



The Planning Act 2008

The Able Marine Energy Park Order 201X

**Panel's Findings and Recommendations to
the Secretary of State**

Panel

Lead Member

Member

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Robert Upton

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Panel's findings and recommendations in respect of an application for a development Consent Order for port development including associated development that comprises a marine energy park in Killingholme, Lincolnshire.

Date: [24 February 2013]

File Reference TR030001

The Able Marine Energy Park Order [201X]

- The application, dated 16 December 2011, was made under Section 37 of the Planning Act 2008 (as amended) (PA2008).
- The applicant Able Humber Ports Ltd.
- The application was accepted for examination on 12 January 2012.
- The examination of the application began on 25 May 2012 and was completed on 24 November 2012.
- The development proposed is the Able Marine Energy Park comprising of a quay of solid construction on the south bank of the River Humber together with an ecological compensation scheme on the opposite bank. Associated development includes dredging and land reclamation, onshore facilities for the manufacture, assembly and storage of marine energy installation components. Ancillary matters include compulsory purchase of land, harbour regulation and the diversion of two footpaths

Summary of Recommendation:

The Examining Authority recommends that the Secretary of State should make the Order in the form attached.

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1.0 INTRODUCTION

EXAMINATION PROCESS

1.1 On 13 April 2012 the following were appointed to be the Examining Authority ('the Panel') for the examination of this application –

Robert Upton	Lead member of the Panel
Simon Gibbs	Member of the Panel
Peter Widd	Member of the Panel

1.2 This document sets out in accordance with section 74(2)(b)(i) of PA 2008 the Panel's findings and conclusions in respect of the application and its recommendation to the Secretary of State for Transport under section 74(2)(b)(ii) of Planning Act 2008 (PA2008).

2.0 MAIN FEATURES OF THE PROPOSAL

Nature of the proposal

- 2.1 Able Humber Ports Ltd (the applicant) propose to develop a marine energy park on the south bank of the Humber Estuary; if consented, the development will be known as Able Marine Energy Park.
- 2.2 The project would incorporate a new quay together with facilities for the manufacture of marine energy components, primarily offshore wind turbines. The proposed development at Killingholme in North Lincolnshire would lie partly on the south bank of the Humber Estuary, which is designated under European law as an important site for nature conservation and forms part of the *Natura 2000* network of sites.
- 2.3 The site is approximately 1 km downstream of the Humber Sea Terminal (HST), a ferry port owned and operated by C.RO, and immediately upstream of the South Killingholme Oil Jetty, which is upstream of the Port of Immingham.
- 2.4 The site, excluding the area of ecological mitigation, covers approximately 268 ha, of which approximately 122.4 ha is covered by existing consent for port-related storage, 100.3 ha is existing arable land that will be developed for industrial use and 45 ha is reclaimed land from the estuary to provide a new quay.
- 2.5 A large proportion of the site's land area currently comprises hard-standing for the storage of imported cars, particularly in the north-east and east of the site and in the west of the site. A railway line (the Killingholme Branch) passes through the site and gives access to the Humber Sea Terminal. There is a redundant sewage works to the south-west of the site.
- 2.6 North Killingholme Marsh pits to the north of the site, which are now flooded, are classified as a Site of Special Scientific Interest (SSSI) and are also part of the *Natura 2000* network of sites. These pits are significant as a roost for the black tailed godwits (BTG). A raised embankment along the eastern boundary supports a flood defence wall, which protects the site from tidal flooding.
- 2.7 The harbour would comprise a quay of 1 279 m frontage, of which 1 200 m would be solid quay and 79 m would be a specialist berth, to be formed by the reclamation of inter-tidal and sub-tidal land within the Humber Estuary.

2.8 Associated development would include -

- dredging and land reclamation;
- the provision of onshore facilities for the manufacture, assembly and storage of wind turbines and related items;
- a passing loop on the North Killingholme Branch line
- works to Rosper Road, the A160 and the A180;
- surface water disposal arrangements;
- provision of ecological mitigation;
- realigning the flood defence at Cherry Cobb Sands; and
- creation of new mudflat and estuarine habitat.

2.9 Ancillary matters would include¹ –

- the diversion of two footpaths that run along the shore of the Humber, one on the south bank and one on the north bank;
- the interference with rights of navigation;
- the creation of a harbour authority;
- a deemed marine licence under section 66 of the Marine and Coastal Access Act 2009;
- the modification of public and local legislation; and
- the compulsory acquisition of land and rights in land and powers of temporary occupation of land to allow the applicant to carry out and operate the above development.

2.10 It is accepted by the applicant that the quay constructed as part of the proposed Nationally Significant Infrastructure Project (NSIP) would have a significant effect on the inter-tidal habitat on the North Killingholme foreshore. There would be a direct and permanent loss of 31.5ha of mudflat and 13.5ha of estuarine habitat on the southern side of the Humber Estuary as a result of the development.

2.11 In order to address this loss of protected habitat, the applicant has proposed a package of compensatory measures. The submitted application included a proposal for a 105ha compensation site at

¹ Originally these included 'the conversion of a railway into a private siding' but this has now been dropped

Cherry Cobb Sands, on land previously reclaimed from the estuary for agriculture. This is on the north side of the Humber directly across the estuary from the application site and within the East Riding of Yorkshire.

European sites and Habitats Regulations

- 2.12 The inter-tidal and sub-tidal portions of the Humber that would be directly and irreversibly affected by the proposed NSIP are protected by three European nature conservation designations, namely the Humber Estuary Special Area of Conservation (SAC), the Humber Estuary Special Protection Area (SPA) and the Humber Estuary Ramsar site. These are referred to collectively as the European sites.
- 2.13 The Humber Estuary was first designated by the UK Government as a Ramsar site under the Convention on Wetlands of International Importance on 28 July 1994. The Humber Estuary was first classified by the UK Government as an SPA under the provisions of the Birds Directive on 28 July 1994. The Ramsar site and the SPA were extended on 31 August 2007. The Ramsar site covers 37,987 ha and the SPA 37,630 ha. The SAC was designated by the Secretary of State for Environment, Food and Rural Affairs under the Habitats Directive on 10 December 2009 and covers 36,657 ha.
- 2.14 The three European designations all relate to the Humber estuary taken as a whole and for the most part overlap. By virtue of these designations the estuary is part of *Natura 2000*, an ecological network of protected areas, set up to ensure the survival of Europe's most valuable species and habitats.
- 2.15 A succinct summary of the most important characteristics of the Humber Estuary, prepared in the context of its designation as a Ramsar site is as follows -

‘An estuary with a maximum 7.4 m tidal range exposing vast mud and sand flats at low tide. Vegetation includes extensive reedbeds, areas of mature and developing saltmarsh, backed by grazing marsh or low sand dunes with marshy slacks and brackish pools. The area regularly supports internationally important numbers of various species of breeding and wintering waterbirds. Many passage birds, notably internationally important populations of ringed plover, *Charadrius hiaticula*, and sanderling *Caldris alba* stage in the area. The site supports Britain's most southeasterly breeding colony of gray seal *Halichoerus grypus*.²’

- 2.16 The Humber Estuary is a Site of Special Scientific Interest (SSSI), covering 37,000 ha. In addition, a 21.6 ha group of coastal lagoons

² . [http://www.ramsar.org/cda/en/ramsar-documents-list-annotated-ramsar-15868/main/ramsar/1-31-218%5E15868_4000_0_]

formed by gravel extraction which lie adjacent to the north of the main application site, bounded to the north-west by Haven Road and to the north east by the seawall, is separately designated as the North Killingholme Haven Pits SSSI.

- 2.17 At North Killingholme the seawall is the formal boundary for the European site designations with the important exception that immediately to the west of the application site, the boundary of the SPA and the Ramsar site extends inland to take in the North Killingholme Pits SSSI.

Modification of compensatory measures

- 2.18 Over the course of the examination period the applicant has amended the compensation proposals with the intention of delivering a package that would be more effective in replacing the ecological function lost at North Killingholme foreshore and protecting the *Natura 2000* network. The applicant's final submission [ADD055] makes the point that the application was not premature or unsound, in that the original compensation proposals prepared by its consultants during the pre-application phase were supported at the time of the application by Natural England (NE).

- 2.19 The Panel's view is that the applicant was correct to consider alternative compensation measures when the original proposal proved deficient, clearly designed to secure the same outcome in terms of replacing lost ecological function.

- 2.20 Further detail about development of the compensation proposals during the examination is set out in section 10. In summary, the compensation scheme now offered by the applicant is as described in EX 28.3 [REP056 zip file] and comprises the following elements –

a) A managed Regulated Tidal Exchange (RTE) scheme at Cherry Cobb Sands on the north bank of the Humber Estuary, to provide replacement mudflat habitat that is sustainable in the long term and that provides a feeding area for wading birds. The proposals are set out in Part 3 of EX 28.3 [REP056] which describes the general features of RTE schemes and how the design put forward would compensate for the habitat lost as a result of the proposed development and provide a foraging resource for SPA birds. This land is within the red line boundary of the application.

b) Over-compensation by way of a wet grassland site totalling 38.5 ha at also at Cherry Cobb Sands, adjoining the RTE, to include 25ha of wet grassland and a wet roost site for BTG within 5ha of open water. The proposals are described in Part 4 of EX 28.3 [in REP056] and the location shown on Drawing ref: NABL 101/11205/1. As the mudflat on the adjoining site will take time to reach optimal functionality, this element has been offered by the applicant as over-compensation. This site falls outside the project boundaries, and the proposal is the

subject of a separate planning application to the East Riding of Yorkshire Council (EYRC).’

(c) The applicant has also offered what is termed ‘further over-compensation’ by way of 38.82ha of wet grassland owned by the applicant at East Halton Marshes. The land involved is shown on Drawing No AMEP-08132 on page 24 of Part 8 of EX 28.3 within REP056. The applicant considers that the ecological function lost at North Killingholme foreshore will be compensated for adequately without this site, but as it is able to offer the additional compensation in this way, it does so to the extent that the Secretary of State may consider it necessary. Planning permission would not be required.

- 2.21 The managed RTE site is to be provided on a permanent basis and the over-compensation and further over-compensation is offered for so long as it is required. When the RTE is fully functional and supporting at least the desired number of birds in the long term, the applicant envisages that the grassland could be returned to agricultural use.
- 2.22 An Environmental Management and Monitoring Plan (EMMP) is to be put in place to ensure delivery of the compensation package in accordance with the conservation objectives. This remained in draft form at the close of the examination with the latest draft covering the Cherry Cobb Sands RTE site and the associated wet grassland area produced on 23 November [PDC038].

3.0 LEGAL CONTEXT

Planning Act 2008

3.1 The Panel has had regard first and foremost to the requirements of the PA2008, as amended. In relation to s.104³ the Panel has had regard to the matters in subsection (2) as noted below –

- There is a National Policy Statement for Ports in force, and the Panel's views on its significance for this application are set out in section 4
- There is not a marine plan for this area, but a draft may appear during the Secretary of State's consideration – see section 4
- Two Local Impact Reports were submitted and are considered in section 5 below

3.2 In relation to subsection (5) the question whether deciding the application in accordance with the National Policy Statement would

³ **s.104 Decisions in cases where national policy statement has effect**

(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.

(2) In deciding the application the Secretary of State must have regard to—

(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),

(aa) the appropriate marine policy documents (if any), determined in accordance with section 59 of the Marine and Coastal Access Act 2009;

(b) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),

(c) any matters prescribed in relation to development of the description to which the application relates, and

(d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.

(3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.

(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.

(6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

(7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.

(8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

lead to the United Kingdom being in breach of its international obligations under the Habitats Directive is considered in section 10 below.

Infrastructure Planning (Environmental Impact Assessment) Regulations

- 3.3 The application is also subject to the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009, as amended by the Infrastructure Planning (Environmental Impact assessment) (Amendment) Regulations 2012, and in particular Regulation 3⁴, which requires the Secretary of State to take the environmental information into account before taking a decision.

European Sites and Application of the Habitat Regulations

- 3.4 The Habitats Directive (92/43/EEC) has been transposed into UK law by the Conservation of Habitats and Species Regulations 2010 (as amended) (the Habitat Regulations). Regulation 61(1) of the Habitat Regulations requires that, before deciding to give consent, permission or other authorisation for, a plan or project which is likely to have a significant effect on a European site and is not directly connected with, or necessary to the management of that site, a competent authority must make an appropriate assessment of the implications for that site in view of the site's conservation objectives.
- 3.5 In paragraph 3.2.9 of Chapter 3 of the Environmental Statement [APP058], the applicant accepts that the proposed development is a plan or project within the terms of the Habitat Regulations, that it would be likely to have a significant effect on the Humber Estuary *Natura 2000* network and that an appropriate assessment should therefore be carried out.
- 3.6 The Conservation of Habitats and Species Regulations 2010 (the Habitats Regulations) are engaged because this case involves the Humber Estuary Special Area of Conservation (SAC) and the Humber Estuary Special Protection Area (SPA) which, as European sites, are subject to the protection required by Article 6(2) of the Habitats Directive. Of particular relevance to this case is Article 6(4) of the Directive which provides for derogation.

⁴ **3.— Prohibition on granting consent without consideration of environmental information**

(1) This regulation applies to—

(a) every application for an order granting development consent for EIA development received by the Secretary of State ; and

(b) every subsequent application for EIA development received by a relevant authority on or after 1st March 2010.

(2) Where this regulation applies, the Secretary of State or relevant authority (as the case may be) must not (in the case of the Secretary of State) make an order granting development consent or (in the case of the relevant authority) grant subsequent consent unless it has first taken the environmental information into consideration, and it must state in its decision that it has done so.

3.7 In determining these applications, the Secretary of State will be acting as competent authority for the purposes of regulations 61, 62 and 66 of the Habitats Regulations.

3.8 The question of possible conflict with international obligations thus arises in relation to the Habitats Directive.

Secretary of State's powers to make a DCO

3.9 The Panel was aware of the need to consider whether changes to the compensation measures meant that the application had changed to the point where it was a different application and whether the Secretary of State would have power therefore under s114 of PA2008 to make a DCO having regard to the development consent applied for.

3.10 The Secretary of State will be aware of the letter dated 28 November 2011 from Bob Neill MP, then Parliamentary Under-Secretary of State for Planning (Appendix J) and the view expressed by the government during the passage of the Localism Act that s.114(1) places the responsibility for making a Development Consent Order on the decision-maker, and does not limit the terms in which it can be made. In exercising this power the Secretary of State may wish to take into account the following views of the Panel -

- The changes to the compensation measures do not constitute extensive modifications to the application. The authorised development⁵ for which development consent is sought has not changed from the authorised development for which application was made.
- The main compensation site at Cherry Cobb Sands remains the same. The changes proposed are changes within that site, re-designed to be more sure of the desired effect of creating a more effective habitat for BTG. The scheme still requires a breach of the sea-wall, so the principal impact is the same, and the marine environment will be monitored and managed under the Marine Environmental Management and Monitoring Plan (MEMMP). The changes in visual impact are minor.
- The change of temporary wet-grassland from Old Little Humber Farm to a new site adjacent to Cherry Cobb Sands is the subject of a separate application to EYRC under the Town and Country Planning Acts, and does not form part of the application for development consent

3.11 The Secretary of State will also wish to note that the revised compensation measures were the subject of non statutory consultation and publicity by the applicant [ADD046 to ADD054] and the Panel ensured a fair procedure was adopted within the framework

⁵ See Work No 1 in Schedule 1 of the DCO

of statutory procedures under PA2008⁶ to deal with the modifications⁷. Anyone affected by the revised compensation measures has had an opportunity therefore to have their views heard and taken into account by the Panel in making their recommendations.

Other legislative provisions

- 3.12 The Panel has also had regard to the provisions of the Natural Environment and Rural Communities (NERC) Act 2006 and the United Nations Environment Programme Convention on Biological Diversity 1992, as required by Regulation 7 of the Infrastructure Planning (Decisions) Regulations 2010, and in particular Articles 6, 7, 8 and 9, in our consideration of the likely impacts of the proposed development and appropriate objectives and mechanisms for mitigation and compensation.

⁶ See PRC006 and PRC007

⁷ See also section 12 detailing the approach to the introduction of supplementary environmental information

4.0 POLICY CONTEXT

National Policy Statement for Ports

4.1 The National Policy Statement for Ports (NPSP) was designated on 26 January 2012 and is the primary source of policy relating to this application.

4.2 Section 1.2.5 of the NPSP states that –

‘The IPC must decide an application for ports infrastructure in accordance with this NPS unless it is satisfied that to do so would:

- lead to the UK being in breach of its international obligations;
- be in breach of any statutory duty that applies to the IPC;
- be unlawful;
- result in adverse impacts of the development outweighing its benefits;
- be contrary to regulations about how the decisions are to be taken.’

4.3 Since the passage of the Localism Act 2012 the role of the Infrastructure Planning Commission (IPC) as decision-maker has been abolished and that function in respect of the NPSP is now exercised by the Secretary of State for Transport.

4.4 The compliance of the application with the requirements of the NPSP is discussed in section 7

Other National Policy Statements

4.5 The applicant has also placed reliance on the policy set out in EN-1, the Overarching Energy NPS, and EN-3, the Renewable Energy Infrastructure NPS. The policy in these documents has been cited as relevant to the benefits to be delivered by the proposal, and to Imperative Reasons of Overriding Public Interest (IROPI) case made in relation to the application of the Habitats Directive and the Birds Directive, and is discussed in section 10.

4.6 There is currently no National Networks NPS. The announcement in the Autumn Statement 2012 that the government is to accelerate the spending planned for the A160/A180 improvements came at the end of the examination period. The Highways Agency confirmed during the examination that whether the A160/180 improvements went ahead had no implications for the application. [REPO27]

- 4.7 No issues relating to the application of the National Policy Planning Framework have been raised in relation to this examination.

Regional Strategy(RS)

- 4.8 The site for the proposed development lies within the Yorkshire and Humber Region and is covered by the *Yorkshire and Humber Plan Regional Strategy to 2026*, May 2008. Section 2 of this states that -

‘Further development of the Humber Ports should be realised within the context of the Regional Strategy’s objective of maintaining the integrity of internationally important biodiversity sites such as the Humber Estuary cSAC, SPA and Ramsar site.’

- 4.9 The Panel was aware during the examination of the government’s stated intention to abolish all Regional Strategies. The process for the Yorkshire and Humber Region had reached the stage of commencing the necessary Strategic Environmental Assessment prior to a formal decision on abolition. The Panel learned after the close of the examination that an Order for revocation has been laid before Parliament under the negative resolution procedure to take effect on 22 February.

- 4.10 The objectives stated in the RS are in broad terms replicated and taken forward in the plans prepared by the local authority and the new Local Enterprise Partnership (LEP). In these circumstances the revocation has no effect on the policy context for this application.

Local Plans

- 4.11 The proposed main development lies in the administrative district of North Lincolnshire Council (NLC), a unitary authority, and close to the neighbouring North East Lincolnshire Council (NELC).

- 4.12 The compensation site lies within the administrative district of the East Riding of Yorkshire Council (ERYC), also a unitary authority.

North Lincolnshire Local Plan

- 4.13 The North Lincolnshire Local Plan, which was adopted in May 2003, allocates a gross area of 740.7 hectares of land for estuary-related B1, B2 and B8 industrial land uses on the South Humber Bank between South Killingholme Haven and East Halton Skitter. This land is allocated under policies IN1-1 and IN4 and IN5.

