

Clyde & Co LLP  
The St Botolph Building  
138 Houndsditch  
London  
EC3A 7AR  
United Kingdom

Telephone: +44 (0) 20 7876 5000  
Facsimile: +44 (0) 20 7876 5111  
DX: 160030 Lime Street 5  
www.clydeco.com

brian.greenwood@clydeco.com  
Dir Line: +44 (0) 20 7876 6140

Email: [ablemarineenergypark@pins.gsi.gov.uk](mailto:ablemarineenergypark@pins.gsi.gov.uk)

National Infrastructure  
The Planning Inspectorate  
Temple Quay House  
2 The Square  
Bristol BS1 6PN

Our Ref  
BG/ALO/10028350

Your Ref  
TR030001

Date:  
26 October 2018

Dear Sir,

**Associated British Ports  
Representations in relation to the application for a non-material change to the Able  
Marine Energy Park Development Consent Order**

**1 Introduction**

- 1.1 We write on behalf of our client Associated British Ports ("ABP"), the owner and operator of the Port of Immingham.
- 1.2 Our letter relates to the *Able Marine Energy Park Development Consent Order*, which came into force on 29 October 2014 and the legality of the application presently before you, submitted by Able Humber Ports Limited ("Able"), to make what the applicant terms as a "non-material" amendment ("NMA") to that Order.
- 1.3 In brief, we understand that Able wish to remove an area of environmental enhancement known as 'Mitigation Area A' from within the consented DCO boundary, as approved by the Secretary of State. Able now wish, we understand, to keep that area of land - which falls within the south-eastern half of the Order site – free from environmental and ecological enhancement with a view to securing planning permission for car storage.<sup>1</sup> To accommodate this proposed change of use, Able wish to move the required mitigation for the Able Marine Energy Park ("AMEP") project to

---

<sup>1</sup> Able's application is currently before the local planning authority, North Lincolnshire Council, for determination - application reference PA 2017/2141.

an area of land that lies some way beyond the consented Order boundary, known as Halton Marshes.

- 1.4 As you are aware, Able hope to effect this change to the consented Order by means of a non-material amendment. The purpose of this letter is to explain why, purely in terms of legal process, we believe that the Secretary of State should refuse to treat this application as a NMA but instead require the application to go through the formal legal process for material changes, as prescribed by the Planning Act 2008 ("PA 2008") and the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 ("2011 Regulations"). This is because, for the reasons set out below, we believe that the change proposed is fundamental to the AMEP project as assessed at and approved following the NSIP examination and should, therefore, be treated as a material change.

## **Mitigation Area A**

- 1.5 We understand that Mitigation Area A covers in total some 47.8 hectares, which includes 16.7 hectares of wet grassland habitat surrounded by a 150m operational buffer strip (amounting to some 4.5 hectares of land dedicated as buffer). As a consequence, the total area of Mitigation Area A more accurately comprises some 52.3 hectares, including the mitigation area and buffer strip.
- 1.6 Mitigation Area A formed an integral part of the original DCO application. Indeed, the provision of *'ecological mitigation works in accordance with the environmental management and monitoring plans'* within the Order limits, forms a fundamental part of the Authorised Development specified in Schedule 1 to the approved DCO.
- 1.7 The Secretary of State required the provision of Mitigation Area A to offset the detrimental impact of AMEP on a range of habitats, species and designated European sites, namely the Humber Estuary Special Area of Conservation (SAC), the Humber Estuary Special Protection Area (SPA) and the Humber Estuary RAMSAR site. In particular, it was intended to offset the loss of terrestrial habitats within the AMEP site at North Killingholme, which is used by SPA birds, including wintering waders (curlew), bats and breeding birds.

## **Basis of Representations**

- 1.8 We should make it clear at the outset that ABP, in submitting this representation, is not basing its concerns on environmental or nature conservation issues. Our client is perfectly happy to rely on the expertise of the Government's regulators and specialist interested third parties in this regard, all of whom will no doubt have their own views as to the impact and consequences of Able's proposals.
- 1.9 Our letter goes solely to the legality of the process by which Able are attempting to secure, what we believe to be a fundamental change to their consented Order - as a non-material change. In terms of legal process and legality, our client's view is that the application, regardless of the merits, should be treated by the Secretary of State as a material amendment to the consented DCO.
- 1.10 If the Secretary of State agrees with our client's position, as detailed below, then we would suggest that it must follow that the applicant should be required to comply with the formal application process whereby the general public, the environmental and nature conservation bodies, the local community and our client are genuinely allowed



to participate in the process. To do otherwise would, we suggest, set a disturbing precedent which would strike at the core of the integrity of the DCO process.

- 1.11 The promoter of the AMEP development does need to understand that our client has no objection to the development of the AMEP site for the purposes prescribed in the DCO, namely – “*the embarkation and disembarkation...[of] .... items associated with offshore renewable energy infrastructure*” (DCO, Schedule 11, Requirement 4).
- 1.12 Indeed, if anything, our client is both surprised and disappointed that the AMEP development has not yet been implemented, bearing in mind that the applicant heralded as part of its application a major regeneration for the locality and the creation of thousands of new jobs.

