm

Applicant's Response to the Ports' Request For Protective Provisions

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Applicant's Response To Ports' Request For Protective Provisions

1. Introduction

- 1.1 In their respective Relevant Representations (RR) and Written Submissions (WR), the Port of London Authority¹ (PLA), London Gateway Port Limited² (LGPL) and Harwich Haven Authority³ (HHA) (collectively 'the ports'⁴) contend that Protective Provisions (PPs) should be included in the Development Consent Order (DCO) for North Falls to protect their respective statutory undertakings.
- 1.2 The Applicant anticipates that it will remain the ports' position that PPs are required in addition to, and irrespective of the mitigation sought by the ports being secured through alternative means (that mitigation being summarised in Section 2 below for context).
- 1.3 For the reasons set out in this submission it is the Applicant's position, as a matter of principle and substance, that PPs are not necessary, appropriate or reasonable in the circumstances, and imposing them would (to the Applicant's knowledge) be unprecedented.
- 1.4 The primary focus of this submission is the matter of PPs and this submission does not seek to address other matters raised in submissions to date by the ports. Any failure to respond to any particular point made by any of the ports in submissions to date should not be read as acceptance by the Applicant of that particular point.

2. Mitigation Is Appropriately Secured By Other Means

- 2.1 It is recognised by the Applicant that Work No. 3 (the offshore export cable corridor or ECC) crosses the Sunk Deep Water Route (**DWR**) and the Trinity DWR, which larger draught vessels⁵ must use to access and exit the approaches to the ports. The Applicant also acknowledges the ports' legitimate concern to ensure installation and

¹ RR-272, REP1-072, REP2-056, REP2-057 and REP3-067.

² RR-204, REP2-040, REP2-041 and REP2-042.

³ RR-126.

⁴ The Applicant understand that Port of Tilbury is considering its position regarding PPs at this stage as recorded in the Statement of Common Ground (Document Reference 10.14) submitted at Deadline 4. Port of Tilbury has not submitted a RR or WS into Examination requesting PPs at the time of writing.

⁵ The PLA WS notes that the port currently handles vessels up to 16.1m draught.

maintenance of Work No. 3 and any associated development (e.g. cable protection) does not adversely affect current or future usage of the Sunk and Trinity DWRs and the Sunk Pilot Diamond area, including by much larger vessels than in current usage⁶.

2.2 To place the Applicant's opposition to PPs in proper context, it is important to provide an update of the mitigation package that is proposed. As of Deadline 4 (**DL4**), the package of mitigation measures committed to by the Applicant and appropriately secured to address the concerns raised by the ports includes (in summary⁷):

Committed Mitigation	Secured By
Issue: insufficient cable burial depth within DWR which impedes future dredging to 22m CD	
Work No. 3 (offshore export cables) and any associated development (e.g. cable protection) will be installed and maintained at a level which will not preclude dredging to maintain a water depth of 22 metres chart datum (CD) within the Sunk and Trinity DWRs.	DCO Requirement 2(3) in Schedule 1, Part 3 of the dDCO (Revision 5, DL4 version).
	Included as a commitment in the outline Cable Specification and Installation Plan (CSIP) submitted at DL4 (see Section 4).
	Transmission assets DML (dDCO Schedule 9), condition 22, requires a final CSIP to be approved by the MMO in consultation with the MCA and Trinity House, and the final CSIP must be in accordance with the oCSIP.
Issues: reduction in water depth within DWR / temporary and permanent impacts from dredging	
Avoidance of disposal of dredged sediment (including Clay) within the DWRs	Included as a commitment in the outline Sediment Disposal Management Plan (SDMP) submitted at DL4 (see section 3 and Figure 31). Secured by DML (Schedule 9) condition 22.
Avoidance of disposal in proximity to Pilot Boarding area	
Any boulders encountered will not be relocated into the DWR.	Included as a commitment in the outline CSIP (see section 3). Secured by DML (Schedule 9) condition 22.
Issue: temporary or permanent impacts on the Sunk Pilot Diamond.	

