

EXPLANATORY MEMORANDUM TO
THE ABLE MARINE ENERGY PARK DEVELOPMENT CONSENT ORDER 2014

[No S.I. number]

1. This explanatory memorandum has been prepared by the Department for Transport (DfT) and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 The instrument is concerned with a proposal of Able Humber Ports Limited (“Able”) to develop a marine energy park on the south bank of the River Humber at Killingholme in North Lincolnshire, comprising a new quay, together with facilities for the manufacture, assembly and storage of marine energy components, primarily offshore wind turbines. Associated development will include dredging and land reclamation and an ecological compensation scheme comprising habitat creation on the opposite bank of the river (“the Project”).
 - 2.2 The purpose of the instrument is:
 - (a) to enable the Project to be constructed and operated in conformity with the Planning Act 2008 (“the 2008 Act”);
 - (b) to authorise the compulsory acquisition of land and rights over land in connection with the construction and operation of the Project;
 - (c) to make provision for various ancillary matters in connection with the Project.
 - 2.3 In deciding the application for the instrument, the Secretary of State considered that significant weight should be given to the strong local support for the Project because of its likely socio-economic potential and associated benefits. Able considers that the Project will deliver socio-economic benefits to the UK generally and the Humber Estuary sub-region in particular by enabling the growth of the emerging renewable energy sector and it is estimated by Able that around 4,100 direct new jobs (plus others across a wider supply chain) could be created as a result of the Project’s implementation. It will also have beneficial consequences for the environment by enabling Europe’s necessary transition to low carbon energy production.
 - 2.4 The Project is likely to likely to have significant effects on the Humber Estuary Special Area of Conservation, Special Protection Area and Ramsar site, including:
 - (a) the permanent direct loss of 13.5 hectares of estuarine habitat to the footprint of the development;
 - (b) the effects of dredging and disposal of dredged materials on estuarine habitats and inter-tidal mudflats;

- (c) the permanent direct loss of 31.5 hectares of inter-tidal mudflat at North Killingholme to the footprint of the development;
- (d) the permanent loss of 2 hectares of saltmarsh at Cherry Cobb Sands due to breach of the seawall for the compensation site;
- (e) indirect habitat changes on qualifying habitats (estuarine habitat, intertidal mudflat and saltmarsh);
- (f) the effects of underwater noise from piling on the feeding behaviour of grey seals and the migratory movements of river lamprey;
- (g) the effects on waterfowl of the permanent direct loss of estuarine and inter-tidal mudflats at North Killingholme and the functional loss of 11.6 hectares of mudflat habitat as a result of disturbance;
- (h) the disturbance effects on birds using North Killingholme Haven Pits from construction activities, and operation of the Project; and
- (i) the loss of terrestrial habitat within the site of the Project at North Killingholme which is used by birds from the Special Protection Area (predominantly curlew).

2.5 Able's compensation proposals in respect of these effects include –

- (a) a Managed Realignment and Regulated Tidal Exchange (“RTE”) scheme providing 101.5 hectares of inter-tidal area at Cherry Cobb Sands on the north bank of the Humber Estuary directly opposite the Project site; this would provide replacement, managed mudflat habitat that is sustainable in the long term and would provide a feeding area for wading birds to replace the ecological function that would be lost as a result of the AMEP development;
- (b) a 38.5 hectare compensatory habitat at Cherry Cobb Sands adjoining the RTE; this would comprise approximately 26 hectares of wet grassland, open water and two islands of approximately 0.4 hectares as roosting areas for black tailed godwit, plus a further roost in a water-filled scrape; and
- (c) a 38.8 hectare site in Able's ownership at East Halton Marshes on the south bank of the Humber Estuary which could be converted to wet grassland to compensate for any time lag between the loss of existing habitat and the establishment of compensatory habitat; this would not require planning permission to be developed.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This is the second development consent order (“DCO”) made under the 2008 Act to have been made subject to special parliamentary procedure.

