23 November 2012

Planning Act 2008

Infrastructure Planning (Examination Procedure) Rules 2010

Able – Proposed MEP, Killingholme

(TR030001)

Closing Submissions Submitted on behalf of Associated British Ports (10015525)

Gentlemen,

These submissions are respectfully addressed to you as an Examining Panel and to Mr Upton in his role as Commissioner for the issue of s127 PA 2008 Certificates. They should be read as a whole.

Introduction

1. The scope of these submissions is limited. Their purpose is not to summarise every important point made by Associated British Ports ('ABP') at the Examination. Indeed as the Panel has emphasised repeatedly, the consenting procedure of the Planning Act 2008 ('the 2008 Act') is primarily based on consideration of written submissions. ABP has already provided extensive written submissions to the Panel, which also has taped recordings of oral submissions made at the various hearings held during the Examination. ABP continues to rely on both its written and its oral submissions and evidence.

2. Accordingly, ABP now provides this document not by way of summary of its position, but instead to address certain issues which it considers require further comment.

3. Before turning to the substance of these submissions however, it is first necessary to address briefly the manner in which the Able Humber Ports Ltd ('the Applicant') has characterised the participation of ABP in the Examination.

4. The Applicant has sought to attack the motives of ABP. Such conduct is an attempt on the part of the Applicant to distract from the important matters at issue. ABP would not object in principle to a properly presented proposal for appropriate facilities on the Humber to service the Government's Round 3 wind energy programme in the North Sea. Rather, ABP, in

addition to its legitimate interest in the pursuit of public good and compliance with the law, naturally seeks:

(i) to avoid becoming the victim of an unjustified compulsory expropriation of land which it holds, and intends to use, for its statutory purposes;
(ii) to safeguard the day to day operations of the Ports of Immingham and Grimsby; and
(iii) to achieve a 'level playing field' in the regulation of the Humber Estuary.

5. In any event, the reasons for ABP's involvement in the process are irrelevant to the merits of the points that it has made during the Examination. It is disappointing that the Applicant has not concentrated on addressing the deficiencies in its proposed development, but instead has sought to distract attention from them by attacking critics. The knowledge and expertise of ABP, and its witnesses such as Peter Whitehead, have been invaluable to the Examination. For example at the specific hearing into the 3rd SPA compensation scheme (presented just before the end of the 6 month Examination Period) he was able, by characteristic diligence, careful attention to detail, and extraordinary willingness to work well beyond the ordinary working day for a prolonged period, to point out that the Regulated Tidal Exchange, as designed, simply would not work. ABP has generally sought to aid the Panel even where its interventions have been against its own interests (as where its counsel at the compensation hearing on 13th November corrected a misunderstanding of the Applicant's leading counsel who had mistakenly misinterpreted EC Guidance on Compensation under Habitats Directive and suggested that irreversible damage to an SPA/SAC was never permissible).

Procedure

6. The Application has been promoted in a manner that runs contrary to both the spirit and the letter of the Planning Act 2008 ('the 2008 Act'). This has created an almost impossible situation for the Panel. ABP has not agreed with many rulings of the Panel. But it has always sought loyally to work within the framework of those rulings during the Examination. The criticisms which ABP makes of the processes are made with respect for, and not directed personally against, members of the Panel. The preclusive provisions of s 118 of the Planning Act 2008 ('PA 2008') unfortunately prevent what would have been a more satisfactory method of resolving the respectful but irreconcilable differences as to what would constitute a fair and lawful process of examination.

7. The procedure of the 2008 Act is predicated on the basis that an application for a development consent order will be 'front-loaded'. Indeed, the procedure is based on an applicant subjecting development proposals to a detailed process of consultation and amendment prior to submission. It is only if an applicant has complied with these 'front loading' requirements that an examination under the 2008 Act can provide a fair and effective assessment of the development proposed.

8. There has been a fundamental failure on the part of the Applicant, such that the essence of the statutory procedure has been absent. This has resulted in substantial prejudice not only to ABP, but to other organisations interested in the Application and also to the general public. The Examination has been fundamentally deficient. It has neither been fair nor effective.

9. In these circumstances, the only lawful course open to the Panel to recommend, and Secretary of State to adopt, is refusal of the Application. This is so, even if it were thought that a proposal for an off-shore wind turbine manufacturing facility at this location might well, in principle, ultimately merit consent.

10. The Applicant only has itself to blame for this circumstance. Rather than devote the necessary time and resources to preparation and refinement of proposals at the appropriate stage in the process (i.e. prior to submission), it sought consent for development which the Examination has revealed to be fundamentally flawed. Faced with the inadequacy of its proposals the Applicant has then sought to use the Examination as a vehicle to re-design its development, and in so doing has time and again introduced important changes to the project.

11. This has imposed an appalling burden in terms of time and expenditure on statutory bodies (such as the Environment Agency), public interest groups (such as RSPB), commercial organisations (such as ABP) and private individuals (such as Mr Kirkwood).

12. Not only would it be appropriate, as a matter of judgement, to reject the Application (as also required by law) but also a rejection would lay down an important marker as to the basis on which the procedure for which the 2008 Act provides is intended to work. Conversely, any failure to reject the proposals would instead send a disastrous message not

only to the Applicant, but to other developers and the public at large; namely that abuse of the system will not only be tolerated but, worse still, will be ignored or condoned.

13. Accordingly if the Secretary of State is not minded to extend the Examination Period for a period of 18 months as requested in the letter of 20th November 2012 sent by ABP's solicitors – so as to enable the Applicant's proposals to be properly reformulated and subjected to the necessary consultation and examination – then he must reject the Application.

14. In so submitting ABP notes, in no particular order, the following matters:

Incorrect Consenting Procedure

(a) The proposed AMEP does not meet the requisite threshold so as to be characterised as a nationally significant infrastructure project ('NSIP'). ABP addressed this issue in its written representations & other submissions, and notes the following:

(i) The NSIP is described as a Quay, notwithstanding the position of the Applicant is that the Quay and manufacturing facilities on the land-side ('the Land-Side Area') are indivisibly linked.

(ii) The manufacturing facilities on the Land-side Area cannot comprise an NSIP, since they satisfy no relevant definition in the 2008 Act. The Quay serves the manufacturing facilities on the Land-Side Area, and as such comprises development associated with (and subsidiary to) a project which is not an NSIP.

(iii) By dint of the fact that the express purpose of the Quay is to serve the Land-Side Area and its manufacturing facilities – indeed it would be restricted to this purpose – the Quay will not be capable of handling the necessary volume of cargo to constitute an NSIP.

Environmental Statement

(b) The Environmental Statement ('ES') submitted by the Applicant pursuant to the Application was manifestly inadequate. It was deficient in terms of its consideration of matters ranging from (to take but two examples) impacts of the proposals on the bathymetry of the Humber Estuary, to the loss of habitat for protected species such as bats (strictly protected under Annex 4A Habitats Directive). Further, it did not (indeed could not) consider critical matters such as the compensation package that is now proposed in respect of the destruction of 44ha of inter-tidal mudflat – the most recently submitted in a series of very different compensation proposals.. This package was only

provided to the Examination in October, and was still the subject of amendment at the Issue Specific Hearing held on 12th November. Consideration of it was and remains a necessary element of an ES both because a description of such measures is a mandatory requirement[1] and because their effectiveness and effects are critical elements in the identification and assessment of the main direct and indirect environmental effects of the project – a further mandatory requirement[2]. Consideration of such effects is a necessary part of any attempt to work out the 'net' effects of a project, yet was never examined at an issue specific hearing – despite a formal request by ABP (regarding which see further below).

(c) Further, and fundamentally, nowhere in the ES is there any attempt to identify or analyse the impacts that would result from the operation of AMEP as a general cargo port, despite the fact that such eventuality is not merely a possibility, but is actually expressly recognised by the Applicant as being the ultimate end-use of the facility. This issue, raised at the outset by ABP, has never been addressed by the Applicant.

Lack of ES Hearing

(d) As noted above, at the very outset of the Examination, ABP requested that the Panel provide within the programme an Issue Specific Hearing to address the relationship between the proposed development and the ES which purported to assess it. However, the Panel declined to hold any such Hearing with the result that the relationship between the Applicant's proposals and the ES has never been properly explored and significant issues remain unresolved.

Supplementary Environmental Information

(e) In consequence of the deficiencies of the ES, the Applicant has sought to make good the position by adducing what it termed Supplementary Environmental Information ('SEI'), which it insisted was not part of the ES. This SEI was drip-fed progressively through the Examination almost to its very end, and was provided in such substantial volumes that analysis of it was not possible within the timeframe of the Examination for the public to absorb it, reflect on it and comment. The statutory bodies were in the same position.

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[1] The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, Schedule 4, Part 1(21) and Part 2(25).

[2] The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, Schedule 4, Part 1(20) and Part 2(26).

