



# Department for Transport

BDP Pitmans LLP  
Solicitors and Parliamentary Agents  
One Bartholomew Close  
London  
EC1A 7BL

Natasha Kopala  
HEAD OF TRANSPORT AND WORKS ACT ORDERS  
UNIT  
DEPARTMENT FOR TRANSPORT  
ZONE 1/14-18  
GREAT MINSTER HOUSE  
33 HORSEFERRY ROAD  
LONDON  
SW1P 4DR  
ENQUIRIES: 07971145878  
EMAIL:TRANSPORTINFRASTRUCTURE@DFT.GOV.UK

Web Site: [www.gov.uk/dft/](http://www.gov.uk/dft/)

13 May 2021

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 Development Consent Order 2014 (“2014 Order”). The NMC Application was made under section 153 and Schedule 6 (“Schedule 6”) of the Planning Act 2008 (“PA2008”). This letter is the notification of the Secretary of State’s decision in accordance with regulation 8 of the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (as amended) (“the 2011 Regulations”).

2. The original application for development consent was granted on 18 December 2014. It permitted the development of 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 to move an area (referred to as “Mitigation Area A” in the 2014 Order) proposed for ecological mitigation to a new site outside the 2014 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 Marshes Wet Grassland (“HMWG”) area. Following the Applicant’s letter of 12 November 2020, an additional change is sought to exclude Mitigation Area A from the 2014 Order limits. This is referred to in this letter as the “Revised Application” and it is this application that the Secretary of State has made his decision on.

4. This letter should be read in conjunction with the Secretary of State's letter of 28 October 2020 (the "Minded To letter") in which he was minded to regard the proposed change as a material change, subject to consideration of further submissions from the Applicant and Interested parties on the matters outlined in that letter.

### **Consultation**

5. The Applicant publicised the NMC Application in accordance with regulation 6 of the 2011 Regulations and having obtained consent from the Secretary of State to consult a targeted list of consultees consulted the persons required by regulation 7 of the 2011 Regulations in the manner prescribed. The deadline for receipt of representations on the NMC Application was 29 October 2018.

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

7. Eight representations were received and considered from: Associated British Ports; C.GEN Killingholme Limited; C.RO Killingholme Limited; Natural England ("NE"); North Lincolnshire Council; Sheila Henley; Dr Graham Milner and EPS Gas Group Ltd.

8. Further consultation was subsequently carried out by the Secretary of State on 29 April 2019 and as further described in this letter.

9. The Secretary of State has considered the representations received in response to the consultations and does not consider that any further information needs to be provided by the Applicant, or that further consultation of those already consulted is necessary.

### **Minded To letter**

10. On 28 October 2020 the Secretary of State published the Minded To letter. After considering the NMC Application and the responses to the Secretary of State's consultations, the Secretary of State set out that he was minded to consider the proposed changes as material unless the Applicant could provide full and clear information or evidence to address gaps in the Environmental Statement ("ES") and the Habitats Regulation Assessment ("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.

11. The Applicant responded on 12 November 2020. The Applicant set out that to address some of the concerns raised, they would additionally seek to remove Mitigation Area A from the 2014 Order limits as part of their NMC Application. A new draft Order was provided to reflect this. The Applicant also confirmed that the planning application submitted under the Town and Country Planning Act 1990 to North Lincolnshire Council for car storage and distribution facilities and associated works to be located at the original Mitigation Area A (ref PA/2017/2141) had been withdrawn. As part of their response, the Applicant provided a revised application statement with an expanded Section 3 to explain the change in the environmental effects pursuant to the Revised Application in greater detail and a revised shadow HRA ("Revised sHRA") to reflect the Revised Application and to include an assessment in relation to Marsh Harrier and cumulative impacts.

