

APPLICANT'S RESPONSE TO NATURAL ENGLAND'S COMMENTS ON 13 AUGUST

INTRODUCTION

1. This document provides the Applicant's comments on the further representations by Natural England (NE) dated 13 August 2024 (the August response). In summary, NE's August response acknowledged comments set out in ABLE's document 'Applicant's Response to the 2024 Consultation', but stated that the advice in their letter dated 6 June 2024 about the environmental risks of the project was unchanged. Accordingly, the Applicant set out further responses below with respect to the specific environmental risks.

- 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.**

Applicant's Further Response

In addition to the Applicant's previous comments, it is noted that the original AA addresses time lag at paragraph 39, see extract below:

The Secretary of State considers that in relation to the time lag between the commencement of the AMEP development and the compensation site becoming fully functional, the applicant has taken reasonable steps to limit the time delay and has agreed in recognition of the delay to provide additional compensation at East Halton Marshes - albeit that this may not be of significant value for the birds displaced by the development. He notes also that further reduction of the risk would be possible by starting work on the Cherry Cobb Sands Wet Grassland Site earlier. The Secretary of State has considered the representations of the RSPB on this matter, but continues to agree with the Panel's opinion that EU and Defra guidance on compensatory measures "allow for a possible time lag, although obviously they will not encourage it" (PR 10.187). He is satisfied that in this instance there is sufficient assurance that the applicant's compensatory measures will in time become fully functioning replacement for the habitat that will be lost, and that all the necessary arrangements are in place to ensure that the measures will proceed and be maintained as agreed.

On the basis of the above, whilst the applicant acknowledges that there is an environmental risk associated with the time lag between the loss of habitat on Killingholme Marshes foreshore and the development of fully functional compensatory habitat, that risk has been fully acknowledged in the original decision to consent the scheme. Plainly, extending the time for commencing the project does not alter in any way the risk that has already been assessed as acceptable by the original decision maker. The timescales already provided for in the DCO for commencing the compensatory habitat before Work No. 1 and for breaching the adjacent flood defence, are not amended by the current application and the Applicant is bound by those timescales.

The additional compensation site at East Halton Marshes is part of the Halton Marshes wet grassland site created in 2018/19.

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Risk: There is no change to the risk associated with time lag since the original AA and decision.

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

Applicant's Further Response

NE state that *'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.'*

NE do not state the source of their understanding that the quay would be created first and then the pumping station. The DCO is very explicit in only requiring compensatory habitat to be constructed in the event that Work No.1 is constructed, refer to the programming constraints set out in Schedule 11, paragraph 21 and the definition of Work No.1 and the associated development set out in Schedule 1 paragraphs 1, 3(a) and 3(d).

Events since the examination also demonstrate that NE had no objection to the construction of the pumping station before the creation of compensatory habitat. Specifically,

- a) A Deed was signed between Able and NE in 2013. Clause 5.2 of the Deed states that *'Nothing in the Deed shall require ABLE to implement the Compensation Measures in the event that ABLE determines not to construct Work No.1 and notifies NE accordingly'*. Work No. 1 has not commenced and relevantly does not include the construction of the pumping station or the dredging of the pumping station outfall.
- b) The pumping station has been established as a standalone part of the AMEP project since 2016, with Natural England and the other regulators being extensively consulted by ABLE on a frequent basis. In 2017, ABLE obtained approval from ERYC (9 March) and NLC (20 April) for the following stages of development, pursuant to Schedule 11 Requirement 3 of the DCO:

4.4 STAGE 1

(previously with Stage 4)

- 4.4.1 Killingholme Marshes Drainage Scheme (KMDS). Originally this aspect was integral to the AMEP terrestrial development. Recent funding requirements required this to be identified as a unique stage of development and will be commenced in 2017.

4.5 STAGE 2

(previously Stage 4)

- 4.5.1 The construction and operation of the Halton Marshes Wet Grassland (not included in DCO, subject to LPA planning approval) and intended, subject to further agreements and permissions, to relocate the functional requirements of Mitigation Area A.

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- 4.6 STAGE 3**
(previously Stage 1)
- 4.6.1 The construction of the AMEP land development at CCS and specifically the RTE.
- 4.6.2 No further development stages can take place until the design of the RTE is approved by the relevant planning authority in consultation with the EA.
- 4.7 STAGE 4**
(previously Stage 2)
- 4.7.1 The construction and operation of the AMEP land development at CCS and specifically the Wet Grassland (not included in DCO).

Natural England knew, at that time, that these were the approved Stages of Development. The Stages are compliant with the DCO and the 2013 Deed. Natural England did not object to this sequencing. Stage 1 is now substantially complete and Stage 2 was completed in 2019. Stage 3 is the construction of the compensation site and has not commenced.

- c) The Environment Agency issued an Environmental Permit on 16 October 2017 permitting the construction of the pumping station within the footprint of the sea wall. Permission was granted following an appropriate assessment that did not identify a requirement for compensation either immediately or on a deferred basis. Natural England was consulted on the appropriate assessment.
- d) On 26 June 2023 MMO approved the discharge of various conditions attached to the Deemed Marine Licence, including dredging of the outfall channel. Again, there was no requirement to provide compensation. Natural England was consulted by MMO before discharging these conditions.
- e) Due to a change in the dredging methodology for the pumping station outfall channel, ABLE, following consultation with the MMO, sought a standalone Marine Licence for dredging the outfall channel. MMO granted the Licence in May 2024 without requiring any compensation to be provided. Natural England was consulted by MMO on this application also.

