
From: Jenn Dawes [Contact details removed]
Sent: Monday, July 23, 2012 2:31 PM
To: Mike Harris
Cc: [Contact details removed]
Subject: AMEP: Submission of Written Summary of Applicant's Case

Mike,

Please find attached our submission of the Written Summary of the Applicant's Case following the specific issue hearing for the Development Consent Order on 12th July 2012.
4 No. paper (hard) copies are in tonight's post.

Kind regards

JENN DAWES
Environmental Scientist

Able UK Ltd
Able House
Billingham Reach Industrial Estate
Billingham
Teesside TS23 1PX

[Contact details removed]

Web: www.ableuk.com

IMPORTANT NOTICE

This email message is CONFIDENTIAL and may contain legally privileged information. If you are not the intended recipient you should not read, copy, distribute, disclose or otherwise use the information in this email. Please also telephone or fax us immediately and delete the message from your system. Email may be susceptible to data corruption, interception and unauthorised amendment, and we do not accept liability for any such corruption, interception or amendment or the consequences thereof.

 **Help cut carbon...please don't print this email unless you really need to.**

This email was received from the INTERNET and scanned by the Government Secure Intranet anti-virus service supplied by Cable&Wireless Worldwide in partnership with MessageLabs. (CCTM Certificate Number 2009/09/0052.) In case of problems, please call your organisation's IT Helpdesk.

Communications via the GSi may be automatically logged, monitored and/or recorded for legal purposes.

Correspondents should note that all communications to Department for Communities and Local Government may be automatically logged, monitored and/or recorded for lawful purposes.



**Specific Issue Hearing on the Development Consent Order,
12 July 2012**

Written Summary of the Applicant's Case

23rd July 2012
Revision: 0
Bircham Dyson Bell

ABLE MARINE ENERGY PARK PROJECT (REF: TR030001)

SPECIFIC ISSUE HEARING ON THE DEVELOPMENT CONSENT ORDER, 12 JULY 2012

WRITTEN SUMMARY OF THE APPLICANT'S CASE

Introduction

1. This document summarises the case put by the applicant, Able Humber Ports Ltd, at the hearing into the Development Consent Order (DCO), including the Deemed Marine Licence (DML) in particular, which took place at the Humber Royal Hotel, Grimsby, on 12 July 2012.

2. The panel invited stakeholders to submit proposed drafts of new provisions and amendments to existing provisions in the DCO as part of their written summaries and the applicant welcomes this. The applicant will respond to these with a new draft of the DCO, together with reasons for the inclusion of any amendments it proposes, and reasons for the inclusion, amendment or exclusion of the changes proposed by others, which it will submit as part of its comments on the written representations by the deadline of 3 August 2012.

3. In what follows, the applicant's submissions follow the issues of principle and issues of detail set out in the examining Authority's letter of 4 July 2012, followed by two additional issues that were raised at the hearing. For convenience, the issues of detail have been reordered into 'DCO order' rather than necessarily the order they were taken in at the hearing.

Issues of principle

The definition and description of development

4. The applicant's case is that the description of development contained in the DCO is set out at Schedule 1 and article 10. There are no model provisions for works descriptions, and the applicant submits that these do not need to be particularly detailed as this is standard for such provisions in Acts of Parliament and Harbour Revision or Empowerment Orders that authorise works. The example given at the hearing was the Crossrail Act 2008, where the principal work is precise about its start and end points and unspecified between these, viz.:

"Work No. 1/3A– A railway (10,809 metres in length, in tunnel) commencing by a junction with Work No. 1/8D at a point 42 metres west of the western face of Lord's Hill Bridge over the Reading Railway, passing eastwards and terminating beneath a point 140 metres west of the junction of Stepney Green with White Horse Lane;"

5. Where detail is required, this is set out in the works plans, the deemed marine licence (Schedule 8) and in the various plans that are required to be signed off by the local planning authority and other agencies.

6. The Humber harbourmaster suggested that vertical limits of deviation be provided as well as lateral ones. The applicant will consider amending the draft as suggested.

