



# Department for Transport

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Our Ref: TWA 8/1/4

Your Ref: ADW/Y059258

28 August 2013

Dear Sirs,

## **PLANNING ACT 2008: APPLICATIONS FOR THE PROPOSED ABLE MARINE ENERGY PARK DEVELOPMENT CONSENT ORDER AND FOR CERTIFICATES UNDER SECTION 127**

1. I am directed by the Parliamentary Under Secretary of State, Norman Baker, appointed by the Secretary of State for Transport to decide this application (in this letter referred to as "the Secretary of State") to say that consideration has been given to:

- the report of the Examining Authority comprising a panel of three members: Robert Upton, Simon Gibbs and Peter Widd ("the Panel"), who conducted an examination into the application made by your client Able Humber Ports Limited ("the applicant") on 16 December 2011 for the Able Marine Energy Park Development Consent Order ("the Order") under sections 37, 114, 115, 117(4), 120 and 122 of the Planning Act 2008 ("the 2008 Act"); and
- the reports of the Examining Inspector, Robert Upton, appointed to consider the associated applications for certificates under section 127 of the 2008 Act ("the section 127 certificates") in relation to land owned by Associated British Ports, the Harbour Master Humber and Network Rail Infrastructure Limited.

2. The examination of the Order application began on 25 May 2012 and was completed on 24 November 2012. The examination was conducted on the basis of written evidence submitted to the Panel and by a series of hearings held in Grimsby, Immingham and Hedon between 12 July and 22 November 2012. The applications for section 127 certificates were considered concurrently with the compulsory acquisition hearing relating to the Order.

3. The Order would grant development consent for a marine energy park on the south bank of the Humber Estuary at Killingholme in North Lincolnshire comprising a new quay, together with facilities for the manufacture, assembly and storage of marine energy components, primarily offshore wind turbines (referred to in this letter as "the project"). Associated development comprised in the project would include dredging and land reclamation and an ecological compensation scheme on the north bank of the Humber

Estuary. Ancillary matters would include the creation of a harbour authority, a Deemed Marine Licence, the compulsory acquisition of land and rights in land for the purposes of the project, and the diversion of two footpaths. The section 127 certificates relate to statutory undertakers' land in or over which interests or rights are required for the purposes of the project.

4. Enclosed with this letter is a copy of the Panel's report. The main features of the project are described in section 2 of the report. The Panel's findings are set out in sections 6 to 16, and its conclusions and recommendations on the request for development consent, the request for compulsory acquisition powers and the terms of the Order are set out (respectively) at sections 17, 18 and 19 of the report. The Examining Inspector's conclusions on the section 127 certificates are at Appendix D to the Panel's report.

### **Summary of the recommendations of the Panel and the Examining Inspector**

5. The Panel recommended on page ii of its report that the Order be made in the form set out in Appendix K to the report. The Examining Inspector recommended that the section 127 certificates be issued in the form set out in the relevant sections of Appendix D to the Panel's report.

### **Summary of Secretary of State's views**

6. For the reasons explained at paragraphs 17 to 23 and 40 in this letter, the Secretary of State considers that he is not yet in a position to decide whether to accept the Panel's recommendation. He is, nevertheless, minded to agree with the Panel that he should make an Order granting development consent for the project, subject to receiving satisfactory evidence of the following:

(1) in relation to the "*substantial risk*" identified by Natural England that the ecological compensation measures will not work, confirmation from the applicant that:

(a) reasonable additional measures can be implemented to reduce that risk, or

(b) developments since the Panel examination have increased Natural England's confidence in the effectiveness of the compensation proposals such that they no longer consider the risk to be "*substantial*"; and

(2) assurance from the applicant, having consulted with Network Rail and the Office of Rail Regulation ("ORR"), that the project will not jeopardise any future operations of the Killingholme Branch railway.

7. The process by which the applicant is invited respond, and by which the response will be made available to interested parties for comment, is set out in paragraphs 56 and 57 below. The Secretary of State is not inviting representations on other matters referred to in this letter.

### **Secretary of State's consideration**

8. The Secretary of State's consideration of the Panel's report is set out in the following paragraphs. His consideration of the Examining Inspector's reports is at

paragraphs 42 to 44 below. All paragraph references, unless otherwise stated, are to the Panel's report ("PR").

## **Policy Context:**

### **Compliance with the National Policy Statement**

9. The Secretary of State agrees with the Panel that the project conforms with the policy objectives set out in the National Policy Statement ("NPS") for Ports and supports the objectives of the Overarching Energy NPS and the Renewable Energy Infrastructure NPS (PR 17.1). Like the Panel, he attaches considerable weight to the statements in the Ports NPS which are relevant to the project. In particular, he considers that the project would play a part in ensuring the security of energy supplies by contributing to the development of renewable energy in the form of offshore wind; it would support economic growth by creating a new cluster of offshore energy businesses in and around the development; and would help to meet the expected substantial demand for port capacity to support the offshore wind industry (PR 7.1-7). The Secretary of State accordingly agrees with the Panel that the presumption in favour of granting consent for urgently needed port infrastructure of this sort, in the terms set out in the Ports NPS, is relevant to the project (PR 7.8).