⁶ The ports seek a position that would safeguard the ability for vessels with a projected draught of up to 20m, which allowing for 10% under keel clearance would require a water depth of 22m below Chart Datum.

⁷ Note, in the interests of brevity the table does not seek to identify each and every measure identified by the Applicant in the dDCO and suite of management plans which should be referred to for detail.

Protocols to ensure North Falls vessels / activities within the 'Area of Interest' ⁸ minimise impact of third-party vessels, including concurrent Restricted Ability to Manoeuvre vessels.	See commitments in the outline Navigation and Installation Plan (NIP), Rev 1 submitted at DL4. Secured by DML (Schedule 9) condition.
All reasonable endeavours will be made to avoid the use of cable protection in the vicinity of the Sunk pilot boarding area ⁹ so as to not reduce the navigable depth in this area.	Included as a commitment in the outline CSIP (see section 4). Secured by DML (Schedule 9) condition 22.

3. Why Protective Provisions Are Not Necessary Or Appropriate

3.1 No detriment to any statutory undertaking

3.1.1 PPs are normally imposed to safeguard the statutory undertaking of a statutory undertaker ('undertaker A') from a risk of serious detriment that might otherwise arise from the exercise by another statutory undertaker ('undertaker B') of powers conferred by subsequent legislation or, as in this case, a DCO. This ensures undertaker A can continue to discharge its statutory obligations, functions and duties in accordance with its governing legislation. In this case, there is no risk of detriment to the statutory undertaking of any of the ports for the reasons set out in the following paragraphs.

3.1.2 The ports do not own, or have any property interest or apparatus in, any land or seabed included within the Order limits. In contrast to other undertakers benefiting from PPs in the dDCO, no land, interests or apparatus owned or held by any port for the purposes of their statutory undertakings would be affected.

3.1.3 The North Falls project – and specifically Work No 3 – lies entirely outside the statutory harbour / jurisdictional limits of the PLA and LGPL. This is

⁸ The 'Area of Interest' is defined in the NIP (Rev 1) and shown on Figure 2.1 and covers the area covered by the Sunk Inner and Sunk Outer Precautionary Areas.

⁹ This area is defined as a 1nm radius around the Sunk pilot diamond, and a 1.5nm radius around the point 1.5nm directly east of the pilot diamond, as shown in Figure 4.1 of the oCSIP.

acknowledged by the PLA in its WS [REP2-056] at paragraph 2.3. There can be no serious detriment to the statutory undertakings of the ports from activities carried out outside their respective harbour/ jurisdictional limits.

- 3.1.4 It is acknowledged that a short section of the North Falls ECC does lie within the harbour limits of HHA. However, in that respect, the dDCO does not amend, limit or alter any statutory powers or provision applicable to HHA. The works by the Applicant within HHA's harbour limits will require a works licence granted by HHA. The interests of HHA are therefore protected and no detriment to HHA's undertaking can arise from any powers sought in the dDCO for North Falls.
- 3.1.5 The Sunk and Trinity DWRs and Sunk Pilotage area are not within the statutory jurisdictional limits of any of the ports. The DWRs and Sunk Pilotage area are 'at sea'. The use of the sea for navigation is a public right. In relation to undertaking works within these areas, there is no statutory requirement to obtain a works licence or any other form of consent from the ports. The relevant regulator and statutory consultees for works and activities such as cable installation in this area are the Marine Management Organisation (**MMO**), Maritime and Coastguard Agency (**MCA**) and the Corporation of Trinity House of Depford Strond (**Trinity House**).
- 3.1.6 The ports do not have a power to dredge to 22m CD. To date, the only specific statutory power identified by the ports and exercisable in respect of the DWR is a dredging power in article 13 (power to dredge) of The London Gateway Port Harbour Empowerment Order 2008 (**HEO 2008**). As discussed at ISH2, the HEO 2008 (schedule 3) permits dredging to a maximum depth "in The Sunk" of 16.5m CD¹⁰, noting also that charted water depths are currently in excess of 16.4m. There is no existing power or ability for LGPL or any of the ports to dredge beyond 16.5m CD currently (far less to 22m

¹⁰ It is noted that at ISH2 Mr Tyrell, on behalf of LGPL, stated that the dredging power includes an over-dredge allowance, permitting dredging to 17.5m CD.

