ABLE MARINE ENERGY PARK

APPLICATION TR030001

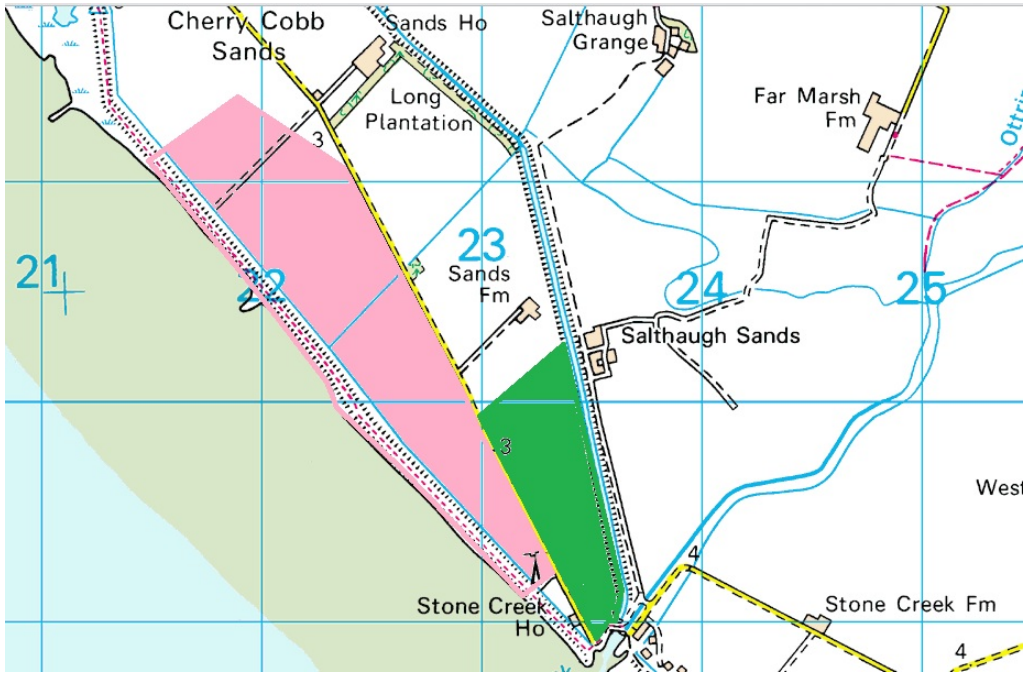
SUMMARY OF APPLICANT'S CASE PUT AT SPECIFIC-ISSUE HEARINGS 11-14 SEPTEMBER 2012

1. This document is a summary of the case put by the applicant, Able Humber Ports Ltd, at the specific issue hearings that took place at the Humber Royal Hotel on 11-14 September 2012.

Tuesday 11 September

Update on project – wet grassland

2. The applicant was invited to provide an update on the project and any changes. Natural England (NE) took the view that the detailed design of the proposed wet grassland site at Old Little Humber Farm had meant that too little of the site would be available as usable habitat, given the protection of utilities actually running and proposed to run across the site, and the need for ponds as part of the system to keep the grassland wet. Accordingly, the applicant, in discussion with NE proposed to use a different site. Old Little Humber Farm would no longer form part of the application and would be removed from the scope of compulsory purchase powers.



3. The alternative site (shown in green above) which had been the subject of discussions with NE is to the south east and immediately adjacent to the proposed regulated tidal exchange (RTE) and realignment site (shown in pink). The applicant has secured an agreement with the Crown Estate, the freeholder of the site, that it can occupy and use it 'for as long as it is required'. Confirmation that Able were able to use this land would be provided by the date of comments on responses to the second round of questions from the panel, namely 12 October..

4. The applicant is proposing to seek planning permission from the local planning authority, East Riding of Yorkshire Council, for engineering works to re-grade existing ground levels and install an irrigation system. This site will therefore be an addition to the list of 'other consents needed' rather than a change to the application. The applicant will nevertheless provide voluntary supplementary environmental information to the examination on the site by 12 October to allow it to be taken into account in connection with this DCO application (see e.g. *Humber Sea Terminal Ltd. v Secretary of State for Transport and Associated British Ports* **[2005] EWHC 1289 (Admin)**).

5. The site was included in the ecological surveys that have been carried out for the original Environmental Statement during the EIA process, since a wider area was included as a buffer: refer to Annexes 35.1, 35.2, 35.4, 35.8 and 35.9 – thus considerable information to inform the environmental baseline and impact assessment already exists. The applicant will carry out topographical and other environmental surveys of this land, although it has been informed by the farmer currently farming the land that it contains no contaminated land or services. As suggested by the Environment Agency, on-site confirmation of LIDAR data will be carried out.

6. In terms of timing, work to convert the new 'Cherry Cobb Sands wet grassland' site to that habitat will be able to start as soon as planning consent is granted. The applicant will undertake not to commence tidal works on the south bank until after the 2013 black-tailed godwit moult season there, i.e. after 31 October 2013. In that way the potential for harm to that species would not occur until the start of the 2014 season, i.e. from August 2014, which would mean that the wet grassland site would have had 15 months to establish itself. The site would be fully available as a roost site then, but would take around another 15 months to be fully functional as a feeding site.[1]

7. The applicant notes the comparison with the Bristol container port project that was referred to at the hearing. There, the Bristol Port Company (BPC) applied for a Harbour Revision Order[2] in July 2008, which was granted in March 2010,. Unlike the present application, no compensation was included in the HRO application and none is referred to in the HRO that was granted, but BPC concluded an agreement with Natural England and other parties in December 2008. BPC then applied for planning permission for the compensation site on the Steart peninsula in Somerset in December 2011[3], which was recently granted on 30 August 2012[4]. The witness from RSPB, Mark Dixon, was unaware of this order of events.

Update on project – regulated tidal exchange

8. David Keiller of Black and Veatch explained that the initial design of the compensation site where a managed realignment was proposed had shown that it would suffer from siltation and

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[1] See oral evidence of Les Hatton of ERM

[2] Port of Bristol (Deep Sea Container Terminal) Harbour Revision Order 2010 http://www.legislation.gov.uk/uksi/2010/2020/pdfs/uksi_20102020_en.pdf

[3] Link to application documents: : http://www.westsomerset.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=_WSC_DCAPR_19758

[4] Link to decision http://www.westsomersetonline.gov.uk/getattachment/Council---Democracy/Council-Meetings/Planning-Committee-Meetings/Planning---30-August-2012/Draft-Minutes-30-08-12.pdf.aspx

the created mudflat would not last long enough. This was also evident from other realignment sites along the Humber. An alternative approach was now proposed, as submitted with the applicant's response to written representations on 3 August, and part of the site would involve a 'regulated tidal exchange' (RTE) scheme, where four cells would be created and the tide managed within them to allow the mudflat to last longer. Each cell would be around 15ha in size. The cells would be managed as necessary to remove accretion that had occurred over time above a defined level. In total the realignment and RTE cells would provide a potential 60-70ha of mudflat with this area being reduced during times when one cell was impounded. As each cell would be 15a, then at least 45ha of mudflat would be available at any time, and up to 70ha would be available most of the time.

9. David Keiller of Black and Veatch gave evidence that the concept demonstrated that the mudflats could be delivered but that the RTE scheme still needed a finalised detailed design to demonstrate that it was suitable for the species that it was intended to cater for, namely the black-tailed godwit. The applicant would complete this detailed design and provide the results to the examination by 12 October. Tony Prater for the RSPB stated in answer to a question from Mr Upton: "*the right combination of the right size of probably RTE, with an adjacent wet grassland as we have indicated to the Applicant, is the way that we would believe would give the very best chance of achieving the objectives*", which is exactly what the applicant is providing.

10. The applicant has not included the dredging of the RTE cells in the deemed marine licence that forms part of the Development Consent Order (DCO), because the DML is only effective for three years and any dredging would take place after more than that time, and so would have to be applied for later.

11. The Statement of Common Ground with the three north bank Internal Drainage Boards (IDBs) sets out the applicant's proposals to monitor Stone Creek and to contribute financially towards any dredging (already being carried out by the Environment Agency) that might be required if that resulted from the effects of the works. A monitoring plan is being developed with the EA and the IDBs (the latter being supported financially in this regard).

Agenda Item 1: Imperative Reasons of Overriding Public Importance

12. The applicant's case for IROPI is set out at Chapter 8 of its shadow Habitats Regulations Assessment Report. The objectives of the project are set out in Section 7.2 of the report and a broad assessment of alternative solutions is provided.

13. The applicant has already limited the cargo that its proposed quay will handle in the current draft of the Development Consent Order (DCO). ABP questions the efficacy of this limiting condition but the applicant is confident that the concept of planning conditions, which requirements mirror, is an effective one.

14. The need for the project is set out in Chapter 5 of the Environmental Statement and is principally driven by the 'urgent' need for renewable energy infrastructure as stated in the Renewable Energy National Policy Statement and supported by the Ports National Policy Statement. The applicant does not believe that it need support this with proof of actual customers, negotiations with which are in any event governed by confidentiality agreements.

15. ABP queried the core objectives of the Development. In addition to the objectives identified within the application, the applicant provided further background at the hearing. AMEP sought to attract an integrated business cluster serving the nascent offshore wind sector. From the perspective of both the sector and the UK Government this concept was proving to be an attractive proposition and a key factor in providing offshore renewable energy facilities. Considerable commercial interest existed and political interest and support was evidenced by the site constituting the UK's largest single Enterprise Zone. AMEP, as a multi-user facility, would attract a wide mix of companies encompassing the principal OEM businesses of the nacelle manufacturers and their supply chains including tower and blade manufacturers. Furthermore it is also anticipated that a number of foundation manufacturers (gravity-based concrete structures, fabricated jackets and monopiles) would operate from the site which could also see individual wind farm developers (the ultimate customer) using the quays.

16. ABP also queried the length of the proposed quay (1,279m) compared to the 600m in development at Green Port Hull. The applicant has pointed out that the 600m was for a single user engaged only in the assembly of turbines. At AMEP it was anticipated that a single nacelle manufacturer would require a minimum of circa 300m of quay (excluding peaks in demand) with a single foundation manufacturer likely to require circa 400m and of course the development would see multiple users of each type. Furthermore developers had requirements of circa 300m and component suppliers would require occasional (if not guaranteed) quay space. In summary the length of quay was limited not by demand but by the physical constraints at each end.

Agenda Item 2: Conservation objectives

17. The applicant notes that Natural England's 'stepping stones' policy was not embodied in any planning policy and that none of the planning authorities have adopted the policy or indeed appear to apply it. However in agreement with NE the applicant had sought to fulfil it, which is an additional point in favour of the proposal.

Agenda Item 3: Effects of AMEP on SAC and SPA

18. The applicant agrees with the RSPB that it is an improvement to the compensation package that replacement habitat be provided where the wet grassland roosting and feeding site is close to the mudflat, and that the mudflat provides the food supply for black-tailed godwits. The Cherry Cobb wet grassland site is now adjacent to the RTE/realignment site and is therefore a material improvement from than Old Little Humber Farm. The applicant is confident that its compensation package, which provides in any event over-compensation in terms of the amount of habitat land lost will provide this once detailed design has been carried out, which will be presented to the examination by 12 October.

Wednesday 12 September
Agenda Item 4: In-combination effects

19. In terms of the assessment of in-combination effects, the applicant made the following points:

    a. Dredging: the MMO had wrongly instructed the applicant on which deposit sites to address and the applicant will now assess disposal at HU082 while disposal by others is taking place at HU081 and HU083. The results of this will be provided by 12 October.

b. Hydrodynamic and morphological change: the applicant's case is that an in-combination assessment of the effect of AMEP together with other projects on hydrodynamic and morphological change had been undertaken but would require revisiting in the light of the modelling of the RTE scheme.

c. Lamprey: Able's case is that it has taken the correct Tidal Stream Generator into account when assessing the in-combination effect of AMEP on lamprey.

