

The Planning Inspectorate
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Date 15 September 2014
Your ref EN010049
Our ref WADDINGTONJ/124792-
000051
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Dear Sirs

**Application by Tidal Lagoon (Swansea Bay) Plc for an Order granting
Development Consent for the Tidal Lagoon Swansea Bay
Our client: St Modwen Developments Limited
Our client's Interested Party Reference: 10026470**

We refer to the Hearing Agendas in relation to the Issue Specific Hearings scheduled for 16th-18th and 23rd September 2014. We write on behalf of our client as set out above.

These written representations therefore set out our client's position on the agenda items. Please note that our client will be attending the issue specific hearings for as much time as possible. However, they may not be able to be present all of the time and will not have their technical experts with them. If the Panel has questions for our client or if our client wishes to make further comments on matters raised at the issue specific hearings then our client will do so either orally, at a later date (if requested by the Panel) or in writing, by the deadline for receipt of written summaries of oral cases (7 October 2014).

We ask the Panel to treat the representations set out in this letter as duly made representations to be taken into consideration prior to the Panel concluding its report to the Secretary of State. We comment by reference to the relevant agenda item.

Day 1 – Tuesday, 16 September

**Item 3 New/Additional Information and Examination Procedure
vi. New Plan of Proposed Piling Activity July 2014 (Applicant's
Response to Written Questions Appendix 3.7.1)**

We are not satisfied that the Applicant has adequately considered the potential impact of piling activity on the SUBC as a result of the proposed development and it should do this.

The Swansea University Bay Campus (SUBC) is not identified in the Plan of Proposed Piling Activity.

SUBC is particularly susceptible to noise and vibration as it is to be the location of highly sensitive scientific equipment. This was highlighted to the Applicant in paragraph 4.1.10 of the Written Representation of Swansea University dated 9 July 2014 (the Written

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Representation). However, it would appear that the impact on SUBC has not been assessed and it should be.

We would also ask that another Requirement be imposed to require approval of a scheme for the implementation of noise nuisance mitigation during both construction and operation of the development. We support the inclusion of proposed Requirement 19 of the draft DCO, to require approval of a piling method statement and proposed Requirement 18, which relates to requiring a scheme for noise monitoring during construction. However, these fall short of addressing our concerns as they do not cover noise mitigation during both construction and operation.

We also submit that the draft DCO should not provide the Applicant with a defence against claims of statutory nuisance as it currently does. Noise is a concern, not only for the reasons set out above, but also, generally, in terms of disturbance for occupiers of the SUBC which also has a residential element in the form of student accommodation. On this basis, it is unacceptable to include such a defence in the DCO. Please see paragraphs 8.1.1-4 of our Written Representation on this point.

Item 4.5 Decommissioning (Article 40)

- i. Need for decommissioning measures in the case of decommissioning before the end of the stated life of the project, and DCO/Development Consent Obligation (DCOb) provisions to secure delivery of appropriate decommissioning/appropriateness of timescale in revised Article 40**

Inadequate detail has been provided in relation to the decommissioning process of the development (be this at the end of the lifetime of the permission or as a result of non-operation prior to this), including its funding. We reiterate paragraph 4.1.12 of our Written Statement.

It is our submission that a bond to cover decommissioning should be put in place prior to the commencement of development and that this bond should also cover other matters such as contamination events, remediation, mitigation requirements (see mitigation measures below – Item 4.6) and any liability or losses suffered by us as a result of having to restrict occupation of the SUBC as a result of the development.

The bond should be put in place prior to commencement of development: We note that a Requirement for a funded decommissioning strategy has been included at article 40 of the draft DCO and support this inclusion (having proposed the same at paragraph 4.1.12 of our Written Representation). However, as presently drafted the submission of a decommissioning scheme is not triggered until the forty-fifth (45th) year of operation of the development and payment into the decommissioning fund only begins from the fiftieth (50th) year of operation.

This is unacceptable because there is a risk that decommissioning is needed before that time, if the project is not successful, particularly as:

- (a) This is a new and untested area of technology which has the potential to cause very significant impacts on a huge area; and
- (b) We (and others) have legitimate concerns about the Applicant's financial standing and the viability of the project.

