

The Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

**The Able Marine Energy Park Development Consent Order**

**Planning Inspectorate Reference: TR030001**

**C.RO Ports Killingholme Limited (Interested Party reference: 10015532)**

**Responses to the Examining Authority's second written questions**

## **INTRODUCTION**

- 1 This document ("WR4") has been prepared on behalf of C.RO Ports Killingholme Limited ("C.RO"), which is the statutory harbour authority for, and operator of, C.RO Ports Killingholme ("CPK"). 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.RO'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.RO's first written representation submitted on 29 June 2012 ("WR1");
  - 2.2 The written summary of C.RO's representations at the Issue Specific Hearing submitted on 23 July 2012 ("WS1");
  - 2.3 C.RO's second written representation submitted on 27 July 2012 ("WR2"); and
  - 2.4 C.RO's third written representation submitted on 3 August 2012 ("WR3").
- 3 C.RO continues to consider the DCO application, including the representations made by other parties on 27 July and 3 August 2012. C.RO therefore reserves the right to amend, or add to, the representations contained in WR4. This submission is also without prejudice to C.RO'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 WR4 includes C.RO's response to the four questions directed to C.RO (WQs 41 to 44) and also general observations to assist the Examining Authority regarding questions directed to other parties that raise issues with which C.RO is concerned. C.RO expects to comment on any responses.
  - 4.2 Where C.RO 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.RO continues to object to Able's application.

## 5 Response to WQs for C.RO

*Q41. Is C.RO now satisfied that enough simulations have been carried out to demonstrate that the AMEP development would pose no undue problems for the berthing and un-berthing of vessels at its facility?*

- 5.1 As stated in its previous representations, C.RO was not satisfied with the simulation work submitted with the application. Furthermore, as stated at paragraphs 4.1 to 4.4 of WR3, C.RO is not satisfied that the additional environmental information relating to hydrodynamic modelling and marine simulations provided by Able during the course of the examination provides the level of information required properly to assess the impacts of AMEP. Whilst it is acknowledged that hydrodynamic modelling and simulations have now been carried out in relation to the final iteration of the quay wall design, uncertainties remain. The latest Simulation Report provided by Able demonstrates that no undue problems for the berthing and un-berthing of vessels at CPK were experienced. However, it should be noted that this was carried out with hydrodynamic data which contends that the recirculation has "disappeared" from the upstream end of the AMEP berth. Able's data clearly shows the existence of such recirculation, albeit of lesser magnitude and range. In addition, no data has been provided by Able to establish what effect a 60 metre beam vessel moored to the upstream end of the AMEP quay will have on the tidal flow and/or whether there is a risk that this will bring the recirculation back into CPK's manoeuvring area.
- 5.2 In light of this uncertainty regarding the impact of AMEP on the river regime, C.RO has carried out its own hydrodynamic modelling and marine simulation work at its own cost. As a result of this work C.RO is now satisfied that the AMEP development would pose no undue problems for the berthing and un-berthing of vessels at CPK.
- 5.3 However, C.RO remains concerned regarding the impact of the construction and operational vessel traffic associated with AMEP on C.RO's scheduled arrivals and sailings. These concerns are outlined in further detail at paragraphs 14.2 to 14.13 of WR1, paragraph 13 of WR2 and paragraph 4.15 to 4.20 of WR3. The protective provisions drafted by C.RO and included in the Paper of Amendments appended to WS1 include protection for C.RO to ensure that this vessel traffic does not adversely affect its operations at CPK. It is important to note that the effect of vessel movements upon scheduled sailings is quite separate from the effect of AMEP upon the hydrodynamic regime. The statement in paragraph 5.2 is without prejudice to the continued objection of C.RO and the need for protective provisions.

*Q42. In respect of the scheduled arrivals at the C.RO facility, how reliable are the arrival times especially in the winter months?*

