

24 June 2011

Mr Angus Walker  
Bircham Dyson Bell LLP  
By email

**Re:** Proposed Able Marine Energy Park  
**Our ref:** TR030001

Dear Mr Walker

I write with reference to your recently supplied draft Development Consent Order (DCO) and Explanatory Memorandum (EM), received Monday 13<sup>th</sup> June 2011 in respect of the above named proposal and your request for our comments. We have now considered the documents provided and set out our comments below. It is hoped that these are found to be helpful at this stage in the process and will assist further in the preparation of further drafts of the DCO. Our comments do not cover typographical points as it is appreciated that these will be addressed ahead of submission nor do they prejudice the future decision of the Commissioner appointed to consider the acceptance of any future application made under s.55 of the Planning Act 2008.

### **Explanatory Memorandum (EM)**

Where noted below, it is considered that the EM should provide more explanation about the purpose and effect of the DCO.

Associated development - further information should be provided in the EM to explain why "the provision of onshore facilities for the manufacture, assembly and storage of wind turbines and related items" has been identified as associated development, for example by explaining the proposed operation and commercial arrangements for the energy park indicating how the manufacturing/supply facilities are "associated with the development" (s115(2)) and "subordinate to and necessary for the development and effective operation to its design capacity of the NSIP that is the subject of the application" (CLG Guidance on associated development paragraph 10).

Article 3 (incorporation of the Harbours, Docks and Piers Clauses Act 1847 (HDPPCA) – it is considered that further explanation about the purpose and effect of this article would be helpful, for example by explaining the general purpose of HDPPCA. It is not clear why s33 of the HDPPCA is substituted by article 28 (not 29?) and why s53 HDPPCA is no longer incorporated – although it is noted that paragraph 4.47 of the EM provides some explanation about s33 it does not explain why an existing Order precedent is used.

Article 4 (modification of enactments) – please explain by reference to s120 (5) (b) why modification of local Acts is necessary or expedient. Subsection 120 (5) (b) is also subject to the provisions of ss121 to 153 of Chapter 1 – are the provisions of s146 (discharge of water) for example met in relation to article 4(2).

Article 6 (period for completion of work) – please explain further why the period has been extended to 10 years – for example why this particular NSIP will require longer to complete and clarify any implications in view of powers which are limited to 5 years under article 32 (power to acquire land compulsorily) and article 19 (protective work to buildings).

Article 7 (jurisdiction of the harbour authority) – it is noted that this article follows the drafting in an existing Harbour Empowerment Order. However, further explanation is needed to clarify the purpose and effect of the article by reference to the functions of AB Ports (and appointed harbour master) and the harbour authority (and appointed dockmaster), any overlap of jurisdiction and the interrelationship of this article with the protective provisions. It would also be helpful if the relationship of article 7 (2) (jurisdiction of the harbour authority) with article 3 (incorporation of HDPCA) were explained.

Article 8 (agreements entered into by the company) – please provide more explanation as to why any agreement or undertaking entered into prior to the DCO may not in its own drafting address this and why therefore the article is necessary as it appears to be dealing with contractual matters outside the DCO.

Article 10 (provision of works) – in the EM please provide further explanation about the ancillary nature of the additional works identified in 10 (2). Please explain the meaning of “it affords statutory authority for interference with the rights of navigation to the whole project”. Is it necessary to include compensatory habitat within the definition of works as this is authorised by virtue of article 5 and schedule 1?

Article 12 (consent to transfer benefit) – it is noted that model clause 27 has been removed, the effect being that the right to lease is subject to the consent of the Secretary of State.

Article 17 (public rights of way) – see comments below.

Article 18 (discharge of water) – please explain the relationship of this power with article 4 (2) which obviates the need for consent under the Land Drainage Act 1991.