As set out in paragraphs 4.1.7 and 5.11.1-5 of our Written Representation, the Applicant has not demonstrated that its financial forecasts are within a reasonable range of

sensitivity. Associated British Ports (ABP) has also raised concerns as to the lack of information as to the Applicant's viability in that its financial standing to compulsorily acquire all necessary land and then construct, complete, maintain and decommission the development has not been demonstrated. Please see the Written Representation of Associated British Ports dated 9 July 2014 (ABP Written Representation) at paragraph 9.1. Accordingly it is our submission that a bond to cover decommissioning should be put in place prior to commencement of development.

The bond should not just cover decommissioning but also other issues of concern: In our Written Representation we propose that a bond be put in place to cover the cost not only of decommissioning but also the cost of complying with notices under Article 18 of the proposed DCO (which we note has been removed but should not have been), together with contamination events and remediation which are considered below. Please see paragraph 9.1.1.3. On the basis that there are other aspects of the development that may require mitigation and the funding for such mitigation should be secured, a bond should be put in place with allocated funds to cover all concerns rather than just a fund limited to the purposes of decommissioning.

ii. Necessity for a decommissioning fund to provide against impacts of early decommissioning

We would ask that (as per Preesall) the Examining Authority require either that the DCOb imposing the bond and/or decommissioning fund is completed in advance of the DCO being closed or that the DCO is contingent upon the signing of the DCOb (considered in relation to Item 4.6).

This approach is supported by the Preesall Saltfield Underground Gas Storage Report and recommendation of the Examining Authority (Preesall), particularly at paragraph 5.58. In Preesall, we note that the Panel was satisfied that a Section 106 Agreement was sufficient to secure funding as the amounts agreed were to be in place prior to the commencement of development and appropriately secured by way of legal charge. We would support this approach.

Item 4.6 The Development Consent Obligation

i. Identifying the key aspects of mitigation the DCOb would contain

We believe that the key aspects of mitigation necessitated by the development are best placed in the DCO, not in a DCOb.

In our Written Representation we have identified a range of issues upon which further investigation and assessment are required, particularly in relation to coastal processes. Of course, such investigation and assessment will need to take place as soon as possible or at least as preconditions to the development. Where these investigations or assessments reveal that mitigation measures are necessary, which is not yet apparent, we would hope that delivery of the same would be the subject of a Requirement in the DCO.

A DCOb is a Section 106 Agreement, or a deed, and as such only remains enforceable for 12 years. We therefore do not believe that a DCOb is an appropriate vehicle for securing obligations extending into and after the lifetime of the development. While a DCOb may be appropriate for preconditions to development or the payment of contributions it may not provide an enforceable method of securing, for example, monitoring or mitigation

measures intended to last for many years and these would need to be included in the DCO.

The mitigation measures we propose are as follows, save that further issues may be added as investigations and assessments are conducted. We note that the following have not been included in the Applicant's DCOB Heads of Terms dated February 2014 (DCOB Heads of Terms) save where indicated:

- Mitigating measures in respect of noise, dust, vibration and light in respect of the use of the SUBC (paragraph 4.1.9-10 of our Written Representation).
- Impact of the Development on the management of the SSSI generally and in particular with reference to our obligations under a planning obligation in relation to SUBC (paragraph 4.1.2 of our Written Representation).
- Monitoring of the Development. We are very willing to assist in agreeing a process for this (paragraph 4.1.11 of our Written Representation).
- Mitigation measures to prevent eutrophication and siltation of the beaches (including appropriate security, we propose by way of bond) (paragraph 5.3.3 of our Written Representation).
- Mitigation measures for contaminated water in the event that effluent from the extended foul waste water outfall outside the lagoon wall is sucked back into the lagoon (including appropriate security, we propose by way of bond) (paragraph 5.3.4 of our Written Representation).
- Mitigation measures should the existing water quality status of the beach areas be adversely affected by the construction of the Development (paragraph 5.3.9 of our Written Representation). We note the DCOB Heads of Terms to provide a scheme to regulate bathing waters within the vicinity of the project (paragraph 6.4) and we support this obligation. But we believe this needs to go further, to deliver mitigation measures.
- Mitigation for the recreational pressures from increased visitor numbers on the SSSI (paragraph 5.4.5 of our Written Representation). ABP have also raised concern as to the practical implications of the introduction of the general public to areas not currently accessible (paragraph 6.1 of the ABP Written Representation).
- Mitigation for the further impacts that may arise from the recreational use of the tidal lagoon by reference to the legal obligation through the SUBC Section 106 Agreement to manage the additional recreational pressures on the SSSI caused by SUBC (including appropriate security, we propose by way of bond) (paragraphs 5.4.6-7 of our Written Representation).
- Monitoring and mitigation for the consequences of the proposal on the coastal processes with Swansea Bay and particularly those impacting upon the SSSI (including appropriate security, we propose by way of bond) (paragraph 5.6.3-5 of our Written Representation).
- Monitoring and mitigation to protect the environment from increased localised algal blooms around the barrage (including appropriate security, we propose by way of bond) (paragraph 5.8.8 of our Written Representation).

