PINS – TR030001

23 November 2012

Planning Act 2008 - Infrastructure Planning (Examination Procedure) Rules 2010

Proposed MEP, Killingholme

Associated British Ports (10015525)

Summary of Oral Representations by Associated British Ports at Draft Development Consent Order and Deemed Marine Licence Hearings, held 21 and 22 November 2012

Preliminary

1. Prior to the hearing sessions, ABP provided the ExA with details of their required changes to Revision 5 of the draft DCO, which was provided by the Applicant on 26 October 2012. ABP's proposed changes were detailed in a 'tracked change' version of Revision 5 of the draft DCO, an accompanying commentary and a plan (reference 12/G/216). These documents were submitted prior to the hearing sessions in order that, to quote Mr Upton at the start of the hearing session, there should be 'no shocks and no surprises'.

2. These documents formed the basis of ABP's oral representations at the hearing sessions, and the points raised in those documents are not repeated in the following summary, but should be taken fully into account.

3. At the outset of the hearing session Counsel for ABP made clear that both the changes documented and the oral comments made were put forward on a without prejudice basis to ABP's overall view that the AMEP application should be refused. It is no part of ABP's case that if the DCO were approved containing the changes put forward by ABP then the AMEP application is acceptable. This summary is put forward on the same basis.

4. Throughout the hearing sessions, the ExA at various points indicated they would be seeking 'proofed text' on certain changes to the DCO from the applicant and other parties. Further, it is clear that the applicant will be indicating in their submissions what further changes they are willing to accept to the DCO. The fact that these hearing sessions have been timetabled some three / two days before the programmed end of the hearing, and that the details of changes acceptable to the applicant are unlikely to be known until after the programmed end of the examination means that at the close of the examination no interested party will know the precise form or detail of the DCO as proposed by the applicant and upon

which the ExA are being asked to base their recommendation, nor will any interested party have been in a position to comment on it.

5. On the second day of the hearing session, leading Counsel for the applicant drew to the attention of the ExA the fact that a lawyer from the firm of Winkworth Sherwoods was 'now' acting for ABP in its capacity as port operator and that lawyers from the same firm were also acting for the Harbour Master. Whilst Counsel for the applicant indicated that he was not in any way criticising the Harbour Master nor his advisors, no such assurance was given in respect of ABP in its capacity as port operator.

6. ABP in its capacity as port operator has been advised by a Partner from Winkworth Sherwoods in respect of DCO matters only - a specialist area of expertise in respect of complex harbour legislation - throughout the examination. For example, he was at the initial DCO hearing session on 12 July in support of ABP's Leading Counsel. As the Panel is aware, ABP in its capacity as port operator has been more widely advised by Osborne Clarke in respect of AMEP matters. For the applicant to raise this point at this late stage is surprising. Counsel for ABP made clear that the specific DCO advice provided by Winckworth Sherwoods was provided by a different Partner to the one who was more widely advising the Harbour Master, and that a 'Chinese Wall' imposing total separation had been in place and operated effectively throughout the process. This position was supported by the Harbour Master Humber.

Section 127 of the Planning Act 2008

7. Counsel for ABP confirmed that ABP are still strongly objecting to the proposed compulsory purchase of their land. It was further made clear that ABP's section 127 objection relates both to their land and their access rights to that land.

Model Provisions

8. At numerous points throughout the hearing session, the response of the Applicant to suggested changes to the DCO was that what had been drafted reflected the 'model provisions'. Leading Counsel for the applicant argued that the Panel should be very slow to depart from the model provisions, and should only do so with good reason.

9. Counsel for ABP (and representatives of others at the hearing session) made clear that just because a particular article had been provided as a potential model to aid drafting, that was no justification for automatic inclusion in the draft DCO, particularly if it was of no relevance to the case in hand or the provisions were not appropriate to the circumstances of this particular application. Such an argument as propounded by Counsel for the applicant was of no merit and patently incorrect.