20. The applicant is providing a signposting document on environmental assessment together with this document, in response to a request from the MMO and the panel.

Item 5: on-site mitigation

21. Construction of the Heron Renewable Energy Plant at Immingham, promoted by Drax, needs part of AMEP's Mitigation Area A for a lay-down area. While the applicant has compulsory purchase powers and could prevent Drax from using the land for this purpose, instead it has looked at options to accommodate Drax. Of the three options presented in the applicant's answers to the second set of written questions, the first no change to Drax's plans and is the preferred option. In that case, Drax will be permitted to use the section of mitigation area A that it currently proposes, which will not be converted to wet grassland until Drax has finished with it. To accommodate this, the applicant will phase its industrial development so that the part of it south of Station Road will instead be used as part of mitigation area A while Drax needs part of Mitigation Area A for construction lay down. The industrial development will be phased in this way, and to ensure that this happens, a new requirement will be added to the final version of the DCO due to be published on 9 October to give effect to this. Both Drax and Natural England are content with this approach.

22. The applicant will provide supplementary environmental information on a voluntary basis regarding the temporary use of the area between mitigation area A and Station Road.

23. Update since hearing: the applicant understands that Drax are no longer pursuing their proposal for a biomass plant and will not exercise their option to use part of Mitigation Area A as a lay-down area.

Bats

24. The Just Ecology report referred to by ABP and included as Annex 11.1 of the Environmental Statement was not the scoping report for the AMEP proposal. It was included in the ES to provide general historic information on the application site but actually covered a much wider area, of some 800ha. The implication that the applicant did not do what its scoping report or scoping opinion for this project recommended is incorrect.

25. Les Hatton of ERM, independent expert for the applicant, stated that the bat surveying actually carried out by Just Ecology was valid. He said that guidance on the number of surveys that was recommended had only been introduced since the assessment had been carried out, and the two surveys that were carried out were both valid, despite one being cut short. He described the follow-on survey carried out in 2011, which satisfied Natural England's concerns. Bat boxes were to be installed as mitigation, despite there being no evidence of bat roosts at present.

26. The applicant remains confident that its assessment of the presence of bats involved a thorough investigation and is robust, and furthermore it has the agreement of Natural England (see paragraph 11.7.3 of the Statement of Common Ground). The mitigation proposed requires further surveying before any tree felling should any bats have arrived since the application was made. Lighting will be hooded to reduce light levels in the bat corridors and foraging areas.

Breeding birds

27. Regardless of whether this is a requirement or not, the applicant has prepared a note to address Natural England's concerns about effects on non-SPA breeding birds, which will be submitted by 12 October.

Item 6: compensation strategy

28. The applicant agrees with the answer given by the RSPB to a question from the panel (as quoted at paragraph 9 above).

29. As mentioned above, the applicant will provide a further design to provide the necessary level of certainty to meet the necessary conservation objectives by 12 October.

Item 7: ecological/environmental management and monitoring plan (EMMP)

30. The applicant proposes to create three EMMPs: terrestrial (i.e. south bank), marine and compensation, on the advice of Natural England, the MMO and the Environment Agency. The requirement for these has already been embodied in the DCO (paragraph 13 of Schedule 8 and requirements 2 and 14 respectively). Natural England are keen that these are finalised before the end of the examination and so final (or near-final) draft versions will be provided to the inquiry by 12 October.

31. As suggested at the hearing, the applicant would be prepared to insert a DCO requirement to review the EMMPs after 5 years, as at Paull Holme Strays and Alkborough, and would establish an 'AMEP environmental steering group' involving statutory bodies and other interested parties to oversee their implementation.

Item 8: any other matters relating to the Habitat Regulations

32. The applicant does not have any further submissions. We note the refusal of Hull City Council and ABP to make the latest draft of the section 106 agreement publicly available. Hull City Council made submissions about piling restrictions for AMEP and Greenport Hull. The applicant makes no comment on this except that the piling restrictions for AMEP have been agreed with the Environment Agency. We presume that the piling restrictions for each site apply reflect the particular circumstances of the site; and development proposals.

Wednesday 12 September
Item 1: the hydrodynamic and sedimentary regime in the Humber

33. The presence of its new quay will reduce sedimentation at other locations along the south bank of the Humber. However the applicant is prepared to undertake to make a financial contribution towards dealing with any increased sedimentation that does in fact occur due to the presence of the quay.

34. To clarify the situation with the E.On cooling water outfall, the application only contains provision to dredge locally around it in the DML. Although the quay will have passive provision to divert the outfall through it, any consents to carry out such a move would be obtained later and the move is not part of the application. The MMO has requested real-time monitoring of sedimentation at the cooling water intakes during construction – the applicant will undertake this and will add it as a condition to the deemed marine licence.

35. The MMO suggested that there was a large discrepancy on accretion in the area of the intakes in the supplementary environmental assessment and the statement of common ground. However, this suggestion is based on a misunderstanding. The former is the total estimate of accretion on the intertidal inshore of the intakes and the latter is an estimate of the annual amount that would need to be removed by plough dredging around the outfall.

36. On the issue of the mooring dolphins at South Killingholme Jetty, if sedimentation was causing difficulty in reaching them by boat, then the applicant would make a financial contribution towards the construction of walkways to the dolphins. Such walkways do not form part of the application. This has been agreed with the owner of the moorings, APT.

37. On sedimentation, the applicant states that the agrees with the MMO that the reduction in sedimentation at neighbouring installations appeared reasonable.

38. The applicant has not assessed the drag effects of the current design of AMEP on C.RO's facility, although drag effects of an earlier design were assessed. According to Mike Dearnaley of HR Wallingford, the applicant's independent expert, this was because the downstream effects were more significant. Nevertheless the applicant has agreed to provide an assessment of drag effects around neighbouring jetties, as requested, and this will be done by 12 October.

39. In response to ABP, Immingham Outer Harbour (IOH) is included in the 3D flow and mud transport modelling undertaken by HR Wallingford for the impact assessment and not in the studies undertaken by JBA. Impacts of IOH on flows and sedimentation rates north of HIT are minimal because of the controlling influence of HIT on the flood tide. IOH does not have an influence on this area during the ebb tide

40. In response to submissions, the applicant will decide upon a suitable distribution of vessels along the berth and then undertake a simulation in the 3D flow model, to be provided by 12 October.

Item 3: dredging and disposal

41. Since disposal site HU080 has received substantial amounts in the past there should be no difficulty in it receiving the appropriate arisings from AMEP.

42. In response to a question from the examiners, the applicant will assess the risk of spillage into the sunk dredged channel from HU080.

43. In terms of ABP's case put by Peter Whitehead, Mr Whitehead admitted in cross examination that he is prohibited from the terms of his contractual arrangements with ABPMer from giving advice or evidence contrary to the interests of ABP or associated companies. His evidence cannot be regarded as independent or impartial. In the circumstances little or no weight can be given to it.

Item 2: Impact on other facilities, including development plans for the Port of Immingham

44. The applicant does not believe there to be impacts on other facilities that are not related to the hydrodynamic and sedimentary regime or dredging and disposal.

45. The applicant requested ABP to confirm whether the draft port plan had been subject to SEA. ABP referred to the final version of its master plan for the Port of Immingham as it existed at the time when it made its answers to the second round of questions from the Panel. The applicant requested immediate disclosure of this document. The applicant has also asked for the memorandum of understanding reached with a customer who wants to use the triangle site and the identity of the company. ABP's advocate said he would take instructions on all three matters, subsequently stating that the port plan had not been subject to SEA.

Item 4: navigation

46. The Harbour Master, Humber is satisfied with the level of detail and results of simulation studies conducted and that the navigational assessment process undertaken satisfies guidance provided in the Port Marine Safety Code. The Applicant has also produced independent expert evidence from Captain Bordas of CBP Marine, who said that pilots visiting C.RO and AMEP would be in contact with each other and that a delay to a ro-ro vessel in a similar situation in his experience was unheard of. During construction, dredgers would be able to move out of the way quickly.

47. The applicant has also undertaken sufficient simulation exercises. The final series of exercises, reported in document EX 14.4 uses the same quay configuration as is in the application. The applicant is satisfied that the risk assessment it has carried out covers issues during construction. This has been confirmed by not only the Harbour Master but also the applicant's own independent expert Captain Bordas. In short there are no navigation issues which have not been dealt with satisfactorily and would count against the application.

Friday 14 September

48. The railway running across the land is part of Network Rail's network, yet it is a legally disconnected part, since there is no track to the north and to the south the track is owned and controlled by ABP. No train (other than one to maintain the track) has travelled along the railway in the last five years. The railway was subject to compulsory purchase in the application because an offer to sell it made by Network Rail in January 2011 was withdrawn in October 2011 for operational reasons and there was no time to develop an alternative.

49. The railway through the site is currently unused, and while this situation obtains, the applicant sees no reason why level crossings should not be installed across the railway at the four points it has identified in its application.

50. There are four cases in which the railway may get used in the future, which are independent of each other:

    a. use of the railway by the applicant, who would obviously be in a position to safely control rail and other site traffic movements;

    b. use of the railway by C.RO Ports Killingholme Ltd (whom the applicant understands has a connection agreement although this has not been made public), should the

company decide to use its port for something other than or in addition to ro-ro vehicles;

c. use of the railway by C.Gen Killingholme Ltd, who do not have a connection agreement, who plan to build a power station to the north of the order land that may be coal-fired. The applicant questions the viability of running trains for 3km from Immingham but nevertheless recognises this as a possibility;

d. the re-opening of the Killingholme Loop, which would involve restoring the track north of the order land and running it round to the existing line at Goxhill. The current cost estimate for this is £40m.

51. All of these options would have speed restraints since at one end there is the North Killingholme Haven Pits SSSI, which is part of the SPA, which is likely to require slow running of trains to avoid disturbance, if trains are permitted to run at all, and at the other end there is ABP's estate with existing speed restrictions.

52. Existing port capacity at Immingham may be a prior constraint to expansion of the use of the railway before the Killingholme Loop project is needed. Furthermore, Network Rail are not yet at a stage to have carried out any environmental or appropriate assessment of the project or to have given any consideration to these matters.

53. In the light of the written representations, the applicant has agreed to remove the railway south of Station Road from the scope of compulsory purchase powers to allow the HIT head shunt project to go ahead. This should relieve some of the capacity issues at Immingham.

54. The total length of track for options a, b and c is of the order of 4km and speed is not essential on such short journeys and indeed is not economical or sensible since most of the journey would involve acceleration and deceleration. A maximum speed of the order of 20 – 25 mph would be sensible. A speed of this order will not present any safety issues on the proposed level crossings.

55. For option d, high speeds are also inappropriate as the approach lines from ABP controlled track and from the main line are such that freight trains will not be travelling faster than about 25 – 30 mph on approach through the junction at Goxhill and 25mph over the ABP track. This combined with the Killingholme Haven Pits issue will render high speeds unlikely and unnecessary.

56. Network Rail has stated in its response to the second round of questions that it is in discussion with the applicant about leasing the railway to the latter. If this happened, the applicant would accommodate the maximum of five trains per day referred to in C.Gen's preliminary environmental information report (PEIR), and would also accommodate the plans of C.RO, with an independent train manager to manage the operation and arbitrate any disputes. The three companies would be able to manage this level of railway traffic with the four level crossings to the satisfaction of the ORR on safety issues. Interruptions to site traffic as a result of trains passing would be of the order of 15 minutes per train and this could be accommodated.

57. If the applicant did not lease the railway and it remained in Network Rail's ownership then, as also stated in the latter's response to the second round of questions, level crossings for heavy machinery would be able to continue even after the line came into use until it became

'obstructive' to trains. The applicant is in discussion with Network Rail as to how to identify the trigger of obstructiveness that would require it to close some or all of the level crossings.

58. If the Killingholme Loop is to be reopened, then discussions are taking place with Network Rail as to how the level crossing issue would be dealt with.