10. The Secretary of State agrees further with the Panel for the reasons given at PR 8 that all the requirements set out in the NPS for Ports have been addressed adequately by the applicant, subject to resolution of flood protection issues at the main development site and the compensation site at Cherry Cobb Sands, which was outstanding at the end of the examination (PR 8.42). In this respect, he notes the Panel's view that these issues would be addressed either by the conclusion of legal agreements between the applicant and the Environment Agency or by the inclusion of additional requirements and protective provisions in the Order (PR 19.90-93). As described further in paragraph 51(k) below, the Environment Agency has now addressed these issues by way of legal agreements. The Secretary of State has accordingly agreed that there is no additional requirement for protective provisions within the Order.

### **Compliance with local policies**

11. The Secretary of State agrees with the Panel that the project conforms with relevant local plans (PR 17.5). In particular, he notes the view of North Lincolnshire Council that the project complies with the policies in the North Lincolnshire Local Plan which allocate areas on the South Humber Bank, including the application site, for estuary-related industrial land uses. He notes further the support for the project in the Council's Core Strategy which identifies the South Humber Bank as a strategic employment site, and refers to the opportunity provided by the deep water channel to develop a new port between Immingham Port and the Humber Sea Terminal (PR 4.13-15). The Secretary of State has had regard also to the strong support in principle for the project expressed by North East Lincolnshire Council, on the basis that the project would help to regenerate the local and wider area (PR 5.14).

12. The Secretary of State notes that the East Riding of Yorkshire Council ("ERYC") considered that Cherry Cobb Sands would be a suitable location for the proposed ecological compensation site, while expressing doubt about whether the new habitat would support a significant population of Black Tailed Godwit ("BTG"), and about the viability of the temporary wet grassland originally proposed by the applicant at Old Little Humber Farm. The Secretary of State agrees with the Panel that, with the exception of the

ecological compensation proposals on which he is seeking further information, the key issues identified by ERYC in its Local Impact Report have been adequately addressed (PR 5.7-11). He notes further that ERYC decided on 16 May 2013 to grant planning permission for the applicant's amended proposals for a temporary wet grassland compensation site at Cherry Cobb Sands on the basis that they represented an acceptable solution to the loss of habitat on the south bank of the Humber Estuary, especially for BTG, as a result of the project.

### **Other policy considerations**

13. The Secretary of State agrees with the Panel that the revocation of the Regional Strategy for Yorkshire and the Humber on 22 February 2013 has no effect on the policy context, given that the relevant objectives in the Regional Strategy are taken forward in the plans prepared by the local authority and in the Local Enterprise Partnership's ("LEP") strategy "A Plan for the Humber 2012-2017" (PR 4.8-10). He notes further that the LEP strategy supports the creation of a super cluster of new industry on both banks of the Humber Estuary in the renewable energy sector (PR 5.16-17).

14. The Secretary of State notes that the Marine Management Organisation ("MMO") published the draft East Inshore Marine Plan referred to by the Panel at PR 4.19-23 for public consultation on 16 July 2013. Although the Plan is not yet in effect, the Secretary of State has considered the extent to which the policies in the draft Plan are relevant to the project. In particular, he considers that the project finds significant support in the following policies in the draft Plan: policy EC2 as regards the likely employment benefits that the project would bring to the Humber Estuary area; policy EC3, in that the project would contribute substantially to offshore wind generation; and policy GOV1 because the project would (as noted by the MMO) provide infrastructure on land for wind-related businesses that would support activities in the marine area. The MMO has also expressly recognised at paragraph 290 of the draft Plan the crucial role which the project, along with other developments, would play in relation to the development of renewable energy.

15. With regard to the potential adverse impacts of the project, the Secretary of State recognises the importance of giving appropriate weight to the conservation of biodiversity in accordance with policy BIO1 and his duties under section 40 of the Natural Environment and Rural Communities Act 2006 in deciding this application, once he has received the further information from the applicant requested in question (1) in paragraph 6. To the extent that policies PS3 (protecting the efficiency of existing port operations and future port development) and DDS1 (protecting licensed dredging and disposal areas) are relevant to the project, the Secretary of State considers that any impacts in these respects have been sufficiently addressed in the examination of the project. He is satisfied that the Order will provide appropriate safeguards, including the Deemed Marine Licence and the protective provisions for other port operators, and that the compulsory acquisition powers required for the project are justified for the reasons given later in this letter.

### **Principal issues:**

#### **Whether the project qualifies as a nationally significant infrastructure project**

16. The Secretary of State agrees with the Panel for the reasons given at PR 9.7-15 that the project as presented to the examination is a nationally significant infrastructure project having regard to the provisions of the 2008 Act and guidance produced by the Department for Communities and Local Government ("DCLG") on what constitutes legitimate associated development.

