

TWA Orders Unit
Department for Transport
Zone 1/18 Great Minster House
33 Horseferry Road
LONDON
SW1P 4DR

29th October 2013

Dear Sirs,

The Planning Act, 2008 (as amended): Application by Able Humber Ports Limited for an Order granting Development Consent for the Able Marine Energy Park at North Killingholme, North Lincs (PINS Ref. TR030001).

I act on behalf of Mr Stephen Kirkwood, (an 'Interested Party') in connection with the above, and attach with this letter submissions from Mr Kirkwood himself; from Mr Roger Morris, of Bright Angel Consultancy; and from myself, all in response to the submissions made by Able UK Ltd dated 15th October 2013.

These submissions are made in response to the letter from The Planning Inspectorate (PINS) dated 18th October 2013.

Please do not hesitate to contact me if you wish to clarify, or discuss, any of the matters raised in these submissions. My e-mail address is dave@plancoop.co.uk and my mobile telephone number is [REDACTED]

Yours sincerely,

David Hickling BSc DipTP MRTPI

The Planning Act, 2008 (as amended): Application by Able Humber Ports Limited for an Order granting Development Consent for the Able Marine Energy Park at North Killingholme, North Lincs (PINS Ref. TR030001).

Introduction

1. I act on behalf of Mr Stephen Kirkwood, (an 'Interested Party') in connection with the above, in response to the letter from The Planning Inspectorate (PINS) dated 18th October 2013, and subsequent submissions made by Able UK Ltd dated 15th October 2013.
2. My client is the tenant farmer of land at Cherry Cobb Sands required as part of the compensation package being promoted by Able UK Ltd. He has consistently opposed the proposed compensation arrangements on the grounds that they will not operate as claimed by the applicants and their advisers and, therefore, that the scheme will not maintain the integrity of the Humber Estuary SSSI/SPA site.
3. However, it should be noted that Mr Kirkwood is not opposed, in principle, to the proposals at the main site at North Killingholme.
4. Representations submitted both during the Examination period and, subsequently, by Mr Roger Morris of Bright Angel Coastal Consultancy Ltd, set out, and justify, my client's concerns in respect of the compensation package proposed by Able UK Ltd - and a further report from Mr Morris is submitted alongside this representation.
5. In addition, my client has made numerous personal representations, based upon his lifelong knowledge of Cherry Cobb Sands and local farming activities (including land drainage issues) in the area - and he has also made further representations at the present stage.
6. In light of these current / previous representations there is no necessity for me to reiterate these concerns.
7. Likewise, it is not necessary to go over points raised in my submissions dated 17th November, 2011, June 2012, September 2012 and 19th November 2012 - all of which remain valid as far as my client is concerned.

The current situation

8. In the current context, I remain seriously concerned that the processes adopted by the Examining Panel, the Planning Inspectorate, and the Secretary of State for Transport (SoSfT) have failed to comply with UK and European requirements - and share the views expressed by the RSPB in their letter to SoSfT dated 10th July 2013 and, (in so far as compulsory purchase proceedings are concerned), by ABP Ltd in the letter from Osborn Clark Ltd to SoSfT dated 16th May 2013.
9. As you are aware from my previous submissions, I also hold the view that the "Cherry Cobb Sands Wet Grassland Site" (CCSWGSS) should have

been incorporated into the DCO application - it being of sufficient importance to be a necessary requirement to allow the scheme to proceed - and that the AMEP application should have been withdrawn in the Summer of 2012 once it became apparent that the original compensation proposals were un-workable.