10. The ExA was reminded that the express provision in the 2008 Planning Act (the 2008 Act), which provides that regard has to be had to the model provisions, had been repealed by

the Localism Act. Further, in any event, the fact that a model provision had been suggested by the SoS did not make its inclusion mandatory (Section 38(3) of the 2008 Act).

11. Put simply, each proposed article and clause of the DCO has to be examined on its own merits to determine if it should be included in the form proposed. It is for the applicant to justify what it is proposing. In this instance, on a number of occasions, the applicant simply has not done so in either its written submissions or its oral evidence.

12. By way of example, ABP drew the ExA's attention to certain superfluous and incorrect articles in the draft Order that dealt with the issue of permitted development rights granted by Parts 11 and 17 of the Town and Country Planning (General Permitted Development Order) 1995. The position of the applicant was that these should remain in the DCO 'just in case' they provided some benefit.

13. Leaving aside the fact that ABP had raised these concerns for the assistance of the ExA and the applicant some months earlier, thereby giving the applicant ample time to consider whether the points raised were correct, it is disappointing that these articles still remain in the draft DCO – it would be incorrect to allow then to remain and they should be removed. At the hearing session, the applicant used the examples of an order approved elsewhere (the Network Rail (North Chord Doncaster) Order 2012) as precedent for what was being put forward in its proposed article 55. First, despite what was claimed by the applicant, that Order does not in fact include the equivalent of article 55. Secondly that argument of itself highlights the very issue drawn to the ExA's attention by Counsel for ABP. If the draft AMEP DCO is approved with such articles in them then this will lead to unnecessary future confusion and debate in law.

Revised Plans and Co-ordinates

14. At the outset of the first day of the hearing session, ABP explained the issue highlighted in their comments regarding the numerous mistakes relating to the co-ordinates of certain elements of the development set out in the DCO and the way they were shown on the works plans.

15. These points were accepted by the applicant who indicted that it would be producing revised works plans and revised co-ordinates which would be checked by an independent engineer. Revised plans and co-ordinates were distributed on the morning of the second day of the hearing session but, as ABP's Counsel made clear at the end of the hearing session, even on the basis of an overview 'non expert' examination in the time available, it was clear that the plans and information are still incorrect.

16. It is extremely concerning that despite assurances, and with less than two days of the six month examination process remaining, the applicant has still not correctly identified the project for which it is seeking consent. Further, there is no time available in the programmed examination timetable to check whether the further revised information which the applicant is now going to provide to the ExA is correct.

17. ABP notes, however, with some weariness, that Counsel for the applicant rather than seek to address how to rectify these fundamental errors within his client's DCO, seemed more concerned to again call into question the independence of one of ABP's witnesses whose evidence had no relevance to the matter being debated, and who was not even at the hearing sessions. ABP has already addressed these concerns during the course of the examination.

Compulsory Purchase

18. ABP's comments on compulsory purchase matters within the DCO should not be taken in any way as a modification of ABP's continued strong objection to the compulsory purchase of their land. ABP put forward changes to Article 33 (Time limit for exercise of authority to acquire land compulsorily). ABP's Counsel explained that there were clear and present intentions for ABP to develop the land in its freehold ownership which is proposed to be compulsorily purchased by the Applicant which justified, in the particular circumstances, a reduction in the time limit proposed by Able. It was also made clear that ABP would be content if the amendment proposed (reducing the time limit from 5 years to 3 years) were to be applied solely to the land in which ABP has an interest which is proposed to be compulsorily purchased (i.e. the land which it owns and the land over which it enjoys rights of access both by land and from the water).

19. As was explained, ABP seek this change because they have a commercial use for the land in question. If the compulsory purchase powers (if granted) are not to be subsequently exercised for whatever reason, ABP would wish, as soon as it was able, to make use of this land. If the intention of the applicant is indeed to proceed with the compulsory purchase (if granted) of ABP's land, then ABP's requested change should not cause them any issues.

Reverter clause (New Article 43A)

20. Counsel for ABP explained the basis for the request for a reverter clause. Leading Counsel for the applicant sought to dismiss ABP's request by indicating that this was an exceptional clause with no precedent and that there were various hurdles to be overcome before ABP would be able to implement their proposed development in any event, including the need to themselves seek compulsory purchase powers. This is an incorrect assertion that for some reason Counsel for the applicant has repeated on a number of occasions and which has no basis in law.

