

INFRASTRUCTURE PLANNING

THE INFRASTRUCTURE PLANNING (EXAMINATIONS PROCEDURE) RULES 2010

THE ABLE MARINE ENERGY PARK DEVELOPMENT CONSENT ORDER

TR030001

Comments on Responses to the Second Round of Written Questions

Harbour Master, Humber

(Rule 8 letter 31 May 2012 Annex C)

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Introduction

1. These comments on the responses to the Second Round of Written Questions are made by Captain P.J. Cowing in his capacity as Harbour Master, Humber, representing Associated British Ports ("ABP") as the statutory harbour authority and, in relation to pilotage, the competent harbour authority for the river Humber ("the Harbour Master, Humber"). The statutory harbour authority's operations are carried out on its behalf by Humber Estuary Services Limited ("HES").
2. The contents of this document and the views expressed by the Harbour Master, Humber are separate and distinct from anything that may be received by the Examining Authority from Associated British Ports in its capacity as a port operator within the Humber.

Comments on Responses to Second Round of Written Questions

Able – Q. 51 – How does AMEP propose to deal with the predicted build up of silt at the outfall/intakes of Centrica and E.On in the long term?

3. The position of the Harbour Master, Humber throughout this examination, and as set out in his response to question 51 of the Second Round of Written Questions, has been that Able should be required to take appropriate steps to prevent or remediate impacts on its neighbours that have the potential to affect the efficient operation/navigation of the river and that such matters should be dealt with by means of protective provisions in the DCO or legally binding side agreements, completed before the Order is made.
4. Able's response does not deal with this point. Rather it addresses the nature of the risk (thought to be limited to the two outfalls, rather than to either of the intakes) and suggests that this could be managed by periodic "plough" dredging local to the outfalls if the structures remain at their present location or by a more permanent solution that would involve the diversion of both outfalls so that they discharge through the new quay. These proposals were discussed at the hearing on 13 September at which it became clear that Able's preference would be for passive provision only to be constructed within the quay.
5. The Harbour Master, Humber wishes to reserve his position on this matter until the MMO's considered opinion on Able's proposals is made known. In any event, however, he remains of the view that all necessary protection for these outfalls and intakes must be provided by way of express statutory obligation imposed on Able from the outset. This will ensure that necessary action is taken as and when it is needed, whilst leaving the parties free to agree other arrangements should they decide to do so.

Able – Q.52 – How does AMEP propose to deal with the predicted siltation and erosion at the dolphins south east of the development?

6. At the hearing on 13 September, a description was given by Able of walkways that could be installed so as to overcome the predicted impacts at this site. The Harbour Master, Humber will wish to comment on these proposals once details are published. In the meantime he reserves his position whilst reiterating his view that that all

necessary protection must be given either in the DCO or by other legally binding arrangements entered into before the order is made.

Able – Q. 58 – Please provide an update on any negotiations for purchase of land in the book of reference

7. In relation to plots 08001 and 09001, Able's response reports that it has been agreed with the Harbour Master in principle that instead of acquiring ABP's leasehold interest held as conservancy authority, the applicant should take an underlease from ABP of the plots in the riverbed and foreshore that will be occupied by the quay and also by the new Able Harbour Authority.
8. The position is that the river bed and foreshore up to the mean high water mark is leased to ABP under a 999 year lease from the Crown Estate in right of the conservancy function represented by the Harbour Master, Humber. This is a separate statutory undertaking to the statutory undertaking of ABP in relation to the Port of Immingham.
9. Able and ABP are at a very early stage in the process of negotiating Heads of Terms for an Underlease of plots 08001 and 09001 as reduced in area and shown on the revised land plans. Once terms are agreed, the parties will be able to enter into an agreement to underlet the relevant land dependent on the granting and implementation of the DCO. As part of that agreement, the plots will be removed from the scope of the DCO.
10. There is one complicating factor which has been communicated to Able. It relates to the part of the foreshore, forming part of plot 09001, that abuts the triangle of operational port land comprising plots 03020, 03022 and 03023. Appendix 1 to these Comments contains copies of an exchange of correspondence between the representatives of the Harbour Master and Able, which also includes a letter to the Harbour Master from solicitors representing the Port of Immingham. For the reasons explained in Mrs Gorlov's letter of 12 October, the Underlease cannot include that part of plot 09001.
11. With regard to plots 10007, 11004, 12004, the Harbour Master, Humber understands that Able no longer seeks any powers over them and that sheets 10, 11 and 12 of the Land Plans have been revised accordingly. This is welcome news. So long as the amended plans are accepted by the Secretary of State as the land plans for the Order that will remove the threat of compulsory purchase of land held for the conservancy authority. However, if the Secretary of State is not minded to accept the amended Land Plans, the Harbour Master, Humber wishes the DCO to be amended so as to exclude this land. Appropriate amendments for this purpose are set out in Appendix 2. References are to the revised draft Order dated 9 October 2012.
12. Finally the Harbour Master, Humber understands that Able no longer seeks powers over plots 02013 and 13004. Again, this is welcome news and the Harbour Master, Humber looks forward to seeing this addressed in a further set of revised plans or within the DCO.