Article 29 – it is noted that “is required” in the model provision has been replaced by “that it may require”. Further explanation is required having regard to s120 (5) (c) which is subject to the provisions of ss121 to 153 of Chapter 1, in particular s122 (a DCO may include provision authorising compulsory acquisition if, inter alia, the land is required)

Article 31 (incorporation of mineral code) – it would be helpful to explain why part 3 of Schedule 2 has been omitted. It would also be helpful if the EM could provide further explanation of the purpose and effect of this article.

Article 39 (temporary use of land) - further explanation should be provided for the increase in temporary possession from one to two years – why would the land in relation to this particular NSIP take longer to restore? If it is not referenced in Schedule 6, it is not clear how “any of the Order land” will be identified and it be made clear for what purpose and in relation to which part of the authorised development it will be temporarily occupied.

## Interpretation

The following comments relate to article 2:

- The term “harbour” is defined as including the open cut or channel also constructed under the powers of the DCO; are these works included within the development for which consent is sought? It would also help the if the EM clarified the terminology used in the DCO to define the development (which is described as a “quay”) perhaps by reference to definitions in the Harbours Act 1964 (for example “harbour”, means any harbour, whether natural or artificial etc and includes a dock, a wharf etc and “wharf” means any wharf or quay etc at which sea-going ships can ship or unship goods or embark or disembark passengers);
- “land and rights plan” and its purpose is described in the Applications: Prescribed Forms and Procedure Regulations (APFP regs) and “Land plan” and “rights plan” are also defined terms in the model provisions. Combining the two may cause confusion and mean that there is failure to comply with procedural requirements in s37(3);
- “the Order limits” - the purpose of the works plan is described in the APFP regs and as a procedural requirement it must be submitted with the application and detail “the limits within which the development and works may be carried out and any limits of deviation provided for in the draft order”. “Development consent application boundary” is a term which is imported from the 1990 Planning Act regime and appears to be a substitute for “the Order limits”. Also see comments further in relation to the Schedules - the “heritage and ecology plan” may not be used as a substitute for the lands plan which must identify land required for/affected by the proposed development (this would include protected trees);
- The APFP regs also require plans to be provided which identify ecological features (APFP Regulation 5 (2) (l) and heritage assets (APFP Regulation 5 (2) (m)). Whilst the IPC does not wish to place unnecessary administrative burdens on applicants or require information to be duplicated, using the “heritage and ecology plan” as proposed may cause confusion and it is uncertain that procedural requirements would be met as a result.
- The definition of “rights over land” is the same as the model article definition. The EM suggests that Article 2 (2) expands the definition

## Other Articles

*Article 5 (development consent granted)* includes “consent to operate” - it is noted that “operation” of a harbour is not identified in Schedule 5 as a matter for which a DCO may make provision although arguably the matters in Schedule 5 are not exclusive. For clarity, the EM should explain why this provision is necessary or expedient (by reference to s120 (5) (c)) and how it is considered to be within the powers of the Planning Act to include it (by reference to s120 (3) and (4)). *Article 7 (Jurisdiction of the Harbour Authority)* – see above under EM comments.

Article 8 (Agreements entered into by Company, etc) – see above; clarity is required with regard to the inclusion of this article within the DCO.

Article 9 (maintenance) permits the undertaker to “enlarge”, “relay” and “extend” - is there inconsistency between this article and the definition of “Maintenance” in the interpretation article?

Article 15 (access to works) – it would be helpful to know whether the local authority has provided comments on the prior approval process proposed by this article.

Article 17 (public rights of way) – it is noted that the authority is a unitary authority. However, is there consistency with requirement 10 (public rights of way) which requires approval of an implementation plan and specification from the planning authority? The definition in article 17 refers to an implementation plan only which is “agreed” between the undertaker and the highway authority whereas requirement 10 requires consultation with the highway authority and approval by the planning authority. Reference is made to Schedule 3 which is entitled “footpaths to be diverted” which is not a relevant description where footpaths are to be extinguished. Is “which in the absence of agreement is determined by arbitration” necessary in the light of article 60 (arbitration)?

