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BY EMAIL ONLY

16 November 2012

Your ref: TR030001/Able - 0016
Our ref: DC9172

The Able Marine Energy Park Development Consent Order 2012

Dear Mr Harris,

Enclosed with this letter is the Marine Management Organisation's summary of the oral case put at the following Specific Issue Hearings:

- **12 & 13 November 2012: Compensation Site.**

Please do not hesitate to contact me should you have any queries on our submission.

Yours sincerely,

Gregor McNiven

**Senior Marine Licensing Manager - Inshore
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Enc –
161112 MMO written summary of oral submission

**WRITTEN SUMMARY OF THE ORAL CASE PUT BY THE MARINE
MANAGEMENT ORGANISATION AT THE SPECIFIC ISSUE HEARING ON THE
COMPENSATION PROPOSALS**

1.1 This is the written summary of the oral case that was put by the Marine Management Organisation (“MMO”) at the specific issue hearing into the compensation proposals for the proposed Able Marine Energy Park (“AMEP”) which took place on 12 and 13 November 2012.

1.2 Only those issues or topics on which the MMO made submissions at the hearing are included below.

2. Representations by the Stone Creek Boat Club Regarding Impacts on Stone Creek

2.1 At the hearing representations were made by Mr Taylor on behalf of the Stone Creek Boat Club. During the course of those representations Mr Taylor raised a concern, previously raised in their written representation of 1 November 2012 regarding anticipated siltation of Stone Creek and the need for dredging of Stone Creek. Mr Taylor’s particular concern was that the dredging of Stone Creek was not secured in any legal form.

2.2 In response to these concerns, the MMO noted that if Stone Creek did need to be dredged, that would have to be permitted by way of a marine licence. No dredging of Stone Creek is provided in the Deemed Marine Licence (“DML”) as part of the Development Consent Order (“DCO”) in this application as the Applicant has consistently indicated that neither capital nor maintenance dredging was proposed at Stone Creek (see Applicant’s response to MMO Relevant Representations on 5 April 2012, as confirmed in comments from the Applicant on 26 June 2012). As such, a separate marine licence would need to be issued in the future to allow for such dredging.

2.3 One issue of concern in this area that was raised was regarding the need for a mechanism to monitor or survey Stone Creek to determine whether or not such a future marine licence is necessary. Such a monitoring requirement

has not been included in the DML to date because the Applicant has consistently maintained that dredging of Stone Creek will not be necessary.

2.4 The MMO clarified, in response to a question from the Examining Authority (“ExA”) that that monitoring could not be provided in the marine licence that allowed for Stone Creek to be dredged, as the monitoring results would be needed to determine whether such dredging and therefore a marine licence, was required in the first place.

2.5 At the hearing, the MMO clarified that monitoring at Stone Creek has now been included in the latest draft of the Compensation Site Environmental Management and Monitoring Plan (“EMMP”) which the ExA received on 12 November. Para. 84 of that draft states that:

“bed levels in the entrance to Stone Creek will be observe prior to, during and after periods of removal of material from the RTE fields by bed levelling and/or dredging (as described in Part 3 of EX 28.3) to demonstrate that there are no adverse impacts on this system. Should bed levels rise in the entrance to Stone Creek during such periods of operational activity, consideration will be given to the need to remove any build up using bed levelling techniques. Where necessary, fixed stakes will be employed to assist in these observations. Findings, and any resultant actions, will be reported to the AEG on an annual basis.”

2.6 The MMO confirmed at the hearing that it is now satisfied that a mechanism for determining whether dredging would be required at Stone Creek, and therefore whether a marine licence will be required in the future, is now provided for. However, the MMO does suggest that this paragraph in the Compensation Site EMMP should note that an application for a marine licence would need to be made to the MMO to dredge at Stone Creek, regardless of the eventual methods employed.

2.7 Further, the ExA should note that, as the MMO stated at the previous specific issue hearing into the compensation site and in its written summary to that hearing, the MMO is concerned that dredging at this location has not been included in any assessment undertaken by the Applicant (see pages 2-3 of Table 54.1 at Annex 1 to the MMO’s response to the ExA’s second round questions). Such an assessment would therefore be required to accompany any future marine licence application for dredging at this location.

