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23 July 2012

Your ref: TR030001 / Able - 0016
Our ref: DC9172

The Able Marine Energy Park Development Consent Order 2012

Dear Mr Harris,

Enclosed with this letter is the Marine Management Organisation's (MMO) summary of the oral case put at the Specific Issue Hearing on the draft Development Consent Order including the draft Deemed Marine Licence held on Thursday 12 July 2012.

In the letter from Robert Upton, dated 15 June 2012, suggested amendments to specific articles or requirements were also invited. The MMO welcome the opportunity to provide comments on this subject and are in regular contact with the Applicant with regards to this matter. This is an iterative process and, as such, the MMO consider that it would be more appropriate to provide detailed comments on this in our representations to be made on 3rd August 2012.

Should you have any questions, please do not hesitate to contact me.

Yours sincerely,

Anna Gerring
Marine Management Organisation

Enc – 120723_MMO summary of submission at DCO hearing

marine management organisation

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WRITTEN SUMMARY OF THE ORAL CASE PUT BY THE MARINE MANAGEMENT ORGANISATION AT THE ISSUE SPECIFIC HEARING ON THE DEVELOPMENT CONSENT ORDER

1.1. This is the written summary of the oral case that was put by the Marine Management Organisation ("MMO") at the issue specific hearing into the Development Consent Order ("DCO") for the proposed Able Energy Marine Park.

1.2. Only those issues or sections of the DCO on which the MMO made submissions at the hearing are included below.

2. Issues of Principle

Issue of Principle 1 – the definition and description of the proposed development

2.1. Article 5 of the DCO grants development consent for the 'authorised development' which is defined in Article 2 by reference to the provisions of Schedule 1. Schedule 1 provides that the Nationally Significant Infrastructure Project ("NSIP") is "*Work No. 1 – a quay of solid construction*" which is to be "*within the limits of deviation for Work No. 1 shown on the works plan.*"

2.2. Paragraphs 2-4 of Schedule 1 go on to make provision for 'associated development' which includes, at paragraph 3 such works as "*(a) dredging and land reclamation, (b) the provision of onshore facilities for the manufacture, assembly and storage of components and parts for offshore marine energy related items.*"

2.3. Further detail is then provided in Part 2 of the Deemed Marine Licence ("DML") in Schedule 8 which sets out the 'licensed activities'. The detailed description of these activities was inserted by the Applicant following concerns raised by the MMO in their relevant representations that the description of works in Schedule 1 did not provide sufficient detail for the purposes of the DML. It was suggested that, if Schedule 1 were to act as a reference for the DML, it should include all licensable activities with a corresponding work number and a works plan to include sufficient coordinates. Alternatively, it was suggested that these details could be provided in the terms of the DML itself, which was the route that the Applicant chose in re-drafting Schedule 8.

2.4. The MMO considers that it would be advisable for all details of the proposed works to be amalgamated into one Schedule and stated in the same location within the DCO. If the details contained within Part 2 of Schedule 8 were included in Schedule 1, the DML could then just cross-refer to Schedule 1 in order to define the licensable activities. Ultimately this is really a question of the niceties of the drafting of the DCO and the MMO is content, subject to further points made below under the DML, that the detail, as currently provided for in Part 2 of Schedule 8, is now being provided within the terms of the DCO.

2.5. In addition, the MMO raised a concern with the way in which the values used in the licensable activities section of the DML had been expressed. This issue is addressed at para. 3.8 below and is not repeated here.

Issues of Principle 2 and 3 – the extent to which the DCO restricts, and should restrict, the proposed developments to wind farm associated manufacturing

2.6. At the hearing the MMO expressed itself to be in agreement with the submissions made by the representatives for Associated British Ports and C.GEN Killingholme Limited concerning the breadth of what is currently permitted by the DCO and the need to adequately define the limits, and particularly the purpose, of the proposed development. In particular, the MMO agrees that there is currently a disconnect between what was assessed by the Applicant for the purposes of the Environmental Impact Assessment ("EIA") Directive and the Habitats Directive, and what is authorised by the DCO given that the DCO simply permits a quay of solid construction and associated works.

2.7. The MMO submitted that, just as Planning Permission would set out the permitted 'use' of the development, so too should the DCO set the use/purpose of the developments for which consent is being granted and therefore link the authorised development to wind farm associated manufacturing. Similarly, it was noted that a Harbour Revision Order under the Harbours Act 1964 would restrict the purpose for which consent was being granted and therefore the DCO should be drafted in similar terms so that what is permitted is limited to that which was actually assessed by the Applicant.

