ABLE MARINE ENERGY PARK TR030001

SUMMARY OF APPLICANT'S CASE MADE AT THE COMPULSORY ACQUISITION HEARINGS ON 16 AND 17 OCTOBER 2012

1. This document relates to the application for the Able Marine Energy Park (AMEP) made by Able Humber Ports Ltd (the applicant) on 19 December 2011.

2. It is a summary of the case presented by the applicant at the compulsory purchase hearings that took place in Grimsby and Immingham on 16 and 17 October 2012, together with the following supplementary information requested by the Examining Authority:

    a. correspondence with the agent of Bethany Jayne Ltd (Annex 1);

    b. the 'live' level crossings crossing the Order land superimposed on the master plan (Annex 2);

    c. Heads of Terms proposed by Network Rail on 15 October (Annex 3);

    d. Guidance on Port Master Plans (DfT, 2008) (Annex 4);

3. The summary follows the sequence of the agenda published by the Examining Authority on 4 October 2012, and in each case the applicant sets out how the tests in section 122 of the Planning Act 2008 are met in relation to the parcels of land concerned.

4. First the applicant re-iterates the compelling case in the public interest for the project as a whole to go ahead, as this applies to all parcels subject to compulsory acquisition, supplemented by specific points made in relation to each parcel.

5. The need for all forms of electricity generation is expressed in the Overarching Energy National Policy Statement EN-1 as 'urgent' and the UK also has an obligation to ensure that 15% of all energy consumption – not just electricity – is from renewable sources by 2020. The AMEP project will provide one of the most significant contributions to the realisation of offshore marine energy in the UK and this is clearly in the public interest. Given the urgency of electricity generation and the renewable energy targets set out in the UK's Renewable Energy Action Plan (2010), the applicant submits that there is a compelling case in the public interest for the project as a whole. The size of AMEP is one of its most significant benefits – 'big is beautiful', to quote John Fitzgerald (Port Director, ABP Immingham and Grimsby) – and this will help to provide the critical mass that will help not only to fulfil the UK government's renewable energy ambitions but also to encourage the development of a cluster of renewable energy-related industry on Humberside and the employment opportunities that would bring.

6. The associated development within the project would also provide and promote the manufacture of marine energy components, which is something that the UK has been deficient in hitherto. The ability to deliver a port project of this scale with the associated benefits is not readily available elsewhere in the UK (see examination of alternatives at Chapter 6 of the Environmental Statement). Furthermore, the need for this development is particularly time-sensitive as the Crown Estate procures the development of its Round 3 wind energy sites.

7. At the end of the case for each group of parcels, the applicant sets out in summary its specific case in the terms of section 122 of the Planning Act 2008.

8. Section 122 of the Planning Act 2008 provides as follows:

"*(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.*

(2) The condition is that the land –

(a) is required for the development to which the development consent relates,

(b) is required to facilitate or is incidental to that development, or

(c) is replacement land which is to be given in exchange for the order land under section 131 or 132.

(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily."

9. The Department for Communities and Local Government produced guidance in February 2010 on the procedures for compulsory acquisition[1]. A further guidance document, refreshed to bring it into line with the Localism Act 2011, was published for consultation in April 2012. While there is no longer a statutory requirement to have regard to this guidance (section 124 of the Planning Act 2008 having been repealed by the Localism Act) it aims to provide advice on the application of the correct procedures and statutory requirements. Paragraph 4 of the consultation draft explains that nothing in the guidance should be taken as indicating that any requirement of planning law or any other law may be overridden, and that

"*The guidance does not in any way replace the statutory provisions of the Act <u>nor does it add to their scope.</u>"* (Emphasis added).

10. The guidance (both the 2010 and 2012 versions) explains that the first criterion under section 122(2) is that the land is required for the development to which the development consent relates. It goes on

"*For this to be met, the promoter should be able to demonstrate to the satisfaction of the decision-maker that the land in question is needed for the development for which consent is sought. The decision-maker should be satisfied, in this regard, that the land to be acquired is no more than is <u>reasonably required</u> for the purposes of the development."* (Emphasis added).

11. This raises the question of what the words 'required' (used in the Planning Act 2008), and 'reasonably required' (used in the guidance) means in this context. The applicant does not accept the bold assertion put forward by Mr Fraser Urquhart on behalf of C.RO and C.GEN that compulsory acquisition can only be authorised where the land in question is essential or

[1] Planning Act 2008: Guidance related to procedures for compulsory acquisition, February 2010

indispensible to enable the development to come forward, such that the scheme would prove to be unviable without that acquisition. That assertion is simply wrong in law.

12. In *Sharkey v Secretary of State for the Environment* (1991) 63 P&CR 332 the Court of Appeal considered the meaning of the word "required" used in that case in the context of justifying compulsory acquisition under section 112 of the Town and Country Planning Act 1971.

13. McCowan LJ said, at 340:

"*I agree with Roch J* [the judge below] *that the local authority do not have to go so far as to show that compulsory purchase is indispensible to the carrying out of the activity or the achieving of the purpose; or, to use another similar expression, that it is essential. On the other hand, I do not find the word 'desirable' satisfactory, because it could be mistaken for 'convenient', which clearly, in my judgment is not sufficient. I believe the word 'required' here means 'necessary in the circumstances of the case'."*

14. While that case concerned a different statutory provision, it related to powers of compulsory purchase, and is relevant in determining the meaning of the word 'required' in the Planning Act 2008. Indeed, the same approach to what is meant by "required" for the purposes of compulsory acquisition has very recently been applied by the New Zealand Court of Appeal. In relation to whether the land was in fact required (either directly or indirectly), the Court defined "required" as "land whose acquisition is, viewed objectively, essential or reasonably necessary rather than in some general sense desired." [underlining added] *Minister for Land Information v Seaton* [2012] NZCA 234 at [31]. In rejecting a challenge that land in question was not even indirectly for the road widening scheme:

"It is not difficult to conceive of situations where land would be required indirectly for a Government work. It seems improbable that Parliament would have denied the Minister the power to acquire land compulsorily where it could be shown that the land was required, even though indirectly. Any such limitation would significantly reduce the PWA's effectiveness and workability, particularly in circumstances such as the present." [Underlining added]

15. The court also rejected a further ground that the Minister had acted improperly in exercising his power for compulsory acquisition in this way because there were alternative routes of acquisition; the Court of Appeal also found for the Minister, saying that he had acted in the public interest in "attempting to ensure a timely, orderly and comprehensive process."

16. In the present case the acquisition of each plot is more than just "convenient" or "desirable" to the applicant: it is reasonably necessary or required in the circumstances of the case to enable the development to proceed in its current form and within the proposed timescale and to retain its appeal to clients and potential clients, with all the public benefits that this will bring. In making his assertion that in determining whether land is required, one should look only at whether the scheme will remain viable without the acquisition of a particular plot, Mr Fraser Urquhart for EN/RO and C/RO argued that the applicant's submission that the project could still go ahead and remain viable even without the compulsory acquisition of Network Rail's land, was

"a complete answer to the fundamental question of, do they need to acquire this railway in order to be able to cross it. The answer is 'no' because they can run a viable site without that railway. "

17. But it would be a wrong and unlawful answer. Frankly and with the greatest respect, this argument advanced on behalf of CRO is nonsense. As the applicant made it clear at the hearing that it considered it would be wrong to equate the test in section 122(2)(a) with the baseline viability of the proposed project (see the case law and guidance above). If so, it would mean that any scheme put forward, which contained provision for the compulsory purchase of land, could only be put forward on the basis that it was the bare minimum to make the scheme viable.

18. Such an approach would also reduce many of the benefits for which the CPO would be granted. It would fail to maximise the opportunity presented by the project in terms of securing what is a very challenging target set for the UK in terms of renewable energy.

19. Of course, any project could be reduced in size and would become less and less viable as this happened but there is not necessarily a clear point at which it would demonstrably switch from 'viable' to 'unviable'. The commercial risks associated with the emerging renewable energy sector generally are well known, *viz* the catalogue of recent failures of biomass schemes to get off the ground at Drax, Brigg, Hull and Roosecote due to the regulatory framework proposed by the government for such schemes. Reducing a scheme to bare viability plainly reduces its attractiveness to the market. Compromises which impact upon flexibility, and thus attractiveness, will also have the ability to impact upon time of delivery. It also increases risk of failure since for example even the smallest change in circumstances could then upset what was previously regarded as a viable project.

20. More specifically, it is important to recognise that the offshore marine energy industry is embryonic and that the project needs to retain as much flexibility as possible to respond to emerging market demands, and so scope should be left for responding to any current 'known unknowns', which include precise tenant specifications.

21. Mere viability as an interpretation of the statutory test is also unlikely to be correct since it is also environmentally unsustainable. If resources are to be used and habitats relocated in should be done in circumstances where the benefits are maximised.

22. The second test for the applicant to meet is that there is a "compelling case" in the public interest for the compulsory acquisition of the land in question. Clearly the question of whether a compelling case in the public interest has been made out will be a matter for the decision-maker to determine. By way of example, the applicant draws attention to the following cases where the test was found to be satisfied and CPOs were confirmed: the provision of a pedestrianised shopping mall, car parking and a new relief road in Stockton which the Secretary of State considered to be Stockton's last, and perhaps only chance to revive its retail economy and regenerate a run-down area (*Chesterfield Properties plc v Secretary of State* (1998) 76 P&CR 117); improvements to the entrance route into Liverpool which would improve the environment, provide better links to existing facilities and provide jobs and new business and community facilities as part of the regeneration of the Kensington area (*Pascoe v Secretary of state for Communities and Local Government* [2009] EWHC 881 (Admin)); and the acquisition of a plot of land used in order to remove the scrapyard use of that land which detracted from existing parkland (*Hall v First Secretary of State* [2007] EWCA Civ 612; [2008] J.P.L. 63).

23. The 2010 guidance makes it clear that for this condition to be met, the decision-maker will need to be persuaded that there is compelling evidence that the public benefits that would be

derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired. It acknowledges (paragraph 29) that the merits of any compulsory acquisition cannot be considered in isolation from wider consideration of the merits of the project to which they relate.

24. In this regard the applicant refers to the need case set out in Chapter 5 of the Environmental Statement and to the case for imperative reasons of overriding public interest set out in Chapter 8 of the Habitats Regulations Assessment.

Mr Revill and Mrs Harper

Parcels 03024 and 03025

25. The applicant's case is that the amenity of these residential occupants, even allowing for the maximum mitigation that could be reasonably be provided, would be significantly adversely affected by the construction and operation of AMEP – this was in the form of noise, vibration and light pollution amounting to a possible actionable nuisance. Further advised impacts included a significant adverse affect upon the visual amenity of the properties. The applicant called expert witnesses Mr Mike Fraser (noise and vibration), Mr John Flannery (visual impact and lighting) and Dr Chris Hazell-Marshall (air quality). The evidence of Mr Fraser in particular regarding noise and vibration from the development during construction and from noise and light during operation would be likely to reduce amenity to a level where complaints were likely. Existing air quality is also likely to be negatively affected but this would not be significant enough on its own to justify acquisition but acts as a cumulative effect with the other amenity impacts.

26. The applicant noted that paragraphs 10.2.2 and 10.2.3 of the Statement of Common Ground between the applicant and North Lincolnshire Council (the relevant environmental regulatory authority) stated the following:

"'10.2.2 It is agreed that the residents of these three properties would suffer significant adverse environmental impacts if the development went ahead with the properties remaining occupied

10.2.3 The SoCG is based on the assumption that Able will secure the removal of residential use from the three properties mentioned above.'".

