ABLE MARINE ENERGY PROJECT (REF: TR030001)

SPECIFIC ISSUE HEARING ON THE DEVELOPMENT CONSENT ORDER, 21-22 NOVEMBER 2012

WRITTEN SUMMARY OF APPLICANT'S CASE

1 Introduction

1.1 This document summarises the case put by the applicant, Able Humber Ports Ltd, at the hearing into the Development Consent Order (DCO), including the Deemed Marine Licence, which took place at the Humber Royal Hotel, Grimsby, on 21 and 22 November 2012.

1.2 The panel invited stakeholders to submit proposed drafts of new provisions and amendments to the draft DCO in written submissions and during the two day hearing.

1.3 In what follows, the applicant's submissions on the points raised broadly follow the agenda set out in the Examining Authority's letter of 12 November 2012.

1.4 Where amendments have been accepted they are now incorporated into the final draft of the DCO submitted by the deadline of 23 November 2012.

Submissions on specific provisions

2 Article 2 – Interpretation

2.1 A number of minor drafting amendments were recommended by parties including Associated British Ports (ABP); the Harbour Master Humber (HMH); C.GEN Killingholme Ltd (C.GEN) and C.RO Ports (Killingholme) Ltd (C.RO). Those accepted have been incorporated into the revised DCO.

2.2 With regard to the definition of "authorised development", we submit that the words "any other development authorised by this Order" are essential and therefore should not be removed, despite C.GEN and C.RO's submission on this point.

2.3 Nor do we agree with HMH's suggestion that it would be desirable for the deposit sites specified in the marine licence to be shown in a plan and that a definition of 'Deposit Location Plan' should be added. The Marine Management Organisation (MMO) are satisfied that dredging is adequately covered by the marine licence, so this is unnecessary.

2.4 C.GEN and C.RO propose a new definition of "limits of deviation". This is covered by article 6 and is again unnecessary.

2.5 ABP propose a new definition for “planning application drawings”. A definition is only required where a term is used more than once.

2.6 It is agreed that a definition of “sections” can be added and this is reflected in the revised DCO.

3 Article 8 – Jurisdiction of the harbour authority

3.1 It is accepted that C.RO should be added to paragraph (5)(a) and paragraph (11).

4 Article 10 – Maintenance of authorised development

4.1 ABP propose that the term “within the limits of the harbour” should be amended. This expression has already been restricted beyond the Model Provisions (MP) in response to comments made at the July hearing. Any argument in favour of departing from the MP must be based on cogent reasons. ABP is unable to specify the danger which the proposed amendment seeks to address and it is therefore not accepted.

5 Article 11 – Provision of works

5.1 C.GEN and C.RO wish to add “subject to paragraph (3) below” to the start of Article 11. This is unnecessary.

5.2 The parties also propose to delete the words “railway lines” in paragraph 11(1). There are already protective provisions in place with regard to the railway and this form of words adheres to that used in the London Gateway Port Harbour Empowerment Order 2008[1].

5.3 C.GEN and C.RO wish to remove “and other works” onwards from Article 11(2)(c). It is surprising that the parties wish to restrict the impact of mitigation. The inclusion of the term is in line with the precedent set out in many other Transport and Works Act Orders and thus not accepted.

5.4 ABP commented on each of the three paragraphs in Article 11.

5.5 They proposed that the power as currently expressed in paragraph 11(1) should be restricted to the limits of deviation for that work. The expression has already been restricted. The proposal goes beyond that required by the MP and is not accepted.

5.6 ABP’s amendment with regard to paragraph 11(2) that it should be restricted to the area within the Order limits on the south bank of the Humber is accepted.

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[1] London Gateway Port Harbour Empowerment Order 2008, No. 1261.

(Source: http://www.legislation.gov.uk/uksi/2008/1261/article/10/made)

5.7 We do not accept that paragraph 11(3) should be deleted. This paragraph and Article 52 are both provided for in the MP. To remove it would provide a restriction which goes beyond that which the Secretary of State considers is normal under the Harbour Act 1964[2].

6 Article 13 – Transfer Benefit of Order

6.1 We do not accept the amendments proposed by the HMH. The provisions suggested are not common to any other order in the Humber area. It is an entirely new point, and if critical, would have been proposed earlier in proceedings. The fact that the applicant's registered office is not based in the United Kingdom is irrelevant. Fairness and equality of treatment must be applied.

