

**Draft Development Consent Order and Deemed Marine Licence Hearing
(Wednesday, 21 and Thursday, 22 November 2012)**

Written summary of oral representations by Natural England

1. This written summary sets out Natural England's final comments on the draft DCO as made orally at the Hearing on 21 and 22 November 2012. The headings below reflect the Panel's agenda items for the hearing. The cumulative suggested text of suggested changes as has been sent to the applicant is appended. Further and final comments on outstanding matters (at least as far as the currently scheduled examination period is concerned) will be provided separately.

21 November 2012

Main Order

2. The possibility of a bond to secure elements of the compensation proposals was raised by the Panel during the Specific Issue Hearing on 11 and 12 September 2012 (see Natural England's summary of 24 September at para.14). Natural England's position is that given the onerous nature in particular of the RTE proposals, a bond to cover those works would increase confidence that the compensation will be adequately carried out as planned, including the long-term management of the site.
3. Article 14(b) goes some way to addressing this point, by providing a guarantee or alternative form of security in respect of "the liabilities of the undertaker to construct and maintain Work No.5 (the compensatory environmental habitat)". This refers to para.5 of Schedule 1 (Authorised Development) that relates to the development of compensatory habitat in accordance with the CEMMP. It therefore goes some way to meeting Natural England's point.
4. Ultimately it is a consideration for the Panel (and the Secretary of State) on the information available to them (and, in due course, him) whether the Applicant's compensatory measures have a sound legal and financial basis for their long-term implementation (see the European Commission's Art.6(4) guidance para.1.5.7). An assessment of the financial feasibility of the measures is part of this – at present, the information on the potential cost of the compensation is at EX28.3(9).
5. The Panel sought views as to the position if the compensation is not successful and the overall coherence of the Natura 2000 network is required to be

maintained. The obligation in Article 14(b) only goes so far. However, if financial security is presented to cover the proposals within the emerging CEMMP (namely the RTE scheme, managed realignment site and wet grassland/roost) the risk that the Secretary of State will be left with an outstanding liability is reduced. If the compensatory measures put forward are unsuccessful and further measures are necessary in order to secure the overall coherence of the Natura 2000 network, the obligation to provide these measures will ultimately fall on the Secretary of State. In this regard the analysis of Ouseley J at paras.65-66 of the Humber Sea Terminals case ([2005] EWHC 1289) is relevant: the Secretary of State is entitled in considering the adequacy of compensatory arrangements as a whole to consider his own powers to secure adequate compensation if needed. Given the uncertainties around the adequacy of the compensatory proposals in this case, Natural England advises that the Secretary of State should be aware of this were he to grant the order for development consent.

Schedule 8 – Deemed Marine Licence

6. Natural England agrees with the submission made by the Marine Management Organisation (MMO) that Clause 9 of the Deemed Marine Licence (DML) should be reworded as it is currently ambiguous. Specifically, the reference to “Cherry Cobb Sands channel” at sub-clause (1)(f) should read “Cherry Cobb Sands breach” and the reference to disposing of the dredged material on the “intertidal area” should be amended to clarify that this means the area within the managed realignment site.
7. It was agreed with the Applicant that Clause 23(3) be amended to change “below the level of -11.5 metres Chart Datum” to “below -11 metres” Chart Datum.
8. It was agreed with the Applicant that in Clause 35 “the use of pile shrouds” would be included in addition to the measures considered in the piling method statement, as the assessment of piling noise disturbance to SPA birds has been undertaken on the understanding that these would be in place.
9. It was agreed with the Applicant that an additional sub-clause be added to Clause 36 to state that “percussive piling shall be carried out in accordance with the cold weather piling restriction”, making the provision consistent with Clause 35.

