

THE ABLE MARINE PARK DEVELOPMENT CONSENT ORDER 2014 (S12014/2935)

**APPLICATION FOR A 7 YEAR EXTENSION TO THE 10 YEAR TIME LIMIT ON
COMMENCING CONSTRUCTION (ARTICLE 7)**

APPLICANT'S RESPONSE TO THE 2024 CONSULTATION

22 JULY 2024

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INTRODUCTION

1. This document provides the Applicant's comments on the representations received pursuant to the public consultation on the application undertaken between 10 May and 21 June 2024. In total, seven representations were received from the following parties:

Environment Agency

Associated British Ports

Natural England

The Coal Authority

The Marine and Coastguard Agency

West Lindsey District Council

East Halton Parish Council
2. A more limited consultation was undertaken by the Applicant before the application was submitted, and that consultation is report in Chapter 5 of the Environmental Review Report (ERR). Thirteen responses were received from that engagement, and these are included in Appendix ER5-4 of the ERR. The Applicant's comments on those responses are presented in Appendix ER5-5 of the ERR.

ENVIRONMENT AGENCY

3. No comments supplemental to those detailed in their letter dated 1 September 2023 in response to the first consultation, refer to Appendices ER5-4 and ER5-5 of the ERR.

CLYDE AND Co. ON BEHALF OF ASSOCIATED BRITISH PORTS

4. For simplicity, this response is reproduced in full below with AHPL's comments added in red text.

1 Introduction

- 1.1 As you are aware, we act for Associated British Ports (ABP), the owner and operator of the Port of Immingham.
- 1.2 In light of the problems you experienced in formally notifying my client of the consultation, my client is grateful for your client's agreement that the period for ABP to respond to the consultation can be extended to Friday 21 June 2024
- 1.3 In writing, I have also been asked by my client to acknowledge receipt of the notification of the consultation by the Humber Harbour Master. In so doing, for your assistance, I can also confirm on behalf of the Harbour Master that he will not be providing a separate response to the consultation.
- 1.4 As far as ABP's response to the consultation is concerned, this effectively

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falls into a number of component parts. Taking each in turn -

2 **Environmental impact**

- 2.1 In terms of environmental impact, you have, of course, seen our client's response to AHPL's original consultation dated 18 September 2023. This was deliberately couched in terms not so much as a critique of your client's Environmental Review but more as a series of questions which were designed to assist your client by identifying a number of issues which we felt merited further consideration.
- 2.2 Having now had the opportunity to consider your client's additional consultation submission which comprises a "*Habitats Regulation Assessment Report*" in two Parts, Part 1 being "*Likely Significant Effect (LSE) Test*" and Part 2 being "*Information to Inform an Appropriate Assessment*", our client's initial concerns as outlined as questions in our letter of 18th September do in some cases still appear to be unanswered, particularly in the context of Environmental Assessment, those questions that we raised in section 7 of our earlier response.

From the time of the original examination, ABP has sought to argue, in broad terms, that the environmental assessment provided by the Applicant has been, in some way or other, inadequate. See, for example, Osborne Clarke's correspondence from July 2012 which can be accessed here:

[TR030001-001615-120718 OS005 TR030001 Associated British Ports letter regarding Adequacy of the Environmental Impact Assessment.pdf \(planninginspectorate.gov.uk\)](https://www.planninginspectorate.gov.uk/tr030001-001615-120718_OS005_TR030001_Associated_British_Ports_letter_regarding_Adequacy_of_the_Environmental_Impact_Assessment.pdf).

It is a trite argument that was rejected by the original Panel and ultimately, through a failed application for Judicial Review, by the High Court in the case of the original application. Regarding the current application, all the previous environmental information has been reviewed and refreshed as required and the exercise is fully reported in the Environmental Review Report.

- 2.3 **Bird count data** - For example on the subject of **Core count data** and **Protected Species**, we do note that the draft *HRA Report and the Likely Significant Effect (LSE) Test* still rely heavily on out-of-date data, such as in Table 5 *BTO Low Tide Counts for the Killingholme Marshes Foreshore sector from 2011-2012* where it is noted at paragraph 7.30 that the age of that data is because "... (.....no further BTO low tide surveys have been undertaken since 2012)" and that it "*should be noted that these surveys did not cover the main mid-winter period, which may explain the lower number of some species in comparison with other data sets*". This is similarly the case for Table 12 - "*BTO Low Tide Counts for the North Killingholme Haven Pits sector - 2011-12*" and there are, inevitably, other instances. That said we do acknowledge that some of the data has been updated and that as we suggested, Wetland Bird Survey data for 2020/2021 and 2021/2022 have been included.

In this consultation response ABP now seeks to characterise the entire set of bird data as '*out of date*' simply because BTO has not conducted a low tide count of the Humber Estuary since 2012. By extension they plainly seek to create doubt that all of the environmental information submitted by the Applicant to support this application is, once more, inadequate. In fact, the environmental information presented in the

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Environmental Review has all been assessed to be adequate by appropriately qualified experts.

In respect of the bird data, whilst no further BTO low tides counts have been carried out since 2012, more recent Through the Tide Counts (TTTCs) (which include low tide counts) have been carried out by the Applicant, refer for example to the 2022/23 counts reported in Appendix ER11-1 of the ERR. The full bird data set used is listed in the Consultation Draft HRA Report (the HRA Report) Part 1, paragraphs 7.26 *et seq.*

- 2.4 Our client's concern, however, is that if AHPL were to be submitting an application for the AMEP project today, Natural England and the Secretary of State would expect and require comprehensive up-to-date data. It surely follows that the same rules – which after all have been applied in relation to ABP's recent Immingham Eastern Ro-Ro Terminal application – should also be met by AHPL in the context of the application to extend the AMEP DCO?

The bird data used in the environmental review and the HRA Report is comprehensive and considered more than adequate for decision making.

