

The Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

The Able Marine Energy Park Development Consent Order

Planning Inspectorate Reference: TR030001

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

Comments on responses to the Examining Authority's second written questions

INTRODUCTION

- 1 This document ("WR5") has been prepared on behalf of C.RO Ports Killingholme Limited ("C.RO"), the statutory harbour authority for, and operator of, C.RO Ports Killingholme ("CPK"). It relates to the application by Able Humber Ports Limited ("Able") to the Secretary of State for the Able Marine Energy Park ("AMEP") Development Consent Order ("DCO") and sets out C.RO's comments on the responses received by the Examining Authority to its second written questions ("WQs").

APPENDIX 1 - NOTE FOR COMPULSORY ACQUISITION HEARING

- 2 Attached to this WR5 at Appendix 1 is a Note prepared for the compulsory acquisition hearing on 16-18 October. The purpose of the note is to assist the Panel and Interested Parties at the hearing by drawing together the material before the Panel and place that material firmly within the legal and policy framework which must inform the Panel's decision concerning Able's application to seek powers of compulsory acquisition over the Killingholme Branch Line (the "Railway").

APPENDIX 2 - NOTE ON ENVIRONMENTAL ASSESSMENT REQUIRED FOR USE OF KILLINGHOLME BRANCH LINE

- 3 Attached to this WR5 at Appendix 2 are legal submissions on the requirements that would need to be met, and in particular the environmental assessment(s) that would be required, before C.RO could run trains on the Railway.

COMMENTS ON ABLE'S RESPONSES TO THE EXAMINING AUTHORITY'S SECOND WRITTEN QUESTIONS

Comment on Able's response to Question 29 (Killingholme Branch and Loop)

- 4 At Question 29 the Panel asked Able whether AMEP remained a viable proposition if the Railway were retained in Network Rail control, given Network Rail's opposition to the creation of new level crossings.
- 5 There are two existing level crossings at the AMEP site, and a bridge. It is understood that Able proposes to create two new level crossings.
- 6 C.RO understands that some of the road traffic that Able would need to cross the Railway at AMEP may not be suitable for movements over bridges, because of the abnormal size of the

components. The footprint of such a bridge would be considerable. As explained at 6.1 of its response, Able has allocated two crossings for such abnormal loads, and two further crossings for C&U vehicles, which are those that can normally use the road network and which, therefore, are suitable for gradients e.g. on bridges.

- 7 At paragraph 6.3 of Able's response, Able explains that it has never asserted that the development of AMEP is only viable if the Railway is removed from the public railway network. Rather, "retaining Network Rail infrastructure would be a significant encumbrance to the efficient and cost effective operation of the development".
- 8 C.RO has never stated that Able should not be able to operate any level crossings, in particular those in existence now. It is not aware that Network Rail has stated this either. What is at issue is the need for additional level crossings. Able has not shown why it needs four level crossings in addition to the existing bridge, nor that the level crossings it proposes are in the most suitable locations (to the extent that they are fixed and bearing in mind C.RO's representations elsewhere about the impact on train movements of multiple level crossings all in operation at the same time). It has not considered whether limiting the use and number of level crossings will detrimentally affect its development. It has apparently not considered the proportion of AMEP traffic that could cross the Railway by the existing or additional bridges.
- 9 C.RO has submitted elsewhere that Able wants maximum flexibility at AMEP. It has not demonstrated that it is prepared to constrain its project where possible and practicable to accommodate other interests. This is demonstrated by the statement at paragraph 6.3 of its response that, "bridge crossings of the railway are 'not reasonably practicable for the end use of the site as a port'". It is assumed that Able is stating that this end use is one that AMEP would be put to once it was no longer required as a marine energy facility. That is not a reason not to construct bridges or adequate justification of why it should obtain compulsory powers over, or control of, the Railway. This is particularly the case given that Able is not promoting a general purpose port, and has agreed to restrict the use of AMEP by suitable drafting in the DCO. It is irrelevant what Able might find convenient for its long-term plans. The interference with the Railway must be considered on the basis of what is reasonably required for AMEP, having regard to the tests in Section 122 of the Planning Act 2008.
- 10 The cost of bridges does not justify not installing them, and would not meet the tests in Section 122 either. £5-10 million cannot be considered an abnormal cost in the context of a circa £500 million development. Able has not produced any evidence to justify this figure.

C.RO considers that the cost of a bridge for C&U traffic is likely to be lower than these figures.

