
From: Broadbent, Richard (NE) [redacted] *Contact details removed*
Sent: Monday, July 23, 2012 7:58 PM
To: Able Marine Energy Park
Cc: [redacted] *Contact details removed*
Subject: Able MEP: Written Statement following Issue Specific Hearing on the DCO

<<Written statement following the Issue Specific Hearing on the draft DCO and DML 12 July 230712(clean).pdf>> <<41826 humber EZ Nlincs LDO final.pdf>> <<Annex 1 Email 8 March.pdf>>

Dear Sirs

Able MEP: Written Statement following Issue Specific Hearing on the DCO

Further to this matter, please see the attached documents.

I should be grateful if you could confirm receipt.

Kind regards

Richard

Richard Broadbent

Senior Solicitor

Natural England

Floor 7, Hercules House

Hercules Road

London SE1 7DU

[redacted]

[redacted] *Contact details removed*

Natural England is here to conserve and enhance the natural environment, for its intrinsic value, the wellbeing and enjoyment of people and the economic prosperity that it brings.

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

Date: Tuesday 14th February 2012
Our ref: 41826



Chris Barwell
Spatial Planning Manager
North Lincolnshire Council

Natural England
Consultation Service
Hornbeam House
Electra Way
Crewe Business Park
CREWE
CW1 6GJ

Contact details removed

Contact details removed

Dear Mr Barwell

Humber Enterprise Zone – proposed Local Development Order for Able Marine Energy Park

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future.

As agreed at the meeting on Wednesday 8th February 2012, I have undertaken an informal consultation with appropriate colleagues about proposals for a Local Development Order (LDO) for part of the Able Marine Energy Park (AMEP). This advice is based on the information provided to date, which includes the proposed boundary of the LDO. The LDO boundary includes all terrestrial elements of the AMEP IPC submission and does **not** include the proposed quay structure. At our meeting on the 8th February it was discussed whether mitigation proposals could be implemented to avoid a likely significant effect in relation to the Humber Estuary designated site. Primarily our discussion focussed on an area of mitigation land to the western part of the site – this mitigation land is also included in the IPC submission.

Natural England would like to take this opportunity to formalise our collective understanding with regard to The Conservation of Habitats and Species Regulations 2010 (“the Habitats Regulations”) and the LDO production process.

Reg 78 the Habitats Regulations reference Local Development Orders:

Local development orders

- 78.** *A local development order may not grant planning permission for development which –*
- (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects); and*
 - (b) is not directly connected with or necessary to the management of the site.*

Therefore any LDO which will result in a likely significant effect will not be compliant with the Habitats Regulations. This requirement is also outlined in Circular 1/06 (Guidance on changes to the Development Control System): “LDOs are restricted from permitting development that is likely to have a significant effect on a European site. This restriction of the power to make an LDO covers potential development not only on such a European site, but also development in the vicinity that might affect the site.” (Para 18, Circular 1/06)

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It is therefore vital to understand how the LDO may affect European sites **before** it is progressed further in order to ensure that the LDO only contains development that is appropriate in the context of the relevant legislation. Natural England expects a screening process (including possible “in combination” effects) to be undertaken if a Local Authority intends to submit an LDO, in order to accord with the Habitats Regulations.

For the proposed LDO at AMEP Natural England advises that:

- In principle, mitigation proposals can be included in the LDO to avoid a conclusion of likely significant effect. The mitigation should be provided before development commences. However, as pointed out at our meeting, the Local Planning Authority should ensure that the existing evidence base relating to the AMEP is used in a consistent way. The IPC submission for the AMEP has shown a conclusion of **Likely Significant Effect (LSE)** in relation to foraging and roosting curlew using the central greenfield area of the application site (see Annex 1). Proposed mitigation was considered when making this judgement. Therefore, it is unclear how a different conclusion can be made in relation to the LDO given that the evidence base is the same.
- The LDO should only focus on the areas within the site where there will be **no Likely Significant Effect**. This will ensure compliance with Reg 78 of The Habitats & Species Regulations 2010 – ‘*A local development order may not grant planning permission for development which—(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects); and (b) is not directly connected with or necessary to the management of the site.*’

Notwithstanding the Local Authority’s responsibilities as the competent authority for this matter, we would like to confirm our continued assistance in progressing matters with regard to the LDO. Currently, I do not see how an acceptable solution to avoid LSE for the greenfield element of the LDO site can be reached on the evidence available. We have reservations that the greenfield element will still fail the LSE test even with the mitigation area in place because the birds will still be displaced. Whilst the proposed mitigation may ultimately ensure no adverse effect on site integrity it is not an acceptable solution to conclude no likely significant effect. Therefore, I suggest that excluding the roosting fields from the LDO be considered.