59. In terms of safety, Network Rail stated that level crossings were a very high risk item for the railways nationally. It was pointed out by David Reid for Able that these safety concerns are generated by those crossings in the public domain where most accidents are a result of a breach of road traffic regulations with drivers and pedestrians ignoring generally clear road traffic signals and signs. He suggested that this was because there was a lack of familiarity.

60. David Reid explained that industrial crossings are generally in controlled sites and those proposed for the AMEP site will be under the control of the site management. Health and safety regulations require that all operatives are properly inducted on commencement of employment and are regularly briefed about hazards and operational issues on the site and all visitors are given induction training before using the site. The use of level crossings is therefore much better controlled and there is virtually no lack of familiarity. The crossings are much safer than in the public domain and there is no reason why they should not be used in the AMEP site.

Bircham Dyson Bell
24 September 2012

CO/4903/2004

Neutral Citation Number: [2005] EWHC 1289 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Monday, 9 May 2005

B E F O R E:

MR JUSTICE OUSELEY

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HUMBER SEA TERMINAL LTD

(CLAIMANT)

-v-

SECRETARY OF STATE FOR TRANSPORT

(DEFENDANT)

-and-

ASSOCIATED BRITISH PORTS LTD

(INTERESTED PARTY)

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MR TIMOTHY STRAKER QC AND MR C BOYLE (instructed by Messrs Herbert Smith) appeared on behalf of the CLAIMANT
MR DRABBLE AND MR J MAURICI (instructed by Treasury Solicitor) appeared on behalf of the DEFENDANT
MR NIGEL PLEMING QC AND MR STEPHEN TROMANS (instructed by Messrs Norton Rose) appeared on behalf of the INTERESTED PARTY

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J U D G M E N T

1. MR JUSTICE OUSELEY: Associated British Ports ("ABP") is a statutory corporation and the largest port operator in the United Kingdom. Immingham on the Humber is one of its 21 ports providing both roll-on and roll-off and load-on and load-off berths. ABP decided that increasing demand and the growth in the beam, length and draught of vessels required the development of five new roll-on roll-off berths in addition to its existing eight berths. These would enable vessels to dock in the main river without having to navigate the lock. These works were known as the Immingham Outer Harbour. The development of Immingham Outer Harbour required the removal of 22 hectares of existing mud flats, an important bird habitat. It sought the necessary Harbour Revision Order ("HRO") by an application made to the Secretary of State for Transport on 12 September 2001 under section 14 of the Harbours Act 1964.

2. The Order, if made, would authorise the construction of certain harbour works at Immingham Outer Harbour, including the provision of a bund, sea wall, reclamation of foreshore, five ro-ro ramps, lines of dolphins and connecting walkways, jetty removal and strengthening, berth improvement and a quay, and would confer ancillary powers in connection with the works.

3. A number of bodies, including statutory bodies with a nature conservation interest, objected within the time allowed for objections under Schedule 3 to the 1964 Act. They withdrew their objections following negotiations and agreement with ABP.

4. The claimant operates a roll-on roll-off terminal on the Humber some four nautical miles upstream from Immingham. It had two berths with a further two not yet fully operational. It objected to ABP's proposal in November 2001 outside the statutory objection period. In May 2003 it told the Secretary of State for Transport of its intention to apply for a Harbour Revision Order which would increase its total roll-on roll-off berths to six. In January 2004 it applied for that HRO.

5. ABP's application for the HRO was considered without a public inquiry. The Secretary of State authorised the making of the HRO in a letter of 7 July 2004 in which he dealt with the objections raised by the claimant. He concluded that the claimant's existing facility and proposed extension would not meet the need identified by ABP for the development of the Immingham Outer Harbour and that the ABP proposal was compatible with the Government's national port strategy, as well as with national and regional policies for transport and planning. He accepted that there would be an adverse effect on a potential Special Protection Area, to which he applied the provisions of the Conservation (Natural Habitats etc) Regulations 1994 SI 2716, because of the loss of 22 hectares of habitat. It was also close to an existing SPA, the Humber Flats Marshes and Coast SPA Phase 1, classified under the Conservation of Wild Birds Directive, Council Directive 79/409/EEC. He took the view that the need for this port development constituted imperative reasons of overriding public interest. He carried out an "appropriate assessment" under the Habitat Regulations and concluded that the adverse effect of the development could not be avoided by mitigation measures. There was no alternative solution to the proposed development. The requirements of Regulation 53 of the Habitat Regulations, that the coherence of the European network Natura 2000 be protected, could be met by compensation measures

embodied in an agreement between ABP and various statutory and other nature conservation bodies, including the Environment Agency and English Nature.

6. The claimant now challenges the ABP (Immingham Outer Harbour) Harbour Revision Order 2004 S.I.2190 on various grounds under section 44 of the Harbours Act. Section 44 permits challenge to be made on the familiar grounds that the Secretary of State had no power to make the order or that there was a failure to comply with procedural requirements which substantially prejudiced the claimant.

Ground 1 - Failure to comply with the Birds Directive

7. In short, the claimant contended that the Secretary of State had no power to make the order in reliance on imperative reasons of overriding public interest, because the flexibility to do so only applied to SPAs classified under the Wild Birds Directive. It did not apply to sites which should have been classified or were treated as classified by the United Kingdom Government but were not in fact so classified.

8. I deal first with the statutory provisions. The Birds Directive in Article 4(1) requires special conservation measures to be taken concerning the habitats of the species of wild bird listed in Annex 1 to the Directive. Article 4(2) deals with protection of migratory birds. Article 4(1), (2) and (4) provide as follows:

> "1 The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.
>
> In this connection, account shall be taken of:
>
> a. species in danger of extinction;
>
> b. species vulnerable to specific changes in their habitat;
>
> c. species considered rare because of small populations or restricted local distribution;
>
> d. other species requiring particular attention for reasons of the specific nature of their habitat.
>
> Trends and variations in population levels shall be taken into account as a background for evaluations.
>
> Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.
>
> 2 Member States shall take a similar measure for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive

applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

4 In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats."

Article 4(4) is important and the first sentence in particular. There is no definition in the Directive of "special conservation measures".

9. Subsequently, the Council Directive on the Conservation of Natural Habitats and Wild Flora and Fauna was passed; 98/42/EEC. Article 3 provides for the establishment of a "coherent European ecological network of special areas of conservation" known as Natura 2000. This network was to include sites classified by Member States under the Birds Directive. Article 6 required the necessary conservation measures to be taken for SACs and for the avoidance of significant disturbance to them. Article 6(3) and (4) are as follows:

"3 Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4 If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

10. Article 7 matters because it replaces the restrictions in the first sentence of Article 4(4) of the Birds Directive:

"Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article

> 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later."

11. These Directives were given effect domestically by the 1994 Habitat Regulations. Implementation of the Regulations and Directives is described in Bown v Secretary of State for Transport [2003] EWCA Civ 1170; [2004] 2 P&CR 7. Paragraph 25 reads:

> "The Habitats Directive was given effect in this country by the Conservation (Natural Habitats etc) Regulations 1994 (SI 1994/27161) ('the 1994 Regulations'). It made provision for the designation of SACs. It made no specific changes to procedure for classifying SPAs. However, it required the secretary of State to compile and maintain, 'in such form as he thinks fit' a register of 'European sites' in Great Britain (reg 11). 'European site' was defined as one of five categories of site under European requirements, including SPAs (reg 11(2)(d)). It must be removed if it ceases to be so categorised (reg 11(4)(b)). When a site is included in the register, the 'appropriate nature conservation body' must be notified immediately (reg 12); and they must notify owners and occupiers of land within the site (reg 13). An entry in the register relating to a European site is a local land charge (reg 14)."

Regulation 10 includes areas classified under the Birds Directive within its definition of "European Site ("ES"). Regulation 49(1) sets out the test which adverse development in such a site has to satisfy:

> "49(1) If they are satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), the competent authority may agree to the plan or project notwithstanding a negative assessment of the implications for the site."

12. These provisions were applied to the Harbour Revision Order application. The Secretary of State for Transport said, in paragraph 41 of his decision letter:

> "Having consulted English Nature, as his statutory adviser and nature conservation body under Regulation 48(3), the Secretary of state agrees that the project is likely to have a significant effect on the combined phase 1 and proposed phase 2 Humber Estuary Special Protection Area, the Humber Estuary Ramsar site and the possible Humber Estuary Special Area of Conservation."

There was no differentiation made in that paragraph between any effect which there might have been on the Phase 1 SPA from that which there might have been on the extension proposed as Phase 2 SPA. In paragraph 45 of the decision letter, the direct loss of 22 hectares of habitat would come from the proposed Phase 2 and the indirect

loss of 5 hectares would come from outside both the actual SPA and proposed extension. The proposed extension was not within the scope of the definition of "European Site" in the Habitat Regulations, although that definition extends beyond those sites actually classified or designated under the two Council Directives.

13. The reason why the Habitat Regulations were applied without differentiation between Phase 1 of the Humber Flats Marshes and Coast SPA, which had already been classified as an SPA under the Birds Directive, and Phase 2, which was being considered for such classification, was the Government policy in PPG9 1994. PPG9 deals with nature conservation and planning. Paragraph 13 states:

> "All National Nature Reserves (NNRs), terrestrial Ramsar Sites, Special Protection Areas (SPAs) and (in future) Special Areas of Conservation (SACs) are also SSSIs under national legislation. In addition, some SSSIs have been identified as potentially qualifying for SPA classification but are currently subject to further survey or consultation work before decisions can be taken about their classification. Similarly, candidate SACs will be identified on a list which the Government must send to the Commission by June 1995. For the purpose of considering development proposals affecting them, potential SPAs and candidate SACs included in the list sent to the European Commission should be treated in the same way as classified SPAs and designated SACs."

Paragraph C7 continues the same point:

> "Regulations 48, 49 and 54 [of the Habitat Regulations] restrict the granting of planning permission for development which is likely significantly to affect an SPA or SAC, and which is not directly connected with or necessary to the management of the site. They apply to planning decisions taken on or after the date the Regulations come into force, regardless of when the application was submitted. They apply to classified SPAs, and to SACs from the point where the Commission and the Government agree the site as a Site of Community Importance to be designated as an SAC. They do not apply to potential SPAs or to candidate SACs before they have been agreed with the Commission, but as a matter of policy the Government wishes development proposals affecting them to be considered in the same way as if they had already been classified or designated (see paragraph 13 of this PPG). The Government has chosen to apply the same considerations to listed Ramsar sites."

14. I turn now to the factual position on the classifications, and the Secretary of State's approach to it. By way of introduction it should be pointed out that there is no statutory or Directive procedure laid down for the classification of SPAs, and the task of assessment is that of the Member State, carried out here by DEFRA. The background is also set out in Bown. The proposed Immingham Outer Harbour works fall outside the Humber Flats, Marshes and Coast Phase 1 SPA classified in July 1994, of which the details were then formally transmitted to the European Commission. In 1994 English

Nature had commenced consultation on a proposed Phase 2, the extent of which has varied over time. But nothing had come of this by 1998 because of various unresolved objections. The proposed areas of extension did not include any land affected by the works in question here.

15. Between 1998 and 2000, further bird survey data indicated that there should be a Phase 2 which for the first time included, as Area 7 of the proposed extension, either the whole or a large part of the land which was proposed for use with the Immingham Outer Harbour. This was the result of surveys carried out in 1999 which showed that that land, which had previously had limited bird interest because it had been shot over, was now rather more valuable. Area 7 was then notified by English Nature as a Site of Special Scientific Interest ("SSSI") and in 2000 consultation was begun by English Nature on an extension which included the areas previously proposed and six new areas, including Area 7. However, in April 2001, some five months before the application for the HRO was submitted, the Council of English Nature withdrew its SSSI notification. That had the effect of terminating consultation on the SPA because it was Government policy that, for land above Mean Low Water Mark, only notified SSSIs should be considered for SPA status. The reasons for withdrawal appear to be related to procedural weaknesses in the way in which certain objectors, including ABP, had been involved, and to weaknesses in the scientific basis for all the extension areas. There did not appear to be any doubt about the overall importance of the estuary as a whole and the need for further extensions to the SPA.

