

DATED

29

APRIL 2013

(1) ABLE HUMBER PORTS LIMITED

AND

(2) NATURAL ENGLAND

DEED IN RELATION TO THE ABLE MARINE ENERGY PARK



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THIS AGREEMENT is made on the

29 APRIL 2013

BETWEEN

- 1 **ABLE HUMBER PORTS LIMITED** (Company number: 107029) registered at Ogier House, The Esplanade, St Helier, JE4 9WG (ABLE); and
- 2 **NATURAL ENGLAND** of Foundry House, 3 Millsands, Riverside Exchange, Sheffield, S3 8NH (NE)

WHEREAS

- (a) On 19 December 2011, ABLE applied to the Infrastructure Planning Commission (now the National Infrastructure Directorate of the Planning Inspectorate) under section 37 of the Planning Act 2008 for a Development Consent Order to authorise the proposed construction of a Marine Energy Park (**the DCO Application**);
- (b) the proposed Able Marine Energy Park (**AMEP**) comprises a harbour development, including the construction of a new quay (**Work No.1**);
- (c) Work No. 1 includes but is not limited to works for the reclamation of 31.5 hectares of intertidal habitat and 13.5 hectares of sub-tidal land comprising part of the Humber Estuary Special Protection Area, Humber Estuary Special Area of Conservation and Humber Estuary Ramsar Site (**the European Site**) and the Humber Estuary Site of Special Scientific Interest;
- (d) It is the view of ABLE and NE that this would constitute an adverse effect on the integrity of the European Site for the purposes of the Habitats Regulations.
- (e) When deciding whether to grant consent for works which may (notwithstanding any proposed mitigation) have an adverse effect upon the integrity of a European Site the Secretary of State may not grant the consent except having satisfied the provisions of Regulation 62 of the Habitats Regulations
- (f) If having satisfied the provisions of Regulation 62 of the Habitats Regulations consent is granted for a plan or project having an adverse effect upon the integrity of a European Site the Secretary of State is required to secure that any necessary compensatory measures are taken to ensure the overall coherence of the Natura 2000 Network is protected;
- (g) NE is concerned with the regulation and implementation of policies relating to the matters referred to in recitals (a) to (f) above, and more particularly the effects of Work No. 1 on the European Site;

- (h) ABLE, in consultation with NE have proposed certain Measures including mitigation and compensation (and the monitoring and management of these) for (amongst other things) the purposes set out in recital (e) and (f) above, the objectives, principles and nature of which are set out in the EMMPs;
- (i) ABLE and NE are entering into this Deed to secure that should the Secretary of State approve the DCO Application, ABLE as a statutory undertaker in relation to Work No.1 will be under a legal obligation to secure the achievement of the objectives and implementation of the Measures identified in the EMMPs; and
- (j) The extent to which this Deed secures those objectives and Measures referred to in recital (i) above is a matter for the Secretary of State in his consideration of the Order application.

NOW IT IS AGREED AS FOLLOWS

1 Interpretation

1.1 In this Deed, unless the context otherwise requires, words and expressions defined above have the meanings given to them, words and expressions defined by the draft Order have the same meaning as they have in the draft Order but are to be interpreted as being adjusted to the extent necessary to accord with the provisions of the Order as made and:

CEMMP means the compensation environmental management and monitoring plan, the agreed form of which is provided at **Appendix 2** to this Deed;

Cherry Cobb Sands Compensation Site means a new 101.5 hectare managed realignment site with regulated tidal exchange cells, to be constructed at Cherry Cobb Sands as more fully described in the CEMMP and shown coloured red on the Plan;

Cherry Cobb Sands Wet Grassland Compensation Site means a new temporary 38 hectare area of wet grassland at Cherry Cobb Sands shown coloured blue on the Plan, the purpose of which is more fully described in the CEMMP and the permanence of which will be subsequently determined by ABLE, following consultation with the Steering Group, in accordance with the achievement of the targets specified in the CEMMP;

Compensation Measures means the provision of the Cherry Cobb Sands Compensation Site and the Cherry Cobb Sands Wet Grassland Compensation Site;

Draft European Protected Species Licence means the letter issued by NE to ABLE dated 2 November 2012, a copy of which can be found at **Appendix 5** to this Deed;

Draft Order means the form of the Able Marine Energy Park Development Consent Order contained in **Appendix 1** to this Deed;