CD). The Applicant cannot interfere with, impede or fetter a statutory power or right which does not currently exist.

3.1.7 To dredge to 22m CD in future, as was acknowledged at ISH2 by the representative of LGPL, a marine licence would need to be obtained by one of the ports (or alternatively a Harbour Revision/ Empowerment Order could be made). Any comment as to the likelihood or not that rights to dredge to 22m CD in future will be granted is speculation.

3.1.8 Therefore, none of the ports has identified specific statutory functions, powers or statutory duties in respect of the DWRs or the Sunk Pilotage Area which form part of their respective statutory undertaking and that would be adversely affected by North Falls to their serious detriment. The onus rests with the ports to identify (if any) the specific extant statutory functions, powers or duties that are exercisable in respect of the DWR and/or Sunk Pilot Diamond and which would be adversely affected by the installation and maintenance of Work No. 3 to their detriment.

3.1.9 The concern raised by the ports is essentially an economic one as openly acknowledged by PLA¹¹, and it relates in large part¹² to a future baseline scenario (which may or may not occur).

3.2 The MMO is the appropriate regulator

3.2.1 NFOWL, or any party, would be perfectly entitled to apply to the MMO for a marine licence under the Marine and Coastal Access Act 2009 (**MCAA**) to authorise works, such as cable installation, in or near the DWR and Sunk Pilotage Area. As noted above, no licence or consent from any of the ports would be needed.

3.2.2 The ports would be consulted on any such marine licence application and the MMO would need to have regard to their submissions and any objection

¹¹ See, for instance, paragraph 15.1 of the PLA WS **[REP2-056]**, where the concern of the PLA is that “*NF may cause economic disbenefits to the Port*”.

¹² For the avoidance of doubt, the Applicant does not seek to downplay the ports’ concerns relating to temporary impacts during cable installation and for which mitigation is provided in the NIP and CSIP.

raised, but the ports would not be the decision-makers and would not have any veto. Furthermore, any mitigation requested by the ports could only be secured by the MMO by means of marine licence conditions. There would be no question of, or opportunity for, the ports to insist upon PPs.

3.2.3 Further to the above, the suggestion in the PLA WS **[REP2-056]** at paragraphs 14.3 and 15.6, that it is “not appropriate for others such as the MMO or the MCA to be making decisions on matters that are fundamental to the PLA and the operation of the Port of London/ River Thames and the DWR”, is wrong in law and is rejected. Parliament has deemed it appropriate, and conferred powers on the MMO to take decisions in respect of marine licensable activities (e.g. dredging, cable installation) within or near the DWR and Sunk Pilotage Diamond area.

3.2.4 The MMO is the appropriate regulator and the ExA and Secretary of State can and should operate on the basis that the MMO and the MCA will perform their functions and duties competently and appropriately. The PLA submissions, insofar as they suggest that nothing short of PPs will suffice (and in a form which effectively supplants them in the MMO’s place as decision-maker) is, in effect, an attack on the competence of the MMO and MCA.

3.3 Unnecessary duplication of control

3.3.1 The proposed PPs would add an additional unnecessary and excessive layer of control. The cable burial commitment, and related mitigation commitments to ensure water depths in the DWR are safeguarded and to manage concurrent working, have been appropriately and adequately secured through the (multiple) means set out in Section 2 above.