10. In my opinion, this should have been signalled to the applicants by the Examining Authority at (or immediately after) the Issue Specific Hearing held in September 2012, when the scheme was significantly amended “on the hoof” by the applicants in response to evidence submitted by Mr Morris.
11. I am also seriously concerned that the additional material provided by Able UK Ltd with regard to the CCSWGS not only fails to relate to the area of land covered by the Development Consent Order (DCO) - but indeed may also be sufficiently different from the scheme granted planning permission by the East Riding of Yorkshire Council as to require a further submission to them.
12. Subsequent events, including the wholly inadequate attempts at consultation with interested parties, and multiple extensions of time to allow for (yet more!) complex amendments, prove the veracity of this position.
13. The SoSfT, in his ‘minded to approve’ letter, requires “satisfactory evidence” from the applicants that reasonable additional measures can be implemented to reduce the risk to the integrity of the Humber Estuary SSSI as well as re-assurance from Natural England that such measures are no longer “substantial” (as it was described by them previously).
14. Mr Morris’s (and Mr Kirkwood;s) submissions at the present stage argue convincingly that Able UK has failed to produce ANY significant new evidence in support of the revised proposals, while (earlier this year at least) Natural England (NE) remained concerned about both the effectiveness and permanency of the compensation proposals (see NE letter to SoSfT dated 1st May 2013).
15. A recently reported change in attitude towards the risks involved by NE remains to be corroborated (see attached article from The Yorkshire Post dated 26th October 2013). If the newspaper report is correct, it begs the question why NE has (apparently) changed its mind when no new evidence has actually been submitted.
16. Indeed, Mr Morris’s evidence identifies a number of assumptions, assertions, and uncorroborated statements in the recent Able UK submission that cast serious doubts on its credibility.
17. Finally, I wish to place on record my client’s continuing concerns relating to land drainage (with regard to flooding and farming activities) and to

land contamination, both of which remain, even at this late stage, unresolved.

David K. Hickling BSc DipTP MRTPI
Hickling-Gray Associates
October 2013

Evaluation of Able UK response to SoS 'Minded to Approve' letter

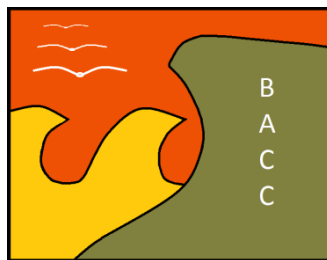
For

Mr Stephen Kirkwood

By

Roger Morris

Bright Angel Coastal Consultants Ltd



24 October 2013

Contract title: Evaluation of Able UK response to SoS
'Minded to Approve' letter

Client: Mr Stephen Kirkwood
D J Kirkwood & Son

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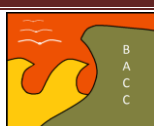
1. Background

- 1.1. On 28 August 2013 the Secretary of State for Transport advised Able UK that he was minded to approve proposals for the Able Marine Energy Park at North Killingholme, subject to resolution of remaining issues concerning Natura 2000 issues.
- 1.2. Able UK has responded to the DfT 'minded to approve' letter in a document dated October 2013. The following report considers the content and arguments presented by Able UK.

2. Able UK's response

- 2.1. The Able UK response to the DfT 'minded to approve' letter largely comprises an edited rehearsal of salient points from previous evidence and views expressed by Natural England and the RSPB.
- 2.2. The 'response' focuses on issues of precedent and makes comparisons with Immingham Outer Harbour and Bathside Bay in particular. In doing so, it assumes that the technical understanding that obtained at the time those agreements were made was as advanced as it is today. There are several important differences between then and now:
 - i. Between 8-10 years have elapsed since the decisions made for Immingham Outer Harbour and Bathside Bay. This has given the statutory agencies and NGOs sufficient time to evaluate the outcomes of those decisions. One port has been built; the other has not.
 - ii. In the case of Immingham Outer Harbour the decisions were taken at a point where the Black-tailed Godwit population was substantially smaller than it is today. The changes in population density could not have been foreseen, but had this been possible there cannot be any certainty that the same advice would have emerged from English Nature and the RSPB.
 - iii. Bathside Bay did not involve the loss of a site that was critical to a single population of birds within the SPA.
 - iv. Bathside Bay involves only an SPA and Ramsar site, whereas the Humber Estuary also has designation as an SAC.
 - v. Ten years ago there was greater confidence in the effectiveness of managed realignment as a tool to offset inter-tidal habitat loss, especially on the Stour and Orwell estuaries where the Trimley realignment still retains substantial areas of mudflat.
 - vi. There was a willingness within EN and the RSPB to take more risks because there was less focused on a particular species of bird. New evidence points to much greater risks (e.g. Morris 2013¹, Burton *et al.*, 2006²) and consequently it is possible that decisions might have been different today.

