From: Brian Greenwood [redacted]
Sent: Monday, July 23, 2012 2:56 PM
To: Mike Harris
Subject: TR030001 - Able UK - MEP - Associated British Ports - [redacted]

<<Final Oral Submissions.PDF>>

Dear Mike,

Attached is a summary of the oral submissions made on behalf by ABP at the issue Specific Hearing on the draft DCO, held on 12 July 2012.

Regards,

Brian

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Partner
Head of Planning and Environment

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Planning Act 2008

Able UK – proposed marine energy park at South Killingholme.

Hearing 12 July 2012 – Draft Development Consent Order

Summary of Representations of Associated British Ports

This document comprises a summary of the oral representations made by Mr Robert McCracken QC on behalf of Associated British Ports (ABP) at the Hearing held on 12 July 2012. The purpose of the Hearing was to consider the Draft Development Consent Order ('DCO') sought by Able UK in respect of its proposal to construct a Marine Energy Park at South Killingholme ('the Proposal').

Preliminary

By way of preliminary comment, ABP formally noted the distinction between the role of ABP as 'Operator' and its role as Harbour Authority. The oral representations summarised below were made on behalf of ABP in its 'Operator' capacity. The Harbour Authority is, for these purposes, a separate body with interests distinct from those of ABP as Operator. The Harbour Master was separately represented at the Hearing

(1) Application

ABP submitted that the Panel should suspend consideration of the Proposal under IP (EIA) Regs 2009 Reg 17. The Panel required that submission to be put into writing.

Pursuant to this requirement, this aspect of ABP's representations has been submitted to the Panel by way of separate correspondence. These representations do not seek to duplicate matters addressed in that correspondence, a copy of which is attached to these summary representations.

(2) Relationship between DCO and Environmental Statement

There is a 'disconnect' between the Proposal in respect of which the DCO is sought, and the development which has been the subject of assessment in the Environmental Statement submitted by Able UK ('the ES'). The 'ES' considered the environmental impacts of a port facility the use of which was confined to servicing the off shore wind energy industry. However, the development which would be permitted by the DCO comprised a general cargo facility, the impacts of which would be materially different to those assessed.

Able must indicate whether it is prepared to accept, and the Panel whether it is prepared to impose, a requirement limiting (1) the use of the quay to the loading and unloading of materials and equipment for the purposes of offshore North Sea wind energy generation, and embarkation and disembarkation of personnel associated therewith and (2) the remainder of the site to the manufacture and storage of materials and equipment for the same purposes.

(3) 'Supplementary Environmental Information'

On the eve of the Hearing, Able UK submitted a large quantity of 'supplementary environmental information' ('the New Material'). Quite apart from the issue of whether the submission of the New Material means that the Panel is required to suspend consideration of the Proposal (see above), the status of the New Material is unclear. In particular, it is unclear whether the New Material is intended to comprise 'further environmental information' for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009[1]. This ambiguous status of the New Material requires clarification.

(4) Restriction

It is necessary for the DCO to incorporate a restriction on the use to which the port facility authorised could be put. Currently, the DCO as drafted would authorise a general cargo port rather than a facility for use in connection with the off shore wind energy industry. In this context the following points are made:

- Such restriction is necessary because the development which has been subject to environmental assessment in the 'ES' (and in the New Material) is a port used in connection with the off shore wind energy industry, not a general cargo port.

- The 'Need' and 'IROPI' case for the Proposal is predicated on provision of a port used in connection with the off shore wind energy industry, not a general cargo port.

- It would not be appropriate for any such restriction to be 'time limited' as suggested by the Panel, since any restriction which automatically allowed the owner/operator of the Port to revert to using the facility as a general cargo port at a particular date would be in breach of European Law, that use not having been the subject of environmental or appropriate assessment.

- It would be appropriate to impose a restriction which required that before the facility could be put to use as a general cargo port, it would be necessary to make an application for a new consent, thus triggering the need for assessment.