7 Article 14 – guarantees in respect of payment

7.1 ABP state that the term "alternative forms of security" in Article 14(1) is unclear. The parent company guarantee describes this as: "including but not limited to a bond, bank guarantee or policy of insurance".

7.2 ABP's proposal that the liabilities referred to in Article 14(1)(b) should be extended to the wet grassland or the new 'over compensation' proposals at East Halton is not accepted. The funding for the wet grassland is not extensive and we do not wish to reference parts of the compensation scheme which fall outside of the DCO.

7.3 The proposal that a guarantee should be provided in respect of the whole development is absurd. This would go far beyond anything any promoter has ever been asked to provide.

7.4 We also reject the argument that the approval of the guarantee should be from the Secretary of State, rather than the local planning authority. Public authorities are emanations of the State and bear the same duties. If it were the case that any development which engaged the EU Habitat's Directive[3] should be entrusted to the Secretary of State we would have the position where no development at all could be consented to by a local authority. Local authorities deal with planning on a regular basis. They have the resources and expertise to deal with this matter and it is appropriate that they should do so in this case.

8 Article 15 – Street works

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[2] The Harbours Act 1964?? Source: http://www.legislation.gov.uk/ukpga/1964/40/contents

[3]EU Habitats Directive:

(Source: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML)

8.1 C.GEN and C.RO want additional text to prevent the closure of Rosper Road. This would be a departure from the MP, which make street works in the DCO subject to the New Roads and Street Works Act 1991[4]. No further protection is necessary.

9 Article 23 – Tidal works not to be executed without approval of the Secretary of State

9.1 HMH, C.GEN and C.RO want to remove "reconstructed, extended, enlarged, replaced" with the word "altered". This is accepted and reflected in the draft DCO.

10 Article 26 – Lights on tidal works etc. during construction

10.1 HMH proposes a criminal offence for the failure to comply with this provision. The Localism Act 2011[5] does provide a general power for such an amendment, but this is different to saying a power should and must be exercised. The need for a cogent evidence base is at its strongest when you are seeking to persuade a decision maker that criminal sanctions are necessary, and the HMH has not provided such evidence. It risks again imposing a requirement which is not found in similar orders and therefore the amendment is not accepted.

11 Article 30 – compulsory acquisition of land

11.1 C.GEN and C.RO want the acquisition of the railway removed. We proposed level crossings to Network Rail as an alternative, but this has not been accepted, therefore we maintain the need for compulsory purchase.

11.2 We do not accept that HMH's land should be excluded.

12 Article 31 – power to override easements and other rights

12.1 C.GEN and C.RO want additional text to remove any easements they have from the scope of this power, and to prevent any agreement it has with Network Rail to be overridden. There are no such easements now that the top of the railway has been removed. We have not seen the agreements with Network Rail and could not agree to such an amendment without considering them in detail. We maintain that the protective provisions for C.GEN set out in Schedule 9 are sufficient.

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[4] New Roads and Street Works Act 1991 (Source: http://www.legislation.gov.uk/ukpga/1991/22/contents)

[5] The Localism Act 2011. (Source: http://www.legislation.gov.uk/ukpga/2011/20/contents/enacted)

13 Article 33 – Time limit for exercise of authority to acquire land compulsorily

13.1 ABP state that the time limit under paragraph 33(1) for exercising authority to acquire their land should be reduced from five to three years.

13.2 This is not accepted. ABP's circumstances are not exceptional. It is likely that many other parcels of land are subject to future development by their current owners. Indeed, it is a matter beyond dispute that ABP's plans are mere proposals, they will therefore suffer less prejudice than other landowner's whose business is already established. The five year stating point provided for by the Model Provisions is the correct approach and entirely appropriate. In any case, ABP's case for the general reduction is based on evidence for only one parcel of land and therefore does not make the case for the general amendment of the order.

13.3 ABP has made no evidential case before the examining authority that it would have a particular need or requirement for the land in three years time. Its case (which is not accepted) is that its need for this piece of land is a pressing immediate need for a development which would be lost if the land is not made immediately available. The fact that the land has not been used for more than 40 years is evidence that absent any case for the land being required in three years time there is likely to be no need for the land. If on the other hand the land is necessary for a project ABP would if it has a compelling case be able to acquire the land either by agreement or compulsorily.

