



Department for Transport

BDB Pitmans LLP
Solicitors and Parliamentary Agents
One Bartholomew Close
LONDON
EC1A 7BL

Natasha Kopala
Head of the Transport and Works Act
Orders Unit
Department for Transport
Zone 1/14
Great Minster House
33 Horseferry Road
LONDON
SW1P 4DR

Enquiries: 07971 145878
Email:
transportinfrastructure@dft.gov.uk

Web Site: www.gov.uk/dft/

28 OCTOBER 2020

Dear Sirs,

PLANNING ACT 2008: APPLICATION FOR A NON-MATERIAL CHANGE TO THE ABLE MARINE ENERGY PARK DEVELOPMENT CONSENT ORDER 2014

1. I am directed by the Secretary of State for Transport (“the Secretary of State”) to say that consideration has been given to the non-material change application (the “NMC Application”) by Able Humber Ports Limited (“the applicant”) made on 19 September 2018 for a non-material change to the Able Marine Energy Park (“AMEP”) Development Consent Order 2014 (“the 2014 Order”). The NMC Application was made under section 153 and Schedule 6 (“Schedule 6”) of the Planning Act 2008 (“PA2008”).

2. The original application was granted consent on 18 December 2013. It permitted the Development 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.

3. The Applicant is seeking a change to the 2014 Order in order to move an area (referred to as “Mitigation Area A” in the 2014 Order) proposed for ecological mitigation to a new site outside the Order limits, next to two other areas which are being used for ecological mitigation for other developments for which the Applicant has been granted planning permission. This area is known as the Halton Marsh Wet Grassland (“HMWG”) area.

Summary of Secretary of State’s position

4. For the reasons explained at paragraphs 24 to 51 of this letter, the Secretary of State is minded to regard the change sought as a material change subject to consideration of further submissions from the Applicant (if it chooses to make them), and Interested parties on the matters outlined below. It is for the Applicant to consider whether it wishes to respond to this letter with further submissions – as there is no guarantee the Secretary of State’s position will change after consideration of such further submissions, meaning the Secretary of State would then decline to determine the application as a non-material change - or to

withdraw the application and apply for the change it is seeking under paragraph 3(1) of Schedule 6, supported by the additional information referenced in the paragraphs below.

Consultations

5. The Applicant wrote to the Secretary of State on 8 June 2018 requesting under regulation 7(3) of the Infrastructure Planning (Changes to, and Revocations of, Development Consent Orders) Regulations 2011 (“the 2011 Regulations”) his consent on the need not to consult with certain persons because they were not directly affected by the proposed changes or because their interests related to a different part of the scheme. Therefore, the Secretary of State responded on 17 August 2017 giving his consent under regulation 7(3) for a reduced consultation.

6. The Applicant publicised the NMC Application in accordance with regulation 6 of the 2011 Regulations and consulted the persons required by regulation 7 of the 2011 Regulations, in the manner prescribed and the deadline for receipt of representations on the Application was 29 October 2018.

7. The NMC Application was made available on the Planning Inspectorate’s website on 19 September 2018, so that there was an opportunity for anyone not notified to also submit representations to the Planning Inspectorate.

8. In total, eight representations were received by the deadline of which two were from local residents: Sheila Henley and Dr Graham Milner. The remaining six were from parties who had an interest or were affected by the scheme: C.GEN Killingholme Limited, C.RO Ports Killingholme Limited, North Lincolnshire Council (“NLC”), Associated British Ports, Natural England, ESP Gas Group Ltd. The Applicant responded to the Representations on 19 November 2018.

9. Following these responses, the Secretary of State considered it necessary to request further Habitats Regulations Assessment (“HRA”) information from the Applicant to inform the Secretary of State’s consideration of the materiality of the proposed changes. The Applicant provided an updated shadow HRA report on 17 May 2019 and comments on this were also provided by Natural England (“NE”) and Clyde and Co LLP on behalf of Associated British Ports.