7. C.RO/C.GEN asked for more detail on Work No. 2. The applicant will consider adding appropriate drawings to requirement 4 (detailed design).

8. The onshore development at item 3(b) of Schedule 1 is 'associated development' for the purposes of the Planning Act 2008. It is akin to 'creation or enhancement of a logistics or distribution centre', and 'development of nearby port-related process facilities', which are two of the examples given in the revised draft guidance on associated development issued by the Department for Communities and Local Government in April 2012.

The extent to which the draft DCO restricts/might or should restrict the proposed development of the port to wind farm-assisted manufacturing

9. The applicant agrees that a restriction in the type of cargo that the development should be permitted to handle should be imposed in the DCO to reflect the basis of environmental impact assessment (EIA) and shadow Habitats Regulations Assessment (sHRA). A proposed draft requirement that takes into account any suggestions from other stakeholders will be included in the revised DCO to be submitted by 3 August. The draft requirement is likely to restrict the cargo that the harbour is permitted to handle to that consisting of, associated with or ancillary to marine energy infrastructure, and adopt a similar mechanism for changes to this restriction as operated by ABP in its Associated British Ports (Hull) Harbour Revision Order 2006. Such changes would be subject to EIA and appropriate assessment as normal.

The nature and extent of provisions relating to the railway network

10. This issue was not covered in any great detail at the hearing, since it is primarily an issue of compulsory acquisition. The applicant confirms that it would not remove the railway tracks crossing the order land or render them unusable and would be happy to commit to this. The applicant will consider the extent to which it can provide detail on any railway works or crossing points that are anticipated and who would carry these out.

The adequacy of provisions relating to the control of design and other matters to be discharged by Local Planning Authorities or other agencies

11. On the control of design issue, the applicant will provide a replacement draft for requirement 4 (detailed design) that more closely mirrors the equivalent requirements (5 and 6) for the Rookery South DCO; in particular listing the individual drawings and plans to which the requirement applies (notwithstanding how they have been described in the application).

12. On the discharge of requirements generally, there is no mechanism in the model provisions for dealing with non-determination, refusal etc. The applicant recognises that further provision is required beyond that specified in article 59 and will substitute this article with the wording used in the Rookery South DCO (article 4).

13. The applicant understands that no automatic discharge of requirements would occur if the Order land were to be covered by a Local Development Order, but will consider this issue further.

14. The applicant would prefer that in every case of discharge of a requirement or other provision that there was one lead body that was responsible for the sign-off, while consulting other bodies rather than having more than one body responsible for sign-off, which might lead to an impasse. In response to the MMO, however, the applicant recognises that the overlapping legal duties of the MMO and of the local planning authority may mean that this is not possible in the area between high and low water marks where both bodies have jurisdiction.

The timescales proposed for land acquisition, start of development and completion of development

15. For ease of reference these are contained at article 32, paragraph (requirement) 2 of Schedule 11 and article 6 respectively. This issue did not seem of particular concern to any party making representations at the hearing; the applicant stands by its comparison with the London Gateway Port project, which has similar timescales.

16. A related issue was raised under this heading, namely that of dependencies – i.e. which activities would have to be carried out if others were carried out, such as the compensation site being provided if the quay were constructed. The applicant will include a note of such dependencies and how these are embodied in the DCO with its comments due by 3 August.

The need for and adequacy of provisions relating to a Construction and Environmental Management Plan (CEMP)

17. The applicant is fairly neutral on whether the Code of Construction Practice and Environmental Management Plan referred to in the DCO should be combined into a single Construction and Environmental Management Plan, although Natural England (NE) and North Lincolnshire Council suggested they should remain separate. There were also submissions from NE and the MMO about three environmental management and mitigation plans (terrestrial, marine and compensation site), which the applicant is likely to agree to and may in any event supersede the environmental management plan. The applicant will consider this and set out its proposals in its 3 August comments.

18. The MMO expressed concern about its involvement in the plans that the DCO required to be produced and their location in the DCO. The applicant would, when submitting a further draft of the DCO, set out in its explanatory note all the plans that the DCO contemplated, who would sign them off, who would be consulted and where in the DCO they were referred to.

