Dear Mike,

I attach a response on behalf of my client Associated British Ports, which I am sending by email only, to the letter from Mr Upton dated 25 July regarding the above, and in particular our submission under Regulation 17.

I should be grateful if you could forward a copy to the members of the Panel.

With thanks,

Regards,

Brian

Brian Greenwood
Partner
Head of Planning and Environment

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as a result of software viruses. You should carry out your own virus checks before opening the attachment.

Osborne Clarke

Mr R Upton
Lead Member
Panel of Examining Inspectors
3/80 Eagle Wing
Temple Quay House
2 Over Square
Bristol
BS1 6PN

Our reference BJG/0956072/O15121040.1/

Your reference TR030001

ABP Reference - [redacted]

2 August 2012

Dear Mr Upton

Proposed Marine Energy Park, South Killingholme
Submission re Infrastructure Planning (Environment Impact Assessment) Regulations 2009, Regulation 17

We write on behalf of our client, Associated British Ports, in response to your letter of 25 July concerning the above.

We must say at the outset, that we find the contents of your letter of 25 July somewhat confusing and are concerned that it fails to express conclusions on important matters raised by our client – which are also of concern to other interested parties.

Responding to each of the three points detailed in your letter:-

1. We have expressed concern that – ***The Environmental Statement does not supply data about, nor assess a general cargo port. The material in it is confined to facilities dedicated to wind energy. The DCO, however, as currently drafted, if approved, would authorise a general cargo port.***

   We should remind the Panel that the application by Able was submitted many months ago, following a long, albeit not particularly effective, period of consultation. As at the date of this letter, no restriction as to the use of the proposed new port has been offered by Able despite ABP's concerns having been noted at various points in the application process. Most recently, as you are aware, ABP through its counsel Robert McCracken QC, suggested a form of words at the oral hearing on 12 July, the principal points made being confirmed in our subsequent written summary, submitted by letter dated Monday 23 July. In the absence of a requirement in terms which provides an effective restriction proposed by Able and agreed by the Panel, after a fair hearing of the views of the other interested parties, the duty to suspend the examination under Regulation 17 remains. We are afraid to say that in our view your letter fails to grapple with this fundamental legal point.

   ABP and the other interested parties are entitled to know whether the Panel agrees that absent such a restriction, the Environmental Statement as submitted by the Applicant is

deficient, and Regulation 17 applies. Indeed, we would add that ABP is entitled as a matter of EU law to an explanation from the Panel as to its position on this point.

In the meantime, we should correct your assumption that the statement by the Applicant that it "agrees that a restriction in the type of cargo that the development shall be permitted to handle" does in fact "dispose of the concern that [we] have expressed". It does not. Indeed we are disappointed the Panel should consider that to be the position before we, or they have seen the proposed restriction bearing in mind the need for the Panel to retain full objectivity in this matter.

2. Turning to the second issue, namely that - ***"The 1500 pages of "Supplementary Environmental Information" which was not supplied in full until 9 July, only very shortly before the oral hearing of 12 July, suggest that Able now recognise that the Environmental Statement was inadequate even for a facility limited to wind energy"***.

We must say that we find your response to the concerns expressed in this respect to be distinctly ambiguous. Indeed, your response does not in fact deal with the issue that has been raised. What our client has been provided in your letter is merely a recitation of the facts. ABP and the other interested parties are entitled to know:-

(i) how the Panel consider the first and third response paragraphs are relevant to ABP's submission that Regulation 17 is engaged; and

(ii) whether the Panel considers that the ES was deficient.

These are direct questions placed before the Examining Authority and as such, we are entitled as a body participating in the examination process to formal responses.

3. Point three is as follows – ***"Although the material supplied a few days before the oral hearing has not yet been fully analysed by ABP (nor by the time of the hearing by others such as the EA and NE), it appears to be inadequate even if the assessment were limited to wind energy facilities. For example, it is not cross-referenced to the original ES, nor is its significance explained."***

Your response to this issue in the first paragraph of this part of your letter implies that the adequacy of the Environmental Statement will be determined at some future time. This is an inadequate response, which avoids the issues that we have raised.

ABP and the other interested parties are entitled to know whether the Panel accepts that:

(i) the Environmental Statement whose adequacy is to be determined is viewed by the Panel as being the Environment Statement originally submitted by Able; and

(ii) Regulation 17 applies even if additional information has been provided by the Applicant on a voluntary basis.

4. ***Timetable*** - Finally your letter raises a fourth point as to timetable. In the final paragraph of your letter, you point out that the Examining Authority is under a duty to complete the examination of the application by 25 November 2012. This is a point that we note has been repeated in your letter to Natural England dated 25 July, presumably with the aim of ensuring that you can adhere to the timetable you set at the outset of this process.

The failure of Able, however, to have aligned the DCO to the Environmental Statement even at this late stage (over seven months after the application was made) and the remaining deficiencies in the material supplied by Able (including the failure to place online the relevant representations in a timely fashion) means that fair and effective examination will only be possible if the time for examination is extended.

Whilst fully acknowledging the constraints under which the Panel is operating, bearing in mind the fundamental deficiencies in process that have been identified to date, it is our view that the Panel should alert the Secretary of State and formally request an extension at this stage so that a sensible rearrangement of the timetable can be made. We should add that failure to do so will raise the risk that the process will be viewed as defective.

In conclusion, we are bound to say that unfortunately, in our view, the examination currently being overseen by the Panel is not providing a fair, effective and lawful examination of the MEP proposals.

In the light of the important points that we have raised above, we look forward to hearing from you at the earliest opportunity.

Yours faithfully

[redacted]

Osborne Clarke