12. The Secretary of State invited comments on the Applicant's response on 20 November 2020. In total, seven responses were received (plus a follow up response from NE). Two responses were from utility companies and one response was from Lincolnshire Wildlife Trust; these three responses all confirmed that they had no comment. North Lincolnshire Council responded to confirm that they continued to have no outstanding objections and that they agreed with the Applicant that the proposed amendments do not present any material changes to the 2014 Order and that they are unlikely to result in any significant additional or materially different environmental considerations. NE responded with comments on the Applicant's Revised sHRA, and followed this up with a further response on 21 December 2020. This is considered further below and in the Secretary of State's Test of Likely Significant Effects report (published alongside this letter). Responses were also received from Clyde and Co LLP responding on behalf of Associated British Ports and a local resident, Dr Graham Milner. These are also considered further below.

### **Consideration of the materiality of the proposed change**

13. The Secretary of State notes 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.

14. So far as decisions on whether a proposed change is material or non-material, the Department for Communities and Local Government (now the Ministry of Housing, Communities and Local Government) produced guidance entitled "Planning Act 2008: Guidance on Changes to Development Consent Orders" (December 2015) ("the Guidance"), which makes the following points. First, given the range of infrastructure projects that are consented through the Planning Act 2008, 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 the environmental impact assessment ("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.

15. Third, 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.

16. The Secretary of State's initial consideration of each of these matters is set out in his Minded To letter. Consideration of the outstanding matters highlighted in the letter are set out below following the information provided by the Applicant on 12 November 2020 and the responses to the consultation. The Secretary of State considers that this information addresses each of the matters in his Minded To letter as follows:

- The Secretary of State considered in his Minded To letter that there was a gap in the ES and HRA assessment material due to a lack of consideration given to potential development of the original Mitigation Area A site (which is Functionally Linked Land ("FLL") that was due to be enhanced to provide Mitigation Area A). The Secretary of State notes that the Applicant now proposes to amend the 2014 Order limits to remove development consent from the parcel of land allocated for Mitigation Area A so it cannot be developed under Article 5 of the 2014 Order. The Secretary of State also notes that Planning Application PA/2017/2141 has been withdrawn. The Secretary of State is therefore satisfied that the Revised Application will not result in the loss of FLL within the boundary of the original Mitigation Area A, leaving it to remain as agricultural land. The Secretary of State is therefore content that this matter has been addressed.
- The Secretary of State considered in his Minded To letter that the re-siting of Mitigation Area A outside of the 2014 Order boundary created new effects and introduced new receptors that were not previously assessed and was therefore of the opinion that updated Supporting Environmental Information was required to understand these effects. The Secretary of State notes that the HMWG site has been fully constructed and is functioning as wet grassland. The Secretary of State also notes the revised application statement and is content that the Applicant's response of 12 November 2020 addresses this matter and that the effects of the Revised Application and re-siting of Mitigation Area A have been adequately assessed.
- The Secretary of State noted in his Minded To letter that as the planning boundary was not proposed to be amended, information regarding the impacts of developing Mitigation Area A land as a worst case scenario needed to be addressed in the ES. As set out above, the 2014 Order Limits are now to be amended to remove Mitigation Area A and Planning Application PA/2017/2141 has been withdrawn. The Secretary of State is therefore satisfied that granting the Revised Application would not authorise the development of Mitigation Area A. Consequently, the Secretary of State is satisfied that this matter has been addressed and that there is no longer a need for the impacts of developing Mitigation Area A land as a worst case scenario to be assessed as part of the Revised Application. The Secretary of State notes that the Applicant does not rule out developing this land in the future and that a document

relating to a potential development of part of Mitigation Area A has been submitted to North Lincolnshire Council (reference PA/SCO/2020/3), but is satisfied that any such proposal would have to undergo its own EIA process.

- The Secretary of State considered in his Minded To letter that information was required on the cumulative and in-combination effects of the application submitted under the Town and Country Planning Act 1990 to North Lincolnshire Council of 27 December 2017 (ref PA/2017/2141) and any other relevant plan or project. The Secretary of State notes that this application has been withdrawn and is satisfied that the cumulative and in-combination effects of all relevant developments have been adequately assessed as part of the Revised Application.

17. More detail on each of these points is set out below 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) set out above.