On the basis of the above, Natural England has maintained a position over several years that there is no requirement for compensation in relation to the construction of the pumping station or the outfall channel.

Risk: The compensation works comprise Stage 3 of the approved Stages of the development and there is no new risk that arises because the compensation works which will still commence at least 7 months before Work No.1 in accordance with the requirements of the DCO.

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.**

Applicant's Further Response

This is another risk related to the timing of the works which was specifically addressed in the original AA as explained above. The DCO does not control the timing of the wet grassland development, this is controlled by the legal agreement between AHPL and NE. The Applicant continues to press ERYC to determine the application but we cannot commence Work No. 1 without the planning permission as we remain bound by the legal Agreement so the risk has not changed since the legal agreement was finalised in 2013.

Risk: Whilst the planning process is inexplicably protracted, there is no risk that Work No. 1 will commence without planning permission being in place and ABLE will endeavour to commence the wet grassland at least 7 months before the commencement of Work No.1, which is an improvement on the obligation in the Deed.

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

Applicant's Further Response

We have explained in our response to NE's original comments that ABLE is willing to undertake the modelling work which NE identify as their preferred approach and we will amend the CEMMP accordingly.

Risk: The matter is agreed. The criteria for success of the compensation relates to its functional performance some years after its construction, so there remain several years for the work to be undertaken. The fact that the work has not been commissioned to date does not give rise to any risk from agreeing to the extension of time.

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.**

Applicant's Further Response

In a later section of their original comments NE state:

'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', (underline added).

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In short, it has been accepted since the period of the examination that, over time, much of the mudflat fronting Killingholme Marshes will convert to Saltmarsh due to the ongoing and irreversible impact of Humber International Terminal which is causing accretion over the mudflat lifting it higher in the tidal range. It has been agreed that mudflat should be compensated at a ratio of 1.5:1 while saltmarsh should be compensated at a ratio of 1:1. Accordingly as the mudflat transforms to saltmarsh, the quantum of compensatory habitat required reduces. The HRA for Material Change 2 acknowledged these facts, see extract below:

Furthermore, the ExB notes that the compensation scheme has not been altered, despite a slight reduction in the extent of effects. The ExB is therefore content that, as stated in the Applicant's Overall Summary of Case [REP6-002], there would be a slightly greater ratio of compensatory habitat being provided to that being lost, when compared to the AMEP DCO. The ExB has concluded that the Proposed Changes would not materially change the outcomes of the original assessment, and most importantly, would not result in additional adverse effects. The ExB therefore considers that the derogations case for the AMEP DCO can be relied upon for the Proposed Changes.

In short, it has already been established, and agreed by Natural England, that the compensation measures as originally consented will continue to provide adequate compensation notwithstanding the delay in starting construction.

Relevantly also, as stated in our original response, the approved MEMMP, which Natural England was also consulted upon, already requires a pre-construction habitat survey of the foreshore.

Risk: There is no uncertainty about the habitat change that is occurring on Killingholme Marshes foreshore. Change was predicted at the time of the examination and the change is progressing as expected. The change does not give rise to any risk that the compensatory habitat will not be appropriate, a fact that Natural England agrees in its own response.

There is no uncertainty about the species impacted by the development which are listed in Part 2, paragraphs 9.21 *et seq* of the HRA report submitted with the application. This new assessment updates the HRA for Material Change 2 and the species impacted are, in fact, exactly the same as those listed in the HRA for Material Change 2, namely, all eight qualifying species of the Humber Estuary Special Protected Area (SPA) and Ramsar site (avocet, marsh harrier, bar-tailed godwit, black-tailed godwit, dunlin, knot, redshank and shelduck) and for six wintering waterbird assemblage species (curlew, lapwing, mallard, ringed plover, shoveler and teal)

The approved CEMMP already requires a review every 5 years. The CEMMP will have to be updated once ERYC determines the planning permission for the proposed Cherry Cobb Sands wet grassland as those sections of the currently approved CEMMP would no longer be relevant.

6. 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.

Applicant's Further Response

Mitigation Area A at Halton Marshes is sized to mitigate for all the Curlew being displaced from Killingholme Marshes. AMEP has no impact on roosting sites outside of Killingholme Marshes. Accordingly there is no residual impact of AMEP on SPA species beyond Killingholme Marshes that need to be considered in combination with any other project. The HRA for MC2 specifically acknowledges this stating:

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.

The HRA submitted by the Applicant found that, following mitigation, impacts on the Humber Estuary SPA/SAC/Ramsar site were restricted to habitats and species on the Killingholme Marshes foreshore and could not be mitigated, so required compensation. As compensation is provided for habitats and species on Killingholme Marshes foreshore, there is no residual impact to consider in-combination with other projects.

In any event:

Project Gigastack has not been taken forward to planning, so there is no detailed environmental information to consider. If it is taken forward in the future it will need to consider AMEP in combination with its own impacts.

The Immingham Eastern Ro-Ro Terminal project is supported by an HRA which found no in-combination effects with AMEP.

The Immingham Green Energy Terminal project is supported by an HRA which found no in-combination effects with AMEP.

Risk: There is no risk of AMEP having impacts on SAC habitats or SPA/Ramsar species in combination with other plans and projects as impacts to species are limited to Killingholme Marshes or Killingholme Marshes foreshore and are being either fully mitigated or fully compensated. AMEP has no residual impacts on SAC habitats or SPA species beyond these areas.

7. Advice Relating to the Environmental Review Report

Applicant's Further Response

The Applicant considers the original responses fully address NE's comments.