EMMPs	means the CEMMP, the MEMMP and the TEMMP;
Habitats Regulations	means the Conservation of Habitats and Species Regulations 2010;
Management Agreement	means an agreement entered into pursuant to Section 7 of the Natural Environment and Rural Communities Act 2006 and/or Regulation 16 of the Habitats Regulations;
Measures	means the Mitigation Measures and the Compensation Measures or such variation of them as may be approved by the Secretary of State in determining to make the Order;
MEMMP	means the draft marine environmental management and monitoring plan at Appendix 3 to this Deed, the terms of which have been agreed between NE and ABLE for the purposes of this Deed but which have yet to, and must be agreed with the Marine Management Organisation and as such any references within this Deed to the MEMMP shall be construed as a reference to the MEMMP as finally agreed with the MMO;
Mitigation Area A	means an area of wet grassland habitat of approximately 48ha (consisting of a 16.7 hectares core with a surrounding buffer, the width of which is to be 150 metres but which will be subject to review having regard to any additional scientifically robust information made available) as more fully described in the TEMMP and shown hatched green on the Plan to provide foraging and roosting habitat for birds to replace that lost due to AMEP;
Mitigation Area B	means an area of approximately 0.7 hectares to the south of Chase Hill Wood, shown coloured green on the Plan and to be managed for the benefit of fauna, including the creation of ponds for the translocation of great crested newts, in accordance with the terms of the Draft European Protected Species Licence;
Mitigation Measures	means the provision of Mitigation Area A and Mitigation Area B;
North Killingholme Haven Pits	means the Site of Special Scientific Interest comprised of flooded clay pits and located to the north of the Site;
the Obligations	means the obligations upon ABLE, contained in Clauses 5, 6, 7, 8 and 9 of this Deed;
Order	means the Able Marine Energy Park Development Consent Order in the form it is made by the Secretary of State;
Plan	means drawing entitled AMEP Development Areas and having the reference AME – 02034 Rev A, appended to this Deed and showing the Measures;

Secretary of State	means the Secretary of State for Transport;
Site	means the site on which it is proposed to construct AMEP and associated compensation proposals, as is shown delineated in red and blue on the Plan;
Steering Group	means the group to be established pursuant to clause 8 of this Deed to pursue the effective implementation of the EMMPs membership and terms of reference for which are provided in Schedule 1;
TEMMP	means the terrestrial environmental management and monitoring plan, the agreed form of which is provided at Appendix 4 to this Deed;
Work No. 1	means Work No. 1 identified in the draft Order, namely a quay of solid construction comprising a quay wall and reclamation behind it on the south side of the River Humber, the quay wall being enclosed by the existing flood wall and the quay limits;

- 1.2 The headings in this Deed are for ease of reference only, and shall not affect its construction and reference to any 'Clause', 'Schedule' or 'Appendix' shall be references to clauses, schedules or appendices of this Deed unless expressly stated to the contrary.
- 1.3 Words importing the singular shall include the plural and vice versa, words importing any gender include every gender and words importing persons include firms, companies and corporations and vice versa.
- 1.4 Any reference in this Deed to a 'Party' or the 'Parties' is a reference to those parties who are signatories to this Deed, or their successors in title.
- 1.5 Any reference to an enactment includes a reference to it as amended (whether before or after the date of this Deed) and to any other enactments which may, after the date of this Deed, directly or indirectly replace it, with or without amendment.

2 Management Agreement

- 2.1 This Deed is to be construed as, and may be enforced as a Management Agreement with the intent that, subject to the remainder of this Clause 2, the Obligations shall be enforceable by NE against ABLE and also against its successors in title.
- 2.2 This Deed is predicated on ABLE securing sufficient proprietary interest in the Site such that it may implement the Measures.
- 2.3 No Party shall be liable for any breach of the Obligations after it shall have either parted with its entire interest in the Site or the part of the Site in respect of which such a breach occurs but without prejudice to liability for any subsisting breach arising prior to parting with such interest.

3 Conditions Precedent

3.1 The Obligations under this Deed are conditional upon:

3.1.1 the Secretary of State making the Order;

3.1.2 in determining to make the Order, the Secretary of State approving the Measures as both necessary and adequate to meet his obligations under the Habitats Regulations; and

3.1.3 ABLE serving notice upon NE pursuant to clause 4 of this Deed.

3.2 ABLE may not commence Work No. 1 until such time as it has secured planning permission for the provision of the Cherry Cobb Sands Wet Grassland Compensation Site and commenced development under that planning permission.

4 Notice of Implementation

4.1 Should ABLE determine to implement the powers granted under the Order it shall serve written notice upon NE specifying the intended date of implementation and such notice shall be served not later than 14 days in advance of the implementation date specified therein.

