



PLANNING COMMITTEE

DATE: Wednesday, 2 March 2022

TIME: 6.00 pm

VENUE: Committee Room - Town Hall,
Station Road, Clacton-on-Sea, CO15
1SE

MEMBERSHIP:

Councillor White (Chairman)	Councillor Codling
Councillor Bray (Vice-Chairman)	Councillor Fowler
Councillor Alexander	Councillor Harris
Councillor Baker	Councillor Placey
Councillor Casey	

Most Council meetings are open to the public and press. The space for the public and press will be made available on a first come first served basis. The meeting will normally be live streamed and the link to this is available at www.tendringdc.gov.uk/livemeetings Those attending the meeting may therefore be filmed. After the meeting the recording of the live stream will normally be available using the same link. Agendas and Minutes are published on the Council's website www.tendringdc.gov.uk Agendas are available to view five working days prior to the meeting date and the Council aims to publish Minutes within five working days of the meeting. Meeting papers can be provided, on request, in large print, in Braille, or on disc, tape, or in other languages.

For further details and general enquiries about this meeting, contact Emma Haward Email: ehaward@tendringdc.gov.uk or Telephone on 01255686007

DATE OF PUBLICATION: Monday, 21 February 2022

AGENDA

1 Apologies for Absence and Substitutions

The Committee is asked to note any apologies for absence and substitutions received from Members.

2 Declarations of Interest

Councillors are invited to declare any Disclosable Pecuniary Interests or Personal Interest, and the nature of it, in relation to any item on the agenda.

3 Questions on Notice pursuant to Council Procedure Rule 38

Subject to providing two working days' notice, a Member of the Committee may ask the Chairman of the Committee a question on any matter in relation to which the Council has powers or duties which affect the District of Tendring **and** which falls within the terms of reference of the Committee.

4 A.1 PLANNING APPLICATION - 21/01810/VOC - BATHSIDE BAY STOUR ROAD HARWICH CO12 3HF (Pages 1 - 102)

Variation of conditions 2 (Approved Plans / Documents), 28 (Operational Lighting), 41 (Highways), 42 (Highways), 43 (Highways), 44 (Highways), 52 (Operational Air Quality Controls) and 53 (Operational Traffic Noise Attenuation) of application 10/00202/FUL in respect of the proposed Bathside Bay container terminal, Harwich.

5 A.2 PLANNING APPLICATION - 21/01792/VOC - BATHSIDE BAY STOUR ROAD HARWICH CO12 3HF (Pages 103 - 162)

Variation of condition 20 of permission 10/00203/FUL to require the approval and installation of an operational lighting scheme before the commencement of operation of the site (rather than the commencement of development).

Date of the Next Scheduled Meeting

The next scheduled meeting of the Planning Committee is to be held in the Committee Room - Town Hall, Station Road, Clacton-on-Sea, CO15 1SE at 6.00 pm on Tuesday, 15 March 2022.

Information for Visitors

FIRE EVACUATION PROCEDURE

There is no alarm test scheduled for this meeting. In the event of an alarm sounding, please calmly make your way out of any of the fire exits in the hall and follow the exit signs out of the building.

Please heed the instructions given by any member of staff and they will assist you in leaving the building and direct you to the assembly point.

Please do not re-enter the building until you are advised it is safe to do so by the relevant member of staff.

Your calmness and assistance is greatly appreciated.

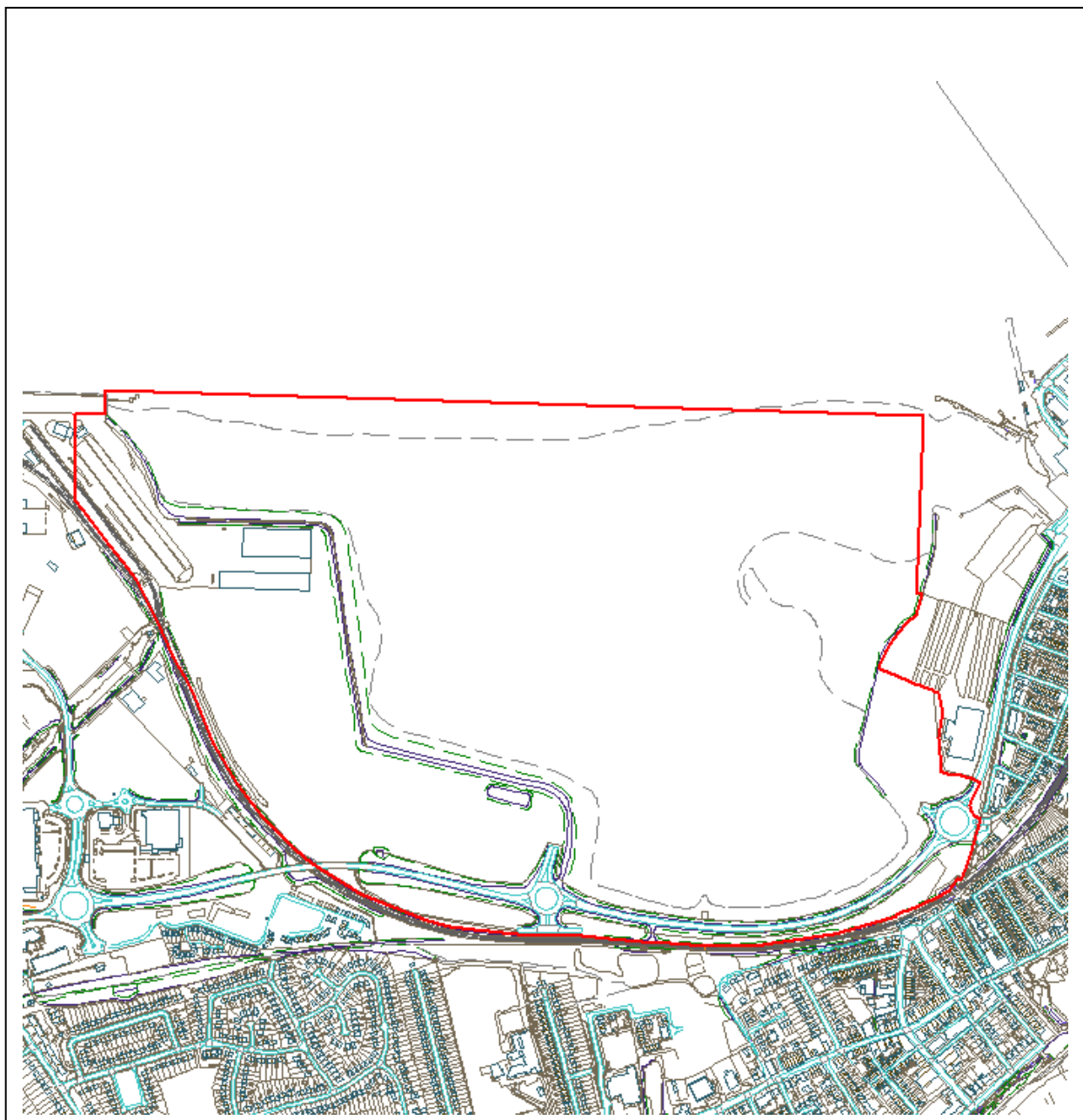
This page is intentionally left blank

PLANNING COMMITTEE

2nd March 2022

REPORT OF THE ASSISTANT DIRECTOR FOR PLANNING

A.1 PLANNING APPLICATION – 21/01810/VOC – BATHSIDE BAY STOUR ROAD HARWICH CO12 3HF



DO NOT SCALE

Reproduced from the Ordnance Survey mapping with the permission of the Controller of Her Majesty's Stationery Office © Crown Copyright. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings.

Application: 21/01810/VOC

Town / Parish: Harwich Town Council

Applicant: C/o Savills - Hutchison Ports (UK) Limited

Address: Bathside Bay Stour Road Harwich CO12 3HF

Development: Variation of conditions 2 (Approved Plans / Documents), 28 (Operational Lighting), 41 (Highways), 42 (Highways), 43 (Highways), 44 (Highways), 52 (Operational Air Quality Controls) and 53 (Operational Traffic Noise Attenuation) of application 10/00202/FUL in respect of the proposed Bathside Bay container terminal, Harwich.

1. **Executive Summary**

- 1.1 In 2003, Hutchison Ports (UK) Limited (“HPUK”) applied for planning permission for the construction of a new container terminal and related works at Bathside Bay, Harwich, and the provision of compensatory habitats at Little Oakley, Hamford Water. On 29th March 2006, permissions, inter alia, for reclamation works and a container terminal; a small boat harbour; the managed realignment of the coastline and creation of compensatory inter-tidal habitats off-site, and listed building consent in respect of the partial demolition of the long berthing arm attached to a listed Train Ferry Gantry were granted by the Secretary of State, following concurrent Public Inquiries held between 20th April 2004 and 21st October 2004. These developments were subject to rigorous assessments and were found on balance to be acceptable. In particular, with regard to the then Habitats Regulations, the Secretary of State found that Imperative Reasons of Overriding Public Interest (IROPI) outweighed the identified harm to the integrity of a European site (the Stour and Orwell Estuaries SPA).
- 1.2 In 2010 HPUK applied for replacement planning permissions for the reclamation works and container terminal (the Container Terminal), and a small boat harbour (the Small Boat Harbour). These permissions (10/00202/FUL and 10/00203/FUL) were granted by the Council on 14 February 2013 and remain extant, but development needs to have commenced on or before 29th March 2022.
- 1.3 This application seeks permission to vary eight of the conditions that formed part of the 2013 planning permission for the development of the Container Terminal at Bathside Bay, to allow for a phased start to the development by 29th March 2022. It is proposed that the list of approved plans specified in one condition is amended, with seven of the originally approved plans being superseded. The applicant has also requested that the wording of seven other conditions is amended to change the timing of their requirements. The original conditions required that details of specific elements of the scheme would be submitted to and approved by the Council prior to the commencement of the development, and in the case of one condition required that off-site highway works be implemented before the development could be operated. The applicant has proposed that the wording of these conditions is changed so that an initial phase of the development can commence without these conditions having to be discharged first.
- 1.4 There is a related application (21/01792/VOC) in respect of the Small Boat Harbour, which is the subject of a separate report. There is also an application (21/02144/FUL) for planning permission for the provision of compensatory habitats at Little Oakley, Hamford Water. The reclamation works forming part of the Container Terminal and Small Boat Harbour permissions will lead to the loss of approximately 69ha of feeding habitat in the Stour and Orwell Estuaries SPA and it is necessary for compensatory habitats to be created. One of the permissions granted by the Secretary of State in 2006 was for the compensatory habitats to be created at Little Oakley, but that permission has lapsed and the applicant now seeks a fresh permission for the same development, which will be the subject of a separate report.

- 1.5 This application has been subject to objections from some of the nature conservation bodies, including Natural England. In the view of Officers the most significant objections raised concern the adequacy of the compensatory measures and the change in July 2020 to the boundary of the Suffolk Coast and Heaths Area of Outstanding Natural Beauty. In its objection Natural England takes the view that the likely effects of the proposed development on the SPA and AONB have not been adequately addressed in the application material, and it has not been shown to Natural England's satisfaction that the proposed compensatory habitats at Little Oakley would be sufficient. The applicant has met with Natural England to discuss its objection, following which on 11 February the applicant's agent sent a letter responding to the points raised by Natural England; a copy of this letter is appended to this report as a background paper.. It is the applicant's view that the Environmental Statement and shadow Habitats Regulations Assessment submitted with the application provide an up to date assessment of the ecological value of the site and the potential impacts of the development, based on the best reasonably available information. It is also said that the proposed compensatory habitats at Little Oakley are sufficient and their delivery is properly secured. At the date of this report it is not known if Natural England's objection is maintained. Any further updates on this will be reported to Members at the meeting.
- 1.6 The change to the boundary of the AONB and the likely impact of the proposed development on it are matters which Officers and Members can judge for themselves as part of their assessment of the planning merits (taking into account the Council's statutory duty under section 85 of the Countryside and Rights of Way Act 2000, policy and any relevant representations). There are, however, particular legal requirements relating to development proposals that might affect an SPA. Under the Habitats Regulations the Council must carry out an appropriate assessment (sometimes called a Habitats Regulations Assessment (HRA)) of the implications of the proposed development on the SPA. As the appropriate nature conservation body, Natural England has an important role to play in this and due weight should be given to its advice. The Council should not deviate from its advice in this area unless it has cogent reasons for doing so.
- 1.7 Officers are satisfied that the variation to the planning conditions and the approved plans are capable of being justified and acceptable, subject to the provision of adequate compensatory habitats. The proposed development remains broadly consistent with the Council's planning policies, provided it secures the required protection of environmental, ecological and amenity interests. It is accepted that the proposed amendments to the layout of the port are necessary for a variety of operational and practical reasons and do not fundamentally alter the nature of the approved scheme. Further, the Planning Practice Guidance (PPG) provides that "*....pre-commencement conditions should only be used where there is a clear justification, which is likely to mean that the requirements of the condition (including the timing of compliance) are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission...*" (Paragraph: 007 Reference ID: 21a-007-20180615). Officers are also of the view that the likely impact on the AONB (as extended) would not provide a reason for refusal.
- 1.8 In light of Natural England's recent objection, however, Officers are reluctant to recommend the grant of permission. It may be that between publication of this report and the Committee meeting the position will have changed, and given the significance of the application and the limited time in which to consider it Officers believe it is appropriate to put the application before Members now. Officers will update Members as soon as possible of any change of circumstances..
- 1.9 If ultimately the decision is taken to grant the application, the new planning permission will need to restate the previous planning conditions (save as varied by the Committee) which will control the development. However, bearing in mind that a number of other pre-development conditions on the 2013 planning permission are being sought to be discharged (or partially

discharged), pursuant to 21/01625/DISCON and 21/01817/DISCON, to enable the first phase to go ahead on existing land i.e. without land reclamation/marine works taking place, in line with the PPG these are provisionally recommended to be amended to compliance conditions wherever possible.

- 1.10 The work to update the planning conditions and the list of approved plans is on-going and it is therefore recommended that Members grant the Assistant Director of Planning authority to continue to update the remaining pre-commencement planning conditions (nos 3, 5, 7, 9, 10, 11, 12, 13, 14, 16, 17, 25, 27, 29, 30, 32, 33, 34, 35, 36, 38, 39, 40, 48 & 49) as these are discharged by the Council through the discharge of conditions applications prior to the issuing of any new planning permission pursuant to this application. There will also need to be appropriate planning obligations in place to ensure (among other things) delivery of the compensatory habitats at Little Oakley, and again the Assistant Director of Planning will require authority to approve such supplemental or other legal agreement as is necessary to make the development acceptable so that if Members ultimately resolve to grant planning permission there is an appropriate legal framework of obligations in place.

Recommendation:

- (1) The Committee consider this report and any updated information provided.**
- (2) The Assistant Director of Planning be authorised:**
 - (a) to approve the completion of a supplemental or other legal agreement under section 106 of the Town and Country Planning Act 1990 to secure the provision of appropriate compensatory habitats and other matters necessary to make the proposed development acceptable;**
 - (b) subject to the conditions stated in section 11 below, and the revision of any conditions that require details to be submitted, to update on a provisional basis pre-commencement conditions to compliance conditions (nos 3, 5, 7, 9, 10, 11, 12, 13, 14, 16, 17, 25, 27, 29, 30, 32, 33, 34, 35, 36, 38, 39, 40, 48 & 49), only where details have been submitted to and approved in writing by the local planning authority pursuant to 21/01625/DISCON and 21/01817/DISCON; and**
 - (c) to refuse planning permission in the event that an appropriate legal agreement has not been completed by March 29th 2022.**

2. Planning Policy

- 2.1 The following National and Local Planning Policies are relevant to this planning application.

National Policy

NPPF National Planning Policy Framework July 2021
National Planning Practice Guidance
National Policy Statement for Ports (2012)

Local Policy

Tendring District Shared Strategic Section 1 Local Plan (2021)

SP1 Presumption in Favour of Sustainable Development

SP2 Recreational disturbance Avoidance and Mitigation Strategy (RAMS)

SP3 Spatial Strategy for North Essex

SP5 Employment

SP6 Infrastructure and Connectivity

SP7 Place Shaping Principles

Tendring District Section 2 Local Plan (2022)

SPL3 Sustainable Design

HP3 Green Infrastructure

PP12 Improving Education and Skills

PP14 Priority Areas for Regeneration

PPL1 Development and Flood Risk

PPL4 Biodiversity and Geodiversity

PPL5 Water Conservation, drainage and sewage

PPL7 Archaeology

PPL8 Conservation Areas

PPL9 Listed Buildings

PPL10 Renewable Energy Generation

CP1 Sustainable Transport and Accessibility

CP2 Improving the Transport Network

DI1 Infrastructure Delivery and Impact Mitigation

Local Planning Guidance

Essex County Council Car Parking Standards - Design and Good Practice

Essex Design Guide

Status of the Local Plan

2.2 Planning law requires that decisions on planning applications must be taken in accordance with the development plan unless there are material considerations that indicate otherwise (Section 70(2) of the 1990 Town and Country Planning Act and Section 38(6) of the Planning and Compulsory Purchase Act 2004). This is set out in Paragraph 2 of the National Planning Policy Framework 2021 (the Framework). The 'development plan' for Tendring comprises, in part, Sections 1 and 2 of the Tendring District Council 2013-2033 and Beyond Local Plan (adopted in January 2021 and January 2022, respectively), together with any neighbourhood plans that have been brought into force.

3. Relevant Planning History

89/02099/OUT	Proposed industry & warehousing area, business park, housing, retail park, hotel & leisure complex, open space, site for primary school, local shops and community centre, heritage centre, mooring basin, footpaths, associated roadworks, landscaping and reclamation of the southern end of Gas House Creek.	Approved	04.03.1992
91/00985/DETAIL	Erection of 57 residential units.	Approved	10.03.1992
95/01439/FUL	(Reclaimed Land at Bathside Bay, Harwich) Variation of 5 conditions (No's. 4, 7, 11, 22 and 27) and amendment to master plan land use allocations granted permission under reference TEN/2099/89	Approved	26.03.1996
96/01321/DETAIL	(Land at Bathside Bay, adjacent to Gas House Creek, off Stour Road, Harwich) Retail development comprising: Factory/Discount Outlets of varying sizes and public toilets	Approved	16.04.1997
98/00052/FUL	(Bathside Bay situated between Parkeston Quay and) Variation to condition 3(a) of consent TEN/2099/89 to read within a period of 8 years commencing on the date of this notice	Approved	02.06.1998
00/00153/FUL	Variation to Condition 03(a) as modified by TEN/98/0052	Approved	29.03.2000
02/01759/FUL	Retention of 2.4m high security fence	Approved	12.11.2002
03/00600/FUL	Reclamation of Bathside Bay and development to provide an operational container port; such works comprising:- Engineering and reclamation works including	Approved on appeal	29.3.2006

construction of a cofferdam and 1.4 km quay wharf; Construction of a concrete block paved container handling and stacking facility with 11 quayside cranes and 44 Rubber Tyre Gantry (RTG) cranes and associated workshop, customs control, Border Inspection Post and mess buildings, substations, fuelling station and mast and crane mounted lighting; Development of a 6.13 ha rail terminal with 3 rail gantry cranes and heavy duty container transfer area linked to existing rail facilities; Associated office building, logistics facility, car and HGV parking and driver facilities; Site works, including additional hardstanding, structural landscape and mounding, wetland buffer, access internal estate roads and perimeter fencing.

03/00601/FUL	Development of a small boat harbour comprising; construction of a cofferdam wall and breakwater; reclamation; sheltered moorings for boats and wave wall; slipway and boat storage and tender compounds; public viewing and seating areas; Fisherman's store and fuel facility; and site works including access road, car parking and lighting, fencing and landscape mounds.	Approved on appeal	29.3.2006
03/00602/LBC	Partial demolition of the long berthing arm attached to the listed Train Ferry Gantry and associated remedial works.	Approved	19.11.2003
10/00201/FUL	Application under Section 73 of The Town and Country Planning Act 1990 (as amended) to vary Conditions 3 (phasing), 45 (Highways), 46 (Highways) and 47 (Highways) and to delete and replace Conditions 41 (Highways), 42 (Highways), 43 (Highways) and 44 (Highways) attached to planning permission 03/00600/FUL.	Withdrawn	23.11.2012
10/00202/FUL	Application for replacement planning permission (in respect of planning permission 03/00600/FUL) subject to a new time limit (to 2021) for the reclamation of Bathside Bay and	Approved	14.02.2013

development to provide an operational container port; comprising:- Engineering and reclamation works including construction of a cofferdam and 1400 metre quay wall; Construction of a concrete block paved container handling and stacking facility with 11 quayside cranes and 44 Rubber Tyre Gantry (RTG) cranes and associated workshop, customs control, Border Inspection Post and mess buildings, substations, fuelling station and mast and crane mounted lighting; Development of a 6.13 ha rail terminal with 3 rail gantry cranes and heavy duty container area linked to existing rail facilities; Associated office buildings, logistics facility, car and HGV parking and driver facilities; Site works, including additional hardstanding, structural landscape and mounding, wetland buffer, internal estate roads and perimeter fencing.

10/00203/FUL	Application for replacement planning permission (in respect of planning permission 03/00601/FUL) subject to a new time limit (to 2021) for a small boat harbour (sic) comprising; engineering and reclamation works including construction of a cofferdam wall and breakwater; sheltered moorings for boats and wave wall; slipway and boat storage and tender compounds; public viewing and seating areas; Fisherman's store and fuel facility; and site works including access road, car parking and lighting, fencing and landscape mounds.	Approved	14.02.2013
10/00204/LBC	Application for replacement listed building consent (in respect of listed building consent 03/00602/LBC) subject to a new time limit (to 2021) for the partial demolition of the long berthing arm attached to the listed Train Ferry Gantry and associated remedial works.	Approved	14.02.2013
21/01625/DISCON	Discharge of conditions 3, (Scheme of phasing substantially) 12, (Archaeological work) 13, (Construction management plan) 14,	Current	

(Control of noise and vibration) 16, (Reverse warning system) 17, (Percussive piling operation) 25, Scheme of construction lighting) 27, (Details of luminaries) 29, (Construction dust management plan) 30, (Cleaning and maintenance programme) 32, (Wheel wash facility) 33, (Handling of materials) 34, (Ambient dust monitoring strategy) 36, (Flood evacuation plan) 38 (Scheme for concrete pouring and filling works) and 39 (Scheme for pollution control) of application 10/00202/FUL.

21/01792/VOC	Variation of condition 20 of application 10/00203/FUL to not release HPUK from the requirement to secure the prior approval and installation of operational lighting, but to defer submission, approval and installation in respect of these details prior to any operation of the SBH. The application sets out the proposed amended wording for this condition.	Current
21/01810/VOC	Variation of conditions 2 (Approved Plans / Documents), 28 (Operational Lighting), 41 (Highways), 42 (Highways), 43 (Highways), 44 (Highways), 52 (Operational Air Quality Controls) and 53 (Operational Traffic Noise Attenuation) of application 10/00202/FUL in respect of the proposed Bathside Bay container terminal, Harwich.	Current
21/01817/DISCON	Discharge of conditions 5, (Landscaping scheme) 7, (Details of the design and external appearance) 9, (Scheme showing full details of fences, walls, gates and other means of enclosure) 10, (Drawings showing foul and surface water drainage) 11, (Scheme for the design of the proposed Wetland Area) 35, (Details of measures to mitigate gas migration and accumulation) 40, (Scheme for the translocation of reptiles) 48, (Vehicular access) and 49 (Scheme and layout for hard standing for	Current

21/02047/LBC	Lorries and cars) of application 10/00202/FUL. Partial demolition of the long berthing arm attached to the listed Train Ferry Gantry and associated remedial works.	Granted	04.02.2022
--------------	--	---------	------------

4. Consultations

ECC Highways Dept	No response received at the time of writing this report, any views expressed will be reported to Members at the Planning Committee meeting.
-------------------	---

Environmental Protection 24.11.2021	They have revisited the original planning permission and submitted documents and can confirm that the variations of the conditions relate to a stage in the planning and construction (allowing the development to progress). This application does not affect the requirements and recommendations made on the original planning application and this is still consistent with their previous representation. Based on this Environmental Protection have no objections to this variation of conditions application.
--	---

Suffolk Coast and Heaths Area of Outstanding Natural Beauty 17.01.2022	To support the above Variation of Condition, application guidance and baseline information used in the preparation of the 2003 Environmental Statement has been reviewed to determine if the conclusions reached remain valid. The review of the previous Landscape and Visual Impact Assessments makes no reference in the LVIA Chapter (Section 12 Part 1) to the fact the Suffolk Coast and Heaths AONB boundary was extended in July 2020.
---	--

The application site lies within the setting to the Suffolk Coast & Heaths Area of Outstanding Natural Beauty (AONB). The boundary of the Suffolk Coast and Heaths AONB was extended in July 2020 to include along with other areas, the south bank of the River Stour in Tendring and the River Stour itself. On the Tendring side of the Stour Estuary, the AONB boundary lies approximately 2.6km west of Bathside Bay, while the boundary of the Suffolk Coast & Heaths AONB on the northern Suffolk side of the Stour Estuary lies 1km opposite the application site.

Paragraph 177 of the NPPF requires development within the setting of AONBs to be sensitively located and designed to avoid or minimise adverse impacts on the designated areas. This and all planning applications linked to the Bathside Bay development will need to be assessed against this national policy requirement. This is necessary to ensure that the primary purpose of AONB designation i.e. to conserve and enhance is met and that the planning authority can meet its Duty of Regard obligations under Section 85 of the Countryside and Rights of Way Act 2000. The Local Planning Authority should be satisfied that impacts on the extended

AONB are being and will be fully considered in all relevant applications linked to the Bathside Bay development.

Condition 28- Operational Lighting

Bathside Bay is sandwiched between the Parkeston Oil Refinery and Harwich International Port to the west and Harwich Town /Dovercourt to the east. Felixstowe Port lies opposite at the mouth of the River Orwell. Given the industrialised nature of these uses tranquillity levels close to the mouth of the Stour Estuary/ Orwell Estuary mouth are already impacted. Without effective light mitigation measures, tranquillity levels could be further eroded.

The application is seeking to vary Condition 28 (Operational Lighting) to provide greater flexibility. Given the industrialised nature of land uses surrounding Bathside Bay, light pollution levels in the local area are already high.

Light pollution levels linked to the development will increase within the setting to the AONB. Light levels will increase overall as each stage of this development progresses. This will have the effect of intensifying existing light pollution levels within the already industrialised landscape. Light pollution will be more evident from Shotley Gate as it lies immediately opposite the site. From the southern bank of the Stour/AONB, lighting from the gantry cranes will be evident and skyglow will increase. These impacts are recognised in the Landscape and Visual Impact Assessments (LVIAs) prepared to support previously approved applications. The LVIAs also acknowledge that it will not be possible to fully mitigate these impacts given the type and scale of the development. Provided that the relevant lighting measures specified in section 3.3.5 of the Planning Statement are implemented, during each operational phase of the scheme, these measures will go some way towards minimising light pollution within the setting of the AONB. As such, Condition 28 could be varied as proposed.

Compensatory Habitat provision.

As part of the VOC application, an amendment is being sought to the previously agreed Section 106 agreement, to vary the timing of the implementation of the Managed Realignment scheme at Little Oakley. This scheme has to be delivered as compensation for the intertidal habitats lost at Bathside Bay and impacts on qualifying species and features of the SPA.

The Section 106 obligation (Schedule 3, 3.1) stated 'Not to implement the Container Port Development until the owner has let a contract securing the implementation of the Little Oakley Managed Realignment (under 03/1200/FUL) in a timely manner in accordance with the terms of the Section 106 obligation'.

The proposed amendment is seeking to postpone the trigger for the implementation of this obligation to Phase 2 when tidal

works at Bathside Bay will have commenced. The change is being sought as it is unlikely that a contract could be let to secure the implementation of the realignment works at Little Oakley, prior to the commencement of the container terminal development, due to the need for a new planning permission, for these works.

The AONB team is concerned that varying the obligation agreed and approved as part of the previous Section 106 agreement(s), to what is now being requested by the applicant would undermine the delivery of ecological mitigation and compensatory habitat in a timely manner. The compensatory habitats created will take considerable time to establish as functioning replacement habitat. The AONB team do not consider that it is appropriate to push the delivery of the compensatory habitat back to Phase 2 as proposed. The compensatory habitat needs to be established as early as possible to ensure that the managed realignment is fully implemented and functioning before the reclaim of Bathside Bay, to meet modern standards and to comply with Government guidance.

The AONB team is aware that a planning application has recently been submitted for the compensatory habitat scheme at Little Oakley (21/02144/FUL). Considerable time has passed since the site at Little Oakley was identified and agreed as suitable compensatory habitat for the loss of intertidal habitat at Bathside Bay.

The Preliminary Ecological Assessment Report submitted to support the Little Oakley application, identifies the presence of some Protected Species and the need for a number of additional ecological surveys. The AONB team propose that the completion of these ecological surveys is prioritized to enable the implementation of the compensatory habitat scheme before tidal works begin at Bathside Bay and to enable work to commence to identify suitable replacement habitats for those species impacted by the proposals that may need to be translocated.

Babergh District Council
14.02.2022

Babergh District Council provides the following comments:

The LPA notes the concerns raised by Natural England, ECC Ecology, RSPB, Essex and Suffolk Wildlife Trusts and the AONB Officer with regards to the impact of the development on the Stour and Orwell Estuary SPA and Ramsar site (part of which is within Babergh District) and trusts that Tendring District Council will ensure that the compensation site at Little Oakley is provided as soon as possible to give time for this habitat to be established prior to the loss of habitat at Bathside Bay;

With regards to Conditions 41, 42 and 43 there is concern that the amendments to these conditions *[as recommended by National Highways in their consultation response of 02.02.2022]* could result in the proposed highway

Marine Management
Organisation
10.01.2022

improvements to the A120 not being implemented with the result that some container traffic diverts along the A137 through Babergh to access the A14 at Wherstead. A very robust evidence base should be required should the developer propose not to undertake upgrades to the A120.

Please be aware that any works within the Marine area require a licence from the Marine Management Organisation. It is down to the applicant themselves to take the necessary steps to ascertain whether their works will fall below the Mean High Water Springs mark.

The Marine Management Organisation (MMO) is a non-departmental public body responsible for the management of England's marine area on behalf of the UK government. The MMO's delivery functions are; marine planning, marine licensing, wildlife licensing and enforcement, marine protected area management, marine emergencies, fisheries management and issuing European grants.

Marine Licensing

Activities taking place below the mean high water mark may require a marine licence in accordance with the Marine and Coastal Access Act (MCAA) 2009. Such activities include the construction, alteration or improvement of any works, dredging, or a deposit or removal of a substance or object below the mean high water springs mark or in any tidal river to the extent of the tidal influence. You can also apply to the MMO for consent under the Electricity Act 1989 (as amended) for offshore generating stations between 1 and 100 megawatts in England and parts of Wales. The MMO is also the authority responsible for processing and determining harbour orders in England, and for some ports in Wales, and for granting consent under various local Acts and orders regarding harbours. A wildlife licence is also required for activities that that would affect a UK or European protected marine species.

Marine Planning

As the marine planning authority for England the MMO is responsible for preparing marine plans for English inshore and offshore waters. At its landward extent, a marine plan will apply up to the mean high water springs mark, which includes the tidal extent of any rivers. As marine plan boundaries extend up to the level of the mean high water spring tides mark, there will be an overlap with terrestrial plans which generally extend to the mean low water springs mark. Marine plans will inform and guide decision makers on development in marine and coastal areas. On 2 April 2014 the East Inshore and Offshore marine plans were published, becoming a material consideration for public authorities with decision making functions. The East Inshore and East Offshore Marine Plans cover the coast and seas from Flamborough Head to Felixstowe. For further information on

how to apply the East Inshore and Offshore Plans please visit our Marine Information System. The MMO is currently in the process of developing marine plans for the South Inshore and Offshore Plan Areas and has a requirement to develop plans for the remaining 7 marine plan areas by 2021.

Planning documents for areas with a coastal influence may wish to make reference to the MMO's licensing requirements and any relevant marine plans to ensure that necessary regulations are adhered to. For marine and coastal areas where a marine plan is not currently in place, we advise local authorities to refer to the Marine Policy Statement for guidance on any planning activity that includes a section of coastline or tidal river. All public authorities taking authorisation or enforcement decisions that affect or might affect the UK marine area must do so in accordance with the Marine and Coastal Access Act and the UK Marine Policy Statement unless relevant considerations indicate otherwise. Local authorities may also wish to refer to our online guidance and the Planning Advisory Service soundness self-assessment checklist.

Natural England

Natural England objects to this proposal. As submitted they advise that:

- It will have an adverse effect on the integrity of Stour and Orwell Estuaries Special Protection Area ('SPA') also designated as Stour and Orwell Estuaries Ramsar <https://designatedsites.naturalengland.org.uk/>;
- Any appropriate assessment made by the Council as competent authority, based on the information that has been so far provided by the applicant and made available to Natural England would be incomplete;
- Natural England remains to be convinced that the compensatory measures proposed are sufficient to meet the requirements of the Habitats Regulations both in terms of the certainty of their delivery and the substance of the measures. This is particularly the case where the assessment of the adverse effects being compensated for is incomplete.
- It will damage or destroy the interest features for which Stour Estuary Site of Special Scientific Interest ('SSSI') has been notified.

Natural England's further advice on designated sites/landscapes and advice on other natural environment issues is set out below.

Introduction

Natural England notes that the original planning permission to which these variations of condition applications relate was granted by the Secretary of State on the grounds of an Imperative Reason of Overriding Public Interest ('IROPI') on 29 March 2006. It is noted from paragraph 3.5.1 of the applicant's planning statement accompanying this application, that "the effect of permitting a section 73 variation of condition is to issue a new planning permission"

and therefore they concur that a Habitats Regulations Assessment ('HRA') is required.

Natural England notes that information has been provided by the applicant which it is presumed will inform the HRA to be carried out by the Council. It remains the obligation of the Council to make its own HRA and to consult Natural England for the purposes of any appropriate assessment it makes during that process. They provide the advice on the assumption that the Council intends to rely on the information provided to date for the purposes of carrying out its HRA.

Paragraph 4.5.5. of the Planning Statement states that "the Habitats Regulations preclude the grant of planning permission pursuant to section 73unless the same thought process has been undertaken by a decision maker as apply on an original grant of permission". In Natural England's view this involves a complete assessment for the purposes of the Habitats Regulations, including an appropriate assessment of the implications for the site in view of its conservation objectives and if necessary considering alternatives, whether there are imperative reasons of overriding public interest why it should proceed and compensatory measures. It is understood from the documents submitted by the applicant that it agrees with this approach and has sought to provide the information that will enable such an assessment to be made by the Council. It remains of course for the Council to satisfy itself as to whether it meets its obligations in this regard (i.e. that the development can proceed due to IROPI).

The site

The proposal site lies within the Stour and Orwell Estuaries Special Protection Area (SPA) and Ramsar, which is recognised as an internationally important site for nature conservation. Accordingly, it is afforded the highest possible level of protection for an environmental site under both UK law and planning policy.

The Stour and Orwell Estuaries SPA and Ramsar comprise extensive mud-flats, low cliffs, saltmarsh and small areas of vegetated shingle on the lower reaches. Breeding avocet feed upon the intertidal mudflats and use the grazing marshes to nest during the summer. The SPA also supports important numbers of overwintering waterbirds, which also use the mudflats extensively for feeding. The saltmarsh and grazing marsh provide important roosting sites, whilst some birds feed and roost on the surrounding arable land. The SPA also supports a large and diverse waterbird assemblage for which it is designated, including great crested grebe (*Podiceps cristatus*), cormorant, (*Phalacrocorax carbo*), dark-bellied brent goose (*Branta bernicla bernicla*), shelduck (*Tadorna tadorna*), wigeon (*Anas penelope*), gadwall (*Anas strepera*), pintail (*Anas acuta*), goldeneye (*Bucephala clangula*), ringed plover (*Charadrius hiaticula*), grey plover (*Pluvialis squatarola*), lapwing (*Vanellus vanellus*), knot (*Calidris canutus islandica*), dunlin (*Calidris alpina alpina*),

blacktailed godwit (*Limosa limosa islandica*), curlew (*Numenius arquata*), redshank (*Tringa tetanus*) and turnstone (*Arenaria interpres*). The following species supported by the site are individually qualifying species of the SPA; Avocet, (*Recurvirostra avosetta*) Black-tailed godwit (*Limosa limosa islandica*) Dark-bellied Brent goose (*Branta bernicla bernicla*) Dunlin (*Calidris alpina alpina*), Grey plover (*Pluvialis squatarola*) Knot (*Calidris canutus*), Pintail (*Anas acuta*) and Redshank (*Tringa tetanus*.)

The Ramsar site is designated for its large and diverse waterbird assemblage along with supporting wetland invertebrate and wetland plant assemblages and the following individually qualifying species; black-tailed godwit (*Limosa limosa islandica*), dark-bellied brent goose (*Branta bernicla bernicla*), dunlin (*Calidris alpina alpina*), grey plover (*Pluvialis squatarola*), knot (*Calidris canutus islandica*), pintail (*Anas acuta*), redshank (*Tringa totanus*).

Natural England's Advice

1. Appropriate Assessment

Natural England notes that the applicants accept that the proposed development will have Adverse Effects on the Integrity (AEOI) of the Stour and Orwell Estuaries SPA and Ramsar site.

Whilst compensation was agreed for the scheme alongside the original permission Natural England must consider the HRA presented to them in the light of the most recent and best available evidence, based on their current understanding of estuarine processes in line with current caselaw and planning guidance.

Note Natural England's comments within the compensation paragraph below regarding the information underlying the appropriate assessment.

2. Reasonable Alternatives

Natural England are not best placed to advise on the matter of alternatives and therefore have no view on this, which is a matter for the Local Planning Authority.

3. IROPI

Natural England is an advisory body with a relatively narrow remit and therefore cannot advise on whether or not the project meets the tests of IROPI. They recommend that TDC seeks legal advice before making this decision but advise, for the avoidance of doubt and for audit trial purposes, that the authority should fully satisfy itself that the project remains imperative taking into account any changes to legislation, planning guidance, site proposals and national need.

In making a judgement of IROPI, particularly with regards to the 'overriding' aspect, the authority should have a full understanding of the ecological value of the site and the

anticipated impacts (see comments below).

4. Compensation

If the competent authority is satisfied that IROPI remains and of the absence of alternatives then it must also consider compensation. Section 68 of the Conservation of Habitats and Species Regulations 2017 states that the "appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected."

Natural England note the updated information provided in the Environmental Statement (ES) including consideration of in-combination impacts from recent and current projects within the port and port approaches area.

They note that the shadow HRA section separates the Phase 1 works from the rest of the project and concludes no adverse effect on integrity if those works are conducted outside of the overwintering bird period. Natural England does not recommend retrospectively slicing the assessment of projects into phases. The project was originally assessed as a whole, and the environmental evaluations were conducted to support delivery of a complete development. They also advise that the supporting evidence for the conclusion of no AEoI does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas - which do contain suitable habitat for breeding and overwintering species and is predominately undisturbed. Therefore, it cannot be concluded that there will be no LSE (impact pathway) and without mitigation there could be an AEoI.

Natural England are currently reviewing the ES provided to support the new planning application for the compensation site as part of the consultation received on 6th January 2022 and have previously engaged with the Applicant as part of the scoping exercise in 2021. At that time, they highlighted that further supporting surveys were required for Bathside Bay and Little Oakley to sufficiently update the original 2003 ES. They acknowledge that work has been done to demonstrate that elements of the original conclusions are still fit for purpose, using publicly available data sources. However, they do not consider that the current evidence provides the confidence to conclude that the proposed managed realignment at Little Oakley would still secure adequate compensation for the loss of Bathside Bay.

In addition Natural England highlights that EC Guidance on Article 6 (4) of the Habitats Directive states that "compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time". They do not believe that sufficient evidence has been provided to suggest

this is the case for Little Oakley. It is unlikely that the compensation measures will be 100% effective in reinstating structure and functionality of the supporting habitats for designated site features of the Stour and Orwell SPA and/or maintain the coherence of the national site network. Since the original planning permission for the Little Oakley managed realignment site was granted, Natural England's understanding in respect of the Habitat Regulations has evolved in line with caselaw, alongside their knowledge around the development processes of coastal and marine compensatory habitats and how they do and do not work. Therefore, they advise that a ratio greater than 2:1 should be provided.

Without certainty that the compensation proposed will deliver the same ecological value for the same affected features and that the full extent and nature of effects have been considered in the appropriate assessment, and/or evaluated, they cannot advise that the coherence of the network will be protected. Therefore, in their view the appropriate assessment is incomplete and does not make a complete assessment of the effects based on the best reasonably available information. Until they have confidence as to the nature and scale of the effects it is not possible to advise that the effects of the development will be compensated for. Consideration will also need to be given in the HRA for the potential impacts to Hamford Water SPA. Natural England is not aware of any evidence to show that the proposed compensatory site, which is functionally linked to the adjacent Hamford Water Special Protected Area, is of less importance than any other area of supporting habitat or designated habitat and features within the Hamford Water protected areas.

In July 2021 there was a consultation on DEFRA's draft 'Best practice guidance for developing compensatory measures in relation to Marine Protected Areas' whilst that is still in draft and focused on Marine Protected Areas they advise that the generic Principles of Compensation Measures (Paragraph 41) are also relevant to this proposal namely:

Compensatory measures should:

- a. Link to the conservation objectives for the site or feature and address the specific damage caused by the permitted activity;
- b. Focus on providing the same ecological function for the species or habitat that the activity is damaging OR, where this is not technically possible, provide functions and properties that are comparable to those that originally justified designation;
- c. Not negatively impact on any other sites or features;
- d. Ensure the overall coherence of designated sites and the integrity of the MPA [designated sites] network; and
- e. Be able to be monitored to demonstrate that they have delivered effective and sustainable compensation for the

impact of the project. The monitoring and management strategy must require further action to be taken if the compensation is not successful.

It is Natural England's understanding that the Marine Management Organisation (MMO) Coastal Concordat signed up to by Tendring District Council in June 2021 states there needs to be regulatory agreement on how to proceed where there is overlapping legal requirements. Applicants will therefore need to provide the relevant information to both regulators to undertake the necessary assessments and support any decision on this proposal.

However, from the searches they have undertaken they are not aware that a marine licence exists for Bathside Bay Container Terminal and had there been they would have expected to be consulted by the MMO on any variation requests and associated HRA assessment. This could be due to the limited lifespan of any Food and Environment Protection Act (FEPA) 1989 licence and/or Coastal Protection Act 1949 licence for the BBCT making them invalid when the Marine and Coastal Access Act 2009 came into existence in April 2010 resulting in them not being transposed over to a marine licence. Natural England advises that the onus is therefore on the Applicant to ensure that they have all the necessary legislative consents and sign off for the project.

In conclusion Natural England advise that the delivery of suitable compensation is uncertain, the relevant permissions are not in place, timings are unclear, and the ES does not follow Defra's draft best practice guidance (Best practice guidance for developing compensatory measures in relation to Marine Protected Areas). Therefore they advise that limited weight can be given to the sufficiency and deliverability of the compensation measures in any decision making.

5. Landscape

As identified in the 2003 Landscape and Visual Impact Assessment (LVIA), the conclusion of which were confirmed by the 2021 update, the proposed development will have an adverse effect on the character and appearance of the Suffolk Coasts and Heaths AONB, which was extended via a Designation Variation Order in 2019 to include parts of the Stour Estuary and land to the south of the Stour Estuary within Essex.

The application site is located outside Suffolk Coast & Heaths Area of Outstanding Natural Beauty (AONB), but within its setting. The effects of the proposed development on the AONB were specifically considered in section 5.12 of the 2003 LVIA accompanying the original planning application, which concludes "The magnitude of effect and significance of impacts to the AONB, in overall terms, is considered to be locally moderate [adverse], intensifying adverse effects of port facilities already apparent in all views towards the site

within the AONB." The 2003 LVIA also acknowledges that it will not be possible to fully mitigate the impacts, particularly on the waterside approach given the type and scale of development proposed and the lack of opportunities for on-site screening to the waterside frontage.

Despite acknowledgement of the adverse effects on the proposed scheme on the AONB, planning consent was granted in 2006 on the basis of IROPI, and the scheme was re-consented in February 2013 following judicial review.

However, in the intervening period between the issue of planning consent for the Bathside Bay scheme and the current applications for discharge and variation of conditions pertaining to the planning permission, the boundary of Suffolk Coast and Heaths AONB has been extended to enlarge the AONB. This has resulted in the boundary of the AONB being brought closer to the application site. In July 2020, the Secretary of State approved a Designation Variation Order for the AONB to include much of the Stour Estuary and land to the south bank of the Stour Estuary within Essex. The AONB boundary now lies within approximately 1km of the application site to the north in Suffolk, and within 1.5km to the west within Tendring. Therefore, they advise that impacts to the settings of the AONB require due consideration.

As noted, the baseline information used in the preparation of the 2003 Landscape and Visual impact Assessment (LVIA) has been reviewed to determine if the conclusions remain valid.

They acknowledge that work has been done to demonstrate that the original conclusions are still fit for purpose, however this approach to re-assessment is not ideal. The original LVIA is now 19 years old and since its production the landscape baseline has changed significantly due to the AONB extension and further industrial development around Felixstowe. Changes in national planning policy such as the NPPF have also been strengthened the protection given to AONBs and their settings. There have also been several changes to published landscape guidance and assessments in the intervening period.

The s73 application effectively triggers a new planning consent. Given the time elapsed, changes to the landscape baseline and designation and the inconsistencies in terminology used in the original report around the significance of impacts, Natural England suggest that the approach taken to updating the original LVIA obfuscates the determination of impacts to the setting of the AONB and that a new standalone Landscape and Visual Impact Assessment should be carried out to determine the significance of landscape and visual impacts to the setting of the Suffolk Coasts and Heaths AONB afresh, as extended in 2020. The objective of the LVIA should be to establish an up to-date landscape baseline, independent of prior assessment and to seek to determine objectively, based on best available and

most recent evidence, the impact of the proposed development on the Landscape. It should fully assess impacts on the nationally designated landscape of the Suffolk Coasts and Heaths AONB including its 2020 extension, not to seek to confirm the previous conclusions of an LVIA that is now 19 years out of date and does not meet with the standards set out in the current GLVIA (2013) guidelines.

The differences in methodology employed in the 2003 LVIA and current best practice are set out in section 12.3 of the ES. The fact that this section of the report is two and a half A4 pages in length, highlights the extent of the inconsistencies between current best practice guidance and the methodology used in the 2003 report, which the applicant has sought at length to justify. The statutory purpose of the AONB is to conserve and enhance the area's natural beauty.

The Local Planning Authority should assess the application carefully as to whether the proposed development would have a significant impact on or harm that statutory purpose in determining the variation of conditions 21/01810/VOC 28 'operational lighting' and condition 20 of 10/00203/FUL. Relevant to this is the duty on public bodies to 'have regard' for that statutory purpose in carrying out their functions (S85 of the Countryside and Rights of Way Act, 2000). The Planning Practice Guidance confirms that this duty also applies to proposals outside the designated area but impacting on its natural beauty.

In summary Natural England advises that LVIA in accordance with current guidelines should be provided and that the planning authority uses this up-to-date evidence along with national and local policies, together with local landscape expertise and information to determine the proposal. Your decision should be guided by paragraphs 176 and 177 of the National Planning Policy Framework which gives the highest status of protection for the 'landscape and scenic beauty' of AONBs and National Parks. Alongside national policy you should also apply landscape policies set out in your development plan, or appropriate saved policies.

They also advise that TDC take into account comments provided by the Suffolk Coast and Heaths AONB Partnership in determining the application. Their knowledge of the site and its wider landscape setting, together with the aims and objectives of the AONB's statutory management plan, will be a valuable contribution to the planning decision.

National Highways
02.02.2022

They recommend that conditions should be attached to any planning permission that may be granted.

Should the Local Planning Authority not propose to determine the application in accordance with this recommendation they are required to consult the Secretary of State for Transport.

Further to their holding response of 8 December 2021,

National Highways has held a number of meetings with representatives of the applicant, to discuss the implications of the proposed changes to the conditions on the future operation of the Strategic Road Network, which in this case relates to the A120 trunk road. The parties agreed that given the date of the original consent for the proposed development, there is a need to bring the original consented conditions up to date to reflect the current forecast impact of the development on the operation of highway network and changes to government policy.