- Such application should be made to the Secretary of State rather than the Local Planning Authority, since the justification given by Able UK for the Proposal is that development facilitating delivery of renewable wind energy is in the national interest. The Local Planning Authority might give local interests (such as the immediate provision of more local jobs (perhaps transferred from an economically depressed area)) greater weight than national ones (servicing the off shore wind energy sector), and thus be content to relax/remove a restriction on the use of the proposed port, in circumstances where the Secretary of State had granted the DCO expressly to serve the national interest.

[1] The terminology used by Mr Walker to describe the New Material on behalf of Able UK varied during the course of the Hearing – at times using the term 'Further Information', as per paragraph 17 of the Regulations.

- The contention by Able UK that it would be appropriate to leave determination of such an application in the hands of the local, rather than the national authority, by drawing comparison with ABP's facility at Green Port Hull is misconceived. Rather than seek to pursue its proposals by way of a harbour empowerment order and necessary planning applications Able UK has determined to seek a DCO pursuant to the Planning Act 2008 on the basis that the development comprises a Nationally Significant Infrastructure Project. In these circumstances, it is appropriate that the body with authority to revoke/relax a fundamental restriction on the nature of the development being authorised be a national, rather than a local one.

(5) <u>Identification of Development in the DCO</u>

The DCO does not incorporate many of the drawings submitted as part of the application. In particular, it only appears to incorporate those drawings identified as 'Design Drawings', and not the collection of drawings entitled 'Planning Application Drawings'.

Further, there is a general lack of detail contained within the DCO as to the development which it would authorise. Able UK's representatives sought to compare the description of development in the DCO with that provided in respect of the Crossrail proposals. In fact, the description of Crossrail in the relevant Act comprised a schedule containing over 20 pages. Nor is the position any different in terms of port development; the description of the London Gateway in the relevant harbour empowerment order extended to some 6 pages.

(6) <u>Tailpiece Conditions and 'Rochdale Envelope'</u>

The DCO currently provides for development to be approved, but includes provision for Able UK to seek variation of the form of the approved development from the Local Planning Authority. Such provisions are unacceptable, insofar as they may result in the Local Planning Authority approving a form of development materially different to that consented by the Secretary of State.

Such variation in the form of development by authorisation of the Local Planning Authority could take place without consultation, thereby frustrating the intention of Parliament that NSIP development be subject to rigorous public consultation at an early stage of proceedings.

Reference to the development 'envelope' by Able UK in this context, if it is intended to mean the 'Rochdale Envelope' is misconceived. The DCO as now proposed restricts only the physical extent of the development area, i.e. the geographical limit. The concept of the Rochdale Envelope was not one that was intended to allow flexibility as to the principles and terms of the development permitted. The 'envelope' was a metaphorical, not purely a geographical, one.

(7) <u>Development not comprising Associated Development</u>

The development listed as item 3(b) in Part 3 of Schedule 1 to the DCO, namely "*provision of onshore facilities for the manufacture, assembly and storage of components and parts for offshore marine energy and related items*" is not capable of being associated development for the purposes of the Planning Act 2008.

Such development is clearly integral to the Proposal, but is not identified as part of the Nationally Significant Infrastructure Project in Part 1 of Schedule 1 to the DCO.

It was no answer for representatives of Able UK to point to the emerging guidance in relation to associated development, and the fact that a sports facility comprised 'associated development' in the context of the Hinkley Point DCO application. Such a sports facility would clearly be 'subordinate' to the nuclear power station for which consent was sought at Hinkley Point. That is in marked contrast to the manufacturing/assembly/storage facilities proposed by Able UK, which would not be subordinate to the NSIP in the present case, which comprises "*a quay of solid construction*".

The Panel are required to have regard to the national guidance, which indicates that associated development should be 'subordinate' to the NSIP with which it is 'associated'. The national guidance should be viewed as a whole. The examples therein given, viewed as a whole, give no support to Able's submissions.