27. The Panel enquired as to whether the occupiers were themselves concerned by the reported reduction in the level of amenity. Mr Revill's attitude to the development and the acquisition is best characterised as "relaxed." The applicant noted that this was of limited relevance as the properties could be sold and future occupiers might seek to prevent nuisance even if the current occupiers did not. Existing owners were also entitled to change their minds. They may for example say that the noise and vibration is worse than they anticipated. Whilst the DCO excluded action under s.81 of the Environmental Protection Act 1990 (EPA 1990) it did not exclude actions for private nuisance nor did it prevent the local authority issuing an abatement order requiring the abatement of any nuisance (s.80 EPA 1990), a failure to comply with such an order without reasonable excuse is a criminal offence (subject to certain statutory defences). A local authority is under a general obligation to issue an abatement notice if it considers that a statutory nuisance has occurred. It is to be noted too that the principal remedy for civil nuisance action is injunctive relief that puts a stop to the nuisance.

Any such injunction, or indeed abatement order issued under s.80 EPA 1990, could result in specific operations at AMEP having to be suspended or discontinued. Such a risk is clearly incompatible with the commercial viability of the project and would threaten the delivery of a project whose need was recognised in national policy. Furthermore, even if the DCO were to be amended so as to remove any possibility of a claim for nuisance or action by the local authority there would be serious issue as to whether -in the absence of compulsory acquisition of the property in question – there would be compliance with article 8 of the European Convention of Human Rights and/or article 1 to the first protocol to the Convention.

28. The applicant is conducting separate negotiations with Mr Revill and Mrs Harper with a view to purchasing the properties by agreement, the latter making more progress to date than the former. The applicant will keep the Examining Authority informed as to any agreement that is reached with either of them.

Section 122 case

29. If these parcels were not acquired, not only would there be significant impacts on the amenity of Mr Revill and Mrs Harper, or a subsequent owner or occupier of the properties, but such people might be able to prevent the AMEP project from being constructed or operated by means of an injunction if they remained in occupation. Those are the reasons why these parcels of land are required for the project and why there is a compelling case in the public interest to acquire them.

Bethany Jayne Ltd

30. The applicant has drafted protective provisions that are satisfactory to Bethany Jayne Ltd as can be seen by the email from Martyn Chilvers, who acts for the company, appended at Annex 1.

Network Rail Infrastructure Ltd

Parcels 03013, 03014, 04004, 04024, 04025, 05023 (part), 05024, 05025, 05026, 05027, 05028

31. A railway belonging to and operated by Network Rail crosses the Order land. In simple terms the applicant wishes to be able to cross the railway at discrete locations and seeks reasonable terms from the landowner to do so. For their part, NR object to any crossing that might impinge on the future operation of the railway if it was ever developed to permit a significant intensification of use. The potential development that would lead to such an intensification of use is known as the Killingholme Loop, although in its answer to Question 65 of the first set of Examiner's questions NR acknowledged that proposals for the Killingholme Loop had 'been discounted for the current time'. NR confirmed this in answer to questions from the applicant at the hearing.

32. Of further relevance is that the proposed route of the Killingholme Loop is not safeguarded within North Lincolnshire Council's Local Plan. That is significant because in order to safeguard the route in a development plan it would be necessary to conclude that there is a realistic possibility of the route coming forward within the plan period. The reason why the planning system requires this is so that rail routes such as the Killingholme Loop with little prospect of coming forward do not impede other development proposals. If Network Rail had wished to give the Killingholme Loop protected safeguarded status for the purpose development control (that thus something that might have been relied upon by NR in the

present proceedings) it should have promoted it through the development plan process, or else objected to the local planning authority's failure to include it as a safeguarded route within the plan.

33. The Yorkshire and Humber Route Utilisation Strategy (NR, 2009), which includes proposals for the Killingholme Loop, cannot be regarded as a 'plan or programme' as it has not itself undergone any strategic environmental assessment. Furthermore, it predates NR's currently specific public statement (which has not been withdrawn) that there is no funding to pursue the scheme. It is to be noted that no clear funding plans have been submitted demonstrating a committed funding programme for a Killingholme Loop still less a timescale when it is said to be achieved or indeed likely.

34. The Examiner is invited to place little or no weight upon the current status of the Killingholme Loop scheme.

35. The applicant has already removed the two parcels containing the railway south of Station Road (02008 and 03015) to allow Associated British Ports (ABP) to construct their proposed 'HIT Head Shunt' extension project, whereby Network Rail would lease those parcels to ABP. Following assurances given at the hearing the applicant is now removing the northern part of parcel 05023 (that which extends beyond the rest of the Order land) and all of parcel 07001 from the scope of compulsory acquisition. The remaining railway land still subject to compulsory acquisition as it bisects the Order land resulting in c.160ha of proposed industrial land not having direct access to the quay.

36. Network Rail has stated in its written representation that it opposes the construction of level crossings as it is contrary to the Office of Rail Regulation's 'clear message that the rail industry is seeking to close level crossings across the Network', (paragraph 4.1 of NR's WR). The applicant submitted the ORR's policy on level crossings at Appendix 6.1 of the applicant's responses to the Second Set of Examiners Questions. That ORR policy actually states that rail companies should, '(t)ake all reasonable opportunities to remove or replace existing level crossings or make them safer'. It also states that, '(e)xcept in exceptional circumstances, there should be no new level crossings on any railway' , so does not preclude the creation of any new level crossing.

37. As shown in Network Rail's written representation (on the 200th page) up to nine existing private level crossings cross the Order land (and are shown superimposed on the applicant's indicative master plan at Annex 2), although some of these have fallen out of use. The applicant seeks four private level crossings in its application. The site would be managed as a private secure industrial site with fences and gates to ensure at no time will persons or traffic have access to the railway line when trains are in operation, and gates to ensure that trains would also be unable to cross the Order land when the crossings were being used. This would make the Order land section of the railway much safer than the sections to the south and north where there are ungated and unsignalled public level crossings accessible by the general public.

38. The application site is a unique national asset: its large size, flat topography, deep water access and proximity to Round 3 development offshore wind energy sites, and suitable mid-North Sea location for future sites combine to make it the optimum choice for its intended purpose as explained in Chapters 5 and 6 of the Environmental Statement. Whilst connection to the rail network is also an advantage, if access across the track were unreasonably

restricted then a large area of the site would have restricted use as access to the quay would need to be via bridges. The applicant considers that the current status of the line (no trains for seven years and little use for 20 years) and prospects for the line (a new loop whose current status is 'discounted', no firm plans for use of the line by C.RO, and plans for use by C.GEN dependent on a successful Planning Act application and the development of carbon capture and storage facilities) and the need to move exceptionally heavy goods (some weighing hundreds of tonnes) from their place of manufacture to the proposed quay represent 'exceptional circumstances'. The particular characteristics of this case is that:

a. the line would be fenced to prevent unauthorised access;

b. there would be no public access;

c. the discrete crossings would be solely used by trained personnel;

d. trains would be very slow running; and

e. there would be clear sight lines for both train drivers and level crossing users (the track is straight and shrubs would be cut back).

39. The indicative masterplan submitted with the application shows four level crossings; two of these are proposed to be for exceptionally heavy loads and this is the minimum that the applicant considers necessary for the project to have adequate flexibility. Whilst the applicant agreed that heavy duty bridges over the railway were feasible, these would be very large structures – up to 9 hectares each – thus reducing the availability of land for the urgently-needed development of marine energy infrastructure. Therefore, until there is an agreement on reasonable terms that the railway can be crossed by four level crossings, a major part of the Order land is effectively severed from the quay by the railway and the applicant must maintain its application for compulsory acquisition.

40. The applicant notes that, 'Planning Act 2008 Guidance related to procedures for compulsory acquisition', (February 2010) states:

'The promoter should be able to demonstrate to the satisfaction of the decision-maker that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored and that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose and is necessary and proportionate'

41. At the Hearing, the applicant distributed to the Panel and other interested parties a copy of the current Heads of Terms (HoTs) proposed by Network Rail (NR) that relate to crossing the railway land; these are reproduced at Annex 3. Two alternative solutions are offered in the HoTs and neither is considered to constitute a reasonable alternative for the reasons explained below.

Alternative 1

42. In this alternative, NR propose to permit a single new heavy duty level crossing if, amongst other things, the applicant closes four existing level crossings, and provides a replacement bridge for one of them - the crossing known as 'Regents Oil' which is located on Station Road - see Plate 1. The location of each crossing is shown at Annex 2..

43. In this alternative, NR would retain ownership of the land and the track save for the easement to cross the line at the new level crossing, and no further level crossings of the track would be permitted within the AMEP site; any other crossings of the track would have to be via bridges. NR's position on the conditions for permitting one new level crossing has changed over time: in its offer to the applicant of 7 September, Network Rail required the closure of one existing level crossing before granting the new one; by 2 October this had increased to two, and in its latest offer of 15 October this had increased to four without any objective justification.

44. NR confirmed at the hearing that there was no specific policy requiring the closure of a certain number of level crossings before any other crossings could be made over railway lines. Nor had there been any risk assessment of this particular site which suggested that for safety reasons four level crossings would have to be closed before one new crossing could be opened . Nor had there been any change in risk between 7 September 2012 and 15 October 2012 which justified NR's change in position from requiring the closure of one existing level crossing to requiring the closure of four level crossings. There was no safety case to suggest that what the applicant proposed was unsafe in road or rail safety terms. NR conceded in questions put by the applicant that it has no safety case in support of its case

45. In relation to the safety of level crossings on industrial sites the applicant referred to the evidence of David Reid on 14 September in which he had drawn a distinction between level crossings on industrial sites and those in public areas. David Reid's evidence to the Panel had been that

"The majority of level crossings and certainly the majority of those that cause accidents are publicly used level crossings, where they are almost always referred to as 'railway accidents', they're almost always a result of people disobeying the road traffic laws and regulations. Most of them are caused by members of the public, be they drivers or pedestrians ignoring warning signs or, indeed, stop lights. In the case of an industrial level crossing there are two differences; one, slow moving speeds for both the site road traffic and the rail traffic and there's also a familiarity of the site operatives with the fact that there's a railway there and there's a crossing there and the lack of familiarity on the public road that does not exist. So there's a difference between public level crossings, where the bulk of the accidents take place, and industrial site level crossings."

46. NR appear to view this application as an opportunity to improve the current safety position of the railway. While the applicant is committed to ensuring the safe operation of the railway and any crossings over it, it considers that there is no safety case for requiring the closure of four level crossings, when NR was previously content to accept the closure of only one level crossing. Mike Stancliffe, of NR, explained to the Panel that

"There seems to be no reason not to make the railway a safer place by implementing an agreement to put in this crossing that will be used by heavy plant, and there seems no reason not to make the railway safer by getting rid of other crossings at that location."

47. This with respect is completely the wrong approach. If NR is to object on safety grounds it must make out a case as to why what is proposed is materially unsafe in particular when compared to other similar crossing whether they be those used by ABP, C/RO or anyone else. Moreover this approach also neglects to take into account the fact that the proposal to permit only one level crossing would not allow AMEP to operate to its full capability and would not fully realise the nationally-recognised benefits that the project would bring. The proposal is

particularly unreasonable having regard to the current (non-)use of the line. The issue cannot be safety: Mr Upton put in terms the proposition that if one level crossing could be safely constructed, then why further level crossings with the same safety arrangements should not also be constructed. It was telling that Mr Upton's question received no proper or coherent response from Network Rail, the answer being that there is none.

48. Even if one were to take Network Rail's case at its most favourable the real issue regarding level crossings is the significant intensification of use of the line that the construction of the Killingholme Loop is alleged to bring. Setting aside the lack of any real prospect of that line going ahead, and whilst the applicant accepts the 'promoter pays' principle in respect of its development and its impacts on the existing baseline, in this alternative the applicant is (unreasonably) being expected to incorporate additional safety measures and incur expense for the purposes of another project. The applicant's current proposals would not prevent this project from going ahead, but the applicant should not effectively be contributing towards another future project, particularly one that has little certainty of progressing.