## Requirements of the Habitats Regulations

17. The Secretary of State notes that there was no dispute among any of the parties that the proposed Able Marine Energy Park would result in both a likely significant effect and an adverse effect on the integrity of the Humber Estuary Special Area of Conservation, Special Protection Area and Ramsar site (“the European sites”) (PR 10.1, 12-13). He is therefore required by the Conservation of Habitats and Species Regulations 2010 (“the Habitats Regulations”) to carry out an appropriate assessment to identify the nature and extent of these impacts; to consider alternatives to the applicant’s proposals; to consider whether there are Imperative Reasons of Overriding Public Interest (“IROPI”) for approving the development; and to assess the adequacy of the compensation proposals. Furthermore, the Habitats Regulations (which implement the European Habitats Directive<sup>1</sup>), require that the ‘*Secretary of State shall secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.*’ (regulation 66). The Secretary of State therefore has an obligation to protect the overall coherence of Natura 2000.

18. The Secretary of State agrees with the Panel’s conclusions that there are no realistic alternatives to the Able Marine Energy Park with lesser impacts on the European sites. The Secretary of State notes the Panel’s conclusions that there are IROPI in favour of the proposals and that the overall coherence of *Natura 2000* would be protected by the compensation proposals as revised during the examination, subject to the agreement and implementation of three Environmental Management and Monitoring Plans (“EMMPs”) (PR 17.3-4).

19. With regard to the EMMPs, the applicant informed the Secretary of State on 15 April 2013 that it had entered a management agreement with Natural England to secure implementation of the measures necessary to mitigate and compensate for the likely adverse impact of the Able Marine Energy Park on the European sites (see PR 10.226-229). The agreement includes details of the EMMPs. Natural England advised the Secretary of State on 1 May 2013 that, although a small number of matters had not been concluded to the total satisfaction of all parties during the negotiations for the legal agreement, it considered that the agreement provides a robust legal mechanism to deliver the measures described within it. However, Natural England made clear that its acceptance of the legal agreement was without prejudice to its advice on the uncertainties and risks over the effectiveness of the compensation proposals explained in its evidence to the Panel.

20. While the Secretary of State recognises the importance of the EMMPs in ensuring delivery of the agreed compensation proposals, he remains concerned about the degree of risk identified by Natural England, who have been designated as the ‘appropriate nature conservation body’ for the purposes of the Habitats Regulations. In particular, he has noted the following comment in Natural England’s submission to the Panel of 16 November 2012 (HEA 086) and referred to their letter of 1 May 2013: “*It is possible that the compensatory measures will succeed, however there is a substantial risk that they will not. It is acknowledged that there will always be doubts in relation to compensation proposals, however the doubts in this case are amplified by a combination of the points noted above: time lag; limited extent; questionable quality; and uncertain implementation.*”

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<sup>1</sup> (Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora)

21. The Secretary of State is mindful that the Panel considered the adequacy of the compensatory measures, and whether they would ensure the overall coherence of Natura 2000 at some length (PR 10.87-237). In particular, they commented that: *“Any compensation measures should be designed to secure the desired outcomes, but as the success of such measures can rarely be predicted with certainty it is not possible to say that there is ‘no reasonable scientific doubt’ as to their success.* (PR10.176).

22. In relation to the time lag between the commencement of works on the proposed site and the compensation becoming fully functional, the Secretary of State notes that a time lag may be unavoidable and that the Panel considered the relevant guidance on compensatory measures and concluded that *“the test is the coherence of the Natura 2000 network and this must allow for damage to occur at a given site provided the necessary compensation measures have been secured not necessarily delivered. The two sets of guidance both clearly allow for a possible time lag, although obviously they will not encourage it.”*(PR 10.187).

23. The Secretary of State agrees with the Panel’s approach described in those paragraphs quoted above. However, he is concerned by the submission put to the Panel by Natural England’s that there is a *“substantial risk”* that the compensatory measures will not work, particularly in light of his obligations to secure necessary compensation pursuant to the Habitats Regulations (see paragraph 17 above). He has therefore requested further information in paragraph 6 above to provide further assurance that these obligations can be met.

### **Social and economic significance of the project**

24. The Secretary of State notes the strong support expressed for the project by the local MPs, the two Lincolnshire local authorities and the LEP because of the key role the project would play in regenerating the Humber region. He notes in particular the applicant’s unchallenged estimate of possibly 9,000 new jobs as a result of implementing the project; North Lincolnshire Council’s view of this as a *“transformational”* project of critical significance to its economic strategy for the area; and the LEP’s view of the project as a uniquely promising opportunity for the region (PR 11.1-6, 11.11-13). While recognising that Associated British Ports (“ABP”) did not share this view of the project’s significance, the Secretary of State agrees with the Panel that in deciding the Order application, significant weight should be given to the strong local support for the scheme because of its likely socio-economic potential and associated benefits (PR 11.8-10, 11.14).

### **Adequacy of the Environmental Statement**

25. The Secretary of State notes the conclusions of the Panel at PR 12, that the environmental information before him is sufficient for the purposes of making a properly informed decision in accordance with regulation 3(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations.2009 (the 2009 Regulations). He also notes the Panel’s conclusion that the applicant’s submission of supplementary environmental information during the examination did not mean that the Environmental Statement submitted by the applicant was not in fact an Environmental Statement for the purposes of those Regulations. While he does not disagree with the Panel’s conclusions on the adequacy of the Environmental Statement, he requires the further information referred to at paragraph 6 above before he determines this application.