C.RO – Q. 41 Is C.RO now satisfied that enough simulations have been carried out to demonstrate that the AMEP development would pose no undue problems for the berthing and un-berthing of vessels at its facility?

13. The Harbour Master, Humber is pleased that C. RO's own hydrodynamic modelling and marine simulation work has demonstrated to its satisfaction that the AMEP

development poses no undue problems for the berthing and un-berthing of vessels at its facility. However, he notes that C.RO remains concerned regarding the impact of Able's construction and operational vessel traffic on C.RO's scheduled arrivals and sailings. The Harbour Master, Humber does not expect the AMEP development to pose undue problems of the sort mentioned so long as there is no interference with his own powers to control vessel movements within his area of jurisdiction.

14. The proposed protective provisions in paragraphs 19 (Statutory functions) and 20 (Operating procedures) of Part 1 of Schedule 9 to the draft Development Consent Order (version 09.10.12) (*Statutory functions*) include provisions that should ensure that the Harbour Master, Humber can direct vessel movements so as to prevent any undue problems for either C.RO or the AMEP. However, this latest draft of the DCO still fails to include a requirement for his approval of the vessel movement management plan to be agreed by the holder of the deemed marine licence with the MMO under paragraph 14 of Schedule 8 to the DCO. The Harbour Master, Humber regards this failure as detrimental to the efficient operation of his undertaking and fears that it demonstrates a lack of understanding of his responsibilities on Able's part.

Environment Agency – Q. 68 – What is your position now on the additional information?

15. At paragraph 2.5 of its response, the Environment Agency states, in relation to the E.ON and Centrica intakes and outfalls, that its preference, from a hydrodynamic perspective, would be for the outfalls to be re-located and that it still has outstanding issues regarding the intakes and outfalls should they remain in-situ. This reinforces the view of the Harbour Master, Humber that all necessary protection for these outfalls and intakes must be provided by way of express statutory obligation imposed on Able from the outset.

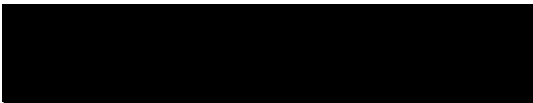
Marine Management Organisation – Q. 68 – What is your position now on the additional information?

16. HMH notes there are still many outstanding issues on which MMO has yet to reach a conclusion. In particular he notes that MMO are still considering additional technical notes relating to disposal of gravel content in HU080 and that MMO are still awaiting clarification from Able regarding potential re-siting of outfall and intakes. He also notes that the "signposting" document which was intended to provide clarity from Able on which impacts have been assessed has still not been received by MMO. As previously stated the HMH will need to be satisfied that MMO are satisfied on all these outstanding issues.

Natural England Matters – Q. 68 – What is your position now on the additional information?

17. Natural England's responses include a section (paragraphs 79 to 81) on the Environmental Monitoring and Management Plans (EMMPs). Natural England advises that it will be of the utmost importance to finalise and agree all the EMMPs before the end of the Examination period. The Harbour Master, Humber seeks an amendment to the DCO to ensure that he is provided with a copy of the EMMPs

relating to the marine and compensation sites and any amendments thereto that may be made from time to time.



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15 October 2012

APPENDIX 1

Correspondence regarding Underlease



BIRCHAM DYSON BELL

Alison Gorlov
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Minerva House
5 Montague Close
London
SE1 9BB

Your Ref

Our Ref
ADW/Y059258

Date
8 October 2012

Dear Alison

Able Marine Energy Park
Harbour master, Humber

In advance of the compulsory acquisition hearings starting on 16 October I am writing to urge progress on the issue of the lease of the foreshore that the new infrastructure is to occupy.