21. In response, Counsel for ABP made clear that ABP's proposals would not require the compulsory purchase of any land or interests, and that the principle of what the clause was seeking to achieve did, in fact, have precedent – reference was made to the Hungerford Overbridges Order, where land would revert back to the Port of London Authority (paragraph 21(2) of Part II of Schedule 10 of the River Thames (Hungerford Footbridges) Order 1999). It was made clear that the reasoning behind the request for the reverter clause was, simply, that this is ABP's land, and if the applicant does not do what they say they are going to do, then ABP want it back so that they can do what they want to do on it.

22. Leading Counsel for the applicant criticised paragraph 3(d) of the reverter clause in particular, on the basis that the provision is not time limited, suggesting that in future when the facility is not being used for the purposes set out in the order then ABP could ask for their land back. This is of concern, in that the applicant's response further underlines the fact that this facility will, in the longer term, be used for purposes other than those described in the Order and the ES. As ABP have consistently made clear from the outset, this has not been the subject of environmental assessment.

23. Leading Counsel for the applicant also suggested that the wording of paragraph 3(b) was unclear. Counsel for ABP offered to amend this by inserting the words “prior to its completion” before the words “construction work” in the third line which would remove any doubt about the meaning of this provision.

Rail Overbridge options

24. On the first day of the hearing session, discussions took place over a proposition put forward by the applicant to Network Rail that they would seek easements for crossing the railway as an alternative to the compulsory purchase of Network Rail land. Debate was had into which option, if any, was acceptable. ABP understand that at the end of this debate, the applicant’s position is that they are proceeding with the compulsory purchase of Network Rail land, and that Network Rail continue to object to this.

25. In this context, Counsel for ABP reminded the ExA that in their response to the ExA’s second set of questions, the applicant had put forward an arrangement of four bridges over the railway line. This arrangement, which was stated by the applicant as not affecting the viability of the scheme, would address the concerns of all parties concerned with this matter. It is, therefore, surprising that the applicant, having suggested a solution which deals with all concerns raised in this regard by Network Rail and others, is not prepared to actively promote it.

Road improvements

26. In their comments, ABP drew attention to the fact that the limits of deviation for work number 2 shown on the works plan, although described as improvement works to the junction of Rosper Road and Humber Road in the Order, extended out to include the Manby Road roundabout.

27. In response, the applicant indicated that works to Manby Road roundabout were also necessary. The description in the order is therefore incorrect, but more importantly no plans or drawings referred to in the order (for example, the works plans, the design drawings and the planning application drawings) detail what these works consist of. The ExA does not, therefore, know what works the applicant is seeking consent for, neither can there, therefore, be any confidence that what the applicant envisages carrying out is acceptable.

Piling Conditions

28. ABP seek, through their proposed changes, that the piling conditions applicable to AMEP are brought into line in certain instances with the same piling conditions that have been imposed on ABP's Green Port Hull project. At the examination the relevant regulators indicated that each project is looked at on a case by case basis. The Environment Agency, presumably working in liaison with the MMO have yet to provide any evidence that would justify the provision of less restrictive requirements as they have sought to impose at Green Port Hull. In fact, in ABP's view, quite the opposite obtains. Without such evidence, and ABP's view is that in the best light, no material distinction can be made between the two projects, the conditions need to be brought into line as ABP have identified.

29. In any event, even if there are material differences between the two projects which justify different piling conditions, there can be no justification for not adopting ABP's suggested paragraph 41A in Schedule 8, which replicates a condition imposed on Green Port Hull by Hull City Council at the request of Natural England.

Protective provisions

30. At the July 2012 DCO hearing session ABP indicated that it required protective provisions within the DCO. These were subsequently provided in ABP's Further Representations (2 August 2012). A further version of these, amended to take account of land access issues that arose out of the land access specific hearing session, were then included in ABP's tracked change DCO submitted to the ExA.