- 11 C.RO has easements to cross the Railway. It accepts that its ability to use those level crossings is dependent on rail traffic levels (which might in future include rail traffic to/from the Able Logistics Park), and is necessarily restricted. C.RO must work around those restrictions. It accepts that in the future, subject to obtaining the necessary consent to construct bridges and other commercial matters, a bridge at C.RO may be a suitable solution to allow it to operate the port flexibly and without unwanted restraints that may arise from the more intensive use of the Railway.
- 12 In summary, C.RO recognises that some traffic movements across the Railway may not be suitable for bridges. However, Able has not investigated the scope for limiting what vehicles need to cross the Railway, and where. It has not, therefore, demonstrated that it requires four level crossings and, therefore, control of the Railway. It has not revealed why two level crossings for abnormal loads would not be sufficient, even if that meant some restrictions. It has not demonstrated the extent to which its traffic could use bridges. It has not demonstrated that it has looked at alternatives for the purposes meeting the tests in the Guidance on compulsory acquisition. Able cannot, therefore, show that compulsory acquisition is necessary because of Network Rail and the ORR's restrictions on new level crossings.
- 13 Further, there has been no environmental impact assessment of these proposals. The Panel cannot know the environmental impact of AMEP on the Railway. It is, therefore, doubtful whether it could recommend that development consent should be granted, given the provisions of the EIA Regulations.

Comment on Able's response to Question 30 (Specific proposals for Railway)

- 14 C.RO is not aware that Able has developed specific proposals in relation to level crossings with Network Rail but would be interested to know if any such proposals have been worked up. It considers them essential to understanding the impacts of AMEP's use of the Railway, and any compulsory acquisition.
- 15 C.RO considers that protective provisions are also required to ensure that the construction and operation of AMEP does not interfere with C.RO's free, uninterrupted and safe use of the Railway or any traffic on the Railway. C.RO refers the Examining Authority to the draft protective provisions annexed to WS1, C.RO's written summary of its oral submissions at the ISH on the DCO.

Comment on Able's response to Questions 53 to 57 (Funding Statement)

- 16 The Examining Authority asked five questions on funding matters. Rather than explicitly responding to three of the five of the Examining Authority's questions regarding the funding statement, Able has provided an Updated Funding Statement at Appendix 10.1. Given the significance of the financial viability of the applicant to the performance of obligations (in protective provisions and elsewhere), and potential liability for compensation, this is surprising. The Funding Statement does not address the matters raised in the questions. The submissions that C.RO raised in its comments on these questions (WR4) at paragraphs 6.1 to 6.5 remain unaddressed by the Applicant.
- 17 C.RO welcomes Able's acceptance of C.RO's repeated request that a clause be included in the DCO requiring the existence of a guarantee or alternative form of security prior to the commencement of the authorised development. However, as well as a requirement for a guarantee, it is important that protective provisions are also included in the DCO. As stated by C.RO at paragraph 6.4 of WR4 these protective provisions must:
- 17.1 provide financial protection for C.RO and other affected parties should they incur loss or expenses as a result of the construction or operation of AMEP; and
- 17.2 secure an indemnity against any loss or damage incurred by the parties to whom the provisions apply by reason or in consequence of the construction, operation, or maintenance of AMEP.
- 18 C.RO refers the Examining Authority to the draft protective provisions submitted as Appendix 1 to C.RO's WS1.
- 19 Able's response to Question 56 regarding the securing and maintaining of funds should Elba Group dispose of AMEP does not address this issue. This is because the securing of a guarantee, whether by the Applicant or a subsequent company, will not provide adequate protection to affected parties. Protective provisions are imperative to ensure that any future operator of AMEP is financially responsible to the affected parties for the purposes set out in 16.1 and 16.2 above.

**COMMENTS ON NETWORK RAIL'S RESPONSES TO THE EXAMINING AUTHORITY'S
SECOND WRITTEN QUESTIONS**

Comment on Network Rail's response to Question 31 (lease of Railway)

- 20 C.RO is concerned by Network Rail's comment that Able has stated to it that Able requires unrestricted road vehicle access over the entire length of the line rather than a number of discrete crossing points. This also contradicts Able's representations, including in its response to these questions, that it will install level crossings. It has shown these on a drawing. There is a worrying lack of clarity about what Able actually proposes. This will prejudice other interested parties.
- 21 C.RO has made extensive representations regarding the lack of detail provided by Able as to its proposals for the Railway, and the impact of those proposals on Railway operations. Detail is required regarding Able's specific proposals, and those proposals must be the subject of environmental assessment.

DLA Piper UK LLP on behalf of C.RO Ports Killingholme Limited
12 October 2012

- END OF REPRESENTATION -

APPENDIX 1

Note for Compulsory Acquisition Hearing concerning Killingholme Branch Line (with Appendices 1-5)

APPENDIX 2

Analysis: Assessment requirements for use of the Killingholme Branch Line