Working with the applicant, the proposed conditions accompanying the application have been reviewed, and a set of new revised conditions have been agreed. These are set out below, together with an explanation of the reasons for the change.

Regarding the following conditions, National Highway offers no comment: Condition 2 (Approved Plans/ Documents), Condition 28 (Operational Lighting), Condition 53 (Operational Traffic Noise Attenuation).

Proposed Change to Condition 41

Prior to the commencement of the construction of Phases 3 and 4 of the development hereby permitted (as shown on approved drawing H1001-19-B) details of a scheme for the improvement of the A12(T)/A 120(T)/A 1232 Ardleigh Crown Interchange shall be submitted to and approved in writing by the Local Planning Authority in consultation and agreement with the highway authorities, unless a Supplementary Transport Assessment submitted to and approved in writing by the Local Planning Authority, in consultation and agreement with the highway authorities, demonstrates that such a scheme is unnecessary

The scheme submitted shall secure improvement of the A12(T)/A 120(T)/A 1232 Ardleigh Crown Interchange in accordance with the standards set out in the Design Manual for Roads and Bridges and meet the requirements of DfT Circular 02/2013 The strategic road network and the delivery of sustainable development, or any subsequent revisions, modifications, or successors to this Circular.

Reason for Change

This condition considers changes to the A12 / A120 / A1232 Ardleigh Crown junction to mitigate the impacts of the development. The proposed amendments introduce a mechanism to review the need for mitigation, given the time elapsed since it was originally identified.

The revised timescale for delivery of the improvement reflects an agreement, that the implementation of Phase 1 will not have a significant impact on the operation of the highway. It provides sufficient timescale for a supplementary transport assessment (STA) to be undertaken, in advance of the construction of Phases 3 and 4.

DfT Circular 02/2013 The strategic road network and the delivery of sustainable development has been introduced since the original consent, and the amendment reflects this change to government policy. Design standards have likewise evolved and the revised wording addresses this.

Proposed Change to Condition 42

Prior to the commencement of the construction of Phases 3 and 4 of the development hereby permitted (as shown on approved drawing H1001-19-B) details of a scheme for the improvement of the A120(T) Parkeston Road/Station Road/Europa Way roundabout shall be submitted to and approved in writing by the Local Planning Authority in consultation and agreement with the highway authorities, unless a Supplementary Transport Assessment submitted to and approved in writing by the Local Planning Authority, in consultation and agreement with the highway authorities, demonstrates that such a scheme is unnecessary,

The scheme submitted will secure improvement of the A120(T) Parkeston Road/Station Road/Europa Way roundabout in accordance with the standards set out in the Design Manual for Roads and Bridges and meet the requirements of DfT Circular 02/2013 The strategic road network and the delivery of sustainable development, or any subsequent revisions, modifications, or successors to this Circular.

Reason for Change

This condition considers changes to the A120(T) Parkeston Road/Station Road/Europa Way roundabout to mitigate the impacts of the development. The proposed amendments introduce a mechanism to review the need for mitigation, given the time elapsed since it was originally identified.

The revised timescale for delivery of the improvement reflects an agreement, that the implementation of Phase 1 will not have a significant impact on the operation of the highway. It provides sufficient timescale for a supplementary transport assessment (STA) to be undertaken, in advance of the construction of Phases 3 and 4.

DfT Circular 02/2013 The strategic road network and the delivery of sustainable development has been introduced since the original consent, and the amendment reflects this change to government policy. Design standards have likewise evolved and the revised wording addresses this.

Proposed Change to Condition 43

No part of Phases 2, 3 and 4 of the development hereby permitted (as shown on approved drawing H1001-19-B) shall commence operation as a container terminal until the improvement works detailed in Conditions 41 and 42 have been agreed by the Local Planning Authority in consultation with the highway authorities and completed and opened to

traffic, unless a Supplementary Transport Assessment submitted to and approved in writing by the Local Planning Authority, in consultation with the highway authorities demonstrates, that the works referred to in Conditions 41 and 42 are un-necessary to support the level of operation proposed.

Reason for Change

This condition provides a backstop to conditions 41 and 42, ensuring operation of Phase 2, 3 and 4 as a container terminal cannot occur without appropriate mitigation in place. The revised timescale for delivery of the improvement reflects an agreement, that the implementation of Phase 1 will not have a significant impact on the operation of the highway.

The wording is updated to reflect

- the potential for the works required to be altered as a consequence of the STA referenced in conditions 41 and 42.
- the updated phasing drawing.

Proposed Change to Condition 44

Condition 44a - A120 Highway Works

Prior to the commencement of the construction of Phases 3 and 4 of the development hereby permitted (as shown on approved drawing H1001-19-B) a Supplementary Transport Assessment (including the A120 from Hare Green Interchange to 'Morrisons [Safeway] roundabout' highway work requirements) shall be submitted to and approved in writing by the Local Planning Authority in consultation and agreement with the highway authorities.

This Supplementary Transport Assessment shall set out and confirm the works required and associated sequencing to support the implementation of the proposed development. Any identified improvements shall be in accordance with the standards set out in the Design Manual for Roads and Bridges and meet the requirements of DfT Circular 02/2013 The strategic road network and the delivery of sustainable development, or any subsequent revisions, updates, successor to this Circular.

Condition 44b - A120 Highway Works

No part of Phases 2, 3 and 4 of the development hereby permitted (as shown on approved drawing H1001-19-B) shall commence operation as a container terminal unless EITHER:

A (i) the Secretary of State for Transport has announced a preferred route for the improvement of the route of the A120(T) (including from Ramsey Bridge roundabout to Parkeston) together with consequential and ancillary improvements thereto and to the A120 and any side roads and access between and in the vicinity of: the A120 (T) / A133 Interchange at Hare Green and Ramsey Bridge Roundabout or in each case such other terminal points for such route improvements as the Secretary of State may announce; and

A(ii) the Local Highway Authority has announced proposals relating to the local highway network Including the A120 from Parkeston roundabout to Morrisons roundabout required as a result of the proposals referred to at A(i), above;

OR

A(iii) the Local Planning Authority in consultation and agreement with the highway authorities has approved in writing such alternative highway improvements and associated sequencing to support the implementation of the proposed development as may be identified in the Supplementary Transport Assessment to be submitted in accordance with Condition 44a;

AND:

B In relation to each of those Phases:

(i) an agreement or agreements have been concluded pursuant to section 278 Highways Act 1980 to secure funding of such route improvement works required in relation to that Phase together with all such consequential and ancillary improvements to the A120 (T), A120 and any side roads in such form and upon such route as may thereafter be authorised pursuant to orders under the Highways Act 1980 and associated instruments made therewith;

(ii) the necessary powers and consents to implement the route improvement works required in relation to that Phase have been secured; and

(iii) such improvement works required in relation to that Phase have been begun by or on behalf of the Secretary of State for Transport and/or Essex County Council by the carrying out of a material operation in respect thereof as the same is defined in section 56 of the Town and Country Planning Act 1990 (as amended).

Reason for Change

This condition relates to proposals to upgrade the A120, and any further works required along the corridor. It is proposed to split the condition into design and implementation elements, consistent with conditions 41 to 43.

The wording is updated to reflect changes in government policy as set out in DfT Circular 02/2013 The strategic road network and the delivery of sustainable development and highway design standards, consistent with conditions 41 to 43.

Condition 44a introduces the potential to review and confirm the proposed A120 mitigation works through production of a STA and proposal of appropriate alternative measures. Alternatively, approval can be sought for designs of the

existing proposals.

The timescale for agreement of the designs has been revised to take account of the low transport impact of Phase 1 on the operation of the highway. The change in timescale is designed to allow sufficient time for the STA to be developed, which would tie in with construction timeline of Phases 3 and 4.

The potential for phased delivery of mitigation is introduced.

Condition 44b revises the timescale for implementation of the works until commencement of the operation of Phases 2, 3 or 4. This change reflects that mitigation will not be required in advance of these phases. Furthermore the timing reflects the likely timescales needed to agree the necessary consents and then instruct a contractor to begin construction.

The potential to consent and implement works in a phased manner is introduced, to ensure mitigation works are implemented as they are required.

Whilst the variation of condition application does not explicitly refer to any changes to Conditions 45, 46 and 47, the consequences of revisions to Conditions 41-44 necessitates minor changes to the Conditions. The suggested changes are set out below, together with an explanation of the reasons for the change

Proposed Change to Condition 45

That part of the development hereby permitted as shown coloured green (Phase 3) and magenta (Phase 4) (for identification purposes only) on drawing H1001/02 Rev A shall not be paved or equipped with ship to shore gantry cranes or used for any purpose that generates road traffic until the improvements to the A120 (T) referred to in Condition 44a and Condition 44b above have been completed and opened to traffic so that, for the avoidance of doubt, no more than six cranes shall be provided at the development until such time as the said improvements have been completed.

Reason for Change

This condition provides a backstop such that only six out of eleven gantry cranes could operate in advance of the mitigation works detailed in condition 44 opening. This restricts traffic generation to around half of the maximum expected, as set out in the S106 agreement. Minor changes are proposed to reflect the revised Condition 44 (a and b) and explicitly referencing the Phase 3 and 4 areas.

Proposed Change to Condition 46

Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (as amended) or any order revoking and re-enacting the Order with or without modification, unless and until the

improvements referred to in Condition 44a and Condition 44b above have been completed, the areas referred to in Condition 45 above shall not be used for any purpose unless the same relates to the construction of the development or would not result in the arrival or departure of traffic to or from the development by road.

Reason for Change

This condition provides a backstop that the Phase 3 and 4 areas cannot be constructed and then used for other purposes. Minor changes are proposed to reflect the revised Condition 44 (a and b).

Proposed Change to Condition 47

Except where the works referred to in Condition 44a and Condition 44b above have been opened to traffic so that this condition shall cease to have effect, the development hereby permitted shall not be operated except in accordance with a scheme (accompanied by a certificate that the same has been supplied to and approved by the Local Highway Authority and National Highways) approved by the Local Planning Authority providing for traffic management and safety measures to remain in place until the works referred to in Condition 44a and Condition 44b have been opened for traffic

Reason for Change

This condition is a backstop to ensure that appropriate interim traffic management and safety measures are in place prior to the Condition 44 works opening and to update the reference from Highways Agency to be National Highways.

Subject to inclusion of the proposed revisions to the planning conditions as set out above National Highways has no objection to the submitted planning application

Tree & Landscape Officer
01.12.2021 & 12.02.2022

In order to quantify the impact of the development proposal on the local landscape character the applicant has carried out a review of an existing Landscape and Visual Impact Assessment (LVIA). This document formed part of the supporting information submitted with an historic planning application relating to the site and was previously considered by the Council in 2003.

The findings of the review are that the baseline landscape qualities are essentially unaltered, that the assessment of the impact made in 2003 is still relevant and accurately reflects the impact of the development proposal on the local landscape character.

It is considered reasonable that the original LVIA remains a genuine and accurate assessment of the impact of the development proposal and that changes in the intervening period are unlikely to have significantly altered the impact of the development on the local landscape character.

In terms of soft landscaping the information provided on drawings entitled: 'Terminal Office Landscape Proposal', 'Overall Landscape Masterplan' and 'Structural Landscape Work and Planting Proposals (1 of 3) set out broad principles and areas to be soft landscaped.

Whilst this information is acceptable and sets out the scope and range of the soft landscaping it does not include detailed planting plans. These will need to be provided at some stage; either prior to the determination of the application of by way of a future discharge of conditions application.

Second Response (dated 12.01.2022)

The tree planting schedule has been amended as agreed.

The soft landscaping details for Phase 1 are now sufficient to enable the Phase 1 element of the soft landscaping conditions to be discharged.

Essex County Council Ecology
(Place Services)
26.01.2021

No ecological objection subject to commencement of the managed realignment project prior to Phase 2 works (as shown on Drawing H1001-19) as required by the s106 Compensation Mitigation and Monitoring Deed and Agreement (2004).

Condition 2 (Approved Plans/Documents) of approved application 10/00202/FUL, requires the development approved to be implemented in accordance with plans, drawings and documents, including the Planning and Design Statement dated April 2003.

They have reviewed the documents supplied by the applicant, Sections 23 & 25 of the Environmental Statement, and the Planning and Design Statement dated October 2021 and other consultee comments. These relate to the likely impacts of Phase 1 development on designated sites, protected & Priority species, and details of mitigation and compensatory measures.

They are satisfied that there is sufficient ecological information available for determination of this (VOC) application to support commencement of Phase 1 only (terrestrial works) of the permitted development. They strongly recommend that new conditions of any permission clearly identify the need to commence the managed realignment project to create the legally required compensatory habitats as soon as possible, subject to renewed permission under a separate, but linked application for 138ha of habitat creation at Little Oakley, to maximise the time ahead of loss of 69ha of marine habitats in Bathside Bay by Phase 2 works as shown on Drawing H1001-19.

They welcome Section 25 of the Environmental Statement (shadow Habitats Regulations Assessment) prepared by Royal Haskoning DHV (13 October 2021) for this VOC application related to Phase 1 of this development. This has

revisited the information in the 2003 ES - which triggered Stage 2 (Appropriate Assessment to consider if mitigation can avoid Adverse Effect on Integrity (AEOI), Stage 3 Alternative solutions and then Stage 4 Imperative Reasons for Over-riding Public Interest (IROPI) and compensatory measures to ensure the development protects the overall coherence of Habitats sites network. Section 25 therefore provides information to support review of the competent authority's Habitats Regulations Assessment (HRA) report for this development either alone or in combination with other plans and projects.

They are satisfied that the scope of the HRA should include Stour & Orwell Estuaries SPA and Ramsar and Southern North Sea SAC and that the reclamation of approximately 65ha of intertidal habitat in Bathside Bay will, without mitigation, lead to likely significant effects (LSE). The impact pathways within scope therefore triggered further consideration at Stage 2 Appropriate Assessment to assess if mitigation can avoid any AEOI of the Habitats sites within scope.

They have considered Natural England's advice included in section 25.3.3 and the Stage 2 Appropriate Assessment section which states that there will be AEOI. Whilst the year-on-year impacts of erosion can be mitigated, the one-off impacts of direct loss of intertidal habitats which support SPA qualifying features and Ramsar qualifying criteria cannot be avoided and compensatory measures are necessary. They also note that, where only the qualifying features of a Ramsar site will be adversely affected, the tests are different and the LPA as the competent authority must take into account the wording of Article 4 of the Ramsar Convention which allows the UK Government as a contracting party, to delete or restrict the boundaries of designated Ramsar sites only "*in its urgent national interest*".

Any benefits arising from the proposal must, however, demonstrably outweigh the harm to the acknowledged international conservation value of the site. The Stour & Orwell Estuaries Ramsar site therefore needs to be assessed, and consideration given, to the above requirement. They agree with the shadow HRA conclusion that the Phase 1 works are short-term, which due to embedded timing restrictions would occur *largely* outside of the over-wintering period and do not involve piling works, can avoid AEOI of the Stour & Orwell Estuaries SPA and Ramsar site. It is recommended that these measures are secured within the new conditions for this VOC application and subsequent variation of the extant planning permission if granted.

They consider that the assessment of likely impacts on Southern North Sea SAC is acceptable and agree that no AEOI of the Southern North Sea SAC is predicted from the development either alone or in combination with other plans

and projects. They understand that section 25.5.2.1 and Table 25.7 do not consider any impacts on protected species (harbour porpoise) outside the SAC separately as the assessments are based on the North Sea Management Unit, which takes into account harbour porpoise in both inside and outside the SAC, in line with current guidance and thresholds for impacts identified by JNCC and Natural England. They are sufficiently satisfied with the scope of the in-combination assessment in section 25.3.3 paragraphs 14 & 15 that no additional disturbance is predicted to occur in combination with other plans and projects included in the assessment.

They acknowledge that the proposed works comprising only Phase 1 of the permitted development are located entirely on existing reclaimed land and mitigation to avoid disturbance has been embedded by timing would occur largely outside of the wintering period and do not involve piling works, are not likely to affect habitat that supports the qualifying features of the Stour & Orwell Estuaries SPA and Ramsar site.

Therefore, they are satisfied that this proposal to vary Condition 2 will not alter the legal requirements secured for delivery of compensatory habitat (at Little Oakley) - in the Compensation Mitigation and Monitoring Agreement (CMMA) (Royal Haskoning, 2004) Annex 1 of the Deed (CMMD) – and that the Phase 1 terrestrial works will not lead to any additional disturbance which would alter this provision. They understand that the Phase 2 & additional phases within the marine environment (i.e. works below level of MHW spring tides) of the Bathside Bay project cannot be implemented without a marine consent from the MMO and that further EIA and HRA is required to support that consenting process.

Published Government guidance *Habitats Regulations Assessments: protecting a European site* (Defra and Natural England, Feb 2021) describes the requirements for the provision of compensatory measures and refers to points that should be considered in order to be confident that the proposed measures will fully compensate for the negative effects of a proposal. This includes *How the compensation would be carried out, including how it will be managed and monitored over the time that is needed, and how it has been secured and How long the compensatory measures will take to reach the required quality and amount of habitat.*

Section 25.6.5 Timing and habitat development provides background on the applicant's inability to state definitively when the seawall at Little Oakley would be breached (and, therefore, when intertidal habitat would begin to be created) in relation to the commencement of construction at Bathside Bay. They appreciate that the relative timing of the commencement of work at Bathside Bay and the creation of the managed realignment site was analysed in detail in the Compensation Mitigation and Monitoring Agreement (CMMA) (Royal Haskoning, 2004) the Deed in which it sits as Annex 1 (CMMD). This HRA report focuses on the predicted habitat

colonisation following breach of the seawall and confirms that whilst invertebrates are likely to rapidly colonise the new intertidal mudflats, it may take 5-10 years for the invertebrate community structure to fully develop on maintenance dredgings which are to be pumped onto the site. It is therefore essential that there is no delay in commencement of the habitat creation and are satisfied that this Variation of Condition does not result in a delay as the CMMD remains a legal obligation.

The Ecologist understands that other consultees seek certainty that this VOC will not undermine delivery of the compensatory habitat required by the HRA Appropriate Assessment linked to the permission for this development. They therefore recommend that, to be HRA compliant and be beyond reasonable scientific doubt, the timing for the implementation of the Little Oakley realignment scheme must remain in accordance with the secured CMMA/D.

It is essential that the LPA secures appropriate and timely compensatory measures for the permitted development to demonstrate its compliance with the Conservation of Habitats and Species Regulations 2017 (as amended). There needs to be no reasonable scientific doubt remaining as to the delivery of compensatory measures and, whilst absolute certainty is impossible to attain, the LPA needs to secure legally enforceable ways of preventing such effects in order to meet the Stage 4 HRA requirements.

With this level of certainty, they are satisfied that the shadow HRA has demonstrated that this variation of conditions application does not seek to delay the creation of compensatory habitat that is necessary to maintain the required level of coherence of Habitats sites. This will enable the LPA to demonstrate compliance with its statutory duties, including its biodiversity duty under s40 NERC Act 2006 and prevent wildlife crime under s17 Crime and Disorder Act 1998.

Recommendation

They recommend that the LPA, as the competent authority, has certainty of likely impacts on designated sites and can adopt the updated shadow HRA submitted by the applicant for Phase 1 works only subject to a formal consultation response from Natural England. The updated information to support the HRA indicates that any likely significant effects from the Phase 1 terrestrial works including the Small Boat Harbour can be ruled out, and the CMMA and CMMD will retain the timing requirement for commencement of compensatory habitat creation before Phase 2 marine works of the development,

Therefore they have no ecological objection to this VOC application to vary Condition 2 subject to commencement of managed realignment project prior to Phase 2 works (as shown on Drawing H1001-19) as required by the s106

Compensation Mitigation and Monitoring Deed and Agreement (2004).

Arch. Liaison Off, Essex Police No response received at the time of writing this report, any views expressed will be reported to Members at the Planning Committee meeting.

Urban Design Advisor (Place Services)
16.12.2021

After review of the Planning Statement and amended plans, it is understood that the updated plans have superseded the previous drawings due to:

- The introduction of the International Ship & Port Security Code (ISPS) which came into force in 2004.
- The impacts of Brexit on additional passport checks for accompanied goods and additional statutory inspections.
- Changes in modern practise with the use of internal movement vehicles for movement of containers and trailers within the terminal.
- The installation of a UKPN cable.

As a result, there are no objections to the proposed variation of Conditions 2 of the approved plans and documents in order to align with modern processes and updated codes that have been put in place since the original application.

Environment Agency
17.01.2022

They have reviewed all the applications in relation to this site and will not be looking to make any comment on the applications.

Essex Wildlife Trust
17.01.2022

They object to this proposal on the following grounds:

- The request for variation of the S.106 agreement in respect of Schedule 1. Para. 3.1, to postpone the trigger for the obligation to commence provision of compensation habitat at Little Oakley fails the third test for a derogation under the Habitats Regulations’;

- The request for variation of the S.106 agreement in respect of Schedule I. para. 3.1, is unjustified;

-The request for variation of the S.106 agreement in respect of Schedule 1. para.3.1, would result in increased temporal impacts on the Stour and Orwell Estuaries SPA and Ramsar site

1. Government guidelines and the derogation legal tests

The most significant adverse impact of the proposed Bathside Bay container terminal on the Stour and Orwell Estuaries SPA and Ramsar site will result from the reclamation of 65ha of intertidal habitat and the dredging of an additional 4ha to create the Small Boat Harbour.

It has already been determined that this will have a significant impact on the integrity of the SPA and its conservation objectives. A variation in the S.106 agreement to delay the delivery of the required compensatory habitat will increase

the temporal impacts on qualifying features of the SPA and is contrary to government guidelines on protecting European sites.

The original planning application failed the integrity test because an adverse effect on site integrity of the SPA could not be ruled out. Under government guidelines permission could not be granted unless the proposal passed the 3 legal tests for a derogation.

The third of these tests requires that necessary compensatory measures can be secured. Compensatory measures must fully offset the damage caused to the SPA and Tendring DC, as the competent authority, must take into account how long the compensation habitat will take to reach target condition.

Government guidelines state that, for example, where a port expansion destroys part of a European site designated for feeding birds, the developer must create replacement feeding habitat for the displaced birds before the port expansion can go ahead and before any existing habitat is damaged.

2. The 2004 Agreement

The details underpinning the S.106 agreement attached to the existing planning permission are set out in the Deed relating to Bathside Bay Container Terminal, Little Oakley Managed Realignment and the Conservation (Natural Habitats & c) Regulations 1994 and Annex 1: Bathside Bay Container Terminal: Compensation, Mitigation and Monitoring Agreement, 2004. This document includes reference to the agreed timings:

1.3 HIPL shall carry out the Compensation Scheme at the Managed Realignment Site so far as is reasonably practicable to enable the following objectives to be met:

3.33 The Compensation Scheme should be in the course of being carried out at the time damage occurs to the Stour and Orwell Estuaries SPA and SPA as a result of construction of Container Terminal Works.

Part 2 of the 2004 Agreement also requires that HIPL "shall use reasonable endeavours to ensure the Breach is carried out not later than 27 months after the commencement of the Marine Works"

The 2004 Agreement has already built in a considerable degree of flexibility in regard to the interpretation of government guidelines and the timing of the provision of the compensatory habitat at Little Oakley. Furthermore, the applicant has had a considerable number of years in which to complete all the necessary ecological survey work and other preparatory work in readiness for breaching the seawall and initiating the creation of new intertidal habitat. It is their view

that the applicant has not provided adequate justification for the requested variation of the S.106 agreement.

3. Conclusion

An extension to the delay in creating the compensation scheme at Little Oakley beyond 27 months after the commencement of Marine Works (as per the 2004 Agreement) would result in increased adverse effects on the integrity of the SPA and would further impact on the site's conservation objectives. This is quite unacceptable.

They concur with the statement by Suffolk Wildlife Trust, in their response to this application, that HPUK should be required to convene the Regulatory and Advisory Group to discuss the delivery of the compensation habitat at Little Oakley in accordance with the 2004 Agreement.

Royal Society For The
Protection of Birds
17.01.2022

The They note that separate applications have been made to Tendring District Council for Discharge of Conditions and Variation of Conditions in respect of planning permission 10/00202/FUL. These applications may have their own implications for wildlife, ecology and biodiversity, but they have limited themselves to responding to this VOC application as it appears to have the most significant potential to affect the environmental implications of the BBCT development and the required delivery of mitigation and compensation measures and requirements as set out in that permission.

The RSPB is interested in the VOC Application as it was a key objector to the original BBCT proposals and played a key role in the Bathside Bay Container Terminal: Compensation, Mitigation and Monitoring Deed and Agreement, 15 October 2004 (the CMMD/CMMA). The CMMD/CMMA remains the key and central document of relevance to the VOC application as it sets out the legal obligations on HIPL in respect of the design and implementation of the Little Oakley managed realignment as ecological compensation for the destruction of 69ha of Bathside Bay, an integral part of the Stour and Orwell Special Protection Area and Ramsar site (the SPA/Ramsar site).

Due to resource constraints, this response is brief and sets out the RSPB's key concerns at this stage. They also make observations on HIPL's intention to apply for a future temporary change of use of the port for offshore wind purposes in the context of the justification under the Conservation of Habitats and Species Regulations 2017 (as amended¹) for consent to damage the SPA/Ramsar site.

VOC application - the RSPB's key concerns

The RSPB's main concerns relate to the compatibility of the VOC Application with the terms of the CMMA Agreement.

Phasing in relation to the delivery of the Little Oakley compensation site

The CMMD/CMMA sets out in detail the obligations on HIPL in respect of the delivery of the Little Oakley managed realignment ecological compensation site. The requirements on timing of delivery in respect of the phasing of the BBCT construction are contained in the CMMA, specifically section 3 in Annex 1. The purpose is to ensure, as a minimum, that the compensation site is implemented before damage to, and loss of Bathside Bay occurs.

The RSPB is concerned that the VOC Application could act to undermine the requirements set out in the CMMD/CMMA in respect of the timing of delivery of the compensation site and the establishment of the intertidal habitats that the SPA/Ramsar sites' wintering and migratory water birds dependent on Bathside Bay will rely on.

As a minimum, the existing requirements set out in the CMMA must be adhered to. However, given the time elapsed and the recent planning application for the Little Oakley managed realignment site, they consider it would be appropriate to discuss how those requirements could be improved upon. In this context, they consider the focus should be to take the opportunity to review the phasing requirements for the Little Oakley compensation site and bring them in to line with modern day standards and Government guidance such that the compensation site is implemented and fully functioning as water bird feeding and roosting habitat at the point at which Bathside Bay becomes unavailable (see section 3.3.3 of the CMMA document).

For this reason, they consider that the VOC Application must be considered alongside the recently submitted planning application for the Little Oakley managed realignment compensation site. The Council must ensure that, as a minimum, the combination of the VOC Application and the Little Oakley managed realignment planning application do not act to undermine the terms of the CMMD/CMMA and therefore the legal requirements upon which permission was granted and seek to bring the phasing and implementation requirements into line with modern day standards.

The RSPB has noted the Suffolk Wildlife Trust's comments on the same matters and considers the above concerns are in line with those.

Establishment of the Regulatory and Advisory Group

Section 1.2.3 of the CMMA requires the establishment of a Regulatory and Advisory Group in respect of the CMMA to advise upon and give approvals in relation to matters envisaged by that document, including the Little Oakley managed realignment compensation site.

The RSPB supports the Suffolk Wildlife Trust's request that HIPL be required to convene the Regulatory and Advisory Group in order to discuss the implications of the VOC Application and future applications to implement the BBCT and Small Boat Harbour schemes for the Little Oakley managed realignment compensation site in accordance with the CMMA.

Other concerns - future changes of use to the Bathside Bay Container Terminal development.

The RSPB is concerned to note in the HIPL 21-01792-VOC Application for the Small Boat Harbour, HIPL is considered an alternative use for the port platform that will be created following the reclamation of Bathside Bay for the purposes of a container terminal.

At paragraph 4.5.14 of the Planning Statement document, HIPL state:

"...By providing a platform for the realisation within the next 10-years of the Green Port and Green Energy Port ambitions set out in the Freeport East bid, the BBCT also supports in a shorter timeframe the Government's ambitious plans to make the UK a world leader in clean wind energy"

The original BBCT was permitted on the basis that it had proven to the satisfaction of the Secretary of State for Transport that there were no less damaging alternative solutions and imperative reasons of overriding public interest (IROPI) for the use of the location as a lift-on, lift-off container terminal - not for use as a non-specific offshore wind facility. These are entirely end-use cases that require different justifications in order to satisfy the legal tests on alternative solutions and IROPI.

No case has been presented justifying the destruction of Bathside Bay for use by the offshore wind sector. The RSPB does not consider it acceptable to seek to bypass the purposes of the Conservation of Habitats and Species Regulations 2017 to avoid unnecessary damage to the National Site Network by (it appears):

- Securing consent to implement a new Phase 1 of the BBCT proposal;
- Securing marine consents to build out the port platform for a container terminal use; and
- Subsequently seeking temporary change of use of the container terminal platform for an entirely different use which has not been justified under Regulation 64 of the Conservation of Habitats and Species Regulations 2017.

They are concerned that seeking to delay the submission of any application for a change of use to the period following the destruction of Bathside Bay ostensibly for container terminal usage, the requirements of the Habitats Regulations tests

could be subverted.

In the absence of explicit proposals from HIPL on its plans in respect of an offshore wind related use for the port platform at Bathside Bay, the RSPB advises the Council to:

- Seek further and detailed information from HIPL on its plans in respect of any alternative use for the container port platform;
- Seek legal advice on what further information it would require from HIPL (and at what time in HIPL's proposed sequence of events) to justify any such change of use consistent with the requirements of Regulation 64 of the Conservation of Habitats and Species Regulations 2017 (as amended) in respect any such change of use; and
- Ensure there are further opportunities for stakeholders such as the RSPB to comment on all new information received.

Essex County
Archaeology
21.12.2021

Council The application is for variation of conditions on application 10/00202/FUL for which there is a condition for archaeological investigation in advance of development. The condition has been part discharged to allow development to proceed on Phase 1 of the development.

Suffolk Wildlife Trust
17.01.2022

They note separate applications have been made to Tendring District Council for Discharge of Conditions and Variation of Conditions in respect of planning permission 10/00202/FUL. They state that these applications may have their own implications for wildlife, ecology and biodiversity, but they have limited themselves to responding to this application as it appears to have the most significant potential to affect the environmental outcomes of the Bathside Bay development and the delivery of its associated mitigation and compensation schemes.

They wish to register a holding objection to the application 21/01810/VOC on the basis that:

1. There is a lack of sufficient information in the supporting documents to give them confidence that approval would not compromise the delivery of the Little Oakley coastal realignment scheme required as compensation for the loss of intertidal habitat at Bathside Bay and significant adverse impacts on the Stour and Orwell Estuaries Special Protection Area.
2. They do not consider that the approach taken to assessing cumulative impacts of the Bathside Bay Container Port development in combination with other developments is adequate to ensure all potentially significant cumulative impacts on the Stour and Orwell Estuaries SPA and Ramsar site, and on the Southern North Sea Special of Conservation (SAC) have been identified and satisfactorily assessed.
3. They are not convinced the applicant's justification of the need to vary the conditions in the manner proposed - to allow

the commencement of development before the expiry of the planning permission 10/00202/FUL - is reasonable grounds for approval given:

- a. the length of time that has elapsed since this planning permission - itself a renewal of an earlier permission - was granted,
- b. the risk to mitigation and compensation of impacts on designated wildlife sites.

Further, they urge HPUK to:

- convene the Regulatory and Advisory Group as prescribed in the '2004 Agreement' to discuss the implications of the VOC application and potential future variation to the Section 106 Agreement for the delivery of the Little Oakley compensatory habitat in accordance with the 2004 Agreement;

- undertake further work to identify potential for significant cumulative impacts from the Bathside Bay development on the wider Stour and Orwell Estuaries SPA;

- amend the timing of the implementation of the Little Oakley realignment scheme to ensure the intertidal habitats it aims to create are established and functioning at a level to provide habitat of equivalent value for the qualifying species of the Stour and Orwell Estuaries SPA that will be impacted by the loss of habitat at Bathside Bay before that loss is incurred.

Detailed discussion of the reasons for Suffolk Wildlife Trust's holding objection and recommendations in relation to the application, 21/01810/VOC:

1. Implications for mitigation and compensation of impacts on the Stour and Orwell Estuaries SPA

The major adverse impact from the Bathside Bay development on the Stour and Orwell Estuaries SPA and Ramsar site will result primarily from the reclamation of 65ha of intertidal habitat and resultant loss of this habitat to use for feeding and roosting by water birds including qualifying species and assemblages of the SPA and Ramsar site. A further 4ha of intertidal habitat will be dredged as part of the scheme in order to create the Small Boat Harbour, which will be located to the east and adjacent to the new Bathside Bay container terminal.

1.1. Timing of delivery of compensatory habitat

Para 3.5.2. of the Planning Statement - S.73 Application to vary conditions 2, 28, 41, 43, 44, 52 and 53 of planning permission 10/00202/FUL states

"The intention is to further vary the S.106 Agreement in respect of a number of pre-implementation obligations, so

that these do not apply prior to implementation, but still deliver benefits or control the development appropriately."

The summary table of the main obligations to be varied in this manner includes:

Section 106 Reference

Schedule 1, Para 3.1

Section 106 Obligation

Not to implement the Container Terminal Development until the owner has let a contract securing the implementation of the Little Oakley Managed Realignment (under planning application 03/01200/FUL) in a timely manner in accordance with the relevant terms of the Section 106 agreement.

Proposed Change

A variation will be required to postpone the trigger for the obligation to the implementation of Phase 2 when the Bathside Bay habitats will have been affected.

Justification

Given the requirement for a new permission at Little Oakley, it is unlikely that a contract to secure implementation at Little Oakley could be let prior to implementation of the container terminal development.

Their comments are as follows:

- One of the consequences of allowing this variation would be a delay to the implementation of the Little Oakley coastal realignment scheme and the establishment of the intertidal habitat required as compensation for habitat lost to the reclamation of Bathside Bay;

- This delay would have the effect of extending the temporal impact of the habitat loss on the SPA and its qualifying species, due to the increased time lag between the impact being incurred and the compensatory habitat being established;

- Evidence from other managed realignment schemes points to a potential time lag of more than 10 years between breaching the sea wall and the new mudflat ecosystem achieving the target condition providing habitat of equivalent ecological value to that lost at Bathside Bay;

- The applicant has known of this obligation since 2006. The fact that the applicants desired schedule for implementing the development now could be impacted by the requirement to let a contract securing the implementation of the Little Oakley Managed Realignment is not sufficient justification to vary

this obligation of the S.106, given the consequences this would have for the delivery of the Little Oakley realignment scheme and impacts on the Stour and Orwell Estuary SPA described above;

- Given the increased importance being given in UK Government policy and environmental legislation, regulations and standards to the need to protect, restore and enhance biodiversity and the natural environment, it is even more important for the Bathside Bay container port development to secure and deliver the Little Oakley compensatory habitat as early as possible in relation to the timing of the intertidal works and reclamation of Bathside Bay that will result in the loss of habitat and significant impacts on designated features and qualifying species of the SPA;

- Government guidelines state that, for example, where a port expansion destroys part of a European site designated for feeding birds, the developer must create replacement feeding habitat for the displaced birds before the port expansion can go ahead and before any existing habitat is damaged.

- Consequently, it is their belief that the variation of the S.106 agreement in respect of Schedule 1, Para 3.1 as described above would fail the third test for a derogation under the Habitats Regulations.

1.2. Compatibility with the Bathside Bay Container Terminal: Compensation, Mitigation and Monitoring Agreement, 2004
The detailed requirements for the delivery of the Little Oakley coastal realignment scheme required under the existing planning permission as an obligation of the S.106 Agreement are set out in the Deed relating to Bathside Bay Container Terminal, Little Oakley Managed Realignment and the Conservation (Natural Habitats & c) Regulations 1994. and its Annex 1: Bathside Bay Container Terminal: Compensation, Mitigation and Monitoring Agreement, 2004 (henceforth referred to as 'the 2004 Agreement').

The variation of the S.106 Agreement obligation under Schedule 1, Para 3.1, as set out in Para 3.5.2. of the Planning Statement would likely result in a delay to the implementation of the Little Oakley coastal realignment scheme, the consequences of this for the timing of provision of compensatory habitat and temporal impacts on the Stour and Orwell Estuaries SPA are discussed in 1.1 above.

Part 2 of the 2004 Agreement, Compensation, 3. Aims of the compensation scheme, p14, states:

1.3 HIPL shall carry out the Compensation Scheme at the Managed Realignment Site so far as is reasonably practicable to enable the following objectives to be met:

3.3.3 The Compensation Scheme should be in the course of being carried out at the time damage occurs to the Stour and Orwell Estuaries SPA and pSPA as a result of construction of

Container Terminal Works.

Further, Annex 1 of 2004 Agreement stipulates that Harwich International Ports Ltd (HIPL) shall use "reasonable endeavours" to ensure that the Compensation Scheme is implemented such that, depending on the date of commencement of the Marine Works, the Breach shall occur not more than 27 months later.

They are not confident the above objectives and obligations could be met if the obligation under Schedule 1, Para 3.1 in the S.106 agreement is varied as proposed in the Planning Statement and set out in 1.1 above.

1.3 Consulting the Regulatory and Advisory Group

Para 1.2.3, pp.5-6 of Annex 1 to the 2004 Agreement, states: "A group will be established to advise upon and give approvals in relation to the matters envisaged by this document."

Membership of the Regulatory and Advisory Group is made up of Regulators (Government Departments and Statutory Agencies) and Consultees, which include the RSPB, Suffolk Wildlife Trust, Essex Wildlife Trust, and Tendring District Council.

It is SWT's understanding that any delay to the implementation of the Little Oakley coastal realignment in relation to the development impact on the SPA that would be likely to impinge on HIPL's ability to meet its obligation under the 2004 Agreement to use "reasonable endeavours" to ensure that the Compensation Scheme is implemented such that, depending on the date of commencement of the Marine Works, the Breach shall occur not more than 27 months later, would need to be informed by consultation with the members of the Regulatory and Advisory Group whose establishment and membership is specified in the 2004 Agreement.

HPUK's stated intent to vary its obligation under Schedule 1, Paragraph 3.1 of the S.106 Agreement would appear to have a material impact on the ability of the parties to the 2004 Agreement to meet their agreed obligations in relation to the timing of implementation of the compensatory habitat relative to the loss of intertidal habitat due to the marine reclamation works at Bathside Bay.

Further, they are not confident that the changes to the phasing of the development proposed in the VOC application would not otherwise compromise the delivery of the Little Oakley coastal realignment scheme by changing the trigger point for implementation of the realignment.

Suffolk Wildlife Trust is listed as a member of the Regulatory and Advisory Group, but has not been consulted as such by HPUK in relation to this VOC application or any specific

elements of which have the potential to impact on the delivery of the Little Oakley compensatory habitat.

To address these concerns, they urge HPUK to convene the Regulatory and Advisory Group as prescribed in the 2004 Agreement to discuss the implications of the VOC application and potential future variation to the Section 106 Agreement for the delivery of the Little Oakley compensatory habitat in accordance with the 2004 Agreement.

2. Assessing cumulative impacts

They do not consider that the approach taken to assessing cumulative impacts of the Bathside Bay Container Port development in combination with other developments, as set out in Chapter 25 of the Environmental Statement - Habitats Regulations Assessment, and Chapter 23 - Cumulative Impact Assessment, is adequate to ensure all potentially significant cumulative impacts on the Stour and Orwell Estuaries SPA and Ramsar site, and on the Southern North Sea Special of Conservation (SAC) have been identified and assessed.

2.1.ES Chapter 25 - Habitats Regulations Assessment

Disturbance of harbour porpoises within the Southern North Sea SAC - In combination effects - they do not agree that impacts from projects that are already underway should be considered to form part of the baseline and therefore be screened out for further consideration of their cumulative effects in combination with the impacts of the Bathside Bay Container Port development.

ES Section 25.5.2.4 Potential for in-combination effects lists such projects screened out of further assessment:

- Dredging / aggregate projects (South Falls, Area 501, and Area 508,509 and 510);
- Greater Gabbard Offshore Wind Farm O&M Activities;
- Thanet Offshore Wind Farm O&M Activities; and
- East Anglia ONE Offshore Wind Farm O&M Activities

It is their view that these projects and activities should be considered further for their potential in combination effects on harbour porpoises with the Bathside Bay development.

2.2.ES Chapter 23 - Cumulative Impact Assessment

They do not consider that the approach taken to assessing cumulative impacts of the Bathside Bay Container Port development in combination with other developments is adequate to ensure all potentially significant cumulative impacts of the scheme on the Stour and Orwell Estuaries SPA and Ramsar site have been identified and assessed.

Planning applications to Tendring District Council for housing

development of a scale and in locations where there is the potential for significant effects in combination with the Bathside Bay development are considered, but developments in other planning authorities bordering the SPA and with the potential for significant impacts on the same qualifying species and assemblages for which the SPA is designated as those affected by the Bathside Bay development are not.

This creates the significant risk that in combination effects of the scheme that might result in significant adverse impacts on the integrity of the SPA have been missed in the assessment of cumulative impacts.

Section 5 of the Non-technical Summary of the ES - Cumulative Impact Assessment presents the following conclusions:

3. For the marine projects, it can be concluded that the cumulative impacts are not significantly different to the sum of the impacts predicted to arise from each project in isolation. In the case of tidal propagation, the combined effect is predicted to be less than the sum of the projects in isolation.

4. For the landside projects, the separation distance between other projects in the area and the proposed scheme, as well as the relatively minor nature of the construction works required to develop the other landside projects (and the mitigation measures which would be adopted by the other projects and the proposed scheme) resulted in no significant cumulative impacts being predicted.

Their comments on these conclusions are as follows:

1. They do not agree, as seems to be implied by 3. above, that the fact the cumulative impacts might not be significantly different to the sum of the impacts from each project individually means that the combined effects are no more significant than the effects of each project in isolation. This appears to contradict the whole concept of cumulative impacts;

2. As already stated above, in their view it is likely that potentially significant cumulative effects in combination with developments with the potential to impact on other parts of the Stour and Orwell Estuaries SPA, and therefore with the potential to result in significant cumulative adverse impacts on the integrity of the SPA and its conservation objectives, have been missed by the approach taken to assessing cumulative impacts.

They recommend further work to identify potential for significant cumulative impacts on the wider Stour and Orwell Estuaries SPA.

3. Justification of the need to vary the Conditions.

They are not convinced the applicant's justification of the need to vary the Conditions in the manner proposed - to allow the commencement of development before the expiry of the planning permission 10/00202/FUL - is reasonable grounds for approval given:

- a. the length of time that has elapsed since this planning permission - itself a renewal of an earlier permission - was granted; and
- b. the risk to mitigation and compensation of impacts on designated wildlife sites.

a. HPUK has known since the renewal of the 2006 planning permission in 2013 that this replacement permission would expire at the end of March 2022.

Any urgency to allow the Variation of Conditions now being sought could have been predicted in 2013 and results directly and entirely from the fact that the conditions the applicant is seeking to vary have not been discharged in a timely manner to allow commencement of the development before the expiry of the planning permission.

b. As described above, approving the VOC application could significantly increase the adverse impacts of the reclamation of Bathside Bay on the Stour and Orwell Estuaries SPA.

Additional comments:

AONB and Landscape and Visual Impacts

- SWT supports the Suffolk Coast and Heaths AONB team's request for the updated Landscape and Visual Impact Assessments to be amended to reflect the extension of the AONB in July 2020 to include the north bank of the River Stour and the River Stour itself.

- Further, they support the AONB team's comment that this VOC application should be considered in light of the NPPF requirement for development within the setting of AONBs to be sensitively located and designed to avoid or minimise adverse impacts on the designated areas.

Impacts on terrestrial ecology at Little Oakley realignment site

- They are aware that a separate application, 21/02144/FUL, has been made to TDC for the renewal of the previously permitted planning permission for the Little Oakley coastal realignment scheme, supported by an updated Environmental Statement.

- Colleagues at Essex Wildlife Trust have drawn their attention to the fact that terrestrial ecology surveys carried

out at the Little Oakley realignment site in 2021 identified the presence of water voles, with additional surveys needed to establish their numbers and distribution more accurately.

- As a protected species under the Wildlife and Countryside Act 1981, and a rare and most threatened species under Section 41 of the Natural Environment and Rural Communities Act (2006), measures will be required to safeguard any water voles present at Little Oakley prior to the commencement of any realignment works that could result in their destruction or the destruction of their habitats.

- They share with their colleagues at Essex Wildlife Trust serious concerns that the schedule being proposed for the development of Bathside Bay Container Terminal could conflict with the need for further surveys, mitigation and likely need for to implement a translocation scheme for water voles before realignment works can begin.

- This could further increase the gap in time between the loss of SPA habitat at Bathside Bay and the provision of functioning compensatory habitat at Little Oakley.

Current national policy and good practice guidance on providing compensatory habitat

- Since the original planning permission for the reclamation of Bathside Bay and construction of a Container Terminal, and the agreement for the provision of compensatory habitat at Little Oakley, there have been significant changes to UK Government policy and good practice guidance on the provision of compensatory habitat.

- Where avoiding and then mitigating adverse impacts on designated sites and/or priority habitats and species cannot prevent significant residual adverse impacts, compensatory measures should be put in place in advance of loss being incurred to minimise the risk of potentially significant impacts resulting from any lag in time between damage to / loss of existing habitats and replacement habitats reaching a stage of development and target condition at which they will function as suitable compensation for the habitats lost.

- If a new planning permission were being sought for the development of the Bathside Bay Container Terminal today, the provision of compensatory habitat in advance of loss would likely be a pre-requisite of permission.

- It is Suffolk Wildlife Trust's view that the implementation of the Little Oakley realignment only after the damage has been done to the Stour and Orwell Estuaries SPA through the destruction of intertidal habitats that will result from the reclamation of Bathside Bay is incompatible with current and emerging UK Government policy on protecting and restoring the natural environment, and with good practice guidance on the provision of compensatory habitat.

- Far from seeking permission to delay the delivery of the Little Oakley compensatory habitat, SWT believes HPUK should be making every effort to bring forward its implementation relative to the reclamation of Bathside Bay.

- Ideally, the intertidal mudflat and saltmarsh habitats the Little Oakley realignment scheme will aim to create should be established and functioning at a level to provide habitat of equivalent value for the qualifying species of the Stour and Orwell Estuaries SPA that will be impacted by the loss of habitat at Bathside Bay before that loss is incurred.

- Any increase in the time lag between habitat loss at Bathside Bay and delivery of the compensatory habitat at Little Oakley should be seen as unacceptable and at the last resort if this does occur it should necessitate an increase in the overall area of compensatory habitat required to offset the increased temporal effect of adverse impacts on the SPA.

- In addition to and not instead of the above, HPUK should seek to enhance the ecological design of the Bathside Bay development to incorporate more features to benefit biodiversity in the urban built environment it will be creating.

Suffolk Wildlife Trust
19.01.2022

Further to their letter of 17th January setting their comments on the application, they raised additional comments in support of concerns raised by the RSPB regarding potential future change of use application for the Bathside Bay container port facility.

1 The current VOC application and accompanying applications to discharge various conditions in relation to the approved development of the Bathside Bay container terminal reiterate the original application's (Ref: 03/00600/FUL) justification of the Imperative Reasons of Overriding Public Interest (IROPI) for allowing the development based on the national strategic need for a new container port capacity.

This IROPI justification was central to the Secretary of State's 2006 decision to approve the application, and allow the associated damage to the Stour and Orwell Estuaries Special Protection Area (SPA) following the applicant's appeal of the original decision by the District Council to refuse consent.

2 The future use of a new Bathside Bay port facility for any other purpose than as a container terminal would not be justified by the IROPI argument accepted by the Secretary of State and restated in the current application.

Suffolk Wildlife Trust fully supports the RSPB's comments on the need for more information on the applicant's plans in respect of any alternative use for the container port platform to ensure that the purposes of the Conservation of Habitats and Species Regulations 2017 are not subverted by allowing unnecessary damage to the National Site Network not

supported by the IROPI argument used to justify the damage to the Stour and Orwell Estuaries SPA based on the need for a new container port facility.

5. Representations

- 5.1 Harwich Town Council has no objection to this application.
- 5.2 No written representations have been received from members of the public or other interested parties.