Your client has offered, in his relevant representation, a sub-lease in substitution for compulsory acquisition, and my client has accepted this in principle in its comment on your client's relevant representation (paragraph 41.8) and that remains the case.

According to my client's records, the offer by ABP to supply a draft sub-lease was first made at a meeting on 19 April, but despite reminders nothing has yet materialised. You have reassured us of your client's independence from ABP Commercial and we have had no reason to doubt that on any other subject, but we are now very concerned by the inexplicable delay in being provided with the draft sub-lease. I look forward to my client receiving the draft as soon as possible so that the matter can be settled before the hearings.

Yours sincerely

Angus Walker
Partner
Government and Infrastructure
For and on behalf of Bircham Dyson Bell LLP

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Our reference BJG/0978800/015619

9 October 2012

Dear Captain Cowing,

Able (UK) Ltd - Proposed new quay and marine energy park, South Killingholme

I write on behalf of the Associated British Ports, in its capacity as owner and operator of the port of Immingham.

We are conscious that Able (UK) Ltd., as part of its marine energy park proposals, seeks to acquire compulsorily part of your long leasehold interest of the foreshore of the south bank of the river Humber that you hold from the Crown Estate in your capacity as Harbour Master. As you are aware, Able require rights over this stretch of the foreshore in order to construct their proposed new quay. You will also be aware, however, that ABP owns a triangular area of land adjacent to and abutting the foreshore, which is held by the Port of Immingham as strategic port development land. ABP proposes to construct a liquid bulks facility on that land, served by a finger jetty across the foreshore to the deep water channel. This development is known as the Western Deepwater Jetty and was identified in the consultation draft of the Port of Immingham Master Plan and indeed has been allocated for port use in the North Lincolnshire Local Plan. We believe that you have objected to Able's proposed compulsory acquisition of the foreshore fronting the proposed AMEP development generally but have indicated that you would be prepared to consider the grant of an underlease to the applicant.

In light of my client's proposals for the Western Deepwater Jetty, I am instructed to write to you recording ABP's opposition to the grant of such an underlease, unless it is granted conditionally – that condition being that no underlease over the area that will be required for the purposes of the construction and operation of ABP's Western Deepwater Jetty, namely the foreshore and seabed that fronts the triangle site, will be granted to the applicant unless the Secretary of State has first confirmed the compulsory acquisition of all three parcels of land over which my client has a legal interest and that the period for legal challenge has expired.

In the light of the above, I trust you will continue to maintain your objection to Able's proposed compulsory acquisition of your leasehold interest and that you will take into account the Port of Immingham's concerns with regard to any underlease that might be sought by Able in this respect. To do so, we suggest, would be entirely consistent with your independent role as Harbour Master and your obligation to act impartially so as not to favour one port operator over another.

Yours sincerely

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12 October 2012

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Dear Angus

Able Marine Energy Park Harbour Master, Humber

I write in reply to your letter of 8 October.

The principle of the underlease route was indeed mentioned in April, and it is a matter of regret to the Harbour Master that progress has not been made. Your clients should be in no doubt that this has not been due to any unwillingness on Captain Cowing's part. When the offer was initially made, it was thought there was a template that could readily be provided for discussion. In fact, leases of the river bed are sufficiently scarce that all the existing leases are bespoke, making production of a template an exercise in itself. This of necessity requires time and direct input from the Harbour Master's property manager.

The Harbour Master has been in regular contact with his property manager, chasing for appropriate draft documentation, but the person concerned is exceptionally hard pressed and (as has come to light only in the past few days) he had not appreciated the time constraints to which we are working. As a result, a first draft document became available only very recently. A number of us have been working on it quite intensively to mould commonly used provisions to suit what is, for the Humber, a slightly unusual situation.

In the course of undertaking that exercise two things have happened. First, we realised that the power to acquire the downstream quay area has a greater

significance than its proximity to the adjoining oil jetty. In addition, we appreciated for the first time that its protrusion down river runs contrary to the Harbour Master's policy concerning water access to the river frontage. This is that all land having a river frontage should have uninterrupted access to and from the river. The proposed downstream river bed acquisition would run counter to that, with the result that land fronting the downstream extremity of the quay would not in future be capable of independent port development. This policy regarding river access has been evolved so as to ensure that the maximum development potential of all land fronting the river is maintained.