2.8. In response to the question asked by the Examining Authority ("ExA") on whether any restriction on the purpose of the development should have a time limit or should exist in perpetuity, the MMO submitted that the inclusion of a time limit would suggest that the use of the authorised development could be changed without a further application for consent being made. As such, it would be preferable for the terms of the DCO to contain no such time restriction, but be left to apply in perpetuity so that any change of use can be dealt with via an application by the Applicant for the appropriate consent.

Issue of Principle 5 – adequacy of provisions relating to the control of design and other matters to be discharged by the Local Planning Authorities or other agencies

2.9. At the hearing the MMO noted that it does have concerns regarding matters to be discharged by the Local Planning Authorities ("LPAs") and other agencies, but that they would be better addressed under discussions of issue of principle 7 and the terms of the DML – please see below.

Issue of Principle 7 – the need for and adequacy for provisions relating to a Construction and Environmental Management Plan

(1) Management Plans

2.10. The MMO agreed with the position put forward by the representative for Natural England ("NE") that there was a need for a detailed and comprehensive approach to the management plans provided for in the DCO.

2.11. The MMO highlighted that there was a need for clarification and consistency in the language used in the DCO when referring to the EMMPs. Currently, there were several references to different plans:
(i) a biodiversity enhancement and monitoring plan (Para 1, Sch 9);
(ii) an ecological management plan (Requirement 14, Sch 11); and
(iii) a code of construction practice (Requirement 15, Sch 11).

2.12. The MMO agrees with the comments made by the Applicant and NE that it would not be appropriate to have one overarching Construction and Environmental Management Plan as the two elements serve separate functions. Instead, the MMO supports the suggestion made by NE that there are specific Ecological Management and Monitoring Plans ("EMMPs") covering three areas: terrestrial elements, marine elements and the compensation site. As NE suggested, these plans should all require to be signed of by the Statutory Nature Conservation Bodies ("SNCBs") and not the local authorities.

2.13. The MMO made it clear that one of its main concerns is relates to the location of the provisions regarding these plans in the DCO. As raised in its relevant and written representations, the MMO is firmly of the opinion that these provisions should be contained within the terms of the DML at Sch. 8 of the DCO. The principal concern for the MMO is that the plans are capable of being adequately enforced. By including the plans within the DML, they can be enforced by the MMO, within its jurisdiction, under the provisions of the Marine and Coastal Access Act 2009 ("the 2009 Act").

(2) Overlapping jurisdiction with the PLAs

2.14. A second concern raised by the MMO at the hearing, which had previously been raised in the MMO's relevant and written representations, was in relation to the overlapping jurisdiction between the MMO and the LPAs where certain requirements are to be signed-off by the LPAs.

2.15. By virtue of the provisions of the 2009 Act, there is an overlap in the jurisdiction of the MMO and the LPAs between the mean low and high water spring tide. In its response to the MMO's relevant representations, the Applicant has expressed the view that, in the area between the high and low water mark where there is overlapping jurisdiction between the bodies, one body should take the lead for monitoring compliance with the DCO's requirements whilst consulting the body. The Applicant would prefer this to be the arrangement, rather than having matters signed off by both bodies, so as to avoid the delay of dual-sign off and to avoid complications should the two bodies be in dispute.

2.16. Whilst understanding the concerns, expressed by the Applicant, the MMO does not support the suggestion put forward for the division of responsibilities between the bodies. The 2009 Act clearly envisages that there will be areas of overlapping jurisdiction between the MMO and the LPAs and the MMO is of the opinion that there is no mechanism by which the MMO is able to relinquish its functions to the LPAs. The MMO is therefore firmly of the view that, where there is an overlap in jurisdiction between the bodies, dual-sign off of those matters will be required.

2.17. The MMO noted that this is not the first application in which the issue of overlapping jurisdiction has arisen, but that the developer in the previous case had been happy that both the MMO and the LPAs needed to sign off the various requirements. In response to a question from the Applicant's representative, the MMO stated that it did not believe that the DCO for that application had contained an arbitration clause in the event of dispute between the bodies.