3. The Possible Impacts of the Two Schemes

The adequacy of the assessment of impacts

3.1 At the hearing, the MMO noted that it shared the concerns raised by the Environment Agency (“EA”) regarding whether there had been an assessment of the predicted erosion at Cherry Cobb Sands Channel. In response to that concern, Dr Dearnley, (HR Wallingford) on behalf of the Applicants, explained that it was expected that 20% greater erosion during the warping stage was expected than that expected for the previous managed realignment scheme design. As such the erosion modelling predictions for the warping stage were higher than those that had originally been assessed in the Environment Statement (“ES”). However, Dr Dearnley stated that such increased erosion would only be for 1-2 years during the warping stage and that, thereafter, the erosion would be reduce to a similar level as that assessed in the ES. Dr Dearnley stated that the extra erosion would only occur downstream of the location where Cherry Cobb Sands creek and drainage channels join. These losses were reported to be in addition to the losses of approximately 2 ha of salt marsh caused by excavation, though no quantitative assessment of the extra area of salt marsh loss is evident (or the MMO is unable to find it). The applicant should either make such an assessment (so that the impact of the scheme as currently planned can be quantified) or show where this assessment already exists. Without this the MMO believes that the impacts during the warping phase of the project have not yet been fully assessed.

3.2 The MMO also raised a concern as to whether there had been an assessment of the predicted erosion at the drainage creek which runs through the managed realignment part of the Cherry Cobb Sands site. In response, Dr Dearnley confirmed that the channel may not be completely stable, but that it might be more stable with the Regulated Tidal Exchange (“RTE”) scheme, than would have been the case with a simple managed realignment scheme. The volume of water flowing through the channel is the main driver of the changes that will occur to the channel’s morphology. The MMO therefore agree with the conclusions of Dr Dearnley that the channel will be more stable with the RTE scheme than with a simple managed realignment scheme, provided the RTE sluices are properly managed. This impact can therefore be considered as fully assessed.

3.3 Finally, the MMO requested clarification as to where the Applicant had assessed the impact of creating the breach at the southern end of the Cherry Cobb Sands site (which is currently provided for at para. 8 of Part 2 of Sch. 8 and Article 2 of the DCO) and the scour protection at the breach that has been proposed (at para. 39 of the Compensation Site EMMP). Para. 39 of the Compensation Site EMMP reads “*Once the embankments and profiling have been completed for the RTE site, and the associated engineering hardware (sluice gates, flap valves, spillways, etc.) have been installed, the existing embankment will be breached to allow tidal waters to enter the managed realignment portion of the site and through to the area of RTE. The optimum location for the single breach (which will be 250 m long) is towards the southern end of the site, although the precise location and level of the breach area will be chosen during detailed design in order to maximise the sustainable creation of intertidal mudflat. The base and southern end of the breached section will not be protected as little erosion is anticipated. The northern end of the breach, which is close to the RTE boundary, will be protected with rock armour.*” This is not an adequate impact assessment and the statement that little scour is anticipated at the southern end of the beach should be backed up with evidence. The plan for scour protection with rock armour should be based upon the predicted erosion which cannot have been adequately assessed as the location and level of the breach area have yet to be finalised.

The adequacy of the consultation on the Compensation Site proposals

3.4 In response to a question from the ExA regarding whether or not the consultation that had taken place on the Compensation Site proposals was adequate, the MMO confirmed that, like the EA, it did not consider that the consultation had been adequate. A great deal of information on new detailed proposals for the Compensation Site, amongst other further information relating to other matters, was provided by the Applicant on 12 October 2012 (and received by the MMO on 15 October 2012), giving the Statutory Bodies less than a month to consider a large quantity of new information on an integral part of the Application. That time has not been sufficient for the MMO to adequately consider all of the information received. Whilst the MMO has been trying to work constructively and engage with the Applicant, it has been

hard to do so given the volume of information that has been provided and the short timescale in which it has needed to be considered, and there are still some outstanding issues of concern which are yet to be resolved to the MMO's satisfaction.