The potential development land in question is the triangle about which ABP Immingham has made its own representations. The Harbour Master is completely divorced from that – if he were not, the realisation that frontage policy was to be infringed would have happened long ago – but he has been made aware of ABP's plans for that land. I enclose a copy of the letter he has received from Osborne Clarke writing on behalf of ABP Immingham. It is clear from this letter that not only would Able's proposed downstream acquisition run contrary to the Harbour Master's general policy, but it could in this instance influence any decisions that might be taken regarding the use of the triangle. As I said in my email to you yesterday, as between actual and potential port operators (as well as in relation to the Secretary of State as decision maker), the inclusion in the underlease of the land in front of the triangle would not be a neutral act by the Harbour Master. It could influence the outcome of either or both the current proceedings on the DCO and any application in relation to the triangle. As I said, careful thought has been given to whether a commitment could be made conditional on Able securing the compulsory powers they seek in relation to the triangle itself. You will appreciate that even that could in fact influence whatever decisions are made by the Secretary of State.

I said yesterday, as you have been told before, that the Harbour Master acts in the interests of all the users and port operators in the Humber, whoever they may be. He cannot act or be seen to act so as to favour one over the other. In the present case, therefore, he has been driven to the conclusion that as regards the land in front of the triangle, he cannot do anything to alter the status quo: he is absolutely clear that his actions in relation to conservancy interests in the river bed must not in any way influence the Secretary of State in deciding land use.

For these reasons, the Harbour Master is unable to commit at this stage to the grant of an underlease of the river bed in front of the triangle, whether to Able or the Port of Immingham – or indeed anyone else. He will be able to review that position as and when the use of the triangle has been finally resolved. For the moment, he is happy to proceed on the basis of an underlease of the remaining river bed plots which Able wishes to acquire. Before further time is devoted to this, please may I know whether your clients wish to proceed on this basis.

In answer to the query in your email on 12 October, I can confirm that where the underlease route can be adopted as indicated above that will be preferable to the Harbour Master, Humber. In the absence of an underlease, he will be constrained to seek additional protective provision giving the same level of directly enforceable protection for the conservancy as would flow from the underlease. The leasehold route also automatically caters for the eventuality that the Harbour Authority

established by the DCO does not endure for as long as ABP or its successors as lessee for the 800 years or so unexpired under the existing lease.

Those are the real issues that arise on your letter. Reluctantly, I must turn to what you say in your third paragraph. Your clients ought to know that any doubts they might entertain are completely unjustified. It ought not to be necessary to remind your clients that their dealings throughout have been with Captain Cowing personally, unsupported by any other element of ABP; that the discussions have all been about your clients' proposals as affecting the conservancy of the river, not the preferences of any particular facility operator or developer; and that the Harbour Master is a neutral defender of the interests of all river users and operators. You will no doubt have advised your clients that this last is a legal obligation by which the Harbour Master is bound. To suggest a lack of independence, therefore, is to suggest not only that the Harbour Master and those representing him have been economical with the truth but also that the Harbour Master has exercised his functions illegally. I am sure no such thing is intended, but in the circumstances perhaps you would be good enough to confirm this.

I am all too conscious of the fact that in the time available it will not be possible to produce agreed documents by the time of next week's hearings. However, it would be helpful to know as soon as possible and in any event before the hearings whether your clients do wish to pursue the underlease route as respects land the Harbour Master feels able to deal with in this way.

Yours sincerely

Alison M H Gorlov
Partner

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APPENDIX 2

Amendments excluding conservancy interests from compulsory purchase

Article 29 (Compulsory acquisition of land)

After paragraph (3) insert—

“(4) This article does not authorise the compulsory acquisition of any interest in Order land below the level of high water which is land in which AB Ports has an interest.”

Article 39 (Temporary use of land for carrying out the authorised development)

After paragraph (10) insert—

“(11) This article is not exercisable in respect of any Order land below the level of high water which is land in which AB Ports has an interest.”

Article 40 (Temporary use of land for maintaining authorised development)

After paragraph (10) insert—

“(11) This article is not exercisable in respect of any Order land below the level of high water which is land in which AB Ports has an interest.”