

Able Marine Energy Park Case Team

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Our Ref
BG/10138581

Your Ref

Date
13 August 2024

Dear Madam/Sir

Application by Able Humber Ports Limited for consent from the Secretary of State to extend a time limit in the Able Marine Energy Park Development Consent Order 2014 (S.I. 2014/2935) under article 7 of this Order.

We write on behalf of our client, Associated British Ports (“ABP”), in relation to the above, with specific reference to the responses that have been provided by Able Humber Ports Limited (“the Applicant”) to the earlier representations and questions addressed by ABP to the Applicant by letter dated 21 June 2024 and previously in our letter dated 18 September 2023.

We should make clear at the outset that, having reviewed the Applicant’s responses, ABP is not persuaded that those responses actually address the points made by our client. That said, however, we see little benefit in entering into what would become simply a repetitive rehearsal of comments already made. We merely make the point that ABP does not believe that the questions raised in its earlier letters have been answered satisfactorily and indeed, the concerns expressed by our client have, if anything, been corroborated by Natural England in their own response dated 6 June 2024 – comments with which ABP would wish to align as appropriate.

In brief, we would simply repeat ABP’s concern that howsoever the Applicant wishes to describe it, the information provided in its Environmental Review Report is incomplete and together with the HRA fails to provide the comprehensive information necessary for the Secretary of State to undertake an Appropriate Assessment.

This concern falls into two parts. As far as issues of environmental impact are concerned, the Applicant has accepted, as noted in its HRA Part 2 document, that “*the Project Time Extension would continue to adversely affect the ecological integrity of the Humber Estuary SPA and Ramsar site and the Humber Estuary SAC*”. In light of this, the comments offered by ABP in its letter of 21 June 2024 remain and require neither amendment nor amplification.

That does, however, leave the question of the HRA derogation unanswered. Our client has noted that the Applicant has rather avoided the questions raised in both of its earlier letters, referenced above, regarding “alternatives” and “need” and the tests that have to be met to demonstrate that the AMEP Project is justified as it is required for Imperative Reasons of Overriding Public Interest (“IROPI”).

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There is no need here to repeat those concerns, but the Secretary of State’s attention is drawn particularly to section 4, paragraphs 4.1 to 4.9 of the letter dated 21 June 2024 in this respect. The Applicant’s response to the questions raised by ABP is that this is just “*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 Applicant then points out that in 2022, in response to the Applicant’s Material Change 2 application the Secretary of State indicated that he was “*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..... The Secretary of State agrees that the Project provides a public benefit which is essential and urgent despite the harm to the integrity of the Humber Estuary*”.

As to the issue of compensation – clearly Natural England have concerns with regard to that aspect of the project and there is no need for us to comment further in that regard.

As to IROPI, however, we are bound to query whether time has demonstrated conclusively that the concerns that ABP raised in 2012, to the effect that the AMEP Project did not satisfy IROPI, were in fact correct then – as they are now. The Secretary of State’s intimation in 2022, quoted above, that he was satisfied that IROPI was made out for the AMEP Project was written without the benefit of the information provided by the Applicant later in its Explanatory Note of August 2023 where the Applicant concedes that it does not have a potential operator/tenant for the AMEP development and neither does it have the capital funding required even to commence the construction of the development.

The Secretary of State will be aware that ABP is currently promoting two Development Consent Order applications, namely the Immingham Eastern Ro-Ro Terminal (“IERRT”) and the Immingham Green Energy Terminal (“IGET”) projects. In terms of both of those projects, ABP has argued that neither will adversely affect the ecological integrity of the designated sites. Despite this, adopting a precautionary approach, the appointed Examining Authority for each project required ABP to produce a detailed HRA derogation report providing detailed information as to why, if either development, either separately or in-combination, created an adverse effect, both projects met the tests of IROPI in terms of “need” and lack of “alternatives”.

In the case of ABP’s IERRT and IGET applications, it was argued that neither created an “adverse effect” yet ABP was still required to produce an HRA derogation report for each project. As far as the AMEP extension application is concerned, the Applicant concedes that the AMEP development if implemented, will have an adverse effect on the ecological integrity of the designated sites – yet we have been unable to locate any reference in the Applicant’s documentation, produced in support of its application, to an HRA derogation report for the AMEP extension.

ABP has made clear in its previous letters regarding the Applicant’s extension application that it does not oppose the principal of the AMEP development. The AMEP DCO, however, came into force on 29 October 2014. By virtue of Article 7 of the DCO the authorised development had to be completed “*within 10 years from the coming into force of this Order*”. The Applicant’s proposed extension is for a further 7 years – extending the timescale for completion of construction to October 2031. Putting aside the fact that even on that extended timescale, securing an operator/tenant, funding and constructing the AMEP development does seem somewhat ambitious, ABP is concerned that if the Secretary of State approves this application she will be creating a legal precedent that will be cited by developers attempting to dilute the requirements of IROPI - to the effect that an IROPI argument that was accepted in 2014 does

not have to be re-evaluated and re-assessed as part of an extension application for a project that may not in fact be constructed for a period of possibly 15/16 years from when the original IROPI exercise was undertaken. In effect, such legal precedent would mean that the Secretary of State would lose the ability to require consideration of IROPI for future extension applications for projects in situations where it may be palpably clear that a project can no longer satisfy the IROPI test on the grounds of “need” and “alternatives” in order to justify the ecological harm required to deliver the project (which indeed may no longer be in the public interest at all).

In terms of “alternatives” the Applicant has maintained that the AMEP project satisfies the IROPI tests, but 10 years on from the AMEP DCO coming into force, potential operators and tenants for such a facility have chosen alternative sites and we have failed to locate any reference in the Applicant’s extension application to the question of “alternatives” – which of itself, brings in to question the issue of “need”.

How can a project consented in 2014 because it apparently was justified on the basis that it was needed for IROPI that overrode environmental damage in 2014 still satisfy those tests some 10/17 years on in 2024/2031 without re-evaluation and re-assessment? Failure to do so would essentially override the IROPI test and negate the very purpose for which this strict legal test exists.

The Secretary of State will appreciate that there is at the root of this extension application a fundamental legal issue which, it is suggested, the Applicant, has carefully avoided and which goes far beyond the issues that have been discussed as part of the extension application and indeed beyond the AMEP project itself.

A decision to approve the extension application without requiring the submission of the required information identified above, and which is currently lacking, would be a decision that would create a legal precedent with long lasting (potentially harmful) implications for the environment, which we suspect the Secretary of State may find undesirable.

Yours faithfully



Brian Greenwood
Partner
Clyde & Co LLP