- 2.5 **Lack of Environmental Assessment** – In this context, in our letter of September 2023, we pointed out that while *"the Material Change 2 UES may have been suitable for the purposes it was intended to serve, it did not contemplate or assess a situation where the AMEP development would be completed several years beyond October 2042"* (para. 7.3 (d)).

ABP implies that all the Applicant has done is to re-submit material prepared for the Material Change 2 application. The Applicant has not done this and has submitted a new Environmental Review with new data where necessary.

- 2.6 We did query, therefore, whether a formal environmental assessment is required taking into account the environmental consequences of the extension if approved? The documentation that has been produced to support this latest consultation cannot, we would suggest, be viewed as a *"formal assessment"* and the concern that we expressed some nine months ago has if anything been underlined by the comment made by your client's consultants in their Executive Summary to the effect that the - *"proposed time extension is to allow the development consented under the AMEP Material Change 2 application in July 2022 to be completed, or substantially commenced, within 17 years from the coming into force of the DCO."* (Our emphasis).

ABP suggests that the environmental information is not a *'formal assessment'*. Presumably the suggestion is that the Environmental Report is not presented as an Environmental Statement. Relevantly two other applications to extend the time limit to implement a DCO have been approved.

On 27 July 2020, the Secretary of State for BEIS approved a 12-month extension to the original five-year time limit for the commencement of the development approved under the Progress Power(Gas Fired Power Station) Order 2015. The application was accepted as a Non-Material Change and was supported by an Environmental Review Report, not an Environmental Statement

On 16 September 2021, the Secretary of State for BEIS approved a 5-year extension to the original five-year time limit for the commencement

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of the development approved under the North Killingholme (Generating Station) Order 2014. Again, the application was accepted as a Non-Material Change and was supported by an Environmental Review Report, not an Environmental Statement.

To summarise the environmental information; the original environmental assessment was undertaken in 2011, partly updated for the subsequently granted Material Change 2 application in 2021 (in accordance with a Scoping Opinion prepared by the Planning Inspectorate) and then fully reviewed by competent specialists as part of this application in 2023.

The extant DCO permits work to be commenced within 10 years. The risk of environmental change is already addressed within the DCO Requirements at Schedule 11, which requires further surveys, submissions and approvals before commencing specified works. See for example DCO Schedule 11 paragraphs 10, 13, 14, 15, 16, 19, 20, 24, 25, 26, 28, 31, 36, 38 and 40.

Therefore, the application to extend the current time limit by 7 years is based on a fully updated review with further submissions to be submitted for approval prior to construction, in accordance with the Requirements within the DCO.

- 2.7 Our question, which we raise for your client, the relevant regulators and the Secretary of State to consider, is whether it is in reality possible for an assessment as to *"whether the proposed Time Extension to the Project would have a likely significant effect with regard to the designated features of the international sites under consideration, or on any designated features supporting habitats and species"* (para. 1.2) to be answered when one is considering a project that was approved in 2014 but which may not be implemented until some indeterminate time possibly in 2031?

This is the point of the Environmental Review. Plainly if it was possible to consent the DCO in 2014 based on a 10-year construction period, it is also possible to consent a 7-year extension based upon updated environmental information given the existing requirements of the DCO to provide further submissions prior to construction.

3 **New "plan or project"**

- 3.1 In section 4 and indeed in section 7 of our September 2023 Consultation Response we raised the question as to whether the application for an extension to the AMEP DCO constitutes in the context of regulation 63 of the Habitats Regulations a "plan or project".
- 3.2 Your latest consultation now includes as Part 2 a document entitled - *"Information to Inform an Appropriate Assessment"* - prepared as part of the *HRA Report*.
- 3.3 We are pleased that the question that we raised in our September 2023 consultation response has been positively acknowledged by your client by the production of this Report but we are bound to question some of the assumptions made which are used to support the conclusion reached and which if anything simply underline the concerns that we expressed last September.
- 3.4 In section 12 of the *Information Report - "Summary and Conclusion"* - your clients' environmental consultants accept at paragraphs 12.3 and

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12.4 that having assessed the "predicted effects of the Project Time Extension on the relevant SPA and SAC qualifying habitat and assemblage species in the context of the Habitats Regulations" and against the SPA and SAC Conservation Objectives "to determine whether there would be any adverse effect of the development on the ecological integrity of the Humber Estuary SPA/SAC/ Ramsar site" it has had to be accepted that the AMEP Project, in conjunction with the Material Change 2 and the Time Extension application "**would have an adverse effect on the ecological integrity of the SPA and of the SAC**". (Our emphasis).

3.5 Paragraph 12.4 continues that the – "residual effects of the DCO Time Extension alone, taking account of the mitigation, will have an adverse effect on the integrity of the Humber Estuary SAC, SPA and Ramsar site due to the reduction in the extent and distribution of qualifying interest habitats (estuarine habitats, intertidal mudflat and saltmarsh) and a deterioration in the quality of these habitats for qualifying bird species. In addition, there will be significant disturbance to these bird species, and their populations and distribution will be affected."

3.6 We would ask your client, and subject to your views, the Secretary of State and Natural England to consider the conclusions that are then drawn from the above, namely that:

a) "The DCO Time Extension impacts that could have an adverse effect on the integrity of the Humber Estuary SAC/Ramsar (and hence require compensation) are the same as those for the original DCO scheme and Material Change 2, and are as follows:

- Permanent direct loss of 43.6 ha estuarine habitats (31.3 ha of intertidal mudflat and 10.4 ha of subtidal habitat, plus an additional loss of 1.9 ha of colonizing saltmarsh" (para. 12.6); and

b) "The DCO Time Extension impacts that could have an adverse effect on the integrity of the Humber Estuary SPA/Ramsar (and hence require compensation) are also the same as those for the original DCO scheme and the Material Change 2, and are as follows:

- Adverse effect on internationally important populations of regularly occurring Annex 1 species, migratory species and the waterfowl assemblage, due to the reduction in extent and distribution of the habitat supporting birds.
- The continued use of NKHP as a roost site by waders from KMFS cannot be confirmed, particularly black-tailed godwit, once the mudflats at KMFS are lost.
- Indirect functional habitat loss through disturbance to internationally important populations of regularly occurring Annex 1 species, migratory species and the waterfowl assemblage, due to the effective reduction in extent and distribution of the habitat supporting birds". (para. 12.7).