Submissions on specific provisions

Article 2: interpretation

19. ABP asked for clarity on the definition of ‘harbour’.

Articles 3 and 28: incorporation of 1847 Act, power to appropriate

20. The applicant has not incorporated section 33 of the Harbours, Docks and Piers Clauses Act 1847, instead effectively substituting this with article 28 (power to appropriate). The applicant’s intention is that the tenants of the onshore part of the project will be given associated rights to use harbour berths either exclusively or preferentially. This retains the public benefit because the purposes for which the tenants will use the berths will be for marine energy infrastructure: indeed this power makes the securing of tenants and the consequent successful operation of the port more likely.

Article 4: modification of enactments

21. The modification of local legislation governing the River Humber is possible in this article without qualification, because there is a general power to modify legislation in section 120(5)(a) of the Planning Act 2008, and the inclusion of such powers does not need the consent of the body that

would have given consent under the local acts, because they are not listed in the Infrastructure Planning (Miscellaneous Provisions) Order 2010 made under section 150 of the 2008 Act.

22. The disapplication of consent under section 23(1) of the Land Drainage Act 1991 is, however, a consent that requires the original consenting body to agree to its inclusion. Such consent has been obtained from the North East Lindsay Internal Drainage Board and is reproduced in the 'list of consents needed' application document (TR030001/APP/24).

Article 6: period for completion of work

23. See comments at paragraphs 15 and 16 above.

Article 8: agreements entered into by Company, etc.

24. This article is intended to allow the applicant to enter into agreements with the Humber harbourmaster before becoming a harbour authority that will endure once it becomes a harbour authority. It is not intended to allow the applicant to enter into agreements that it would not be able to enter into once it had become a harbour authority, and the applicant will consider drafting changes to address this point.

Article 9: maintenance of authorised development

25. This article, taken from the model provisions and used extensively in Harbour Revision Orders for other harbours, would allow the applicant to 'enlarge' and 'extend' the harbour as part of its maintenance powers. The applicant recognises that it would be inappropriate to use this power to extend the footprint of the quay, for example, and will consider drafting to make this and any other such limitations clear.

Article 10: provision of works

26. The applicant will consider limiting the scope of this article so that it does not apply to all of the Order land.

Article 12: consent to transfer benefit of Order

27. This article, taken from the model provisions, would allow Order powers to be transferred to another body with the consent of the Secretary of State. At the hearing, the Humber harbourmaster, the Marine Management Organisation (MMO) and C.RO/C.GEN expressed concern that this might conflict with the requirement to obtain further consents to transfer the powers and duties of the applicant as harbour authority, and also that the transferee may not be capable of fulfilling its obligations under the DCO.

28. The applicant has no intention to short-circuit any requirement to obtain, say, a Harbour Revision Order to allow powers to be transferred, and will consider amendments to the draft to reflect this.

Article 20: authority to survey and investigate the land

29. This article allows the applicant to enter onto land within the Order limits or which may be affected by the development for surveying and other related purposes. The panel had asked whether the notice period of 14 days in article 20(2) was long enough given the complexity of this project. The

applicant considers that the complexity of the project *per se* is not something that would affect consideration of how much notice a landowner should be given before entry for these purposes and therefore proposes to keep the notice period as it is unless further reasons for departing from the model provisions are provided, in which case it will consider changing the period.

30. ABP raised the issue of the potentially broad application of the phrase 'which may be affected by the development'. The applicant will consider whether it is practicable to limit this and how this relates to pre-application consultation.

Article 23: abatement of works abandoned or decayed

31. The panel had questioned this provision given that it was similar to that at paragraph 17 of Schedule 9 (protective provisions) except that the latter provision gave power to the Humber harbourmaster to give notice rather than the Secretary of State. The applicant is content that either of these be removed if they lead to unnecessary duplication, or to retain them both if both parties with powers would wish to keep them, and will consider further representations on this matter.