In addition to the above it is also vital to ensure all impacts on the natural environment are considered at an early stage, this includes effects on protected species using the site. The Local Authority in exercising their functions “*must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions*” (Regulation 9(5) of the Habitats Regulations). In order to comply with this duty the LPA can only grant planning permission for development that would affect a European Protected Species on the basis that:

- The proposed development is in accordance with Article 12(1) of the Habitats Directive, which relates to the protection of species.
- The proposal would be likely to receive a Protected Species license from Natural England, if required.

The LPA should ensure they are compliant with the requirements of the Habitats Directive and Regulations before adopting a LDO.

If I can provide any further advice relating to this matter, please do not hesitate to contact me. For all other correspondence, please contact the address above.

Yours sincerely

Signature removed

Chris H Smith BA(Hons) BSc(Hons) DipURP MRTPI

Senior Adviser – Planning
Operations, Land Use Function

Contact details removed

Annex 1

The fields are important in relation to curlew, with survey results indicating that numbers recorded were regularly >1% of the Humber Estuary population (as outlined in the HRA of the IPC submission). The shadow HRA for the IPC submission indicates that there will be a permanent loss of inland terrestrial habitat used by qualifying interest bird species, predominantly curlew. Two of the main onshore areas lie within the AMEP site and will be lost as a result of the development. On this basis the HRA concluded LSE:

“Two of the main onshore areas used by curlew at Killingholme Fields lie within the AMEP site and will be lost, these are fields J (also referred to in the surveys as Field 240) and K (also referred to as Field 235) (see Figure 5.13). It is not possible at this stage to conclude no likely significant effect. The AMEP project does include areas of land (47.8 ha) which will provide mitigation for the loss of this inland habitat for bird species in accordance with the strategic approach to mitigation at South Humber Bank.”

In the IPC submission the mitigation has been taken into account at LSE stage and states that the mitigation will be completed in advance of development: *“This habitat will be created prior to any significant area of existing terrestrial habitat of roosting and foraging value being lost.”*

Key Roosting/Feeding Sites on South Humber Bank



Source: Catley 2007/06 Winter Bird Survey of East Halton and Killingholme Marshes and Inland Fields.

Specific Issue Hearing on the draft Development Consent Order, including the draft Deemed Marine Licence (Thursday, 12 July 2012)

Written statement following oral representations by Natural England

Session 1 – Issues of principle

Compensatory measures (relevant to matters 1, 5 and 6)

1. Natural England repeats its general concern about the late provision of detailed information relating to the Applicant's compensation proposals, a matter also addressed in its letter of 11 July 2012 to the Planning Inspectorate.
2. The only reference to the proposed compensatory measures in the draft DCO is within the description of Associated Development in Schedule 1, that is at para.4:

“In the district of the East Riding of Yorkshire, the development of compensatory environmental habitat.”
3. Natural England's position is that this is insufficient. Within the DCO the proposed compensatory measures need to be clearly defined and set out as a requirement. It is also important that the timescale for providing compensatory measures is reflected in the DCO, to ensure that they will be effective – for example, it is established that a certain amount of compensatory habitat should be available *at the time of loss*.
4. At this stage Natural England is still waiting on further detailed proposals of what exactly the compensatory measures will be, so it is not possible to be prescriptive as to how the above matters should be included in the draft DCO. A preliminary suggestion is that a further requirement is added to Schedule 11 as follows:

“Compensatory environmental habitat

2A.—(1) The compensatory environmental habitat must be provided in accordance with details set out in [*insert reference to final plan/agreement on compensatory measures*].

(2) No part of the authorised development that affects the Killingholme Marshes foreshore shall commence until [*insert reference to relevant part of compensation proposal*] has been provided in accordance with [*insert reference to final plan/agreement on compensatory measures*].”