49. In the case of C.RO and C.GEN, the two other potential users of the line, the limited intensification of the use of the line that might occur can be accommodated in conjunction with the applicant's proposed level crossings, and it had already added protective provisions to the DCO to that effect (paragraphs 48, 49, 60 and 61 of Schedule 9).

50. The 'Killingholme Loop' whose status is currently 'discounted' despite the oral evidence of Network Rail, would require funding of around £50m to be made available, its own DCO, its own environmental impact assessment and appropriate assessment and its own safety case if it was ever brought forward. The applicant should not be expected to fund works for that project (i.e. bridge crossings) that might never be needed – that is a transparently unreasonable expectation.

51. This unreasonableness is further highlighted in NR's WR which contains a report by Corus, 'Killingholme/HIT/Goxhill Track Enhancements Brief Report on Option Key Issues for Consultation Purposes', (September 2008), where it was proposed that Network Rail would not replace one of the existing level crossings further north, and would not replace the Regent's Oil crossing with a bridge itself. The former is the crossing at Haven Road which is shown in Plate 1 – the report states:

'"Haven Road (2m 19ch) is an adopted highway, giving the only access to the estuary in that area for the public. Due to the close proximity of an environmentally sensitive site that is a Special Protection Area and a Site of Special Scientific Interest, it will be difficult to provide a bridge at this location. It is therefore recommended that the crossing is considered for upgrading to an Automatic Half Barrier (AHB). An Automatic Barrier Crossing Locally Monitored (ABCL) would not be appropriate at this location owing to the poor sighting distances on the north side of the crossing."'

52. The Regents Oil crossing (Station Road) is shown at Plate 2 and is currently used by the public and the Environment Agency to access the sea wall; as the only access to two residential properties and by employees and visitors to the Oil and Pipeline Agency's Tank Farm. Regents Oil is a 'user worked crossing' with gates that are normally left open (though they should not be). The applicant proposes to upgrade the quality of this crossing both in terms of the road and safety. The report states that:

"'Regent Oil Level Crossing (1m 04ch) is an Occupation Road (UWC). The crossing is provided with user operated gates and is subject to misuse. The proposed Killingholme Loop will cross this Occupation Road. This crossing should be closed and the existing alternative access negotiated for Regent Oil (Texaco) from Marsh Farm Lane, near the estuary, with appropriate compensation paid. To facilitate this Marsh Farm Lane should be adopted by the Highways Authority.'"

53. In summary therefore, this alternative is unreasonable because it requires the promoter of AMEP to fund and construct works that might only be required if the Killingholme Loop was to be consented even though the status of that project is currently 'discounted for the current time'. The applicant considers that such improvements are part of that project rather than the AMEP project, and should be brought forward at that time if it ever proceeds.

Alternative 2

54. In the second alternative, NR would agree to the lease of the land and their infrastructure to the applicant on condition that, among other things, the applicant 'secure powers to build the operational railway comprising the Alternative Killingholme Loop Scheme', and on condition that 'Network Change is in place to remove the section of KIL2 which runs through the site of the Proposed Development'. The benefit of this to the applicant is that, whilst crossings of the track would still need to be as safe as reasonably practicable, NR would no longer prevent more than one level crossing being provided. This alternative, however, is also unreasonable for the following reasons.

55. As stated above, NR does not have a right to construct the Killingholme Loop at this time – it has no planning approvals or applications, and is likely to require its own Development Consent Order to do so. To obtain such an Order it would need to undertake an environmental impact assessment, appropriate assessment, the compulsory purchase of additional land and the consideration of alternative solutions, particularly if they were unable to mitigate the intensification of the use of the route through the North Killingholme Haven Pits (part of the Humber Estuary SPA) to the extent that they were unable to avoid an adverse effect on the integrity of the European site. If the applicant did not provide an alternative route, NR, or a third party who required the additional rail capacity, would need to fund that application process which is likely to cost several million pounds.

56. Until the Killingholme Loop is shown to be needed, which it is not currently, an application for an alternative route could not be shown to be needed and would thus be doomed to failure.

57. It is therefore clearly unreasonably punitive and ultimately fruitless to require AHPL to fund an alternative application for a DCO. Accordingly that condition is neither proportionate nor reasonable.

58. So far as the second condition is concerned, noted in paragraph 31 above, the process of Network Change appears to provide all parties with a reasonable right to 'veto' proposals and one such party is ABP who are bound to frustrate the process and prevent the lease being made if at all possible. That condition precedent is also therefore also demonstrably unreasonable.

59. Notwithstanding all of the above, the applicant continues to negotiate with Network Rail with a view to avoiding the need to compulsorily acquire the railway but must maintain the power in its application until this happens.

Plate 1: Haven Road Level Crossing looking towards the Estuary. This would be improved but retained within the Killingholme Loop. Note: it is ungated

Plate 2: Regent's Oil / Station Road level crossing looking towards the estuary

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60. The land is required for the development because without it the Order land would effectively be severed. The construction of bridges is unnecessary and would reduce the public benefit of the AMEP project by taking up valuable space that would otherwise be used to deliver marine energy manufacturing, assembly and storage, and this would also reduce the attractiveness of the project to customers.

61. While it is not the applicant's case that the project would be unviable without the compulsory acquisition of the Network Rail land, there would be a significant impact on the benefits which the project can deliver and the speed at which it can deliver those benefits. The applicant put its case at the hearing that the failure to acquire this land would have a significant adverse impact on the flexibility, speed of delivery and attractiveness of the project.

62. There is a compelling case in the public interest for the AMEP project as a whole to take place and being able to cross the railway is an essential and compelling element of the proposed scheme as access to the quay is a key part of the project and is vital for those operating on the site.

C.RO and C.GEN

63. As has been stated above, C.RO and C.GEN are also potentially affected by railway matters, as the former has a right to use the railway crossing the Order land, albeit currently not exercised since 2005, and the latter is seeking a right to use the railway for fuel for its potential power station. To address this the applicant has inserted protective provisions into the Development Consent Order (paragraphs 48, 49, 60 and 61 of Schedule 9) so that it will

not prevent railway access to either party, and will not unreasonably interfere with access by trains used by the former in connection with its port (with no limit) and to the latter in connection with its power station (up to a limit of five trains per day – this is the figure given in the Preliminary Environmental Information for its project, although the applicant notes that this has changed to an 'average minimum' of five trains per day in the note supplied to the Examining Authority on 12 October).

ABP

Parcels 03020, 03021, 03022 and 03023

64. The applicant seeks to acquire the 4.78 hectare triangle of land that these parcels constitute from ABP for part of the onshore manufacturing, assembly and storage of components and parts for offshore marine energy infrastructure that form part of the AMEP project, specifically for external storage, the siting of a pumping station and associated drainage ditches and for quay access (the parcels immediately abut the proposed quay), all as shown on the indicative master plan submitted with the application.

65. Whilst the Book of Reference submitted by the applicant with the application records the owner of parcels 03022 and 03023 to be 'unknown' (other than the footpath crossing the latter), ABP's solicitor informed the Hearing that ABP had now registered the land as the presumptive owner, such ownership being confirmed if unchallenged for 12 years. ABP therefore does not have assured ownership of this site and would have to pursue any development plans by way of compulsory purchase if it wished to development as it claims in order to guarantee security of the site. It is to be noted that the draft HRO does not seek compulsory powers in this respect.

66. The applicant explained that the triangle site was required to enable a cohesive site configuration to be achieved on the scale proposed, with full access along the length of the quay to and from the onshore land. The scale of the development is necessary in order to address the scale of the need by the offshore wind sector as set out in national and European policy. If the triangle site were omitted, and the frontage left undeveloped to provide for the possibility of the current owner developing the site in the future, then the quay would have to be consequently reduced to two-thirds of its length and scale of the terrestrial development and flexibility of accessibility to the quay would also reduce significantly and potentially by a greater extent. Furthermore, the balance of the needs for the offshore energy sector would have to be provided elsewhere, at another port, and this would result in a more fragmented industry based at less optimal locations which would have less chance of being realised. Such alternatives are discussed in Chapter 5 and Annexes 6.1 and 6.2 of the ES.

67. Mr John Fitzgerald (JF), Port Director for the Port of Immingham and Grimsby, explained that ABP intended to develop the triangle site partly as a replacement site for the Immingham Gas Jetty that would be displaced by ABP's proposed Humber International Terminal third birth (HIT 3) project, and also for a liquid bulks operator. This proposal would be thwarted if the AMEP quay were built even if the parcels of land were not acquired.

68. JF asserted that the need for HIT 3 would primarily be driven by demand from the electricity generating industry for biomass. In answer to a question, JF stated that HIT 3 was likely to handle 3-4 million tonnes of biomass per year.

69. In support of these assertions, ABP revealed at the hearing that it had finalised its Master Plan for the Port of Immingham, which was said to have received Board approval on 11 October 2012, and this now replaced the Consultation Draft Master Plan (CDMP) issued in 2010. On inspection of the final Master Plan (fMP), it is evident that ABP are planning to import 10 million tonnes of biomass per annum by 2030, a significant increase on that predicted in the CDMP which only forecast 7.5 million tonnes per annum. On a simple pro rata basis therefore two further quays of the scale of HIT3 would be required for the balance of 6 to 7 million tonnes of biomass which HIT3 would not be able to handle. This does not appear credible however, since all of the existing quays will be needed for coal and iron ore imports that are also planned to increase over the timescale of the Master Plan - refer to Table 1.1 of the fMP. The fMP's growth forecasts for dry bulks are therefore demonstrably inconsistent with the physical developments of the port that are described in the Plan, either for quays or for adequate covered storage which is essential for biomass products.

70. In any event, the fMP is demonstrably inconsistent with current Government policy in relation to bioenergy as set out in, '*UK Bioenergy Strategy'*, (DECC, 2012). This states that, '(n)*ew dedicated biomass will have a limited role as part of a wider energy mix, focusing on cost effective deployment and carbon abatement opportunities*'. In practice this will mean focusing on co-firing and conversion of existing coal fired plants, with support for new large scale dedicated biomass plants being limited to a small number of projects. The mix of bulks anticipated in the future should therefore show reduced coal imports as biomass imports increase in response increasing conversion to co-firing (of biomass and coal) at existing generating stations. As noted above the fMP simply shows increases in all commodities.

71. The applicant questioned JF on the current status of ABP's application for a new bulk import facility of the Port of Hull, the Hull Riverside Bulk Terminal or HRBT. It should be noted that the ES for HRBT had the same need argument as the Port of Immingham were deploying for HIT 3. Whilst JF stated that HRBT had been promoted for a single specific project that was now cancelled, namely the DONG biomass plant at the Port of Hull, and that the Port of Hull had limited accessibility, this is not the case. Rather, although Mr Fitzgerald's evidence was loquacious and repetitive (regardless of the question asked), it demonstrated also Mr Fitzgerald's poor understanding of the development proposed for Hull. The proposals for Hull include deepening access channels to enable access for Capesize vessels and servicing the Trent and Aire valley areas. Furthermore, the HRBT ES clearly states this purpose – relevant paragraphs are reproduced below (emphasis added):

"2.68 Although HRBT will be designed and constructed to handle a variety of dry bulk products, it will deal principally with the importation of biomass and coal for the foreseeable future. The following section therefore focuses on the need for biomass and coal importation to the UK.

2.69 The need for the proposed HRBT development can be summarised as follows:

- *the urgent need to develop handling facilities for dry bulk products at the Port of Hull capable of accommodating* ***Panamax and Capesize*** *vessels;*
- *the increasing need for the UK to import biomass for burning in new biomass-fired power stations (including a proposal by DONG Energy to locate a biomass-fired power station at the Port)* ***and for co-firing in existing coal-fired power stations****;*
- *the need for imported biomass and coal to be transported from ports to power stations efficiently and using sustainable transport modes; and • the continuing need for the UK to import coal for burning in power stations located in* ***the Trent and Aire valleys*** *and to*

ensure security and cost-effectiveness of UK electricity supply.