3.3.2 The CSIP, NIP and SDMP are secured by DML conditions and must accord with the outline plans, which plans now include the various mitigation commitments sought by the ports and have been submitted into Examination. There is no basis for concluding that the MMO, in consultation with the

MCA¹³, would approve final plans which had been “diluted”¹⁴ in any material way such that they did not contain key mitigation measures contained in the outline plans.

- 3.3.3 It is entirely common-place for key mitigation measures to address adverse impacts to be contained in and secured through outline management plans, which are then conditioned as pre-commencement requirements in DMLs. This is a sensible and proportionate approach. The suggestion that this approach is inappropriate and insufficiently secure or does not provide sufficient certainty is rejected and should be resisted by the ExA and Secretary of State. If it is the case that nothing short of free-standing DCO requirements for each and every specific impact are required, DCOs will become ever more unwieldy.
- 3.3.4 Without prejudice to the submissions above, in an effort to resolve the concerns of the ports, as noted in Section 2 above the Applicant has included a cable burial DCO requirement at Deadline 4 (see Schedule 1, Part 3, 2(3) of the dDCO (Rev 5)). A failure to comply with the proposed DCO Requirement on cable burial depths would (without reasonable excuse) be an offence under the Planning Act 2008.
- 3.3.5 There is no basis for concluding that a DCO requirement, in addition to the CSIP, NIP and SDMP, is insufficiently certain or secure such that PPs are also necessary. The onus is on the ports to advance good reasons why PPs are necessary (as opposed to desirable from their perspective) I in addition to (not even instead of) the commitments secured in the manner set out in Section 2 above.
- 3.3.6 The reason which appears to be advanced in the case of the PLA is that it is not appropriate for the MMO and MCA to make decisions affecting the DWRs

¹³ It is noted that the MCA representative made the point at ISH2 that the MCA would ensure that the ports were consulted and their interests taken into consideration.

¹⁴ As suggested by LGPL in its WS **[REP2-041]** at paragraph 16.

and Sunk Pilotage area¹⁵. If that is the only reason, that is rejected for the reasons set out in Section 3.4 above.

3.4 PPs would be unprecedented

- 3.4.1 The Applicant is not aware of any precedent for PPs in analogous circumstances. The ports have not identified to the ExA any analogous precedent to date. If there was precedent it would presumably have been set out in submissions to this Examination (and likewise the Five Estuaries Examination).
- 3.4.2 The fact that PPs were the subject of negotiations (which did not reach agreement) by the ports and the Five Estuaries applicant does not serve as precedent or lead to any conclusion that PPs are necessary. As with planning conditions, the fact that an applicant may volunteer or be reluctantly willing to accept PPs does not render them necessary, reasonable and lawful to impose.
- 3.4.3 In our submission, it would be unreasonable and unprecedented to impose PPs which cede effective control to a third party to determine the basis on which an activity properly to regulated by another entity (in this case the MMO) is carried out, outside of the normal situation for PPs where a statutory undertaker's undertaking would be detrimentally affected.

4. Concluding Remarks

- 4.1 The Applicant acknowledges and takes the concerns raised by the ports very seriously. For this reason it has been working to identify appropriate mitigation measures. The Applicant welcomes the continued engagement of the ports on the specific details of the technical mitigation requirements in relation to the Sunk and Trinity DWR and Sunk Pilotage area. Through these ongoing discussions, the Applicant believes agreement can be reached during Examination on the specific technical measures required.

¹⁵ PLA WS [REP2-056] at paragraph 14.3.

- 4.2** The likely residual area of disagreement between the Applicant and the ports relates to the need or otherwise for PPs, in addition to and on top of other mechanisms which secure the identified mitigation as outlined in Section 2 above. For the reasons given in Section 3 above, the Applicant's firm position is that PPs are not necessary, appropriate or reasonable in the circumstances, and would be unprecedented.
- 4.3** Any such residual disagreement is not a matter that goes to whether development consent can or should be granted, rather it relates to the terms on which development consent may be granted.



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HARNESSING THE POWER OF NORTH SEA WIND

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