Article 20 (authority to survey and investigate land) -article 20(1) (d) authorises steps to protect or remove flora or fauna; do the “steps” envisaged constitute works which should be included in the description of the authorised development and might licences be required in accordance with the 2010 Conservation of Habitats and Species Regulations or other relevant legislation? It would be helpful to know whether Natural England has provided comments on this article?

Article 30 (power to override easements and other rights) requires further clarification addressing the points below:

- whether it is relevant or necessary to include “by its statutory successor” and “any of their servants or agents”;
- the absence of protection for statutory undertakers (cf s237 (3) Town and Country Planning Act 1990);
- the absence of residual liability for the undertaker;
- the need for confirmation in the article that extinguishment etc arises at the time of interference or breach;
- the omission of “injurious affection”.

Article 32 (compulsory acquisition of land – incorporation of the mineral code) – explanation is required for omitting part 3 of Schedule 2 and see comments above

Article 39 (temporary use of land for carrying out the authorised development) – see above.

Article 45 (trees subject to tree preservation orders) – note previous comments regarding whether it is appropriate to use the heritage and ecology plan to identify land over which it is proposed to exercise a right to use the land.

Article 47 (railway network) further explanation is required as to why this is necessary or expedient for giving full effect to other provisions of the DCO (s120 (5)). It is not clear why the undertaker needs a general power in the DCO to enter agreements with Network Rail and the Office of Rail Regulation. Does the “removal of the line” constitute works which should be included in the description of the authorised development? It is noted that there are no protective provisions for the benefit of Network Rail.

Article 48 (arrangements with Her Majesty’s Revenue and Customs) it is not clear why or whether a general power can be given in the DCO for Her Majesty’s Revenue and Customs (see s120 (4) and Schedule 5).

Article 56 (certification of plans) – see comments above regarding the absence of a works plan and the merging of the land plan and rights plan.

Article 58 (traffic regulation) – further explanation is required in relation to s120 (8) (a DCO may not include provision creating offences).

Article 60 (requirements - appeals) –It would be helpful to know whether the planning authority has provided comments on this article.

### **Schedules**

Schedule 1 (authorised development) – see comments above in relation to associated development. Also reference to article 2 should be replaced by reference to article 5.

Certain provisions of the DCO (and also requirements) relate to works such as a surface and foul water drainage system, lighting, parking provided in accordance with the travel plan and ecological mitigation works. Has consideration been given to whether, where these works constitute development, they should be included as part of the authorised development?

Schedule 3 (footpaths to be diverted) –please see earlier comment; these footpaths are to be extinguished. See earlier comments also regarding the “land and rights plan” and note also that the APFP regs require a plan (arguably separate) to be submitted where applicable identifying any extinguishments of rights of way.

Schedule 8 (deemed marine licence) – it would be beneficial to understand the level of involvement of the MMO on drafting the licence and if they have provided comments before we make further comment.

### **Requirements**

Requirement 23 (European protected species) - where there is a reasonable likelihood of protected species being present on a site ecological surveys should not be secured by a condition on the consent and carried out after development consent has been granted. It would be helpful to know whether the comments of Natural England have been sought in relation to this requirement.

Requirement 24 (reinstatement of land used temporarily for construction) – how does this requirement sit with article 39 which requires removal and restoration to be carried out to the satisfaction of the owners of the land?

Requirement 25 (requirement for written approval) – is cross reference to article 60 required for clarity?

Requirement 26 (amendments to approved details) – further consideration may be required in the light of the LPA’s ability to amend, given s153 and Schedule 6.

I trust that the above will prove to be of assistance, however, if there is any further advice that we can offer or if clarification is required please do not hesitate to contact us. Furthermore, if you would find it helpful to meet ahead of the application being submitted to discuss the above, and any other issues, please contact me to discuss.

Yours sincerely

Mike Harris, Case Lead  
Cc Richard Cram, Able UK

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