## **Material and Non-Material Changes**

- 1.13 Before the Secretary of State can authorise a change to a development consent order pursuant to the PA 2008 and the 2011 Regulations, he must consider whether the change proposed is a material or a non-material change - the distinction going to legal process.
- 1.14 There is, however, no statutory definition of what constitutes a 'material' or 'non-material' change in the legislation. In essence, the question as to whether a proposed change to a development consent order is material is a matter of fact and degree, to be determined by the Secretary of State, in the context of the consented development itself.
- 1.15 In summary, we understand that the applicant is suggesting that the amendments which it is asking the Secretary of State to approve are non-material amendments because:
  - (a) The re-sited area will act as a substitute for the functional requirements of the land approved for that purpose and lying within the DCO boundary;
  - (b) The re-siting gives rise to no material change in the impacts associated with the construction or operation of the Able Marine Energy Park; and
  - (c) The re-siting is not considered to give rise to any new significant effects or materially different effects compared to those set out in the Environmental Statement for the authorised project.
- 1.16 It is our view, however, that the applicant is mistaken in its assertion that the proposed changes are 'non-material'. Having reviewed the information provided to you by the applicant in support of its application, we would suggest that the only conclusion that can be reached by the Secretary of State is that, on the basis of the proposed scope, impact and effect of the changes, the applicant's proposal, if implemented, would constitute a material change to the DCO.
- 1.17 If you are in agreement, then it must follow that the application currently before you is defective and that as a result, the Secretary of State should refuse to determine it but instead, direct that it be substantially amended and made subject to the formal process set out in Part 2 of the 2011 Regulations relating to 'material' changes.

1.18 In summary, our concerns regarding the mischaracterisation of the materiality of the proposed changes relate to the applicant's failure:

- (a) Genuinely to assess the potential impacts and effects of the proposed change to the approved Order;
- (b) To consider, whether, in the light a properly undertaken assessment, the proposed change constitutes EIA development;
- (c) To consider, whether, in the light a properly undertaken assessment, a fresh Habitats Regulation Assessment is required;
- (d) Properly to assess the impact of the proposed change on the local area and local community; and
- (e) Overall, to attempt to secure a fundamental alteration to an approved Order in the context of the proposed removal from within the boundary of the consented DCO of an environmental and nature conservation element which certainly at the time of the Secretary of State's consideration at the NSIP examination was considered to constitute a fundamental element of the overall scheme - simply on the basis of a high-level review lacking basic information and an analysis.

1.19 Our client's concerns with regard to the materiality of the proposed changes are set out in further detail below.

## 2 **Materiality of the proposed change – Legislative Context**

2.1 The statutory test for determining whether a change is material is set out in paragraph 2(2) of Schedule 6 to the PA 2008, which provides that:

*"In deciding whether a change is material, the Secretary of State must have regard to the effect of the change, together with any previous changes made under this paragraph, on the development consent order as originally made."*

2.2 It is clear from the above, therefore, that in determining whether or not an application for a change to a DCO is material, the Secretary of State is only able to consider the effect of the change on the specific DCO the subject of the application. It logically follows, therefore, that an amendment proposed to one DCO which is adjudged not to be material, may well be material when considered in the context of an entirely different DCO.

2.3 This legislative test is supplemented by the Department for Communities and Local Government Guidance - *'The Planning Act 2008: Guidance on Changes to Development Consent Orders'* ("Guidance"). This helpfully identifies certain characteristics of an application for a change to a DCO which will point to the change being proposed being more likely than not to be treated as material. These include:

- (a) The need for an updated Environmental Statement to take account of new, or materially different "likely significant" effects on the environment;
- (b) The need for a Habitats Regulation Assessment, or an additional licence in respect of European Protected Species;
- (c) Authorisation of the compulsory acquisition of land or an interest in or rights over land;



- (d) The potential impact of the proposed changes on local people or businesses; and
- (e) The particular circumstances of the given case, some examples including impacts relating to visual amenity from changes to the size or height of buildings, impacts on the natural or historic environment, and impacts arising from additional traffic.

2.4 Of note, however, is that although the Guidance provides yet further assistance as to whether a particular change would be material or not, it does not purport to be exhaustive. Indeed, paragraph 10 of the Guidance states that:

*"Given the range of infrastructure projects that are consented through the 2008 Act, and the variety of changes that could possibly be proposed for a single project, this guidance cannot, and does not attempt to, prescribe whether any particular types of change would be material or non-material. Such decisions will inevitably depend on the circumstances of the specific case."*

2.5 We would suggest that some further assistance may be gleaned by reference to the Planning Inspectorate's 'Advice Note Sixteen: How to request a change which may be material' (Version 2, March 2018). As you are aware, this relates to a material change made to an accepted DCO application prior to the commencement of the examination. Whilst we recognise that this is not directly on-point to the application currently before you, it does provide some further helpful guidance as to what may constitute a material change, such as the following:

*"There is no legal definition of 'material' but the tests to apply are whether the change is substantial or whether the development now being proposed is not in substance that which was originally applied for..."*

*Whether a proposed change falls within either of these categories is a question of planning judgment which may be based on criteria including, for example, whether the change would generate a new or different likely significant environmental effect(s). Similarly, whether (and if so the extent to which) a change request involves an extension to the Order land, particularly where this would require additional Compulsory Acquisition powers e.g. for new plots of land and/or interests."*

### **Judicial Interpretation**

2.6 Due to the lack of cases involving material changes to development consent orders under the PA 2008, we consider the judicial interpretation relating to the analogous provisions in the Town and Country Planning Act 1990 ("TCPA 1990") – i.e. section 96A which relates to non-material changes to a planning permission and section 73, which relates to minor material amendments to a planning permission – to be relevant in this regard.