5 The Measures

5.1 In order to address the impacts of AMEP on habitats and species and to meet the objectives set down within the EMMPs, and subject always to:

(a) satisfaction of the Conditions Precedent; and

(b) the provisions of Clause 5.2 below,

ABLE hereby undertakes to implement the Measures.

5.2 Nothing in this Deed shall require ABLE to implement the Compensation Measures in the event that ABLE determines not to construct Work No. 1 and notifies NE accordingly.

6 Timescales

6.1 Implementation of Work No. 1 and the Measures by ABLE shall be undertaken in accordance with all relevant timescales specified in:

- (a) Schedule 11 (Requirements) to the Draft Order; and
- (b) the EMMPs.

7 Monitoring

7.1 Management and monitoring of the Measures will be undertaken by ABLE in accordance with the EMMPs.

7.2 In so far as is reasonably practicable, the Cherry Cobb Sands Compensation Site should be managed such that after the passage of 10 years from its creation, it should be of sufficient quality to qualify as an extension to the European Site.

8 Steering Group

8.1 ABLE shall, as soon as reasonably practicable following satisfaction of the Conditions Precedent, establish the Steering Group.

8.2 The Steering Group shall:

8.2.1 hold its first meeting as soon as reasonably practicable following its commencement and thereafter meet biannually until the date falling 10 years after the date of its first meeting but in the event that on that date the Cherry Cobb Sands Compensation Site is not yet considered to have achieved the objectives of the CEMMP, the Steering Group shall continue to meet until either:

- (a) the date falling 15 years after the date of its first meeting; or
- (b) the date on which the objectives of the CEMMP in respect of the Cherry Cobb Sands Compensation Site have been met,

whichever date comes sooner; and

8.2.2 in its final year carry out a full review of the effectiveness of the Measures in achieving the objectives of the CEMMP in respect of the Cherry Cobb Sands Compensation Site and following this review the Steering Group will make recommendations as regards what general revisions could be made in terms of the effectiveness of the Measures including how the Site may continue to be managed

provided always that it will remain open throughout the above mentioned periods for the Steering Group to determine to meet less frequently.

- 8.3 ABLE shall make publicly available and have regard to any reviews, recommendations or updates received from the Steering Group in accordance with its terms of reference and thereafter employ reasonable endeavours to implement any recommendations including, where necessary, through proposing to the Group such alterations to the Measures as ABLE considers appropriate, having regard what is reasonable, practicable, and achievable in all the circumstances.
- 8.4 Where ABLE proposes alterations to the Measures pursuant to clause 8.3 above and those proposals are accepted by the Steering Group, ABLE shall implement those alterations.
- 8.5 ABLE shall be responsible for the payment of any reasonable costs associated with the proper administration of the Steering Group (for instance office or secretarial costs) but for the avoidance of doubt ABLE shall not be responsible for reimbursing individual representatives of the Steering Group for the expenses they might incur in attending meetings or otherwise participating in the Steering Group, such costs in each case should be borne by the organisations nominating them as representatives.
- 8.6 NE hereby covenants to participate in the Steering Group in accordance with its terms of reference as set down in Schedule 1 to this Deed.

9 North Killingholme Haven Pits

- 9.1 Subject to clause 9.3, ABLE hereby undertakes to use reasonable endeavours to improve habitat management at North Killingholme Haven Pits and in particular to resolve issues with the existing outfall linking North Killingholme Haven Pits and the River Humber by connecting the northern section of surface water drainage serving AMEP to the North East Lindsey Drainage Board ditch in order to increase flows and reduce accretion at the North Killingholme Haven Pits.
- 9.2 In the event that connecting surface water drainage in the manner described in clause 9.1 does not achieve its objective, ABLE shall, subject always to clause 9.3, mechanically excavate the existing outfall at the North Killingholme Haven Pits to create a channel and allow the free flow of water into and out of the North Killingholme Haven Pits.
- 9.3 The obligation in clause 9.1 and 9.2 are subject always to ABLE securing to its satisfaction all required third party consents, planning permission or other statutory approvals required for the works including the agreement of the North East Lindsey Drainage Board, which ABLE hereby undertakes to use reasonable endeavours to secure.

10 Disputes

- 10.1 The Parties hereby undertake to act reasonably at all times in implementation of their respective duties and obligations under this Deed.
- 10.2 Without prejudice to any other provision of this Deed, the Parties must attempt to resolve any lack of agreement, dispute or difference between them by discussion and agreement.

10.3 Any dispute or difference arising between the Parties as to their respective rights, duties and obligations under this Deed or as to any matter arising out of it or in connection with the subject matter of this Deed which is not capable of resolution pursuant to clause 10.2 is, in the first instance, to be referred to a representative of each Party, each of whom holding a senior management position. Those representatives are to meet as soon as possible and endeavour in good faith to resolve any dispute or difference amicably.