¹ Morris, R.K.A., 2013. Managed realignment as a tool for compensatory habitat creation - A re-appraisal. *Ocean & Coastal Management*, **73**: 82-91.



- vii. These decisions preceded EU guidance (2007³) that clearly emphasises the need for compensatory habitat to be functioning before damage occurs.
- 2.3. The argument that there is a precedent based on several previous port development cases cannot be sustained. Precedent can and does change, especially in the light of new evidence. In this case, there is compelling evidence that historic approaches to risk-taking may have been over-optimistic. This evidence means that there should be a re-appraisal of the levels of risk that the Secretary of State will take and the degree to which the statutory advisers assess risk as acceptable.
- 2.4. The report uses examples of Regulated Tidal Exchange and similar structures in the Tees estuary, on the Schelde in Belgium and salt pans at the Salinas Del Duque in Spain. There are several fundamental differences between these examples:
- i. The Tees Estuary carries a much lower sediment load than the Humber Estuary.
 - ii. The Lippenbroek site is so far up the tidal river that the environment is substantially fresh water.
 - iii. The Salinas Del Duque undergo a very different management process that undoubtedly provides feeding grounds for many birds, including Black-tailed Godwits, but the functional approach here does not involve the same ecological communities – they are saline or even hyper-saline lagoons.
- 2.5. It should be emphasised that Regulated Tidal Exchange has not previously been used as a compensation measure and it is appropriate for the advice of Natural England and others to raise this as a considerable risk. This risk is not diminished by the ‘evidence’ presented.
- 2.6. The main body of the report presents views countering those of Natural England and the RSPB. These arguments neither support nor deflect the argument of risk. They simply show that this proposal lies within a body of examples containing substantial variation in their objectives and apparent efficacy. As such, it is unlikely that there will be conclusive evidence to support or refute the belief that the proposed package of measures is adequate to offset the key impacts:
- i. Loss of a substantial section of muddy foreshore whose morphology is driven by a combination of tidal and wave energy.
 - ii. Loss of an established feeding/roosting/loafing area used by a significant proportion of the Black-tailed Godwits that visit the Humber Estuary and make an important contribution to both the assemblage and absolute numbers of migratory waterfowl.

² Burton, N.H.K., Rehfish, M.M. Clark, N.A. & Dodd, S.G., 2006. Impacts of sudden winter habitat loss on the body condition and survival of redshank *Tringa tetanus*. *Journal of Applied Ecology*, **43**(3): 464-473.

³ EEC, 2007. Clarification of the Concepts of Alternative Solutions, Imperative Reasons of Overriding Public Interest, Compensatory Measures, Overall Coherence, Opinion of the Commission



- iii. Loss of a substantial extent of inter-tidal habitat that contributes to the overall extent of habitat recognised as important in the context of designation as a Special Area of Conservation.
- 2.7. Natural England and the RSPB have maintained reservations about the likely efficacy of the proposed offsetting measures. We have also provided analysis that suggests that there is a substantial risk that they will not work.
- 2.8. The major issue concerning operation of the RTE concerns its propensity to accumulate sediment and consequently to cease to function as it has been intended. This is discussed in the latest report but there is little further refinement of the management process. Able UK state (para 5.6.9): *“Based on the results of trials and success of the implementation the sediment management plan will be reviewed every 24 months. The plans for water level management and sediment management will be reviewed at the same time.”*
- 2.9. This statement clearly acknowledges that there is uncertainty about the likely efficacy of the proposed measures. It also underscores the reason why there are grounds for concern about fulfilling the requirements of the Habitats Directive. The principle examples cited in the report concern sites where there is a much lower sediment load and of considerably smaller dimensions. The combination of these factors means that very little confidence can be placed in the efficacy of the measures, especially if they encounter technical difficulties that require refinement over a period of years. The displaced birds cannot wait for refinement to achieve the desired functional objectives as they need to feed rather more frequently.
- 2.10. The issue of risk does not, therefore, appear to have been resolved. We submit that the information presented by Able UK is not sufficient to allay concerns about conformity with the Habitats Directive.