2.7 As with the NSIP infrastructure regime, there is no statutory definition of 'non-material' under section 96A of the TCPA 1990 - it will be dependent on the context of the overall scheme (PPG, Reference ID:17a-002-20140306). The courts have held in relation to the question as to whether a proposed change to a planning permission granted under the TCPA 1990 is material is a matter of fact and degree for the decision-maker (*Singh v. SSCLG [2010] EWHC 1621 (Admin)*).

- 2.8 There is also no statutory definition of 'minor material amendment' under section 73 of the TCPA 1990. It is the case, however, that an amendment would be considered to be a minor material amendment if its scale and nature results in a development which is not substantially different from the one that has been approved – i.e. there is no 'fundamental' change made (PPG, Reference ID: 17a-017020140306). This test was highlighted in *Pye v Coventry City Council ex parte Arrowcroft Plc* [2001] in which Sullivan J stated that:

*"A condition may have the effect of modifying the development proposed by the application provided that it does not constitute a fundamental alteration in the proposal" put forward in the original application.*

- 2.9 Further, Singh J in *R (On the Application of Wet Finishing Works Ltd), v Taunton Deane Borough Council* [2017], stated that:

*"The question of whether an alteration is fundamental is one of fact and degree. Like such questions generally in planning law, it is one which falls primarily to the decision-maker to assess. Its assessment will only be questioned by the Court if it is irrational ..."*

- 2.10 Relevantly, the Encyclopaedia of Planning Law and Practice, published by Sweet & Maxwell states at P73.04 that:

*"Section 73 gives an express power to apply for planning permission for the development of land without complying with conditions attached to an earlier permission. Importantly, it only confers power to amend or remove conditions and not to amend any other part of the permission e.g. the description of development."*

- 2.11 Paragraph 73.06 goes on to state that section 73 does not permit the permission to be rewritten and the new conditions (or amendment to conditions) must have been conditions which could have been imposed on the original (*R (Arrowcroft Group PLC) v Coventry City Council* [2001] PLCR 7).

- 2.12 The types of changes that have not been considered to amount to 'fundamental alterations' include the introduction of a new condition relating to off-street parking (*Richmond-upon-Thames LBC v Secretary of State for the Environment* [1974]), the deletion of a proposed means of access (*Kent CC v Secretary of State for the Environment* (1976)) and the scaling down of an approved development (*Kent CC v Secretary of State for the Environment* (1976); *Wheatcroft v Secretary of State for the Environment* [1982]).

- 2.13 In light of the above, if the type of change proposed by the NMA were being made in respect of a planning permission granted under the TCPA 1990, we are of the view that it is highly likely that the proposed relocation would not constitute either a non-material change under section 96A, or a minor material change under section 73. This view is underlined by the fact that, in terms of the impact on the Authorised Development, specific reference is made in Schedule 1 of the DCO to the ecological mitigation area being provided within the limits of the approved Order.

***Examples of material and non-material changes***

- 2.14 As stated above, as far as we are aware, no applications requesting a material change to a development consent order have been submitted to the Secretary of



State to date. We understand, however, that a potential material change application is likely to be made shortly in respect of the Hinkley Point C New Nuclear Power Station DCO in relation to the proposed removal of a requirement to install certain mitigation measures. We believe that it is the case that the applicant considers that the change could be deemed to be 'material' as it will probably require an updated environmental statement and Habitats Regulations Assessment. We do note also, in the context of this particular DCO, that three non-material amendments have already been made to the Order.

2.15 Indeed, we are conscious that there have been a number of non-material change applications determined by the Secretary of State to date. These relate to a range of changes including:

- (a) *Heysham Link Road* - realignment of the slip road at junction 34 of the M6 by a maximum of 11.7 metres from the alignment authorised by the original DCO. The change would not require the exercise of any new compulsory acquisition powers and would avoid the need to divert a National Grid high pressure gas pipeline.
- (b) *Galloper Wind Farm* - increase in the permitted monopole diameter from a maximum of 7.0 metres to a maximum of 7.5 metres.
- (c) *Hinkley Point C* - changes to a number of service buildings, including nine new or relocated structures for the safe operation of plant and the movement of 15 structures from their consented locations. No changes were proposed to the tallest buildings or to the overall site footprint.
- (d) *East Anglia ONE* – change to allow the applicant the option to construct either a 750MW wind farm with a High Voltage Alternating Current (“HVAC”) transmission system or the 1200MW wind farm with a High Voltage Direct Current transmission system for which development consent had been granted. The change to the HVAC system would generate a need for an increase in the height of the electrical equipment at the onshore sub-station.

2.16 In this context, we should also draw your attention to a non-material change application that was granted by the Secretary of State on 19 September 2018, relating to the relocation of a biodiversity enhancement area in respect of the *Ferrybridge Multifuel 2 Power Station* project. We understand that the proposed relocation of the approved enhancement area to an area 300m north-west was granted for the following reasons:

- (a) The objective and purpose of the area was not to act as a visual screen for the development, but rather was to provide biological enhancement. It was not intended to mitigate any significant adverse effects.
- (b) The applicant reviewed the Environmental Statement and demonstrated that there were no new, or materially different, likely significant effects not previously identified and concluded that no update was required to the Environmental Statement.
- (c) There are no European Sites, Ramsar sites or nationally designated landscapes located within the vicinity of the project (nor within 20km) nor any protected species, as a consequence of which no Habitats Regulation Assessment was required.