16. English Nature then worked through the Humber Estuary Designations Project which was intended to supply the scientific justification for the proposed extensions to the SPA, and in January 2004 it sent its brief on the extensions to DEFRA. This brief proposed various extensions to the SPA, including the subtidal estuary channel, and Area 3 which at least overlaps with the formerly proposed Area 7, and covered the area of the proposed harbour works. Consultation on this extension began in February 2004 and the Humber Estuary SSSI notification was confirmed in October 2004.

17. Mr Straker QC for the claimant drew my attention to a number of passages in the evidence which showed the acceptance by English Nature and others of the importance of the extension covering the HRO area and the way in which he said that it met the requirements of the Birds Directive. Those sites which meet the criteria within the Directive must be classified or recognised under the Birds Directive. The important references in the evidence are those which relate to the extension which affects the area of the HRO. In Birds Directive terms, the English Nature brief to DEFRA in April 2000 appears to focus on the importance of the then Area 7 for migratory birds, as a result of the new survey referred to. It also considered the importance of the proposed extension as a whole as did the January 2004 brief. There had been some changes in the nature of the bird interest at that time but the extension as a whole qualified both in respect of Annex 1 species and Annex 4.2 migratory birds. The intertidal flats of Area 3 were important for feeding. The two briefs also considered the relationship of the areas to other conservation regimes, including the Ramsar Convention. The environmental statement submitted in connection with the application for the HRO referred to the Humber Estuary, in context a reference to the SPA and the 2001

proposed extension as a whole, as qualifying under Articles 4(1) and 4(2) of the Birds Directive.

18. The Secretary of State for Transport in his decision letter plainly considers the impact of the HRO as if the potential SPA is SPA in fact, as his language makes clear and as his policy would require. In paragraphs 18 and 20 of his decision letter he sets out what ABP concluded about the effect of the proposal on areas of bird interest:

> "18. The Applicant determined that the proposed works would be likely to have a significant effect on the potential Humber Flats, Marshes and Coast Special Protection Area (SPA) and proposed Ramsar site and the possible Humber Estuary Special Area of Conservation (pSAC).
>
> 20. The conclusions of the Appropriate Assessment are that the proposal would have an adverse effect on the integrity of the proposed SPA and Ramsar site and pSAC. The proposed development is also close to an existing SPA and Ramsar site. There would be a loss of SPA, Ramsar and pSAC features, both as a result of the project and in combination with other projects and plans. It could not be demonstrated that the development would not have an adverse effect on the SPA/Ramsar internationally important population of birds."

The consequence was that alternative solutions and the need for imperative reasons of overriding public interest had to be considered. The Secretary of State's approach to this is clear from paragraphs 24 and 34 of the decision letter:

> "24. Before giving consent to a project which has been assessed, as the Applicant has assessed it, as being likely to have an adverse impact on a designated site within the meaning of the Habitats Regulations, the Secretary of State must be satisfied that there are no alternative solutions to the scheme and that it should proceed for imperative reasons of overriding public interest.
>
> 34. The Secretary of State acknowledges that where a project has been identified as likely to have an adverse impact upon the integrity of a designated European conservation site he must determine whether there are imperative reasons of overriding public interest that the project be permitted. It is for the Secretary of State to assess the case for need in the public interest, which may be of a social or economic nature."

After concluding that there were no alternative solutions and that mitigation measures could not avoid an adverse impact, the Secretary of State concluded that there were imperative reasons of overriding public interest which justified the grant of consent.

19. Mr Straker relied on that approach by the Secretary of State to advance the following submission. Although the potential SPA area was not classified, the Secretary of State had treated the potential SPA as if it were an SPA. This amounted to an acknowledgment that it should have been one. The Secretary of State had held that it

should be treated as an SPA and that was not really different from saying that it should be an SPA. That was sufficient to bring in the application of Article 4 of the Birds Directive and, following the ECJ decision in Commission v France [2000] ECJ C-374/98, known as the Basses Corbieres case, the Secretary of State and ABP could not rely on the Habitats Directive alteration to the provisions of the Birds Directive, which enables development in classified SPAs to be justified on the basis of imperative reasons of overriding public interest. That could only be done for those sites which had actually been classified. If a site should have been classified but had not been classified, that flexibility was not available for development within it. Accordingly, the Secretary of State had given himself in permitting this development a flexibility which he did not have in law.

20. This argument depends entirely upon the effect of the Basses Corbieres case and the earlier decisions upon which it draws. In that case France had not classified any area of the Basses Corbieres site as an SPA. The Commission had issued a reasoned opinion and France had not classified any part within the period allowed by that opinion. It admitted its breach of its obligations to classify it as an SPA in the infraction proceedings brought by the Commission. It appears that for the specific habitat of the Bonelli's eagle there were sufficient special conservation measures (para 20) but that those measures were insufficient in their geographic extent (para 29). Some time before the reasoned opinion, the limestone quarry had opened and was being worked to the detriment of the ecological interest of the Basses Corbieres area. It appears from paragraph 79 that the original permission had been annulled by the French courts but that another permission with compensatory measures had been granted and put into operation.

21. The Commission argued that, since from 1994 the provisions of Article 6 of the Habitats Directive, which had permitted development for imperative reasons of overriding public interest, had applied to an SPA, the requirements of that Habitats Directive could be complied with rather than the stricter requirements of Article 4(4) of the Birds Directive. The ECJ rejected that argument. It first held that the literal interpretation of Article 7 of the Habitats Directive only applied the Article 6 regime to those SPAs which had actually been classified as such. In paragraphs 46 to 47 it said:

> "46. Moreover, the text of Article 7 of the habitats directive states that Article 6(2) to (4) of that directive replace the first sentence of Article 4(4) of the birds directive as from the date of implementation of the habitats directive or the date of classification by a Member State under the birds directive, where the latter date is later. That passage of Article 7 appears to support the interpretation to the effect that the application of Article 6(2) presupposes the classification of the area concerned as an SPA.
>
> 47. It is clear, therefore, that areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the birds directive."

22. The ECJ then referred to an earlier case, before the Habitats Directive, in which Spain had tried to argue that the provisions of the Birds Directive could not apply to a site which, in breach of its treaty obligations as the court found (para 32), it had not classified under Article 4 of the Birds Directive. In the Basses Corbieres case the ECJ held:

> "49. Thus, the fact that, as the case law of the Court of Justice shows (see, in particular, Case C-355/90 Commission v Spain [1993] ECR I-4221, paragraph 22), the protection regime under the first sentence of Article 4(4) of the birds directive applies to areas that have not been classified as SPAs but should have been so classified does not in itself imply that the protection regime referred to in Article 6(2) to (4) of the habitats directive replaces the first regime referred to in relation to those areas."

The ECJ continued:

> "50. Moreover, as regards the Commission's argument concerning a duality of applicable regimes, it should be noted that the fact that the areas referred to in the previous paragraph of this judgment are, under the first sentence of Article 4(4) of the birds directive, made subject to a regime that is stricter than that laid down by Article 6(2) to (4) of the habitats directive in relation to areas classified as SPAs does not appear to be without justification.
>
> 51. As the Advocate General points out in paragraph 99 of his Opinion, a Member State cannot derive an advantage from its failure to comply with its Community obligations.
>
> 52. In that respect, if it were lawful for a Member State, which, in breach of the birds directive, has failed to classify as an SPA a site which should have been so classified, to rely on Article 6(3) and (4) of the habitats directive, that State might enjoy such an advantage.
>
> 53. Since no formal measure for classifying such a site as an SPA exists, it is particularly difficult for the Commission, in accordance with Article 155 of the EC Treaty (now Article 211 EC), to carry out effective monitoring of the application by Member States of the procedure laid down by Article 6(3) and (4) of the habitats directive and to establish, in appropriate cases, the existence of possible failures to fulfil the obligations arising thereunder. In particular, the risk is significantly increased that plans or projects not directly connected with or necessary to the management of the site, and affecting its integrity, may be accepted by the national authorities in breach of that procedure, escape the Commission's monitoring and cause serious, or irreparable ecological damage, contrary to the conservation requirements of that site.
>
> 54. Natural or legal persons entitled to assert before the national courts interests connected with the protection of nature, and especially wild bird life, which in this case means primarily environmental protection

organisations, would face comparable difficulties.

55. A situation of this kind would be likely to endanger the attainment of the objective of special protection for wild bird life set forth in Article 4 of the birds directive, as interpreted by the case-law of the Court (see, in particular, Case C-44/95 Royal Society of the Protection of Birds [1996] ECR I-3805, paragraphs 23 and 25).

56. As the Advocate General has, essentially argued in paragraph 102 of his Opinion, the duality of the regimes applicable, respectively, to areas classified as SPAs and those which should have been so classified gives Member States an incentive to carry out classifications, in so far as they thereby acquire the possibility of using a procedure which allows them, for imperative reasons of overriding public interest, including those of a social or economic nature, and subject to certain conditions, to adopt a plan or project adversely affecting an SPA.

57. It follows from the above that Article 6(2) to (4) of the habitats directive do not apply to areas which have not been classified as SPAs but should have been so classified."

23. The Advocate General's opinion is of some importance. I note in particular paragraphs 102 and 103, which says:

"102. The duality of the regime for classified special protection areas, on the one hand, and those that should have been classified, on the other, as alluded to by the Commission, may be unproblematic, but it will create a certain incentive for Member States to classify SPAs if they thereby open up the possibility of deviating from the rigid requirements laid down by Article 4(4) of the birds directive (as interpreted by the Court).

103. Neither is it by any means the case that all regions, irrespective of their nature and quality, would be assessed under the strict requirements laid down by Article 4(4) of the birds directive, simply because they had not been classified as SPAs. On the contrary, such sites must be those that should have been classified as SPAs. They must be of a particular quality, characterised by a high degree of certainty in terms of their importance to the bird population. In accordance with paragraph 4 of article 4(1), it must be one of the most suitable territories in number and size for the conservation of the species. When a site qualifies as an area that should have been classified as an SPA, there is associated with this a certain judgment of unworthiness with regard to omissions in the fulfilment of the Member State's obligations under Article 4(1) and (2) of the birds directive. In all other regions, the duty of endeavour embodied in the second sentence of Article 4(4), which reads, "Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats", continues to apply."

24. It is useful at this stage to mention another case involving France: Commission v France C-166/97 [1999] E CR 1-1719, referred to in paragraph 20 of Bown. France was again in breach of the Birds Directive following a reasoned opinion and its argument that it was consulting on the matter was rejected because its internal procedures could not be pleaded as a justification for a breach of its Directive obligations. But the ECJ held that the Commission had failed to prove that the area in question was "one of the most suitable territories for the conservation of birds" as required by Article 4 of the Birds Directive.

25. Mr Straker's simple submission was that Area 3 at least was treated as an SPA and should have been therefore an SPA, but the area was not classified and so the full rigours of the Birds Directive continued to apply.

26. I agree with the submissions of Mr Drabble QC for the Secretary of State and Mr Pleming QC for ABP that the Basses Corbieres case applies only where the lack of classification of the site involves a failure to comply with the Directive obligation. I agree that the notion of a site which "should have been classified" in Basses Corbieres terms, is a reference to a site the failure to classify which has involved a breach of Directive obligations.

27. That seems to me to be the plain reading of the passages cited in the light of the earlier Advocate-General opinion and the earlier Spain case. Indeed I find it hard to see what else it could mean. The point of the decision in the Spain or Santona Marshes case and which underlies the rationale for the Basses Corbieres decision was that the failure to classify was itself a breach of the Directive obligations. It would be merely an encouragement to breaches of those obligations if the breach could enable the infracting state to say that the obligations which flowed from compliance could be evaded.