3.5 The MMO clarified that it was of the view that the amount of time provided is a key consideration to the adequacy of the consultation in this case, as time is needed to review and consider the information so that the Statutory Bodies are in a position to provide the ExA with the requisite advice. If the Statutory Bodies have not had sufficient time to consider that information, they cannot advise the ExA as required and that necessarily means that the consultation has not been adequate.

3.6 The MMO also noted that it needs to be borne in mind that the new information on the Compensation Site was not the only issue that has needed to be addressed over the last few weeks. A great deal of other information which the MMO has received, amounting to [12 reports relevant to the MMO with over 1,200 pages was provided by the Applicant on 15 October 2012. This also needed to be considered by the other Statutory Bodies. Further, the MMO had to undertake a significant amount of work on the draft DCO and Deemed Marine Licence ("DML") to meet the ExA's deadline of 26 October 2012.

Amendments required to the Report on Integrity of European Sites

3.7 At the hearing the ExA asked for clarification on any amendments that were required to be made to the Report on Integrity of European Sites ("RIES") as a result of the further information that was provided by the Applicant on the Compensation Site on 15 October 2012 and throughout the Specific Issue Hearings.

3.8 The MMO confirmed that it shared the view of Natural England as to the amendments required especially in relation to the increased potential for erosion of a designated foreshore due to the implementation of the RTE scheme. The MMO also refers the ExA to the joint letter submitted by Natural England, the Environment Agency and the MMO on 7 November 2012, sent to the ExA in response to a Rule 17 request on 17 October 2012.

4. The Implementation Process

4.1 At the hearing the MMO provided an overview regarding how the works to construct the Compensation Site will be provided by way of the DML. Those construction works to be provided in the DML are:

- (1) creation of the breach;
- (2) disposal of material from the creation of the breach;
- (3) use of temporary matting etc. during construction activities;
- (4) installation of scour protection.

4.2 Condition 8 of the DML relates to the Compensation Site creation and permits the Applicant to remove a 250 metre section of the existing flood wall to create the Cherry Cobb Sands channel. Further, condition 9(1)(f) of the DML permits the Applicant to carry out capital dredging works at the Cherry Cobb Sands channel to a depth of -5.0 metres Chart Datum. The coordinates for the channel are provided in the definition of the Cherry Cobb Sands channel in Article 2 of the DCO. For the ExA's information, details of the proposed breach are provided at paras. 39 and 40 of the updated Compensation Site EMMP (Draft report v3, dated 12 November 2012).

4.3 Condition 9(2) of the DML permits the Applicant to deposit the material dredged pursuant to *inter alia* condition 9(1)(f) in the approximate quantities and at the locations provided in the table at condition 9(2). That table permits the Applicant to deposit 2,000 tonnes of sand and 8,000 tonnes of silt on the intertidal area landward of Cherry Cobb Sands channel, if that material is suitable for deposition in the intertidal environment. It is noted that the applicant's previous proposals were to strip the existing saltmarsh vegetation and it would be 're-laid' within the managed realignment site to encourage the development of saltmarsh (see Environmental Statement, Volume 2, Chapter 28, paragraph 28.2.23). It is still unclear however as to the applicant's plans for the remaining alluvial material, and where this will be placed within the site. As previously stressed, this material must be proven to be suitable for such deposit prior to this occurring. Consequently, plans will need to be drawn up in case this material proves unsuitable for deposition in the intertidal/marine area. .

4.4 At para. 41 of the Compensation Site EMMP it is suggested that, where appropriate, temporary bog matting will be used by construction plant. This temporary deposit also requires included within the DML as it is a licensable activity under the Marine and Coastal Access Act 2009.

4.5 At para. 39 of the Compensation Site EMMP, the Applicant explains that the northern end of the breach will be protected with rock armour. As such the MMO will suggest a suitable condition to be inserted into Part 2 of the DML to allow this deposit.