- (d) No additional compulsory acquisition of land was required.
- (e) There was no significant change in the impact on local people and businesses.
- (f) There were no other relevant circumstances which would make the change material.

2.17 In our view, the *Ferrybridge* application is clearly distinguishable from the application currently before you, namely the proposed removal and relocation of an important mitigation area that was the subject of detailed consideration at the NSIP examination. In short, the rationale for our proposition is as follows:

- (a) The purpose and objective of Mitigation Area A as promoted by the applicant was to provide an area of habitat creation, enhancement and restoration for wildlife impacted by the AMEP scheme.
- (b) Mitigation Area A was, in addition, required to offset the landscape and visual impacts of the AMEP development by providing boundary planting to break up the scale and mass of buildings and hardstand forming part of the proposal. You will be aware that this is confirmed by the applicant's submitted Environmental Statement and the accompanying landscape and visual impact assessment.
- (c) The applicant has provided insufficient – indeed to all practicable intents and purposes no – information to support its assertion that there are no new, or materially different, likely significant effects resulting from the proposed change. As such, we would suggest that on the basis of the information provided to date by the applicant, the Secretary of State is not in a position to exclude the possibility that the application will create significant environmental effects and that a comprehensive reappraisal of the Environmental Statement will as a consequence be required.
- (d) The AMEP site is located within the vicinity of a number of European sites and should it ever be implemented, the applicant has accepted that it will detrimentally impact on a range of protected species. Indeed, the Habitats Regulation Assessment that formed part of the DCO application stated that the AMEP development would result in an adverse effect on the integrity of the European nature conservation designated sites on the Humber Estuary.

#### ***Consultation with the Planning Inspectorate***

- 2.18 We note that the Guidance cited above also strongly advises applicants to discuss with the Planning Inspectorate whether a proposed change is likely to be judged to be material before they commence any of the procedural steps prescribed in the 2011 Regulations.
- 2.19 The applicant met with the Planning Inspectorate on 8 March 2018 in relation to the proposed relocation of Mitigation Area A. It would appear that the purpose of the meeting was not to obtain the Planning Inspectorate's views as to whether or not the proposed change was material, but rather to ascertain the correct consenting route for the application. Interestingly, the meeting notes record that the Planning Inspectorate merely provided general advice regarding changes to DCO's. In particular, the Planning Inspectorate:



*"Advised that any assessment will need to consider the in-combination effect of all elements of the proposal..."*

*"Pointed out that the reasons for the imposition of the requirement were important to understand and address in seeking any change..."*

*"Advised that AHPL should also consider the implications of their proposal in terms of the Environmental Statement (ES), and may wish to demonstrate that there are no different, or no significantly worse, environmental effects. They would also want to consider any implications applicable since the introduction of the 2017 Environmental Impact Assessment (EIA) Regulations and any applicable transitional provisions."*

- 2.20 Despite the very clear advice provided by the Planning Inspectorate, for the reasons set out below, we consider that the applicant has failed to demonstrate that there are no different or significantly worse environmental effects arising should Mitigation Area A be relocated to a site outside the consented DCO boundary.

### 3 Environmental Statement

- 3.1 Turning to the first characteristic identified in the Guidance which would give rise to a material change, paragraph 12 of the Guidance states that:

*"A change should be treated as material if it would require an updated Environmental Statement (from that at the time the original Development Consent Order was made) to take account of new, or materially different, likely significant effects on the environment."*

- 3.2 Relevantly, the Application Statement at Table 3.1 provides the applicant's assessment of the 'materiality of the re-siting of Area A on the EIA undertaken for the approved DCO, and reasoning'. In short, this assessment concludes that the relocation of Mitigation Area A will not give rise to any new significant effects, or materially different effects, from those identified in the Environmental Statement for the AMEP.

- 3.3 We would suggest that in the light of the terms of the submitted environmental statement, the discussion at the NSIP examination and the practical consequences on the ground itself, the applicant's assessment set out in Table 3.1 is worryingly high-level. It lacks detail and does not contain any real or meaningful consideration of the impacts of the proposed changes compared with the impacts assessed in the original Environmental Statement. In particular, there are two main areas that we consider, even from our client's standing as a non-environmental expert, to be inadequate. These relate to the applicant's failure:

- (a) To consider a range of relevant factors which may result in new or different changes to those identified or assessed in the Environmental Statement, such as:
  - (i) the date the original Environmental Statement was prepared (including changes to baseline environmental conditions, such as ecological baseline, transport movements, and air quality since that time);
  - (ii) changes to committed development;
  - (iii) updates to planning policy;

- (iv) any changes to guidance affecting the assessment methodology used; and
  - (b) Properly to assess the environmental effects of the proposed change being sought, particularly those impacts relating to ecology, landscape and cumulative and in-combination impacts that may have changed from those assessed in the Environmental Statement. We have considered each of these areas in further detail below.
- 3.4 One does not need to be an environmental or nature conservation expert to identify the scarcity of real information provided.
- 3.5 It is undeniable that there have been significant changes to the local area, in addition to known changes to planning policy since the time of the preparation of the submitted AMEP application and environmental statement. The applicant does not appear to have recognised this very clear fact and acknowledged it in its application.
- 3.6 Taking such factors into consideration, it is our client's view that the applicant's assertion that the application is a 'non-material' change simply cannot be supported on the basis of the information submitted. As a consequence, we do not believe that it is possible for the Secretary of State to exclude the possibility of significant environmental effects arising as a result of the proposed change.
- 3.7 As the potential clearly exists for likely significant effects to arise that were not identified previously, we consider that the most robust approach would be for the applicant to provide further environmental information relating to the proposed change in the form of an addendum to its environmental statement - that addendum being formally submitted for consultation.