28. That thinking is developed in the Advocate-General's opinion in Basses Corbieres. The force in the Commission argument that there were two regimes and that the more flexible applied on classification, and could therefore be applied to those which should have been classified, was rejected because that was seen as conferring an incentive on a State not to classify a site in breach of the Directive. The State would have nothing to lose in terms of development flexibility, yet it would be able to avoid taking special conservation measures or being prosecuted for its failure to do so. It could not take advantage of its breach. It is clear that in both Basses Corbieres and the Santona Marshes cases there was a breach of the Directive obligation either as found by the ECJ or admitted by the State and following a reasoned opinion from the Commission. In Basses Corbieres the development of the quarry had begun without adequate compensatory measures and without geographically adequate special conservation measures.

29. In Basses Corbieres the ECJ adopts that reasoning and is concerned that an infracting state should not gain an advantage from its breach. It also points out the further practical points that if a state is able to take advantage of the development flexibility in the Habitats Directive for an unclassified site which should have been classified, the State will not have had to take special conservation measures, it might not apply the right test for development anyway, it would be difficult for the Commission to monitor

what it was doing and difficult for other interested parties to rely on the Directive to protect sites which should be protected.

30. I consider that there is a clear distinction between the way a site is treated for the purposes of PPG9 and of the application of the Habitats Regulations as a matter of policy, and whether a site should have been classified to avoid a breach of Directive obligations. The former involves no allegation of breach, whereas the latter necessarily must do so if Basses Corbieres is to be relied on. Unless the claim is made that the Secretary of State is in breach of the Directive, Basses Corbieres is of no assistance to the claimant.

31. It would be very strange if the mere fact that the Secretary of State as a matter of policy treated those sites which were under consideration for SPA classification as benefiting from the protection afforded by the Habitats Directive and Habitat Regulation tests, stringent as they are, meant that he had to disapply the limited flexibility in the Habitats Directive in favour of the very much tighter tests of the Birds Directive. It would create a real and perverse incentive to cease that precautionary policy. As the test is applied which would be applied were the site to achieve classification there is no disadvantage to the ecological interests from such an approach. There is no incentive on the Secretary of State not to classify that which should be classified because the same test is applied as if it had been classified. The oddity of the claimant's position is illustrated by the fact that if the site had been classified, the result of the HRO application would be exactly that which it now faces. If, however, the precautionary principle had not been applied, the development would not have been subject to the constraints of which it seeks to take advantage in this application. It is seeking to take advantage of the precautionary application of the policy in PPG9 for the period of uncertainty about classification.

32. As Mr Drabble pointed out, there is nothing comparable between the stance of the Secretary of State in PPG9 applying the Habitats Directive and the Habitat Regulations to this unclassified site and the failure of France in breach of the Directive to classify and protect Basses Corbieres whilst allowing development there to go ahead, and then seeking retrospectively to permit what had been done by applying part of the tests, without classifying what it ought to have classified. None of the incentives to breach the Directive, which the ECJ wished to prevent, are present in this case, nor are any of the unattractive consequences of allowing the state to take advantage of its breach of the law. (I note, without reaching any conclusion on it, that "classification" is the language of Article 4(1) of the Birds Directive and "recognition" is the language of Article 4(2). There was a brief argument from ABP that the actions of the Secretary of State amounted to "recognition", in which case it would be even more difficult to say that there had been a breach of the Directive).

33. Accordingly, in my judgment, it is necessary for the claimant to allege and prove a breach of the Directive obligation if it is to succeed on this ground. There were times during the course of Mr Straker's submissions when he appeared to be making just such a submission. In part, this was a result of his equiparating the treating of a site as within the Habitats Regulations and saying that a site should have been classified as a site, within the meaning of that phrase in Basses Corbieres. But he seemed also to be

submitting at times that there was in fact a breach by the Secretary of State in his failure to have classified Area 3 at least of the potential SPA. However he clarified in reply that he was not making such an assertion, and that it was not necessary for him to do so for his case.

34. However I should add, in view of some of the exchanges which took place, that I do not accept that there was a clear allegation in the grounds of application or in the claimant's skeleton argument that the Directive was breached. If there had been an intention to argue such a case, I would have expected the claimant to have responded to the Secretary of State's skeleton argument, which said that no such point was being made, by contradicting it straightaway.

35. I also consider that the material which I have been shown does not, without more, come close to showing a breach. There would be scope for argument about the significance in Bird Directive terms of Area 3 alone and scope for argument about what area had to be looked at for the purposes of asserting a breach. There would be scope for argument about the suitability of any particular area of the proposed extension such as Area 3, as Commission v France referred to in Bown showed. There is scope for argument about the classification timetable after the 1999 surveys. The Secretary of State had not sought to address arguments which were not made and there is no evidence from him, which he would have been entitled to produce had such a point been clearly raised.

36. But the allegation which in my view it is necessary to make has not been proved and the first ground fails.

Ground 2 - Inadequacy of the Environment Statement.

37. This ground was, in short, that the ES was so deficient in not covering the topic of compensatory measures that it could not be regarded as an ES at all and the Secretary of State therefore could not consider the application. His consideration was therefore ultra vires.

38. Schedule 3 to the Harbours Act 1964 sets out the procedure for making an HRO. Paragraph 8 contains the requirements in relation to the contents of an ES. There was no debate but that an ES was required and that a significant document which described itself as an ES was provided. Paragraphs 8(1) and (2), 8(c) and 9 of Schedule 3 read as follows:

> "8(1) Where this paragraph applies pursuant to paragraph 6(1), the Secretary of State shall direct the applicant to supply him with an environmental statement in such form as he may specify.
>
> (2) The environmental statement shall include the following information -
>
> (c) data required to identify and assess the main effects which the project is likely to have on the environment;
>
> (9) The Secretary of State shall not consider an application for a harbour

revision order unless the applicant complies with any direction under paragraph 8(1) and with any relevant requirements of paragraphs 10 to 14."

39. The Secretary of State also had power under paragraphs 8, (3) and (4) to require additional information to be provided if that information was relevant to his decision and the environmental features likely to be affected by the project.

40. Mr Straker also relied on the Environmental Impact Assessment Directive 85/337 to assist in showing the nature of the obligations as to the content of an ES. Article 5(3) is in the same terms as paragraph 8 of Schedule 3 to the Harbours Act. Article 5(1) requires Member States to ensure that the information which developers may reasonably be required to supply, having regard to current knowledge, is that set out in Annex 4. Paragraphs 4 and 5 of Annex 4 say:

> "4. A description of the likely significant effects of the proposed project on the environment resulting from:
>
> - the existence of the project;
>
> - the use of natural resources;
>
> - the emission of pollutants, the creation of nuisances and the elimination of waste,
>
> and the description by the developer of the forecasting methods used to assess the effects on the environment.
>
> 5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.
>
> [The description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.]"

41. It was accepted by Mr Straker that it was not sufficient for him to show some omission from the ES; the omission had to be of such a nature that there was no ES. It is also established that that is a matter for the reasonable judgment of the decision-maker.

42. It was apparent, he submitted, from the scoping discussions for the ES and from the ES itself, that the adverse impact of the project was such that there would have to be compensatory measures and that mitigation alone would not suffice to off-set the adverse effects. For example, in January 2001, a local authority identified the fact that the direct loss of 22 hectares of intertidal mud would require compensatory habitat creation which the scoping report had not dealt with. English Nature wrote in a similar vein about the need for compensatory measures to be identified, though not with reference to the content of the ES. It said that it was difficult to assess the development of the compensation package without even an EIA to refer to. The ES referred to the mitigation measures which were being put forward. A key issue was the loss of

intertidal habitat and its impact on conservation objectives. The admitted losses which could not be mitigated meant that ABP would have known that Regulation 53 of the 1994 Habitat Regulations would apply and would require compensatory measures. Regulation 53 is as follows:

> "Where in accordance with regulation 49 (considerations of overriding public interest) -
>
> (a) a plan or project is agreed to, notwithstanding a negative assessment of the implications for a European site, or
>
> (b) a decision, or a consent, permission or other authorisation, is affirmed on review, notwithstanding such an assessment, the Secretary of State shall secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected."

43. There was a compensation package embodied in the agreement between ABP, English Nature, the Environment Agency, the RSPB and others in June 2003 which provides for the realignment of the river in two places through works which will lead to the creation of intertidal mud where at present there is agricultural land, and in one place, which was mentioned in the ES, where habitat would be enhanced to create intertidal mud.

44. When the copy of this agreement was first shown to the claimant, after an initial refusal, the location of the two realignment schemes was blanked out in order that the claimant would not know where they were lest it sought to acquire them before ABP had completed its purchases. The claimant did not know of the location until 23 December 2004. Mr Straker said that those understandable commercial concerns could not justify the details and effect of the compensation scheme not being part of the ES so that everyone could see the full effect of the project. It simply meant that the details had to be sorted out earlier in the development process. It is true that the effect of the two realignments is not covered in the ES.

45. Mr Straker submitted that it was simply a clear matter of law. These measures fell within the scope of the project or within the scope of its effects; they should have been included in the ES for assessment. They were not described nor their location identified. No data was given so that their effects could be identified and no alternative compensation measures were considered. It would be wrong to confine the definition of a project to that which was the direct subject matter of the application and to exclude all else from the ES. He accepted, however, that here there was no document asserting or evidencing that the compensatory measures were a main or significant adverse effect of the project.

46. I note at this stage that the two realignment schemes both required planning permission. English Nature's evaluation of them as effective compensation pointed that out and said that it believed in consequence that they did not need to be evaluated as part of the original application. I do not think that that follows at all, as I consider later, but it then said:

> "In this case, EN was able to advise that whilst there would be a likely significant effect there would not be an adverse effect... The re-alignment sites will not adversely affect any European site ..."

47. Mr Drabble submitted that the language of Regulation 53 showed that compensation measures were not part of the plan or project and it was the plan or project which had to be assessed. The need for the compensation measures arose out of the agreement to the project and so could not be part of it in the first place. A European Commission publication "Managing Natura 2000 Sites" made just that point. This construction was the logical consequence of the duty to provide compensation measures lying on the Member State which could be discharged by the state independently of the developer. The ES was required to provide details as to what the developer was proposing at the time of the ES, by way of off-setting measures. The nature of those proposed at the time was discussed in the ES including works at Doigs Creek, and the principle of trickle recharge, although trickle recharge is not what was in the later compensation measures agreement.

48. Schedule 3 to the Harbours Act could not require developers to produce an environmental statement relating to what they did not know or could not reasonably know. (There is a confusion of terminology as between "compensation" and "mitigation" in the ES which does not reflect the strict argument which Mr Drabble put forward, which distinguishes clearly between compensation under Regulation 53 and other broadly mitigatory measures). There was no suggestion that the effects of the two realignment schemes interacted with the project in the HRO so as to produce a different effect for the project itself from that which it would have had without the realignments.

49. Mr Pleming adopted those submissions but added that, as Newman J had said in R (Burkett) v London Borough of Hammersmith & Fulham [2003] EWHC 1031 Admin; [2004] ELR 3, the making of an EA is a dynamic process which does not end with the ES. But it would not be necessary to issue an updated ES. Nor could any interactive effect be assessed in the ES because ABP did not know what the compensation measures would be.

50. There is, in my judgment, some grammatical and logical force in the submission that Regulation 53 compensation measures are not part of the project, for they come after the agreement to the project and before it can be approved, if the project creates an adverse effect which is justified because of imperative reasons of overriding public interest. This is consistent with the concept of the plan or project being that which is the subject matter of the application for development consent. But I think that that does not of itself answer the point, which goes to what the Harbours Act Schedule 3 paragraph 8 or the EIA Directive require as to the content of an ES. There can also be too rigid a distinction between the project and its effects on the one hand, and compensatory measures under Regulation 53 on the other, which does not reflect the purpose of the EIA system. The two are not hermetically sealed from each other, as Mr Straker put it. There may often be scope for debate as to when a measure is mitigatory or compensatory or compensatory within Regulation 53 or not. It would not advance the purpose of the ES system for those rigid conceptual distinctions to be adopted as the

determining factor for the inclusion of a topic within the ES. Nor does it appear that that was the approach adopted by those who provided the ES in this case.