2.70 In addition, the general port use area will be used to expand the availability of paved storage at the Port in order to meet the needs of the Port's existing customers and their growth plans.

2.71 The importance of ports and port development to the local, regional and national economy is also recognised and described below.

2.72 The Port of Hull has, for many years, serviced the needs of the energy generation industry – initially for the export of UK coal and, more recently, for the import of foreign coal and biomass to the UK. Increasingly, however, the Port is becoming marginalised in this trade because vessel sizes are increasing to the point where today's large dry bulk carrying vessels are too large to fit through the lock entrance to Hull docks (at 25.5 m wide). The largest dry bulk carrying vessel that can therefore be accommodated currently at the Port of Hull is a Handysize sized vessel (typically up to 185 m length, and up to 25 m width) (see Table 2.1 below).

2.73 Today dry bulks are increasingly carried in vessels that are larger than Handysize dimension i.e. in Panamax and Capesize vessels. Neither of these sizes of vessel can fit through Hull locks or be accommodated in Hull docks.

2.74 For this reason ***it is imperative that bulk handling facilities capable of accommodating Panamax and Capesize vessels are developed in Hull****, if the Port is to retain its existing dry bulk tonnage and/ or grow.*

2.75 The consequences of not accommodating larger vessels at the Port will be the eventual loss of the Port's dry bulks trade.

2.76 The Government's legally-binding target is for 15% of the UK's energy (electricity, heat, transport) to come from renewable sources by 2020. As part of this their lead scenario suggests that more than 30% of our electricity could be generated from renewables by 2020, from a current level of 5.5% (The UK Renewable Energy Strategy, DECC 2009). The construction of new biomass-fired power stations as well as the co-firing of biomass with coal at existing power stations has an important role to play in meeting this target.

2.77 In terms of the construction of new biomass fired power stations, a significant proportion of the biomass required as feedstock will have to be imported, given the limited availability of domestically sourced material. Within the geographical hinterland of the Port of Hull, a number of new biomass power stations are at various stages of the approvals process, including:

- *a separate proposal by DONG Energy to construct a power station on land adjacent to the HRBT jetty; - [now cancelled]*
- *RWE Innogy's proposed biomass plant at Stallingborough (now consented under section 36 of the Electricity Act)*
- *Drax's Heron renewable energy plant at Immingham. [now cancelled]*
- *Drax's Ouse renewable energy plant at Selby*

2.78 Other proposals are likely to be forthcoming and the Port of Hull is ideally placed to handle the quantities of ***imported biomass required to service dedicated renewable energy plants within the Yorkshire and Humber region****, given its unique location with large areas of land available for development immediately adjacent to deep water access."*

72. The Hull Riverside Bulk Terminal project is counting on the same need as HIT 3, a point the applicant has previously expressed in its comments on written representations (paragraph

22.232). Whilst Mr Fitzgerald sought to dismiss this at the hearing saying that the Port of Hull had poor vessel access[2] and that the HRBT scheme was exclusively for an on-site biomass plant that had now been withdrawn, as can be seen from the abstract above, neither of these assertions is correct.

73. The HRBT ES identifies four other ports able to supply the Trent and Aire valley power stations: Hunterston (Clyde); Bristol; Tyne and Liverpool. Of these, the Port of Tyne already supplies 1 million tonnes of biomass to Drax power station at Selby and has plans to supply other generators too. The Port of Liverpool's Master Plan states an intention to develop further into the biomass energy market targeting 2.9 million tonnes of imports by 2030. At Bristol Port, the Bristol Bulk Terminal can receive Capesize ships up to 130 000 tonnes deadweight and has existing rail access; the port also has plans for a biomass plant within its curtilage. Meanwhile, Hunterston has the capability of supplying the Trent and Aire valley power stations and has done so in the past. Other Ports, such as Teesport, on the Tees Estuary can also handle biomass products. None of these alternatives are considered in the fMP.

74. Indeed, it is increasingly obvious that there is no 'urgent' need for HIT 3 at all. On the basis of Mr Fitzgerald's own evidence at the Hearing, HIT 1 and HIT 2 are currently only operating at 70 per cent of their capacity, whilst Drax's Heron Renewable Energy Plant within the port estate has been cancelled and the Preliminary Environmental Information Report for the Glanford Brigg Biomass project published in September 2012, clearly states that their biomass requirements can be met by existing quay capacity at the Port of Immingham. In fact the latter project was also cancelled this week (24 October 2012). This renders ABP's proposals for HIT 3 as appearing speculative at best. Of course, the need for the Western Deepwater Jetty on ABP's triangle of land only arises if the HIT 3 project is to be implemented.

75. At the Hearing, it was Mr Fitzgerald's evidence that the fMP was a carefully considered document[3]. The applicant identified to Mr Fitzgerald a number of obvious errors in the drafting of the fMP, including: references to superseded planning policy statements (PPS9 and PPS25 which were both revoked in March 2012), references to planning documents that did not exist (North East Lincolnshire Core Strategy which was abandoned in June 2012, without being adopted); references to cancelled projects (the Heron Renewable Energy Plant), and to the absence of any allocation of land for mitigation despite an obvious need for such. With respect to the latter omission, the *Guidance on the Preparation of Port Master Plans* (Department for Transport, 2008) specifically records that Master Plans should set out, '*what environmental measures will be taken to ensure that not only adverse are adverse effects* (of development) *mitigated, but as far as possible the port makes a positive contribution to the environment and amenity*', (paragraph 10). Mr Fitzgerald claimed that the guidance from the Department of Transoirt did not require the Master Plan to identify proposed mitigation

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[2] JF said, on the evening of 16th October 2012 "*I think the reality of the situation is that Immingham, with its deep water access, will always be a preferable alternative to the Port of Hull, which doesn't have the vessel capabilities that Immingham has. […] The riverside large ship, likely they'll have Cape facility at Immingham, is what the customer, big is beautiful in the energy business and it's those economies of scale. […] the fact that we can handle lightened Capes in Immingham, which they would not be able to handle in Hull is important when it comes to moving product in parcel sizes."*

[3] Morning of 17th October 2012

measures in such plans[4]. Clearly he was wrong in that regard. It is therefore quite evident that the document produced by ABP that they refer to as a Masterplan is not a Port Master Plan that is compliant with the guidance, in that it fails to identify any measures that would be needed to mitigate consequential adverse environmental effects. A copy of the guidance is included as Annex 4.

76. In the light of the errors and omissions noted above, John Fitzgerald confirmed that ABP had planned to publish the fMP in a few months' time, but had hurried it through as a result of the AMEP application[5].

77. The applicant confirmed at the hearing that they had responded to the CDMP in 2010. However, it should be clarified that the applicant's response predated their initial public statement in relation to AMEP which began with the circulation of an informal consultation with all potential consultees in July 2010.

78. The Master Plan has changed since the draft was issued for consultation in several significant respects insofar as AMEP is concerned, namely a different and more urgent use for the triangle site and four specific references to the Killingholme Loop where none existed before (paragraphs 5.41, 7.21, 7.29 and 8.31 of the fMP). Clearly the four specific references to the Killingholme Loop are changes which are material to this application, as is the development now proposed for the Western Deepwater Jetty. It was initially asserted by ABP's advocate that there had been only one change that was material to this inquiry and that was the new proposal for the Western deepwater Jetty. When it was put to him that the new document also contained references to the Killingholme loop he confessed not to being fully aware of the contents of the document. Similarly, when questioned on this, Mr Fitzgerald initially claimed that it remained ABP's case that the only material change relevant to this application was the identification of the use of the WDJ as a bulk liquid jetty and subsequently appeared to depart from this position by accepting that references to the Killingholme Loop were a relevant material change, albeit he was reluctant to give straight answers to questions put to him on behalf of the applicant.

79. One example of this reluctance was John Fitzgerald's repeated refusal to reveal when the references to the Killingholme Loop were added to the master plan, although this would appear to have taken place after 7 September this year given the claim at that time in ABP's response to the Examining Authority's second round of questions (paragraph 39.7) was that the only change to the master plan that was material to this application was the change in use and urgency of the development of the triangle land as the Western Deepwater Jetty (WDJ). The applicant considers that John Fitzgerald was a less than straightforward witness. The following exchange is included as one illustration of his lack of transparency or unwillingness to assist the Panel:

"***Gregory Jones QC**: Specific question, and I know you are trying o help the inquiry, and you'll do your best, and I will let you answer and then we'll see where we go. We know that in the draft plan, there was no express mention of the importance of the Killingholme Loop, and we see, and everyone has had an opportunity to read about the importance that is now specifically attached to the Killingholme Loop. Can you help us please, if you refer to the*

[4] Morning of 17th October 2012
[5] Morning of 17th October 2012

evidence of Network Rail, when it was, when it was that the draft version was amended to include expressed reference to the Killingholme Loop. Was it following, first of all, evidence that this inquiry, the last attendance of Network Rail, so the last time you were all not literally here together, was that when it took place?

John Fitzgerald: *No, we've been talking to Network Rail because we talked to Network Rail about the customer base that we both service. We had the Freight Director of Network Rail, came to visit the port some 18 months ago and we talked to him about how things were changing. He was there again last... In the summer, and we've been having regular meetings with Network Rail as this demand for biomass, as more and more of the customers are converting their existing coal stations to biomass. The pressure is being put because they ask the question of port capacity, they ask the question of rail capacity, and that, of course, gets back to Network Rail. They are customers of Network Rail, although indirectly. So, Network Rail are very interested in the strategic development of the energy, dry bulks energy business, out of the Port of Immingham, which as I said, is a hub for industrial rail business*.

Gregory Jones QC*: So, when, Mr. Fitzgerald?*

John Fitzgerald: *We've been talking to Network Rail regularly over the last 12 months.*

Gregory Jones QC: *When was this put in the draft?*

John Fitzgerald: *The draft is an evolving document.*

Gregory Jones QC: *When?*

John Fitzgerald: *The draft has been an evolving document.*

Gregory Jones QC: *Answer the question, please. It's a clear question. When was the draft... When was this inserted in the draft? If it is not... We know it wasn't in 39.7, unless you have been disingenuous in your representations, it was not identified as a material change in 39.7. When was 5.41 and the other paragraphs put in the draft?*

John Fitzgerald: *Sorry, can I just clarify again, I think 39.7 outlines the requirement for the Western Deep Water Jetty, and I've explained the background for that requirement and all the implications of that in terms of berth capacity and in terms of rail capacity. So, the enhanced rail capacity and looking for Network Rail... As we talked about it in the draft, we need to ensure that the rail capacity grows with the port's business. So, that's been...*

Gregory Jones QC: *When were these paragraphs inserted into the draft?*

John Fitzgerald: *The draft's been a working document over...*

Gregory Jones QC: *Alright, alright, well, there you are."*

80. Given the above facts and the dissembling nature of John Fitzgerald's answers to questions posed by the applicant, the Examining Authority is invited to place little weight upon the fMP, as the drafting of it is unquestionably in response to the AMEP application. It must be recalled that this was against the background of the refusal of ABP to reveal copies of the draft to which reference was made in their response to the second set of questions. Mr McCracken on two consecutive days had been unable to give a straight answer to a straight question in

relation to the disclosure of that document, when sought first by the applicant and then by the panel.