### **Environmental Statement**

18. The Secretary of State has considered whether the Revised Application would give rise to any new or materially different likely significant effects when compared to the effects set out in the Environmental Statement for the development authorised by the 2014 Order. The Secretary of State is satisfied that the information provided by the Applicant as part of their original application for a NMC along with their response of 12 November 2020 including the attachment 'Application Statement Incorporating Environmental information revision D' is sufficient to allow him to make a determination on the application.

19. As set out above, the Applicant is now seeking to amend the 2014 Order limits to remove any development consent from the parcel of land allocated for Mitigation Area A so it cannot not be developed under article 5 of the 2014 Order. The Applicant has also withdrawn planning application PA/2017/2141. The Secretary of State therefore agrees with the Applicant that the Revised Application removes development powers from Mitigation Area A.

20. With regard to the effect of relocating Mitigation Area A to HMWG, the Secretary of State notes that this has already been constructed and that there is no future construction disturbance to consider. It is therefore also no longer agricultural land and any effects of its loss have already taken place and were assessed pursuant to the granting of planning permission PA/2016/649. The Secretary of State notes the Applicant's conclusion that the Revised Application will have no impact on the physical environment at Halton Marshes. The Secretary of State further notes that a revised draft Terrestrial Environmental Management and Monitoring Plan which addresses all the terrestrial habitats and species impacted by the Applicant on land at North Killingholme has been agreed in principle between the Applicant and NE.

21. The Secretary of State is content that the information provided by the Applicant on 12 November 2020 updates the assessment provided with the original NMC Application to take full account of the 2017 EIA Regulations and therefore addresses his concerns in his Minded To letter.

22. The Secretary of State has considered the information provided by the Applicant on 12 November 2020 and the views of consultees on this information. The Secretary of State notes that North Lincolnshire Council, in their response of 7 December 2020, agreed with the Applicant that the proposed amendments do not present any material change to the 2014 Order and that they are unlikely to result in any significant additional or materially different environmental considerations.

23. Overall the Secretary of State is content that, taking account of the changes made to the 2014 Order limits as part of the Revised Application and the additional information provided by the Applicant on 12 November 2020, all the matters raised in his letter of 28 October 2020 have been addressed. He agrees with the Applicant's conclusions that there will not be any new or materially different likely significant effects resulting from the Revised Application when compared to the effects set out in the Environmental Statement for the development authorised by the 2014 Order.

### **Habitats Regulations Assessment**

24. On 17 May 2019 the Applicant submitted a shadow HRA ("the 2019 sHRA") to the Secretary of State. Following the concerns raised by the Secretary of State in his Minded To letter, and the changes made by the Applicant in their Revised Application, the Applicant submitted a revised shadow HRA ("the revised sHRA") on 12 November 2020. The Secretary of State considered the Applicant's revised sHRA and the representations received in response to it and produced a Test of Likely Significant Effects report. This assessed the potential for likely significant effects (and whether an appropriate assessment was required) in relation to the following European sites:

- Humber Estuary Special Area of Conservation;
- Humber Estuary Special Area of Protection ("SPA"); and
- Humber Estuary Ramsar Site.

25. The Secretary of State concluded, taking into account the position of NE (in the responses dated 8 December 2020 and 21 December 2020), the combination of the HMWG already being constructed and *in situ* and the nature and current agricultural land use of Mitigation Area A remaining unchanged under the Revised Application, that there is no pathway for likely significant effects on any European site alone or in combination.

26. Views on the Secretary of State's Test of Likely Significant Effects report were sought from the Applicant and Interested Parties on 2 March 2021. Responses were received from the Applicant, NE and Clyde and Co LLP on behalf of Associated British Ports.

27. The Applicant noted that they agreed with the Secretary of State's approach, process and conclusions. NE stated that they agreed with the conclusions of the Secretary of State's report and assumed that it inferred that the provision of the mitigation measures at Halton Marshes will maintain the original HRA conclusion that there will be no adverse effects on integrity of any of the European sites in question, due to the loss of Functionally Linked Land associated with the 2014 Order. The Secretary of State is content that this is the case and that HMWG is a suitable alternative to Mitigation Area A, providing the same functional ecological requirements as Mitigation Area A. The Secretary of State notes that NE confirmed in its comments of 21 December 2020 that it was satisfied that the change in

location of the mitigation area will not result in an adverse effect on the SPA/Ramsar features.