Ecological Management and Monitoring Plans (relevant to matters 5 and 7)

5. Natural England agrees with the Applicant that combining the Code of Construction and the Environmental Management Plan within a single document as a Construction and Environmental Management Plan (CEMP) would not be appropriate. This is particularly the case given the ecological sensitivity of the location and the detailed nature of the mitigation and monitoring required.
6. Natural England's position is that in addition to a construction plan, three separate and enforceable Ecological Management and Monitoring Plans (EMMPs) are needed (see eg para.5.1 of its Relevant Representations), and that these should be approved by the national regulator. These are:

- i. A terrestrial EMMP – this will provide details (including objectives, management and monitoring prescriptions, delivery mechanisms, timescales and responsibilities) for necessary terrestrial mitigation. It will focus upon mitigation areas A and B and also include wider biodiversity enhancements to the terrestrial environment.

The terrestrial EMMP should be approved by Natural England in consultation with the local planning authority and will be enforced by the local planning authority in consultation with Natural England.

- ii. A marine EMMP – this will provide details (including objectives, management and monitoring prescriptions, delivery mechanisms, timescales and responsibilities) for necessary marine mitigation. It will focus upon the validation of the predictive modelling for sedimentation.

The marine EMMP should be approved and enforced by the Marine Management Organisation (and, where appropriate the local planning authority) in consultation with Natural England.

- iii. A compensation EMMP – this will provide details (including objectives, management and monitoring prescriptions, delivery mechanisms, timescales and responsibilities) for the provision and maintenance of compensatory measures.

It is anticipated they will include some form of managed realignment as well as an area of wet grassland, there is uncertainty about what exactly the compensation measures will comprise.

7. Much of the content of the terrestrial and marine EMMPs is agreed (at least in broad outline) and is satisfactory to Natural England. Natural England is continuing to discuss the form and structure of these plans with the Applicant.

The compensation EMMP needs considerable further work, for the reasons noted above.

8. In any event, it is important that the final DCO is robust and consistent. The current draft DCO is inconsistent in its references to the EMMPs: Art.56 and Art.2 refer to “the ecology plan”, requirement 14 of Schedule 11 refers to an “ecological management plan”, the provisions in Schedule 9 for the protection of Natural England provide alternative titles (“a biodiversity enhancement and monitoring plan” and “a post-construction plan for the monitoring of indirect sediment transport and geomorphological effects”).
9. Natural England proposes rewording requirement 14 of Schedule 11 as follows:

“Ecological Management and Monitoring

14.—(1) No stage of the authorised development shall commence until the relevant Ecological Management and Monitoring Plan (terrestrial or marine) for that stage, reflecting the survey results and ecological mitigation and enhancement measures included in the environmental statement, has been submitted to and approved by Natural England and (for the marine EMMP) the Marine Management Organisation.

(2) The Ecological Management and Monitoring Plans shall include an implementation timetable and must be carried out as approved.”

10. Natural England supports the MMO’s position that the marine EMMP should also be reflected in the draft Marine Licence (Schedule 8).

Specific issues raised by the Panel (relevant to matter 5)

11. The Panel raised two particular matters relevant to subsequent planning controls at the site. Natural England indicated that it would provide further information, as appropriate, in writing.

Local Development Order

12. The first matter was the relevance of the site being in a local enterprise zone, if a local development order is made by North Lincolnshire Council (the proposed South Humber Gateway Local Development Order (LDO)). The Council told the Panel that Natural England had advised the Council not to pursue the LDO prior to the DCO application but to revisit the proposal post-AMEP. Natural England’s advice in fact was that as it had already been determined for the AMEP proposal that there would be a likely significant effect on protected European sites, further or related proposals for development on the same land could not overcome that

conclusion: Reg.78 of the Conservation of Habitats and Species Regulations 2010 (“the Habitats Regulations”) states that an LDO may not grant planning permission for development “likely to have a significant effect on a European site ... *either alone or in combination with other plans or projects*” (see Natural England’s letter of 14 February 2012, and email dated 8 March 2012 appended at Annex 1). The important point is that the LDO should not be a process which makes different assessments about the nature conservation impact of substantially the same development as proposed in the DCO. There must be consistency. If it is advanced further, Natural England would expect to be consulted further on the proposed LDO.

