
From: Brian Greenwood [REDACTED]
Sent: 02 August 2012 16:44
To: Mike Harris
Cc: Able Marine Energy Park
Subject: TR030001 - Associated British Ports [REDACTED] - proposed Able marine energy park - comments and further representations

Follow Up Flag: Follow up
Flag Status: Red

Attachments: AB Response JL amendments.pdf; ABP Further Reps and Apx 20120802.pdf; Response to Written Reps_ABP (10015525) - Highways Tucker.pdf; FinalResponse 02-08-12.pdf; Associated British Ports Rail Response to WRs.pdf; UKLWF7ECS77_EXCHANGE_02082012-162402.PDF

<<AB Response JL amendments.pdf>> <<ABP Further Reps and Apx 20120802.pdf>> <<Response to Written Reps_ABP (10015525) - Highways Tucker.pdf>> <<FinalResponse 02-08-12.pdf>> <<Associated British Ports Rail Response to WRs.pdf>> <<UKLWF7ECS77_EXCHANGE_02082012-162402.PDF>>

Dear Mike,

Further to the above, I attach on behalf of my client Associated British Ports, further written representations commenting on the replies to the ExA's Questions and the responses to the Relevant Representations with regard to –

- 1 Land ecology – Andrew Baker;
- 2 Marine impact – Peter Whitehead;
- 3 Rail – Chris Geldard;
- 4 Highways and transportation – Simon Tucker;
- 5 Project assessment, planning and the draft DCO – Phil Rowell.
- 6 Compulsory purchase – John Fitzgerald

I trust in sending all of the representations together, that has not caused any problems at your end and I would be grateful if you could acknowledge safe receipt.

Regards,

Brian

Brian Greenwood
Partner
Head of Planning and Environment

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.....

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PINS reference TR030001

Associated British Ports

ABP Reference Number: [REDACTED]

Application for the proposed Able Marine Energy Park on the south bank of the River Humber at Immingham, North Lincolnshire

Response to first stage Written Representations
in Respect of Terrestrial Ecology and
Nature Conservation

By

Andrew Baker BSc (Hons) MIEEM

2 August 2012



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1 Summary

- 1.1 Able UK has submitted a considerable amount of new data in the form of two volumes of "Supplementary Environmental Information" (SEI) in relation to its application for a Marine Energy Park (MEP), as well as responding to the Relevant Representations and the questions posed by the Examining Authority.
- 1.2 The purpose of this response document is threefold. First, I provide the Examining Authority (ExA) with my assessment of the new Able UK documentation and its implications for the understanding of impact of the scheme upon terrestrial ecology and nature conservation.
- 1.3 In this document I have reviewed the information that is relevant to my area of expertise. Some of the information presented by Able UK is completely new. Other reports are simply reinterpretations of data that has already been presented, whilst the remainder consists simply of reiterations of Able UK's views on why they have not addressed key issues.
- 1.4 While some of this additional information will be helpful to the ExA there are still considerable gaps in the data and the consequential assessment presented. It follows, therefore, that both the Environmental Statement, even as supplemented by the SEI, and the shadow Habitats Regulations Assessment remain inadequate.
- 1.5 Secondly, I have reviewed the Written Representations submitted by Natural England (NE) and the Royal Society for the Protection of Birds (RSPB), and thirdly, I have also considered the answers provided by Able UK to the first round of questions asked by the ExA. Certainly in

this context, it should be noted that Able UK's response to Question 5 in relation to its intended use of the new port for general cargo demonstrates that it has failed to assess the full extent of the scheme and its potential impact and it must be the case that the ExA cannot legally grant permission for the DCO as it currently stands.

2 Response to additional data

2.1 Able UK has published large amounts of additional information that is relevant to terrestrial ecology. In the following section I have reviewed these additional reports and assessed how this information might affect the ExA's examination of the various subject matters. The nomenclature used below follows that which has been used by Able in presenting the "Supplementary Environmental Information". (SEI)

Ex 11.16 - Assessment update for breeding birds

2.2 The impact upon breeding birds within the development site was considered in the ES Volume 1 Chapter 11, paras 11.6.64 to 11.6.67. Like other aspects of the ecology chapter, the assessment was cursory and Natural England found that Able's assessment of the impacts was inadequate (see NE's WR para 8.48). The SEI has remedied some of the defects. It should now enable the ExA to gain a greater, although not a comprehensive, understanding of the value of the site for breeding birds.

2.3 The report, however, still fails to assess the proposed mitigation, which it is claimed in the ES (para 11.9.6) will fully mitigate the identified impacts (with the exception of Skylark). In addition, it does not describe any of the residual impacts. While the report addresses some of the shortcomings that have been identified, the impact assessment

is still incomplete and, therefore, inadequate.

2.4 Furthermore, there are a number of aspects of the assessment that appear to be unrealistic. In looking at the number of breeding territories that will be lost to the development the applicant's consultant team has made the assumption that some of the areas that will be converted to industrial land will still support breeding birds. This is simply not a realistic reflection of the impacts of the development, as such mitigation will only be effective if the storage areas are committed as mitigation. Birds will only nest in areas that are not being disturbed throughout the breeding season. The assumptions made by the applicant do not, as a consequence, constitute a reasonable expectation for a working area.

2.5 It is necessary to base the assessment presented by the applicant on the '*worst case scenario*' only. For example, the report assumes that the number of breeding pairs of Little Ringed Plover (a species of High Sensitivity that receives special protection under the Wildlife and Countryside Act 1981) will increase by 3 pairs. The more reasonable expectation, however, is that there will be a loss of 2 breeding pairs.

2.6 The assessment looks at the loss of the breeding territories for each species on its own (albeit, it should be noted, under-estimated). The report does not, however, look at the impacts upon the breeding bird assemblage. The assessment of the impacts upon nesting birds must, therefore, continue to be viewed as inadequate - a view that is shared by Natural England (para 8.48 NE's WR).

Ex 11.17 Vascular Plant Survey

2.7 This report on vascular plants does not contain any new information nor does it offer any new survey data. The report simply gives Able

UK's views as to why up-to-date vascular plant surveys were not presented. This is unacceptable in terms of the standard of environmental assessment required and the criticisms raised in my original WRs still stand.

Ex 11.19 Bat survey: Supplemental Note

- 2.8 In my Written Representations I have criticised the bat survey on a number of counts. Natural England has also found the material inadequate and stated that additional survey work is required to determine the use of the site by bats. The supplemental report presents no additional survey data. The surveys that informed the ES, therefore, remain inadequate and the criticisms raised both by myself and Natural England still stand. The ExA must note that all bats are European Protected species and there is a legal duty to secure compliance with the Habitats Directive under which these species are protected, through the Conservation of Habitat and Species Regulations 2010 Regulation 9.

Ex 11.20 Draft Great Crested Newt Licence Application

- 2.9 This document is a copy of Natural England's response to the submission by Able UK of a European Protected Species licence consultation. The document does not contain any new survey data for Great Crested Newts. Throughout the document Natural England's licensing team raise issues concerning the level of information provided, the efficacy of the surveys carried out and inaccuracies in the reporting. These failings have not been addressed by the applicant and the criticisms raised by Natural England and myself still stand. The ExA simply does not have sufficient information to assess the impacts upon Great Crested Newts and therefore cannot assess the efficacy of the proposed mitigation. Like bats, Great Crested Newts are a European

Protected Species and the same legal duties apply.

Ex 11.22 Impact of the Self Propelled Modular Transporters (SPMT) and the Cranes on the Operational Buffer, and Operational Noise Effect on Birds at North Killingholme Haven Pits.

- 2.10 Natural England has requested further information on the likely impacts of noise arising from the operation of the site including 'SPMT's, the applicant's ES having concluded that there would be no impact from noise disturbance arising from the operation of the site.
- 2.11 The supplemental report, however, has accepted that there is the potential for noise levels to exceed 55dB (A). This is a level above which Natural England has indicated there may be impacts upon the SPA birds found on North Killingholme Haven Pits (NKHP). The report also states that further information is required to assess the noise levels and asserts that this cannot be obtained until the detailed design is known. It is not possible to know, therefore, on the basis of the information supplied whether or not the effects could be made acceptable through mitigation secured by conditions.
- 2.12 It should also in this context be noted that Natural England had requested that information be presented on the likely noise impacts upon birds at (NKHP) arising from the operational phase. This required information has not been presented.

Ex 11 31 M456 Invertebrate Survey

- 2.13 In response to criticisms over the lack of invertebrate data, Able UK has submitted a report of a walkover survey carried out in 2007. The survey was carried out on one day in April. No sampling of the site was carried out. The majority of the survey area was outside the application site. Even as an initial assessment of invertebrate potential this is a

manifestly inadequate survey and adds no useful information about the site in question.

Ex 19.1 Lighting Lux Plan

- 2.14 This document sets out the proposed location of lighting columns across the site and the associated lux levels. The document provides the necessary information to allow an assessment of the likely success of the proposed bat corridors and foraging areas (see below).

Ex 20.3 Additional Landscape Masterplan

- 2.15 The additional landscape masterplan consists of some generalised sketch plans of the proposed ecological mitigation. No details of how the tree avenues and ditches to be created are given, there are no species lists, no cross sections, dimensions, nor are there management proposals.
- 2.16 It is my view that the proposed bat mitigation is very unlikely to succeed. First, the necessary surveys to assess the current use of the site have not been completed and it is not known what species of bat the mitigation is aimed at. Secondly, the proposed bat corridors actually appear to coincide with lighting columns and therefore will be fully lit at the highest Lux levels. It is in fact the case that many bats are sensitive to lighting and will, therefore, actively avoid lit areas such as this.

Ex 28.2 Old Little Humber Farm: Wet grassland creation, management and monitoring plan.

- 2.17 This report provides detail on how the temporary mitigation sites at Old Little Humber Farm (OLHF) will be created, managed and monitored. It is apparent that the site is constrained by the presence of numerous services that severely limit the amount of wet grassland that can be created on the site. This reduces the area that can provide the high

numbers of invertebrates to support species such as Black-Tailed Godwits. Water levels within the site are to be maintained artificially with the use of wind powered pumps and regular human intervention. Regular and comprehensive monitoring would have to be carried out to ensure that the site meets its objectives. Given these inherent uncertainties, these obligations need to be agreed by the applicant **before** the habitat at the development site is destroyed.

- 2.18 It should be noted that the design of the wet grassland does not include roosting areas, and so there will be no replacement of the ecological function that is provided by the close proximity of North Killingholme Haven Pits and Killingholme Marshes Foreshore (see below).

Ex 44.1 Cumulative and In-combination Effect

- 2.19 As I previously identified in my WRs, the in-combination assessment presented in the sHRA was fundamentally flawed. There is now a new document that replaces the cumulative impact assessment within the EIA. Its relationship to the shadow HRA is, however, unclear. First, the new document confuses the two terms, cumulative impacts and in-combination effects. Secondly, the new document does not in fact specifically assess 'in-combination' effects (i.e. effects arising in combination with other plans and projects) with reference to the Habitats Directive. 'In-combination' impacts are identified but the shadow Habitats Regulations Assessment has not been updated to reflect this.
- 2.20 While this new cumulative assessment has remedied some defects, it does not attempt to deal with the required steps of the HRA process. Having identified the in-combination effects, the document does not

then go on to assess whether modification of the compensation is required to address these effects.

- 2.21 It is not enough just to assess the cumulative impacts alone. Having identified cumulative impacts, it is necessary to adjust the mitigation and compensation proposals depending upon the outcomes of the cumulative assessment.

Summary of outstanding issues

- 2.22 Able UK has still failed to present a considerable amount of the data that was requested in the Scoping Opinion. Most notably, no surveys of invertebrates have been carried out and no additional data on this group has been presented. While the additional assessment on breeding birds is welcome it is still fundamentally flawed (impacts underestimated, the assemblage is not assessed and mitigation is not evaluated). The failings as regards other aspects within the Ecology Chapter have not been addressed and the criticisms raised in my WRs still stand. Gaps in the information on bats and Great Crested Newts are still to be addressed.
- 2.23 As a consequence, it remains the case that the ExA does not have sufficient ecological data, nor a structured, sufficiently reasoned assessment of the full ecological impacts of the scheme. Of serious concern is the fact that many of the gaps and omissions relate to rare and/or European protected species, which the ExA has specific legal duties to address.

3 Response to Written Representations

Natural England

- 3.1 I note that Natural England is still expecting further data on a number of areas which have still not been covered even by the "Supplementary

Environmental Information". These include;

- Agreed mitigation for Lamprey and Grey Seals
- Impact of construction on NKPH (the additional note Ex 11.22 only deals with operational noise)
- Further information on mitigation for breeding birds (Ex 11.16 does not explore the adequacy of the mitigation)
- Information on flightlines between OLHF and the Estuary (para 8.70)
- Further survey work on bats (para 8.72) (Ex 11.19 contains no additional survey data)
- Details of water vole mitigation (para 8.73) (Ex 20.3 provided no detail of how mitigation will be achieved)
- Details of the operational buffer alongside mitigation area (A) (Ex 20.3 provided no detailed information).

Royal Society for the Protection of Birds (RSPB)

3.2 The RSPB has presented a detailed case that examines the efficacy of the proposed compensation. I note that the RSPB consider that Cherry Cobb Sands cannot develop sufficient habitat to replace the mud flats that will be destroyed by the development.

3.3 The RSPB shares my view that the compensation proposal has failed to address the impact upon the Black-Tailed Godwits. Like NE, the RSPB refute Able UK's assertion (SHRA para 6.3.36) that there is no close relationship between the BTG roost at NKHP and feeding ground at Killingholme Marsh Foreshore. This ecological function of a major

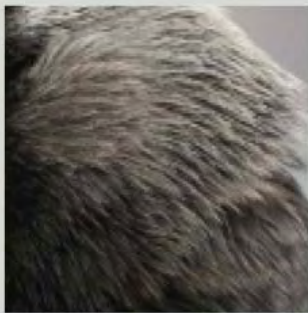
roosting site in close proximity to the main feeding site has not been addressed and RSPB share my view that this is a major flaw within the proposed compensation. In simple terms, the compensation does not maintain the coherence of Natura 2000 as required by the Habitats Directive.

4 Issues relating to "Habitat Regulations Assessment"

- 4.1 In my WRs I queried the actual extent and nature of the project in the context of how it is defined by the draft DCO. The project does not seem to be confined to a Marine Energy Park but includes use of the site as a general port. This has fundamental implications for the HRA, which I have set out in my WR (paras 5.11 – 5.23).
- 4.2 The ExA addressed this issue in Question 5 a) where it is asked, *'Is it the intention to accept any cargos other than those relating to the manufacture of wind turbines on either a temporary (interim) or permanent basis?'*
- 4.3 Able UK in their answer to this have made it clear that the project is not restricted to cargos relating to the renewable energy market and they envisage that the proposal will include other cargos, although I am informed that this standpoint may be changing. I have, however, seen no details in this respect at the time of preparing these representations.
- 4.4 Question 5 d) goes on to ask *'what provisions in the Development Consent Order (DCO) might be appropriate and necessary to ensure no derogation from the Imperative Reasons of Over-riding Public Interest (IROPI) justification put forward in the proposal?'*
- 4.5 Able summarise the IROPI arguments that are presented in the sHRA which, it is noted, are confined entirely to renewable energy. If the ExA

were to accept this approach, they would be contemplating a development which clearly would not meet the requirements of the Habitats Directive. It would be erroneous to for the ExA to draw conclusions on on IROPI for one type of project when the proposal described in the DCO, albeit not assessed, contemplates much broader and quite different activities. The ExA must follow the stepped process (see Appendix 1 of my proof) based on the full extent of the proposal.