22 November 2012

Schedule 11 – Requirements

Requirement 17

10. Natural England's consultation response to the Applicant was that Requirement 17(1), (2) and (3) should refer not only to the environmental statement but also to the further information that has been provided as part of the examination process. The Applicant already agreed at the Hearing to amend the definition of "environmental statement" in Requirement 1. The point is that baseline data and the analysis of it has moved on since submission of the environmental statement. Most obviously the compensation proposals have changed. For the avoidance of any doubt Natural England reiterates that this should be reflected in the text of Requirement 17.
11. Minor points were suggested by the Panel allowing scope for multiple local authorities to be consulted and by Natural England that the MMO should be a consultee on the CEMMP.
12. A separate point relates to the timetable for the works. It is important that there be not only an implementation timetable for the various EMMPs, but that this be related to the timetable for the works on the authorised development. The Applicant provided an indicative timetable of works insofar as they relate to the compensation proposals at the hearing on 13 November 2012. Natural England considers that a new requirement should be added (or another suitable mechanism) to link the provision of both mitigation and compensation to the main consented development. The Applicant confirmed at the Hearing that it would consider providing a "suitable linkage". One way of doing this might be to incorporate the indicative timetable (which would require some amendment to include Mitigation Area A) within the DCO and to add a new requirement that the authorised development only be carried out in line with the sequence in that timetable. The Panel noted that it may be possible to include something of this nature within Requirement 3 (*Stages of development*). The form of specification of such a linkage is properly a matter for the Applicant, not Natural England.

Requirement 27

13. Natural England considers that Requirement 27 could be better expressed (in line with its consultation comments).
14. In particular, the reference in the Requirement to the "Secretary of State for the Environment, Food and Rural Affairs" is anomalous, given that Natural England has responsibility for licensing activities that may impact upon European protected species on the Secretary of State's behalf, and should be removed. A suggested rewording of the Requirement is included in the Annex, relying in part on the relevant model provision.¹

¹ Note however that the reference to the Secretary of State appears to derive from that model provision (34), that the Applicant relied upon when drafting the DCO.

15. Nationally protected species should be capable of being adequately protected through the various EMMPs.

Requirement 40

16. Three separate points arise in relation to Requirement 40.

17. First, in relation to noise mitigation, sub-paragraphs (3) and (4) have broadly been agreed by an email dated 19 November 2012 and this was confirmed at the Hearing. Suggested wording is included in the Annex.

18. Secondly, the Applicant proposes to provide two buffers to protect North Killingholme Haven Pits SSSI and Mitigation Area A. It is agreed that these need to be safeguarded to prevent an impact on birds within the respective nature conservation areas. However, as drafted the Requirement only restricts storage. It is understood that the Applicant only intends to use these areas for storage, but (i) the protection should be expressed more generally so that it would restrict other uses or activities (such as structures) to the same degree, (ii) any storage (or other) use should not compromise the management of the 60m operational buffer to Mitigation Area A as “species rich neutral grassland” – as expressed in the TEMMP (20 November 2012 version, p.20) and (iii) Natural England should have control over variations to the Requirement. Again, wording to cover these points is suggested in the Annex.

19. In addition, the two buffers should be clearly indicated on the plans accompanying the DCO. This is important to ensure that those planning the works are aware of the buffer zones. This would be in addition to the provision in sub-paragraph (2) of the requirement for on-site markings. The Applicant confirmed that it would consider this.

20. Finally, in relation to North Killingholme Haven Pits SSSI more generally, it has been the agreed position between the parties for some time that certain improvements are required as part of the proposed mitigation (see NE’s 3 August representations at paras.2.26.1 and 2.27.1; see also HRA StoCG at para.6.2.3 in relation to improvements for little ringed plover). The SSSI is currently in unfavourable condition and the Applicant is the site owner. The Applicant confirmed that this will be included within the TEMMP. Were the scheme to proceed, ideally, these improvements would be additionally secured through the legal agreement.

Other points on Requirements

21. While the matters do not fall within Natural England’s remit, it was noted that just as there is some overlap between Requirements 16 and 32 (listed buildings)

there appears to be overlap between Requirements 14 and 38 (both on contaminated land).

Other legal agreements (e.g. mitigation measures)

