

Mr Angus Walker
BDB Pitmans LLP
One Bartholomew Close
London
EC1A 7BL

Dir Line: +44 (0) [REDACTED]

Our Ref
BG/10138581

Your Ref

Date
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Dear Mr Walker

AMEP DCO Expansion Application

1 Introduction

- 1.1 As you are aware, we act for Associated British Ports (ABP), the owner and operator of the Port of Immingham.
- 1.2 In light of the problems you experienced in formally notifying my client of the consultation, my client is grateful for your client's agreement that the period for ABP to respond to the consultation can be extended to Friday 21 June 2024
- 1.3 In writing, I have also been asked by my client to acknowledge receipt of the notification of the consultation by the Humber Harbour Master. In so doing, for your assistance, I can also confirm on behalf of the Harbour Master that he will not be providing a separate response to the consultation. 65443
- 1.4 As far as ABP's response to the consultation is concerned, this effectively falls into a number of component parts. Taking each in turn -

2 Environmental impact

- 2.1 In terms of environmental impact, you have, of course, seen our client's response to AHPL's original consultation dated 18 September 2023. This was deliberately couched in terms not so much as a critique of your client's Environmental Review but more as a series of questions which were designed to assist your client by identifying a number of issues which we felt merited further consideration.
- 2.2 Having now had the opportunity to consider your client's additional consultation submission which comprises a "*Habitats Regulation Assessment Report*" in two Parts, Part 1 being "*Likely Significant Effect (LSE) Test*" and Part 2 being "*Information to Inform*"

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an *Appropriate Assessment*’, our client’s initial concerns as outlined as questions in our letter of 18th September do in some cases still appear to be unanswered, particularly in the context of Environmental Assessment, those questions that we raised in section 7 of our earlier response.

- 2.3 **Bird count data** - For example on the subject of **Core count data** and **Protected Species**, we do note that the draft *HRA Report and the Likely Significant Effect (LSE) Test* still rely heavily on out-of-date data, such as in Table 5 *BTO Low Tide Counts for the Killingholme Marshes Foreshore sector from 2011-2012* where it is noted at paragraph 7.30 that the age of that data is because “... (*.....no further BTO low tide surveys have been undertaken since 2012*)” and that it “*should be noted that these surveys did not cover the main mid-winter period, which may explain the lower number of some species in comparison with other data sets*”. This is similarly the case for Table 12 - “*BTO Low Tide Counts for the North Killingholme Haven Pits sector – 2011-12*” and there are, inevitably, other instances. That said we do acknowledge that some of the data has been updated and that as we suggested, Wetland Bird Survey data for 2020/2021 and 2021/2022 have been included.
- 2.4 Our client’s concern, however, is that if AHPL were to be submitting an application for the AMEP project today, Natural England and the Secretary of State would expect and require comprehensive up-to-date data. It surely follows that the same rules – which after all have been applied in relation to ABP’s recent Immingham Eastern Ro-Ro Terminal application – should also be met by AHPL in the context of the application to extend the AMEP DCO?
- 2.5 **Lack of Environmental Assessment** – In this context, in our letter of September 2023, we pointed out that while “*the Material Change 2 UES may have been suitable for the purposes it was intended to serve, it did not contemplate or assess a situation where the AMEP development would be completed several years beyond October 2042*” (para. 7.3 (d)).
- 2.6 We did query, therefore, whether a formal environmental assessment is required taking into account the environmental consequences of the extension if approved? The documentation that has been produced to support this latest consultation cannot, we would suggest, be viewed as a “*formal assessment*” and the concern that we expressed some nine months ago has if anything been underlined by the comment made by your client’s consultants in their Executive Summary to the effect that the - “*proposed time extension is to allow the development consented under the AMEP Material Change 2 application in July 2022 to be completed, or substantially commenced, within 17 years from the coming into force of the DCO.*” (Our emphasis).
- 2.7 Our question, which we raise for your client, the relevant regulators and the Secretary of State to consider, is whether it is in reality possible for an assessment as to “*whether the proposed Time Extension to the Project would have a likely significant effect with regard to the designated features of the international sites under consideration, or on any designated features supporting habitats and species*” (para. 1.2) to be answered when one is considering a project that was approved in 2014 but which may not be implemented until some indeterminate time possibly in 2031?
- 3 **New “plan or project”**
- 3.1 In section 4 and indeed in section 7 of our September 2023 Consultation Response we raised the question as to whether the application for an extension to the AMEP DCO constitutes in the context of regulation 63 of the Habitats Regulations a “*plan or project*”.