## ***Ecology and Nature Conservation***

- 3.8 In terms of ecological impacts arising as a result of the relocation, the applicant has stated that:
  - (a) The relocated Mitigation Area A will have the same functional requirements and is considered to have equal mitigation value as the original mitigation area;
  - (b) The site lies within the communing distance for curlew, so it will not compromise the mitigation value for curlew; and
  - (c) Whilst the buffer is less than the 150m originally required, the buffer distance is deemed to be acceptable.
- 3.9 Again, whilst not in any way wishing to usurp the expertise of the Government's statutory regulators and expert third party interested organisations, in light of the significant impacts that the AMEP scheme will patently have on a range of habitats and species, from our perspective, we find it difficult to believe that the above assessment is other than wholly inadequate as a vehicle seemingly intended to support a finding that the proposed relocated mitigation area does not result in any material change to the environment – and the permitted scheme itself - in terms of impact.
- 3.10 From our basic understanding, Mitigation Area A was originally proposed to provide mitigation in close proximity to where the relevant harm was being caused to a range of wintering waders (including curlew and Black Tailed Godwits 'BTG'), bats and



breeding birds that would be displaced by the AMEP. As such, we presume that the specific location of the actual mitigation land was a key factor in mitigating the harm caused? Indeed you will be aware that this fact was highlighted in paragraph 11.7.9 of the Environmental Statement, which states that Mitigation Area A incorporates the following key principles:

- *It is located in an area which is appropriate for the bird species based on the findings of the latest bird survey data.*
- *Access to the area is available from the Humber Estuary to the south and the east.*
- *Able is committed to managing the land to retain the required type(s) of habitat as part of any consent.*

3.11 Again, relying on a purely factual understanding of the case as promoted by Able at the examination, we were led to understand that the location of the mitigation area was particularly important to the BTG, and some considerable consideration was given during the examination of the AMEP as to whether Halton Marsh was actually a suitable location to mitigate impacts to the BTGs (as part of the "Over Compensation Area"). In this regard, we note that paragraph 10.160 of the Examining Authority's report stated that:

*"RSPB however, is of the view that the site [Halton Marsh] is of little value to the BTG as there is only a small area of steep mudflat in the vicinity although small numbers of BTG had been observed at the site."*

3.12 Further, in terms of the quality of wet grassland at East Halton Marshes, paragraph 38(e) of the Secretary of State's Decision Notice stated that:

*"Natural England considers that there is a high level of uncertainty that the creation of wet grassland in this location will provide anything other than habitat of modest value to the high numbers of birds that will be displaced by the AMEP development, because the site is some distance from suitable mudflat used by BTG."*

3.13 Although the Secretary of State ultimately accepted the proposed location of the Over Compensation Area, the above evidences some fundamental uncertainty from environmental bodies about the ecological value of the Halton Marshes as an area of suitable mitigation. This is no doubt a point that you will wish to address with the relevant bodies.

3.14 On the basis of the above, however, we are bound to query whether the proposed relocated area can actually provide the ecological benefits required for those species that will be displaced, such as curlew and bats.

3.15 In this context, we believe that it may be relevant in your consideration that the applicant has in fact made only limited reference to the impacts resulting from the change in location of the mitigation area. It has stated that the new site is within commuting distances for curlew, therefore *"it is a suitable location to re-site Area A without compromising the mitigation value for curlew"* (Table 3.1). We must apologise if we are missing the point, but again from our perspective, we cannot see that the applicant has undertaken a similar assessment in relation to all habitats and species impacted by the relocation of Mitigation Area A, such as BTGs, bats and breeding

birds, to determine whether they will be impacted by the change in locational specific element of the mitigation area.

