INFRASTRUCTURE PLANNING

THE INFRASTRUCTURE PLANNING (EXAMINATIONS PROCEDURE) RULES 2010

THE ABLE MARINE ENERGY PARK DEVELOPMENT CONSENT ORDER

TR030001

Comments by the Harbour Master, Humber on the revised draft Order dated 9 October 2012

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Introduction

1. The Harbour Master Humber (HMH) commented at length direct to the Applicant on the draft DCO dated 3 August 2012. It raised issues going to the principle of the DCO and what sort of provision is proper to be included, not just in this DCO but in DCOs generally. HMH is glad to see that some of his comments have been taken on board. However, the revised DCO (version 4, 9 October 2012) still gives rise to a number of issues of direct concern to HMH.. Details are as follows. Amendments, so far as it is possible to provide them, are shown in the amended draft DCO in Appendix 1.

Article 2 (Interpretation)

2. In the definitions of "the approach channel" and "the berthing pocket" the references to "the land plan" and "the works plan" need to be amended to the plural.

3. The definition of "area of jurisdiction" is poorly drafted and introduces two further expressions when only one is required. There is no need for "boundary of jurisdiction …" as well as "limits of harbour". There are no limits "so" shown in the defined sense: they are labelled "boundary". And the wording on the Schedule 10 plan should reflect the wording of the DOC. It is also unhelpful for "limits of the harbour" to be lost in this definition. Appropriate amendments in the definition and Schedule 10 are included in the revised draft DCO in Appendix 1.

4. "Area of seaward construction activity" is defined by reference to the Order limits, which in turn are defined by reference to the works plans. The definition of "area of seaward construction activity" should therefore refer to the works plans rather than the land plans.

5. The definition of "the Company" only refers to the Applicant's registered office in Jersey. The Order must identify an address within the jurisdiction of the UK. It is evident from the application form that the Applicant has established a branch in the UK which should be registered for compliance with the Overseas Companies Regulations 2009 (SI 2009/1801). This UK address should be referred to in the definition.

6. The definition of "the Conservancy Authority" is not correct. It should refer to AB Ports, not the services division, and, given the Conservancy Authority's statutory status, "Humber Conservancy" should be replaced by "river".

7. It would be desirable for the deposit sites specified in the deemed marine licence to be shown on a plan. This is expanded on below. A definition of "deposit location plan" would be required because the plan should be made one of the plans requiring certification, in which case it will be referred to in both article 56 and Schedule 8.

8. In the definition "an environmental management and monitoring plan", "and the terrestrial" should be "or"; the "an" does not work in the only place in which these plans are referred to generically; and as there is only the one generic reference (Schedule 1, paragraph 5), HMH wonders whether it is needed at all.

9. In the definition of "harbour", it would be more consistent with article 9 if the words "limits of the harbour" were substituted for "area of jurisdiction".

10. The amended definition of "the Harbour Authority" has been extended to any transferee but not to lessees. If this approach is adopted, the reference here should be to article 12(1)(a).

11. The definition of "MMO" cannot be left in Schedule 8 as the MMO is also referred to in Part 1 of Schedule 9.

12. "Order land" is not defined by reference to the order limits, as would be conventional in a statutory instrument of this kind, but as "the land shown on the land plans as within the boundary of land required for or affected by the proposed development, and described in the book of reference". Assuming "Order limits" is what is intended, HMH requests that those words be used in this definition, just as they appear throughout the DCO. This also avoids using a plethora of expressions for the same thing. It is for the wording of the land plans to match the DCO, not the other way round. The legislation is the DCO itself. The plan is merely a supporting document to be referred to as showing graphically something that either cannot be stated in words or which benefits from graphic representation.

13. In relation to the land plans, and "boundary of land required for or affected by the proposed development", neither "boundary" nor "land" is defined. One assumes "boundary" is the same as "limits" and that "proposed development" means the authorised development, but that is only deduction. In HMH's submission, the fact that the deduction may be correct does not rectify a defect: the plans should be brought into line with the DCO.

14. A similar point arises on the definition of "the Order limits". The reference to the authorised development (which is defined) has been replaced by reference to unspecified "development and works". As a result, the description of the limits is both ambiguous and wrong. The fact that this wording replicates the works plan is not relevant – see above.

15. The river Humber is variously referred to as the "River Humber" (body of Order), "the estuary" (undefined, in Schedule 8) and "the river" (Part 1 of Schedule 9). This could helpfully be tidied up.

16. In the definition of "tidal work" the words "or operation" are needed to make clear that the definition captures dredging operations.