4. Legislative Context

- 4.1 The construction and operation of the Project constitute a nationally significant infrastructure project, as defined in the 2008 Act. As such it needs to be granted development consent by means of a DCO made under Chapter 8 of Part 6 of the 2008 Act before it can proceed. The instrument is a DCO.
- 4.2 The grant of development consent means that planning permission and certain other forms of consent which would otherwise be required are not required (section 33 of the 2008 Act). A DCO can also authorise compulsory acquisition of land or rights over land and make provision for matters ancillary to the development for which consent is granted (see sections 120 and 122 of the 2008 Act).
- 4.3 Under the 2008 Act, a DCO is made by the Secretary of State following the completion of procedures set out in the Act and regulations made under it. Those procedures include an examination stage at which an Examining Authority (in this case a panel of three Examining Inspectors) considers the application for the DCO and representations made in relation to it by interested parties, and then makes a report to the Secretary of State.
- 4.4 The application for the DCO was submitted to the Infrastructure Planning Commission on 16th December 2011 under Part 5 of the 2008 Act. The Commission has since been abolished by the Localism Act 2011, and its functions transferred to the Secretary of State. The application was examined under Part 6 of the 2008 Act. The Secretary of State published his decision to grant development consent and make a DCO in respect of the Project on 18th December 2013 and made the instrument on 13th January 2014.
- 4.5 The instrument authorises compulsory acquisition of land and rights over land. Some of the land concerned is the property of Associated British Ports Limited (“ABP”), ABP in its capacity as conservancy authority for the River Humber, E.ON UK Plc, Centrica Plc, Anglian Water Services Limited and Network Rail Infrastructure Limited. Those bodies are statutory undertakers for the purposes of s. 128 of the 2008 Act, and since they made, and did not withdraw, representations about the Application, and the Application was not made by a statutory undertaker, the instrument is subject to special parliamentary procedure.
- 4.6 Section 24 of the Growth and Infrastructure Act 2013 repealed s.128 of the 2008 Act relating to special parliamentary procedure. However, by virtue of article 7(1) of the Growth and Infrastructure Act 2013 (Commencement No. 1 and Transitional and Saving Provisions) Order 2013 (S.I. 2013/1124), that repeal does not apply in relation to the instrument.

5. Territorial Extent and Application

- 5.1 The instrument is a local instrument which applies in relation to the area where the Project and related works specified in the instrument are to be located.

6. European Convention on Human Rights

6.1 Robert Goodwill, the Parliamentary Under Secretary of State for Transport, has made the following statement regarding Human Rights:

In my view the provisions of the Able Marine Energy Park Development Consent Order 2014 are compatible with the Convention rights.

7. Policy background

7.1 The policy underlying the system of DCOs established by the 2008 Act is to combine, in a single process of application, examination and granting of consent, provision for a number of aspects of nationally significant infrastructure projects that would otherwise require separate consents and procedures, notably development consent and compulsory purchase.

7.2 The policy background relating to the consenting of harbour facilities is set out in the National Policy Statement for Ports dated January 2012, available on the National Archives website at <http://snurl.com/28c30ht>.

7.3 The reasons for the Secretary of State's decision to grant development consent for the Project are set out in his "minded to approve" letter of 28 August 2013 and his decision letter of 18 December 2013. They are available on the Planning Inspectorate's National Infrastructure Planning website at <http://snurl.com/28c31bm> and <http://snurl.com/28c30xl> respectively.

8. Consultation outcome

8.1 As required by the 2008 Act, there was consultation on the Project before the Application was submitted.

8.2 In July and August 2010 Able carried out a period of informal (non-statutory) consultation with key stakeholders including the relevant local planning authorities. Nineteen responses were received. These were taken into account in the development of the Project and changes were made as a result of the responses received. Changes included the dropping of proposals to include a biomass plant and helipad, the dredging level was raised from -15m to -11m and the proposed quay length was shortened from 1600m to 1320m.

8.3 On 31 January 2011, the formal pre-application consultation commenced. This comprises three elements.

(a) First, there was direct consultation with specified organisations together with any landowners affected by the Project, under section 42 of the 2008 Act. Able also included in this process certain key stakeholders who are not prescribed as statutory consultees, whom it wished to engage in the consultation process. 49 responses were received and these resulted in further changes being made to the

Project. For instance, the quay size was further reduced by 80metres, 48.5 hectares of land on the south bank was set aside for environmental mitigation and additional temporary compensation land on the north bank was identified.

(b) Secondly, there was consultation with the local community in the vicinity of the proposed Project, under section 47 of the 2008 Act. Here, before preparing its statement setting out how it proposed to consult the people living in the vicinity of the land affected (the Statement of Community Consultation, or “SoCC”), Able consulted the relevant local planning authorities and provided them with a draft copy of the SoCC seeking their comments on what would be the best way to consult with the local community. In preparing the draft SoCC and the SoCC, Able took the responses received from the local authorities into account; as well as Department for Communities and Local Government guidance on pre-application consultation as required by the 2008 Act. The SoCC was then published in local newspapers circulating in the vicinity of the development. Able also communicated with local people using the following methods: exhibitions / drop-in sessions; leafleting residents, businesses and special interest groups within 2km of the site; making consultation documents and plans available for inspection; launching a bespoke website; providing a freephone number to enable feedback to be given orally; making documents available for purchase as well as being available for free download from Able’s website; offering face-to-face meetings with certain local authorities, MPs and parish councils.