- 5.4 There are a number of factors that come into play that will have an effect on the steaming time between a departure port and arrival at CPK. These factors are not necessarily restricted to winter months. As such, it would not be appropriate to distinguish the winter months from any other period.
- 5.5 C.RO sends a weekly email setting out that week's vessel arrival/sailing schedule in accordance with the respective routes' forward planning. This is circulated to a wide audience, including Humber VTS, tug operators, and C.RO's contracted dredging company. While C.RO's schedule is fairly reliable, which is a precondition for and factor in the port's success, adjustments may be needed from time to time due to factors such as the weather, delays incurred at the loading port, and mechanical issues. However, these are designed to ensure reliability, not the result of any inherent unreliability in the schedules.
- 5.6 Regardless of the reliability of C.RO's schedule, it is important that C.RO's approaches are kept clear at all times, to accommodate the arrival of vessels that have failed to keep to the schedule for the reasons outlined above, or are unscheduled. This is also necessary to ensure that vessels leaving CPK can move off the quay freely. It is not acceptable for vessels associated with AMEP to be sitting in CPK's approaches when a vessel arrives at, or sails from, CPK at a time not specifically scheduled. Furthermore, a number of C.RO's customers have an existing contractual entitlement to a berth on arrival, regardless of the time at which they arrive. C.RO's ability to meet this contractual requirement will be compromised if vessels associated with AMEP are blocking the approach to CPK. C.RO's vessels must take precedence in its own approach channel.
- 5.7 Able has failed to provide any proposals to manage this. It is not the normal procedure for VTS to control vessel movements in a local area, such as the waters around CPK and AMEP, and it is not appropriate for Able to rely on VTS to do so now. VTS do not interfere with the manoeuvring of vessels, or the order in which they move and will not, therefore, address construction or operational traffic movements where there is a local impact on CPK. It is not for VTS to arbitrate vessel priority.

*Q43. In respect of the scheduled departures at the C.RO facility, do the ships shut out cargo and always sail on time or do they wait to complete loading before sailing?*

5.8 The decision of C.RO's customers whether to shut out cargo in order to maintain a scheduled departure, or hold until all cargo has arrived at CPK for loading, will depend on a number of factors. These include the destination (and in particular the steaming time to that destination and whether lost time could be made up), the volume of freight involved, and the commercial impact any delay may have on the route. It is important to note that the decision to employ a shut out scenario remains with C.RO's customers, and not with C.RO.

5.9 This variability reinforces the need for flexibility in relation to movements to/from CPK. There will be occasions where vessels will make unscheduled sailings from CPK and C.RO needs to avoid a situation where these vessels are impeded by construction or operational vessels associated with AMEP sitting in CPK's approaches.

*Q44. How often does C.RO carry out hydrographic surveys of its berths and approach channel and on average how many times a year does C.RO find it necessary to dredge? Does C.RO use contractors for this work or ABP's services?*

5.10 C.RO's dredging requirements for CPK are variable. The variability in the river regime and the number of berths in operation at CPK will both affect the number of times, and extent, that C.RO finds it necessary to dredge. At present C.RO engages the services of a third party to carry out surveys on a monthly basis. C.RO is also currently required to dredge on a monthly basis through the contracted use of a third party. Any dredging carried out is controlled directly by C.RO, and is not left to VTS to manage, nor the River Authority, with the strict undertaking of not interfering with the safe navigation of any vessels stemmed for CPK.

## **6 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?*

6.1 C.RO 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.RO 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 paragraphs 17.11 to 17.15 of WR1, at the Issue Specific Hearing on 12 July 2012 and at paragraphs 10.1 to 10.3 of WS1.

6.2 C.RO wishes to emphasise that these are genuine concerns. C.RO 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 of 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.

6.3 As well as a parent company guarantee, it is imperative that protective provisions are included in the DCO that provide financial protection for C.RO, C.GEN Killingholme Limited and other affected parties should they incur loss or expenses as a result of the construction or operation of AMEP, such as the cost of additional dredging or the carrying out of survey

work. 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.RO refers the Examining Authority to the draft protective provisions 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.

6.4 Able's 3 August 2012 response to C.RO's comments in WR1 states that it is a long established UK company based on Teesside and the Humber. From what C.RO 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.

6.5 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.RO 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?*

- 6.6 This question reinforces the points that have been made by C.RO in relation to Able's failure to establish need under section 122 of the Planning Act 2008. C.RO has already expressed its concerns regarding the need for compulsory acquisition in its previous representations and refers the Examining Authority to paragraphs 4.6 to 4.14 of WR3 and paragraphs 16.8 to 16.27 of WR1.
- 6.7 C.RO 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.
- 6.8 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 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 CPK or C.GEN Killingholme Limited whilst they wait for the track to be cleared has not been assessed. C.RO has genuine concerns in this regard and awaits Able's response to this question with interest.
- 6.9 C.RO 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 16.22 to 16.26 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.

**7 Response 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?*

7.1 Whilst C.RO welcomes the consideration of alternatives to the compulsory acquisition of the Railway, to which C.RO 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. In addition, C.RO 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.

7.2 C.RO considers that it must be provided with greater detail on any such proposal. That detail must include:

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

7.2.2 How the interests of C.RO will be protected.

**DLA Piper UK LLP on behalf of C.RO Ports Killingholme Limited**

**5 September 2012**

**- END OF REPRESENTATION -**