- 3.16 Further, we note that page 22 of the proposed draft Terrestrial Environmental Management and Monitoring Plan (Appendix F to the Application Statement) it is stated that - *"it is the ethos behind the Objectives and Targets [relating to Mitigation Area A] which are applicable no matter where the geographical location."* Given the importance of the locational-specific element of Mitigation Area A, we cannot see how this can be an accurate statement. The particular functions of Mitigation Area A must be provided within a geographical location suitable to offset the harm caused to local habitats and species, as such, it would seem that location is an important consideration to be assessed.
- 3.17 Similarly, we note that Mitigation Area A was designed to offset the loss of the Station Road Local Wildlife Site ("SRLWS"), which is a habitat of local value that consists of a neutral grassland strip, associated elm hedge and field ponds. As such, Mitigation Area A was required to contain at least 1.7 hectares of neutral grassland within the northern operational buffer zone, to directly offset this loss. We cannot see how the SRLWS mitigation area will be incorporated within the relocated Mitigation Area A at Halton Marshes, particularly as the applicant concedes that the operational buffer to be provided at Halton Marshes is 30m, which is significantly less than the 150m operational buffer originally requested and proposed at Area A. On the basis of the submitted information, it is unclear whether the applicant has undertaken any assessment of the environmental impacts arising from the relocation of habitat which was specifically required to mitigate the loss of the SRLWS as a result of the AMEP project.
- 3.18 We are also concerned that the applicant appears to have failed properly to assess the impacts arising from the significant reduction in the overall size of the mitigation area as a result of its relocation. Both the NMA Application Statement and its covering letter state that Mitigation Area A comprises - *"16.7 ha core area of wet grassland habitat surrounded by a 150m buffer strip"*. They fail to highlight, however, that Mitigation Area A is actually 47.8 hectares overall (of which the 16.7 hectares only forms part) and the operational buffer strip amounts to 4.5 hectares – these areas are clearly identified on the approved Indicative Landscape Masterplan (i.e. approved DCO application drawing AME-02007-A).
- 3.19 Further, we wish to highlight that the 16.7 hectare 'core area' is not specifically delineated on the Indicative Landscape Masterplan nor is this core area referred to in the particular functional requirements of Mitigation Area A as stated on the approved drawing (we note that these requirements are replicated in paragraph 1.4.1 of the Application Statement). As such, we consider that Mitigation Area A must be considered in terms of its approved form (i.e. one single area of land of 47.8 ha) when assessing the environmental impacts of the proposed relocation.
- 3.20 The current position, therefore, is that the applicant is required to provide 80.5 hectares of mitigation area in total at the AMEP site and Halton Marshes (excluding buffer areas), comprising:
  - (a) Mitigation Area A (47.8 ha) under the DCO;
  - (b) Mitigation Area B (0.7 ha) under the DCO;
  - (c) The Over Compensation Area (20 ha) under the DCO; and



(d) Mitigation required to offset Phase 1 of the Able Logistics Park ("ALP") - PA/2015/1264 (12 ha which is required to be provided at Halton Marshes).

- 3.21 Conversely, as a result of the proposed relocation, the new size of Mitigation Area A as proposed is only 20 hectares. When considered in conjunction with the Over Compensation Area and the mitigation area required for Phase 1 of the ALP planning permission, the total core mitigation area to be provided by the applicant is 52 hectares at Halton Marshes and 0.7 hectares at the AMEP site. This results in an overall loss of 27.8 hectares of mitigation area.
- 3.22 We understand that the Halton Marshes area includes a large area of 'wet grassland buffer' of approximately 31.6 hectares. It is unclear whether the applicant considers that this buffer area is sufficient to offset the significant reduction in Mitigation Area A as a result of the relocation. If this is the case, the documents submitted in support of the NMA do not contain any assessment of whether this area replicates the ecological benefits conferred by Mitigation Area A. In the absence of such information, however, this cannot be assumed.
- 3.23 Although the applicant asserts that the functional requirements of Mitigation Area A will be replicated at Halton Marshes and that there are benefits associated with amalgamating the mitigation areas required to be provided under other schemes (which we clearly are not in a position to dispute), as far as we can see, the applicant has failed to undertake any assessment of the likely significant environmental effects arising as a direct result of reducing the size of Mitigation Area A by over 50% and the consequential loss of 27.8 hectares of mitigation.
- 3.24 Further, although Mitigation Area A is proposed to be co-located with the area of Over Compensation and the wetland required by the ALP planning permission, the change in environmental effects arising from the relocation must surely be considered in the context of the AMEP scheme as a whole, in order to determine whether any update to the Environmental Statement is required.
- 3.25 Based on the above, therefore, we would suggest that the applicant's limited assessment of materiality of changes contained in Table 3.1 fails properly to consider the ecological impacts of relocating the mitigation area to the north of the AMEP site – and beyond the consented and assessed Order boundaries. It surely follows that the applicant's conclusion that the re-siting of Mitigation Area A does not give rise to any new, significant or materially different effects to those set out in the Environmental Statement is premature and cannot be justified on the information provided. For this reason alone, it must be the case that the Application cannot be considered to be a non-material change.

#### ***Landscape and Visual Impact***

- 3.26 The AMEP scheme comprises a range of man-made elements, including very large buildings and large hard surfaced areas, which will impact on the landscaping and views in the wider area. Accordingly, a landscape and ecology mitigation strategy was developed and submitted in support of the Environmental Statement.
- 3.27 Relevantly, this strategy included a range of mitigation objectives that specifically related to Mitigation Area A, including:
- *"Boundary and internal structure planting will break up the large scale of the proposed AMEP and provide partial visual screening of the proposal thereby*

*integrating same into the receiving landscape. Planting will be introduced within the site, for example, semi mature avenue trees along the two main access roads and in between large working areas. From a landscape and visual perspective this planting will assist in breaking up the scale and mass of the buildings and hardstandings...*

- *The south eastern end of the site features Mitigation Area A which measures 47.8 hectares...*
- *The low bunded area at the northern boundary of Mitigation Area A will comprise neutral grassland to offset that lost at the Station Road Fields Local Wildlife Site. A range of habitat creation and enhancement measures are proposed including woodland management, creation of new ponds to support great crested newts and grassland conservation"*

3.28 In terms landscape and visual impact of the proposed re-location of Mitigation Area A, the applicant states that - *"Area A, which does not contain tall structures, was not considered a significant part of the landscape and visual impact assessment undertaken."* On this basis, the applicant considers that the relocation of Mitigation Area A does not materially change the DCO assessment in terms of landscape and visual impacts.