Article 28: power to appropriate

32. See the comments at paragraph 20.

Article 39: temporary use of land for carrying out the development

33. For commentary on the 14-day notice period at article 39(2) see paragraph 29.

34. ABP also submitted that to subject land that was proposed to be compulsorily acquired to powers of temporary possession was unwarranted. The applicant had included the provision so that land subject to compulsory acquisition that from further analysis would only need to be temporarily occupied could be subject to the lesser power and then returned to the owner rather than being permanently acquired. The applicant will consider any further submissions on this point.

35. The applicant will consider the Panel's point about the test to be applied to by it in relation to requests for temporary occupation powers.

Article 41: statutory undertakers

36. National Grid / E.ON's lawyer questioned this provision in the context of section 138 of the Planning Act 2008 (extinguishment of rights, and removal of apparatus, of statutory undertakers etc.).

37. The applicant would consider this issue further but would make it clear in the DCO if necessary that the power under article 41 did not override any requirement to obtain consent under section 138.

Article 47: railway network

38. Network Rail asked what the effect of article 47(3) would be. This is simply for the avoidance of doubt to give Network Rail, the ORR and the applicant the ability to enter into agreements in relation to the railway crossing the land, and nothing more.

Article 50: operational land for purposes of the 1990 Act

39. The panel asked for what purpose this article was in the DCO. The applicant understands that it is for the purpose of permitted development rights. The applicant will review this article to ascertain whether the whole of the Order land should be given this designation.

Article 51: defence to proceedings in respect of statutory nuisance

40. ABP submitted that the defence in article 51(1)(a)(i) that any nuisance was in accordance with a notice served by the local authority under section 60, 61 or 65 of the Control of Pollution Act 1974 should not be available to the applicant in the case of proceedings commenced by individuals. The applicant will consider this point and whether any changes to the drafting should be made as a consequence.

Article 54: disapplication of regulation 73 of the Conservation of Habitats and Species Regulations 2010

41. The panel asked whether the disapplication of regulation 73 of the 2010 Regulations was appropriate, which adds a condition to permitted development that the approval of the local planning authority is required before development likely to have a significant effect on a European site can be begun. This would apply to works authorised by article 10 except where they fell outside the 'plan or project' that is the subject of the DCO application, or were subject to a further authorisation or approval.

42. The applicant will consider this point further (it not appearing on the agenda for the hearing) and make any changes it believes necessary to this article as appropriate. Natural England undertook to consider this point further and the applicant will welcome their views.

Article 59: requirements - appeals

43. See the comment at paragraph 12.

Schedule 1: authorised development

44. See the comments at paragraphs 4 to 7.

Schedules 2 and 3: streets subject to street works and streets to be temporarily stopped up

45. The applicant notes that North Lincolnshire Council were content with the contents of these schedules. The schedules do not apply to land within any other local planning authority area.

Schedule 8: deemed marine licence (DML)

46. The applicant has made a wholesale replacement the previous draft of this schedule in its comments on relevant representations, in response to a request from the Marine Management Organisation (MMO) that it be set out in a different way. Paragraphs 4 to 11 set out the activities that are deemed to be licensed, and paragraphs 12 to 29 consist of conditions that apply to such activities.

47. The applicant will continue to work with the MMO to produce a draft that the latter is content with. The MMO raised the issue at the hearing that it would expect the applicant to liaise with other River Humber users as to any content they wished to see in the DML. The applicant will consider

whether it needs to take any further steps to discharge this beyond considering the representations that the parties are making as part of the examination of the DCO.

48. The MMO, E.ON and Centrica expressed concern about lack of clarity on which activities had to be carried out and which were optional. The applicant will insert a condition that reflects the dependencies of the licensed activities on each other.

49. The applicant will consider the points about detail and cross-referencing that were made at the hearing and make any amendments to the draft it considers appropriate.

50. The MMO asked that values given as approximate were re-expressed as maxima. The applicant will amend the draft where it considers appropriate.

Schedule 9: protective provisions

51. The schedule already contains protective provisions for:

- a. Natural England (who requested that they be moved to the requirements),
- b. the Humber harbourmaster,
- c. the Environment Agency,
- d. the Highways Agency, and
- e. Network Rail (albeit blank at present).