## **Marine issues and the implications for other users of the Humber**

26. The Secretary of State has considered the Panel's comments at PR13.1-11 on the conflict between the project and ABP's plans for the development of the Western Deepwater Jetty ("WDJ") at Immingham. He accepts the Panel's view that there are possible alternatives available for the WDJ which would not require the "triangle site" that is owned by ABP and is needed by the applicant for full implementation of the project.

27. The Secretary of State agrees with the Panel that the concerns of C.RO Ports (Killingholme) Limited ("C.RO") about potential adverse impacts of the project on the use of C.RO's own marine facilities have been adequately addressed by the protective provisions in Part 6 of Schedule 9 to the Order (PR 13.12-17). The Secretary of State notes that the MMO was satisfied with the modelling which had been carried out in relation to the capital and maintenance dredging required for the project, and with the modelling of the flow regime and the dispersal of arisings in the deposit areas. He agrees with the Panel that these matters have been addressed adequately in the Deemed Marine Licence (in Schedule 8 to the Order) and in the future would be subject to licensing decisions in the context of the Marine Environmental Mitigation and Monitoring Plan (PR 13.18-30).

28. The Secretary of State agrees with the Panel that the protective provisions for E.ON and Centrica in Parts 9 and 10 of Schedule 9 to the Order adequately address their concerns about predicted siltation at the outfalls/intakes for their power stations (PR 13.31-35). As regards the impacts of the project on the hydrodynamics of and sedimentation in the Humber Estuary, the Secretary of State agrees with the Panel that, with the supplementary modelling carried out by H.R. Wallingford, these issues have been addressed adequately (PR 13.36-41).

29. As regards the relationship between the MMO and the Harbour Master Humber, the Secretary of State is satisfied that the terms of the Order and the Deemed Marine Licence as recommended by the Panel would ensure sufficient clarity about their respective responsibilities and would support a viable working relationship (PR 13.42-47).

## **The Killingholme Loop**

30. The Secretary of State agrees with the Panel that, while there remains uncertainty about the need for and route of the possible Killingholme Loop railway scheme, to preserve the opportunity for that development and to meet the concerns of potential users of it (C.RO and C.GEN), the railway line which currently runs through the site of the Able Marine Energy Park should remain within the operational network of Network Rail (PR 14).

## **Road transport issues**

31. The Secretary of State agrees with the Panel that, for the reasons given at PR15.1-15, the traffic impacts of the project have been assessed comprehensively, using appropriate techniques and assumptions agreed with the relevant highway authorities, and that necessary mitigation measures have also been assessed adequately. He is accordingly satisfied that the highway network can accommodate the traffic associated with the project without causing detriment.

32. With regard to the Order, the Secretary of State agrees with the Panel that the protective provisions for Royal Mail, which are now at Part 13 of Schedule 9 to the Order will adequately protect its operations in the area (PR 15.16-20). He is satisfied that

requirement 27 in Schedule 11 to the Order (at Appendix K to the PR) would ensure the implementation of a construction travel plan and a travel plan relating to the operation of the project, both of which would require the approval by the relevant planning authority (PR 15.21-24). He notes also that the applicant has signed appropriate agreements with the two local highway authorities under section 106 of the Town and Country Planning Act 1990 relating to provision of necessary junction improvements (PR 15.25-28).

### **Rights of way**

33. The Secretary of State agrees with the Panel that the proposed closure of District of North Lincolnshire Footpath 50, which runs along the top of the existing flood defence wall, and its diversion around the perimeter of the development site is justified (PR 16.3-4). He agrees also that the closure and diversion of District of East Riding of Yorkshire Paull Footpath 5 is justified for the purposes of creating a breach of the flood defences at Cherry Cobb Sands; and that to minimise the risk of disturbance to birds using the newly created inter-tidal habitat, the re-aligned footpath should be positioned at low level, inland of the new flood defence embankment, as proposed by the applicant (PR 16.5-12).

### **The Panel's conclusions and recommendations on development consent**

34. In addition to the Panel's conclusions referred to earlier in this letter, the Secretary of State notes the Panel's conclusion that the application satisfies all legal and regulatory requirements, including the international obligations of the United Kingdom Government, and that the project can proceed without putting the UK Government in breach of the Habitats Directive (PR 17.2-4). He has, however, not yet reached a view on the adequacy of the ecological compensation proposals pending receipt of the information requested in question (1) of paragraph 6 above.

35. With regard to section 104(7) of the 2008 Act, the Secretary of State notes the Panel's view that the benefits of the project, if fully realised, in terms of its contribution to the local, regional and national economy, its contribution to sustainable energy and carbon reduction, and the creation of employment opportunities in a disadvantaged area, are of major significance and outweigh the adverse impacts of the project (PR 17.6-7). The Secretary of State agrees with the Panel on the extent and significance of those benefits and for this reason is minded to agree that development consent should be given for the project. He has not, however, reached a conclusion on whether those benefits would outweigh the residual adverse impacts of the project pending proper consideration of the information requested in paragraph 6 above.