These matters are fully addressed in the HRA Report.

Relevantly, the current impacts on the Humber Estuary

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SPA/SAC/Ramsar site arising from Material Change 2 are less than those for the original DCO project. This is explained in Appendix UES 11-2¹ submitted with the Material Change 2 application. Nevertheless, compensation has remained the same as for the greater impacts of the original scheme.

- 3.7 Reviewing those conclusions, our client remains concerned, as it indicated in its September 2023 response, that considerable weight is being placed by your client's consultant team on the Material Change 2 application and the documentation produced to support that application as opposed to the comprehensive environmental assessment documentation which supported the original application for the AMEP DCO – but which was produced around 2010 when your client's original application was being formulated - some 14 years ago.

Having asserted throughout the original examination that the environmental information provided then was inadequate (see previous comments), in this response ABP now state that it was, in fact, 'comprehensive'. By contrast, they assert that the environmental information supplied with this application is inadequate.

This characterisation of the environmental information supplied with the application as in some way old, inadequate or unreliable is clearly incorrect. The Applicant is not relying on assessments undertaken 14 years ago. The ERR provides a full review of impacts.

- 3.8 Whilst our client fully accepts that a degree of environmental impact updating was undertaken for the Material Change 2 application in 2021, that application was actually only for a minor reconfiguration of the quay to which incidentally, you will be aware, our client had no objection.

The Updated Environmental Statement produced to support MC2 was comprehensive in reassessing the impacts on the Humber Estuary SPA/SAC/SSSI/Ramsar site. The updated impacts were agreed in SoCG's with Natural England, the Environment Agency and the Marine Management Organisation.

The applicant has submitted a further updated Environmental Review and HRA Report.

- 3.9 What is now being predicated by this consultation, is that the original DCO application in combination with the Material Change 2 and the latest consultation documentation are together sufficient to support an application for an extension to the period within which the project has to be commenced by a further 7 years – thereby extending the potential commencement of construction date to an indeterminate time in 2031 – in total, 17 years.

The statement ignores the fact that a new Environmental Review has also been submitted.

- 3.10 Our client's difficulty is that although the Consultation Reports produced to support this extension application concede that the local environment is changing and evolving in both character and form, all of the submitted Reports seem to be based on an underlying assumption that - despite

¹ [TR030006-000174-TR030006-APP-6A-11-2.pdf \(planninginspectorate.gov.uk\)](#)

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the fact that as at today the area of the foraging mudflat assessed in 2010 for the original DCO application has been lost due to its conversion to saltmarsh, that the protected birds will have to relocate, and that the bird counts are out of date - as compensation was agreed in 2011 and the Material Change 2 approval led to a reduction in the size of the habitat that will be lost it, therefore, follows that the scheme is not that different from the scheme originally assessed in 2010. The conclusion drawn from this is that the assessment undertaken can be relied upon for an application that contemplates works not commencing for potentially another 7 years, i.e., to mid-2031.

The application is not based on an *'underlying assumption that ... the scheme is not that different from the scheme assessed in 2010'*. The scheme is, by definition, materially different and the assessment of the material change was assessed in 2021. The 2021 assessment has then been fully reviewed by competent persons as reported in the Environmental Review.

ABP is essentially repeating the same argument they raised in Section 2 above, namely that; the environment is changing; the surveys are merely a snapshot of today, *ipso facto* the environmental submission is an unreliable basis for permitting construction to commence within an extended period of time.

The Applicant can only repeat that the changing environment is addressed within the Requirements of the DCO which require various additional environmental information to be submitted before works actually commence.

- 3.11 Our client is not convinced that such a conclusion is supported by the logic of the situation as identified in the draft Appropriate Assessment. As it is accepted that the environment is changing, the saltmarsh is expanding, bird foraging grounds are being lost and waders are having to relocate, we fail to see how in 2024 a conclusion can be reached that the *"proposed Time Extension would have the same impacts as the Material Change 2, that compensation scheme can be expected to still provide the appropriate quantum of compensation."*

ABP misunderstands how the quantum of compensatory habitat is derived.

Bird numbers are not material to the quantum of compensation provided. It is based on the direct and indirect loss of mudflat and saltmarsh. Mudflat is compensated on a ratio of 2:1 and saltmarsh on a ratio of 1:1 As the impacted habitat is in the process of transforming from mudflat to saltmarsh (directly attributable to the construction of ABP's Humber International Terminal) the quantum of compensation needed is reducing but no actual reduction in compensation area has been proposed by the Applicant.

Further, it is the current short-term losses that are relevant. In the longer term the impact of sea level rise would in any event cause a reduction in area of the inter tidal habitat and further transformation of mudflat to saltmarsh along the impacted foreshore. In contrast, the compensation site will be managed to provide compensation for losses calculated from 2011 when there was more mudflat than exists today.

- 3.12 Whilst our client does not object to the principal – and the user – of the

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AMEP development, it is bound to query whether the consultation documents as produced are sufficient to meet the tests contemplated by Regulation 63 of the Habitats Regulations. As the HRA Report itself concedes, in terms of the likely Significant Effect Test, the "*proposed time extension is to allow the development consented under the AMEP Material Change 2 application in July 2022 to be completed, or substantially commenced, with 17 years from the coming into force of the DCO*".