4.6 At the hearing the MMO explained that the other licensable activities that are required to be carried out during the operation of the Compensation Site will require a separate marine licence. Based on the information provided in Part 3 of EX28.3 it is expected that management of the Compensation Site in relation to sediment control will take the form of one or a combination of the following: (i) flushing (see para. 7.5.5); (ii) bed levelling and flushing (see para. 7.5.6) and (iii) bed levelling and suction dredging (see para 7.5.11).

4.7 It is not currently known exactly what form the Compensation Site management will take or when it will first need to be provided. However, given the length of time that it will take the Applicant to provide the Compensation Site, it is likely that these activities will fall outside the timeframe of the DML which, by condition 12(3), is time limited to six years from the date of the coming into force of the DCO. As such, a separate, future marine licence application will need to be made for the management activities proposed on the Compensation Site.

5. The operation of the Compensation Site Environmental Monitoring and Management Plan (EMMP)

5.1 At the hearing the MMO noted that it agreed with the submissions made by Natural England regarding the operation of the draft Compensation Site EMMP provided by the Applicant on 12 November 2012 (Draft report v3) and made some overarching comments of its own which are set out below. More detailed comments on specific provisions of that document can be found in Annex 1 to this written summary.

- 5.2 In relation to the ExA's point regarding whether the issues had been sufficiently identified, investigated and pinned down in the EMMP, the MMO noted that there are currently several inconsistencies between the details provided in the EMMP, other parts of EX28.3 and the DCO.
- 5.3 First, paragraph 39 of the EMMP states that the optimum location for the single breach will be towards the southern end of the site, but states that the precise location and level of the breach area will be chosen during detailed design in order to maximise the sustainable creation of intertidal mudflat. This is contrary to what has been set out in the latest draft of the Development Consent Order ("DCO") which provides for the breach to be made at condition 8 of Sch. 8 in the DML and provides co-ordinates for the location in Article 2 of the DCO.
- 5.4 Secondly, paragraph 39 of the EMMP explains that the northern end of the breach will be protected with rock armour. However, the MMO has not been able to find any reference to the need for scour protection in the other Parts of EX28.3. It should also be noted that it was stated that the breach would not be protected in the original Environmental Statement (Volume 2, Chapter 28, paragraph 28.2.25).
- 5.5 Thirdly, para. 40 of the EMMP suggests that material that is removed to provide the breach will be placed within the intertidal area of the managed realignment portion of the site. However, condition 9(2) of the DCO makes clear that the material which is to be removed can only be placed in the intertidal area if it is suitable for deposition in that environment – this caveat is not replicated in the EMMP. Nor does the EMMP provide the quantities of material that have been licensed for deposition which are provided in the Table at condition 9(2).
- 5.6 The MMO explained at the hearing that it was important that these inconsistencies were resolved, particularly in light of the fact that the legal obligations as set out in the draft legal agreement relating to the Compensation Site, at EX28.3 Part 10, defined those obligations in relation to the matters set out in the EMMP and EX28.3.

5.7 In relation to the management that is provided in the EMMP, under point 2(iv) of the ExA's issues, the MMO noted that there was nothing in the EMMP in relation to the on-going sediment control management at the site. Instead, the only references are to an "*appropriate site management and maintenance plan*" (see para. 61) and a "*comprehensive Operation and Maintenance Manual*" (see para. 110) being developed to embody the site maintenance requirements following detailed design. The MMO is of the view that the options for site maintenance that are described in EX28.3 should be included in the EMMP.

5.8 Further, under this point, the MMO notes that there is no reference in the EMMP to the need to apply for a separate marine licence in order to carry out certain elements of the site management.

5.9 Finally, under the third of the ExA's points regarding the extent to which all parties which need to be engaged in the implementation of the EMMP are provided for, the MMO noted that it is not currently listed as a member of the Ecological Advisory Group ("EAG"). Given the matters covered by the plan and the MMO's remit once the site becomes part of the marine environment, the MMO is of the view that it would be appropriate for it be a member of the EAG. The MMO is grateful for the indication given by the Applicant at the hearing that it would be happy to extend membership of the EAG to the MMO.