- 4.6 Question b) referred to non-renewables related cargos and asked ‘... *what would these cargos be and how does the project documentation take account of their possible impact?*’ Able has responded by saying that their documentation does not consider cargos other than those relating to marine energy.
- 4.7 This demonstrates that Able UK has not in fact assessed the full extent of the scheme (see para 5.12 of my WR). As a consequence, it would not be lawful for the ExA to approve the DCO in its current form.



baker*consultants*

**PLANNING ACT 2008 (PA 2008) AND THE INFRASTRUCTURE PLANNING
(EXAMINATION PROCEDURE)**

**APPLICATION FOR THE PROPOSED ABLE MARINE ENERGY PARK
ON THE SOUTH BANK OF THE RIVER HUMBER AT IMMINGHAM,
NORTH LINCOLNSHIRE**

PLANNING INSPECTORATE REFERENCE NUMBER: TR030001

Unique Reference Number: 

**Response to Comments on Relevant and Written Representations and 1st Round Examiner
Questions on Marine Matters**

Peter Whitehead BSc (Hons) C.WEM MCIWEM CGeog FRGS

Coastal Processes/ Morphology/Modelling

ABP Marine Environmental Research Ltd

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- PW2. New modelling of impact on flows - ES (DCO) quay design
- PW3. Original modelling of impact on flows presented in ES - Assumed 'Worst Case' quay design

1. Introduction

- 1.1. The applicant issued a substantial quantity of documentation entitled “Supplementary Environmental Information” (SEI) on/around 9 July 2012. I have not yet been able to read, absorb and analyse the approximately 1500 pages of new information. I will, therefore, submit any comments additional to those set out below arising as a result of the newly submitted information to the Panel as soon as I am able.
- 1.2. The problems which I identify and concerns which have been expressed in ABP’s Relevant Representations and my Written Representations will not be repeated in this document. I should, however, emphasise for the benefit of the panel two particular problems.
- 1.3. The first is that Able proposes to transfer substantial quantities of fine sediment from the middle reach to the lower reach of the Humber Estuary both during the construction works and then continuing into the future from the required maintenance dredging. There are two aspects to this problem:
 - I. The loss of fine sediment in the middle reaches is likely to cause morphological change in the long term which is inconsistent with the maintenance of the integrity of the features of the European designated SAC. The existing sediment balance within this part of the estuary would be upset;
 - II. The fine material removed from the middle reach will be deposited over a different type of material (silt/mud over sand) in the lower reach. This also affects the morphological dynamics of the lower estuary, alters the overall estuary sediment balance as more material will be lost through the estuary entrance and affects the existing water quality and bed sediments, which together create a significant risk to the fauna of the estuary.
- 1.4. The second problem I wish to draw to the ExA’s attention is one that is of direct concern to ABP and other operators on the south bank of the Humber. The maintenance dredging required if the new quay is constructed will be significantly greater to current requirements. An increase in the maintenance dredging requirement in conjunction with the proposed disposal strategy is a serious and real future operational risk for ABP and other users.

- 1.5. The Sunk Dredged Channel (SDC), see Figure PW1, is a critical passage for large vessels navigating to and from ABP and other estuary users facilities. It has a cyclic pattern of sedimentation with a consequent maintenance dredging requirement. The current status is that of a self-maintaining channel but it is reaching a point in the cycle when sedimentation is expected to rapidly increase. The last peak in sedimentation (1996/7) was so severe that for several months not even the continuous operation of two dredgers was able to keep the channel open for vessels at the previously maintained depth. Since that time, vessels have generally become larger and the Humber International Terminal (HIT) has been opened, hence more vessels requiring transit through the channel. The proposed annual volume of maintenance dredge arisings from the Able development to be deposited at HU080 (Middle Shoal) would substantially increase the risk that the SDC during the next period of peak sedimentation would be unavailable for vessels for a longer period of time. It is not possible to calculate the precise effect, but based on the relative increase in volume that is likely to be deposited during the peak sedimentation period it is estimated that the maintenance dredging requirement in the channel may be increased by 15 to 20%. Even more critical for vessel management will be the increase in rate of sedimentation (loss in depth) and the rate at which this can practically be removed. This would directly impact on access to the Port of Immingham for larger vessels and, unless comprehensively safeguarded, may leave the Port severely disadvantaged by Able's proposals.
- 1.6. By contrast ABP will deposit its maintenance material from Green Port Hull and the proposed Humber River Bulk Terminal in the same area of the estuary that it originates, thereby avoiding or minimising the risk of the problems that would be encountered if the Able proposals are approved as currently contemplated.

2. Format of this Document

- 2.1. The format of this section of the document refers to the specific paragraph numbering within the Able response document - "AMEP Applicant's comments on the relevant representations, June 2012".

3. Response to Comments on Relevant Representations

3.1 General comment Para 42.8 and 42.9

- 3.1. There remain areas of significant environmental risk that are likely to arise from various components of the development that have **not** been identified and then assessed. These omissions are significant for the overall assessment of the effects of the AMEP development during both the construction and operational phase. Examples of these omissions/deficiencies have already been presented in my Written Representation, and as far as I can establish, have not been fully resolved by the information provided in the SEI.

3.2 Issue 6 - Marine Impact

Para 42.33 (also relevant to Para 42.49)

- 3.2. In Para 42.33 we accept that ABP were consulted on the proposal in general terms. The point being made in Para 7.2 of the ABP Relevant Representations is that the dimensions of the development (reclamation size and shape, dredge requirements) were being changed throughout the consultation. Accurate assessment of the potential effects and impacts of the project was, therefore, clearly impossible. As a consequence, the potential impact on the marine processes and sedimentary effects could in reality only be considered by ABP and the other consultees at the time of the application.
- 3.3. As I explained in my previous representations, the AMEP scheme design which was modelled for the ES was not the same for determining all the potential impacts that were modelled.
- 3.4. The process of optimising the design took account of only a limited number of potential impacts. In particular it seems to have been undertaken solely with respect to the Centrica/E.ON intake and outfalls. As such, it has failed to reflect other important impacts such as those on ABP facilities.
- 3.5. For example in the ES the effects on flows were assessed for a preliminary design whilst fine sediment transport was assessed for the final (DCO) design. Consequently the results are not

directly comparable and therefore impacts related to flow changes, e.g. those relating to navigation issues, which could impact directly on marine operations at the Port of Immingham, could not have been assessed using appropriate modelling results and are not correctly represented in the ES.

Para 42.34

- 3.6. I observe that the applicant now notes ABP's concerns with respect to IOH. The applicant, however, still makes no comment about whether IOH was actually modelled in the baseline hydrodynamics.
- 3.7. A comparison of the June 2012 modelling results at Figures 3.9 and 3.10 of supplementary report EX 8.7 with the equivalent Figures 15 and 16 in the original ES demonstrates that IOH was not included in the original modelling. This is further substantiated by:
- Firstly, IOH was not shown or recognised as a sensitive receptor in the original ES; and
 - Secondly the pattern of change in the later modelled version is very different; see the attached Figures PW2 and PW3.

The assessment is flawed and unacceptable.

Para 42.35

- 3.8. The argument put forward for no increase in sedimentation in IOH might be credible if the local baseline hydrodynamics had been correctly modelled and IOH had been correctly represented in the model. This does not, however, appear to be the case and the queries raised by ABP in this respect have not been answered by the applicant's response. If it had been included I would have expected to see the data from the model. This has not been provided.
- 3.9. The new report, EX8.7, is an attempt to justify the assertion that there will be no effect on IOH. However, comparison of equivalent diagrams from this new report and the original modelling presented in the ES, (Figures PW2 and PW3 respectively attached), show distinctly different

patterns of effect on the local flow regime. Figure PW2 is the new modelling with the DCO development design and Figure PW3 is the ES presented design, which was inferred in the ES as the worst case. It should also be noted that IOH and the jetty structures appear in the new modelling but are absent from the ES. This supports our view in 7.2 (b) of the Relevant Representations that the works have not been correctly reflected in the ES nor properly assessed. As I indicated in Para 1.1, I have not had an opportunity yet to determine whether the new modelling has been properly undertaken and support the assertions made about it and in particular whether it has properly assessed IOH and the jetty structures, assets that are critical to marine operations at the Port of Immingham.

- 3.10. This confirms our view that DCO design gives rise to different potential effects on the marine environment to those presented for assessment in the ES. On this basis the ES does not give a true representation of the local hydrodynamic effects of the AMEP development and must as a consequence be viewed as fundamentally flawed.

4. ExA - General Comments

- 4.1. I note, particularly in relation to the ExA's questions on Marine matters, that Able frequently respond by reference to the new modelling and new assessment reports (which they have recently provided in their "Supplementary Environmental Information") and not by reference to the material provided in the original ES.
- 4.2. I should add in the context of these responses that it is disappointing to note that Able take the opportunity to criticise ABP/ABPmer in their answers, which is unjustified. For example:
- Able talk about the Managed Realignment at Paull Holme Strays (Para 19.3 of their response) and state accretion has been greater than predicted by designers ABPmer as if it could have been designed with certainty. In fact, the assertion that accretion has been greater than ABPmer predicted merely reinforces the need to adopt a precautionary approach to modelling predictions. I should add that in so far as the criticism is of the competence of the work on the design undertaken by ABPmer, it is

also a criticism of the consultants currently working for Able (formally Binnie, Black & Veatch (now Black & Veatch)) who were also a party involved with that design along with the EA and Prof John Pethick;

- Able assert in their answer to Examiners question 17 that ABPmer have withheld the 2011 NE commissioned report - Biological Survey of the Intertidal Sediments of the Humber Estuary. To my knowledge we have never been approached to supply this document;
- Also within comments with respect to cumulative/in- combination studies (Para 41.5 of the Able response to Relevant Representations), the applicant states that ABP would not give details of the Green Port Hull (GPH) design to justify why they used the 2005 design. To the best of my knowledge ABP were not approached to supply this specific information.

5. MMO Written Representation

5.1. The MMO Written Representation makes similar reference to the inadequacies in the information provided by Able that were made in ABP's Written Representation. The MMO note that many of these inadequacies were identified by them at an early stage but have not been resolved by Able. However, the MMO do not seem to have considered the implications of:

- The different types of material that will be disposed at the HU080 site compared to the bed material and the most recent disposals at the site from both capital and maintenance material;
- The fact that large volumes (in the order of 1 million m³ per annum) of extra material (silt/fine sand) will be transferred from the middle estuary to the lower estuary artificially, and the effect this will have on:
 - The suspended sediment concentrations (SSC) and natural dynamics of the area in the long-term;
 - Possible implications to the SDC, particularly when in the future maintenance dredging will be required again due to the long natural cyclic variability;
 - Potential change to habitats; and

- Consideration of the sediment balance of the estuary.

These points are important.

- 5.2. Until these latest proposals, the universal practice has been to deposit all maintenance dredged material in the same section of the estuary as that from which it came, thereby keeping the material characteristics the same. The current Able proposals depart from this long term practice. This is bad environmental practice with respect to the EU designations and should not be permitted. Such a practice would affect the morphological balance of the estuary in a way that is inconsistent with the maintenance of the integrity of the identified features of the SAC. The consequences are difficult to predict due to the inherent variability, a variability which of itself should have alerted the applicant.
- 5.3. This practice has predominantly applied even to the *erodible* capital material from previous developments. *Non erodible* material is sometimes treated differently. This is because it is predominantly stable and once deposited it is likely to have less effect except at the immediate site. In the light of the above, it would appear that the MMO have not considered the Able dredge deposit proposal in the context of determining the ***best practical environmental option***, particularly with respect to future risk, particularly in an area so close to the major navigation channel to the estuary.

6. Environment Agency Written Representation

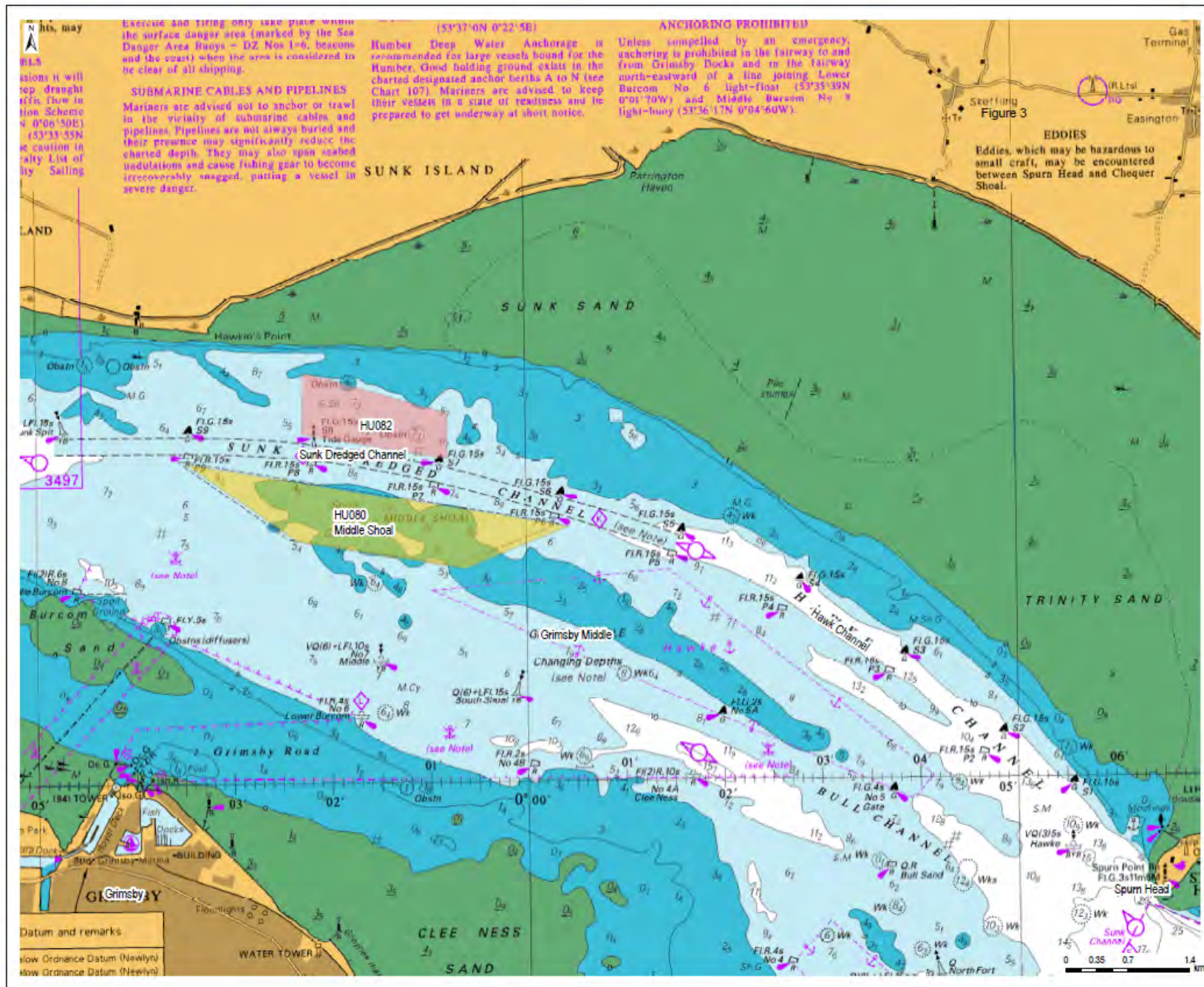
- 6.1. The Environment Agency identifies inadequacies in the ES similar to those identified by ABP.
- 6.2. It is noteworthy that their view is that coastal squeeze will give rise to a long-term loss of 10ha of intertidal mudflat over 100 years and consider that this should be added to the compensation requirement at a ratio of 1:1.

