



marine
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BY EMAIL ONLY

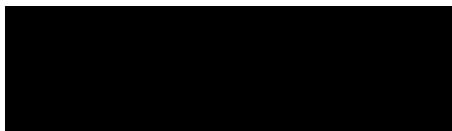
22 February 2013

Dear Mr Woods,

Protective Provisions – Correspondence received from Associated British Ports (ABP)

The MMO received a letter from ABP on 27 November 2012 in relation to the protective provisions proposed by ABP for their protection in relation to the proposed Able Marine Energy Park (AMEP) Development Consent Order (DCO). The MMO has been considering its position in relation to the use of protective provisions, both in relation to the AMEP DCO and also in relation to future applications. The MMO has therefore clarified its position in its response to ABP, dated 20 February 2013. In the interests of transparency and openness in relation to this correspondence, we append our written response for your information. This information has also been provided to the Applicant and other Interested Parties to the AMEP case where contact details are available to us.

Yours sincerely,



Andrew Kerrigan

**Head of Inshore Marine Licensing
For and on behalf of the Marine Management Organisation**

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200213 ABP Letter Response – FINAL
MMO re protective provisions 27 Nov 12 _4_



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20 February 2013

Dear Mike,

Thank you for your letter dated 27 November 2012 entitled 'Protective Provisions – Able Marine Energy Park Proposed DCO'.

The MMO made oral representations on the draft Development Consent Order (DCO) and Deemed Marine Licence (DML) for the proposed Able Marine Energy Park (AMEP) at the specific issue hearings held by the Examining Authority (ExA) appointed by the Planning Inspectorate (PINS) on Wednesday 21st and Thursday 22nd November 2012. The MMO then submitted a written summary of the oral case made at both hearings to PINS on Friday 23rd November 2012.

In paragraphs 16 to 21 of this written submission, the MMO addressed the issue of the proposed Protective Provisions submitted to the ExA in Appendix 4 of ABP's written submissions of 03 August 2012.

We stated in paragraph 16 of our written submission that *'As a general proposition, the MMO does not consider protective provisions to be necessary where protection can be effectively and appropriately be provided through the MMO's regulatory powers'*. In paragraph 18 we stated that *'The MMO does not consider it necessary to include the protective provisions proposed by ABP in its draft paragraph 96. The appropriate regulatory tool to deal with these matters is the DML which the MMO is able to enforce'*.

It was therefore the MMO's opinion that the protective provisions suggested by ABP (and not adopted by the applicant in their DCO draft) related to environmental matters, and such it would be appropriate to include protection through a provision in the DML and remediation in the Marine Environmental Management and Monitoring Plan (MEMMP) (as outlined in paragraph 20 of our written submission).

Subsequently the MMO has reconsidered the issue of the use and application of protective provisions within the wider DCO process. Having done so, the MMO wishes to revise the position previously outlined in its written submission.

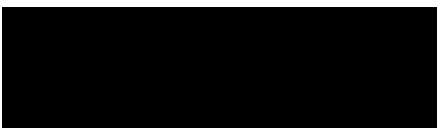
In your letter dated 27 November 2012 it is stated that ABP's proposed protective provisions primarily relate to the safeguarding of ABP's marine assets *'in the event that the construction of the proposed AMEP development causes erosion or accretion at ABP's existing berths, including an indemnity as to costs incurred in remedying such occurrences'*. It is the opinion of the MMO, on reflection, that the DML and MEMMP would not be the most appropriate method of securing such remedial actions (and payment of costs thereof) should they be required.

In addition, the MMO is satisfied that should the Secretary of State consider it necessary and appropriate, that the adoption of the protective provisions proposed would not impact on the MMO's statutory function of regulating the marine environment, or interfere with the MMO's specific duties and responsibilities contained within the DML of the AMEP DCO.

Consequently, the MMO no longer maintains the position that such provisions are not necessary and for the reasons outlined above has no representations to make either for or against the proposed protective provisions. The necessity of their inclusion within the DCO (should it be made) will be a matter for the Secretary of State to consider and decide upon.

I trust that this letter adequately addresses the points raised in your letter.

Yours sincerely

A solid black rectangular box used to redact the signature of Andrew Kerrigan.