- 4.14 Policy IN4 defines estuary-related industrial land uses, and includes the application site. There are other policies that have links to the South Humber Bank employment site in terms of nature conservation and landscape (in the Landscape chapter). These policies have been saved and run concurrently with the Core Strategy. In the view of

NLC, the current proposal complies with these policies (REP017, para 4.3.3).

North Lincolnshire Council's Core Strategy

- 4.15 NLC's Core Strategy was adopted in 2011. Policy CS12 identifies the South Humber Bank as a strategic employment site and states its role and function to be to –

'...maintain, increase and enhance the role of Immingham Port as part of the busiest port complex in the UK, by extending port related development northwards from Immingham Port to East Halton Skitter in harmony with the environmental and ecological assets of the Humber Estuary. This will include safeguarding the site frontage to the deep water channel of the River Humber for the development of new port facilities and the development of new pipe routes needing access to the frontage. The deep water channel offers the opportunity of developing a new port along the River Humber frontage between Immingham Port and the Humber Sea Terminal. The role of the South Humber Ports should be strengthened by providing an increased number of jobs particularly giving employment opportunities for North Lincolnshire and North East Lincolnshire residents.'

East Riding of Yorkshire Council's Holderness District Wide Local Plan

- 4.16 The Local Plan was adopted in 1999 and policies from it have been saved. Policy Env5 of this plan relates to proposals in the Holderness coastal zone and Policy Env11 to the estuarine coastal area. Policies R13 and R15 relate to public rights of way. Policies are referred to within Chapter 27 of the Environmental Statement (ES) [APP085] and in the ERYC Local Impact Report (LIR). [REP019]

Objectives for SAC & SPA

- 4.17 Draft objectives derived in May 2012 for the Humber SAC and SPA are set out in Annex B (pages 153 and 155) of Natural England's written representations [WRR025]. These are set out in broad high level terms such as avoiding deterioration of qualifying features. NE has recognised that broadly defined objectives do not of themselves provide what is needed for the assessment of 'plans or projects' under Article 6(3) of the Habitats Directive. At the close of the Examination, there was no more detailed development available to the Panel as formal objectives for the SAC or the SPA.
- 4.18 Nonetheless, on the strength of the evidence provided before and during the examination by the applicant, NE, Environment Agency (EA), Marine Management Organisation (MMO) and Royal Society for the Protection of Birds (RSPB), the Panel considers that enough

material has been gathered and tested for the requisite assessment of the project.

Drafting of East Inshore Marine Plan

- 4.19 The draft plan for the East Inshore Marine Area is scheduled to be published for public consultation during the period January-March 2013.⁸ Thus the plan will not be ready in its final form before this report is presented to the Secretary of State.
- 4.20 If it is published in draft form while the Secretary of State is considering his decision it would, however, become a potentially important and relevant consideration.
- 4.21 A report was commissioned by the MMO in July 2011 entitled 'The East Marine Plan Area: maximising the socio-economic benefits of marine planning'⁹ to inform the preparation of the Plan.
- 4.22 The Panel notes in paras 4.27 and 4.31 of this report that –

'The Able Marine Energy Park in North Killingholme is a project of National Significance, in that it is one of the relatively few sites of the necessary scale in the UK to allow both the construction of wind turbines and their assembly before they are transported out to sites in the North Sea. ...

...Given the national strategic importance of the project, and the regional and local social and economic benefits, the proactive support of the MMO for the Marine Energy Park is sought.'

- 4.23 The Panel infer from this that the draft Plan is also likely to be supportive or at least is unlikely to oppose the proposed development.

Humber Flood Risk Management Strategy 2008

- 4.24 This sets out the EA's strategy for managing the risk of flooding from the Humber Estuary as the climate changes and sea levels rise. At paragraph 36.2.8 of Chapter 36 of the ES [APP091] it is stated that –

'The Cherry Cobb Sands site is identified as a 'Planned habitat creation site' where realignment of estuary defences is planned after 2030.'

⁸ (www.marinemanagement.org.uk)

⁹ www.tynconsult.com

5.0 LOCAL IMPACT REPORTS

5.1 LIRs were submitted by NLC (REP017) and EYRC (REP018).

5.2 In the circumstances of this case, and given the importance attached to LIR in s.104 of PA2008¹⁰, the Panel convened a Specific Issue Hearing (PRC012) on 22 October 2012 to ensure adequate examination of the issues.

North Lincolnshire Council

5.3 The LIR submitted by NLC covers the topics of Site and Project Description, Site History: Planning Approvals from 1998, Development Plan Policy and Relevant Evidence, Landscape and Visual Impacts, Local Transport Patterns and Issues, Designated Sites and Footpaths, Historic (Built) Environment, Socio-Economic Impact, Noise, Light, Air Quality and Land Contamination, Flood Risk, Drainage, Water Supply and Water Quality, Biodiversity and Ecology, Waste, Health, Planning Obligations, Consideration of the Provision and Requirements of the Draft Order and Security and Police Issues. It is a comprehensive document which the Panel considers to show a good understanding of the proposal and to be well-evidenced.

5.4 The implications of this document are discussed below in the section on the significance of the proposal, section 11.

5.5 It should be noted that in paragraph 4.4.2 of the LIR the Council refers to the Killingholme Loop in the following terms –

‘... it is not essential for the Killingholme Rail Loop to be in place for the AMEP proposal to be constructed. North Lincolnshire Council will continue to support this scheme in negotiation with South Humber Bank industrial users and Network Rail (NR).’

5.6 By the time of the Specific Issue Hearing on the LIR the Council had changed its position on the Killingholme Loop.

East Riding of Yorkshire Council

5.7 ERYC (REP018 and REP019) raised the following as key issues that they wished the examination to address –

- the effectiveness of the compensatory habitat for BTG;
- the need for two new public rights of way; one along the base of the new embankment (as proposed in the application) and one along the top with a limitation which would allow this route to be

¹⁰ (2) In deciding the application the Secretary of State must have regard to—
(b) any local impact report (within the meaning given by section 60(3)) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),

closed as necessary for part of the year to protect wetland birds at sensitive times;

- to keep open the 460 metre section of the existing footpath running along the flood embankment south-easterly from the proposed breach as it provides a walk to a point of interest;
- the scheme not taking account of Natural England's preference for routes to follow higher ground offering fine views over estuaries, the sea and surrounding wetland landscape but exclude access to wildlife areas to prevent disturbance to wetland birds;
- a full archaeological survey;
- a report on the impact of the proposal on the adjoining farmland;
- a report on the effect of the proposal on the Humber Cockle Beds.

5.8 The Panel considers that all these points have been addressed in the examination. The matters relating to BTG are set out in the sections dealing with the Habitats Regulations Assessment; the footpaths are addressed under the section on rights of way; the potential impacts on adjacent farmland are mainly drainage concerns, and together with the archaeology and fisheries are covered by the Compensation Environmental Monitoring and Management Plan, the Marine Environmental Monitoring and Management Plan and Requirements 13, 15 and 41 *et seq* of the draft Development Consent Order (DCO).

5.9 In the main report ERYC stated that it considered that Cherry Cobb Sands was a suitable compensation (para 4.3.5) site, but –

‘The concentrations of BTGs in the Humber estuary are quite localised, with many areas of apparently suitable mudflat habitat not being utilised by the birds. Therefore there is a considerable degree of uncertainty as to whether the new habitat created will support a significant population of Black tailed godwits. (4.3.7)’

5.10 ERYC also expressed doubts about the viability of Old Little Humber Farm (4.3.11), the original site proposed for temporary wet grassland, which proved to be prescient.

5.11 Noting the significant employment prospects that the scheme would bring, and the regenerative effect on the Humber Sub-Region, and stating its support for the principle of renewable energy, ERYC concluded that subject to its concerns being addressed it offered no objection to the scheme.

5.12 Regrettably ERYC did not attend the Specific Issue hearing on the Local Impact Reports.

North East Lincolnshire Council

5.13 North East Lincolnshire Council (NELC) did not submit a LIR but did make a Relevant Representation (RRP046) and took part in the Open Floor Hearing on 6 September 2012 in Immingham.

5.14 In its Relevant Representation (RRP046) NELC state –

‘In terms of economic development in the area there is strong support for this development in principle given that it would strengthen the areas offer in terms of renewable off shore energy production. The development has the potential to create a significant number of jobs for North East Lincolnshire residents. It would also create opportunities for new and existing businesses involved in the supply chain. Any wind turbine manufacturing facilities developed in North Lincolnshire would positively support the growth of the operations and maintenance sector developing at Grimsby Port. The application would help to regenerate the local and wider area.’

5.15 NELC’s main concerns related to highways and possible air quality issues, which it wished to see addressed through appropriate travel plans.

Local Enterprise Partnership

5.16 The Humber LEP produced its strategy *A Plan for the Humber 2012 – 2017* in October 2012, [ADD081] and the draft was the basis of the presentation by the Chair of the LEP at the Open Floor Hearing in Immingham on 06 September 2012. (HEA025).

5.17 The Panel notes that a key component of the strategy is the identification of ‘A new economic opportunity’. The strategy states that the Humber has ‘a once in a generation opportunity’ to for the creation of a super cluster of new industry on both banks of the Estuary in an emerging sector, renewable energy. [ADD081, page 8] This theme was expanded by other participants at the Open Floor hearing [HEA025].

5.18 Its implications are discussed below in the section dealing with the significance of the proposal (section 11).

6.0 INITIAL ASSESSMENT OF PRINCIPAL ISSUES

- 6.1 In accordance with s.88 of PA2008, the Panel made an initial assessment of principal issues. This was sent to all Interested and Affected Parties on 13 April 2012, and was part of the agenda for the Preliminary Meeting held on 24 April 2012.
- 6.2 The principal issues that the Panel discerned at the outset of the examination were as follows.
1. The capacity of the proposed port in relation to the threshold set out in Planning Act 2008.
 2. The extent to which the proposed port might have significant adverse navigation or other marine impacts on other operators in the Humber estuary, and possible mitigation requirements.
 3. The scope and scale of the principal and associated development constituting the proposal, and the extent of the land proposed for compulsory acquisition.
 4. The design process that has been followed, and the extent to which the proposed development is shown to be sustainable and fit-for-purpose.
 5. The extent of the likely impacts of the proposed development and compensation sites on the European (SAC, SPA and Ramsar) and other sites.
 6. The basis for the assessment of the proposed compensation site requirements, the basis on which the specific sites have been identified, the adequacy and appropriateness of those sites and the consequential impacts of their use for this purpose.
 7. The impacts of the proposed development on land traffic and the adequacy of the proposed mitigation.
 8. The impacts of the proposed development on the assets and operations of NR.
 9. The relationship of the proposed port to the emerging requirements of the Marine Management Organisation's East Inshore Marine Plan.
 10. The adequacy and efficacy of the draft Development Consent Order and the draft Marine Licence.
- 6.3 The Panel received several requests during the Preliminary Meeting for additions to be made to the list of Principal Issues. These covered flood risk management, the impact of piling noise on migratory

fisheries, 'soundness' and the possible impacts on both Killingholme Power Station and the Centrica site.

- 6.4 The Panel did not see a need to revise or expand the Principal Issues. The Panel clarified in the meeting its view that 'marine issues' was a broad heading which covers navigation, hydrology and other possible effects. There was no apparent reason why any of the points covered by these requests should not properly be raised by the interested parties or affected persons as part of their written representations or in response to questions that the Panel has already decided to ask.
- 6.5 The selection of these issues informed the Panel's first round of written questions and the decisions as to which topics might require Specific Issue hearings. (PRC004)
- 6.6 The following sections of the report deal with the matters that have emerged as the key issues in the examination, which are therefore relevant to the Secretary of State's final decision.

7.0 COMPLIANCE WITH THE NATIONAL POLICY STATEMENT

- 7.1 The Panel considers that several of the statements in NPSP are particularly relevant to this application, and have given particular weight to them in assessing it.
- 7.2 First, the role of the proposed development in relation to energy policy –

'Energy supplies

3.1.5 Ports have a vital role in the import and export of energy supplies, including oil, liquefied natural gas and biomass, in the construction and servicing of offshore energy installations and in supporting terminals for oil and gas pipelines. Port handling needs for energy can be expected to change as the mix of our energy supplies changes and particularly as renewables play an increasingly important part as an energy source. Ensuring security of energy supplies through our ports will be an important consideration, and ports will need to be responsive both to changes in different types of energy supplies needed (and to the need for facilities to support the development and maintenance of offshore renewable sites) ...'

- 7.3 The Panel notes that this project is predicated on the contribution that it would make to the development of renewable energy in the form of offshore wind.
- 7.4 Second, the socio-economic context –

'Wider economic benefits

3.1.7 Ports continue to play an important part in local and regional economies, further supporting our national prosperity. In addition to some 70,000 people estimated in 2010⁹ to be working on port related activities or on the port estate, indirect employment (supplying goods and services to companies engaged in port activity) and induced employment (associated with expenditure resulting from those who derive incomes from ports) ranged from 18,000 to 96,000. More recent studies have produced higher estimates.¹⁰ By bringing together groups of related businesses within and around the estate, ports also create a cluster effect, which supports economic growth by encouraging innovation and the creation and development of new business opportunities. And new investment, embodying latest technology and meeting current needs, will tend to increase the overall sector productivity.'

7.5 The Panel notes that a main objective of this proposal is to create a new cluster of offshore energy businesses in and around the development.

7.6 In relation to the specific objective of supporting the offshore wind industry, in which this country is a leader, NPSP states –

‘3.4.10 Since the 2006–07 forecasts, it has become evident that demand for port capacity to service manufacture, operation and maintenance of offshore windfarms will be substantial, especially in the short term in support of the 'Round 3' offshore developments. To some extent, capacity provided for by container terminal consents may help to contribute, on an interim basis, to meeting this demand. Because of the Government's renewables targets and in light of the policies set out in the Renewable Energy NPS (EN-3), there is a strong public interest in enabling ports to service these developments. Benefits from such developments may include social and economic advantages from attracting business to the UK that would otherwise locate abroad, as well as avoiding transport by road of abnormal loads.’

7.7 The Panel notes that this application is clearly directed towards that objective.

7.8 NPSP is also very clear as to the presumption that the decision-maker should adopt -

‘3.5.2 Given the level and urgency of need for infrastructure of the types covered as set out above, the [decision maker] should start with a presumption in favour of granting consent to applications for ports development. That presumption applies unless any more specific and relevant policies set out in this or another NPS clearly indicate that consent should be refused. The presumption is also subject to the provisions of the PA2008.’

7.9 NPSP sets thresholds for the qualification of port proposals as Nationally Significant Infrastructure Projects (NSIPs). Compliance with these thresholds was a matter raised in the examination, and is considered below.

8.0 OTHER NATIONAL POLICY STATEMENT MATTERS

Climate change

- 8.1 Section 4.12 of NPSP deals with climate change mitigation; section 4.13 deals with climate change adaptation.
- 8.2 The Panel asked three first round questions relating to the minimisation of emissions and fuel efficiency, use of renewable energy and whether the latest UK climate change projections had been used in both the design and the Environmental Statement, and applied over the estimated life-span (100 years) of the project.
- 8.3 The applicant's responses are at sections 6, 7 and 8 of REP024. On the strength of these answers, taken with the other evidence in the Environmental Statement, the Panel considers that the application meets the requirements of NPS in this respect.

Security

- 8.4 Section 4.17 of NPSP deals with security considerations.
- 8.5 No evidence was brought before the Panel suggesting that the application had any implications for national defence.
- 8.6 In respect of security arrangements for the new facility the applicant confirms that it has consulted with the Transport Security Compliance Division of the Department of Transport on their requirements and is confident that he will be able to fully comply with the International Ship and Port Facility Security Code (ISPS). [REP 024, Q 29]
- 8.7 The Panel see no reason to conclude that the facility would not be able to comply with the ISPS Code, and consider that this should be sufficient for the purposes of NPSP.

Design

- 8.8 Section 4.10 of NPSP requires an applicant to have regard to the principles of good design, and paragraph 4.10.4 sets out specific requirements¹¹.
- 8.9 The Panel sought to test this through our first round questions. We asked the applicant how the design process was conducted and how the proposed design had evolved.

¹¹ Applicants should be able to demonstrate in their application documents how the design process was conducted and how the proposed design evolved. Where a number of different designs were considered, applicants should set out the reasons why the favoured choice has been selected. In considering applications, the decision-maker should take into account the ultimate purpose of the infrastructure and bear in mind the operational, safety and security requirements which the design has to satisfy. (Ports NPS, 4.10.4)

- 8.10 The applicant has given an extensive response to this question (REP024, para 42 *et seq*). The applicant's own summary of the process (para 42.13) is that the design evolved through –
- Liaison with potential end-users to understand their requirements.
 - Surveys and investigations to fully understand development constraints.
 - Liaison with regulators, the public and the local planning authority.
 - Liaison with local businesses.
 - The Environmental Impact Assessment (EIA) process.
- 8.11 The Panel consider that the applicant's response demonstrates a thorough and logical approach that is appropriate and necessary for a project of this complexity.
- 8.12 The Panel wished to be clear as to the extent to which the drawings in the application represent a fully evolved final design.
- 8.13 The applicant responded (REP024, para 43.1 *et seq*) that the design of the quay itself is settled in terms of its overall size and structural form. The Indicative Masterplan presents the applicants best understanding of the requirements of the emerging offshore wind industry and provides the essential features in terms of access, building envelope, plot size, building services, lighting, security and quay lay down. The applicant explained that this is based on extensive discussions with the industry, most of which are covered by commercial confidentiality agreements.
- 8.14 The Panel asked how the chosen design took into account functionality (including fitness for purpose and sustainability) and aesthetics.
- 8.15 The applicant responded to this in detail. The applicant argues that port development must, first and foremost, be functional. Annex 4.4, together with the main text of the ES, explains the need for the design to -
- 'permit the transport around the entire site of large, heavy components, and thus the site must be essentially level;
 - provide large areas for component storage, hence the size of the associated development;
 - provide heavy duty quays suitable for the operation of mobile cranes, hence the piled relieving slab alongside the quay;
 - provide berths of sufficient depth and width to enable use by existing and proposed installation vessels, hence the deep berthing pocket;

- provide adequate lighting to enable 24/7 operation, hence the high mast lighting;
- provide connectivity across the railway, hence the need to take the railway line out of the network.’ (REPO24, para 42.14)

- 8.16 The Panel notes that the first and last of these became significant issues during the course of the examination, and as such are discussed in the section relating to the proposed compulsory acquisition of the northern section of the Killingholme Branch.
- 8.17 The applicant’s response on sustainability is set out in Table 42.1 of REPO24, using the current National Planning Policy Framework tests.
- 8.18 The applicant notes that Commission Architecture and the Built Environment (CABE) was approached during the design stage but was unable to provide detailed comments.
- 8.19 The Panel consider that the applicant has demonstrated a robust approach to sustainable development, in the context of a port and manufacturing facility. Requirement 3B of the draft DCO as developed requires the local planning authority to approve the details of the layout, scale and external appearance where these are not already specified in the project drawings.
- 8.20 This also answers the Panel’s question 43(c) as to what safeguards within the DCO would be appropriate to ensure that final detailed design remains compatible and consistent with the details of the scheme as submitted for approval and specifically, what safeguards would ensure that the final detailed design could not have any new or greater impact than assessed through the Habitats Regulation Assessment (HRA) and the Environmental Statement (ES).
- 8.21 The Panel consider that the approach that the applicant has taken and the measures proposed meet the requirements of NPSP on this point fully.