81. At the hearing on 13 September Mr Jones asked that the final version of the draft master plan be made available. The following exchange took place :

"***Gregory Jones QC:*** *Well Sir, I thought we'd moved on to plans for impact on plans of Immingham. I've just got some questions for whatever witness ABP […] I don't know if its Mr Whitehead or if it's someone else. The main document you just need Sir is ABP's recent responses, the second set of written responses which came in at the beginning of this week, so I don't know…*

Robert McCracken QC: *Well if we can just be told which of those responses because they're all, all those responses I think have names attached to them.*

Gregory Jones QC: *Ah yes…I can do that, it's in respect of questions to do with ABP's plans so question 39, the draft master plan for the Port of Immingham and that continues with its current status and also liquid bulk cargoes and the Immingham deep water jetty. So…*

[…]

Robert McCracken QC: *Well look, I mean the position is this. Those two matters are matters that will be dealt with by Mr Fitzgerald who is going to come here during the CPO session so we can't help by presenting Mr Fitzgerald today, but if Mr Jones tells us what the information is that he wants, what the clarification is that he wants, then we will endeavour to respond to him as soon as we can. So if he can just indicate.*

Gregory Jones QC: *I won't do that. I find it, I must comment, totally unsatisfactory that ABP have come here unprepared to deal with an item on the Agenda and did not raise that earlier. We have been sitting here for quite a long period of time. I am going to then restrict my questions and I would like answers either now or immediately and not to wait for a week given that this was a topic number. The first question then…*

[…]

Robert McCracken QC: *Today's session is headed 'Marine'. These questions are not ones relating t, as it were, as far as I can see, to the way in which the estuary operated as an estuary which is what one understands by the heading of 'marine'. These questions appear to be related to the matters that were dealt with by Mr Fitzgerald in relation to the CPO. But we will do our best to answer the questions.*

[…]

Gregory Jones QC: *The next point is under the current status of the Immingham Port Master Plan we have the draft but at paragraph 39.7 reliance is made, 39.7 its above in summary the only material change in the final version of the master plan so*

we're told it hasn't been adopted, we've been told there is a final version of the master plan different to the consultation draft but the only material change we are told in the final version is as then set out. That, as I understand it, therefore in order to make that statement, there must be in existence a final version although it not officially adopted and I would as ABP to supply us with a copy of it because they rely on it expressly in their submissions.

Robert McCracken QC:** : Well I'll take instructions on both of those matters."**

82. On the morning of 14 September the Panel's Chair questioned Mr McCracken about the production of the final version of the Master Plan, and the following exchange took place:

"***Robert Upton:** Dealing with outstanding business from yesterday, the one point of which I'm aware, is that Mr. Jones asked Mr. McCracken three questions relating to ABPs plans. Mr. McCracken said that he would need to take instructions on that. I don't know if Mr, McCracken is able to answer this morning or?*

***Robert McCracken QC:** I can answer the first question: there has been no strategic environmental assessment of the port plan. I can't answer the second and third question but we will supply an answer as soon as we can.*

***Robert Upton:** Mr Jones?*

***Gregory Jones QC:** Well the second question, as you'll remember, was for production of a document in the written representation. So I would like to press why a document which ABP asked this panel to take into account, is not one that they're prepared to disclose? And I note the third, which was for a disclosure of the memorandum of understanding, and the identity of the supplier, and I just obviously note that at this stage, that remains a position. But I would like to press number two for a further explanation as to a document which Associated British Ports seek to rely on in their second representation, and I took you yesterday to the passage, is one that they are no in a position to disclose now. Because it makes it difficult for us to response to it, and test it, if it's not being disclosed. We just have an assertion as to what it contains.*

Robert McCracken QC:** The position is, as I have stated, I will take instructions. Mr Jones' comments are noted."**

83. On the afternoon of 14 September the Panel endorsed Mr Jones' request for the production of the final version of the Master Plan:

"***Gregory Jones QC:** Sir, on the point that follows on from Mr McCracken helpfully indicating that … obviously we'll make submissions as well … one of the key aspects, as I understand, from APB's case on roads is an assertion about assessing their plans and projects in the highway, their plans in, I think, their draft master plan. In that respect, could I ask through you now whether Mr McCracken has [1.13.38] … experienced solicitors and an extensive team behind him, whether he has any progress, please, on the disclosure of the final version of the as yet unadopted of the core plans because that is, so far as I'm concerned, relevant to any highways position and could he update us on that, please?*

Robert McCracken QC: *The position has not changed since this morning.*

Gregory Jones QC: *Could I ask for a explanation as to why this document cannot be disclosed?*

Robert McCracken QC: *Before we go there, I think that …*

Gregory Jones QC: *Does it exist?*

Robert Upton: *I have not said this so far but from the panel's perspective, Mr McCracken, this document has been referred to and referred to extensively in your client's second round responses and I think that the panel would also like to see this document or see a version of the document. Mr Jones has referred specifically to the latest final draft … sorry, I'm not putting words in your mouth, Mr Jones … but certainly, if this document is through the submissions that your client has made, relevant and important to the examination, then I think we [laughs] do need to see it and, please, sooner rather than later.*

Robert McCracken QC:*: The panel's observations are also noted, Sir.*

Gregory Jones QC: *I want to see the version as it was when those submissions were made because we have an assertion that's been made throughout, every day, that these things are going to be adopted before the end of the hearing process. There is a reference then to a final version, which is materially different only in one respect, it said to the panel, which exists and that document exists and we've heard a lot from APB about openness and fairness and I would like an explanation as to why that document which exists, which is no doubt sitting behind there and has been referred to and relied upon, is not being disclosed. I would like to have an answer!*

Robert Upton: *Mr McCracken, can you answer that?*

Robert McCracken QC: *I've said that I will take instructions, the position has not changed since this morning.*

Gregory Jones QC: *Has Mr McCracken taken instructions? That was the position yesterday.*

Robert McCracken QC: *It's fairly obvious that this is a matter that calls for instructions from the witness whose statement referred to the master plan.*

Gregory Jones QC: *That is not true!*

Robert McCracken QC: *Well, we'll just have to agree to differ on whether that is right or not.*

Robert Upton: *Sorry, Mr McCracken, I genuinely don't understand the point that you are making. Mr Jones asked and now the panel has in its own way endorsed the release of the master plan …*

Robert McCracken QC: *Yes.*

Robert Upton: *I don't see how that relates to the witness? I can see that there might be a corporate decision but I don't see how the witness comes into it?*

Robert McCracken: *Well, the position of the witness makes him central to an answer to that question. I've indicated I shall take instructions, I shall take instructions and I find … no, I'll say no more. I shall take instructions. But it would be gratifying if … no, I shall say no more."*

84. Mr McCracken claimed that only Mr Fitzgerald could answer that question. However when Mr. Jones asked the question of Mr Fitzgerald at the CPO session, Mr McCracken intervened in effect to prevent a fair questioning of Mr Fitzgerald to give an answer which Able had already made clear lacked credibility.

85. At the hearing of 16 October 2012 the following exchanges took place:

"Gregory Jones QC: *And what I was anxious to get was not the consultation draft, not the adopted version but the document that had been the basis of the submissions that were before the panel. And it's a very simple point, then, to ask. That's where it arises, Mr. Fitzgerald, do you see in 39.7 where it said the only material change in the final version of the master plan as compared to the consultation version that is relevant to this examination is the identification of the Western Deep Water Jetty, specifically... I mean, I would like the witness to answer this on his own without his solicitor. Unless an application is made, if necessary. What is relevant to the examination is the identification of the use of the Western Deep Water Jetty, specifically as a bulk liquids jetty. This is discussed in more detail, et cetera. And then Mr. McCracken rightly refers to the letter, could the letter be given to the witness as well, please, that responded from Osborne Clarke?*

Robert McCracken QC: *Do you still have the date of that letter?*

Gregory Jones QC: *Yes, it's the 21st of September 2012. It's the letter which Mr. McCracken has already referred. And it's the penultimate paragraph, Mr. Fitzgerald. I believe that's what's a... I hope is a straightforward question. Do you have it? I do know, however, that our response...*

John Fitzgerald: *My answer on this one, Mr. Jones, if you don't*

Gregory Jones QC: *I don't, I think he's got it, actually. Mr. Fitzgerald, do you have the penultimate paragraph? I do note, however, our response 39.7. Do you have that?*

John Fitzgerald*: I do, sir. Yeah.*

Gregory Jones QC: *Yeah. And then, what is said, I should've perhaps explained that these words were designed to assist and clarify to the panel, though you will understand we will not, in fact, be in a position to release a final version of the plan until it's been considered, approved, and adopted by the APB Board. And I said, "In retrospect, the sentence would perhaps be better expressed if we'd said it's likely to be rather than it is." Now, I understand that was the*

position and there was a refusal to disclose, I mean, it says it's not able, but a refusal to disclose the version that was referred to in the second response questions, and that we would have to wait adoption. Does that remain ABP's position?

Robert McCracken QC: *I'm sorry, that is not my understanding of the import of the correspondence.*

Gregory Jones QC*: Can the witness answer?*

Robert McCracken QC:*Well, no, because Mr. Jones is characterizing the position, the collective position of ABP as put by me at the hearing and as put by Osborne Clarke in correspondence. And he is misrepresenting the position as put by ABP. And the position put by ABP is as set out in the 21st of September letter, and it's very clear from the last sentence of the penultimate paragraph where Mr. Greenwood says, "In retrospect the sentence would perhaps have been better expressed if we'd said is likely to be rather than is after examination," that he was, as it were, making absolutely clear that there wasn't a version, as it were, that was in existence at the time of the previous hearing session, that was superseded by the final version, but the reference to the final version had been proleptic, anticipatory and was relating to that which would in due course be adopted. And indeed, I'm somewhat surprised at this line of questions because if one looks at the answers given by ABP to the examining authority's questions, one sees copious reference to what will happen. And Mr. Jones is seeking to suggest on the basis of one particular passage taken out of context, that there is, as it were, a version of the plan that has not been disclosed.*

Robert Upton: *Before, before, before, before you, ladies and gentlemen, Mr. Jones, where is this line of questioning taking us?*

Robert McCracken QC: *Nowhere now, in the light of that intervention. I'll make submissions on it, but I'll just make it very clear. Mr. McCracken said he gave an explanation at the last hearing. He refused to give one, he said he would take instructions. When I pushed for it and you pushed it, we were told what we must ask of Mr. Fitzgerald. I want it noted that Mr. McCracken has intervened to prevent the witness, which he said was best placed to answer these questions, to prevent me answering that question and has now given an answer which he says is the interpretation of that paragraph which I wanted to put to the witness fairly as the person, Mr. McCracken, had said was the appropriate person to give the answer as to why the representations had been made in the way they are. I cannot now put that because Mr. McCracken -- it's an old but not very nice trick -- has intervened to give the answer which I was seeking from the witness.*

And the reason I was seeking it from this witness was because Mr. McCracken had refused, on two occasions, to answer the point which I put and you put fairly to him at a time when we could properly deal with it. And therefore, I will reserve the right to cast doubt on the credibility of these plans by reference to the way in which this has emerged. And that is consistent

with APB adopting last week the proposal, without giving any intimation to this panel, or to any of the parties until midway through your questioning of the witnesses, that they have done so."

86. However, something of the true position has emerged by Mr Fitzgerald's inadvertent confession that the document was rushed through for the purposes of this application. The actual position is that the port master plan having been moribund for so long has been rapidly rewritten with a view solely to hinder the Able project. The Port Plan and the ulterior purposes for which it has been hurried though are so transparent as to be frankly embarrassing. It does not represent a document which any credible weight can be given

87. In this regard, the applicant reminds the Panel that the triangle of land which it seeks to acquire has been owned by ABP (and its predecessor) since March 1967. During that time there has been no development on the site and no applications for planning permission to develop the site. A draft Master Plan was produced for consultation in 2010. That draft made it clear that the expectation was that it would be adopted by the middle of 2010. It was not, in fact adopted until 11 October 2012.

