

**Planning Act 2008 - Infrastructure Planning (Examination Procedure) Rules 2010**

**Proposed MEP, Killingholme**

**Associated British Ports (10015525)**

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**Summary of Oral representations by Associated British Ports at Compensation Hearings, held 12 and 13 November 2012**

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**ABP's position**

- 1 It has been ABP's position, throughout the hearings on both ecological impact and compensation, to note and support, where appropriate, the evidence offered and the representations made by the technical nature conservation and ecological advisers, in particular Natural England, the Environment Agency and the RSPB and only to intervene when appropriate for the assistance of the Panel.
  
- 2 As far as the hearings held on 12 and 13 November are concerned, ABP fully supports the representations made by the RSPB and as was very clearly stated at the hearing by counsel on behalf of ABP, the ExA are asked to consider with considerable care –
  - a) Whether sufficient detail has been provided by the applicant to the ExA and the nature conservation bodies with regard to its compensation proposals?
  - b) Whether the ExA can be satisfied the applicant has provided "good scientific evidence" to support its compensation proposals?
  - c) Whether the compensation proposals as outlined can actually provide both area requirements and ecological function in terms of compliance with the UK and European law? – although we did also comment that the detail submitted by the client in this respect was somewhat lacking.
  - d) Whether the monitoring and management plans are sufficient to ensure the sustainability of the compensation?
  - e) Whether measures are in place to enforce adaptive management should monitoring indicate the compensations requirements are not being achieved?

- f) Whether, in consequence of the above, sufficient compensation is actually being provided?
- g) Whether, as a result, the applicant's compensation proposals are compliant with the requirements of the Habitats Regulations and the enabling Habitats Directive?
- h) Whether the applicant's proposals are in fact sufficiently certain to enable the ExA to come to a conclusion on this aspect of the project?

To which questions the answer must be 'No'

- 3 Whilst ABP is content to rely on the transcript of proceedings, and the notes of the evidence taken by the Panel during the hearings, it may assist if we drew attention to a number of key points which were made to the Panel during the hearings, both by senior counsel Robert McCracken and Mr Peter Whitehead of ABP Mer on behalf of Associated British Ports.

### Compensation efficacy

- 4 On a number of occasions, counsel for ABP, in supporting counsel for the RSPB asked the ExA to ensure that the efficacy of the compensation proposed was fully tested. Key issues that the ExA were asked to consider included questions as to –
- a) The impact of the proposed rolling programme for bed levelling, sluicing and dredging on the ability of the adjacent mud flats to provide and maintain optimal feeding conditions?
  - b) Whether the proposed RTE control structures would provide sufficient water to keep the site sufficiently wet throughout the tidal cycle?
  - c) The impact of the pumping and sluicing of dredged material on the main channel and Stone Creek?
  - d) Whether the draining channel from the RTE/MR will result in erosion of the MR channel and Cherry Cobb Sand Creek?
  - e) Whether, taking into account the various structures, channels and salt marsh colonisation, the RTE/MR will provide sufficient mudflat habitat?
  - f) Whether Black-tailed Godwits will actually use areas close to the embankments?
  - g) Whether Black-tailed Godwits will actually feed on those areas that are permanently flooded when they prefer exposed mud flats? – and in this context, attention is drawn to the response from the applicants - "*Well they will just have to*".
  - h) What room is there for adjustment if the compensation is found to underperform?
  - i) How rapidly will the infauna colonise?

To which questions the answers must be inconsistent with a sensible or lawful decision to grant the sought DCO

- 5 We emphasised that the burden of establishing adequacy of compensation falls on Able. In Article 6.4 of the Habitats Directive the use of the word '**ensure**' means that certainty is required.

### **Baseline for monitoring**

- 6 We supported the concerns raised by Natural England and RSPB in the context of the baseline for the monitoring of the mudflats and the request from the nature conservation bodies as to the need for surveys at this stage. We also supported the concerns expressed by RSPB, as detailed in the transcript, as to biomass densities.