7. Natural England Written Representation

- 7.1. Natural England also identifies inadequacies in the data supplied in the ES.
- 7.2. That said the Natural England Written Representations are somewhat confusing. In Section 6 they largely repeat Able's Shadow HRA without actually critically examining it.
- 7.3. Tables 6.1 and 6.2 of the NE Written Representation show the applicant's calculations of the direct and indirect habitat area changes that are predicted to result from the AMEP development. The derivation of these numbers is not provided, however. In my view, based on experience from monitoring the effects of the Humber International Terminal development, the creation of 12.3ha of saltmarsh and the 7.88ha of increased intertidal from subtidal is unlikely to occur to the magnitudes stated. These data appear to be based on the morphological modelling results which in my opinion indicate unrealistic rates of accretion. There is therefore considerable uncertainty as to the quantity of indirect losses and gains, which ultimately affects the compensation requirement.
- 7.4. Taking the areas of change as presented and applying the same logic as used for recent ABP developments in the estuary, the total area of compensation required, on a precautionary basis, would be around 127ha. About 80ha of this would need to be ecologically functioning intertidal mudflat. It is very unlikely that this amount of compensation, particularly the intertidal mudflat can be provided at the Cherry Cobb Sands compensation site.
- 7.5. The numbers provided by the applicant seem to have been taken at face value by Natural England thus far without close examination. This is not a satisfactory basis for assessing the compensation requirements for a European designated site.
- 7.6. Further, there does not appear to be adequate consideration of the need for compensation arising from the development of the Cherry Cobb Sands compensation site and coastal squeeze which can only lead to an increase in the overall compensation requirement.

- 7.7. The compensation requirement therefore has not been completely defined and the proposed provision is inadequate. The project, therefore, fails the tests prescribed by the Habitats Directive and it's implementing UK Regulations.
- 7.8. Furthermore, the NE Written Representations merely point the ExA to documents which should be taken account of in the HRA rather than assessing the proposal against those documents.
- 7.9. It is, however, clear that despite fortnightly meetings during the pre-application process (and since) the NE officers still have serious doubts about the mitigation/compensation proposal (even for the compensation requirement proposed by Able), predominantly with respect to:
- Inaccurate predictions as to the effects on breeding birds;
 - The proposed compensation site at Cherry Cobb Sands which will become saltmarsh quicker than originally expected and, therefore, will not provide the appropriate ratios of habitat (e.g. 2:1 for mud flat loss);
 - The absence of compensation for, or consideration of, loss of subtidal mud in the berth pocket (to be replaced by stone/rock aggregate and in dredge and disposal areas); and
 - A failure to demonstrate adequate mitigation for Great Crested Newts (Area B).

The material subsequently supplied cannot be reasonably regarded as overcoming these concerns.



UK Disposal Sites 2012

HU080
HU082

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Scale: 1:40,000
QA: N/A

4033 - 018FigPW1_LocSDC.mxd
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ABP mer
MARITIME ENVIRONMENTAL MANAGEMENT

Location of SDC Proposed Deposit Grounds

Figure PW1

Figure 3-9: Change in peak flows due to the scheme during a flooding MHWS tide

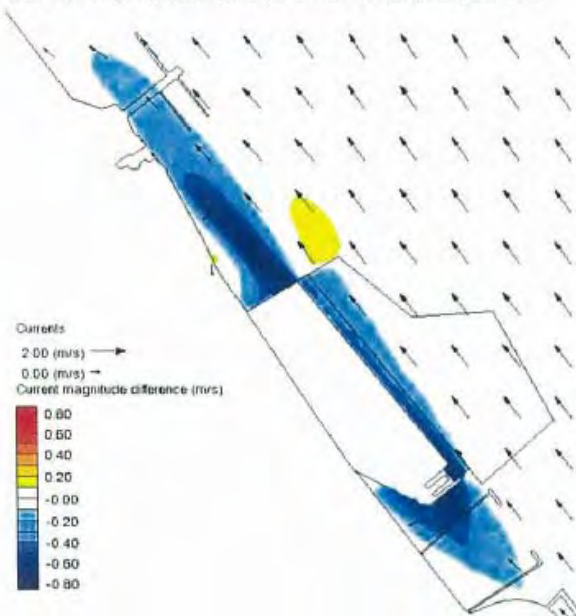
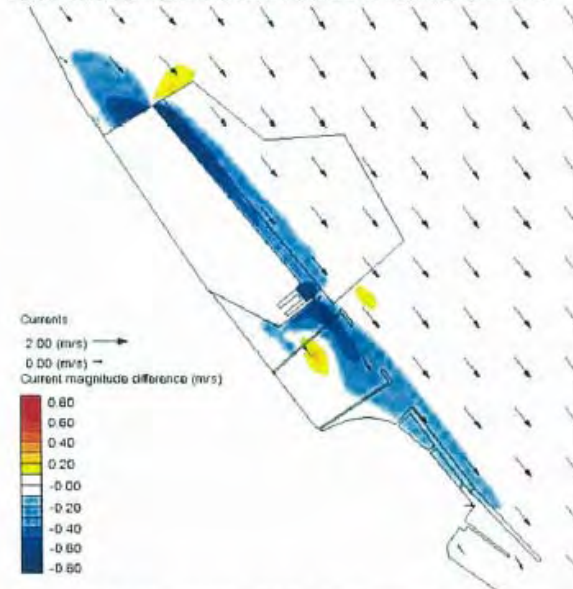


Figure 3-10: Change in peak flows due to the scheme during an ebbing MHWS tide



The changes to currents are manifest in bed shear stresses. During peak flood MHWS flow, bed stresses adjacent to the quay walls to the south east and in the lee of the quay to the north west are reduced (Figure 3-11). In areas where flows are increased, at the corners of the quay, increased bed shear stress is predicted. The increases peak at approximately 20% of the baseline values (which are approximately 3N/m^2 over the location of the dredge area during peak MHWS flood flow). The pattern of change is largely similar for peak MHWS ebb flow, though the decrease in shear stress extends downstream farther. An increase in stress is observed shoreward the SKOJ berth, due to the recirculation pattern produced at the downstream edge of the AMEP quay.

These patterns of potential bed morphology change agree well with the results of the mud modelling study by HR Wallingford¹⁵. This study predicts accumulation in the areas denoted here as less energetic (blue) and greater potential erosion (depending on the bed material) in areas denoted here as more energetic (yellow/orange) (see their Figure 14 and Figure 15). This provides good validation of the models used in these studies.

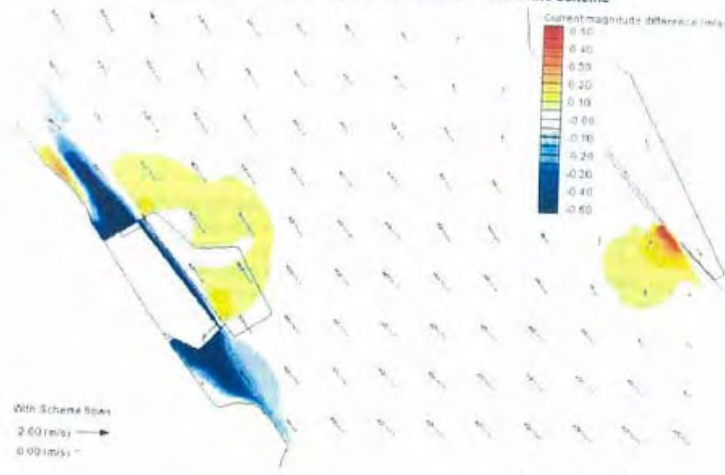
The estuary-wide changes to bed shear stress are shown in Figure 3-13 and Figure 3-14. These show that the changes to the bed shear stress are local to the quay. Therefore, the AMEP development will not affect the bed shear stresses, and therefore erosion patterns, where three gas pipelines cross the estuary upstream of AMEP (Figure 2-4).

¹⁵ HR Wallingford (2011) Able marine Energy Park 3D Mud Modelling. Report EK 6603
2010s4456 AMEP Supplementary Report - Modelling of final quay design.docx

PRESENTED IN ES. (EX 8.1)

JBA
consulting

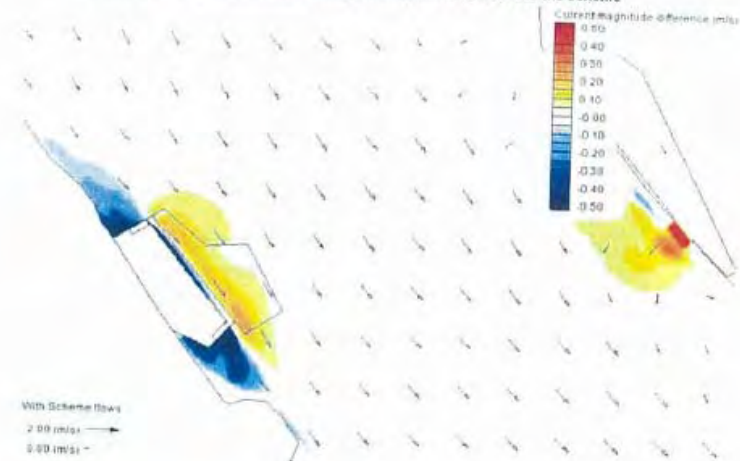
Figure 15: Change in peak flows during a rising MHWS tide due to the scheme⁷



⁷ The triangle area of white to the south east of the quay, adjacent to the reclamation area of the Humber International Terminal, is intertidal area where there is no data at these times (as opposed to there being no change in current speed).

JBA
consulting

Figure 16: Change in peak flows during a falling MHWS tide due to the scheme⁸



5.17 During peak flood flow a recirculation area forms in the wake of the quay, centred on the HST (Figure 17). This leads to reduced flow offshore and increased current speeds over the intertidal area at the HST and North Killingholme Pits. This has ramifications for bed shear stress patterns that are discussed in the next section.

⁸ The triangle area of white to the south east of the quay, adjacent to the reclamation area of the Humber International Terminal, is intertidal area where there is no data at these times (as opposed to there being no change in current speed).

FIGURE PW3

**PLANNING ACT 2008 (PA 2008) AND THE INFRASTRUCTURE PLANNING
(EXAMINATION PROCEDURE) RULES 2010**

**APPLICATION FOR THE PROPOSED ABLE MARINE ENERGY PARK ON THE
SOUTH BANK OF THE RIVER HUMBER AT IMMINGHAM, NORTH
LINCOLNSHIRE**

PLANNING INSPECTORATE REFERENCE NUMBER: TR030001

Objector Reference: [REDACTED]

Comments on AMEP Answers to ExA Questions and
Response to Written Representations
on matters of Rail Transport
by Christopher John Geldard
on behalf of ABP

Associated British Ports Rail Response to WRs final.doc

1st August 2012

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Associated British Ports

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1. COMMENTS ON APPLICANT'S RESPONSE TO PLANNING INSPECTORATE QUESTIONS

1.1 Railway Construction and Operation – Question 44

Is it the intention to operate the railway line within the application site solely as a single siding?

AMEP Answer

'Additional sidings may be added to permit trains to pass, depending on demand.'

Comment

- 1.1.1 This is an inadequate and unhelpful answer. It illustrates the lack of consideration given to rail matters by the applicant.
- 1.1.2 The Killingholme Branch Line is a single track line operated under the control of Network Rail. It provides access to other rail facilities. Access along the Branch Line therefore must be maintained to ensure that access along the Line for third party traffic is not impeded.
- 1.1.3 C.RO Ports Killingholme (formerly HST) hold a regulated Connection Agreement with Network Rail for their connection from the Killingholme Branch Line at Admiralty Sidings. In addition, the proposed development of C.GEN Killingholme also requires a rail connection at the western end of the Killingholme Branch Line, see paragraph 3.3 below.
- 1.1.4 Importantly, other rail users requiring access to their facilities will require the applicant's trains to vacate the Killingholme Branch Line during loading and discharge operations. Under normal circumstances this would involve the use of working sidings which would be connected directly to the Branch Line.
- 1.1.5 A working siding is the line which forms part of the area in which the train is held for the loading and discharge operation. It needs to be long enough to accommodate the full train length and would have a working pad of concrete or similar hard surface upon which mechanical handling equipment would operate to effect loading and discharge.

- 1.1.6 It must also be remembered that as there is currently no exit at the western end of the Killingholme Branch Line there will need to be a facility to “run-round” the locomotive. This operation is described in detail in ABP’s Rail Written Representation.
- 1.1.7 Clearly, there is a need for appropriate track infrastructure for this operation to take place. The track configuration therefore requires either a connection to the Branch Line at both ends of the working siding thereby allowing the Branch Line to be used for the run-round operation or a single connection at the entrance to the working siding and an additional parallel siding to allow run-round to take place within the site.
- 1.1.8 The reality is that it would be impossible to operate the Killingholme Branch Line as a single siding with the need to load and discharge the applicant’s trains, to provide run-round and stabling facilities and to accommodate the movement of third party traffic which will have to pass through the MEP site. Instead, investment in additional infrastructure to accommodate trains servicing AMEP is required in order to maintain the integrity of the Branch Line.
- 1.1.9 The question is particularly relevant given Network Rail’s desire, shared by ABP, to establish the Killingholme Loop, see paragraph 3.2 below, which would significantly improve the efficiency of rail operations in the area. In this regard it is also worth restating the fact that approximately 25% of the UK’s railfreight volume originates from the Port of Immingham and that volume is expected to grow substantially in the future as new cargos come on-stream. It is therefore essential that the status and route of the Killingholme Loop are safeguarded, a factor currently ignored by AMEP.

1.2 Railway Construction and Operation - Question 45

Is it the intention to reinstate the railway line along the section which is dismantled towards the Logistics Park and if so where are the impacts of this addressed?

AMEP Answer

‘The railway already extends beyond Humber Sea Terminal towards the Logistics Park. No further extension is proposed along the route of the dismantled line, but a spur will be taken into the Logistics Park, subject to demand.’

Comment

- 1.2.1 The applicant fails to acknowledge the strategic significance of the Killingholme Line. The track-bed extending towards Goxhill, outside the DCO area and under the ownership of Network Rail is part of the route of the Killingholme Loop. It connects to the Network Rail operational railway within the DCO area. The whole of the Killingholme Line is integral to the Killingholme Loop and must be safeguarded as part of the national railway infrastructure. By contrast there is no commitment to use rail by the applicant. It is noteworthy that the creation of a spur into the Logistics Park is “subject to demand”.

1.3 Railway Construction and Operation - Question 46

What would be the implications for the construction and operation of the proposed development if the compulsory acquisition of the Network Rail land was not approved?

AMEP Answer

‘Network Rail has stated that if the line remains within the network and on its current alignment, grade separated crossings will be required to cross it. This is not reasonably practicable for the intended purpose of the site and is not essential for the site specific conditions, viz. a freight only line where speed restrictions can be imposed without detriment to operations.’

Comment

- 1.3.1 As the applicant’s information on rail is extremely limited and does not demonstrate a serious commitment to rail use it is possible that the Killingholme Branch Line could be lost to the public with no corresponding public benefit.
- 1.3.2 The AMEP answer given above avoids this fundamental issue. The contention that the provision of safe crossings or bridges is “not reasonably practicable” and that compulsory purchase of the Line is the only solution is untenable, depending as it does purely on the commercial ambitions of the applicant – which pays no regard to the commercial needs of adjacent commercial operators. The avoidance of at-grade crossings may be generally desirable, but the provision of new at-grade crossings for private areas not accessible to the public may be justifiable for large goods such as those associated with offshore wind energy.

- 1.3.3 The applicant refuses to recognise or acknowledge that other operators have a legitimate usage interest. The Killingholme Loop would be for the benefit of all rail users in the South Humber region and its capability and availability is regarded by Network Rail as strategically important, see NR Answers to Questions, paragraph 4.2. For these two reasons the compulsory acquisition of Network Rail's land must not be accepted. The applicant should be required to modify the AMEP proposal in a way that preserves the integrity of the Killingholme Branch Line
- 1.3.4 Network Rail must continue to maintain and operate the Line in the interests of Network Rail and all other rail users. This would safeguard the Branch Line as well as allow for future growth in rail traffic by enabling the completion of the Killingholme Loop.

1.4 Railway Construction and Operation - Question 47

Is it proposed that the railway track should be maintained at existing levels, or does the proposed development require that it should be raised to match new ground levels of working areas?

AMEP Answer

'Yes. The track will be maintained at existing levels with discrete crossing points.'