(see transcript for Monday/ Tuesday Nov 12/13th,especially the comments of Mr Hickling, Ms Bolt for the Environment Agency and Ms Harling Phillips for the Marine Management Organisation). Further, material was frequently provided in respect of matters when the Issue Specific Hearing designated for consideration of those matters had already been held, *thus (a) depriving participants of the necessary information in an appropriate form for effective participation as required by law and (b) .precluding its being tested.*

Regulation 17 Suspension

(f) Despite application being made, both orally and in writing, that it suspend the Examination in compliance with its obligation under Regulation 17 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, the Panel proceeded without any adjournment/suspension. In consequence of the Applicant's approach to submission of the ES, SEI and other documentation, the power to suspend the Examination should have been exercised more than once, at various stages during the proceedings, so as to allow the Application Documents to be subjected to serious analysis and consideration on a properly informed basis. It was not simply a matter of advertising it but also giving parties time to absorb, reflect and comment on it without having to perform *at the same time* the myriad other tasks associated with a major development examination.

Lack of Signposting Document

(g) Despite repeated complaints from a number of interested parties, including ABP, regarding the coherence of its submission and the difficulty in tracking the Application, the Applicant failed to provide a 'signposting document' explaining the extent to which original Application documentation had been supplemented/amended/superseded by later submissions until October 2013, 5 months into the Examination process. It should be noted that the 'signposting document' was inaccurately (and misleadingly) dated September, and that in any event the document was not complete.

(h) Nor did the combination of 'signposting document' and documents to which it referred constitute a systematic assembly of applicant's material required by the EIA Directive and Aarhus Directive enabling ordinary people to participate in an informed basis, as explained by the House of Lords in Berkeley v SSE [2001] AC 663 where Lord Hoffmann noted:

'The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues.'

The point about the environmental statement contemplated by the Directive is that it constitutes a ***single and accessible*** *compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language'(our emphasis).*

(i) Also relevant in this context is the decision of the House of Lords in Burkett [2002] UKHL 23. As Lord Steyn put matters at [16] :

'The Directive creates rights for individuals enforceable in the courts: World Wildlife Fund (WWF) v Autonome Provinz Bozen (Case C-435/97) [2000] 1 CMLR 149, paras 69-71; Berkeley v Secretary of State for the Environment [2001] 2 AC 603. There is an obligation on national courts to ensure that individual rights are fully and effectively protected: see the Berkeley case, at pp 608D (Lord Bingham of Cornhill) and 618B-H. The Directive seeks to redress to some extent the imbalance in resources between promoters of major developments and those concerned, on behalf of individual or community interests, about the environmental effects of such projects.'

NID/PINS Systems

(j) The difficulties faced by ABP and others in these circumstances were exacerbated by the wholly inadequate means by which the Panel and the National Infrastructure Directorate ('NID')/Planning Inspectorate ('PINS') made available the documentation submitted by the Applicant. In particular:

(i) There was no attempt made by the Panel/NID to provide any system of indexation to the vast quantity of documentation submitted by the Applicant (and others), either originally as part of the Application or subsequently to support it (or commenting on it);

(ii) The panel did not even give each document a unique reference number, as is standard practice at planning inquiries of much more modest length, and with far fewer documents.

(iii) No hard copy of the documentation, including Application Documents was available, either at the Examination venue or at NID headquarters in Bristol;

(iv) In at least one instance it was clear that the deficiency in terms of document supply/organisation meant that the Panel was considering one draft of a document at an Issue Specific Hearing, whilst all others participating in the Examination were considering another; and most crucially

(v) The NID website was itself simply not fit for purpose. As was noted by ABP and others at various times, the website was all but impossible to navigate. There was no mechanism indicating where documents were to be found, when they had been submitted or to what it was they related. Documents were periodically moved from one part of the website to another without notice, logic or explanation. In addition, at certain stages of the Examination the system of document supply broke down altogether. Submissions provided by the Applicant and objecting Interested Parties were not 'posted' on the website, or alternatively were not 'admitted' by the website portal. Indeed, ABP is not clear whether certain of its written submissions have ever been received by the Panel.

The system as a whole was woefully inadequate in terms of the extent to which it provided for participation in the Examination

Late Compensation Proposal

(k) Some 5 months into the Examination, the Applicant first indicated that it was not pursuing a material part of the compensation proposal, namely the wet grassland at Old Little Humber Farm ('OLHF'), as per the Application. Instead, it proposed to provide compensation at a new location – Cherry Cobb Sands Wet Grassland ('CCSWG'). This proposed compensation should have been assessed – both in terms of its effectiveness and its effects – in the ES but this was not done. Although the area lies outside of the application boundary, CCSWG forms a critical part of the compensation measures proposed as part of what is in effect part of a new project, and its effectiveness and effects are among the main direct or indirect effects of the project. As such, notwithstanding that it comprises an integral element of the Applicant's scheme, this proposal is to be considered by a local planning authority (East Riding of Yorkshire Council) that has not taken any active part in the Examination, and which is not properly appraised of the issues which have arisen in respect of the Application. The proposed

compensation at CCSWG comprises associated development for the purposes of the 2008 Act, and should have formed part of the Application itself – as of course the original compensation package at OLHF did.

Inadequate Consultation

(l) The 2008 Act expressly requires consultation to be carried out in respect of proposed development, prior to submission of an application. The Applicant failed to discharge its statutory obligations regarding the need to undertake consultation in respect of its proposal – and indeed to have regard to the responses generated by the consultation exercise undertaken – prior to submission of the Application. In choosing to make substantial changes to its proposals during the course of the Examination, the Applicant has frustrated the statutory procedure. The consultation undertaken – notably with statutory regulators and with local planning authorities – was carried out in respect of a scheme of development which has now been superseded. By way of example of the effects of this, the Local Impact Report prepared by East Riding of Yorkshire was undertaken in respect of OLHF, not in relation to CCSWG. The attempt by the Applicant to undertake a consultation of sorts during the course of Examination in no way satisfies the statutory requirement, and it is noteworthy that both the Environment Agency and the Marine Management Organisation stated unequivocally that the consultation undertaken by the Applicant in respect of the compensation package has not been adequate. As stated above, consultation must – as a matter of statutory requirement – be undertaken prior to submission of an application. It should not be undertaken during the 5th month of an examination, in respect of proposals which even at this final stage are still evolving, as in the present case.

(m) Furthermore, ABP notes that the pre-application consultation was undertaken in respect of a development the use of which was materially misrepresented. In this context the Examination will recall the extent to which the Applicant has resisted the imposition of any restriction regarding the use to which AMEP may be put, notwithstanding that it canvassed public opinion on the basis that the facility would be used solely to construct and ship wind turbines. Even at this late stage the Applicant has failed to accept imposition of a suitably worded restriction.

Evolving Documents

(n) At the close of the Examination, there are still various documents fundamental to the proposal – environmental monitoring plans, legal obligations and other agreements – in respect of which not only do substantive issues remain outstanding, but in respect of which the Applicants' own case is that they have not thought about them. An example is the assertion by Leading Counsel for the Applicant, that the secrecy provisions in relation to disputes in the draft compensation legal agreement was not something which Able wanted but was instead something taken without reflection from a precedent. It is not acceptable for documents of this nature to be submitted at the end of the Examination, or to be left for consideration at some later stage. The Aarhus Convention and EU law, consistently with Rio Declaration Principle 10, require that the public be entitled to participate at an early and effective stage during the decision-making process.

(o) The extent to which important documentation has still to be provided in an accurate, and indeed intelligible, form was illustrated by the Issue Specific Hearing held on 21st/22nd November 2012. On 21st November, 2 days before its close the Examination heard from the Applicant that the Works Plans – which had themselves recently been re-submitted – were inaccurate and that further plans would need to be provided. The Applicant was also compelled to concede that the DCO as drafted contained the wrong coordinates for the proposed development – such that as matters stood the 'berthing pocket' to serve the Quay stretched into land-side coal yards in the Port of Immingham. Then subsequently, when a yet further set of revised plans was provided on the very last hearing day of the Examination– along with a supposed guarantee that here at last were plans in respect of which all faults had been rectified – a cursory examination was sufficient to reveal a number of inconsistencies and inaccuracies. Such flaws in the documents clearly came as a surprise to the Applicant, which had not seen fit to review them. Accordingly, even at the close of the Examination, the Applicant has failed to provide accurate plans depicting the development in respect of which development consent is sought.

Conduct of Hearings

(p) It is submitted that the manner in which the various Hearings were conducted was not fair and equitable. In particular, whilst counsel for ABP was repeatedly warned by the Panel that he was entitled only to 15 minutes to undertake cross-examination, no such

strictures were applied to the Applicant's advocate. By way of example, during the Compulsory Purchase Hearing, ABP (whose land the Applicant proposes to compulsorily acquire) was allowed only some 20 minutes cross-examination of the Applicant's witnesses. In contrast, the Applicant was allowed to cross-examine ABP's Mr Fitzgerald alone for several hours.

(q) The holding of sporadic hearings over a 4 month period and unpredictable changes of timetable at a late stage, have created great difficulties. This coupled with the late provision of critical materials to the Examination by the Applicant has meant, by way of example, that the preparation of these submissions has been seriously hampered.