Andrew Kerrigan
Head of Inshore Marine Licensing
For and on behalf of the Marine Management Organisation



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27 November 2012

BY E-MAIL ONLY

Dear Andrew

PROTECTIVE PROVISIONS - ABLE MARINE ENERGY PARK PROPOSED DCO

I am writing to seek the MMO's urgent clarification as to how protective provisions in favour of port operators are to be dealt with by the MMO in consent orders.

This question has come about as a result of oral submissions made by Counsel to the MMO at the Able Marine Energy Park (AMEP) Development Consent Order (DCO) hearing that took place on 22 November 2012, at which you were present.

At that hearing, ABP sought a number of protective provisions safeguarding its marine assets in the event that construction of the proposed AMEP development causes erosion or accretion at ABP's existing berths, including an indemnity as to costs incurred in remedying such occurrences. Such provisions are fair, reasonable and limited in scope, and have been extensively used in orders and Acts of Parliament elsewhere in order to protect the interests of existing statutory port operators in the circumstances where marine construction works are contemplated nearby and the impact on sedimentary regimes is uncertain. For example similar provisions were included in the Humber Sea Terminals (phase III) Harbour Revision Order 2006, the Great Yarmouth Outer Harbour Revision Order 2008, the London Gateway Port Harbour Empowerment Order 2008, the Crossrail Act 2008 (Schedule 17) and the Ouseburn Barrage Order 2007.

It therefore came as a great surprise that, when asked by the Examining Authority (ExA) Chair, Mr. Robert Upton, as to the MMO's views, the response given by Counsel to the MMO was that such protective provisions are unnecessary and, indeed, unhelpful since the necessary protection could be secured through conditions

imposed on the deemed marine licence. For the record, we do not agree with either of these propositions.

In subsequent discussions at the hearing, the MMO sought to clarify its initial oral submission by suggesting that such concerns could be dealt with in an Environmental Monitoring and Monitoring Plan (EMMP), a suggestion met with considerable consternation by Able UK. The MMO's position then appears to have been further modified later in the hearing, with Counsel to the MMO indicating that the MMO would research its own powers and set out its position in its closing submission to the ExA.

Due to the timing of the hearings, ABP will therefore have no opportunity to absorb, question or comment on MMO's position before the close of the AMEP hearing.

We also note that C.Ro is seeking protective provisions within the AMEP DCO that are very similar in extent to those being sought by ABP. It appears that MMO chose not to comment on C.Ro's provisions at the hearing (and, given the apparent willingness of Able to accept them in principle, they may well appear in the final DCO).

The position that ABP therefore finds itself is that the protective provisions sought by ABP in the AMEP DCO are, in our view, in danger of being discarded by the ExA, as a result of submissions made by Counsel to the MMO, in spite of their extensive use in other consent orders and, indeed, elsewhere in the AMEP DCO. Indeed, it would seem wholly inappropriate and impracticable for specific protection for statutory undertakers to be secured and enforced through conditions within a marine licence (or EMMP).

It is not clear to me that any prior consideration had been given to this point by the MMO and instead, rather than accepting at the AMEP hearing that it had not actively considered this issue, the MMO team appeared to provide an off the cuff and ill-considered reply. This is a point of very considerable importance to both ABP, and indeed all statutory harbour authorities and marine operators in the vicinity of the proposed AMEP development who may be adversely affected by that development and the MMO's response may have resulted in significant potential liability to those existing operators. In addition there are, potentially, significantly wider implications for the ports industry as a whole.

This position is not acceptable to ABP and, in light of it, please would you confirm as a matter of urgency:

- The MMO's view of the treatment of protective provisions within the AMEP DCO (as well as the MMO's powers to enforce any alternative mechanism it is now proposing instead of protective provisions) and, specifically, how it will address any dispute arising between Able and existing neighbouring ports who consider the AMEP development has caused damage to their operations by way of increased sedimentation or erosion;
- Whether this view been communicated to the ExA by the stated closing date for submissions (if so, please provide a copy to ABP by return);
- Whether the position adopted by the MMO for the purposes of the AMEP DCO is intended to be applied to future consent orders; and

- More generally, why the long established system of protective provisions provided for in orders and Acts of Parliament is no longer deemed to be relevant or appropriate.

I would be grateful for your response as soon as possible.

Yours sincerely

Michael Stacey
Head of Projects, ABP

Copy: Mr Andrew Garner, General Counsel, ABP