51. In my judgment the true answer is simpler. The requirement is to include a description of the measures which the applicant proposes to take to remedy significant adverse effects of the project. That language is apt to cover both mitigatory and compensatory measures. The same result flows from paragraph 5 of Annex 4 to the EIA Directive. Both compensatory and mitigatory measures could be off-set measures. The Schedule and the EIA Directive also require the description of the "main" effects (Schedule 3) or the "likely significant effects" (EIA Directive) of the development. I would see it as perfectly possible for a remedial measure to fall within either of those phrases on the facts of any case, whether mitigatory, compensatory or howsoever described.

52. However as to the first - that is remedial measures - the ES covered what it was that the applicant was proposing to do. The fact that the proposed remedial measures changed as the discussions reached a conclusion does not make the ES something other than an ES. Nor does it mean that the project changed to become a different project. It is in this context that the distinction between the project applied for and the compensatory measures can have force, rather than providing an absolute answer at the outset of the ES process, permitting a relevant and known remedial measure to be consciously omitted from an ES. A change in the compensatory measures does not change the project so as to require consideration of a revised ES. I note in this context what Newman J said in Burkett.

53. As to the second - that is the obligation to identify main or likely significant effects - there was simply no evidence to suggest that the compensatory measures were main or likely significant effects of this Immingham Outer Harbour proposal or, more accurately, should reasonably have been seen as main or likely significant effects by either the developer or the Secretary of State. Nothing in the correspondence suggests that, and the English Nature letter above denies any adverse effect and deals with the effect of the compensatory measures seen on their own. The question of whether an effect was a "likely significant effect" is a matter upon which evidence would have been required, to show that it was or ought reasonably to have been seen as one. It would not have been easy to persuade a court that the evidence justified that conclusion.

54. There is no evidence that the compensation measures issue was seen as a main or likely significant issue by ABP. The Secretary of State did not use his powers to call for further information. There are routinely issues as to whether an effect is significant. It may even be accepted by an applicant or concluded by the decision-maker contrary to his view, that it is. That does not inevitably make the ES no longer an ES, requiring the parties to restart the ES process. I do not see how the omission of the compensatory measures, even if of a main or likely significant effect, could be said to be of such a severity that the ES, substantial as it was, was not in law an ES. I note that there is no evidence that those who would be most concerned with the impact of a project on the natural environment raise such a concern about the status of the ES. No assertion to that effect was made by the claimant. Its claim was a simple and in my judgment

erroneous one that the omission of the later compensatory measures inevitably meant that the ES was simply not an ES.

55. Accordingly, I reject this second ground.

Ground 3 - Ensuring the coherence of Natura 2000

56. In short, this ground complains that the compensatory measures agreement does not achieve the object required of it, which is to ensure the continuing coherence of the network of European sites known as Natura 2000.

57. The relevant obligations arise under the Habitat Regulations but do not do so because of any identified effect on the European site, as I understand the parties to agree, but because PPG9 applies the provisions of the Habitat Regulation as a matter of policy to the potential SPA. I have already set out Regulation 53. It is agreed that the Secretary of State needs to comply with this provision because he had accepted that the project was being approved because of imperative reasons of overriding public interest, because there was no alternative solution and because there was a negative assessment of the effect of the proposal.

58. Mr Straker submitted that the agreement failed because of its terms to secure that coherence. It was not that the compensatory measures, if implemented properly, would fail in the statutory objective; it was that the implementation of the agreement could not be secured and hence the coherence of Natura 2000 could not be secured either.

59. It was submitted without any specific evidence from the claimant that it was critical that the replacement habitat be available before, or at the latest at the same time as, the destruction of the existing habitat. But there was no trigger to start the compensatory works in the agreement, something usually achieved by a prohibition on development until the compensation measures were in place. All that was required by the agreement was that the land ownership and consents be secured. The sites had to go through an appropriate assessment and at the time when the agreement was entered into it was not possible to say what the outcome of that would be. What was missing was any enforceable obligation to carry out the works. The Secretary of State was not even a party. He could not secure his duty. It was not a question of whether a reasonable Secretary of State could issue a development consent or take the view that the agreement would be complied with. He had to know that at the time of issuing the consent he could secure compliance and he could not do so here.

60. There was material in the English Nature assessment of the compensation sites that recognised a time lag between the start of works and the replacement reaching its full potential.

61. The agreement becomes binding on ABP on the issue of a satisfactory HRO. The agreement provides in clauses 5.1 and 5.2 as follows:

> "5.1 Not to commence the development of the Outer Harbour or Quay 2005 until

(a) it has sufficient proprietary interest in the relevant land required for either the Outer Harbour or Quay 2005 Habitats Schemes as appropriate to enable it to carry out the works described in the Implementation Plan; and

(b) and consents which are required for the implementation of the relevant Habitats Schemes have been issued with the exception of the consents required for Chowder Ness which shall be secured by ABP as soon as reasonably practicable.

5.2 To deliver subject to Appropriate Assessment the relevant Habitats Schemes in accordance with the implementation Plan and the conditions of this Agreement."

The schemes are essentially the realignment works which I set out part of to give a flavour of the detail:

"• Removal of existing flood bank and the reconstruction of new flood defences to the rear of the site. The new defences will be constructed with a minimum crest width of 4m and a minimum height of 5.6m above ODN, in line with the agency guidance and to the Agency's reasonable satisfaction.

• Profiling of the site by between 0 to 1m resulting in the relocation of 94,000m³ of material which will be retained on site and incorporated into the new flood defences.

• Construction of appropriate breaches through the existing saltmarsh fronting the site."

The implementation plan provides details of the general mitigation measures and sets out the planned sequence of construction and timetables for the Habitats Schemes. Detailed timing will depend on the timing of consent approvals. The timetabling of works is set out though no start date is given. There are general mitigation provisions such as a Code of Practice. There are provisions for monitoring and review with a multi-party steering committee. If changes are said to be needed there is a general obligation to work together to achieve them. The plan could be amended with the agreement of the steering committee. There is an arbitration clause.

62. Mr Drabble submitted that, as the challenge was based on the powers and duties of the Secretary of State, it was necessary to recognise what those actually were. There was a duty under Regulation 53 of the Habitats Regulations but that only arose when consent was given - that is, when the project was agreed to. There was no requirement that the arrangements for compensation be in place before consent was given. It was at that stage that the duty arose and was a continuing duty on the Secretary of State. If ABP failed to carry out its obligations under the agreement and enforcement by the parties to

it was ineffective, the duty remained on the Secretary of State to take the necessary steps.

63. In reality, submitted Mr Drabble, this was not a vires but a rationality challenge alleging that the Secretary of State should not have given consent because he could not rationally regard the material, including the agreement, as enabling him to be satisfied that he would be able to discharge his obligation. But that must fail because of the advice which he had received from English Nature as to the satisfactory nature of the compensation measures. The land had been increased to its present size to take account of the risks and possible time lags between work starting and the replacement reaching its full potential. The agreement prevented ABP from starting work until it was in a position to implement the compensation measures.

64. Mr Pleming adopted those submissions.

65. If the challenge is treated as the vires challenge which it purports to be, it can only be to the effect that where the project was agreed to, as it was here in July 2004, the Secretary of State at that time failed to secure, or inevitably will be unable to secure, that any necessary compensation measures are taken. I do not think that Regulation 53 means - and it was not so contended - that the compensation measures themselves had to be in place before consent was granted. It is that the duty to secure them then arose. But it cannot be said that the Secretary of State had already failed at the moment when the consent was issued because that simply was the earliest moment at which any duty could arise. The timing of the measures he has to secure depends on the timing of the events which would detract from the coherence of Natura 2000. It is not even necessary for there to be an agreement in place at all with anyone before he issues consent. He could lawfully conclude that he would acquire land himself or use land under his control to secure the compensation measures at that time.

66. It is correct that the means chosen here for the securing of that duty is the agreement between ABP and others. But even if it could be shown that that would inevitably fail, that would not go far enough to show an absence of power on the Secretary of State's part to grant consent, unless it could be said that he would be disabled thereby from performing his duty. If the claimant cannot go that far and the Secretary of State may yet be able to perform his duty, it is difficult to see how it could be said that he was in breach of his duty to secure the coherence of Natura 2000 when he issued the consent, which is the point in time upon which this argument has to focus.

67. It is plain that the agreement will not inevitably fail to secure the coherence of Natura 2000. ABP has to be in a position to implement the agreement and the implementation plan before it can start works. There are plenty of parties who have an interest opposite to that of ABP who would be in a position to enforce the agreement pursuant to its terms, leaving aside the exercise of any statutory powers which the Secretary of State might have. The terms of the agreement would require, on the face of it, ultimately enforcement by positive injunction, but the provisions are not so vague and the works not so complex that it is at all obvious to me that an injunction in positive terms could not properly be fashioned. In any event, the claimant's argument assumes, without evidence, that ABP might breach its obligations or seek to interpret them in a way

which seriously undermines their effectiveness. There is no evidence of such an attitude. It is true that there is no start date for the works of compensation but, as of the Secretary of State's decision, I can see no basis upon which it could be said that the agreement would be bound or even likely to fail to achieve its objectives. The specific point about the time lag has led to the increase in area of compensation land over that of the land lost.

68. I do not regard there as being a practical difference between that vires attack and an attack based on rationality. It may be that the better analysis of the true nature of the challenge is that, because there is a continuing Regulation 53 duty on the Secretary of State which arises once he grants development consent, the question is could he rationally believe that he could fulfil his continuing duty or indeed fulfil it in the chosen manner through the agreement, or could he only rationally conclude that he would be unable to fulfil it. For the same reasons as led me to conclude that the Secretary of State had the power to issue the consent, which I have dealt with above, I take the view that he could rationally believe that the agreement would be implemented. In so far as the issue is one of rational belief in the effectiveness of the agreement in achieving its aims, as opposed to its enforceability, the Secretary of State was entitled to rely upon the clear advice to that effect from English Nature. There is no evidence to displace that. Accordingly, this ground of challenge fails.

Ground 4 - In-combination effects

69. This ground contended that the Secretary of State had failed to consider the in-combination effect of the Immingham Outer Harbour project and the development of Humber Sea Terminal by the claimant.

70. Regulation 48 of the Habitat Regulations provides:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which -
>
> (a) is likely to have a significant effect on a European site in Great Britain (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, shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives."

71. The ES of August 2001 referred to Humber Sea Terminal but could not consider the in-combination effect of proposals which were not publicly known and may not then have existed. So the ES did not consider the effect of the combined shipping movements and activities which might be created by Immingham Outer Harbour and by the HST

proposal notified to the Secretary of State in May 2003 and which became the subject of an application for an HRO by the claimant in January 2004.

72. It had become a project by May 2003, submitted Mr Straker, and accordingly it became necessary for the Secretary of State to consider in his own appropriate assessment of the Immingham Outer Harbour project those combined effects. He had not done so. His decision letter had noted his own obligation to carry out an appropriate assessment. But the position of the claimant's application was dealt with in paragraph 28(e)(ii) of the decision letter thus:

> "HST's current application before the Secretary of State for a Harbour Revision Order involves the provision of two new berths for ships with a draught up to 8.5m, in addition to two existing berths and two berths already consented to but not yet in full operation. The Secretary of State notes that HST expected in 2001 that a provision of five berths at HST (whish would include the two current berths, the two berths already consented to and one further berth) would be expected to be fully utilised, and that in this case they would consider the possible provision of further berths at HST. He also notes that HST state that they have carried out initial feasibility studies for further berths at HST beyond the six currently existing, consented to and applied for."