Comment

- 1.4.1 This answer demonstrates how the applicant simply does not understand rail transport operations and, it follows, has not given serious consideration to intended rail use.
- 1.4.2 The use of the track for loading and unloading operations would require the track levels to be raised to those of the surrounding areas. If the existing track level is not to be changed then loading and unloading would need to take place on working lines at a different level.

2. COMMENTS ON APPLICANTS COMMENTS TO ABP REPRESENTATION NO 47

2.1 Relevant ABP Representation - Railway Transport

9.1 Further information is required from the applicant in connection with its proposals for railway use. The assessment as presently presented is vague and ambiguous, giving little indication as to what is actually proposed and why. This is an issue of particular importance

to ABP bearing in mind the Port of Immingham's already established use of the existing railway network, historically contributing some 25% of the UK's rail freight and likely to increase with the onset of new cargo movements.

9.2 Particular concerns include:-

(a) The proposed compulsory acquisition of part of the railway track within the ownership of Network Rail would restrict the future passage of commercial rail traffic serving the local industrial community. The CPO would physically frustrate the completion of the "Killingholme Loop".

(b) The proposed compulsory purchase would impact upon ABP's current proposals, under negotiation with Network Rail, in the context of use of its existing track serving the Port of Immingham.

(c) No consideration appears to have been given to potential future rail use and the detrimental impact that will be placed upon ABP's, and indeed other users, rail operations.

9.3 Generally, there is a serious lack of detail relating to the use of rail in support of the project. This is important and exacerbated by the poor definition and ambiguous scope of the project itself. It is impossible to identify with the necessary clarity either the proposed use of the new port or its consequent likely impact upon the existing rail infrastructure.

2.2 AMEP Comments

The following are the applicant's comments on the ABP Representation relating to Rail Transport:

'Issue 8 – Rail Transport

42.44 Refer to applicant's comments to Representation No 35. (to Network Rail)

42.45 The applicant's proposals for converting the existing rail line within the site into a private siding are set out in chapter 4 of the ES at paragraphs 4.4.47 to 4.4.48.

42.46 The maximum use of rail proposed by the applicant is set out in Chapter 15 of the ES at paragraphs 15.5.12 to 15.5.13.'

As explained in the following sections, these responses by the applicant are wholly inadequate and, I trust, will be tested by the ExA.

2.3 ABP Comments

2.3.1 Set out below are the ABP comments in response to the comments by the applicant.

AMEP Comment to NR 30.7 *'It is therefore evidenced that the rail line passing through the site and terminating at Humber Sea Terminal can be safely operated and managed as part of the port estate, obviating an unnecessary and complex interface with the public railway. In effect it would operate as a private siding with its own appropriate safe operating procedures.'*

2.3.2 Operating the Killingholme Branch Line as a private siding does not protect the interests of other users as is the case with Network Rail owned infrastructure. The term "ransom strip" is often used in the rail industry to describe private land and track through which trains must pass to access a third party facility. This expression describes the outcome that would result from the applicant's proposals and would put other rail users at serious risk.

2.3.3 In addition, and critically, future rail enhancements such as those described in paragraph 2.3.5 and 2.3.6 would not be possible on private sidings.

AMEP Comment to NR 30.8 *'The applicant considers that the alternative of retaining Network Rail infrastructure through the site would be a significant encumbrance to the efficient and cost effective operation of the development; Network Rail has advised the applicant that in this event, there would need to be 'a solution that bridges the existing Rail Network line'. This is not a reasonably practicable solution for the end-use of the site as a port.'*

2.3.4 The prospect of the Line remaining in the ownership of Network Rail is described by the applicant as "a significant encumbrance to the efficient and cost effective operation of the development". The statement itself must be tested by the ExA. The reality is that the applicant has totally failed to recognise the interests of other users of the Line.

2.3.5 The ExA will have noted incidentally, that in this response the applicant reveals its ultimate aspirations to develop a general cargo port by stating, "This is not a reasonably practicable solution for the end-use of the site as a port".

AMEP Comment to NR 30.11 *'Network Rail does not elaborate very greatly on the need argument that it seeks, at least in part, to rely on; the broad contention being (ironically), that the transfer of land to the applicant would risk the UK's renewable energy objectives. The applicant acknowledges that Drax Biomass Immingham Limited has recently obtained consent for a 299 MW biomass power station to the south of AMEP. Whilst the*

Environmental Statement for that development identifies movement of fuel and ash by road, rail and sea, the application contains no proposals for the use of the existing Killingholme Branch Line.'

- 2.3.6 Future developments and uses of the Killingholme Branch Line in support of the UK electricity supply industry are described in detail in the Written Representations from ABP, Network Rail and C.GEN. The applicant has failed to recognise the strategic significance of this Network Rail infrastructure. The applicant's response is deliberately disingenuous and ignores the reality. The only access to the Drax site by rail is on the existing Killingholme Branch Line.

AMEP Comment to NR 30.12 *The applicant is not aware of any other detailed proposals for biomass fuelled power stations in the area although the proposed C.GEN facility may wish to use rail to service its site. The applicant notes however that the initial proposals for AMEP included a biomass power station but that insufficient commercial interest existed to retain it within the final proposals*

- 2.3.7 C.GEN has provided substantial evidence describing their need to have uninhibited rail access to their site, see paragraph 3.3 below. With regard to the overall use of biomass it should be noted that Centrica Energy have commenced the planning process for a biomass fired power station at their rail connected site at Brigg, 10 miles from Immingham. Also, ABP is presently in discussion with the five main coal fired power stations in the Aire and Trent Valleys regarding the delivery of biomass for co-firing at their sites. To support the use of renewable fuels ABP has a planned £70m investment in biomass handling facilities including the HIT headshunt.

AMEP Comment to NR 30.13 *'The applicant is aware that Network Rail undertook a preliminary study in 2007 to improve rail connectivity to the South Humber Bank. Network Rail produced a draft report but the study does not appear to have been published as a finished document; it is understood that this was due largely to the absence of a compelling economic case for any rail improvements at that time. The applicant appreciates that the economic case may have changed very recently but the need for retaining this spur of the network as operational Network Rail infrastructure appears inchoate at best. Network Rail seems to be giving great weight to the mere possibility of a demand arising in the future rather than any certain need.'*

- 2.3.8 The Killingholme Loop is described in detail in the Network Rail Written Representation. As can be seen from this information the need for Network Rail to retain the infrastructure as operational railway is certainly not inchoate – and the applicant does itself a disservice by describing it as such. Both ABP and Network Rail have emphasised the strategic significance of this rail enhancement in the overall context of fuel for to the electricity supply industry.

AMEP Comment to NR 30.15 *'The AMEP proposals have been broadly consulted upon in accordance with the statutory requirements of that Act and the applicant contends that the public interest is best served by the development of AMEP as a coherent single port site with a private rail siding.'*

- 2.3.9 Here the applicant raises the issue of public interest stating that "public interest is best served by the development of AMEP as a coherent single port site with a private siding". As has been noted above, the public interest is clearly not best served through the ownership of this infrastructure passing from Network Rail to the applicant. The reverse is the case.

AMEP Comment to ABP *'The applicant's proposals for converting the existing rail line within the site into a private siding are set out in chapter 4 of the ES at paragraphs 4.4.47 to 4.4.48.'*

- 2.3.10 AMEP has provided minimal information on rail issues in response to the ExA's questions as listed in paragraph 1 and the same applies to the last two issues raised in ABP's representation. Indeed the only response from AMEP is to state that the proposals to convert the existing rail line to private a siding are contained in the ES. The applicant is simply side stepping the genuine issues raised by ABP which I presume the Panel will agree is unsatisfactory.

- 2.3.11 Paragraph 4.4.47 of the ES provides only a basic description of the existing rail infrastructure and a statement relating to Network Rail's possible plans for the Line. In paragraph 4.4.48 the applicant only makes reference to the transfer of ownership of the Line which would become private sidings and to erect barriers and install level crossings. The applicant has made no attempt to provide genuine and justified information on the use of rail, how rail infrastructure would be developed and how rail operations would be conducted in support of the project.

- 2.3.12 Significantly, there is no recognition in the AMEP comments of the ABP rail infrastructure project to develop the HIT headshunt as described in detail in the Written Representations from ABP and Network Rail.

AMEP Comment to ABP *'The maximum use of rail proposed by the applicant is set out in Chapter 15 of the ES at paragraphs 15.5.12 to 15.5.13.'*

- 2.3.13 This is a revealing response. It shows quite clearly that AMEP has failed to plan a strategy for rail services. No service details such as rail providers, routes, traffic or timings have been provided. This reveals that there is no real commitment by the applicant to the use of rail transport.

3. COMMENTS ON OTHER RELEVANT WRITTEN REPRESENTATIONS

- 3.1 The observations by Network Rail Infrastructure Limited, C.GEN Killingholme Limited and C.RO Ports Killingholme Limited are telling. I endorse them.
- 3.2 The Network Rail Written Representation provides the HIT headshunt Functional Specification and Plan at Annex 1 and the Killingholme Loop Report at Annex 6.
- 3.3 The C. GEN Written Representation itemises their operational concerns and provides a report specifying rail requirements for their North Killingholme Power Project.

C J Geldard
1st August 2012

**PLANNING ACT 2008 (PA 2008) AND THE INFRASTRUCTURE
PLANNING (EXAMINATION PROCEDURE) RULES 2010**

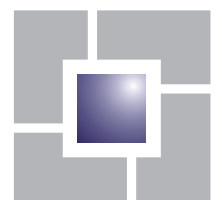
**APPLICATION FOR THE PROPOSED ABLE MARINE ENERGY PARK ON
THE SOUTH BANK OF THE RIVER HUMBER AT IMMINGHAM, NORTH
LINCOLNSHIRE**

PLANNING INSPECTORATE REFERENCE NUMBER: [REDACTED]

Objector Reference: 10015525

Response to Relevant Representations and responses to ExA's Questions

Simon Tucker BSc (Hons) MCIHT
On matters of Road Transport, Access and Traffic Impact
on behalf of ABP



david tucker associates
transport planning consultants

**PLANNING ACT 2008 (PA 2008) AND THE
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**PLANNING INSPECTORATE REFERENCE NUMBER:
TR030001**

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Response to Relevant Representations and ExA's Questions

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On matters of Road Transport, Access and Traffic Impact
on behalf of ABP

2nd August 2012
SJT/13204-06_response to WR_final.docx

Prepared For:

Associated British Ports



1.0 Introduction

- 1.1 This representation has been prepared on behalf of Associated British Ports (ABP) to explain ABPs ongoing issues and concerns having now received and reviewed the further submissions made by all parties including ABP and the relevant Highway Authorities.
- 1.2 This should be read in conjunction with my Written Representation dated 28th June 2012. In summary, ABP maintain their strong objection to the application on the grounds that the proposed development would have a manifestly unacceptable impact on main transport access to the Port of Immingham. It would also have a severe impact on the wider transport network to the extent that any consent would be contrary to Government Policy on Transport issues.

2.0 Highways Agency Position – Letter 29th June 2012

- 2.1 The Highways Agency have clarified that the Rosper Road / Humber Road junction does not form part of the Trunk Road network and that the views of North Lincolnshire should be sought. This clarification affects para 3.5.3 of my Written Representation which suggested that a road safety audit was required by HA guidance for this junction. However, my criticism remains valid for the Manby Road junction.
- 2.2 The applicant has now provided a Road Safety Audit and this is discussed below.
- 2.3 The letter also confirms that the HA have agreed matters with the applicants and therefore do not propose to respond to other representations in respect of traffic and highways issues. This is surprising given the clear mathematical and analytical errors in the JMP assessment, although I accept that at the time of writing the letter our comments in this regard were not available to them. Nevertheless, the fact remains that reliance cannot be placed on the Highways Agency agreement.



3.0 North Lincolnshire Council

- 3.1 The North Lincolnshire Local Impact Report confirms that matters of highways and traffic are still under negotiation. It makes no reference to the Rosper Road / Humber Road junction and their comments on this are clearly essential for the decision maker in the context of the issues raised in my Written Representation.
- 3.2 It is noted that discussions are taking place in relation to a Section 106 agreement to secure off-site highway works. It is important that ABP has the opportunity to comment on any such agreement, in draft, to ensure that its provisions secure appropriate improvements to the Rosper Road junction in particular. At present this document has not been made available for review.

4.0 Able UK Response to ABP Relevant Representations

- 4.1 Paragraphs 42.38 – 42.43 cover their response to the traffic / transportation issues raised by ABP. For the reasons set out in my WR Section 4, the applicant has failed to properly assess the impact of the development and the scale of mitigation measures proposed are inadequate. The applicant now has our views on this and a detailed review of the errors referred to in the original RR. Their response is awaited.

5.0 Able UK Response to NELC Relevant Representations

- 5.1 This section confirms that matters are still subject to negotiation and introduces the Road Safety Audits (in the Supplementary Environmental Information Volume 2). This is new information and is discussed below.

6.0 Able Response to Inspectors Questions

- 6.1 The Able response to Question 1 confirms that WebTAG has not been used in the assessment and therefore confirms the concerns raised in Section 3.5 of my WR. Although they have now provided an Appraisal Summary Table for the Economy sub-objective, the assessment of the remaining four sub-objectives is missing, so the assessment provided fails to perform its intended function.
- 6.2 In response to Q48, Able have confirmed that they have made no allowance for Growth at the Port of Immingham. Notwithstanding that such an approach has

apparently been adopted with the approval of NELC and the HA, for the reasons set out in Section 4 of my WR this is not a sound basis for decision making and is the cause of serious concern to ABP. All parties are agreed that the wider HA improvement scheme is not a firm commitment and cannot be relied on. All parties also agree that individual developments should only be required to mitigate their own impact.

6.3 However, based on the current assessment provided by the applicant and my review of it, it is clear that the proposed mitigation package does not deal with their impact and the development would significantly impact on the safe operation of the adjacent highway network.

7.0 Road Safety Audits (RSA)

7.1 Two road safety audits are provided in the SEI, one dated March 2009 and the second dated June 2012. Although the first includes a design office response, the introduction confirms the scope of the audit was limited and in particular the auditors were provided with no information on a number of key factors including accident data, traffic flows / pedestrian routes and any departures from standard. The brief is not therefore in accordance with normal RSA requirements.

7.2 The 2012 RSA (prepared by JMP) raises a total of 9 Problems with the current layout many of which echo the concerns raised at Para 4.6.9 of my WR. However, the RSA makes no mention of Non Motorised Users which is a flaw.

7.3 All of the problems would require changes to the layout and therefore the traffic modelling which JMP have previously proposed. Contrary to normal procedures there is no design office response to the Audit, so it is not clear at this stage how or indeed if the designers could overcome these issues.



8.0 Conclusion

- 8.1 On the basis of the above, it is clear that the additional information provided has not addressed any of the concerns raised by ABP. ABP therefore maintain their strong objection to the application on the grounds that the proposed development would have a manifestly unacceptable impact on main transport access to the Port of Immingham. It would also have a severe impact on the wider transport network to the extent that any consent would be contrary to Government Policy on Transport issues.

SJT/13204-06_response to WR_final.docx
2nd August 2012

**PLANNING ACT 2008 AND THE INFRASTRUCTURE
PLANNING (EXAMINATION PROCEDURE) RULES 2010**

**APPLICATION FOR THE PROPOSED ABLE MARINE ENERGY
PARK ON THE SOUTH BANK OF THE RIVER HUMBER AT
IMMINGHAM, NORTH LINCOLNSHIRE**

PLANNING INSPECTORATE REFERENCE: TR030001

Unique Reference Number: 

**Further Representations on information submitted on
29/6/2012**

**Philip Rowell BA(Hons) DipTP MRTPI MCIHT
(Adams Hendry Consulting Ltd)
on behalf of
ASSOCIATED BRITISH PORTS**

2 August 2012

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NOTE

On the 25 July, after the substantive completion of these further representations, ABP were provided with a letter from the Examining Authority (ExA) in response to its request made to the Panel in relation to Regulation 17 of the IP EIA Regulations. This response indicated that the applicant has undertaken to restrict the 'cargo that the harbour is permitted to handle to that consisting of, associated with or ancillary to marine energy infrastructure'. The terms of any restriction proposed to be included by the applicant in the draft DCO have not as yet been provided to ABP. As a consequence, these further representations are submitted in response to the written information and representations provided by the applicant and others on 29 June. If consequential amendments are later required, these will be provided as appropriate.