3.29 We are far from convinced, however, that this is a correct statement of the position on the ground. Our client is concerned that the applicant has actually failed to assess the material impact of the proposed location in accordance with the stated landscape mitigation objectives. In particular, the proposed relocation would result in the loss of a very large area of boundary planting that was specifically identified as an important measure to break up the scale and mass of buildings and hardstand forming part of the AMEP and its consequential impact on the SRFLWS and surrounding landscape character areas.

3.30 The Indicative Landscape Masterplan, submitted in support of the Application, does not appear to have incorporated any additional landscape and/or visual measures to offset this change. Accordingly, it is therefore likely that the residual impacts on the local landscape character will have changed as a result of the loss of 47.8 hectares of planting within the DCO limits, such as an increase in the visibility of the AMEP from within the surrounding landscape character areas, and potential increase in hardstanding and/or large buildings.

### ***Cumulative and In-combination Impact***

3.31 The summary of environmental impacts set out in Table 3.1 of the Application Statement has failed to undertake any consideration of the cumulative impacts of re-siting of Mitigation Area A, and whether this may give rise to the need for an updated environmental statement.

3.32 In terms of cumulative impacts on European Designated Sites and wetland bird species, paragraph 11.9.3 of the Environmental Statement provides that:

*"At Killingholme Fields a mitigation area has been agreed with NE which will provide a safe and secure area for the wetland bird species which area affected by AMEP. As a result cumulative effects are not predicted."*



- 3.33 Further, in respect of breeding birds, paragraph 11.9.6 of the Environment Statement provides that:

*"The AMEP scheme will seek to retain as many farmland bird species as possible by providing mitigation on site within AMEP as well as in the dedicated mitigation areas of Area A and Area B. Some cumulative loss may result on farmland species such as skylark, however this species is common in the local area and as Able are incorporating mitigation for this species in all of their schemes a significant impact is not predicted."*

- 3.34 In light of the above, it must surely be the case that the provision of Mitigation Area A within the DCO site boundary formed a key part of the assessment of cumulative impacts contained in the Environmental Statement? If this is correct, it is of some concern that the applicant has failed to consider the potential change in cumulative impacts arising from the relocation of this area beyond the Order boundary. In the absence of this assessment, we consider that the proposed relocation cannot be considered to be a non-material change.
- 3.35 Further, it is clear from the Application Statement that the applicant's intention is to utilise the area formerly reserved for Mitigation Area A for future economic development. If Mitigation Area A is moved to Halton Marshes, it will open up approximately 50 hectares of land at the AMEP site, for development purposes.
- 3.36 Although the Application Statement does not identify the proposed use of this land, we understand that the applicant intends to utilise this area for car storage and port uses – this is evidenced by a planning application which has been submitted, but not yet determined by, the local planning authority for permanent construction and operation of a car storage and distribution facility on the site of Mitigation Area A (Planning Application Ref: 2017/2141).
- 3.37 Despite the applicant's clear aspiration to re-use the mitigation area for future economic development, the Application Statement does not appear to provide any assessment of the impact this change may have in the context of the scheme as a whole, or whether any potential cumulative effects could arise as a result of this separate development.

#### ***Environmental Impact Assessment***

- 3.38 A fundamental part of the application is consideration of whether the proposed change would constitute 'EIA development' for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("EIA Regulations").
- 3.39 Of relevance is the fact that paragraph 13(1) of Schedule 2 to the EIA Regulations states that the following will constitute EIA development:

*"(1) Any change to or extension of development of a description listed in Schedule 1 to these Regulations (other than a change or extension falling within paragraph 21 of that Schedule) or in paragraphs 1 to 12 of this Schedule, where that development is already authorised, executed or in the process of being executed, and the change or extension may have significant adverse effects on the environment."*

- 3.40 In paragraph 3.4.3 of the NMA Application Statement, the applicant asserts that *"the changes do not constitute either Schedule 1 development or Schedule 2*

*development"* under the EIA Regulations. The applicant then states in paragraph 3.4.4 that *"the proposals at HMWG for which planning permission was sought (and attained) did not, in fact, constitute EIA development."*

3.41 We are concerned with this analysis on two particular grounds:

- (a) First, the applicant appears to have considered the wrong scheme. The change contemplated by the NMA is a change to the AMEP scheme, not the Halton Marshes Wet Grasslands area ("HMWG") proposal. The AMEP scheme was EIA development, which means that the proposed change would constitute EIA development if it has the potential to have significant effects on the environment.
- (b) Second, based on the significant concerns with the applicant's assessment of the environmental effects of the proposed relocation of Mitigation Area A (as identified above), it is clear that they are not in a position to conclude that the changes will not result in any significant adverse effects on the environment. Such a decision can only be made by the Secretary of State by way of an entirely objective analysis of the proposal.

3.42 Accordingly, due to the realistic possibility that the proposed change constitutes EIA development under the EIA Regulations, we consider, purely on the basis of legal process, that the applicant must request a screening opinion from the Secretary of State in respect of the proposed change to establish whether environmental impact assessment is required in accordance with the EIA Regulations. In the absence of such a screening opinion, it must be the case that the Application cannot be considered to be a non-material change.