14 Article 42 – Statutory Undertakers

14.1 Following comments by the panel this article has been amended to show which powers are involved.

15 Article 43(A) – Reverter to ABP

15.1 The amendment is not accepted. There is no evidential basis for the clause, quite apart from the drafting errors. ABP base their argument on the fact that they seek to develop the land, yet the land has been in non-use for over forty years. Again the amendment would depart from the Model Provisions, which must be the starting point. point without any cogent reason for so doing. Furthermore, ABP has made no evidential case before the examining authority that it would have a particular need or requirement for the land in three years time. Its case (which is not accepted) is that its need for this piece of land is a pressing immediate need for a development which would be lost if the land is not made immediately available. The fact that the land has not been used for more than 40 years is evidence that absent any case for the land being required in three years time there is likely to be no need for the land. If on the other hand the land is necessary for a project ABP would if it has a compelling case be able to acquire the land either by agreement or compulsorily.

16 Article 48 – railway network

16.1 The applicant has put forward a proposal to Network Rail which it considers would remove the need to compulsory purchase land by providing for the establishment of new easements over

the line. We believe this addresses concerns raised and provides a reasonable solution which will have less impact on all parties. Network Rail does not agree that it would overcome its objections.

16.2 Thus unfortunately, Network Rail does not accept this proposal, while failing to provide any constructive alternative.

16.3 Given this, and the possibility that easements would not overcome the inhibitions to the operation of the proposed development, the applicant must maintain its position with regard to compulsory purchase of the Network Rail land identified in the original Book of Reference. This will allow the Secretary of State the scope to determine whether the easements – a lesser proposal – are a more appropriate solution.

17 Article 51 – Permitted development rights

17.1 ABP submit this article is confusing as, by reference to the area of jurisdiction, it grants operational land status to an area of the water beyond the quay edge. ABP present no cogent arguments why there should be a departure for the model conditions. However the provision is more limited in fact than that provided for in the Model Provisions and only extends the operational land to an area 100m beyond the quay. We believe we have made sufficient amendments to the article and the submission is rejected.

18 Article 56 – Planning, etc. jurisdiction

18.1 ABP argue that this provision has the effect of bringing a large area of the River Humber within planning jurisdiction for all purposes and not just for the purpose of authorised works. This is not accepted. The question regarding permitted development arising out of a DCO is unclear. Section 33(1)(a) of the Planning Act 2008[6] says NSIPs do not require planning permission, but the provision is in the Model Provisions and it should therefore be maintained. It should be noted that the Network Rail (North Doncaster Chord) Order 2012 [7] also included this provision.

19 Article 57 – Certification of plans

19.1 We do not accept that the design drawings should be certified because they are likely to change.

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[6] The Planning Act 2008
(Source: http://www.legislation.gov.uk/ukpga/2008/29/section/33)

[7] The Network Rail (North Doncaster Chord) Order 2012
(Source: http://www.legislation.gov.uk/uksi/2012/2635/contents/made)

20 Schedule 1 – authorised development

20.1 C.GEN and C.RO want to add additional works. This is not necessary.

20.2 ABP say the onshore development and parking should be tied to the application drawings. We have drafted requirement 4 to refer to an envelope for this so it is unnecessary.

20.3 ABP question what work No. 2 comprises of. Details of Work No. 2 (works to Rosper Road/Humber Road) were originally presented in ES Annex 15.1: Transport Assessment, Drawing NEA1114/01 Rev A in Appendix Q. A revised plan was submitted as Drawing NEA1114-01 Rec B within Annex 3, Stage 1 Road Safety Audit Brief, Report & Designer's Response, of the Summary of Case for Highways Hearings.

20.4 Royal Mail want works to Pelham Road executed as a work, but we have provided a unilateral undertaking instead.

21 Schedule 8 – Deemed marine licence

21.1 The HMH's proposal that paragraph 7(1)(c) should say "riverward" and not "seaward" is accepted.

21.2 HMH questions the backfilling of the berthing pocket, but this will be allowed to happen naturally now.

21.3 We accept that HMH should be consulted on the active monitoring system.

21.4 HMH submit that the applicant is obliged to provide an oil spillage plan, which must be compatible with "Humber Clean". This is an entirely new request, which came on the last day of the hearing. There is a statutory mechanism which addresses this and the submission is therefore rejected.