SECTION 1. SUMMARY

1.1 These further representations on behalf of ABP respond to the information submitted to the ExA on 29 June 2012 by:

- i. the applicant;
- ii. the local authorities;
- iii. statutory consultees; and
- iv. other interested parties.

1.2 From the various comments, answers and information submitted by the applicant, the following conclusions can be drawn:

- i. The applicant has demonstrated that the project which has been applied for is not the project which has been environmentally assessed. The ES produced is therefore fundamentally flawed.
- ii. The applicant has demonstrated that the project that has been applied for is not the project that it has sought to justify in terms of the requirements of the Habitats Directive and the implementing UK Regulations.
- iii. The applicant has not demonstrated how the project applied for is needed for Imperative Reasons of Overriding Public Interest, neither has it demonstrated that there are no alternatives to the project the subject of the application.
- iv. The applicant has demonstrated that the project which has been applied for is different to the project which was the subject of the required pre-application consultation.
- v. The applicant has not indicated that it would be willing to accept a restriction on the use of the project so as to ensure that what is permitted actually relates to what has been assessed, and which was the subject of the pre-application consultation and assessed in the context of IROPI and alternatives. The reasons given for this standpoint relate to:

- (a) Matters of viability, which further undermine the justification for the scheme.
- (b) If the marine energy uses at the facility cease then the quay must have a use.
- (c) Alleged past practice, which is not supported by available evidence.

vi. The applicant has highlighted that if the harbour facility created is to be used solely for purposes associated with offshore wind energy then it would not handle the amount of cargo annually necessary to meet the relevant NSIP statutory threshold. The conclusion that must be drawn from this is that if the project is restricted through the consenting instrument to what has been assessed, justified and subject to pre-application consultation then the cargo handling capability of the facility falls below the statutory NSIP threshold.

vii. The material presented by the applicant demonstrates that the 'onshore manufacturing facilities' element of the project is not "associated development". The conclusion that must be drawn from this analysis is that a process is being initiated which is not capable in law of leading to a valid consent.

viii. Through the provision of the Supplementary Environmental Information the applicant has demonstrated that the information which was initially provided with the application did not constitute a valid Environmental Statement submitted in compliance with the requirements of domestic and EU law.

1.3 On the basis of the conclusions summarised above, all of which are drawn from and based upon the written information provided by the applicant, it follows that the overall conclusion must be that the AMEP application, in its current form, cannot be considered further by the ExA.

1.4 From the information which has been submitted by the local authorities the following conclusions are drawn.

- i. All of the local authorities have undertaken their consideration and analysis on the basis that the project comprises a wind turbine manufacturing facility. This is not the project for which authorisation is being sought. Reliance cannot therefore safely be placed on the conclusions on impacts and issues that are put forward by the local authorities.
- ii. The fact that none of the local authorities has identified that authorisation is actually being sought for a harbour facility unrestricted as to the trade or cargo it could handle, adds weight to the conclusions that the pre-application consultation process that has been undertaken is fundamentally flawed.
- iii. Of note is the fact that, despite the above, and even on the basis that they have considered a wind turbine manufacturing facility, the local authorities are of the opinion that further information is still required to enable them fully to understand the likely environmental effects of the project.
- iv. There has not been the necessary consideration of the impact of the proposed development on existing neighbouring operations and facilities which are themselves already recognised as being of national significance.

1.5 From the information submitted by statutory consultees and other interested parties it is noted that:

- i. The analysis of the project that has been undertaken has generally been on the basis that the project is solely a wind turbine manufacturing facility. This is not the project for which authorisation is being sought. The conclusions and views reached and expressed therefore need to be read and considered on that basis.
- ii. This adds further weight to the judgement that the pre-application consultation process that has been undertaken is fundamentally flawed.

iii. Even on the basis that the scheme is a wind turbine manufacturing facility, various of the bodies and organisations submitting information have highlighted that they consider that further information is still required if they are properly to identify and assess the environmental effects of the project.

SECTION 2. SCOPE OF THESE RESPONSES

2.1 These further representations contain my observations on matters that have been raised in the following documents.

- i. Information submitted by the applicant (Section 3), namely:
 - Applicant's Comments on the Relevant Representations (June 2012);
 - Response to Planning Inspectorate Questions (Rule 8 Letter) (June 2012), and
 - "Supplementary Environmental Information".
- ii. Information submitted by the local authorities (Section 4), namely:
 - responses to ExA's relevant first questions submitted by North Lincolnshire Council;
 - the Local Impact Report submitted by North Lincolnshire Council;
 - Responses to ExA's relevant first questions submitted by North East Lincolnshire Council;
 - the written representations from Hull City Council; and
 - the Local Impact Report submitted by East Riding of Yorkshire Council.
- iii. Information submitted by other statutory consultees and organisations (Section 5).
- iv. Information submitted by 'other' parties and organisations (Section 6).

2.2 In addition to providing observations on the above information I attach at Appendix 4 a draft of protective provisions which ABP as a neighbouring commercial port operator to the proposed AMEP development would currently wish to see included in the DCO. These are produced following the discussion at the DCO hearing session on 12 July. Further required provisions will be forwarded as appropriate.

SECTION 3. RESPONSE TO INFORMATION SUBMITTED BY THE APPLICANT

3.1 This section contains my observations on the further information provided by the applicant. The information provided by the applicant is contained within:

- i. the document which provides comments on relevant representations (subsequently referred to as 'Comments Document' or 'CD'),
- ii. the document which provides responses to certain of the Examining Authority's first written questions (subsequently referred to as the 'Response Document' or 'RD'), and
- iii. the various material labelled "Supplementary Environmental Information" ('SEI').

Summary of the applicant's position

i) *The project which has been applied for.*

3.2 Both the CD and the RD provide information that assists in determining what is the project for which the applicant is seeking authorisation.

3.3 This is confirmed as being a harbour facility that is unrestricted in terms of the cargo or port trade it could handle. ExA question 5(c) asks whether a restriction on the operation of the facility to those functions described in schedule 1 of the DCO is necessary and appropriate. In response to this question (at RD paragraph 5.4) the applicant states that, *"If the question is to explore the imposition of a requirement to restrict the cargo that the harbour facilities will handle to marine energy infrastructure, the applicant would not wish to accept any restriction."*

3.4 General Cargo Port - In commenting upon ABP's relevant representation the applicant (CD paragraph 42.19) indicates that " ... *it is accepted that where a change in use occurs, that this might be subject to further application and consenting processes*" (emphasis added). The DCO as currently drafted does not restrict the use. Thus there would be no need for a subsequent application and consenting process to be carried out to change the use of the

port to enable it to handle another cargo. The response given by the applicant offers no reassurance as to the assessment of potential impacts should the use change or be different from that considered.

- 3.5 As such, it is evident from the comments and answers provided by the applicant that the harbour facility in respect of which the DCO is sought would be unrestricted as to the cargo or port trade it could handle. It is also evident from this information that the applicant does not wish to accept any restriction which would limit the breadth of cargo the facility could handle.
- 3.6 If, as has now been suggested, despite the above, the applicant is prepared to propose a restriction as to use – and if that is the case one is bound to query why such a suggestion was not offered at the start of the process – the wording proposed must be subjected to close scrutiny. This is a fundamental point which ABP has raised consistently.
- 3.7 Requirement 4 - The ExA, in their question 43(c) ask what safeguards would ensure that the final scheme could not have any new or greater impact than that assessed in the ES and HRA. In response to this question the applicant proposes an amendment to Requirement 4 in the DCO (RD paragraphs 43.7 and 43.8). On an initial read this amendment appears to be restricting the development proposed to what is assessed in the ES. On careful reading, however, it is not.
- 3.8 When the amendments suggested in RD paragraph 43.8 are made to Requirement 4, it reads:
- 'The authorised development shall be carried out in accordance with the design drawings unless otherwise approved in writing by the relevant planning authority and the development so altered falls within the envelope assessed by the ES and falls within the Order limits.'*
- 3.9 This proposed rewording of Requirement 4, however, does not deal with the following fundamental points:

- (a) It does not tie what is authorised to the 'planning application drawings' (although, the planning application drawings are, in any event, themselves inadequate in restricting the development sufficiently).
- (b) It does not tie what is proposed by the draft DCO to that which has been described in the ES. The term 'envelope', juxtaposed as it is with the phrase 'order limits', would refer to solely a geographical area rather than the principles set out in the ES.
- (c) The 'tail piece' problem is not remedied as there would still be no public participation in the process of agreeing amendments. All that the rewording does is limit the geographical area in which 'tail piece' approval could be given. This is important because public participation is required by EU law. Further, this site is within a SAC and participation in the process both by statutory bodies, non-government organisations and others is especially important.
- (d) In any event, no mechanism is provided for determining whether, how or when the proposed limitation would be satisfied.
- (e) Finally, it should be noted that the requirement only applies to the 'carrying out' of development i.e., the construction phase and the initial change of use. It would not apply to the manner in which the quay was operated nor the purposes to which it was put.

3.10 ExA questions 43(a) and 43(b) seek answers to queries over the extent to which the drawings in the application, including the planning application drawings, represent a fully evolved design and what particular matters might the applicant need or wish to change. It is noteworthy that:

- (a) The applicant's answers fail to make it clear that the 'planning application drawings' that are referred to in the first part of the question are not the drawings which are being referred to in Requirement 4 of Schedule 11 of the DCO. This Requirement only refers to what is shown on the design drawings rather than the 'planning application drawings'.
- (b) Leaving aside concerns relating to the adequacy of the controls envisaged in the ES which are reflected on the planning application drawings, such 'Rochdale' controls are still not, save as to geographical area, secured in the DCO through the revised requirement.

- 3.11 In respect of the 'Rochdale envelope' concept which is hinted at in the applicant's answers - a concept which has been held to be a lawful means to tie a permission to what has been assessed - this is something which refers to a metaphorical envelope rather than merely a geographical one.

ii) *The project which has been environmentally assessed.*

- 3.12 The comments and answers provided by the applicant also confirm that the project which has been assessed is not the project for which authorisation is being sought.
- 3.13 Non wind turbine cargo - ExA question 5(b) asks how the project documentation has taken account of the possible impact of handling other 'non wind turbine manufacturing' cargo. The applicant in response (RD paragraph 5.2) states that "*The project documentation (which must therefore include the ES) does not consider cargoes other than those related to marine energy*".
- 3.14 This statement confirms that the operation of facility as a general cargo port, which is line with what is proposed in the draft DCO, has not been assessed in any of the project documentation – contrary to EU and national law. Further, it is not accepted that the ES (and also the SEI now provided) has considered the implications of handling marine energy cargoes generally as opposed to marine wind energy cargo specifically.
- 3.15 The ES that has been produced in support of the application is therefore fundamentally flawed as it does not meet the requirements of Directive 2011/92/EU (the consolidated EIA Directive) and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (the IP EIA Regulations).

iii) The arguments advanced by the applicant in respect of a restriction on the use of the facility.

3.16 Three arguments are specifically advanced by the applicant as to why there should not be a restriction on the use of the facility in terms of the cargo that can be handled. The arguments advanced are:

(a) **First Able Argument:** Any such restriction on the use of the facility would adversely affect its ability to attract the necessary funding. Paragraph 42.18 of the comments document states that any restriction is “*bound to influence any post-consent funding decision*”. Further, in answer to ExA question 5(c) – which has been summarised above in paragraph 3.3 - it is made clear that “... *any prescriptive restriction could significantly undermine an overarching economic case and could preclude the project from being funded* ” (RD paragraph 5.4).

(b) **Second Able Argument:** If the marine energy uses at the facility ceases then the quay must have a use (CD paragraph 42.18).

(c) **Third Able Argument:** General practice in consenting instruments for harbours such as Development Consent Orders, Harbour Revision Order and Harbour Empowerment Orders is that they do not generally prescribe a use to which harbour facilities may be put (CD paragraph 42.16 which deals with paragraph 3.2(a) of ABP's relevant representation). Paragraph 42.16 of the comments document goes on to state that the applicant sees “*no reason to depart from*” what they consider is general practice.

3.17 As to (a) these appear to be admissions that unless the facility is unrestricted in terms of its possible use then the development is not viable as it would not be able to attract the necessary funding. This admission has implications in respect of the justification for the project in both planning and environmental assessment terms.

3.18 As authorisation is being sought for a general cargo port, the applicant must be able to demonstrate that such a general cargo port is needed for

Imperative Reasons of Overriding Public Interest. However, the IROPI argument put forward by the applicant is based on a harbour facility that would be used for offshore wind energy purposes. Such an argument cannot be used to justify a general cargo port.

- 3.19 As to (a) and (b), it is surprising that Able have failed to consider IROPI and alternatives matters in the context of a general cargo port, in view of the clear recognition on their part that this may be its immediate use (see (a) above) and likely, in any event, to be its ultimate use (see ES paragraphs 4.10.1 and 4.10.3)
- 3.20 As to (c) while HROs and HEOs do not always impose a restriction on use they do, and are required to do so, where it is appropriate. Examples where consenting instruments such as HEOs and HROs have sought to specifically restrict the cargo that could be handled at the facility for which authorisation was being sought include; the London Gateway Port Harbour Empowerment Order 2008 (Schedule 2), the Associated British Ports (Hull) Harbour Revision Order 2006 (Schedule 1) and the Port of Southampton (Dibden Terminal) Harbour Revision Order 2000. It is noteworthy that the majority of these examples authorise (or would have authorised) new stand alone port facilities similar to those now being proposed by the applicant.
- 3.21 Although the scheme was ultimately refused consent by the Secretary of State, the Dibden Terminal Harbour Revision Order (which sought authorisation for an expansion of the Port of Southampton through a new stand alone terminal facility) contained a specific restriction (by way of modification) which would have limited the authorisation given to *“development comprising, or in connection with, the handling of container, aggregates and (within an area no greater than 10.9 hectares) roll-on roll off traffic.”* In considering this restriction the Inspector (Mr Michael Hurley) in his report (paragraph 36.9 – see Appendix 1) concluded that *“In my view, such a limitation would be essential”*, before going on to make clear that *“Unless the proposed modification is made, the HRO would authorise the use of the land for all manner of port purposes, which have not been assessed in the Environmental Statement, and for which no justification has been made.”* The

Secretary of State, in his decision letter, endorsed the Inspector's judgment (see Appendix 2).

- 3.22 This not only demonstrates that consenting instruments for harbours do prescribe the use to which they can be put, but that such restrictions have in the past been considered essential by Inspectors and the Secretary of State to ensure that what is authorised reflects that which has been assessed and justified.
- 3.23 A further reason why the applicant probably does not wish to accept a restriction tying the use of the port facility solely to wind turbine manufacturing is that such a facility would not have the cargo handling capability to qualify as an NSIP. Through their response to question 2 (at RD paragraph 2.4) and question 4(b) (at RD paragraph 4.9) the applicant confirms that the maximum use of the facility for offshore wind energy purposes would be well below 5 million tonnes of cargo per year.
- iv) “Associated Development” - Is ‘the provision of onshore facilities for the manufacture, assembly and storage of components and parts for offshore marine energy and related items’, associated development?**
- 3.24 The applicant seeks to demonstrate that the ‘onshore facilities’ element of the development is associated development through their comments on ABP’s relevant representation. It refers (CD paragraph 42.13) to Annex A of DCLG guidance on associated development, which provides examples of the type of development *“that may qualify as associated development”* (DCLG Guidance paragraph 18).
- 3.25 The DCLG guidance referred to must be read as a whole. The examples the guidance gives in Annex A are what common sense suggests would be development associated with harbour development. The examples the applicant gives – ‘creation or enhancement of a logistics or distribution centre’ and ‘development of nearby port related process facilities’ – cannot on the face of it be reasonably said to apply to a substantial facility used for a

manufacturing purpose which is a critical component of the development proposed.

