Osborne Clarke

The Secretary of State for Transport
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Our reference BJG/0956072/O15933938.1/SAMF

Your reference

20 November 2012

Dear

Planning Act 2008
Proposed Able Marine Energy Park

We write on behalf of our client Associated British Ports in connection with the on-going Examination of the application made by Able Humber Ports Ltd for a Development Consent Order authorising the development of a new quay and marine energy park at South Killingholme ('AMEP').

The Panel appointed under the Act has emphasised to us on a number of occasions that the statutory period for examination of an application for a Development Consent Order made under the Planning Act 2008 is limited to six months, by virtue of section 98 of the 2008 Act. Accordingly the Examination in respect of AMEP, which commenced following the Preliminary Meeting held on 24 May 2012, is due to close on 25 November 2012.

You will, of course, be aware, however, that the Secretary of State has power to extend the deadline for completion of the Examination under section 98(4) of the 2008 Act.

In a letter to RSPB dated 4th October 2013, the Panel referred to "the date by which the examination ***must*** end" (emphasis added), observing that "no party [had] sought an extension of time from the Secretary of State". On receipt of this letter, counsel for ABP queried with the Panel in open session, whether it was the latter's understanding that an extension to the Examination period could only be sought by an Interested Party, or whether it was also open to the Panel to request an extension to the Examination period in the event that it thought it appropriate to do so. The Panel confirmed that it was their understanding that it was also open to them to seek an extension to the Examination period.

In view of the way in which the Examination has proceeded, we consider it surprising that the Panel has not in fact made an application for an extension. Nevertheless, in the absence of such an application from the Panel, we would be grateful if you would take this letter as a formal request for an extension to the Examination period.

For your assistance, we are copying this letter to the Panel and to Able.

Modifications of Scheme & Fresh Evidence

During the course of the Examination, an uncontrollable mass of material has been submitted by the Applicant. We refer, in this context, not only to material such as the Applicant's late Supplementary Environmental Information ('SEI') nor the even more recent additions and alterations to it, but also to

the various representations made by the Applicant in response to questions put by the Panel and the comments of the Applicant on representations made by others. Most importantly, we refer to the substantial changes made to the AMEP scheme during the course of the Examination, and the documentation which the Applicant has submitted in relation to those changes.

These changes to the AMEP scheme are in fact continuing to the present day. They concern matters as diverse as highway design and SPA/SAC compensation provision. It is our view that the documentation which the Applicant is continuing to submit should, as a matter of law, have formed part of the Application as originally lodged – rather than being drip-fed during the Examination.

Indeed, a very significant body of complex data and analysis has been provided by the Applicant in late October/early November. The lateness of the submission of this documentation means that there is no prospect of ABP, other Interested Parties (such as RSPB) or the public at large to have the opportunity to give adequate consideration to it, still less to make meaningful representations in respect of it.

Compensation Proposals

The problems to which the Applicant's approach has given rise were very clearly illustrated by the recent Issue Specific Hearing held on 12th and 13th November in respect of the compensation habitat proposed in respect of AMEP.

The AMEP development, if consented, would result in the loss of 44ha of intertidal mudflat in the Humber Estuary. This area, which comprises SAC and which provides protected habitat for large numbers of protected species, would be irretrievably lost. Notwithstanding that it was well-known that the proposal would entail the destruction of this European designated habitat, however, the Applicant failed to submit as part of its application adequate compensation proposals. The proposals which were the subject of the original application, including temporary habitat at Old Little Humber Farm, a Managed Realignment of land at Cherry Cobb Sands ('CCS') have now been withdrawn and "may" be replaced by a new area of land entitled 'Cherry Cobb Sands Wet Grassland' ('CCSWG') – albeit that the application for that aspect of the NSIP has been submitted to East Riding of Yorkshire Council, as opposed the ExA because it was not part of the Applicant's original application - whilst the Applicant has suggested that the Managed Realignment of land at Cherry Cobb Sands should be replaced by a Regulated Tidal Exchange ('RTE').

