
From: Nolan, Sarah [Contact details removed]
Sent: Monday, July 23, 2012 7:07 PM
To: Mike Harris
Cc: Able Marine Energy Park; [Contact details removed]
Subject: AMEP - Written summary of oral representation - C.GEN Killingholme Limited

Dear Sirs,

[Ref No. removed]

Please find attached the written summary of the oral representations of C.GEN Killingholme Limited at the Issue Specific Hearing on the draft Development Consent Order.

Kind Regards,

Sarah Nolan
Solicitor (New Zealand qualified)

DLA Piper UK LLP

[Contact details removed]

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C.GEN Killingholme Limited

The Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

The Able Marine Energy Park Development Consent Order

Planning Inspectorate Reference: TR030001

**Written summary of the oral representations of C.GEN Killingholme Limited at the
Issue Specific Hearing on the draft Development Consent Order**

Ref No. removed

23 July 2012

INTRODUCTION

1. This written summary ("WS 1") has been prepared on behalf of C.GEN Killingholme Limited ("C.GEN"). It relates to the oral submissions made by C.GEN at the Issue Specific Hearing ("ISH") on the draft Able Marine Energy Park ("AMEP") Development Consent Order ("DCO") held on Thursday 12 July 2012.
2. C.GEN proposes to make an application under the Planning Act 2008 to the Secretary of State for Energy and Climate Change in the second half of 2012 to construct and operate a 470MWe thermal generating station and associated development on land adjacent to C.RO Ports Killingholme ("CPK"). This land, which is owned by C.GEN, is adjacent to that affected by the DCO. This document summarises the submissions made by C.GEN at the ISH in relation to the DCO, using the agenda of the ISH as a framework.
3. Attached as Appendix 1 is a Paper of Amendments, setting out the amendments that C.GEN considers should be made to the DCO.

MORNING SESSION: ISSUES OF PRINCIPLE

4. **Issues 1, 2 and 3: The definition and description of the proposed development and the extent to which the DCO restricts, or should restrict, the proposed development of the port to wind farm-associated development.**
 - 4.1 At the ISH the first three issues of principle were discussed in conjunction with each other.
 - 4.2 As submitted at the ISH, C.GEN is concerned that the project is not adequately described in the DCO. There need to be greater restrictions on what Able is permitted to do in future, bearing in mind the lack of detail in the description of the project. The amount of flexibility currently permitted by the drafting in the DCO raises considerable concerns for C.GEN because this flexibility would enable Able to construct a wide range of additional elements that are to date unspecified, and the environmental consequences of which have not been assessed. Such flexibility is not appropriate and is a concern for C.GEN because of the potential for it to enable development that will adversely affect the environment, with consequences for C.GEN. This includes impacts on the local road network, on the Killingholme Branch Line (the "Railway"), and CPK. C.GEN may transport fuel for, and waste from, its project via the Railway and/or CPK and is concerned to ensure its future operations are not prejudiced by any adverse impacts AMEP may have.

4.3 As stated at the ISH, C.GEN considers that it is appropriate not only to limit the flexibility inherent in the draft DCO by amending individual provisions, but also to restrain the use of AMEP through a requirement. These amendments will go some way to removing uncertainty and risk. Proceeding without such provisions would not be lawful.

4.4 C.GEN also acknowledged at the ISH that it is clear that Able wishes to have flexibility. C.GEN has not stated that Able should never be allowed to use AMEP for purposes other than those associated with the offshore energy industry. However, if it is currently contemplating other uses, it should specify them and assess them in the normal way. If it is not, and such uses will be promoted/adopted in the future, Able must accept the usual position for any development, which is that the environmental effects of a project must be constrained (through requirements and by not including unnecessarily wide and inappropriate powers in the DCO) to those that have been assessed. The impacts of alternative uses (including of the construction activities of those uses) will be different.

5. **Issue 5: The adequacy of provisions relating to the control of design**

5.1 As stated at the ISH, C.GEN's position is that the current draft of the DCO does not contain an adequate framework for the control of design. C.GEN drew the Examining Authority's attention to the Rookery South (Resource Recovery Facility) Order, which provided that the authorised development must be carried out in accordance with the requirements of the plans listed by number in that order and the Design and Access Statement.