6. Assessment

6.1 Overview

- 6.1.1 This application seeks permission to vary eight of the planning conditions that formed part of the planning permission granted by the Council in 2013 for the development of a Container Terminal at Bathside Bay.
- 6.1.2 The application site at Bathside Bay is located between Harwich International Port, Parkeston, to the west and Harwich to the east, on the south side of the estuary of the River Stour, on the opposite bank from the small settlement of Shotley Gate, which is itself separated from the Port of Felixstowe to the east by the estuary of the River Orwell. The 65ha site comprises primarily a large bay which forms part of the irregular edge to the southern shore of the Stour Estuary. From Parkeston in the west to Harwich in the east, the site is about 1.6km wide. From the open water of the Stour Estuary in the north, the distance across the site to the A120 road and the land fringing Dovercourt and Bathside Bay in the south is about 1km.
- 6.1.3 The proposed new terminal was assessed by the Secretary of State to have a capacity of 2.1 million TEU's (Twenty-foot Equivalent Units) when fully developed and operational. As a reference point the Port of Felixstowe, which is Britain's biggest and busiest container port, and one of the largest in Europe currently has capacity to handle more than 4million TEUs per annum.
- 6.1.4 In summary the 2013 planning permission for the Container Terminal comprises:
- Engineering and reclamation works including the construction of a cofferdam and 1.4km quay wharf;
 - Construction of a concrete block paved container handling and stacking facility with 11 quay side cranes - 80m high with booms down (on top of a quay that would be 4m AOD) and 113m high with booms up – to serve 4 berths;
 - Mast and crane mounted lighting;
 - Container storage to a maximum of 5 containers high (i.e. 15m high in total)
 - 44 rubber tyred gantry cranes (RTGs) each approximately 21m high;
 - Terminal office accommodation and car parking;
 - Terminal control gateway;
 - Border inspection post with X-ray facility;
 - A logistics building, mess room, workshop and drivers' facilities;
 - 6.13ha rail terminal with 8 parallel rail sidings and 3 rail gantry cranes, each about 20m high;
 - Sheet piled flood wall;
 - Primary substation;
 - Replaced external fencing to the A120 frontage plus security fencing within the site; and
 - Wetland area/mounding – new tree planting, wetland vegetation and mounding (4m above the level of the A120 road) in a buffer strip adjacent to the A120 road.

- 6.1.5 When the proposals for the development were being drawn up, concerns were raised about the impact of the works and subsequent operation the port would have on the users of small boats used for recreation and fishing, who previously moored their boats within the bay. The Local Plan at the time also identified the area as being suitable for continued development and expansion of port facilities, as well as a mixed-use development and mooring basin. This all led to the proposal that a Small Boat Harbour that would be provided by the developer of the container port adjacent to it. The Small Boat Harbour was designed to provide an alternative sheltered marine environment where boats could be moored or dock with facilities for use by both fishing and recreational boats, including by the Harwich and Dovercourt Sailing Club. Berthing facilities will be provided for at least 77 boats.
- 6.1.6 The planning permission for the Small Boat Harbour comprises:-
- Engineering and reclamation works, including construction of a cofferdam wall and breakwater;
 - Sheltered moorings for boats and a wave wall;
 - Slipway and boat storage and tender compounds;
 - Public viewing and seating areas;
 - Fisherman's store and fuel facility; and
 - Site works including access road, car parking and lighting, fencing and landscape mounds.
- 6.1.7 The applicant has stated that it intends to implement the extant permission for the Container Terminal on or before its expiration on 29th March 2022.
- 6.1.8 The planning permission was granted on the basis that the development would be built in phases and condition 3 requires the submission and approval of a phasing plan prior to the commencement of development. The applicant has submitted a separate discharge of condition application which sets out the phasing plan for the development and the Council has approved those phasing details through application ref.no.21/01625/DISCON.
- 6.1.9 The elements of work being undertaken within Phase 0 and Phase 1 are of relevance to the assessment of this application as these are the elements of the development that would be undertaken before the conditions and obligations that are the subject of this application are discharged:

Phase 0 (works being undertaken under Permitted Development Rights for statutory harbour undertaker)

- Internal roads, including cyclamen scanner lanes;
- Control Gates;
- Border Inspection Post & Customs Control;
- UK Border Force facility; and
- Driver Facilities.

Phase 1

- Internal roads (linking to the already constructed A120 roundabouts);
- Holding areas and car parks;
- In – Out Control Gate (and diversion of internal road / relocation of cyclamen portal lanes being installed in Phase 0);
- Office Buildings;
- Workshop; and
- Landscaping and wetland areas to the west of the western A120 entrance.

- 6.1.10 The remainder of the development, including all the tidal works will be carried out within the remaining 3 phases (Phases 2-4).

- 6.1.11 As set out within the planning history section of this report, HPUK have already made two separate applications to discharge the remaining pre-commencement planning conditions on the extant permission (the aforementioned nos 3, 5, 7, 9, 10, 11, 12, 13, 14, 16, 17, 25, 27, 29, 30, 32, 33, 34, 35, 36, 38, 39, 40, 48 & 49), and Officers continue to assess these applications with the assistance of the relevant statutory consultees.
- 6.1.12 The application seeks permission to vary eight planning conditions in planning permission 10/00202/FUL, in respect of the proposed Bathside Bay Container Terminal. There are two elements to the request –
- i) variation to Condition 2, to allow the substitution of twelve new plans to replace seven of the plans that were approved as part of the original planning permission, and
 - ii) change the time at which the other seven conditions need to be discharged. Currently these are required to be discharged prior to the commencement of development. The applicant asserts that this is unnecessary as the elements of the development that are being controlled and/or mitigated do not relate to the initial phase (phase 1) of the development. The changes are proposed to condition 28 (Operational Lighting); condition 41 (A120 Highway Improvements); condition 42 (Off-Site Highway Works); condition 43 (Off-Site Highway works); condition 44 (A120 Highway works), 52 (Operational Air Quality Controls) and 53 (Operational Traffic Noise Attenuation).
- 6.1.13 The applicant considers that some of the planning conditions imposed by the Secretary of State would now be considered unreasonable, with reference to current legislation and Government policy (the PPG). This is because seven of the eight conditions that are proposed to be varied require the submission and approval of certain details, and the carrying out of highway works to the A120, for elements of the development prior to its commencement or operation, even though the impact that would be controlled or mitigated would not occur at the outset of the development process, but after phase 1. The other condition to be varied is condition no.2 which requires that the development is built out in accordance with a list of approved plans. As a result of changing operational port requirements and following discussions with utility undertakers some minor modifications are proposed to the previously approved development layout.
- 6.1.14 The applicant is not proposing that any of the imposed planning conditions are removed from the planning permission, simply that the approved plans are revised and the wording of seven other conditions amended to change the 'trigger' for the submission of details, and the carrying out of highway works, from pre-commencement of the development (or pre-operation in the case of the highway works) to a point after Phase 1.
- 6.1.15 If this application is approved by Members, the Council will be issuing an entirely new planning permission, and should apply the same controls and requirements that were imposed on the original planning permission. However, it should be noted that whilst section 73 applications can be used to vary or remove (seek non-compliance with) planning conditions, they cannot be used to amend the time limit for implementation; consequently the condition specifying the timeframe within which the development should commence (condition no1) must remain unchanged from the original permission.
- 6.1.16 Because of the scale, nature and environmental impacts of the proposed development, the original 2003 planning application was accompanied by an Environmental Statement (ES), pursuant to the Environmental Impact Assessment (EIA) Regulations. The application for a replacement permission submitted in 2010 was accompanied by a Supplementary Environmental Report (SER) which reviewed and revised the original ES. The present application to vary planning conditions is accompanied by a further ES which reviews the 2003 ES and 2010 SER and where appropriate updates their assessments. The current ES

completes the assessment by updating any effects that may have changed during the intervening period, since the replacement permission was granted in 2013. The applicant's assessment and its conclusions are considered within the body of this report.

6.1.17 When the Secretary of State (in 2006) and the Council (in 2013) assessed the proposals for the Container Terminal and Small Boat Harbour, this was alongside two further associated applications. These applications covered additional development and works which would be necessary to facilitate and mitigate the impacts of the combined development, namely:

- Engineering works to create new habitat to mitigate the ecological impacts of the Container Terminal development, including the breaching of the existing seawall at Little Oakley, and
- Listed building consent for the partial demolition of the long berthing arm attached to the listed Train Ferry Gantry, Harwich and associated remedial works.

6.1.18 In 2010, HPUK submitted applications to the Council for replacement planning permissions to extend the period of time allowed to implement the development. Although three planning permissions and one listed building consent had been obtained originally, HPUK only submitted applications to extend the time allowed to implement the Container Terminal and Small Boat Harbour developments, along with a new application for Listed Building Consent in respect of the Train Ferry Gantry. No application was made to extend the time allowed to implement the works to create compensatory habitats at Little Oakley. Subsequently that planning permission lapsed in 2016.

6.1.19 The applicant has submitted a new application for Listed Building Consent in respect of the Train Ferry Gantry works (21/02407/LBC) and a new planning application for the works at Little Oakley (21/02144/FUL). Those applications were received some time after the application the subject of this report, and the latter is still being assessed by Officers, however Listed Building Consent was granted 4th February 2022. The different applications are inextricably linked in that they are all necessary if the proposed Container Terminal is to proceed. It is possible to consider each proposal separately by assessing each scheme against the Development Plan, whilst having regard to all material considerations, but ultimately they stand or fall together. In particular, the Council will need to be satisfied that appropriate compensatory habitats will be created at Little Oakley before it can grant permission for the Container Terminal. The Little Oakley application has been called to Planning Committee for determination by Councillor Mike Bush at a later date.

6.2 Context and Background

6.2.1 As highlighted above, in 2003 HPUK applied for planning permission for the construction of a new container terminal at Bathside Bay, Harwich, along with three associated applications for works to facilitate the development of the port, and to carry out works of development at Little Oakley to mitigate some of the impacts of the proposal.

6.2.2 The three associated planning applications were for:

- Provision of a 4ha Small Boat Harbour in the vicinity of Gas House Creek, Harwich, at the eastern side of the Bay, consisting of engineering and reclamation works including the construction of a cofferdam wall and breakwater; provision of sheltered moorings for boats and a wave wall; slipway and boat storage/tender compounds; public viewing and seating areas; and fishermen's store and fuel facility;
- Creation of compensatory intertidal habitats, to mitigate the ecological impacts of the Container Port and Small Boat Harbour, on 138ha of land to the south east of Foulton Hall, Little Oakley, a few kilometres south of Harwich and Dovercourt. The proposed works would involve the stripping of vegetation, removal of topsoil, construction of seawalls and borrow dykes around the inner/landward side of the site, localised widening and deepening

of the former creek, a 70m breach of the existing seawall, construction of wave breaks inside the site next to the breach, diversion of the footpath around the perimeter of the site, pumping of dredged mud into the site (from Bathside Bay) and the placement of dredged sand and shingle. The habitats to be created would comprise (approximate initial areas) intertidal mudflat (76ha), intertidal mudflat/saltmarsh transition (19ha), saltmarsh (10ha), sand and shingle (5ha), fresh/brackish water borrow dykes (7ha), and

- Listed building consent for the partial demolition of the long berthing arm attached to the listed Train Ferry Gantry and associated remedial works.

6.2.3 The above applications were granted permission by the Secretary of State in 2006 following appeals against non-determination. In 2010, HPUK made applications for replacement permissions in respect of the Container Terminal and Small Boat Harbour, and a replacement Listed Building Consent (LBC), to extend the period of time to implement the development to 2021. Those applications were considered by the Council to be consistent with the prevailing local and national planning policies and they were approved in 2013 with a new condition which required that the development commence by 29th March 2021.

6.2.4 The decision of the Council to grant the replacement permissions and LBC was subject to an unsuccessful Judicial Review. Because a developer's plans to implement a planning permission would be delayed whilst a Judicial Review is considered and determined, planning legislation allows them an additional year to implement it where a Judicial Review is brought. This means that the current permissions for the Bathside Bay Container Terminal and the Small Boat Harbour, granted in 2013, remain extant, but development must be begun on or before 29th March 2022.

6.2.5 The development of the Container Terminal and the Small Boat Harbour are both significant developments and by virtue of their scale, nature and location the developments will have some significant local impacts. When the Secretary of State granted the various planning permissions in 2006, conditions were imposed and S106 agreements executed in order to control and mitigate these impacts. When the Council came to grant the replacement planning permissions in 2013, the same conditions were imposed and the S106 agreements were varied and supplemented so that they worked in tandem with the 2013 permissions.

6.2.6 Permission for the Container Terminal was subject to 54no separate planning conditions, of which 18no were 'pre-commencement conditions' – where the applicant is required to submit and gain approval of details prior to the commencement of the development.

6.2.7 In parallel with the current S73 application, the applicant has submitted two separate discharge of condition applications which seek to discharge all the other pre-commencement conditions attached to the 2013 planning permission which are not the subject of this application.

6.3 Planning History

6.3.1 The 54no planning conditions attached to 2013 planning permission are summarised below, along with the details of which ones were pre-development commencement conditions. For the pre-commencement conditions the table also identifies whether the applicant is proposing to vary the condition (through this Variation of Condition application), or the related discharge of condition application (DISCON), where relevant. Condition nos 16 and 17 are the subject of 21/01625/DISCON, with details having been submitted, but they are not pre-commencement conditions.

Condition no. & purpose	Pre-comm. condition	DISCON application Reference.
-------------------------	---------------------	-------------------------------

	Yes/No	
1. Time to commence	No	-
2. Approved plans	No	(To be varied by this application)
3. Phasing	Yes	21/01625/DISCON
4. Approved document (Planning and Design Statement)	No	-
5. Landscaping scheme	Yes	21/01817/DISCON
6. Landscape management scheme	No	-
7. Details of external appearance of buildings and hardstanding	Yes	21/01817/DISCON
8. Top Soil	No	-
9. Means of enclosure	Yes	21/01817/DISCON
10. Foul and surface water drainage	Yes	21/01817/DISCON
11. Details of wetland area	Yes	21/01817/DISCON
12. Archaeology	Yes	21/01625/DISCON
13. Construction Management Plan	Yes	21/01625/DISCON
14. Noise & vibration	Yes	21/01625/DISCON
15. Operation of plant	No	-
16. Plant audible alarms	No	21/01625/DISCON
17. Piling	No	21/01625/DISCON
18. Piling - hours	No	-
19. Construction noise levels	No	-
20. Construction vibration levels	No	-
21. Operational noise and vibration monitoring plan	No	-
22. Operational noise levels	No	-
23. Open storage – height of container stacking	No	-
24. Open storage – height of container stacking south of rail terminal	No	-
25. Construction lighting scheme	Yes	21/01625/DISCON
26. Construction lighting – max height	No	-
27. Construction lighting – luminaires	Yes	21/01625/DISCON
28. Operational lighting scheme	Yes	(To be varied by this application)
29. Construction dust management plan	Yes	21/01625/DISCON
30. Cleaning and maintenance programme for site roads	Yes	21/01625/DISCON
31. Vehicles sheeted	No	-
32. Wheel wash facilities	Yes	21/01625/DISCON
33. Storage and handling of construction materials	Yes	21/01625/DISCON
34. Dust monitoring strategy	Yes	21/01625/DISCON
35. Gas mitigation	Yes	21/01817/DISCON
36. Flood evacuation plan	Yes	21/01625/DISCON
37. Minimum floor level of buildings	No	-
38. Concrete pouring and filling	Yes	21/01625/DISCON
39. Pollution control	Yes	21/01625/DISCON
40. Translocation of species	Yes	21/01817/DISCON
41. Details of highway works – A12, A120 & A1232	Yes	(To be varied by this application)
42. Details of highway works – A120 & Parkeston Road roundabout	Yes	(To be varied by this application)
43. Implementation of highway works agreed for conditions 41 & 42	Yes	(To be varied by this application)
44. Details of highway improvements – A120	Yes	(To be varied by this

		application)
45. Implementation of highway works agreed for condition 44	No	-
46. Restrictions on use of part of the site until highway works (condition 45) are completed	No	-
47. Temporary traffic management – A120	No	-
48. Vehicle access to the site from the A120	Yes	21/01817/DISCON
49. Operational parking for HGV's & cars – phased	Yes	21/01817/DISCON
50. RoRo vehicles	No	-
51. Emergency port closure scheme	No	-
52. Operational Air quality management plan	Yes	(To be varied by this application)
53. Operational Traffic Noise Mitigation (Wix Road Ramsey)	Yes	(To be varied by this application)
54. Not to extend Container Terminal to include land within existing Harwich International Port	No	-

6.4 Proposals

6.4.1 The present application seeks permission to vary eight planning conditions from planning permission 10/00202/FUL in respect of the proposed Container Terminal. There are two elements to the request –

i) variation of Condition 2 to revise the list of approved plans, adding twelve new plans to replace and supplement seven plans that were approved as part of the original planning permission, and

ii) change the time / trigger at which the other seven conditions need to be discharged. Six of the seven conditions require that they are discharged prior to the commencement of development: these are condition 28 (Operational Lighting); condition 41 (A120 Highway Improvements); condition 42 (Off-Site Highway Works); condition 44 (A120 Highway works), 52 (Operational Air Quality Controls) and 53 (Operational Traffic Noise Attenuation). Condition 43 requires that the off-site highway works referred to in conditions 41 and 42 are implemented before the permitted development is operated.

6.4.2 In broad terms, the applicant has applied to change the wording of the conditions so that the specified details can be submitted and approved, and the off-site highway works carried out, after phase 1 of the proposed development has been completed.

6.4.3 The revised wording of the conditions sought by the applicant (with some additional minor updating changes) is set out below. The words which are struck out form part of the original condition wording and are proposed to be deleted. The words in bold font and italics are new words that are proposed to be added.

- Condition 28 – Operational Lighting

~~The~~***No part of the*** development permitted by this planning permission shall ~~not be commenced~~***commence operation*** until a scheme for the provision and control of operational lighting (including high mast lighting and column lighting) on ***that part of*** the site has been ***installed in accordance with a scheme which has first been*** submitted to an approved by the Local Planning Authority. The operational lighting scheme shall include the following:

(a) use of luminaires with high quality optical systems of Hat glass construction for high mast lighting;

- (b) use of full cut-off luminaires which do not produce upward spread of light near to or above the horizontal;
- (c) a restriction on the luminaire tilt angle to maximum of 8 degrees above the maximum peak of intensity angle or luminaire;
- (d) the direction of high mast lighting so as to minimise direct light into windows or properties in the proximity of the development site;
- (e) a reduction of the heights of high mast lighting towers and columns towards the boundary of the site;
- (f) automatic extinguishment of ship to shore gantry crane boom arm floodlighting and maintenance access walkway lighting on the raising or a crane boom arm 10 degrees from the horizontal operation position;
- (g) access and safety luminaries on access walkways and ladders shall be fitted with diffusers;
- (h) the working lighting of the ship to shore gantry cranes shall be switched off when not in use for any extended period of time, retaining only access, safety and security lighting;
- (i) ship to shore gantry crane boom arm, floodlighting luminaries located beyond the riverside edge of berthed vessels shall be manually turned off when not in use;
- (j) working lighting of rubber tyre gantry cranes shall be switched off when not in use for an extended period of time, retaining only access, safety and security lighting;
- (k) operational lighting monitoring procedures and action to be taken in the event of non-compliance.

The lighting scheme hereby permitted shall be carried out and maintained in accordance with the approved scheme.

- Condition 41 – A120 Highway Improvements

No part of **Phases 2, 3 and 4 of** the development hereby permitted (**as shown on approved drawing H1001-19-B**) shall ~~be commenced~~ **commence operation as a container terminal** until such time as details of works for the improvement of the A12(T)/A 120(T)/A 1232 Ardleigh Crown Interchange in such form as ~~the National Highways Agency~~ and **the** Local Highway Authority may approve in writing, have been submitted to and approved in writing by the Local Planning Authority. The details of the said works shall:

- (a) be to a standard at least capable of ensuring:
 - (i) that conditions at the Interchange are no worse during and at the expiration of a period of 10 years from the anticipated date of commencement of operation of the development; and
 - (ii) the safety of all road users including pedestrians and cyclists using the junction; and
- (b) include drawings to a scale of not less than 1:500 whether or not requiring the land of third parties.

- Condition 42 – Off-Site Highway Works

No part of **Phases 2, 3 and 4 of** the development hereby permitted (**as shown on approved drawing H1001-19-B**) shall ~~be commenced~~ **commence operation as a container terminal** until such time as the details of a scheme for the Improvement of the A120(T) Parkeston Road/Station Road/Europa Way roundabout, in such form as National Highways and the Local Highway Authority may approve in writing, have been submitted to and approved in writing by the Local Planning Authority. The details of the said works shall:

- (a) be to a standard at least capable of ensuring:

- (i) that all traffic relating to the development is accommodated during and at the end of a period of 10 years from the anticipated date of commencement of operation of the development; and
 - (iii) the safety of all road users including pedestrians and cyclists using the junction; and
- (b) include drawings to a scale of not less than 1:500 whether or not requiring the land of third parties.

- Condition 43 – Off-Site Highway Works

No parts of **Phases 2, 3 and 4 of** the development hereby permitted (**as shown on approved drawing H1001-19-B**) shall be operated **as a container terminal** until the works referred to in Conditions 41 and 42 have been implemented and/or opened to traffic as the case may be.

- Condition 44 – A120 Highway Works

No part of **Phases 2, 3 and 4 of** the development hereby permitted (**as shown on approved drawing H1001-19-B**) shall ~~be commenced~~ **commence operation as a container terminal** unless:

- (i) the Secretary of State for Transport has announced a preferred route for the improvement of the route of the A120(T) (including from Ramsey Bridge roundabout to Parkeston) together with consequential and ancillary improvements thereto and to the A120 and any side roads and access between and in the vicinity of:
 - (a) the A120(T)/A133 Interchange Hare Green and Horsely Cross roundabout to no less a standard than a two lane dual carriageway; and
 - (b) from Horsely Cross Roundabout to Ramsey Bridge Roundabout to no less a standard than a wide single carriageway; or in each case such other terminal points for such route improvements as the Secretary of State may announce;
- (ii) the Local Highway Authority has announced proposals relating to the local highway network including the A120 Parkeston roundabout to Morrison roundabout required as a result of the proposals referred to at (i) above;
- (iii) an agreement or agreements have been concluded pursuant to section 278 Highways Act 1980 to secure funding of such route improvement works together with all such consequential and ancillary improvements to the A120(T), A120 and any side roads in such form and upon such route as may thereafter be authorised pursuant to orders under the Highways Act 1980 and associated instruments made therewith;
- (iv) the necessary powers and consents to implement the works referred to at paragraphs (i) and (ii) above have been secured; and such improvement works have been begun by or on behalf of the Secretary of State for Transport and/or Essex County Council by carrying out of a material operation in respect thereof as the same is defined in section 56 of the Town and Country Planning Act 1990.

- Condition 52 – Operational Air Quality Controls

No part of the development hereby permitted shall ~~be implemented~~ **commence operation** until a ~~written~~ scheme providing for the operation of the development in accordance with measures designed to secure controls on activities likely to adversely affect air quality **as a result of activities on that part of the site** has been installed **in accordance with a written scheme which has first been** submitted to and approved in writing by the Local Planning Authority. The scheme shall include:

- (i) a strategy for the procurement of plant, machinery and vehicles to be used in operating the development complying with Government air quality objectives from time to time for

- control of emissions including (where appropriate) the fitting and use of catalytic convertors;
- (ii) a requirement that the development should be capable of being retrofitted with apparatus for the purposes of the supply of electricity from land to vessels berthed alongside;
 - (iii) procedures for liaison and review in relation to the prospects of securing improvements to emissions from the development and the adoption of reasonable measures identified as being necessary as a result of such liaison and review; and
 - (iv) a requirement upon the terminal operator to request that the Harwich Haven Authority imposes reductions in vessel speeds in order to limit emissions.

The development shall be operated in accordance with the scheme so approved.

- Condition 53 – Operational Traffic Noise Mitigation (Wix Road Ramsey)

No part of **Phases 2, 3 and 4** of the development hereby permitted shall ~~be commenced~~ **commence operation** until a scheme for the provision of noise attenuation measures designed to mitigate the impact of traffic noise arising from the operation of the development on residential and/or noise sensitive properties at or in the vicinity of Wix Road Ramsey has been submitted to and approved in writing by the Local Planning Authority. The approved scheme shall be carried out prior to commencement of the operation of the development.

6.5 Policy Considerations

- 6.5.1 The application must be assessed against the Development Plan and other material considerations that are considered relevant to the proposed development. Given that an extant permission exists, part of this consideration will include assessing whether there have been any material changes in circumstances, including in national or local planning policy, since the Council last considered the proposed development in 2013 that would result in a different decision being reached today.

National Planning Policy

National Policy Statement for Ports

- 6.5.2 The National Policy Statement for Ports 2012 (NPS) is intended to provide the framework for decisions on proposals for new port development (Para.1.2.1). 'The NPS sets out the Government's conclusions on the need for new port infrastructure, considering the current place of ports in the national economy, the available evidence on future demand and the options for meeting future needs' (Para.1.2.4).
- 6.5.3 A new Container Terminal at Bathside Bay is listed in the NPS as being one of the permitted schemes that the Government was counting on to increase the national deep water container port capacity, with capacity to handle an estimated 1.7 million TEU per annum, helping to meet the growing national need for this type of facility.
- 6.5.4 The NPS states that based on Government forecasts over the next 20-30 years there is a compelling need for substantial additional port capacity, to be met by a combination of development already permitted and development for which applications have yet to be received. The NPS concludes by warning that 'Excluding the possibility of providing additional capacity for the movement of goods and commodities through new port development would be to accept limits on economic growth and on the price, choice and availability of goods imported into the UK and available to consumers. It would also limit the local and regional economic benefits that new developments might bring. Such an outcome would be strongly against the public interest' (Para.3.4.16).

- 6.5.5 It is noted that the NPS was published in 2012 and is now almost 10 years old; however the Secretary of State is responsible for monitoring the need to review and update the NPS. When considering whether the document needs to be reviewed they are required to consider whether there has been a significant change in any circumstances on which the policy was based and whether such change was anticipated when the NPS was designated.
- 6.5.6 The NPS has not been subject to revision, indicating that the Secretary of State does not consider that circumstances have changed to an extent that the NPS needs to be revised. Officers note that since 2012 the Department for Transport have produced updated forecasts for UK Port Freight Traffic. The 2019 forecast continues to show very large increases in the level of container freight and the publication of these forecasts did not lead the Secretary of State to withdraw or update the 2012 NPS.
- 6.5.7 The NPS also states that the need for port infrastructure ‘depends not only on overall demand for port capacity, but also on the need to retain the flexibility that ensures that port capacity is located where it is required, including in response to any changes in inland distribution networks and ship call patterns that may occur, and on the need to ensure effective competition and resilience in port operations’ (Para.3.4.1). The need for resilience has been emphasised in the last few years where the media have reported bottle necks at UK ports which have led to delays and increased costs.

National Planning Policy Framework (2021)

- 6.5.8 The NPPF states that the planning system should be achieving sustainable development. Achieving sustainable development means that the planning system has three overarching objectives, which are interdependent and need to be pursued in mutually supportive ways – economic objectives; social objectives and environmental objectives.
- 6.5.9 Local Planning Authorities are directed to ensure that local plan policies make provision ‘for any large scale transport facilities that need to be located in the area, and the infrastructure and wider development required to support their operation, expansion and contribution to the wider economy’ and take into account any relevant national policy statements (Para.106(e))
- 6.5.10 Guidance on habitats and biodiversity is given in Paras 179-182 of the NPPF. Broadly speaking, the Council should seek to protect and enhance biodiversity in the exercise of its planning functions. Where (as here) an appropriate assessment has shown that development would adversely affect the integrity of a habitats site, the presumption in favour of sustainable development in Para 11(d) does not apply.
- 6.5.11 In addition to national policy on biodiversity, s 40 of the Natural Environment and Rural Communities Act 2006 requires the Council, in exercising its functions, to have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.

Freeports

- 6.5.12 In March 2021 the Government announced in the Budget the locations of eight new Freeports within England. Freeports are intended to be national hubs for global trade and investment across the UK. They also aim to promote regeneration and job creation as part of the Government’s policy to level up communities. Freeport East, which includes Felixstowe and Harwich, was one of the eight designated sites in England. The Government propose that Freeports will benefit from incentives relating to customs, tax, planning, regeneration,

infrastructure and innovation. The designation of Freeport East can be seen as recognition of the national importance of existing and proposed port operations at Felixstowe and Harwich.

- 6.5.13 Overall it is considered that there have been no material changes in the thrust of national planning policy that would alter the context within which the application would be assessed. Indeed the recent announcement about Freeport East and the fact that the NPS remains unchanged as the national policy on ports after updated port traffic forecasts were produced in 2019 indicates continuing support for the proposals for the Container Terminal, and associated developments.

The Development Plan

- 6.5.14 Planning applications should be determined in accordance with the development plan unless material considerations indicate otherwise.

Tendring District Shared Strategic Section 1 Local Plan (2021)

- 6.5.15 The shared Part One of the Local Plan sets out high level planning policies for the North Essex Authorities (Tendring, Braintree & Colchester). Policy SP3 sets out the spatial strategy for development and states that existing settlements will be the principal focus for additional growth across the North Essex Authorities area within the Local Plan period. Policy SP5 is concerned with employment and the policy states that the North Essex Authorities will promote a strong, sustainable and diverse economy and will pursue a flexible approach to economic sectors showing growth potential across the Plan period. The Container Port proposals are broadly consistent with both policies, being located on the edge of one of the District's main towns. As evidenced through the NPS, the port sector, and container ports in particular, are a sector of the economy that has significant growth potential if suitable facilities are provided.
- 6.5.16 It is also noted that the North Essex Spatial Portrait identifies the Haven Ports as being important facilities, not only locally, but also nationally with the role that they play in handling container ships and freight transport to and from the rest of the UK.

Tendring District Section 2 Local Plan (2022)

- 6.5.17 The previous Tendring District Local Plan (2007) contained specific policies regarding both the Bathside Bay Container Terminal and the Small Boat Harbour – Policies HAR1 & HAR10. Policy HAR1 sought to protect the site for the permitted use, but also guarded against variations to the scheme that had been approved that would be unacceptable in terms of local amenity; infrastructure; nature conservation interests; and designated heritage assets. The 2007 Local Plan is now superseded so these policies no longer carry any weight.
- 6.5.18 Policy PP14 designates Harwich Old Town as one of the Priority Areas for Regeneration. The Section 2 Local Plan in its supporting text lists one of the aims for regeneration as being to maximise the opportunity offered by 'Freeport' status and the proposals for expansion at Harwich International Port and Bathside Bay and to support opportunities to improve water-based recreation facilities in the area (Para.6.10.8). The supporting text also refers to the designation of Freeport East and the unique opportunity this presents to build a truly global trade hub at the same time as accelerating opportunities in green energy and helping 'level-up' the economy.
- 6.5.19 Other policies of relevance include SP1 which identifies Harwich & Dovercourt as being one of the District's four Strategic Urban Settlements, making this a preferred location for new development. Policy PP6 seeks to protect employment sites for employment generating uses. Whilst a small part of the designated employment site will be used to create the Small Boat Harbour this is being provided to facilitate the larger Container Terminal development. The

employment and economic benefits of the Container Terminal scheme justify the small loss of land designated for general employment purposes. Policy PP8 sets out the Council's approach to development associated with tourism. The policy states that proposals for marinas and boat harbours and associated facilities will be supported on appropriate sites, subject to general compliance with other development plan policies.

- 6.5.20 Chapter 7 of the Local Plan is entitled Protected Places and contains a number of policies which seek to manage development in a way that protects against inappropriate development causing harm in terms of Flood Risk (PPL1); the rural landscape (PPL3); Biodiversity and Geodiversity (PPL4) and the historic environment (PPL7, PPL8 & PPL9). The Protected Places policies are considered to be generally consistent with the approach taken in policies within the development plan as it was at the time of the Secretary of State's decision in March 2006 and the Council's grant of replacement permissions in February 2013.
- 6.5.21 Policy SP6 is concerned with Place Shaping Principles. The policy clearly seeks to protect the amenities of existing and future residents, referring to noise, vibration, smell, loss of light and overlooking. Although not specifically listed, it is considered that protection of amenities should reasonably include lighting in general and not just loss of light.
- 6.5.22 It should be noted that the Inspector who reported on the original application to the Secretary of State concluded that it is inevitable that a development of the scale and nature would be unlikely to accord with every policy contained within a development plan and that the correct legal approach is to consider the policies of the development plan as a whole.
- 6.5.23 When determining the application in 2006 the Secretary of State concluded that the details of the proposals, supported by the suite of planning conditions and obligations, would ensure compliance with the vast majority of development plan policies. Whilst he accepted that there were some visual and landscape policy matters incapable of being complied with, he concluded that overall, the proposals, as proposed to be mitigated and compensated, would accord with the broad thrust of development plan policies. In 2013 the Council adopted a similar approach, albeit the development plan at the time had changed. Although the current development plan does not have the same site-specific policy support for the development, on balance Officers consider that provided the requirements of the Habitats Regulations are satisfied the proposed development, with conditions varied as proposed, would be in accordance with the current development plan taken as a whole.

7. Assessment

Condition 2 (Approved Plans / Documents)

- 7.1.1 The applicant proposes that condition 2 is varied which requires that the development is carried out in accordance with a list of approved plans and documents. The majority of the approved plans remain unchanged, but it is proposed that 7no approved plans are superseded and replaced by new ones. It is also proposed that 5no additional plans are added to the list of approved plans.
- 7.1.2 The need for there to be revisions to the proposed layout is largely borne out of changes of operational requirements at UK ports since the original Masterplan was approved in 2006. In its Planning Statement the applicant identifies the main drivers for the changes as being additional security requirements; the impacts of Brexit; and changes in technology.
- 7.1.3 Security - With regards to security, the introduction in 2011 of the International Ship & Port Security Code (ISPS) has resulted in a number of modifications being required to the Masterplan, including the need for additional security check points; provision of cyclamen

radiation scanners and 3m high weld mesh fence topped with barbed wire to create a restricted area for port operations.

- 7.1.4 Brexit – in terms of port operations the UK's departure from the European Union (EU) has resulted in the need for additional checks on passport and on paperwork for imports and exports of goods to the EU; and additional physical inspections of goods. It should be noted that these requirements have had greatest impact on freight moved by Ro-Ro shipping. The term Ro-Ro shipping is an acronym for roll-on, roll-off shipping. Unlike container shipping where freight is moved within metal shipping containers, Ro-Ro shipping is where freight is transported in road-going trailers ie HGVs. The new port facility at Bathside Bay is to be used for container shipping, not Ro-Ro shipping. Harwich International Port already carries Ro-Ro traffic and the Bathside Bay planning permission prohibits Ro-Ro freight being transported through the container terminal. HPUK already operate Harwich International Port and they propose to provide new facilities to meet the additional requirements for Ro-Ro traffic coming to and from Europe within the site of the Bathside Bay Container Terminal. It is proposed that Ro-Ro freight will leave the port through facilities and roads on the Container Terminal site. This has led to the facilities being reorganised and relocated within the application site to the south of the rail head. This has in turn resulted in further consequential changes to the layout to the south of the rail terminal, including the relocation of the port control gate; changes to the position of the office building and office car park; splitting the pre-gate holding area into two parts; and omission of the post-gate holding area.
- 7.1.5 Technology – it is now good practice within ports to use electric internal movement vehicles to move containers and trailers around within the port. This is to be welcomed in terms of reducing CO2 emissions, reducing reliance on fossil fuels, and improving air quality, amongst other things. The use of these electric vehicles means that the layout has had to be amended to create a larger parking area which includes space for charging points.
- 7.1.6 Finally the applicant reports that some changes to the landscape strip along the southern side of the site have been necessary to accommodate the installation of an underground UKPN electricity cable.
- 7.1.7 To Officers, the proposed changes appear reasonable, allowing the Container Terminal to operate, whilst complying with current standards and regulations and also helping to maintain the efficient operation of the neighbouring Harwich International Port. No objections have been received from any statutory consultees in respect of these changes and accordingly Officers have no objection to the proposed changes either.

Conditions 28 (Operational Lighting), 52 (Operational Air Quality Controls) and 53 (Operational Traffic Noise Mitigation (Wix Road Ramsey))

- 7.1.8 The nature and scale of the proposed port operation means that it is inevitable that there will be a need to control various aspects of the operation of the container port – which will operate throughout the day and night. Failure to do so could lead to unacceptable impacts on the local environment in respect of matters such as ecology; visual amenity and the amenity of local residents. As a result, amongst the conditions that were imposed by the Secretary of State, were requirements that the Council approve schemes that will control the operational lighting of the site and activities within the port to protect local air quality. It was also accepted that the development would cause an increase in HGV traffic and that the resulting increased road noise would particularly impact some local residents living in Wix Road, Ramsey. It was accepted that a noise barrier would need to be installed, to protect these properties, on the north side of the A120(T). This would provide noise attenuation to mitigate the impact of traffic noise arising from the operation of the development on residential and/or noise sensitive properties.

- 7.1.9 There have been no changes to the spirit of planning policies, meaning that there remains a need to control the operational lighting of the site, air quality and noise from increased traffic. However, as previously stated the Government now requires local planning authorities, and other decision makers, to only use pre-commencement planning conditions when this is absolutely necessary and can be justified.
- 7.1.10 The applicant explains within its Planning Statement that it remains committed to fulfilling the requirements of these conditions, but does not feel it is necessary or reasonable that the details have to be submitted and approved before it commences any development (Officer emphasis). In respect of condition nos 28 and 52, the lighting and air quality schemes relate to when the port will be operating and not the initial construction phase. Accordingly Officers can see no objection to amending the wording and timing of these conditions.
- 7.1.11 In respect of condition no 53 and the noise mitigation at Wix Road, it is noted that the Statement of Common Ground that was agreed between the parties at the 2004 Inquiry, stated that this mitigation was 'a medium term measure' indicating that the problem only required mitigation some way in to the development, meaning it was linked to the operational traffic and not the construction traffic that would occur during the early phases of the development. Despite the agreement that this was a medium term problem, the Inspector recommended a condition that details of the proposed noise attenuation measures be approved prior to commencement of development. In light of current policy on pre-commencement conditions and the lack of objection from Environmental Health and Highways Officers to the condition being amended, Officers consider that the proposed wording is acceptable. The amended wording would still require that the noise attenuation (a noise barrier) is installed prior to the container port becoming operational rather than prior to any development (ie. phase 1) taking place.
- 7.1.12 The re-worded condition no 53 is considered to be consistent with relevant local and national planning policies.

Conditions 41, 42, 43 & 44 (Highways)

- 7.1.13 This application to vary the planning conditions was accompanied by a Supplementary Transport Assessment. Due to the time that has elapsed since the original 2003 planning application was determined, the applicant has undertaken a review and assessment of the original Transport Assessment and the modelled impacts and updated the effects that may have changed over time.
- 7.1.14 There is nothing within the Supplementary Transport Assessment which indicates that the original assessment is now fundamentally flawed, or that additional highway works would be required to mitigate the traffic impacts of the development. Indeed, whilst National Highways had not formally responded to the consultation at the time of writing this report, their Officer has intimated that it is quite possible that a greater amount of port related traffic could be redirected to more sustainable means, ie rail, than was deemed to be the case 16 years ago.
- 7.1.15 The applicant has clearly set out within their Planning Statement that they are not seeking to remove any of the requirements of the conditions imposed by the Secretary of State. This includes the package of highway capacity improvements that were secured through planning condition nos 41-44. However, the applicant proceeds to state that the highway improvements are not necessary to accommodate the increase in traffic that would arise from the construction works and that the required highway works will only be necessary before the operation of Phase 2, 3 and 4 of the development. Having assessed the original Transport Assessment and the Supplementary Traffic Assessment neither National Highways nor Essex County Council Highways have objected to the principle of variation of these conditions, thereby acknowledging that the works are not required to mitigate the impacts arising from the construction activities. However, in its formal recommendation dated 1 February 2022 National

Highways has put forward its own proposed wording for conditions 41-44, with further consequential changes to conditions 45-47, all of which are said to have been agreed with the applicant (see above). Unfortunately, Officers consider that some of the proposed changes are problematic.

- 7.1.16 In particular, National Highway's proposed changes call into question off-site highway works that were considered necessary in 2006 and 2013, and permit the development to proceed without them if the highway authorities and Council agree to dispense with them, through the submission of a Supplementary Traffic Assessment. To date, this has not been what the applicant has applied for and there has been no public consideration of the consequences of forgoing these significant highway works. Indeed, the present application documentation explicitly states that all mitigation previously agreed will still be provided by the applicant.
- 7.1.17 If it is the case that the planned off-site highway works now go beyond what is considered necessary to mitigate the effects of the proposed development, this is something that should be properly evidenced and considered by way of an appropriate application. If in the future, through further discussions between the applicant and National Highways, it can be shown that some or all of the highway works are unnecessary, then the applicant would need to make a further application to vary or seek non-compliance with the relevant planning condition/s. It is not however something that the Local Planning Authority should be concerned with at this stage, and if such a proposal were to arise, it would be subject to a full public consultation exercise in the future. In the view of Officers the present application should proceed on the basis of the proposed changes to conditions set out in section 6.4 above.
- 7.1.18 If the Council does not propose to determine the application in accordance with National Highway's recommendation, it must first consult the Secretary of State for Transport. If, therefore, Members agree with the view of Officers and a resolution to grant is ultimately passed, it will be necessary first to refer the application to the Secretary of State for Transport before any permission can be issued.

7.2 Environmental Considerations

Environmental Impact Assessment

- 7.2.1 The EIA Regulations cover applications made under section 73 of the Town and Country Planning Act 1990 i.e. those to carry out development without complying with a condition attached to an existing planning permission.
- 7.2.2 The current section 73 application is for Schedule 1 development and thus an application for EIA development within the meaning of Article 2 of the EIA Regulations. Accordingly, the Council must not grant planning permission without first taking the environmental information provided by the applicant into consideration.
- 7.2.3 HPUK submitted a full Environmental Statement (ES) when it made its original applications in 2003. The ES included an assessment of the Container Terminal development as a whole and this included the consequential development that was necessary to make the development of the Container Terminal acceptable, including the provision of the Small Boat Harbour which was only being proposed to meet a specific need arising from the development of the port facility. The examining Inspector and the Secretary of State were both satisfied that the ES that was submitted with the application met the requirements of the regulations and provided sufficient information to assess the environmental impacts of the development. The ES was taken into account by the Secretary of State when granting the 2006 Permissions. The Secretary of State concluded that the benefits of the proposal outweighed any adverse environmental impacts when the proposed mitigating measures were taken into account.

- 7.2.4 As part of the applications for replacement planning permissions in 2010, the applicant submitted a Supplementary Environmental Report (SER) which reviewed the 2003 ES and updated the environmental effects that were considered to have changed during the intervening period, or which might arise as a result of the proposed changes.
- 7.2.5 The applicant has submitted with this application a further ES which reviews the previous ES and SER and updates the environmental effects that are considered to have changed during the intervening period, or which might arise as a result of the proposed changes. The ES includes an assessment of changes to applicable legislation and guidance for each of the technical chapters; considers and where appropriate updates the baseline environmental conditions for each of the technical chapters scoped in to the assessment; and includes additional chapters to account for changes to the EIA Regulations. The ES concludes by assessing whether the conclusions of the 2003 ES and 2010 SER remain valid.
- 7.2.6 It should be noted however from the representations above, that issues have been raised on both this and the sibling S73 application 21/01792/VOC (for the Small Boat Harbour, also before Members at this Planning Committee meeting) in respect of the requirements of the Habitats Regulations and upon the effect of the proposals upon the AONB as extended. These representations challenge the adequacy of elements of the ES and these issues are discussed below.

Habitats Regulations

- 7.2.7 The Container Terminal development and the proposed Small Boat Harbour would lead to the cumulative loss of 69ha of intertidal habitat forming part of the Stour and Orwell Estuaries SPA/Ramsar site/SSSI. The Council is required by the Habitats Regulations to carry out an assessment of the implications of this, and is prohibited from granting planning permission unless satisfied that:
- there is no alternative solution;
 - the development must be carried out for imperative reasons of overriding public interest (IROPI);
 - necessary compensatory measures have been secured that ensure that the overall coherence of the national site network of SACs and SPAs is protected.
- 7.2.8 Concerns have been expressed about the adequacy of the updated ecological assessment within the ES, including whether a suitable assessment had been made of the potential cumulative impacts arising from this and other developments – both on-shore and off-shore. Of particular significance is the letter of objection from Natural England dated 4 February 2022, in which Natural England concludes:
- (1) The development will have an adverse effect on the integrity of Stour and Orwell Estuaries Special Protection Area ('SPA') also designated as Stour and Orwell Estuaries Ramsar.
 - (2) Any appropriate assessment made by the Council as competent authority, based on the information that has been so far provided by the applicant and made available to Natural England would be incomplete.
 - (3) Natural England remains to be convinced that the compensatory measures proposed are sufficient to meet the requirements of the Habitats Regulations both in terms of the certainty of their delivery and the substance of the measures. This is particularly the case where the assessment of the adverse effects being compensated for is incomplete.
 - (4) The development will damage or destroy the interest features for which Stour Estuary Site of Special Scientific Interest ('SSSI') has been notified.

- 7.2.9 Conclusions (1) and (4) are already common ground in that harm to the SPA and SSSI was accepted as an inevitable consequence of the development by the Inspector and Secretary of State in 2005/2006, and by the Council in 2013. As Natural England had been content with the 2003 ES and 2010 SER when the Council granted planning permission in 2013, and had also been content with the proposed compensatory habitats at Little Oakley (and indeed is a signatory to the S106 agreement for the development at Little Oakley) its recent objection represents a significant change of position.
- 7.2.10 In approving the original applications in 2006 the Secretary of State found that there was no alternative solution to the proposed container terminal at Bathside Bay, and having regard to the Secretary of State's decision, the Inspector's report, the NPS and the information provided in the applicant's ES and Planning Statement this remains Officer's opinion to date. The Secretary of State also concluded that the national need for additional container terminal capacity constituted IROPI, and that adequate compensation measures had been proposed in response to the likely adverse effect on the integrity of the SPA.
- 7.2.11 In carrying out its own determination under the Habitats Regulations, the Council is entitled to have regard to the fact that the Secretary of State found that the Bathside Bay project should be carried out for IROPI, and to the advice given in the NPS on Ports referred to above.
- 7.2.12 Whilst it is true that a considerable period of time has elapsed since the first applications for the Container Terminal and Small Boat Harbour were submitted and approved, this is not evidence that the IROPI no longer exist. The global downturn that began in 2008 and the Coronavirus pandemic have both delayed the predicted increase in demand for container traffic, but there is nothing before the Council that casts serious doubt on the proposition that there is likely to be a long term increase in demand for container terminal capacity. Officers accept what is said in section 2.1.1 of the ES that "Volumes [of container throughput] have been growing at a [compound annual growth rate] of 2% over the period 2000-2020. Growth has been relatively stable, with the exception of the noticeable fall in volumes due to the financial crisis in 2009 and the stable throughput for the next few years until 2014. Volumes were also lower in 2020 due to the Covid-19 pandemic, but still above 2014 volumes." The ES goes on to say that national forecasts based on projected increases in GDP show national UK TEU volumes are projected to increase by a [compound annual growth rate] of 2%, reaching a throughput of almost 19m TEU by 2050; and the ports in the south-east will handle around 14m TEU by 2050, almost doubling compared to the estimated volumes for 2021 (7.2m) (section 2.3.1).
- 7.2.13 Comparing demand and capacity, the ES states at section 2.3.3:

"Ports typically start experiencing delays and congestion related issues when the utilisation exceeds around 85% of capacity, a level which is expected to be reached at a regional level in 2027. Based on an analysis of forecast demand versus current capacity (Figure 2.31), it is expected that regional capacity will be exceeded in 2036 if no ports undertake expansions. This implies that further capacity is likely to be needed by 2027. However, as discussed in section 2.1, operational capacity is typically lower than design capacity. This highlights the need for additional capacity earlier than this.

For Felixstowe in particular, capacity is likely to be exceeded by 2033 (Figure 2.32). However, it is predicted that the port will already be operating at a high capacity of over 85% from 2025 (i.e. the point at which delays and congestion related issues occur). It is therefore vital that additional capacity is provided to accommodate future volume increases and maintain a competitive position in the market. BBCT, located in Harwich Haven when fully developed, could provide an additional 2.1m TEU, increasing the effective capacity of Felixstowe to 7.3m TEU. This should be enough to cover future demand until 2050. If the port reaches its target of 8m TEU then capacity utilisation would be 89% in 2050 according to the forecast."

