



Robert Goodwill MP  
Parliamentary Under Secretary of State for Transport  
Department for Transport  
Great Minster House  
33 Horseferry Road  
London  
SW1P 4DR

Our reference BJK/0956072/O19467320.1/SAMF

Your reference

**14 November 2013**

Dear Sir,

**Planning Act 2008  
Proposed Able Marine Energy Park**

1. We write on behalf of our client, Associated British Ports, the owner and operator of the Port of Grimsby and Immingham in relation to the "minded to approve" letter of 28 August written by Martin Woods on behalf of the then Parliamentary Under Secretary of State, Norman Baker. Our letter is written in response to the recently submitted answers to the questions raised by the Minister, published on the PINS website on 18 October 2013.
2. In his letter the Minister asked for assurances from the applicant, Able UK (Able), on two specific issues, namely -
  - (a) His concerns with regard to the applicant's proposals for compensation in compliance with the "Habitats Regulations" in the light of the "*substantial risk identified by Natural England that the ecological compensation measures will not work*"; and
  - (b) Assurance from the applicant that the AMEP project "*will not jeopardise any future operations of the Killingholme Branch railway*".
3. The observations now made on behalf of our client are, therefore, confined to the questions raised by the Minister and the applicant's responses. That said, the Minister will be aware from the representations made by our client both during and after the examination, that a number of concerns remain outstanding in addition to those specifically identified, which our client will pursue, should it be necessary, elsewhere.
4. In the context of the concerns specifically identified by the Minister, and in the light of the applicant's responses, we would comment as follows -

**Compensation**

5. As the owner and operator of the Port of Grimsby and Immingham, which of itself is regularly required to bring forward proposals in relation to the port which impact upon marine and nature conservation issues – its proposals for Grimsby River Terminal and the Immingham Western Deep Water Jetty being but two recent examples - ABP is concerned to ensure that in the context of the

legislative process, the regulator, at this stage in the process, the Secretary of State, recognises the equitable imperative of the "level playing field".

6. It is in this context that our client draws the Secretary of State's attention specifically to the letter dated 11 October 2013 from NE to Able, included within Appendix 3.1 of the Applicant's response document entitled "Response to Department for Transport's "Minded to Approve" Letter in Respect of Compensatory Measures" (Oct. 2013).
7. In that letter, NE summarised their position as at the end of the examination to the effect that there was a "substantial risk" that the proposed compensation package would not work on the basis of an "assessment of the large scale of ecological impact and the low level of certainty about the compensation measures; specifically, time lag, extent of mudflat, quality of mudflat and uncertain implementation". (para. 9).
8. "Put simply, the "substantial risk" relates mainly to the unproven potential for an untested system of regulated tidal exchange (RTE) cells to provide the compensatory mudflat habitat necessary to support an internationally-important population of black-tailed godwits as well as large populations of seven other SPA/Ramsar waterbirds." (para. 10).
9. We note that on the basis of that new information, NE now believe that the "substantial" risk previously identified by them in relation to the delivery of workable compensation has reduced to a "residual" risk – although, as NE acknowledge - "some risk remains" (para. 25). In fact, as we note below, it would perhaps be more accurate to state that a "substantial risk" does still remain in a number of areas.
10. Our client is very familiar with the regulatory imperatives applied by bodies such as NE, the Marine Management Organisation and the Environment Agency.
11. That said, therefore, we are more than a little concerned to note that despite the somewhat less critical terms now employed in the body of their letter when compared to the views expressed during the Examination, NE do still conclude by once again repeating their concern that the proposed RTE scheme is "a novel approach, untested before on this scale in the UK, and requiring extensive intervention, management and monitoring..... Thus there is a risk that the RTE scheme does not deliver the required compensatory habitat for black-tailed godwits, which it may not be possible to resolve through adaptive management". (para. 28).
12. Significantly, NE conclude by advising the Secretary of State "that as a minimum requirement Able UK should identify suitable contingency measures in the event of a failure of the RTE scheme". (para 29). This advice is included in a letter dated 11 October 2013 – and no assurance in this respect has, as far as we are aware, been given by Able other than to note that - "The Applicant has considered NE's advice but does not consider that the total failure of the RTE site is a credible risk..." It is perhaps pertinent in this context, to draw attention to the fact that by stating that they do not consider a "total failure" to be a credible risk, Able do seem to be rather missing the point. NE are not in their letter referring to just a "total failure" – they are stating that any degree of failure would be unacceptable – be it total or partial.
13. In the context of the above, therefore, we are bound to question how the risk originally identified by NE can actually now be downgraded to "residual" as opposed to "substantial"? Indeed, we must say that this question is underlined by the additional information included in Table 1 which NE have helpfully appended to their letter.
14. As you will be aware, Table 1 is designed to act as a summary of NE's position in the light of the fresh information that has now been provided by the applicant. It is reproduced below for the assistance of the Secretary of State (with areas of note highlighted in yellow) –