### **Compulsory acquisition matters**

36. The Secretary of State has considered the compulsory acquisition powers sought by the applicant against the tests concerning compulsory acquisition in sections 122 and 123 of the 2008 Act and associated DCLG guidance, and has taken into account the cases of the applicant and the objectors reported at PR 18.24-138.

37. The Secretary of State agrees with the Panel that, taking into account the Ports NPS, the Overarching Energy NPS, Renewable Energy Infrastructure NPS and the IROPI case made by the applicant in the context of the Habitats Regulations Assessment, there is a compelling case in the public interest for the compulsory acquisition powers applied for (PR 18.144-149). He agrees with the Panel that, having regard to the applicant's Habitats Regulations Assessment Report, there are no appropriate alternative sites to the one



selected (PR 18.150-153, 208). In relation to the scale and layout of the development proposed by the applicant, he is satisfied, based on the Panel's recommendation, that the applicant's assumptions and calculations are reasonable. He is satisfied also that the legal interests in land set out in the revised book of reference that would be subject to compulsory acquisition under the Order (subject to the exclusion of plots 01001, 02013, 06001-5 referred to at paragraph 51(i) below, and subject to the applicant's review of the four proposed easements over Network Rail's land referred to at paragraph 40 below) are required to implement the project (PR 18.154-160, 207). He notes that amendments to the book of reference and land plans are required to reflect the exclusions referred to above.

38. As regards the adequacy of funding to meet compulsory acquisition and blight costs, the Secretary of State agrees with the Panel that the applicant has satisfied the requirements in DCLG guidance in this respect; and that the funding arrangements would be sufficiently secured by the applicant's unilateral undertaking given to North Lincolnshire Council and by article 14 of the Order (guarantees in respect of payment) (PR 18.161-168, 19.33-38). The Secretary of State further agrees with the Panel that interference with human rights as a result of the compulsory acquisition of land for the project would be lawful, necessary, proportionate and justified in the public interest (PR 18.169-171).

39. The Secretary of State agrees with the Panel that, subject to the qualifications in respect of Network Rail's land explained at paragraph 40 below, the case for granting compulsory acquisition powers in respect of the particular interests referred to at PR 18.172-206 is justified for the reasons given by the Panel. He is satisfied that in each case the land in question is required for the development, the public interest would be served by the scale of public benefit which the project would achieve, and this would be frustrated if the land or rights were not acquired.

40 The Secretary of State notes that during the examination the applicant reduced the extent of the compulsory acquisition powers sought over the Killingholme Branch railway which runs through the site of the project to four easements for level crossings. He notes the fact that Network Rail was prepared to grant one easement for a level crossing (referred to in the Examining Inspector's report at PR Appendix D). However, the Secretary of State attaches importance to the current policies of Network Rail and the ORR not to create new level crossings other than in exceptional circumstances. In particular, he is concerned that the creation of four new level crossings may hinder the future operation of the railway as well as create a safety hazard. The Secretary of State notes the Panel's conclusions (at PR 18.186-199) that the Order should authorise the compulsory acquisition of four easements for the purpose of creating level crossings, but seeks further assurances about the future operations of the Killingholme Branch railway. The Secretary of State accordingly invites the applicant to reconsider its proposals for access across the railway in consultation with Network Rail and the ORR for the purposes of providing assurance that the proposal will not prejudice the future operation of that railway. Should this require a reduction in the number of level crossings, the applicant is asked to propose any consequential amendments to the Order, the plans and the book of reference, to confirm the required easements and powers required to enable the construction of those facilities.

41. In relation to those parcels of land which are Crown land, or are owned by statutory undertakers and the undertakers have made representations, the following further requirements under the 2008 Act apply to the inclusion of compulsory acquisition powers in the Order.

## **Certificates under section 127 of the 2008 Act**

### Associated British Ports

42. The Secretary of State agrees with the Examining Inspector, for the reasons given in Appendix D to the PR, that ABP's proposed WDJ at Immingham (referred to at paragraph 26 above) is still at an early stage of development; and that it is not certain that it will proceed or must occupy the site referred to in the PR as the "triangle site", which the applicant requires for the purposes of the project. He agrees further with the Examining Inspector that the acquisition of ABP's land at this time would not cause serious detriment to the carrying on of its undertaking, and notes that there are possible alternatives for the WDJ (PR 13.8-10). Accordingly, the Secretary of State accepts the Examining Inspector's recommendation to issue a certificate under section 127(2)(b) of the 2008 Act in respect of that "triangle site", should he proceed to make the Order.

### Harbour Master Humber

43. The Secretary of State agrees with the Examining Inspector that the fact that the Harbour Master Humber is prepared in principle to grant an under-lease to the applicant in relation to land required for constructing the new quay indicates that the Harbour Master Humber's land can be occupied by the applicant without hindering the undertaking. He therefore agrees that the relevant land may be acquired and not replaced without serious detriment to the carrying on of the undertaking (PR Appendix D). The Secretary of State notes also from the further correspondence (described at 53(d) below) that no such under-lease has yet been agreed. Accordingly he accepts the Examining Inspector's recommendation to issue a certificate under section 127(2)(b) of the 2008 Act in respect of the relevant land, should he proceed to make the Order.