2.18. The MMO is of the view that an arbitration clause would not be appropriate to regulate this issue. It will be for the Applicant to seek to agree the relevant matters between the LPAs and the MMO individually, rather than the LPAs and the MMO coming to a mutual agreement. If such separate agreement is not possible, then it would be open to the Applicant to challenge the failure to agree in the usual way.

2.19. As with the proposed EMMPs, principally for the purposes of enforcement as explained above, the MMO is of the view that any such requirements should be included as conditions on the DML.

3. Issues of Detail: the Deemed Marine Licence

3.1. As the Applicant confirmed at the hearing, there are no model provisions for DMLs and the MMO is not, currently, intending to produce any. The MMO has, however, provided the Applicant with an example marine licence so that the Applicant is aware of the level of detail which the MMO would expect to be included within the DML. That template has formed the basis of re-drafting undertaken by the Applicant since the relevant representations were made.

3.2. At the hearing, the MMO highlighted that all discussions regarding the terms of the DML are subject to the concerns raised by the MMO in its representations. In those representations, the MMO explained that, in order for activities to be included in the DML, the Applicant needs to clearly demonstrate through the EIA process that the potential environmental impact(s) of all licensable activities has been addressed and, where required, mitigated. At the time of the relevant representations, the MMO did not believe that the ES and associated application documents achieved that.

3.3. As the ExA heard at the beginning of the hearing, since these representations were made, the Applicant had provided a vast volume of additional supporting material to the ES. The MMO has not had the opportunity to review all of that material in detail. However, from an initial consideration of that information, the MMO is of the preliminary view that it does not appear to have addressed all of the concerns previously raised regarding the assessment of the proposed development. If, on a fuller consideration of the material, that preliminary view is confirmed to be the case, it will not be possible to agree a DML if the activities licensed there under have not been properly assessed.

3.4. At the same time as considering the material submitted by the Applicant, the MMO has been engaging with the Applicant to try and agree the terms of a DML should it be concluded that an adequate assessment has been undertaken. However, consideration of the MMO's views on the drafting of the proposed DML must be taken with the caveat above in mind regarding the possibility of granting a licence in this case.

3.5. The comments on the DML made by the MMO at the hearing focused on overarching matters of concern rather than detailed amendments that are required to specific clauses of the DML. Those overarching matters are included in this written summary with matters of detail being left to the MMO's representations of specific amendments to the DCO which should be made.

3.6. The overarching issues concerning the DML relate to:
(i) the terms of Part 2 of the DML regarding the licensable activities;
(ii) the quantities of dredged material; and
(iii) the conditions to the DML contained in Part 3.

(i) the licensable activities

3.7. The MMO has been working with the Applicant so that the level of detail concerning the licensable activities which the MMO would expect to see in a DML is included in the terms of the DCO. Significant progress has been made with the Applicant in this regard and the MMO is now content that, subject to some detailed amendments, possible changes to the licensable activities and the comments made under Issue of Principle 1 above, the licensable activities are stated and close to being agreed between the Applicant and the MMO.

3.8. However, Part 2 of Sch. 8, in setting out the licensable activities, makes several references to approximate values. For example, para. 4(1)(a) refers to "*approximately 550 tubular… piles may be driven into the bed of the estuary to form the external face of the quay*." The MMO is of the view that approximate values are not appropriate for inclusion in the DML. Instead, where the exact figures cannot be provided, they should be expressed as maximum values based on what was assessed by the Applicant in its ES.

3.9. Secondly, the language in Part 2 requires clarification. In setting out the licensable activities, Part 2 switches between providing mandatory and discretionary requirements so that the Applicant "*is <u>permitted to</u> construct a quay…",* "*return walls <u>may</u> be constructed…", "return walls <u>may</u> be reclaimed…", "monitoring equipment fixed to buoys <u>shall</u> be deployed…"* and "*licence holder <u>must</u> deposit up to 250,000 tonnes of gravel."* The MMO is of the opinion that, in general, where the licensable activities are stated, it would be more appropriate to use the phrase "*is permitted to."* However, this will not be appropriate in all cases, where mandatory language will be needed, and therefore the MMO will discuss this issue with the Applicant going forward.

(ii) quantities of dredged material

3.10. Part 2 of the DML authorises the Applicant to carry out capital (para. 10, Sch. 8) and maintenance (para. 11, Sch. 8) dredging and to deposit that dredged material at certain locations. Tables setting out the material to be dredged and its dredge and deposit locations are set out in paras. 10 and 11 of Part 2, Sch. 8. These tables currently do not contain values for the quantities of material to be dredged and deposited.

