Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London
EC3A 7AR
United Kingdom
Telephone: +44 (0) 20 7876 5000
Facsimile: +44 (0) 20 7876 5111
DX: 160030 Lime Street 5
www.clydeco.com

brian.greenwood@clydeco.com
[redacted]

The Secretary of State for Transport
Able Marine Energy Park Team
The Planning Inspectorate
Temple Quay House
Temple Quay
Bristol
BS1 6PN

Our Ref	Your Ref	Date:
BG/10138581		8 December 2020

Dear Sir

Planning Act 2008: Application for a non-material change to the Able Marine Energy Park Development Consent Order 2014.
Response from Associated British Ports

1 We write on behalf of our client Associated British Ports, (ABP), in relation to the above. We are responding to your invitation to submit, should we so wish, any further comments following the submission by the applicant, Able Humber Ports Limited, of additional information designed to support its claim that the proposed change to the above DCO can be taken forward as a "non-material change".

2 We should say at the outset that we do not intend in this response simply to repeat the comments made in our two previous responses of 26 October 2018 and 17 May 2019. That said, we should also make very clear that nothing in the applicant's latest submission of 12 November 2020 has persuaded us that there is any need either to amend or withdraw any of the comments that lie before you in our earlier letters. Indeed we note that our views have been fully endorsed by the Secretary of State in what we interpret as being a "minded to" letter of 28 October 2020.

3 On that basis, therefore, please note that both our response of 26 October 2018 and 17 May 2019 remain before you, on the record, as submitted.

4 In responding to the applicant's latest submission, it is disappointing that the applicant, having clearly recognised that it would be unable to refute the concerns expressed in our previous two responses has had to adopt the strategy of referring to ABP's allegedly "*unsubstantiated assertions*" but has then failed to identify these so-called "*assertions"* rather than actually answering the points that we raised. The Secretary of State will no doubt draw his own conclusions from the applicant's lack of response.

5 Our client has made it very clear that it has no objection to the applicant's proposed development of the Able Marine Energy Park for the uses permitted by the DCO. In addition, ABP has made it clear that it has no wish nor intention to comment on the environmental consequences of the proposed change to the DCO, the impacts, the need to reassess and the HRA. Our client is content to leave such issues to the Secretary of State and any comments made by ABP in that respect in our earlier letters were, as careful consideration by the applicant would have revealed, directed to legal process – not environmental detail.

6 What the applicant has failed to understand, however, and which with respect, the Secretary of State clearly has understood, is that the applicant cannot simply argue that whilst in 2011 –

(a) The AMEP scheme was the scheme that had been taken through the PEIR, statutory consultation, environmental assessment and submission stages; that

(b) The scheme was that as detailed in the plans and so described in the draft DCO; and that

(c) The development site comprised an operational area, land to act as compensation under the Habitats Regulations and land to serve as mitigation and/or a buffer zone;

- and then in 2020, claim that the scheme, despite the fact that it had been tested by the ExA and the Secretary of State in the context of a broad range of representations from both stakeholders and interested third parties in 2011 – some seven years or so after the NSIP examination - simply ask all of those who participated in the NSIP process to forget what was said during the original application process. We do not understand how the removal of some 50 hectares of environmental mitigation (primarily ecological mitigation but also landscape mitigation) can simply be treated as a non-material change. We do not believe that this is how the Planning Act 2008 was designed to work.

7 Drawing an analogy – what would have been the position if an applicant had assessed a scheme in its Preliminary Environmental Information Report, undergone statutory pre-application consultation, and then at the application submission stage, moved 50 hectares of mitigation to another location somewhat considerable distance from the actual development site itself? One is bound to ask whether in such circumstances, the applicant would have been required to reconsult to ensure that all stakeholders and interested parties were provided with a genuine opportunity to comment on the actual scheme and for those comments then properly to be taken

into account. The recent PINS decision with regard to the withdrawal of the Lower Thames Crossing DCO (TRO100320) is perhaps a case in point?

8 Whilst we have read with interest the applicant's response of 12 November 2020, we would suggest that the applicant is still missing the point. If this application is allowed to proceed as a non-material change then such an approval would raise a serious – and we would suggest, worrying - precedent in terms of an incorrect application of the legal process as envisaged by the Planning Act 2008.

9 Our client's view has always been – and remains – that the actual quality of the proposed mitigation land is irrelevant to the case in point. It may well be that the proposed replacement land at Halton Marshes is of first-class quality. That is not, however, a matter upon which ABP would wish to comment as very clearly stated in our earlier letters. The difficulty facing the applicant is that by basing its arguments purely on the alleged quality of the proposed replacement land it has simply not addressed the principal points at issue.