73. Mr Morris, a principal administrator in the Ports Casework Branch in the Department for Transport, said in his witness statement that the Secretary of State did not consider the full effects of the claimant's proposal in the decision on the ABP HRO because it had already decided that an appropriate assessment was necessary because of the significant effects which the ABP proposal had by itself. The available information did not suggest that the outcome or provision of compensation would have been any different if more detail had been available.

74. The short response by the Secretary of State adopted by ABP was that the purpose of the reference in Regulation 48 to in-combination effects was to ensure that an appropriate assessment was carried out on those projects which would not by themselves have warranted an appropriate assessment but in combination with others would. Hence Regulation 48 had achieved its purpose when the requirement to carry out an appropriate assessment was created by the effects of a project on its own. If the HST proposal created the need for compensation and an appropriate assessment that would be a matter for that project. There was no evidence of any in-combination effects which were not simply additive and which could not be dealt with by separate compensation measures.

75. The contention from the claimant was that there were possible combined shipping effects which had not been considered and which were relevant to the effect on the European sites. The purpose of the appropriate assessment under Regulation 48 is to test whether a project alone or in combination with another would have a significant effect on a European site and to assess the implications of the project for that site. That may lead to a negative assessment which then requires imperative reasons of overriding

public interest, an absence of alternatives and compensation if it is agreed to under Regulation 53. So the focus has to be on the effect on the nature conservation interest of the European site.

76. If an appropriate assessment is being carried out on a site which warrants one because of its stand-alone effects, it would, in my judgment, be very curious if combination effects had to be ignored and only taken into account for those developments which did not warrant an appropriate assessment by themselves. That would be to introduce a lacuna for which there is no purpose. The trigger for the appropriate assessment does not confine the content of the appropriate assessment which has to be carried out.

77. There was a certain amount of uncertainty about the use of the words "in-combination". It means more than the baseline effect of a permitted but unimplemented previous development. The ABP ES uses "in-combination" to cover both additive and interactive losses: the former being simply additional losses; the latter involves a worsening of a loss because it is exacerbated by another effect.

78. It is for the claimant to show that the Secretary of State did not carry out an appropriate assessment. The Secretary of State is necessarily restricted by the information available and there is no evidence about what the Secretary of State had either from the ABP final appropriate assessment or from the claimant themselves. Certainly there was no evidence that there was any interactive loss which might be increased by the possible effects of ABP and the HST proposal in combination. If there had been it might have been necessary to apportion how any extra compensation was to be dealt with. But in the absence of any such evidence, there is no material upon which it could be concluded that the absence of a full assessment of the HST proposal could affect the compensation due as a result of the Immingham Outer Harbour proposal. Mr Drabble was right to say that if the in-combination effect was simply additive in terms of habitat losses, it would be for the claimant to make appropriate compensation as a result of its own appropriate assessment. Again that would have no material effect upon the decision of the Secretary of State in relation to this application.

79. There is nothing here to show either a substantive or procedural error and the ground fails.

Ground 5 - 24-hour access

80. This ground alleged that the Secretary of State had no evidence to support his finding as to the importance of 24-hour vessel access to the need for the Immingham Outer Harbour project, unencumbered by lock or the state of the tide. The decision letter said, in examining whether the HST proposal for a further two berths at HST would meet the need identified for Immingham Outer Harbour:

> "28(b) The Applicant's proposed works at Immingham would afford customers 24 hour access to the new berths, whereas the works proposed by HST offer access which is to a certain extent governed by the state of the tide. The Secretary of State accepts that customers value the ability to

> have vessel access to berths 24 hours of the day in preference to time slots which are dependent on the state of the tide."

Mr Straker submitted that the only evidence the Secretary of State had was that contained in the ES and the references amount to no more than a few assertions as to the advantage which 24-hour access gave.

81. I disagree. The simple basis is this, taken from the ES:

> "Most of the current trade through the port is with north west Europe and Baltic ports. The main goods include food and components to/from factories, which operate on the just in time principle. This means Ro/Ro ferries need to run to specific timetables and not be restricted by tides or lock congestion. This type of trade is ideally suited to Ro/Ro as it avoids the additional time involved for goods transported by Lo/Lo methods."

The brevity of the references shows rather an assumption that the reader does not need further elaboration of what is obvious. Twenty-four hour access enables vessels to arrive or depart without waiting for the tides; they do not have to stand off; their timetables are not interrupted; the port becomes more attractive to shipping lines and to the importers and exporters of goods. There was no evidence provided by the claimant to the Secretary of State or to the court suggesting that it was other than a significant advantage. That did not surprise me.

82. There is nothing in this point.

Ground 6 - Managing Natura 2000

83. This ground originally appeared to be that the Secretary of State had not considered a "zero option", or doing nothing. Regulation 49(1) of the Habitat Regulations provide:

> "If they are satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature) the competent authority may agree to the plan or project notwithstanding a negative assessment of the implications for the site."

In Commission Guidance of 2000 as to the application of Article 6 of the Habitats Directive it was said that in examining alternatives which better respected the site's integrity, a zero option should be considered as well as different designs or locations. Paragraph 25 of the decision letter states:

> "25. The Secretary of State accepts the Applicant's conclusions that a do nothing option at Immingham, better use of existing facilities at Immingham or alternative designs for works at Immingham would not achieve the purpose of the project, which is the accommodation of increased ro-ro traffic including a new generation of larger super-ferries. The Secretary of State also accepts the Applicant's conclusions with regard to possible alternative developments at other local ports owned by

the Applicant."

84. Mr Straker appeared to resile from the submission that zero option had not been considered as an alternative. It is in any event far from clear how it can be an alternative in the sense of that phrase in Regulation 49, although the question of whether there are imperative reasons of overriding public interest clearly raises the question of whether it is better to do nothing. Mr Straker then developed an allegation that the Secretary of State ought to have considered a combination of part of the IOH works and the whole of the HST proposals. This was not a point that had been raised for his consideration before. Mr Drabble is right that the Secretary of State's views on the need for the development are sufficiently clear that the whole of IOH is needed even if the claimant obtains approval for the project.

85. This ground lacks substance.

Ground 7 - Failure to identify the legislative objective

86. Mr Straker contended that the power to make a Harbour Revision Order was set out in Schedule 2 of the Harbours Act and that it was necessary for the Secretary of State, in order lawfully to make a Harbour Revision Order, to identify those powers within the Schedule which were being exercised. The HRO was silent about that. Sections 14(1) and 14(2)(b) provide as follows:

> "(1) Subject to the provisions of this section and to the following provisions of this Act, there may, in relation to a harbour which is being improved, maintained or managed by a harbour authority in the exercise and performance of statutory powers and duties, be made by the appropriate Minister an order (in this Act referred to as a 'harbour revision order') for achieving all or any of the objects specified in Schedule 2 to this Act.
>
> (2) Subject to the next following section, a harbour revision order shall not be made in relation to a harbour by the appropriate Minister -
>
> (b) unless the appropriate Minister is satisfied that the making of the order is desirable in the interests of securing the improvement, maintenance or management of the harbour in an efficient and economical manner or of facilitating the efficient and economic transport of goods or passengers by sea [or in the interests of the recreational use of sea-going ships]."

Schedule 2 provides in paragraphs 3, 4 & 17:

> "3. Varying or abolishing duties of powers imposed or conferred on the authority by a statutory provision of local application affecting the harbour, being duties or powers imposed or conferred for the purpose of -

(a) improving, maintaining or managing the harbour;

(b) marking or lighting the harbour, raising wrecks therein or otherwise making safe the navigation thereof; or

(c) regulating the carrying [on by others of activities relating to the harbour or of] activities on harbour land.

4. Imposing or conferring on the authority, for the purpose aforesaid, duties or powers (including powers to make byelaws), either in addition to, or in substitution for, duties or powers imposed or conferred as mentioned in paragraph 3 above.

17. Any object which, though not falling within any of the foregoing paragraphs, appears to the appropriate Minister to be one the achievement of which will conduce to the efficient functioning of the harbour."

87. Mr Straker submitted that it was insufficient for the ABP in court to select the objects which the HRO might have been made to achieve, trying to fit the powers within various paragraphs of Schedule 2. But the fact that a Harbour Revision Order might now be made, which required imperative reasons of overriding public interest, meant that it was even more important for its objects to be stated and to do so would only require a further recital.

88. Mr Drabble pointed out that the form adopted was not merely the conventional form of HRO and the same as that applied for by the claimant, but that there was no legislative requirement for those objectives to be stated. As Mr Pleming pointed out, the ground asserted by Mr Straker had either to be one of power or one of form. The works needed to be authorised and the Secretary of State had authorised them.

89. If the submission were merely as to form, it would necessarily fail in my judgment. There is no requirement either in Schedule 3 - the procedural schedule - or elsewhere that the objectives in Schedule 2, for which the HRO is necessary, be stated. Even if there were some legislative procedural requirement to state the objectives in the HRO, there is no evidence that that failure has caused any, let alone substantial, prejudice to the claimant.

90. As to powers, the submission is not that the works authorised by the HRO fall outside the scope of Schedule 2, because they do not or cannot fall within the scope of any of the paragraphs, wide-ranging as they are, with a sweeping-up provision of the breadth of paragraph 17. In any event, were such a submission to have been made, it might well require evidence as to why the provisions of the HRO did not fall within any of those paragraphs. It would be especially curious because it might only mean that an HRO was unnecessary for the works being undertaken.

91. The submission is simply that for the Secretary of State to exercise his powers the objects must be identified and stated, but there is no legislative requirement for that to be done in order for the Secretary of State to have the necessary power to make the

order. The sole question is whether the works authorised are within the objectives set out in Schedule 2.

92. The works here involved the removal of some existing works which are no longer to be maintained and the creation of new works which would interfere with foreshore and navigable water but which have to be maintained thereafter. Paragraphs 3 and 4 seem very apt for those, and paragraph 17 sweeps up any residual matters.

93. This ground is accordingly rejected.

94. Mr Straker sought leave to amended his grounds to allege two further points. One related to the consideration of piling, the other to the consideration of highways. Their related legal arguments varied somewhat.

Piling

95. The claimant's skeleton argument contended that the ES was flawed because English Nature had not informed ABP of the potential piling impacts on international ornithological interests. It was thereby "materially flawed" because it did not consider piling impacts in conjunction with the piling impacts of the HST proposed works. This therefore flawed the Secretary of State's determination.

96. It became clear that that point was untenable, because in a number of passages the ES did address piling impacts from the HRO works and it could not address any in-combination effects of HST's proposal because it was not yet a proposal. Nor was any evidence led to suggest that any interactive effects needed examination at a later stage in any appropriate assessment either by ABP or the Secretary of State. It is also clear that the letter from English Nature to the solicitors for the claimant, relied on as showing that it had not offered advice in relation to piling impact, related to a different project. It is also far from clear that if the factual errors alleged had existed that it was necessary that the legal consequences asserted would follow.

97. The argument was developed before me that the Secretary of State in his own appropriate assessment had had no English Nature input on piling impacts or piling impacts in combination with those from the possible HST proposal. There is no evidence to support that. The letter previously relied on could not do so. It is a misreading of paragraph 41 of the decision letter to treat that as the outcome of the appropriate assessment; it simply shows that an appropriate assessment is necessary. Paragraphs 43 and 44 of the decision letter deal with the material the Secretary of State considered and that includes the final record of appropriate assessment from ABP which is not before the court, and the advice of English Nature. Paragraphs 45 to 46 represent the conclusion and consequences of the appropriate assessment. There is no evidence either of any interactive in-combination effect in relation to piling or even of any such possible effect being raised for consideration or, if raised, of it not being considered. The reference to "interactive in-combination effects" is necessary because it is that which would affect consideration of ABP's project, rather than simply the fact that there might be more noise from the HST proposal, the purely additive effect.

98. There was nothing to alert either the Secretary of State or ABP that the piling argument as developed was the point which it had to address. On the material available it is unarguable, and in any event there was insufficient forewarning of the true point.