3.11. The MMO has been in discussions with the Applicant concerning the need to provide values for the quantity of material to be dredged and deposited. Values have been provided to the MMO by the Applicant and are currently under

consideration. The MMO confirms that it expects these values should be provided by the Applicant to the other parties to the examination.

3.12. At this stage, therefore, the ExA should simply be aware that this is an outstanding issue between the parties that is still to be resolved.

(iii) conditions on the DML

3.13. A principal outstanding issue of concern for the MMO is the level of control provided by the conditions on the DML contained in Part 3 of Sch. 8. The conditions contained at paras. 21-27 of Sch. 8 have been inserted by the Applicant following provision of the example marine licence referred to above. Whilst these conditions require some further amendment, particularly in defining the terms used within them, the piling conditions at paras. 22-27, in particular, demonstrate the level of detail, and therefore control, which the MMO would expect all conditions on the DML to provide.

3.14. The conditions relating to dredge and disposal activities, which are currently found at paras. 28-29 of Sch. 8, therefore require substantial re-drafting to reflect the level of detail now provided in the piling conditions. The same will apply in relation to any conditions that are required for all licensable activities. The MMO will liaise with the Applicant in relation to this issue so that adequate conditions can be included for all licensable activities.

3.15. A further concern regarding the conditions contained in the DML is the level of consultation with other parties potentially affected by the DML which has been undertaken by the Applicant. The MMO's jurisdiction is not limited to environmental impacts in the marine area, but also extends to such matters as impacts on navigation and users of the marine area.

3.16. The MMO is concerned that the conditions on the DML do not adequately capture matters that will be required to be managed and/or enforced by the MMO post-consent. An example of such matters is the concerns raised by parties at the Hearing regarding vessel movements. The MMO would usually expect those concerns to be addressed in the terms of the DML by the provision of a vessel management/navigation risk plan which would be assessed and signed-off by the MMO under the terms of the DML following consultation with relevant parties.

3.17. However, for such concerns to be reflected and controlled within the terms of the DML, the Applicant will need to consult the relevant parties so that their concerns can be considered and, if appropriate, reflected by appropriate management and/or enforcement measures within the DML conditions.

3.18. Finaly, in relation to the conditions to be attached to the DML and management and enforcement under the terms of its provisions, the MMO notes the points raised in relation to the proposed EMMP and the overlapping jurisdiction with the LPAs made above, but does not repeat them here.

4. Issues of Detail: the DCO

4.1. Article 12 – Consent to transfer the benefit of the Order: in its relevant representations the MMO expressed concern over this provision. At the hearing the

MMO again raised a concern as to the ability to transfer the benefit of the DCO. The Applicant stated that the DCO could be amended by way of a Harbour Revision Order under the Harbours Act 1964. The MMO disagrees with the position put forward by the Applicant. Whilst it is, of course, for the ExA to determine the scope of the Planning Act 2008 to authorise such matters with regards to the DCO application, the MMO feels that clarification of this point would be beneficial.

4.2. Article 23 – Abatement of works abandoned or decayed: during the course of the hearing it became clear that there is duplication of this provision within the DCO. Article 23 provides for the Secretary of State to make the determination as to abandonment and/or decay where as para. 17 of Sch. 9 provides for a determination by the Conservancy Authority. At the hearing, the MMO sought clarification regarding the mechanism by which the Secretary of State could make the determination required by Article 23 and would ask the Applicant to provide clarification on this point as it is not clear on the face of the DCO.

4.3. Schedule 9 – Protective Provisions: the MMO notes that the submissions made under Issue of Principle 7 above concerning the provision of EMMPs and overlapping jurisdiction with the LPAs relate to provisions within Schedule 9, but do not seek to repeat them here.

4.4. Schedule 10 – Limits of the Harbour: the MMO notes that the Applicant has agreed to provide coordinates to be added to the plan in Sch. 10, in line with the comments made by the MMO in its relevant representations, so that the limits of the harbour are more clearly defined.

4.5. Schedule 11 - Requirements: the submissions of the MMO concerning the provisions of EMMPs and the overlapping jurisdiction with the LPAs which are made above are of relevance to Sch. 11, in particular paras. 13-15, but are not repeated here.