21.5 HMH argue that a new form of words is necessary to recognise that the applicant must go through the Harbour Authority and to incorporate wording for the reimbursement of costs in doing so. MMO does not agree that this standard clause needs to be amended, and neither do we. The presumption should be in favour of the MMO standard wording.

21.6 C.GEN and C.RO have asked for protective provisions to address the concern that the applicant will have a marine licence to dredge in an area which overlaps with that defined by the terms of their own licence. Most of these have been agreed and are shown in the revised order.

21.7 The MMO and the applicant have agreed drafting changes to address inconsistencies with the statement of common ground and for the purpose of further clarity. These are reflected in the revised DCO.

21.8 ABP argue for a number of conditions which mirror those imposed at Green Point Hull. To impose such conditions would be lawfully irrational. There is no evidential basis for the submission and the Environment Agency, the MMO and Natural England are content with the licence as it stands.

22 Schedule 9 – protective provisions

22.1 Part 1 – For the protection of the Humber Conservancy

22.2 HMH argued that in the event that a proposed underlease is not agreed, the DCO should include protective provisions which reflect certain necessary lease terms.

22.3 This amendment is not accepted. The lease has not been agreed because it lacked key provisions such as the length of its term or any indication of rent. The provisions submitted at the hearing were entirely new, and would remove our powers of compulsory purchase over the land. A concern is also raised about which party is negotiating the terms of the lease, given that the same law firm is acting both for the HMH and ABP. We do not agree that a new lease can be created compulsorily.

22.4 Part 2 – For the protection of the Environment Agency

22.5 The Environment Agency and the applicant have reached agreement on a number of issues including provisions addressing: flood risk; the compensation site; long-term maintenance obligations and salmon. The Agreements are not yet finalised but are near conclusion. Both parties are confident that no further protective provisions are necessary.

22.6 Part 4 – For the protection of Network Rail

22.7 Network Rail's proposal to introduce a new sub-clause into paragraph 35 is not accepted. Given the case advanced by Network Rail at various stages of the hearings, the applicant can not accept that "reasonably withheld" would be applied in the proper way. It is likely to present an insurmountable obstacle.

22.8 The applicant does not accept that a standard indemnity clause should be included. Parties can resolve any such matters through the courts. The indemnified body may reach an unreasonable settlement with the third party having no incentive to reduce this, which would then be passed on to the applicant.

22.9 Part 5 – For the protection of C.Gen

22.10 Reference new protective provisions negotiated at the hearing.

22.11 Part 6 – For the protection of C.Ro

22.12 Reference new protective provisions negotiated at the hearing.

22.13 Part 8 – For the protection of National Grid

22.14 National Grid and the applicant have established that none of the equipment is required to be interfered with or extinguished. There are therefore no instances in the Book of Reference and the high pressure gas main is protected by an easement.

22.15 However, National Grid has requested that the applicant signs Asset Protection Documents which set out the standards which should be followed when development is carried out near National Grid assets.

22.16 These agreements were not submitted to the applicant until a very late stage and we have not had sufficient time to provide agreement. Given this, National Grid has submitted a new protective provision which is included in the revised draft of the DCO, although the applicant has removed the indemnity clause and the payment of expenses for approval of plans.

22.17 Part 9 – For the protection of E-ON UK PLC

22.18 The protective provisions relating to EON are agreed. The agreement between Anglian Water and the applicant are also acceptable to E-ON, although Anglian Water did in fact agree to delete the reference to E.ON..

22.19 Part 11 – For the protection of Anglian Water

22.20 Anglian Water state that the negotiated agreement is sufficient to protect the interests of all parties and it is unnecessary to include further provisions, but wish compulsory purchase powers to be exercised as a last resort. We have added agreed wording which clarifies that compulsory purchase will only be used as a last resort and after discussion with Anglian Water. The remaining protective provisions are also agreed.

22.21 Part 10 – For the protection of Centrica

22.22 The applicant has considered Centrica's submissions and included those agreed in the revised draft of the DCO. The main one not inserted is that provided for in paragraph 79. This paragraph is rejected in preference for drafting common to the provisions provided for other undertakers. We believe that rather than inserting preferred terms into the order, such matters are for negotiation.