6. The operation of the Legal Agreement

6.1 At the hearing the MMO made some overarching submissions on the draft Legal Agreement relating to the Compensation Site at EX28.3 Part 10. More detailed comments on specific provisions of that document can be found in Annex 2 to this written summary.

6.2 In relation to the draft, the MMO noted that it was of the view that generally the document was vague and needed much tighter, more specific drafting. In particular, the MMO noted that the definitions provided in the document were too vague, particularly in relation to the definitions of the relevant sites, which instead should be defined by reference to co-ordinates and cross-references to maps and plans where available. Similarly, the Legal Agreement could

usefully cross refer to those provisions in the DCO which are applicable to the matters contained in the Agreement.

6.3 Once again, the MMO drew the ExA's attention to the importance of resolving the inconsistencies between the EMMP and EX28.3 (referred in the Legal Agreement as the 'October Report') given that the obligations are drafted with references to those documents. In order for there to be certainty regarding the terms of the obligations and to ensure the enforceability of the Legal Agreement these issues need to be rectified.

6.4 In relation to the ExA's questions concerning the need for the Legal Agreement in light of the draft EMMP that has been provided and the terms of the DCO, it is the MMO's recollection from previous hearings that the provision of a legal agreement was suggested in the place of a separate EMMP for the Compensation Site.

6.5 In this regard, the MMO notes that the "*development of compensatory environmental habitat in accordance with the environmental management and monitoring plans*" is included in the provisions for 'associated development' at para. 5 of Sch. 1 of the DCO. Further, para. 17(1) of Sch. 11 to the DCO provides that "*the authorised development shall not commence until the compensation environmental management and monitoring plan reflecting the survey results and ecological and enhancement measures included in the environmental statement and the undertaker's proposed compensation package, has been submitted to and approved by Natural England after consultation with the Environment Agency and the relevant planning authority.*" Para. 17(4) goes on to provide that the "*compensation environmental management and monitoring plan...shall include an implementation timetable and must be carried out as approved.*"

6.6 As such, the delivery of the Compensation Site as provided for in EX28.3 and the Conservation Site EMMP is secured in the terms of the DCO. However, the MMO does understand Natural England's desire for that organisation to be able to enforce the terms of the Legal Agreement and thereby the provision of the Compensation Site, which would otherwise only be enforceable by the relevant planning authority under the terms of the DCO. However, in relation to those parts of the compensation site with which

the MMO is concerned, the MMO is satisfied that the necessary compensation measures are adequately enforceable via the terms of the DCO. To this extent the MMO does not view a separate legal agreement covering the same measures as necessary in this case.

6.7 The MMO does understand, however, Natural England's concerns regarding the part of the compensation scheme which is not part of the DCO, but which is subject to a separate terrestrial planning application. In order for those elements of the compensation measures to be in place, the MMO can see the need for some form of binding legal agreement. However, as this separate element of the compensation site does not engage any matters within the MMO's purview, the MMO is of the view that, for the reasons given above, it is not necessary for it to be a party to the legal agreement which has been put forward.

6.8 Despite the MMO being of the view that it is not necessary for it to be a party to the legal agreement, the MMO has, nevertheless, provided detailed comments on specific clauses of the Legal Agreement at Annex 2 to this written summary in order to aid the Applicant's consideration of the drafting of that agreement.

Marine Management Organisation

16 November 2012

ANNEX 1

MMO comments on '*Compensation Site Environmental Monitoring Plan: Draft report (V3)*' (Issued electronically Monday 12 November 2012 18:43)

General comments

1. The MMO is pleased that the plan structure for the compensation site EMMP is now more suitable and moving away from reading like a report rather than an EMMP.
2. The compensation site EMMP should clearly state the proposed construction start dates for each element of the project for which monitoring must be in place, the frequency of monitoring required, duration, number of surveys and sites, and the expected completion date.
3. The compensation site EMMP should also contain clear maps or charts showing the locations where construction activities are to be undertaken, and also monitoring sites/transects etc.
4. The MMO's comments on areas of the Marine EMMP which may be better included in the compensation site EMMP (provided to Applicant on 9 November 2012) should be noted and actioned where appropriate (sections 2-4 of current marine EMMP, dated 11 October 2012).