- 3.13 We do not believe that the documentation produced to date is sufficient to support an assumption of no change in environmental impact from a DCO application submitted in 2011 for a development which your client accepts will have a likely significant effect if commenced in 2024.
- 3.14 In light of this, we are bound to repeat the question raised in our earlier consultation response to the effect that as the application in our view constitutes a new "plan or project" in terms of the Habitats Regulations, does it not follow that a formal Environmental Impact Assessment should accompany the application?

No.

The Habitat Regulations require an appropriate assessment, not an EIA. It is for the decision maker to undertake the appropriate assessment. The Applicant has provided an HRA Report to assist this process.

- 3.15 We would be grateful if you would confirm that this concern will be specifically drawn to the attention of the Secretary of State and Natural England, as required by regulation 63(3) of the Habitats Regulations.

4 Imperative Reasons of Overriding Public Interest

- 4.1 In our September 2023 letter, we highlighted our client's concerns in the context of Business Need.
- 4.2 We summarised what we considered to be the position at paragraph 6.1 of our letter to the effect that your client has seemingly accepted that over the past 10 plus years –
- a) Sector expansion has not materialized.
 - b) Revenues required to invest in the quay have not been realised.
 - c) Manufacturers have not relocated to AMEP.
 - d) The timescales for the construction of the quay remain unknown, and
 - e) Full financial support has not been forthcoming.
- 4.3 Whilst one does not want to overuse the "level playing field" maxim, bearing in mind the tests that our client is currently quite properly having to satisfy in relation to its two DCO applications for the Immingham Eastern Ro-Ro Terminal and the Immingham Green Energy Terminal proposals, we do have considerable difficulty in understanding how AHPL's application actually meets the IROPI test as provided by regulation 64 of the Habitats Regulations.
- 4.4 As you know, this test comprises a number of limbs, namely in brief:
- a) Are there any alternative solutions? If not –

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- b) Must the plan or project –
- c) Be carried out for imperative reasons of overriding public interest – bearing in mind that where the site concerned “*hosts a priority natural habitat type or priority species*”, which is the case here, the “*reasons*” in the IROPI test must relate to human health, public safety, beneficial environmental consequences or for such reason as the competent authority believes to meet the test.
- 4.5 Whilst we accept that the IROPI test is referenced in the draft HRA Report, at paragraph 1.12, this understandably is only referenced in the context of projects affecting European sites.
- 4.6 We have seen no reference in the consultation supporting documentation demonstrating how the IROPI test is met in the context of there being an “*imperative need of overriding public interest*”. Indeed the Explanatory Note of August 2023, which we believe is the document that has been reproduced for this consultation, if anything makes it very clear that there is no “*imperative need*” for the project – indeed, quite the contrary appears to be the case.
- 4.7 As your Explanatory Note dated August 2023 explains, the dilemma your client currently faces is that as AHPL does not, yet, have a potential tenant/operator for the AMEP development, it is as a consequence, unable to commit to the capital funding required to commence the construction of the AMEP development which will require significant investment from several as yet unidentified manufacturers of offshore wind components. Those manufacturers will, however, need firm orders before they will be prepared to invest in and commit to AMEP.
- 4.8 Our client notes AHPL’s argument that further Allocation Rounds will eventually lead to investment in AMEP and whilst not in any way wanting to contradict that belief, the fact remains that the AMEP DCO was approved in 2014 on the basis that there was an “*Imperative Overriding Need in the Public Interest*” for the development to proceed even though in so doing, it would destroy large tracts of designated nature conservation sites.
- 4.9 Ten years later the AMEP development has not commenced – apart from the undertaking of minimal works to ensure technical implementation. In the circumstances our client does question whether the extension application as now formulated can meet the basic test set down in the Habitats Regulations?

This is another repeated and unsuccessful argument. For example, in 2014 ABP sought Judicial Review of the original consent on various grounds, including that IROPI had not been ‘*made out*’. The application was rejected on the papers on all grounds without hearing oral arguments.

Relevantly, the HRA undertaken by the Department of Transport in July 2022 pursuant to the Material Change 2 application states the following:

The Secretary of State is satisfied that there are imperative reasons of overriding public interest for the Project to proceed subject to adequate compensatory measures being implemented as set out in the AMEP DCO. In arriving at his decision, the Secretary of State has considered the objectives set out by the Applicant and has reviewed how the Project

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addresses those objectives by providing a new quay with direct access to a significant land parcel that is to be developed to support the manufacture of components for the offshore renewable energy sector. The Secretary of State accepts this is a sector that must grow to enable the delivery of offshore wind and agrees that the Project provides a public benefit which is essential and urgent despite the harm to the integrity of the Humber Estuary.

The Applicant considers that this assessment remains valid and there is no reason at all to demur from it.

5 **Conclusion**

- 5.1 In conclusion, our client remains concerned that as the appropriate assessment and the LSE reports are not supported by comprehensive up-to-date data and as the extension application constitutes a "plan or project" under the provisions of the Habitats Regulations, the application should as a result be made the subject of a formal and comprehensive re-evaluation of impacts by way for a fresh environmental assessment. This would enable a formal consideration as to whether the proposal meets the IROPI tests as prescribed by the Habitats Regulations to be undertaken.

Other than a mistaken belief that the only low tide counts used in the accompanying assessment date from 2012, ABP's concerns about the currency of the environmental assessment are unsubstantiated assertions, similar to those expressed previously.

The provisions of the Habitats Regulations require an appropriate assessment to be undertaken by the decision-maker. The Applicant has provided robust data for a reliable assessment to be undertaken.

- 5.2 We would be grateful if you could confirm that these observations will all be drawn to the attention of the Secretary of State.