- Construction Environmental Management Plan and Operation Environmental Mitigation Plan to be agreed with the relevant authority prior to the carrying out of dredging but to be expressly required to include details and appropriate mitigation in relation to the sediments and deposits within or outside of the lagoon and including maintenance dredging, where required (including appropriate security, we propose by way of bond) (paragraph 8.1.6 of our Written Representation).

In addition we have proposed a series of Requirements in paragraph 9 of our Written Representation. Should the Examining Authority be minded to grant the DCO without including such Requirements listed at paragraphs 9.1.1.1, 9.1.1.2, 9.1.1.7 and 9.1.1.9 (insofar as it relates to post-construction and operational monitoring) we would seek to secure the same in a DCOB although we believe these are better placed in the DCO. Please note that the other proposed Requirements listed in paragraph 9 are preconditions to development and so would not be suitable for inclusion in a DCOB and should be in the DCO.

We note that the DCOB Heads of Terms include an obligation under paragraph 6.3 to work with us to secure a programme of comprehensive ecological enhancements. We would support this and encourage the Applicant to include NRW in the agreement of a suitable programme.

ii. Whether consent should be dependent on the signing of a DCOB

We strongly believe that any DCO must be contingent upon completion of the DCOB. To allow otherwise gives rise to two risks:

- a) that the liability envisaged by or otherwise provided for by the DCOB may arise in advance of completion of the DCOB; and
- b) that the DCOB is not entered into at all, because, for example, negotiations of the DCOB stall (there being no real incentive on the Applicant to complete it) or the Applicant becomes insolvent prior to completion of the DCOB.

Item 5 Effect of the Lagoon on Coastal Processes within Swansea Bay

We have serious concerns in relation to the modelling behind and conclusions reached by the Environmental Statement in relation to the likely impact of the development on coastal processes, including: the overall sediment movement within the Bay region, the impact on water quality and heavy metals, the consequent tidal patterns within the Bay, the impact on fine sediments and in particular the mud that may build up on the beaches inside the Lagoon. We reiterate our concerns as set out in our Written Representation (paragraph 2.2.1 of our Written Representation).

**Item 5.4 Potential physical consequences for
ii. Crymlyn Burrows**

Insufficient assessment has been made of the effect upon the SSSI at Crymlyn Burrows, please see paragraph 5.4 of our Written Representation. NRW, in its Written Representation dated 9 July 2014 (NRW Written Representation), states that qualifying features of the Crymlyn Burrows SSSI could be adversely impacted and that the impact assessments, monitoring and mitigation measures are not sufficient (paragraph D1 of the NRW Written Representation).

In particular, in our view the Applicant has not addressed how the development may impact upon our liability to manage the SSSI pursuant to the SUBC planning obligation and any potential additional liability thereunder as a result of the development. Please see paragraphs 4.1.2 and 5.4.6 of our Written Statement. At paragraph 9.1.1.4 of our Written Representation we propose that this concern is dealt with by Requirement. NRW has also raised concern in relation to our management obligation and securing the proposed lagoon wardening which has not been included in the DCOB Heads of Terms (paragraph D1.10).

In relation to Item 4.5 above we refer to a bond to be put in place by the Applicant and funds therein allocated for different purposes. One of these purposes would be to make good any damage to the SSSI.

In relation to the above, therefore, we concur with and support the findings of NRW in the NRW Written Representation.