Impacts on housing, education and health

- 8.22 NPSP states in section 4.3.4 that –
- ‘... where a port development is likely to lead to a substantial net increase in employment (of 5,000 or more) which would require inward migration to the area, the effect on demand for local public services (such as affordable housing, education and healthcare) should be assessed.’
- 8.23 The evidence from NLC was that their expectation was that, taking direct and secondary employment implications together, there might be a net increase of the order of 10,000 jobs. To test the effect on

local services, the Panel asked in its second round Question 66 how the Local Development Framework or emerging Local Plan and NHS North Lincolnshire's strategy for the area take account of the potential demand for affordable housing, education and healthcare.

- 8.24 NLC (REP050) states that their Adopted Local Development Framework (LDF) Core Strategy Development Plan Document (DPD) has a significant evidence base which has been used to create a 'spatial strategy' for the area. This includes an economic development and housing strategy that seeks to position North Lincolnshire to the deliver its 'global gateway' strategic objectives.
- 8.25 The overall housing requirement for the Core Strategy factors in the economic growth potential of the South Humber Bank strategic employment site, and that alongside the strategic policies of the Core Strategy, a robust evidence base has been created to assess the impact this increase in employment and inward migration would have on existing and new critical infrastructure (including that for affordable housing, education and healthcare) in line with section 4 of the NPSP.
- 8.26 NLC also state that the affordable housing policy in the Core Strategy was set using a joint Strategic Housing Market Assessment (SHMA) carried out with NELC in 2008 and a rural housing survey from 2009. These joint studies support a joint strategic approach to meeting the increased housing demand and a joint spatial planning approach. The SHMA evidence along with an Affordable Housing Financial Viability Assessment calculated the potential demand for affordable housing across the area against the Core Strategy overall housing requirement and spatial strategy to ensure that it was genuinely viable and sustainable. NLC's policy is to ensure that adequate affordable housing is available to meet the new housing demands arising from the South Humber Bank employment opportunities.
- 8.27 NLC further states that it has produced an Infrastructure Delivery Plan (IDP). Drawing on the spatial strategy, the IDP calculates the level of new provision required for education and healthcare infrastructure in liaison with NHS North Lincolnshire and the Local Education Authority. These needs are included in an infrastructure delivery schedule (an appendix to the Core Strategy) which sets out infrastructure needs and cost, how it will be funded, the lead delivery organisations and contingency measures.
- 8.28 NHS North Lincolnshire confirm [REP049] that, on the assumption that many of the new jobs will be taken by people already resident in the area, and that their homes will be spread across the area, they are satisfied that the health needs of any influx or population to the area meeting the above assumptions would be met from within current services.

- 8.29 The Panel is satisfied that the likely education, health and housing impacts of the proposed development have been assessed adequately and are unlikely to cause any significant problems.

Biodiversity

- 8.30 Issues relating to biodiversity, protection of habitats and species [NPS 5.1.1 to 5.1.16] are covered in the examination of mitigation and compensation proposals in section 10 below.

Dredging

- 8.31 Matters relating to dredging [NPS 5.1.22 to 5.1.25] are covered in Chapter 8 (main site) and Chapter 32 (compensation site) of the Environmental Statement [APP063 and APP087 respectively].
- 8.32 These issues were also the subject of extensive supplementary environmental information provide by the applicant in June 2012, most specifically EX8.5, EX8.6, EX8.7, EX8.8, EX8.12, EX8.13, EX10.4, EX10.6 and EX11.4. [all ADD041].
- 8.33 Issues relating to dredging arising in the examination are discussed in section 13
- 8.34 Dredging is to be controlled by the Deemed Marine Licence in Schedule 8 of the draft Development Consent Order.
- 8.35 The Panel is satisfied that the issues relating to dredging have been assessed fully and tested adequately, and that the requirements of the NPSP are met.

Flood Risk

- 8.36 Flood risk and drainage for the main site are assessed in Chapter 13 of the Environmental Statement [APP068] and in the Flood Risk Assessment (FRA) [APP149], and for the compensation site [NPS 5.2] are addressed in Chapter 36 of the ES [APP091] and in the FRA [APP149]. This was based on the original compensation proposals.
- 8.37 Specific flood risk issues were identified by the EA in its Written Representation [WRR016], which states –

‘Although the risks to and from the development of the Marine Energy Park site have been assessed, this was undertaken on an early version of the quay design. We therefore require an update to this work, based on the final quay design, to ensure the findings are still valid. From the work provided so far, we can advise that the proposal will impact on overland flood flows, increasing the depth of flooding, to properties along Manby Road and Marsh Lane ...’

- 8.38 We also require further assurance that a satisfactory surface water management scheme will be implemented.
- 8.39 All works within 9m of our sea defences require our consent under the Environment Agency Anglian Region Land Drainage and Sea Defence Byelaws 1987. We will therefore require protective provisions/legal agreements to ensure our interests are protected.
- 8.40 In its comments on the Written Representations [REP008] the applicant confirms that the additional information has been provided by the applicant as EX13.2 in ADD042.
- 8.41 There is an agreed Requirement 11 in Schedule 11 of the draft DCO requiring a surface water drainage strategy to be approved by the local planning authority after consultation with EA and others.
- 8.42 The outstanding issue at the close of the examination was the lack of signed legal agreements on flood protection for the main development site and the compensation site at Cherry Cobb Sands. This is discussed in section 10.
- 8.43 Subject to the points made there, the Panel consider that flood risk has been addressed satisfactorily.

Coastal change

- 8.44 Implications for coastal change [NPSP 5.3] are assessed for the main site in Annexes 8.1 [APP121] and 8.2 [APP122], and (under the original scheme) for the compensation site in Annex 32.1 of the ES [APP176].
- 8.45 In its Written Representations EA stated –
- ‘The assessment of the proposal in respect of the impact on the hydrodynamic and sedimentary regime is not, in our opinion, adequate. There is little discussion of the impact of waves, no assessment of the impact of capital and maintenance dredging on the long-term impact on estuary processes, including indirect inter-tidal losses. The in-combination and cumulative impact assessments are also inadequate. Additional modelling in respect of the final quay design has not been undertaken; earlier modelling cannot be relied upon. We believe Able also needs to provide for a further 10ha of compensation for the long-term (100 yr) indirect loss of inter-tidal habitat, as a result of sea level rise.’
- 8.46 The applicant responded to this with an addendum to Annex 8.1 in the Supplementary Environmental Information [EX8.7 in ADD041].
- 8.47 The applicant stated in response to the Panel’s question that the quay at the main development site would remain as a permanent fixture of

coastal defence rather than be decommissioned [REP024, Question 41] and will be covered by a Section 30 Agreement between the applicant and the EA under the Anglian Water Authority Act 1977

- 8.48 The role in coastal management played by the compensation site is part of the discussions on the legal agreement between the applicant and EA.
- 8.49 The Panel considers that coastal change has been assessed adequately, and that the long-term use of the quay as a sea defence, the role of the Marine Environmental Monitoring and Management Plan and the management arrangements put forward by the Environment Agency for Cherry Cobb Sands together meet the requirements of the NPSP.

Traffic and transport

- 8.50 Traffic and transport issues [NPSP 5.4] are addressed in Chapter 15 (main site) and Chapter 37 (compensation site) of the Environmental Statement [APP070 and APP092 respectively].
- 8.51 The Panel held Specific Issue hearing on railway matters and a further hearing on road matters.
- 8.52 These issues are discussed in section 15.
- 8.53 The Panel believes that these matters have been addressed adequately, and that mitigation and modal share have been addressed appropriately and realistically in terms of both site operation and travel plans.

Waste management

- 8.54 Waste management [NPSP 5.5] is addressed in Chapters 23 (main site) and 43 (compensation site) of the ES [APP107 and APP127 respectively].
- 8.55 The Statement of Common Ground (SoCG) between the applicant and EA [PDC024] states that a detailed Site Waste Management Plan will be developed by the principal contractor prior to the commencement of construction activities to mitigate the impact of waste on the Compensation Site. This is a statutory requirement under the Site Waste Management Plans Regulations 2008.
- 8.56 EA agrees that the applicant has identified the relevant waste management legislation and needs to prepare a detailed Site Waste Management Plan. [ibid, para 34.3.5] Discharges to water are covered in the Deemed Marine Licence (DML) to be managed by MMO.
- 8.57 The Panel believes that this issue has been addressed adequately.

Water quality

8.58 Impacts on water quality [NPSP 5.6] are assessed in the Environmental Statement [APP064]. A Water Frameworks Directive Assessment has been carried out [APP128]. The management of possible impacts are addressed in Requirements 11, 12 and 13 of the draft DCO.

8.59 The Panel believes that this issue has been addressed adequately.

Air quality, Dust, Odour, Artificial Light, Smoke, Steam and Insect infestation

8.60 Sections 5.7 and 5.8 of NPSP are applicable.

8.61 Smoke, steam and insect infestation have not been identified by the applicant or statutory bodies as probable impacts.

8.62 Air quality, including dust and odour, is addressed in Chapter 17 (main sites) and Chapter 39 (compensation site) in the Environmental Statement. Impacts are assessed to be minimal or insignificant.

8.63 There are four existing Air Quality Management Areas (AQMA) within which the development might have these impacts, and the possibility of a further AQMA for North Killingholme. Mitigation of possible impacts is primarily a matter for the construction management plan (Requirement 18), the construction traffic plan (Requirement 21), the control of emissions plan (Requirement 24), the travel plan (Requirement 25 and the traffic management plan (Requirement 26).

8.64 Artificial light is addressed in Chapter 19 of the Environmental Statement. [APP074].

8.65 Dust is associated primarily with construction, and is a matter for the construction management plan, although an appropriate surface will be used on the manufacturing site to reduce dust creation during operation [APP072].

8.66 The Panel considers that these issues have been addressed appropriately by the applicant. The management of these other impacts is covered through Requirement 24 of the draft DCO, which calls for a management scheme to deal with odour, artificial light, smoke, steam, dust and insects has been approved by the local planning authority before construction commences.

8.67 The Panel believes that these issues have been assessed adequately, and that the mechanisms for managing any impacts are robust and sufficient.

Noise and vibration

- 8.68 Noise [NPSP 5.10] is addressed in Requirements 22 and 23 of the draft DCO. Issues relating to vibration arising primarily from piling are addressed in Articles 37 *et seq* of the draft DML, Schedule 8 of the draft DCO.
- 8.69 The Panel believes that these issues have been addressed adequately.

Landscape and visual impacts

- 8.70 Landscape and visual impacts [NPSP 5.11] have not been a major issue in the examination. The main development site is in an industrial landscape, with a background (from the river) primarily of a very large oil refinery.
- 8.71 The impacts are addressed in Chapter 20 of the Environmental Statement [APP075] and in the Landscape Masterplan [APP111].
- 8.72 These matters are to be managed through Requirements 5, 6 and 7 of the draft DCO.
- 8.73 The Panel believes that this issue has been addressed adequately.

Historic environment

- 8.74 Matters relating to the historic environment [NPSP 5.12] are addressed in Chapter 18 of the Environmental Statement (main site) and Chapter 40 (compensation site). [APP073 and APP095]
- 8.75 The impacts are to be managed through Requirements 15 (archaeology) and 16 (listed buildings) of the draft DCO.
- 8.76 The Panel believes that these issues have been addressed adequately.

Open Space and Green Infrastructure

- 8.77 The proposed development has no implications for open space or green infrastructure [NPSP 5.13], other than its implications for the coastal footpath at Cherry Cobb Sands which is discussed in section 16 below.
- 8.78 The Panel believe that these issues have been addressed adequately.

Socio-economic impacts

- 8.79 Socio-economic impacts [NPSP 5.14] are discussed in section 11 on the significance of the proposed development.
- 8.80 The Panel believes that these issues have been addressed adequately.

9.0 WHETHER THE PROJECT QUALIFIES AS A NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECT

9.1 The status of the proposal as an NSIP was challenged in the examination by Associated British Ports (ABP).

ABP's arguments

9.2 ABP advances three arguments on this point –

(a) that the Nationally Significant Infrastructure Project is described as a quay, notwithstanding the position of the applicant that the quay and the manufacturing facilities on the land-side are indivisibly linked;

(b) the manufacturing facilities on the land-side cannot comprise an NSIP, since they satisfy no relevant definition in PA2008. The quay in ABP's view serves the manufacturing facilities and as such constitutes development which is associated with and subsidiary to a project which is not itself an NSIP;

(c) because the purpose of the quay is to serve the manufacturing facilities on the land-side, and is by the applicant's agreement to be restricted to this purpose, the quay will not be capable of handling the necessary volume of cargo required to qualify as an NSIP under PA2008. [ADD056, para 14]

The applicant's response

9.3 The applicant has sought to respond to these points. In its comments on the Written Representations made by ABP the applicant, referring to the *Guidance on Associated Development*¹² issued by CLG in September 2009, states with regard to the first and second points raised by ABP –

'With respect to AMEP, the harbour facility is patently the NSIP element of the project ... and the manufacturing facilities are consistent with the principles of associated development that are set out in the consultation draft document issued on 13th April 2012. In particular, the manufacturing facilities comprise 'retail/business space (that) is not disproportionate to the retail/business space normally found in similar types of infrastructure of a comparable capacity' [REP008, para 22.13]

9.4 In response to the third point raised by ABP, the applicant states –

¹²

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7726/guidanceassocdevelopment.pdf

'This argument is however flawed as the legal test for a harbour to qualify as an NSIP, as set out in The Planning Act 2008, is independent of use - it is related to the quantity of goods that the harbour is 'capable of handling'. So, if a harbour is capable of handling 5M tonnes of cargo, its actual use is irrelevant in determining whether it is an NSIP or not; there is no threshold for actual, likely or intended use in the 2008 Act.' [REP008, para 22.8]

- 9.5 As proof of the capacity the applicant has provided the following calculations.
- 9.6 The applicant's project engineers Hochtief used the standard port industry model of 4.05 ha of land storage for each 200m of quay frontage with the ability to turn over its storage area, on average 15 times a year. Hochtief calculate a notional rated-capacity of 6.54 million tonnes a year. This is approximately 30% greater than the threshold of 5 million tonnes [REP008].

The Panel's view

- 9.7 The starting point for the Panel's consideration has necessarily been the provisions of PA2008 and the Department for Communities and Local Government(DCLG) Guidance, although as the applicant has noted –

'...whilst s115(6) of the 2008 Act states that '(i)n deciding whether development is associated development, a Panel or the Council must have regard to any guidance issued by the Secretary of State' this requirement was repealed by virtue of Schedule 13 of the Localism Act.'

- 9.8 With regard to ABP's first and second points, the Panel believes that the arguments put forward by the applicant are, on balance, sound. The Panel notes in particular the statement in the DCLG Guidance that -

'Associated development should not be an aim in itself but should be subordinate to and necessary for the development and effective operation to its design capacity of the NSIP that is the subject of the application'

- 9.9 The Panel takes the view that there can be no question that the NSIP in question must be the harbour facility or quay; nor does the applicant suggest otherwise. The key questions then are whether the manufacturing facility constitutes legitimate associated development, and conforms to the stricture in the DCLG Guidance.
- 9.10 The Panel's view is that the manufacturing facility conforms closely to the broad concept of '...retail/business space normally found in similar types of infrastructure of a comparable capacity'. The DCLG Guidance

is clearly not meant to be unduly restrictive about the nature of associated business, and there is no suggestion from any party that the manufacturing activity proposed here might have a main purpose outside the operation of the harbour facility.

- 9.11 The Panel also concludes that the scale of the manufacturing proposed is properly related to the design capacity of the proposed harbour facility. The nature of the proposal is that there should be potential for several manufacturers to use the port, who should not be constrained in their use of the harbour by the concurrent activities of other manufacturers. The Panel conclude that this is particularly relevant to the question of design capacity.
- 9.12 The Panel is also guided by the consideration that it is generally accepted that transport is a derived demand. In this case the applicant seeks to define and provide the demand to be met.
- 9.13 With regard to ABP's third point, that the quay will not be capable of handling the requisite volume of cargo, the relevant sections of PA2008 are s.14(1)(j) and s.24(1) and s.24(3)(c).¹³
- 9.14 The Panel's view is that the applicant's argument in relation to the application of s.24(3)(c) is correct. Thresholds in legislation must necessarily be set in terms of capacity not actual performance or achievement, and capacity by definition means what could be achieved. The Panel see no reason to doubt the calculation of capacity; nor has it been challenged by other parties.
- 9.15 The Panel is therefore satisfied that the application as presented is a nationally significant infrastructure project in accordance with the requirements of PA2008.

¹³ Section 1491)(j) specifies –

(1) In this Act "nationally significant infrastructure project" means a project which consists of any of the following—

(j) the construction or alteration of harbour facilities;

Section 24(1) states –

(1) The construction of harbour facilities is within section 14(1)(j) only if (when constructed) the harbour facilities—

(a) will be in England or Wales or in waters adjacent to England or Wales up to the seaward limits of the territorial sea, and

(b) are expected to be capable of handling the embarkation or disembarkation of at least the relevant quantity of material per year

Section 24(3)(c) states –

(3) "The relevant quantity" is—

(c) in the case of facilities for cargo ships of any other description, 5 million tonnes;

10.0 REQUIREMENTS OF THE HABITAT REGULATIONS ASSESSMENT

10.1 There is no dispute among any of the parties that the proposed development will have an adverse impact on sites of European significance, and that under the Habitats Regulations this requires an appropriate assessment to be made by the decision maker.

10.2 The following sections set out the Panel's consideration and conclusions on –

- the nature and extent of these impacts;
- the case for derogation under Article 6(4): alternatives to the proposal, and the case for the application of Imperative Reasons of Overriding Public Interest (IROPI);
- the mitigation measures proposed and their adequacy
- the objectives that should be set for compensation proposals in this case;
- how the test of 'protecting the overall coherence of Natura 2000' should apply in this case;
- the compensation measures proposed, and how these have developed during the examination;
- the effectiveness and adequacy of the components of the compensation proposals;
- the standard of certainty that should be sought through compensation proposals;
- the role to be played by adaptive management;
- the role of a suite of Environmental Monitoring and Management Plans and legal agreements in addressing concerns and delivering the required outcomes; and
- the Panel's overall conclusions on the compensation proposals

The nature and extent of the impacts – key references

10.3 The application includes [APP310] a comprehensive Habitats Regulations Assessment (HRA) Report.¹⁴ Paragraph 6.6.8 of the HRA Report states that –

¹⁴ The report covers the HRA process, the methodology used, a description of the development, the European sites affected, a Shadow Appropriate Assessment, Alternative Solutions (including possible 'in combination' effects), the application of IROPI and the compensation measures originally proposed.

'The Appropriate Assessment has concluded that the proposed development will result in an adverse effect on the integrities of the European nature conservation designations on the Humber Estuary.'