15. The above matters, which are examples rather than an exhaustive list, of the procedural flaws associated with the Examination, are such as to mean that a decision to grant consent in respect of the Application would not be inappropriate but also simply unfair and unlawful. It would be a dangerous precedent which would work against the achievement of the intentions of the Planning Act 2008 and the national interest.

Approach to Obligations under EU law (eg re the EIA and Habitats Directives):

16. The following general principles apply to the interpretation of domestic law deriving from EU environmental law.

(i) The EU constitution provides for a high level of protection and enhancement of the environment and the application of the preventative, precautionary and polluter pays principles (Art 191 TFEU, ex Art 174 EC). The CJ regards these principles as critical to the interpretation and application of EU legislation (see eg Case C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij [2005] Env LR 14 at [44] ('Waddenzee').

(ii) Article 4 (3) TEU (ex Art 10 EC) and Article 288 TFEU (ex Art 249 EC) have the following effects in combination. National legislation must so far as possible be interpreted so as to be consistent with it: Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135 at [13]. Insofar as domestic legislation cannot be so interpreted it must be

disapplied: Case C-106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR. 629 at [24].

(iii) All emanations of the state have a duty to use their powers to secure the implementation of EU law Case C-103/88 Costanzo [1989] ECR 1839.Domestic courts must enforce the obligations on members states deriving from directives: Case C-72/95 Kraaijeveld v Netherlands [1997] Env LR 265 at [55-61]; Case C-435/97 World Wildlife Fund (WWF) v Autonome Provinz Bozen [1999] ECR I-5613 at [68] – [71].

(iv) The courts have a duty to nullify the unlawful consequences of a breach of EU law: Case C-6/90 Francovich v. Italy [1991] ECR I-5357 at [36] and Case C201/02 Wells v SSE [[2004] ECR I-723

(v) The decision of Humber Sea Terminals v SST & ABP [2005] EWHC 1289 [2006] 1 PC&R 5 (Admin) on which the Applicant relies does not have the effect for which the Applicant has contended. First: It was a decision of a first instance judge made both before a series of important ECJ/CJEU decisions in the relevant area and a much greater appreciation of EU law demonstrated by English judges sitting in the Court of Appeal. It did not consider *inter alia* Case C127/02 Waddenzee, (ECJ), C-142/07 Ecologistas en Accion-CODA v Ayuntamiento de Madrid , (C-2/07) Abraham v Region Wallonne, C-205/08 Umweltanwalt von Karnten v Karntner Landesregierung, Brown v Carlisle City Council[3] [2010] EWCA Civ 523, [2011] Env. L.R., Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321. Second: it is clearly distinguishable on the facts; it does not address the national habitats policy requirements against which this proposal fails Third: It does not address the exercise of powers to require further information under Reg 17 of the IP(EIA)Regs 2009 Fourth: It does not deal with the situation where the adequacy of the compensation

[3] Where the Court of Appeal held that since the object of the Regulations and Directive 85/337 [the EIA Directive] , which they implemented, was to ensure that any cumulative environmental effects were considered before any decision was taken as to whether permission should be granted, an assurance that they would be assessed at a later stage when a decision was taken as to whether further development should be permitted would not, save in exceptional circumstances, be a sufficient justification for declining to quash a permission granted in breach of reg.3(2) and/or the Directive.

scheme (if implemented) has not been demonstrated

Impacts on SPA/SAC

Preliminary

17. The Humber Estuary is designated as a Special Area of Conservation ('SAC') and Special Protection Area ('SPA'). The proposed development would straddle the south bank of the Humber Estuary at North Killingholme, with the quay extending across the mudflats exposed at low tide.

18. North Killingholme Marshes is a habitat that of itself is worthy of SPA designation. The location is of particular value owing to the nexus of suitable roosting grounds (at North Killingholme Haven Pits) with a feeding area of exceptional quality (the mudflats), for the Black-tailed Godwit. It is very unusual that circumstances combine so as to bring about such concentration of one species.

19. Construction of AMEP would cause the destruction of some 44ha of these inter-tidal mudflats, and thus cause irreversible harm to this habitat. There is no dispute that the development would result in the displacement of the Black-tailed Godwit population.

20. As such, consent could only be granted in respect of AMEP on the basis of a conclusion both that there are no alternatives to AMEP as proposed, and that its provision is required for Imperative Reasons of Overriding Public Interest. Further, if such conclusions were in fact reached, then provision of suitable compensation would be required.

21. When the Applicant was asked to identify the overall objective which AMEP was intended to meet, it declined to do so. Instead, Leading Counsel on its behalf chose to identify a series of broad objectives. This is a matter of considerable importance since as ABP explained, the loose approach to the question of 'objective' adopted by the Applicant has the consequence that there are potentially a number of alternative solutions capable of meeting the general 'objectives' selected by the Applicant. In such circumstances, neither the Panel nor the Secretary of State can be satisfied that there are no alternatives to AMEP, for the purposes of the Habitats Regulations.

22. It should also be noted that the IROPI case advanced by the Applicant is based on a 'wind turbine facility', as indeed is the Applicant's discussion of alternatives in the context of the

requirements of the Habitats Regulations and Directive. This is of consequence both in terms of the status of the proposed development as an NSIP and its assessment in accordance with the EIA Directive.

Compensation

23. Given that construction of AMEP would entail the destruction of the internationally protected inter-tidal mudflats, detailed analysis of the compensation proposals advanced by the Applicant is fundamental to any assessment of the Application. As matters currently stand, it appears that the Applicant's case in respect of compensation is founded on provision of:

    (i) A combined Regulated Tide Exchange ('RTE')/Managed Realignment ('MR') at Cherry Cobb Sands ('CCS'); and
    (ii) An area of wet grassland, also at Cherry Cobb Sands ('CCSWG').

24. As already noted, analysis of these proposals has been prevented by reason of the fact that they did not form part of the Application, but rather represent the Applicant's third attempt to design a compensation scheme and were provided in the 5th month of a 6 month Examination Period. Indeed, they were still evolving at the second Issue Specific Hearing held in respect of compensation matters, convened at a late stage by reason of the fact that the compensation proposed at the time of the original Issue Specific Hearing was, as the Applicant's witness then conceded, not fit for purpose. In particular, at the later Hearing the Applicant accepted through its witness (in respect of what was the 3rd compensation scheme) that the proposed sluice structures proposed would not allow sufficient ingress of water to allow the RTE to function as intended – so that an increase of 25% in capacity would be required. Such further change to the scheme would in turn affect flow patterns and levels not only in the MR and RTE, but also in Cherry Cobb Sand Creek and past Stone Creek.

25. These submissions do not include a detailed critique of the technical deficiencies of the Applicant's compensation proposals. Such critique was undertaken effectively by the witnesses of RSPB, notably Mr Mark Dixon. ABP endorses the criticisms by RSPB, and notes that the latter's contribution to the Examination was far more convincing than that of Natural England ('NE'). The failure of NE to engage substantively with the Examination regarding the Applicant's compensation proposal can presumably be attributed to its desire

not to be perceived as obstructive. However, it was noteworthy that occasionally the true view of NE officers was revealed – notably by Mr Saunders at the Issue Specific Hearing on 12th November 2012. The reality appears to be that the corporate stance of NE was not consistent with the professional judgement of its own scientist officers.

26. In addition to endorsing the stand adopted by RSPB, ABP makes the following observations as regards the issue of compensation:

    (i) The burden is on the Applicant to demonstrate that its compensation proposals are adequate[4].

    (ii) Compensation should be in place and functioning before irreversible harm is caused to protected habitat (in the present case, before work commences on inter-tidal mudflat).

    (iii) The requisite degree of confidence that the Panel/Secretary of State must have that the compensation proposals would provide an effective replacement for the habitat destroyed is 'reasonable certainty'. This necessarily flows from the wording of Article 6(4) of the Habitats Directive, which requires *"all compensatory measures necessary to **ensure** that the overall coherence of Natura 2000 is protected"* (emphasis added).

27. It would be very difficult as a matter or principle to have the requisite degree of confidence in the Applicant's proposals, since the RTE design would be dependent on almost continuous human intervention and management in order for it to operate as proposed. In effect, it would require the site to have a permanent site engineer.

28. In addition to these general observations, ABP submits the following by way of detailed comment.

Timeframe

29. The Applicant has failed entirely to address important questions arising from its 'projected timeline' – a document which was not even provided to the Panel or Interested Parties until 13th November 2012, less than two weeks before the end of the Examination. This 'timeline' illustrates that, even on the Applicant's evidence, there is envisaged by the applicants a

[4] See, by way of example, box 5.6.2 of EC Guidance 2000

time-lag of up to 4 ½ years following the commencement of development, before the compensation habitat is functioning properly. Given this context, fundamental questions to which the Applicant has failed to provide an answer include the following:

(i) Firstly, what does the Applicant anticipate that the large population of Black-tailed Godwit will do in the interim period before the compensatory habitat comes on-line? Where will the birds go? Will they, and, if so, what proportion will, survive?