Article 12 (Consent to transfer benefit of Order)

17. HMH is aware that this article follows the Model Provisions. The provision is difficult to interpret as "the benefit of the provisions of the Order" does not readily identify statutory functions against physical asset, either of which might be transferred or leased. It would not be difficult for the whole statutory undertaking and its physical assets to be fragmented among different entities and interests, This would not matter in a commercial context, but in the context of a DCO-authorised statutory harbour authority each fragment could have some statutory function. Third parties would have no way of identifying the holder of any specific function, an impossible position for such as HMH who must be able to deal with bodies whose statutory status is transparent and ascertainable without special proof. HMH has not previously objected to this. Following the hearing on 17 October dealing with the Funding Statement, however, he feels obliged to draw the Examining Authority's attention to the risks inherent in article 12 in its present form.

18. Paragraph 23 of Schedule 9 would require the undertaker to give HMH notice of any transfer or lease made or granted under article 12. This does not address the problem of identification by other third parties. Neither does it ensure that HMH is made aware of the physical assets that have been transferred or leased, which it will be essential for him to know. Most importantly, it provides no assurance of financial means to assume the benefit transferred or granted. HMH ought not to have to undertake a due diligence. The Secretary of State will have to satisfy himself of financial standing when he approves a transfer or grant under article 12. However, in case the Secretary of State decides to make the Order on the strength of the current financial information (or lack of it), HMH seeks an amendment requiring his approval as well, as allowing for a possibly more rigorous test so far as HMH is concerned.

Article 12A (Guarantees in respect of payment)

19. This article is altogether inadequate to safeguard against the risk of the Company being granted statutory powers without having the financial means to implement them. The limited scope of the proposed guarantee would not provide any assurance in respect of Able's overall ability to implement (which include long term functions and liabilities), while the identity of the guarantor or other providers of security is not provided for. For the same reasons, article 12A provides no assurance against the (non-statutory) blight that would be caused in the Humber and its existing port and similar operations by the grant of powers that are not exercised.

Article 21 – Right to dredge

20. It seems curious to describe this article as granting a 'right', which is by its nature a privilege exercisable as against an owner. Legislation authorising dredging in the public navigation is granting a power that can be used as against third parties/the public at large.

Article 22 (Tidal works not to be executed without approval of Secretary of State)

21. The words "extended, enlarged," should be omitted where they appear in paragraphs (1) and (2). This is consequential on articles 9 and 10: there will not be power to extend or enlarge the authorised development.

22. It is understood that the reason for providing for extended or enlarged works which are outside the scope of articles 9 and 10 is to capture works (we quote Bircham Dyson Bell) "if permitted within the tidal works process". As the DCO does not contain any provision for the extension or enlargement of the authorised development, it follows that this refers to some process separate from the DCO, one assumes relating to future works. Article 22 relates to any "tidal work", defined in article 2(2) as a work authorised by the DCO. It follows that article 22 cannot apply to future works. It might hereafter be applied to such works, but that will be for the relevant authority then. In the context of the DCO these words do not work.

23. Alterations can make significant changes in these works in the public navigation. HMH accordingly seeks to have the "alterations" included in the list of works subject to approval.

Article 25 (Lights on tidal works, etc. during construction)

24. The references to "extension" and "enlargement" should be omitted for the reasons given in relation to article 22. This amendment was previously agreed on behalf of the Applicant.

25. As HMH has previously observed (Annex 1 to his Written Representation, paragraph 16), the list of works requiring the placing of lights should include alterations. This is both well precedented and consistent with the Model Provisions reflecting the fact that it is also necessary.

26. The Model Provisions do not include a precedent for failure to comply, but there is ample precedent for this in Orders under the Harbours Act 1964. A prime example is article 18 of the London Gateway Port Harbour Empowerment Order 2008, which authorised a very similar scheme in the river Thames.

Article 29 (Compulsory acquisition of land)

27. Reflecting HMH's position that the river bed and foreshore can be leased but should not

be acquired from the Conservancy Authority. HMH seeks an amendment to exclude from the scope of this provision land below the level of high water in which the Conservancy Authority has an interest.

Article 30 (Power to override easements and other rights)
Article 33 (Compulsory acquisition of rights)
Article 39 (Temporary use of land for carrying out the authorised development)
Article 40 (Temporary use of land for maintaining authorised development)

28. See above regarding compulsory acquisition of the river bed and foreshore vested in ABP and the amendments to exclude this land from the scope of these articles.

Article 56 (Certification of plans)

29. HMH seeks a deposit location plan to support the references to numbered sites in Schedule 8. As the plan will illustrate an important aspect of the works, he submits that this should be one of the plans requiring certification.

Schedule 7

30. The reference to "the ecology plans" in Schedule 7 (in the heading for column (2)) now needs to be plural (see definition in article 2(1)).