- 10.4 A SoCG [PDC026] on matters relevant to the HRA assessment was agreed between the applicant, NE and the MMO, dated 24 August 2012.
- 10.5 In addition the Panel circulated a Report on the Implications for European Sites (RIES) to all interested parties on 17 October 2012 as a Rule 17 question. [REP063]
- 10.6 The RIES is a series of screening matrices for the European sites to identify qualifying features that might potentially be affected by the Marine Energy Park and matrices summarising anticipated effects on the integrity of the European sites. In this instance it used the information available at the start of the examination. The RIES is attached as Appendix C to this Report, and is also at REP063.
- 10.7 Within the RIES it is stated that –
- This report, and the consultation responses received upon it, will inform the Examining Authority's report to the Secretary of State as to:
- the implications of the project for the European Sites in view of their conservation objectives, and
 - whether the integrity of any of the European sites will be adversely affected.
- 10.8 Although the RIES was sent to all interested parties, the only respondents were the applicant [REPO64], the Lincolnshire Wildlife Trust [REPO65] and NE [REPO66].
- 10.9 NE response advises that in its view the format utilised in the SoCG better reflects the Habitat Regulations process. Writing as the Government's advisor on conservation matters and with the support of the MMO and the EA, Natural England states that –
- 'The SoCG on the sHRA dated 24 August 2012¹⁵ is more current and more comprehensive than the assessment document prepared by the Planning Inspectorate.'
- 10.10 The Panel accepts that the RIES terminates at the point of determining whether there is an adverse effect on the integrity of the designated sites and does not include discussion of potential mitigation for adverse effects or of what compensation would be

¹⁵ Statement of Common Ground between Able, NE and the MMO dated 24 August 2012 [PDC026]

required to maintain the coherence of the *Natura 2000* network should the proposed development go ahead.

- 10.11 The Panel advises that the Secretary of State as competent authority should have full regard to the contents of the SoCG alongside the RIES, the comments of parties on the RIES and the findings of the shadow Appropriate Assessment submitted by the applicant.

The nature and extent of the impacts

- 10.12 The outcome of an appropriate assessment in this case is not in dispute. The overall summary in section 3.7.1 of the SoCG is that -

‘The AMEP proposals alone will have a likely significant effect on the Humber Estuary SAC, SPA and Ramsar site.’

- 10.13 At paragraph 1.2.1 the SoCG records that –

‘There is universal agreement between AHPL, Natural England (NE) and the Marine Management Organisation (MMO) that AMEP will result in both a likely significant effect and an adverse effect on the integrity of the European sites. It is also agreed that in order for the proposals to proceed, measures are required which compensate for the adverse effects of AMEP.’

- 10.14 Chapter 3 of the SoCG contains the formally stated conservation objectives for the European sites. After taking account of mitigation that is embedded within the project, the effects that it is predicted that AMEP will have are listed and an assessment made of where these effects either will or may have a likely significant effect is made.
- 10.15 Table 3.2 assesses the significance of various direct and indirect effects on SAC qualifying interest features.
- 10.16 Table 3.3 is an assessment of the impacts that various aspects of the project would have on bird species of the Humber Estuary SPA. Amongst the effects on SPA qualifying interest features, the table identifies bar-tailed godwit as an internationally important wintering population of a regularly occurring Annex I species and BTG, dunlin, redshank and shelduck as internationally important migratory species that would be significantly affected by permanent direct loss of and indirect changes to inter-tidal mudflat. Curlew, lapwing and ringed plover are also listed as other species of the waterfowl assemblage that would be affected by these and other changes.
- 10.17 Paragraph 3.1.3 records agreement that due to the extent that the qualifying interest features overlap, assessing the effects of AMEP against the qualifying interests of the SAC and the SPA is enough to ensure that the interests of the Ramsar site are taken into account.

10.18 At section 3.9.1 the issues that form the scope of the Appropriate Assessment and that need to be assessed in more detail are listed as being –

'For the SAC

- The effects of permanent loss of estuarine habitat from the footprint of the development.
- The effects of capital and maintenance dredging on estuarine habitats and inter-tidal mudflats.
- The effects of disposal of dredged material on estuarine habitats and inter-tidal mudflats.
- The effects of the permanent direct loss of inter-tidal mudflat from NKM [North Killingholme Mudflats] due to the footprint of the development.
- The effects of the permanent loss of saltmarsh.
- The effects of indirect habitat changes on qualifying habitats (estuarine habitat, inter-tidal mudflat and saltmarsh).
- The effects of underwater noise from piling on the feeding behaviour of grey seals and the migratory movements of river lamprey.

For the SPA

- The effects of the permanent direct loss of estuarine and specifically inter-tidal mudflats from NKM on waterfowl that it supports.
- The functional loss of 11.6 ha of mudflat habitat as a result of disturbance.
- The effects on the use of NKHP [North Killingholme Haven Pits] as a roost if the feeding areas on the mudflats at NKM are lost.
- The disturbance effects on birds due to piling activities during construction of the new quay.
- The disturbance effects on birds using NKHP from construction activities other than piling, and operation of AMEP.
- The effects of loss of terrestrial habitat within the AMEP site at North Killingholme which is used by SPA birds (predominantly curlew).'

10.19 Chapter 4 of the SoCG summarises the findings of the applicant's sHRA [APP310].

10.20 Chapter 5 sets out the measures which have been agreed to compensate for adverse effects on the European sites should the tests of 'no alternatives' and IROPI be accepted by the competent authority. Chapter 6 summarises the agreed position overall in respect of the sHRA.

10.21 The Panel believe that there is a robust and adequate identification of likely impacts, agreed by the key statutory consultees and the applicant, on which the Secretary of State can make the necessary appropriate assessment.

The Case for Derogation: Applying the Tests of Article 6(4)

10.22 Having accepted that the proposed new quay would have an adverse effect on the integrity of the European sites, the applicant has prepared and presented a case that (a) there is an absence of alternative solutions and (b) the scheme must be carried out for imperative reasons of overriding public interest (the IROPI test).

10.23 It is necessary, in accordance with the Habitat Regulations 2010 that the proposal should pass these tests, which are of their essence high hurdles, if a derogation from the Habitats Directive is to be applied in this instance. Even if the tests for a derogation are passed, then it remains necessary to act in accordance with the Regulations and the Directive in respect of compensation measures necessary to ensure that the overall coherence of *Natura 2000* is protected.

Examination of Alternative Solutions

10.24 The applicant's case on alternatives is to be found in Chapter 6 of the ES [APP061] and in Chapter 7 (pages 156 to 197) of the sHRA Report of December 2011 [APP310]. The IROPI test is covered in Chapter 5 of the ES [APP060] and again in Chapter 8 of the sHRA [APP310] ES.

10.25 Presentations of the two sets of arguments on alternatives are very similar in the ES and the sHRA but the former is prepared in the context of Schedule 4 of the Infrastructure Planning (EIA) Regulations [SI2009 No 2263] which requires 'An outline of the main alternatives studied by the applicant', the latter is an assessment of 'alternative solutions' as required by the Habitat Regulations 2010.

10.26 Chapter 7 of the sHRA Report of December 2011 [APP310] ranges through a definition of the objectives of the project, takes in the zero option, and then examines alternatives in the following terms: whether there is an alternative site that would be less damaging to the *Natura 2000* network; whether there is an alternative design that would be less damaging to the *Natura 2000* network; and whether the facility can be operated in any way that would reduce the negative impact on the *Natura 2000* Site.

- 10.27 The Panel probed the basis on which alternatives had been identified and evaluated. In the First Round Questions sent out as Annex D1 to the Rule 8 letter [PRC004], the Panel asked four questions (Q9 to Q12) relating to the assessment of alternatives, including whether possible alternative sites had been assessed in terms of their Ramsar or *Natura 2000* implications, and whether the applicant had considered alternative designs for the quay.
- 10.28 The applicant responded on 28 June in REP025 with reference back to material in Chapter 6 and to Annexes 4.4, 6.1 and 6.2 of the ES, and the statement that –
- ‘...it is clear that the AMEP scenario is not outperformed by any of the alternative options and there is no scenario which provides a demonstrably ‘better’ environmental solution.’
- 10.29 The question of alternatives was also addressed by reference to the proposed Green Port Hull to be developed by ABP, which is also intended to serve the offshore wind sector. Paragraph 7.5.8 of the sHRA [APP310] states –
- ‘The Port of Hull has been identified by Siemens for turbine manufacturing, and as such is not an alternative to AMEP; it is needed as well. The provision of a facility at Hull would not remove the urgent need for wind-farm manufacturing that drives the requirement for a facility of the scale of AMEP.’
- 10.30 The Panel considers that the size of the opportunity presented by the NSIP proposal, and the fact that its proposed associated development includes manufacturing rather than assembly, is an important and distinctive feature of the proposal offering a realistic prospect of the emergence of a super cluster of activities connected with the marine energy sector that could have a transforming effect on the economy of Humberside. Chapter 6 of the ES [APP061] demonstrates credibly that the application site is the only one on the east coast that could host such a major development as this project. The Panel considers that a number of smaller schemes such as Green Port Hull, developed over a wider geographical area cannot reasonably be viewed as an alternative to it.
- 10.31 The Panel considers that Chapter 7 of the sHRA looks into the question of alternative solutions in a comprehensive manner, and that its conclusions are borne out by our questioning.
- 10.32 On balance the Panel considers that it has been sufficiently established that there are no alternative solutions that would secure the aims and objectives of the application while being less damaging to the *Natura 2000* network.

The IROPI test

- 10.33 Material on the IROPI test was submitted with the application. There is directly relevant background material in the ES, particularly Chapter 5, [APP060] and in Chapter 8 of the sHRA [APP310] the test is addressed explicitly.
- 10.34 Chapter 5 of the ES [APP060] relates the need for the development to a number of international, national and regional imperatives. The topics introduced are: the need to decarbonise world energy production, the importance to the UK of energy security, the importance of developing large capacity offshore wind turbines, the UK's need to increase its manufacturing base and the particular need for growth in the Humberside economy.
- 10.35 Paragraph 5.3.13 of APP060 suggests that a UK cumulative total of 22GW is considered a reasonable target for installed offshore wind capacity by 2020. Paragraph 5.4.2 and 5.4.3 refer to the advantages to be secured by larger turbines and the need this creates for manufacturing facilities located at port facilities because the size of machines that can be transported by road or rail is limited.
- 10.36 Paragraph 5.8.4 of APP060 refers to the report from Bain and Company on 'Employment Opportunities and Challenges in the Context of Rapid Industry Growth' commissioned by the British Wind Energy Association in 2008. This concluded that manufacturing clusters that enable the efficient production of offshore components are an essential component of a thriving offshore wind industry. Paragraph 5.8.8 goes on to set out the advantages of Marine Energy Parks (MEP) having such manufacturing clusters with their own suitably designed goods handling zones adjacent to a quay.
- 10.37 Chapter 6 of the ES [APP061] proceeds to examine the availability of sites for development of MEPs. This is more closely related to the assessment of alternative solutions but it is relevant to the IROPI argument. The conclusion of the chapter is that there are few sites in the UK with the necessary features and only one on the east coast of England, the application site, is capable of supporting a significant development on a single site.
- 10.38 Chapter 8 of the sHRA [APP310] repeats these arguments and sets them against the essential elements of the IROPI test. In the context of there being no priority habitat or species involved that are features of the European Sites, paragraph 8.1.4 identifies the following as the potential categories of overriding public interests to be considered—
- human health;
 - public safety
 - socio-economic

- beneficial consequences of primary importance for the environment
- other imperative reasons that are subject to the opinion of the European Commission.

10.39 Paragraph 8.1.5 summarises the basic case as being 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 ...It will also have beneficial consequences of primary importance for the environment by enabling Europe’s necessary transition to low carbon energy production.’

10.40 Section 8.6 of the sHRA [APP310] is a conclusion which presents ‘The Balance of Interests. This is presented in summary form in paragraph 8.6.1 -

There is a compelling case that the overriding public interest to –

- decarbonise the means of energy production;
- secure energy supplies from indigenous sources;
- manufacture large scale offshore generators;
- grow manufacturing in the UK; and
- regenerate the Humber sub-region outweighs the loss of 45 ha of a *Natura 2000* site.

10.41 The following two paragraphs 8.6.25 and 8.2.6 state that –

‘The project addresses these objectives by providing a new quay with direct access to a significant land parcel that is to be developed to support the manufacture of components for the offshore renewable energy sector. This is a sector that must grow to enable the delivery of European Energy policy. The sector has specific locational requirements that are realised with the least possible environmental harm.

The imperative overriding needs detailed above are both certain and immediate and the project will make a significant contribution towards them over a long period of time.’

10.42 The broad thrust of the arguments relating to the importance of the proposals for the economic regeneration of Humberside was supported by the Humber LEP [HEA025], by NLC and NELC [WRR011], the MP

for the Scunthorpe County Constituency [HEA028] and the MP for Cleethorpes¹⁶.

- 10.43 NLC stated at the second Open Floor Hearing that the AMEP development is totally compliant with the IROPI principle. As set out in the written summary of NLC's oral submission on 6 September [HEA026] –

'The announcement of the Crown Estate's £100 billion Round 3 Offshore Wind programme has the potential to provide a renaissance in British engineering and manufacturing. The Humber has the optimal location for the Round 3 sites and has a once in a lifetime opportunity to transform its economy and indeed of the whole northern UK region. This opportunity is entirely predicated upon the development of the South Humber Bank AMEP development. Without it, the UK's ability to attract overseas manufacturers and supply chain will be seriously compromised and could result in the UK becoming little more than an installation facility for offshore wind.'

- 10.44 The Panel considers that, taken together, there is strong evidence that the proposed development is indeed a unique opportunity to develop the South Humber Bank and exploit its proximity to the Humber deep water channel and the sites for North Sea wind-farms; and that the development has the potential to make a major contribution to employment and the economy while supporting sustainable development.

Conclusions on the tests for derogation

- 10.45 The Panel concludes that the applicant's evidence in Chapters 5 and 6 of the submitted ES [APP060 & APP061] and in Chapter 8 of the sHRA [APP310] addresses sufficiently the Article 4 test of no alternative solutions and fully demonstrates adequately that there are Imperative Reasons of overriding Public Interest for allowing the development to proceed.
- 10.46 The Panel therefore considers that these two essential requirements for making a derogation under the terms of Article 6(4) are satisfied.
- 10.47 In coming to these judgements, the Panel has considered very carefully the position taken by ABP at the close of the examination. In paragraph 21 of ABP's closing submission [ADD056] the argument is put that –

'... the loose approach to the question of 'objective' adopted by the Applicant has the consequence that there are potentially a number of alternative solutions capable of meeting the general 'objectives' selected by the Applicant. In such circumstances,

¹⁶ The MP for Scunthorpe stated that the MP for Brigg and Goole had asked him to say that he concurred with his views.

neither the panel nor the Secretary of State can be satisfied that there are no alternatives to AMEP, for the purposes of the Habitats Regulations.'

- 10.48 These closing comments echo earlier criticisms made by ABP. In a letter of 4 October [REP086] responding to a Rule 17 question of 24 Sept [REP070] ABP stated that –
- 'The Able proposals have failed to meet both procedural and substantive requirements of European and domestic law and if allowed to proceed would distort the level playing [field] of legal and environmental compliance imposed upon the UK port industry and indeed the developers of other major UK infrastructure.'
- 10.49 More specifically in relation to the Humber LEP's aspirations for a super cluster of industry related to offshore wind, ABP responded to the Panel's question that 'Able's proposals are not the only way of achieving an excellence in offshore wind' and concluded that ABP's support for the development of the Humber as a "super cluster" is not inconsistent with opposing Able's scheme 'which is in fact just one development in the overall scheme of potential Humber developments.'
- 10.50 The Panel considers the approach taken by the applicant in relation to the study of alternative solutions in this case to be correct. We do not consider that the notion of alternatives can reasonably be cast so wide as to include any and every possible alternative strategy. Although a 'do nothing option' must be considered¹⁷, an application must reasonably relate to a specific project, and it is in the context of that project that alternatives arise. In this case the applicant has argued the case in relation to alternative sites, alternative designs, alternative scales and alternative methods of operation. The Panel concludes that the examination of alternatives has been realistic and appropriate.
- 10.51 The Panel notes the strong support expressed for precisely this project put to us at the Open Floor Hearing by key local and regional leaders. We conclude that the implementation of this project is essential if those shared aspirations to achieve a super cluster of offshore renewable industry in the Humber side area are to be realised.
- 10.52 At the same time the Panel notes that it is entirely on the basis that the application meets a need for a Marine Energy Park directly related to the offshore wind industry that the IROPI case has been put forward by the applicant and it is on that basis that the Panel supports the case presented. This is a significant point in relation to the inclusion of a clause in the DCO that creates a linkage between the new quay and the marine energy sector. The applicant offered such a

¹⁷ In this case at Section 7.4 of the applicant's sHRA Report [APP310]

revision during the examination, and it is included in the Requirements section of the final draft DCO as Requirement 3A.

Mitigation measures

- 10.53 In relation to the area inland of the proposed quay at North Killingholme, the applicant proposes a series of measures to mitigate the impacts of the proposed development on habitats and species.
- 10.54 The basis for assessing what these impacts would be is set out in Chapter 11 of the ES [APP066] which in turn derives material from a large number of surveys over a wide range of subjects, mostly carried out in 2010 and 2011, that are reported in detail in various annexes to that chapter [APP134 to APP147]. While there has been additional survey work and analysis since the ES was prepared, the range and scale of impacts is unchanged from the ES and the style and scope of mitigation, though refined, is essentially unchanged.
- 10.55 The mitigation measures would all be within the project site boundary and would be secured by one of the three Environmental Management and Monitoring Plans (EMMPs). This document, the Terrestrial EMMP, was still in draft form at the close of the examination but the version circulated on 23 November [PDC040] had evolved to an advanced form.
- 10.56 Two components of the proposed mitigation measures are the lay out and subsequent management of two parts of the site, specifically to meet identified impacts on particular species. This is described in the Chapter 48 of the ES [APP103], the Non-technical Summary, in the following terms –
- ‘Because the terrestrial areas of AMEP will result in the loss of fields currently used by estuary birds and farmland birds, and of ponds occupied by Great Crested Newts, two mitigation areas will be developed to provide enhanced habitat for the species affected.’
- 10.57 Mitigation Area A is a plot of 47.8 ha adjacent to the southern edge of the application site, which will be developed to provide wet grassland habitat for the use of feeding and roosting birds, and also farmland birds. Mitigation Area B is a plot of 0.7 ha adjacent to the Chase Hill Wood local wildlife site, which will be developed for the use of great crested newts, including the provision of new ponds. This area will be developed to complement the local wildlife site and will provide nest opportunities for breeding birds.
- 10.58 The location of these two areas is shown on the Landscape Masterplan, [APP035] Annex 4.5 of the ES. Mitigation Site A is at the southern end of the AMEP site and Mitigation Site B in the north western corner. The Landscape Masterplan also shows framework

planting across the site, much of it in association with drainage ditches.