3. Analysis

- 3.1. The Able UK case centres upon whether it is appropriate to change custom and practice i.e. the approach taken in the case of several other port developments. This approach may gain support from some observers but it overlooks the fundamental issue of science – it is a process of challenge and learning and can reject the proposed theses on the basis of new information.
- 3.2. History is littered with such changes in direction where contentious issues have only been resolved by the gradual accumulation of new evidence. For example, there have been several stages in the development of restrictions on the use of important wildlife sites for economic development (inter-alia):
- i. The National Parks and Access to the Countryside Act (1949) which established the concept of SSSI;



- ii. The Wildlife and Countryside Act (1981) with subsequent amendments to prevent damage to SSSI during the consultation phase;
 - iii. The Environmental Protection Act (1990)
 - iv. The Habitats Directive (1992) and Habitats Regulations (1994)
 - v. The Countryside and Rights of Way Act (2000)
 - vi. The Marine and Coastal Access Act (2009).
- 3.3. If the above example of changed legislation followed precedent, the pre-1981 situation would still obtain. The files of the Nature Conservancy Council were littered with examples of SSSI that were destroyed without any offsetting measures and for very questionable reasons. Changes in legislation were brought in because it was clear that without greater protection there would be unacceptable loss of wildlife assets. Even with this protection the diversity and abundance of wildlife is declining and there is an ongoing initiative to halt and reverse losses⁴. This strategy follows on from previous strategies that failed to meet the same target.
- 3.4. In the case of the North Killingholme foreshore, there has been an evolution in the science of conservation management as we have learned more about the ways in which the natural world responds to change and concern has grown about loss of biodiversity. When I took up the role of Conservation Officer (South Humberside) in 1994, these mudflats were excluded from SSSI and SPA designation. The reasons for exclusion were not recorded but seemed to revolve around a belief that narrow sections of mudflat were of limited importance for migratory waterfowl. There may also have been an element of socio-economic pressure too! Subsequent events have shown that this is an important section of mudflat, and current usage by Black-tailed Godwits reinforces this message; clearly justifying the designation both as SSSI, SPA and a Ramsar site (and refuting arguments presented by ABP at the time of the designation process at the turn of this Century).
- 3.5. Ten years ago, considerably more faith was placed in the ability of managed realignment to deliver compensatory inter-tidal habitat, and fewer cases of damage had occurred. Evidence from the Humber Estuary, which was at the forefront of compensatory habitat creation, is therefore fundamental to the learning process.
- 3.6. We now know that managed realignment is unlikely to resolve impacts of inter-tidal habitat loss in highly sediment-laden estuaries. A similar situation obtains from the Mühlenberger Loch case in Germany⁵. This means that the statutory agencies and NGOs cannot advise that established practice is consistent with the objectives set by the Habitats Directive. This would place the UK Government in a vulnerable position and would make it liable to challenge in Europe.

⁴ Biodiversity 2020: A strategy for England's wildlife and ecosystem services.

<https://www.gov.uk/government/publications/biodiversity-2020-a-strategy-for-england-s-wildlife-and-ecosystem-services>

⁵ REMEDE, 2008. D12: Compensation for Development of the Airbus Facility within the Mühlenberger Loch/Germany.