22.23 Part 12 – For the protection of Bethany Jane LTD.

22.24 The parties have agreed the revised drafting included in the DCO.

22.25 Part 13 – For the protection of the Royal Mail Group LTD.

22.26 A unilateral section 106 undertaking will be submitted to cover funding of the works if they prove necessary. It was confirmed on 21 November 2012 that the A160 project is to go ahead so this should release the necessity for the works.

22.27 Part 14 - ABP

22.28 The drafting of ABP's amendment to Article 96 is unacceptable, but more importantly, the provision is unnecessary. Our evidence is that there will be none; in fact there will be less erosion than there is presently.

22.29 In terms of Article 96(b) – the MMO's initial position at the hearing was that there was no need for such a provision. The appropriate means for such a requirement is the marine licence, which can be policed. Indeed, the MMO initially described such a proposal as 'unhelpful'. Unfortunately it seems that the MMO was subjected to pressure, and changed from this very clear legal position in the afternoon session.

22.30 With regard to paragraph 97, we submit that the HMH already has sufficient statutory power to regulate such movement.

22.31 In terms of paragraph 98, we do not accept that ABP should have rights over Station Road because we are acquiring the rights to the land at the end of the road. This amendment comes extremely late and was not part of ABP's original request when discussing the head-shunt. We remain to be convinced whether it is necessary for ABP to have any additional access. This right for access for the head shunt alone has been included in the protective provisions.

22.32 We do not accept paragraph 23.8 for the reasons already explained above which applies in relation to indemnities in general.

23 Schedule 11

23.1 Centrica

23.2 We have inserted the definition requested by Centrica in Article 2 of the revised DCO.

23.3 ABP

23.4 We have considered an amendment to the definition of Environmental Statement and this is provided for in the revised DCO at paragraph 1.

23.5 The submission that the definition should be restricted to 'offshore wind industry' is rejected. The facility is for marine renewable energy infrastructure, and this is the basis on which the Environmental Assessment was undertaken. We refer to our submissions at the compulsory purchase hearing with regard to the case that onshore facilities should also be restricted.

23.6 ABP submit that a further DCO, an HRO or a TWAO, rather than planning permission, is necessary to amend the DCO. Yet at Hull, ABP itself if seeking to vary the type of cargo it holds by means of planning permission.

23.7 The applicant is not amending the DCO – it simply means that any free-standing additional consent granted will not be in breach of DCO.

23.8 Second, it would be impractical to require any such variation in cargoes to go by NSIP because the matters might be quite small. If such matters are of national importance and may impact upon either national issues or IROPI then the Secretary of State will be in control.

23.9 In respect of HRO it is the MMO as agent for the Secretary of State ("SoS") who makes the decision, in respect of TWA it is the SoS, in respect of planning application the Secretary of State has call-in powers – this is not just on the basis of an old ministerial statement, it has been updated this year – any consultee may apply to SoS who must then determine whether there is a more than local issue he must call in. ABP have the same situation for Greenport Hull although not a NSIP, it is IROPI, and therefore requires consideration of national issue by local planning authority – again subject to call in provision.

23.10 Finally, all would have to be subject to consent procedures and if appropriate EIA and or AA. The role of the Secretary of State in planning is not to intervene in competition between port facilities.

23.11 Requirements 3B, 4 and 5 – design drawings. Details of layout, scale and external appearance now have to be signed off. These drawings will be used for the application but if changes are required, the details may need to be signed off by the Local Planning Authority. This provides necessary flexibility. To suggest that we would need to apply to the Secretary of State for any small amendment to the DCO would bring the planning system into disgrace.

23.12 Natural England

23.13 Requirement 17 – It should be noted that we have amended the definition of 'Environmental Statement' which addresses Natural England's concerns with regard to the term. In terms of timing and responding to new data, the EEMP will allow for further baseline surveys to be carried out. The applicant notes the comments made at the hearing with regard to timing and will ensure there is suitable linkage between the EEMP and the development.

23.14 Requirement 22 – the suggestion that "minimising" noise should be replaced with "reducing" noise is accepted and reflected in the final draft DCO.

23.15 Requirements 16 and 32 relating to the listed buildings, and the Requirement 14 and 38 on contaminated land, have been re-positioned in the DCO, following the comments at the hearing.

23.16 Various other points on the drafting of schedule 11 have been considered and accepted. The new schedule 11 is provided for in the revised DCO.

24 Other matters

24.1 Following the hearing, Able have provided further maps with revised co-ordinates.

Bircham Dyson Bell
23 November 2012.