Art.54 of the draft DCO

13. The second matter was a query about Art.54 of the draft DCO. Art.54 provides that Reg.73 of the the Habitats Regulations (relating to permitted development rights and HRA) shall not apply “to any planning permission which relates to the works authorised by Art. 10 (provision of works) and which is granted by article 3(1) of the Town and Country Planning (General Permitted Development) Order 1995 for the class of development described as permitted development in Part 11 of Schedule 2 to that Order.” Art.54 duplicates Art.54 of Schedule 3 (Model provisions for harbours) to the now repealed Infrastructure Planning (Model Provisions) (England and Wales) Order 2009.
14. The logic of Art.54, read with Art.10, is that there is no need for further assessment under the Habitats Regulations of subsidiary works and permitted development that has already been assessed as part of the DCO process. Art.54(2) is an important safeguard to the effect that appropriate assessment may still be required for works that “do not form part of the plan and project which was subject to an appropriate assessment ...”. The wording should be changed to “assessment under the Habitats Regulations”, as appropriate assessment is only one stage of that assessment.
15. Subject to that, and proper assessment of the impacts of the proposal, Natural England has no concerns about Art.54 of the proposed DCO.

Session 2 – Issues of detail

Art.9 – Maintenance of authorised development

16. Natural England considers that the power conferred upon the undertaker to “... enlarge, relay or extend temporarily or permanently the authorised development” is too wide given the sensitivity of the location and should be deleted.

Art.20 – Authority to survey and investigate land

17. As much of the land surrounding the site is subject to statutory environmental protection, certain consent procedures apply which should be referred to in Art.20. Natural England proposes a new sub-paragraph:

“(4A) The undertaker shall ensure that prior to taking any action listed in paragraph (1) it has obtained any necessary permits or consents under the Conservation of Habitats and Species Regulations 2010 or the Wildlife and Countryside Act 1981.”

Art.50 – Operational land for the purposes of the 1990 Act

18. Natural England agrees with the Applicant’s suggestion that the compensation site should be excluded from the definition of “operational land”. In addition, on further consideration of the matter, Natural England’s position is that mitigation Areas A and B should also be excluded from the definition of “operational land”.

Schedule 9 – Protective provisions

19. A suggested rewording of the provisions for the protection of Natural England, so that they are consistent with the other points made, are included as Annex 2 to this document.

Schedule 11 – Requirement 17

20. Some suggested amendments to Schedule 11 are set out above. In addition, Natural England confirms that it would expect to be included as a consultee on external lighting in requirement 17.

Natural England
23 July 2012

ANNEX 1

ANNEX 2

“FOR THE PROTECTION OF NATURAL ENGLAND

1. For the protection of Natural England the following provisions shall, unless otherwise agreed in writing between the undertaker and Natural England, have effect.

Ecological Management and Monitoring

Terrestrial mitigation and enhancement

2. No stage of the authorised development shall commence until a terrestrial Ecological Management and Monitoring Plan has been prepared by the undertaker and approved by Natural England in consultation with the relevant Local Planning Authority .

3. The authorised development shall be carried out in accordance with the terrestrial Ecological Management and Monitoring Plan and the undertaker shall implement the monitoring and other measures as detailed in that plan.

Sediment transport and geomorphological effects

4. No works below mean high water (tidal works) shall commence until a marine Ecological Management and Monitoring Plan, including a post-construction plan for the monitoring of indirect sediment transport and geomorphological effects, has been prepared by the undertaker and approved by the Marine Management Organisation in consultation with Natural England and the relevant Local Planning Authority.

5. The tidal works shall be carried out in accordance with the marine Ecological Management and Monitoring Plan and the undertaker shall implement the post-construction monitoring and other measures as detailed in that plan.

European Protected Species

6. No works shall be carried out that will disturb (etc) a European protected species under Reg.41 of the Conservation of Habitats and Species Regulations 2010 unless a licence has first been obtained from Natural England under Reg.53 (Licences for certain activities relating to animals or plants).”