Detailed Comments on Specific Provisions

5. It should be noted that the MMO has only provided comment on the areas that fall within its jurisdiction and with which it is concerned in relation to the Compensation Site. All other matters fall within the purview of other Interested Parties and have not been raised here.
6. **Proposed compensation habitats, Paragraph 7:** It is not clear whether the reference here is to the wet grassland site or other areas of the compensation site. This required clarification.

7. **Scope of report, Paragraph 16:** This is the first reference to the Ecological Advisory Group (“EAG”), details of which are only provided later at para. 18. A preliminary reference to the EAG should therefore be made here.
8. **Report Approval, Paragraph 17:** The MMO would request that it is included in the list of organisations who are to be consulted prior to the EMMP being approved by Natural England.
9. **The Ecological Advisory Group, Paragraph 19:** As noted at the hearing, the MMO thinks that it would be appropriate for it to be a member of the EAG and is grateful to the Applicant’s representation that it is happy for the MMO to be listed as a member.
10. **Appointment of Environmental Manager, Paragraph 26:** This addition to the EMMP is welcomed. However it is not clear whether this will be a full-time employee and how will they interact with the operatives who will be managing the site on a daily basis. Clarification on this point should be provided.
11. **Intertidal, paragraph 35:** It is worth noting here that the scheme will not really provide 88ha of ‘intertidal habitat’ at the start, but will take time to develop into anything which resembles true intertidal habitat.
12. **Site inundation, paragraph 39:** This paragraph noted that the optimum location for the single breach will be towards the southern end of the site, but states that the precise location and level of the breach area will be chosen during detailed design in order to maximise the sustainable creation of intertidal mudflat. This is contrary to what has been set out in the latest draft of the Development Consent Order (“DCO”) which provides for the breach to be made at condition 8 of Sch. 8 in the Deemed Marine Licence (‘DML’) and provides co-ordinates for the location in Article 2 of the DCO.
13. **2.3.1.1: Site inundation, paragraph 40:** this paragraph refers to how the material that has been removed in order to create the breach will be dealt with. It suggests that, once removed, it will be placed within the intertidal area of the management realignment portion of the site. It is noted that the applicant’s previous proposals were to strip the existing saltmarsh vegetation and it would be ‘re-laid’ within the managed realignment site to encourage the development of saltmarsh (see Environmental Statement, Volume 2, Chapter 28, paragraph 28.2.23). It is still unclear however as to the applicant’s plans for the remaining alluvial material, and

where this will be placed within the site. As previously stressed, this material must be proven to be suitable for such deposit prior to this occurring. Consequently, plans will need to be drawn up in case this material proves unsuitable for deposition in the intertidal/marine area.

14. **Site inundation, paragraphs 39 - 41:** these paras. contain information which is more suitable for inclusion within an impact assessment rather than an EMMP. In connection with this the MMO notes that this information was not, in fact, included in the EIA Review at Part 6 of EX28.3 and therefore should be included in that document
15. **RTE site management, paragraphs 49:** this paragraph notes that automatic recorders will be installed to monitor the water level within each RTE field, and a similar water level monitor placed in the open part of the managed realignment. It is presumed that these will be installed during construction and pre-breach (i.e. before the site becomes part of the marine environment) and hence do not need to be included in the DML. However, clarification should be provided on this issue as these elements may require inclusion in the DML, or for maintenance or replacement purposes.
16. **Stakes for sediment monitoring, paragraph 50:** This para. provides that sediment levels will be monitored by stakes. Once again, it is presumed that these will be provided pre-breach and therefore do not require inclusion in the DML. However the points made in relation to para. 49 above are repeated here.
17. **Full time employees, paragraph 54:** this para. explains that two full time employees will need to be employed by the Applicant. However, it is not clear how these employees will interact with the Environmental Manager, referred to in paragraph 26, whether these are additional employees to the Environmental Manager and how long these employees will be employed for given the length of time that the Applicant is required to provide the compensation site. Clarification should be provided on these issues.
18. **Site maintenance, paragraph 61:** This para. refers to an appropriate site management and maintenance plan being developed. However, it is not clear how this plan will interact with the Operations and Maintenance Manual referred to in para. 110 of the EMMP and in para. 4.6.26 of Part 3 of EX28.3