10 The question that has to be addressed, and the question that we would suggest our client ABP has addressed, as clearly has the Secretary of State in the letter of 28 October, is that when the AMEP application was submitted in December 2011, that entire scheme was then considered, scrutinised and assessed by all stakeholders and interested parties, the ExA and the Secretary of State, on a holistic basis. It was one single project comprising a number of elements. Thus, for example, an interested local resident participating at that stage would have known that as far as the development's impact on adjacent property was concerned, an area of some 50 hectares of mitigation land would as a result of the DCO permanently lie between his land and the industrial operations proposed by the applicant. On that basis that party – and possibly others – may have been content with the proposal as submitted.

11 If the application now before the Secretary of State is approved – that holistic examination by the Examining Authority will have been for nothing. Indeed, in this context specific attention is drawn to the concluding comments of the Secretary of State at paragraphs 39 to 41 of the letter of 28 October 2020 with which we fully agree.

12 The Secretary of State has provided a comprehensive response to the applicant as to the likely impact of the application on the original ES and HRA. As noted above and in its earlier letters, ABP does not wish to comment on the detail of the consequences of the environmental changes now being proposed by the applicant, the need to reassess those impacts and the need to assess those consequences and impacts in the context of both the original environmental statement and the original HRA. The very fact that these concerns have been noted by the Secretary of State underlines the fact that the proposed change to the DCO cannot be taken forward as a non-material amendment.

13 We fully acknowledge the Secretary of State's comments at paragraph 51 of his letter of 28 October in relation to third parties. The fact remains, however, that by altering the boundary of the DCO - at what must be seen as a sensitive location bearing in

mind its proximity to residential development – the comfort and assurances received seven years ago by those living adjacent to the AMEP site would be rendered worthless if this application is approved.

14 That of itself would suggest that the impact of the proposed change needs to be reconsidered in terms of the AMEP development as originally submitted. Certainly, it is contradictory for the applicant in section 12 of its response to state that the effect of the removal of Mitigation A from the boundary of the DCO will - "*remove uncertainty in respect of [that land's] future use*" – when in the very next section the applicant states that it - "*does not rule out the possibility developing this land in the future."* Such obvious contradiction is unfortunate and undermines the applicant's arguments.

15 Indeed, it has now come to our attention that the applicant submitted to North Lincolnshire Council a "*Scoping Information Document – Able Marine Energy Park – SeAH Monopile Manufacturing Facility*" which was validated by the Council on 2 December and uploaded on to its weekly update report on 3 December.

16 The Scoping Document outlines proposals for the construction of a monopole manufacturing facility on Mitigation Area A. The timing of such a report is noteworthy – and suggests that it was under preparation at least at the same time that the applicant was seeking to assure the SoS - "*that no physical change to the environment will occur as a result of the NMC"* - (para. 3 of the applicant's response date 12 November). It is difficult to understand, however, how such a statement can be made in the light of the submission of this Scoping Document and it can, at best, only be interpreted as being an economical statement of the position.

17 Bearing in mind the Secretary of State's very clear comments in paragraph 42 to 48 of his letter 28 October regarding the HRA and the need for an in-combination assessment, our client cannot understand why no reference was made to this proposal in the applicant's response of 12 November.

18 ABP has noted the Secretary of State's view that if the applicant were to bring forward an application for commercial/industrial use for what is currently the Mitigation A land - should that land be removed from the DCO boundary - is not an issue that should influence the Secretary of State's decision. ABP would, however, query whether that view is, in the circumstances of this application, now entirely correct, in light of the above comments and additional information.

19 When the AMEP proposal was considered as a single holistic project, Mitigation Area A formed an integral part of that development. Representations were made by all parties at the time based on the DCO boundary as then drawn. Surely it is not unreasonable now to question how it can be argued in law that the removal – effectively the deletion - of what was perceived by everyone at the time as being a permanently protected area of some 50 hectares of green field buffer land should not of itself be viewed as a material change to the original DCO?

20 Add to this the submission of a Scoping Report that contemplates the construction of a monopile factory on the currently protected mitigation land, then the question

becomes even more pressing in light of the applicant's failure to mention its proposals in its latest response to the Secretary of State.

Conclusion

21 As we have noted, in responding to the Secretary of State's invitation to submit further representations, we have not simply repeated what is already before the Secretary of State in the context of our earlier submissions. Despite the applicant's very obvious attempt to divert attention from the principal thrust of our client's concerns, we would simply draw attention to paragraphs 1.8 to 2.20 of our letter of 26 October 2018, noting in particular the emphasis that our client has wished us to place on the fact that our - "*letter goes solely to the legality of the process".*

22 That remains the case today.

Yours faithfully

Brian Greenwood

Brian Greenwood
Partner
Clyde & Co LLP