10.4 Any dispute or difference arising between the Parties as to their respective rights, duties and obligations under this Deed or as to any other matters arising out of it or in connection with the subject matter of this Deed (other than (a) a difference as to meaning or construction) which cannot be resolved under clause 10.3 is to be referred to and settled by arbitration in the manner provided by article 59 (Arbitration) of the draft Order.

11 Notices

11.1 Any notice served or given or plans, drawings or documents supplied under or in relation to this Deed will (in the case of a notice) be in writing, must refer to the relevant provision of this Deed, and will in all cases be deemed to be sufficiently given, served or supplied if addressed or supplied to ABLE or NE as the case may be, and sent by first class post, courier service or registered post to:

(a) in the case of ABLE, to:

Able Humber Ports Limited
Care of
Able UK Ltd
Able House, Billingham, TEESSIDE TS231PX

(b) in the case of NE, to:

Natural England
Foundry House
3 Millsands
Riverside Exchange
Sheffield
S3 8NH

or to such other address as any Party may from time to time designate by written notice to the others.

11.2 Any notice, plan, drawing or document given, served or supplied in accordance with clause 11.1 will be deemed, in the absence of evidence of earlier receipt, to have been given, served or supplied two days after posting or despatch, exclusive of the day of posting.

12 Variations

12.1 No variation of this Deed shall be effective unless it is reduced to writing and is signed by or on behalf of a duly authorised representative of each of the parties.

13 **Rights of third parties**

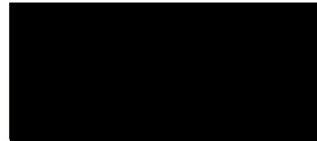
13.1 Only ABLE and NE may enforce the terms of this Deed and no third Party may enforce any such term by virtue of the Contracts (Rights of Third Parties) Act 1999.

In witness of which this Deed has been signed by the Parties on the date appearing on the first page.

EXECUTED (but not delivered until the date)
Hereof) as a Deed by **ABLE HUMBER**)
PORTS LIMITED acting by one director)
and its secretary of by two directors)



The Common Seal of)
NATURAL ENGLAND)
Was hereunto affixed in the presence of)



SCHEDULE 1: THE STEERING GROUP

1 Membership of the Steering Group

- 1.1 ABLE will invite one named representative from each of the following to join and participate in the Steering Group:

Organisation	Address for Service
Humber Industry Nature Conservation Association (as Chair)	
ABLE	
NE	
The Environment Agency	
The MMO	
The RSPB	
Yorkshire Wildlife Trust	
Lincolnshire Wildlife Trust	
North Lincolnshire Council	
East Riding of Yorkshire Council	
Paull Parish Council	
North Killingholme Parish Council	
South Killingholme Parish Council	

- 1.2 Each organisation may name not more than one additional person to assume the role of delegate representative, to attend meetings and otherwise participate in the Steering Group in circumstances where the named representative is unable to do so.
- 1.3 In addition to the above the Steering Group can co-opt members to form sub-working groups where appropriate to consider specific issues.
- 1.4 An agenda will be drawn up in advance of each Steering Group meeting by ABLE and minutes will be produced by them after the meeting for agreement.
- 1.5 The Steering Group will be able to call special meetings in response to specific significant issues /concerns identified based on a majority decision amongst the Group.

- 1.6 In the event of there being disagreement on technical issues the Steering Group may refer the matter to an independent third party expert, appointed by the Steering Group, who can provide further input for the consideration of the Group.

2 Terms of Reference for the Steering Group

- 2.1 It shall be for the Steering Group to finalise the precise nature of its role but principally this will be to:
- (a) monitor implementation of the Measures and the EMMPs to ensure objectives are being met;
 - (b) consider and recommend remedial measures where those objectives are not being met;
 - (c) provide expert views, opinions and feedback to ABLE about key issues;
 - (d) direct and help focus the EMMPs and their development in an interactive way including through the revisions to targets, monitoring requirements and if necessary the adoption of any remedial actions;
 - (e) undertake a comprehensive review of the EMMPs at least every five years;
 - (f) co-opt members and working groups if necessary; and
 - (g) ensure a transparent and open process to implementation with an evident audit trail and regular updates produced for dissemination to a wider audience
- 2.2 It shall be for the members of the Steering Group to establish such arrangements for the administration and operation of the Group as together they may decide, acting reasonably and in accordance with the terms of this Deed.