6. **Issue 4: The nature and extent of provisions relating to the railway network**

6.1 C.GEN's starting position is that there should be no compulsory acquisition of the track and track bed of the Railway. Also, the regulated status of the Railway should not be altered. C.GEN's submission is that there is also a significant lack of detail in the DCO in relation to the works proposed to the Railway. Regardless of whether compulsory acquisition goes ahead, if Able proposes works to the Railway (which in itself is unclear given the lack of any detail in the application and environmental statement as to the works proposed) these must be listed in Schedule 1 as part of the Authorised Development. Any works to the Railway must also be properly reflected in plans listed in the DCO and Able must be required to carry them out. These works must also be properly assessed. This has not yet taken place.

7. Issue 7: Need for/adequacy of provisions relating to a construction and environmental management plan

7.1 This issue is generally representative of the flaws in the DCO as a whole. As stated at the ISH, C.GEN is concerned that the application and environmental statement contained inadequate detail to allow for a proper assessment of the impacts of the construction and operation of AMEP.

AFTERNOON SESSION: ISSUES OF DETAIL

8. Schedule 9: Protective Provisions

8.1 C.GEN submits that because of the potential effects of AMEP on the local road network and the Railway, protective provisions for the benefit of C.GEN are required. C.GEN has drafted the protective provisions that it considers are necessary and appropriate. These are included in the attached Paper of Amendments, without prejudice to the need to amend, vary or augment them. The possible need to augment them derives from the lack of detail known about AMEP.

8.2 C.GEN also submits that as the harbour authority for CPK, which C.GEN proposes to use for the transportation of fuel and waste to/from its project, C.RO must be adequately protected through appropriate protective provisions.

9. Section 106 agreement

9.1 C.GEN is concerned about whether Able will be in a position to meet its obligations and liabilities. Any section 106 agreement must ensure that a parent company guarantee and/or other protection is put in place for interested parties who may be subject to loss as a result of compulsory acquisition of the Railway or injurious affection in particular, and/or the failure of Able to perform its obligations under the DCO, including as required by protective provisions.

9.2 As advised at the ISH, this approach was required for the section 106 agreement in relation to the Rookery South (Resource Recovery Facility) Order, to ensure that Covanta was able to draw on resources of its wider group to meet compensation and other liabilities, and to reassure the Infrastructure Planning Commission of the sufficiency of resources to meet those liabilities.

C.GEN Killingholme Limited

9.3 C.GEN endorsed the submissions of ABP that drafts of the section 106 agreement should be made available. C.GEN suggested that the approach of Covanta for the Rookery South Resource Recovery Facility examination to disclose the latest draft as part of each Written Representation was adopted by Able.

DLA Piper UK LLP on behalf of C.GEN Killingholme Limited

23 July 2012

THE PLANNING ACT 2008

THE PROPOSED ABLE MARINE ENERGY PARK DEVELOPMENT CONSENT ORDER

**APPENDIX 1
PAPER OF AMENDMENTS TO DRAFT ORDER
PROPOSED BY C.GEN KILLINGHOLME LIMITED**

Introduction

1. Able Humber Ports Limited ("Able") submitted a Revised Draft Development Consent Order as Appendix B to its Comments on the Relevant Representations in relation to the Able Marine Energy Park ("AMEP"). The following amendments are proposed by C.GEN Killingholme Limited ("C.GEN") to that version of the draft Development Consent Order ("DCO") for consideration by the Examining Authority.
2. The amendments draw on the Written Representation of C.GEN, and the submission made at the Issue Specific Hearing on the DCO. The amendments proposed here relate to the revised draft DCO published by Able on 29 June 2012. C.GEN reserves the right to propose further amendments, or amend, vary or augment the amendments set out below, in response to or as a result of any further representations made during the examination by Able or other Interested Parties (including oral or written representations and responses to written questions, and as a result of the publication of any further draft of the DCO).
3. Schedule 1 does not set out an appropriate level of description for a project of this nature. This, combined with the lack of appropriate restrictions on design, layout, and use, as well as loopholes in the drafting of the DCO, means that AMEP is not appropriately constrained to those environmental impacts that have been assessed. As a result, and in conjunction with the current drafting of the DCO, Able has attempted to give itself an extremely and unjustifiably wide discretion to modify AMEP in future.
4. The design of AMEP is currently addressed in design drawings, which are for Work No. 1 only, and in a collection of drawings marked "planning application drawings" that do not appear to be referred to anywhere in the DCO or the requirements attached to it. Those planning application drawings include drawings that are confusingly labelled "indicative".