#### 4 **Habitats and Protected Species**

4.1 The Guidance states that any change to a DCO that would invoke a need for a Habitats Regulation Assessment, or a new or additional licence in respect of a European Protected Species, is likely to be a material change.

4.2 The appropriate assessment submitted as part of the DCO application concluded that the proposed AMEP development would result in an adverse effect on the integrity of the European nature conservation designated sites on the Humber Estuary. One of those identified impacts related to the effect of loss of terrestrial habitat within the AMEP site at North Killingholme which is used by SPA birds (predominately curlew). As such, measures required to compensate the adverse effect of the AMEP were incorporated as part of the DCO.

4.3 Due to the impact of the AMEP on habitats and species, the examination for the DCO involved detailed consideration as to whether the test of Imperative Reasons of Overriding Public Interest (IROPI), made in relation to the application of the Habitats Directive and Birds Directive, was satisfied.

4.4 In terms of the recent Application, the applicant relies upon the appropriate assessment undertaken by North Lincolnshire Council in respect of the planning permission to develop ecological habitat at Halton Marshes, known as the 'HMWG' scheme (Planning Reference PA/2016/649), which concluded the mitigation habitat would not give rise to an adverse effect on the integrity of the Humber Estuary European Site.



4.5 Although we are not in a position to comment on the conclusion reached by North Lincolnshire Council in this regard, we do question whether reliance by the applicant on this assessment in terms of the NMA application is sufficient, given that the Council was considering the benefits of the HMWG in isolation (i.e. the creation of wet grassland). Although the HMWG includes *'the wider objectives of AMEP Mitigation Area A'*, it appears that the Council did not specifically assess the ability of the HMWG to replicate the ecological benefits conferred by Mitigation Area A.

4.6 As such, we speculate whether a separate Habitats Regulations Assessment would be required to consider whether the scheme still satisfied the tests set out in Article 6(4) of the Directive, namely the IROPI test, once the mitigation area is removed from the vicinity of the AMEP site?

## 5 Impact on Business and Residents

5.1 The Guidance states that the potential impact of the proposed change on local people, such as residents and businesses, will be relevant in considering whether a change is material. Section 4 of Able's Application Statement does relate to 'stakeholder engagement', but this only references historical correspondence, and which is not directly related to the application at hand. Accordingly, the Application Statement does not appear to contain any assessment of:

- (a) the effect of the change on the local business and community (i.e. what effect, if any, it would have on the local community); or
- (b) the likely level of public interest in the change (i.e. whether the general public would be likely to be interested in or concerned by the change, taking into account the consultation undertaken to date).

5.2 Given the potential size and scale of any future development that could be undertaken on the approximately 50 hectare site, we consider there is very real potential for significant impact on the amenity of the local area and community. Accordingly, we are of the view that this factor alone is sufficient to constitute a material change.

## 6 Conclusion

6.1 As you will appreciate, whilst deliberately not commenting on the quality nor indeed the integrity of the environmental and nature conservation information provided by Able to support its application, it does seem to us that purely on the basis of legal process, the proposal now before you has the potential to create far-reaching effects and impacts which would support our view that this application cannot, in law, be viewed as non-material.

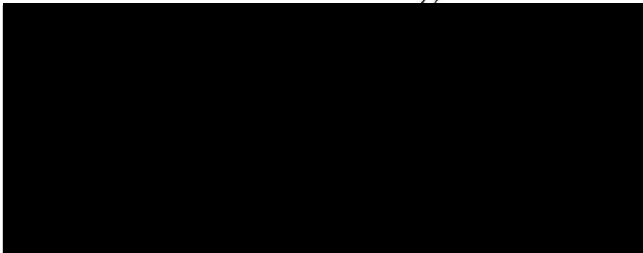
6.2 To determine otherwise would lead to a disturbing and worrying precedent which could be interpreted as the Secretary of State accepting a process which could be seen by some as being contrary to the rules of justice and the underlying principle in such matters of maintaining a justiciable "level playing field". Whilst it is not for my client to speculate on the outcome of the Secretary of State's determination, my client is nevertheless strongly of the view that a proper and transparent process must be followed.

6.3 We are, of course, not in a position to comment on the expert views that will no doubt be provided by the environmental regulators and other interested third parties – nor

would we wish so to do. The purpose of these representations is not to go to the content or quality of the applicant's supporting information but to go to legal process alone. It is our client's firm view, however, that on an entirely objective analysis of the proposal, in light of the potential effects and impacts of the proposal, the seeming paucity of information provided and the consequential high-level approach to analysis of the effects adopted by the applicant, the proposal now before you should be properly processed as a material amendment to the approved DCO.

- 6.4 We would, as a consequence, ask the Secretary of State to determine that in light of the potentially far-reaching effects of the proposal and the inherent defects in the proposal as presented, the applicant should be advised that its application should be withdrawn, reviewed and corrected and then re-submitted in accordance with the legal process set out in Part 2 of the 2011 Regulations relating to applications for 'material' changes to a development consent order. This will provide all parties with a genuine opportunity to understand the true impacts and effects of the application and to enable fair and equitable consultation and comment.

Yours faithfully



**Brian Greenwood**  
Partner  
Clyde & Co LLP