7.2.14 Past and predicted increases in demand support the Government's belief expressed in the NPS that there is a compelling need for substantial additional port capacity over the next 20–30 years, to be met by a combination of development already consented (including the Container Terminal at Bathside Bay) and development for which applications have yet to be received. In light of this Officers remain of the view that the IROPI that existed in 2006 still exist today.

7.2.15 To assist the Council in carrying out an appropriate assessment of the implications of the development as required by the Habitats Regulations, the applicant has included within section 25 of its current ES a "shadow appropriate assessment". In relation to this Natural England states:

"We note that the shadow HRA section separates the Phase 1 works from the rest of the project and concludes no adverse effect on integrity if those works are conducted outside of the overwintering bird period. Natural England does not recommend retrospectively slicing the assessment of projects into phases. The project was originally assessed as a whole, and the environmental evaluations were conducted to support delivery of a complete development. We also advise that the supporting evidence for the conclusion of no AEoI [adverse effect on integrity] does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas - which do contain suitable habitat for breeding and overwintering species and is predominately undisturbed. Therefore, it cannot be concluded that there will be no LSE [likely significant effects] (impact pathway) and without mitigation there could be an AEoI."

7.2.16 The response from the applicant's agent dated 11 February 2022, a copy of which is appended to this report, contests this. The agent states that the shadow HRA (section 25 of the ES) does not slice the assessment of the project into phases, nor does it slice the provision of compensatory habitat into phases, with it assessing the whole project. The reference to Phase 1 individually is made to demonstrate that those works do not trigger the need for compensatory measures. Therefore, the relevance of the reference to Phase 1 in distinction to the balance of the project is simply in directly linking the provision of compensatory habitat to effects upon the designated features of Bathside Bay. This is a position, secured by planning condition that is no different to the protection afforded by the existing planning permission.

7.2.17 In relation to the proposed compensatory habitats at Little Oakley, Natural England goes on to say (underlining added):

"Natural England are currently reviewing the ES provided to support the new planning application for the compensation site as part of the consultation received on 6th January 2022 and have previously engaged with the Applicant as part of the scoping exercise in 2021. At that time, we highlighted that further supporting surveys were required for Bathside Bay and Little Oakley to sufficiently update the original 2003 ES. We acknowledge that work has been done to demonstrate that elements of the original conclusions are still fit for purpose, using publicly available data sources. However, we do not consider that the current evidence provides the confidence to conclude that the proposed managed realignment at Little Oakley would still secure adequate compensation for the loss of Bathside Bay.

In addition Natural England highlights that EC Guidance on Article 6 (4) of the Habitats Directive states that "*compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time*". We do not

believe that sufficient evidence has been provided to suggest this is the case for Little Oakley. It is unlikely that the compensation measures will be 100% effective in reinstating structure and functionality of the supporting habitats for designated site features of the Stour and Orwell SPA and/or maintain the coherence of the national site network. Since the original planning permission for the Little Oakley managed realignment site was granted, Natural England's understanding in respect of the Habitat Regulations has evolved in line with caselaw, alongside our knowledge around the development processes of coastal and marine compensatory habitats and how they do and do not work. Therefore, we advise that a ratio greater than 2:1 should be provided."

7.2.18 The applicant's response is that "The predicted impact of the BBCT and SBH is a direct loss of 69ha of intertidal habitat and reduced exposure of approximately 3ha of designated intertidal habitat due to effect on tidal propagation. As reported in the CMMA/CMMD, the Little Oakley managed realignment is predicted to deliver 105ha of a mixture of intertidal mudflat, mudflat/saltmarsh transition and saltmarsh (with an additional 5ha of sand / shingle habitat). The total managed realignment site is 138ha, with the balance including fresh/brackish water habitat and the new borrow dyke system. The compensation ratio is therefore 1.7:1 to 1.8:1".

7.2.19 The EC guidance referred to in Natural England's letter states (among other things) that "compensation ratios are best set on a case-by-case basis", "the final decision on the proportion of compensation must be justified" and "There is wide acknowledgement that ratios should be generally well above 1:1". The amount of compensatory habitats proposed at Little Oakley was considered acceptable by Natural England in 2005 and 2013 and its current objection does not explain why a ratio greater than that proposed is necessary in the present case.

7.2.20 Natural England's letter of objection continues:

"Without certainty that the compensation proposed will deliver the same ecological value for the same affected features and that the full extent and nature of effects have been considered in the appropriate assessment, and/or evaluated, we cannot advise that the coherence of the network will be protected. Therefore, in our view the appropriate assessment is incomplete and does not make a complete assessment of the effects based on the best reasonably available information. Until we have confidence as to the nature and scale of the effects it is not possible to advise that the effects of the development will be compensated for. Consideration will also need to be given in the HRA for the potential impacts to Hamford Water SPA. Natural England is not aware of any evidence to show that the proposed compensatory site, which is functionally linked to the adjacent Hamford Water Special Protected Area, is of less importance than any other area of supporting habitat or designated habitat and features within the Hamford Water protected areas."

7.2.21 As already indicated, these concerns represent a change in Natural England's position as it was at the inquiry in 2004 and in response to the applications for replacement permissions which were granted in February 2013. The applicant's letter of response rejects the criticism that the appropriate assessment is incomplete for the reasons set out therein.

7.2.22 Natural England's conclusion on the issue of compensation is as follows:

"In conclusion Natural England advise that the delivery of suitable compensation is uncertain, the relevant permissions are not in place, timings are unclear, and the ES does not follow Defra's draft best practice guidance (Best practice guidance for developing compensatory measures in relation to Marine Protected Areas). Therefore

we advise that limited weight can be given to the sufficiency and deliverability of the compensation measures in any decision making.”

7.2.23 In response to concerns about timing and delivery of compensation, the applicant states:

“... HPUK is proposing that the compensatory measures will be secured by a combination of the following:

a) a requirement in paragraph 3.1 of Schedule 1 of the Section 106 to let a contract securing the implementation of the Little Oakley Managed Realignment Scheme prior to the commencement of Phase 2 of the development, which is the point at which an adverse effect on the integrity of the SPA would occur; and

b) the obligations placed on HPUK by a deed dated 15 October 2004 between Harwich International Port Limited, Harwich Haven Authority, The Environment Agency and English Nature (which became Natural England in 2006) to deliver the compensation (and mitigation) works in accordance with the specifications and timescales set out in that document.

Should the application be granted, HPUK will therefore be under a clear legal obligation to deliver the compensation (and mitigation) works. NE is therefore incorrect to suggest that such delivery is uncertain or that timings are unclear”.

7.2.24 The Council's Ecologist originally reviewed the submitted information and concluded that in respect of the Stour & Orwell Estuaries SPA and Ramsar and Southern North Sea SAC the reclamation of approximately 65ha of intertidal habitat in Bathside Bay would, without mitigation, lead to a likely significant effect (LSE). The impact pathways within scope therefore triggered further consideration at Stage 2 Appropriate Assessment to assess if mitigation can avoid any AEOI of the Habitats sites within scope. She considered Natural England's advice included in section 25.3.3 of the ES and the Stage 2 Appropriate Assessment section which states that there will be AEOI from the development of Bathside Bay Container Terminal. She also noted that, where only the qualifying features of a Ramsar site will be adversely affected, the tests are different and the LPA as the competent authority must take into account the wording of Article 4 of the Ramsar Convention which allows the UK Government as a contracting party, to delete or restrict the boundaries of designated Ramsar sites only “in its urgent national interest”. Any benefits arising from the proposal must, however, demonstrably outweigh the harm to the acknowledged international conservation value of the site. The Stour & Orwell Estuaries Ramsar site therefore needs to be assessed and consideration given to the above requirement.

7.2.25 The Ecologist considered that the assessment of likely impacts on the Southern North Sea SAC was acceptable and agreed that no AEOI of the Southern North Sea SAC were predicted from the development either alone or in combination with other plans and projects. She understood that section 25.5.2.1 and Table 25.7 in the ES do not consider any impacts on protected species (harbour porpoise) outside the SAC separately, as the assessments are based on the North Sea Management Unit, which takes into account harbour porpoise in both inside and outside the SAC, in line with current guidance and thresholds for impacts identified by JNCC and Natural England. She was sufficiently satisfied with the scope of the in-combination assessment in section 25.3.3 paragraphs 14 & 15 that no additional disturbance was predicted from varying the conditions in combination with other plans and projects included in the assessment.

7.2.26 She agreed with the shadow HRA conclusion that there will be no additional impacts from the proposed changes to the planning permission, including the changes to the timing of the conditions to allow the development to commence in advance of the details being submitted

and agreed for the matters covered by conditions 28, 41-44, 52 & 53, so this VOC does not need the competent authority to amend its previous HRA report for this permitted development. She acknowledges that the proposed works comprising only Phase 1 of the development are located entirely on land and mitigation to avoid disturbance, including lighting has been secured by Condition 20 to seek approval for operational lighting before any impacts occur, so this VOC has no impact pathway to affect habitat that supports the qualifying features of the Stour & Orwell Estuaries SPA and Ramsar site or Southern North Sea SAC.

- 7.2.27 Further the Council's Ecologist was satisfied that this proposal to vary these conditions would not alter the legal requirements secured for delivery of compensatory habitat (at Little Oakley) - in the Compensation Mitigation and Monitoring Agreement (CMMA) (Royal Haskoning, 2004) Annex 1 of the Deed (CMMD) – and that the Phase 1 works for the development of the Container Terminal involve only terrestrial works which will not lead to any additional disturbance which would alter this provision. She understands that the Phase 2 & additional phases within the marine environment (i.e. works below level of MHW spring tides) of the Bathside Bay project cannot be implemented without a marine consent from the MMO and that further EIA and HRA is required to support that consenting process.
- 7.2.28 She was aware that published Government guidance Habitats Regulations Assessments: protecting a European site (Defra and Natural England, Feb 2021) describes the requirements for the provision of compensatory measures and refers to points that should be considered in order to be confident that the proposed measures will fully compensate for the negative effects of a proposal. This includes how the compensation would be carried out, including how it would be managed and monitored over the time that is needed; and how it would be secured and how long the compensatory measures would take to reach the required quality and amount of habitat.
- 7.2.29 She appreciated that the relative timing of the commencement of work at Bathside Bay, and the creation of the managed realignment site was analysed in detail in the Compensation Mitigation and Monitoring Agreement (CMMA) (Royal Haskoning, 2004) the Deed in which it sits as Annex 1 (CMMD). The HRA report focuses on the predicted habitat colonisation following breach of the seawall and confirms that whilst invertebrates are likely to rapidly colonise the new intertidal mudflats, it may take 5-10 years for the invertebrate community structure to fully develop on maintenance dredgings which are to be pumped onto the site. It is therefore essential that there is no delay in commencement of the habitat creation and she was satisfied that this VOC in relation to provision of information on lighting would not result in a delay as the CMMD remains a legal obligation. It was however stressed that it is essential that the LPA secures appropriate and timely compensatory measures for the permitted development to demonstrate its compliance with the Conservation of Habitats and Species Regulations 2017 (as amended). There needs to be no reasonable scientific doubt remaining as to the delivery of compensatory measures and, whilst absolute certainty is impossible to attain, the LPA needs to secure legally enforceable ways of preventing such effects in order to meet the Stage 4 HRA requirements.
- 7.2.30 The Council's Ecologist was satisfied that the shadow HRA for the Bathside Bay Container Terminal has demonstrated that this variation of conditions application does not seek to delay the creation of compensatory habitat that is necessary to maintain the required level of coherence of Habitats sites. This will enable the LPA to demonstrate compliance with its statutory duties, including its biodiversity duty under s40 NERC Act 2006 and prevent wildlife crime under s17 Crime and Disorder Act 1998.
- 7.2.31 However, at a meeting held between Natural England, the applicant and the Assistant Director of Planning, Natural England expanded on its advice to TDC that “...*your authority should have a full understanding of the ecological value of the site and the anticipated impacts...*”, stating that additional waterbird data (not referenced in the ES and shadow HRA) for Bathside

Bay has been collected as part of the assessment of/monitoring for the Galloper offshore wind farm operations and maintenance facility ('the Galloper O&M facility'). It is understood that this data is not published or publicly accessible, and at the time of writing this report had not been provided to the applicant. The Council's Ecologist has stipulated that she maintains her position, provided that the ES and sHRA are updated with the Galloper monitoring data. If NE continues to object, then the Council will need to determine whether there are cogent reasons to override NE's objection. It is anticipated that Members will be updated on this matter at the Committee meeting.

- 7.2.32 Consequently, the Council's Ecologist recommends that the LPA, as the competent authority, has certainty of likely impacts on designated sites and can adopt the updated shadow HRA submitted by the applicant for Phase 1 works, provided that it is updated with the Galloper monitoring data, and subject to considering a further formal consultation response from Natural England. The updated information to support the HRA indicates that any likely significant effects can be ruled out from varying the conditions in relation to commencement of the development with the Phase 1 terrestrial works, and the CMMA and CMMD will retain the timing requirement for commencement of compensatory habitat creation before Phase 2 marine works of the development.
- 7.2.33 The Secretary of State was satisfied that the proposed managed realignment site at Hamford Water, Little Oakley, represented the necessary compensatory measures required under the Habitats Regulations. The Secretary of State granted planning permission for the engineering works and habitat creation at Little Oakley in 2006. Whilst that planning permission has now lapsed, the applicant has submitted a new planning application (21/02144/FUL) for that development. It is noted that that application has been subject to quite a number of objections and Officers have been discussing these issues with the applicant. The applicant has attended a public meeting at the invitation of Little Oakley Parish Council, to allow the local community to discuss concerns and to allow them the opportunity to see whether the scheme might be amended, to address some of those concerns whilst still delivering the required compensatory habitats. Pending a conclusion to these discussions the application remains under consideration by Officers, but will be reported to the Planning Committee in due course. Members will however need to be satisfied that the Little Oakley development provides sufficient mitigation for the adverse effects on the Stour and Orwell Estuaries SPA, and is adequately secured, before the present S73 application can be finally determined.
- 7.2.34 The works identified by the applicant as forming Phase 1 of the Container Terminal development are all proposed to be undertaken on existing land and the information provided by the applicant demonstrates that they will not affect the qualifying features of the SPA and Ramsar sites themselves. As such, it is Officer's view that the carrying out of Phase 1 works will not adversely affect the integrity of the protected habitats and the development can commence without the need to have started work on creating the compensatory habitats at Little Oakley. The Council's Ecologist has reviewed the current application and concluded that they are satisfied that the delay in letting the Little Oakley contract and not 'getting started' on the managed realignment ahead of the Phase 2 marine works commencing, resulting in loss of SPA mudflats is still within the secured 2004 Deed and its Annex 1 Compensation Mitigation and Monitoring Agreement (CMMA/CMMD), which gives a maximum period between the Bathside Bay marine works and the creation of the compensatory habitats by way of breach of the sea wall at Little Oakley of 27 months.
- 7.2.35 DEFRA guidance *Habitats regulations assessments: protecting a European site* (2021) states that "Compensatory measures should usually be in place and effective before the negative effect on a site is allowed to occur". The example given in the guidance of a port expansion is to the same effect. However, in 2005/2006 and 2013 Natural England did not consider that the compensatory habitats at Little Oakley had to be created before the Bathside Bay reclamation works were carried out, and the S106 Agreements that secure the provision of the new habitats allow a period of time between the reclamation works and the breach of the sea wall

at Little Oakley that will create the new intertidal habitats. The recent objection from Natural England says no more than that “timings are unclear”, but to date it has not said that the timings for the compensatory works provided for in the S106 agreements are no longer acceptable.

7.2.36 The applicant has proposed some changes to the S106 agreements. One change relates to the compensatory works. At present the S106 agreement that applies to the 2013 Container Terminal permission provides that “The Owner shall not implement the Container Terminal Development until it has let a contract securing the implementation of the Little Oakley Managed Realignment in a timely manner in accordance with the relevant terms of this Deed”. The applicant seeks a variation of this so that the contract for the Little Oakley works must be let before commencement of Phase 2 of the development (when the reclamation works take place), on the grounds that there will not be time to let a contract before 29 March 2022, when the development must be begun. On the basis that the other provisions of the S106 agreements relating to the compensatory works at Little Oakley remain unchanged, Officers consider that this variation would be acceptable.

7.2.37 Members should be aware that if a resolution to grant planning permission is passed, the Habitats Regulations require that the Council notifies the Secretary of State and seeks a derogation for permitting development which without compensation will lead to AEOI. The Secretary of State can then decide if he wishes to intervene.

Other Matters

7.2.38 Concerns were raised by other bodies (but not specifically by Natural England) about whether the ES also adequately assessed the cumulative impacts of the development when combined with permitted residential development within the area. The District Council has for some time now been assessing the in-combination impacts of residential development on the protected Essex coastal sites. In accordance with Natural England guidance, the Essex Coast RAMS has been adopted by the District Council. The scheme provides a means of ensuring that developers mitigate the impact of new residential development on the protected sites through a range of measures to divert and deflect visitors from going to them for daily recreation and to mitigate the impact of those who do visit through improved visitor management measures. The Council considers that it adequately mitigates the recreational impacts arising from residential development such that it does not give rise to additional cumulative impacts that require assessment with the proposed development.

7.2.39 A number of objections received have referred to a passage within the applicant’s planning statement which indicates that the port platform to be created at Bathside Bay could be used as a Green Energy Port, as opposed to the Container Port operation that planning permission was granted for. The objectors refer to the fact that the case for the IROPI was based on the pressing national need to increase container port capacity and this need is quite different to port capacity to support the growing off-shore wind sector.

7.2.40 The Council have sought Counsel’s opinion on this application, who has guided Officers in the assessment of the proposal. With regard to this matter of the Green Port, it has been concluded that such proposals are vague and it is currently difficult to discern what, if any impact they might have on the future operation of the port. Given the limited scope of a S73 application and the relatively modest change in conditions sought, it is considered that the primary purpose of the proposed development – to increase container terminal capacity to meet growing international demand at an appropriate location on the east coast – is not set to change. Any material change of use however would constitute development for which planning permission would normally need to be obtained.

7.3 Extended AONB Designation

7.3.1 The application site lies outside of, but is considered to be within the setting of, the Suffolk Coast & Heaths Area of Outstanding Natural Beauty (AONB). On the Tendring side of the Stour Estuary, the AONB boundary lies approximately 2.6km west of Bathside Bay, while the boundary of the Suffolk Coast & Heaths AONB on the northern (Suffolk) side of the Stour Estuary lies 1km opposite the application site. Paragraph 176 of the NPPF states that development within their setting should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas.

7.3.2 In addition to the above concerns, Natural England considers that the applicant should not be relying on the 2003 Landscape and Visual Impact Assessment, saying:

“We acknowledge that work has been done to demonstrate that the original conclusions are still fit for purpose, however this approach to re-assessment is not ideal. The original LVIA is now 19 years old and since its production the landscape baseline has changed significantly due to the AONB extension and further industrial development around Felixstowe. Changes in national planning policy such as the NPPF have also been strengthened the protection given to AONBs and their settings. There have also been several changes to published landscape guidance and assessments in the intervening period.”

7.3.3 In Natural England’s view “a new standalone Landscape and Visual Impact Assessment should be carried out to determine the significance of landscape and visual impacts to the setting of the Suffolk Coasts and Heaths AONB afresh, as extended in 2020”.

7.3.4 The AONB Project Officer raised concerns to 21/01810/VOC that the applicant’s review of the previous Landscape and Visual Impact Assessment made no reference in the LVIA Chapter (Section 12 Part 1) to the fact the Suffolk Coast and Heaths AONB boundary was extended in July 2020 to include the south bank of the River Stour in Tendring and the River Stour itself. However, these comments were received prior to all sections of the LVIA Chapter being posted on the Council’s website; they have been sent the remaining sections and any further comments received will be reported to Members at the committee meeting.

7.3.5 Section 12.1.1.8 of the LVIA review states:

“There have been several changes to published landscape guidance and assessments and the baseline situation since the 2003 LVIA, including an extension to the Suffolk Coast and Heaths Area of Outstanding Natural Beauty (AONB). These are not considered to materially affect the assessment of effects upon landscape and visual receptors. It is therefore concluded that the findings of the 2003 LVIA remain valid.”

7.3.6 In response to the comments raised, the applicant draws the Council’s attention to the fact that the AONB extension is referred to on a number of other occasions within the review, including references to relevant development plan policies and other guidance and assessments. Also found within the LVIA review is a description of discrete areas of the extension, with particular reference to the study area; a summary of baseline evidence prepared to inform the extension; a comparison of the Landscape Character Units described in the 2003 LVIA with the equivalent, current baseline LCA in relation to the extended AONB, with predicted effects (Table 12.7); and a consideration of viewpoints in the 2003 LVIA, with specific reference to their location in relation to the pre/post 2020 AONB extension.

7.3.7 Although the AONB extension was only approved in 2020 it is evident that the extension was being promoted back in 2004 when the Inspector held the Public Inquiries into the proposed developments. The Inspector considered the impact on what was the designated AONB in 2004 before proceeding to consider the impact on the AONB if the AONB were to be extended

along the south bank of the river towards Parkestone ie akin to that now in place. The Inspector concluded that the extended AONB would have limited inter-visibility and where views in to, or out of, the AONB were found, these were views often shared with quayside cranes, at Felixstowe and Harwich International Port, and the oil refinery at Parkestone. The Inspector concluded the level of harm to be Minor Adverse and in his judgement the Container Terminal and Small Boat Harbour would not seriously damage views into or out of the area of the possible AONB extension.

- 7.3.8 Having assessed the evidence presented Officers are satisfied that the Landscape and Visual Impact Assessment, in conjunction with the current ES and LVIA review, provides a reasonable assessment of the visual impacts of the development within the setting of the AONB, as extended, and no further evidence is required.

7.4 Traffic Assessment

- 7.4.1 The application is accompanied by a Supplementary Transport Assessment. In a similar manner to the ES, the applicant has undertaken a review and assessment of the original Transport Assessment and the modelled impacts and updated the effects that may have changed over time.
- 7.4.2 The supplementary report concludes that the baseline data remains valid and the future years forecast of traffic volumes remains robust. With the package of highway works and improvements secured through the planning permission conditions, the conclusion remains that the Container Terminal and associated developments will not have a significant transportation impact. The report goes on to state that the assessment indicates that the increased volume of traffic during the construction phase does not require mitigation works to ensure that there is no significant transport impact. The Highway Authority (Essex County Council) and National Highways have both assessed the supplementary transport report and neither take issue with the updated assessment or the conclusion that the applicant has reached.
- 7.4.3 Overall, having taken careful account of the original ES, the updated ES, the comments of the original Inspector and Secretary of State; and the views expressed by statutory consultees, it is considered that the amendments to the Masterplan and revisions to the list of approved plans; the changes to the wording of conditions which delays the submission of operational lighting and air quality management measures; and the revised timing for the road noise mitigation and highway improvements, would not result in any material adverse impact over and above those set out in the original reports which were clearly judged by the Secretary of State to be acceptable in principle, when taken with the proposed mitigation measures.

8. Section 106 Agreement

- 8.1 The planning permission for the Bathside Bay Container Terminal was subject to a Section 106 legal agreement dated 15th October 2004. This agreement has been subsequently varied and supplemented on three occasions – a Deed of Variation dated 23rd March 2006; First Supplemental Deed dated 28th June 2011; and Second Supplemental Deed dated 28th June 2011.
- 8.2 If the Council are to grant a new planning permission then a further supplemental agreement will be required to link the legal agreements to the new planning permission.
- 8.3 As mentioned above, the planning statement accompanying the application included proposals to vary some of the obligations contained within the original / main S106 legal agreement.

8.4 The original S106 agreement dealt with the following matters:

- Accretion Land
- Small Boat Harbour
- Little Oakley Managed Realignment
- Travel Plan
- Financial Contribution for Air Quality Monitoring Station
- Procurement of Goods and Services and Local Employment
- Sound Insulation Grants Scheme
- Wetland Zones
- Tree Planting Scheme
- Conservation Area improvement contribution & maintenance, illumination and interpretation board for the listed Train Ferry Gantry
- Cycling and pedestrian improvements
- Harwich International Port Lighting
- HGV Capping and A120 route works
- Remote railway works

8.5 The applicant proposes to vary the following five obligations contained within the main S106 agreement:

Little Oakley Managed Realignment (Schedule 1, Section 3, Para.3.1)

8.5.1 The main Container Terminal S106 agreement prohibits the owner from beginning the Container Terminal Development until it has let a contract securing the implementation of the Little Oakley Managed Realignment (as approved by planning permission 03/01200/FUL) in a timely manner and in accordance with the relevant terms of the S106 agreement.

8.5.2 As set out above, the applicant proposes that the time at which the contract must be let for the Little Oakley scheme is varied so that it is required prior to the implementation of Phase 2 of the development. This is the first part of the development process that will include the inter tidal area, which of course form part of the habitats that led to the area being designated as part of the Stour & Orwell Estuaries SPA and Ramsar.

8.5.3 As set out previously in this report Officers have carefully reviewed both the main S106 agreement and the accompanying Compensation Mitigation and Monitoring Agreement (CMMA). The Council's Ecologist is satisfied that the proposed variation to the legal agreement does not significantly alter the legal requirements secured for delivery of compensatory habitat (at Little Oakley) - in the CMMA.

8.5.4 The proposed change to the trigger for this obligation will narrow the amount of time that the owner has to implement the compensatory scheme following the letting of the contract, but it does not change the point at which the scheme needs to have been implemented. The Council's Ecologist is satisfied that it has been demonstrated that the proposed changes to the Container Terminal permission (the variation of the planning conditions and the amendments to the S106 agreement) do not seek to delay the creation of compensatory habitat that is necessary to maintain the required level of coherence of protected sites. The proposed change to the trigger is therefore considered acceptable.

Travel Plan (Schedule 1, Section 4, Para 4.1)

8.5.5 Currently the obligation requires that the owner submits a draft of the Travel Plan prior to the implementation of the Container Terminal development. As with the pre-commencement conditions the applicant considers this to be premature and unnecessary. The Travel Plan is intended to promote the use of sustainable transport modes for staff employed at the

Container Terminal, but the operational staff will not be employed for years whilst the terminal is constructed.

- 8.5.6 The applicant has suggested that the trigger for the obligation and payment of the travel plan monitoring fee is linked to the operation of the Container Terminal. In principle, Officers accept that the submission and agreement of a Work Place Travel Plan for operational staff is unnecessary prior to commencement of the development. It does however need to be in place prior to the Container Terminal becoming operational. The Travel Plan needs to be operating at the time that operational staff are recruited so that when those employees are planning their journey to their new place of work they can make those travel plans with knowledge of the sustainable transport options that exist. Prior to someone starting employment can be the best time to influence their travel behaviour. Planning Officers are working with colleagues at Essex County Council to agree a suitably worded revised trigger point for the Travel Plan to be agreed and operational.

Cycling and Pedestrian Improvements (Schedule 1, Section 12, Para.12.1)

- 8.5.7 This obligation requires that before the Container Terminal Development commences the developer enters into appropriate Highway Works agreements with the Highway Authority for various improvements relating to cycling and pedestrian facilities to provide access to BBCT. The improvements are required to help facilitate and encourage more employees to walk and cycle to the port to work. It is proposed that the trigger for the obligation is postponed until the implementation of Phase 2 of the development. Whilst this delay would mean that construction workers travelling to the site to work on Phase 1 would not have access to the new improved facilities, the main reason for the obligation is to ensure that the hundreds of employees at the new Container Terminal will be encouraged to walk / cycle to work. In comparison, the number of staff likely to use these improved facilities initially during Phase 1 construction works is deemed to be limited in comparison. Accordingly Officers do not object to the principle of this variation as it still secures the required improvements to pedestrian and cycle ways at a time when other members of staff are planning to come back in to the office.

Sound Insulation Grants (Schedule 4)

- 8.5.8 The obligation requires the establishment of a scheme which will provide grants for households in specified parts of Harwich, Dovercourt and Shotley Gate to fund the installation of secondary double glazing and acoustically treated ventilation units for bedrooms.
- 8.5.9 On the same principle that noise mitigation measures to residential properties will be required as a result of increased HGV entering and leaving the Container Terminal during its operation, there is no need for the Scheme to be implemented during Phase 1 of the development. Phase 1 involves development of land-side facilities and any increase in road traffic during construction would not need to be mitigated with regards to noise. As with the noise mitigation barrier required by planning condition at Wix Road the important issue is that the mitigation is in place before Operational traffic to / from the port commences. Given the time that will elapse before operations commence this revision is considered to be acceptable.

Rail Improvements (Schedule 6)

- 8.5.10 The S106 agreement includes an obligation that before the Container Terminal Development commences the developer enters into a binding agreement with Network Rail for a schedule of off-site rail works, to help ensure that the rail network has the capacity to carry the increased loads arising from the Container Terminal. A variation is proposed that the works are linked to implementation of the container terminal development Phase 2.
- 8.5.11 In a similar manner to the proposed highway works, the proposed change is considered to be acceptable as the only revision is to the timing of when the obligation needs to be in place. The

improvements can still be secured, and could still be delivered before the Container Terminal is operational and generating additional freight movements on the rail network.

9. Other Considerations

Discharge of Planning Conditions

- 9.1 As previously stated the applicant has submitted two applications (21/01625/DISCON and 21/01817/DISCON) to discharge the pre-commencement planning conditions imposed upon the extant planning permission (10/00202/FUL); at the time of writing this report these were awaiting delegated approval following receipt of all consultation responses.
- 9.2 If Members ultimately resolve to approve this Section 73 application, and there is no intervention by either Secretary of State, then the Council will be issuing a new planning permission and will need to set out the planning conditions that it considers are necessary in respect of the proposed development. If the same conditions were transferred from the 2013 planning permission to this new permission, then the applicant would need to apply to discharge the same pre-commencement conditions, notwithstanding that they had been discharged in relation to the 2013 permission.
- 9.3 Since the original planning permissions were granted, the Government has introduced legislation which imposes restrictions on the use of pre-commencement conditions. The Government imposed these rules with the aim of speeding up the planning process by discouraging decision makers from including unnecessary pre-commencement planning conditions that might slow down starts on-site and consequently drive up costs, or even prevent development from happening at all.
- 9.4 Section 100ZA(5) of the Town and Country Planning Act 1990 states that planning permission for the development of land may not be granted subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition.
- 9.5 The Government's Planning Practice Guidance also emphasises to local planning authorities that pre-commencement conditions should only be used where there is a clear justification for the requirement and that this is likely to mean that the requirements of the condition are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission. A pre-commencement condition that does not meet the legal and policy tests may be found to be unlawful by the courts and therefore cannot be enforced by the local planning authority if it is breached.
- 9.6 If the Council resolves to grant the new permission it must be mindful of the current policy and legislation regarding the use of pre-commencement conditions. Given that the Council may well approve details submitted through the two discharge of conditions applications for this development, on the whole it is considered that it would be unnecessary for the applicant to submit all of that information again via discharge of conditions applications prior to the commencement of development. At the time of writing this report the applicant had been invited to submit the details submitted pursuant to 21/01625/DISCON and 21/01817/DISCON as part of this S73 application. This would allow the Council to list the plans and documents as approved plans on this new planning permission (if granted) and by turning conditions requiring the submission of details prior to commencement of development into 'compliance' conditions which require the development to be carried out in accordance with the approved plans and details, there will be no need to seek approval of the same details a second time, which would also be beneficial in terms of Officer resources.
- 9.7 As Officers are continuing to work on discharging these pre-commencement conditions, it is recommended that the Planning Committee grant delegated powers to the Assistant Director

of Planning to revise the wording of the other pre-commencement conditions, to make them compliance conditions, if/when the Council approve the details submitted by the applicant.

10. Conclusion

- 10.1 In 2003, Hutchison Ports (UK) Limited (“HPUK”) applied for planning permission for the construction of a new container terminal at Bathside Bay, Harwich. On 29th March 2006, permissions, inter alia, for a container terminal; a small boat harbour; the managed realignment of the coastline and creation of compensatory inter-tidal habitats off-site, and listed building consent in respect of the partial demolition of the long berthing arm attached to a listed Train Ferry Gantry were granted by the Secretary of State, following concurrent Public Inquiries held between 20th April 2004 and 21st October 2004. These developments were subject to rigorous assessments and were found on balance to be acceptable. In particular, with regard to the then Habitats Regulations, the Secretary of State found that Imperative Reasons of Overriding Public Interest (IROPI) outweighed the identified harm to the integrity of a European site (the Stour and Orwell Estuaries SPA).
- 10.2 In 2010 HPUK applied for replacement planning permissions for the reclamation works and Container Terminal, and the Small Boat Harbour. These permissions (10/00202/FUL and 10/00203/FUL) were granted by the Council on 14 February 2013 and remain extant, but development needs to have commenced on or before 29th March 2022.
- 10.3 This application relates to the 2013 Container Terminal permission and seeks to vary the list of approved plans to reflect changes in the operational requirements of port facilities that were not envisaged when the 2013 planning permission was granted. These changes do not significantly change the nature or operation of the Container Terminal. The other proposed changes to the planning conditions alter just the timing requirements of the conditions. The original conditions required that the developer submit details for approval of operational lighting, off-site highway works, operational air quality controls and noise attenuation measures prior to the commencement of the development. A further condition prohibits operation of any part of the development until certain off-site highway works have been provided.
- 10.4 The proposed changes to the conditions do not release the developer from complying with the requirements of the conditions; they simply propose that the timing for the submission of details or the completion of works are linked to the time when the impacts of the development need to be controlled / mitigated. This approach will allow Phase 1 of the development (which is confined to land-based works) to commence without further delay whilst still ensuring that the objectives of the conditions are fulfilled at the appropriate time. This approach is considered reasonable and proportionate
- 10.5 Officers are satisfied that the variations are justified and acceptable. The permission (as varied) would be consistent with the Council’s planning policies and still ensure that the development will come forward in an appropriate form.
- 10.6 As the proposed development would harm the Stour and Orwell Estuaries SPA & Ramsar, the Council is required to carry out an appropriate assessment of the implications of the development on SPAs, SACs & Ramsar sites under the Habitats Regulations. Furthermore, it is prohibited from granting planning permission unless satisfied that:
- there is no alternative solution;
 - the development must be carried out for imperative reasons of overriding public interest (IROPI);
 - necessary compensatory measures have been secured that ensure that the overall coherence of the national site network of SACs and SPAs is protected

- 10.7 For the reasons given in this report Officers consider that there is no alternative to the Container Terminal development and there is a national need for additional container terminal capacity amounting to IROPI. The proposed compensatory measures to make up for the loss of 69ha of intertidal habitat within the Stour and Orwell Estuaries SPA & Ramsar consist of the creation and maintenance of 138ha of new intertidal habitats at Little Oakley, Hamford Water, which are secured by S106 agreements.
- 10.8 The Council has recently received an objection from Natural England, the appropriate nature conservation body, which takes issue with the information provided by the applicant in its Environmental Statement. At present Natural England considers that it is not possible for the Council to carry out an appropriate assessment on the basis of the ES. It also considers that the proposed compensatory works at Little Oakley have not been shown to provide satisfactory mitigation for the adverse effects on the SPA & Ramsar. The Council is required to give due weight to the expert advice of Natural England.
- 10.9 The applicant has responded in detail to Natural England's objection and the Council's Ecologist has also considered the adequacy of the information and proposed compensatory measures put forward by the applicant. A further response from Natural England is awaited. In light of Natural England's current objection officers are reluctant to make a positive recommendation for the grant of planning permission, although it is ultimately for Members to consider whether the requirements of the Habitats Regulations have been satisfied. It is possible that further dialogue between the Council, the applicant and Natural England before Members consider this application will provide a resolution to the objection. In any event, progress can be made on updating pre-commencement conditions where details have been approved, and on agreeing suitable wording for revised S106 agreements.

11. **Recommendation**

- 11.1 **(1) The Committee consider this report and any updated information provided.**
(2) The Assistant Director of Planning be authorised:
- (a) to approve the completion of a supplemental or other legal agreement under section 106 of the Town and Country Planning Act 1990 to secure the provision of appropriate compensatory habitats and other matters necessary to make the proposed development acceptable;**
 - (b) subject to the conditions stated below, and the revision of any conditions that require details to be submitted, to update on a provisional basis pre-commencement conditions to compliance conditions (nos 3, 5, 7, 9, 10, 11, 12, 13, 14, 16, 17, 25, 27, 29, 30, 32, 33, 34, 35, 36, 38, 39, 40, 48 & 49), only where details have been submitted to and approved in writing by the local planning authority pursuant to 21/01625/DISCON and 21/01817/DISCON; and**
 - (c) to refuse planning permission in the event that an appropriate legal agreement has not been completed by March 29th 2022.**

11.2 **Conditions and Reasons**

- 1) The development shall be commenced on or before 29th March 2022.

Reason - To comply with the requirements of Section 91 of the Town and Country Planning Act 1990, as amended by the Planning and Compulsory Purchase Act 2004 to ensure consistency with the planning permission for the construction of the Bathside Bay Container Terminal and to allow sufficient time to implement highway mitigation and improvement

measures therefore, other infrastructure improvements and the provision of compensatory habitat.

- 2) The development hereby approved shall be implemented in accordance with the following plans, drawings and documents hereby approved:

- H1001/01 Application Boundary
- H1001/02 Rev. C Overall Master Plan
- H1001/03 Rev. B RTG Layout Sections X-X
- H1001/04 Existing and Proposed Flood Defences
- H1001/05 Sheet 1 Existing Topographic Survey
- H1001/05 Sheet 2 Existing Topographic Survey
- H1001/05 Sheet 3 Existing Topographic Survey
- H1001/05 Sheet 4 Existing Topographic Survey
- H1001/05 Sheet 5 Existing Topographic Survey
- H1001/05 Sheet 6 Existing Topographic Survey
- H1001/05 Sheet 7 Existing Topographic Survey
- H1001/06 Terminal Office General Arrangement Floor Plans
- H1001/07 Terminal Office Elevations and Sections
- H1001/08 Terminal Control Gate General Arrangement
- H1001/09 Logistics Facility General Arrangement Plan
- H1001/10 Logistics Facility – Elevations
- H1001/11 Driver Facilities Building Plan and Elevations
- H1001/12 Mess / Amenity Block General Arrangement Plans
- H1001/13 Mess / Amenity Block Elevations
- H1001/16 Workshop Facility General Arrangement Plan
- H1001/17 Workshop Facility Elevations
- H1001/18 Lighting Layout
- 1514LO/52 Rev. A Structural landscape work and planting proposals Sheet 1 of 3
- 1514LO/52 Structural landscape work and planting proposals Sheet 2 of 3
- 1514LO/52 Structural landscape work and planting proposals Sheet 3 of 3
- 1514LO/53 Illustrative planting Inset Plans & Earthwork Proposals
- 1514LO/54 Rev. A Overall Landscape Masterplan
- 1514LO/55 Rev. A Terminal Office Landscape Proposals
- 21026-LSI-Z1-00-DR-A-2000 A – Rev .C01 General Arrangement Plan Gr. Floor
- 21026-LSI-Z1-00-DR-A-2050 A – Rev .C01 General Arrangement Elevations S.
- 21026-LSI-Z1-00-DR-A-2051 A – Rev .C01 General Arrangement Elevations E-W
- 21026-LSI-Z1-00-DR-A-2052 A – Rev .C01 General Arrangement Elevations N.
- 21026-LSI-Z1-00-DR-A-2070 A – Rev .C01 General Arrangement Sections S01 / S02
- 21026-LSI-Z1-00-DR-A-2071 A – Rev .C01 General Arrangement Sections S03 / S04
- 21026-LSI-Z1-00-DR-A-2072 A – Rev .C01 General Arrangement Section S05
- 60666559-ACM-BB-LA-10-0002 Rev.02 General Arrangement Phase 1 – Sheet 2 of 2
- Planning and Design Statement dated April 2003
- Planning Statement dated October 2021
- Environmental Statement dated 13 October 2021

Reason - For the avoidance of doubt and in the interests of proper planning.

- 3) No development permitted hereby shall commence until a scheme of phasing substantially in accordance with Application Drawing H 1001/02/A has been submitted to and approved in writing by the Local Planning Authority. The scheme shall provide (inter alia) for:

(a) the construction of the quay wall comprised in the development to begin at the western end of the area marked Phase 1 on Plan H 1001/02/A and proceed thereafter in an easterly direction;

(b) the timing of implementation of the landscaping scheme in accordance with Condition 5 below; and

(c) the notification of commencement and completion of construction of each phase.

The development shall be implemented in accordance with the approved scheme of phasing.

Reason - To protect the amenity of the residents or Bathside, Old Harwich and the ecology of Bathside Bay and to ensure an orderly development and compliance with the Environmental Statement.

- 4) The development shall be carried out in accordance with the Planning and Design Statement dated April 2003 and Planning Statement dated October 2021 identified in Condition 2 above save insofar as otherwise provided in any condition attached to this permission.

Reason - To ensure that the development is carried out in accordance with the design principles set out in the Environmental Statement.

- 5) No part of the development hereby permitted shall be commenced until a landscaping scheme, including a programme for its implementation according with the indicative scheme shown in the application drawings, including details of screen mounding and tree planting, has been submitted to and approved in writing by the Local Planning Authority. The landscaping scheme as approved shall be implemented during the first planting season following completion of topsoil dressing works at the development site. Any tree or shrub dying or becoming seriously diseased within five years of completion of the relevant phase of the development shall be replaced with a suitable specimen of similar species in accordance with the approved scheme.

Reason - To ensure the establishment of a new landscape character in the interests of visual and residential amenity.

- 6) No phase of the development shall commence operation until a landscape management plan, including long term design objectives, management responsibilities and maintenance schedules for all landscape areas of that phase of the development, has been submitted to and approved in writing by the Local Planning Authority. The landscape management plan shall be carried out as approved.

Reason - To ensure the proper management and maintenance of the approved landscaping in the interests of visual and residential amenity.

- 7) No phase of the development shall commence until details of the design and external appearance of the buildings and hardstanding areas to be constructed within that phase of the development according with the Planning and Design Statement dated April 2003 have been submitted to and approved in writing by the Local Planning Authority. The details shall include dark block paving for the container stacking area and quayside comprised in the development. The development shall be carried out in accordance with the details as approved.

Reason - To enable proper control to be exercised over the design and external appearance of the development in the interests of visual amenity.

- 8) Except with the prior written agreement of the Local Planning Authority and Local Highway Authority, top soil comprised in the development is not to be undertaken using material from any source other than from the managed realignment site at Little Oakley and which shall not be delivered from the said site at Little Oakley other than by sea.

Reason - To ensure that beneficial use is made of available materials and to minimise HGV road traffic entering the site, in the interests of highway safety.

- 9) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order amending, revoking and re-enacting that Order with or without modification), no development shall begin until a written scheme showing full details of fences, walls, gates or other means of enclosure has been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the details as so approved.

Reason - In the interests of security and visual amenity.

- 10) No part of the development hereby permitted shall be commenced until drawings showing both foul and surface water drainage (including the provision of all oil and diesel interceptors) incorporating a Sustainable Drainage System (SuDS) connected with the development have been submitted to and approved in writing by the Local Planning Authority and thereafter any works in relation to the development shall be undertaken in accordance with the approved drawings.

Reason - To prevent pollution.

- 11) No part of the development hereby permitted shall begin until a scheme for the design of the proposed 'Wetland area' comprised in the development has been submitted to and approved in writing by the Local Planning Authority. The development shall be implemented in accordance with the scheme as approved.

Reason - To ensure appropriate environmental and drainage standards for the proposed wetland area.

- 12) No part of the development (including ground works) hereby permitted shall commence until a programme of archaeological work (including marine archaeology) for the site (including any works that might be necessary and practicable to preserve the remains in situ) has been submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in accordance with the approved programme.

Reason - To allow proper investigation and recording of the site, which is potentially of archaeological and historic significance.

- 13) No part of the development hereby permitted shall be commenced until a written Construction Management Plan (CMP) together with a certificate that the same has been submitted in that form to National Highways and Natural England has been submitted to the Local Planning Authority and Local Highway Authority and approved by each of them in writing. The CMP shall include details of management during the construction phase of the development of the matters contained in Conditions 14 to 20 inclusive (construction noise and vibration), a Construction Traffic Management Plan in accordance with the Bathside Bay Construction Traffic Management Plan produced by ERM and dated 7th June 2004, Conditions 25-27 (construction lighting) and Conditions 29-33 (construction dust management) of this permission.

Furthermore, the CMP shall incorporate environmental measures to protect biodiversity, to include the following:

- a) Risk assessment of potentially damaging construction activities.
- b) Identification of "biodiversity protection zones".
- c) Practical measures (both physical measures and sensitive working practices) to avoid or reduce impacts during construction (may be provided as a set of method statements).
- d) The location and timing of sensitive works to avoid harm to biodiversity features.

- e) The times during construction when specialist ecologists need to be present on site to oversee works.
- f) Responsible persons and lines of communication.
- g) The role and responsibilities on site of an ecological clerk of works (ECoW) or similarly competent person.
- h) Use of protective fences, exclusion barriers and warning signs.
- i) Containment, control and removal of any Invasive non-native species present on site

The development hereby permitted shall be carried out in accordance with the CMP as so approved.

Reason - To ensure that the construction impacts of the development are kept within acceptable limits; and to conserve protected and Priority species and allow the LPA to discharge its duties under the Conservation of Habitats and Species Regulations 2017 (as amended), the Wildlife & Countryside Act 1981 (as amended) and s40 of the NERC Act 2006 (Priority habitats & species) as updated by the Environment Act 2021.

- 14) No part of the development hereby permitted shall be commenced until details relating to the control of noise and vibration from the construction of the development have been submitted to and approved in writing by the Local Planning Authority. These details shall include the following:
- (a) definitions of roles and responsibilities;
 - (b) the adoption of best practice for the specification and procurement of quiet plant and equipment;
 - (c) consultation and reporting processes for noise and vibration;
 - (d) noise and vibration monitoring procedures, including recording measures and the location of measuring instruments for each phase of the development;
 - (e) action to be taken in the event of non-compliance with (b) to (c) above;
 - (f) a record of the occasions on which percussive piling operations take place;
 - (g) complaint response procedures;
 - (h) requirements to provide environmental noise awareness training to operatives; and
 - (i) construction methods for percussive piling designed to minimise the noise generated by such operations through practical methods such as shrouding or other appropriate alternative methods.

The development hereby permitted shall be carried out in accordance with the approved details.

Reason - To ensure that the noise and vibration impacts of the development are kept within acceptable limits.

- 15) All plant, machinery and vehicle used on site in constructing the development shall be fitted with effective silencers at all times which shall be maintained in accordance with the manufacturers' recommendations and current British Standards applicable thereto. No such plant shall be left running when not being operated.

Reason -To ensure that the noise impacts of the development are kept within acceptable limits.

- 16) Where any vehicle or plant is required to be fitted with a reverse warning system, such vehicles or plant shall not be installed or used prior to the approval in writing by the local Planning Authority of such a system. In operating such vehicles or plant the approved system shall be used.

Reason - To ensure that the noise Impacts of the development are kept within acceptable limits.

- 17) No percussive piling operation for the development shall be carried out except in accordance with a programme for that phase which shall first have been approved in writing by the Local Planning Authority. The said programme shall provide that:

(i) no percussive piling operations shall be undertaken in relation to the construction of the development during more than thirteen weekends in any six months; and

(ii) except with the prior written approval of the Local Planning Authority no more than three hours of percussive piling of tubular piles for the main quay wall shall take place on any day.

Reason -To ensure that the noise impacts of the development are kept within acceptable limits.

- 18) Except with the prior written agreement of the Local Planning Authority, no percussive piling operations shall be undertaken in relation to the construction of any part of the development outside the hours of:

(a) 08:00 to 18:00 Monday to Friday; and

(b) 09:00 to 13:00 on Saturday;

or at any time on Sundays or Bank or Public Holidays, provided that percussive piling operations may be undertaken in relation to the construction of the development outside the permitted hours:

(i) in the case of emergency, or

(ii) where piling is required on the grounds of safety or environmental protection; and

(iii) In either case the situation would otherwise be dangerous to life or limb.

The Local Planning Authority shall be promptly notified in writing of any event of this type and the reason why percussive piling took place outside the permitted hours.

Reason - To protect residential amenity during construction.