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NATURAL ENGLAND

5. For simplicity, this response is reproduced in full below with AHPL's comments added in red text.

Thank you for your consultation on the above dated 02 May 2024 which was received by Natural England on 09 May 2024.

Natural England's comments are in relation to the following documents:

- Able Marine Energy Park (Article 7 Extension of Time) Environmental Review report and appendices (dated October 2023).
- Able Marine Energy Park (Article 7 Extension of Time) Habitats Regulations Assessment Report - Part 1: Likely Significant Effect (LSE) Test (dated February 2024).
- Able Marine Energy Park (Article 7 Extension of Time) Habitats Regulations Assessment Report - Part 2: Information to Inform an Appropriate Assessment (dated February 2024).

We note that the Environmental Review report states that Natural England did not provide a consultation response previously. For clarification, Natural England received a request from Able UK Limited for our Discretionary Advice Service (DAS) on this proposal as a non-statutory consultation on 05 September 2023. We did offer this service; however, this offer was later declined by Able UK Limited. We did provide high level comments on 08 November 2023, these are further detailed below.

Natural England responded to the original consultation on 15 August offering to respond in accordance with its Discretionary Advice Service, subject to ABLE making a request. This is a time charged service and Able submitted a request on 7 September. NE confirmed agreement to the request on 10 October, by which time the documents were ready to be submitted to the Secretary of State. The application was submitted on 11 October and on 12 October ABLE advised NE that they should expect to be consulted by the SoS as the application had been submitted. A letter providing comments on the original consultation material was subsequently received on 8 November, but the points raised were not such as to materially affect the conclusions of the Environmental Review Report that had already been submitted.

We are unsure of the process of amending article 7 and therefore wish to highlight a number of environmental risks that may arise as a result of a 7-year time extension to inform your decision-making. This is a complex project, both in terms of the environmental impacts but also in terms of the numerous permissions and consents required, and therefore our advice is based on the case history and our current understanding of the situation, particularly where there are matters that are still to be resolved/ finalised.

1. Compensation and overcompensation site habitat has not yet been delivered. If a time extension were granted, there is opportunity to reduce the environmental risk of time lag in compensation habitat becoming functional. Detail should be provided to demonstrate that the minimisation of these environmental risks has been considered within the proposed new timescales for the project. As Natural England set out in its advice on the Able Marine Energy Park Material Change 2

application, we continue to reiterate our concerns that we had at the time of examination around the importance of creating the compensation, as well as the overcompensation (of which there appears to be no mention within the Environmental Review (ER) report) as early as possible. The site location plan also does not include the boundary of the overcompensation sites at Cherry Cobb Sands and Halton Marshes or the mitigation site at Halton Marshes.

As agreed in the Statement of Common Ground (SoCG) (dated August 2012), *"The benthic communities on the intertidal compensation site will take approximately three years to mature and hence there is a need for further overcompensation for black-tailed godwit to supplement their foraging whilst the intertidal site matures."*

And

"The overcompensation will require the provision of an area of wet grassland, the size and timely provision of which is appropriate to provide the necessary functional support for foraging black-tailed godwit. This grassland will be accessible from the intertidal compensation site."

There is little mention of this within the Environmental Review report. Paragraph 1.2.18 of the ER, refers to planning permission obtained for the creation of wet grassland and a wet roost adjacent to the compensation site. However, it fails to explain that this habitat creation is a compensation measure as agreed by the Secretary of State.

The application relates to the AMEP DCO. The site location plan AME-002-000000A referred to does not include two overcompensation sites simply because it shows the Order Limits only.

The two wet grassland sites being referred to are not consented under the DCO and are outside the Order Limits; they both have separate planning permissions. The mitigation site at Halton Marshes is shown in Figure 1-5 of the Environmental Review report, and the compensation site on the north bank is shown in Figure 1-6.

Impacts on the habitats and species relevant to the Humber Estuary SPA/SAC/Ramsar site are addressed in the separate Consultation Draft HRA Report (the HRA Report).

Paragraph 12.8 of Part 2 of the HRA Report records that the compensation scheme is set out in the AMEP CEMMP, that impacts of the materially amended scheme were slightly reduced but that the agreed compensation would be unchanged. The agreed compensation includes the wet grassland as described in the agreed CEMMP.

As part of the Material Change 2 application, the SoCG between Natural England and the applicant (dated 08 March 2022) set out matters which were fully agreed between the parties, including that Cherry Cobb Sands Wet Grassland overcompensation should be created as soon as practically possible and, in any event, well in advance of the quay construction. This is to ensure that the overall coherence of the National Site network remains protected. Natural England highlights that this should be at the latest commenced 7 months prior to the construction of the quay, in accordance with the timescale in Clause 6 of the Management Agreement between Natural England and Able UK.

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The 2022 SoCG states the following:

An appropriate timescale for commencing compensation habitat creation.

- 3.3 The parties agree that the Application does not seek to amend any timescales for the creation of compensation habitat that are already set out in Schedule 11 paragraph 22 of the existing AMEP DCO or those in a separate legal agreement between the parties dated 29 April 2013 (attached at Appendix 1).
- 3.4 Natural England reiterates its advice provided in a letter to the Secretary of State dated 15 November 2013 during the original DCO examination that Cherry Cobb Sands Wet Grassland should be created as soon as practically possible and, in any event, well in advance of the quay construction. This is to ensure that the overall coherence of the National Site network remains protected. NE highlights that this should be at the latest commenced 7 months prior to the construction of the quay, in accordance with the timescale in Clause 6 of the Management Agreement.

In relation to paragraph 3.3 above, the AMEP DCO is not applicable to the wet grassland so the timescales in the DCO are irrelevant.