Table 1

Compensation Measures – Issues identified as contributing to the assessment of substantial risk at the close of the hearing		Level of certainty and risk as at 11 October 2013
Time lag		Minor change to timetable but no overall change to the risk
Extent of RTE/MR Mudflat		No change
Quality of RTE/MR Mudflat	Technical certainty (scheme design and operation)	Risk mitigated
	Ecological certainty (provision of equivalent functional habitat)	No change
Quality of roost and wet grassland habitat at Cherry Cobb Sands	Technical certainty (scheme design and operation)	Risk mitigated
	Ecological certainty (provision of equivalent functional habitat)	Risk mitigated
Quality of wet grassland over-compensation habitat at East Halton Marshes	Technical certainty (scheme design and operation)	Risk reduced
	Ecological certainty (provision of equivalent functional habitat)	Risk reduced
Implementation of compensation measures		Risk mitigated

With regard to the various matters raised within Table 1 we would comment as follows:

15. **Time lag** - In relation to NE's expressed concerns as to time lag between delivery and commencement of the development, NE's comment in the Table is - "**Minor change to timetable but no overall change to the risk**". As was pointed out at the examination by a number of parties, the loss of the mudflat at this location will have a significant impact on black-tailed godwits (BTG) in that this area of mudflat is the most important feeding area of only two areas available in the Humber favoured by this species. It should be noted that the BTG cannot simply move to a second site as there is no evidence that a second site alone will provide sufficient resources to support them. The long time gap – perhaps as many as 5 winters – is likely, therefore, to have a profound impact upon the BTG population on the Humber.
16. **Extent of RTE/MR mudflat** - In relation to the risk associated with the extent of RTE/MR mudflat being offered, NE's comment is – "**No change**". It is clear from NE's assessment that the ratio of re-provision is less than would normally be required. The applicant has failed to provide any additional information in response to this issue and, in any case, whatever is being provided will only be acceptable if the RTE/MR "*meets its quality objectives and targets*". On that basis, we assume the risk remains **substantial**?
17. **Quality of RTE/Mudflat** - In relation to the quality of the RTE/mudflat being offered, whilst NE appears to accept that the risk involved in the scheme design and operation has been mitigated, the risk in relation to the ecological certainty, ie the provision of equivalent functional habitat, is assessed by NE as - "**No change**". In fact, in the light of the information provided during the examination – and the proposals made after the close of the examination – this is not surprising in that the nature conservation bodies have on a number of occasions raised concerns regarding the

quality of mudflat, particularly bearing in mind the need for human intervention such as dredging even to maintain that quality and the consequent uncertainty as to the detrimental impact that the human intervention is bound to have on the feeding ground. In reality, we are not convinced that any new information has been provided by the applicant with respect to the question of the MR/RTE. They have simply provided the old information but in a repackaged form. Whilst further benthic surveys of the Killingholme Marsh intertidal to be lost and the intertidal in front of the MR have been made and analysed, these in themselves do not reduce the risk. On that basis, it logically follows that the **substantial risk** remains.