Item 5.5 Mitigation and Monitoring

We would ask that the bond referred to in item 4.5 also cover remediation from contamination arising from the development.

Contamination is a key concern which flows from a number of aspects of the development as considered below. Each of these issues will require monitoring and, should contamination arise, appropriate remediation. The NRW Written Representation states that coastal processes are not adequately robust and that the monitoring measures identified are not sufficiently broad in scope (please see paragraphs E1 and E1.25 of the NRW Written Representation).

We share NRW concerns and add that in the event that appropriate schemes for monitoring and mitigation are agreed, the financial viability of the Applicant to meet the costs of the same is not certain. Therefore the funds placed in the bond referred to in relation to Item 4.5 above, should also be allocated for remediation of contamination arising from, but not limited to, any of the following methods:

- Geotubes used in the construction process will be filled with potentially contaminated materials obtained through the dredging process. The geofabric is at risk of leaking such materials and no testing of such materials in a marine environment has been undertaken to assess this risk (please see paragraph 4.16 of our Written Statement).
- The disturbance of the seabed as a result of the development and associated dredging, also poses a contamination risk due to the presence of high densities of heavy metals and other contaminants within the sediment. Please see paragraph 5.2 of our Written Representation.
- We note that the outfall pipe is now to be extended so that it discharges outside of the lagoon. However, a risk still remains that raw sewage will end up within the lagoon (please see paragraphs 5.3 of our Written Statement).
- The development poses a risk of sediment movement which could result in muddying of the foreshore. (Please see paragraph 5.1 of our Written Statement, where we also suggest potential mitigation measures).

The development will in the long term alter the existing balance of wave and tide driven sediment movements in Swansea Bay. The nature of changes will require modelling, please see paragraph 5.6 of our Written Statement.

In relation to the above therefore, we again endorse and support the findings of NRW in the NRW Written Representation.

Day 2 – Wednesday, 17 September

Item 9.2 Recreational Use of the Lagoon

We ask that a Requirement be included in the DCO that the Developer be required to consult with the University to agree security measures to be put in place to safeguard students at the SUBC. There will shortly be approximately 2,000 students at the SUBC. We are concerned about the safety of those students who will have direct and easy access to the lagoon structure and the cycle path along it at all times of day and night. The University has a duty of care in respect of its students whose safety is paramount. The University also has considerable experience in looking after students. For these reasons it is absolutely critical that the Developer discuss and agree with the University measures which need to be put in place to safeguard the wellbeing of those students. Please see paragraph 3.2 of our Response to Written Representation dated 5 August 2014.

We also ask that a Requirement be included in the DCO to provide and maintain security measures in relation to visitors to the Development and areas in the vicinity of the Development.

We are generally concerned for human safety in relation to the use of the lagoon.

ABP also have concerns in relation to the introduction of the general public to this area, please see paragraph 6.1 of the ABP Written Representation. ABP propose a protective provision in this regard, please see paragraph 12.2 of the ABP Written Representation.

The NRW Written Representation also refers to lagoon wardening and how this is to be secured (paragraph D1.10 of the NRW Written Representation).

We also request that there be a Requirement in the DCO that the Developer not make any byelaws pursuant to the DCO which restrict the use of the foreshore by residents, employees or visitors to the SUBC.

Day 4 – Tuesday, 23 September

Item 16.1 Crown Land

We note that consent to lease of the Crown land is one of the consents required prior to the grant of the DCO but has not yet been secured. If the same is not secured, considerable time and cost will have been expended by us and the other Interested Parties in participating in the DCO process which will then be wasted. We feel very strongly that the Developer ought to have secured this consent in advance of pursuing a DCO and that in the absence of that consent this DCO process is premature.

Item 16.2 Extent of Plots Required

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We have found it difficult to interpret the plans submitted by the Applicant and would find overlay plans useful to determine the precise locations of works proposed. The ExA is therefore requested to ensure that adequate clarification is secured from the Applicant on this point such that there can be no doubt as to the extent of the plots that will be required for the scheme to be implemented.

Item 16.5 Progress on Protective Provisions

In our Written Representation we submitted a series of proposed Protective Provisions, at paragraph 10, which we reiterate.

We would be grateful if these representations are noted and addressed before any recommendation is made to the Secretary of State.

Yours faithfully

Eversheds LLP