22. Natural England made comments on the legal agreement at the Hearing on 12-13 November 2012, in its 9 November submission for that Hearing and in its 16 November summary. Natural England's position remains that a robust legal agreement would provide greater confidence in the mechanism by which the compensatory habitat proposed will be secured. This is for the reasons set out at para.58 of the 16 November summary. It is important to emphasise that this is without prejudice to Natural England's advice to the Secretary of State as to the uncertainties over the effectiveness of the proposals themselves. *Whatever* one's view of the compensatory habitat, if it is to be relied upon, it should be secured as robustly as possible. In addition to finalising and agreeing the EMMPs, Natural England is willing to enter into a legal agreement with the Applicant to facilitate this. This is subject to the agreement of terms, but Natural England is cautiously optimistic that these can be settled.
23. As the Applicant has emphasised, the suggestion of a legal agreement was Natural England's, derived in part from analogies of compensation agreements elsewhere (albeit without the DCO context). Furthermore, Natural England provided the Applicant with a model legal agreement (relating to Bathside Bay Container Terminal) between (then) English Nature, Harwich Haven Authority, the Environment Agency and Harwich International Port Authority (dated 2004). Natural England did not intend for that legal agreement to be adopted with very little alteration, as happened. In any event, the Bathside Bay legal agreement is far from perfect. The Applicant accepted a number of criticisms of its draft legal agreement (both from Natural England and other parties) at the 12-13 November Hearing, however no new version has been presented and there has been no subsequent correspondence from the Applicant in relation to the legal agreement. The Applicant confirmed at the Hearing that it has not progressed the document further, except, perhaps, to remove certain provisions relating to confidentiality.
24. Natural England can only provide assistance to the Applicant within the bounds of reasonableness and does not have capacity to draft documents of this nature on behalf of private developers (nor would that be appropriate). However, it is willing to assist by providing further comments and continuing to work with the Applicant on coming to an acceptable draft.
25. However, it is highly unlikely that there will be a final legal agreement signed by the end of the examination period. The question therefore arises as to what role (if any) it may play in the Panel's recommendation. It may be helpful to set out a few points in this regard.

- a. There is no requirement that a legal agreement must be finalised and signed by the parties in order for weight to be attributed to it by the Panel.
- b. The role of the legal agreement is to provide additional confidence that the CEMMP can be secured, this is particularly important given that some of the compensatory measures relied upon fall outside of the red line area for the application.
- c. It is expected that the legal agreement will be bound together with the CEMMP and will provide measures whereby Natural England (and any other parties to it) are in a position to enforce those provisions, should that be necessary, whether by a robust dispute resolution mechanism, court injunction or otherwise.
- d. Therefore the legal agreement cannot sensibly be considered in isolation from the CEMMP, the final version of which will not be ready before the close of the examination.
- e. The burden must be on the Applicant to go as far as it is willing and able to propose a robust technical, legal and financial basis for the compensation it puts forward.
- f. Both in relation to the legal agreement and the CEMMP, Natural England will endeavour to set out its final position as far as it is reasonably possible in the very limited number of hours now remaining at the end of the examination process. The Panel will therefore be in a position to consider any outstanding concerns expressed, together with any concerns of its own, when deciding what weight to give to the legal agreement and the CEMMP. However, there is no reason to doubt that some form of legal agreement is achievable, and can in due course be settled.
- g. There is no reason why a legal agreement may not be signed prior to the Secretary of State's determination.² It is not anticipated that the compensatory proposals will change in any significant degree. It will be important to include appropriate triggers in the agreement so that it does not bind the Applicant unless the DCO is granted and does not bind Natural England (or the MMO) unless the Secretary of State approves the compensatory measures. If other parties, such as the RSPB can be brought into the agreement, so much the better.
- h. There is scope also for the legal agreement to include elements of the mitigation proposals (all or part of the TEMMP) and particularly the

² Natural England does note, though, the RSPB's comments at the second compensation issue specific hearing that these agreements can take a long time to settle. If other parties were to be involved that would likely extend the period required to settle the document.

proposed improvements at North Killingholme Haven Pits SSSI, which is also without the red line application area.

26. The Applicant argues that the agreement is “not necessary for the guarantee that compensation will be provided by AMEP” (summary of 12-13 November Hearing para.159). Natural England does not accept that it would be otiose. However, nor does it seek to foist it onto the Applicant – it must be a matter for the Applicant what it puts forward and a matter for the Secretary of State what he considers acceptable in light, in particular, of the European Commission’s guidance. As is proper, Natural England seeks only to facilitate the process and help to provide mechanisms so that the Applicant can deliver what it purports to rely upon. To the extent that it is suggested by the Applicant that Natural England has been unhelpful or has acted inconsistently (see its summary of 12-13 November Hearing at para.158ff), this is not accepted. Natural England has been working tirelessly to assist the Applicant in circumstances where essential elements of both the detail and the mechanism of the compensatory proposals relied upon have only been presented and developed at an extremely late stage in the examination process.

Any other business

27. It is agreed that there is an error in the development boundary as indicated on Works Plan No.5 submitted at the Hearing. It should not include the strip of land incorporating the railway through North Killingholme Haven Pits SSSI.