- 3.2 Your latest consultation now includes as Part 2 a document entitled - *“Information to Inform an Appropriate Assessment”* – prepared as part of the *HRA Report*.
- 3.3 We are pleased that the question that we raised in our September 2023 consultation response has been positively acknowledged by your client by the production of this Report but we are bound to question some of the assumptions made which are used to support the conclusion reached and which if anything simply underline the concerns that we expressed last September.
- 3.4 In section 12 of the *Information Report – “Summary and Conclusion”* – your clients’ environmental consultants accept at paragraphs 12.3 and 12.4 that having assessed the *“predicted effects of the Project Time Extension on the relevant SPA and SAC qualifying habitat and assemblage species in the context of the Habitats Regulations”* and against the SPA and SAC Conservation Objectives *“to determine whether there would be any adverse effect of the development on the ecological integrity of the Humber Estuary SPA/SAC/ Ramsar site”* it has had to be accepted that the AMEP Project, in conjunction with the Material Change 2 and the Time Extension application ***“would have an adverse effect on the ecological integrity of the SPA and of the SAC”***. (Our emphasis).
- 3.5 Paragraph 12.4 continues that the – *“residual effects of the DCO Time Extension alone, taking account of the mitigation, will have an adverse effect on the integrity of the Humber Estuary SAC, SPA and Ramsar site due to the reduction in the extent and distribution of qualifying interest habitats (estuarine habitats, intertidal mudflat and saltmarsh) and a deterioration in the quality of these habitats for qualifying bird species. In addition, there will be significant disturbance to these bird species, and their populations and distribution will be affected.”*
- 3.6 We would ask your client, and subject to your views, the Secretary of State and Natural England to consider the conclusions that are then drawn from the above, namely that:
- a) *“The DCO Time Extension impacts that could have an adverse effect on the integrity of the Humber Estuary SAC/Ramsar (and hence require compensation) are the same as those for the original DCO scheme and Material Change 2, and are as follows:*
 - *Permanent direct loss of 43.6 ha estuarine habitats (31.3 ha of intertidal mudflat and 10.4 ha of subtidal habitat, plus an additional loss of 1.9 ha of colonizing saltmarsh” (para. 12.6); and*
 - b) *“The DCO Time Extension impacts that could have an adverse effect on the integrity of the Humber Estuary SPA/Ramsar (and hence require compensation) are also the same as those for the original DCO scheme and the Material Change 2, and are as follows:*
 - *Adverse effect on internationally important populations of regularly occurring Annex 1 species, migratory species and the waterfowl assemblage, due to the reduction in extent and distribution of the habitat supporting birds.*
 - *The continued use of NKHP as a roost site by waders from KMFS cannot be confirmed, particularly black-tailed godwit, once the mudflats at KMFS are lost.*

- *Indirect functional habitat loss through disturbance to internationally important populations of regularly occurring Annex 1 species, migratory species and the waterfowl assemblage, due to the effective reduction in extent and distribution of the habitat supporting birds". (para. 12.7).*

- 3.7 Reviewing those conclusions, our client remains concerned, as it indicated in its September 2023 response, that considerable weight is being placed by your client's consultant team on the Material Change 2 application and the documentation produced to support that application as opposed to the comprehensive environmental assessment documentation which supported the original application for the AMEP DCO – but which was produced around 2010 when your client's original application was being formulated - some 14 years ago.
- 3.8 Whilst our client fully accepts that a degree of environmental impact updating was undertaken for the Material Change 2 application in 2021, that application was actually only for a minor reconfiguration of the quay to which incidentally, you will be aware, our client had no objection.
- 3.9 What is now being predicated by this consultation, is that the original DCO application in combination with the Material Change 2 and the latest consultation documentation are together sufficient to support an application for an extension to the period within which the project has to be commenced by a further 7 years – thereby extending the potential commencement of construction date to an indeterminate time in 2031 – in total, 17 years.
- 3.10 Our client's difficulty is that although the Consultation Reports produced to support this extension application concede that the local environment is changing and evolving in both character and form, all of the submitted Reports seem to be based on an underlying assumption that - despite the fact that as at today the area of the foraging mudflat assessed in 2010 for the original DCO application has been lost due to its conversion to saltmarsh, that the protected birds will have to relocate, and that the bird counts are out of date - as compensation was agreed in 2011 and the Material Change 2 approval led to a reduction in the size of the habitat that will be lost it, therefore, follows that the scheme is not that different from the scheme originally assessed in 2010. The conclusion drawn from this is that the assessment undertaken can be relied upon for an application that contemplates works not commencing for potentially another 7 years, i.e., to mid-2031.
- 3.11 Our client is not convinced that such a conclusion is supported by the logic of the situation as identified in the draft Appropriate Assessment. As it is accepted that the environment is changing, the saltmarsh is expanding, bird foraging grounds are being lost and waders are having to relocate, we fail to see how in 2024 a conclusion can be reached that the *“proposed Time Extension would have the same impacts as the Material Change 2, that compensation scheme can be expected to still provide the appropriate quantum of compensation.”*
- 3.12 Whilst our client does not object to the principal – and the user – of the AMEP development, it is bound to query whether the consultation documents as produced are sufficient to meet the tests contemplated by Regulation 63 of the Habitats Regulations. As the HRA Report itself concedes, in terms of the likely Significant Effect Test, the *“proposed time extension is to allow the development consented under the AMEP Material Change 2 application in July 2022 to be completed, or substantially commenced, with 17 years from the coming into force of the DCO”*.