The separate Agreement dated 29 April 2013 (the 2013 Agreement) is explicitly applicable to the wet grassland at Cherry Cobb Sands, and that states the following:

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

Work No. 1 is the Quay. Plainly, this restriction means that the quay construction can commence once the work to construct the wet grassland has simply commenced. Natural England are aware that this is our understanding on this point. Nevertheless, the Applicant is prepared to bring forward the start of the works for the wet grassland, but not before the programme for the construction of the Quay is settled.

With the proposed time extension, it is currently unclear what the proposed timescales are for completing the creation of the compensation habitats and how these timescales compare to those that were originally assessed as part of the examination and referred to in the Secretary of State's decision letter (dated 18 December 2013). Natural England considers that there has, and if a 7-year extension is granted, will be opportunity to reduce the environmental risks set out around the time lag in habitat being lost and the compensation habitat becoming functional. We consider that detail should be provided to demonstrate that the minimisation of these risks has been considered within the proposed new timescales for the project.

The timescales are no different to those already set out in the DCO and in the 2013 Agreement.

For clarity, the application does not seek to amend the DCO in any material or non-material way. The process for extending the DCO is separate from the process for amending the DCO. The programming restrictions already set out in the DCO will therefore continue to apply, in particular Schedule 11 paragraph 22.

2. Potential delay in provision for any compensation habitat required for works currently being undertaken associated with the pumping station.

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Natural England has recently been consulted on a Marine Licence application (MLA/2023/00436) for changes to the pumping station and outfall construction methodology, associated with the Able Marine Energy Park DCO. These works may result in temporary and permanent loss/ change of SAC/ SPA/ Ramsar habitat. It is our understanding that at the time of examination the original phasing of the works was that the quay would be constructed first and then the pumping station and outfall channel would be created following this. Therefore, the habitat compensation requirement would have been triggered, prior to the loss of habitat from the pumping station works. This is indicated through Schedule 8 Deemed Marine Licence Requirement 7 (2) "*Works outside the cofferdam must be undertaken using land-based plant operating from a berm formed within the south-eastern return wall of the quay*".

It is our understanding that the habitat affected by the pumping station works is accounted for within either the compensation provision for habitat that will be lost when the quay is built, or the compensation provision for the area of habitat that will be functionally lost for birds. We are currently uncertain which this would be, as it is our understanding that the impacts of habitat loss/ change from the pumping station works have not been assessed separately from the wider project.

Based on the assessment in the original HRA, we consider that there is potential that compensation habitat at Cherry Cobb Sands is required for aspects of the pumping station design. As mentioned above, no compensation habitat has been provided yet. Natural England's view is that the Cherry Cobb Sands compensation sites should be created as soon as practically possible to ensure that the time lag in providing compensatory habitat is minimised. Natural England considers that there are environmental risks that if a 7-year extension is granted, the provision of compensation for the habitat loss associated with the pumping station works could potentially be significantly delayed, unless further assurances are provided by the applicant. In addition, we advise that your authority should satisfy itself that, in the event that the quay is never constructed, sufficient assessment of the impacts of the pumping station have been undertaken to ensure that any appropriate compensatory measures will be provided, if required.

Marine Licence MLA/2023/00436 was issued by the MMO on 3 May 2024. Natural England was consulted by the MMO. No requirement for compensation arose. The permitted works are now substantially complete on the basis of the consent received from the MMO.

3. Uncertainties remain around the ability to commence works on the overcompensation habitat as soon as practicably possible, as planning permission for the re-design of Cherry Cobb Sands overcompensation site has not yet been granted.

In the Secretary of State's decision letter (dated 18 December 2013) a number of risks are identified and discussed (page 23 onwards). To follow on from the section on "Quality of roost and wet grassland habitat at Cherry Cobb Sands", we highlight that due to a lack of freshwater available to keep the site wet, the overcompensation wet grassland habitat has been re-designed to enable the site to use brackish water instead of freshwater. Natural England has supported the applicant in the re-design of the site. However, we note that the planning permission (reference 23/01384/STPLF) has not yet been determined. There are points of clarification in our consultation response to the planning application that we consider could be easily overcome. We would encourage the applicant to provide these clarifications in a timely manner, as without planning permission

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there remains a level of uncertainty around the ability to commence works on the overcompensation habitat as soon as practicably possible. The Compensation Environmental Management and Monitoring Plan (CEMMP) will also need to be updated in light of the changes to the design of the site, to ensure that the objectives and targets remain relevant and achievable. We consider that evidence should be provided to demonstrate that the CEMMP will remain fit for purpose in the context of the proposed time extension and will be updated in a timely manner.

Schedule 11 Requirement 19(1) requires a CEMMP to be approved prior to commencement of the DCO. The Applicant agrees that the approved CEMMP would need amending once the latest planning application for the Cherry Cobb Sands wet grassland is actually determined. The planning application was validated by East Riding of Yorkshire Council on 11 July 2023. The Applicant has responded to all correspondence from the LPA in a timely manner and has repeatedly requested updates from LPA on the progress of the application. The applicant understands that NE is waiting for the LPA to submit an appropriate assessment to them in accordance with the requirements of the Habitats Regulations.

The DCO and the separate legal agreement between AHPL and NE provides sufficient protection that the compensation measures will be delivered, as determined by the Secretary of State and set out in paragraphs 32 *et seq* of the original appropriate assessment.

4. Outstanding matters to be agreed remain regarding the criteria for success of the compensation site (benthic invertebrate prey targets).