28. The Secretary of State also notes that NE highlighted that the updated draft Terrestrial Environmental Management and Monitoring Plan has been agreed in principle and can be finalised, if the Revised Application is approved. NE also noted that within the Secretary of State's Test of Likely Significant Effects report not all of the compensation measures required are described (i.e. those at Cherry Cobb Sands). As NE have stated, this is because only those compensation measures relevant to Halton Marshes are considered necessary to include for the purposes of the Secretary of State's Test of Likely Significant Effects report.

29. The Secretary of State is satisfied that the views of NE as the appropriate nature conservation body have been considered and that they are in agreement with the conclusions in the Secretary of State's Test of Likely Significant Effects report.

30. The Secretary of State notes that Clyde and Co LLP on behalf of Associated British Ports highlighted in their response of 8 December 2020 that despite the Revised Application removing the original Mitigation Area A from the planning boundary, from documents submitted by the Applicant to the local planning authority (reference PA/SCO/2020/3), it would appear the Applicant is contemplating the construction of a monopile factory. The Secretary of State further notes Clyde and Co LLP's argument that this would be contrary to the Secretary of State's conclusion in the Test of Likely Significant Effects report that the nature and current agricultural land use of Mitigation Area A will remain unchanged. Consideration of this proposed application is set out in the Test of Likely Significant Effects report. The Secretary of State considers that granting the Revised Application would not authorise the development of Mitigation Area A. Any impacts arising from any proposed future development of that area will require a separate HRA.

31. The Secretary of State has considered the information provided by the Applicant, alongside the advice of NE as well as the representations made by other parties, and is satisfied that HMWG at Halton Marshes is a suitable alternative to Mitigation Area A, providing the same functional ecological requirements as Mitigation Area A. The Secretary of State is therefore satisfied that the conclusions of the HRA undertaken in 2014 remain unchanged in relation to the Revised Application. The Secretary of State has made minor amendments to his Test of Likely Significant Effects report to reflect the comments received and this is published alongside this letter.

### **Compulsory Acquisition**

32. The Secretary of State notes the revised Application does not result in any change to the compulsory acquisition provisions of the 2014 Order and he is satisfied that this does not raise any issues of materiality.

### **Impacts on local people**

33. Following the removal of the original Mitigation Area A from the 2014 Order Limits and the withdrawal of planning application PA/2017/2141, the Secretary of State considers that matters relating to the impacts on local people raised in his Minded To letter have been addressed. The Secretary of State notes in the Applicant's response of 12 November 2020

that the Applicant is of the view that local people will see no change in the environment as a consequence of the Revised Application, or experience any change of amenity, because neither Mitigation Area A nor HMWG will be subject to any development.

34. The Secretary of State has no reason to disagree with this conclusion and is content that the potential impacts on local people and businesses are no greater than those that arise from the development permitted by the 2014 Order.

### **Other matters raised during consultation since the Minded To letter**

35. Clyde and Co LLP responded on behalf of Associated British Ports on 8 December 2020 (and again on 16 March 2021) setting out that they do not object to the proposed development of the Able Marine Energy Park for the uses permitted by the 2014 Order, but that they are of the view that in light of the careful consideration given to the issues that arose in relation to the 2014 Order, they consider the amendment to be significant and that it cannot be viewed as non-material. The Secretary of State's consideration of the materiality of the change is set out above.

36. Dr Graham Milner also raised concerns regarding the impact of Able UK's presence on local wildlife, the application for a car storage facility on Mitigation Area A that he considers will be re-submitted after the Revised Application is determined, his treatment by Able UK in relation to his property, and the materiality of the change. The Secretary of State has set out his consideration of these matters so far as they relate to the Revised Application in this letter. The other matters raised, although noted by the Secretary of State, are not specifically related to the Revised Application and therefore cannot be addressed through this process.