- 3.7. The examples of Regulated Tidal Exchange (RTE) explored in the Able UK submission provide evidence that useful wildlife habitat may be created by such engineering. There is, however, a significant difference between creating wildlife habitat and meeting the requirements of the Habitats Directive in relation to the maintenance of coherence of the Natura 2000 series.
- 3.8. In this case, RTE has not been demonstrated to form 'like for like' replacement of intertidal mudflats that form the Humber Estuary Special Area of Conservation. Moreover, the level of disagreement on its possible efficacy and sustainability gives strong grounds for doubt that the compensation mechanism will effectively resolve concern about the possible fate of internationally important Black-tailed Godwit populations that use the Humber Estuary in the autumn. It is difficult to see how the recent Able UK response actually takes this process forward to provide the necessary reassurance that the compensatory measures fulfil the UK's obligations in respect of the Habitats Directive.
- 3.9. Any risks taken by DfT and Defra will hinge upon Able UK's ability both in the immediate future and in the long-term to meet obligations in respect of maintaining the proposed Regulated Tidal Exchange in perpetuity. In this respect it is worth reflecting upon the case of Great Yarmouth Outer Harbour, whose consent also revolved upon a commitment to management measures to maintain long-term coastal processes.
- 3.10. In this latter case, the port was to be responsible for a sediment bypass scheme to make sure that longshore processes of sand transport were not interrupted. There is developing evidence that the port is having severe impacts on beach levels further along the coast. Despite the inclusion of a legal agreement to ensure sand supplies were not interrupted, concerns about diminishing beach levels are being contested by the port. This is despite the fact that interruption of sediment supplies was a critical concern at the time the development was consented and could (and was) have been anticipated when the consent was granted.
- 3.11. The debate therefore focuses upon the level of risk that the Secretary of State is willing to accept in making a decision in favour of Able UK. There are several possible avenues of progress after this point:
- i. Natural England and the NGOs concerns are allayed and the European Commission is advised that an adequate package of compensation measures has been secured and:
 - a. one or more bodies make representations to the European Commission that the measures are inadequate and that the UK Government has not secured adequate compensation measures; or
 - b. the project progresses without challenge and subsequent monitoring determines whether or not a detrimental impact upon the important Black-tailed Godwit population has resulted. At this point a negative impact would become the responsibility of the UK Government unless adequate financial provision is made to secure additional measures to rectify negative impacts.



- ii. Natural England and the NGOs concerns are not resolved and further development of compensatory measures is pursued.
- iii. Natural England and the NGOs concerns are not resolved and the SoS concludes in favour of Able UK. If so, it is possible that a third party will make representations to the European Commission using arguments developed in the course of this process.
- iv. Natural England and the NGOs concerns are not resolved and the SoS rules against Able UK.

3.12. It is noteworthy that several major port developments have been consented but have yet to be built or have only been partially built. This is despite compelling evidence at the time that there was sufficient demand to justify consent on imperative reasons of overriding public interest (IROPI). Decisions were made according to the evidence but might have been different in the light of more recent experience. Had subsequent economic events been foreseen, it would certainly have been difficult for English Nature and the RSPB to maintain the policy lines they took at the time.

3.13. The socio-economic case for AMEP has not been part of our submissions, but it is important to reflect that there is an alternative at Green Port Hull, and that this has been shown to have far lower impacts on the natural environment. This could form an important part of any challenge in Europe as it is clear that a case could be made to demonstrate the presence of adequate alternatives.

3.14. It should also be noted that if AMEP is built and its socio-economic projections fail to be met, there must be doubt about its propensity to meet obligations concerning management of the Regulated Tidal Exchange. In which case, responsibility for ensuring its maintenance would presumably transfer to the UK Government?

4. Summary

4.1. The evidence presented by Able UK adds nothing substantive in scientific terms. It simply emphasises that there different approaches have been taken in different cases. This approach is entirely consistent with the concept of addressing issues on a case-by-case basis. It is also consistent with the approach advocated in *Modern Ports* – the UK Ports Policy⁶ that was in place at the time consents issues at Bathside Bay and Immingham Outer Harbour were evaluated.

4.2. Assessment of the AMEP proposals follows a similar approach, but has been complicated because the North Killingholme foreshore has proved to of **exceptional** importance to Black-tailed Godwits. As such, a more rigorous approach to issues of compensation and timing is essential. This also greatly limits the potential for risk-taking by the statutory agencies, RSPB and ultimately Government.

⁶ Modern Ports – a UK policy

<http://webarchive.nationalarchives.gov.uk/tna/20110503182441/http://www.dft.gov.uk/pgr/shippingports/ports/modern/modernportsaukpolicy>



Dear Minister

I write with reference to Able UK's response to your decision in which you advised that you were minded to grant consent for Able Marine Energy Park. I would like to register my particular concern about the way in which this issue has been addressed and the feeling that it is little more than an undemocratic shambles. My view has formed because Able UK have been allowed to continually alter designs throughout the process. This means that rather than considering a firm proposal, I and many other affected parties have had to keep pace with an ever-changing environment in which submissions have been made without proper public scrutiny.