- 10.59 Mitigation measures put forward in the draft Terrestrial EMMP [PDC040] are for the creation or realignment of 2.71 km of drainage ditch throughout the development site designed to provide a habitat of high suitability for water vole, for creation and enhancement of bat habitat including green corridors and roosting opportunities and for enhancement of boundary features, hedgerows, and ditches to offset the loss of breeding birds.
- 10.60 Table 1 of the draft Terrestrial EMMP records a loss of 1.136 km of hedgerow, described on page 9 as 'species poor'. While the 23 November draft does not specify the length of hedgerows within the site, it is said in paragraph 1.26 of EX11.27 [part of REP056] that a total length of 3.1km of hedges is to be managed for conservation purposes.
- 10.61 Also evident on the Landscape Masterplan [APP035] is the extent of the area adjacent to North Killingholme Haven Pits that is to be used for low level storage only in order to safeguard the significant numbers of SPA bird populations supported by the SSSI from visual and noise disturbance. The control measures for this are presented in the draft Terrestrial EMMP and are reflected in Requirement 40 of the DCO [PDC037].
- 10.62 EX 20.3 dated June 2012 is an Additional Landscape Masterplan and is part of the supplementary environmental information provided by the applicant [pages 206 to 215 of ADD042]. It elaborates on the proposals in the Landscape Masterplan [APP035] illustrating how habitat impacts are being mitigated for the benefit of wildlife. It contains a series of plans of the site which help to locate features of the site that are currently of value or potential value to great crested newts, water voles, bats and breeding birds and further annotated plans that show what is proposed by way of mitigation
- 10.63 The position of NE, MMO and EA in respect of the impacts of the AMEP project on terrestrial ecology and birds is recorded on pages 65 to 71 of the SoCG dated 27 July 2012 [PDC024]. This covers great crested newts, bats, water vole, badgers, breeding birds and terrestrial feeding and roosting by the SPA assemblage over the tidal cycle.
- 10.64 In relation to the newts, paragraph 16.3.9 reports progress on a licence application. Subsequently NE has issued a letter of comfort to the applicant dated 2 November 2012 [ADD077]. This explains that no final licensing decisions can be made or licence issued unless and until the development obtains all necessary consents in order to proceed. However, referring specifically to the mitigation proposed for great crested newts, the letter states that 'We agree that the principles of mitigation proposed allow us to grant a letter of comfort for this scheme.'

- 10.65 The quality and extent of bat surveys carried out in 2006 and 2010 reported in Annex 11.3 [APP137] and Annex 11.8 [APP143] of the ES was the subject of criticism from ABP drawing on submissions from a professional ecologist. The conclusion presented by the applicant in paragraph 11.5.123 was that there is 'not a significant bat population using the site' and that it is unlikely that any of 5 species recorded are roosting on the site. These results were similar to those from 2006. Further surveys in April 2011 conducted at the request NE were focused on the habitat viewed as most likely to serve as a bat roost, Old Copse woodland, this recorded foraging bats (including a 6th bat species previously unrecorded) but gave no indication of roosting bats.
- 10.66 In relation to bats, paragraphs 16.4.10 and 16.4.11 of the SoCG dated 27 July 2012 [PDC024] record that –
- 'Natural England agrees with the conclusions of the bat surveys which have shown that there is a low likelihood of bats roosting on the development site. However, as the possibility of bats roosting in trees to be felled during site clearance works cannot be excluded it is important that surveys are carried out prior to felling works and that if roosting bats are recorded then a bat mitigation licence will need to be applied for and issued in order to allow the works to proceed ... Natural England agrees with the landscaping proposals within the landscape masterplan which will enhance foraging opportunities for bats.'
- 10.67 The Panel considers that in relation to protected species, great crested newts and bats, the mitigation proposed by the applicant is a suitable strategy and there should be no insuperable difficulty with processing of suitable licences in order to allow the development to proceed. It should be noted particularly that none of the matters involving protected species are related to development within the European sites and that the species involved are not qualifying features of the SPA or SAC.
- 10.68 For voles and badgers there is a record of broad agreement within the SoCG [PDC024] on the mitigation strategy to be adopted. In relation to use by the SPA assemblage of fields outside the European sites for roosting and feeding paragraph 16.8.7 records that –
- 'Natural England agrees that Area A is sufficient to avoid an adverse effect on the site integrity of the SPA, when it is considered alongside the commitment to comply with the management and monitoring measures that will be agreed in the EMMP.'
- 10.69 In its Relevant Representation on the application Natural England expressed reservations on the extent to which the applicant had fully mitigated the impact of site development on breeding birds. In

paragraph 1.18.5 of the relevant representations [RRP060] this is expressed as follows –

‘With reference to the duty for public authorities under Section 40 NERC Act to have regard to the conservation of biodiversity, Natural England advises that a development site of this scale should provide sufficient opportunities to mitigate impacts on breeding birds.’

- 10.70 There was discussion of this but no agreement in the context of the SoCG between NE, MMO and EA. The SoCG [PDC024] records at paragraph 16.7.6 that as at the end of July ‘... the total number of bird territories affected by the development has not been agreed.’
- 10.71 A first draft of the Terrestrial EMMP was produced in response to the Panel’s second round of questions [REP056 zip file with NE commenting on it on 5 November [ADD050]. EX11.27 [REP056 zip file] on the strategy for breeding bird mitigation was produced by the applicant in October 2012. The updated assessment has not made any major change to the overall assessment of the impact of the development on breeding birds. The development would mean that several species that are currently using industrial land would be predicted to be lost from the site, including little ringed plover, ringed plover and lapwing.
- 10.72 The impacts on these species, rather than providing them with additional industrial habitat, would be a loss of two, three and seven pairs respectively. In the Panel’s view, taking NE’s advice into account, this would still not be a significant effect, but at the request of NE additional mitigation for this loss has been included in a revised Terrestrial EMMP.
- 10.73 The latest draft of the Terrestrial EMMP produced during the examination [PDC040, 23 November 2012] covers environmental baseline, identified impacts and objectives in relation to habitat and wildlife. There is separate coverage of water voles, bats, great crested newts, breeding birds and SPA birds (notably curlew). In relation to some of these topics the management programme is set out in relation to specific actions in specific areas - eg great crested newts and Mitigation Area B and for water voles as part of the design and management of the approximately 2.03 km of drainage ditches required through the site. For other species, including a range of breeding birds the mitigation is secured both in association with mitigation areas A and B and as part of the management of habitat features across the site.
- 10.74 NE commented on the 23 November draft of the EMMPs on 24 November [ADD080] welcoming the amendments made to the Terrestrial EMMP and the movement away from lengthy reports to focused plans. It is stated that the Terrestrial EMMP should be capable of satisfactory conclusion.

- 10.75 The Panel notes that the only adverse comments made on this EMMP are of a minor nature and there is no criticism of the mitigation strategy for breeding birds.
- 10.76 The Panel endorses the approach demonstrated in the draft Terrestrial EMMP of 23 November and consider that it forms a firm basis for moving forward to fully mitigate impacts of the proposed development on land at North Killingholme on habitats and species. The Panel does not anticipate that there will be any further matters of substance to emerge that would prevent full agreement of a Terrestrial EMMP between the applicant and Natural England or the issuing in due course of licences for mitigation in respect of great crested newts and bats.
- 10.77 It is again to be noted that the scheme as a whole raises no issues in respect of protected species that are qualifying features of the European sites.
- 10.78 The Panel concludes that there is now substantial agreement as to what mitigation measures should achieve, and that the Terrestrial EMMP will ensure its achievement.

Setting objectives for compensation proposals

- 10.79 The Panel's assessment of the implications of the proposed NSIP on the Humber Estuary SPA is taken against the following factual background -
1. That the Humber estuary is highly dynamic, both as a result of the natural characteristics of an estuary with a high tidal range and the added consequences of rising sea levels associated with climate change.
 2. That the habitats affected by the proposal are found extensively throughout the estuary and that they are subject to continuous change through natural and man-induced processes of erosion, including dredging, and deposition.
 3. That the combined effect of rising sea level and fixed flood defences results in the estuary as a whole being subject to "coastal squeeze" with pressure particularly on salt marsh habitat.
 4. That as a response to coastal squeeze the Environment Agency has promoted a policy of selective managed retreat of flood defences to re-establish estuarine habitat on land reclaimed for agriculture in historical times.
 5. That this policy has been implemented in association with schemes of habitat compensation carried out as part of harbour works on the Humber, including ABP's works at Welwick,

Chowderness and Alkborough associated with the Immingham Outer Harbour and at Green Port Hull.

6. That the character of the foreshore at both the main application site and Cherry Cobb Sands has changed in living memory, that the changes are measurable and can be expected to continue to evolve.
7. That conditions favourable to the formation of extensive areas of very gently sloping inter-tidal mudflat at the North Killingholme Marshes have been reinforced by the creation of the Immingham Outer Harbour but that the general pattern is that accreting shorelines will develop into salt marsh as has happened observably at Cherry Cobb Sands and in some locations on the Killingholme shore adjacent to the floodwall.

Potential impacts for appropriate assessment for the SAC from Statement of Common Ground

The Panel's assessment

Loss of 31.5 ha of inter-tidal mudflat from the footprint of the development.

The loss is a small percentage (0.33%) of the inter-tidal mudflat which is very widely found within the estuary; so of itself the loss of habitat is not likely to affect overall coherence generally. However without compensation, in the form of replacement inter-tidal habitat, there is a *possibility of in combination or cumulative effects*.

Loss of 13.5 ha of estuarine habitat from the footprint of the development.

There is no indication that the sub-tidal habitat affected is of any special character, distinguishing it from the rest of the estuary. It represents less than 0.1% of the 16,800ha sub-tidal resource. With sea level rise there is an expansion of sub-tidal habitat within the estuary at the expense of littoral habitat, including salt marsh, lost by coastal squeeze. Loss of habitat from the estuary could be compensated for by managed retreat of flood defences.

The effects of capital and maintenance dredging on estuarine habitats and inter-tidal mudflats.

The impact of capital and maintenance dredging would be primarily, if not exclusively on sub-tidal habitat rather than on inter-tidal mudflats. The sub-tidal habitat affected is not of particular ecological importance in itself and its loss or degradation is not likely to be of great significance in terms of the features of interest of the SAC. The proposal is a marginal change in comparison with the extent of dredging currently but *there remains a possibility of in combination or cumulative effects*

The effects of disposal of dredged material on estuarine habitats and inter-tidal mudflats.

Disposal of dredged material is managed and monitored. Locations for disposal of dredged material can be selected to minimise adverse effects on benthic communities while maintaining the sediment balance within the estuary. Because there would be additional dredging adding to existing dredging in the estuary *there is a possibility of in combination effects over long term.*

The effects of indirect habitat changes on qualifying habitats (estuarine habitat, inter-tidal mudflat and saltmarsh).

The dynamic situation in the estuary means that when it comes to indirect effects it would be difficult *to disentangle the impact of the proposal from other influences on the river – minor point but would benefit from monitoring regime*

Construction stage - noise from piling on the feeding behaviour of grey seals and the migratory movements of river lamprey

Piling is a passing phase and any impact would not have an irreversible effect. Lamprey behaviour is little understood. There is scope for mitigation, including avoiding impacts at most sensitive times. The piling conditions take account of this

- 10.80 The Panel considers that in terms of the size of the Humber Estuary SAC as a whole the loss of ecological function from the proposals would be small and that the habitats are types that are found over a very wide area. In consequence the loss of habitat in itself would have a very minor effect on the SAC overall. However loss of estuarine habitat without compensatory provision would set a precedent that would set up the prospect of cumulative adverse effects.
- 10.81 If the Panel had to consider compensation for the loss of inter-tidal and estuarial habitat at North Killingholme solely in relation to the characteristics of the SAC, there would be little reason for controversy over the scheme that has been brought forward at Cherry Cobb Sands. There would be concern over the regrettable loss of highly productive agricultural land and the consequences for a particular farm holding but in our view these would not be sufficient to outweigh the major benefits that the current scheme could deliver.
- 10.82 However the contribution that the North Killingholme foreshore makes to the Humber Estuary SPA raises additional and much more significant considerations. During the months of October and November, a period which coincides with the autumn moult, BTG numbered in their thousands make use of inter-tidal mudflats at North Killingholme Marshes as their preferred feeding ground. Numbers of BTG roosting at the nearby North Killingholme Haven Pits at this time are even higher and persist.

Potential impacts for appropriate assessment for the SPA

- Loss of nutrition from 31.6 ha of inter-tidal mudflats at North Killingholme Marshes.
- Functional loss of 11.6 ha of mudflat habitat as a result of disturbance.
- The effects on the use of North Killingholme Haven Pits as a roost if the feeding areas on the mudflats at North Killingholme Marshes are lost.
- Disturbance from operation of the NSIP
- The disturbance effects on birds due to piling activities during construction of the new quay.
- The disturbance effects on birds using North Killingholme Haven Pits from construction activities other than piling
- The effects of loss of terrestrial habitat within the application site at North Killingholme which is used by SPA birds (predominantly curlew).

Panel assessment

Very significant feeding ground for migratory species – BTG – important element in estuary's position on migration route. Proximity to suitable roost is an important aspect of the site

As above – additional impact

There could be harm from breaking the linkage between this roost and availability of a nearby feeding ground in close proximity.

It is not obvious that there would be additional disturbance outside the site. Much of the surrounding area is already industrialised. A buffer zone is proposed to North Killingholme Haven Pits. This is a passing phase and unlikely to have adverse effects on conservation objectives. There are controls on duration and levels of construction noise and birds have other opportunities for temporary relocation.

Construction is a passing phase and in itself unlikely to have adverse effect on longer-term conservation objectives

Adverse impacts are to be offset by proposals for Site A within the main site. Conservation measures for this site amount to mitigation of adverse impacts on the European sites.

10.83 The Panel has three principal findings in relation to the SPA.

- 10.84 First, there is a likely significant harmful effect from the proposals that goes to a core purpose of the Ramsar and of the SPA European site designations, namely the protection of habitat of importance for migratory birds. This is a clear example of a negative assessment that should not be allowed unless the development proposed satisfies the tests for derogation in Regulation 62(1) of the Habitat Regulations which reflects Article 6(4) of the Habitats Directive. The tests in Article 6(4) are those of there being ‘imperative reasons of overriding public interest’ (IROPI) why the plan or project should be carried out and an ‘absence of alternative solutions’. Development approved in accordance with Regulation 62, is also subject to Regulation 66 and ‘the appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of *Natura 2000* is protected.’ The necessary compensatory measures in this case must include the provision of suitable nutritional resource for BTG and a roost site in proximity to that nutritional resource.
- 10.85 Second, there is nothing about the proposals that leads the Panel to the view that there would be adverse effects on qualifying features of the European sites directly from capital dredging. The regime of maintenance dredging and the disposal of material from capital and maintenance dredging could give rise to possible in-combination or cumulative effects over the long term. The potential for adverse effects can be avoided with a regime of monitoring linked with mechanisms for securing modification of working practices if any adverse effects are identified. A Marine EMMP is required by Condition 15 of the proposed DML and also by Requirement 17 of the proposed DCO [PDC037].
- 10.86 Third, with the proposed establishment of Mitigation Site A, there would be no adverse effect on the qualifying features of the European sites from possible development of farmland within the compensation site. A Terrestrial EMMP is required in Requirement 17 of the proposed DCO [PDC037].

Protecting the Overall Coherence of Natura 2000

- 10.87 The Panel has sought to understand and assess what is necessary and appropriate by way of compensation in the terms of Article 6(4) of the Habitats Directive and of the wording of Regulation 66 of the Habitats Regulations¹⁸.
- 10.88 Article 6(4) applying to development potentially affecting a European site states –

¹⁸ Regulation 66 of the Conservation of Habitats and Species Regulations 2010 states that “Where in accordance with regulation 62 (considerations of overriding public interest) - (a) a plan or project is agreed to, notwithstanding a negative assessment of the implications for a European site or a European offshore marine site, or (b) ... the appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of *Natura 2000* is protected.”

'If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest ... the Member State shall take all compensatory measures necessary to ensure that the overall coherence of *Natura 2000* is protected.'

10.89 The Panel accordingly put a Rule 17 question [REP080] to the applicant, NE, EA, MMO and RSPB asking for views on how the protection of the overall coherence of *Natura 2000* (Article 6(4) of the Habitats Directive 92/43/EEC) should be interpreted and applied in the present case.

10.90 The applicant's response [REP099], NE's response [REP100] and RSPB's response [REP101] are all dated 23 November just before the close of the examination period. Despite the fact that they were made independently, there is a considerable degree of agreement in these written responses. NE's letter was prepared in consultation with EA and MMO who are reported as having confirmed that they are in agreement with it.

10.91 The parties' responses make no reference to any interpretation or application of the phrase in relation to any court decision; indeed at paragraph 2 of its response NE states -

'There is no legal authority on this point, although there is some guidance.' [REP100].

10.92 The parties refer to much the same sources of guidance. These are EC guidance on the provisions of Article 6 in *Managing Natura sites* published in the year 2000¹⁹ and the guidance specifically on Article 6(4) of the Habitats Directive of January 2007 (re-issued with minimal change in 2012)²⁰. The applicant and the RSPB both refer to the August 2012 Defra consultation document on guidance on the application of Article 6(4). In addition NE refers to Section 3.3.4 of the European Commission's sector guidance document *The Implementation of the Birds and Habitats Directives in estuaries and coastal zones* (2011)²¹.

10.93 In paragraph 2 of its response [REP100] NE states that –

'... the assessment of overall coherence in a particular case depends on a number of site-specific factors –

a. the conservation objectives of the site;

¹⁹ http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

²⁰

http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/new_guidance_art6_4_en.pdf

²¹ http://ec.europa.eu/environment/nature/natura2000/management/docs/guidance_doc.pdf

b. the number and status of protected habitats and species within the site;

c. the role (the) site plays in ensuring the geographical distribution of protected habitats and species.'

10.94 These are general statements of principle but the first two are not ones that the Panel have found particularly helpful in relation to this case. This is particularly true of 'conservation objectives of the site' since the objectives for the SPA and SAC, acknowledged by NE to be high-level objectives, are expressed in terms of ensuring the integrity of the site is maintained and avoiding deterioration of habitats of qualifying features²².

10.95 The third matter is, however, in our view of very particular and very direct relevance to this case, in which these three parties are agreed as to the significance of the site for one particular species BTG – and that the emphasis should be on replacing the ecological function of the habitat that is being lost.

10.96 This is something that RSPB has identified as the aim of compensation proposals from the outset. Paragraph 2.18 of RSPB's initial written representation [WRR026] states –

'It is accepted that, in principle, the creation of new inter-tidal habitat could be relied on as compensation as long as the provision is adequate to replicate the ecological function and resource of the area lost for the long term.'

10.97 In paragraph 10 of its submission NE states that –

'... the ecological function provided by the site which is to be lost (the mudflat at NKM) must be replicated in order for the decision-maker to be confident that the coherence of the network will be maintained.'

10.98 In paragraph 26 of the applicant's response [REP099], this is expressed as –

'... interim or even permanent damage to one particular site will not necessarily damage the coherence of the *Natura 2000* network (as distinct from adversely affecting the integrity of the particular site), provided the ecological functions of that site are replaced so that there is no irreversible harm to the network as a whole.'

²² The published objectives for the Humber SPA are to be found at http://www.naturalengland.org.uk/images/uk9006111-humber-estuary-spa_tcm6-32298.pdf

10.99 The broad thrust is the same and echoes the position taken in section 3.3.4 of the EC Guidance on the implementation of the EU nature legislation in estuaries and coastal zones, that –

‘Compensation measures must be designed on the basis of best scientific knowledge and should accomplish the ecological functions necessary to support the affected species and habitats.’