18. **Quality of wet grassland over-compensation** - Significantly the substantial risk identified in connection with the quality of the proposed wet grassland over-compensation habitat at East Halton Marshes has not been mitigated, but only "**reduced**". Putting aside the query as to whether the concept of "over-compensation" has any status in law - surely it is either compensation or not compensation? - it is in fact very unclear as to precisely what function the proposals for East Halton Marshes actually serves. It is our understanding that the East Halton Marshes site is designed to provide an additional roosting ground and some terrestrial feeding resource. The loss and damage that will actually be caused by the AMEP project, however, is to the feeding mudflat. On that basis, the applicant does not appear to be replacing like with like - a concern that appears to be confirmed by NE when they state that, with - "*the location of the site being some distance from suitable mudflat [it] is unlikely to be of significant value for high numbers of birds that will be displaced by the development*". It follows logically, therefore, that the risk remains.
19. We should also add in the context of the East Halton Marshes, that over and above the concerns expressed by NE, we are at somewhat of a loss to understand how an area of land that has been identified for and appears to have received planning permission as mitigation for another project, namely the Able Logistics Park, and has been assessed as such for that consented development, can somehow now be taken out of that development and simply transposed to an entirely different development to be used for that development as compensation - without assessment as to its purpose and future viability. Any planning permission to carry out works on that site is presumably directed to its use as mitigation for the Logistics Park - not compensation for the Marine Energy Park?
20. It is a matter of concern that in a number of areas the perceived "risk" appears still to be rather more than just "residual". Able have failed to respond to a number of points, and no clear indication has been given by NE as to whether they consider the risk to be sufficiently acceptable to allow the project to proceed - apart from NE's advice given to the Secretary of State, to which reference is made above, to the effect that - "*as a minimum requirement Able UK should identify suitable contingency measures in the event of the failure of the RTE scheme*" - which they have patently not done.
21. In addition, whilst NE may appear to have retreated from their original view that the risk is "substantial", presumably with a view to assisting the consenting process, not only does a clear substantial risk remain in many respects with regard to the proposed compensation package but in those areas where NE have concluded that some of their concerns have been met, there is evidently still a residual risk - although we must say that on the evidence of NE's letter alone, it is not transparent as to how the conclusion of residual risk, as opposed to significant risk, has actually been reached.
22. We would finally point out in this context that NE appear to have departed from the precautionary approach that they normally adopt when faced with development proposals of this nature. That precautionary approach is mandatory under EU law and therefore essential if the regulator is to ensure compliance in law with the relevant European and International environmental/nature conservation regimes.

## Rail

23. In his "minded to approve" letter of 28 August 2013, the SoS indicated that he required satisfactory assurances from Able, having consulted with Network Rail ("NR") and the Office of Rail Regulation ("ORR") that the AMEP project will not jeopardise any future operations of the Killingholme Branch railway.
24. Able, in their response to the DfT dated October 2013 set out to explain the nature and outcomes of their consultations with both NR and the ORR that have taken place since 28 August.
25. In summary, whilst ABP agrees with some of the assertions made in the applicant's response to the DfT, it strongly disagrees with others to such an extent that it is bound to advise the Secretary of State, that in its view it is not yet possible to conclude with any confidence that the AMEP proposals will not jeopardise future operations of the Killingholme Branch railway. The fact that some 25% of the nation's entire rail freight volume originates from the Port of Immingham lends significant weight to ABP's views in this regard.

## The Process

26. ABP agrees that it is appropriate for the proposed modification to the rail infrastructure of the Killingholme Branch railway to be delivered through the Network Change process, as defined in Part G of the Network Code.
27. Given the critical strategic importance of the Killingholme Railway, however, our client believes that if it is his intention to approve the DCO, then the Secretary of State should add a condition to the draft DCO, to the effect that the construction of AMEP cannot commence until the Network Change process has been completed to the satisfaction of the ORR, otherwise there can be no certainty as to rail connectivity both for AMEP and other rail users. In so suggesting, we would point out incidentally, that both the applicability of Network Change to the problems arising in connection with rail connectivity and indeed the concept of the Rosper Road Loop were never raised at the Examination.
28. The principal reason why our client believes such a condition to be essential is surprisingly straightforward. Quite simply, from the additional information provided to DfT by Able, it is far from clear what Able are now actually proposing to construct in terms of rail infrastructure and connectivity under the development powers to be granted by the DCO. Until this is clarified and documented for the benefit of all affected parties, construction of the AMEP must not be allowed to commence.
29. Our point is best illustrated by a chronology of Able's proposals as they impact on the Killingholme Branch railway which is as follows:
  - (a) At the start of public hearings into AMEP – Able proposed the compulsory acquisition of the bed of the Killingholme Branch railway from the edge of the ABP port estate, including land not required to construct AMEP.
  - (b) During the public hearings into AMEP – Able modified their proposals to the compulsory acquisition of the bed of the Killingholme Branch railway – to the extent that it interfered with the AMEP proposal – so as to enable Able to concrete up to the railway line.
  - (c) As reported in the ExA Panel's Findings and Recommendations to the Secretary of State – Able are now seeking the acquisition of four easements to create new level crossings (in contravention of ORR general policy).