### **Equality Act 2010**

37. The Equality Act 2010 includes a public-sector equality duty. This requires a public authority, in the exercise of its functions, to have due regard to the need to (a) eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic (e.g. age; sexual orientation; sex; gender reassignment; disability; marriage and civil partnerships; pregnancy and maternity; religion and belief; and race) and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

38. The Secretary of State has had due regard to the need to achieve the statutory objectives referred to in section 149 of the Equality Act 2010, and is satisfied that there is no evidence that granting the Revised Application will affect adversely the achievement of those objectives.

### **Human Rights Act 1998**

39. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights, by the amended development. The Secretary of State considers that the grant of development consent would not contravene any human rights as enacted into UK law by the Human Rights Act 1998.



## **Natural Environment and Rural Communities Act 2006**

40. The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting amended development consent. The Secretary of State is of the view that biodiversity has been considered sufficiently in this application for an amendment to accord with this duty.

### **The Secretary of State's overall conclusion and decision**

41. The Secretary of State has considered the ongoing need for the development and considers that the project continues to conform with the policy objectives set out in the National Policy Statement ("NPS") for Ports and supports the objectives of the Overarching Energy NPS (EN-1) and the Renewable Energy Infrastructure NPS (EN-3). The Secretary of State considers that the need for this Development remains as set out in his letter of 28 August 2013.

42. The Secretary of State notes that the change requested will enable Mitigation Area A to be replaced by land co-located at Halton Marshes alongside two other areas of ecological mitigation. These two other areas of ecological mitigation are an area for Overcompensation as part of the 2014 Order, and wetland required to be provided in relation to planning permission granted for Able Logistics Park by North Lincolnshire Council (PA/2015/1264). Mitigation Area A will be removed from the 2014 Order limits.

43. The Secretary of State has considered the nature and effect of the proposed changes, noting that they would have no new or materially different likely significant environmental effects. He is satisfied that the conclusions of the HRA undertaken in 2014 remain unchanged and notes that no new powers of compulsory acquisition are sought.

44. For the reasons given in this letter, the Secretary of State is satisfied that the change requested by the Applicant is not a material change to the 2014 Order, and has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make a non-material change in relation to the 2014 Order so as to authorise the change.

### **Modifications to the draft Order**

45. Minor drafting amendments have been made by the Secretary of State to the draft Order proposed by the Applicant. These changes do not materially alter the terms of the draft Order.

46. These changes include an amendment to the definition of 'environmental statement' in paragraph 1 of Schedule 11 (requirements) and the insertion of a new article 55A (certification of further environmental documents). The amendment made to the definition of 'environmental statement' is to refer to any further environmental documents that are certified by the Secretary of State under article 55A. The new article 55A sets out the further environmental documents that are required to be certified by virtue of the amendment order and will ensure there is clarity and transparency in what is required.

47. The insertion of the new article 55A replaces article 3 in the Applicant's draft revised Amendment Order. The effect of the new article 55A is to make clear that the revised or new drawings to be substituted in paragraph 6a of Schedule 11 to the 2014 Order are not required to be certified by the Secretary of State. This ensures an approach which is consistent with the approach taken in the 2014 Order where such drawings were not required to be certified.

### **Challenge to the decision**

48. The circumstances in which the Secretary of State's decision may be challenged are set out in the note attached to the Annex to this letter.

### **Notification of decision**

49. The Secretary of State's decision on this application is being notified as required by regulation 8 of the Changes Regulations.

Yours faithfully,

**Natasha Kopala**

## **LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS**

Under section 118(5) of the Planning Act 2008, a decision under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make a change to an Order granting development consent can be challenged only by means of judicial review. A claim for judicial review must be made to the High Court during the period of 6 weeks beginning with the day on which the Order making the change is published. Please also copy any claim that is made to the High Court to the address at the top of this letter.

The Able Marine Energy Park Development Consent Order 2014 (as amended by this non-material change) is being published on the Planning Inspectorate's website at the following address: <https://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/able-marine-energy-park>

**These notes are provided for guidance only. A person who thinks they may have grounds for challenging the decision to make the amending Order referred to in this letter is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London, WC2A 2LL (020 7947 6655)**