



Mr Robert Upton
Lead Member
Examining Authority
The Planning Inspectorate
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Temple Quay House
2 The Square
Bristol BS1 6PN

Our reference BJG/0956072/O15629248.1/SZZB

Your reference TR030001

10 October 2012

Dear Mr Upton

**Application for Proposed Development Consent by Able UK for a New Port and Marine Energy Park
Infrastructure and Environmental Impact Assessment
Associated British Ports - 10015525**

At the Issue Specific hearing on rail access and rail infrastructure that was held on Friday 14 September, various submissions were made to the Panel in relation to the impact of the completed Killingholme Loop in the context of the environmental impact assessment and the related legal regime.

We are conscious that you have already received representations in this respect from Network Rail. We felt it appropriate, however, still to offer the following comments for the assistance of the Panel, very much as a supplement to the representations that were made by Robert McCracken on behalf of our client Associated British Ports at the hearing. Our comments will hopefully clarify and confirm the legal position in respect of this particular issue, entirely in accord with the views of Network Rail.

I should state at the outset that it is recognised that economic enterprises and public bodies such as Network Rail have a general responsibility to have regard to the environment. The formal requirements for specific forms of assessments are not a necessary pre-condition to consideration of such issues. This has been recognised by Network Rail in their feasibility study of the Killingholme Loop.

The reality is that environmental impact assessment (under Directive 2011/96/EU ex 85/337/EEC) and appropriate assessment under the Habitats Directive (92/43/EC) are processes. In addition, the Directive and transposing UK legislation must be construed together. The general principles of EU law and the preamble to the Directive are important aids to such construction.

On the one hand it is of course the case that a precautionary approach should be taken in screening and scoping a given project (C-127/02 ECJ: *Waddensee*). This underlying principle was, in effect, recognised by Ward LJ in the court of appeal case of *Morge v Hampshire* [2010] EWCA Civ 608 [80]. Thus, as you will be aware, the word "likely" connotes "real risk".

On the other hand, however, significant effects are to be viewed in the context of a Directive whose preamble is concerned with "major effects".

As Mr McCracken explained at the rail hearing, the use of the existing rail line through the North Killingholme Haven Pits to serve C.Ro or C.Gen would not require EIA as the use would not constitute a project. Nor, for the same reason would it require appropriate assessment. We should perhaps add in this context that even if it were a project, the question as to whether it required assessment under either the EIA Directive or the Habitats Directive would depend on a screening decision of the competent authority.

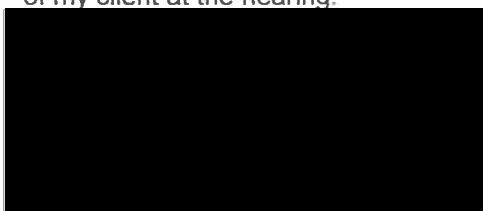
The construction of the remainder of the Killingholme Loop, however, *might* be a project qualifying for EIA. The construction of railways are included in the TCP (EIA) Regulations 2011, in Schedule 2, Part 10(d) and the area required for the construction of the loop would, of course, exceed 1 hectare. The development would, therefore, require EIA if it was likely to have significant environmental effects. Screening, as you are aware, is an exercise that falls to the relevant competent authorities. A view would, therefore, have to be taken by the competent authorities at the appropriate time as to whether the project was likely to have significant environmental effects.

The Killingholme Loop would also be a project for the purposes of the Habitats Directive. It *might* require appropriate assessment. As with EIA, a view would have to be taken as to whether there was a real risk that such a project would have significant effects on the protected habitats. Again, screening is for the relevant competent authorities.

In the context of the above, however, we should add, as indeed senior counsel noted at the hearing, that birds and trains cohabit readily: hence an important bird reserve, to which counsel referred at the hearing, exists at Potteric Carr, near Doncaster, which is surrounded by busy railway lines. The Killingholme Loop as a project, might well therefore be screened out i.e. the competent authority may decide that there is no need for either EIA or AA. Even if the competent authority did consider that there was a need to undertake either or both of these processes, however, the result of those assessments might well be that no significant environmental adverse effects or adverse effects on integrity arose.

In any event, the importance of the Killingholme Loop suggests that it should be approved – applying the tests that would be applied after an environmental impact assessment or appropriate assessment. There is certainly, in the context of the above, no reason to suppose that the possible need for either environmental impact assessment or appropriate assessment would frustrate the Killingholme Loop project.

I trust the above clarifies the position of ABP in relation to the submissions that were made on behalf of my client at the hearing.



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