As you will be aware, the AMEP proposals involve measures that will have a considerable bearing on my business interests. Consequently I have made it my business to make sure that I have read the documents Able UK have produced. This information comprises a substantial body of information that is becoming ever more confused as new iterations of evidence supplement or supersede previous positions. In this respect, the Able UK response to your 'minded to' letter reinforces this experience. It is a process of obfuscation that makes it very difficult for any but the most resolute to maintain engagement. I remain resolute!

Able UK's response comprises a re-hash of previous information and as far as I can see it provides very little new data or real science to resolve the concerns raised by Natural England and the RSPB. The Able reply is virtually the same information as they have put forward before and which must be considered as such. Able UK quote from work Messrs Les Hatton and Andy Coates of ERM, the Applicant's ecological consultants. The two gentlemen's figures and assertions were strongly contested by the RSPB at the Grimsby hearing and the audience was clearly advised by Mr Hutton that the reason why Black-tailed Godwits would use the proposed compensation site was because 'they would have to'. I do not believe that this is one of the underpinning laws of nature! In reality, if the compensation site is inappropriate or inadequate they will not use it and will respond by seeking alternative habitat. If that is inadequate then they will die! This happened at Cardiff Bay, and there is no reason to suppose that any different situation will occur on the Humber Estuary.

I believe that any analysis of the Able UK response should take note of the advice of Natural England. For example, Natural England's statements quoted below require compelling evidence to meet their concerns:

- 'It is **highly unlikely** that this will be able to provide sufficient habitat for the number of birds displaced from Killingholme Marshes'.
- 'Even taking into account the possibility of adaptive management, at present it is clear that the level of risk in this case **is substantial**',...
- 'It is right to acknowledge that much work has been put into developing (albeit at a very late stage) interesting and apparently workable plans for mudflat habitat at Cherry Cobb Sands. The proposal is however novel, and the environment is challenging. It is possible that that the compensatory measures will succeed, however there is **a substantial risk** they will not.' [HEA 086, para 8]
- Plainly it is never possible to say that compensation will definitely work. There is always a level of risk and a possibility of failure. To some extent this can be addressed by monitoring and management. However, even taking into account the possibility of adaptive management, at present it is clear that the level of risk in this case **is substantial**'

- The RTE proposal is heavily engineered and relies greatly on operational management in order for the objectives to be met. Some quite major interventions are proposed, such as maintenance dredging. There needs to be more information on monitoring and the thresholds that will be applied before such management measures are engaged (see Royal Haskoning review). (Issue 6).

The only reply Able have managed to come up with is that they will produce 'a manual':

This Manual will be based upon trials of sluice operation, impoundment and flushing during the warping up phase.

There are no specific details. Have they evidence that any of these suggested measures will work in this particular area of the Humber which has extremely high sediment levels? What if these measures do not work?

I am not qualified to argue on many of the details of the pros and cons of the scheme but I have lived in the compensation area for 50 years and have some ideas of the sediment levels in this part of the Humber. Where is this sediment going, into the river? What effect will that have on Stone Creek and Keyingham drain? Has Able explained this situation of the new scheme being adopted, to the local drainage board? There is nothing in this reply the mentions that agreements made with the drainage boards were made before substantive changes to the scheme as agreed.

In addition, although I am not an ecologist I really cannot see how destroying a habitat necessary for such as the BTG's without providing an immediate alternative habitat would work. If the alternative habitat is not going to be functional for 5-6 years after the loss of habitat, where are these BTG going to go? And if they can go somewhere else why is compensatory habitat needed at huge cost in the first place?

On the basis of these observations, I do not see how these proposals can conform with the Habitat Regulations. I have read and re-read the relevant passages and it seems to me that if it can be argued this scheme conforms with the Habitats Regulations, then the Regulations are a waste of time.

I have not mentioned previous schemes etc except to say that they do not seem particularly relevant here as the circumstances are unique

In conclusion I would like to confirm we are not objecting to the AMEP development in general, but are specifically objecting to the proposed compensatory habitat. For whatever reason, Able UK chose the wrong site early on in the proceedings and appear to be unable to make the changes that might resolve the problems they face as a developer and you face as the competent authority.

Yours sincerely

Stephen Kirkwood