The RTE comprises a proposal for which there exists no precedent, and was presented to the Examination as late as October, leaving wholly insufficient time for Interested Parties or the public to give the proposals proper consideration – albeit that RSPB and others (for example Roger Morris) sought, under protest, to undertake such analysis as was possible in the very limited time available prior to the Hearing. On any view, a very considerable further amount of analysis/discussion is necessary before it would be possible to draw any positive conclusion regarding the capacity of the proposed compensation at CCS to make good the destruction of the protected habitat on the south bank of the Humber.

As regards CCSWG, the area does not even lie within the boundary of the Application. Despite being an essential part of the project, as noted above, consent for this has had to be sought from East Riding of Yorkshire Council ('ERYC') as a separate planning permission, rather than pursuant to the DCO as associated development. Such situation is unacceptable. From an EU Law perspective the delivery of CCSWG is part of the project, its mitigation measures and effects, and should be assessed as such.

That consideration and examination of compensation proposals is being hurried through in the last few weeks of the Examination, makes a mockery of the examination process, and indeed the DCO procedure in general. Instead, these proposals should have been carefully and comprehensively worked up and been the subject of a genuine public consultation exercise prior to the submission of the Application - not as a post-script to its Examination.

Need for Extension

At various times during the Examination ABP, through its counsel and in correspondence, has requested the Panel to suspend consideration of the Application due to the inadequacy of the Environmental Statement, in compliance with the obligation under Regulation 17 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. The Panel, however, has rejected these requests (inter alia by way of formal letter dated 20 September 2012) with the result that the Panel is now faced with:

(i) a development proposal that has very significantly changed from that which was the subject both of consultation and of the Application; and

(ii) a vast body of new material, submitted not as part of the Application but in the form of the SEI documentation and/or in other written representations – which information has not been subject to any sensible degree of scrutiny - such is its volume and lateness in the Examination process.

In the light of the above, ABP formally requests that the Secretary of State direct that the deadline for completion of the Examination be extended for a period of 18 months. This length of time has been specifically requested because, in our view, the Applicant has to go back to the beginning of the application process. The Applicant will then be able to:

(i) identify clearly what it is that the proposed development comprises;

(ii) organise and consolidate the documentation submitted in support of that application;

(iii) consult upon that documentation/those proposals, both with the general public and with statutory consultees;

(iv) refine the proposals in the light of comments made on the basis of information supplied in time for effective consideration; and

(v) bring properly evolved proposals back before the Panel so that they can be considered through the Examination process.

The necessity for the long extension to the Examination is a consequence of the Applicant's own conduct. The consenting procedure provided for by the 2008 Act is a 'front-loaded' one. It is predicated on the basis that an applicant will refine development proposals through a lengthy and detailed process of consultation and amendment, undertaken prior to the submission of an application. That is why there is a pre-application stage of publication and consultation on Preliminary Environmental Information which is a first draft of the ES. This has not been the case with this application - indeed the project described in the original Preliminary Environmental Information bears little resemblance to that which is presently being promoted before the Panel.

It is only if an applicant has complied with these 'front loading' requirements, however, that an examination under the PA 2008 procedure can be fair and effective as an assessment of the development proposed. It is only in such circumstances that the necessary scrutiny can be provided. This Examination has been neither fair nor effective; indeed, inevitably in the light of the above, its scrutiny has been ineffective.

The Applicant has been attempting to re-formulate and make good what have been demonstrated to be deficient proposals for the AMEP during the course of the Examination. In effect, the Applicant has sought to use the Examination as a process to design its scheme. This is simply not consistent with the procedure of the 2008 Act and the requirements of both EU and domestic law.

ABP, therefore, asks that the Examination be extended for a period of 18 months. Nothing less could remedy the deficiencies in the assessment process which mean that any DCO would be unlawful.

Unfortunately s 118 PA 2008 has prevented us, and continues to prevent us, at this stage, from making an application to the High Court.

Yours faithfully

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