Whilst the CEMMP has been approved by Natural England in December 2015, we highlight that there are still significant outstanding matters to be agreed. As stated at 1.2.2 of the CEMMP, it requires "undertaking a complete review of the EMMP every five years". This has not been updated since December 2015. We have included a copy for ease of reference. In particular, the benthic SPA bird prey targets need to be agreed. 1.3.1 explains why they were not agreed when the CEMMP was originally approved, "It is understood that the targets can only be finalised once the baseline benthic surveys at NKM and Cherry Cobb Sands (CCS) have been completed. This will occur prior to the start of any work on AMEP that involve the loss of mudflats at the NKM foreshore, or disturbance to SPA birds that use it". Between November 2020 - March 2021, Natural England received the benthic invertebrate surveys, however, concluded these were too limited and too out of date to be the only source of data used for target setting in this highly dynamic area. We were of the opinion that alone, these surveys would not be adequate to generate robust targets. We suggested two options to progress:

1. Undertake additional benthic invertebrate surveys to provide both additional, and more up to date, data, of which we provided further detail.
2. We recognise that due to the time constraints of the project that this might not be desirable, and therefore we strongly recommend a complimentary individual-based modelling approach, irrespective of whether new benthic surveys are commissioned. Whilst the invertebrate data are limited and out of date, we do have more accurate bird count data. It is possible to calculate the energetic requirements of the birds due to be displaced from the development site and, consequently, how

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much food they eat. This information can then be used to develop benthic prey targets for the compensation site. This would be a desk-based exercise using bird counts from the development site, instead of requiring additional benthic survey data.

This type of modelling approach is highly specialised. However, Natural England had a preliminary discussion with Professor Richard Stillman at Bournemouth University, the UK's leading academic expert in this field, who agreed the work is feasible. Natural England advised the applicant that the individual-based model was its preferred approach, however, we have received no further assessment following those discussions. Therefore, the environmental assessment and agreement on the benthic prey targets remain outstanding.

For context, four benthic invertebrate surveys were undertaken in accordance with the details included in the approved Marine Environmental Management and Monitoring Plan at a combined cost of around £150,000 to the Applicant. The agreed purpose of these surveys was to inform benthic targets for the compensation site. Natural England then summarily rejected the data set compiled by the Applicant and recommended an alternative approach. This is an ongoing matter and is not material to the application to extend the DCO. The alternative approach can be undertaken once the programme for the quay is settled; it does not require survey effort and can therefore be undertaken at any time in the future.

5. The proposed extension creates uncertainties around whether there could be further potential changes in the habitats and species that require compensation, since the examination. We advise that Appendix UES11-2 Change in Habitat Losses Within the Designated Site (dated 21 June 2021), set out for material change 2 should be updated to reflect the proposed 7-year extension. The CEMMP should also be re-assessed to ensure that it remains fit for purpose.

As identified in the material change 2 of AMEP DCO, there has been changes in habitat type and number of birds present on the Killingholme foreshore since the assessments in the original Environmental Statement. Appendix UES11-2 Change in Habitat Losses Within the Designated Site (dated 21 June 2021), set out the updated assessment. We note that no detail has been provided within the application documents, on whether this assessment will need to be further updated if a 7- year extension is granted. We advise that this should be provided. In addition, we advise that consideration should be provided on whether the CEMMP requires further updates in light of the proposed time extension to demonstrate that it will still be fit for purpose.

The assessment of impacts on the Humber Estuary SPA/SAC/SSI/Ramsar site has been fully updated in the HRA submitted with the application. Paragraph 9.7 states that habitat losses at the time of this application are the same as those for the consented Material Change 2 application.

Habitats Regulations Assessment Screening

We advise that an in-combination assessment with the applications for Project Gigastack (PA/SCO/2022/13), Immingham Eastern Ro-Ro Terminal NSIP and Immingham Green Energy Terminal NSIP should also be undertaken within the Habitats Regulations Assessment.

Refer to paragraphs 11.3 and 11.4 of the HRA Report Part 2 which are

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reproduced below for ease of reference.

11.3. In the HRA prepared by the Secretary of State for Material Change 2, it is recorded that:

'AEol from the Proposed Changes in-combination with other plans or projects In combination effects only occur if there are residual effects of a project because impacts of the project have not been fully mitigated (or compensated) which could then cause a significant impact when taken together with another project that has not fully mitigated its impacts. As with the AMEP DCO, all impacts from the project alone are either fully mitigated or compensated for. The Secretary of State notes that in response to the RIES, NE [REP6-007] confirmed that it was satisfied that in combination effects have been satisfactorily addressed', (Section 5.3).

11.4. The compensation and mitigation proposals that have been agreed with Natural England for the Project continue to fully avoid any residual effects, therefore in-combination effects with other projects can be discounted.

In short, as there are no residual effects of AMEP on the features of the Humber Estuary SPA/SAC/Ramsar site, the in-combination assessment is not relevant as there are no residual impacts to take forward. Refer to the HRA for Material Change 2, extract below:

'AEol from the Proposed Changes in-combination with other plans or projects only occur if there are residual effects of a project because impacts of the project have not been fully mitigated (or compensated) which could then cause a significant impact when taken together with another project that has not fully mitigated its impacts. As with the AMEP DCO, all impacts from the project alone are either fully mitigated or compensated for. The Secretary of State notes that in response to the RIES, NE [REP6-007] confirmed that it was satisfied that in combination effects have been satisfactorily addressed', (Section 5.3, final paragraph).

Advice related to the Environmental Review Report

Main site

Chapter 11 - Terrestrial Ecology

We welcome that 2022/23 daylight and nocturnal bird surveys have been carried out to update the baseline for intertidal bird usage.

We note from paragraph 11.1.6 of the ER that WeBS core counts from 2014/15-2019/20 are used in the assessment. It is not clear why more recent WeBS data have not been used. We advise the latest available WeBS core count data are used (2022/23 for whole estuary and 2023/24 for individual sectors).

The Draft Consultation HRA Part 1 used the most up to date core counts available at the time of the application, refer to paragraph 7.26. The data used provides a robust basis for assessment.

We note that paragraph 11.1.15 of the ER states that 'the status of Black-tailed Godwit in and around the AMEP site may require future update over the longer-term.' It is not clear what this means and what implications this may have for the current application.