10.100 It is important to note that there are differences between the parties, in particular in relation to what has to be provided. NE and RSPB use the word ‘replicate’ whereas Able uses the less specific ‘replace.’

10.101 The Panel considers, however, that the extent of agreement between the applicant, NE and the RSPB over how the compensation requirement to address the loss of the *ecological function* of this part of the North Killingholme marshes is to be assessed is sufficient assurance that the question of what is meant by ‘protecting the overall coherence of *Natura 2000*’ is not in itself contentious in this case.

Applying the principle of protecting the Overall Coherence of Natura 2000 in the particular context of North Killingholme

10.102 Further agreement between the applicant, Natural England and the RSPB is to be found in identifying the actual ecological function that North Killingholme Marshes supplies and that compensation is to be designed to achieve.

10.103 In this case while the marshes have a general role as a feeding ground for wading birds, including dunlin and redshank, they have a much more significant, specific and particular function in providing a nutritional resource for BTG in very large numbers during what the experts agree is the critical period of the autumn moult. The compensation site should thus be designed with the specific objective of being able to meet the feeding needs of BTG.

10.104 Paragraph 9 of the Written Summary of RSPB’s Oral Case at the Issue Specific Hearings on Compensation Proposals held on 12 and 13 November 2012 [HEA091] states that –

‘It is common ground that the ecological resource and function which the compensation provision has to meet is:

a. Inter-tidal mudflat to support the feeding requirements of a substantial majority of the Humber population of black-tailed godwit in the autumn moulting period; and

b. Adjacent or readily accessible high quality roosting sites.’

10.105 The Panel notes that the function that these three parties agree should be compensated for is an important element in the

international migration of BTG. Ensuring that such patterns of migration are capable of being maintained is in our view an especially important feature of the protection of habitats with international designations and as a result can be seen to be of special significance in maintaining the overall coherence of *Natura 2000*.

10.106 This special significance of wetlands for migrating birds is reflected in Article 4(2) of the Directive 2009/147/EC on the Conservation of Wild Birds which says –

‘Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.’²³

10.107 It is also reflected in the following extract from page 6 of the European Commission’s sector guidance document *The Implementation of the Birds and Habitats Directives in estuaries and coastal zones* (2011)²⁴ –

‘Estuaries and coastal zones are among the most productive ecosystems in the world, with both high ecological and economic values. They are of prime importance for wildlife, especially migrating and breeding birds and of major value in terms of their rich natural resources.’

The Panel’s conclusions on Protection of Overall Coherence of Natura 2000

10.108 The Panel concludes that, on the basis of the evidence and the submissions before it, the overall coherence of *Natura 2000* would be protected in this case if –

(a) that is understood to mean the replacement of the critical ecological function that would be lost with this section of the North Killingholme Marshes, in particular the foreshore;

(b) in practice, the compensation package is capable of meeting the requirement to replace the ecological function performed by North Killingholme Marshes for BTG during the autumn moult.

10.109 In this case while the marshes have a general role as a feeding ground for wading birds, including seven species (shelduck, lapwing, ringed plover, dunlin, bar-tailed godwit, redshank and curlew) that are part

²³ . [\http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:020:0007:0025:EN:PDF

²⁴ http://ec.europa.eu/environment/nature/natura2000/management/docs/guidance_doc.pdf

of the SPA non-breeding waterbird assemblage, they have a much more significant, specific and particular function in providing a nutritional resource for BTG in very large numbers during what the experts agree is the critical period of the autumn moult.

10.110 Responding to Second Round Question 2, NE advises that all these species are likely to be catered for if the needs of the BTG population, the species present in the most significant numbers and with specific requirements are met [REP051 Zip File Annex 1 page 3].

10.111 The Panel is consequently satisfied that the compensation site should thus be designed with the specific objective of being able to meet the feeding needs of BTG during the autumn passage.

The development of the compensation proposals during the examination

10.112 The original compensation proposals comprised a managed realignment site at Cherry Cobb Sands with a temporary wet grassland site at Old Little Humber Farm. During the examination the applicant concluded that these proposals would not deliver the necessary compensation. In consequence the compensation proposals have changed to a RTE scheme at Cherry Cobb Sands, with a new 'temporary' (but indefinite) wet grassland site adjacent. The latter is the subject of a separate planning application to ERYCS under the Town and Country Planning Acts.

The basis of the original proposals

10.113 It is important to understand that the applicant clearly worked closely with NE in the assessment of the compensation requirement and in the development of the compensation proposals before the original version of the application was submitted.

10.114 The application documents note that, in order to maintain the coherence of the *Natura 2000* network and to comply with the requirements of the Habitats Directive the loss of these areas would require compensation, citing NE –

'NE has confirmed that habitat compensation will need to be secured before consent is granted [APP084, ES 29, 1.3].'

10.115 NE has stipulated that the compensatory habitat should be located within the Humber middle estuary²⁵ [APP085, ES 30, 2.1]

'...the stated objective being to accommodate with the least disturbance the nine species of bird that will be displaced, in particular the large population of BTG (66%) wintering in the Humber estuary.'

²⁵ the area between the Humber Bridge and Grimsby

10.116 NE's advice to the developer was that the creation of a mudflat habitat to habitat loss should be in the ratio of 2: 1 and 1: 1 compensation for the loss of designated estuary features of the SAC to meet the tests in Regulation 66 of the Habitats Regulations and Article 6(4) of the Habitats Directive' This was calculated to equate to 73.4ha of inter-tidal mudflat and 21.2ha of sub-tidal estuary. [see also APP310, para 9.2.3]

10.117 The applicant also stated that –

'Natural England has advised that the compensatory habitat needs to be sustainable with the minimum of management intervention' [REPO36, Q 21].

'- and to achieve this objective a managed realignment scheme was chosen.'

10.118 In its Written Representations made in the early stages of the examination NE stated that it ' ... has a sufficient degree of confidence that the proposed amount of compensation should be sufficient [WRR 025], although it noted that further modelling work would be carried out to predict mudflat development in the first ten years.

10.119 The applicant used criteria that were agreed with Natural England and EA [APP085 with APP171] to identify the most suitable site for the compensatory habitat. The key criteria were –

- the area to be within the Humber middle estuary
- avoidance of areas with a large number of dwellings or infrastructure including major road and rail connections and industrial areas
- an area of approximately 100ha.

10.120 A total of eighteen sites were initially identified as potentially suitable. In the event, Cherry Cobb Sands on the north bank, opposite the main application site was chosen. This was apparently not least because the '...land has already been earmarked by the EA as a planned habitation creation site' [APP085, ES 30, Table 30-2] to compensate for coastal squeeze losses.

10.121 It should be noted that ABP also wished to acquire this land as potential compensatory habitat for future port development. In the event the land was put out to tender by the landowner (The Crown Estate) with the current applicant being the preferred bidder.

10.122 In addition 1.5km inland of the north bank between Cherry Cobb Sands and Paull Holme Strays 38ha of temporary wet grassland was to be created at Old Little Humber Farm to provide a feeding resource

for BTG and other birds until the new habitat at Cherry Cobb Sands became established.

The compensation proposals presented during the Examination

- 10.123 Criticisms of the original proposals for managed retreat at Cherry Cobb Sands were raised at the Open Floor hearing held at Hedon on the north bank of the Humber on 5 September. Mr Kirkland, the tenant farmer of the Crown Land that would be taken to provide estuarial habitat, said that the site had not been well chosen and if flooded would quickly become salt marsh and so not provide the intertidal mudflat habitat to meet the needs of BTG [HEA021].
- 10.124 These objections were backed up by a report dated 29 July 2012, from Mr Roger Morris of Bright Angel Coastal Consultants [ADD031]. The conclusion of the Bright Angel report, which had been commissioned by Mr Kirkwood, was that –
- ‘... the compensation site at Cherry Cobb Sands will not deliver comparable functionality to the mudflats that will be lost on the AMEP frontage.’
- 10.125 This report helped to inform the Panel’s Second Round Questions [PRC010] which were sent out on 17 August particularly Questions 8 and 11 which were addressed to NE in the first instance. In its response to Question 11 of the Second Round Questions [REP052] NE said that it was–
- ‘...in agreement with Roger Morris that the first interim design modelled by Black and Veatch would not have been sufficient to maintain the coherence of the *Natura 2000* network.’
- 10.126 The main features of the applicant’s revised approach to compensation are presented in the summary of its case put at the hearings on 11 to 14 September [HEA039]. Paragraph 8 acknowledges that managed realignment would suffer from siltation so that mudflat would not last. It then introduces the concept of a RTE in which –
- ‘...four cells would be created and the tide managed within them to allow the mudflat to last longer.... The cells would be managed as necessary to remove accretion that had occurred over time above a defined level. In total the realignment and RTE cells would provide a potential 60-70ha of mudflat with this area being reduced during times when one cell was impounded.’
- 10.127 The RTE proposals are designed to achieve managed sloping mudflats which do not dry out. As such they are more likely to promote conditions attracting black tailed godwit and meeting their nutritional demands than a scheme of managed retreat. The latter would be likely to end up with the type of habitat achieved at Paull Holme

Strays, with relatively steep sided creeks and extensive areas of salt marsh, rather than the extensive level areas of level mudflat seen on the foreshore at North Killingholme.

- 10.128 The applicant argues [HEA090] that if the mudflats are developed in association with a suitable flooded area to be a roost, comparable to North Killingholme Haven Pits, as is now proposed on land adjacent to Cherry Cobb Sands (but outside the red line of the AMEP project application site), the prospects of attracting BTG during the autumn moult are further increased.
- 10.129 In paragraph 2 of HEA039 the applicant states that Old Little Humber Farm is no longer put forward as temporary wet grassland. Paragraphs 3 to 6 explain that it is to be replaced by another area, adjacent to the Cherry Cobb Sands site, which is to be developed as wet grassland. Paragraph 3 states that the Applicant has secured an agreement with The Crown Estate that it can use this area ‘... for as long as it is required’. Subsequent refinement indicates that five ha of this 38ha site would be a wetland bird roost, intended to have a relationship to the Cherry Cobb Sands inter-tidal site, that is comparable to that between North Killingholme Haven Pits and the foreshore at North Killingholme Marshes.
- 10.130 The extent of the changes made in the compensation proposals and the extent to which further work is required on them has prompted a challenge as to whether the Panel should have allowed these changes to be introduced into the examination.

The effectiveness and adequacy of the RTE proposals

- 10.131 In its further submission following the second set of Specific Issue Hearings on compensation proposals on 12 and 13 November the applicant provides further detail on the RTE scheme. [HEA090]
- 10.132 A total of 101.5ha of inter-tidal area is to be provided within the area of Cherry Cobb Sands. The RTE area of this scheme will be an area of approximately 72ha which will be split into four areas of 18ha each.
- 10.133 Of this 18ha, 1.5ha will be taken up with channels and ponded areas whilst a further 1.5ha will be of reduced functionality due to bed levelling. Thus, there will normally be 60ha available, dropping to 45ha during neap tides when one area will have water impounded within it to provide a reservoir to keep the remaining areas covered with water. Sluices will be provided to allow sea water to enter each area directly and also between each area to allow sea water to be transferred between areas as required.
- 10.134 The first one to two years will be taken up with a ‘warping up phase’ when the sediment (mud) in the water is allowed to settle within the RTE areas. 100mm of sediment across all areas is the aim of this phase. The applicant’s consultant states that –

'Prey species for BTG would start to arrive within weeks of the start of warping... and that the biomass of the mud would be fully functional in no more than 18 months after the warping was complete' [HEA 090, para 48]

10.135 After this period dredging and bed levelling will be used to keep the mud at this depth. Construction would be expected to start in the autumn of 2013 and be in full operation by 2018.

10.136 The RTE scheme would require full time management to make sure it is operating effectively. In particular, it would require adaptive management with the ability to make any changes rapidly to any observed failings.

10.137 The concept of an RTE scheme has been generally seen as an improvement on the original proposals for managed retreat. The EA stated in September that it is -

'... pleased to see improvements to the proposed design of the compensation site, using the Regulated Tidal Exchange(RTE) scheme. The EA has no issues with the principle of using such a scheme It is the EA's opinion that a RTE scheme will deliver mudflat for a longer period than a managed realignment site alone, but without intervention in the future there will still be accretion and salt marsh reversion' [HEA038, p 2]

- and the prospect of a bird roost closely associated with inter-tidal mudflats is also welcomed; but the responses from NE and RSPB reflect the uncertainty as to how well this novel technology (in this country) will work.

10.138 RSPB in its response to the Panel's Second Round Questions stated that –

RTE is not being put forward '...in line with recommendations of the of the RSPB' ... an RTE is an option that should be considered ... It is impossible to approve a novel RTE in this location without detailed design and detailed assessment as to how it would work (and its environmental implications). It is far too late in the process for RTE to be raised and impossible for a third iteration to be worked up and tested within the time lines' [REP046, 7 Sept, Overview]

10.139 Dr Tony Prater, RSPB's expert on BTG, nevertheless stated subsequently in an answer to a question from the Panel at the Specific Issue hearing on the compensation proposals on 11-12 September 2012 that –

'... the right combination of the right size of probably RTE, with an adjacent wet grassland as we have indicated to the Applicant, is the way that we would believe would give the

very best chance of achieving the objectives.’ [HEA040, para 9]²⁶

10.140 RSPB’s position is made clear in para 2 of the written summary of its oral case put at the hearings on 11 and 12 September [HEA040] –

‘... the new indicative regulated tidal exchange (RTE) proposal had been shown to be fundamentally flawed in a number of basic respects; and ... there can rationally be no confidence that compensatory mudflat of sufficient quantum and quality can be provided at CCS within the fixed parameters of the site area and the location of the breach.’

10.141 That position remained in large measure RSPB’s stance on 9 November when making more detailed comments [ADD051] on the applicant’s final proposals²⁷ for RTE and wet grassland in EX28.3 [REPO56 zip file].

10.142 RSPB’s main concern is that the food resource of very high quality available on the North Killingholme foreshore will not be able to be replicated in the mudflats of the RTE. The applicant’s expert witness is of the view, however, that there would be enough food available in the RTE but also on the Cherry Cobb Sands foreshore. [HEA090 para 78]

10.143 RSPB is also concerned about the need for bunds and the lack of very wide open spaces with unimpeded views, which it fears may discourage BTG from using the site [HEA 091, para 47]. The applicant’s expert witness is of the view that since BTG already feed in the enclosed space of the North Killingholme Haven Pits there is no reason to suppose that they will not do so at Cherry Cobb Sands.

10.144 A further RSPB concern relates to the flat nature of the fields in the RTE and the consequent implications for BTG feeding. [HEA 091, para 47] The applicant’s expert witness contends that BTG would feed in 100mm of water as the North Killingholme Haven Pits showed.

10.145 RSPB is also concerned over the neap tide cycle and its implications for the availability of feeding areas. [HEA 091, para 47] in particular maintain that over the neap tide period, typically eight days out of each 14 day cycle, only 45ha would be available for feeding due to the need to keep the other fields wet.

10.146 RSPB sees a problem in the disturbance to the mud that would be caused by levelling and dredging and thus the impact on the invertebrate resource which constitutes the BTG food-source. [HEA 091, para 47] The applicant’s consultant agreed that there would be a disturbance to the area dredged but said it had been dealt with in the impact assessment, and that *Macoma balthica*, a preferred prey, have a moderate tolerance to this type of disturbance. [HEA 090, para 50]

²⁶ This is as recorded by the applicant.

²⁷ Final during the period of the examination

- 10.147 RSPB is concerned too about the risk of accretion to saltmarsh given that the RTE ground levels would be significantly above Mean High Water Neaps (at least 2.1m compared to a Mean High Water Neap of 1.9m. [HEA091, para 47] Against this, the applicant is of the view that any saltmarsh that did develop would do so only slowly and if necessary would be removed by hand.
- 10.148 NE share similar concerns to the points raised by RSPB, and particularly about the rate at which the food-stock of *Macoma* would develop in the 'sloppy mud' environment to be created, with the addition of a concern, shared in turn by EA, about the potential for increased erosion of both mudflat and saltmarsh on the foreshore in front of the RTE.
- 10.149 The Panel's conclusions on this topic are set out below.
- The effectiveness and adequacy of the temporary wet grassland at Cherry Cobb Sands*
- 10.150 There is less concern about the working of the temporary wet grassland, and support from NE and RSPB for the idea that it must be beneficial to have it adjacent to the RTE, although there is concern from those bodies as to when it will become effective as a source of food. [HEA086 para 36 - 46, HEA091 para 41, 42]
- 10.151 This area is approximately 38ha, with 26ha of wet grassland and the rest given over, at the southern end of the site, to an area of open water with two islands of approximately 0.4ha to provide roosting areas for the BTG. A further roost site will be provided in a water filled scrape in the wet grassland area. [REP056]
- 10.152 The applicant states that earthworms will be encouraged within the wet grassland to provide a food resource for the birds. If the rainfall is not sufficient to keep the grassland wet then water will be taken from the Keyingham drain. The grass will be kept down using grazing cattle as appropriate. [REP057]
- 10.153 The applicant assesses that this site would take at least two years to be fully functional – thus not before the end of 2015. [REP057, 1.7.7)]
- 10.154 The applicant considers this area only temporary because if the RTE achieves full functionality in terms of a food resource for the BTG then the wet grassland/roost site would become redundant at that stage. NE however, are of the view that this area will be needed in perpetuity because it mimics the roost site at North Killingholme Haven Pits in terms of closeness to the North Killingholme foreshore and the wet grassland will provide a further food source for the BTG.

- 10.155 The applicant has stated that The Crown Estate is prepared to make this site available for as long as is necessary, although the applicant has not given documentary evidence of this.
- 10.156 The issue that this aspect of the compensation scheme raises in relation to the application is deliverability. It forms what would be an essential part of the project, but it does not form part of the application. It is the subject of a separate application under the Town and Country Planning Acts to ERYC.
- 10.157 The Panel therefore recommends that the Secretary of State should seek confirmation from the applicant whether the application has been approved.

The need for 'over-compensation' at East Halton Marsh

- 10.158 The applicant states that, should the Secretary of State decide that further compensation is needed for the impacts of the time lag between the readiness for use of the compensation habitat and the loss of the existing habitat, then it offers a site which it owns at East Halton Marsh on the South Bank of the Humber Estuary. This site is of 38.82ha in size and is currently in arable use but would be converted to pasture. Seeding has already taken place.
- 10.159 The site's drainage is already isolated from surrounding fields; the applicant believes that it will develop into wet grassland. This then will become a feeding resource and high tide roost for BTG and other birds. [REP090, para 113]
- 10.160 RSPB however, is of the view that the site is of little value to the BTG as there is only a small area of steep mudflat in the vicinity although small numbers of BTG had been observed at the site. [HEA090, para 116]
- 10.161 NE notes that the habitat would not be fully functional until the end of 2015, and that the proposal is not clearly linked to the ecological function that would be lost were development of the main proposal to go ahead. NE states that if it is relied upon '... some, but fairly limited, additional confidence' can be ascribed to this aspect of the compensation proposal. [HEA086, paras30 and 31]
- 10.162 NE also states that it sees no difficulty in principle with amending the Compensation EMMP post-consent to include East Halton should the Secretary of State consider it appropriate. [ibid, para 32]
- 10.163 The Panel is of the view that it should be included within the scheme. The adequacy of food-stock for BTG remained contentious throughout the examination, with experts from the RSPB, NE and the applicant in dispute over the basis of calculation of the current ash free dry weight to be found in North Killingholme Marshes and therefore what the replacement value would be. (The applicant's case is at HEA090, paras

41 to 47; RSPB's case is at HEA091 paras 15 to 18; NE's views are at HEA086, paras 9 to 16.)