### Network Rail Infrastructure Limited

44. For the reasons given at paragraph 40 above, the Secretary of State has requested further assurances before reaching a conclusion on the Examining Inspector's recommendation to issue a certificate under section 127(2)(b) of the 2008 Act in respect of the four easements sought by the applicant for the creation of level crossings over the Killingholme Branch railway.

### Anglian Water, Centrica and E.ON

45. In a letter dated 16 July 2013, the Secretary of State for Environment, Food and Rural Affairs decided to issue a certificate under section 127(2)(b) of the 2008 Act in respect of land required for the project which is owned by Anglian Water. In a letter dated 27 August 2013 the Secretary of State for Energy and Climate Change advised that he intends to issue certificates under section 127(2)(b) of the 2008 Act in respect of land owned by Centrica and E.ON if the Order is made.

## **Considerations under section 135 of the 2008 Act**

46. Under section 135 of the 2008 Act, the Order may only include provision for the compulsory acquisition of an interest in Crown land, or any other provision applying in relation to Crown land, if the appropriate Crown authority consents. The Secretary of State for Defence has given consent under section 135 for the relevant provisions in the Order to apply to the land owned by the Secretary of State for Defence within the Order

limits. His consent was subject to the inclusion in the Order of protective provisions for the Oil and Pipelines Agency.

47. The Highways Agency (“HA”) advised in a letter dated 2 May 2013 that it would not give consent for the Order to apply to plot 01001 (Manby Road roundabout on the A160) for the purposes of Work No. 2 in Schedule 1 to the Order. The HA considers that powers for the applicant to take temporary possession of and to use this plot are unnecessary because of the Government’s decision in 2012 to accelerate delivery of its A160 upgrade scheme. The HA would be willing, in any eventuality, to work with the applicant on any highway improvements on its land that are required for the purposes of the project. The Secretary of State considers that in the circumstances the proposed powers over plot 01001 are not justified and is satisfied that removing them would not frustrate the implementation of the project or associated highway mitigation measures. He has therefore decided to delete the entry relating to plot 01001 in Schedule 6 to the Order.

48. As regards land owned by the Crown Estate (“TCE”), the Secretary of State notes that during the examination TCE had agreed a formal option for the applicant to purchase the land at Cherry Cobb Sands required for the ecological compensation site (PR 18.216). However, prior to the close of the examination TCE had not given the consent required by section 135 of the 2008 Act in relation to land owned by TCE and required for the construction of the new quay at Killingholme.

49. The Secretary of State accordingly announced on 21 May 2013 that he was setting a new deadline for his decision on this application to allow time for the applicant to negotiate with TCE the terms of a lease over the land in question, such as would enable TCE to give its consent under section 135. TCE advised the Secretary of State on 22 August 2013 that it had reached a formal agreement with the applicant for the lease of that land. TCE was therefore giving consent under section 135(1) of the 2008 Act to the inclusion in the Order of provision for the compulsory acquisition of plots 08001 and 09001 at Killingholme. TCE confirmed also that it was giving consent under section 135(2) of the 2008 Act to the inclusion in the Order of any other provisions that would apply to TCE land or to rights benefitting the Crown for the purposes of the authorised development.

### **Considerations under section 138 of the 2008 Act**

50. The Secretary of State agrees with the Panel that, in relation to the land in which Anglian Water, Centrica and E.ON have or may have a right to keep apparatus, the provisions in article 42 of the Order at Appendix K to the PR for the extinguishment of rights or the removal of apparatus of those statutory undertakers are necessary for the purposes of carrying out the development (PR 18.83-90). In the letters referred to at paragraph 45 above, the Secretary of State for Environment Food and Rural Affairs gave consent under section 138(4)(b) for the purposes of the project and the Secretary of State for Energy and Climate Change has confirmed that he intends to give consent under section 138(4)(b) of the 2008 Act if the Order is made.

### **Draft Order, requirements and obligations**

51. The Secretary of State agrees with the Panel’s conclusions on the text of the Order, subject to the proposed qualifications and further changes detailed below which would be necessary if the Secretary of State decides to make to the Order (references are to Appendix K of the Panel’s report).

(a) Article 2 (interpretation)

A definition of “limits of deviation” has been added (PR 19.22).

(b) Article 11 (provision of works)

The Secretary of State considers that paragraph (3), which would confer permitted development rights for subsequent development not authorised by the Order, is appropriate (PR 19.28).

(c) Article 13 (consent to transfer benefit of Order)

The Secretary of State considers that the provision is appropriate, for the reasons given by the Panel, and is satisfied that it is within the powers of the 2008 Act (PR 19.29-32).

(d) Article 26 (lights on tidal works etc. during construction)

Article 27 (provision against danger to navigation)

Article 28 (permanent lights on tidal works)

The Secretary of State considers that it is appropriate to add provisions to these articles in respect of penalties for failure to comply with the obligations in those provisions, in line with established practice for enactments authorising works in tidal waters (PR 19.40-44).