Mudflat along the North Killingholme upper to mid foreshore is transitioning to saltmarsh. This change in habitat will alter, and likely reduce, the dependence of Black tailed godwit on the area.

Compensation site

Chapter 32 – Hydrodynamic and Sedimentary Regime

We note paragraph 32.2.8 of the ER states that the majority of works will be behind the floodbank, however, there is no detail provided on the construction works in the context of the breaching of the sea wall to create the compensation site and whether there are any potential changes due to accretion of saltmarsh on the foreshore.

The application does not change anything other than the date for commencing new stages of the works.

Specifically, there is no change to the works to breach the floodbank and this is already consented under the DCO, as set out in Schedule 1 and in Schedule 8 paragraph 8 of the DCO. The Draft Consultation HRA Part 2, Table 19, fully accounts for the change of saltmarsh to mudflat following creation of the breach in the sea wall.

Chapter 34 – Aquatic Ecology

We note from paragraph 34.4.4 that there is a change in the area of saltmarsh to be removed. Whilst this is a natural shift in the type of habitat affected and Natural England acknowledges that the compensatory habitat at Cherry Cobb Sands will remain adequate, it is important to have an accurate audit trail of habitat losses and gains related to the development. Therefore, we advise that an updated table of habitat losses and gains should be provided. In addition, all the relevant documents need to be consistent in this respect to assist with future consultations.

The approved MEMMP already requires a pre-construction habitat survey, see extract below:

2.4.4 → Given the potential for further change to saltmarsh extent and associated changes/impacts to adjacent habitat status, a pre-construction reference survey of saltmarsh extent and composition will be undertaken. Details are given in Section 3.2 and Appendix 3. These data will also be assessed in the context of adjacent mudflat change, using LiDAR to map mudflat extent and topography, with details in Section 3.3 and Appendix 1.¶

Chapter 35 – Terrestrial Ecology and Birds

We note that paragraph 35.4.69 of the ER states 'the boundary of the [Cherry Cobb Sands compensation] site will be much closer to Cherry Cobb Sands Road than the original ES suggested'. We advise clarity is provided around the changes that have occurred to the Cherry Cobb Sands compensation site.

This statement is incorrect, the boundary of the CCS compensation site has always been alongside Cherry Cobb Sands Road, refer to the approved drawings AME-02016 and AME-02017 submitted with the original application and referenced in Schedule 11 paragraph 6 of the DCO.

We welcome that paragraph 35.5.3 of the ER states that a site management plan and a monitoring strategy for Cherry Cobb Sands compensation site is still required, which will be developed in consultation with Natural England.

Chapter 38 – Noise

We note that Chapter 38 of the ER relates to human noise receptors only. It should be noted that potential impacts to ecological receptors were assessed through a Discharge of Requirements application made to East Riding of Yorkshire Council (application reference 20/30250/CONDET).

THE COAL AUTHORITY

6. The Coal Authority had no comments on the application.

MARITIME AND COASTGUARD AGENCY

7. The MCA had no significant concerns about the application.

WEST LINDSEY DISTRICT COUNCIL

8. WLDC had no objections to the applications.

EAST HALTON PARISH COUNCIL

9. East Halton Parish Council requested that the Applicant attend a meeting of the Parish Council. The Applicant attended a meeting on 5 July, minutes are appended.

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APPENDIX: MINUTES OF EHPC MEETING 7 JULY 2024

MINUTE – East Halton Parish Council

Hannah Hepworth – Clerk to EHPC

7-July-2024

East Halton Village Hall 7pm
AMEP DCO Extension
Present
East Halton Parish Council
M J Walker – Able.

8 Parish Councillors plus Clerk
2 Owners from Amethyst Hotel (to discuss a planning application) & Local Hotel
& 7 members of the public.
Marcus Walker – Development Director - Humber, Able UK.

Notes Minutes

The Parish Council welcomed M Walker to the meeting and invited him to provide a presentation for the AMEP DCO Extension proposals and asked they could also discuss highway matters and the Able Energy Park which MTW confirmed he was happy to discuss.

AMEP (AHP) Article 7 DCO Extension

MJW explained the background to the original 2014 DCO consent and the details of this proposal including the new quay facility and the wider hinterland development including the compensation and mitigation proposals. MJW then explained the purpose of the non-material amendment (2021) and also provided background to the impacts of the Contracts for Difference (CfDs) process in hindering the provision of offshore wind and meaningful UK content. The scope and necessity of the required DCO extension until October 2031 were set out along with an outline of the process and timescales.

MJW received one question regarding traffic movements and the Parish Council raised no objections or concerns with regards to the DCO Extension and thanked MJW for the presentation.

ABLE ENERGY PARK (AEP)

The Parish Council raised concerns at recent hedge removal works that had impacted on public rights of way access and left parts of the area untidy. MJW explained the purpose of the works and stated that he would in future make sure the Parish Council were informed of any significant siteworks that would affect public footpaths and also that the works were supervised and expedited without adverse impact to local villagers..

HGV MOVEMENTS

The Parish Council raised concerns that HGV movements were an issue / nuisance in the village because some HGV's that were travelling to Killingholme Airfield were missing the turning and driving through into East Halton village. The Parish Council requested MJW speak to the council (because of his former

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role) and seek a 7.5 tonne restriction on East Halton Road. The concern was that North Lincolnshire Council (NLC) and National Highways Agency both considered it to be the responsibility of the other. The Parish Council also enquired if signage for HGV drivers would be erected on the development of AEP. MJW confirmed that Killingholme Airfield was not owned or operated by Able (Salfina – the owners) and stated that Able had no jurisdiction over the public highway but would happily attend any future meeting called by the Parish Council to discuss the issue. MJW confirmed that it was likely that additional signage would be erected by Able on construction of AEP.

MJW thanked the Parish Council for his Friday evening invite and confirmed there were no concerns relating to the DCO.