This includes an Indicative Masterplan drawing, the purpose of which is unclear. Notwithstanding its name, it appears to show a layout for the landside elements of AMEP, including three level crossings. How this will be delivered or secured - if at all - is not certain.

5. This attempt at unfettered flexibility raises considerable concerns about the potential impact of AMEP on C.GEN's future operations. This includes impacts on the local road network, on the Killingholme Branch Line, and C.RO Ports Killingholme.
6. Therefore, C.GEN proposes the amendments set out below. A number of amendments to the DCO are required to constrain AMEP so that it can only be operated as a facility for the manufacture of marine energy components. This will ensure that the environmental effects of AMEP are limited to those assessed. It is not C.GEN's position that AMEP should never be used for any other purpose, only that these other uses must be properly assessed. If Able considers that other works may be required, or other uses of AMEP are contemplated, Able should specify these now so that they can be subject to environmental assessment.
7. C.GEN acknowledges that a number of the provisions for which it seeks amendments, and in particular Article 10, are included in the Infrastructure Planning (Model Provisions) England and Wales) Order 2009 ("Model Provisions"). However C.GEN submits that a blanket reliance on the Model Provisions is not appropriate here, given the DCO's lack of specificity as to the authorised development.

Amendments

8. Amend Article 2 by:
 - 8.1 Deleting the words "and any other development authorised by this Order" from the definition of "Authorised Development";
 - 8.2 Amending the definition of "Order Limits".

[Drafting note: in the works plans the limits are delineated with a dashed blue line and described as "limits within which the development and works may be carried out". There is no reference to "order limits" between the various plans which must be rectified and reflected in the definition of Order Limits.]

9. Amend Article 9 by deleting the words "and within the limits of the harbour, from time to time enlarge, relay or extend temporarily or permanently the authorised development,".

10. Amend Article 10 by:
 - 10.1 Amending 10(1) by:
 - 10.1.1 Inserting at the beginning of the paragraph the words "Subject to paragraph (3) and (4)"; and
 - 10.1.2 Deleting the words "railway lines".
 - 10.2 Amending 10(2) by deleting sub-paragraph (c).
 - 10.3 Amending 10(3) by inserting the words "Subject to paragraph (4) below," at the beginning of the paragraph.
 - 10.4 Inserting a new sub-paragraph 4 as follows:

(4) Insofar as the authorised development falls within Part 11 in Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 it shall be subject to Article 3(10) of that same Order and in that case Article 3(12) of that Order shall not apply.
11. Amend Article 13 by inserting the following sub-paragraphs and re-numbering the remaining sub-paragraphs accordingly:

(4) No works permitted by this Article shall allow the closure of or impeding access via any of the streets specified in Schedule 2 to or from any premises on such street, unless a suitable and commodious alternative is provided prior to and for the duration of any works permitted by this Article.
12. Amend Article 14 by:
 - 12.1 Amending 14(1)(b) by inserting "and (3)" after the words "subject to paragraph (2)"
 - 12.2 Inserting the following sub-paragraph and re-numbering the remaining sub-paragraphs accordingly:

(3) No street shall be wholly or partly stopped up under this Article unless a temporary alternative route for the passage of such traffic as could have used the street to be stopped up is first provided and thereafter maintained by the undertaker, to the reasonable satisfaction of the street authority, between the commencement and termination points for the stopping up of the street until the completion and re-opening up of the street affected by the temporary stopping up.
13. Amend Article 20 by deleting the phrase "or which may be affected by the authorised development" in sub-paragraph (1).
14. Amend Article 22 by deleting the phrase "reconstructed, extended, enlarged, replaced or relaid" in sub-paragraphs (1) and (2).
15. Amend Article 29 by inserting the following sub-paragraph:

(5) Nothing in this Order shall permit the compulsory acquisition of interests in railway, track bed and associated structures from Network Rail Infrastructure Limited, being the

parcels numbered 02008, 03013, 03014, 03015, 04004, 04014, 04024, 04025, 05023, 05024, 05025, 05026, 05027, 05028, 07001 in the land plans.