- 3.13 We do not believe that the documentation produced to date is sufficient to support an assumption of no change in environmental impact from a DCO application submitted in 2011 for a development which your client accepts will have a likely significant effect if commenced in 2024.
- 3.14 In light of this, we are bound to repeat the question raised in our earlier consultation response to the effect that as the application in our view constitutes a new “plan or project” in terms of the Habitats Regulations, does it not follow that a formal Environmental Impact Assessment should accompany the application?
- 3.15 We would be grateful if you would confirm that this concern will be specifically drawn to the attention of the Secretary of State and Natural England, as required by regulation 63(3) of the Habitats Regulations.

4 **Imperative Reasons of Overriding Public Interest**

- 4.1 In our September 2023 letter, we highlighted our client’s concerns in the context of Business Need.
- 4.2 We summarised what we considered to be the position at paragraph 6.1 of our letter to the effect that your client has seemingly accepted that over the past 10 plus years –
- a) Sector expansion has not materialized.
 - b) Revenues required to invest in the quay have not been realised.
 - c) Manufacturers have not relocated to AMEP.
 - d) The timescales for the construction of the quay remain unknown, and
 - e) Full financial support has not been forthcoming.
- 4.3 Whilst one does not want to overuse the “level playing field” maxim, bearing in mind the tests that our client is currently quite properly having to satisfy in relation to its two DCO applications for the Immingham Eastern Ro-Ro Terminal and the Immingham Green Energy Terminal proposals, we do have considerable difficulty in understanding how AHPL’s application actually meets the IROPI test as provided by regulation 64 of the Habitats Regulations.
- 4.4 As you know, this test comprises a number of limbs, namely in brief:
- a) Are there any alternative solutions? If not –
 - b) Must the plan or project –
 - c) Be carried out for imperative reasons of overriding public interest – bearing in mind that where the site concerned “*hosts a priority natural habitat type or priority species*”, which is the case here, the “*reasons*” in the IROPI test must relate to human health, public safety, beneficial environmental consequences or for such reason as the competent authority believes to meet the test.
- 4.5 Whilst we accept that the IROPI test is referenced in the draft HRA Report, at paragraph 1.12, this understandably is only referenced in the context of projects affecting European sites.
- 4.6 We have seen no reference in the consultation supporting documentation demonstrating how the IROPI test is met in the context of there being an “*imperative need of overriding public interest*”. Indeed the Explanatory Note of August 2023, which we believe is the document that has been reproduced for this consultation, if anything

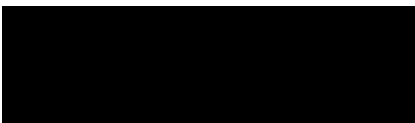
makes it very clear that there is no “*imperative need*” for the project – indeed, quite the contrary appears to be the case.

- 4.7 As your Explanatory Note dated August 2023 explains, the dilemma your client currently faces is that as AHPL does not, yet, have a potential tenant/operator for the AMEP development, it is as a consequence, unable to commit to the capital funding required to commence the construction of the AMEP development which will require significant investment from several as yet unidentified manufacturers of offshore wind components. Those manufacturers will, however, need firm orders before they will be prepared to invest in and commit to AMEP.
- 4.8 Our client notes AHPL’s argument that further Allocation Rounds will eventually lead to investment in AMEP and whilst not in any way wanting to contradict that belief, the fact remains that the AMEP DCO was approved in 2014 on the basis that there was an “*Imperative Overriding Need in the Public Interest*” for the development to proceed even though in so doing, it would destroy large tracts of designated nature conservation sites.
- 4.9 Ten years later the AMEP development has not commenced – apart from the undertaking of minimal works to ensure technical implementation. In the circumstances our client does question whether the extension application as now formulated can meet the basic test set down in the Habitats Regulations?

5 **Conclusion**

- 5.1 In conclusion, our client remains concerned that as the appropriate assessment and the LSE reports are not supported by comprehensive up-to-date data and as the extension application constitutes a “plan or project” under the provisions of the Habitats Regulations, the application should as a result be made the subject of a formal and comprehensive re-evaluation of impacts by way for a fresh environmental assessment. This would enable a formal consideration as to whether the proposal meets the IROPI tests as prescribed by the Habitats Regulations to be undertaken.
- 5.2 We would be grateful if you could confirm that these observations will all be drawn to the attention of the Secretary of State.

Yours sincerely



Brian Greenwood
Clyde & Co LLP