- 3.26 Fundamentally, associated development should not be an aim in itself and should be subordinate to the NSIP that is the subject of the application (see DCLG Guidance paragraph 10). Further, development should not be treated as associated development if it is actually an integral part of the NSIP. Quite simply these requirements are not met in respect of what is proposed in this case.
- 3.27 (These aspects of the guidance on associated development are transferred – albeit with some suggested changes - through to the latest April 2012 consultation draft of the guidance to which the applicant refers to in their comments at CD 42.14 and which were referred to by the applicant's representatives at the DCO hearing session on 12 July. Changes suggested in the consultation draft (emphasis added) include: (i) an indication that associated development now '**must not** be an aim in itself' rather than '*should not* be an aim in itself'; (ii) an indication that associated development now '**must be** subordinate to the development which is the principal subject of the application' rather than '*should be* subordinate to the NSIP'; and (iii) an indication that development should not be treated as associated development if it is 'an integral part of the principal development' as opposed to 'an integral part of the NSIP'.)
- 3.28 ExA question 15 asks whether there are precedents for arguments of IROPI applying to a development proposal other than for its ostensibly primary purpose. In response, the applicant (at RD paragraph 15.3) admits that in the case of AMEP the division between the NSIP element (the quay) and the associated development (which includes the 'onshore facilities') is "*..somewhat artificial*" because the "*...project is indivisible*". This paragraph goes on to state that "*A marine energy park must comprise both a harbour and the manufacturing units that make the goods that are simply too large and/or too heavy to be transported by any other means than by ship. The Project must therefore be viewed as whole, rather than a series of parts.*"

- 3.29 The reader can only therefore conclude from this answer that the 'onshore facilities' are:
- i. an integral part of the NSIP being applied for;
 - ii. that they are not subordinate to the quay; and
 - iii. are an aim or purpose in themselves.
- 3.30 The answer given by the applicant demonstrates that the proposed element of the project that consists of the 'onshore facilities' does not constitute associated development.
- 3.31 The material presented by the applicant, therefore, confirms the concerns that I raised in my original WRs at paragraph 3.10, namely that *'it is the quay that is being provided to service these facilities [the onshore manufacturing facilities] and it is the quay, therefore, that is necessarily subordinate to these facilities'*.
- 3.32 My conclusions are that the onshore manufacturing facilities are an integral part of the project for which authorisation is being sought but that they do not fall within a category of development capable of being an NSIP. Furthermore, even if this element could somehow be incorporated into the NSIP element of the project being applied for, the cargo handling capability of the facility created would then be at a level below the statutory NSIP threshold.
- 3.33 The overall conclusion reached from the information provided by the applicant is that a process is being initiated which is not capable in law of leading to a valid consent. The correct approach should have been for the applicant to have sought consent for the project through a combination of a HRO/HEO and planning application.
- v) *Are the Imperative Reasons of Overriding Public Interest that are claimed to be fulfilled by the applicant actually fulfilled?***
- 3.34 ExA question 5(d) asks what provisions might be appropriate and necessary to ensure that there is no derogation from the IROPI justification that has

been put forward. Through their response the applicant confirms (at RD paragraph 5.7) that if the harbour facility to be created is unrestricted in the cargo it can handle then it is only possible to rely on two strands of the five strand IROPI argument advanced. These strands are identified in the answer as:

- to grow manufacturing in the UK; and
- to regenerate the Humber sub-region.

3.35 In answering this question the applicant (in RD paragraph 5.7) claims that *“if additional cargo (i.e. non marine energy cargo) were able to be handled then at least the final two IROPI reasons would still be fulfilled”*. No evidence has been provided, however, either in the application documentation (which includes the ES and the HRA report) or the comments or answers given, to demonstrate that a harbour facility unrestricted as to the cargo it could handle would fulfil either of these two objectives – still less to the extent that it could be said that they are overriding or imperative.

3.36 Critically, in any event, in addition to IROPI issues the absence of alternatives for a general cargo port would need to be demonstrated – no case has been made in this respect.

3.37 It has already been highlighted earlier (see paragraph 3.13) that through their response to ExA question 5(b) the applicant has made it clear that *“The project documentation does not consider cargoes other than those related to marine energy”*. In addition to the earlier conclusion reached that the reference to project documentation must include the ES, it can similarly be concluded that this documentation must also include the HRA Report.

3.38 This statement, therefore, confirms that the operation of the facility as a general cargo port (which is what has been applied for) has not been considered in respect of the requirements of habitats legislation. Further, ABP does not accept that the analysis that has been undertaken in respect of these requirements has considered the implications of a facility handling

marine energy cargoes generally as opposed to marine wind energy cargo specifically.

vi) *Is the project which has been applied for the project which has been the subject of pre-application consultation?*

3.39 In commenting upon ABP's relevant representation, the applicant (CD paragraphs 42.47 to 42.54) advances arguments as to why they consider the pre-application consultation they have undertaken with ABP is adequate. The consultation information which is referred to in this answer is the consultation information that has been analysed in Section 6 and Appendix 2 of my original Written Representation. As explained there, the project which has been applied for is a harbour facility unrestricted as to use. This is not the project for which pre-application consultation was undertaken.

vii) *Does the 'Supplementary Environmental Information' that has now been submitted assist in answering the planning questions ABP have raised?*

3.40 The simple answer is no. The SEI which has been submitted relates to a project which is to be used solely for offshore wind energy purposes. This is not the project for which authorisation is being sought.

3.41 The provision of this SEI does, however, demonstrate that the information that what was initially provided with the application was inadequate and did not, as a consequence, constitute an Environmental Statement. ABP has set out very clearly elsewhere in written submissions to the Panel the duty that arises under Regulation 17 of the IP (EIA) Regulations 2009.

3.42 It should be noted in addition, that ABP's professional advisors have not yet had an opportunity to fully analyse the SEI. Further comments will be submitted as soon as it is possible to do so as appropriate.

Conclusions arising from the Applicant's comments, answers and the SEI

3.43 From the various comments, answers and information submitted by the applicant, the following conclusions can be drawn.

- i. The applicant has demonstrated that the project which has been applied for is not the project which has been environmentally assessed. The ES produced is therefore fundamentally flawed.
- ii. The applicant has demonstrated that the project that has been applied for is not the project that it has sought to justify in terms of the requirements of the Habitats Directive and the implementing UK Regulations.
- iii. The applicant has not demonstrated how the project applied for is needed for Imperative Reasons of Overriding Public Interest, neither has it demonstrated that there are no alternatives to the project the subject of the application.
- iv. The applicant has demonstrated that the project which has been applied for is different to the project which was the subject of the required pre-application consultation.
- v. The applicant has not indicated that it would be willing to accept a restriction on the use of the project so as to ensure that what is permitted actually relates to what has been assessed, and which was the subject of the pre-application consultation and assessed in the context of IROPI and alternatives. The reasons given for this standpoint relate to:
 - (a) Matters of viability, which further undermine the justification for the scheme.
 - (b) If the marine energy uses at the facility cease then the quay must have a use.
 - (c) Alleged past practice, which is not supported by available evidence.

vi. The applicant has highlighted that if the harbour facility created is to be used solely for purposes associated with offshore wind energy then it would not handle the amount of cargo annually necessary to meet the relevant NSIP statutory threshold. The conclusion that must be drawn from this is that if the project is restricted through the consenting instrument to what has been assessed, justified and subject to pre-application consultation then the cargo handling capability of the facility falls below the statutory NSIP threshold.

vii. The material presented by the applicant demonstrates that the 'onshore manufacturing facilities' element of the project is not "associated development". The conclusion that must be drawn from this analysis is that a process is being initiated which is not capable in law of leading to a valid consent.

viii. Through the provision of the Supplementary Environmental Information the applicant has demonstrated that the information which was initially provided with the application did not constitute a valid Environmental Statement submitted in compliance with the requirements of domestic and EU law.

3.44 On the basis of the conclusions summarised above, all of which are drawn from and based upon the written information provided by the applicant, it follows that the overall conclusion must be that the AMEP application, in its current form, cannot be considered further by the ExA.

SECTION 4. RESPONSE TO INFORMATION SUBMITTED BY THE LOCAL AUTHORITIES

- 4.1 This section sets out my observations on the information that has been submitted by the various local authorities.

Response to information submitted by North Lincolnshire Council

- 4.2 The information submitted by North Lincolnshire Council (NLC) consists of a Local Impact Report (LIR) and responses to certain ExA questions.
- 4.3 Regulation 60(3) of the 2008 Planning Act defines a LIR as “*..a report in writing giving details of the likely impact of the proposed development on the authority’s area (or any part of that area)*”. A LIR can only provide accurate details of the likely impact of the proposed development on the authority’s area if it has considered the development for which authorisation is sought.
- 4.4 The LIR produced by NLC has not considered the development for which authorisation has been sought. It has considered the project which is assessed in the ES, which is not the project which has been applied for in the draft DCO as submitted. Reliance cannot therefore safely be placed on the conclusions reached in the LIR.
- 4.5 For example, section 9 of the LIR deals with the socio-economic matters. The information in this section that relates to the impact of the proposed development appears to be a simple reflection of the position which the applicant puts forward in the ES. The socio-economic information put forward in the ES relates solely to the construction and operation of a wind turbine manufacturing facility. No information in the ES (and therefore the LIR) is provided as to the likely socio-economic impact of a general cargo port (which is what has been applied for). If a general cargo port is to be created then this could well have negative socio-economic implications for existing port facilities, their workers and the wider community within the local authority’s area and neighbouring areas.

- 4.6 The LIR at paragraph 4.3.3 details some of the Local Plan policies relevant to the AMEP site. It is surprising, but noteworthy, that no reference is made to policy IN4A which is titled 'Port related development – ABP'. This relates to ABP's area of operational port land within the AMEP site and supports an ABP proposal which could not be taken forward under the terms of the DCO as currently drafted.
- 4.7 Policy IN4A makes clear that port related development within the port area designated on the Proposals Map will be supported, and the supporting text (following on from an acknowledgement of the national economic and functional importance of the Port of Immingham) further makes clear that such development will be encouraged as well as supported.
- 4.8 The Draft Port of Immingham Master Plan – which NLC are aware of as they were consulted on it and, in commending the draft, asked ABP to do more to attract greater traffic from other congested ports (see paragraph 3.4 of response provided at Appendix 3) – identifies the future likely development of the area of land covered by policy IN4A. The Government at the time Port Master Plans were put forward as something the major ports should produce, recommended the production of them to, amongst other things, bring *"...together strategic planning information at the right stage, for each port, to help work in partnership with planning authorities, network providers, and the community at large"* (Interim Ports Policy Review 2007 paragraph 17).
- 4.9 It is disappointing that the NLC LIR does not consider the impacts arising from the fact that the AMEP proposal would stop an existing port operation, itself acknowledged by NLC as already being of national economic and functional significance, bringing forward proposals the type of which NLC indicate they will support and encourage.
- 4.10 It is clear from the LIR that NLC have failed to identify that the applicant is in fact hoping to construct a harbour facility unrestricted as to the trade or cargo it could handle – and not a wind energy park. If the local authority, through their planning department, have been unable to identify that the project for which authorisation is sought is a general cargo port as a result of the

consultation process then it is unlikely that even a well informed member of the public would have been able to.

- 4.11 Further, in the LIR it is made clear by NLC that (despite their general support for the project) they consider that there is still outstanding information which they require in order to be clear on the impacts which the project may generate. Paragraphs 8.6.10 and 8.6.11 indicate that additional terrestrial archaeological survey work is needed to fully understand the impacts of the scheme, and it is made clear that *“This work should be completed before any consent is granted”* (LIR paragraph 8.6.11). Paragraph 8.6.4 makes a similar point in respect of marine archaeology.
- 4.12 Finally, reference within the NLC LIR is made to improvements on the highway network that are not being applied for as part of the DCO application. It is essential to ensure that any necessary improvements are secured in respect of the AMEP DCO development. I note that within the DCO documentation nobody appears to have addressed the question as to whether these improvements, which relate to a highway for which the Secretary of State is highway authority, themselves qualify as NSIPs.

Response to information submitted by North East Lincolnshire Council

- 4.13 The information submitted by North East Lincolnshire Council (NELC) consists of a response to certain of the ExA's questions and a short written representation.
- 4.14 It is noted that the consideration given by NELC has been on the basis that the project is a facility used solely for wind turbine manufacturing purposes, which is not the project for which authorisation is being sought. The conclusions reached in the Report must, therefore, be read accordingly.

Response to information submitted by East Riding of Yorkshire Council

- 4.15 The information submitted by East Riding of Yorkshire (ERYC) consists of a Local impact Report (LIR) and a short list of issues that ERYC wish to be covered by the Panel.
- 4.16 It is similarly noted again that the consideration given by ERYC has been on the basis that the project is a facility used solely for wind turbine manufacturing purposes, which is not the project for which authorisation is being sought. The conclusions reached have to therefore be read in light of this.
- 4.17 It is noted that ERYC request a condition be attached to any consent relating to archaeology matters (section 4.10 of the LIR). As in the case of NLC's LIR, ERYC indicate that there is insufficient information available on the potential archaeology impacts of the proposal (section 4.9 of the LIR). The wording of the suggested condition is noteworthy. If accepted, this condition would effectively allow the applicant to undertake an assessment of the archaeological impacts to be undertaken post consent. The suggested approach runs contrary to the EIA Directive and Regulations (see *R v Cornwall County Council Ex P Hardy* [2001] Env. LR 25).

Response to information submitted by Hull City Council

- 4.18 The information submitted by Hull City Council (HCC) consists of written representations. As for the other authorities, it is noted that the consideration given by HCC has been on the basis that the project is a facility used solely for wind turbine manufacturing purposes, which is not the project for which authorisation is being sought.

Conclusions arising from the information submitted by the Local Authorities

- 4.19 From the information which has been submitted by the local authorities the following conclusions can be drawn.

- i. All of the local authorities have undertaken their consideration and analysis on the basis that the project comprises a wind turbine manufacturing facility. This is not the project for which authorisation is being sought. Reliance cannot therefore safely be placed on the conclusions on impacts and issues that are put forward by the local authorities.
- ii. The fact that none of the local authorities have identified that authorisation is actually being sought for a harbour facility unrestricted as to the trade or cargo it could handle, adds weight to the conclusions that the pre-application consultation process that has been undertaken is fundamentally flawed.
- iii. Of note is that fact that, despite the above, and even on the basis that they have considered a wind turbine manufacturing facility, the local authorities are of the opinion that further information is still required to enable them fully to understand the likely environmental effects of the project.
- iv. There has not been the necessary consideration of the impact of the proposed development on existing neighbouring operations and facilities which are themselves already recognised as being of national significance.

SECTION 5. RESPONSE TO INFORMATION SUBMITTED BY STATUTORY CONSULTEES AND ORGANISATIONS

- 5.1 Extensive information has been submitted by various statutory consultees. Where appropriate matters raised in this information have been responded to by others on behalf of ABP. This section does not seek to repeat the points raised elsewhere on ABP's behalf. Rather it provides some general comments in respect of those matters covered in my written representation.
- 5.2 My principal comments, which are already a common theme running through the preceeding sections of these further representations, are :
- i. The analysis of the project that has been undertaken by statutory consultees has generally been on the basis that the project is solely a wind turbine manufacturing facility. This is not the project for which authorisation is being sought. The conclusions and views reached and expressed therefore need to be read and considered on that basis.
 - ii. This adds further weight to the judgement that the pre-application consultation process that has been undertaken is fundamentally flawed.
 - iii. Even on the basis of the scheme being a wind turbine manufacturing facility, various of the statutory consultees have highlighted that they consider that further information is still required if they are properly to identify and assess the environmental effects of the project.