Consultation Responses

Sheila Henley

10. The Secretary of State notes that Ms Henley had no objection per se but considered that the opportunity should be taken to enhance the wider ecology, biodiversity and the flora and fauna in the area to help land based animals, birds, amphibians and insects and other migrant birds; and reduce soil erosion to enhance biodiversity. The Secretary of State also notes concerns were raised about a number of other issues such as the impact of off road bikers on pedestrians in the area and fly tipping. As these do not relate to the NMC Application, these matters have not been considered further.

Dr Graham Milner

11. The Secretary of State notes the view of Dr Milner that a car storage facility does not constitute a nationally significant infrastructure project. He further notes that the DCO was

granted on the premise that wind turbines would be constructed, and along with other infrastructure, would provide employment for over 3000 people and reduce fossil fuel consumption.

12. The Secretary of State notes that Dr Milner is of the opinion that the proposed car-storage Area, which he claims is the reason for the non-material change application, would provide low quality, zero hour contracted and unskilled employment and the extra vehicles imported would also increase the consumption of fossil fuels.

13. He further notes Dr Milner's view that Mitigation Area A was intended to provide a haven for the wildlife of this area that would be displaced by the AMEP and the amendment would result in a massive car storage facility being built less than 10 metres from his property on green fields that are currently reserved as habitat for wildlife and that the application cannot therefore be described as a non-material change.

C.GEN Killingholme Limited and C.RO Ports Killingholme Limited

14. G.CEN Killingholme Limited and C.RO Ports Killingholme Limited set out that they considered that the proposals required an updated environmental statement which means the application is not a non-material change. The Secretary of State notes their view that the environmental information is incomplete and it only assesses the consolidation of mitigation at Halton Marshes and not the impacts of any development on the land freed up.

15. The Secretary of State notes further their view that the Applicant is using processes under the Town and Country Planning Act 1990 and the Planning Act 2008 to materially change the nature and details of the project approved in the 2014 Order without proper scrutiny. He also notes their view that the Applicant is using the benefit of its 2014 Order to progress a project that is not in itself a nationally significant infrastructure project.

North Lincolnshire Council

16. Whilst the Secretary of State notes that NLC's objection was withdrawn on 15 June 2020, the basis of their objection was that they considered the proposed amendments to the 2014 Order to be material in nature because the proposed mitigation area is outside of the existing 2014 Order limits and Mitigation Area A was a significant factor in the consideration of the 2014 Order application to ensure that there were no adverse effects on the qualifying features of the European Site.

17. The Secretary of State notes that NLC highlighted that they had received a planning application under the Town and Country Planning Act 1990 to delete Mitigation Area A and substitute it with an alternative mitigation area at Halton Marshes (Ref PA/2017/1802) and that a separate planning application was submitted for car storage and distribution facilities and associated works to be located at Mitigation Area A (ref PA/2017/2141). The NLC considered that they did not have the powers to determine these two applications as they considered that the applications were not covered by the powers conferred by Schedule 11 of the 2014 Order.

Associated British Ports

18. The Secretary of State notes the view from Associated British Ports that the Applicant has failed to genuinely assess the potential impacts and effects of the proposed changes to the 2014 Order and whether in the light of a properly undertaken assessment the proposed

change constitutes Environmental Impact Assessment (“EIA”) development or requires a fresh HRA.

19. The Secretary of State further notes their view that the Applicant has failed to properly assess the impact of the proposed change on the local area and local community and that they are attempting to secure a fundamental alteration to an approved Order on the basis of a high-level review lacking basic information and analysis. He notes their view that the Applicant has failed to consider a range of relevant factors which may impact the conclusions in the Environmental Statement (“ES”). He also notes their view that the Applicant also appears to have failed to properly assess the impacts arising from the reduction in the overall size of the mitigation area.