From: Smith, Chris H (NE)
Sent: 08 March 2012 10:56
To: Barrie Onions
Cc: [REDACTED]

Contact details removed

Subject: RE: 41826 Humber EZ Proposed LDO for Able Site - request for clarification

Hello Barrie

Apologies that this response is later than I promised. As I explained to Chris Barwell in a phone call yesterday, the proposed LDO for the Able site has been subject to further discussions within Natural England and government to ensure that all avenues are explored to try and progress a LDO but also considering the consequences if a LDO is made.

To clarify the points raised:

- You are unclear about the terminology I used in a particular paragraph. Within the shadow HRA accompanying the IPC application, the “mitigation site” exists as a result of the (stage 2) Appropriate Assessment and is there to ensure no adverse effect on site integrity. The LDO process has to show no LSE from a HRA screening (stage 1). Our view is that displacement of birds across the whole greenfield area proposed by the LDO is a LSE even with the “mitigation site” in place.
- I agree with the sentence in bold. From the evidence available, principally from the shadow HRA, Natural England’s opinion is that the result of the granting of full planning permission for the proposed development is likely to have a significant effect on a European site (either alone or in combination with other plans and projects).
- Our view is that the best chance of an LDO not demonstrating LSE is to make it only on the area covered by hardstanding but we understand that this is not acceptable to Able. This would be consistent with the existing evidence base accompanying the IPC submission.

Although a finding of “likely to have a significant effect” in respect of a proposed development would mean that an LDO may not be granted (in accordance with regulation 78 of the Habitats Regulations), this does not mean that the proposed development cannot go ahead at all. Rather, it would be necessary for planning permission to be sought for that proposed development in the normal way and in accordance with the Habitats Regulations.

Another alternative might be to use a Planning Performance Agreement (PPA) for the Able site. As you are aware (& I suspect so are Able) there are a number of LDOs submitted for the Tees EZ, but there are also PPAs proposed for sites where it was agreed that LDOs were not appropriate because of similar issues to those we have here. (Zoe Buddle was instrumental in those discussions and she can advise you.)

Also, I understand that North Lincolnshire Council are aware of the proposal from Able to move the "mitigation site" away from the LDO area and you will have to consider how that would impact on a proposed LDO.

We would be happy to meet you for further discussions. Please note that I am on leave from Friday 9th to Tues 20th March, so please contact Zoe.

Regards

Chris

Chris H Smith BA (Hons) BSc (Hons) DipURP MRTPI
Senior Adviser - Planning
Natural England
Operations Delivery
Land Use Function

Contact details removed

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From: Barrie Onions *Contact details removed*
Sent: 29 February 2012 13:09
To: Smith, Chris H (NE)
Cc: *Contact details removed*
Subject: RE: 41826 Humber EZ Proposed LDO for Able Site - request for clarification

If you didn't know Chris - Andrew is currently liaising with Able as to an appropriate LDO boundary. Thanks for your holding response and hope you get a final response to us by Friday.

I am just checking important e-mails - i am on leave this week. So can you make sure that as well as e-mailing me please copy in Andrew Taylor and Chris Barwell.

Regards Barrie.

-----"Smith, Chris H (NE)" *Contact details removed* wrote: -----

To: "Barrie Onions" [redacted] *Contact details removed*
From: "Smith, Chris H (NE)" [redacted] *Contact details removed*
Date: 27/02/2012 08:56AM
Subject: RE: 41826 Humber EZ Proposed LDO for Able Site - request for clarification

Hello Barrie

Just to let you know that I've asked my colleagues in Marine & in other Functions for some clarification about the points you've raised. I will get something back to you by Friday 2nd at the latest.

Chris

Chris H Smith BA (Hons) BSc (Hons) DipURP MRTPI

Senior Adviser - Planning

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Operations Delivery

Land Use Function

[redacted] *Contact details removed*

[redacted]

[redacted]

[redacted]

[redacted]

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From: Barrie Onions [redacted] *Contact details removed*
Sent: 21 February 2012 15:58
To: Smith, Chris H (NE)
Cc: [redacted] *Contact details removed*
Subject: Fw: 41826 Humber EZ Proposed LDO for Able Site

Hello Chris.

I need to clarify points with you regarding the above proposed LDO.