- 19) The noise from construction activities in relation to the development shall not exceed the following daytime free-field equivalent sound pressure levels, as measured at a height of 1.5 m above ground level at the nearest residential property to the development:

(a) 67 dB LAeq 12H and 85 dB LA1 5 mins (in relation to percussive piling operations) during the hours of 07:00 to 19:00 on Mondays to Fridays, excluding Bank Holidays;

(b) 55 dB LAeq 1hr during the hours of 19:00 to 23:00 on Mondays to Fridays, excluding Bank Holidays;(

c) 67 dB LAeq 6hr and 85 dB LA1 5 mins (in relation to percussive piling operations) during the hours of 07:00 to 13:00 on Saturdays; and

(d) 50 dB LAeq 1hr at all other times.

Reason - To ensure that the noise impacts of the development are kept within acceptable limits and to protect residential amenity.

- 20) Vibration levels from piling or other construction activities in relation to the development, as measured immediately adjacent to the nearest residential property or vibration sensitive structure for that phase shall not exceed a peak particle velocity of 5mm/s.

Reason - To protect residential amenity.

- 21) No part of the development hereby permitted shall be operated until an Operational Noise and Vibration Management and Monitoring Plan (NVP), relating to the control of noise and vibration from the operation of the development has been submitted to and approved in writing by the Local Planning Authority. The NVP shall include the following:

- (a) definitions of roles and responsibilities in relation to the obligations contained in the NVP;
- (b) requirements for the adoption of best practice for the specification and procurement of quiet plant and equipment;
- (c) consultation and reporting processes in relation to noise and vibration;
- (d) noise and vibration monitoring and recording procedures;
- (e) action to be taken in the event of non-compliance;
- (f) complaint response procedures; and
- (g) a requirement to provide environmental noise awareness training to operatives.

The development hereby permitted shall be carried out in accordance with the approved NVP.

Reason -To protect residential amenity.

- 22) Noise from the operation of the development and emanating from the site shall not exceed a free-field sound pressure level of 55 dB LAeq 1 hr at any residential property existing at the date of this permission measured at a height of 4 m above local ground level between the hours of 23:00 to 07:00.

Reason -To protect residential amenity.

- 23) No stack or stacks of containers on any part of the development hereby permitted shall exceed five containers in height save that nothing in this condition shall preclude the lifting of containers above any stack of five containers.

Reason -In the interests of visual amenity.

- 24) There shall be no stacking of containers (other than containers on HGV trailers) more than one high on land south of the rail terminal comprised in the development.

Reason - In the interests of visual amenity.

- 25) No phase of the development hereby permitted shall be begun until a written scheme of construction lighting for that phase has been submitted to and approved in writing by the Local Planning Authority. The scheme shall include details of:

- (a) definitions of roles and responsibilities;
- (b) design including locations of the construction lighting in accordance with conditions 26 and 27 to this permission;
- (c) installation of the construction lighting;
- (d) management of the construction lighting; and
- (e) construction lighting monitoring procedures and action to be taken in the event of non-compliance.

The development hereby permitted shall be carried out in accordance with the approved scheme.

Reason - To protect amenity and ensure navigational safety.

- 26) The height of fixed lighting installations used in the construction of the development shall not exceed twelve metres above ground level.

Reason - To ensure that the construction lighting impacts of the development are kept within acceptable limits.

- 27) No phase of the development shall commence until details of the luminaires to be mounted on lighting columns on site in connection with the construction of the development have been submitted to and approved in writing by the Local Planning Authority. The details shall include:

- (a) use of luminaires with high quality optical systems of flat glass construction, where appropriate;
- (b) limits upon the aiming angle of the peak Intensity of the luminaire to maintain the light from the luminaire generally within 75 degrees from the downward vertical; and
- (c) use of the most appropriate photometry reflectors available at the date of this permission.

The development shall be carried out in accordance with the approved details.

Reason - To minimise any possible glare or sky glow caused by the construction lighting for the development and to minimise the effect of the construction lighting on the surrounding areas.

- 28) No part of the development permitted by this planning permission shall commence operation until a scheme for the provision and control of operational lighting (including high mast lighting and column lighting) on that part of the site has been installed in accordance with a scheme which has first been submitted to and approved by the Local Planning Authority. The operational lighting scheme shall include the following:

- (a) use of luminaires with high quality optical systems of Hat glass construction for high mast lighting;
- (b) use of full cut-off luminaires which do not produce upward spread of light near to or above the horizontal;
- (c) a restriction on the luminaire tilt angle to maximum of 8 degrees above the maximum peak of intensity angle or luminaire;
- (d) the direction of high mast lighting so as to minimise direct light into windows or properties in the proximity of the development site;
- (e) a reduction of the heights of high mast lighting towers and columns towards the boundary of the site;
- (f) automatic extinguishment of ship to shore gantry crane boom arm floodlighting and maintenance access walkway lighting on the raising or a crane boom arm 10 degrees from the horizontal operation position;
- (g) access and safety luminaries on access walkways and ladders shall be fitted with diffusers;
- (h) the working lighting of the ship to shore gantry cranes shall be switched off when not in use for any extended period of time, retaining only access, safety and security lighting;
- (i) ship to shore gantry crane boom arm, floodlighting luminaries located beyond the riverside edge of berthed vessels shall be manually turned off when not in use;
- (j) working lighting of rubber tyre gantry cranes shall be switched off when not in use for an extended period of time, retaining only access, safety and security lighting;
- (k) operational lighting monitoring procedures and action to be taken in the event of non-compliance.

The lighting scheme hereby permitted shall be carried out and maintained in accordance with the approved scheme.

Reason – To minimise any possible glare or sky glow caused by the operational lighting for the development and to minimise the effect of the operational lighting on navigational aids or signs, public roads and local residential areas.

29) No part of the development hereby permitted shall begin until a construction dust management plan has been submitted to and approved in writing by the Local Planning Authority. The construction dust management plan shall include details of:

- (a) definitions of roles and responsibilities;
- (b) the adoption of best practice for the specification of plant and equipment;
- (c) the consultation and reporting processes;
- (d) dust monitoring procedures;
- (e) action to be taken in the event of non-compliance; and
- (f) complaint response procedures.

The development hereby permitted shall be carried out in accordance with the approved plan.

Reason - To ensure that appropriate construction dust management measures are in place.

30) No part of the development hereby permitted shall be commenced until details of the cleaning and maintenance programme for the site roads to be used during construction have been submitted to and approved in writing by the Local Planning Authority. The programme shall include details of:

- (a) the use of water bowsers and sprays for damping down of hard surface site roads;
- (b) sweeping of hard surface site roads; and
- (c) grading and maintenance of loose aggregate surface site roads.

The development shall be operated in accordance with the approved programme.

Reason - To prevent deterioration and build-up of contaminating materials able to emit dust.

31) All vehicles used to transport materials to or from the site during construction shall be sheeted so as not to deposit materials on the highway.

Reason - To prevent deposits on the highway and the emission of dust in the interest of local amenity and highway safety.

32) No part of the development hereby permitted shall be commenced until written details of a wheel wash facility and its location have been submitted to and approved in writing by the Local Planning Authority and Local Highway Authority. The development hereby permitted shall be carried out so as to ensure that vehicles leaving the development site during construction first pass through the approved wheel wash facility.

Reason - To prevent the deposits of materials on the public road network.

33) No part of the development hereby permitted shall be operated until a plan for the handling of materials and stockpiling of new construction materials on site (using physical containment, partial shielding where available and water misting/sprays where appropriate) has been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the approved plan.

Reason - To prevent the migration of dust off the site.

- 34) No part of the development hereby permitted shall be commenced until an ambient dust monitoring strategy has been submitted to and approved in writing, by the Local Planning Authority. The ambient dust monitoring strategy shall include details of the following:

- (a) three months' 'baseline' data;
- (b) the numbers and locations of deposit gauge units;
- (c) monthly sampling requirements;
- (d) wind direction monitoring requirements;
- (e) assessment criteria;
- (f) reporting processes; and
- (g) action to be taken in the event of non-compliance with the approved assessment criteria.

The development hereby permitted shall be carried out in accordance with the approved ambient dust monitoring strategy.

Reason - To provide a long term record and a comparison with baseline dust concentrations.

- 35) No part of the development hereby permitted shall be commenced until details of measures to mitigate gas migration and accumulation, in accordance with the recommendations contained in the Bathside Bay Development Project Landfill Gas Investigation Report Ref E6702/1991/OCT/L6, have been submitted to and approved In writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the approved details.

Reason - To prevent gas migration and minimise gas accumulation, in the interests of public safety.

- 36) No part of the development hereby permitted shall be commenced until a flood evacuation plan has been submitted to and approved in writing by the Local Planning Authority and the Local Highway Authority. The development hereby permitted shall be carried out and operated in accordance with the approved plan.

Reason -To ensure that appropriate flood evacuation measures are put in place.

- 37) All buildings constructed as part of the development shall have a minimum ground floor level of at least 4.6 m AODN with the provision of dry access at the same or higher levels to all such buildings.

Reason - To provide protection in the event of flooding.

- 38) No part of the development hereby permitted shall be commenced until a scheme for concrete pouring and filling Works has been submitted to and approved in writing by the Local Planning Authority. The scheme shall include the following:

- (a) monitoring procedures: and
- (b) remedial action works to be undertaken in the event of spillage.

The development hereby permitted shall be carried out in accordance with the scheme as so approved.

Reason -To minimise risk of accidental pollution of watercourses during construction works.

- 39) No part of the development hereby permitted shall be commenced until a scheme for pollution control has been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out and operated in accordance with the scheme as so approved.

Reason - To prevent the migration of pollutants from the site to adjoining land and for public safety.

- 40) No site clearance for the development hereby permitted shall be commenced until a scheme for the translocation of reptiles, invertebrates and coastal vegetation within the site has been submitted to and approved by the Local Planning Authority. The scheme shall include the following:

(a) exclusion fencing to be erected around the site;

(b) tinning to be carried out over a minimum of 60, 70 or 90 suitable days for a low, medium or high population level respectively, between the months of March and September;

(c) relocation of the reptiles found to areas of suitable habitat outside the exclusion fencing.

The development hereby permitted shall be carried out and operated in accordance with the scheme as so approved.

Reason - To avoid harm to reptiles, invertebrates and coastal vegetation.

- 41) No part of Phases 2, 3 and 4 of the development hereby permitted (as shown on approved drawing H1001-19-B) shall commence operation as a container terminal until such time as details of works for the improvement of the A12(T)/A 120(T)/A 1232 Ardleigh Crown Interchange in such form as National Highways and the Local Highway Authority may approve in writing, have been submitted to and approved in writing by the Local Planning Authority. The details of the said works shall:

(a) be to a standard at least capable of ensuring:

- (i) that conditions at the Interchange are no worse during and at the expiration of a period of 10 years from the anticipated date of commencement of operation of the development; and
(ii) the safety of all road users including pedestrians and cyclists using the junction; and

(b) include drawings to a scale of not less than 1:500 whether or not requiring the land of third parties.

Reason – In order that the A 120 Trunk Road continues to serve its purpose as part of the national strategic road network and to satisfy the reasonable requirements of road safety on the A120 and connecting roads.

- 42) No part of Phases 2, 3 and 4 of the development hereby permitted (as shown on approved drawing H1001-19-B) shall commence operation as a container terminal until such time as the details of a scheme for the Improvement of the A120(T) Parkeston Road/Station Road/Europa Way roundabout, in such form as National Highways and the Local Highway Authority may approve in writing, have been submitted to and approved in writing by the Local Planning Authority. The details of the said works shall:

(a) be to a standard at least capable of ensuring:

- (i) that all traffic relating to the development is accommodated during and at the end of a period of 10 years from the anticipated date of commencement of operation of the development; and
 - (iii) the safety of all road users including pedestrians and cyclists using the junction; and
- (b) include drawings to a scale of not less than 1:500 whether or not requiring the land of third parties.

Reason - In order that the A120 Trunk Road continues to serve its purpose as part of the national strategic road network and to satisfy the reasonable requirements of road safety on A120 and connecting roads.

- 43) No parts of Phases 2, 3 and 4 of the development hereby permitted (as shown on approved drawing H1001-19-B) shall be operated as a container terminal until the works referred to in Conditions 41 and 42 have been implemented and/or opened to traffic as the case may be.

Reason – In order that the A 120 Trunk Road continues to serve its purpose as part of the national strategic road network and to satisfy the reasonable requirements of road safety on the A 120 and connecting roads.

- 44) No part of **Phases 2, 3 and 4** of the development hereby permitted (**as shown on approved drawing H1001-19-B**) shall **commence operation as a container terminal** unless:

- (i) the Secretary of State for Transport has announced a preferred route for the improvement of the route of the A120(T) (including from Ramsey Bridge roundabout to Parkeston) together with consequential and ancillary improvements thereto and to the A120 and any side roads and access between and in the vicinity of:
 - (a) the A120(T)/A133 Interchange Hare Green and Horsely Cross roundabout to no less a standard than a two lane dual carriageway; and
 - (b) from Horsely Cross Roundabout to Ramsey Bridge Roundabout to no less a standard than a wide single carriageway; or in each case such other terminal points for such route improvements as the Secretary of State may announce;
- (ii) the Local Highway Authority has announced proposals relating to the local highway network including the A120 Parkeston roundabout to Morrison roundabout required as a result of the proposals referred to at (i) above;
- (iii) an agreement or agreements have been concluded pursuant to section 278 Highways Act 1980 to secure funding of such route improvement works together with all such consequential and ancillary improvements to the A120(T), A120 and any side roads in such form and upon such route as may thereafter be authorised pursuant to orders under the Highways Act 1980 and associated instruments made therewith; and
- (iv) the necessary powers and consents to implement the works referred to at paragraphs (i) and (ii) above have been secured; and such improvement works have been begun by or on behalf of the Secretary of State for Transport and/or Essex County Council by carrying out of a material operation in respect thereof as the same is defined in section 56 of the Town and Country Planning Act 1990.

Reason – In order that the A 120 Trunk Road continues to serve its purpose as part of the national strategic road network and to satisfy the reasonable requirements of road safety on the A120 and connecting roads.

- 45) That part of the development hereby permitted as shown by magenta and green colouring on the drawing H1001/02 Rev C shall not be paved or equipped with ship to shore gantry cranes or used for any purpose that generates road traffic until the improvements to the A120 (T)

referred to in Condition 44 above have been completed and opened to traffic so that for the avoidance of doubt no more than six cranes shall be provided at the development until such time as the said improvements have been completed.

Reason -In order that the A 120 Trunk Road continues to serve its purpose as part of the national strategic road network and to satisfy the reasonable requirements of road safely on the A 120 and connecting roads.

- 46) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order amending, revoking and re-enacting that Order with or without modification) unless and until the improvements referred to in Condition 44 above have been completed, the areas referred to in Condition 45 above shall not be used for any purpose unless the same relates to the construction of the development or would not result in the arrival or departure of traffic to or from the development by road.

Reason - In order that the A120 Trunk Road continues to serve its purpose as part of the national strategic road network and to satisfy the reasonable requirements of road safety on the A 120 and connecting roads.

- 47) Except where the works referred to in Condition 44 above have been opened to traffic, when this condition shall cease to have effect, the development shall not be operated except in accordance with a scheme (accompanied by a certificate that the same has been supplied to and approved by the Local Highway Authority and Highways England) approved by the Local Planning Authority providing for traffic management and safety measures to remain in place until the works referred to in Condition 44 have been opened for traffic.

Reason - In order that the A 120 Trunk Road continues to serve its purpose as part of the national strategic road network and to satisfy the reasonable requirements of road safely on the A120 and connecting roads.

- 48) No part of the development hereby permitted shall be commenced until such time as details of the means of vehicular access to the site from the A 120 have been submitted to and approved in writing by the local Planning Authority and the Local Highway Authority. The development shall not be operated until the vehicular access has been constructed in accordance with the approved details and opened to traffic.

Reason - In order that the A120 Trunk Road continues to serve its purpose as part of the national strategic road network and to satisfy the reasonable requirements of road safety on the A 120 and connecting roads.

- 49) No phase of the development hereby permitted shall be commenced until a detailed scheme and layout of hard standing for lorries and cars, including a requirement that no charge be levied for HGVs delivering or collecting goods from the development and reasonable and proper provision for disabled people in accordance with the plans hereby approved has been submitted to and approved in writing by the local Planning Authority and Local Highway Authority. The development shall be implemented in accordance with the approved scheme and layout which shall be retained thereafter.

Reason - To secure the proper layout and function of parking areas.

- 50) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order amending, revoking and re-enacting that Order with or without modification) no linkspan (or other structure to permit the use of the development hereby permitted or any part thereof) by RoRo type vehicles (here including vehicles referred to at paragraph (iii) below) shall be constructed pursuant to this planning permission or otherwise and no part of the development shall be used:

- (a) for the import or export of RoRo vehicles or goods carried by RoRo vehicles (at the time of import or export); or
- (b) for the storage or handling of RoRo vehicles; or
- (c) for the loading or unloading of RoRo vehicles from any vessel; or
- (d) for the collection or deposition of passengers arriving or departing as passengers by sea on vessels capable of carrying over 50 passengers. In this Condition;

"RoRo vehicle" means a wheeled vehicle capable of being used upon the public highway for the carriage of passengers or freight whether capable of moving under its own power or otherwise (e.g. trailer) including motorcycles, cars, buses and HGVs (in each case including any trailer) but does not include:

- (i) vehicles in use for the conveyance of goods, persons or containers to, from or within the development where the vehicle so used is not imported or exported with the goods, persons or containers;
- (ii) vehicles contained within containers;
- (iii) specialist vehicles used for the conveyance of awkward unusually large or bulky or unusual loads including solid wheel flat bed (MAPI) trailers (or similar); or
- (iv) vehicles delivered to the development for the use in its construction or operation

Reason - To ensure that the development is not used for roll-on, roll-off traffic in place of container traffic.

- 51) No part of the development hereby permitted shall be operated until a written emergency port closure scheme setting out:

- (i) procedures for the evacuation and/or closure of the development in the event of an emergency;
- (ii) procedures to be followed in the event of the closure of the development to sea traffic;
- (iii) the areas of HGV parking within the development to be used in the event of the closure of the development to sea traffic;
- (iv) procedures for notification and liaison with emergency services and highway authorities; and
- (v) procedures to be followed in the event of closure to or restrictions upon the use of the A120 and/or A120(T) by HGVs, together with a certificate that the same has been submitted in that form to Highways England has been submitted to and approved in writing by the Local Planning Authority and Local Highway Authority. The scheme shall be implemented as so approved.

In Conditions 49-51: 'HGV' means a heavy goods vehicle of COBA Vehicle Category OGV1 and/or OGV2 as defined in the Design Manual for Roads and Bridges. Volume 13. Section 1 (May 2002).

Reason - To ensure appropriate responses to emergencies and port closure.

- 52) No part of the development hereby permitted shall commence operation until a scheme providing for the operation of the development in accordance with measures designed to secure controls on activities likely to adversely affect air quality as a result of activities on that part of the site has been installed in accordance with a written scheme which has first been submitted to and approved in writing by the Local Planning Authority. The scheme shall include:

- (i) a strategy for the procurement of plant, machinery and vehicles to be used in operating the development complying with Government air quality objectives from time to time for

- control of emissions including (where appropriate) the fitting and use of catalytic converters;
- (ii) a requirement that the development should be capable of being retrofitted with apparatus for the purposes of the supply of electricity from land to vessels berthed alongside;
 - (iii) procedures for liaison and review in relation to the prospects of securing improvements to emissions from the development and the adoption of reasonable measures identified as being necessary as a result of such liaison and review; and
 - (iv) a requirement upon the terminal operator to request that the Harwich Haven Authority imposes reductions in vessel speeds in order to limit emissions.

The development shall be operated in accordance with the scheme so approved.

Reason – For the protection of air quality and, so far as reasonably possible, its improvement.

- 53) No part of Phases 2, 3 and 4 of the development hereby permitted shall commence operation until a scheme for the provision of noise attenuation measures designed to mitigate the impact of traffic noise arising from the operation of the development on residential and/or noise sensitive properties at or in the vicinity of Wix Road Ramsey has been submitted to and approved in writing by the Local Planning Authority. The approved scheme shall be carried out prior to commencement of the operation of the development.

Reason – To protect residential amenity.

- 54) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any order revoking and re-enacting that Order with or without modification) the hereby permitted container terminal shall not be extended to include land within the existing Harwich International Port without the submission of a planning application and the prior written permission of the local Planning Authority or the Secretary of State.

Reason - For the avoidance of doubt as to the scope of this permission.

11.3 Informatives

Positive and Proactive Statement

The Local Planning Authority has acted positively and proactively in determining this application by identifying matters of concern within the application (as originally submitted) and negotiating, with the Applicant, acceptable amendments to the proposal to address those concerns. As a result, the Local Planning Authority has been able to grant planning permission for an acceptable proposal, in accordance with the presumption in favour of sustainable development, as set out within the National Planning Policy Framework.

Legal Agreement Informative

This application is the subject of a legal agreement and this decision should only be read in conjunction with this agreement.

Highways Informatives

On the completion of the Development, all roads, footways/paths, cycle ways, covers, gratings, fences, barriers, grass verges, trees, and any other street furniture within the Site and in the area it covers and any neighbouring areas affected by it, must be left in a fully functional repaired/renovated state to a standard accepted by the appropriate statutory authority.

All work within or affecting the highway is to be laid out and constructed by prior arrangement with and to the requirements and specifications of the Highway Authority; all details shall be agreed before the commencement of works.

The applicants should be advised to contact the Development Management Team by email at development.management@essexhighways.org or by post to:

SMO1 – Essex Highways Colchester Highways Depot,
653 The Crescent,
Colchester CO4 9YQ

The Highway Authority cannot accept any liability for costs associated with a developer's improvement. This includes design check safety audits, site supervision, commuted sums for maintenance and any potential claims under Part 1 and Part 2 of the Land Compensation Act 1973. To protect the Highway Authority against such compensation claims a cash deposit or bond may be required.

Sustainable Urban Drainage Informatives

Essex County Council has a duty to maintain a register and record of assets which have a significant impact on the risk of flooding. In order to capture proposed SuDS which may form part of the future register, a copy of the SuDS assets in a GIS layer should be sent to suds@essex.gov.uk.

Any drainage features proposed for adoption by Essex County Council should be consulted on with the relevant Highways Development Management Office.

Changes to existing water courses may require separate consent under the Land Drainage Act before works take place. More information about consenting can be found in the attached standing advice note.

It is the applicant's responsibility to check that they are complying with common law if the drainage scheme proposes to discharge into an off-site ditch/pipe. The applicant should seek consent where appropriate from other downstream riparian landowners.

The Ministerial Statement made on 18th December 2014 (ref. HCWS161) states that the final decision regarding the viability and reasonableness of maintenance requirements lies with the LPA. It is not within the scope of the LLFA to comment on the overall viability of a scheme as the decision is based on a range of issues which are outside of this authority's area of expertise.

We will advise on the acceptability of surface water and the information submitted on all planning applications submitted after the 15th of April 2015 based on the key documents listed within this letter. This includes applications which have been previously submitted as part of an earlier stage of the planning process and granted planning permission based on historic requirements. The Local Planning Authority should use the information submitted within this response in conjunction with any other relevant information submitted as part of this application or as part of preceding applications to make a balanced decision based on the available information.

12. Additional Considerations

Public Sector Equality Duty (PSED)

- a. In making your decision you must have regard to the PSED under section 149 of the Equality Act 2010 (as amended). This means that the Council must have due regard to the need in discharging its functions to:
 - b. A. Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
 - c. B. Advance equality of opportunity between people who share a protected characteristic and those who do not. This may include removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; taking steps to meet the special needs of those with a protected characteristic; encouraging participation in public life (or other areas where they are underrepresented) of people with a protected characteristic(s); and
 - d. C. Foster good relations between people who share a protected characteristic and those who do not, including tackling prejudice and promoting understanding.
- e. The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, being married or in a civil partnership, race including colour, nationality and ethnic or national origin, religion or belief, sex and sexual orientation.
- f. The PSED must be considered as a relevant factor in making this decision but does not impose a duty to achieve the outcomes in section 149 and section 149 is only one factor that needs to be considered, and may be balanced against other relevant factors.
- g. It is considered that the recommendation to grant permission in this case would not have a disproportionately adverse impact on a protected characteristic.

Human Rights

- h. In making your decision, you should be aware of and take into account any implications that may arise from the Human Rights Act 1998 (as amended). Under the Act, it is unlawful for a public authority such as the Tendring District Council to act in a manner that is incompatible with the European Convention on Human Rights.
- i. You are referred specifically to Article 8 (right to respect for private and family life), Article 1 of the First Protocol (protection of property) and Article 14 (right to freedom from discrimination).
- j. It is not considered that the recommendation to grant permission in this case interferes with local residents' right to respect for their private and family life, home and correspondence or freedom from discrimination except insofar as it is necessary to protect the rights and freedoms of others (in this case, the rights of the applicant). The Council is also permitted to control the use of property in accordance with the general interest and the recommendation to grant permission is considered to be a proportionate response to the submitted application based on the considerations set out in this report.

Finance Implications

- k. Local finance considerations are a matter to which local planning authorities are to have regard in determining planning applications, as far as they are material to the application.
- l. Under current regulations it is not thought that the Council would directly receive additional revenue from business rates paid by the operator of the Container Terminal operation. Whilst the Container Terminal development would generate additional economic benefits for the district there are no direct local finance considerations for the Council which should attract significant weight.

13. Background Papers

- a. In making this recommendation, officers have considered all plans, documents, reports and supporting information submitted with the application together with any amended documentation. Additional information considered relevant to the assessment of the application (as referenced within the report) also form background papers. All such information is available to view on the planning file using the application reference number via the Council's Public Access system by following this link <https://idox.tendingdc.gov.uk/online-applications/>. However for ease, the letter from the applicant to the Council which responds to the objections raised by Natural England (dated 11th February 2022) is appended here.

11 February 2022

Susanne Chapman-Ennos
Tendring District Council
Council Offices
Thorpe Road
Weeley
Essex
CO16 9AJ

The Savills logo consists of the word "savills" in a lowercase, sans-serif font, colored red, set against a solid yellow rectangular background.

Emma Andrews
E: emma.andrews@savills.com
DL: +44 (0) 20 3810 9842

33 Margaret Street W1G 0JD
T: +44 (0) 20 7499 8644
F: +44 (0) 20 7495 3773
savills.com

By Email

Dear Susanne

**Hutchison Ports (UK) Limited: Bathside Bay
Application Reference Numbers: 21/01810/VOC and 21/01792/VOC**

My client, Hutchison Ports (UK) Limited ('HPUK') has seen the consultation response from Natural England dated 4 February 2022, which objects to the above applications. An initial response was provided in our letter of 8 February 2022. A meeting was subsequently held with Natural England (which was also attended by Graham Nourse of Tendring District Council (TDC)) on 9 February 2022 to discuss the comments in further detail. This letter provides an update to our 8 February response, reflecting the outcome of the discussion with Natural England on 9 February 2022.

In summary, HPUK's position remains unchanged in that all of the points raised by Natural England in their advice letter have either been addressed by the ES and shadow HRA supporting the applications or should not prevent TDC making a timely positive determination of the applications. This letter expands on our reasoning for this position.

I deal below only with the matters in Natural England's letter that require a response and do not address their comments on Appropriate Assessment or Reasonable Alternatives (items 1 and 2 respectively of their 8 February 2022).

1. IROPI

Contrary to Natural England's suggestion, our view is that the ES does provide TDC with a full and up to date understanding of the ecological value of the site and the potential impacts. Further details are provided below (in response to Natural England's comments regarding compensation), but in summary section 7 of the ES provides an updated baseline for the waterbird interest of Bathside Bay and the Stour and Orwell Estuaries SPA and Ramsar site (i.e. core counts from the Wetland Birds Survey (WeBS) for the most recent 5 available years from the British Trust for Ornithology (up to and including the winter of 2019/20) and low water counts for the five winters to 2018/19).

In the meeting on 9 February 2022, Natural England expanded on its advice to TDC that "...*your authority should have a full understanding of the ecological value of the site and the anticipated impacts...*", stating that additional waterbird data (not referenced in the ES and shadow HRA) for Bathside Bay have been collected as part of the assessment of / monitoring for the Galloper offshore windfarm operations and maintenance facility ('the Galloper O&M facility'). Our understanding is that the data referred to by Natural England are not published or publicly accessible. The data have been requested since the meeting but have not been provided to HPUK and, therefore, it is not clear which data are being referred to or the timeframe covered by the data. On this basis, and given the long-

running and recent data set on which the conclusions of the ES and shadow HRA are based, HPUK feels it is unreasonable for Natural England to infer that the conclusions of the ES and shadow HRA are not robust due to data deficiency. The conclusions are based upon a robust and long running dataset, gathered by a body with long experience of bird assemblages in Harwich Haven and can be considered to benefit from a high degree of scientific certainty. This matter is explored in further detail below in response to the more detailed points raised by Natural England.

Section 8 of the ES reports the findings of the Preliminary Ecological Appraisal undertaken in 2021 and, on the basis of that survey, the ES identifies the mitigation required where necessary.

IROPI is addressed in detail in section 4.5 of the Planning Statement, with supporting information in section 2 of the ES. It can be concluded that IROPI remains in full force for the proposed development.

2. Compensation

This section of Natural England's letter raises several points, which we address as follows.

- **Shadow HRA**

Natural England stated that *"We note that the shadow HRA section separates the Phase 1 works from the rest of the project and concludes no adverse effect on integrity if those works are conducted outside of the overwintering bird period. Natural England does not recommend retrospectively slicing the assessment of projects into phases"*.

As we explained in our letter of 8 February and in the meeting on 9 February, the shadow HRA (section 25 of the ES) does not slice the assessment of the project into phases. Similarly, the shadow HRA does not slice the provision of compensatory habitat into phases. The shadow HRA assesses the whole project (and each element of the project is explicitly referred to in section 25.3.2 which reports the screening for likely significant effect (LSE) stage of the HRA process). The shadow appropriate assessment is reported on the same basis in section 25.3.3. For the avoidance of doubt, the shadow HRA concludes that LSE cannot be excluded for the whole project (i.e. including Phase 1) and therefore carries the whole project into the shadow appropriate assessment stage.

It is assumed that Natural England is referring to paragraph 13 of section 25.3.3 which refers to Phase 1 of BBCT and SBH. That paragraph is included to highlight that no adverse effect on integrity is concluded for the Phase 1 works. As noted above, the shadow HRA process does encompass all phases of works for the BBCT and SBH, and the reference to Phase 1 individually is made to demonstrate that those works do not trigger the need for compensatory measures on their own.

Therefore, the relevance of the reference to Phase 1 in distinction to the balance of the project is simply in directly linking the provision of compensatory habitat to effects upon the designated features of Bathside Bay. This is a position, secured by planning condition, that is no different to the protection afforded by the existing planning permission.

- **Adverse Effects on the Integrity (AEol) of the Stour and Orwell Estuaries SPA and Ramsar site and sufficiency of Little Oakley Compensatory Habitat**

Natural England stated that *"We also advise that the supporting evidence for the conclusion of no AEol does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas - which do contain suitable habitat for breeding and overwintering species and is predominately undisturbed. Therefore, it cannot be concluded that there will be no LSE (impact pathway) and without mitigation there could be an AEol"*.

The conclusion regarding AEol is only relevant to SPA (and Ramsar site) features, albeit that the SSSI features also form part of the waterbird assemblage of the SPA and Ramsar site. The qualifying interests of all designated sites are, however, included in the assessment reported in section 7 of the ES. Section 25 of the ES presents the shadow HRA.

Notwithstanding the above distinction between the designated sites relevant to the scope of the shadow HRA, the ES does describe the current potential for effects on the SPA, Ramsar site (and SSSI) features within the designated areas adjacent to the Phase 1 works (and the wider BBCT and SBH developments). As such, the potential for impacts upon these features is considered in the ES.

Natural England has drawn attention to overwintering (i.e. non-breeding) species and to breeding species. As noted above, non-breeding waterbird data up to the winter of 2019/20 (the most recent data available from the WeBS surveys) is reported in section 7 of the ES. The Bathside Bay WeBS count sector for which data are included in the ES coincides with the boundaries of the SPA, Ramsar site and SSSI, and this data is presented in the context of the most recent WeBS data for the Stour and Orwell Estuaries (summarised in Table 7.4 of the ES, with a further species-specific analysis in Table 7.5 of the ES). The only breeding qualifying feature of the SPA and Ramsar site is avocet, which does not breed in Bathside Bay or on the land surrounding the Bay. The shadow appropriate assessment concludes that AEol on the SPA and Ramsar site can be excluded for Phase 1, but clearly cannot be excluded for the project as a whole.

The comment made by Natural England in its letter to TDC was discussed further in the meeting on 9 February, specifically the assertion that *“the conclusion of no AEol does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas”*. Natural England’s stated position is that *“the appropriate assessment is incomplete and does not make a complete assessment of the effects based on the best reasonably available information”*.

In exploring this point, Natural England referred to the waterbird data collected in connection with the Galloper O&M facility. As noted in Section 1, these data are not published or publicly accessible and, therefore, the ES and shadow HRA were supported by the most recent WeBS data and low water count data, which provide a full and up to date understanding of the ecological value of the site using data that can be verified by third parties (i.e. the assessment does use the *“best reasonably available information”*).

Nevertheless, HPUK does have access to some of the data gathered in connection with the Galloper O&M facility and, given Natural England’s challenge to the sufficiency of the data and the discussion at the meeting, it is assumed this represents (at least some of) the data Natural England is referring to. These data are discussed below.

Waterbird surveys within and adjacent to Bathside Bay were undertaken over the periods October 2018 to June 2019 and October 2019 to March 2020. Two surveys per month were undertaken at low water (over the period -1.5 hours to +1.5 hours around the time of predicted low water) with one survey per month over the mid tide period (from 1.5 hours to 4.5 hours after or before predicted low water). On each survey, counts were divided into one hour time slices (e.g. -1.5 hours to -0.5 hours before low water, -1.5 hours to +0.5 hours around low water, +0.5 hours to +1.5 hours after low water). Bathside Bay was counted in sectors covering the whole of the intertidal area and the shallow subtidal area, but also including any birds observed roosting on the land surrounding the bay.

Using the raw count data from surveys undertaken for the Galloper O&M facility, for each of the low and mid tide counts, the total number of waterbirds recorded has been calculated and the mean peak number of waterbirds identified. The following summarises the conclusions of this analysis:

- a) The low tide mean peak is 1,478 waterbirds. Using the same five year mean peak (2012/13 to 2018/19) low water count data for the estuarine system as presented in the ES (Table 7.7) for context, this represents 2.6% of the Stour and Orwell estuarine system population. This very

closely agrees with the analysis of the low water population supported at Bathside Bay in the context of the estuary system presented in section 7.2.4 of the ES (2.8% of the estuarine population).

- b) The mid tide mean peak is 1,830 waterbirds. There are no directly comparable mid tide data from other sources but, adopting the same analysis presented in item a), this represents 3.2% of the low water estuarine population (five year mean peak (2012/13 to 2018/19)).
- c) As reported in the ES (section 7.2.4), the equivalent comparative data reported in the 2003 ES (which supported the original application) and the 2010 Supplementary Environmental Report (which supported the subsequent extension of time permissions for BBCT and SBH granted in 2013) confirmed that the low water count in Bathside Bay represented up to 2.4% (2003 ES) and 3.6% (2010 SER) respectively.
- d) The above analysis of the data available to HPUK from the Galloper O&M facility surveys confirms the conclusion of the ES that the current low water population aligns closely with the comparative data from the 2003 ES and the 2010 SER (and certainly does not demonstrate that the importance of Bathside Bay has increased in the context of the estuarine system).
- e) A comparison of the Galloper O&M facility data with the WeBS core count data is less valid because the latter data represents waterbird usage around the time of high water. However, when assessed in the context of the WeBS core count data, the mid tide mean peak of 1,830 waterbirds recorded in the Galloper O&M facility data represents approximately 3.3% of the Stour and Orwell estuarine winter peak population (54,781 birds; see Table 7.4 of the ES). Again, this very closely aligns with the conclusion of the analysis of the WeBS data in the ES (paragraph 9 of section 7.2.3) which states that the mean peak of the high tide waterbird assemblage in Bathside Bay (2015/16 to 2019/20) represented 3.4% of the mean peak count in the Stour-Orwell Estuary SPA.
- f) Although not related to the Galloper O&M facility data, with respect to the usage of Bathside Bay at high water we reiterate the point made in our letter of 8 February. The analysis of the high water data shows that the current waterbird assemblage at Bathside Bay is lower than that reported in the 2003 ES. Paragraph 8 of section 7.2.3 of the ES notes that *“Overall, the waterbird assemblage in the Stour-Orwell estuarine system appears to be lower in recent years (43,065 individuals, 2015/16 to 2019/20) than the mean peak of c.57,000 over the 1995/96 to 1999/00 period reported in the 2003 ES and 2010 SER. Reflecting this trend, the mean peak at Bathside Bay (1,473 individuals, 2015/16 to 2019/20) is lower than that reported in the 2003 ES and 2010 SER (c.3,300 individuals, 1995/96 to 1999/00)”*.
- g) It is important to note that the Galloper O&M facility data include counts of waterbirds in the shallow subtidal areas to the north of Bathside Bay. This strengthens the conclusion that the waterbird population based on the results of the Galloper O&M facility counts, when assessed in the context of the estuarine system, is no greater than that reported and assessed in the ES and shadow HRA.

With regard to sufficiency of the Little Oakley managed realignment site, Natural England states that *“we do not consider that the current evidence provides the confidence to conclude that the proposed managed realignment at Little Oakley would still secure adequate compensation for the loss of Bathside Bay”*. This was also one of the key points discussed at the meeting.

In response, and informed by the above analysis, we conclude the following, which tend to enhance the certainty of the conclusions that HPUK's expert team have established:

- i. The waterbird data presented in the ES, and which supports the shadow HRA, represents the best reasonably available information.
- ii. All the data, including that collected for the Galloper O&M facility, demonstrate that the importance of Bathside Bay in the context of the estuarine system is, at most, comparable to that prevailing at the time of the 2003 ES and 2010 SER that supported the positive decisions on the previous applications.
- iii. Based on current ecological value of Bathside Bay, there is no reason to suggest that the Little Oakley managed realignment site does not represent sufficient compensatory measures.
- iv. The Galloper O&M facility data includes waterbirds in the shallow subtidal area to the north of Bathside Bay. Because the inclusion of that area in the counts does not change the conclusion regarding the importance of the populations at Bathside Bay, the conclusions of the shadow HRA are unchanged and the sufficiency of the managed realignment site is maintained.

In the meeting on 9 February, Natural England stated that the shadow HRA does not draw all of the information together to enable the competent authority to undertake its HRA. We strongly disagree with this point given that section 25 of the ES:

- presents the current conservation objectives and qualifying features of the relevant designated sites.
- provides a LSE screening assessment for the whole project.
- presents a shadow appropriate assessment in the context of Natural England's Advice on Operations and supplementary advice on conservation objectives.
- includes assessment of the potential effects on the qualifying features of the relevant designated sites, supported by the best available evidence (as discussed above).

In light of the above, and given Natural England does not present any specific evidence to suggest a contrary position, it is difficult to understand the rationale for Natural England's statement regarding the sufficiency of compensatory provision represented by the proposed managed realignment at Little Oakley. Based upon the data supplied by HPUK and the absence of contradictory data, a high degree of scientific confidence can be placed in the information supplied in the application when concluding as to the sufficiency of compensatory habitat.

• **Completeness of the Appropriate Assessment**

We do not understand the relevance of references to compensation at a ratio of 1:1 or below. HPUK has always proposed a ratio of provision well in excess of 1:1, which was based upon the need to accommodate larger assemblages as originally assessed. The approach that HPUK has taken is appropriate having regard to the up to date assessment reported in the application, and when the further justification of that information as reported above is taken into account. This is considered further below.

The predicted impact of the BBCT and SBH is a direct loss of 69ha of intertidal habitat and reduced exposure of approximately 3ha of designated intertidal habitat due to effect on tidal propagation. As reported in the CMMA/CMMD, the Little Oakley managed realignment is predicted to deliver 105ha of a mixture of intertidal mudflat, mudflat/saltmarsh transition and saltmarsh (with an additional 5ha of sand / shingle habitat). The total managed realignment site is 138ha, with the balance including fresh/brackish water habitat and the new borrow dyke system. The compensation ratio is therefore 1.7:1 to 1.8:1 and not, as Natural England suggests, less than 1:1.

Natural England states that *“It is unlikely that the compensation measures will be 100% effective in reinstating structure and functionality of the supporting habitats for designated site features of the Stour and Orwell SPA and/or maintain the coherence of the national site network”*. We emphasise that the managed realignment proposal was developed specifically to account for uncertainty in effectiveness, and this has been expressly acknowledged from the outset. Therefore, no criticism should be made of measures that are already designed to take account of the need for confidence in relation to effectiveness. Indeed, the 2003 ES for the Little Oakley managed realignment states:

“...there is likely to be some uncertainty in the confidence with which the compensatory habitat will be able to support the affected qualifying features. In order to address these uncertainties, the ratio of compensatory habitat to that which is lost may be increased; the magnitude of increase is subject to the level of uncertainty involved, time lag and spatial displacement...it is proposed to create a larger area of intertidal than would be required in a like-for-like situation (i.e. a 1:1 replacement of intertidal area). Hence, the proposal is to create approximately 105ha of intertidal area as opposed to the 69ha that would be lost at Bathside Bay”.

The Inspector’s report in respect of the BBCT Inquiry (23 March 2005) records, at paragraphs 2.57 to 2.67, the agreed position on nature conservation between various parties, including Natural England (at the time, English Nature). Paragraphs 2.66 and 2.67 record:

“2.66 EN is of the opinion that, should BBCT and the managed realignment be allowed, the package of compensatory measures agreed would be both appropriate and necessary to secure the coherence of Natura 2000 (the Europe-wide network of SPAs and Special Areas of Conservation). This is without prejudice to the decision of the SoSs under reg.49 of the Conservation (Natural Habitats, &c.) Regulations 1994.

2.67 EN and the RSPB agree the contents of the CMMA. This document deals with the implications of BBCT for the designated status of the Stour and Orwell Estuarine system, as well as for protected species. It describes the proposed mitigation and compensatory measures and their objectives and details proposals for monitoring the Stour and Orwell estuarine system with respect to nature conservation. Proposals for monitoring the development of habitats and the numbers and distribution of water-birds within the proposed managed realignment scheme, as well as the effects of the managed realignment on the designated status of the Walton Backwaters, (Hamford Water SPA, Ramsar site and SSSI), are also detailed”.

At paragraphs 18.146-18.165 the Inspector sets out his conclusions on the Little Oakley compensation scheme including his overall conclusion (accepted by the Secretary of State) that it *“would represent the necessary compensatory measures that would need to be taken to ensure protection of the overall coherence of Natura 2000, in accordance with Reg. 53 of the Habitat Regulations”*.

HPUK considers that the above position applies with equal force to the present day. This matter is addressed in detail in section 25.6 of the ES, which considers the characteristics of the compensatory habitat in light of current Defra and Natural England guidance (February 2021) titled *Habitats regulations assessments: protecting a European site*.

HPUK notes that Natural England has not given any express reason for diverging from its publicly expressed position in 2004. Importantly, Natural England has also reaffirmed this position, most recently on 14 February 2013 when the planning permissions for BBCT and the SBH were renewed (application reference numbers: 10/00292/FUL and 10/00203/FUL). Again, there is no specific reason given for any divergence from Natural England’s 2013 view.

- **Defra Best Practice Guidance**

HPUK's view is that the draft principles referred to in Natural England's letter are satisfied by the managed realignment proposals.

- **Coastal Concordat**

Prior to the implementation of Phase 2 of BBCT there will be a need to secure appropriate marine consents. At that point HPUK will engage with the Marine Management Organisation (MMO) and the relevant information will be supplied to support those applications.

- **Delivery of Suitable Compensation**

If the Application is granted, Regulation 68 of the Habitats Regulations ("Regulation 68") requires that the LPA "*secure any necessary compensatory measures are taken to ensure that the overall coherence of [the national site network]*".

The question as to whether the proposed compensation at Little Oakley is suitable has already been addressed above, as has NE's comment in relation to the draft best practice guidance. HPUK is proposing that the compensatory measures will be secured by a combination of the following:

- a) a requirement in paragraph 3.1 of Schedule 1 of the Section 106 to let a contract securing the implementation of the Little Oakley Managed Realignment Scheme prior to the commencement of Phase 2 of the development, which is the point at which an adverse effect on the integrity of the SPA would occur; and
- b) the obligations placed on HPUK by a deed dated 15 October 2004 between Harwich International Port Limited, Harwich Haven Authority, The Environment Agency and English Nature (which became Natural England in 2006) to deliver the compensation (and mitigation) works in accordance with the specifications and timescales set out in that document.

Should the application be granted, HPUK will therefore be under a clear legal obligation to deliver the compensation (and mitigation) works. NE is therefore incorrect to suggest that such delivery is uncertain or that timings are unclear.

It is then important that the compensatory habitat is identified – as it has been throughout. However, nothing in Regulation 68 nor in the guidance issued by the Department for Environment, Food & Rural Affairs requires that planning permission for the compensatory development at Little Oakley must be in place at the time that this planning application is determined. The requirement under Regulation 68 is simply that compensatory measures are "secured", and the LPA can be satisfied that this is the case on the basis of the two legal agreements referred to above. HPUK will be precluded from commencing that part of the development that is predicted to cause an adverse effect on the integrity of the SPA and Ramsar site until it has let a contract for the construction of the managed realignment scheme, and it will then be obliged to carry it out under the terms of the 2004 CMAA/CMMD.

On this basis, HPUK strongly disagrees with NE's statement that "*limited weight can be given to the sufficiency and deliverability of the compensation measures in any decision making*". This is because the sufficiency is shown and has long been accepted and that there is an entirely normal and conventional mechanism in place to secure their delivery. Decision making may safely proceed.

3. Landscape

With reference to Natural England's comment that 'impacts to the setting of the AONB require due consideration':

Para. [12.1.3.19](#) of the LVIA review outlines the 2015 Partnership Position Statement in relation to development within the setting of the AONB. The LVIA review considers, on the basis of this statement, that the site is within the setting. It should be noted that this Statement pre-dates the 2020 extension of the AONB, although the Statement itself does not define the geographical extent of the setting (para. [12.3.2.5](#)).

The LVIA review concludes that development will not result in any direct landscape effects on areas within the AONB, including those within the 2020 extension. Effects will arise on the setting through noise and movement (perceptual effects on landscape character) and through a change in view (visual effects). The 2003 LVIA states that an 'in overall terms' the effect on the AONB is 'locally Moderate'; the LVIA review concludes (para. [12.3.2.10](#)) that "*it is considered that the effect of Moderate significance on the AONB can be regarded as being applicable to the impact on the AONB setting*".

This conclusion takes account of the perceptual influence of the development on the designation, but also the acknowledged presence of existing port infrastructure in views from the AONB, which have increased around Felixstowe since 2003. It is supported by an analysis of the 2003 viewpoints within both the pre- and post-extension boundary of the AONB. Viewpoint 7 (Shotley Promenade) is located within the latter; the 2003 assessment noted visual effects of major significance, which are considered to adequately represent those at this closest point of the designation.

With reference to NE's comment on the validity of the 2003 findings in relation to changes in industry guidance and planning policy:

Changes in planning policy, including the NPPF and references to designations including AONB, are noted the LVIA review. This includes the 2012 National Policy Statement for Ports, which states that whilst 'due regard' should be given to designations such as AONBs, but "*the fact that a proposed project will be visible from a designated area should not in itself be a reason for refusing consent*".

The LVIA review acknowledges the changes in guidance since the publication of the original assessment. However, as stated in Section 12.3, the overall conclusion is that the 2003 findings are robust and based on a rigorous, comprehensive baseline analysis. Whilst there have been minor changes in terminology and semantics, the overall methodology and conclusions—including significant effects reported for a number of receptors—remain sound. This 2021 review also considers changes to the baseline since 2003, which encompasses elements ranging from increased port infrastructure, additional housing development and enhanced levels of screening by vegetation that has matured over time.

Based on our comments set out above, we consider that Tendring District Council can and should proceed to a positive determination of these planning applications which, as recognised by Natural England in our recent meeting, the Council has the discretion to do.

Should you have any queries on or wish to discuss any of the points within this letter, please do not hesitate to contact my colleague John Bowles or me by return.