SECTION 6. RESPONSE TO INFORMATION SUBMITTED BY OTHERS

- 6.1 Extensive information has been submitted by various 'other' parties. As in the case of the information submitted by statutory consultees and organisations, the position that has been adopted in this document is to provide general comments in respect of those matters covered in my initial written representation. Further aspects of the information submitted by others are dealt with by others on behalf of ABP as appropriate.
- 6.2 The general comments that are made in respect of the information submitted by 'others' are similar to those given in respect of statutory consultees and organisations, see above.
- 6.3 In respect of the consultation issues raised, the written representation of Groveport Logistics Ltd is particularly noted. Leaving aside any issues that they raise in respect of whether they have been specifically consulted, it is apparent that the general pre-application consultation material that has been made available has misled consultees into thinking the facility being applied for was solely a wind turbine manufacturing facility. This is not what has been applied for.

SECTION 7. OVERALL CONCLUSION

- 7.1 The applicant has demonstrated that the project applied for in the draft DCO has not been assessed in the Environmental Statement.
- 7.2 The applicant has demonstrated that the project applied for in the draft DCO is not the project it has sought to justify in respect of IROPI arguments and absence of alternatives.
- 7.3 The applicant has demonstrated that the project applied for in the draft DCO is different to the project which has been the subject of pre-application consultation.
- 7.4 The deficiencies in the ES and in the pre-application consultation exercise make it necessary to suspend consideration of the application so that appropriate publicity can be given to new environmental information (which goes beyond what has been already provided by way of Supplementary Environmental Information) to ensure that a genuine and comprehensive public consultation exercise can take place.
- 7.5 Simply, if the project that has been applied for is an NSIP by virtue of it being capable of handling 5 million tonnes of cargo, then that is what has to be assessed, subjected to consultation and justified in respect of IROPI and alternatives. If the project is not a harbour facility capable of handling this amount of cargo then it is not an NSIP.
- 7.6 Even if every aspect of these matters were somehow ultimately resolved in favour of the applicant, the nature of the relationship between 'onshore facilities' and the NSIP is such that the onshore facilities cannot be "associated development". Ultimately, therefore, the only lawful recommendation is one of refusal.

**APPENDIX 1. EXTRACT FROM THE DIBDEN TERMINAL HRO INSPECTORS
REPORT**

36 Inspector's Conclusions

Inspector's Note. In this section of the report, references in square brackets denote the paragraph(s) above from which conclusions as to matters of fact have been derived.

Structure of the Conclusions

- 36.1 Paragraph 9 of Schedule 3 to the Harbours Act 1964 precludes the Secretary of State from considering an application for a HRO unless the applicant has complied with a requirement to provide an Environmental Statement. A number of objectors have questioned the adequacy of ABP's Environmental Statement in support of the draft HRO. The first matter dealt with in these conclusions is therefore the extent to which that Environmental Statement meets the requirements of the legislation.
- 36.2 In the second part of the conclusions, I review the evidence on matters about which the Secretary of State for Transport Local Government and the Regions particularly wished to be informed, as indicated in his letter of 25 July 2001. Following this, I identify what I consider to be the main issues to be resolved in the determination of the applications. I then set out my assessment of those issues, and the reasons for my final recommendations. In doing so, I examine the need for additional port capacity; the extent to which alternative solutions are available; and the impact of the proposed development, under various topic headings.
- 36.3 Throughout my conclusions, I make recommendations about the manner in which the draft Orders should be modified, if they are made; and about conditions that should be imposed if any planning permissions are granted. These contingent recommendations are summarised in Appendix 8. ABP propose a number of modifications which correct minor errors in the draft Orders or are otherwise uncontentious. I do not comment separately on these in my conclusions, but they are also covered in Appendix 8, together with one or two other detailed drafting amendments which I propose. **I recommend that if either Order is made, or if any planning permission is granted, this should be subject to the modifications or conditions (as appropriate) that are listed in Appendix 8.**

Adequacy of the Environmental Statement

The Description of the Project and Offsetting Measures

- 36.4 The first count on which objectors question the adequacy of the Environmental Statement submitted in support of the draft HRO is that the project is not adequately defined. Paragraph 8(2) of Schedule 3 to the Harbours Act requires that the Environmental Statement include:

- (a) a description of the project comprising information on its site, design and size; and
- (b) a description of the measures which the applicant proposes to take in order to prevent, reduce or remedy significant adverse effects.

- 36.5 In essence, the objectors argue that, if the draft HRO were to become effective, it would authorise a project that could be in a form significantly different to that described in the Environmental Statement. The Environmental Statement does not seek to hide this point. At paragraph 4.5 it says, in terms, that:

Once consent for the Terminal is granted, ABP will be free to vary the detail of what is built. The EIA is therefore based on an indicative scheme [4.18].

- 36.6 In my view, this approach is inconsistent with the judgment in *R v Rochdale BC ex parte Tew*, which draws attention to the pitfalls inherent in basing an environmental assessment on an indicative scheme. It was held that:

The fact that the environmental assessment was based on the illustrative masterplan and indicative schedule of uses is a tacit acknowledgement that the description of the development in the application was inadequate ... (NFDC/0/3, Case 6, page 96).

- 36.7 Similarly, in *R v Rochdale BC ex parte Milne*, it was held that:

The development which is described and assessed in the environmental statement must be the development which is proposed to be carried out and therefore the development which is the subject of the development consent and not some other development (RSPB/0/2, Case 12, page 433).

- 36.8 The remedy in the present case is to limit the scope of the draft HRO, so as to achieve the requisite degree of congruence between the development that has been assessed in the Environmental Statement and the development that would be authorised, were the HRO to be made. ABP are alive to this. They propose a suite of modifications to the draft HRO that would introduce some of the requisite limitations [3.70 et seq]. Objectors propose additional modifications to this end.

Use of the Dibden Terminal

- 36.9 The first of ABP's proposed modifications would limit the authorisation given by the HRO to "development comprising, or in connection with, the handling of container, aggregates and (within an area no greater than 10.9 hectares) roll-on roll-off traffic" [3.70]. In my view, such a limitation would be essential. Paragraph 4.12 and Figure 4.2 of the Environmental Statement plainly describe such an arrangement. The proposed development would undoubtedly have adverse environmental consequences, which ABP have assessed and sought to justify by reference to the mixture of port activities specified. Unless the proposed modification is made, the HRO would authorise the use of the land for all manner of port purposes, which have not been assessed in the Environmental Statement, and for which no justification has been made. Accordingly, **I recommend that, if the HRO is made, Schedule 3 should be modified by the introduction of paragraph 1(1)(b) as shown in the filled-up Order (CD/ABP/121).**

- 36.10 ABP propose a further modification, whereby the 10.9ha limit on ro-ro traffic might be exceeded during the construction of the authorised works. In effect, this would permit virtually the whole of the proposed Terminal site to be used for ro-ro traffic indefinitely, since there is no specified end-date for the construction period. That is

**APPENDIX 2. EXTRACT FROM THE SECRETARY OF STATE DIBDEN
TERMINAL DECISION LETTER**

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Transport

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Our Ref: P89/24/59

20 April 2004

Dear Sirs

**HARBOURS ACT 1964: PORT OF SOUTHAMPTON (DIBDEN TERMINAL) HARBOUR
REVISION ORDER**

**TRANSPORT AND WORKS ACT 1992: FAWLEY BRANCH LINE IMPROVEMENTS
ORDER**

**TOWN AND COUNTRY PLANNING ACT 1990: STOPPING UP OF HIGHWAYS
(COUNTY OF HAMPSHIRE) (NO.) ORDER**

1. I am authorised by the Secretary of State to inform you that consideration has been given to the Report of the Inspector, Mr Michael Hurley BA, Dip TP, MRTPI, on the Public Inquiries held initially in Hythe and subsequently in Southampton from 27 November 2001 to 12 December 2002, following objections made to the Port of Southampton (Dibden Terminal) Harbour Revision Order for which you formally applied under Section 14 of the Harbours Act 1964 on behalf of your clients, Associated British Ports, on 28 September 2000. The Report of the Inspector also covers the applications for:
 - the Fawley Branch Line Improvements Order under the Transport and Works Act 1992 ("the TWA Order");
 - a direction as to deemed planning permission ("the planning direction") for works provided for in the TWA Order, under section 90 (2A) of the Town and Country Planning Act 1990; and

associated planning direction **be refused**. He recommended also that the applications for planning permissions and an exchange land certificate be refused.

Summary of the Secretary of State's decisions

9. For the reasons given in this letter, the Secretary of State agrees with the Inspector's recommendations on the Harbour Revision Order, the Highway Stopping Up Order, the TWA Order and the associated planning direction. **He has, therefore, decided not to make those Orders and not to give the requested planning direction.**

Summary of Inspector's conclusions on the case for Orders

10. The Inspector's conclusions on the issues relating to the proposed orders (including issues requested in the Secretary of State's statement of matters for the Public Inquiries) are set out in section 36 of his Report. Paragraphs 36.647 to 36.677 of that Report provide a summary of his conclusions and set out his overall balancing of those conclusions. References below to paragraph numbers are to paragraphs in the Inspector's Report, unless otherwise stated.
11. The Inspector structured the conclusions of his Report by considering first the adequacy of the Environmental Statement prepared by the Applicant and then the matters about which the Secretary of State stated in his letter of 25 July 2001 that he particularly wished to be informed. Following examination of these matters, he then reviewed what he considered the main issues under various topics, concerning in particular the need for additional port capacity in relation to the public interest, the extent to which alternative solutions in the public interest were available and the impact of the proposed development and its relation to proposed offsetting measures.
12. The main conclusions reached by the Inspector are set out below and are followed by the Secretary of State's consideration of them.

Adequacy of the Environmental Statement for the draft Harbour Revision Order (HRO)

13. The Applicant submitted an Environmental Statement of the likely effects of the proposed development, in accordance with the requirements of Schedule 3 to the Harbours Act 1964. The Inspector considered that the Environmental Statement as originally put forward by the Applicant did not sufficiently define the development which might be authorised and thus was incompatible with previous case law [36.5 - 36.7]. The remedy was to limit the scope of the draft HRO to achieve a degree of congruence between the development assessed in the Environmental Statement and the development which would be authorised by the HRO [36.8]. The Inspector considered that the addition of certain modifications to the HRO, including some of those proposed by the Applicant, with the conclusion of obligations under Section 106 of the Town and Country Planning Act 1990 [36.30], would be sufficient to ensure that the proposed development would accord with that described in the Environmental Statement [36.31]. The Inspector concluded that the Environmental Statement, taking into account the afore-mentioned changes, was adequate as to its identification and

assessment of the main environmental effects of the project and complied with the requirements of the Harbours Act 1964 [36.39, 36.43].

Statement of Matters

14. The Secretary of State does not see a need to set out in detail each and every item the Inspector considered as part of the Statement of Matters listed in the Secretary of State's letter of 25 July 2001.
15. The Inspector considered that the particular works described in the draft Orders applied for would be necessary if the development were to proceed [36.46 - 36.50], with certain exceptions, concerning the Hythe Marina Bund, the Pumpfield Farm Park and Ride scheme and the Hythe to Cadland foreshore recharge [36.51 - 36.61]. The Inspector considered that some of the proposals for compulsory purchase of land were not justified [36.62 et seq].
16. The Inspector considered that assessment of the compatibility of the scheme with national, regional and local planning and transport policies was in general a matter of balancing economic, social and environmental considerations, which he considered in more detail under particular topics [36.76 - 36.77, 36.87, 36.111, 36.114, 36.126 - 36.128, 36.146, 36.153]. With regard to local planning policies he identified Policy EC6 of the Hampshire Structure Plan (Review) as being the key determining County policy concerning port development at Dibden Bay [36.139], the criteria for which the proposed development would have to meet in preference to the requirements of other local policies.
17. The Inspector considered that no reliance could be placed on the Appropriate Assessment undertaken by the Applicant under the Conservation (Natural Habitats, & c.) Regulations 1994 SI 1994 No 2716 ("the Habitats Regulations"). He noted that the Applicant no longer adhered to the initial conclusion that the proposed development would not adversely affect the integrity of the European sites considered. Moreover, the Applicant had made no assessment of the effects of the proposed development on the River Itchen cSAC (candidate Special Area of Conservation) [36.166]. The Inspector considered that, contrary to the view put forward by the Applicant, the proposals would be likely to have an adverse effect upon the integrity of the designated conservation sites. In reaching this view the Inspector found against the Applicant's "functional approach" towards assessing environmental impact [36.169 - 36.172]. He considered the Applicant's assessment fundamentally flawed in that it treated compensatory measures as mitigation and wrongly relied on proposed habitat creation outside the European sites in concluding that the development would not adversely affect their integrity [36.184].
18. The Inspector saw no unacceptably adverse impacts of the scheme on soil, air quality and climatic factors, the archaeological and architectural heritage, rights of navigation, tourism and recreation, road traffic generation locally and on the wider road network and certain other matters referred to in the statement of matters about which the Secretary of State particularly wished to be informed by the Inspector [36.225 et seq, 36.248, 36.462 et seq]. He noted some adverse effects upon visual impact for the Hythe Conservation Area [36.229] and on residential amenity [36.231].

concluded that there was no guarantee that the proposed Dibden Terminal would be operational in 2006. However, the Inspector, citing in support of his views European Commission guidance contained in "*Managing Natura 2000*", was not convinced that a temporary lack of handling capacity should be regarded as an imperative reason of public interest that should override the protection of internationally designated sites [36.668].

38. The Inspector considered it a reasonable prospect that any shortfall in national container handling capacity would be short-lived and thus there were, at present, no imperative reasons of overriding public interest to support the Dibden Terminal project, sufficient to outweigh its adverse impacts. He recognised that this conclusion was based on a finely-balanced judgement on which others might conclude differently and that a different conclusion might be drawn if certain other proposed developments failed to materialise [36.669 - 36.670].

The Adequacy of the Applicant's proposed offsetting measures

39. The Inspector identified the third and last main issue to be whether the offsetting measures proposed by the Applicant would be adequate in environmental terms. The Inspector considered the answer to be clear-cut, namely that the proposals advanced by the Applicant would not be adequate to permit the Secretary of State to meet the requirements of regulation 53 of the Habitats Regulations. Nor would they meet the wider requirements of Policy EC6 of the Structure Plan Review. The Inspector considered that this should be determinative and, accordingly, recommended against the HRO being made [36.671].

Secretary of State's Consideration

Environmental Statement for the HRO

40. The Secretary of State agrees with the Inspector's conclusions, for the reasons he gives, on the adequacy of the Applicant's Environmental Statement in so far as it meets the requirements of the Harbours Act 1964.

Statement of Matters

41. The Secretary of State agrees with the Inspector's conclusions, for the reasons he gives, on the issues identified in the Statement of Matters.

Main issues

Need for project

42. The Secretary of State agrees with the Inspector's conclusions on need for the project in relation to the port of Southampton, the economy of the South East of England, and the wider economy. With regard to financial viability of the project, he draws attention to his policy, as set out in "*Modern Ports - a UK Policy*", which is that where solely private funding is involved developers are best placed to assess their projects' sources of funding and commercial viability.

**APPENDIX 3. PORT OF IMMINGHAM MASTER PLAN CONSULTATION
RESPONSE FROM NORTH LINCOLNSHIRE COUNCIL**



www.northlincs.gov.uk

Cllr Mark Kirk - Leader
Simon Driver MA, CFEA - Chief Executive

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Contact: Mr. S. C. Driver
Our Ref: MK/SCD/LIR – sd3555
Your ref:
Date: 30 April 2010

Mr John Fitzgerald
Port Director
Port of Immingham
Dock Office
Immingham
DN40 2LZ

Dear John

ABP – PORT OF IMMINGHAM MASTERPLAN

1 Overall context for response

- 1.1 North Lincolnshire Council wishes to comment formally on the company's proposed masterplan for the Port of Immingham over the next 20 years. We set our comments in the context of the potential growth of the wider Hull and Humber Ports City Region. Not to do so, we feel, would make no sense.
- 1.2 We feel the draft masterplan seeks to set out the important role envisaged by ABP for the Port of Immingham, although there are issues which could be accorded greater prominence and priority. North Lincolnshire Council certainly shares the company's ambitions for the port, vital in helping to realise the long-term prosperity of northern Lincolnshire, the Hull and Humber Ports City Region; and indeed, its contribution to the economic performance of the wider region and UK PLC.
- 1.3 We would like to place on record our appreciation for ABP's active involvement in the Humber Economic Partnership and its support for the development of the Hull and Humber Ports City Region
- 1.4 North Lincolnshire Council has a vital community leadership role and responsibility to enhance the well-being of its residents. Key to this is the successful economic development of the SHG, so that we are best equipped, in the face of intense national and international competition, to attract major investment; and with it secure and retain quality jobs. The council is committed to working cooperatively with ABP, not just at the Port of Immingham, but also across all the Humber ports. Past economic performance across the City Region has not been impressive. This has to change.