52. The applicant will consider and make provision in the DCO as it sees appropriate from the drafts provided in relevant/written representations received from:

- a. E.ON Climate and Renewables,
- b. E.ON UK plc,
- c. Centrica,
- d. National Grid,
- e. Anglian Water, and
- f. Network Rail.

53. The applicant will consider drafts if they are submitted by the following (who indicated at the hearing that they would do so):

- a. Phillips 66 (formerly ConocoPhillips),
- b. the Oil and Pipelines Agency,
- c. C.RO Ports Killingholme, and
- d. ABP.

54. When the applicant provides a further draft of the DCO on or before 3 August, it will set out in the accompanying explanation the current status of all other infrastructure in the area for the assistance of the panel and interested parties.

Schedule 10: limits of harbour

55. The applicant will substitute the plan at Schedule 10 with a new plan that gives a limit of 100m rather than 200m, adds co-ordinates and deals with the triangle of land mentioned by the Humber harbourmaster as the applicant considers appropriate.

Schedule 11: requirements

56. For requirement 13 (archaeology), the applicant will consider the point about overlapping jurisdiction made by the MMO.

57. For requirements 14 and 15, see the comments at paragraph 17.

58. For requirement 17 (lighting), the applicant will add Natural England as a consultee and consider what changes to make to the draft in the light of submissions about removal of lighting upon completion of construction and interference with navigation and signalling.

59. For requirement 20 (nuisance) the applicant will consider the request to include 'other pollutants' made by ABP.

Section 106 agreement(s)

60. The applicant will develop section 106 agreement(s) with the three local authorities of North Lincolnshire Council, North East Lincolnshire Council and East Riding of Yorkshire Council. It will consider how and at what frequency to release drafts of the agreement(s) for interested parties' comments.

Other matters

Environmental Impact Assessment Regulations, Regulation 17

61. ABP made a submission at the hearing that the examination of the application should be suspended in order either that further environmental information it considers necessary for the examination of the application is provided, or so that the publicity required under regulation 17 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 could be given to the supplementary information already provided. The applicant refutes claims that:

- a. the Environmental Statement (ES) compiled by ERM and Black and Veatch and submitted with its application is inadequate for the purposes of examining and deciding the application;
- b. the supplementary information it provided as part of the comments on the relevant representations constitutes 'further information' for the purposes of regulation 17 of the EIA regulations (while agreeing with the Panel's recognition that it (the Panel) has an ongoing duty to consider whether the environmental information supplied is adequate).

62. The next paragraph consists of a brief rebuttal of the 'regulation 17' case put by ABP at the hearing, of which the applicant had no notice. Although it is in addition to the case put by the applicant at the hearing, the applicant hopes that it will be acceptable to the examining Authority to include it in this summary in the circumstances in the interests of the efficient progress of the examination.

63. The environmental impact assessment of a large project is necessarily an iterative process and the provision of supplementary information in response to representations is merely a manifestation of that. It is intended to respond to the points raised by those making representations, indeed to demonstrate that the conclusions the original ES reached were robust, rather than to remedy any inadequacy with the ES. A large amount of additional material has been supplied by the promoters of other nationally significant infrastructure projects during the examination of their applications, but no promoter has been so far required to publicise such information in the interests of EIA. EDF Energy did publish notices on 10 April 2012 when it submitted additional information for its Hinkley Point C project, but this was because there were minor changes to the project rather than to publicise further environmental information. In contrast, this project has not changed. Towards the end of the hearing on 12 July, ABP submitted that much (although not necessarily all) of its arguments on this point were related to the lack of restriction on the cargo that AMEP would handle. Given that the applicant is proposing to insert a requirement to this effect, this reduces the force of its submissions considerably.

64. The applicant also refutes the assertion that the onshore part of the project is not capable of constituting 'associated development' under the Planning Act 2008. The test in the Act is that such development is associated with the nationally significant infrastructure project in question, which it clearly is, and the revised guidance (to which there is no longer a statutory duty to have regard) gives clearly equivalent examples in its annex, of 'creation or enhancement of a logistics or distribution centre' and 'development of nearby port-related process facilities'.

Bircham Dyson Bell LLP
23 July 2012