Schedule 8

31. Schedule 8 refers to a great many co-ordinates which are said to be shown on numbered sheets of the works plans. None of those co-ordinates is marked on the plans themselves and there are no lines to show e.g. the location of the approach channel. It is not therefore possible either to identify in the DCO or immediately to ascertain from the plans where these works are and whether they are within or outside the DCO limits. This needs to be rectified. A scheme of lettered points on the plan corresponding to the relevant co-ordinates would serve.

32. In paragraph 7(1)(d) the words "such that its seaward extent is above" do not make sense: seaward extent is lateral, not vertical. The amendment proposed by HMH provides for the pumping station to occupy the same area as the mattress (i.e. the pumping station must not overhang the mattress) which is presumably what is intended.

33. The Examining Authority might want to revisit "seaward" in this context. Even if it is appropriate for Schedule 8 to be written in terms of the "estuary" rather than the "river" (see paragraph 15 above), an estuary is the mouth of a river, not part of the sea. Accordingly, "seaward" means out of the estuary towards the North Sea, not south across the river, which appears to be the intended meaning.

34. HMH draws the Examining Authority's attention to the Applicants proposal to dredge. HMH notes that the capital dredging permitted by paragraph 9 is to greater depths than the maintenance dredging depths specified in paragraph 10. It is understood that this reflects the Applicant's intention to dredge the berth pockets down to hard material so that jack-up rigs have a hard standing. These areas would later be back-filled to the depths specified in paragraph 10, the intention being that these should be the permanent depths. The back fill material would be rock dressed with smaller gauge material (gravel or cobbles). This is provided for in general terms in paragraph 6. However, there is nothing in Schedule 8 to safeguard against the risk that the backfill may not stay in place, identified by HMH in paragraph 5 of his response to Q46 in the Second Round of Written Questions.

35. HMH considers that there should be specific provision in the body of the DCO. These

proposals have potential to cause siltation problems and to affect the risk regarding stated amounts of dredged material raised in HMH's responses to Q46 and Q47 of the Second Round of Written Questions. It is therefore necessary for the DCO to make appropriate provision that third parties can if necessary enforce against the licence holder (or, if different, the Harbour Authority).

36. Paragraph 16 of Schedule 9 only addresses this to a degree, and only after the event. It seems to be a matter for both the deemed marine licence and approval by the Conservancy Authority

37. Paragraph 9(2) allocates the approximate quantities to specific locations. The DCO does not make clear what is to happen if these quantities are exceeded.

38. In reply to the HMH's request, the Applicant agreed that a plan of the deposit location could be provided. HMH submits that this plan should be one of the article 56 certified plans. Reference to the plan should be made in Schedule 8, paragraphs 9 and 10.

39. Paragraph 9(1)(a) refers to capital dredging at "the quay site". This expression is not defined. Presumably it refers to the quay limits for which there is a definition in paragraph 1(1).

40. In paragraph 13, "mitigation" needs to be amended to "monitoring".

41. The active monitoring scheme required by paragraph 26 will include details of the locations of active monitoring buoys. The placing of buoys is a potential obstruction to navigation. It should be subject to HMH's approval

42. Generally in relation to plans, schedules and other documents to be prepared by the licence holder under Schedule 8, it will almost invariably be necessary for the licence holder to ensure that documents submitted to the various parties for approval or agreement have first been approved by HMH as the person responsible for management of navigation and works in the river. In some cases consultation may be sufficient. At all events, the Applicant's failure to involve HMH in the process in any way is unacceptable and impracticable. Such involvement is in the Applicant's own interest. HMH has made reasonable suggestions as to how this could be dealt with. A different balance between consultation and approval might well serve, but whatever that balance might be, some provision for HMH's involvement must be made.

Schedule 9, Part 1 (For the protection of the Humber Conservancy)

43. At HUM's suggestion the Applicant agreed to amend "Humber Harbour Master" to refer to the harbour master (defined in article 2). That amendment now needs to be followed through at paragraphs 4, 14, 19, 20, 22 and 23 of Schedule 9 and paragraph 20 of Schedule 11.

44. The Applicant has adopted HMH's proposed extended definition of "plans" to include sections, elevations, drawings, specifications, programmes, method statements and hydraulic information (see article 2(1)), which will apply in Schedule 9.

45. The amendments in paragraph 3(1) and (2) provide for HMH's role in the preparation of the documents mentioned in those paragraphs. The documents or parts of documents where HMH/the Conservancy Authority has a direct input are subject to approval. The remainder are for consultation.

46. In the event that the proposed underlease is not agreed, provision reflecting certain necessary lease terms will have to be made on the face of the Order. Separate amendments on this will be provided shortly.

Conclusion

47. Appendix 1 contains the 9 October draft with amendments reflecting these comments.