88. The draft Plan identified certain developments which were likely to be taken forward between 2010 and 2030, of which the last item in the list was the Western Deepwater Jetty on the triangle of land the applicant now seeks to acquire (paragraph 1.25). The CDMP suggested that any development of that triangle would take place between 2020 and 2030 (paragraph 7.42). John Fitzgerald accepted in his evidence to the Hearing that since the consultation exercise on the CDMP took place, there have been significant changes both in national policy and in market demand[6]. As a result material changes have been made to the draft version of the Master Plan. In light of the long delay since the CDMP was published for consultation, and the significant changes since that date, had ABP been engaged in a genuine consultation exercise it would have put the (materially different) fMP out to further consultation. This has not been done.

89. The applicant has made the case (in its comments on the answers to second round questions) that the ABP Master Plan should have undergone a strategic environmental assessment prior to its adoption. It is relevant to note that the RSPB responded to the consultation on the draft Master Plan on 22 June 2010, explaining its position in the following terms:

"*We consider the Port of Immingham Master Plan constitutes a 'plan' under the Habitats Regulations, and believe that the Master Plan will have a likely significant effect on the Humber Estuary SAC, SPA and Ramsar. As such, the Master Plan should be subject to a (shadow) Appropriate Assessment (AA_ pursuant to Regulation 61. A shadow AA will help to identify the likely impacts on Natura 2000 sites and plan for any necessary mitigation (and compensation) measures.*

[…]

We believe that all Port Master Plans should be screened to determine whether they require a formal Strategic Environmental Assessment (SEA) under the Directive. We submit that a

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[6] Evening of 16th October 2012.

voluntary Shadow SEA should be completed for the Immingham Port Master Plan. The shadow SEA for Immingham should cover, among other aspects, the sustainability issues associated with cargo handling by the Port, such as implications for UK transportation.

[…]

The possible need for an Appropriate Assessment (AA) pursuant to the Habitats Regulations for each of the proposed projects set out in Chapter 7 is raised. We welcome this commitment to consideration of the strict tests set out by the Habitats Regulations. The RSPB considers that the Port of Immingham Masterplan itself constitutes a 'plan' to which the Habitats Regulations apply. We accept that a full strategic AA of the Masterplan may not be possible due to constraints in the detail available. However, we submit that an AA/Shadow AA is necessary. We understand that a Shadow AA and shadow SEA was completed for ABP's Southampton Masterplan 2009. We would welcome further discussion with Natural England and ourselves on the scope of such environmental assessments in relation to the Port of Immingham Masterplan 2010 – 2030." (Emphasis added).

90. Natural England, in its consultation response of 24 June 2010 also recommended that ABP undertake shadow AA and SEA of its Port Master Plan.

91. In the absence of any Appropriate Assessment or Strategic Environmental Assessment, the applicant submits that the adoption of the Port Master Plan was unlawful and no weight should be attached to it. Alternatively the Master Plan is a purely commercial document, hurried through at the last minute by a commercial rival, in order to frustrate this application, and as such it should not be taken to genuinely reflect any firm commitments to develop this triangle of land which has laid undeveloped, in ABP's hands for over forty years. Even if it did not strictly speaking require an SEA this can only be because it is not a plan or programme and should not carry material weight in any event. Its lack of any form of environmental impact assessment also undermines its status whether one was mandatory or not. This is also reflected in the cavalier attitude of ABP to consultation responses and also its failure even to consider reconsultation following the material changes made to the adopted plan which was not the subject of consultation but driven plainly by ABP's commercial monopolistic desire to frustrate this proposal by Able.

92. During the Hearing the Panel asked if the AMEP quay could be developed without the applicant acquiring the triangle site. In order to do this, the pumping station would need to be relocated to a position approximately 250m upstream of its proposed location and the outfall would need to be culverted through the reclamation area and ultimately through the quay face. Large penetration of the quay face would not be possible, as this would break the structural continuity of the piles. Accordingly, the outfall would need to comprise a series of pipes that could be positioned between the piles. These penetrations would need to be carefully formed to prevent any 'gaps' in the wall through which liquidised granular fill could flow from the reclamation and into the estuary. The reclamation itself would need to abut the existing flood defences without extending over the top of them. Meanwhile the triangle site would no longer be fit for its intended purpose, which ABP say is to support a jetty. Furthermore the operation of the site would be compromised by a significant reduction in the length of terrestrial area with direct quay access.

93. In short, omitting the triangle site from the development would not render it impossible, but would introduce disproportionate complications into the design of the surface water drainage

system, impinge on the operability of the site, whilst the land that was left undeveloped would be blighted to the extent that it would be no longer be fit for its intended purpose. It therefore remains reasonably necessary or reasonably required for the proposal (see above)

94. ABP questioned why the pumping station was located on the triangle site at all given that paragraph 6.5.1 of the Flood Risk Assessment (FRA) (Annex 13.1 of the ES) identified 'feasible' alternatives to the north of the quay. The applicant noted at the Hearing that paragraph 6.5.1 provided only a short summary of Appendix G of the FRA, which needed to be consulted to understand what constraints pertained to each of the alternative options that were not being adopted

95. Indeed, a review of Appendix G identifies that the alternative routes to the north present potential maintenance liabilities that are not present in the recommended route to the south. Alternative Routes A and B follow the same alignment. Whilst Route A was assessed to be feasible it resulted in very deep, wide drains that would introduce *'maintenance problems'*. Also, the invert level at the outfall would be lower than the existing outfall that might also give rise to increase siltation risks. Route B overcame the maintenance issues identified in Route A, but in doing so included a second pumping station which reduced the sustainability of that option. Route D was recommended as it minimised the maintenance liabilities and was the most sustainable.

96. ABP also enquired whether the applicant knew of an alternative site for the Immingham Gas Jetty. The applicant responded in the negative, although notes that the CDMP did contain an alternative site for it to the south.

97. ABP suggested that the stone surface proposed for the triangle site was unsuitable for the storage of heavy components. The applicant corrected this misunderstanding, giving as an example Able's facility at Seaton Port, which was finished with a stone aggregate and was demonstrably fit for purpose, refer to Plate 3.

98. ABP provided a draft of a Harbour Revision Order with its second round responses that would authorise HIT 3 and the Western Deepwater Jetty. Given that according to Mr Fitzgerald the former would be expected to handle 3-4 million tonnes of biomass per year and that the latter would be able to accommodate Panamax vessels with fully laden cargos of 80,000 tonnes, the Jetty would only need to handle 12 such vessels a year for the project as a whole to exceed the Planning Act threshold of 5 million tonnes of cargo per year. Indeed it is likely that HIT 3 would require a DCO on its own.

99. The HRO does not include any compulsory purchase powers despite ABP not having full title to the strip of land on the foreshore[7]. Nor does it include any proposals to address the need for ABP to provide environmental mitigation and/or compensation for the displacement of curlew that would be arise out Western Deepwater Jetty proposal or for enhanced safety measures at the existing Regent Oil crossing.

[7] ABP explained at the Hearing, on 17 October 2012, that it had registered freehold possessory title of the strip of land over which the footpath runs, but that there is a twelve year period to allow people to object to that claim of ownership .

Plate 3 : 1500 Tonne section of North West Hutton Jacket being moved by SPMT on a stone surface at Able Seaton Port. (Note the large expanse of flat site)

100. The triangle of land is required for the AMEP project as shown on the indicative master plan. The maximum amount of onshore land is required to support the quay to allow the single site of a quay supported by the manufacture, assembly and storage of offshore marine energy infrastructure to be realised.

101. There is a compelling case in the public interest for the project as a whole and these parcels form an essential part of it. This case is not outweighed by the proposals put forward by ABP, which would also mean reducing the quay by 1/3 of its length were they to be able to be realised.

Land on the north bank of the Humber

102. The applicant has now removed all the parcels on the north bank of the Humber from the scope of compulsory acquisition, as shown in its revised land plans and book of reference.

Humber harbour master
Parcels 08001 (part) and 09001 (part)

103. The applicant must obtain ownership of the land where its quay will be situated in some form, whether through acquiring part of the harbour master's lease from the Crown or by subletting the land from the harbour master. The harbour master originally offered, and the applicant has accepted, the principle of a sub-lease. The harbour master's lawyer freely admitted that

the lack of progress on any form of lease until the week before the hearing was entirely on his side. The harbour master himself has behaved as far as the applicant is aware with independence throughout, however his property affairs are handled by ABP Property who also serves ABP commercial. Mrs Gorlov, on his behalf explained that:

"*It is right that we have made lamentably little progress here. True also that Able have been chasing. What Mr Jones doesn't know is that for our part, we also have been chasing the property people, Mike Hill in particular. Mr Jones may be doubtful about this, but the truth of the matter is we have got nothing out of him because as we understand it, well, no, O am not going to sat as we understand it, it is the case that Mr Hill has been very heavily pressed amd he didn't appreciate the order of priorities. It is all very well to say he ought to have done, I am not going to say that, but perhaps he should, I don't know. But in all events, he didn't […] it was only when we started kicking and screaming rather louder than usual that it became apparent to those actually responsible for putting words on the page that here was this time constraint of which they said they had not been aware."*

104. The applicant had been constantly chasing ABP Property who were aware of the importance of the matter and also in no doubt as to ABP's commercial objection to the scheme.

105. It is now no longer clear whether the harbour master will grant a lease of the whole of the quay land, but might only do so for that part that is not in front of the ABP triangle, as doing so would apparently appear to take sides between the applicant and ABP. The applicant remains keen to enter an agreement to lease all of the land from the harbour master. Since the terms of a lease of part of the land would be the same as for all of it, the applicant is willing to consider this on the understanding that it would be extended to the whole area if the applicant was granted compulsory purchase powers over ABP's triangle. The applicant notes that despite the apparent urgency expressed at the hearing, a draft lease has yet to be provided, noting that ABP's property officer is clearly 'a servant of two masters'. The Panel were addressed by the applicant as to its concerns about the involvement of ABP's Property service which will not be repeated herein.

Section 122 case

106. The applicant requires these parcels for its quay, the central part of its project. Without the quay there is no project. If there is a compelling case in the public interest for the project as a whole then there is such a case for acquiring the land where the quay will be situated.

Funding statement

107. The applicant undertook to provide further information to reassure the Examining Authority and interested parties as to its ability to demonstrate that it can pay for compulsory acquisition costs and also that the project is able to be realised.

108. It should be noted that regulation 5 of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 requires an application for a DCO which contains provision for the compulsory acquisition of land to contain

"a statement of reasons and a statement to indicate how an order that contains the authorisation of compulsory acquisition is proposed to be funded"

109. The 2010 guidance explains (paragraph 46) that

"*The APR 2009 made under section 37(3)(d) of the Planning Act require a promoter, when seeking an order which would authorise compulsory acquisition, to submit with the application a statement of reasons (relating to the compulsory acquisition), a statement to explain how an order that contains the authorisation of compulsory acquisition will be funded, and a plan showing any land which it is proposed to acquire compulsorily."*

110. The clear implication is that where compulsory acquisition forms part of the DCO the applicant must include a statement explaining how that acquisition of that land will be funded.

111. Mr Fraser Urquhart suggested that the funding statement must address both how the acquisition of the land will be funded, and how the development to take place on that land will be funded. In that regard he relied upon paragraph 33 of the 2010 guidance. The applicant's position (supported by paragraph 4 of the 2012 draft guidance which says that nothing in the guidance adds to the scope of the statutory provisions) is that the Planning Act must be accorded priority over the non-statutory guidance, and the Act itself requires only a funding statement indicating how the acquisition of the land will be funded.