### **Compensation sites**

- 7 The question was raised as to whether Cherry Cobb Sands Wet Grassland Roost Site is to be permanent or temporary? In response to our questioning, the applicant said that it was temporary but available for as long as it was needed. We pointed out that as this new area of land is designed to replace the key functionality of the Black-tailed Godwit roost, we could not see how it could be viewed as temporary unless it fails. If it fails then further compensation must be provided. Counsel for ABP raised two broad queries relating to legal certainty if this aspect of the NSIP is to be legally compliant with the Directives. The first related to the fact that this roost site proposal is not being considered in terms of necessary consent through the DCO process. The second was that the applicant had not provided any documentary evidence that they had effective and necessary control over the land on which the roost site is proposed.
- 8 In addition, counsel for ABP, pointed out that new data had been presented within the new environmental information, which had itself been submitted extremely late in the examination process (EX 28.3 Part 6), and the applicant had merely extrapolated from the adjacent RTE site data rather than provide actual and up-to-date site specific data. This was unacceptable in law and did not meet the requirements of either the EIA or the Habitats Directives/Regulation.
- 9 Compensation is an integral part of the project and ABP pointed out that as the new proposed wet grassland is an essential component of the compensation "package" being proposed by the applicant, it should have been included in the original environmental statement.

### **RTE culverts and sluice gates**

- 10 Concern was expressed by the Environment Agency, fully supported by ABP that the sluices may need to be enlarged from the size currently proposed – but that the impacts of such an increase in size had not been assessed. This underlined counsel for ABP's general expression of concern as to the prematurity of the application.
- 11 In this context, during consideration of this issue **Mr Peter Whitehead** was invited to address the ExA. He drew the Panel's attention to a fundamental defect, namely that the current sluice design will not allow sufficient water to be stored to operate the RTE as currently proposed. (We spotted this error. What other errors are there that have not been spotted because of the failure to comply with EIA law, consultation requirements and lack of time for reflection?) We still do not know how in fact Able propose to remedy this fundamental deficiency and what knock on effects this may have.

- 12 Whilst we are content to rely on the transcript and the observations which will have been noted by the Panel, Mr Whitehead did point out that in Figures 5.2 (Ex 28.3, Part 3, page 31), the modelling shows that the culverts even in "warping mode" (which maximises the volume of water entering the RTE) will cause a reduced HW level in the RTE when compared to free estuary. For a tide with an estuary level above MHWS (Figure 5.2), the level in the fields only makes about 2.8 AOD compared to 3.63 AOD outside, due predominantly to the "throttle" provided by the sluices and culverts.
- 13 In Figure 7.3 (page 53 Ex 28.3 Part 3), a graph is provided of the excess water available on storage in the RTE for different tidal heights above different RTE ground levels. As Mr Whitehead explained, the problem is that the amount of available excess water for storage in the single RTE field will be considerably less than indicated in Figure 7.3. This seriously affects the ability to transfer water between fields over neap tides when no natural flooding of the RTE will occur, particularly when sedimentation increases the bed level above the original base level.
- 14 Quite simply, ABP submitted that in support of the comments from the regulators and RSPB, the scheme as proposed by the applicant could not work because sedimentation detrimental to the proposed compensation will occur.

#### **South bank mudflat**

- 15 The applicant surprisingly attempted to argue that concreting over the south bank mudflat did not constitute "*irreversible damage*" but was unable to demonstrate that the simultaneity of provision as contemplated in the EU Guidance *Managing Natura 2000 Sites - The provision of Article 6 of the Habitats Directive 92/43/EEC (EC 2000)*, did not apply to its project.
- 16 The Panel were reminded that the Guidance provides in the Table at section 5.4.2 that compensatory measures should - "*normally ... be operational at the time when the damage is effective on the site concerned with the project unless it can be proved that this simultaneity is not necessary to ensure the contribution of this site to the Natura 2000 network*".
- 17 Counsel for ABP drew the Panel's attention to the fact that critically, although the Guidance required proof that simultaneity was not necessary, if the normal practice of requiring it was to be relaxed, the applicant had not presented any evidence to that effect.

#### **Draft Habitats Regulations Assessment**

- 18 Counsel for ABP expressed concern that the draft HRA has been based on flawed data. Whilst the Panel responded to the effect that this was simply the first step on the paper trail, the concern expressed remains, namely that the "first step" is flawed. As a consequence, the draft HRA does not actually reflect the project as currently proposed.

#### **Draft EMMP**

- 19 Considerable concern was expressed by Natural England, the MMO, the Environment Agency, RSPB and Associated British Ports that the hearing had been presented with a new version of the draft EMMP only on the morning of the last day

of the compensation hearings. Although counsel for ABP raised a number of points with regard to the drafting of the latest version of the EMMP, such as querying the party that would actually "control" the monitoring and performance of the compensation, timescales and the lack of an actual plan for the management of the sites. These concerns were shared by RSPB and (in part) reflected the issues raised by the nature conservation regulators.

## **Associated British Ports**