Yours sincerely



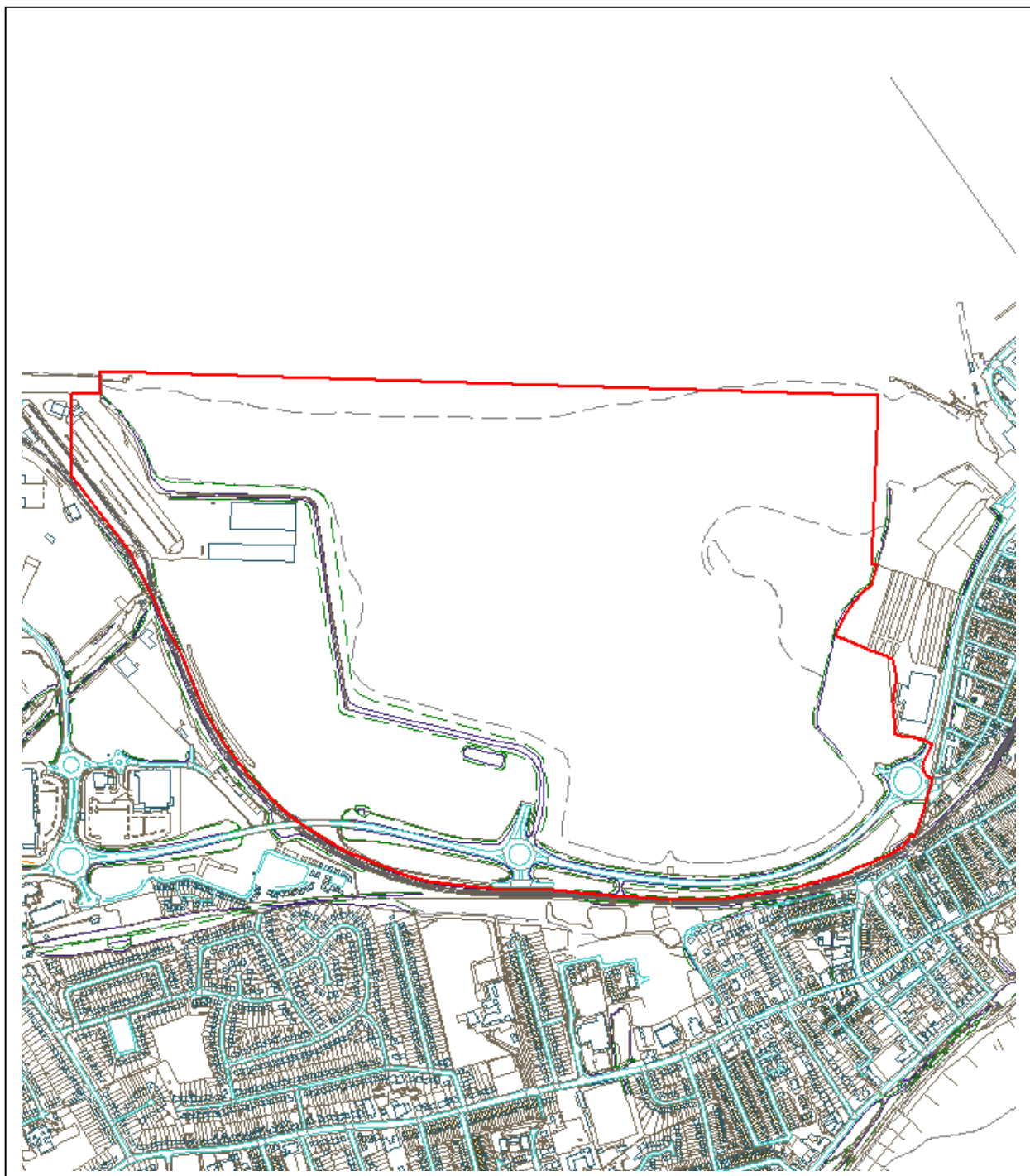
Emma Andrews
Director

PLANNING COMMITTEE

2nd March 2022

REPORT OF THE ASSISTANT DIRECTOR FOR PLANNING

A.2 PLANNING APPLICATION – 21/01792/VOC – BATHSIDE BAY STOUR ROAD HARWICH CO12 3HF



DO NOT SCALE

Reproduced from the Ordnance Survey mapping with the permission of the Controller of Her Majesty's Stationery Office © Crown Copyright. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings.

Application: 21/01792/VOC

Town / Parish: Harwich Town Council

Applicant: C/o Savills - Hutchison Ports (UK) Limited

Address: Bathside Bay Stour Road Harwich CO12 3HF

Development: Variation of condition 20 of permission 10/00203/FUL to require the approval and installation of an operational lighting scheme before the commencement of operation of the site (rather than the commencement of development)

1. **Executive Summary**

- 1.1 In 2003, Hutchison Ports (UK) Limited (“HPUK”) applied for planning permission for the construction of a new container terminal and small boat harbour at Bathside Bay, Harwich, and the provision of compensatory habitats at Little Oakley, Hamford Water. On 29th March 2006, permissions, inter alia, for reclamation works and a container terminal; a small boat harbour; the managed realignment of the coastline and creation of compensatory inter-tidal habitats off-site, and listed building consent in respect of the partial demolition of the long berthing arm attached to a listed Train Ferry Gantry were granted by the Secretary of State, following concurrent Public Inquiries held between 20th April 2004 and 21st October 2004. These developments were subject to rigorous assessments and were found on balance to be acceptable. In particular, with regard to the then Habitats Regulations, the Secretary of State found that Imperative Reasons of Overriding Public Interest (IROPI) outweighed the identified harm to the integrity of a European site (the Stour and Orwell Estuaries SPA).
- 1.2 In 2010 HPUK applied for replacement planning permissions for the reclamation works and container terminal (the Container Terminal), and a small boat harbour (the Small Boat Harbour). These permissions (10/00202/FUL and 10/00203/FUL) were granted by the Council on 14 February 2013 and remain extant, but development needs to have commenced on or before 29th March 2022.
- 1.3 This application seeks permission to vary one of the conditions (no20) on the 2013 planning permission for the Small Boat Harbour (10/00203/FUL). It is proposed that the wording is amended to change the timing of the condition. The original condition required that the details of the operational lighting were submitted and approved prior to the commencement of the development. The applicant has proposed that the wording is changed so that the details are submitted and approved, and the operational lighting installed, prior to each phase of the harbour becoming operational. There is a parallel application (21/01810/VOC) for permission to vary conditions attached to the 2013 Container Terminal permission.
- 1.4 Officers are satisfied that the variation proposed to the Small Boat Harbour permission is justified and acceptable. However, Natural England has raised an objection to this application and the Container Terminal application. In its objection Natural England takes the view that the likely effects of the proposed development on the Stour and Orwell Estuaries SPA and Coast & Heaths AONB have not been adequately addressed in the application material, and it has not been shown to Natural England’s satisfaction that the proposed compensatory habitats at Little Oakley would be sufficient. The applicant has met with Natural England to discuss its objection, following which on 11 February the applicant’s agent sent a letter responding to the points raised by Natural England; a copy of this letter is appended to this report as a background paper. It is the applicant’s view that the Environmental Statement and shadow Habitats Regulations Assessment submitted with the application provide an up to date assessment of the ecological value of the site and the potential impacts of the development, based on the best reasonably available information. It is also said that the proposed compensatory habitats at Little Oakley are sufficient and their delivery is properly secured. At

the date of this report it is not known if Natural England's objection is maintained. Any further updates on this will be reported to Members at the meeting.

- 1.5 In light of Natural England's recent objection, which at the time of writing this report has not been withdrawn, Officers are reluctant to recommend the grant of permission. It may however be that between publication of this report and the Committee meeting the position will have changed, and given the significance of the Container Terminal development, with which the Small Boat Harbour is inextricably linked, and the limited time in which to consider it, Officers believe it is appropriate to put the application before Members now. Officers will update Members as soon as possible of any change of circumstances.
- 1.6 If ultimately the decision is taken to grant this application, the new planning permission will need to restate the previous planning conditions (save as varied by the Committee) which will control the development. However, bearing in mind that a number of other pre-development conditions on the 2013 planning permission are being sought to be discharged (or partially discharged), pursuant to applications 21/01624/DISCON and 21/01816/DISCON, to enable the first phase to go ahead on existing land i.e. without land reclamation/marine works taking place, in line with the PPG these are provisionally recommended to be amended to compliance conditions wherever possible.
- 1.7 The work to update the planning conditions is on-going and it is therefore recommended that Members grant the Assistant Director of Planning authority to continue to update the remaining pre-commencement planning conditions (nos 3, 6, 8, 9, 10, 11, 12, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30 & 32) as these are discharged by the Council through the discharge of conditions applications prior to the issuing of a new planning permission, pursuant to this application. There will also need to be appropriate planning obligations in place to ensure (among other things) delivery of the compensatory habitats at Little Oakley, and again the Assistant Director of Planning will require authority to approve such supplemental or other legal agreement as is necessary to make the development acceptable, so that if Members resolve to grant planning permission there is an appropriate legal framework of obligations in place.

Recommendation:

- (1) The Committee consider this report and any updated information provided.**
- (2) The Assistant Director of Planning be authorised:**
 - (a) to approve the completion of a supplemental or other legal agreement under section 106 of the Town and Country Planning Act 1990 to secure the provision of appropriate compensatory habitats and other matters necessary to make the proposed development acceptable;**
 - (b) subject to the conditions stated in section 11 below, and the revision of any conditions that require details to be submitted, to update on a provisional basis pre-commencement conditions to compliance conditions (nos 3, 6, 8, 9, 10, 11, 12, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30 & 32), only where details have subsequently been submitted to and approved in writing by the local planning authority pursuant to 21/01624/DISCON and 21/01816/DISCON; and**
 - (c) to refuse planning permission in the event that an appropriate legal agreement has not been completed by March 29th 2022.**

2. Planning Policy

- 2.1 The following National and Local Planning Policies are relevant to this planning application.

National Policy

NPPF National Planning Policy Framework July 2021
National Planning Practice Guidance
National Policy Statement for Ports (2012)

Local Policy

Tendring District Shared Strategic Section 1 Local Plan (2021)

SP1 Presumption in Favour of Sustainable Development

SP2 Recreational disturbance Avoidance and Mitigation Strategy (RAMS)

SP3 Spatial Strategy for North Essex

SP5 Employment

SP6 Infrastructure and Connectivity

SP7 Place Shaping Principles

Tendring District Section 2 Local Plan (2022)

SPL3 Sustainable Design

HP2 Community Facilities

HP3 Green Infrastructure

PP8 Tourism

PP12 Improving Education and Skills

PP14 Priority Areas for Regeneration

PPL1 Development and Flood Risk

PPL4 Biodiversity and Geodiversity

PPL5 Water Conservation, drainage and sewage

PPL7 Archaeology

PPL8 Conservation Areas

PPL9 Listed Buildings

PPL10 Renewable Energy Generation

CP1 Sustainable Transport and Accessibility

CP2 Improving the Transport Network

DI1 Infrastructure Delivery and Impact Mitigation

Local Planning Guidance

Essex County Council Car Parking Standards - Design and Good Practice

Essex Design Guide

Status of the Local Plan

- 2.2 Planning law requires that decisions on planning applications must be taken in accordance with the development plan unless there are material considerations that indicate otherwise (Section 70(2) of the 1990 Town and Country Planning Act and Section 38(6) of the Planning and Compulsory Purchase Act 2004). This is set out in Paragraph 2 of the National Planning Policy Framework 2021 (the Framework) The 'development plan' for Tendring comprises, in part, Sections 1 and 2 of the Tendring District Council 2013-2033 and Beyond Local Plan (adopted in January 2021 and January 2022, respectively), together with any neighbourhood plans that have been brought into force.

3. Relevant Planning History

- 3.1 The information in this section includes the planning history of the land the subject of the Container Terminal adjacent.

89/02099/OUT	Proposed industry & warehousing area, business park, housing, retail park, hotel & leisure complex, open space, site for primary school, local shops and community centre, heritage centre, mooring basin, footpaths, associated roadworks, landscaping and reclamation of the southern end of Gas House Creek.	Approved	04.03.1992
91/00985/DETAIL	Erection of 57 residential units.	Approved	10.03.1992
95/01439/FUL	(Reclaimed Land at Bathside Bay, Harwich) Variation of 5 conditions (No's. 4, 7, 11, 22 and 27) and amendment to master plan land use allocations granted permission under reference TEN/2099/89	Approved	26.03.1996
96/01321/DETAIL	(Land at Bathside Bay, adjacent to Gas House Creek, off Stour Road, Harwich) Retail development comprising: Factory/Discount Outlets of varying sizes and public toilets	Approved	16.04.1997
98/00052/FUL	(Bathside Bay situated between Parkeston Quay and) Variation to condition 3(a) of consent	Approved	02.06.1998

TEN/2099/89 to read within a period of 8 years commencing on the date of this notice

02/01759/FUL	Retention of 2.4m high security fence	Approved	12.11.2002
03/00600/FUL	Reclamation of Bathside Bay and development to provide an operational container port; such works comprising:- Engineering and reclamation works including construction of a cofferdam and 1.4 km quay wharf; Construction of a concrete block paved container handling and stacking facility with 11 quayside cranes and 44 Rubber Tyre Gantry (RTG) cranes and associated workshop, customs control, Border Inspection Post and mess buildings, substations, fuelling station and mast and crane mounted lighting; Development of a 6.13 ha rail terminal with 3 rail gantry cranes and heavy duty container transfer area linked to existing rail facilities; Associated office building, logistics facility, car and HGV parking and driver facilities; Site works, including additional hardstanding, structural landscape and mounding, wetland buffer, access internal estate roads and perimeter fencing.	Approved on appeal	29.03.2006
03/00601/FUL	Development of a small boat harbour comprising; construction of a cofferdam wall and breakwater; reclamation; sheltered moorings for boats and wave wall; slipway and boat storage and tender compounds; public viewing and seating areas; Fisherman's store and fuel facility; and site works including access road, car parking and lighting, fencing and landscape mounds.	Approved on appeal	29.3.2006
03/00602/LBC	Partial demolition of the long berthing arm attached to the listed Train Ferry Gantry and associated remedial works.	Approved on appeal	29.03.2006
10/00201/FUL	Application under Section 73 of The Town and Country Planning Act 1990 (as amended) to vary	Withdrawn	23.11.2012

Conditions 3 (phasing), 45 (Highways), 46 (Highways) and 47 (Highways) and to delete and replace Conditions 41 (Highways), 42 (Highways), 43 (Highways) and 44 (Highways) attached to planning permission 03/00600/FUL.

10/00202/FUL	Application for replacement planning permission (in respect of planning permission 03/00600/FUL) subject to a new time limit (to 2021) for the reclamation of Bathside Bay and development to provide an operational container port; comprising:- Engineering and reclamation works including construction of a cofferdam and 1400 metre quay wall; Construction of a concrete block paved container handling and stacking facility with 11 quayside cranes and 44 Rubber Tyre Gantry (RTG) cranes and associated workshop, customs control, Border Inspection Post and mess buildings, substations, fuelling station and mast and crane mounted lighting; Development of a 6.13 ha rail terminal with 3 rail gantry cranes and heavy duty container area linked to existing rail facilities; Associated office buildings, logistics facility, car and HGV parking and driver facilities; Site works, including additional hardstanding, structural landscape and mounding, wetland buffer, internal estate roads and perimeter fencing.	Approved	14.02.2013
10/00203/FUL	Application for replacement planning permission (in respect of planning permission 03/00601/FUL) subject to a new time limit (to 2021) for a small boat harbour (sic) comprising; engineering and reclamation works including construction of a cofferdam wall and breakwater; sheltered moorings for boats and wave wall; slipway and boat storage and tender compounds; public viewing and seating areas; Fisherman's store and fuel facility; and site works including access road, car parking and lighting, fencing and landscape mounds.	Approved	14.02.2013

10/00204/LBC	Application for replacement listed building consent (in respect of listed building consent 03/00602/LBC) subject to a new time limit (to 2021) for the partial demolition of the long berthing arm attached to the listed Train Ferry Gantry and associated remedial works.	Approved	14.02.2013
21/01624/DISCON	Discharge of conditions 10, (Archaeological work) 11, (Construction management plan) 12, (Control of noise and vibration) 14, (Approved system for operating vehicles and plants) 15, (Percussive piling operation) 19, (Scheme of construction lighting) 21, (Construction dust management plan) 23, (Details of a wheel wash facility) 24, (Handling of materials) 26 (Scheme for concrete pouring) and 27 (Scheme for pollution control) of application 10/00203/FUL.	Current	
21/01625/DISCON	Discharge of conditions 3, (Scheme of phasing substantially) 12, (Archaeological work) 13, (Construction management plan) 14, (Control of noise and vibration) 16, (Reverse warning system) 17, (Percussive piling operation) 25, Scheme of construction lighting) 27, (Details of luminaries) 29, (Construction dust management plan) 30, (Cleaning and maintenance programme) 32, (Wheel wash facility) 33, (Handling of materials) 34, (Ambient dust monitoring strategy) 36, (Flood evacuation plan) 38 (Scheme for concrete pouring and filling works) and 39 (Scheme for pollution control) of application 10/00202/FUL.	Current	
21/01792/VOC	Variation of condition 20 of application 10/00203/FUL to not release HPUK from the requirement to secure the prior approval and installation of operational lighting, but to defer submission, approval and installation in respect of these details prior to any operation of the SBH. The application sets out the proposed amended wording for this condition.	Current	

21/01810/VOC	Variation of conditions 2 (Approved Plans / Documents), 28 (Operational Lighting), 41 (Highways), 42 (Highways), 43 (Highways), 44 (Highways), 52 (Operational Air Quality Controls) and 53 (Operational Traffic Noise Attenuation) of application 10/00202/FUL in respect of the proposed Bathside Bay container terminal, Harwich.	Current	
21/01816/DISCON	Discharge of Conditions 3 - (Landscaping Scheme) , 6 - (Design and External Appearance of Buildings, Structures and Hardstanding Areas), 8 - (Details of Fences, Walls, Gates and other Enclosures), 9 - (Foul and Surface Water Drainage), 25- (Gas Migration and Accumulation), 28 - (Translocation of reptiles, Invertebrates and Costal Vegetation), 29 - (Vehicular Access from A120), 30 - (Scheme of Provision to be made for Disabled People to Gain Access to Public Areas) 32- (Scheme and Layout of Hard Standing for Vehicles)of application 10/00203/FUL.	Current	
21/01817/DISCON	Discharge of conditions 5, (Landscaping scheme) 7, (Details of the design and external appearance) 9, (Scheme showing full details of fences, walls, gates and other means of enclosure) 10, (Drawings showing foul and surface water drainage) 11, (Scheme for the design of the proposed Wetland Area) 35, (Details of measures to mitigate gas migration and accumulation) 40, (Scheme for the translocation of reptiles) 48, (Vehicular access) and 49 (Scheme and layout for hard standing for Lorries and cars) of application 10/00202/FUL.	Current	
21/02047/LBC	Partial demolition of the long berthing arm attached to the listed Train Ferry Gantry and associated remedial works.	Granted	04.02.2022

4. Consultations

Tree & Landscape Officer
21.01.2022

No objection.

Babergh District Council

Raise no objection to the proposal.

Environmental Protection
24.11.2021

They have reviewed the planning statement and the proposed variation of the condition and can confirm that they have no objections to make.

ECC Highways Dept

No response received at the time of writing this report, any views expressed will be reported to Members at the Planning Committee meeting.

Essex County Council
Ecology (Place Services)
24.01.2022

No ecological objection subject to commencement of the managed realignment project prior to use of any operational lighting on the site.

They have reviewed the documents supplied by the applicant, Sections 23 & 25 of the Environmental Statement and the Planning and Design Statement dated October 2021. These relate to the likely impacts of Phase 1 development including the Small Boat Harbour on designated sites, protected & Priority species, and details of mitigation and compensatory measures.

They are satisfied that there is sufficient ecological information available for determination of this (VOC) application to support commencement of the Small Boat Harbour element within Phase 1 only (terrestrial works) of the development.

They note that the applicant seeks permission to vary the trigger for provision of this information, not to release it from the requirement, but to defer submission, approval and installation prior to any operation of the Small Boat Harbour.

They welcome Section 25 of the Environmental Statement (shadow Habitats Regulations Assessment) prepared by Royal Haskoning DHV (13 October 2021) for this VOC application related to Small Boat Harbour under Phase 1 of this development. This has revisited the information in the 2003 Environmental statement (ES) - which triggered Stage 2 (Appropriate Assessment to consider if mitigation can avoid Adverse Effect on Integrity (AEOI), Stage 3 Alternative solutions and then Stage 4 Imperative Reasons for Over-riding Public Interest (IROPI) and compensatory measures to ensure the development protects the overall coherence of Habitats sites network. Section 25 therefore provides information to support review of the competent authority's Habitats Regulations Assessment (HRA) report for this development either alone or in combination with other plans and projects.

They are satisfied that the scope of the HRA should include Stour & Orwell Estuaries SPA and Ramsar and Southern North Sea SAC and that the reclamation of approximately 65ha of intertidal habitat in Bathside Bay will, without mitigation, lead to a likely significant effect (LSE). The impact pathways within scope therefore triggered further consideration at Stage 2 Appropriate Assessment to assess if mitigation can avoid any AEOI of the Habitats sites within scope. They have considered Natural England's advice included in section 25.3.3 and the Stage 2 Appropriate Assessment section which states that there will be AEOI from the development of Bathside Bay Container Terminal. They also note that, where only the qualifying features of a Ramsar site will be adversely affected, the tests are different and the LPA as the competent authority must take into account the wording of Article 4 of the Ramsar Convention which allows the UK Government as a contracting party, to delete or restrict the boundaries of designated Ramsar sites only "in its urgent national interest". Any benefits arising from the proposal must, however, demonstrably outweigh the harm to the acknowledged international conservation value of the site. The Stour & Orwell Estuaries Ramsar site therefore needs to be assessed, and consideration given, to the above requirement.

They consider that the assessment of likely impacts on Southern North Sea SAC is acceptable and agree that no AEOI of the Southern North Sea SAC is predicted from the development either alone or in combination with other plans and projects. They understand that section 25.5.2.1 and Table 25.7 do not consider any impacts on protected species (harbour porpoise) outside the SAC separately as the assessments are based on the North Sea Management Unit, which takes into account harbour porpoise in both inside and outside the SAC, in line with current guidance and thresholds for impacts identified by JNCC and Natural England. They are sufficiently satisfied with the scope of the in-combination assessment in section 25.3.3 paragraphs 14 & 15 that no additional disturbance is predicted from varying Condition 20 in combination with other plans and projects included in the assessment.

They agree with the shadow HRA conclusion that there will be no additional impacts from Phase 1 works including the Small Boat Harbour from varying the trigger for provision of information on lighting as required by Condition 20 so this VOC does not need the competent authority to amend its previous HRA report for this permitted development. They acknowledge that the proposed works comprising only Phase 1 of the Small Boat harbour are located entirely on land and mitigation to avoid disturbance, including lighting has been secured by Condition 20 to seek approval for operational lighting before any impacts occur, so this VOC has no impact pathway to affect habitat that supports the qualifying features of the Stour & Orwell Estuaries SPA and Ramsar site or Southern North Sea SAC.

They are satisfied that this proposal to vary Condition 20 will not alter the legal requirements secured for delivery of compensatory habitat (at Little Oakley) - in the Compensation Mitigation and

Monitoring Agreement (CMMA) (Royal Haskoning, 2004) Annex 1 of the Deed (CMMD) – and that the Phase 1 terrestrial works including the Small Boat Harbour will not lead to any additional disturbance which would alter this provision. They understand that the Phase 2 & additional phases within the marine environment (i.e. works below level of MHW spring tides) of the Bathside Bay project cannot be implemented without a marine consent from the MMO and that further EIA and HRA is required to support that consenting process.

They are aware that published Government guidance Habitats Regulations Assessments: protecting a European site (Defra and Natural England, Feb 2021) describes the requirements for the provision of compensatory measures and refers to points that should be considered in order to be confident that the proposed measures will fully compensate for the negative effects of a proposal. This includes how the compensation would be carried out, including how it will be managed and monitored over the time that is needed; and how it has been secured and how long the compensatory measures will take to reach the required quality and amount of habitat.

Section 25.6.5 Timing and habitat development provides background on the applicant's inability to state definitively when the seawall at Little Oakley would be breached (and, therefore, when intertidal habitat would begin to be created) in relation to the commencement of construction at Bathside Bay. They appreciate that the relative timing of the commencement of work at Bathside Bay, including the Small Boat Harbour and the creation of the managed realignment site was analysed in detail in the Compensation Mitigation and Monitoring Agreement (CMMA) (Royal Haskoning, 2004) the Deed in which it sits as Annex 1 (CMMD). This HRA report focuses on the predicted habitat colonisation following breach of the seawall and confirms that whilst invertebrates are likely to rapidly colonise the new intertidal mudflats, it may take 5-10 years for the invertebrate community structure to fully develop on maintenance dredgings which are to be pumped onto the site. It is therefore essential that there is no delay in commencement of the habitat creation and are satisfied that this VOC in relation to provision of information on lighting does not result in a delay as the CMMD remains a legal obligation. It is essential that the LPA secures appropriate and timely compensatory measures for the consented development to demonstrate its compliance with the Conservation of Habitats and Species Regulations 2017 (as amended). There needs to be no reasonable scientific doubt remaining as to the delivery of compensatory measures and, whilst absolute certainty is impossible to attain, the LPA needs to secure legally enforceable ways of preventing such effects in order to meet the Stage 4 HRA requirements.

With this level of certainty, they are satisfied that the shadow HRA for the Small Boat Harbour has demonstrated that this variation of condition 20 application does not seek to delay the creation of compensatory habitat that is necessary to maintain the required level of coherence of Habitats sites. This will enable the LPA to

demonstrate compliance with its statutory duties, including its biodiversity duty under s40 NERC Act 2006 and prevent wildlife crime under s17 Crime and Disorder Act 1998.

Recommendation: They recommend that the LPA, as the competent authority, has certainty of likely impacts on designated sites and can adopt the updated shadow HRA submitted by the applicant for Phase 1 works only to include the Small Boat Harbour, subject to formal consultation response from Natural England. The updated information to support HRA indicates that any likely significant effects can be ruled out from varying Condition 20 in relation to commencement of the Small Boat Harbour element of Phase 1 terrestrial works, and the CMMA and CMMD will retain the timing requirement for commencement of compensatory habitat creation before Phase 2 marine works of the development including operation of the Small Boat Harbour.

They therefore have no ecological objection to this VOC application to vary Condition 20 subject to commencement of managed realignment project prior to use of any operational lighting on the site.

Natural England

Natural England objects to this proposal. As submitted they advise that:

- It will have an adverse effect on the integrity of Stour and Orwell Estuaries Special Protection Area ('SPA') also designated as Stour and Orwell Estuaries Ramsar <https://designatedsites.naturalengland.org.uk/>;
- Any appropriate assessment made by the Council as competent authority, based on the information that has been so far provided by the applicant and made available to Natural England would be incomplete;
- Natural England remains to be convinced that the compensatory measures proposed are sufficient to meet the requirements of the Habitats Regulations both in terms of the certainty of their delivery and the substance of the measures. This is particularly the case where the assessment of the adverse effects being compensated for is incomplete.
- It will damage or destroy the interest features for which Stour Estuary Site of Special Scientific Interest ('SSSI') has been notified.

Natural England's further advice on designated sites/landscapes and advice on other natural environment issues is set out below.

Introduction

Natural England notes that the original planning permission to which these variations of condition applications relate was granted by the Secretary of State on the grounds of an Imperative Reason of Overriding Public Interest ('IROPI') on 29 March 2006. It is noted from paragraph 3.5.1 of the applicant's planning statement accompanying this application, that "the effect of permitting a section 73 variation of condition is to issue a new planning permission" and therefore they concur that a Habitats Regulations Assessment ('HRA') is required.

Natural England notes that information has been provided by the applicant which it is presumed will inform the HRA to be carried out by the Council. It remains the obligation of the Council to make its own HRA and to consult Natural England for the purposes of any appropriate assessment it makes during that process. They provide the advice on the assumption that the Council intends to rely on the information provided to date for the purposes of carrying out its HRA.

Paragraph 4.5.5. of the Planning Statement states that "the Habitats Regulations preclude the grant of planning permission pursuant to section 73 ...unless the same thought process has been undertaken by a decision maker as apply on an original grant of permission". In Natural England's view this involves a complete assessment for the purposes of the Habitats Regulations, including an appropriate assessment of the implications for the site in view of its conservation objectives and if necessary considering alternatives, whether there are imperative reasons of overriding public interest why it should proceed and compensatory measures. It is understood from the documents submitted by the applicant that it agrees with this approach and has sought to provide the information that will enable such an assessment to be made by the Council. It remains of course for the Council to satisfy itself as to whether it meets its obligations in this regard (i.e. that the development can proceed due to IROPI).

The site

The proposal site lies within the Stour and Orwell estuaries Special Protection Area (SPA) and Ramsar, which is recognised as an internationally important site for nature conservation. Accordingly, it is afforded the highest possible level of protection for an environmental site under both UK law and planning policy.

The Stour and Orwell estuaries SPA and Ramsar comprise extensive mud-flats, low cliffs, saltmarsh and small areas of vegetated shingle on the lower reaches. Breeding avocet feed upon the intertidal mudflats and use the grazing marshes to nest during the summer. The SPA also supports important numbers of overwintering waterbirds, which also use the mudflats extensively for feeding. The saltmarsh and grazing marsh provide important roosting sites, whilst some birds feed and roost on the surrounding arable land. The SPA also supports a large and diverse waterbird assemblage for which it is designated, including great crested grebe (*Podiceps cristatus*), cormorant, (*Phalacrocorax carbo*), dark-bellied brent goose (*Branta bernicla bernicla*), shelduck (*Tadorna tadorna*), wigeon (*Anas penelope*), gadwall (*Anas strepera*), pintail (*Anas acuta*), goldeneye (*Bucephala clangula*), ringed plover (*Charadrius hiaticula*), grey plover (*Pluvialis squatarola*), lapwing (*Vanellus vanellus*), knot (*Calidris canutus islandica*), dunlin (*Calidris alpina alpina*), blacktailed godwit (*Limosa limosa islandica*), curlew (*Numenius arquata*), redshank (*Tringa tetanus*) and turnstone (*Arenaria interpres*). The following species supported by the site are individually qualifying species of the SPA; Avocet, (*Recurvirostra avosetta*) Black-tailed godwit (*Limosa limosa islandica*) Dark-

bellied Brent goose (*Branta bernicla bernicla*) Dunlin (*Calidris alpina alpina*), Grey plover (*Pluvialis squatarola*) Knot (*Calidris canutus*), Pintail (*Anas acuta*) and Redshank (*Tringa tetanus*.)

The Ramsar site is designated for its large and diverse waterbird assemblage along with supporting wetland invertebrate and wetland plant assemblages and the following individually qualifying species; black-tailed godwit (*Limosa limosa islandica*), dark-bellied brent goose (*Branta bernicla bernicla*), dunlin (*Calidris alpina alpina*), grey plover (*Pluvialis squatarola*), knot (*Calidris canutus islandica*), pintail (*Anas acuta*), redshank (*Tringa totanus*).

Natural England's Advice

1. Appropriate Assessment

Natural England notes that the applicants accept that the proposed development will have Adverse Effects on the Integrity (AEOI) of the Stour and Orwell estuaries SPA and Ramsar site.

Whilst compensation was agreed for the scheme alongside the original permission Natural England must consider the HRA presented to them in the light of the most recent and best available evidence, based on their current understanding of estuarine processes in line with current caselaw and planning guidance.

Note Natural England's comments within the compensation paragraph below regarding the information underlying the appropriate assessment.

2. Reasonable Alternatives

Natural England are not best placed to advise on the matter of alternatives and therefore have no view on this, which is a matter for the Local Planning Authority.

3. IROPI

Natural England is an advisory body with a relatively narrow remit and therefore cannot advise on whether or not the project meets the tests of IROPI. They recommend that TDC seeks legal advice before making this decision but advise, for the avoidance of doubt and for audit trial purposes, that the authority should fully satisfy itself that the project remains imperative taking into account any changes to legislation, planning guidance, site proposals and national need.

In making a judgement of IROPI, particularly with regards to the 'overriding' aspect, the authority should have a full understanding of the ecological value of the site and the anticipated impacts (see comments below).

4. Compensation

If the competent authority is satisfied that IROPI remains and of the absence of alternatives then it must also consider compensation. Section 68 of the Conservation of Habitats and Species Regulations 2017 states that the "appropriate authority

must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected."

Natural England note the updated information provided in the Environmental Statement (ES) including consideration of in-combination impacts from recent and current projects within the port and port approaches area.

They note that the shadow HRA section separates the Phase 1 works from the rest of the project and concludes no adverse effect on integrity if those works are conducted outside of the overwintering bird period. Natural England does not recommend retrospectively slicing the assessment of projects into phases. The project was originally assessed as a whole, and the environmental evaluations were conducted to support delivery of a complete development. They also advise that the supporting evidence for the conclusion of no AEoI does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas - which do contain suitable habitat for breeding and overwintering species and is predominately undisturbed. Therefore, it cannot be concluded that there will be no LSE (impact pathway) and without mitigation there could be an AEoI.

Natural England are currently reviewing the ES provided to support the new planning application for the compensation site as part of the consultation received on 6th January 2022 and have previously engaged with the Applicant as part of the scoping exercise in 2021. At that time, they highlighted that further supporting surveys were required for Bathside Bay and Little Oakley to sufficiently update the original 2003 ES. They acknowledge that work has been done to demonstrate that elements of the original conclusions are still fit for purpose, using publicly available data sources. However, they do not consider that the current evidence provides the confidence to conclude that the proposed managed realignment at Little Oakley would still secure adequate compensation for the loss of Bathside Bay.

In addition Natural England highlights that EC Guidance on Article 6 (4) of the Habitats Directive states that "compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time". They do not believe that sufficient evidence has been provided to suggest this is the case for Little Oakley. It is unlikely that the compensation measures will be 100% effective in reinstating structure and functionality of the supporting habitats for designated site features of the Stour and Orwell SPA and/or maintain the coherence of the national site network. Since the original planning permission for the Little Oakley managed realignment site was granted, Natural England's understanding in respect of the Habitat Regulations has evolved in line with caselaw, alongside their knowledge around the development processes of coastal and marine compensatory habitats and how

they do and do not work. Therefore, they advise that a ratio greater than 2:1 should be provided.

Without certainty that the compensation proposed will deliver the same ecological value for the same affected features and that the full extent and nature of effects have been considered in the appropriate assessment, and/or evaluated, they cannot advise that the coherence of the network will be protected. Therefore, in their view the appropriate assessment is incomplete and does not make a complete assessment of the effects based on the best reasonably available information. Until they have confidence as to the nature and scale of the effects it is not possible to advise that the effects of the development will be compensated for. Consideration will also need to be given in the HRA for the potential impacts to Hamford Water SPA. Natural England is not aware of any evidence to show that the proposed compensatory site, which is functionally linked to the adjacent Hamford Water Special Protected Area, is of less importance than any other area of supporting habitat or designated habitat and features within the Hamford Water protected areas.

In July 2021 there was a consultation on DEFRA's draft 'Best practice guidance for developing compensatory measures in relation to Marine Protected Areas' whilst that is still in draft and focused on Marine Protected Areas they advise that the generic Principles of Compensation Measures (Paragraph 41) are also relevant to this proposal namely:

Compensatory measures should:

- a. Link to the conservation objectives for the site or feature and address the specific damage caused by the permitted activity;
- b. Focus on providing the same ecological function for the species or habitat that the activity is damaging OR, where this is not technically possible, provide functions and properties that are comparable to those that originally justified designation;
- c. Not negatively impact on any other sites or features;
- d. Ensure the overall coherence of designated sites and the integrity of the MPA [designated sites] network; and
- e. Be able to be monitored to demonstrate that they have delivered effective and sustainable compensation for the impact of the project. The monitoring and management strategy must require further action to be taken if the compensation is not successful.

It is Natural England's understanding that the Marine Management Organisation (MMO) Coastal Concordat signed up to by Tendring District Council in June 2021 states there needs to be regulatory agreement on how to proceed where there is overlapping legal requirements. Applicants will therefore need to provide the relevant information to both regulators to undertake the necessary assessments and support any decision on this proposal.

However, from the searches they have undertaken they are not aware that a marine licence exists for Bathside Bay Container

Terminal and had there been they would have expected to be consulted by the MMO on any variation requests and associated HRA assessment. This could be due to the limited lifespan of any Food and Environment Protection Act (FEPA) 1989 licence and/or Coastal Protection Act 1949 licence for the BBCT making them invalid when the Marine and Coastal Access Act 2009 came into existence in April 2010 resulting in them not being transposed over to a marine licence. Natural England advises that the onus is therefore on the Applicant to ensure that they have all the necessary legislative consents and sign off for the project.

In conclusion Natural England advise that the delivery of suitable compensation is uncertain, the relevant permissions are not in place, timings are unclear, and the ES does not follow Defra's draft best practice guidance (Best practice guidance for developing compensatory measures in relation to Marine Protected Areas). Therefore they advise that limited weight can be given to the sufficiency and deliverability of the compensation measures in any decision making.

5. Landscape

As identified in the 2003 Landscape and Visual Impact Assessment (LVIA), the conclusion of which were confirmed by the 2021 update, the proposed development will have an adverse effect on the character and appearance of the Suffolk Coasts and Heaths AONB, which was extended via a Designation Variation Order in 2019 to include parts of the Stour Estuary and land to the south of the Stour Estuary within Essex.

The application site is located outside Suffolk Coast & Heaths Area of Outstanding Natural Beauty (AONB), but within its setting. The effects of the proposed development on the AONB were specifically considered in section 5.12 of the 2003 LVIA accompanying the original planning application, which concludes "The magnitude of effect and significance of impacts to the AONB, in overall terms, is considered to be locally moderate [adverse], intensifying adverse effects of port facilities already apparent in all views towards the site within the AONB." The 2003 LVIA also acknowledges that it will not be possible to fully mitigate the impacts, particularly on the waterside approach given the type and scale of development proposed and the lack of opportunities for on-site screening to the waterside frontage.

Despite acknowledgement of the adverse effects on the proposed scheme on the AONB, planning consent was granted in 2006 on the basis of IROPI, and the scheme was re-consented in February 2013 following judicial review.

However, in the intervening period between the issue of planning consent for the Bathside Bay scheme and the current applications for discharge and variation of conditions pertaining to the planning permission, the boundary of Suffolk Coast and Heaths AONB has been extended to enlarge the AONB. This has resulted in the boundary of the AONB being brought closer to the application site. In July 2020, the Secretary of State approved a Designation Variation Order for the AONB to include much of the Stour

Estuary and land to the south bank of the Stour Estuary within Essex. The AONB boundary now lies within approximately 1km of the application site to the north in Suffolk, and within 1.5km to the west within Tendring. Therefore, they advise that impacts to the settings of the AONB require due consideration.

As noted, the baseline information used in the preparation of the 2003 Landscape and Visual impact Assessment (LVIA) has been reviewed to determine if the conclusions remain valid. They acknowledge that work has been done to demonstrate that the original conclusions are still fit for purpose, however this approach to re-assessment is not ideal. The original LVIA is now 19 years old and since its production the landscape baseline has changed significantly due to the AONB extension and further industrial development around Felixstowe. Changes in national planning policy such as the NPPF have also been strengthened the protection given to AONBs and their settings. There have also been several changes to published landscape guidance and assessments in the intervening period.

The s73 application effectively triggers a new planning consent. Given the time elapsed, changes to the landscape baseline and designation and the inconsistencies in terminology used in the original report around the significance of impacts, Natural England suggest that the approach taken to updating the original LVIA obfuscates the determination of impacts to the setting of the AONB and that a new standalone Landscape and Visual Impact Assessment should be carried out to determine the significance of landscape and visual impacts to the setting of the Suffolk Coasts and Heaths AONB afresh, as extended in 2020. The objective of the LVIA should be to establish an up to-date landscape baseline, independent of prior assessment and to seek to determine objectively, based on best available and most recent evidence, the impact of the proposed development on the Landscape. It should fully assess impacts on the nationally designated landscape of the Suffolk Coasts and Heaths AONB including its 2020 extension, not to seek to confirm the previous conclusions of an LVIA that is now 19 years out of date and does not meet with the standards set out in the current GLVIA (2013) guidelines.

The differences in methodology employed in the 2003 LVIA and current best practice are set out in section 12.3 of the ES. The fact that this section of the report is two and a half A4 pages in length, highlights the extent of the inconsistencies between current best practice guidance and the methodology used in the 2003 report, which the applicant has sought at length to justify. The statutory purpose of the AONB is to conserve and enhance the area's natural beauty.

The Local Planning Authority should assess the application carefully as to whether the proposed development would have a significant impact on or harm that statutory purpose in determining the variation of conditions 21/01810/VOC 28 'operational lighting' and condition 20 of 10/00203/FUL. Relevant to this is the duty on public bodies to 'have regard' for that statutory purpose in carrying out their functions (S85 of the

Countryside and Rights of Way Act, 2000). The Planning Practice Guidance confirms that this duty also applies to proposals outside the designated area but impacting on its natural beauty.

In summary Natural England advises that LVIA in accordance with current guidelines should be provided and that the planning authority uses this up-to-date evidence along with national and local policies, together with local landscape expertise and information to determine the proposal. Your decision should be guided by paragraphs 176 and 177 of the National Planning Policy Framework which gives the highest status of protection for the 'landscape and scenic beauty' of AONBs and National Parks. Alongside national policy you should also apply landscape policies set out in your development plan, or appropriate saved policies.

They also advise that TDC take into account comments provided by the Suffolk Coast and Heaths AONB Partnership in determining the application. Their knowledge of the site and its wider landscape setting, together with the aims and objectives of the AONB's statutory management plan, will be a valuable contribution to the planning decision.

Marine Management
Organisation
10.01.2022

Please be aware that any works within the Marine area require a licence from the Marine Management Organisation. It is down to the applicant themselves to take the necessary steps to ascertain whether their works will fall below the Mean High Water Springs mark.

The Marine Management Organisation (MMO) is a non-departmental public body responsible for the management of England's marine area on behalf of the UK government. The MMO's delivery functions are; marine planning, marine licensing, wildlife licensing and enforcement, marine protected area management, marine emergencies, fisheries management and issuing European grants.

Marine Licensing

Activities taking place below the mean high water mark may require a marine licence in accordance with the Marine and Coastal Access Act (MCAA) 2009. Such activities include the construction, alteration or improvement of any works, dredging, or a deposit or removal of a substance or object below the mean high water springs mark or in any tidal river to the extent of the tidal influence. You can also apply to the MMO for consent under the Electricity Act 1989 (as amended) for offshore generating stations between 1 and 100 megawatts in England and parts of Wales. The MMO is also the authority responsible for processing and determining harbour orders in England, and for some ports in Wales, and for granting consent under various local Acts and orders regarding harbours. A wildlife licence is also required for activities that that would affect a UK or European protected marine species.

Marine Planning

As the marine planning authority for England the MMO is responsible for preparing marine plans for English inshore and offshore waters. At its landward extent, a marine plan will apply up to the mean high water springs mark, which includes the tidal extent of any rivers. As marine plan boundaries extend up to the level of the mean high water spring tides mark, there will be an overlap with terrestrial plans which generally extend to the mean low water springs mark. Marine plans will inform and guide decision makers on development in marine and coastal areas. On 2 April 2014 the East Inshore and Offshore marine plans were published, becoming a material consideration for public authorities with decision making functions. The East Inshore and East Offshore Marine Plans cover the coast and seas from Flamborough Head to Felixstowe. For further information on how to apply the East Inshore and Offshore Plans please visit our Marine Information System. The MMO is currently in the process of developing marine plans for the South Inshore and Offshore Plan Areas.

Planning documents for areas with a coastal influence may wish to make reference to the MMO's licensing requirements and any relevant marine plans to ensure that necessary regulations are adhered to. For marine and coastal areas where a marine plan is not currently in place, they advise local authorities to refer to the Marine Policy Statement for guidance on any planning activity that includes a section of coastline or tidal river. All public authorities taking authorisation or enforcement decisions that affect or might affect the UK marine area must do so in accordance with the Marine and Coastal Access Act and the UK Marine Policy Statement unless relevant considerations indicate otherwise. Local authorities may also wish to refer to our online guidance and the Planning Advisory Service soundness self-assessment checklist.

Environment Agency
17.01.2022

We have reviewed all the applications in relation to this site and will not be looking to make any comment on the applications.

As we has previously discussed, when it comes to Variation and Discharge of conditions, if we did not request the original condition we will not look to comment on the applications. While the guidance you have below shows us as a statutory consultee for EIA applications, this is for the EIA application and the same criteria for Variation and Discharge conditions applies for EIA applications.

We have none-the-less reviewed the documents we have been forwarded by other interested parties as well as online at the planning portal and can confirm that we have no comment to provide as these do not fall within our remit. We do however advise as before to ensure you have consulted your emergency planners, but also to consult Natural England if not done so already.

Essex County Council
Archaeology

The above application is for variation of conditions on application 10/00203/FUL for which there is a condition for archaeological

21.12.2021

investigation in advance of development. The condition has been part discharged to allow development to proceed on Phase 1 of the development however the condition has not been satisfied and will need to be applied to the variation of condition application.

5. Representations

- 5.1 Harwich Town Council has no objection to this application.
- 5.2 No written representations have been received from members of the public at the time of writing this report.

6. Assessment

6.1 Overview

- 6.1.1 This application seeks permission to vary the wording of one planning condition (no. 20) that forms part of the planning permission granted by the Council in 2013 for the development of a Small Boat Harbour on land to the east of the proposed Container Port at Bathside Bay.
- 6.1.2 The application site is located on land near Gas House Creek which is situated on the eastern side of the bay, located to the west of the town of Harwich, on the southern side of the estuary of the River Stour. It is roughly opposite Shotley Gate, which is itself separated from the Port of Felixstowe to the east by the estuary of the River Orwell.
- 6.1.3 In totality, the application site covers approximately 7.3ha of land, of which approximately 4ha is inter-tidal land which will be dredged in the future to create the Small Boat Harbour.
- 6.1.4 When the proposals for the development of the Container Terminal at Bathside Bay were being drawn up, concerns were raised about the impact the works and subsequent operation of the port would have on the users of small boats used for recreation and fishing, who previously moored their boats within the bay. The Local Plan at the time also identified the area as being suitable for continued development and expansion of port facilities, as well as a mixed-use development and mooring basin. This all led to the proposal that a Small Boat Harbour would be provided by the developer of the container port adjacent to it. The Small Boat Harbour was designed to provide an alternative sheltered marine environment where boats could be moored or dock with facilities for use by both fishing and recreational boats, including by the Harwich and Dovercourt Sailing Club. Berthing facilities will be provided for at least 77 boats.
- 6.1.5 The 2013 planning permission for the Small Boat Harbour comprises:-
- Engineering and reclamation works, including construction of a cofferdam wall and breakwater;
 - Sheltered moorings for boats and a wave wall;
 - Slipway and boat storage and tender compounds;
 - Public viewing and seating areas;
 - Fisherman's store and fuel facility; and
 - Site works including access road, car parking and lighting, fencing and landscape mounds.
- 6.1.6 The applicant has stated that it intends to implement the extant permission for the proposed Small Boat Harbour on or before its expiration on 29th March 2022.