10.164 There was no resolution of this during the examination, but there was agreement that there should be a further survey. The implications of this are discussed below in relation to adaptive management and the EMMPs. But in the Panel's view in conditions of uncertainty it must be sensible to make as much available potential feeding ground available as possible.

Other possible impacts of the RTE

10.165 The introduction of the revised compensation scheme at Cherry Cobb Sands has raised further issues in relation to its impacts on the marine environment.

10.166 These concerns have been articulated primarily by EA and include–

- a concern shared with MMO that during the warping-up phase that there will be an increase in erosion in Stone Creek of up to 20% (1.8m) over the original scheme, and that any re-design of the sluices must not lead to an increase in the velocity and shear stresses during this phase. [HEA092, para 2.2]. EA also wished to know where the additional material will be deposited, and the implication for the vicinity of Stone Creek. [HE084, para 2.10] MMO requires the applicant to make an assessment or show where it can be found.
- a concern shared with Mrs Osgerby [HEA087] (a local resident) over the effect the new proposals would have on the Keyingham Drain which is situated at the head of Stone Creek and drains a large inland area preventing flooding, and that due to the erosion in Stone Creek there will be a greater head of water against the doors resulting in the tidal doors being shut for longer leading to a build up of fresh water on the other side of the doors, the effect of which has not been assessed.
- EA's desire to see a new appropriately protected flood defence at Cherry Cobb Sands, and are seeking a legal agreement with the applicant to secure this. [HEA 092, para2.6] The EA is hopeful a legal agreement can be secured in relation to this work. If this is obtained then the EA will remove their objection on flood risk in relation to the compensation site. See Environment Agency HEA113 para 1.1 – 1.5 for the position of legal agreements at the close of submission
- EA's concern that the wider hydrodynamics in terms of the drainage from the RTE and Foul Holme Sand via Cherry Cobb Sands creek, and the potential impact this may have on Stone

Creek, have not been adequately assessed [HEA092, para 2.11]

10.167 In the Panel's view these issues are all now addressed adequately by Requirements 37, 42, 43 and 44 of the draft DCO and the Marine EMMP .

10.168 MMO wishes to know where the applicant had assessed the breach in the sea wall at the southern end of the Cherry Cobb Sands site in terms of scour protection. Although para 39 of the Compensation EMMP states –

'... the base and southern end of the breached section will not be protected as little erosion is anticipated. The northern end of the breach, which is close to the RTE boundary, will be protected with rock armour.' [PDC 038]

- the MMO considers that this is not an adequate impact assessment and counter that –

'... the statement that little scour is anticipated at the southern end of the breach should be backed up with evidence. The plan for scour protection with rock armour should be based upon the predicted erosion which cannot have been adequately assessed as the location and level of the breach area have yet to be finalised.' [HEA 084, para 3.3]

10.169 The Panel considers that this is also now addressed adequately by Requirements 41 and 42 and the Marine EMMP

The question of certainty

10.170 The complexity of the issues around the necessary compensation to replace the lost ecological functions required the Panel to consider in the examination what the requisite standard of certainty should be. This was discussed in particular during the second Specific Issue Hearing on compensation on 12 and 13 November 2012. [HEA091, HEA090]

10.171 RSPB stated that while it accepted that, on an accreting shore, an RTE proposal is more likely to deliver long term sustainable mudflats than a Managed Realignment proposal [HEA 040, para 34], and that 'from a purely engineering prospective' the proposals might work [HEA 091, para 67] it had no confidence that the new proposals would be able to compensate for the ecological function at North Killingholme, particularly as regards BTG.

10.172 RSPB also states that it considers that the correct test of certainty is one of 'no reasonable scientific doubt', as articulated in the Waddenzee case (ECJ, Case C-127/02).

10.173 The Panel particularly sought the views of NE as scientific advisor to the government for these matters. NE takes a more nuanced view, stating that –

‘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 the compensatory measures will succeed, however there is a substantial risk they will not.’ [HEA 086, para 8]

10.174 NE observes that there must always be a risk associated *with any project* that the compensatory measures will fail, and especially with a scheme that has not been used before in the UK. This truism is recognised in European case-law –

‘The preservation of existing natural resources is preferable to compensatory measures simply because the success of such measures can rarely be predicted with certainty’ [ECJ, Case C-239/04, para 35]

10.175 But NE states that it does not consider that European Law includes a test of ‘no reasonable scientific doubt’ (as RSPB seeks to argue) in relation to the success of compensatory measures under Article 6(4) of the Habitats Directive. [HEA 086, para 3] NE considers that the correct test in Article 6(4) is a judgement that the compensatory measures must be sufficient to ensure the overall coherence of *Natura 2000* is protected.

10.176 The Panel concurs with this view, and agrees with the applicant [HEA090, paras 5 to 11] that the test of ‘no reasonable scientific doubt’ that there will be no adverse impact derived from the Waddenzee case can not reasonably be applied to assessing the likely outcomes of compensation measures. Any compensation measures should be designed to secure the desired outcomes [see NE’s advice in ADD080], but as the success of such measures can rarely be predicted with certainty it is not possible to say that there is ‘no reasonable scientific doubt’ as to their success.

10.177 It should be understood, however, that these discussions all took place in the context of the production by the applicant of the suite of draft EMMPs, the significance of which is discussed below.

The timing of implementation

10.178 It thus became clear during the examination that a significant issue was not just if the compensation proposals would be effective or how effective they would be, but when they might become effective.

- 10.179 At the Panel's request the applicant produced a timetable showing its desired implementation programme [ADD055]. This was discussed extensively during the second Specific Issue Hearing on 12 and 13 November 2012.
- 10.180 NE stated its concerns about when the compensation measures might reach full functionality, and the likelihood of a 'significant time-lag'. NE noted the applicant's proposed over-compensation, but observed that wet grasslands were not in themselves habitat for BTG and that there would be a time-lag on their provision at Cherry Cobb Sands. Referring specifically to paras 20 to 24 of the draft DEFRA Guidance issued in August 2012, NE stated that its implication was that compensation must be secured before implementation of the project and should 'normally' be delivered before implementation.
- 10.181 The applicant referred to para 22 of the DEFRA draft Guidance, which states –
- 'The competent authority (liaising with the statutory nature conservation body and others as necessary) must have confidence that the compensatory measures will be sufficient to offset the harm. This can be a complex judgement and requires consideration of factors including ... time to establish the compensatory measures to the required quality.'
- 10.182 If there is uncertainty or a time lag between harm to the site and the establishment of compensatory measures, larger area of compensation may be needed, coupled with a monitoring and management strategy that would require the applicant to take action if the compensation is not successful.
- 10.183 The applicant argues from this that the principle of a time lag is thus accepted, and that although para 24 of the DEFRA draft Guidance states that 'compensation must be secured before damage occurs', para 25 states that –
- 'In certain situations damage to European sites may necessarily occur before the compensatory measures are fully functioning. There may also be circumstances where the compensatory measures will take a long time to become fully-functioning (e.g. re-creation of woodland). In such circumstances it may be acceptable to put in place measures which do not provide a complete functioning habitat before losses occur. Provided undertakings have been made that the measures will in time provide such a habitat and additional compensation is provided to account for this.'
- 10.184 The applicant has also referred to para 5.4.2 of the EU Guidance *Managing Natura 2000 Sites*²⁸, which states that 'A site should not be

²⁸ http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

irreversibly affected by a project before the compensation is indeed in place'. The applicant's case on 'irreversibility' is that this should be understood in terms of the effect on the coherence of the *Natura 2000* network, not an irreversible impact at the particular project site in question – otherwise no time lag could ever be allowed, when it was patently operating in several cases in the UK. [HEA090, para 149]

10.185 NE argues, however, that –

Managing Natura 2000 provides (at para.5.4.2) the example (with a direct analogy to the case here) that 'a wetland should normally not be drained before a new wetland, with equivalent biological characteristics, is available for inclusion in the Natura 2000 network'. [HEA086, para 39]

10.186 The Panel, however, is not convinced that this is a direct analogy: the wetland referred to in this example seems more likely to be the 'network' itself, not a relatively small component part of it.

10.187 On balance, having considered the texts of both the EU Guidance and the DEFRA draft Guidance carefully, the Panel concurs with the applicant. In our view the test is the coherence of the *Natura 2000* network, and this must allow for damage to occur at a given site provided the necessary compensation measures have been secured not necessarily delivered. The two sets of guidance both clearly allow for a possible time lag, although obviously they will not encourage it.

The role of adaptive management

10.188 Given the uncertainties in this case, the Panel has considered carefully the role of adaptive management.

10.189 Guidance on the implementation of EU nature legislation in estuaries and coastal zones with particular attention to port development and dredging is provided in a January 2011 document *Guidelines on the implementation of the Birds and Habitats Directives in estuaries and coastal zones*²⁹.

10.190 This introduces the important concept of adaptive management, which was referred to in Second Round questions Q17 to 21 [PRC010]. NE's response to Q20 was –

'...if the monitoring determines that the site is not meeting its compensation objectives, then this will inform the need for adaptive measures.' [para 60 of Annex 1 in zip file REP051].

10.191 The answer given to Q20 in paragraph 32.1 of the applicant's responses to second round questions [REP052] is similar while pointing out that there is commitment to providing an appropriate

²⁹ http://ec.europa.eu/transport/modes/maritime/doc/guidance_doc.pdf

level of compensation for BTG to help reduce the levels of uncertainty and the need to rely on adaptive measures. The applicant refers itself to the need for adaptive management in relation to the management of the mudflats in the RTE. [HEA090, paras 51 and 52]

10.192 Section 3.4 of the Guidance is titled *Dealing with uncertainties: adaptive management* and includes the following –

‘An adaptive approach for the implementation of a plan or project or a compensation scheme may be particularly useful to address cases where, due to uncertainty associated with different contributory factors (location, confidence, unexpected delays), it is impossible to define all the effects of the plan or project or of a compensation scheme in sufficient details and if such uncertainty cannot be factored in through increased ratios. In such a situation, a rigorous monitoring scheme and a pre-defined validated package of appropriated corrective measures must be foreseen. Such measures must allow to adjust mitigation and/or compensatory measures to the reality of the impacts and by that way, make sure that the initially unforeseen adverse effects are being neutralized.’

10.193 The Panel views the concept of adaptive management and the scope for building adaptive responses into the Compensation EMMP as a highly significant to this case. As indicated in RSPB’s response to Second Round question Q17 [REPO46] there has been no experience of a scheme seeking to address a comparable impact on BTG and no specific evidence as to how they might be expected to respond.

10.194 The RSPB says of BTG ‘... they are highly aggregated species... found in very small areas of estuaries often in large numbers’. While the RSPB draw a conclusion that ‘There is no scientific evidence to give rise to the belief that they could adapt and go elsewhere’, the Panel notes that there is an equal absence of evidence for concluding that they cannot or will not go elsewhere³⁰.

10.195 The essential point is that how BTG would respond to creation of a compensation site at Cherry Cobb Sands is unpredictable and there is a number of potential outcomes, some of which may call for adjustment to the compensation. That requires that mechanisms be created for adaptive management, and these must be the EMMPs.

The role of the Environmental Monitoring and Management Plans

10.196 During the course of the examination it became increasingly evident that there would not, indeed could not, be a detailed set of

³⁰ As EYRC observes in its Local Impact Report, sites may be apparently suitable for BTG but still not have them

arrangements for compensation agreed by all parties and which the Panel could advise the Secretary of State were sure to deliver the required effects.

- 10.197 This is not due simply to the need for the applicant to revise the compensation package to take account of the shift from managed realignment to RTE; or to the disagreement over the standards of certainty to be set; or to the concerns expressed by NE or RSPB in particular as to the adequacy and efficacy of the proposals.
- 10.198 The problem that emerged very clearly for the Panel was not just the complexity of the proposals but the complexity of the environment itself. The River Humber is manifestly a very complex and highly dynamic ecosystem.
- 10.199 At an early stage in the examination the applicant noted –
- ‘The prediction of geomorphological impacts (which occur over decadal timescales) is not a precise science. When the Environment Agency commissioned an assessment of geomorphological change due to sea level rise in order to inform the Coastal Habitat Management Plan for the Humber Estuary, they obtained results from three separate numerical models; all provided different results with a significant range of impacts predicted.’ [REP008, para 22.142]
- 10.200 We can be sure that the River Humber eco-system will change, with or without human intervention. Predicting the nature and extent of that change with any degree of precision, however, seems to the Panel, to be a more-than-human skill.
- 10.201 This is not to undervalue the knowledge or professional and technical skills that has been displayed *en masse* during the examination. But the Panel is firmly of the view that the correct response to this dynamic environment is a monitoring and management system that respects and reflects it. This follows the EU Guidance on *Managing Natura 2000 Sites* and the draft DEFRA Guidance.
- 10.202 The Panel asked several questions [PRC006 Question 24, PRC010 Question 24, REP074] in the course of the examination about the role that such plans might play. NE states its concerns about whether the compensation measures will be effective and thus maintain the coherence of the *Natura 2000* site relate to the time lag between the beginning of the works and the functionality of the compensation site, the extent and quality of the mud in terms of food resource, and the certainty of implementation. These are issues that the Compensation EMMP in particular would seek to address [HEA086 para 79].
- 10.203 The applicant, NE, EA and MMO in particular have all invested significant effort in developing a suite of three plans covering the compensation, terrestrial and marine requirements. The provisions in

the latest drafts produced before the close of the examination are described briefly below.

Compensation Environmental Monitoring and Management Plan

10.204 The Compensation EMMP [PDC038] has become one of the most important documents related to the application. It covers the proposed compensation sites and the measures to be taken there. It sets out –

‘... the compensation measures that are required and lists specific objectives which are fundamental to their delivery. Further it includes targets and management actions which support the objectives and the monitoring which will be undertaken to confirm progress towards the objectives, and ultimately confirming that they have been achieved. Limits of acceptable change are defined and any necessary remedial actions which will be undertaken should the monitoring show that these limits have not been met.’ [ibid, para2]

10.205 The Compensation EMMP specifies that further discussions over targets, management actions and monitoring are to be held before a DCO is granted, and the plan would be reviewed in its entirety every five years. [ibid, paras 3 and4]

10.206 The applicant will be responsible for the implementation of the CEMMP but a Steering Group will be formed to monitor the effectiveness of the CEMMP.

10.207 Specifically the Steering Group would –

- monitor the progress of the Plan to ensure it is meeting its objectives
- consider and recommend remedial measures where and if these objectives are not been met
- provide expert views
- focus on targets, monitoring requirements and the adoption of remedial actions
- carry out the five-yearly review
- ensure that there is a transparent and open process for the implementation of the CEMMP with an evident audit trail
- provide regular updates on the implementation of the CEMMP to a ‘wider audience’. [ibid,para6]

10.208 Membership of the Steering Group would include NE, EA, MMO, RSPB, representatives from the local wildlife trusts, representatives from the

local authorities, Humber Industry Nature Conservation Association (HINCA); and two representatives, one from the local residents and one from local interest groups, to be rotated as required.

10.209 Under Requirement 17 of the DCO the Compensation EMMP requires the agreement of NE before development can commence.

Terrestrial EMMP

10.210 The Terrestrial EMMP [PDC040] covers the area within the AMEP site and as this partly covers a SAC and SPA/ RAMSAR site it is a important document. It also covers important species inland of the quay.

10.211 The significance of the Terrestrial EMMP is that it describes in detail the mitigation measures that are required and lists specific objectives to achieve their delivery. In addition, it includes targets and management actions to achieve specific objectives and the monitoring that will be required to meet these objectives.

10.212 As with all the EMMPs, the applicant would have the responsibility for implementing the EMMP but a Steering Group would be formed to ensure the applicant meets its responsibilities, with the same membership and duties as for the Compensation EMMP.

10.213 Under Requirement 17, the Terrestrial EMMP requires the agreement of NE before development can commence.

Marine Environmental Management and Monitoring Plan [PDC039]

10.214 The Marine EMMP [PDC039] is being drawn up to provide measures to mitigate the effects in the marine sphere that the proposed development would have on the SAC, SPA and Ramsar sites of the Humber Estuary. It would not be issued until the MMO, NE and the EA are satisfied that the targets/management actions and subsequent monitoring requirements are all in place.

10.215 The Marine EMMP would be reviewed every five years by a Steering Group consisting of the MMO, NE, EA and local wildlife organisations. Although the applicant has the responsibility for the delivery of the marine EMPP it is the Steering Group who will monitor the objectives set and recommend any remedial measures they think necessary to meet these objectives.

10.216 The marine EMPP would cover the following broad objectives -

- During dredging ensure sediment levels remain within limits agreed
- Corroborate predictions on intertidal accretion/erosion
- Record changes in the extent and composition of saltmarsh.

- Identify deleterious change to intertidal and subtidal benthic invertebrate and other fauna.
- Record and identify potential changes in intertidal topography.
- To identify deleterious change to subtidal benthic invertebrate fauna due to dredging and dredge disposal.
- Derive baselines for dredging and disposal impacts and to validate boundaries to disposal grounds.
- Ensure compliance with piling restrictions to restrict or remove potential impacts on sensitive marine mammal receptors
- Assess the longer term impacts of the development within the wider estuary on the EA sea defences. [PDC 039, Draft MEMPP, 23rd. Nov 2012]

10.217 Under Requirement 17, the Marine EMMP requires the approval of MMO before development can commence.

Provisions within the draft Development Consent Order

10.218 The force given to the three EMMPs is in Requirement 17 of the draft DCO, which specifies that the authorised development shall not commence until all three are in place, having been approved by NE or MMO as appropriate in consultation with the other statutory agencies and the relevant planning authority.

10.219 Requirement 17 also makes provision for further surveys and implementation timetables to be included.

The Panel's conclusions on the EMMPs

10.220 The Panel attaches great weight to the final drafts of the three Environmental Monitoring and Management Plans.

10.221 None was completed at the time that the examination was closed, and as described above they are in any event 'living documents' in that they make provision for plans to change as outcomes are observed or as the environment changes.

10.222 EA has expressed concerns and reservations about the EMMPs, in their current state of development, and notes that further amendments will be necessary.

10.223 But the Panel judges that, on balance, the final drafts available at the end of the examination showed sufficient development and agreement among key parties for us to have confidence that the resulting documents will be robust and practicable. As evidenced by the comments on the emerging EMMPs made by NE on 24 November [ADD080] and the EA on 23 November [HEA113] the matters

outstanding are in the Panel's view important points of detail, but not issues that should prove a block to final agreement and implementation.

- 10.224 The inclusion of these EMMPs in a Requirement that makes their completion to the satisfaction of the appropriate statutory authority before development can commence gives them the necessary force.

Legal Agreements

- 10.225 Legal agreements are sought by NE and EA.