19. **Botanical monitoring, paragraph 65:** Given the potential for rapid sediment accretion within the site and thus the potential for development of saltmarsh vegetation, it is felt prudent that that results are communicated on a 6 monthly cycle of meetings and then included in annual reports, rather than the yearly approach advocated in this paragraph.
20. **Fish monitoring, paragraphs 66 to 70:** Fish monitoring is welcomed, however any deposit of equipment may require a Dispensation from the MMO to ensure conformity with national and European marine fisheries legislation.
21. **Physical monitoring, paragraph 77:** this para. refers to the fact that agricultural soils may be washed into the estuary following initial breaching. In this regard, the MMO would note that it is therefore imperative that all necessary actions have been taken by the Applicant prior to this period to remedy or remove any contaminated soils or materials on the site during its construction, to prevent the potential mobilisation of contaminants into the marine environment.
22. **Annual surveys, paragraph 83:** Given the physical development of the site is recognised as the key element in para. 71, the MMO is concerned that annual surveys may not be adequate for monitoring site development. This is particularly the case given the speed with which it has been predicted that sediments will accrete. Consequently, the MMO recommends that at least 6 monthly surveys are carried out given the recognised dynamism of this environment and the predictions which have been made by the Applicant regarding its likely development.
23. **Monitoring of Stone Creek, paragraph 84:** Detailed submissions on this monitoring are made in the MMO's written summary of the Specific Issue Hearings into the Compensation Site and are not repeated here. However, this para. could usefully refer to the fact that any removal of material by bed-levelling and/or dredging, as suggested here, would require an application for a further marine licence.
24. **Monitoring proposals, paragraph 111:** this para. suggests that newly created intertidal habitat, post-construction, will be monitored by three stations on each of two transects across each of the four RTE fields. The MMO queries whether two transects across each RTE field is sufficient, given the size of each RTE field, the predicted variation in site conditions across each field, and the potential for differing rates of site development due to the control of sedimentation through operation of the

sluice mechanisms. Further, the MMO questions how the North bank control site will be determined given the variability in sedimentary conditions experienced on the north shore (e.g. relatively sandy in places) compared with the southern shore, where mud predominates.

ANNEX 2

MMO comments on the draft Compensation Site Legal Agreement at EX28.3 Part 10

1. These comments are in addition to those overarching comments that are made by the MMO in its written summary of the oral case put at the Specific Issue Hearing into the Compensation Site.

Clause 1 – Definitions

2. **The Definition of ‘Advisory Group’** – the organisations are listed in Schedule 3 and not 4.
3. **The Definition of ‘Compensation Scheme’** describes the scheme as that outlined in Schedule 2 of the Agreement and in the report entitled ‘Development and Operation of the Regulated Tidal Exchange’ which was submitted on the 12th October 2012. It should be clarified which report this refers to (e.g. currently this is called EX28.3 ‘Final Compensation Proposals’, however there will also be further final reports produced during the Detailed Design stage.
4. **The definitions of Mitigation Areas A and B** are vague – this should be defined by reference to co-ordinates with cross-reference to appropriate maps/plans.
5. **The definition of ‘Quay Works’** should be defined with reference to the specific provision of the DCO that defines Work No.1.
6. **The definition of ‘Severe Weather’** could be improved. –The definition should be redrafted with direct reference to the specific publication (allowing for any superseding documents) which contains the criteria of the Joint Nature Conservation Committee.
7. **The definition of ‘Wet Grassland site’** should be defined by reference to co-ordinates with cross-reference to appropriate maps/plans.