- 1.5 It is vital that the council and the business community look to develop the potential of the Humber sub region, and ABP has a key role in this.
- 1.6 Over the last few years, the council has played a prominent role in the Humber and Yorkshire and Humber region's campaign to abolish or reduce the tolls on the Humber Bridge. We have the evidence from the Colin Buchanan & Partners social and economic impact assessment (2008 and 2009) to make a compelling case to Ministers. As part of a regional delegation, we have taken the case to Ministers. As a first step, the Minister, because of the lobbying, froze the tolls last July. In means, there will have been no increase from April 2006 to at least April 2011. Furthermore, the DfT has now commissioned a £150,000 transport, economic and financial appraisal. This is due to report to the Secretary of State for Transport by September.

2 Recent and planned developments in the Humber

- 2.1 The council believes the Hull and Humber Ports City Region must be able to operate on a level playing field and to perform to its full potential. This means ending the present intolerable position where we have two separate job markets on either side of the bridge. That is not how a City Region is meant to operate. The continuation of high tolls must be ended, and to achieve this, the cross-party and business campaign must continue.
- 2.3 It was confirmed on 22 March 2010 that the long awaited improvements to the A160 had finally received 'preferred route' status from the DfT. This is a key landmark. Subject to the outcome of the General Election and the possible financial implications that follow, it is hoped the £110m scheme can finally begin construction in 2013. It was also excellent news that the A63 Castle Street scheme received 'preferred route' status on the same day. Also in March, the South Humber Gateway Board, after extensive lobbying, was informed that Yorkshire Forward had approved funding for the planned £5m Killingholme Marshes Integrated Drainage Scheme. This bodes well for the future, particularly with regard to the emerging Dogger Bank and Hornsea offshore wind development zones. Paragraphs 6.32 to 6.38 in the masterplan cover offshore wind. The council would only wish to point out that the SHG must also be considered as an ideal location for offshore wind operations. Paragraph 6.33 appears to recognise this. The size of the potential offshore wind market is such that it is perfectly possible, and indeed appropriate, to consider a number of locations on both banks of the Humber.
- 2.4 The Killingholme Marshes, with its access to a large riverfront, and lying between the Port of Immingham and the Humber Sea Terminal, is vital to the future development of the South Humber Gateway (SHG).

- 2.5 Despite the increasing congestion in traffic emanating from ports in the South East, and the commercial advantages this presents for shifting trade to the Humber, the masterplan does not appear to signal a major shift in investment and trade from the South East to the Humber. The council would like to see this addressed more aggressively in the masterplan.
- 2.6 We are committed to working with ABP and other key players, including Network Rail and The Northern Way to expedite gauge enhancements at the Humber Ports. For both the SHG and the Port of Immingham, this would represent a major advance. We welcome the company's commitment to the SHG as we move forward to identify the costs and issues of such works. It would be helpful if the company and the SHG Board could jointly agree to give the issue of gauge enhancements a higher priority.

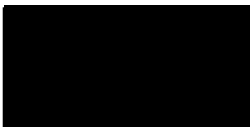
3 Conclusion

- 3.1 With the go-ahead for the A160 improvements and the drainage of Killingholme Marshes, the infrastructure will be in place – along with the emerging green agenda –to ensure the SHG is in a very favourable position. It is essential that major investment opportunities are fully exploited for port related, logistics, offshore wind and the feasibility of a new container port. These entirely realistic ambitions are supported by the Government's green energy policy and the development of increased container capacity and resilience – as clearly outlined in the draft National Ports Policy Statement.
- 3.2 North Lincolnshire Council, with responsibility for approximately 80 per cent of the SHG, is actively seeking to establish the evidence base to support such investment. We firmly believe the SHG is the best-placed location for a new container port. Not to pursue the option would be a strategic mistake if this part of the region is finally to realise its economic potential, especially after so many false dawns.
- 3.3 The council believes that, while the public sector (at local government, regional and national level) can and is playing an essential role, eg the multi-million pound A160, the market is best placed to determine the feasibility of extra port capacity to benefit both banks of the Humber and the wider region.
- 3.4 The council commends the masterplan – set, as it is, against a backdrop of difficult economic conditions. It recognises that significant on-going investment in the Port is essential to take advantage of an economic upturn. The council, however, would like to see ABP do more to exploit the Humber's location and attract greater traffic from the congested southern ports. This calls for continued investment in the Humber Ports to enhance their role as a 'strategic centre of distribution for the UK, and strengthening the offer here is good for UK competitiveness'.¹ Despite such congestion, and the commercial advantages this presents for shifting trade to the Humber, the masterplan does not appear to signal a major shift in investment and trade from the South East to the Humber.

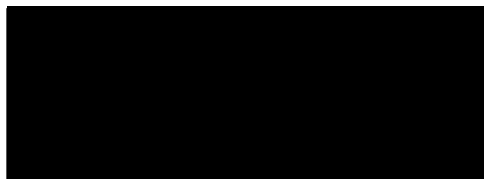
¹ Colin Buchanan & Partners, *Humber Bridge Tolls Impact Assessment*, Final Report, October 2008, p36.

- 3.5 The masterplan, however, does not address the economic sustainability of continuing increases in traffic using congested southern ports, or what can be done proactively to shift some of the focus to the Humber over the timescale covered. The council would like the company as a whole to reflect on this and respond.
- 3.6 Finally, the council would like the company, hopefully in partnership with the SHG Board, to give a higher priority to gauge enhancements at the Humber Ports, including, of course, the Port of Immingham. Such investment would bring considerable economic development benefits to both the company and the SHG.

Yours sincerely



Simon Driver
Chief Executive



Cllr Mark Kirk
Leader

APPENDIX 4. DRAFT PROTECTIVE PROVISIONS

SCHEDULE 9 PROTECTIVE PROVISIONS

PART 6

FOR THE PROTECTION OF ASSOCIATED BRITISH PORTS

1. In this Part of this Schedule—

“A.B. Ports” means Associated British Ports in its capacity as harbour authority for the Ports of Immingham and Grimsby;

“accumulation” means any accumulation of silt or other material which impedes access to or berthing at any harbour work belonging to or occupied by A.B. Ports within the Ports of Immingham or Grimsby;

“construction” includes execution and placing and maintenance, extension or enlargement and “construct” and “constructed” shall be construed accordingly;

“erosion” means any erosion of the bed or banks of any structure of whatever nature owned or occupied by A.B. Ports within the Ports of Immingham or Grimsby;

2. The provisions of this Part of this Schedule shall unless otherwise agreed in writing between the Able Harbour Authority and A.B. Ports have effect for the protection of A.B. Ports.

3.—(1) If—

- (a) during the construction of a tidal work or within 10 years after the completion of that work and wholly or partly in consequence of its construction or,
- (b) during the exercise of the powers conferred under article 21 (right to dredge) or within 10 years of the exercise of those powers and wholly or partly in consequence of the exercise of those powers,

there is caused or created an accumulation or erosion, the Able Harbour Authority, if so requested by A.B. Ports acting reasonably, shall remedy such accumulation or erosion to the extent attributable to such construction or exercise of such powers in the manner specified in sub-paragraph (3) and, if they refuse or fail so to do, A.B. Ports may itself cause the work to be done and may recover the reasonable cost of doing so from the Able Harbour Authority.

(2) If any accumulation or erosion in consequence of such construction or exercise of the powers conferred under article 21 arises within such period of 10 years and is remedied in accordance with sub-paragraph (3), any recurrence of such accumulation or erosion shall from time to time be so remedied by the Able Harbour Authority during that period of 10 years and at any time thereafter.

(3) For the purposes of sub-paragraphs (1) and (2) above—

(a) in the case of an accumulation, the remedy shall be its removal; and

(b) in the case of erosion, the remedy shall be the carrying out of such reconstruction works and other protective works or measures as may be necessary.

(4) In the event that surveys, inspections, tests and sampling carried out pursuant to paragraph 5(1) of this Part of this Schedule or paragraph 19 of Part 2 of this Schedule establish that such accumulation or erosion would have been caused in any event by factors other than the construction of a tidal work or the exercise of the powers conferred by article 21, the Able Harbour Authority shall be liable to remedy such accumulation or erosion only to the extent that the same is attributable to such construction or exercise.

(5) For the purposes of sub-paragraph (1) above the date of completion of a work shall be the date on which it is brought into use.

4. In exercising the powers of the Order to construct the authorised development the Able Harbour Authority shall ensure that the movement of construction vessels does not obstruct or interfere with the operation of the Ports of Immingham and Grimsby.

5.—(1) Without prejudice to the other provisions of this Part of this Schedule, the Able Harbour Authority shall be responsible for, and make good to A.B. Ports, all losses, costs, charges, damages and expenses however caused (including a proper proportion of the overhead charges of A.B. Ports) which may reasonably be incurred by or occasioned to A.B. Ports by reason of or arising from—

(a) any accumulation or erosion in consequence of the construction of a tidal work or the exercise of the dredging powers of the Order,

(b) any surveys, inspections or tests reasonably undertaken to establish whether any such accumulation or erosion is occurring or has occurred or

(c) any obstruction or interference referred to in paragraph 4.

(2) Without prejudice to the generality of sub-paragraph (1) of this paragraph, the Able Harbour Authority shall indemnify A.B. Ports from and against all claims and demands arising out of, or in connection with such erosion or accumulation or obstruction or interference as is mentioned in that sub-paragraph.

(3) Nothing in this paragraph shall impose any liability on the Able Harbour Authority to the extent that any losses, costs, charges, damages, expenses, claims or demands as is referred to in sub-paragraph (1) or (2) is attributable to negligence on the part of A.B. Ports or of any person in its employ or of its contractors or agents.

(4) A.B. Ports shall give to the Able Harbour Authority notice in writing of any claim or demand for which the Able Harbour Authority may be liable under this paragraph and no settlement or compromise of any such claim or demand shall be made without the consent in writing of the Able Harbour Authority.

6. Any difference arising between the Able Harbour Authority and A.B. Ports under this Part of this Schedule shall be determined by arbitration as provided in article 58 (arbitration).

Planning Act 2008 and the Infrastructure Planning (Examination Procedure) Rules 2010**Proposed Able Marine Energy Port****Associated British Ports****Comments on answers to ExA Questions and responses to Relevant Representations****Concerning the proposed powers of compulsory purchase****Supplementary Representations by John Fitzgerald, Port Director, ABP Grimsby & Immingham****1. Introduction**

This supplementary written representation does not repeat ABP's objection to Able's proposals to acquire compulsorily land in the ownership of ABP in connection with the marine energy port project, as set out in the Written Representations that I have already submitted. It is simply intended to address additional matters raised by Able in their answers to the ExA's written questions and in their response to ABP's Relevant Representation.

2. Comments on applicant's response to ExA's Questions and on applicant's comments on ABP Relevant representations

- 2.1 Able's response to the ExA's Question 5 (c) states that *'it would not be appropriate to restrict operations to the functions described in Schedule 1 (of the draft DCO), since there are no functions set out as such in Schedule 1, in terms of what the harbour facilities would be used for.'* They continue by stating that *'the applicant would not wish to accept any restriction' limiting the cargo that the facility should handle solely to marine energy infrastructure.*
- 2.2 Able apparently rely on, *'the commercial reality that needs to be recognised in terms of funding a large development'*, highlighting that in the funding and commercial justification of a large piece of marine infrastructure such as the AMEP, there are *'certain risks [that] are beyond the control of the applicant.'* Able have apparently identified potential commercial risks to the AMEP. Crucially, Able state that a *'prescriptive restriction'* on the type of cargo handled could *'preclude the project from being funded.'*
- 2.3 If the economic case for the AMEP facility requires the new port facility to be able to function as a conventional port, this must raise serious questions as to the overall viability of the scheme as it has been described and assessed in the environmental statement and supporting documents in that Able is now effectively stating that a project which is restricted to the support of offshore renewable marine energy technology is not viable or commercially coherent.
- 2.4 Indeed, Able also state that a lack of flexibility in the facility's use will *'preclude the significant economic opportunity for the UK provided by the development'*. This does seem to be a contradiction of the IROPI case used by Able to justify its proposals in the context of the Habits Regulations, that case having been put forward on the basis that the facility will be used exclusively for servicing the offshore wind energy sector.

- 2.5 In this context, I refer the ExA to the written representations made on behalf of ABP by Mr Philip Rowell and to the oral submissions made by Mr Robert McCracken QC at the Hearing on 12 July 2012, which highlight the 'disconnect' between the AMEP proposal in respect of which the DCO is sought, and the development proposal that has been the subject of assessment in the Environmental Statement ('the ES'). The ES assesses the environmental effects of a port facility to be constructed solely to support the offshore wind sector, whereas the DCO allows for the construction and operation of a conventional port, the impacts of which would be materially and substantially different to those assessed.
- 2.6 In Able's response to the ExA's Question 5 (d), Able suggest that the proposal, even in the form of a general cargo port, would still be justified on the basis of IROPI, since the capacity to handle 'additional cargo' would assist the growth of manufacturing in the UK and the regeneration of the Humber sub-region. This has never been a part of Able's application and no substantive evidence has been put forward in support of it. Without considerable further evidence, ABP does not believe that ExA can come to such a conclusion.
- 2.7 If it is indeed the case that the AMEP project is not financially viable solely as a facility supporting the offshore wind energy sector, and such a restriction on use will preclude the successful financing of the scheme, it follows that the ExA must question the justification of the compulsory purchase apparently required in connection with the project. Should the DCO be confirmed, thereby authorising the compulsory purchase of the ABP Land, that land would be blighted by a proposal for which the business model justified and assessed for the purposes of the ES and IROPI, is not viable. This would mean that ABP's development of the ABP Land for the purposes of the Western Deep Water Jetty would be frustrated, even in circumstances where the AMEP does not progress. On this basis alone, the draft DCO in its current form cannot be approved.
- 2.8 While ABP does not accept some of Able's commentary on its Relevant Representations, ABP does not believe that further explanation of its own operational position at this stage, as far as the proposed CPO is concerned, will aid the ExA's objective and independent assessment of Able's application – although ABP would be happy to assist the ExA should further information be required.
3. **Conclusions**
- 3.1 Able has, in responding to the ExA's questions and Relevant Representations, including those of ABP, indicated that a Marine Energy Park facility solely providing support for renewable marine energy technology, as proposed and assessed in Able's application for the purposes of the ES and IROPI considerations, may not secure sufficient funding. As a consequence, Able have argued that there should be no restriction on the type of cargo the facility should be able to handle.
- 3.2 If the DCO were to be granted without restriction, it would follow that considerations arising in connection with the ES and IROPI will not have been fully or adequately assessed and taken into account. Certainly at present, the degree of evidence and information required to enable the ExA to undertake a correct assessment in law is not available.
- 3.3 If on the other hand, the DCO were to be granted with a marine energy support restriction, then the compulsory acquisition of the ABP Land would be authorised, blighting that land and frustrating ABP's Western Deep Water Jetty proposals, in circumstances where the development is likely never to take place.
- 3.4 In such circumstances ABP believes that it is wholly inappropriate for the Able marine energy port DCO to be granted.