30. This would appear to remain the applicant's position on the matter. Indeed, such is Able's implacable opposition to the use of any road bridges at AMEP, one can only conclude that Able have no regard for the fact that the Killingholme Railway forms part of the national rail network. Equally, it must be assumed that they have no interest in seeing the Killingholme Branch safeguarded for the wider public benefit. For this reason, an acceptable solution to all Access Beneficiaries must be identified before construction of the AMEP commences so as to ensure that Able cannot continue to adopt the narrow self-interested approach that it has thus far adopted throughout this process, particularly in relation to rail matters.

#### Network Rail

31. In this context, ABP would offer the following comments on the Statement of Common Ground (SOCG) – the legal status of which is open to debate - between Able and NR – in particular:
- (i) SOCG – point 3: The previous work undertaken by NR on possible alignments for the Killingholme Loop has indicated a preferred option, being the extension of the Killingholme Branch railway towards Goxhill, with a new chord to link up with the Goxhill Line. For reasons that are discussed below, ABP is as yet far from convinced that the Rosper Road Loop represents a credible alternative.
  - (ii) SOCG – point 4: this statement is largely meaningless and does not acknowledge the position of the ORR regarding the need for road bridges, which is discussed further below.
  - (iii) SOCG – point 5: it is important to note the emphasis contained in NR's response to the effect that NR are willing to assist Able in the promotion of Network Change - "*that meets the requirements of the Access Beneficiaries*". NR should not be associated with promoting a solution that is not acceptable to all Access Beneficiaries if it is to maintain an even-handed position, something that is essential if it is to discharge its statutory responsibilities in compliance with over-arching rail legislation.

#### ORR

32. We would suggest that the applicant, in its response, is seeking to misrepresent the views of the ORR, which are set out with admirable clarity in their letters of 24 September 2013 and 14 October 2013. The correct position would appear to be that:
- (a) ORR accepts that it is not reasonably practicable to divert the Killingholme Branch railway around the perimeter of the AMEP site. ABP has no reason to disagree with the ORR's conclusion;
  - (b) ORR accepts that the only reasonably practicable way to move **abnormal loads comprising exceptionally heavy plant and equipment** (emphasis added) is on the level (i.e. by a level crossing).
  - (c) ORR states their belief "*that if a solution is found that entails two new level crossings for abnormal loads... then this would be no bar to any future development of the Killingholme/Goxhill branch.*" Provided an operating protocol is adopted that gives rail priority over the movement of abnormal loads, then ABP has no reason to disagree with the ORR's conclusion.
  - (d) ORR policy is to avoid the creation of new level crossings for normal road traffic if it is possible to find a grade separated solution. In this case, ABP is strongly of the view that a grade separated solution exists in form of a series of road bridges across the site. To suggest otherwise – as Able have at various times – is nonsense.

- (e) As regards the phased approach to development, the ORR states that “*discussions with colleagues have revealed the vulnerability of this approach; it is hard to envisage the framework that would ensure that the necessary steps are taken in a timely way.*” Given Able UK’s overall approach to rail matters, ABP agrees with ORR on this point – indeed this is more compelling evidence as to why a solution that safeguards the Killingholme Railway line must be agreed before the commencement of construction of the AMEP.

