



Mr Norman Baker MP
Parliamentary Under Secretary of State for Transport
Department of Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR
Our reference BJK/0956072/O18456628.1/JDJ
Your reference

19 August 2013

Dear Sir

Proposed Able Marine Energy Park, Killingholme, North Lincolnshire (AMEP)

You will recall that we recently wrote to you with regard to the above on behalf of our client Associated British Ports, the owner and operator of the Ports of Grimsby and Immingham - our letter dated 9 August 2013.

We must apologise for writing again so soon after our last letter, but in that letter we did draw your attention to a number of our client's concerns, one of these being the fact that the AMEP project had been allowed to evolve to such an extent during the course of the examination that the environmental assessment of the project by the close of the examination and now before you had departed fundamentally and materially from that originally submitted with the application for a development consent order – and indeed, in the context of what presumably you still consider to be a "front-loaded" NSIP process, the assessment originally put out to public consultation prior to submission. We are sure we do not need to repeat the comments made in our earlier letter but in that letter, we did also point out that this process of evolution has continued even after the close of the examination. By that time, of course, none of the interested parties, nor indeed your appointed Panel, were any longer able to participate in the examination process. This is an exclusion which we would suggest runs entirely contrary to the objectives and indeed political aspirations of the Planning Act.

In our earlier letter we provided a number of examples illustrating what we consider to be a breach in the legal process and lack of transparency with which you have been faced during this particular NSIP process. Specifically in the context of this letter, we would point to an application submitted to East Riding of Yorkshire Council relating to the compensation package that the applicant is required to provide in order to secure the AMEP project's legal compliance with the Conservation of Habitats and Species Regulations 2010 and the Habitats Directive. As you will be aware, the planning authority has granted consent for that application. We must say that in our view it is highly questionable whether in law a planning authority is in fact empowered to determine an application for development which ostensibly contemplates the creation of an ecological conservation site designed to act as compensation under the Habitats Regulations for a project proposed beyond the boundaries of the planning authority. This is particularly so bearing in mind that this site is actually on the other side of the Humber Estuary from the NSIP project and had not been placed before the NSIP examination. As a consequence, it has not been possible for your Panel to satisfy itself during the examination as to the actual efficacy of the project proposed – an examination in which, incidentally, the East Riding

Council had declined to participate – despite being invited so to do. Our letter to the Council questioning its legal authority in this respect is on the record.

Our letter also drew your attention to the fact that, again after the close of the examination, the applicant had clearly been negotiating, entirely behind closed doors, an environmental/conservation agreement with Natural England. This agreement had not been made available to those parties which had declared an interest, and indeed given evidence on conservation issues, at the NSIP examination. Such an agreement, which goes to the legal sustainability of an NSIP project, is not something that can or should be negotiated behind closed doors. It is not a private contract between two parties – it is in law a compensation agreement proposed by an applicant whose development will in fact destroy a European designated conservation site and is, therefore, required under UK national legislation ie the Habitats Regulations. As such, it must in law be open to consideration by all parties interested in the AMEP project and tested as such. To proceed on the basis that such an agreement can be negotiated outside the NSIP examination process is legally unsustainable. This would be the position whether or not the compensation proposed is central to the project or designed to act effectively, as we suspect is the case for AMEP as "reserve" compensation, bearing in mind that the actual compensation proposed by the applicant and tested before the Panel was patently inadequate and could not perform.

Whilst our client does not hold itself out as an expert on environment and conservation matters, you will appreciate that over the years in the context of the many port developments which it has itself promoted, it is well-versed in the requirements and duties imposed by the national and European environmental legislative regime. In view of its long-standing experience in this area – and indeed the entirely reasonable need to monitor the approach taken to the AMEP project in the context of maintaining a level playing field – our client did in fact lead environmental and nature conservation evidence at the examination. This evidence encompassed both marine and terrestrial impact, supplementing the evidence given by bodies such as Natural England, the Environment Agency and RSPB.

It was with some considerable concern, therefore, that only a day or so after sending our earlier letter to you, our attention was drawn to the fact that East Riding of Yorkshire Council had posted on its webpage a series of documents relating to Able's proposals for an area of land known as Cherry Cobb Sands. This site is located on the north bank of the Humber and is being offered by the applicant as compensation under the Habitats Regulations and the Directive for the environmental impact that its proposals will have on the European designated mudflats (on the south bank of the Humber) over which it intends to construct its quay. These newly released papers – published in August 2013 – some 8 months after the close of the examination – relate, amongst other things, to -

- 1 Compliance with conditions concerning the management and provision of the compensation site such as management of flood flow routes – reference being made to a Flood Risk Assessment which the applicant admits was only written in February 2013, three months after the close of the examination;
- 2 Necessary mitigation proposals for traffic mitigation; and
- 3 To the surprise of a number of interested parties, a first sight of a Compensation and Ecological Management and Monitoring Plan, effectively a compensation agreement, which has seemingly been negotiated by the applicant and Natural England – in

private – and which carries the date “March 2013” – four months after the close of the examination. Our comments above refer.

In the light of the above, we really do fail to understand how, with such material information fundamental to the acceptability of the AMEP proposal being made available at such a late stage after the close of the examination – and indeed at a stage far too late for you or indeed the Panel to consider transparently - you can contemplate the determination of the DCO application by 28 August and still comply with the UK legislative process?

As we, and we believe others, have already indicated, even during the examination process voluminous new information was being provided by the applicant in a patent effort to shore up its defective environmental statement. The process conducted, however, afforded inadequate and by the close of the examination, no time to the interested parties to review and comment on that information.

With this latest example of what can only be seen as a total failure by the applicant to comply with the provisions of the Planning Act, which Government has always lauded as a transparent and front-loaded process - and we do query also whether Human Rights issues should not also be taken into account - we are bound to repeat our request that the applicant be required to publish a fully and properly compliant environmental assessment of its actual proposal. This should incorporate all of the new and additional information produced both during and after the close of the examination. It then follows that the examination should be reopened to enable that new information to be formally tested in law.

We look forward to hearing from you.

Yours faithfully



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