Natural England

20. The Secretary of State notes that NE made representations on the basis that Mitigation Area A was required to offset the loss of Functionally Linked Land (“FLL”) for the Humber Estuary Special Protection Area (“SPA”) associated with the development of Killingholme Marshes and that Halton Marshes needs to be able to also offset the loss of FLL. The Secretary of State notes that NE set out that the original HRA did not assess the relocation of Mitigation Area A and that an updated HRA was required to assess this.

21. NE also set out that a series of Environmental Management and Monitoring Plans (“EMMPs”) were secured via a legal agreement between NE and the Applicant dated 29 April 2013 and that these would need to be updated to include this updated mitigation scenario and submitted to and agreed by NE.

22. The Secretary of State notes that in response to the Applicant’s shadow HRA, NE recommended that the updated HRA should address the complete loss of FLL on the development site; demonstrate that the proposed off-site mitigation at Halton Marshes will ensure that the overall coherence of the Natura 2000 network remains protected; and assess whether the new location of the mitigation at Halton Marshes can adequately provide the alternative terrestrial habitat function for birds that use the North Killingholme marshes fronting and North Killingholme Haven Pits (“NKHP”). NE also stated that the screening assessment in the original HRA determined that the disturbance effects on birds using NKHP from construction activities (other than piling) and operation of AMEP required mitigation. It was concluded that based on a commitment to achieve 55 dB(A) L_{Amax} at the NKHP site boundary that there would be no adverse effect on birds within NKHP. Therefore, if Mitigation Area A was to become part of the AMEP development site, NE requested assurance that the noise level commitment will continue. NE also highlighted that any future applications for development at Mitigation Area A would require an assessment to determine if there were additional environmental impacts as the previous application considered this area as grassland.

ESP Gas Group

23. ESP Gas Group confirmed they had no gas or electricity apparatus in the vicinity of this site address and will not be affected by the proposed works.

Consideration of the Materiality of the Proposed Change

24. The Secretary of State has given consideration as to whether the Application is for a material or non-material change. In doing so, he has had regard to paragraph 2(2) of

Schedule 6 to the PA2008 which requires the Secretary of State to consider the effect of the change on the development consent order (“DCO”) as originally made.

25. There is no statutory definition in the Planning Act 2008 or the 2011 Regulations of what constitutes a ‘material’ or ‘non-material’ change for the purposes of Schedule 6 to the PA2008 and Part 1 of the 2011 Regulations.

26. So far as decisions on whether a proposed change is material or non-material, guidance has been produced by the Department for Communities and Local Government, the “Planning Act 2008: Guidance on Changes to Development Consent Orders” (December 2015) (“the Guidance¹”), which makes the following points. First, given the range of infrastructure projects that are consented through the PA2008, and the variety of changes that could possibly be proposed for a single project, the Guidance cannot, and does not attempt to, prescribe whether any particular types of change would be material or non-material. Second, there may be certain characteristics that indicate that a change to a consent is more likely to be treated as a material change, namely:

- a. A change should be treated as material if it would require an updated ES to take account of new, or materially different, likely significant effects on the environment. There may be cases where the change proposed will result in likely significant effects on the environment that are entirely positive, but in such cases an updated ES will still be required and the application will need to be treated as a material change to ensure that the regulatory requirements on EIA are met.
- b. A change is likely to be material if it would invoke a need for a HRA. Similarly, the need for a new or additional licence in respect of European Protected Species is also likely to be indicative of a material change.
- c. A change should be treated as material that would authorise the compulsory acquisition of any land, or an interest in or rights over land, that was not authorised through the existing DCO.
- d. The potential impact of the proposed change on local people will also be a consideration in determining whether a change is material. Additional impacts that may be relevant to whether a particular change is material will be dependent on the circumstances of a particular case, but examples might include those 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.

27. Third, that although the above characteristics indicate that a change to a consent is more likely to be treated as a material change, these only form a starting point for assessing the materiality of a change. Each case must depend on thorough consideration of its own circumstances.