Also I understand that from a meeting attended by yourself and Chris (and others) in Hull recently that certain issues were raised regarding a full LDO versus outline LDO.

Firstly your letter is not entirely clear as to what area the LDO should be so as to reduce or negate likely significant effect on the Natura 2000 site. Whilst we understand the legislative background you clearly set out (and we agreed with at our meetings in Scunthorpe), your terminology used regarding the paragraph in which you recommend land to be excluded from the LDO leads to confusion (at least to Chris and myself).

The paragraph in question from your letter reads:

"Notwithstanding the Local Authority's responsibilities as the competent authority for this matter, we would like to confirm our continued assistance in progressing matters with regard to the LDO. Currently, I do not see how an acceptable solution to avoid LSE for **the greenfield element** of the LDO site can be reached on the evidence available. We have reservations that **the greenfield element** will still fail the LSE test even with the mitigation area in place because the birds will still be displaced. Whilst **the proposed mitigation** may ultimately ensure no adverse effect on site integrity it is not an

acceptable solution to conclude no likely significant effect. Therefore, I suggest that **excluding the roosting fields from the LDO** be considered."

I do have an interpretation of what you say (see below) but Able have seen your letter and (only in a telephone discussion) Able have interpreted differently to me. I think it best if you explain perhaps with a plan exactly what area you are suggesting should be the LDO and thereby showing what green elements should be excluded? I have asked Andrew Taylor but have not had much time in collecting any response and to be fair it is your letter and i feel you should explain more?

I am concerned that when the roosting fields are excluded from the LDO this will reduce the LDO much more and make the LDO almost worthless in terms of what the LDO is trying to achieve. The roosting fields have been taken into account within mitigation options (including off-site) within the AMEP IPC proposal - the roosting fields i believe from the bird survey work to be mainly fields (two large fields) within the proposed AMEP development along the southern boundary of the AMEP where development is proposed in the AMEP IPC application - an option for mitigation is included in the AMEP proposal in a field further south.

It would seem that you have raised these concerns on the basis of the LDO possibly being decided before the IPC decision on the AMEP - as per the meeting with Able. I am presuming that if the AMEP IPC proposal is approved with mitigation options to be taken then there would not be a problem with the current boundary of the LDO. **My take on the current position is that it would be unlikely that Able would wish to reduce the LDO area - if this is the case i think you are saying that a LDO (with the existing boundary) would produce a likely significant effect which would rule out the making of a LDO?**

As you can see what i am after is a clear response from you without trying to read between each line and determine different interpretations.

Secondly, you raised concerns about the proposed Able LDO at the Hull meeting. Your latest views seem to have shifted somewhat from what i understood to be your previous views!

I trust you appreciate my request for clarification.

Regards Barrie.

-----Forwarded by Barrie Onions/PL/NorthLincs on 21/02/2012 03:02PM -----

To: *Contact details removed*, Andrew Taylor *Contact details removed*
From: Chris Barwell/PL/NorthLincs
Date: 14/02/2012 03:04PM
Cc: *Contact details removed*
Subject: Fw: 41826 Humber EZ Proposed LDO for Able Site

Richard/Andrew,

Please find attached a letter I have received from Chris Smith outlining Natural England's advice in relation to the progression of a Local Development Order (LDO). Essentially Chris Smith's advice is that he does not see how the proposal in this form will not result in 'likely significant effects'. His advice is to suggest the exclusion of the roosting fields from the LDO.

Regards

Chris Barwell
Spatial Planning Manager
Spatial Planning
Regeneration and Planning
North Lincolnshire Council

Contact details removed

-----Forwarded by Chris Barwell *Contact details removed* on 14/02/2012 02:51PM -----

To: "Chris Barwell" *Contact details removed*
From: "Smith, Chris H (NE)" *Contact details removed*
Date: 14/02/2012 01:26PM
Subject: 41826 Humber EZ Proposed LDO for Able Site

Hi Chris

As promised at our meeting last Wed, I have talked to colleagues about a proposed LDO for the Able site and our advice is detailed in the attached letter

<<41826 humber EZ Nlincs LDO final.pdf>>

Regards

Chris

Chris H Smith BA (Hons) BSc (Hons) DipURP MRTPI

Senior Adviser - Planning

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