(ii) Secondly, what 'knock-on' effects will result from the response of the Black-tailed Godwit to the loss of their habitat?

Property Interest

30. ABP repeatedly raised the question of the extent to which the Applicant does in fact have a legally enforceable right to provide compensatory habitat at CCSWG. Absent such right, the ability of the Applicant to deliver that element of the compensation package proposed on CCSWG is necessarily precarious and cannot form the basis of any conclusion on the part of the Panel/Secretary of State that the compensation will *"ensure"* the protection of the Natura 2000 Network.

31. ABP notes that the Applicant has refused to provide a copy of any document which identifies it as having any lease, sub-lease or option over the land[5]. Thus, as matters stand the only comfort currently provided is in the document entitled 'Land Ownership and Funding', dated October 2012. This notes firstly that:

> *"The Wet Grassland...is owned by the Crown Estate and subject to a tenancy dated 10th January 1995. That tenancy is a tenancy from year to year and governed by the provisions of the Agricultural Holdings Act 1986. Under the provisions of that Act the Tenant has security of tenure during his lifetime".*

It then proceeds to assert that:

> *"Able Humber Ports **will** be granted a sub tenancy of the land"* (emphasis added).

32. The clear implication of this statement is that as matters currently stand, the Applicant does not yet have any legal interest in CCSWG, albeit that it hopes that it will acquire such.

[5] The suggestion that such document would be commercially sensitive is not credible. As ABP explained to the Examination, it did not seek disclosure of any financial data (such as price paid for an interest), which could readily be redacted. Instead, it sought only disclosure of the wording governing the *extent* of that interest.

33. There is thus uncertainty as to the Applicant's ability to deliver compensation on CCSWG. Able's unwillingness so to concede is no doubt a reflection of its appreciation of the importance of the point.

Over Compensation

34. The issue of the so-called 'over-compensation' – which is offered at Halton Marshes – can be considered shortly. Not only did RSPB dismiss it as being incapable of providing any suitable replacement habitat for the displaced Black-tailed Godwit population; further than that, even NE rejected it. Indeed, not even the Applicant appeared to attach any genuine weight to it as an element of the compensation package. In truth, it was proffered as little more than an after-thought. We would also draw attention to the fact that this area of compensation has apparently already been allocated for mitigation/compensation purposes by the Applicant for its proposed development of land adjacent to AMEP for the purposes of the Able Logistics Park ('ALP').

Further Ecological Considerations

Efficacy of HRA

35. The sHRA is fundamentally flawed because it does not take into account the plethora of design changes that have been submitted since the shadow assessment was completed. These include:

    - The replacement of Old Little Humber Farm ('OLHF') compensation site with Cherry Cobb Sands Wet Grassland Site ('CCSWG');
    - The redesign of the mudflat compensation and the introduction of the RTE which may in itself have an adverse impact on the integrity of the site in combination with other plans and projects. (e.g. erosion in the main Humber channel);
    - The introduction of the over-compensation at Halton on the south bank of the Humber;

36. The sHRA cannot be relied upon even as a starting point. For the Panel/Secretary of State to base its assessment upon the sHRA even as a starting point would be incompatible with the requirements of the Habitats Directive.

EIA

37. The ES of the development is fundamentally flawed and does not meet the requirements either of the directive or the domestic legislation. In evidence given to the hearing, ABP's witness Mr Andrew Baker highlighted a wide range of deficiencies including:
    - Incomplete survey data which did not meet the scoping opinion of the IPC.
    - An incomplete and flawed assessment process that did not follow established industry guidance.
    - Gross underestimation of the number of pairs of breeding birds to be lost at the development site.
    - Inadequate survey techniques employed
    - Incorrect interpretation of the data on European protected Species (bats) (which means that the ExA cannot meet its legal obligations under the Habitats Regulations).
    - Mitigation, the efficacy of which is grossly over-estimated.
    - The ES has not been updated to reflect the changes in design. (e.g. new compensation areas, over-compensation area, RTE proposal)
    - Given that the scope of the project is not fully defined, the IROPI test and Alternatives are not properly addressed.

38. The numerous changes to the project that have been presented during the hearing have not been subject to EIA. For example; the new compensation proposal for CCWGS is outside the redline boundary and has not been assessed for its ecological impacts. The Applicant has not carried out any ecological surveys of CCWGS but has merely extrapolated data from the neighbouring site. This approach is flawed, does not follow industry guidance and is not compliant with the EIA regulations.

Rail Considerations

39. As the evidence of Mr Geldard illustrated, the rail network serving the South Humber at Immingham is currently operating at close to capacity.

40. The infrastructure is limited. As matters now stand, any rail traffic serving the Port of Immingham must gain access and egress by way of KIL1 (that part of the existing rail line passing through the Port of Immingham). Rail capacity is a matter of concern to ABP, and it is on this basis that ABP has successfully negotiated with Network Rail in order to deliver the 'HIT Headshunt'.

41. The position regarding transport of rail-freight through the Port of Immingham currently merits particular attention in light of the increasing customer demand for Biomass. As Mr Fitzgerald explained, the proposed conversion of existing power stations to Biomass has resulted in the Port being pressed to facilitate delivery of large volumes of this fuel. This is a matter of some significance, since the fact that Biomass is materially lower in density than more traditional fuels such as coal, means that importation of Biomass will generate greater volumes of cargo for onward transportation.

42. Of further concern is the fact that whilst currently it is only traffic from the Port of Immingham that makes use of KIL1, C.Gen also has identified plans to utilise rail transport. Given the company's existing Access Agreement with Network Rail, C.Gen retains the right to run trains through the AMEP Site and onto the infrastructure at KIL1. These intentions on the part of C.Gen must be borne in mind when identifying the 'baseline' in terms of network capacity, as must the possibility that C.Ro will also modify their existing operations to include onward transport of cargo by rail.

43. In these circumstances, the failure on the part of the Applicant to provide any detail regarding its intentions for use of rail is extremely problematic. No indication has been given in relation to AMEP's planning infrastructure requirements, rail operations or rail traffic. This absence of information as to the Applicant's intentions is critical because in the event that AMEP were to generate any significant volume of traffic, it would cause the limited capacity of KIL1 to be exceeded. The resulting congestion would occur at the expense of ABP (and potentially others such as C.Ro), the efficiency of whose operations would be materially prejudiced. This situation would have been avoided if the Applicant had given proper consideration to its intentions for the use of rail.

44. This concern is particularly acute, given that the Applicant has acknowledged that the ultimate use of AMEP will be as a general cargo port – the impact of which would be considerable in terms of the strain which it would put on the local rail network. Notwithstanding the Applicant has not seen fit to assess the traffic that would be generated by such a facility, Mr Geldard demonstrated that this would be significantly greater than existing infrastructure could bear.

45. Indeed, ABP notes that the only substantive indication that Applicant has given regarding matters rail-related, is its stated intention to pursue development notwithstanding the

adverse consequences that would have for the one rail infrastructure improvement which Network Rail has identified as being capable of materially improving capacity/efficiency of the network for rail-freight on the South Bank of the Humber – namely the Killingholme Loop.

46. The significance of the Loop and basis on which ABP contends the Applicant should not be permitted to prejudice its delivery, are matters addressed elsewhere in these submissions.

Marine Matters

47. As the Examination is aware, the Humber Estuary is a dynamic and sensitive environment. The high concentration of sediment in the River Humber is such that the utmost care is necessary when considering the introduction of new infrastructure; even relatively modest development may cause significant change to the bathymetry of the Estuary. AMEP, comprising as it would a solid and substantial addition to the existing infrastructure on the South Bank, has the potential to cause extensive change. This change may have far-reaching consequences on both the protected environment that is the SAC/SPA, and also on the operations of ABP and other commercial operators with facilities upstream and downstream of AMEP.

48. In these circumstances it is necessary that before any consent is granted for AMEP, the impacts of the proposal are fully identified and considered. Unfortunately, the Applicant has failed to undertake the necessary analysis to understand these impacts and the ES in which the Applicant purported to undertake such analysis, was fundamentally flawed.

49. As Mr Whitehead demonstrated on behalf of ABP, both in his written submissions and in the oral evidence he gave to the Examination, the flaws in the ES as originally submitted were numerous. Most notably, the modelling evaluated a different scheme to that in respect of which consent was sought, whilst the ES did not identify all relevant impacts, still less assess them.

50. By way of example, the Hydrodynamic and sediment modelling was flawed in that

    (i) Neither Immingham Outer Harbour nor Waterfront Jetty Infrastructure was included in the hydrodynamic model;
    (ii) Calibration was limited; and
    (iii) Incorrect calibration for SSC sediment distribution was included in the fine sediment model.

51. The consequence of these failings is that the effects which the construction of AMEP would have are not properly assessed, so that their impact – and that of the proposal – has not been reliably quantified. This in turn means that future dredging requirements are uncertain – as are the impact of those dredging requirements. In circumstances where a precautionary approach must be adopted, so as to avoid the risk of significant harm, the failure of the Applicant properly to address these matters is unacceptable.