(8) Section 106 Agreement

It is necessary that Able UK provides the parties with a rolling draft of the Section 106 Agreement as the Examination proceeds. If the Panel is to have any regard to such an agreement, it is necessary that the parties are aware of what it currently states when making either Written Representations or oral representations at the series of Hearings programmed for the Examination.

The appropriate procedure is that adopted by the IPC at the Covanta Examination.

(9) Articles within the DCO

In the afternoon session, during which the Panel conducted a review of the Articles and Schedules within the DCO, ABP made the following representations:

Articles 2 and 3, and Schedule 10

The extent of the 'Harbour' and the meaning of the term "limits" when applied to the Harbour requires clarification.

Articles 3 and 28

The London Gateway development is not a precedent for disapplying section 33 of the Harbours, Docks and Clauses Act 1847.

Article 8

The Article as worded potentially allows Able UK to enter into binding agreements prior to the coming into force of the DCO, which it would not be entitled to enter into once the DCO were granted and it had become the Harbour Authority.

Article 9

The power conferred by this Article to 'enlarge' and 'extend' the quay is inappropriate, given its sensitive location adjacent to an SAC

Article 20 and 39

The Article as worded provides for the undertaker to enter onto an undefined area of land; not merely land "*shown within the Order Limits*" as Able UK contended, but also land "*which may be affected by the authorised development*". Such area is not sufficiently defined, and is potentially vast in scope, whilst there is no mechanism for resolving disputes arising from the exercise of this right. Further the pre-application consultation requirements could not have been met.

Article 39

The extent of this power would be too draconian in terms of its effect and the period of 14 days allowed for notice is insufficient.

Article 51

The defence to actions in statutory nuisance afforded by Article 51(1)(a)(i) should be removed, since its effect is to render the operator immune from proceedings in circumstances where the nuisance caused is not one that "*cannot reasonably be avoided*", but is instead one resulting from a scheme approved by the Local Planning Authority. (Note further : ABP written representations are to the effect that the default defence of statutory authority under the PA 2008 should be disapplied (as envisaged in section 158(3) of the PA 2008)).

Schedule 8

The fact that the extent of capital dredging in paragraph 10 of Part 2 is as yet undefined is unacceptable and goes to the validity of the application. Until such time as the depth of dredging is known, it is not possible to understand what the extent of the impact caused by the Proposal would be.

Further, the Marine Licence is:

(a) permissive; and

(b) in any event is not required by the Harbour Authority for dredging

and therefore certainly cannot be used as a mechanism for controlling what is otherwise authorised by the DCO.

Schedule 9

ABP would wish the DCO to contain protective provisions relating to its operations/premises. Drafts of such provisions will be supplied to Able UK by ABP.

Schedule 11

The reference in paragraph 14 to an ecological management plan "***reflecting*** *the* ***survey results*** *and ecological mitigation and enhancement measures included in the environmental statement*" (emphasis added), is unacceptably vague.

In paragraph 17 there is no obligation to remove the construction lighting provided for.

The emissions referred to in paragraph 20(1)(a) should be extended to include an additional category, namely "other pollutants".

General Observation (not made during the course of the Hearing)

A general point regarding the casual drafting of the DCO is illustrated by Article 54. That Article is puzzling, and appears to be wholly misconceived since Part 11 of the General Permitted Development Order would not apply to development authorised by the DCO – see paragraph 3.17 of the Written Representations dated 29 June 2012 prepared by Philip Rowell on behalf of ABP. As regards general observation on the drafting of the DCO, see Mr Rowell's statement at paragraph 3.30 of the Written Representations:

> "…in a number of respects the drafting of the DCO appears not to have been undertaken with the necessary rigour and care. Caution therefore needs to be taken in considering for what the draft DCO seeks authorisation".

On behalf of Associated British Ports.

23 July 2012