16. Amend Article 30, by inserting the following sub-paragraph and re-numbering the remaining sub-paragraphs accordingly:

(6) Nothing in this Article shall

- (a) apply to any easement or other right in which C.RO Ports Killingholme Limited or C.GEN Killingholme Limited has an interest in, or has the benefit of; or
- (b) override any agreement between Network Rail and either C.RO Ports Killingholme Limited or C.GEN Killingholme Limited relating to the rights to connect to and use Network Rail's railway.

17. Amend Article 34 by inserting the following sub-paragraph and re-numbering the remaining sub-paragraphs accordingly:

(6) This article does not apply to any easement in relation to crossing the Railway or other right to access and use the Railway in which C.RO Ports Killingholme Limited or C.GEN Killingholme Limited has an interest in, or has the benefit of.

18. Amend the land plans to remove the pink wash from the parcels numbered 02008, 03013, 03014, 03015, 04004, 04014, 04024, 04025, 05023, 05024, 05025, 05026, 05027, 05028, 07001.

19. Delete Article 47.

20. Amend Article 59 by deleting it in its entirety, and replacing it with the following provision:

59. (1) The provisions of section 72 of the 1990 Act shall apply so that the requirements shall be deemed to be imposed as and as if they were conditions imposed upon the grant of planning permission pursuant to section 72 of the 1990 Act and the development consent granted by this Order was a planning permission granted under the 1990 Act.

(2) Sub-section (1) of section 78 of the 1990 Act shall apply to the development consent granted by this Order and to the requirements save that it shall be modified so as to read for the purposes of this Order only as if there were inserted after subsection (b) the following—

"(bb) refuse an application for any consent, agreement or approval of that authority required by a requirement imposed on a grant of development consent or contained in a development consent order, or a grant it subject to conditions; or"

(3) Sections 78 and 79 of the 1990 Act shall have effect in relation to any appeal under the terms of this article save that the Secretary of State in question shall be the Secretary of State who would be responsible for determining an application for development consent with the subject matter of this Order if section 103(1) of the 2008 Act applied.

(4) The terms of any development order, and other rules and regulations, including without limitation regulations requiring environmental impact assessment, and which apply to applications pursuant to conditions or the subject matter of section 78 of the 1990 Act shall apply to any application or appeal made under the requirements or terms of this article.

(5) Nothing in this article shall alter the effect of section 161 of the 2008 Act.

21. Amend Schedule 1 by:
- 21.1 Inserting the words "Work No. 3 - " at the beginning of sub-paragraph (3)(b);
- 21.2 Inserting the following sub paragraphs and renumbering the remaining sub-paragraphs accordingly:
- (d) Work No. 4 - [works to the Killingholme Branch Line];
- (e) Work No. 5 - [construction of level crossings];
22. Amend Schedule 11 Requirements by:
- 22.1 Amending the definition of "authorised development" by deleting the words "and any other development authorised by this Order""
- 22.2 Inserting an additional Requirement after Requirement 2 and renumbering the remaining provisions accordingly:

Restriction of operations

3. The Authorised Development shall be operated only as a facility for the manufacture, assembly, storage and transport of components and parts for offshore marine energy and related items.

- 22.3 Amending Requirement 4 by deleting the text in its entirety and replacing it with the following Requirement:

4. (1) Except where the authorised development is carried out in accordance with the plans listed in paragraph (2) below, no authorised development shall commence until details of the layout, scale and external appearance of Works No. 1, 2, 3, 4, and 5 comprised in the authorised development so far as they do not accord with the authorised plans have been submitted to and approved by the relevant planning authorities. The authorised development must be carried out in accordance with the approved details.