52. As the Examination is aware, the Applicant has sought to address the various omissions/errors in its modelling by submission of 'Supplementary Environmental Information' ('SEI'). This was drip-fed during the course of the Examination process, in a manner that left both regulatory bodies and Interested Parties such as ABP little time to review it. Furthermore, 'supplementary reports' have been submitted and then withdrawn, creating uncertainty as to what documents now actually comprise the Applicant's assessment.

53. It was incumbent on the Applicant to undertake these various 'supplementary' pieces of analysis at the outset of the process – prior to submission of the Application, rather than towards the end of the Examination. However, even now the data/analysis provided by the Applicant remains deficient. The SEI has not fully addressed the matters raised by ABP and others, so that a number of issues remain unresolved and impacts remain to be assessed. In this context ABP notes that, again by way of example, the characteristics of the erodible sediments from the capital works were not initially accurately identified to the Marine Management Organisation for disposal at site HU080. Following the Issue Specific Hearing held in respect of Marine matters the Applicant sought to assess the likely effect of depositing gravel at HU080, but the modelling was flawed and the results are not consistent with the existing sedimentation patterns at the site. Given that the dispersion predicted by the modelling is unrealistic, the benthic assessment upon which it is based is also flawed. The fact that this data was supplied after the Issue Specific Hearing had taken place meant that it could not be tested by questioning before the Examination.

Highways Considerations

54. The Application has very significant highways/road transport implications. Such implications fall to be considered in a context where there is agreement between all parties that the local highway network is already congested. It is crucial that the AMEP development does not have a material adverse impact on the ability of the network to function effectively, given

that it serves the Port of Immingham – an infrastructure facility of national importance, through which is imported some 50million tonnes of UK seaborne trade, which is just under 10% of all freight cargo entering the UK.

55. Deficiencies in the data/analysis submitted on behalf of the Applicant have been identified in the written submissions of Mr Simon Tucker. ABP continues to rely on that evidence. In broad terms these deficiencies are twofold, in that:
    (i) The data that has been provided by the Applicant's consultant Mr Pickard is inconsistent and selective, so as to preclude it being subject to any audit; and
    (ii) That data and analysis undertaken by Mr Pickard has failed to address important considerations.

56. In consequence, it is submitted that any objective assessment of the highways impacts of the proposal necessarily results in a conclusion that construction of AMEP would be likely to have a materially adverse impact on the highway network and thus on the efficient operation of the Port of Immingham.

57. Further important failings in the Application which are general in nature, and which remain unresolved, include the following:

Failure to have regard to growth at Port of Immingham

- In reaching his conclusion that the highway network can accommodate AMEP without causing detriment, the Applicant's consultant Mr Pickard failed to make any allowance in his modelling for traffic generated by growth of the Port of Immingham. This omission invalidates the assessment, given the clear indication of commitment to such development in the Port of Immingham Masterplan.

General Cargo Port

- No assessment has been undertaken of the likely traffic impacts that would occur when AMEP reverts to use as a General Cargo Port. Given that the Applicant acknowledges this reversion as inevitable, such analysis should have been provided as part of the Transport Assessment.

WebTag

- The Traffic Assessment undertaken by the Applicant is not WebTag compliant. Notwithstanding the protestation of Mr Pickard, this remains the position. In particular

ABP notes that there has been no quantitative assessment, nor is there any consideration given to either 'alternative' or 'do-nothing' scenarios. The assessment is therefore in conflict with paragraph 5.4.4 of the National Policy Statement for Ports.

Late provision of Data/Analysis

- At the time of the Issue Specific Hearing held in respect of road transport (22nd October 2012), significant traffic data had still not been supplied to the Examination. Further data was supplied after the Hearing, but given the timing of its provision neither the Panel nor Interested Parties were afforded the opportunity to test it. This failing is particularly significant, given that such data does not address the objections raised on behalf of ABP (in which context, see for example the comments in respect of the Humber Road/Rosper Road junction, below).

Lack of Detailed Design

- Nowhere in the DCO as drafted is there reference to plans depicting the detailed design of the proposed roadworks. Rather, as counsel for ABP pointed out at the DCO Hearing held on 21st/22nd November, the DCO provides only an 'area of works' on one of the Works Plans. Given the significance of the proposed highways works to operation of the Port of Immingham, it is vital that works to be undertaken are identified in a DCO itself. Notably, such identification of detailed design of highway works was required at Rookery South and for the Doncaster Rail Chord. The Applicant undertook to provide the Examination with references to detailed plans, but then failed to do so. Accordingly, at the close of the Examination, there is nothing in the DCO that identifies works to be undertaken.

58. Outstanding criticisms in respect of specific matters include the Applicant's treatment of the Humber Road/Rosper Road Junction. The impact of AMEP on the functioning of this junction would comprise a very significant impediment to the day to day operation of the Port of Immingham, given the location of the junction on the final stretch of the main highway access to the Port.

59. Currently, traffic using Humber Road to access/exit the Port has priority. The junction design advanced by the Applicant involves the introduction of traffic lights, and would necessarily result in delay to Port traffic. However, the analysis of the proposed junction undertaken by the Applicant's consultant is materially deficient, with the result that the extent to which the

junction would fail to function has not been acknowledged by the Applicant. In this context, ABP notes the following matters:

Right-Turn Filter

(i) Traffic turning right from Humber Road into Rosper Road would need to be served by a separate signal (with a green arrow), as the Applicant's consultant Mr Pickard conceded at the Hearing. However, the traffic modelling supplied fails to make allowance for this right turn filter. In the event that the operation of such filter is introduced to the modelling, the capacity of the junction is exceeded so that it needs to be redesigned.

It is important to note that at the Hearing, not only did Mr Pickard state that traffic modelling for the junction should allow for such right turn filter, he maintained that such 'revised' modelling had already been undertaken. When pressed as to why this had not been provided to the Examination, Mr Pickard undertook to provide it by 26 October. Notwithstanding that substantial further data was provided by the Applicant on 26 October, this did not include the revised modelling referred to. No explanation has been provided for the failure to disclose this modelling to the Examination.

Pedestrian/Cycle Facilities

(ii) In modelling the junction no allowance has been made for facilities accommodating pedestrian/cycle traffic, notwithstanding that the Transport Assessment undertaken submitted on behalf of the Applicant emphasised the extent to which use of such modes of transport would be encouraged. Given that any pedestrian/cycle traffic accessing AMEP from the town of Immingham would necessarily travel through this junction, facilities to accommodate such traffic would need to be provided there. Introduction of these facilities would result in a further reduction in capacity of the junction, in the order of 20%. This area is flat. It lends itself to cycling as mode of transport for workers from homes in Immingham to the site via the problematic junctions. By way of observation ABP notes that, across the Estuary, Hull has a high rate of cycling

Abnormal Loads

(iii) The junction has not been designed to accommodate abnormal loads, despite the fact that the main identified route for abnormal loads accessing/leaving the Port of Immingham entails use of this junction. As such, the ability of abnormal load traffic to

access/exit the Port of Immingham would be materially reduced – in circumstances where, unsurprisingly, the volume of such traffic is significant.

HGV Tracking

(iv) Notwithstanding it was one of the key concerns highlighted in the original safety audit of the proposed junction design, the Applicant has failed to provide detailed tracking of HGV movements through the Humber Road/Rosper Road junction. Given the volume of HGV traffic currently moving through the junction, and the additional volume of such traffic that would be generated were AMEP to be constructed, the failure to resolve this issue is of particular concern.

Compulsory Purchase

60. The Application seeks consent for the exercise of compulsory purchase powers in respect of the various plots of land, including land owned by statutory undertakers – notably ABP and Network Rail. In these circumstances it is necessary to have regard both to the general provision governing the authorisation of compulsory purchase in the 2008 Act (section 122), and the extant national guidance issued by DCLG entitled '*Planning Act 2008: Guidance related to procedures for compulsory acquisition*' ('the Guidance'). Given that the land in respect of which powers of compulsory purchase are sought also comprises land held by statutory undertakers for the purpose of their undertakings, the following section of these submissions considers the application of section 127 of the 2008 Act.

Funding

61. Before turning to consider whether the Application can satisfy the statutory requirements of section 122 of the 2008 Act, it is necessary to address the issue of funding. Paragraph 33 of the Guidance provides:

> ""*any application for a consent order authorising compulsory acquisition must be accompanied by a statement explaining how it will be funded. This statement should provide* ***as much information as possible*** *about the resource implications of both acquiring the land and* ***implementing the project*** *for which the land is required."* (emphasis added).

62. The information provided by the Applicant simply fails to meet this requirement of Government policy. .

63. The level of information provided in the original 'Funding Statement' dated 29 November 2011 was risible. The position was not materially improved by the Applicant's second submission, provided in September 2012 in response to a question posed by the Panel. The third submission was delivered to the Examination only after ABP (and others) had pointed out its deficiencies – and only after the Panel had itself pointed out to the Applicant the jeopardy which it risked were it not more forthcoming. Further and importantly, that third submission was provided to the Examination *after* the CPO Hearing – once again precluding its being tested in the appropriate forum.