23 November 2012

ANNEX

DCO: suggested amended wording

Schedule 8 – Deemed Marine Licence

9. (1) The licence holder is permitted to carry out capital dredging at the following locations:-

...

(f) the Cherry Cobb Sand ~~channel~~ breach to a depth of 5 metres Chart Datum.

...

[Within Table, last row, first column]

The Cherry Cobb Sand ~~channel~~ breach

[Within Table, last row, fourth column (*Deposit location*)]

If the dredged material is suitable the intertidal area within the managed realignment site landward of Cherry Cobb Sands channel

23.

...

(3) If the licence holder carries out the activity licensed under paragraph 9(1)(b) then it ... must not undertake maintenance dredging below the level of -11.5 metres Chart Datum

35.

[After (a) insert new sub-clause] the use of piling shrouds

36.

[After (d) insert new sub-clause] percussive piling shall be carried out in accordance with the cold weather piling restriction

Schedule 11 - Requirements

[Potentially include **new Requirement** relating to the timetable and/or sequence of works]

17. (1) The authorised development shall not commence until the compensation environmental management and monitoring plan reflecting the survey results and ecological enhancement measures included in the environmental statement and the further environmental information provided by the undertaker ~~undertaker's proposed compensation package~~, has been submitted to and approved by Natural England after consultation with the Environment Agency, Marine Management Organisation and the relevant planning authorityies.

(2) The authorised development shall not commence until the marine environmental management and monitoring plan reflecting the survey results and ecological mitigation and enhancement measures included in the environmental statement and the further environmental information provided by the undertaker, has been submitted to and approved by the Marine Management Organisation after consultation with the Environment Agency, Natural England and the relevant planning authorityies.

(3) The authorised development shall not commence until the terrestrial environmental management and monitoring plan reflecting the survey results and ecological mitigation and enhancement measures included in the environmental statement and the further environmental information provided by the undertaker, has been submitted to and approved by Natural England in consultation with the Environment Agency, and the relevant planning authorityies.

...”

[Substitute for Requirement 27]

27. (1) No stage of the authorised development shall commence until it has been established by existing or further survey work whether any European protected species or nationally protected species is present.

(2) Where a European protected species is shown to be present, that stage shall only be commenced following appropriate consultation with Natural England and after any necessary licence has been obtained from Natural England pursuant to regulation 53 of the Conservation of Habitats and Species Regulations 2010.

(3) “European protected species” has the same meaning as in regulations 40 and 44 of the Conservation of Habitats and Species Regulations 2010.

40. (1) During the construction and operation of the authorised development, no storage, use of plant or other development shall take place

(a) at a height greater than 3m from ground level within 70m of the North Killingholme Haven Pits Site of Special Scientific Interest, or

(b) at a height greater than 6m from ground level between 70m and 150m from the North Killingholme Haven Pits Site of Special Scientific Interest, or

(c) at a height greater than 9m from ground level between 150m and 200m from the North Killingholme Haven Pits Site of Special Scientific Interest, or

(d) at a height greater than 10m from ground level within the 60m operational buffer strip adjacent to Mitigation Area A

unless otherwise agreed in writing by Natural England.

~~(2) Before any storage activity referred to in sub-paragraph (1) on the Order land takes place, the exclusion buffer areas referred to in sub-paragraph (1) shall be clearly marked on-site (by pegs or otherwise) to the written satisfaction of the relevant planning authority.~~

~~(3) The construction and operation of the works shall not be permitted to be carried out to the extent that it causes noise levels measured as L_{Amax} exceed 65dB L_{Amax} A) unless an alternative level is agreed with Natural England as a result of concurrent bird and noise monitoring at the boundary of anywhere in the North Killingholme Haven Pits Site of Special Scientific Interest, unless otherwise agreed in writing by the relevant planning authority in consultation with Natural England based on the findings of monitoring programme and taking account of the noise level duration.~~

~~(4) The construction and operation of the works shall not be permitted to be carried out to the extent that it causes noise levels to exceed 65dB L_{Amax}) unless an alternative level is agreed with NE as a result of concurrent bird and noise monitoring, anywhere in the Core Area of Mitigation Area ‘A’ (separated from the operational boundary of AMEP by a 90m green buffer strip as defined in the terrestrial environmental management and monitoring plan¹), unless otherwise agreed in writing by the relevant planning authority in consultation with~~

¹ This will need to be incorporated into the TEEMP

Natural England based on the findings of monitoring programme and taking account of the noise level duration.

...