Clause 7 – Dispute Resolution (Procedure)

8. Based on the current wording there is the potential for conflict between Clauses 7.6 and 7.7. Under clause 7.6 the parties agree that where a difference/dispute is required by:
- Any protective provisions attached to an order made under the Planning Act 2008; or
 - Under any similar provision in any order subsequently to be made (as a result of the Consents) by AHPL or others in the Deed;
- to be referred to arbitration, then this Dispute Resolution Procedure does not apply.
9. Under Clause 7.7 the parties agree that where a difference/dispute relates wholly or partly out of the subject matter of the Deed then the Dispute Resolution Procedure applies notwithstanding that arbitration is required to resolve such a difference/dispute by:
- Any protective provisions attached to an order made under the Planning Act 2008; or
 - Under any similar provision in any order subsequently to be made (as a result of the Consents) by AHPL or others in the Deed.
10. The effect therefore is that where a difference/dispute arises wholly or partly in relation to the subject matter of the Deed AND also that difference/dispute is required by an order to be settled by arbitration then Clause 7.6 states that it can only be settled by Arbitration, and Clause 7.7 states that it can only be settled under the Dispute Resolution Procedure.
11. On the assumption that it is possible in reality for there to be such an overlap, the drafting needs to be clearer as to when each type of resolution applies. If, in fact, no such overlap is possible then there is no need for both provisions and one should be selected.

Clause 8 – Adjudication Procedure

12. At clause 8.1.1, the time period specified in accordance with Sections 108 and 116 Housing Grants, Construction and Regeneration Act 1996 is 7 days (excluding Christmas Day, Good Friday and other Bank holidays). It might have been easier to simply say 7 business days and then use the definition of 'business day' (currently located in Clause 14.6).

13. Clause 8.1.2 is silent as to what happens if the parties cannot agree an adjudicator, and (unless the dispute is a Construction Dispute) there is no time limit set for this consultation. Therefore it could cause significant delay. The clause also refers to a 'Construction Dispute'. However, this term is not defined in the agreement and so consequently it is not clear as to exactly what it means. The MMO shares the view expressed by several Interested Parties at the Specific Issue Hearing that this may not be the most appropriate adjudicator for this type of case.
14. In clause 8.2.1, the conduct of the Adjudication is to be in accordance with the TecSA Adjudication Rules 'made or published by the Technology and Construction Court Solicitors Association'. From information on the Association, it is clear that these Rules are often updated. The most recent version appears to be version 3.2. For clarity, the agreement should identify the version of the rules that apply. The issue concerning which different versions of the rules applies, affects clause 8.2.1.2. Five of the six clauses which are not to have effect do not exist in version 3.2 of the rules. Therefore currently it is impossible to interpret how the Adjudication rules are to be applied to such adjudications.

Clause 11 – Confidentiality

15. The MMO shares the concerns expressed by several parties that this clause, in providing that the Applicant has the ability to decide what the Regulators get to see in terms of documentation/information gives it quite a wide power to decide to retain information on the grounds of confidentiality.

Schedule 1 – Mitigation and Compensation

16. Is there a better way of describing the ponds to which Paragraph 2.1 apply? Should AHPL start works in the belief that they are not within 500m of a pond containing newts, then discover that they are, it will be impossible for them to have completed Mitigation Area B 12 months before they started work. If the relevant ponds have previously been identified, they should be mentioned here.
17. The values quoted in Section 2 should reflect those provided in the final compensation site EMMP.

Schedule 2 – The Compensation Scheme

18. The MMO has similar concerns to those expressed by other parties at the Specific Issue Hearing that this Schedule reads more like a policy statement than a legal document. Whilst EX28.3 sets out the proposed scheme in more detail, in some places it is inconsistent with the EMMP and the provisions of the DCO. This Schedule should be drafted in more precise terms so that it can be established, with certainty, whether the Applicant has completed the Compensation Scheme.