(2) The authorised development shall be carried out in accordance with the approved plans submitted with the application and bearing references [] (unless otherwise approved in writing by the relevant planning authorities and the altered development accords with the principles of the design and access statement and falls within the Order limits) as follows:

[Insert list of detailed drawings]

(3) Where any alternative details are approved pursuant to this requirement, those details are to be deemed to be substituted for the corresponding approved details set out in this requirement.

23. Insert the following Part into Schedule 8 Protective Provisions:

PART 7

FOR THE PROTECTION OF C.GEN KILLINGHOLME LIMITED

General

34. The following provisions shall apply for the protection of C.GEN, unless otherwise agreed in writing between the undertaker and C.GEN.

35. In this Part of this Schedule-

"construction" includes execution and placing, maintenance, extension, improvement, enlargement, relaying and renewal and "constructed" should be construed accordingly;

"C.GEN" means C.GEN Killingholme Limited;

"C.GEN land" means the land owned by C.GEN adjacent to the Order land;

"CPK" means C.RO Ports Killingholme Limited, a statutory harbour located to the west, and upriver of, the proposed Able Marine Energy Park;

"plans" includes arrangements, sections, descriptions, drawings and specifications;

"Railway" means the track and track bed of the Killingholme Branch Line;

Railway

36. The undertaker shall not in the exercise of the powers conferred by this Order prevent C.GEN's access to the Railway.

37. (1) The construction and operation of the authorised development must not interfere with or obstruct the free, uninterrupted and safe use of the Railway or any traffic on the Railway.

(2) If any such interference is caused or takes place in consequence of the construction or operation of the authorised development the undertaker shall pay to C.GEN all reasonable expenses to which C.GEN may be put and compensation for any loss which it may sustain by reason of any such interference or obstruction.

Rosper Road

38. The undertaker shall not in the exercise of the powers conferred by this Order prevent C.GEN's access to and use of Rosper Road.

39. (1) The construction and operation of the authorised development must not interfere with or obstruct the free, uninterrupted and safe use of Rosper Road or any traffic on Rosper Road, unless an alternative access that is suitable and commodious is provided prior to and for the duration of any such interference.

(2) If any such interference is caused or takes place in consequence of the construction or operation of the authorised development the undertaker shall pay to C.GEN all reasonable

expenses to which C.GEN may be put and compensation for any loss which it may sustain by reason of any such interference or obstruction.

Indemnity

40. (1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction, maintenance or failure resulting from any of the authorised development any damage is caused to any property of C.GEN or C.GEN suffers any loss as a result of delays or other interruptions to port operations at CPK or as the result of delays or interruptions to the operation of the Railway the undertaker shall—

- (a) bear and pay the cost reasonably incurred by C.GEN in making good such damage; and
- (b) indemnify C.GEN against all claims, demands, proceedings, costs, damages and expenses which may be made against, or recovered from, or incurred by it

by reason or in consequence of any such damage or exercise by the undertaker of its powers conferred by this Order.

(2) Nothing in sub-paragraph (1) shall impose any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of C.GEN, its officers, servants, contractors or agents.

(3) C.GEN shall give the undertaker reasonable notice of any such claim or demand and no settlement or compromise shall be made without the consent of the undertaker which, if it withholds such consent, shall have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand with such assistance from C.GEN as may be reasonably necessary.

Liability

41. With the exception of any duty owed by C.GEN to the undertaker which is expressly provided for in this Part of this Schedule, nothing in this Order shall be construed as imposing upon C.GEN either directly or indirectly, any duty or liability to which C.GEN would not otherwise be subject and which is enforceable by proceedings before any court.

Drainage

42. Article 4(2) of this Order shall not apply to any watercourse which is used for the drainage of the C.GEN land.

Disputes

43. Unless otherwise agreed in writing, any dispute arising between the undertaker and C.GEN under this Schedule shall be determined by arbitration as provided in article 66 (arbitration).