Secretary of State considerations

28. For the reasons explained at paragraphs 30-51 of this letter, the Secretary of State is minded to consider that the proposed changes are material unless the Applicant can provide full and clear information or evidence to address the following gaps in the ES and

¹ <https://www.gov.uk/government/publications/changes-to-development-consent-orders>

HRA assessment material and demonstrate that the proposed change gives rise to no materially new or materially different likely significant effects, compared to those assessed as part of the 2014 Order:

- The Secretary of State notes that Mitigation Area A was provided in relation to the 2014 Order to offset the loss of FLL for the Humber Estuary SPA and that Mitigation Area A was also initially FLL. The Secretary of State is of the opinion that the shadow HRA is too narrowly focused. There is a gap in the ES and HRA assessment material due to lack of consideration given to development of the original Mitigation Area A site (which is FLL that was due to be enhanced to provide Mitigation Area A). The missing assessment for both ES and HRA purposes would need to consider the context of the original loss of FLL, plus loss of Mitigation Area A FLL, plus impacts on FLL at Halton Marshes due to the habitat creation measures as a whole.
- The Secretary of State further notes that the mitigation proposed is now outside of the existing DCO boundary. The re-siting of Mitigation Area A creates new effects and introduces new receptors that were not previously assessed. He is of the opinion that updated Supporting Environmental Information is required to understand these effects.
- The Secretary of State notes that the planning boundary is not proposed to be amended as part of this application to remove Mitigation Area A. The Secretary of State requires information regarding the impacts of developing Mitigation Area A land as a worst case scenario not addressed in the ES that accompanied the 2014 Order or the supporting environmental information that accompanied the NMC Application.
- The Secretary of State also notes the application submitted under the Town and Country Planning Act 1990 to NLC of 27 December 2017 (ref PA/2017/2141) for a “car storage and distribution facility, port related storage, engineering works, pre-delivery inspection facility building, other minor buildings, lighting columns and other minor works”. The Secretary of State considers that sufficient information should be provided to ensure that he can consider the cumulative and in-combination effects of this and any other relevant plan or project as part of his consideration of EIA and HRA matters.

29. More detail on each of these points is set out in the Secretary of State’s consideration of the materiality of the proposed change in relation to the four matters lettered (a), (b) (c) and (d) in paragraph 26 above:

(a) The Environmental Statement

30. The Secretary of State notes that the ‘non-material change indicative masterplan’ (AME-02006c) submitted as part of this application removes the authorised buffer zone and original Mitigation Area A shaded area that was included in the authorised masterplan from 2012 (AME-02006A). The order limits are not amended by AME-02006c. The Secretary of State notes the Applicant’s conclusion in the supporting environmental information is that the original assessment findings remained valid.

Implications of retaining the original Order limits

31. The Secretary of State considers that the proposed retention of the original order limits creates uncertainty with regard to the original assessment’s presentation of the

reasonable worst case scenario and extent of the likely significant effects assessed. The original Mitigation Area A land would still benefit from the development powers within the DCO, meaning that the land could be developed resulting in new, different or increased significant effects compared with those presented in the original ES.

32. The Applicant's submission of a planning application to NLC dated 27 December 2017 (ref PA/2017/2141) under the Town and Country Planning Act 1990 ("the TCPA application") indicates that there is an intention to develop the original Mitigation Area A land which will result in the loss of FLL and have associated effects. Although the impacts of the TCPA application will be required to be considered before a decision is made on it by NLC, the Secretary of State considers that as this area of land is to remain within the boundary of the 2014 Order an updated ES is required in respect of the NMC Application to ensure that the likely worst case scenario for the area within the planning boundary of the 2014 Order has been appropriately assessed and its outcome considered.