64. Turning to the substance of the third submission, the document comprised in large part an attempt to critique the financial position of ABP (regarding which see further below). As regards the assertion on the part of the Applicant that the cost of constructing AMEP can readily be met through a combination of the Applicant's own reserves and third party finance, this is not remotely convincing. It is important to note the matters set out in ABP's note on finance and the following:

    (i) No accounts have been provided for the Applicant or any parent company.

    (ii) No information has been provided regarding shareholders in the Applicant company, or indeed shareholders in any parent company.

    (iii) The only substantive information proffered in support of financial strength of the Applicant is a letter from a firm of accountants. This letter is notable in the following respects:

        - It is not provided by the firm which audits the accounts of either the Applicant or its parent company
        - The author of the letter states that their assessment does not comprise an audit and should not be regarded as providing any "assurance".
        - The letter only cherry picks certain numbers from the accounts, and in any event fail s to explain the basis of those numbers. It does not state what proportion of the assets (on which it relies) are from development properties (whose valuations are much less reliable and which are not valued in the way that investment properties are). The majority may well be from such properties.

65. In addition, this letter – and indeed the totality of the information provided by the Applicant in the context of funding – must be considered in the context of the written submissions

made on the Applicant's behalf in connection with ABP's proposal that any consent for AMEP be made the subject of a restriction as to the use to which AMEP could be put. In particular ABP notes that, in response to Question 5(c) of the First Set of Questions posed by the Panel, the Applicant asserted that no restriction should be imposed on the scope of the use of AMEP, stating:

> *"any prescriptive restriction could significantly undermine an overarching economic case and could preclude the project from being funded".*

66. As the Panel is aware, the Applicant has now belatedly agreed to the imposition of such a restriction, having recognised that the project which has been environmentally assessed is such a 'restricted project' rather than a general cargo port.

67. Given the clear statement of the Applicant regarding the consequence of any restriction for funding and viability, the Panel cannot now take at face value the assertion that the Applicant is 'good for the money'. In essence, the Applicant is seeking that the Panel (and indeed the Secretary of State) take on trust the submission that it has the necessary financial strength to deliver a project whose costs (together with those of the Able Logistics Park ('ALP') – which development is described as part of the same 'project' as AMEP) run to some £800million, in circumstances where it has itself previously questioned the viability of the proposal for which it is now seeking consent.

Statutory Requirement

68. Section 122 of the 2008 Act provides:

> *(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the decision-maker is satisfied that the conditions in subsections (2) and (3) are met.*
>
> *(2) The condition is that the land-*
>
> *(a) Is required for the development to which the development consent relates,*
>
> *(b) Is required to facilitate or is incidental to that development, or*
>
> *(c) Is replacement land which is to be given in exchange for the order land under section 131 or 132.*
>
> *(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.*

69. The paragraphs below illustrate why it is that the Application fails to satisfy the statutory requirements set out above, both as regards land owned by Network Rail and also ABP.

Network Rail Land - Killingholme Loop

70. As the Examination is aware from the evidence given on behalf of ABP by Mr Fitzgerald, the Port of Immingham is extremely significant to the economy not only at local and regional levels, but also in a national context. This evidence has never been disputed by the Applicant and is a position recognised by North Lincolnshire Council.

71. What is similarly uncontested, is the degree to which the Port of Immingham depends on the onward despatch of imported cargos by rail. The evidence of Mr Geldard, again not challenged in any respect upon this point, is that the Port of Immingham accounts for 25% of all rail freight within the UK. As matters currently stand, railway infrastructure serving the South Bank of the Humber is close to capacity. The implications of this, particularly having regard to the predicted increased volume of Biomass cargos as compared to coal, are potentially serious for the national economy.

72. The land in the ownership of Network Rail which the Applicant seeks to acquire, comprises a rail line which bisects the AMEP Site. That line was identified to the Examination by Network Rail as comprising part of a proposed infrastructure development known as the Killingholme Loop ('the Loop'). Network Rail informed the Examination that it has identified the Loop as comprising the only means of improving rail access to the facilities on the South Bank and Mr Cleland, on behalf of Network Rail, spoke clearly as to the need to protect its capacity to deliver the Loop.

73. Notwithstanding the value of the rail link to the wider public and commercial interest, the Applicant continues to pursue powers of compulsory purchase to acquire this rail line. That such powers continue to be sought is difficult to justify, in light of the fact that the Applicant has expressly conceded that in fact it does not *need* to acquire the Network Rail land in order to deliver AMEP. Indeed, Leading Counsel for the Applicant was at pains during the CPO Hearing to make clear that the scheme could function viably without such acquisition. In this context, ABP respectfully draws the attention of the Panel to the plan which the Applicant provided to the Examination[6], depicting the four bridges which it could/would

[6] See Figure 6.1, provided by the Applicant in answer to the Panel's second set of questions.

construct to enable operations on the land-side area to marry with use of the Quay, in the event that compulsory acquisition of the Network Rail land was not authorised.

74. In these circumstances, and in particular given the clear public interest in Network Rail retaining ownership of the line so as not to prejudice delivery of the Loop, the Applicant cannot satisfy the necessary test to justify authorisation of compulsory purchase powers. The *"compelling case in the public interest"*, which both the Guidance and section 122 of the 2008 Act require as a pre-requisite to compulsory acquisition, has not been made out. Accordingly, it is appropriate and necessary that the Panel/Secretary of State refuse to authorise compulsory acquisition of the Network Rail land.

ABP Land – 'The Triangle'

75. The various parcels of land and related interests held by ABP which the Applicant seeks to compulsorily acquire have, during the course of the Examination, been referred to collectively as the 'Triangle'[7]. This usage of this term has also included the vehicular right of way linking the Triangle to the main public highway.

76. Any assessment of the merits of the Applicant's designs over the Triangle necessarily requires consideration of the ABP's own intentions regarding use of it; specifically the Western Deepwater Jetty ('WDJ').

77. As Mr Fitzgerald explained in both written and oral evidence to the Examination, construction of the WDJ will:

    (i) Enable the Immingham Gas Jetty to be redeveloped , by providing a substitute facility to which traffic currently served by the Gas Jetty can relocate. The redevelopmentof the Gas Jetty will in turn facilitate construction of HIT 3, the purpose of which is – amongst other things – to serve the growing market for Biomass fuelstocks.

    (ii) Enable importation of refined fuels to a facility directly adjacent to the terminal for the nationally significant Government Pipeline Storage System ('GPSS'), currently operated by the Oil and Pipelines Agency.

[7] For the avoidance of doubt, the Triangle incorporates the following plots as identified in the Book of Reference, namely the 'Triangle' – 03020; 03021; 03022 and 03023 and the Right of Way – 03009; 03014 and 03016.

78. The WDJ will therefore serve the national interest, not only in making an immediate contribution to national and regional economic regeneration, but also in facilitating a contribution to two of the very policy objectives said to justify the AMEP scheme,, in that it will make a major contribution to

    (i) Promoting renewable energy generation (through importation of Biomass), and

    (ii) increasing security of energy supply (through the importation of refined fuels)

The Port Masterplan

79. The WDJ was proposed in the draft Port of Immingham Master Plan dated 2009, regarding which the Applicant was consulted. It is significant that the Applicant made no comment regarding the proposal for the WDJ in its consultation response, notwithstanding the detailed commentary it provided on the draft plan in other respects.

80. The WDJ has since been brought forward in the adopted version of the MasterPlan ('the MasterPlan'), published in October 2012.

81. The Masterplan is a significant document, not because it is a development plan (which it is not), not because it has statutory weight (which it does not), but because it represents a clear statement of intention on the part of ABP for the Port of Immingham generally and, in particular, the Triangle. It should be noted that ABP has brought forward and adopted the Masterplan in the context of government guidance advocating that port operators promote such plans.

82. No doubt it is because the Applicant appreciates the significance of the Masterplan, it has sought to undermine the status of the document. As to the suggestion that the Masterplan should be ignored on account of the absence of any strategic environmental assessment ('SEA'), ABP has already submitted a written representation to the Panel. ABP notes the following:

    (i) Government guidance does not require that port masterplans be subject to SEA;

    (ii) European caselaw is not to the effect that SEA is required for a plan such as a port masterplan; and

    (iii) Even if it were the case that the Masterplan were subject to SEA, the consequence would be to delay its adoption until after SEA processes had been completed. The intention of ABP in respect of the land of which Able seek to expropriate would be no different.

83. As already noted, the Masterplan was subject to an extensive period of consultation, in which the Applicant and various other organisations/individuals participated. The results of that consultation have been provided to the Examination. The Applicant did not object to the WDJ.

