

The Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

The Able Marine Energy Park Development Consent Order

Planning Inspectorate Reference: TR030001

C.GEN Killingholme Limited (Interested Party reference: 10015531)

Responses to the Examining Authority's second written questions

INTRODUCTION

1 This document ("WR4") has been prepared on behalf of C.GEN Killingholme Limited ("C.GEN"). WR4 relates to the application by Able Humber Ports Limited ("Able") to the Secretary of State for the Able Marine Energy Park ("AMEP") Development Consent Order ("DCO") and sets out C.GEN's responses to the Examining Authority's second written questions included at Annex A to its letter dated 17 August 2012 ("WQs").

2 These responses are made further to:

2.1 C.GEN's first written representation submitted on 29 June 2012 ("WR1");

2.2 The written summary of C.GEN's representations at the Issue Specific Hearing submitted on 23 July 2012 ("WS1");

2.3 C.GEN's second written representation submitted on 27 July 2012 ("WR2"); and

2.4 C.GEN's third written representation submitted on 3 August 2012 ("WR3").

3 C.GEN continues to consider the DCO application, including the representations made by other parties on 27 July and 3 August 2012. C.GEN therefore reserves the right to amend, or add to, the representations contained in WR1 to WR4. This submission is also without prejudice to C.GEN's general objections notwithstanding any suggestions or representations made in respect of shortcomings in the DCO or the application.

RESPONSES TO THE EXAMINING AUTHORITY'S SECOND WRITTEN QUESTIONS

4 Introduction

4.1 While the Examining Authority has not directed any questions primarily to C.GEN's attention, to assist the Examining Authority C.GEN has provide a response to those questions that raise issues in which it is concerned. C.GEN expects to comment on any responses.

4.2 Where C.GEN has not expressly commented upon a particular matter stated by Able (or any other party) it does not mean that the point is accepted. C.GEN continues to object to Able's application.

5 **Response to WQs for Able**

Funding Arrangements

Q53. None of the sources identified as being responsible for funding are a direct party to the application. Could the applicant therefore confirm how sufficient, necessary funds are to be secured, guaranteed and drawn upon within the terms of any compulsory acquisition provisions incorporated within the draft Development Consent Order?

Q54. In particular, does the applicant intend to secure a formal legal agreement with the Elba Group covering covenants to AMEP from Elba Group for compensation payments or possible claims for blight?

Q55. Given that the cost of the project as estimated by AMEP is £450m, and the Elba Group's assets are estimated as in excess of £300m, how are the necessary assets over liabilities to be maintained and demonstrated to be maintained?

Q56. Acknowledging the Secretary of State's role under article 13 in consenting any transfer, what provisions are proposed to secure and maintain funds for compulsory acquisition in the event that it became necessary or desirable for the Elba Group to seek to dispose of AMEP and thus transfer the benefit or partial benefit of any DCO granted?

Q57. To what extent is the funding dependent on a contribution from the Regional Growth Fund and the European Regional Development Fund?

5.1 C.GEN welcomes these questions and awaits Able's response with concern in that it requires certainty on these very points in its own discussions with Able. C.GEN has raised concerns regarding the ability of Able to meet its obligations and liabilities in the absence of parent company guarantees and other appropriate mechanisms at the Issue Specific Hearing on 12 July 2012 and at paragraphs 9.1 to 9.3 of WS1.

5.2 C.GEN wishes to emphasise that these are genuine concerns. C.GEN is not seeking to question the soundness of Able as a company. However, should Able's DCO application be successful Able will face unquantified - and unlimited - liabilities. These could potentially include payments to its neighbours to compensate for a failure by Able to carry out its obligations, such as the cost of additional dredging that may be required, or compensation for any loss or diminution in value caused by the compulsory acquisition of the Killingholme Branch Line (the "Railway"). In seeking to meet these liabilities Able will not have the ability to call on the resources of its related companies without a parent company

guarantee. The Examining Authority should not grant the application for the DCO without ensuring not only that such an arrangement is in place but that the guarantee is given by - and maintained by - a person of considerable substance, in line with the level of financial and commercial exposure C.GEN might face, more specifically in the case of operational disturbance or even the halting of production at its power plant (see also paragraph 6.1 below).