(e) Article 30 (compulsory acquisition of land)

Paragraph (3) has been deleted as the relevant Crown authorities have now given the consents required under section 135 of the 2008 Act for the purposes of the authorised development (see paragraphs 46 and 49 above).

(f) Article 31 (power to override easements and other rights)

The Secretary of State agrees with the conclusion of the Panel at PR 19.51 that the additional text sought by C.GEN and C.RO is not necessary. He considers further that their use of the Killingholme Branch railway would be safeguarded by the protective provisions in Parts 5 and 6 of Schedule 9 to the Order.

(g) Article 48 (railway network)

The Secretary of State agrees with the Panel that this article is unnecessary and has decided to delete it (PR 19.60-61).

(h) Article 55 (disapplication of regulation 73 of the Conservation of Habitats and Species Regulations 2010)

The Secretary of State has decided to delete this article which would be of no effect since none of the works authorised by the Order would constitute development of the sort described in Part 11 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995.

(i) Schedule 6 (land of which temporary possession may be taken)

Plot 01001 has been deleted for the reasons given at paragraph 47 above. The Secretary of State notes also that although the Panel refers to plots 02013, 06001, 06002, 06003 and 06004 as being required for the project (PR 18.9, 10), these plots (and plot 06005) were omitted from the final form of the Order submitted by the applicant and the Order as recommended by the Panel. He has therefore retained the drafting in Schedule 6 as recommended by the Panel.

(j) Schedule 8 (deemed marine licence)

With regard to paragraph 6, in a letter dated 25 April 2013, the MMO has confirmed that it had not agreed that the amount of rock and gravel that may be placed in the berthing pocket should be increased from 250,000 to 300,000 tonnes (PR 19.70). This provision has been amended accordingly. In addition, references in the Schedule to “the Company” have been changed to “the undertaker” in the interest of consistency with the rest of the Order.

(k) Schedule 9, Part 2 (for the protection of the Environment Agency)

In letters dated 19 April 2013, 7 May 2013, and 16 May 2013 the Environment Agency confirmed that it had agreed with the applicant the terms of legal agreements in relation, respectively, to compensation for the adverse effect from piling on migratory salmon, a marine monitoring regime, and flood defence works and maintenance at the Able Marine Energy Park and the Cherry Cobb Sands sites (see PR 19.90-93). The Secretary of State has accordingly not included in the Order the additional protective provisions contained in Appendix B to the Environment Agency’s closing submission nor the additional requirement 6 in Appendix A to that document. In addition, references to “the Company” have been changed to “the undertaker” in the interest of consistency with the rest of the Order. The Environment Agency confirmed on 5 July 2013 that it had withdrawn all of its objections to the Order application.

(l) Schedule 9, Part 4 (for the protection of Network Rail)

The Secretary of State agrees with the Panel that, in the circumstances of this application, the protective provisions should not include a requirement for Network Rail’s consent to the compulsory acquisition of easements over the Killingholme Branch railway or an indemnity clause (PR 19.100-102). In addition, references to “the Company” have been changed to “the undertaker” in the interest of consistency with the rest of the Order.

(m) Schedule 9, Part 11 (for the protection of Anglian Water)

References to “the Company” have been changed to “the undertaker” in the interest of consistency with the rest of the Order.

(n) Schedule 9, Part 14 (for the protection of AB Ports)

In a letter dated 22 February 2013, the MMO confirmed that it no longer maintained the position expressed at the examination that paragraph 96 of ABP’s proposed protective provisions (in Appendix G to the PR) about the effects of erosion and accretion was

unnecessary. The Secretary of State has therefore decided to insert that paragraph into this Part of the Schedule (see PR 19.151-153).

(o) Schedule 9, Part 15 (for the protection of the Oil and Pipelines Agency)

The Secretary of State has added these provisions as noted at paragraph 46 above.

(p) Schedule 11 (requirements)

The Secretary of State agrees with the Panel that requirement 3A(3) about the use of the authorised development for categories of cargo other than items associated with offshore renewable energy infrastructure is unnecessary and has deleted it (PR 19.175-177).

In relation to requirement 44(1), the Secretary of State has inserted text that was omitted from Appendix K to the PR.

General

52. In addition, the Secretary of State has decided to make various minor drafting changes to the Order which do not materially alter its effect, including changes to conform with the current version of Statutory Instrument Practice (e.g. modernisation of language), changes in the interests of clarity and consistency, and changes to ensure that the Order has the intended effect. The Secretary of State is mindful of the fact that the questions raised in this letter may require the applicant to submit a revised Order in due course. The text of the Order including all the modifications referred to above is being published with this letter.

**Representations since examination**

53. In addition to the various letters received by the Secretary of State since the close of the examination already referred to above, he has received further correspondence and representations as follows:

(a) North Lincolnshire Council advised the Secretary of State on 1 March 2013 of an application by Bethany Jayne Limited for planning permission to construct a building on, and to use as a haulage yard, land which would be subject to compulsory acquisition under the Order. At the date of this letter the application has not been determined. However, this planning application does not alter the Secretary of State's views on the merits of the project or the case for granting compulsory acquisition powers over the land as recommended by the Panel.