The Effect of relocating Mitigation Area A to HMWG

32. The Secretary of State considers that the change in location of Mitigation Area A to the HMWG gives rise to effects on new features, habitats and receptors that were not originally considered in the ES. It can be argued that some of these effects are not materially different in the sense that the broad conclusion of significance is not changed (e.g. in relation to impacts on drains, buried archaeology, numbers of properties affected). However, whilst the Secretary of State notes that separate planning permission has been granted for HMWG he considers that the effects on the specific receptors at HMWG were not previously identified as part of the Able Marine DCO application and they require specific assessment in relation to the NMC Application.

33. The Secretary of State notes that in the original ES, Mitigation Area A would affect the following receptors:

- Existing agricultural grassland (16.7ha), which is FLL supporting Curlew in numbers >1% of the population;
- Existing drains at the Mitigation Area A site hosting water vole;
- Existing archaeology specific to the site;
- 1 residential receptor on the boundary of the site; and
- The road network i.e. Rosper Road and Marsh Lane leading to Able MEP.

34. At the HMWG site, the works would affect the following receptors:

- Existing agricultural land (20ha), which is FLL supporting an existing bird assemblage, which includes Marsh Harrier (a qualifying feature of the Humber SPA);
- Existing drains including water vole population;
- Existing archaeology specific to the site;
- One different residential receptor adjacent to the site; and
- The road network i.e. Skitter Road, leading to the HMWG site.

35. The Secretary of State therefore considers that the relocation of the site has the following implications for the original ES assessment:

- Impacts on a new area and quantum of agricultural land supporting a different bird assemblage that was not previously assessed in terms of construction disturbance or operation in the original ES.

- The impact of the new proposals on Marsh Harrier, which was recorded on the HMWG site in ecological surveys in 2005, has not been assessed or addressed.
- Table 3.1 of the Applicant's NMC Application Statement does not explain how the relocation of Mitigation Area A will satisfy the functional requirement for bat foraging. The Applicant's shadow HRA for the NMC dated May 2019 states that the functional requirements for bats are provided within HMWG, however it is unclear whether provision of the same functional requirements mitigates the specific effect at the original Mitigation Area A site or the prospective development of that site.
- Effect on new receptor drains;
 - The original Phase 1 habitat survey suggests that there are no notable flora but that water vole are present in the ditch network at the original Mitigation Area A site and HMWG – no information is provided regarding the two populations (in terms of size, coherence, sensitivity etc.) or the relative effect of the works on the populations. The Secretary of State is therefore unable to conclude whether the significance of effect remains the same;
- Possible impact of leachate and landfill gas from landfill sites near HMWG, a new potential impact not assessed in the original ES.
- Table 3.1 does not include commentary on the potential for the change in location of Mitigation Area A to give rise to any new or different cumulative effects. It is reasonable to assume that cumulative effects could be different from those previously assessed due to the different geographical location.
- In addition, the relocation of the Mitigation Area A proposal to HMWG has potential to release the original Mitigation Area A for development. The cumulative impact of developing the Mitigation Area A at HMWG, alongside the original Mitigation Area A site, has not been assessed.

The implication of applying the Infrastructure Planning (Environmental Impact Assessment) 2017 to the consideration of effects

38. The Secretary of State notes that the NMC Application Statement (Part 1) states that the Applicant has considered whether the proposed change would constitute 'EIA Development' for the purposes of the Infrastructure Planning (EIA) Regulations 2017 ("the 2017 EIA Regulations"). The Secretary of State notes the original ES prepared in relation to the 2014 Order was prepared under the Infrastructure Planning (EIA) Regulations 2009 ("the 2009 EIA Regulations"). The 2017 EIA Regulations introduced new environmental assessment aspects including human health, climate change (as opposed to climatic factors) and major accidents and disasters. The Secretary of State notes that whilst Table 3.1 of the NMC Application Statement addresses human health it does not reference climate change or major accidents and disasters. Whilst it is unlikely that a major accident or disaster risk applies to the development proposed under the NMC application, the effect of climate change is pertinent to the future success of any habitat created. The impacts of the development proposed under the NMC application will, where relevant, need to be assessed cumulatively with those arising from other developments, including the AMEP development authorised by the 2014 Order.