- 5.3 As well as a parent company guarantee, it is imperative that protective provisions are included in the DCO that provide financial protection for C.GEN, C.RO Ports Killingholme Limited and other affected parties should they incur loss or expenses as a result of the construction or operation of AMEP. These protective provisions should also secure an indemnity attached to any AMEP undertaking against any loss or damage incurred by the parties to whom the provisions apply by reason or in consequence of the construction, operation, or maintenance of AMEP. C.GEN refers the Examining Authority to the draft protective provisions for C.GEN included in the Paper of Amendments appended to WS1. As well as ensuring that Able is financially responsible, these protective provisions will also bind any future operator of AMEP.
- 5.4 Able's 3 August 2012 response to C.RO Ports Killingholme Limited's first written representation states that it is a long established UK company based on Teesside and the Humber. From what C.GEN understands, this may be the case for commercial entities engaged in Able's Teesside operations, although the financial wherewithal of even those entities cannot be accepted without further data. Whatever the standing of other Able entities, for the Humber the standing of the applicant in this case must not be taken as read.
- 5.5 The applicant is, of course, not Able UK Limited. Instead, the DCO application has been made by Able Humber Ports Limited, which is a special purpose vehicle registered in Jersey - i.e. it is an offshore entity of limited means. No information has been provided regarding its assets, nor as to the identity or assets of the Jersey-registered Elba Group, to which Able is a subsidiary and, according to the Funding Statement provided as part of the application, on whose assets Able is reliant. A review of the Company Registries in both the UK and Jersey reveals a complex ownership structure. Moreover, as noted by the Examining Authority, the estimated costs of AMEP exceed the stated value of the Elba Group's assets. Greater detail is required from Able in relation to its funding arrangements and C.GEN looks forward to Able's response to these questions.

The Railway

Q29...*In its comments on the 'Applicant's written summary dated 1 August Network Rail has stated that -*

NR explained that the precise nature of the works are unclear and that although the explanatory memorandum referred to there being no physical works, the masterplan drawings showed several level crossings which Network Rail could not agree to for safety reasons. The Applicant commented that draft DCO contained provisions for creating a new railway and that this would allow them to create new sidings. Network Rail consider this to be physical works. At the hearing, Network Rail reiterated its fundamental objection to new level crossings detailed in the Written Representation, which are against the policy of both Network Rail and the Office of Rail Regulation (Network Rail's safety regulator).

Given this apparently clear statement, if the Killingholme Branch remains within the National Rail network is the development of the Marine Energy Park on the scale and extent proposed a viable proposition?

5.6 This question reinforces the points that have been made by C.GEN in relation to Able's failure to establish need under section 122 of the Planning Act 2008. C.GEN has already expressed its concerns regarding the need for compulsory acquisition in its previous representations and refers the Examining Authority to paragraphs 3.3 to 3.12 of WR3 and paragraphs 25.10 to 25.27 of WR1.

5.7 C.GEN has seen no explanation as to why AMEP cannot be constructed or operated at the scale and extent proposed unless the Railway is removed from the Network Rail network. Able has provided limited information in its most recent representations submitted on 3 August 2012 about the need to cross the railway at regular intervals to facilitate the movement of large products and components. Still less has it provided operational details so that the effects can be understood and assessed. Furthermore, Able has not provided any detailed proposals regarding the crossing points and has failed to explain why compulsory acquisition is required to facilitate them.

5.8 Able is seeking a great deal of flexibility in relation to the Railway. Able should be required to state the location, number and nature of the crossings that are planned for the Railway and these should be specified as works in the DCO. No information has been provided as to whether AMEP would (or would not) be viable if Able were restricted to one or two crossing points, or were prevented from installing level crossings. No information has been

provided to allow an assessment as to whether the movement of products and operations across the track at regular intervals will affect the ability to run trains along the line. In particular any risk of backlog if trains are forced to stop en route to C.GEN's power plant or C.RO Ports Killingholme whilst they wait for the track to be cleared has not been assessed. C.GEN has genuine concerns in this regard and awaits Able's response to this question with interest.

- 5.9 C.GEN acknowledges Network Rail's opposition to the creation of new level crossings. However further technical details must be provided to establish why Able cannot manage or design AMEP differently to allow it to be operated whilst retaining the Railway under Network Rail control if AMEP is to be approved. As things stand this cannot take place. This information includes detail as to why Able's proposal could not be modified by incorporating mechanisms other than level crossings, such as building bridges or underpasses, rearranging the layout of its development to have a bridge crossing accessed by gentle gradients, or even diverting the Railway. This point was made in detail at paragraphs 25.22 to 25.26 of WR1. Unless Able provides further information in this regard, the Examining Authority cannot be satisfied that Able has fully explored the alternatives to compulsory acquisition.

6 Responses to WQs for Network Rail

Q31. Is it correct that Network Rail is now prepared to offer a lease on the section of track running through the AMEP site?

- 6.1 Whilst C.GEN welcomes the consideration of alternatives to the compulsory acquisition of the Railway, to which C.GEN is strongly opposed, it notes that any lease negotiated between Able and Network Rail must make provision for Able to discharge all the obligations that would otherwise fall on Network Rail (see the points made in relation to C.GEN's potential financial and commercial exposure in paragraph 5.2 above). In addition, C.GEN questions the appropriateness of a company with no other railway operating experience obtaining a lease of a section of track that it has no intention to use, other than to move products and components across it. This is particularly the case when there is a foreseeable and reasonable prospect of use of that same section of track by other parties wishing to transport goods on the Railway.
- 6.2 C.GEN considers that it must be provided with greater detail on any such proposal. That detail must include:

C.GEN Killingholme Limited

6.2.1 How Able will discharge Network Rail's statutory obligations; and

6.2.2 How the interests of C.GEN will be protected.

DLA Piper UK LLP on behalf of C.GEN Killingholme Limited

5 September 2012

- END OF REPRESENTATION -