112. Moreover, the applicant does not consider the guidance to contain any further requirement than that set out in the Act. Paragraphs 33 and 34 of the 2010 guidance provides that

"any application for a consent order authorising compulsory acquisition must be accompanied by a statement explaining how it will be funded. This statement should provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required. It may be that the project is not intended to be independently financially viable, or that the details cannot be finalised until there is certainty about the assembly of the necessary land. In such instances, the promoter should provide an indication of how any potential shortfalls are intended to be met. This should include the degree to which other bodies (public or private sector) have agreed to make financial contributions or to underwrite the scheme, and on what basis such contributions or underwriting is to be made.

The timing of the availability of the funding is also likely to be a relevant factor. Regulation 3(2) of the CMR 2010 allows for five years within which any notice to treat must be served beginning on the date on which the order granting development consent is made, though the decision-maker does have the discretion to make a different provision in an order granting development consent. Promoters should be able to demonstrate that adequate funding is likely to be available to enable the promoter to carry out the compulsory acquisition within the statutory period following the order being made, and that the resource implications of a possible acquisition resulting from a blight notice have been taken account of."

113. The guidance makes it clear that the funding statement must show only how the CPO is to be funded - which accords with what the provision in the Regulations. While the guidance does go on to say *"This statement should provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required."* this is clearly not an absolute requirement (requiring, as it does, only as much information as possible) and it is a requirement to provide information about the resource implications of the project, rather than the ability to fund that project.

114. Both the 2010 guidance and the draft 2012 guidance refer to Circular 06/2004 (which has not been replaced by the National Planning Policy Framework) in paragraphs 53 and 51

respectively and explain that the Circular contains further general guidance on matters related to compulsory acquisition. These guidance documents make it clear that the Circular remains relevant in compulsory acquisition cases.

115. Circular 06/2004 explains (paragraph 16 of annex A) that

"Any decision about whether to confirm an order made under section 226(1)(a) of the 1990 Act will be made on its own merits, but the factors which the Secretary of State can be expected to consider include

[…]

(iiii) the potential financial viability of the scheme for which the land is being acquired. A general indication of funding intentions, and of any commitments from third parties, will usually suffice to reassure the Secretary of State that there is a reasonable prospect that the scheme will proceed…" (Emphasis added).

116. A further complaint made by Mr Fraser Urquhart was that information relating to the funding of the compulsory acquisition had only come out at a late stage. He suggested that as a result the Panel ought to attach less weight to the assurances by the applicant that it was able to fund the compulsory acquisition. The applicant rejects that submission. A funding statement was provided with the DCO application and further information on funding has been provided since then. Neither the Regulations nor the guidance make it clear exactly what information is required, and the applicant has attempted to provide the relevant information with very little to assist it in the way of guidance or precedents. Indeed, the provision of a parent company guarantee was only made following the compulsory acquisition hearing for the Rookery South application, at a slightly later stage in the examination process.

117. In relation to the viability of the project, it is the applicant's case that it is able to fund both the compulsory acquisition of the relevant land, and the project itself. The applicant also draws the Panel's attention to the case of *Chesterfield Properties Plc v Secretary of State for the Environment* (1998) 76 P. & C.R. 117 .

118. That case concerned a challenge to a compulsory purchase order made under section 226 of the Town and Country Planning Act 1990. Section 226(1) provided (at the material date) that

"*A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in the area which –*

(a) is suitable for and required in order to secure the carrying out of development, redevelopment or improvement; or

(b) is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated."

119. The potential funding, or economic viability of the scheme was at the centre of the challenge. Before the Inspector a substantial case was presented to the effect that the development scheme was not financially viable. The Inspector concluded that, at best, the scheme was marginal on a two-year building programme, and was 'probably financially viable' on an eighteen-month scheme. He recommended, however, that the CPO be confirmed, and the Secretary of State duly confirmed the Order.

120. In its appeal against the Order the applicants argued that the Secretary of State could mot lawfully authorise a CPO unless he was satisfied that the development to which it related would probably be carried out:

"*it is…fundamental* [it was argued by the applicants] *to the confirmation of the order under section 226(1)(a) that the Secretary of State be satisfied at the date of confirmation that the redevelopment scheme is likely to proceed if the order is confirmed"*

121. This argument was rejected by the court (see the judgment of Laws J at 124).

122. Laws J (as he then was) referred to the cases of *Royal Life Insurance v Secretary of State for the Environment* [1992] 2 EGLR 23 and *Green v Secretary of State for the Environment and Transport* [1985] JPL 119 and explained (page 127):

"*These authorities seem to me to hold, at least by implication, that there are circumstances in which the Secretary of State might lawfully confirm a compulsory purchase order even though he cannot conclude that the related development would, or would probably go ahead: if economic viability is, as seems common sense, a sine qua non of the eventual development, then so far as there are situations in which the Secretary of State need not arrive at a judgment about viability, they demonstrate that it is not a condition precedent of his power to confirm a Compulsory Purchase Order that he must be satisfied that the development will be carried out."*

123. The applicants also made the submission that the compulsory acquisition of land was a violation of a constitutional right which the courts should only sanction if a substantial justification is shown, and such a justification must necessarily involve the confirming authority being satisfied that the development will probably take place [at 127]. Laws J responded to that argument [at 131] in the following way:

"*The requirement that the Secretary of State find a substantial public interest if he is to justify a Compulsory Purchase Order does not imply that he must conclude on the facts that the related development will probably take place. There is no basis on which I can hold that such a conclusion is a sine qua non for the existence of such a public interest. There may very readily be cases where the Secretary of State concludes (a) that the public interest decisively requires the development to go ahead; (b) that it is less likely, or much less likely, to go ahead without a Compulsory Purchase Order; (c) but that even if the order is made he cannot conclude that it will probably go ahead. I think this is such a case."*

124. In this case the applicant is able to fund both the compulsory acquisition of land and the proposed development, but *Chesterfield Properties Plc* simply serves to put in perspective the obligation of the Secretary of State in considering whether to allow the compulsory acquisition of land. He must be satisfied that there is a compelling case in the public interest justifying such a power. This does not necessarily require him, as a condition precedent to authorising the acquisition, to be satisfied on the balance of probabilities that the proposed development will go ahead if the land is acquired. It is for the Secretary of State to determine whether there is a compelling case in the public interest, and his decision will only be susceptible to review if he reaches an irrational conclusion.

125. Mr Peter Stephenson for the applicant provided figures at the hearing for the construction costs of AMEP and also the construction and land acquisition costs of AMEP and the Able

Logistics Park project combined of £800m. This was to reassure the Examining Authority that the company could afford both projects and was not double-counting its resources. The two projects will be funded by a 40% contribution from the Elba group of companies and 60% through borrowing against future income. [PS to correct and clarify how much AMEP will cost altogether and how this is to be funded]

126. Submitted together with this document is a further representation on funding, which contains an organogram showing the relationship between Elba Group Ltd and the applicant Able Humber Ports Ltd.

127. The document also provides a digest of the accounts of Elba Group Ltd produced by its accountants Ernst & Young to demonstrate that it has sufficient funding for the companies' contribution to the financing of the project as a whole, and will able to fund compulsory purchase compensation and s106 contributions out of its own funds.

128. The document deals with the cost of compensation for the remaining parcels of land subject to compulsory purchase, which has been calculated by surveyors to be around £1.7m. This is around 10% of Elba Group Ltd's available funds and so can clearly be financed.

129. In order to provide the equivalent comfort that the payment of compensation will be guaranteed to be paid as was the case for the Rookery South project, the applicant has provided a unilateral s106 undertaking with a parent company guarantee appended. These are annexed to the funding representation.

130. The Examining Authority asked what percentage of Order land remained subject to compulsory purchase. The funding representation shows that the land still subject to compulsory purchase is 15.53% of the total. 90% of this total is comprised of the railway and foreshore land subject to compulsory purchase – if these are removed, the total drops to 1.55%.

Any Other Business
Section 138

131. Section 138 of the Planning Act requires a certificate to be obtained to the effect that the Secretary of State considers that the extinguishment of statutory undertakers' rights or the removal of apparatus is necessary for the purpose of carrying out the development.

132. The guidance on compulsory acquisition does not mention section 138 at all and the applicant has therefore not expected to have to apply for such certificates. Nevertheless in order to assist the Secretary of State in deciding whether a certificate can be granted, the applicant makes the following observations.

133. The application contains powers to extinguish the rights of five statutory undertakers who have the right to install etc. apparatus in the Order land: Network Rail, National Grid, E.ON, Centrica and Anglian Water. The applicant does not intend to remove any apparatus. The applicant is also compulsorily acquiring land from Associated British Ports but does not believe that the latter has any apparatus on its land.

134. Article 41 of the Order now states that compulsory acquisition of statutory undertakers' rights can only be exercised if it is necessary for the purpose of carrying out the development, in

order to mirror the test before the Secretary of State and thus ensure that the extinguishment can only take place on that condition.

135. The applicant maintains the right to extinguish the rights to install etc. apparatus, because it may be the case that rights may exist over land Able acquires, or the existing rights over Able's land turn out to impede the implementation of the project.

136. In the case of Network Rail, the applicant is seeking to extinguish its right to use the railway by compulsory acquisition according to the arguments expressed above. In the case of the four other utilities, however, the applicant has added additional protection to ensure that the rights can only be extinguished in limited circumstances.

137. In each case, the right to extinguish is covered by a protective provision whereby it can only be exercised if a replacement right is provided that is reasonably convenient for that purpose with the agreement of the undertaker in question, such agreement not to be unreasonably withheld or delayed. The relevant provisions are all in Schedule 9: paragraph 70 for National Grid, paragraph 74 for E.ON, paragraph 79 for Centrica and paragraph 86 for Anglian Water.

138. Thus it is in a sense trivially the case that extinguishment of these rights could not take place unless it was necessary for the purposes of the development, and that furthermore any extinguished rights of National Grid, E.ON, Centrica and Anglian Water must be replaced with reasonably convenient alternative rights, with the agreement of the undertaker concerned (not to be unreasonably withheld or delayed).

ANNEX 1 – CORRESPONDENCE WITH THE AGENT OF BETHANY JAYNE LTD

From: Martyn Chilvers [mchilvers@wilkinchapmangrange.co.uk] Sent: Mon 22/10/2012 09:12
To: WALKER Angus
Cc:
Subject: RE: AMEP: Bethany Jayne Ltd

Angus,

I confirm the protective provisions set out below are acceptable to my client

Kind Regards

Martyn

Martyn Chilvers
Partner

Wilkin Chapman LLP

Email: mchilvers@wilkinchapmangrange.co.uk
DDI: 01472 262614
Main Tel: 01472 262626
Website: www.wilkinchapman.co.uk

From: WALKER Angus [mailto:AngusWALKER@bdb-law.co.uk]
Sent: 20 October 2012 22:11
To: Martyn Chilvers
Subject: AMEP: Bethany Jayne Ltd

Dear Martyn

For the purposes of being able to confirm this to the Panel, please could you reply to let me know whether this verson of the proposed protective provision is acceptable to your client:

PART 12

FOR THE PROTECTION OF BETHANY JAYNE LTD

89. Before interfering with or extinguishing any existing rights for Bethany Jayne Ltd to

(a) pass along parcel 03009 (Station Road), or

(b) use services and utilities in, on or over the Order land which serve land owned by Bethany Jayne Limited at the date of the coming into force of this Order,

the undertaker shall, with the agreement of Bethany Jayne Ltd, create substitute rights (including appropriate ancillary rights of entry for the purposes of connection, maintenance, repair and renewal) that are reasonably convenient for Bethany Jayne Ltd, such agreement not to be unreasonably withheld or delayed, and to be subject to arbitration under article 58.