(c) Thirdly, there was general public consultation on the Project, under section 48 of the 2008 Act. Here, in accordance with the 2008 Act, a newspaper notice was published in a number of publications including the Times, Lloyd’s List, local newspapers and Fishing News.

8.4 Able elected to run each of these three strands of consultation in parallel. The consultation began on 31 January 2011 and ended on 20 March 2011 (48 days).

8.5 Following the commencement of the consultation some additional landowner consultees were identified. These consultees were provided with the same consultation pack as the others but the end date of their consultation was adjusted to ensure that they had at least 28 days to respond. The final consultation expiry date for such additional consultees was 20 April 2011. A late consultation response was received from a local authority and was taken into account. While a number of respondents to the consultation were strongly against the Project, in purely numerical terms, more positive than negative responses were received.

8.6 ABP responded to the consultation. In broad terms, they stated that the Project’s scale was unrealistic and that the compensation site might not be feasible and should be a like-for-like replacement. Able considered the scale of the project necessary. In respect of the quantum and type of habitat to be compensated, Able disagreed with ABP’s conclusions on the basis of Able’s discussions with Natural England.

- 8.7 The Harbour Master Humber's response stated that the dredging strategy would need to show sufficient capacity at deposit sites and the relationship between new and existing dredged areas. No changes were made to the Project as a result of this response as the dredge disposal sites had been agreed with the Marine Management Organisation.
- 8.8 Network Rail's response included the following points: they were concerned that railway infrastructure should not be compromised; that drainage should be adequate; that performance at Immingham Docks should not be compromised; and that all buildings should be at least 2 metres from the railway boundary. As a result of these comments, protective provisions were negotiated for inclusion in the order.
- 8.9 The RSPB submitted a response mainly concentrating on the Habitats Regulations assessment conducted by Able and its treatment of terrestrial ecology and birds. As a result of these comments, Able decided to provide a large area of on-site mitigation and made amendments to its Environmental Statement to include further analysis of birds species and impacts upon them.
- 8.10 Further publicity and opportunities for interested parties to comment followed submission of the Application, as prescribed by the 2008 Act. A number of interested parties, including those mentioned in paragraphs 8.6 to 8.9 above, took advantage of opportunities both to comment in writing and to attend hearings held by the panel of Examining Inspectors on various aspects of the Project.
- 8.11 During the examination of the Project Natural England expressed the view that there was a "substantial risk" that Able's ecological compensation proposals would not work. Accordingly, in the Department's "minded to approve" letter of 28 August 2013, Able was invited to review those proposals and to advise whether additional measures could be adopted to reduce the level of risk. Interested parties were then given an opportunity to comment on the further information provided by Able in October 2013. In its response, Natural England considered that there had been some reduction in the risk since the examination, but that there remained a "residual risk" that the compensation proposals may not deliver the extent and quality of habitat required to replace that which would be lost to the development at Killingholme. In contrast, the RSPB remained of the view which it had expressed during the examination that there was a substantial risk that the compensation proposals would not work. In the decision letter of 18 December 2013, the Secretary of State concluded that the remaining risk that the compensatory measures might fail was acceptable.

9. Guidance

- 9.1 Not applicable.

10. Impact

- 10.1 Not applicable.

11. Regulating small business

11.1 Not applicable.

12. Monitoring & review

12.1 The 2008 Act makes provision for changes to be made to DCOs, and for them to be revoked on a case-by-case basis (see Schedule 6). However, it is not proposed that there should be any systematic review of individual DCOs, as opposed to a review of the efficacy of the 2008 Act regime generally. The Secretary of State for Communities and Local Government presented a Command Paper comprising a memorandum on post legislative scrutiny of the 2008 Act in October 2013, and then in December 2013 published a discussion document entitled “Reviewing the Nationally Significant Infrastructure Planning Regime”. The latter document seeks views on the working of the 2008 Act, with a view to publishing a final report in Spring 2014, which will contain an implementation plan. The two documents can be found on the Department’s webpages at <http://snurl.com/28c31pb> and <http://snurl.com/28c31rs> respectively.

13. Contact

Martin Woods at the Department for Transport.

Tel: 020 7944 2488 or email: martin.woods@dft.gsi.gov.uk