99. I refuse leave for it to be argued.

Highways

100. The argument in the claimant's skeleton argument was that the Highways Agency had not been consulted on the Harbour Revision Order and therefore the ES was flawed. The ES did consider the highway effect of the proposal, again understandably not in conjunction with the as yet unknown HST proposal. It is quite impossible to say that the ES was therefore flawed in law so as not to be an ES. It is also impossible to say that the ES is flawed because ABP had not consulted the Highways Agency.

101. The argument again developed in front of me and became an argument that the Secretary of State had failed in his duty under Schedule 3 of the Harbours Act to consult the Highways Agency with its responsibility for trunk roads and motorways. Paragraph 6(4) of Schedule 3 is irrelevant to this argument because it deals with consultations necessary to see whether an ES should be required. Paragraph 15(a) provides that the Secretary of State shall consult "such bodies likely to have an interest in the project by reason of their environmental responsibilities as he thinks appropriate."

102. There is no evidence of anything material or adverse which the Highways Agency might have said if asked. The claimant could have asked it. Indeed, the Highways Agency might be hard put to say that they were unaware of a public proposal of Immingham and its principal, the Secretary of State for Transport, certainly was not unaware. There is no evidence, therefore, of any material consideration which was ignored, let alone one being raised for consideration.

103. If this is seen as a procedural failure, there is no specific duty on the Secretary of State to consult the Highways Agency. There is nothing in the ES suggesting an impact on the trunk roads or motorways which might generate a need for a specific consultation, and the Secretary of State was not obliged to consult people unless he regarded them as an appropriate consultee. Unless there is a possible significant impact it cannot be said that it was necessarily irrational for the Secretary of State not to treat the Highways Agency as an appropriate consultee in this case.

104. There is no evidence of any prejudice to the claimant from any possible failure to consult the Highways Agency, for example by way of possible impact on the success of its own proposal. The case as formulated in the skeleton argument and as reformulated in court is unarguable.

105. I refuse leave to argue it.

106. Accordingly, and despite Mr Straker's valiant endeavours, this application is dismissed.

107. MR MAURICI: My Lord, in addition to an order dismissing the application I seek an order that the applicant pay the Secretary of State's costs, subject to detailed assessment if your Lordship agrees.

108. MR PLEMING: My Lord, I make a similar application, knowing that I apply as a second party in such a case. To take matters shortly and to save your Lordship's pen, I produced a short note. I hope that will assist.

109. MR JUSTICE OUSELEY: Presumably, Mr Straker, you accept the Secretary of State; you resist this one.

110. MR STRAKER: My Lord, I most certainly do not resist the Secretary of State's application for costs.

111. MR JUSTICE OUSELEY: No, but you resist this one.

112. MR STRAKER: Yes, my Lord.

113. MR PLEMING: My Lord, you will be familiar with the territory so I will be able to take you shortly.

114. MR JUSTICE OUSELEY: Yes.

115. MR PLEMING: We refer your Lordship to the Bolton decision. I am sure you will be familiar with that case. The principles are there set out from Lord Lloyd's speech. Attached to note, my Lord, two pages on, is the report of the Bolton Metropolitan District Council case and the passages we refer your Lordship to appear in the speech of Lord Lloyd, and perhaps most usefully at page 1178F. Your Lordship perhaps could remind yourself of the principles. His Lordship there sets out a series of propositions starting with the fundamental rule that there are no rules. If your Lordship could read on to the end of D - because that is a case where third-party costs were awarded - your Lordship will see that one of the reasons at D set the scale of development, and the importance of the outcome for the developers, were both of exceptional size and weight. My Lord, if I could go back to the note, paragraph 3, we proceed on the basis that the Bolton approach applies more generally. We have then also attached for your Lordship extracts from the latest edition of Michael Fordham's "Judicial Review Handbook" which, at paragraphs 18.1 and 7, sets out the illustrations - and they are no more than that - of how the rule is applied.

116. My Lord, at paragraph 5 we make it clear that we do not submit that we needed to be heard to make simple representations on the law. We did, I hope, our modest best to support the Secretary of State, but most of our legal argument ran exactly parallel with the Secretary of State. We had some other input but they came to the same effect. We do say, however, that it is a heavily fact-sensitive challenge. It has been necessary for ABP to be represented throughout to respond to and address factual matters and we have put in witness statement evidence and supporting documents. We do submit that ABP has a separate interest and that the interest required separate representation. First of all, this is a purely commercial challenge - we leave it to your Lordship to take what your Lordship does of that challenge - by a competitor anxious to prevent or at least

substantially delay the development of the port at Immingham. It is necessary for ABP to be represented to resist that challenge - not merely because it is a developer, but because of the wider need case advanced before the Secretary of State's justifying the HRO itself.

117. Could I expand that. It could be a separate ground, a fourth ground. Perhaps it is more appropriately linked here to what I have just read to your Lordship from Bolton, and that is a reference to the scale of the development, the importance of the outcome for the developers, and I add in also, for Immingham and Grimsby, that is the basis for the need to be economical, and the social case for the development of that area. They are both of exceptional size and weight, and by weight I here say of public importance and importance generally to the area. So my Lord, there is either a separate ground or part of the first ground.

118. Second, the exercise of discretion. My Lord, we say we had to be represented throughout, not only to make the arguments themselves on the various grounds, but also to be prepared to make submissions on the exercise of discretion. And then your Lordship will appreciate as there are ten grounds in the end the submissions on discretion would have to be very varied, depending for example on Basses Corbieres and (inaudible) environmental statement of grounds. We say submissions could not have been made effectively without taking a full part in the hearing and the fact that in the end it was not necessary to make submissions is not the point.

119. Finally, as your Lordship knows from the evidence, for reasons of commercial necessity ABP had had to start the works before the court had ruled on the challenge; and you saw the documentation in the additional witness statement from Mr Arroner(?) We say it would have been necessary, had the claimant succeeded, to explain and justify that action.

120. For those four reasons we say this is a case where the normal rule should not apply and ABP should also be entitled to its costs to be subject to a detailed assessment if not agreed.

121. MR STRAKER: My Lord, I respectfully resist that application for costs made by Associated British Ports. Associated British Ports is of course present before your Lordship as a volunteer, not as a conscript. In those circumstances, as your Lordship will know and as is made plain in the Bolton case, such a volunteer as Lord Lloyd indicated is not normally entitled to his costs unless there is likely to be a separate issue. There was not. What was in challenge here was the Harbour Revision Order, the making of which of course the Secretary of State attached considerable importance and therefore was defending and proposing to defend and there was no other interest. So that in those circumstances, as is revealed by the extract from the latest book by Mr Fordham at page 364 of the penultimate page in the extract provided by my learned friend, this is a circumstance where, as Munby J said in a different context, the normal rule is that two sets of respondent's costs should not be awarded.

122. My learned friend seeks to rely upon the fact that had the argument gone against the Secretary of State a point might or might not have arisen on discretion. As far as that is

concerned, my Lord, I would respectfully say, if I may, that such a course did not require the attendance of Associated British Ports as a volunteer, let alone as a conscript. Indeed, as far as the first point my learned friend makes, namely that works had started at their risk, notwithstanding the proceedings prior to your Lordship's hearing, it was of course a matter for Humber Sea Terminal as to whether that claimant company took proceedings under the Act for an interim order and did not; and so nothing there arose, with the greatest respect to my learned friend.

123. If, following on, say, the situation had been one where your Lordship had taken a different view as to the environmental statement point and to consider that there had been a matter of a main effect being omitted, then on this side it may be that the contention would have been that no issue of discretion arose. But if your Lordship was in any way concerned about that of course there was still no need for my learned friend to have attended. Had your Lordship wished that situation to arise then no doubt it could have been dealt with and they could have been called for subsequently. But my Lord, in my respectful submission all the arguments were arguments directed to the Harbour Revision Order. That was what the Secretary of State was seeking to defend, and accordingly the position is one whereby the ordinary rule applies. The fact that the case was heavier than some cases; the fact that at the end of the day there were a number of points does not affect that principle, and principle approach to this particular matter which, in my respectful submission, your Lordship should sustain.

124. MR JUSTICE OUSELEY: Did you want to come back on anything?

125. MR PLEMING: No, my Lord.

126. MR JUSTICE OUSELEY: There is an application for costs by the Secretary of State which is not resisted. There is an application for a second set of costs by the interested party which is resisted.

127. Applying the principles in Bolton Metropolitan District Council and Others v Secretary of State for the Environment [1995] 1 WLR 1176, it is clear that ABP has a separate interest. It had in the event no separate arguments. It had a number of concerns which entitled it to be separately represented, in particular the discretion arguments which it might have wished to raise very much more strongly than the Secretary of State had the Secretary of State lost. It has an interest that is perhaps different from the Secretary of State in terms of the importance to it of the proposal, but the Secretary of State was well able to deal with issues relating to the general public importance of the proposal because those were the very stuff and matter of his conclusions.

128. This does not seem to me to be a case in which it can be said that the developer had an interest which required separate representation. There are insufficient differences particularly viewed with the benefit of hindsight, as I believe you are entitled to do, to say that the presence of Mr Pleming to support those interests was required.

129. However, I do consider that in a case of this sort it is appropriate for there to be recognition that evidence from the interested party is legitimate, and I award the costs and the costs only of the preparation of the interested party's witness statements.

130. MR STRAKER: My Lord, the other matter which I would ask to be heard upon is the question of permission to appeal. My Lord, as far as that is concerned I only wish to advance it in relation to the first two grounds. My Lord, in my respectful submission, as far as the second ground is concerned - the environmental statement ground - I can respectfully put myself under that heading of reasonable prospect of success because there was here an effect which was never identified in the dynamic process in terms of where is it; and as I observed to your Lordship, it must be - and in my respectful submission this could be the character of the argument to be developed - main or significant because of the importance attached to that which was being removed, quite apart from the size of that which was being created. So that would be the character of the argument and, as I respectfully urge upon your Lordship, I put myself under the heading there "reasonable prospect of success".

131. In connection with the first point, the Basses Corbieres point, there I would turn the situation around and say that there was some other compelling reason, the situation there being one whereby, as your Lordship may know, a number of Harbour Revision Orders are currently before the Secretary of State where the question of the consequence of the Basses Corbieres case is of some significance in their consideration, and indeed in consideration of ecological matters generally; so that I am entitled, therefore, to rely on that heading for my application for permission to appeal.

132. I would also seek of course to say that there is there a reasonable prospect of success. But in my respectful submission, having developed that point under the environmental statement ground, I do not take up time before your Lordship in pressing that in the context of Basses Corbieres. So for those reasons I respectfully ask for permission to appeal.

133. MR JUSTICE OUSELEY: Thank you. The Basses Corbieres point is, in my judgment, very clear. There may be a number of people who are seeking to raise the same argument. That does not alter the fact that the answer is clear.

134. The ES point, whatever its theoretical objections, fails an evidential grounds. I do not regard those points as reasonably arguable now that they have been gone through and you will have to seek to persuade their Lordships.

16 New Burlington Place
London, W1S 2HX

General enquiries: 020 7851 5000
Web: www.thecrownestate.co.uk

THE CROWN ESTATE

Neil Etherington
Group Development Director
Able UK Ltd
Able House
Billingham Reach Industrial Estate
Billingham
Teesside
TS23 1PX

Iain Mills
Coastal Manager
Tel: 020 7851 5267
Fax: 020 7851 5125
E-mail: iain.mills@thecrownestate.co.uk

Your Ref.:
Our Ref.:

Subject to Contract

24 September 2012

Dear Neil

Land forming part of Sands Farm – Wet Grassland

I refer to our various conversations in respect of the above and can confirm that our respective agents have been instructed to draft an agreement in respect of the above that will allow Able UK Ltd to occupy the above land for the purposes of creating a temporary wet grassland habitat adjacent to the mitigation land at Cherry Cobb Sands for as long as it is required.

[redacted]

Iain Mills MRICS