Many thanks

BIRCHAM DYSON BELL

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W www.bdb-law.co.uk

ANNEX 2 – POTENTIAL LEVEL CROSSINGS ACROSS ORDER LAND

ANNEX 3 – 15 OCTOBER HEADS OF TERMS FROM NETWORK RAIL INFRASTRUCTURE LTD

Heads of Terms for an Option Agreement and Agreement for Lease between:

Able UK

and

Network Rail Infrastructure Limited

In connection with the Application for the Able Marine Energy Park Development Consent Order ("the Order") ("the Application")

Parties:

(1) Network Rail Infrastructure Limited ("Network Rail") (Company number 02904587) of Kings Place, 90 York Way, London N1 9AG; and

(2) Able UK ("Able") [company number] of [registered office]

These heads of terms form the basis of an agreement between Network Rail and Able which, once completed, will enable Network Rail to remove the Relevant Representation and the Written Representation submitted in connection with the Application ("the intended agreement").

1. **Definitions:**

(a) "the Alternative Killingholme Loop Scheme" means a scheme approved by Network Rail, which is a viable alternative to the proposed Killingholme Loop scheme, the timing of construction of which is within Network Rail's discretion;

(b) "Application" means Able's application for the Order;

(c) "FOC" means Freight Operating Company;

(d) "KIL1" means the Killingholme Branch Line 1;

(e) "KIL2" means the Killingholme Branch Line 2;

(f) "the Killingholme Loop" means the NR proposals for the provision of a new railway line which would run west from the Port of Immingham via the existing KIL2, over the Goxhill Branch and join into the rail network via the construction of a new chord;

(g) "Order" means the proposed Able Marine Energy Park Development Consent Order;

(h) "ORR" means the Office of the Rail Regulation;

(i) "Paper of Amendments" means the Paper of Amendments to the Proposed DCO submitted by NR to the Examining Authority on 19th July 2012 and attached at Appendix [1];

(j) "Plan" means the plan attached at Schedule [1];

(k) "Proposed Development" means the proposed Able Marine Energy Park as applied for under the powers of the Order;

(l) "the railway land" means the land identified on the plans submitted with the Application as plot nos. [xxxxxxxx] which is owned by Network Rail and is operational railway land, shown edged red on the Plan;

(m) "the Relevant Representation" means the relevant representation submitted by Network Rail to the Application on 26th March 2012;

(n) "the Written Representation" means the written representation submitted by Network Rail to the Application on 29th June 2012.

2. **Conditions Precedent:**

2.1 The intended agreement will be conditional upon:

2.1.1 Able undertaking to submit to the Examining Authority the Paper of Amendments and to request the Examining Authority to recommend to the Secretary of State that the amendments are incorporated into the Order; and

2.1.2 The Order being made in substantially the form applied for, to include the amendments submitted in the Paper of Amendments.

2.2 Paragraph 4 of these heads of terms (Option for level crossing) will be conditional upon:

2.2.1 Able is the freehold owner of the land either side of the railway land.

2.2.2 The following level crossings are closed by Network Rail:

2.2.2.1 Regents Oil;

2.2.2.2 Level Crossing No.11;

2.2.2.3 Level Crossing No.12; and

2.2.2.4 Unnamed level crossing close to existing bridge;

which are identified on the Plan as LC1, LC2, LC3 and LC4, and those level crossings are removed from the operational railway and all rights to them and over them are surrendered.

2.2.3 Able obtaining all relevant permissions (other than those required from Network Rail) to construct a single level crossing across the operational railway on the railway land.

2.2.4 Able obtaining planning permission, and any other relevant permission and/or agreement (including from the Highway Authority), for the construction of a road bridge for the passage of traffic diverted from the closed Regents Oil crossing. Such bridge to be in reasonable proximity to the site of Regents Oil crossing to form a no less commodious route from Rosper Road to the premises on the north side of the railway line served by Regents Oil Crossing.

2.2.5 Able constructing the bridge referred to in paragraph 2.2.4 in accordance with a design approved by Network Rail, and to a specification approved by Network Rail.

2.2.6 The completion of an Asset Protection Agreement in the form at Appendix [2] (Level Crossing Asset Protection Agreement).

2.2.7 The completion of the Asset Protection Agreement in the form at Appendix [4] (Bridge Asset Protection Agreement).

2.2.8 The agreement of a methodology in substantially the form at Appendix [3] (methodology for level crossing) for the construction of, and use of, the level crossing.

2.3 Paragraph 5 (Option for Bridge) of these heads of terms will be conditional upon:

2.3.1 Able being the freehold owner of the land either side of the railway land.

2.3.2 Able obtaining all relevant permissions (other than those required from Network Rail) to construct one or more bridges over operational railway on the railway land.

2.3.3 The completion of the Asset Protection Agreement in the form at Appendix [4] (Bridge Asset Protection Agreement).

2.3.4 The agreement of a methodology for the construction of, and use of, the bridge or bridges substantially in the form at Appendix [5] (methodology for bridge or bridges over railway land).

2.3.5 Able constructing the bridge referred to in paragraph 2.2.4 in accordance with a design approved by Network Rail, and to a specification approved by Network Rail.

2.4 Paragraph 6 (Option to take a lease) of these heads of terms will be conditional upon:

2.4.1 Able secures the relevant statutory authorisation (capable of being implemented by NR or such other party as Network Rail elect) for the construction and operation of the Alternative Killingholme Loop Scheme which will include, but will not be limited to, the following:

2.4.1.1 A design procured by Able and approved by Network Rail;

2.4.1.2 a link from the west side of the Port of Immingham to the main rail network;

2.4.1.3 all necessary connections and signalling;

2.4.1.4 compliance with all such operating criteria as are identified by Network Rail;

2.4.1.5 secure the land powers over all land interests required for the Alternative Killingholme Loop Scheme;

2.4.1.6 secure powers to build the operational railway comprising the Alternative Killingholme Loop Scheme; and

2.4.1.7 secured any third party agreements as are necessary in connection with the Alternative Killingholme Loop Scheme, including (but not limited to):

(a) any such agreements with the Highways Authority concerning the construction of bridges comprising part of that scheme; and

(b) any such rights as may be required for use of any third party rail infrastructure utilised as part of the Alternative Killingholme Loop Scheme.

2.4.2 Able will secure a financial bond in a form agreed with Network Rail to underwrite Network Rail's financial exposure in the following scenarios:

2.4.2.1 The additional cost of the Alternative Killingholme Loop scheme as compared to the Killingholme Loop proposals;

2.4.2.2 the means by which the powers to construct the Alternative Killingholme Loop Scheme are the subject of judicial review; and

2.4.2.3 the time limit of any power (specifically the power to acquire or otherwise use land, or the power to complete the development) required to construct the Alternative Killingholme Loop Scheme expires prior to the commencement, or completion, of that scheme.

2.4.3 Network Change is in place to remove the section of KIL2 which runs through the site of the Proposed Development.

2.4.4 C.RO and C.GEN agree in principle to the grant of a lease of the railway land.

2.4.5 Able has in place agreements to legitimately operate such part of KIL2 as runs through the Proposed Development by one of the following means:

2.4.5.1 operating agreements are in place between Able and the users of Humber Sea Terminal (including but not limited to C.RO, C.Gen and the FOCs), in a form agreed by Network Rail, which provide for train access from Humber Sea Terminal to KIL2 south of the site of the Proposed Development for the duration of the Lease; or

2.4.5.2 Able has acquired the necessary rights to be Licensed Network Operator of that section (approved by the ORR) for the section of KIL2 serving the Humber Sea Terminal.

3. Network Rail

3.1 Network Rail will withdraw the Relevant Representation and the Written Representation and will refrain from further opposition to the Application.

3.2 Nothing in paragraph 3.1 will prevent Network Rail from objecting to or making representations against any proposed variation to the Proposed Development.

4. **Option for Level Crossing**

4.1 On the satisfaction of the conditions precedent set out paragraph 2.2, Network Rail will offer to Able the option to take an easement in form at Appendix [5] (Form of Easement for level crossing) on the following terms:

4.1.1 Grant: to enter on to the railway land and construct a level crossing in a position agreed with Network Rail and in accordance with the agreed methodology, and thereafter use the level crossing as access between the plots of land either side of the operational railway. Grant to be subject to the running of trains over the operational railway**.**

4.1.2 Term: the easement will expire after a period of 99 years after the date of grant.

4.1.3 Costs: Any costs incurred by Network Rail in connection with

4.1.3.1 the construction, use and maintenance of the approaches to and fencing to the level crossing; and

4.1.3.2 the maintenance of the deck and operational equipment

will be reimbursed by Able.

4.1.4 Maintenance: Network Rail will be responsible for the maintenance of the deck and operational equipment, and Able will otherwise be responsible for the maintenance of the level crossing.

4.1.5 Protection of the operational railway: Network Rail may enter onto the railway land and carry out any works required to safeguard the railway in the event that in its discretion it considers the safe operation of the railway to be compromised by the level crossing or operations on it.

4.1.6 Consideration: [*tbc*]

5. **Option to construct and use a Bridge**

5.1 On the satisfaction of the conditions precedent set out paragraph 2.3, Network Rail will offer to Able the option to take an easement in form at Appendix [6] (easement for bridges) on the following terms:

5.1.1 Grant: to enter on to the railway land and construct a bridge or bridges in accordance with the design agreed with Network Rail and to a specification agreed with Network Rail, and thereafter use the bridge

or bridges as access between the plots of land either side of the operational railway. Grant to be subject to the running of trains over the operational railway**.**

5.1.2 Term: the easement will expire after a period of 99 years after the date of grant.

5.1.3 Costs: Any costs incurred by Network Rail in connection with the construction, use and maintenance of all or any of the bridges will be reimbursed by Able.

5.1.4 Maintenance: Able is responsible for the maintenance of each of the bridges.

5.1.5 Protection of the operational railway: Network Rail may enter onto the railway land and carry out any works required to safeguard the railway in the event that in its discretion it considers the safe operation of the railway to be compromised by any or all of the bridges or operations on it or them.

5.1.6 Consideration: [*tbc*]

6. **Option for Lease**

6.1 On the satisfaction of the Conditions Precedent set out in paragraph 2.4, Network Rail will offer to Able the option to take a lease on the following terms:

6.1.1 Term: the lease will run for 99 years.

6.1.2 Rent: [*tbc*]

6.1.3 No Security of Tenure: the lease will be contacted out from the provisions of the Landlord and Tenant Act 1954

6.1.4 Demise: the extent of the demise is shown edged red.

6.1.5 Early termination provisions: Network Rail terminate the lease early on 1 year notice to Able in the following circumstances:

6.1.5.1 non-payment of rent;

6.1.5.2 if Able has not complied with any of the terms of the Lease;

6.1.5.3 if Able enters into Liquidation [*definition tbc*]; or

6.1.5.4 if an administration order is made in respect of Able or a receiver or administrative receiver is appointed over all or any of Able's assets.

6.1.6 Permitted User: Authorised use of the land to include:-

6.1.6.1 Use as access from between parts of Able's adjoining premises;

6.1.6.2 Use as a private railway siding;

6.1.6.3 No alterations to be carried out save for [constructing access/road way; maintenance of access/road way; installing service media]

6.1.7 Tenant's repair and restore covenant: obligation to repair and restore on expiration of term.

6.1.8 Insurance covenant [*tbc*]

6.1.9 *[insert further terms of proposed lease in course of negotiations*].

7. **Option Period**

7.1 The options in clauses 4, 5 and 6 above expire after [10] years from the date of this Agreement.

8. **The Railway Network**

8.1 For the avoidance of doubt, unless a lease is granted pursuant to the option in clause 6, the operational railway will remain part of the Rail Network.

9. **Costs**

9.1 [*tbc*]

10. **Termination**

10.1 Termination of the Agreement for Lease in the following circumstances:

10.1.1 [*tbc*]

11. **Confidentiality**

11.1 [*NR standard terms*]

12. **Dispute Resolution**

12.1 [*tbc*]

ANNEX 4 – GUIDANCE ON PORT MASTER PLANS, DfT, 2008