Need for WDJ

84. The need for ABP to bring forward the WDJ was explained by Mr Fitzgerald. The Port of Immingham has historically evolved, and must in the national interest continue to so evolve, in order to meet the needs of its users. Notwithstanding the current absence of support for provision of new Biomass fuelled power stations, most existing coal-fired power-stations are currently engaged in a process of converting to burning Biomass. In order to be able to continue to meet the needs of such power stations, the Port of Immingham must develop its infrastructure accordingly[8].

85. The redevelopment of the existing Immingham Gas Jetty to meet such demand for Biomass requires the redirection of existing cargos from the Gas Jetty to WDJ.

86. In addition, in the light of the loss of a significant proportion of the nation's fuel refinery capacity, it is clearly in the national interest that facilities to import refined product are brought forward. The suitability of the Triangle to provide such a facility, with its nexus to the GPSS and its proximity to extensive gas storage caverns, is self-evident.

87. Contrary to the Applicant's attempts to characterise the WDJ as a new proposal aimed solely at blocking the Applicant's compulsory acquisition of the Triangle, ABP's intent to bring forward the WDJ development is longstanding and has in fact been public knowledge since 2009. It pre-dates publication of the AMEP proposal.

[8] ABP notes that the Applicant has asserted that there is no need for ABP to construct the WDJ on the basis that ABP's project at the Port of Hull, the Hull Riverside Bulk Terminal (HRBT'), could accommodate the Biomass cargos destined for HIT3, and so relieve the pressure now faced by the Port of Immingham. Such suggestion is wholly misconceived. The Port of Immingham is better located to serve the needs of regional power stations than HRBT, which in any event would be more expensive to construct and more importantly the Port of Hull cannot accommodate the deep drafted vessels that the Port of Immingham can. HRBT has not yet been consented, and it could not serve as a replacement for HIT3.

Deliverability of WDJ

88. There are no significant bars to development of WDJ, regarding which ABP asks the Panel to note the following matters:

(i) An existing Liquid Bulks customer of the Port of Immingham has already signed a Memorandum of Understanding for use of the WDJ and Triangle;

(ii) A Harbour Revision Order has already been drafted in respect of the proposal;

(iii) Work has begun on an EIA Scoping Report; and

(iv) Preliminary discussions are taking place with both the MMO and NE.

89. ABP notes the efforts of the Applicant to downplay ABP's commitment to the WDJ, and to criticise the deliverability of the proposal. There is no substance to the various assertions made. In particular:

(i) ABP owns the land it needs. It has freehold title. There will be no need for ABP to seek compulsory purchase powers to deliver the WDJ; ABP holds all the interests necessary to enable it to construct the WDJ. In suggesting that compulsory purchase powers would be required, the Applicant is misrepresenting the position. The Applicant has sought to compare ABP's interest in parts of the Triangle to that of a party seeking to acquire rights by adverse possession. Such comparison is wholly misconceived. .

(ii) There is no environmental barrier to the proposal of the kind that the Applicant alleges. Specifically,

(a) the Applicant's assertion that the Triangle is used by Curlew as a roosting site is not justified.. There is no evidence that Curlew currently make any use of the Triangle (see Baker report dated 22nd November 2012).

(b) The structure on the Estuary proposed by ABP would be a finger pier of open piled construction and would have much less impact than the Applicant's solid quay (see further below).

WDJ as compared to AMEP

90. It is the Applicant's case that the Secretary of State should authorise the compulsory acquisition of the Triangle, notwithstanding the serious detriment that would cause to ABP by precluding delivery of the WDJ. To the extent that this necessitates a comparison of the merits of the respective proposals, ABP notes the following:

Relative Impact on SAC/SPA

(i) The ABP proposal will entail construction of a finger pier stretching into the Humber Estuary, serving landside facilities constructed on the Triangle (last in agricultural use). As such, it will cause only a small fraction of the loss to the intertidal mudflat that would result from construction of AMEP. As already noted, the latter will entail the destruction of some 44ha of mudflat. Such consideration merits particular weight, given the uncertainty regarding the Applicant's ability to finance the ***completion*** of its proposal.

Relative Project Cost

(ii) At around £40m, the cost of the WDJ is modest compared with that of AMEP, which is either £370m or £800m, depending on whether one considers AMEP as a free-standing proposal or in combination with the Able Logistics Park ('ALP')[9]. The smaller cost of the ABP proposal has implications in terms of which of the two projects has a more realistic prospect of delivery.

Relationship to Existing Infrastructure

(iii) Also relevant to the question of deliverability, is the fact that whilst the WDJ would comprise part of an existing port complex which is itself already of national, economic and functional importance, the Applicant would need to establish AMEP from a 'standing start'.

Proposed Use of Triangle by ABP

91. ABP notes that the Applicant proposes to use the Triangle for the purposes of overspill storage, and for provision of a pumping station. However, the ES expressly identified two feasible alternative locations for the siting of the Pumping Station, neither of which would entail use of the Triangle. It is evident that both these options were discounted in favour of the use of the Triangle on the basis that the latter would involve "*the lowest level of capital and operating expenditure*" - reasons which do not satisfy the PA 2008 tests. At the Compulsory Purchase Hearing, speaking on behalf of the Applicant, Mr Cram was unable to provide any justification as to why acquisition of the Triangle was pursued in place of either one of these 'feasible alternatives'

[9] In this context ABP notes that the oral evidence of Mr Stephenson to the CPO Hearing was to the effect that AMEP and ALP are part of a single project.

92. , ABP notes paragraph 20 of the Guidance, which provides that –

> "*The promoter should be able to demonstrate to the satisfaction of the decision-maker that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored and that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose and is necessary and proportionate*".

93. Despite undertaking to do so, the Applicant has failed to provide any explanation for its decision to disregard the existence of 'feasible alternatives', following the Compulsory Purchase Hearing.

Compatibility of AMEP and WDJ

94. As a necessary element of its case in respect of compulsory purchase, it was incumbent on the Applicant to demonstrate that the AMEP could not be designed other than in such manner as required use of the Triangle. This it has failed to do.

95. In particular, the Applicant has failed to provide any evidence that it could not bring forward a shorter quay, such as would enable ABP to retain the Triangle and appropriate marine access to construct the WDJ. On the Applicant's own admission, were ABP to retain its interest and bring forward the WDJ, the Applicant would still be able to construct a quay of about 2/3 of the size of the 1.279km proposed.

96. Whilst the Applicant stated why it *wished* to construct a pier of 1.2km in length, it failed to provide evidence capable of justifying why it should be afforded powers of compulsory acquisition to do so. In particular, ABP notes that no business case has been adduced demonstrating that a shorter quay would render the proposal less viable for use as an off-shore wind manufacturing facility. In reality the more modest in length is the quay, the less expensive it is to construct, and the better the prospects are of its viability.

Absence of Compelling Case for Compulsory Acquisition

97. The Applicant has failed to demonstrate a *"compelling case in the public interest"*, consistent with the Guidance, section 122 of the 2008 Act, in respect of the ABP Triangle and Article One of the First Protocol to the European Convention of Human Rights ('ECHR') . The procedural deficiencies set out earlier mean that authorisation of the CPO would be

inconsistent also with Article 6 of the ECHR. Accordingly, the Panel/Secretary of State must refuse to authorise compulsory acquisition of the ABP Triangle (with its marine access).

Section 127 Certification

98. Section 127 of the 2008 Act provides:

(1) This section applies in relation to land ('statutory undertaker's land') if-
(a) The land has been acquired by statutory undertakers for the purposes of their undertaking,
(b) A representation has been made about an application for an order granting development consent before the completion of the examination of the application, and that representation has not been withdrawn, and
(c) As a result of the representation the decision-maker is satisfied that-
(i) The land is used for the purposes of carrying on the statutory undertaker's undertaking, or
(ii) An interest in land is held for those purposes
(2) An order granting development consent may include provision authorising the compulsory acquisition of statutory undertaker's land only to the extent that the Secretary of State-
(a) Is satisfied of the matters set out in subsection (3), and
(b) Issues a certificate to that effect.
(3) The matters are that the nature and situation of the land are such that-
(a) It can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or
(b) If purchased it can be replaced by other land belonging to, or available for acquisition by, the undertaker's without serious detriment to the carrying on of the undertaking.

99. Mr Commissioner Upton should therefore (in discharging the powers of the Secretary of State pursuant to section 127), ask the following questions:

(i) Does the Triangle comprise '*statutory undertaker's land*' for the purpose of section 127(1)?

(ii) If the Triangle were compulsorily acquired, would its loss to ABP cause serious detriment to the latter's ability to carry on its statutory undertaking?

(iii) If acquired, could the Triangle be replaced by other land (either owned by ABP or available to it) without causing serious detriment to ABP's ability to carry on its statutory undertaking?

100. If the answer to the first question is affirmative , a certificate may only be issued if the answer to the second question is negative, or the answer to the third question is affirmative .