- 6.1.7 As set out within the planning history section of this report, HPUK have already made two separate applications to discharge the remaining pre-commencement planning conditions on the extant permission (the aforementioned nos 3, 6, 8, 9, 10, 11, 12, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30 & 32), and Officers continue to assess these applications with the assistance of the relevant statutory consultees.
- 6.1.8 The applicant however considers that planning condition no. 20 would now be considered unreasonable, with reference to current legislation and Government policy (the PPG). This is because the condition requires the submission and approval of details for elements of the development prior to its commencement, even though the impact that would be controlled or mitigated would not occur at the outset of the development process, but on operation i.e after its implementation.
- 6.1.9 The applicant is not proposing that any of the imposed planning conditions are removed from the planning permission, simply that the wording of condition no. 20 is amended to change the 'trigger' for the submission of details from pre-commencement of the development to before first operation.
- 6.1.10 If this application is approved by Members, the Council will be issuing an entirely new planning permission, and will need to apply controls and requirements similar to those that were imposed on the original planning permission. However, it should be noted that whilst section 73 applications can be used to vary or remove (seek non-compliance with) planning conditions, they cannot be used to amend the time limit for implementation; consequently the condition specifying the timeframe within which the development should commence (condition no1) must remain unchanged from the original permission.
- 6.1.11 Because of the scale, nature and environmental impacts of the proposed development and the related Container Terminal development, the original planning application was accompanied by an Environmental Statement (ES), pursuant to the Environmental Impact Assessment (EIA) Regulations. This application to vary a planning condition is accompanied by a further ES which reviews the previous Environmental Statement and where appropriate updates its assessments. The ES completes the assessment by updating any effects that may have changed during the intervening period, since previously approved. The applicant's assessment and its conclusions are considered within the body of this report.
- 6.1.12 Originally, when the Secretary of State determined the proposals for the Container Terminal and Small Boat Harbour, this was alongside two further associated applications. These applications covered additional development and works which would be necessary to facilitate and mitigate the impacts of the combined development, namely:
- Engineering works to create new habitat to mitigate the ecological impacts of the Container Terminal development, including the breaching of the existing seawall at Little Oakley, and
 - Listed building consent for the partial demolition of the long berthing arm attached to the listed Train Ferry Gantry, Harwich and associated remedial works.
- 6.1.13 In 2010, HPUK submitted applications to the Council for replacement planning permissions to extend the period of time allowed to implement the development. Although three planning permissions and one listed building consent had been obtained originally in 2006, HPUK only submitted applications for replacement planning permissions for the Container Terminal and Small Boat Harbour developments, along with a new application for Listed Building Consent in respect of the Train Ferry Gantry. No application was made for a replacement planning permission for works to create compensatory habitats at Little Oakley. Subsequently, the planning permissions granted in 2006 lapsed in 2016.
- 6.1.14 The applicant submitted a new application for Listed Building Consent in respect of the Train Ferry Gantry works (21/02407/LBC) and a new planning application for the works at Little

Oakley (21/02144/FUL). Those applications were received some time after the application the subject of this report, and the latter is still being assessed by Officers, however Listed Building Consent was granted 4th February 2022. The different applications are inextricably linked, in that they are all necessary if the proposed Container Terminal and Small Boat Harbour are to proceed. It is possible to consider each proposal separately by assessing each scheme against the Development Plan, whilst having regard to all material considerations, but ultimately they stand or fall together. In particular, the Council will need to be satisfied that appropriate compensatory habitats will be created at Little Oakley before it can grant permission for the Container Terminal and Small Boat Harbour. The Little Oakley application has been called to Planning Committee for determination by Councillor Mike Bush at a later date.

6.2 Context and Background

- 6.2.1 As highlighted above, in 2003 HPUK applied for planning permission for the construction of a new container terminal at Bathside Bay, Harwich, along with three associated applications for works to facilitate the development of the port, and to carry out works or development to mitigate some of the impacts of the proposal.
- 6.2.2 On 29th March 2006, permissions, inter alia, for the container terminal; the small boat harbour; the managed realignment of the coastline and creation of compensatory inter-tidal habitats off-site and listed building consent in respect of the partial demolition of the long berthing arm attached to a listed Train Ferry Gantry were granted by the Secretary of State. The Secretary of State's decision followed the recommendations of a Planning Inspector who conducted concurrent Public Inquiries between 20th April 2004 and 21st October 2004. These developments were subject to rigorous assessments and were found, on balance, to be acceptable. In particular, as regards the then Habitats Regulations, the Secretary of State found that Imperative Reasons of Overriding Public Interest (IROPI) outweighed the identified harm to the integrity of a European site (the Stour and Estuaries SPA). The permissions all required that the particular development, or work to the listed structure, be begun before the expiration of 10 years from the date of the permission or consent – in other words by March 2016.
- 6.2.3 In 2010, HPUK made an application for replacement planning permissions to extend the period of time allowed to implement the Container Terminal and Small Boat Harbour development. Those applications were considered by the Council to be consistent with the prevailing local and national planning policies and they were approved in 2013 with a new condition which required that the development commence by 29th March 2021.
- 6.2.4 The decision of the Council to grant the replacement planning permissions for the Bathside Bay Container Terminal and Small Boat Harbour was subject to an unsuccessful Judicial Review. Because a developer's plans to implement a planning permission would be delayed whilst a Judicial Review is considered and determined, planning legislation allows developers an additional year to implement a planning permission where a planning permission is subject to Judicial Review. This means that the current permission for the Bathside Bay Container Terminal and the Small Boat Harbour, granted in 2013, remains extant, but development must be begun on or before 29th March 2022.
- 6.2.5 The development of the Container Terminal and the Small Boat Harbour are both significant developments and by virtue of their scale, nature and location the developments will have some significant local impacts. The Secretary of State sought to control and mitigate these impacts through the use of planning conditions and planning obligations secured through S106 agreements and these were carried forward by the Council in 2013.
- 6.2.6 Planning permission for the Small Boat Harbour was subject to 32no separate planning conditions, of which 18no were 'pre-commencement conditions' – where the applicant is

required to submit and gain approval of details prior to the commencement of the development.

6.2.7 As explained above, the applicant has submitted separate discharge of condition applications which seek to discharge all of the other pre-commencement conditions, in addition to condition nos 14 and 15, with the exception of condition 20 which is the subject of this application.

6.3 Schedule of Conditions

6.3.1 The 32no planning conditions attached to the original planning permission are summarised below, along with the details of which ones were pre-development commencement conditions and the related discharge of condition application (DISCON), where relevant. Condition nos 14 and 15 are the subject of 21/01624/DISCON, with details having been submitted, but they are not pre-commencement conditions.

Condition no. & purpose	Pre-comm. condition Yes/No	DISCON application Reference.
1. Time to commence	No	
2. Approved plans	No	
3. Landscaping scheme	Yes	21/01816/DISCON
4. Landscape management plan	No	
5. Approved document (Planning and Design Statement)	No	
6. External materials	Yes	21/01816/DISCON
7. Top soil	No	
8. Means of enclosure	Yes	21/01816/DISCON
9. Foul & surface water drainage	Yes	21/01816/DISCON
10. Archaeology	Yes	21/01624/DISCON
11. Construction Management Plan	Yes	21/01624/DISCON
12. Noise & vibration	Yes	21/01624/DISCON
13. Operation of plant	No	
14. Plant audible alarms	No	21/01624/DISCON
15. Piling	No	21/01624/DISCON
16. Piling – hours	No	
17. Noise levels	No	
18. Vibration levels	No	
19. Construction lighting	Yes	21/01624/DISCON
20. Operational lighting	Yes	
21. Dust management	Yes	21/01624/DISCON
22. Vehicles sheeted	No	
23. Wheel wash	Yes	21/01624/DISCON
24. Material storage	Yes	21/01624/DISCON
25. Gas mitigation	Yes	21/01816/DISCON
26. Concrete pouring and filling	Yes	21/01624/DISCON
27. Pollution control	Yes	21/01624/DISCON
28. Translocation of species	Yes	21/01816/DISCON
29. Details of access to A120	Yes	21/01816/DISCON
30. Access for mobility impaired	Yes	21/01816/DISCON
31. Dredging – hours	No	
32. Internal roads & parking	Yes	21/01816/DISCON

6.4 Proposals

- 6.4.1 The application seeks permission to vary the wording of planning condition no20 (operational lighting) from planning permission 10/00203/FUL, in respect of the proposed development of a Small Boat Harbour. The condition currently requires the submission and approval of an operational lighting scheme prior to the commencement of development. The applicant has applied to change the wording of the condition so that it is required to submit and gain approval for operational lighting, and install the approved lighting, prior to each part of the site coming in to operation.
- 6.4.2 The revised wording of the condition is listed below. The words which are struck out formed part of the original condition and are proposed to be deleted, the words in bold font and italics are new words that are to be added:

Condition 20 – Operational Lighting

No part of the hereby permitted development shall ~~be implemented~~ ***commence operation*** until a scheme relating to the provision and control of operational lighting ***on that part*** of the site has been ***installed in accordance with a scheme which has been*** submitted ~~to~~ and approved in writing by the Local Planning Authority. The lighting scheme shall be carried out in accordance with the scheme so approved.

6.5 Policy Considerations

National Planning Policy

National Policy Statement for Ports

- 6.5.1 The National Policy Statement for Ports (NPS) is intended to provide the framework for decisions on proposals for new port development (Para.1.2.1). 'The NPS sets out the Government's conclusions on the need for new port infrastructure, considering the current place of ports in the national economy, the available evidence on future demand and the options for meeting future needs' (Para.1.2.4).
- 6.5.2 A new Container Terminal at Bathside Bay is listed in the NPS as being one of the permitted schemes that the Government is counting on to increase the national deep water container port capacity, helping to meet the growing need for this type of facility.
- 6.5.3 The NPS states that based on Government forecasts over the next 20-30 years there is a compelling need for substantial additional port capacity, to be met by a combination of development already consented and development for which applications have yet to be received. The NPS concludes by warning that 'Excluding the possibility of providing additional capacity for the movement of goods and commodities through new port development would be to accept limits on economic growth and on the price, choice and availability of goods imported into the UK and available to consumers. It would also limit the local and regional economic benefits that new developments might bring. Such an outcome would be strongly against the public interest' (Para.3.4.16).
- 6.5.4 It is noted that the NPS was published in 2012 and has not been subject to revision, indicating that the Secretary of State does not consider that circumstances have changed to an extent that the NPS needs to be. Officers note that since 2012 the Department for Transport have produced updated forecasts for UK Port Freight Traffic. The 2019 forecast continues to show very large increases in the level of container freight.
- 6.5.5 The NPS also states that the need for port infrastructure 'depends not only on overall demand for port capacity but also on the need to retain the flexibility that ensures that port capacity is located where it is required, including in response to any changes in inland distribution networks and ship call patterns that may occur, and on the need to ensure effective competition and resilience in port operations' (Para.3.4.1). The need for resilience has been

emphasised in the last few years where the media have reported bottle necks at UK ports which have led to delays and increased costs.

National Planning Policy Framework 2021

- 6.5.6 The NPPF states that the planning system should be achieving sustainable development. Achieving sustainable development means that the planning system has three overarching objectives, which are interdependent and need to be pursued in mutually supportive ways - economic objectives; social objectives and environmental objectives.
- 6.5.7 Local Planning Authorities are directed to ensure that local plan policies make provision 'for any large scale transport facilities that need to be located in the area, and the infrastructure and wider development required to support their operation, expansion and contribution to the wider economy' and take into account any relevant national policy statements (Para.106)
- 6.5.8 Guidance on habitats and biodiversity is given in Paras 179-182 of the NPPF. Broadly speaking, the Council should seek to protect and enhance biodiversity in the exercise of its planning functions. Where (as here) an appropriate assessment has shown that development would adversely affect the integrity of a habitats site, the presumption in favour of sustainable development in Para 11(d) does not apply.
- 6.5.9 In addition to national policy on biodiversity, s 40 of the Natural Environment and Rural Communities Act 2006 requires the Council, in exercising its functions, to have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.

Freeports

- 6.5.10 In March 2021 the Government announced in the Budget the locations of eight new Freeports within England. Freeports are intended to be national hubs for global trade and investment across the UK. They also aim to promote regeneration and job creation as part of the Government's policy to level up communities. Freeport East, which includes Felixstowe and Harwich, was one of the eight designated sites in England. The Government propose that Freeports will benefit from incentives relating to customs, tax, planning, regeneration, infrastructure and innovation. The designation of Freeport East can be seen as recognition of the national importance of existing and proposed port operations at Felixstowe and Harwich.
- 6.5.11 Overall it is considered that there have been no material changes in national planning policy that would significantly alter the context within which the application should be assessed. Indeed the recent announcement about Freeport East and the fact that the NPS remains unchanged as the national policy on Ports after updated port traffic forecasts were produced in 2019 could lend some additional support to the proposals for the Container Terminal, and associated developments.

The Development Plan

- 6.5.12 Planning applications should be determined in accordance with the development plan unless material considerations indicate otherwise.

Tendring District Shared Strategic Section 1 Local Plan (2021)

- 6.5.13 The shared Part One of the Local Plan sets out high level planning policies for the North Essex Authorities (Tendring, Braintree & Colchester). Policy SP3 sets out the spatial strategy for development and states that existing settlements will be the principal focus for additional growth across the North Essex Authorities area within the Local Plan period. Policy SP5 is concerned with employment and the policy states that the North Essex Authorities will promote

a strong, sustainable and diverse economy and will pursue a flexible approach to economic sectors showing growth potential across the Plan period. The Container Port and Small Boat Harbour proposals are broadly consistent with both policies, being located on the edge of one of the District's main towns. As evidenced through the NPS the port sector, and container ports in particular, are a sector of the economy that has significant growth potential if suitable facilities are provided.

- 6.5.14 It is also noted that the North Essex Spatial Portrait identifies the Haven Ports as being important facilities not only locally, but also nationally with the role that they play in handling container ships and freight transport to and from the rest of the UK.

Tendring District Section 2 Local Plan (2022)

- 6.5.15 The previous Tendring District Local Plan (2007) contained specific policies regarding both the Bathside Bay Container Terminal and the Small Boat Harbour – Policies HAR1 & HAR10. Policy HAR1 sought to protect the site for the permitted use, but also guarded against variations to the scheme that had been approved that would be unacceptable in terms of local amenity; infrastructure; nature conservation interests; and designated heritage assets. The 2007 Local Plan is now superseded so these policies no longer carry any weight.
- 6.5.16 Policy PP14 designates Harwich Old Town as one of the Priority Areas for Regeneration. Modifications were also made to the Draft Publication Local Plan to add supporting text which lists one of the aims for regeneration as being to maximise the opportunity offered by 'Freeport' status and the proposals for expansion at Harwich International Port and Bathside Bay; and to support opportunities to improve water-based recreation facilities in the area (Para.6.10.8). The supporting text also refers to the designation of Freeport East and the unique opportunity this presents to build a truly global trade hub at the same time as accelerating opportunities in green energy and helping 'level-up' the economy.
- 6.5.17 Other policies of relevance include Policy SP1 which identifies Harwich & Dovercourt as being one of the District's four Strategic Urban Settlements, making this a preferred location for new development. Policy PP6 seeks to protect employment sites for employment generating uses. Whilst a small part of the designated employment site will be used to create the Small Boat Harbour this is being provided to facilitate the larger Container Terminal development. The employment and economic benefits of the Container Terminal scheme justify the small loss of land designated for employment purposes. Policy PP8 sets out the Council's approach to development associated with tourism. The policy states that proposals for marinas and boat harbours and associated facilities will be supported on appropriate sites, subject to general compliance with other development plan policies.
- 6.5.18 Chapter 7 of the Local Plan is entitled 'Protected Places' and contains a number of policies which seek to manage development in a way that protects against inappropriate development causing harm in terms of Flood Risk (PPL1); the rural landscape (PPL3); Biodiversity and Geodiversity (PPL4) and the historic environment (PPL7, PPL8 & PPL9). The Protected Places chapter is considered to be generally consistent with the approach taken in policies contained within the development plan as it then was in 2006 when the Secretary of State granted permissions, and in 2013 when the Council granted the replacement planning permissions.
- 6.5.19 Policy SP6 is concerned with Place Shaping Principles. The policy clearly seeks to protect the amenities of existing and future residents, referring to noise, vibration, smell, loss of light and overlooking. Although not specifically listed it is considered that protection of amenities should reasonably include lighting in general and not just loss of light.
- 6.5.20 It should be noted that the Inspector who reported on the original application to the Secretary of State concluded that it is inevitable that a development of the scale and nature of Container

Terminal application and the associated developments would be unlikely to accord with every policy contained within a development plan and that the correct the legal approach is to consider the policies of the development plan as a whole.

6.5.21 When determining the application, the Secretary of State concluded that the details of the proposals, supported by the suite of planning conditions and obligations, would ensure compliance with the vast majority of development plan policies. Whilst he accepted that there were some visual and landscape policy matters incapable of being complied with he concluded that overall, the proposals, as proposed to be mitigated and compensated, would accord with the broad thrust of development plan policies. The Council reached a similar view in 2013, and Officers consider that (provided the requirements of the Habitats Regulations are satisfied) this remains the case with the newly adopted Local Plan policies.

7 Assessment

7.1 Overview

7.1.1 Whilst it is accepted that this type of facility will need some form of external lighting for safety and security reasons there is also a need to ensure that the lighting design is appropriate and has been designed to account for relevant issues, including ecology, visual and residential amenity.

7.1.2 There have been no changes to planning policies which would indicate that there is no longer a need to control the external lighting of the site through the planning conditions.

7.1.3 The requirement to submit and gain approval of a lighting scheme needs to be linked to a clearly defined point in the development process. The wording of the original condition requires that the details be agreed prior to commencement of development. The applicant has proposed that the condition is amended so that the details need to be submitted, approved and installed prior to the part of the site where the lighting is installed becoming operational. The re-worded condition will still allow the Council to control the lighting design to ensure that a safe environment is created whilst also protecting visual amenity, ecology, energy efficiency and reducing the risk of unnecessary light pollution. The re-worded condition is considered to be consistent with relevant local and national planning policies.

7.2 Environmental Considerations

Environmental Impact Assessment

7.2.1 The EIA Regulations cover applications made under section 73 of the Town and Country Planning Act 1990 i.e. those to carry out development without complying with a condition attached to an existing planning permission.

7.2.2 The current section 73 application for planning permission (together with the application regarding the Container Port) are for Schedule 1 development and thus are applications for EIA development within the meaning of Regulation 2 of the EIA Regulations. Accordingly, the Council must not grant planning permission without first taking the environmental information provided by the applicant into consideration.

7.2.3 HPUK submitted a full Environmental Statement (ES) when it made its original applications. The ES included an assessment of the specific impacts arising from the Small Boat Harbour as the proposed development was a direct consequence of the proposals to create the new Container Terminal. The examining Inspector and the Secretary of State were both satisfied that the ES that was submitted with the application met the requirements of the then EIA Regulations and provided sufficient information to assess the environmental impacts of the development. The ES was taken into account by the Secretary of State when granting the

2006 Permissions. The Secretary of State concluded that the benefits of the proposal outweighed any adverse environmental impacts when the proposed mitigating measures were taken into account.

- 7.2.4 As part of the section 73 applications in 2010, to extend the length of time in which the development must commence, the applicant submitted a Supplementary Environmental Report (SER) which reviewed the 2003 ES and updated the environmental effects that were considered to have changed during the intervening period, or which might arise as a result of the proposed changes.
- 7.2.5 The applicant has submitted with this application a further ES which reviews the previous ES and SER and updates the environmental effects that are considered to have changed during the intervening period, or which might arise as a result of the proposed changes. The ES includes an assessment of changes to applicable legislation and guidance for each of the technical chapters; updates to the baseline environmental conditions for each of the technical chapters scoped in to the assessment; and inclusion of additional chapters to account for changes to the EIA Regulations. The ES concludes by assessing whether the conclusions of the 2003 ES and 2010 SER remain valid.
- 7.2.6 It should be noted however from the representations above, that issues have been raised on both this and the sibling S73 application 21/01810/VOC (for the Container Terminal, also before Members at this Planning Committee meeting) in respect of the requirements of the Habitats Regulations and upon the effect of the proposals upon the AONB as extended. These representations challenge the adequacy of elements of the ES and these issues are discussed below.

Habitats Regulations

- 7.2.7 The Container Terminal development and the proposed Small Boat Harbour would lead to the cumulative loss of 69ha of intertidal habitat forming part of the Stour and Orwell Estuaries SPA/Ramsar site/SSSI. The Council is required by the Habitats Regulations to carry out an assessment of the implications of this, and is prohibited from granting planning permission unless satisfied that:
- there is no alternative solution;
 - the development must be carried out for imperative reasons of overriding public interest (IROPI);
 - necessary compensatory measures have been secured that ensure that the overall coherence of the national site network of SACs and SPAs is protected.
- 7.2.8 Concerns have been expressed about the adequacy of the updated ecological assessment within the ES, including whether a suitable assessment had been made of the potential in-combination impacts arising from this and other developments – both on-shore and off-shore. Of particular significance is the letter of objection from Natural England dated 4 February 2022, in which Natural England concludes:
- (1) The development will have an adverse effect on the integrity of Stour and Orwell Estuaries Special Protection Area ('SPA') also designated as Stour and Orwell Estuaries Ramsar.
 - (2) Any appropriate assessment made by the Council as competent authority, based on the information that has been so far provided by the applicant and made available to Natural England would be incomplete.
 - (3) Natural England remains to be convinced that the compensatory measures proposed are sufficient to meet the requirements of the Habitats Regulations both in terms of the certainty of their delivery and the substance of the measures. This is particularly the

case where the assessment of the adverse effects being compensated for is incomplete.

- (4) The development will damage or destroy the interest features for which Stour Estuary Site of Special Scientific Interest ('SSSI') has been notified.

7.2.9 Conclusions (1) and (4) are already common ground in that harm to the SPA and SSSI was accepted as an inevitable consequence of the development by the Inspector and Secretary of State in 2005/2006, and by the Council in 2013. As Natural England had been content with the 2003 ES and 2010 SER when the Council granted planning permission in 2013, and had also been content with the proposed compensatory habitats at Little Oakley (and indeed is a signatory to the S106 agreement for the development at Little Oakley) its recent objection represents a significant change of position.

7.2.10 In approving the original applications in 2006 the Secretary of State found that there was no alternative solution to the proposed container terminal at Bathside Bay, and having regard to the Secretary of State's decision, the Inspector's report, the NPS and the information provided in the applicant's ES and Planning Statement, this remains Officer's opinion to date. The Secretary of State also concluded that the national need for additional container terminal capacity constituted IROPI, and that adequate compensation measures had been proposed in response to the likely adverse effect on the integrity of the SPA.

7.2.11 In carrying out its own determination under the Habitats Regulations, the Council is entitled to have regard to the fact that the Secretary of State found that the Bathside Bay project should be carried out for IROPI, and to the advice given in the NPS on Ports referred to above.

7.2.12 Whilst it is true that a considerable period of time has elapsed since the first applications for the Container Terminal and Small Boat Harbour were submitted and approved, this is not evidence that the IROPI no longer exist. The global downturn that began in 2008 and the Coronavirus pandemic have both delayed the predicted increase in demand for container traffic, but there is nothing before the Council that casts serious doubt on the proposition that there is likely to be a long term increase in demand for container terminal capacity. Officers accept what is said in section 2.1.1 of the ES that "Volumes [of container throughput] have been growing at a [compound annual growth rate] of 2% over the period 2000-2020. Growth has been relatively stable, with the exception of the noticeable fall in volumes due to the financial crisis in 2009 and the stable throughput for the next few years until 2014. Volumes were also lower in 2020 due to the Covid-19 pandemic, but still above 2014 volumes." The ES goes on to say that national forecasts based on projected increases in GDP show national UK TEU volumes are projected to increase by a [compound annual growth rate] of 2%, reaching a throughput of almost 19m TEU by 2050; and the ports in the south-east will handle around 14m TEU by 2050, almost doubling compared to the estimated volumes for 2021 (7.2m) (section 2.3.1).

7.2.13 Comparing demand and capacity, the ES states at section 2.3.3:

"Ports typically start experiencing delays and congestion related issues when the utilisation exceeds around 85% of capacity, a level which is expected to be reached at a regional level in 2027. Based on an analysis of forecast demand versus current capacity (Figure 2.31), it is expected that regional capacity will be exceeded in 2036 if no ports undertake expansions. This implies that further capacity is likely to be needed by 2027. However, as discussed in section 2.1, operational capacity is typically lower than design capacity. This highlights the need for additional capacity earlier than this.

For Felixstowe in particular, capacity is likely to be exceeded by 2033 (Figure 2.32). However, it is predicted that the port will already be operating at a high capacity of over 85% from 2025 (i.e. the point at which delays and congestion related issues occur). It is therefore vital that additional capacity is provided to accommodate future volume

increases and maintain a competitive position in the market. BBCT, located in Harwich Haven when fully developed, could provide an additional 2.1m TEU, increasing the effective capacity of Felixstowe to 7.3m TEU. This should be enough to cover future demand until 2050. If the port reaches its target of 8m TEU then capacity utilisation would be 89% in 2050 according to the forecast.”

7.2.14 Past and predicted increases in demand support the Government’s belief expressed in the NPS that that there is a compelling need for substantial additional port capacity over the next 20–30 years, to be met by a combination of development already consented (including the Container Terminal at Bathside Bay) and development for which applications have yet to be received. In light of this Officers remain of the view that the IROPI that existed in 2006 still exist today.

7.2.15 To assist the Council in carrying out an appropriate assessment of the implications of the development as required by the Habitats Regulations, the applicant has included within section 25 of its current ES a “shadow appropriate assessment”. In relation to this Natural England states:

“We note that the shadow HRA section separates the Phase 1 works from the rest of the project and concludes no adverse effect on integrity if those works are conducted outside of the overwintering bird period. Natural England does not recommend retrospectively slicing the assessment of projects into phases. The project was originally assessed as a whole, and the environmental evaluations were conducted to support delivery of a complete development. We also advise that the supporting evidence for the conclusion of no AEol [adverse effect on integrity] does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas - which do contain suitable habitat for breeding and overwintering species and is predominately undisturbed. Therefore, it cannot be concluded that there will be no LSE [likely significant effects] (impact pathway) and without mitigation there could be an AEol.”

7.2.16 The response from the applicant’s agent dated 11 February 2022, a copy of which is appended to this report, contests this. The agent states that the shadow HRA (section 25 of the ES) does not slice the assessment of the project into phases, nor does it slice the provision of compensatory habitat into phases, with it assessing the whole project. The reference to Phase 1 individually is made to demonstrate that those works do not trigger the need for compensatory measures. Therefore, the relevance of the reference to Phase 1 in distinction to the balance of the project is simply in directly linking the provision of compensatory habitat to effects upon the designated features of Bathside Bay. This is a position, secured by planning condition that is no different to the protection afforded by the existing planning permission.

7.2.17 In relation to the proposed compensatory habitats at Little Oakley, Natural England goes on to say (underlining added):

“Natural England are currently reviewing the ES provided to support the new planning application for the compensation site as part of the consultation received on 6th January 2022 and have previously engaged with the Applicant as part of the scoping exercise in 2021. At that time, we highlighted that further supporting surveys were required for Bathside Bay and Little Oakley to sufficiently update the original 2003 ES. We acknowledge that work has been done to demonstrate that elements of the original conclusions are still fit for purpose, using publicly available data sources. However, we do not consider that the current evidence provides the confidence to conclude that the proposed managed realignment at Little Oakley would still secure adequate compensation for the loss of Bathside Bay.”

In addition Natural England highlights that EC Guidance on Article 6 (4) of the Habitats Directive states that *“compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time”*. We do not believe that sufficient evidence has been provided to suggest this is the case for Little Oakley. It is unlikely that the compensation measures will be 100% effective in reinstating structure and functionality of the supporting habitats for designated site features of the Stour and Orwell SPA and/or maintain the coherence of the national site network. Since the original planning permission for the Little Oakley managed realignment site was granted, Natural England’s understanding in respect of the Habitat Regulations has evolved in line with caselaw, alongside our knowledge around the development processes of coastal and marine compensatory habitats and how they do and do not work. Therefore, we advise that a ratio greater than 2:1 should be provided.”

7.2.18 The applicant’s response is that “The predicted impact of the BBCT and SBH is a direct loss of 69ha of intertidal habitat and reduced exposure of approximately 3ha of designated intertidal habitat due to effect on tidal propagation. As reported in the CMMA/CMMD, the Little Oakley managed realignment is predicted to deliver 105ha of a mixture of intertidal mudflat, mudflat/saltmarsh transition and saltmarsh (with an additional 5ha of sand / shingle habitat). The total managed realignment site is 138ha, with the balance including fresh/brackish water habitat and the new borrow dyke system. The compensation ratio is therefore 1.7:1 to 1.8:1”.

7.2.19 The EC guidance referred to in Natural England’s letter states (among other things) that “compensation ratios are best set on a case-by-case basis”, “the final decision on the proportion of compensation must be justified” and “There is wide acknowledgement that ratios should be generally well above 1:1”. The amount of compensatory habitats proposed at Little Oakley was considered acceptable by Natural England in 2005 and 2013 and its current objection does not explain why a ratio greater than that proposed is necessary in the present case.

7.2.20 Natural England’s letter of objection continues:

“Without certainty that the compensation proposed will deliver the same ecological value for the same affected features and that the full extent and nature of effects have been considered in the appropriate assessment, and/or evaluated, we cannot advise that the coherence of the network will be protected. Therefore, in our view the appropriate assessment is incomplete and does not make a complete assessment of the effects based on the best reasonably available information. Until we have confidence as to the nature and scale of the effects it is not possible to advise that the effects of the development will be compensated for. Consideration will also need to be given in the HRA for the potential impacts to Hamford Water SPA. Natural England is not aware of any evidence to show that the proposed compensatory site, which is functionally linked to the adjacent Hamford Water Special Protected Area, is of less importance than any other area of supporting habitat or designated habitat and features within the Hamford Water protected areas.”

7.2.21 As already indicated, these concerns represent a change in Natural England’s position as it was at the inquiry in 2004 and in response to the applications for replacement permissions which were granted in February 2013. The applicant’s letter of response rejects the criticism that the appropriate assessment is incomplete for the reasons set out therein.

7.2.22 Natural England’s conclusion on the issue of compensation is as follows:

“In conclusion Natural England advise that the delivery of suitable compensation is uncertain, the relevant permissions are not in place, timings are unclear, and the ES does not follow Defra’s draft best practice guidance (Best practice guidance for developing compensatory measures in relation to Marine Protected Areas). Therefore we advise that limited weight can be given to the sufficiency and deliverability of the compensation measures in any decision making.”

7.2.23 In response to concerns about timing and delivery of compensation, the applicant states:

“... HPUK is proposing that the compensatory measures will be secured by a combination of the following:

a) a requirement in paragraph 3.1 of Schedule 1 of the Section 106 to let a contract securing the implementation of the Little Oakley Managed Realignment Scheme prior to the commencement of Phase 2 of the development, which is the point at which an adverse effect on the integrity of the SPA would occur; and

b) the obligations placed on HPUK by a deed dated 15 October 2004 between Harwich International Port Limited, Harwich Haven Authority, The Environment Agency and English Nature (which became Natural England in 2006) to deliver the compensation (and mitigation) works in accordance with the specifications and timescales set out in that document.

Should the application be granted, HPUK will therefore be under a clear legal obligation to deliver the compensation (and mitigation) works. NE is therefore incorrect to suggest that such delivery is uncertain or that timings are unclear”.

7.2.24 The Council’s Ecologist originally reviewed the submitted information and concluded that in respect of the Stour & Orwell Estuaries SPA and Ramsar and Southern North Sea SAC the reclamation of approximately 65ha of intertidal habitat in Bathside Bay would, without mitigation, lead to a likely significant effect (LSE). The impact pathways within scope therefore triggered further consideration at Stage 2 Appropriate Assessment to assess if mitigation can avoid any AEOI of the Habitats sites within scope. The Ecologist considered Natural England’s advice included in section 25.3.3 of the ES and the Stage 2 Appropriate Assessment section which states that there will be AEOI from the development of Bathside Bay Container Terminal. She also noted that, where only the qualifying features of a Ramsar site will be adversely affected, the tests are different and the LPA as the competent authority must take into account the wording of Article 4 of the Ramsar Convention which allows the UK Government as a contracting party, to delete or restrict the boundaries of designated Ramsar sites only “in its urgent national interest”. Any benefits arising from the proposal must, however, demonstrably outweigh the harm to the acknowledged international conservation value of the site. The Stour & Orwell Estuaries Ramsar site therefore needs to be assessed and consideration given to the above requirement.

7.2.25 The Ecologist considered that the assessment of likely impacts on Southern North Sea SAC was acceptable and agreed that no AEOI of the Southern North Sea SAC were predicted from the development either alone or in combination with other plans and projects. She understood that section 25.5.2.1 and Table 25.7 of the ES do not consider any impacts on protected species (harbour porpoise) outside the SAC separately as the assessments are based on the North Sea Management Unit, which takes into account harbour porpoise in both inside and outside the SAC, in line with current guidance and thresholds for impacts identified by JNCC and Natural England. She was sufficiently satisfied with the scope of the in-combination assessment in section 25.3.3 paragraphs 14 &15 that no additional disturbance was predicted from varying Condition 20 in combination with other plans and projects included in the assessment.

- 7.2.26 The Ecologist agreed with the shadow HRA conclusion that there would be no additional impacts from Phase 1 works including the Small Boat Harbour from varying the trigger for provision of information on lighting as required by Condition 20 so this VOC does not need the competent authority to amend its previous HRA report for the permitted development. She acknowledged that the proposed works comprising only Phase 1 of the Small Boat harbour are to be located entirely on land and mitigation to avoid disturbance, including lighting has been secured by Condition 20 to seek approval for operational lighting before any impacts occur, so this application would have no impact pathway to affect habitat that supports the qualifying features of the Stour & Orwell Estuaries SPA and Ramsar site or Southern North Sea SAC.
- 7.2.27 Further the Council's Ecologist was satisfied that this proposal to vary Condition 20 would not alter the legal requirements secured for delivery of compensatory habitat (at Little Oakley) - in the Compensation Mitigation and Monitoring Agreement (CMMA) (Royal Haskoning, 2004) Annex 1 of the Deed (CMMD) – and that the Phase 1 terrestrial works including the Small Boat Harbour would not lead to any additional disturbance which would alter this provision. She understood that the Phase 2 & additional phases within the marine environment (i.e. works below level of MHW spring tides) of the Bathside Bay project cannot be implemented without a marine consent from the MMO and that further EIA and HRA will be required to support that consenting process.
- 7.2.28 The Ecologist was aware that published Government guidance Habitats Regulations Assessments: protecting a European site (Defra and Natural England, Feb 2021) describes the requirements for the provision of compensatory measures and refers to points that should be considered in order to be confident that the proposed measures will fully compensate for the negative effects of a proposal. This includes how the compensation would be carried out, including how it would be managed and monitored over the time that is needed; and how it would be secured and how long the compensatory measures would take to reach the required quality and amount of habitat.
- 7.2.29 The Council's Ecologist appreciated that the relative timing of the commencement of work at Bathside Bay, including the Small Boat Harbour and the creation of the managed realignment site was analysed in detail in the Compensation Mitigation and Monitoring Agreement (CMMA) (Royal Haskoning, 2004) the Deed in which it sits as Annex 1 (CMMD). The HRA report focuses on the predicted habitat colonisation following breach of the seawall and confirms that whilst invertebrates are likely to rapidly colonise the new intertidal mudflats, it may take 5-10 years for the invertebrate community structure to fully develop on maintenance dredgings which are to be pumped onto the site. It is therefore essential that there is no delay in commencement of the habitat creation and she was satisfied that this VOC in relation to provision of information on lighting would not result in a delay as the CMMD remains a legal obligation. It was however stressed that it is essential that the LPA secures appropriate and timely compensatory measures for the permitted development to demonstrate its compliance with the Conservation of Habitats and Species Regulations 2017 (as amended). There needs to be no reasonable scientific doubt remaining as to the delivery of compensatory measures and, whilst absolute certainty is impossible to attain, the LPA needs to secure legally enforceable ways of preventing such effects in order to meet the Stage 4 HRA requirements.
- 7.2.30 The Council's Ecologist was satisfied that the shadow HRA for the Small Boat Harbour has demonstrated that this variation of condition 20 application does not seek to delay the creation of compensatory habitat that is necessary to maintain the required level of coherence of Habitats sites. This would enable the LPA to demonstrate compliance with its statutory duties, including its biodiversity duty under s40 NERC Act 2006 and prevent wildlife crime under s17 Crime and Disorder Act 1998.
- 7.2.31 However, at a meeting held between Natural England, the applicant and the Assistant Director of Planning, Natural England expanded on its advice to TDC that *"...your authority should have a full understanding of the ecological value of the site and the anticipated impacts..."*,

stating that additional waterbird data (not referenced in the ES and shadow HRA) for Bathside Bay has been collected as part of the assessment of/monitoring for the Galloper offshore wind farm operations and maintenance facility ('the Galloper O&M facility'). It is understood that this data is not published or publicly accessible, and at the time of writing this report had not been provided to the applicant. The Council's Ecologist has stipulated that she maintains her position, provided that the ES and sHRA are updated with the Galloper monitoring data. If NE continues to object, then the Council will need to determine whether there are cogent reasons to override NE's objection. It is anticipated that Members will be updated on this matter at the Committee meeting.

- 7.2.32 Consequently, the Council's Ecologist recommends that the LPA, as the competent authority, has certainty of likely impacts on designated sites and can adopt the updated shadow HRA submitted by the applicant for Phase 1 works only to include the Small Boat Harbour, provided that it is updated with the Galloper monitoring data, and subject to considering the formal consultation response from Natural England. The updated information to support the HRA indicates that any likely significant effects can be ruled out from varying Condition 20 in relation to commencement of the Small Boat Harbour element of Phase 1 terrestrial works, and the CMMA and CMMD will retain the timing requirement for commencement of compensatory habitat creation before Phase 2 marine works of the development including operation of the Small Boat Harbour.
- 7.2.33 The Secretary of State was satisfied that the proposed managed realignment site at Hamford Water, Little Oakley, represented the necessary compensatory measures required under the Habitats Regulations. The Secretary of State granted planning permission for the engineering works and habitat creation at Little Oakley in 2006. Whilst that planning permission has now lapsed, the applicant has submitted a new planning application (21/02144/FUL) for that development. It is noted that that application has been subject to quite a number of objections and Officers have been discussing these issues with the applicant. The applicant has attended a public meeting at the invitation of Little Oakley Parish Council, to allow the local community to discuss concerns and to allow them the opportunity to see whether the scheme might be amended, to address some of those concerns whilst still delivering the required compensatory habitats. Pending a conclusion to these discussions the application remains under consideration by Officers, but will be reported to the Planning Committee in due course. Members will however need to be satisfied that the Little Oakley development provides sufficient mitigation for the adverse effects on the Stour and Orwell Estuaries SPA, and is adequately secured, before the present S73 application can be finally determined.
- 7.2.34 The works identified by the applicant as forming Phase 1 of the Small Boat Harbour and Container Terminal development are all proposed to be undertaken on existing land and the information provided by the applicant demonstrates that this will not affect the qualifying features of the SPA and Ramsar site. As such the carrying out of Phase 1 works will not adversely affect the integrity of the protected habitats and the development can commence without the need to have started work on creating the compensatory habitats at Little Oakley. The Council's Ecologist has reviewed the current application and concluded that she is satisfied that the delay in letting the Little Oakley contract and not 'getting started' on the managed realignment ahead of the Phase 2 marine works commencing, resulting in loss of SPA mudflats is still within the secured 2004 Deed and its Annex 1 Compensation Mitigation and Monitoring Agreement (CMMA/CMMD), which gives a maximum period between the Bathside Bay marine works and the creation of the compensatory habitats by way of breach of the sea wall at little Oakley of 27 months.
- 7.2.35 DEFRA guidance *Habitats regulations assessments: protecting a European site* (2021) states that "Compensatory measures should usually be in place and effective before the negative effect on a site is allowed to occur". The example given in the guidance of a port expansion is to the same effect. However, in 2005/2006 and 2013 Natural England did not consider that the compensatory habitats at Little Oakley had to be created before the Bathside Bay reclamation

works were carried out, and the S106 Agreements that secure the provision of the new habitats allow a period of time between the reclamation works and the breach of the sea wall at Little Oakley that will create the new intertidal habitats. The recent objection from Natural England says no more than that “timings are unclear”, but to date it has not said that the timings for the compensatory works provided for in the S106 agreements are no longer acceptable.

- 7.2.36 The applicant has proposed some changes to the S106 agreements. One change relates to the compensatory works. At present the S106 agreement that applies to the 2013 Container Terminal permission provides that “The Owner shall not implement the Container Terminal Development until it has let a contract securing the implementation of the Little Oakley Managed Realignment in a timely manner in accordance with the relevant terms of this Deed”. The applicant seeks a variation of this so that the contract for the Little Oakley works must be let before commencement of Phase 2 of the development (when the reclamation works take place), on the grounds that there will not be time to let a contract before 29 March 2022, when the development must be begun. On the basis that the other provisions of the S106 agreements relating to the compensatory works at Little Oakley remain unchanged, Officers consider that this variation would be acceptable.
- 7.2.37 Members should be aware that if a resolution to grant planning permission is passed, the Habitats Regulations require that the Council notifies the Secretary of State and seeks a derogation for permitting development which without compensation will lead to AEOI. The Secretary of State can then decide if he wishes to intervene.

Other Matters

- 7.2.38 Concerns were raised by other bodies (but not specifically by Natural England) about whether the ES also adequately assessed the in-combination impacts of the development when combined with permitted residential development within the area. The District Council has for some time now been assessing the in-combination impacts of residential development on the protected Essex coastal sites. In accordance with Natural England guidance, the Essex Coast RAMS has been adopted by the District Council. The scheme provides a means of ensuring that developers mitigate the impact of new residential development on the protected sites through a range of measures to divert and deflect visitors from going to them for daily recreation and to mitigate the impact of those who do visit through improved visitor management measures. The Council considers that it adequately mitigates the recreational impacts arising from residential development such that it does not give rise to additional cumulative impacts that require assessment with the proposed development.
- 7.2.39 A number of objections received have referred to a passage within the applicant’s planning statement which indicates that the port platform to be created at Bathside Bay could be used as a Green Energy Port, as opposed to the Container Port operation that planning permission was granted for. The objectors refer to the fact that the case for the IROPI was based on the pressing national need to increase container port capacity and this need is quite different to port capacity to support the growing off-shore wind sector.
- 7.2.40 The Council have sought Counsel’s opinion on this application, who has guided Officers in the assessment of the proposal. With regard to this matter of the Green Port, it has been concluded that such proposals are vague and it is currently difficult to discern what, if any impact they might have on the future operation of the port. Given the limited scope of a S73 application and the relatively modest change in conditions sought, it is considered that the primary purpose of the proposed development – to increase container terminal capacity to meet growing international demand at an appropriate location on the east coast – is not set to change. Any material change of use however would constitute development for which planning permission would normally need to be obtained.

7.3 Extended AONB Designation

7.3.1 The application site lies outside of, but is considered to be within the setting of, the Suffolk Coast & Heaths Area of Outstanding Natural Beauty (AONB). On the Tendring side of the Stour Estuary, the AONB boundary lies approximately 2.6km west of Bathside Bay, while the boundary of the Suffolk Coast & Heaths AONB on the northern (Suffolk) side of the Stour Estuary lies 1km opposite the application site. Paragraph 176 of the NPPF states that development within their setting should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas.

7.3.2 In addition to the above concerns, Natural England considers that the applicant should not be relying on the 2003 Landscape and Visual Impact Assessment, saying:

“We acknowledge that work has been done to demonstrate that the original conclusions are still fit for purpose, however this approach to re-assessment is not ideal. The original LVIA is now 19 years old and since its production the landscape baseline has changed significantly due to the AONB extension and further industrial development around Felixstowe. Changes in national planning policy such as the NPPF have also been strengthened the protection given to AONBs and their settings. There have also been several changes to published landscape guidance and assessments in the intervening period.”

7.3.3 In Natural England’s view “a new standalone Landscape and Visual Impact Assessment should be carried out to determine the significance of landscape and visual impacts to the setting of the Suffolk Coasts and Heaths AONB afresh, as extended in 2020”.

7.3.4 The AONB Project Officer raised concerns to 21/01810/VOC that the applicant’s review of the previous Landscape and Visual Impact Assessment made no reference in the LVIA Chapter (Section 12 Part 1) to the fact the Suffolk Coast and Heaths AONB boundary was extended in July 2020 to include the south bank of the River Stour in Tendring and the River Stour itself. However, these comments were received prior to all sections of the LVIA Chapter being posted on the Council’s website.

7.3.5 Section 12.1.1.8 of the LVIA review states:

“There have been several changes to published landscape guidance and assessments and the baseline situation since the 2003 LVIA, including an extension to the Suffolk Coast and Heaths Area of Outstanding Natural Beauty (AONB). These are not considered to materially affect the assessment of effects upon landscape and visual receptors. It is therefore concluded that the findings of the 2003 LVIA remain valid.”

7.3.6 In response to the comments raised, the applicant draws the Council’s attention to the fact that the AONB extension is referred to on a number of other occasions within the review, including references to relevant development plan policies and other guidance and assessments. Also found within the LVIA review is a description of discrete areas of the extension, with particular reference to the study area; a summary of baseline evidence prepared to inform the extension; a comparison of the Landscape Character Units described in the 2003 LVIA with the equivalent, current baseline LCA in relation to the extended AONB, with predicted effects (Table 12.7); and a consideration of viewpoints in the 2003 LVIA, with specific reference to their location in relation to the pre/post 2020 AONB extension.

7.3.7 Although the AONB extension was only approved in 2020 it is evident that the extension was being promoted back in 2004 when the Inspector held the Public Inquiries into the proposed developments. The Inspector considered the impact on what was the designated AONB in 2004 before proceeding to consider the impact on the AONB if the AONB were to be extended along the south bank of the river towards Parkestone ie akin to that now in place. The

Inspector concluded that the extended AONB would have limited inter-visibility and where views in to, or out of, the AONB were found, these were views often shared with quayside cranes, at Felixstowe and Harwich International Port, and the oil refinery at Parkestone. The Inspector concluded the level of harm to be Minor Adverse and in his judgement the Container Terminal and Small Boat Harbour would not seriously damage views into or out of the area of the possible AONB extension.

- 7.3.8 Having assessed the evidence presented Officers are satisfied that the Landscape and Visual Impact Assessment, in conjunction with the current ES and LVIA review, provides a reasonable assessment of the visual impacts of the development within the setting of the AONB, as extended, and no further evidence is required.

7.4 Traffic Assessment

- 7.4.1 In addition to the ES the section 73 applications for the Container Terminal and Small Boat Harbour are also accompanied by a Supplementary Transport Assessment. In a similar manner to the ES, the applicant has undertaken a review and assessment of the original Transport Assessment and the modelled impacts and updated the effects that may have changed over time.

- 7.4.2 The supplementary report concludes that the baseline data remains valid and the future years forecast of traffic volumes remains robust. With the package of highway works and improvements secured through the planning permission conditions, the conclusion remains that the Container Terminal and Small Boat Harbour will not have a significant transportation impact. The report goes on to state that the assessment indicates that the increased volume of traffic during the construction phase does not require mitigation works to ensure that there is no significant transport impact. The Highway Authority (Essex County Council) and National Highways have both assessed the supplementary transport report (also submitted with 21/01810/VOC) and neither take issue with the updated assessment or the conclusion that the applicant has reached.

- 7.4.3 Overall, having taken careful account of the original ES, the updated ES, the comments of the original Inspector and Secretary of State; and the views expressed by statutory consultees, it is considered that the proposed change to the wording of condition 20 and the delayed submission of operational lighting details would not result in any material adverse impact over and above those set out in the original reports which were clearly judged by the Secretary of State to be acceptable in principle, when taken with the proposed mitigation measures.

8. Section 106 Agreement

- 8.1 The provision of the Small Boat Harbour is secured through the S106 agreement for the Bathside Bay Container Terminal. There are no changes proposed to the substance of the planning obligations in relation to the provision of the Small Boat Harbour, although a supplemental agreement will be formed to carry the provisions over to the planning permission, the subject of this planning application, if the decision is taken to approve it.

9. Other Considerations

Discharge of Planning Conditions

- 9.1 As previously stated the applicant has submitted two applications (21/01624/DISCON and 21/01816/DISCON) to discharge the pre-commencement planning conditions imposed upon the extant planning permission (10/00203/FUL); at the time of writing this report these were awaiting delegated approval following receipt of all consultation responses.