(b) In a letter dated 10 July 2013, the RSPB said that it had not had an opportunity to comment on the legal agreement with Natural England (including the Compensation Environmental Management and Monitoring Plan) referred to at paragraph 19 above; that the planning application made to ERYC for the revised compensation proposals represented a post-examination change beyond the powers of the 2008 Act; and that all new material concerning the ecological compensation proposals that had been submitted to the Secretary of State since the examination should be subject to consultation before a decision is made. The Secretary of State considers, however, that none of these matters amount to substantive changes to the compensation proposals considered by the Panel during the examination such as would require consultation with other interested parties. He notes also that the Panel's recommendation that the DCO be made was not contingent

on the applicant entering into a management agreement with Natural England, although that was highly desirable (PR 10.229); and that under the requirements in the Order (if made) the Environmental Management and Monitoring Plans would be subject to approval by Natural England or the MMO after consultation with relevant statutory authorities before the project can be implemented. The Secretary of State does not therefore consider it necessary to invite representations on the matters referred to by the RSPB.

(c) In letters dated 16 and 29 May and 9 and 19 August 2013, ABP said that since the close of the examination the applicant had without notice to other interested parties reversed its position on negotiating an agreement with the Harbour Master Humber in relation to the part of the river bed and foreshore required for the project; and that the applicant had similarly continued to amend its compensation and mitigation proposals without notice to other interested parties. ABP considered that the Secretary of State could not properly proceed to determine this application without reopening the examination to consider these changes. As regards the compulsory acquisition of the interests of the Harbour Master Humber in the river bed and foreshore, the Secretary of State notes that at no point has the applicant withdrawn its request for powers to acquire compulsorily those interests. The sufficiency of the Environmental Statement has been considered at paragraph 25 above. Finally, as with the RSPB's representations, the Secretary of State does not consider that any of the developments regarding the compensation proposals notified to him to date by the applicant since the examination closed are such as to require consultation with other interested parties before he determines this application. The Secretary of State does intend to provide an opportunity to interested parties to respond to any further representations made by the applicant specifically in relation to the further information requested in this letter.

(d) In letters dated 23 July and 8 August 2013, the Harbour Master Humber made further representations explaining the practical effects of issues raised during the examination should the applicant be authorised to acquire compulsorily its interests in the river bed and foreshore for the purposes of the project; and asked that (if made) the Order should be modified so as to limit the interests in that land which could be compulsorily acquired to a new under-lease from the conservancy authority. The representations do not, however, cause the Secretary of State to disagree with the Panel's conclusions at PR 18.178-185 on the case for conferring the compulsory acquisition powers sought by the applicant in respect of those interests.

54. The Secretary of State has received a number of other letters from the applicant and interested parties about the project since the close of the examination. He considers that none of those letters raises a new matter or amount to new evidence which should be referred to other parties, neither do any of them cause him to come to a different conclusion on the findings and recommendations in the Panel's report. The Secretary of State is therefore satisfied that it is unnecessary for him to invite representations on any of that correspondence, or the representations referred to in paragraph 53 above, before he reaches a decision on this application.

### **Secretary of State's overall views on the Panel's conclusions**

55. For the reasons given in this letter, the Secretary of State is minded to agree with the Panel that the Order granting development consent for the project should be made. In particular, he considers that facilitating the regeneration and economic development of the area around the project, and supporting the development of the offshore renewable energy industry are matters of substantial public benefit. He nevertheless recognises that the

project would be likely to have a number of adverse environmental impacts, especially in relation to the ecologically sensitive Humber Estuary. While he understands that a range of mitigation and compensation measures will be secured through the Order and the legal agreements with Natural England and the Environment Agency, he considers that he needs further information as explained in this letter to enable him to confirm that sufficient compensation measures will be put in place to ensure compliance with obligations under the Conservation of Habitats and Species Regulations 2010. The Secretary of State also wishes to be satisfied before determining this application that any arrangements that would be put in place for access across the Killingholme Branch railway would not prejudice the future operation of the railway.

### **Next Steps**

56. The applicant is invited to respond to the Secretary of State (at the address at the top of this letter) by 25 September 2013 to inform him whether or not it has been possible to address the issues referred to at paragraph 6 above. If it is not possible for the applicant to address those issues within that time, the applicant should explain the reasons for this. If any consequential revisions to the Order are required the applicant is invited to submit a revised Order with its response.


57. The applicant's response and any revised Order will then be published on the Planning Inspectorate's website and comments will be invited from interested parties within a further 28 days on those matters only. The Secretary of State will consider the applicant's response and any related comments in reaching his decision.

58. In order to allow time for these steps to be taken, the Secretary of State is setting a new deadline for his decision on this application of 18 December 2013 and will make a statement to the House of Commons when it returns in accordance with section 107(7) of the 2008 Act.

### **Distribution**

59. This letter is being published on the Planning Inspectorate website and all interested parties are being notified of this so that they are aware of the information that is being requested and extended timetable for reaching a decision on this application.

Yours faithfully,

A solid black rectangular box used to redact the signature of the Secretary of State.

**Martin Woods**