Conclusion

39. It is the conclusion of the Secretary of State that the proposed change could result in changes to the outcome of the assessment in the Applicant's original ES and that new or different significant effects cannot be ruled out, requiring the need for an updated ES. The

most compelling reason for this conclusion is that the retention of the Order limits permits development and loss of existing habitat that was not previously assessed in the original ES. An assessment of cumulative impacts is required that takes account of planning application ref. PA/2017/2141. It is also clear that the proposed development would affect new receptors not previously considered within the ES, regardless of the Applicant's conclusion that the effects are overall no worse, and that these are new and different impacts not previously assessed.

40. The Secretary of State is content that an application is not necessarily material due to a need to update the ES but that an application could be considered material if it needs to be updated to address new or materially different likely significant effects on the environment that were not assessed as part of the original application. In this instance, such a change could fall under paragraph 13(1) of Schedule 2 to the 2017 Regulations as the Secretary of State considers that the relocation of the habitat mitigation outside the Order limits is a change or extension to the project. This paragraph sets out EIA development as *"Any change to or extension of development of a description listed in Schedule 1 (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"*.

41. The Secretary of State considers that he does not have enough information to determine whether there are any new, different or extended impacts and if there are whether they are significant. However, taking the above factors into account, the Secretary of State is minded to consider that the application is material.

b. The Habitats Regulation Assessment

42. The Secretary of State notes that the Applicant's initial July 2018 request for a NMC Application was not accompanied by an HRA prepared in support of that request. Instead the Applicant provided the shadow assessment submitted to NLC as part of the Applicant's request for planning permission for the HMWG site. The Applicant also provided a copy of the Appropriate Assessment undertaken by NLC in respect of that permission, which concluded that the application would not have an adverse effect on the integrity of any designated sites.

43. The scope of the HRA for the HMWG considers the effect of relocating Mitigation Area A to the HMWG site but does not consider the effect of development taking place on the FLL at the original Mitigation Area A site, either in the context of application PA/2017/2141 (the site location plan of this application indicates that the land subject to the application is Mitigation Area A land) or in the context of the retained Order limits and the powers of development that may be afforded to the Mitigation Area A site under the 2014 Order.

44. On 29 April 2019 the DfT wrote to the Applicant requesting information to inform a HRA to assess the materiality of the changes being sought in the NMC Application. The Applicant submitted a shadow HRA for the NMC Application on 17 May 2019. The Secretary of State notes that this assessed the impact of relocating the Mitigation Area A proposals to HMWG in terms of whether the HMWG mitigation site would provide the same functionality as the original Mitigation Area A land. However, similar to the shadow assessment for the HMWG site, in providing the assessment, the Applicant has not given consideration to the

potential loss of FLL that exists at the original Mitigation Area A site. This is a matter that has been highlighted in the consultation responses from NE.

45. Regardless of PA/2017/2141, as set out above, the NMC Application removes the mitigation land from the Order limits and would not restrict development of land within the original Mitigation Area A. Neither the original HRA nor the shadow HRA for the NMC Application considered the potential for the original Mitigation Area A to be developed. In light of the development powers afforded by the 2014 Order, based on retention of the original Order limits, it is considered that the original HRA would need to have included additional assessment to consider the likely significant effect arising from the loss of the FLL at the original AMEP site, plus the loss of the original Mitigation Area A FLL, as well as the effect of the mitigation works on FLL at the HMWG site.

46. Further, as the NMC Application was submitted after the submission of PA/2017/2141, the Secretary of State considers the development subject to PA/2017/2141 to be a plan or project for which an in-combination assessment should have been undertaken.

47. In the absence of this assessment, it is not possible for the Secretary of State to understand whether the original HRA would have concluded that there was no adverse effect on the integrity (“AEoI”) of the designated sites in a scenario where mitigation was located at HMWG and the original Mitigation Area A land was developed. This creates uncertainty in the Applicant’s conclusions regarding the coherence of the Natura 2000 network and in the conclusions that can be drawn by the Secretary of State as the Competent Authority. The HRA conclusions were a key part of the decision on the original application.