31. The solicitor to the applicant, being questioned by the Chairman of the Panel, admitted that he had not taken the trouble to respond to ABP on the proposed protective provisions but he then, at the hearing, some three and a half months after receiving them, indicated that the Applicant was not prepared to accept them.

32. Paragraph 96 deals with siltation or erosion caused by the development authorised by the Order which could impede access or cause damage to facilities at the Ports of Immingham or Grimsby. Provisions of this sort are included on a routine basis in Orders or Acts of Parliament which could affect a statutory harbour authority. These particular provisions are based on the protection which has been secured by ABP in the various orders authorising harbour works for Humber Sea Terminals (now C.RO Ports), see for instance the Humber Sea Terminal (Phase III) Harbour Revision Order 2008. It was suggested that such protection was unnecessary because it would be secured through the conditions included in the deemed marine licence. Nothing in the proposed conditions secures this and ABP's position is that it would be appropriate for specific protection for statutory port operators to be addressed and enforced as it always has been, through specific protective provisions rather than a marine licence. Not least this is because the port operator will have a better understanding as to the extent of siltation or erosion that could affect its undertaking.

33. It was explained in response to a concern expressed by the Leading Counsel for the applicant that, with the DCO as currently drafted, Able would only be responsible for remedying siltation or erosion to the extent that it was attributable to the AMEP project. As

regards the applicant's assurance that its works would not cause siltation or erosion, if this is correct these provisions will never need to be invoked, but they do give ABP the security that if contrary to the applicant's expectation such effects are caused, its statutory undertaking is protected.

34. Paragraph 97 is intended to secure that AMEP construction traffic should not obstruct or interfere with traffic to and from Immingham and Grimsby. Although the harbour master will have overall control over the passage of vessels in the interests of safety it is not his function to prevent the considerable potential commercial damage which could be caused by extensive delays caused to regular users of the ports of Grimsby and Immingham and that is why specific protection is required. It was suggested that there should be a reciprocal provision, containing protection for AMEP construction traffic. This is misconceived - in the case of an application for special statutory powers to construct a new project the onus is on the applicant to mitigate the construction impacts of the development on existing statutory undertakings. In addition existing users of the ports of Grimsby and Immingham have regular and scheduled timings for their sailings which construction traffic should be able to accommodate whereas existing traffic cannot easily be rescheduled so as to accommodate construction traffic.

35. Paragraph 98(1) secures that existing access over Station Road is protected through the requirement to provide a substitute if this is extinguished or interfered with. This is relevant in two different circumstances. First, if ABP's triangle site is not acquired it will need access over the whole of Station Road. Secondly, however, even if the triangle site is acquired by Able, ABP will still need access (for maintenance purposes) to the railway headshunt which it will be operating and maintaining for the purpose of rail traffic to its port. We have redrafted this provision to make this clear as follows:–

> "**98**.— (1) Before extinguishing or interfering with any existing rights for AB Ports to pass or re-pass, the undertaker shall, with the agreement of AB Ports, create a new right of way for vehicular traffic, in substitution for the right of way that is extinguished or interfered with, that is reasonably convenient for AB Ports, such agreement not to be unreasonably withheld or delayed."

36. Paragraph 98(2) requires that before carrying out works to, or making temporary closures of, specified roads which are critical means of road access to the Port of Immingham ABP must be consulted and that in exercising these powers access to the port should not be materially impeded. Again this recognises the importance of avoiding disruption to the operation of the Port of Immingham, an existing nationally important statutory undertaking.

37. Paragraph 99 simply follows on from the other provisions and provides for payment of costs and losses incurred as a result of sedimentation or erosion caused by the works, for costs incurred in establishing whether this has occurred, and if obstruction to marine or land access is caused by breach of paragraphs 97 or 98. This again reflects the indemnities that are normally included for statutory undertakers, reflecting the fact that costs and liabilities incurred in the discharge of a statutory undertaking are not appropriately addressed by the normal statutory compensation code for landowners, as applied by the Order.