- 9.2 If Members ultimately resolve to approve this Section 73 application, and there is no intervention by the Secretary of State, then the Council will be issuing a new planning permission and will need set out the planning conditions that it considers are necessary in respect of the proposed development. If the same conditions were transferred from the 2013 planning permission to this new permission, then the applicant would need to apply to discharge the same pre-commencement conditions, notwithstanding that they had been discharged in relation to the 2013 permission.
- 9.3 Since the original planning permissions were granted, the Government had introduced legislation which imposes restrictions on the use of pre-commencement conditions. The Government imposed these rules with the aim of speeding up the planning process by discouraging decision makers from including unnecessary pre-commencement planning conditions that might slow down starts on-site and consequently drive up costs, or even prevent development from happening at all.
- 9.4 Section 100ZA(5) of the Town and Country Planning Act 1990 states that planning permission for the development of the land may not be granted subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition.
- 9.5 The Government's Planning Practice Guidance also emphasises to local planning authorities that pre-commencement conditions should only be used where there is a clear justification for the requirement and that this is likely to mean that the requirements of the condition are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission. A pre-commencement condition that does not meet the legal and policy tests may be found to be unlawful by the courts and therefore cannot be enforced by the local planning authority if it is breached.
- 9.6 If the Council resolves to grant the new permission, it must be mindful of the current policy and legislation regarding the use of pre-commencement conditions. Given that the Council may well approve details submitted through the two discharge of conditions applications for this development, on the whole it is considered that it would be unnecessary for the applicant to submit all of that information again via discharge of conditions applications prior to the commencement of development. At the time of writing this report the applicant had been invited to submit the details submitted pursuant to 21/01624/DISCON and 21/01816/DISCON as part of this S73 application. This will allow the Council to list the plans and documents as approved plans on this new planning permission (if granted) and by turning conditions requiring the submission of details prior to commencement of development into 'compliance' conditions which require the development to be carried out in accordance with the approved plans and details, there will be no need to seek approval of the same details a second time.
- 9.7 As Officers are continuing to work on discharging these pre-commencement conditions, it is recommended that the Planning Committee grant delegated powers to the Assistant Director of Planning to revise the wording of the other pre-commencement conditions, to make them compliance conditions, if/when the Council approve the details submitted by the applicant.

10. Conclusion

- 10.1 In 2003, Hutchison Ports (UK) Limited ("HPUK") applied for planning permission for the construction of a new container terminal at Bathside Bay, Harwich. On 29th March 2006, permissions, inter alia, for a container terminal; a small boat harbour; the managed realignment of the coastline and creation of compensatory inter-tidal habitats off-site, and listed building consent in respect of the partial demolition of the long berthing arm attached to a listed Train Ferry Gantry were granted by the Secretary of State, following concurrent Public Inquiries held between 20th April 2004 and 21st October 2004. These developments were subject to rigorous assessments and were found on balance to be acceptable. In particular, with regard to the then Habitats Regulations, the Secretary of State found that Imperative

Reasons of Overriding Public Interest (IROPI) outweighed the identified harm to the integrity of a European site (the Stour and Orwell Estuaries SPA).

- 10.2 In 2010 HPUK applied for replacement planning permissions for the reclamation works and Container Terminal, and the Small Boat Harbour. These permissions (10/00202/FUL and 10/00203/FUL) were granted by the Council on 14 February 2013 and remain extant, but development needs to have commenced on or before 29th March 2022.
- 10.3 This application seeks permission to vary one of the conditions (no20) on the 2013 planning permission for the Small Boat Harbour (10/00203/FUL). It is proposed that the wording is amended to change the timing of the condition. The original condition required that the details of the operational lighting were submitted and approved prior to the commencement of the development. The applicant has proposed that the wording is changed so that the details are submitted and approved prior to that part of the harbour becoming operational.
- 10.4 Officers are satisfied that the variation is justified and acceptable. The permission (as varied) would be consistent with the Council's planning policies, and the other conditions and proposed planning obligation would secure the required protection of environmental, ecological and amenity interests on operation of the proposed development. Further, the Planning Practice Guidance (PPG) stipulates that pre-commencement conditions should only be used where there is a clear justification, which is likely to mean that the requirements of the condition (including the timing of compliance) are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission.
- 10.5 As the proposed development would harm the SPA, the Council is required to carry out an appropriate assessment of the implications of the development for the SPA under the Habitats Regulations. Furthermore, it is prohibited from granting planning permission unless satisfied that:
- there is no alternative solution;
 - the development must be carried out for imperative reasons of overriding public interest (IROPI);
 - necessary compensatory measures have been secured that ensure that the overall coherence of the national site network of SACs and SPAs is protected
- 10.6 Officers consider that there is no alternative to the Container Terminal development (with which the Small Boat Harbour is inextricably linked) and there is a national need for additional container terminal capacity amounting to IROPI. The proposed compensatory measures to make up for the loss of 69ha of intertidal habitat within the SPA consist of the creation and maintenance of 138ha of new intertidal habitats at Little Oakley, Hamford Water, which are secured by S106 agreements.
- 10.7 The Council has received an objection from Natural England, the appropriate nature conservation body, which takes issue with the information provided by the applicant in its Environmental Statement. At present Natural England considers that it is not possible for the Council to carry out an appropriate assessment on the basis of the ES. It also considers that the proposed compensatory works at Little Oakley have not been shown to provide satisfactory mitigation for the adverse effects on the SPA. The Council is required to give due weight to the expert advice of Natural England.
- 10.8 The applicant has responded in detail to Natural England's objection and the Council's Ecologist has also considered the adequacy of the information and proposed compensatory measures put forward by the applicant. A further response from Natural England is awaited. In light of Natural England's current objection officers are reluctant to make a positive recommendation for the grant of planning permission, although ultimately it is for Members to consider whether the requirements of the Habitats Regulations have been met. It is possible

that further dialogue between the Council, the applicant and Natural England before Members consider this application will provide a resolution to the objection. In any event, progress can be made on updating pre-commencement conditions where details have been approved, and on agreeing suitable wording for revised S106 agreements.

11. Recommendation

11.1

- (1) The Committee consider this report and any updated information provided.**
- (2) The Assistant Director of Planning be authorised:**
 - (a) to approve the completion of a supplemental or other legal agreement under section 106 of the Town and Country Planning Act 1990 to secure the provision of appropriate compensatory habitats and other matters necessary to make the proposed development acceptable;**
 - (b) subject to the conditions stated below, and the revision of any conditions that require details to be submitted, to update on a provisional basis pre-commencement conditions to compliance conditions (nos 3, 6, 8, 9, 10, 11, 12, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30 & 32), only where details have subsequently been submitted to and approved in writing by the local planning authority pursuant to 21/01624/DISCON and 21/01816/DISCON; and**
 - (c) to refuse planning permission in the event that an appropriate legal agreement has not been completed by March 29th 2022.**

11.2 Conditions and Reasons

- 1) The development shall be commenced on or before 29th March 2022.

Reason - To comply with the requirements of Section 91 of the Town and Country Planning Act 1990, as amended by the Planning and Compulsory Purchase Act 2004 to ensure consistency with the planning permission for the construction of the Bathside Bay Container Terminal and to allow sufficient time to implement highway mitigation and improvement measures therefore, other infrastructure improvements and the provision of compensatory habitat.

- 2) The development hereby approved shall be implemented in accordance with the following plans, drawings and documents hereby approved:

H1002/01	Application Boundary
H1002/02 Rev. B	Small Boat Harbour Master Plan
H1001/03	Existing Topographic Survey
H1001/07	Lighting Layout
H1001/08	Fisherman's Store Location Plan
H1001/09	Fisherman's Store General Arrangement
H1001/10	Fisherman's Store Sections and Elevations
H1001/11	Fisherman's Store East Elevation
H1001/12 Rev. A	Division Wall Sections
H1001/13	Train Ferry Pier Termination Details
1514LO/50	Landscape Proposals
1514LO/51	Details of Quayside (Landscape)
1514LO/52	Structural Landscape Works
1514LO/53	Illustrative Planting Insets & Sections

Planning and Design Statement dated April 2003
Planning Statement dated October 2021
Environmental Statement dated 13 October 2021

Reason - For the avoidance of doubt and in the interests of proper planning.

- 3) No part of the development hereby permitted shall be begun until a landscaping scheme including a programme in accordance with the indicative scheme shown in application drawings 1514LO/50, 1514LO/52 and 1514LO/53, including details of screen mounding and tree planting, has been submitted to and approved in writing by the Local Planning Authority. The scheme as so approved shall be implemented during the first planting season following completion of topsoil dressing works at the development site. Any tree or shrub dying or becoming seriously diseased within five years of planting shall be replaced by a specimen of the same or similar species in accordance with the approved scheme.

Reason - To ensure the establishment of a new landscape character in the interests of visual and residential amenity.

- 4) The small boat harbour hereby permitted shall not be brought into use as such unless and until a landscape management plan, including long term design objectives, management responsibilities and maintenance schedules for all landscape areas, has been submitted to and approved in writing by the Local Planning Authority. The landscape management plan shall be carried out as so approved.

Reason - To ensure the long term maintenance of the landscaping elements of the development.

- 5) The development shall be carried out in accordance with the Planning and Design Statement dated April 2003 identified in Condition 2 above except insofar as otherwise provided for in any condition attached to this permission.

Reason - To ensure that the development is carried out in accordance with the design principles set out in the relevant documents.

- 6) No phase of the development shall begin until details of the design and external appearance, including materials of the buildings, structures and areas of hardstanding to be constructed within the development, according with the Planning and Design Statement dated April 2003 and identified in Condition 2 have been submitted to and approved in writing by the local planning Authority. The development shall be carried out in accordance with the details as so approved.

Reason - To enable proper control to be exercised over the design and external appearance of the development in the interests of visual amenity.

- 7) Except with the prior written agreement of the Local Planning Authority and Local Highway Authority, top soil comprised in the development is not to be undertaken using material from any source other than from the managed realignment site at Little Oakley and which shall not be delivered from the said site at Little Oakley other than by sea.

Reason - To ensure that beneficial use is made of available materials and to minimise HGV road traffic entering the site, in the interests of highway safety.

- 8) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order amending, revoking and re-enacting that Order with or without modification), no development shall begin until a written scheme showing full details of fences, walls, gates or other means of enclosure has been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the details as so approved.

Reason - In the interests of security and visual amenity.

- 9) Development pursuant to this planning permission shall not begin until drawings showing both foul and surface water drainage (including the provision of all oil and diesel Interceptors) connected with the development have been submitted to and approved In writing by the Local Planning Authority and thereafter any works in relation to the development shall be undertaken in accordance with the drawings as so approved except as otherwise first agreed In writing by the Local Planning Authority.

Reason - To prevent pollution.

- 10) No part of the development (including ground works) hereby permitted shall commence until a programme of archaeological work to the site (including marine archaeology and any works which might be necessary and practicable to preserve any archaeological remains in situ) has been submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in accordance with the approved programme.

Reason - To allow proper investigation and recording of the site, which is potentially of archaeological and historic significance.

- 11) No part of the development hereby permitted shall be commenced until a written Construction Management Plan (CMP) together with a certificate that the same has been submitted in that form to National Highways and Natural England has been submitted to and approved in writing by the Local Planning Authority and Local Highway Authority. The CMP shall include details of the management during the construction phase of the development of the matters contained in Conditions 12 to 18 inclusive (construction noise and vibration), a Construction Traffic Management Plan in accordance with the Bathside Bay Construction Traffic Management Plan produced by ERM and dated 7th June 2004, Condition 19 (construction lighting) and Condition 21 (construction dust management) of this permission.

Furthermore, the CMP shall incorporate environmental measures to protect biodiversity, to include the following:

- a) Risk assessment of potentially damaging construction activities.
- b) Identification of "biodiversity protection zones".
- c) Practical measures (both physical measures and sensitive working practices) to avoid or reduce impacts during construction (may be provided as a set of method statements).
- d) The location and timing of sensitive works to avoid harm to biodiversity features.
- e) The times during construction when specialist ecologists need to be present on site to oversee works.
- f) Responsible persons and lines of communication.
- g) The role and responsibilities on site of an ecological clerk of works (ECoW) or similarly competent person.
- h) Use of protective fences, exclusion barriers and warning signs.
- i) Containment, control and removal of any Invasive non-native species present on site

The development hereby permitted shall be carried out in accordance with the CMP as so approved.

Reason - To ensure that the construction impacts of the development are kept within acceptable limits; and to conserve protected and Priority species and allow the LPA to discharge its duties under the Conservation of Habitats and Species Regulations 2017 (as amended), the Wildlife & Countryside Act 1981 (as amended) and s40 of the NERC Act 2006 (Priority habitats & species) as updated by the Environment Act 2021.

- 12) No part of the development hereby permitted shall be commenced until details relating to the control of noise and vibration from the construction of the development have been submitted to and approved in writing by the local Planning Authority. These details shall include the following:
- (a) definitions of roles and responsibilities;
 - (b) the adoption of best practice for the specification and Procurement of quiet plant and equipment;
 - (c) consultation and reporting processes for noise and vibration;
 - (d) noise and vibration monitoring procedures including recording measures and the location of measuring instruments;
 - (e) action to be taken in the event of non-compliance with (b) to (d) above;
 - (f) a record of the occasions on which percussive piling operations take place;
 - (g) complaint response procedures;
 - (h) a requirement to provide environmental noise awareness training to operatives; and
 - (i) construction methods for percussive piling designed to minimise the noise generated by such operations through practical methods such as shrouding or other appropriate alternative methods.
- The development hereby permitted shall be carried out In accordance with the approved details.

Reason -To ensure that the noise and vibration impacts of the development are kept within acceptable limits.

- 13) All plant, machinery and vehicles used on site in constructing the development shall be fitted with effective silencers at all times which shall be maintained in accordance with the manufacturers' recommendations and current British Standards applicable thereto. No such plant shall be left running when not being operated.

Reason -To ensure that the noise impacts of the development are kept within acceptable limits.

- 14) Where any vehicle or plant is required to be fitted with a reverse warning system, such vehicles or plant shall not be used or installed prior to the approval of such a system in writing by the Local Planning Authority. In operating such vehicles or plant the approved system shall be used.

Reason -To ensure that the noise impacts of the development are kept within acceptable limits.

- 15) No percussive piling operation for the development shall be carried out except in accordance with a programme for that phase which shall first have been approved in writing by the Local Planning Authority. The said programme shall provide that:

(i) no percussive piling operations shall be undertaken in relation to the construction of the development during more than thirteen weekends in any six months; and

(ii) except with the prior written approval of the Local Planning Authority no more than three hours of percussive piling of tubular piles for the main quay wall shall take place on any day.

Reason -To ensure that the noise impacts of the development are kept within acceptable limits.

- 16) Except with the prior written agreement of the Local Planning Authority, no percussive piling operations shall be undertaken in relation to the construction of any part of the development outside the hours of:

(a) 08:00 to 18:00 Monday to Friday; and

(b) 09:00 to 13:00 on Saturday;

or at any time on Sundays or Bank or Public Holidays, provided that percussive piling operations may be undertaken in relation to the construction of the development outside the permitted hours:

(i) in the case of emergency, or

(ii) where piling is required on the grounds of safety or environmental protection; and

(iii) In either case the situation would otherwise be dangerous to life or limb.

The Local Planning Authority shall be promptly notified in writing of any event of this type and the reason why percussive piling took place outside the permitted hours.

Reason - To protect residential amenity during construction.

17) The noise from construction activities in relation to the development shall not exceed the following daytime free-field equivalent sound pressure levels, as measured at a height of 1.5 m above ground level at the nearest residential property to the development:

(a) 67 dB LAeq 12H and 85 dB LA1 5 mins (in relation to percussive piling operations) during the hours of 07:00 to 19:00 on Mondays to Fridays, excluding Bank Holidays;

(b) 55 dB LAeq 1hr during the hours of 19:00 to 23:00 on Mondays to Fridays, excluding Bank Holidays;

(c) 67 dB LAeq 6hr and 85 dB LA1 5 mins (in relation to percussive piling operations) during the hours of 07:00 to 13:00 on Saturdays; and

(d) 50 dB LAeq 1hr at all other times.

Reason - To ensure that the noise impacts of the development are kept within acceptable limits and to protect residential amenity.

18) Vibration levels from piling or other construction activities in relation to the development, as measured immediately adjacent to the nearest residential property or vibration sensitive structure for that phase shall not exceed a peak particle velocity of 5mm/s.

Reason - To protect residential amenity.

19) No part of the development hereby permitted shall be begun until a written scheme of construction lighting has been submitted to and approved in writing by the Local Planning Authority. The scheme shall include details of:

(a) definitions of roles and responsibilities;

(b) design including locations of the construction lighting;

(c) Installation of the construction lighting;

(d) management of the construction lighting; and

(e) construction lighting monitoring procedures and action to be taken in the event of non-compliance. The development hereby permitted shall be carried out in accordance with the approved scheme.

Reason - In the interests of visual amenity and ensure safety.

- 20) No part of the hereby permitted development shall commence operation until a scheme relating to the provision and control of operational lighting on that part of the site has been installed in accordance with a scheme which has been submitted to and approved in writing by the Local Planning Authority. The lighting scheme shall be carried out in accordance with the scheme so approved.

Reason - To minimise any possible glare or sky glow caused by the operational lighting for the development and to minimise the effect of the operational lighting on navigational aids or signs, public roads and local residential areas.

- 21) No part of the development hereby permitted shall begin until a construction dust management plan has been submitted to and approved in writing by the Local Planning Authority. The construction dust management plan shall include details of:

- (a) definitions of roles and responsibilities;
- (b) the adoption of best practice for the specification of plant and equipment;
- (c) the consultation and reporting processes;
- (d) dust monitoring procedures;
- (e) action to be taken in the event of non-compliance; and
- (f) complaint response procedures.

The development hereby permitted shall be carried out in accordance with the approved plan.

Reason - To ensure that appropriate construction dust management measures are in place.

- 22) All vehicles used to transport materials to or from the site during construction shall be sheeted so as not to deposit materials on the highway.

Reason - To prevent deposits on the highway and the emission of dust in the interest of local amenity and highway safety.

- 23) No part of the development hereby permitted shall be commenced until written details of a wheel wash facility and its location have been submitted to and approved in writing by the Local Planning Authority and Local Highway Authority. The development hereby permitted shall be carried out so as to ensure that vehicles leaving the development site during construction first pass through the approved wheel wash facility.

Reason - To prevent the deposits of materials on the public road network.

- 24) No part or the development hereby permitted shall be operated until a plan for the handling of materials and stockpiling of new construction materials on site (using physical containment, partial shielding where available and water misting/sprays where appropriate) has been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the approved plan.

Reason - To prevent the migration of dust off the site.

- 25) No part of the development hereby permitted shall be commenced until details of measures to mitigate gas migration and accumulation, in accordance with the recommendations contained in the Bathside Bay Development Project Landfill Gas Investigation Report Ref E6702/1991/OCT/L6, have been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out in accordance with the approved details.

Reason - To prevent gas migration and minimise gas accumulation, in the interests of public safety.

- 26) No part of the development hereby permitted shall be commenced until a scheme for concrete pouring and filling works has been submitted to and approved in writing by the Local Planning Authority. The scheme shall include the following:

(a) monitoring procedures; and

(b) remedial action works to be undertaken in the event of spillage.

The development hereby permitted shall be carried out in accordance with the scheme as so approved.

Reason - To minimise risk of accidental pollution of watercourses during construction works.

- 27) No part of the development hereby permitted shall be commenced until a scheme for pollution control has been submitted to and approved in writing by the Local Planning Authority. The development hereby permitted shall be carried out and operated in accordance with the scheme as so approved.

Reason - To prevent the migration of pollutants from the site to adjoining land and for public safety.

- 28) No site clearance for the development hereby permitted shall be commenced until a scheme for the translocation of reptiles, invertebrates and coastal vegetation within the site has been submitted to and approved by the Local Planning Authority. The scheme shall include the following:

(a) exclusion fencing to be erected around the site;

(b) tinning to be carried out over a minimum of 60, 70 or 90 suitable days for a low, medium or high population level respectively, between the months of March and September;

(c) relocation of the reptiles found to areas of suitable habitat outside the exclusion fencing.

The development hereby permitted shall be carried out and operated in accordance with the scheme as so approved.

Reason - To avoid harm to reptiles, invertebrates and coastal vegetation.

- 29) Development shall not begin until details of the means of vehicular access to the site from the A120 have been submitted to and approved in writing by the Local Planning Authority and the Local Highway Authority. The development shall not be operated until the vehicular access has been constructed in accordance with the approved details and opened to traffic.

Reason - In order that the A120 Trunk Road continues to serve its purpose as part of the national strategic road network and to satisfy the reasonable requirements of road safety on the A120 and connecting roads.

- 30) Development pursuant to this planning permission shall not begin until a scheme of provision to be made for disabled people to gain access to public areas forming part of the development shall have been submitted to and approved in writing by the Local Planning Authority. The agreed scheme shall be implemented before the development hereby permitted is brought into use.

Reason - To ensure disabled persons access to buildings on the site.

- 31) Except with the agreement of the Local Planning Authority, no dredging operations shall be undertaken in relation to the construction of the development outside the hours of:

(a) 07:00 hours to 19:00 hours Monday to Fridays;

(b) 07:00 hours to 13:00 hours Saturdays;

or at any time on Sundays or on Bank or Public Holidays.

Reason - To ensure that the noise impacts of the development are kept within acceptable limits and to protect residential amenity.

- 32) Before the development is begun written details of the layout, construction and surfacing of the internal roadways and hardstanding for cars comprised in the development shall be submitted to and approved in writing by the local Planning Authority and Local Highway Authority. The development shall be implemented in accordance with the details so approved and retained thereafter.

Reason - To ensure a safe layout and a satisfactory standard of construction for internal roadways.

11.3 Informatives

Positive and Proactive Statement

The Local Planning Authority has acted positively and proactively in determining this application by identifying matters of concern within the application (as originally submitted) and negotiating, with the Applicant, acceptable amendments to the proposal to address those concerns. As a result, the Local Planning Authority has been able to grant planning permission for an acceptable proposal, in accordance with the presumption in favour of sustainable development, as set out within the National Planning Policy Framework.

Legal Agreement Informative

This application is the subject of a legal agreement and this decision should only be read in conjunction with this agreement.

Highways Informatives

On the completion of the Development, all roads, footways/paths, cycle ways, covers, gratings, fences, barriers, grass verges, trees, and any other street furniture within the Site and in the area it covers and any neighbouring areas affected by it, must be left in a fully functional repaired/renovated state to a standard accepted by the appropriate statutory authority.

All work within or affecting the highway is to be laid out and constructed by prior arrangement with and to the requirements and specifications of the Highway Authority; all details shall be agreed before the commencement of works.

The applicants should be advised to contact the Development Management Team by email at development.management@essexhighways.org or by post to:

SMO1 – Essex Highways Colchester Highways Depot,
653 The Crescent,
Colchester CO4 9YQ

The Highway Authority cannot accept any liability for costs associated with a developer's improvement. This includes design check safety audits, site supervision, commuted sums for maintenance and any potential claims under Part 1 and Part 2 of the Land Compensation Act 1973. To protect the Highway Authority against such compensation claims a cash deposit or bond may be required.

Sustainable Urban Drainage Informatives

Essex County Council has a duty to maintain a register and record of assets which have a significant impact on the risk of flooding. In order to capture proposed SuDS which may form part of the future register, a copy of the SuDS assets in a GIS layer should be sent to suds@essex.gov.uk.

Any drainage features proposed for adoption by Essex County Council should be consulted on with the relevant Highways Development Management Office.

Changes to existing water courses may require separate consent under the Land Drainage Act before works take place. More information about consenting can be found in the attached standing advice note.

It is the applicant's responsibility to check that they are complying with common law if the drainage scheme proposes to discharge into an off-site ditch/pipe. The applicant should seek consent where appropriate from other downstream riparian landowners.

The Ministerial Statement made on 18th December 2014 (ref. HCWS161) states that the final decision regarding the viability and reasonableness of maintenance requirements lies with the LPA. It is not within the scope of the LLFA to comment on the overall viability of a scheme as the decision is based on a range of issues which are outside of this authority's area of expertise.

We will advise on the acceptability of surface water and the information submitted on all planning applications submitted after the 15th of April 2015 based on the key documents listed within this letter. This includes applications which have been previously submitted as part of an earlier stage of the planning process and granted planning permission based on historic requirements. The Local Planning Authority should use the information submitted within this response in conjunction with any other relevant information submitted as part of this application or as part of preceding applications to make a balanced decision based on the available information.

12. Additional Considerations

Public Sector Equality Duty (PSED)

- a. In making your decision you must have regard to the PSED under section 149 of the Equality Act 2010 (as amended). This means that the Council must have due regard to the need in discharging its functions to:
 - b. A. Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
 - c. B. Advance equality of opportunity between people who share a protected characteristic and those who do not. This may include removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; taking steps to meet the special needs of those with a protected characteristic; encouraging participation in public life (or other areas where they are underrepresented) of people with a protected characteristic(s); and
 - d. C. Foster good relations between people who share a protected characteristic and those who do not, including tackling prejudice and promoting understanding.
- e. The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, being married or in a civil partnership, race including colour, nationality and ethnic or national origin, religion or belief, sex and sexual orientation.
- f. The PSED must be considered as a relevant factor in making this decision but does not impose a duty to achieve the outcomes in section 149 and section 149 is only one factor that needs to be considered, and may be balanced against other relevant factors.
- g. It is considered that the recommendation to grant permission in this case would not have a disproportionately adverse impact on a protected characteristic.

Human Rights

- h. In making your decision, you should be aware of and take into account any implications that may arise from the Human Rights Act 1998 (as amended). Under the Act, it is unlawful for a public authority such as the Tendring District Council to act in a manner that is incompatible with the European Convention on Human Rights.
- i. You are referred specifically to Article 8 (right to respect for private and family life), Article 1 of the First Protocol (protection of property) and Article 14 (right to freedom from discrimination).
- j. It is not considered that the recommendation to grant permission in this case interferes with local residents' right to respect for their private and family life, home and correspondence or freedom from discrimination except insofar as it is necessary to protect the rights and freedoms of others (in this case, the rights of the applicant). The Council is also permitted to control the use of property in accordance with the general interest and the recommendation to grant permission is considered to be a proportionate response to the submitted application based on the considerations set out in this report.

Finance Implications

- k. None

13. Background Papers

- a. In making this recommendation, officers have considered all plans, documents, reports and supporting information submitted with the application together with any amended documentation. Additional information considered relevant to the assessment of the application (as referenced within the report) also form background papers. All such information is available to view on the planning file using the application reference number via the Council's Public Access system by following this link. However for ease, the letter from the

applicant to the Council which responds to the objections raised by Natural England (dated 11th February 2022) is appended here.

11 February 2022

Susanne Chapman-Ennos
Tendring District Council
Council Offices
Thorpe Road
Weeley
Essex
CO16 9AJ

The Savills logo consists of the word "savills" in a lowercase, sans-serif font, colored red, set against a solid yellow rectangular background.

Emma Andrews
E: emma.andrews@savills.com
DL: +44 (0) 20 3810 9842

33 Margaret Street W1G 0JD
T: +44 (0) 20 7499 8644
F: +44 (0) 20 7495 3773
savills.com

By Email

Dear Susanne

Hutchison Ports (UK) Limited: Bathside Bay
Application Reference Numbers: 21/01810/VOC and 21/01792/VOC

My client, Hutchison Ports (UK) Limited ('HPUK') has seen the consultation response from Natural England dated 4 February 2022, which objects to the above applications. An initial response was provided in our letter of 8 February 2022. A meeting was subsequently held with Natural England (which was also attended by Graham Nourse of Tendring District Council (TDC)) on 9 February 2022 to discuss the comments in further detail. This letter provides an update to our 8 February response, reflecting the outcome of the discussion with Natural England on 9 February 2022.

In summary, HPUK's position remains unchanged in that all of the points raised by Natural England in their advice letter have either been addressed by the ES and shadow HRA supporting the applications or should not prevent TDC making a timely positive determination of the applications. This letter expands on our reasoning for this position.

I deal below only with the matters in Natural England's letter that require a response and do not address their comments on Appropriate Assessment or Reasonable Alternatives (items 1 and 2 respectively of their 8 February 2022).

1. IROPI

Contrary to Natural England's suggestion, our view is that the ES does provide TDC with a full and up to date understanding of the ecological value of the site and the potential impacts. Further details are provided below (in response to Natural England's comments regarding compensation), but in summary section 7 of the ES provides an updated baseline for the waterbird interest of Bathside Bay and the Stour and Orwell Estuaries SPA and Ramsar site (i.e. core counts from the Wetland Birds Survey (WeBS) for the most recent 5 available years from the British Trust for Ornithology (up to and including the winter of 2019/20) and low water counts for the five winters to 2018/19).

In the meeting on 9 February 2022, Natural England expanded on its advice to TDC that "...*your authority should have a full understanding of the ecological value of the site and the anticipated impacts...*", stating that additional waterbird data (not referenced in the ES and shadow HRA) for Bathside Bay have been collected as part of the assessment of / monitoring for the Galloper offshore windfarm operations and maintenance facility ('the Galloper O&M facility'). Our understanding is that the data referred to by Natural England are not published or publicly accessible. The data have been requested since the meeting but have not been provided to HPUK and, therefore, it is not clear which data are being referred to or the timeframe covered by the data. On this basis, and given the long-

running and recent data set on which the conclusions of the ES and shadow HRA are based, HPUK feels it is unreasonable for Natural England to infer that the conclusions of the ES and shadow HRA are not robust due to data deficiency. The conclusions are based upon a robust and long running dataset, gathered by a body with long experience of bird assemblages in Harwich Haven and can be considered to benefit from a high degree of scientific certainty. This matter is explored in further detail below in response to the more detailed points raised by Natural England.

Section 8 of the ES reports the findings of the Preliminary Ecological Appraisal undertaken in 2021 and, on the basis of that survey, the ES identifies the mitigation required where necessary.

IROPI is addressed in detail in section 4.5 of the Planning Statement, with supporting information in section 2 of the ES. It can be concluded that IROPI remains in full force for the proposed development.

2. Compensation

This section of Natural England's letter raises several points, which we address as follows.

- **Shadow HRA**

Natural England stated that *"We note that the shadow HRA section separates the Phase 1 works from the rest of the project and concludes no adverse effect on integrity if those works are conducted outside of the overwintering bird period. Natural England does not recommend retrospectively slicing the assessment of projects into phases"*.

As we explained in our letter of 8 February and in the meeting on 9 February, the shadow HRA (section 25 of the ES) does not slice the assessment of the project into phases. Similarly, the shadow HRA does not slice the provision of compensatory habitat into phases. The shadow HRA assesses the whole project (and each element of the project is explicitly referred to in section 25.3.2 which reports the screening for likely significant effect (LSE) stage of the HRA process). The shadow appropriate assessment is reported on the same basis in section 25.3.3. For the avoidance of doubt, the shadow HRA concludes that LSE cannot be excluded for the whole project (i.e. including Phase 1) and therefore carries the whole project into the shadow appropriate assessment stage.

It is assumed that Natural England is referring to paragraph 13 of section 25.3.3 which refers to Phase 1 of BBCT and SBH. That paragraph is included to highlight that no adverse effect on integrity is concluded for the Phase 1 works. As noted above, the shadow HRA process does encompass all phases of works for the BBCT and SBH, and the reference to Phase 1 individually is made to demonstrate that those works do not trigger the need for compensatory measures on their own.

Therefore, the relevance of the reference to Phase 1 in distinction to the balance of the project is simply in directly linking the provision of compensatory habitat to effects upon the designated features of Bathside Bay. This is a position, secured by planning condition, that is no different to the protection afforded by the existing planning permission.

- **Adverse Effects on the Integrity (AEol) of the Stour and Orwell Estuaries SPA and Ramsar site and sufficiency of Little Oakley Compensatory Habitat**

Natural England stated that *"We also advise that the supporting evidence for the conclusion of no AEol does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas - which do contain suitable habitat for breeding and overwintering species and is predominately undisturbed. Therefore, it cannot be concluded that there will be no LSE (impact pathway) and without mitigation there could be an AEol"*.

The conclusion regarding AEol is only relevant to SPA (and Ramsar site) features, albeit that the SSSI features also form part of the waterbird assemblage of the SPA and Ramsar site. The qualifying interests of all designated sites are, however, included in the assessment reported in section 7 of the ES. Section 25 of the ES presents the shadow HRA.

Notwithstanding the above distinction between the designated sites relevant to the scope of the shadow HRA, the ES does describe the current potential for effects on the SPA, Ramsar site (and SSSI) features within the designated areas adjacent to the Phase 1 works (and the wider BBCT and SBH developments). As such, the potential for impacts upon these features is considered in the ES.

Natural England has drawn attention to overwintering (i.e. non-breeding) species and to breeding species. As noted above, non-breeding waterbird data up to the winter of 2019/20 (the most recent data available from the WeBS surveys) is reported in section 7 of the ES. The Bathside Bay WeBS count sector for which data are included in the ES coincides with the boundaries of the SPA, Ramsar site and SSSI, and this data is presented in the context of the most recent WeBS data for the Stour and Orwell Estuaries (summarised in Table 7.4 of the ES, with a further species-specific analysis in Table 7.5 of the ES). The only breeding qualifying feature of the SPA and Ramsar site is avocet, which does not breed in Bathside Bay or on the land surrounding the Bay. The shadow appropriate assessment concludes that AEol on the SPA and Ramsar site can be excluded for Phase 1, but clearly cannot be excluded for the project as a whole.

The comment made by Natural England in its letter to TDC was discussed further in the meeting on 9 February, specifically the assertion that *“the conclusion of no AEol does not fully consider the current potential for SPA and SSSI features, or other protected or priority waterbird species, within the designated areas adjacent to the proposed Phase 1 work areas”*. Natural England’s stated position is that *“the appropriate assessment is incomplete and does not make a complete assessment of the effects based on the best reasonably available information”*.

In exploring this point, Natural England referred to the waterbird data collected in connection with the Galloper O&M facility. As noted in Section 1, these data are not published or publicly accessible and, therefore, the ES and shadow HRA were supported by the most recent WeBS data and low water count data, which provide a full and up to date understanding of the ecological value of the site using data that can be verified by third parties (i.e. the assessment does use the *“best reasonably available information”*).

Nevertheless, HPUK does have access to some of the data gathered in connection with the Galloper O&M facility and, given Natural England’s challenge to the sufficiency of the data and the discussion at the meeting, it is assumed this represents (at least some of) the data Natural England is referring to. These data are discussed below.

Waterbird surveys within and adjacent to Bathside Bay were undertaken over the periods October 2018 to June 2019 and October 2019 to March 2020. Two surveys per month were undertaken at low water (over the period -1.5 hours to +1.5 hours around the time of predicted low water) with one survey per month over the mid tide period (from 1.5 hours to 4.5 hours after or before predicted low water). On each survey, counts were divided into one hour time slices (e.g. -1.5 hours to -0.5 hours before low water, -1.5 hours to +0.5 hours around low water, +0.5 hours to +1.5 hours after low water). Bathside Bay was counted in sectors covering the whole of the intertidal area and the shallow subtidal area, but also including any birds observed roosting on the land surrounding the bay.

Using the raw count data from surveys undertaken for the Galloper O&M facility, for each of the low and mid tide counts, the total number of waterbirds recorded has been calculated and the mean peak number of waterbirds identified. The following summarises the conclusions of this analysis:

- a) The low tide mean peak is 1,478 waterbirds. Using the same five year mean peak (2012/13 to 2018/19) low water count data for the estuarine system as presented in the ES (Table 7.7) for context, this represents 2.6% of the Stour and Orwell estuarine system population. This very

closely agrees with the analysis of the low water population supported at Bathside Bay in the context of the estuary system presented in section 7.2.4 of the ES (2.8% of the estuarine population).

- b) The mid tide mean peak is 1,830 waterbirds. There are no directly comparable mid tide data from other sources but, adopting the same analysis presented in item a), this represents 3.2% of the low water estuarine population (five year mean peak (2012/13 to 2018/19)).
- c) As reported in the ES (section 7.2.4), the equivalent comparative data reported in the 2003 ES (which supported the original application) and the 2010 Supplementary Environmental Report (which supported the subsequent extension of time permissions for BBCT and SBH granted in 2013) confirmed that the low water count in Bathside Bay represented up to 2.4% (2003 ES) and 3.6% (2010 SER) respectively.
- d) The above analysis of the data available to HPUK from the Galloper O&M facility surveys confirms the conclusion of the ES that the current low water population aligns closely with the comparative data from the 2003 ES and the 2010 SER (and certainly does not demonstrate that the importance of Bathside Bay has increased in the context of the estuarine system).
- e) A comparison of the Galloper O&M facility data with the WeBS core count data is less valid because the latter data represents waterbird usage around the time of high water. However, when assessed in the context of the WeBS core count data, the mid tide mean peak of 1,830 waterbirds recorded in the Galloper O&M facility data represents approximately 3.3% of the Stour and Orwell estuarine winter peak population (54,781 birds; see Table 7.4 of the ES). Again, this very closely aligns with the conclusion of the analysis of the WeBS data in the ES (paragraph 9 of section 7.2.3) which states that the mean peak of the high tide waterbird assemblage in Bathside Bay (2015/16 to 2019/20) represented 3.4% of the mean peak count in the Stour-Orwell Estuary SPA.
- f) Although not related to the Galloper O&M facility data, with respect to the usage of Bathside Bay at high water we reiterate the point made in our letter of 8 February. The analysis of the high water data shows that the current waterbird assemblage at Bathside Bay is lower than that reported in the 2003 ES. Paragraph 8 of section 7.2.3 of the ES notes that *“Overall, the waterbird assemblage in the Stour-Orwell estuarine system appears to be lower in recent years (43,065 individuals, 2015/16 to 2019/20) than the mean peak of c.57,000 over the 1995/96 to 1999/00 period reported in the 2003 ES and 2010 SER. Reflecting this trend, the mean peak at Bathside Bay (1,473 individuals, 2015/16 to 2019/20) is lower than that reported in the 2003 ES and 2010 SER (c.3,300 individuals, 1995/96 to 1999/00)”*.
- g) It is important to note that the Galloper O&M facility data include counts of waterbirds in the shallow subtidal areas to the north of Bathside Bay. This strengthens the conclusion that the waterbird population based on the results of the Galloper O&M facility counts, when assessed in the context of the estuarine system, is no greater than that reported and assessed in the ES and shadow HRA.

With regard to sufficiency of the Little Oakley managed realignment site, Natural England states that *“we do not consider that the current evidence provides the confidence to conclude that the proposed managed realignment at Little Oakley would still secure adequate compensation for the loss of Bathside Bay”*. This was also one of the key points discussed at the meeting.

In response, and informed by the above analysis, we conclude the following, which tend to enhance the certainty of the conclusions that HPUK's expert team have established:

- i. The waterbird data presented in the ES, and which supports the shadow HRA, represents the best reasonably available information.
- ii. All the data, including that collected for the Galloper O&M facility, demonstrate that the importance of Bathside Bay in the context of the estuarine system is, at most, comparable to that prevailing at the time of the 2003 ES and 2010 SER that supported the positive decisions on the previous applications.
- iii. Based on current ecological value of Bathside Bay, there is no reason to suggest that the Little Oakley managed realignment site does not represent sufficient compensatory measures.
- iv. The Galloper O&M facility data includes waterbirds in the shallow subtidal area to the north of Bathside Bay. Because the inclusion of that area in the counts does not change the conclusion regarding the importance of the populations at Bathside Bay, the conclusions of the shadow HRA are unchanged and the sufficiency of the managed realignment site is maintained.

In the meeting on 9 February, Natural England stated that the shadow HRA does not draw all of the information together to enable the competent authority to undertake its HRA. We strongly disagree with this point given that section 25 of the ES:

- presents the current conservation objectives and qualifying features of the relevant designated sites.
- provides a LSE screening assessment for the whole project.
- presents a shadow appropriate assessment in the context of Natural England's Advice on Operations and supplementary advice on conservation objectives.
- includes assessment of the potential effects on the qualifying features of the relevant designated sites, supported by the best available evidence (as discussed above).

In light of the above, and given Natural England does not present any specific evidence to suggest a contrary position, it is difficult to understand the rationale for Natural England's statement regarding the sufficiency of compensatory provision represented by the proposed managed realignment at Little Oakley. Based upon the data supplied by HPUK and the absence of contradictory data, a high degree of scientific confidence can be placed in the information supplied in the application when concluding as to the sufficiency of compensatory habitat.

• **Completeness of the Appropriate Assessment**

We do not understand the relevance of references to compensation at a ratio of 1:1 or below. HPUK has always proposed a ratio of provision well in excess of 1:1, which was based upon the need to accommodate larger assemblages as originally assessed. The approach that HPUK has taken is appropriate having regard to the up to date assessment reported in the application, and when the further justification of that information as reported above is taken into account. This is considered further below.

The predicted impact of the BBCT and SBH is a direct loss of 69ha of intertidal habitat and reduced exposure of approximately 3ha of designated intertidal habitat due to effect on tidal propagation. As reported in the CMMA/CMMD, the Little Oakley managed realignment is predicted to deliver 105ha of a mixture of intertidal mudflat, mudflat/saltmarsh transition and saltmarsh (with an additional 5ha of sand / shingle habitat). The total managed realignment site is 138ha, with the balance including fresh/brackish water habitat and the new borrow dyke system. The compensation ratio is therefore 1.7:1 to 1.8:1 and not, as Natural England suggests, less than 1:1.

Natural England states that *“It is unlikely that the compensation measures will be 100% effective in reinstating structure and functionality of the supporting habitats for designated site features of the Stour and Orwell SPA and/or maintain the coherence of the national site network”*. We emphasise that the managed realignment proposal was developed specifically to account for uncertainty in effectiveness, and this has been expressly acknowledged from the outset. Therefore, no criticism should be made of measures that are already designed to take account of the need for confidence in relation to effectiveness. Indeed, the 2003 ES for the Little Oakley managed realignment states:

“...there is likely to be some uncertainty in the confidence with which the compensatory habitat will be able to support the affected qualifying features. In order to address these uncertainties, the ratio of compensatory habitat to that which is lost may be increased; the magnitude of increase is subject to the level of uncertainty involved, time lag and spatial displacement...it is proposed to create a larger area of intertidal than would be required in a like-for-like situation (i.e. a 1:1 replacement of intertidal area). Hence, the proposal is to create approximately 105ha of intertidal area as opposed to the 69ha that would be lost at Bathside Bay”.

The Inspector’s report in respect of the BBCT Inquiry (23 March 2005) records, at paragraphs 2.57 to 2.67, the agreed position on nature conservation between various parties, including Natural England (at the time, English Nature). Paragraphs 2.66 and 2.67 record:

“2.66 EN is of the opinion that, should BBCT and the managed realignment be allowed, the package of compensatory measures agreed would be both appropriate and necessary to secure the coherence of Natura 2000 (the Europe-wide network of SPAs and Special Areas of Conservation). This is without prejudice to the decision of the SoSs under reg.49 of the Conservation (Natural Habitats, &c.) Regulations 1994.

2.67 EN and the RSPB agree the contents of the CMMA. This document deals with the implications of BBCT for the designated status of the Stour and Orwell Estuarine system, as well as for protected species. It describes the proposed mitigation and compensatory measures and their objectives and details proposals for monitoring the Stour and Orwell estuarine system with respect to nature conservation. Proposals for monitoring the development of habitats and the numbers and distribution of water-birds within the proposed managed realignment scheme, as well as the effects of the managed realignment on the designated status of the Walton Backwaters, (Hamford Water SPA, Ramsar site and SSSI), are also detailed”.

At paragraphs 18.146-18.165 the Inspector sets out his conclusions on the Little Oakley compensation scheme including his overall conclusion (accepted by the Secretary of State) that it *“would represent the necessary compensatory measures that would need to be taken to ensure protection of the overall coherence of Natura 2000, in accordance with Reg. 53 of the Habitat Regulations”*.

HPUK considers that the above position applies with equal force to the present day. This matter is addressed in detail in section 25.6 of the ES, which considers the characteristics of the compensatory habitat in light of current Defra and Natural England guidance (February 2021) titled *Habitats regulations assessments: protecting a European site*.

HPUK notes that Natural England has not given any express reason for diverging from its publicly expressed position in 2004. Importantly, Natural England has also reaffirmed this position, most recently on 14 February 2013 when the planning permissions for BBCT and the SBH were renewed (application reference numbers: 10/00292/FUL and 10/00203/FUL). Again, there is no specific reason given for any divergence from Natural England’s 2013 view.

- **Defra Best Practice Guidance**

HPUK's view is that the draft principles referred to in Natural England's letter are satisfied by the managed realignment proposals.

- **Coastal Concordat**

Prior to the implementation of Phase 2 of BBCT there will be a need to secure appropriate marine consents. At that point HPUK will engage with the Marine Management Organisation (MMO) and the relevant information will be supplied to support those applications.

- **Delivery of Suitable Compensation**

If the Application is granted, Regulation 68 of the Habitats Regulations ("Regulation 68") requires that the LPA "*secure any necessary compensatory measures are taken to ensure that the overall coherence of [the national site network]*".

The question as to whether the proposed compensation at Little Oakley is suitable has already been addressed above, as has NE's comment in relation to the draft best practice guidance. HPUK is proposing that the compensatory measures will be secured by a combination of the following:

- a) a requirement in paragraph 3.1 of Schedule 1 of the Section 106 to let a contract securing the implementation of the Little Oakley Managed Realignment Scheme prior to the commencement of Phase 2 of the development, which is the point at which an adverse effect on the integrity of the SPA would occur; and
- b) the obligations placed on HPUK by a deed dated 15 October 2004 between Harwich International Port Limited, Harwich Haven Authority, The Environment Agency and English Nature (which became Natural England in 2006) to deliver the compensation (and mitigation) works in accordance with the specifications and timescales set out in that document.

Should the application be granted, HPUK will therefore be under a clear legal obligation to deliver the compensation (and mitigation) works. NE is therefore incorrect to suggest that such delivery is uncertain or that timings are unclear.

It is then important that the compensatory habitat is identified – as it has been throughout. However, nothing in Regulation 68 nor in the guidance issued by the Department for Environment, Food & Rural Affairs requires that planning permission for the compensatory development at Little Oakley must be in place at the time that this planning application is determined. The requirement under Regulation 68 is simply that compensatory measures are "secured", and the LPA can be satisfied that this is the case on the basis of the two legal agreements referred to above. HPUK will be precluded from commencing that part of the development that is predicted to cause an adverse effect on the integrity of the SPA and Ramsar site until it has let a contract for the construction of the managed realignment scheme, and it will then be obliged to carry it out under the terms of the 2004 CMAA/CMMD.

On this basis, HPUK strongly disagrees with NE's statement that "*limited weight can be given to the sufficiency and deliverability of the compensation measures in any decision making*". This is because the sufficiency is shown and has long been accepted and that there is an entirely normal and conventional mechanism in place to secure their delivery. Decision making may safely proceed.

3. Landscape

With reference to Natural England's comment that 'impacts to the setting of the AONB require due consideration':

Para. [12.1.3.19](#) of the LVIA review outlines the 2015 Partnership Position Statement in relation to development within the setting of the AONB. The LVIA review considers, on the basis of this statement, that the site is within the setting. It should be noted that this Statement pre-dates the 2020 extension of the AONB, although the Statement itself does not define the geographical extent of the setting (para. [12.3.2.5](#)).

The LVIA review concludes that development will not result in any direct landscape effects on areas within the AONB, including those within the 2020 extension. Effects will arise on the setting through noise and movement (perceptual effects on landscape character) and through a change in view (visual effects). The 2003 LVIA states that an 'in overall terms' the effect on the AONB is 'locally Moderate'; the LVIA review concludes (para. [12.3.2.10](#)) that "*it is considered that the effect of Moderate significance on the AONB can be regarded as being applicable to the impact on the AONB setting*".

This conclusion takes account of the perceptual influence of the development on the designation, but also the acknowledged presence of existing port infrastructure in views from the AONB, which have increased around Felixstowe since 2003. It is supported by an analysis of the 2003 viewpoints within both the pre- and post-extension boundary of the AONB. Viewpoint 7 (Shotley Promenade) is located within the latter; the 2003 assessment noted visual effects of major significance, which are considered to adequately represent those at this closest point of the designation.

With reference to NE's comment on the validity of the 2003 findings in relation to changes in industry guidance and planning policy:

Changes in planning policy, including the NPPF and references to designations including AONB, are noted the LVIA review. This includes the 2012 National Policy Statement for Ports, which states that whilst 'due regard' should be given to designations such as AONBs, but "*the fact that a proposed project will be visible from a designated area should not in itself be a reason for refusing consent*".

The LVIA review acknowledges the changes in guidance since the publication of the original assessment. However, as stated in Section 12.3, the overall conclusion is that the 2003 findings are robust and based on a rigorous, comprehensive baseline analysis. Whilst there have been minor changes in terminology and semantics, the overall methodology and conclusions—including significant effects reported for a number of receptors—remain sound. This 2021 review also considers changes to the baseline since 2003, which encompasses elements ranging from increased port infrastructure, additional housing development and enhanced levels of screening by vegetation that has matured over time.

Based on our comments set out above, we consider that Tendring District Council can and should proceed to a positive determination of these planning applications which, as recognised by Natural England in our recent meeting, the Council has the discretion to do.

Should you have any queries on or wish to discuss any of the points within this letter, please do not hesitate to contact my colleague John Bowles or me by return.

Yours sincerely



Emma Andrews
Director