48. In addition, the Applicant’s shadow HRA in respect of the NMC application screened out effects on Marsh Harrier. Marsh Harrier is a qualifying feature of the Humber SPA and neither the original HRA nor the shadow HRA produced for the NMC Application appear to take into account impacts on Marsh Harrier using arable land to forage at the HMWG site. The shadow HRA for the NMC Application is therefore considered to be incomplete in the absence of this information or clarification of the reason for screening out effects on Marsh Harrier. The Secretary of State therefore considers that he does not have the necessary information to conclude that there would be no significant effect on Marsh Harriers.

Conclusion

49. In the absence of an assessment of the effects on all affected FLL, and on Marsh Harrier, the Secretary of State cannot conclude that the HRA conclusions remain the same and is therefore minded to consider that the application is material. In respect of European Protected Species, the Secretary of State is satisfied based on the current information that the changes considered in this letter do not bring about the need for a new or additional licence.

c. Compulsory Acquisition

50. The NMC Application does not result in any change to the compulsory acquisition provisions of the 2014 Order. Consequently, this question does not raise issues of materiality.

d. Impacts on Local People and Businesses

51. The Secretary of State notes the concern raised by Dr Graham Milner that the amendment would result in a car storage facility being built less than 10 metres from his property and that this area is currently green fields reserved as habitat for wildlife. The Secretary of State notes that this concern relates specifically to the TCPA application which has not yet been decided. Whilst the Secretary of State considers that the NMC Application needs to take account of the TCPA application, it is not for the Secretary of State to consider whether or not this should be granted permission as this is a matter for NLC. On the basis of the information provided by the Applicant, the Secretary of State is satisfied that the potential impacts on local people and businesses of moving Mitigation Area A will not be significantly different to those originally assessed. However, as stated, the impact on local people and businesses of the development of the original Mitigation Area A land (whether under the DCO or a separate planning application) needs to be considered as part of the assessment of cumulative effects.

The Secretary of State's Overall Conclusion

52. For the reasons set out in this letter the Secretary of State is minded to regard the proposed change as material. The Secretary of State considers that given the gaps in the information currently before him, he cannot conclude that the application is non-material and proceed to determine it. As set out in this letter he is giving the Applicant the option of submitting further information so as to be able to come to a final view on whether the application is non-material or material and if the former, whether it should be approved.

53. Given the number and range of issues raised in this letter and the extent and complexity of further information required, it is for the Applicant to consider whether it wishes to take up the option of submitting further information or instead to withdraw the application and make a new application under paragraph 3(1) of Schedule 6. There is no guarantee the Secretary of State will be able to determine the application under paragraph 2(1) in the light of further information provided. Any such new application would need to include the further information referred to in the paragraphs above.

54. The 2011 Regulations do not provide an express procedure for the situation where there is doubt as to whether an application can be determined under paragraph 2(1) of Schedule 6. The Secretary of State wishes to highlight that Applicants making an application under paragraph 2(1) need to make the fullest attempt in the application to demonstrate why they consider the change sought is not material or accept that it is, in fact, material. There is a danger that a series of requests for additional information turns into a form of examination, when the point of the non-material change procedure is that it is quick and streamlined because the change is clearly non-material based on the information provided by the Applicant in the application, taking account of the Guidance.

Next Steps

55. The Applicant is invited to respond to the Secretary of State (to e-mail address AbleMarineEnergyPark@planninginspectorate.gov.uk) by Thursday 12 November to provide any relevant information on the matters referred to above, or to withdraw the application if it decides not to respond.

56. The Applicant's response will then be published on the Planning Inspectorate's website and comments will be invited from interested parties. The Secretary of State will consider the Applicant's response and any related comments before deciding next steps and in reaching his decision.

Yours sincerely

Natasha Kopala