38. It was noted by ABP's Counsel at the hearing sessions that whilst there was a refusal on the part of the applicant to accept these provisions for the protection of ABP, similar provisions for the protection of C.Ro and C.Gen were not similarly rejected .

39. Prior to the lunch break on the second day the Marine Management Organisation (MMO) indicated that the types of provisions which ABP were seeking were unnecessary and unhelpful. This was an extremely surprising statement from the MMO in light of the fact that such provisions are standard and usual in instruments consenting harbour works. After the lunch break the MMO clarified their position explaining that they did not, on reflection, consider that the deemed marine licence or the EMMP actually did secure the protection ABP were seeking in their protective provisions and that it would be appropriate in this case to include such provisions

40. In responding to this clarification after the lunch break, leading Counsel for the applicant appeared to imply that in some way the comments of ABP had influenced the MMO's position. It is not clear whether any criticism of ABP was intended through those comments, however, ABP have no influence whatsoever over the position taken by the MMO.

Restriction on use / description of development

41. The changes ABP have put forward to requirement 3A are fundamental. In short, as ABP's Counsel explained, the changes are required in order to ensure that:

(i) the development which takes place reflects the development which has been subject to environmental assessment and for which arguments and evidence have been put forward;

(ii) it is not just the quay element and the embarkation and disembarkation activity is covered; and

(iii) any change in the use of the facility is a matter considered and decided upon by the Secretary of State.

42. These changes were supported at the hearing by C.Ro and C.Gen.

43. Leading Counsel for the applicant sought to dismiss aspect (iii) by arguing that any change to the use of the facility that was sought via a planning application could be recovered for consideration by the Secretary of State, and therefore this was a bad point. ABP's Green Port Hull proposals were quoted as precedent for changing the use of a harbour facility via a 'planning application'.

44. A number of points were made in response to this, including:

(i) The Planning Act 2008 (through section 153 and Schedule 6) ensures that jurisdiction stays with the Secretary of State. As the applicant has at numerous times pointed out, if parliament has provided a process then there needs to be a strong case not to use it.

(ii) The Secretary of State's process and approach of calling in planning application is, as Mr Upton commented, a fallible process, uncertain and not to be assumed - and in any case, in the light of para (i) above, is irrelevant.

(iii) By indicating that the change of use via a planning application would not be a breach of the DCO, it is possible to interpret this as an attempt to circumvent the Planning Act 2008. If this is the case, then this is not acceptable. If this is not the case then what is this provision seeking to achieve?

(iv) Given that the applicant claims this to be an NSIP, any material change (such as a change in the use of the facility) can in law only be secured through the process expressly set out in the 2008 Act.

45. ABP noted the 'continual unease' of Mr Upton in respect of this matter.

46. In respect of aspect (ii), the applicant indicated that the whole of the development was restricted by virtue of paragraph 4(b) of Schedule 1. Counsel for ABP (supported by C.Gen and C.Ro) explained that this was not clear and such a response was, therefore, inadequate. If the accepted position is that it is right that the landside facilities are to be restricted as well as the quay, then there can be no sensible objection to clarifying this and putting it in restriction 3A.

47. In respect of aspect (i), the applicant indicated that they would be willing to change the description of the use allowed to 'renewable marine energy'. Counsel for ABP indicated he would take instructions on the acceptability or otherwise of this suggested change. ABP's position is that, although a step in the right direction, the DCO should be restricted specifically to offshore wind as detailed in their changes, as this is the specific use that has been assessed and justified.

Tail piece conditions

48. As part of its justification for its changes to Requirement 4, Counsel for ABP indicated that the type of 'tail piece' condition envisaged was not lawful. Counsel for the applicant sought details of the cases on which ABP relied in order to address issues arising from them in their written summary. The applicant was reminded by ABP that this matter (and relevant cases) were detailed in paragraph 3.7 of the written representation of Mr Rowell (29 June 2012). No response to this point has yet been offered by the applicant, and in view of the imminent close of the Examination, ABP will not have an opportunity to deal with any matters which may arise in the applicant's subsequent written summary.

Associated British Ports