### Supporting Information

#### *Western Diversion Option Study*

33. ABP accepts that the diversion of the Killingholme Railway around the AMEP is probably not practicable.

#### *The Alternative Rosper Road Loop*

34. The Rosper Road Loop (RRL) report, commissioned by Able, represents an attempt to seek a solution that avoids the need for the Killingholme Loop line and the consequential impact on the AMEP site. It seeks to do so by proposing the creation of a new single line, to be used by inbound (empty) freight trains, with outbound (full) freight trains departing using the existing railway that crosses the Port of Immingham.
35. To place this piece of rail infrastructure in its proper context, the current railway already handles, amongst other goods and materials, all coal and iron ore imports for Tata Scunthorpe as well as loading in excess of 10m tonnes of ESI coal and, more recently biomass, for consumption at regional power stations. It is, therefore, clearly a nationally-critical piece of infrastructure, vital for energy and steel production. Any proposals that may impact on its working must therefore be considered with due care.
36. ABP has only had around 3 weeks to consider the contents of this initial feasibility report, so these following observations should be viewed as preliminary at this stage:
- (a) The study ignores “*issues regarding land ownership and any costs associated therein*” (page 7). As such the proposed route appears to cross the buffer zone established around the nearby oil refinery, a factor that could well prove fatal to the proposal.
  - (b) It is not clear whether the projected costing of £38.4m includes the cost of the “*Indicative connections for CGEN and HIT*” that are shown as dashed red lines on drawing B90391-DRG-PWY0001 Rev P05. For the scheme to function in the way envisaged in the description of operations (section 4.7, page 18), these additional running lines, serving three rail loading facilities, would need to be provided. At best, this places a significant question-mark over the assertion that the RRL is cheaper than the Killingholme Loop.
  - (c) The Project Risk analysis provided as an annex to the RRL report describes scope confidence as “*low*” (which, according to the footnote means that “*scope may grow significantly*”) for all aspects of this proposal including signalling, track, telecoms, structures, civil engineering and utilities. Additionally price confidence is described as “*poor*” (meaning “*poor cost knowledge and/or price certainty*”) for the same aspects of the proposal. This places a further significant question-mark over the assertion that the RRL is cheaper than the Killingholme Loop.
  - (d) The RRL does not provide the same level of redundancy as the Killingholme Loop – it has no facility to hold trains that have arrived at the Port of Immingham “*out of sequence*”. This is a major drawback of the RRL proposal in comparison to the

Killingholme Loop which included such provision. It serves to undermine a number of the alleged key benefits of constructing the RRL.

- (e) The report recommends that the - "*development of the interface between the new railway and the HIT terminal should be investigated further with Network Rail and ABP.*" Some of the critical interface issues that need to be considered before any credence can be attributed to the RRL proposal include:
- (i) Empty trains will be facing the wrong direction for loading at Humber International Terminal (HIT) (i.e. trains needs to be drawn from east to west through the HIT loading area – this proposal envisages a west to east operation, which will most probably require substantial reconfiguration of the HIT facility).
  - (ii) It isn't at all clear how trains departing the C.Ro Ports facility will exit onto the main line. If they head up the RRL, they will be going against the flow of traffic along this single line route. Alternatively if the intention is to route such trains through the existing Port of Immingham lines, there is no apparent way of crossing the lines that are required to access HIT (shown as dashed red lines on drawing B90391-DRG-PWY0001 Rev P05).
  - (iii) It is unclear whether the siding connections to HIT are of sufficient length to accommodate full length trains without blocking the RRL.
  - (iv) The report concedes that no evaluation of signalling requirements has been undertaken – given the nature of the interface issues identified, this is likely to be highly complex given the nature of the proposal.

37. For these reasons, which are very much a summary of our client's current position, ABP is unable to endorse the RRL report as being a credible alternative to the Killingholme Loop. Indeed our client is of the view that the RRL proposals as presented are at best, premature – indeed we are not aware that there has been any attempt to consult the other potential rail users – or at worst, unworkable. On that basis, we must express serious concern on our client's behalf that the applicant has presented these proposals to the Secretary of State as its plausible response to the specific question raised in his letter of 28 August. It is one thing to divert the issues remaining in this respect to the perceived solution that may be offered by Network Change - it is quite another to attempt to divert those issues on the basis of the applicant's inadequate proposals for the RRL.
38. The Network Change process allied to the RRL, put forward as a means to resolve the critical issues arising in connection with rail connectivity, together and separately constitute a fundamental change to anything put before the ExA.

### **Concluding Comments**

39. We must say, therefore, on behalf of our client, that at this late stage in the NSIP process we find it quite extraordinary, that in the context of what was promulgated as a front-loaded, fast track process for major infrastructure projects, we are still receiving – 12 months after the close of the examination - new information from the applicant on matters that are critical to our client in operational terms as far as rail infrastructure is concerned, and just as important to our client in terms of the need to maintain an equitable level playing field, in terms of nature conservation and compensation.
40. In the light of the above we suggest that it would not only be wrong as a matter of judgment, but also unlawful for the Secretary of State to make the Order. The issues that have been raised are clearly a matter of public interest but they do also directly impact upon our client both in terms of practical port operations on the south bank of the Humber and in the interests of maintaining a level playing field.



41. We trust this letter will be read in the context of the representations already submitted on behalf of our client to the ExA as part of the NSIP process – and, of necessity, after the close of the examination by reason of the failure of the applicant to identify and address the fundamental problems inherent in its proposal.

Yours faithfully



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