Status as Statutory Undertaker's Land

101. As to the first question: Both the basis on which the ABP Triangle was acquired and also the basis on which it is currently held, were addressed in oral and written evidence by Mr Fitzgerald. He explained that the land was purchased in 1967 by ABP's predecessor, the British Transport Docks Board, at a time when it was already designated in the development plan for port development purposes[10]. Since that time, the land has been held for the purposes of ABP's statutory undertaking, with the intention of bringing it forward to deliver additional port infrastructure. Notably, it was identified as the proposed location for the WDJ in the draft version of the Masterplan – a document published in 2009, when ABP was unaware of any proposal by the Applicant to acquire the Triangle, or indeed to bring forward the AMEP. Furthermore, the Triangle is also identified as part of the Port of Immingham in the North Lincolnshire Local Plan.

102. There was no challenge to Mr Fitzgerald's evidence on any of these matters, nor could there have been. It could not credibly have been suggested, nor was it put to Mr Fitzgerald, either that the land was not acquired for the purposes of a statutory undertaker (see subsection 127(1)(a)), or that the land was not 'held' for the purposes of the statutory undertaking.

103. There is no basis on which Mr Commissioner Upton can reach any conclusion but that the Triangle comprises statutory undertaker's land for the purposes of the 2008 Act. Therefore the answer to the first question is 'yes'.

Serious Detriment

104. As to the second question: in the light of ABP's existing development proposals for the Triangle (discussed above), the inescapable conclusion is that acquisition of the Triangle would result in serious detriment to ABP.

105. The Triangle comprises the only piece of undeveloped land owned by ABP at the Port of Immingham with river frontage, and in addition sits immediately adjacent to the terminal for the Government Pipeline Storage System. Furthermore, it also lies close to the underground gas storage caverns. It is therefore ideally located for development of the WDJ.

[10] Documentation relating to the acquisition was provided to the Panel appended to the Summary of ABP's Submissions to the CPO Hearing.

WDJ is crucial to the ability of ABP to continue to serve the needs of its existing/future clients in the energy sector.

106. Accordingly, the answer to the second question must necessarily be 'yes' – in the event that the Triangle were acquired, it would result in serious detriment to the ability of ABP to carry on its statutory undertaking.

Replacement Land

107. As to the third question: For the reasons identified above, the Triangle is uniquely suited to accommodate the WDJ. There is no other location to which WDJ could be relocated. Further, it could not credibly be, nor has it been suggested by the Applicant that there is any other land which could be acquired/used by ABP in place of the Triangle. Indeed at the Compulsory Purchase Hearing Leading Counsel for the Applicant confirmed that this was no part of the Applicant's case.

108. Accordingly, the answer to the third and final question is 'no'; the Triangle cannot be replaced by other land owned by/available to ABP.

Conclusion on the s127 Commission

109. It follows from the above that, as a matter of law, Mr Commissioner Upton cannot issue a certificate pursuant to section 127 of the 2008 Act, authorising the compulsory acquisition of the Triangle.

The Development Consent Order

110. Without prejudice to its position that the Application should be refused, ABP makes the following observations in respect of the DCO.

Restriction

111. ABP has considered the need for the imposition of a restriction on the DCO ('the Restriction'), governing the use to which both the quay ('Quay') and the land-side manufacturing area ('Land-Side Area') can be put, in the event that the DCO were to be granted. As was made clear at both DCO Hearings, the Restriction should limit the use of both aspects of the proposal, to activities relating to the off-shore wind sector.

112. The Restriction would be of fundamental importance, were AMEP to be consented. This is so, because it is as a facility to manufacture and ship components for the off-shore wind sector that AMEP has been subject to environmental assessment, and in respect of which the IROPI case has been made.

113. In this context ABP draws attention to the need for precision in the wording of the Restriction, and the need for it to confine activities to off-shore wind as opposed to any broader category – such as 'marine energy'. Were the Restriction to be worded loosely, then there would be a breach of EU law. The Able Group is involved in the decommissioning of oil and gas platforms. Such activity, whilst arguably one concerned with 'marine energy', is not one the impacts of which have been assessed in connection with the Application. Serious issues arise in relation to the breaking up of such structures.

114. Further, ABP emphasises the need for the Restriction to relate not only to the Quay but also the Land-Side Area. At the Compulsory Purchase Hearing, Mr Angus Walker of Bircham Dyson Bell confirmed, in the presence and hearing of Able's Leading Counsel and Mr Stephenson, that it was understood by the Applicant that the DCO would not allow use of the Land-Side Area for purposes other than marine energy/offshore wind even if the Restriction did not apply to it. Whilst noting the Applicant's intention and understanding, ABP does not accept that the DCO as drafted would so restrict the proposed development. In these circumstances, it is clearly appropriate that even if it were simply a matter of ambiguity regarding the scope of the Restriction, such ambiguity should be removed. The Restriction should be expressly stated so as to apply not only to the Quay but to the Land-Side Area.

Controlling Authority

115. ABP notes the suggestion on the part of the Applicant that the power to authorise any derogation from the Restriction should rest with the local planning authority, North Lincolnshire Council ('NLC'). This would not be appropriate.

116. The mechanism for 'relaxing' the Restriction should not be controlled by NLC, but rather by the Secretary of State. AMEP, so the Applicant contends, is a nationally significant infrastructure project ('NSIP'). It is on this basis that the Applicant has sought consent

through the 2008 Act, and asserted that delivery of the scheme is justified notwithstanding the damage to the environment that it would involve[11].

117. In these circumstances, it would be inappropriate for the power to relax the Restriction – given that relaxation may fundamentally alter the nature of the development that has been consulted upon and for which the Secretary of State has granted consent – to be left in the control of a local, as opposed to a national body. NLC might, in any number of scenarios, consider it would be appropriate to relax the Restriction on account of the fact that such relaxation would benefit the *local* interest. However, were the Secretary of State to grant consent he would have done so on the basis that the proposed development was in the *national* interest. (For example non offshore wind inwards investment in Immingham might well be a very attractive proposition to the ***local*** authority even though otherwise that investment would go to a different, deprived area of the UK such as Merseyside).

118. Accordingly, there is no reason why any DCO should provide a mechanism of amendment other than that for which the 2008 Act already provides, namely that contained in section Schedule 6 to the 2008 Act[12]. The procedure provided for by that schedule would leave any decision as to whether the Restriction should be relaxed with the Secretary of State.

Protective Provisions

119.

ABP has sought the inclusion in the DCO of protective provisions. It requested the inclusion of such provisions at the DCO Hearing held in July 2012, and then subsequently provided written text of such provisions on 2nd August.

Although these draft provisions have, (with one exception), been in the possession of the Applicant for several months, no attempt has been made by the Applicant to engage with ABP as to their content.

For the avoidance of doubt, ABP submits that that in the event that the DCO is granted, such protective provisions are included. ABP notes the following:

[11] Such harm including, but not limited to, the loss of 44ha of intertidal mudflat which comprises part of an SAC.

[12] Brought into effect by section 153 of the 2008 Act

(i) ABP is a statutory undertaker, responsible for the operation of infrastructure important to the national economy (the Port of Immingham). The importance of the facility is such as to require the protective provisions are afforded to it.

(ii) The construction/operation of AMEP has the potential to cause significant detriment to the day to day operations of the Port of Immingham. Such detriment might take the form of erosion/accretion caused at or near the Port by the carrying out of works at AMEP, or else might take the form of delay being caused to shipping accessing/exiting the Port. These detriments may have very considerable financial consequences for ABP.

(iii) Whilst the Applicant appears to object to the principle of affording protection to ABP regarding any harm/financial loss caused by AMEP, it apparently has no such 'in principle' objection to affording protection of this sort to C.Ro and C.Gen. There is no justification for any different approach to be adopted.

(iv) The MMO conceded that its initial stance of opposition to the protective provisions sought by ABP was made in error. Insofar as the Panel intends to attach weight to the views of the MMO, it was the latter's final position that the Deemed Marine Licence would not afford sufficient protection to ABP, and that as such it did not oppose inclusion of the provisions that ABP is seeking.

(v) It is necessary that, come what may, ABP retain the right to access the north-western end of the HIT Headshunt. ABP currently has vehicular access to the Headshunt, and its need to retain that access is self-evident. The Headshunt will itself comprise important infrastructure, and ABP needs to be in a position to maintain it.

The only further point to note in this context is with reference to the protection sought by C.Ro regarding its use of the existing rail line through AMEP. It of course remains the position of both ABP and C.Ro that the Applicant's request for powers to compulsorily acquire that rail line (or alternatively to acquire easements across it) should be refused. However, in the event that any such powers were granted, like C.Ro ABP would also need to be afforded protection in respect of its right to use the rail line in the future. The Examination has been made aware by Network Rail and others that this section of rail line will ultimately form part of the Killingholme Loop. Given that the Loop will come forward in such way as entails use of the section of rail line running through AMEP, ABP (and indeed potentially others) would need to have their rights to unrestricted use of the Loop

protected, to preclude their being limited by powers granted to the Applicant, in the event that the Applicant is authorised to exercise such powers.

Overall Conclusion:

ABP respectfully submits that the DCO, CPO and associated applications should not be granted.