- 10.226 The legal agreement between NE and the applicant has proved more problematic, in that the applicant has not resisted but maintains that it is not strictly necessary. The applicant argues that in other cases compensation proposals have not been integral to the application and therefore had to be secured by legal agreement, but in this case –

'... environmental compensation is included in the main application, and has been worked up to a considerable degree of detail. As the Royal Haskoning report commissioned by Natural England states, the RTE proposals include *'quite comprehensive engineering detail for this stage of the site's development'*. Thus given the guarantees in the DCO that the compensation site will be delivered, in contrast with other projects there is much more certainty in this case about what the compensation package will involve at the time of grant of the main development.' [HEA090, para 161]

- 10.227 NE counters this with the argument that –

'... a legal agreement is preferable in this case, and it would be willing to enter into one – ideally with other parties such as the Crown Estate and RSPB. It is accepted that the DCO provides some scope to contain the details of compensation proposals. However, for a number of reasons the robustness and enforcement of the compensation proposals would be enhanced if it were secured additionally by legal agreement. First, it would give Natural England a direct role in enforcement, if necessary. The relevant local planning authority East Riding of Yorkshire Council (that would enforce any requirement under the DCO) has not been active in the hearings over the compensation proposals. Secondly, part of the area relevant to the compensation proposals concerns the MMO, a proposed party to the agreement. Thirdly, the roost and wet grassland site is without the red line area of the application, so a supplementary commitment of some kind is required to secure that. Ultimately, it is a matter for the Applicant whether it enters into such an agreement and on what terms.' [HEA086, para 58]

10.228 In its written summary of its oral case following the final hearings on the draft DCO, NE relate this specifically to the issue of certainty –

‘Natural England’s position remains that a robust legal agreement would provide greater confidence in the mechanism by which the compensatory habitat proposed will be secured. This is for the reasons set out at para.58 of the 16 November summary. It is important to emphasise that this is without prejudice to Natural England’s advice to the Secretary of State as to the uncertainties over the effectiveness of the proposals themselves. *Whatever* one’s view of the compensatory habitat, if it is to be relied upon, it should be secured as robustly as possible. In addition to finalising and agreeing the EMMPs, Natural England is willing to enter into a legal agreement with the Applicant to facilitate this. This is subject to the agreement of terms, but Natural England is cautiously optimistic that these can be settled.’ [HEA108, para 22]

10.229 If the completion of this agreement has not yet been notified to the Secretary of State of State, the Panel recommends that NE should be asked about its status. The Panel accept NE’s argument that such an agreement would add to the level of confidence in the delivery of the compensation measures; given the complexity of the case, that seems to us highly desirable, and we hope that the applicant has concluded such an agreement and notified the Secretary of State. The Panel would not however recommend that consent should be withheld on the grounds of the lack of this agreement alone.

10.230 After considering the revised compensation proposals presented by the applicant on 12 October, EA stated that it would require additions to the DCO and/or Legal Agreements. These include flood defence works at Cherry Cobb Sands, including long term maintenance of the sites, long term monitoring of estuary processes, potential impacts on flood defences and erosion and sedimentation impacts. EA has also sought to include compensation for the adverse impacts of piling on salmon fisheries.

10.231 EA says that it seeks to conclude this legal agreement so that it can be satisfied that its interests will be properly protected and be in a position to withdraw its objections on various matters. [HEA108, Section 15]

10.232 At the end of the examination EA appeared confident that agreement would be reached, as did the applicant, but provided draft Requirements and additional protective provisions for the DCO in the event that agreement has not been or will not be reached. The draft Requirements have been incorporated in the DCO as part of Schedule 11, and the additional protective provisions are dealt with in the section on Part 2 Schedule 9.

10.233 If the completion of this agreement has not yet been notified to the Secretary of State, the Panel recommends that EA should be asked about its status. The Panel has not felt able to come to a clear view on the claims of the salmon fisheries, but the other provisions sought by EA are in our view necessary.

The Panel's overall conclusions on the compensation proposals

10.234 It will be clear that a very large amount of evidence was put forward in relation to defining the requirements for and then developing mechanisms for delivering the necessary compensation, and that it could be said that this became the primary focus of the examination.

10.235 It will also be apparent that at the end of the examination there were many issues that had not yet been resolved to the satisfaction of the three key statutory consultees, NE, EA and MMO, together with the continuing concern or opposition expressed by RSPB.

10.236 The Panel notes the statement in *Managing Natura 2000 Sites* (para 5.4.3) that -

'In order to ensure the overall coherence of *Natura 2000*, the compensatory measures proposed for a project should therefore: (a) address, in comparable proportions, the habitats and species negatively affected; (b) concern the same biogeographical region in the same Member State; and (c) provide functions comparable to those which had justified the selection criteria of the original site.'

10.237 The Panel concludes that the first and second of these tests are met; and that, with the recognition of the principle of adaptive management and its application through the three EMMPs, there is adequate assurance that the third test will be met.

11.0 THE SOCIAL AND ECONOMIC SIGNIFICANCE OF THE PROJECT

11.1 The application is supported strongly by local MPs, the LEP and the two Lincolnshire local authorities, all of whom took part or were represented at the Open Floor Hearing in Immingham.

11.2 During the examination the LEP produced the final version of its strategy *A Plan for the Humber 2012 - 2017*, which states –

‘The Humber’s location and land resources on both banks offer unrivalled competitive assets for offshore wind. We intend to capitalise on these to create a ‘super cluster’ through the formation of a new industry sector in the UK for the first time in 40 years.’ [ADD081, page 7]

- and goes on to make the point that –

‘Scunthorpe is home to the Tata Steel Europe Long Products Hub, one of Europe’s most competitive integrated steel plants. The Humber’s plans to grow the offshore wind sector have major potential in terms of steel demand from the supply chain and the development of complementary areas of expertise.’ (ibid, page 9)

11.3 The applicant’s estimate of possible new jobs, which has not been challenged, is over 9000, direct and indirect [APP076].

11.4 There was unanimity and strength in the views expressed at the Open Floor Hearing in support of the project generally and the LEP’s strategy. The Leader of NLC states there that –

‘We now have a once in a lifetime opportunity to transform the economy of the whole of the Humber based upon providing a renewable energy cluster centred on the South Humber Bank’ [HEA026]

11.5 The key messages that came through were that –

- regeneration in the Humber region is a pressing need, already recognised by the government through both the designation of the large Enterprise Zone on the South Bank followed recently by the award of a £10m Regional Growth Fund grant (HEA067)
- all the parties involved are realistic about the limited range of options for achieving this objective
- all are agreed that the creation of a new manufacturing and servicing cluster supporting offshore wind is the critical central component
- the AMEP proposal is central to the delivery of that cluster.

11.6 The LEP said that it would be 'A big setback to the Humber economy if the Able development does not materialise' (ibid). NLC went further and said–

'In short, the Able Marine Energy Park is critical to the prosperity of Northern Lincolnshire and the Humber and it simply has to happen and with timing being of the essence.'
[HEA026]

11.7 NLC also expresses concern at the hearing about ABP's perceived opposition to the application, its implications for their 'virtual monopoly' of the River and its incompatibility with ABP's membership of the LEP. (HEA026).

11.8 The Panel asked for ABP's views through a Rule 17 Question to which ABP responded (REP084) at length, to the effect that –

- ABP supports the development of Humber as a super cluster as an area of excellence for *all* renewable energy
- But this is just one of many important objectives for the Humber
- Neither ABP nor the LEP can view the concept of a super cluster as being more important than maintaining, protecting and developing the Humber's existing strengths
- Offshore wind is only one form of renewable energy and AMEP is not the only way to achieve 'excellence' in offshore wind
- If AMEP does not proceed that would not frustrate the realisation of many equally important but possibly competing objectives of the LEP plan.

11.9 The Panel notes the points that ABP makes. The tension that ABP feels is entirely understandable, given its desire to develop Green Port Hull for off-shore wind and Immingham for possible future biomass traffic and to protect its landholdings at Immingham to support that. But we conclude that this does put ABP at variance with the current objectives of the LEP.

11.10 The Panel considers that the LEP's *A Plan for the Humber* seeks to strike a balance between realism as to what the opportunities for the region might be with a determination to seize the promising ones; and that the members of the LEP should see the current application as uniquely promising in that respect.

11.11 The same points were reinforced in the evidence given to the Panel at the Specific Issue Hearing into the LIRs submitted. The LIR produced by NLC is not an advocacy document. Nevertheless its assessment of

the potential socio-economic impact in Section 9.2 provides strong support for the proposal –

‘Since details of the development became public there have been an increased number of investment enquiries from renewable sector companies and other associated supply chain businesses and industries. There is evidence that these enquiries have increased particularly over the last year ...

The build phase of the AMEP will create 419 temporary jobs during the construction phase which is likely to run over a number of years. Of these jobs a number will be temporary jobs created through sub-contracted works within local firms ...

Once the AMEP is operational there will be 4,271 direct jobs created predominantly in manufacturing although new occupations will be brought to the area requiring varying levels of skills. This is in addition to the 5,100 jobs that are to be created through the Logistics Park which is also located on the South Humber Bank. Local residents will have a significant opportunity to improve or diversify their career from their current employment ...

Following the initial first-stage investment of the new manufacturing businesses on the AMEP there will be further investment in the South Humber Bank through associated supply chain companies co-locating for financial advantage. Non-renewable sector companies in North Lincolnshire and surrounding areas will also benefit through providing supplies and services to these first-stage companies such as: office supplies, service industries, finance and legal, logistics, training, etc, all bringing an additional benefit to and increased sustainability of the local economy. It is estimated that a further 10,400 further jobs will be created in the area due to the secondary investment stage.’

- 11.12 At the Specific Issue hearing on 22 October 2012 the Panel queried the implications for NLC’s economic strategy if the application did not proceed, and whether the Council had a ‘Plan B’. NLC’s representative stated -

‘No ...I came into this post five years ago, and was challenged to actually create transformational developments as opposed to the kind of betting and bobbing which has happened too long in the Humber. So in doing so, all the effort has been focused upon that single transformational project and there are not too many Plan B transformational projects across the country right now. This is the single one’ (cited from transcript in ADD055, para 44).

- 11.13 NLC also seek to make the point that the proposed development has significant implications for other parts of the Humber region –

‘Indeed the proposal to create 10,000 jobs on the South Humber Bank is also the basis and the catalyst for regenerating the town of Scunthorpe 20 miles away and there are ambitious plans to create one of the largest housing projects mixed use schemes in the north of England with a project called the Lincolnshire Lakes. A 2,000 hectares site where a series of villages around brand new waterside settings will be created. The council have a private investor who is backing this scheme and will start as early as 2015 to create a new business park, new leisure facilities and a new waterside setting that will transform the image of the area and put Scunthorpe upon a new economic trajectory. This cannot happen unless the jobs are created upon the South Humber Bank.’ (HEA067)

- 11.14 The Panel is not in a position to assess the probability of such second-order implications. But we consider that it is probably an unusual attribute of a NSIP that it should have such strong and significant local support based upon an assessment of its ‘transformational’ socio-economic potential and the associated benefits. The Panel gives this significant weight in making its recommendation that the Secretary of State give consent to the application.

12.0 ADEQUACY OF THE ENVIRONMENTAL STATEMENT

The relationship between the Environmental Statement and the description of the project

- 12.1 Throughout the examination the adequacy of the ES has been subject to a series of challenges, mainly by ABP.
- 12.2 ABP has expressed concern that the project is wrongly described [RRP042], repeated and developed in its Written Representation [WRR007].
- 12.3 ABP raised this concern at the Preliminary Meeting on 24 May 2012 [PDC005, PDC006], and requested an additional Issue Specific hearing on the matter of 'soundness', or the status of the application as an NSIP under the PA2008. The Panel put specific questions on this point addressed both to the applicant and to other parties. The Panel considered that responding to questions, and commenting on answers provided, gave adequate opportunity for all parties to present their views. [PRC004] It was discussed at some length during the first draft DCO hearing.

The introduction of supplementary environmental information

- 12.4 ABP raised a further challenge during the first Specific Issue hearing on the draft DCO and DML on 12 July 2012. ABP argued that the provisions of Regulation 17 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (as amended) applied with the effect that the examination should be suspended.³¹
- 12.5 The Panel sought a written submission from ABP on this point, which was provided on 17 July (ADD002). The main points in this submission were that the ES did not supply data about a general cargo port; the extent of the supplementary environmental information suggested that the applicant accepted that the ES was inadequate; and the ES would still be inadequate even if the facility was limited to wind energy.
- 12.6 The Panel considered this application and responded on 25 July [PRC009], noting that the applicant had stated that it would include a

³¹ **17.— Accepted application — effect of environmental statement being inadequate**

(1) Where an Examining authority is examining an application for an order granting development consent; and paragraph (2) applies, the Examining authority must—

(a) issue a written statement giving clearly and precisely the full reasons for its conclusion;

(b) send a copy of that written statement to the applicant; and

(c) suspend consideration of the application until the applicant has provided further information.

the Examining authority must suspend consideration of the application until the requirements of paragraph (3) are satisfied.

(2) This paragraph applies if—

(a) the applicant has submitted a statement that the applicant refers to as an environmental statement; and

(b) the Examining authority is of the view that the statement should contain further information.

restriction on cargo to limit this to marine energy infrastructure, and that the Panel did not consider that provision of supplementary environmental information meant that the ES was not in fact an ES.

- 12.7 In reaching this view the Panel had regard to authorities such as *R (Blewett) v Derbyshire County Council 2004* that cases where environmental statements are so deficient as not to be environmental statements will be 'few and far between'³²; and *Humber Sea Terminal Ltd v Secretary of State for Transport 2005*, in which Ouseley J found that despite the challenge the Environmental Statement did cover a description of the proposed remedial measures (covering both mitigation and compensation measures) and in any event 'the fact that the proposed remedial measures changed as the discussions reached a conclusion' did not make the ES 'something other than an ES'.
- 12.8 In the Panel's view, the environmental information is sufficient for the Secretary of State to take into consideration before taking a decision in compliance with Infrastructure Planning (Environmental Impact Assessment) Regulation 3(2)³³.

³² The [EIA] Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the "environmental information" of which the statement will be but a part. (*Blewett*).

³³ **3.— Prohibition on granting consent without consideration of environmental information**

(1) This regulation applies to—

- (a) every application for an order granting development consent for EIA development received by the Secretary of State; and
- (b) every subsequent application for EIA development received by a relevant authority on or after 1st March 2010.

(2) Where this regulation applies, the Secretary of State or relevant authority (as the case may be) must not (in the case of the Secretary of State) make an order granting development consent or (in the case of the relevant authority) grant subsequent consent unless it has first taken the environmental information into consideration, and it must state in its decision that it has done so.

13.0 MARINE ISSUES AND THE IMPLICATIONS FOR OTHER USERS OF THE HUMBER

- 13.1 Conflict with ABP Plans for the Development of the Western Deepwater Jetty (WDJ).
- 13.2 ABP seeks to make a strong case that they need the 'triangle site' (plots 03020, 03021, 03022 and 03023) in order to be able to construct the WDJ.
- 13.3 In their submissions and in the Port of Immingham Master Plan 2010-2030, dated October 2012, ABP states its intention, subject to demand for the anticipated need for imported biomass, to extend the Humber International Terminal (HIT) to create HIT 3. This would be done by upgrading the Immingham Gas Jetty and extend the current HIT. The displaced cargo from the Gas Jetty will then be accommodated at the WDJ.
- 13.4 The Panel has considered this carefully: the Port of Immingham is very important to sea-trade, and anything that might frustrate its development is to be taken very seriously.
- 13.5 Three significant issues relating to this arose during the examination.
- 13.6 First, the Port Masterplan on which ABP relied strongly was finalised in October 2012. [ADD034] The applicant has pointed out several apparent flaws or omissions in its preparation. [CAI021, para 75]
- 13.7 Second, the assumptions on which the demand for this development are predicated are subject to challenge – indeed are challenged by the applicant, notably in paragraphs 112 et seq of the applicant's closing submission. [ADD055]
- 13.8 Third, there appear to be a number of alternatives to the WDJ. A new jetty could be constructed between HIT3 and the South Killingholme Oil Jetty. South Killingholme Oil Jetty itself could be used, or the East and/or West Jetty, common user berths, both of which already handle liquid petroleum and chemical traffic; or possibly the Immingham Oil Terminal (IOT).
- 13.9 The Port Masterplan states in paras 7.36, 7.37 and 7.38 that -
- 'With the expiry of the exclusive lease new operational arrangements will be introduced. [7.36] ...The deepwater facilities at IOT, however, have the capability to service a wider customer base in the future. Land has been assembled in the vicinity of IOT to provide areas for future storage capacity for new traffic... [7.37] ...plans to redevelop the Immingham Gas Jetty as part of the HIT3 construction will require alternative exit supply routes for these white oil trades

currently handled by the jetty. Part of this proposal is to transfer this operation to the WDJ and/or IOT.'[7.38]

- 13.10 Thus ABP itself acknowledges that there are possible alternatives readily available for the WDJ. The Panel notes that land has been acquired nearby for storage of oil products from these berths.
- 13.11 Without the triangle site the applicant would not be able to complete the hard standing, and it would be impossible to construct the quay in its entirety because the foreshore is the base of the triangle site and needed to complete the quay as planned.

Operation of C.RO with Regard to Navigation

- 13.12 C.RO has concerns about the construction and operation of the proposed NSIP in respect of how it will affect their own marine facilities. C.RO has carried out its own hydrodynamic modelling and marine simulation to satisfy itself that the proposed NSIP would not pose any undue problems for the berthing and un-berthing of vessels at their facility [REP054, para 5.2]. After this work C.RO is now satisfied with this aspect of the proposal but have other concerns that have been addressed through protective provisions in the DCO.
- 13.13 C.RO has asked why the applicant's dredged turning circle overlapped with C.RO's approach channel. The HMH (HMH) has explained that this was necessary to accommodate the largest vessel that might use the proposed NSIP. In the simulation studies a large bulk carrier was used as this was thought to represent the worst case in terms of size and manoeuvrability (length 225m x beam 32m, 45,420 DWT).
- 13.14 A protective provision (59C Part 6) is included which requires the applicant not to dredge in C.RO's approach channel without prior approval from C.RO. Furthermore, C.RO is indemnified against any expenses or losses incurred by C.RO if increased sedimentation occurs as a result of the development.
- 13.15 Notwithstanding the fact that HMH is ultimately responsible for the safe and timely movement of vessels within his jurisdiction, (C.RO's jurisdiction does and the applicant's jurisdiction would only extend 100m from the quay or jetty face) C.RO still seeks protective provisions regarding the arrival and departure of vessels from their facility regarding vessels visiting the proposed NSIP blocking the C.RO approach channel. These are given in 59A and 59B in Part 6 of the DCO [PDC037, 23 November].
- 13.16 C.RO has also been concerned about the effect that a large vessel moored at the upstream end of the proposed NSIP might have on its own area. The applicant has commissioned a further study [REP 056, Ex 8.15] from H.R. Wallingford to model this. In their Interpretation of Model Results, para 2.2 they found that –

Peak flow speeds for this very large spring tide are predicted to reduce by ~0.4m/s at CPK. No re-circulations are predicted at CPK.

- 13.17 The Panel considers that C.RO's concerns are now adequately addressed by protective provisions given in Schedule 9, Part 6 of the DCO [PDC037].

Dredging

- 13.18 Extensive dredging will have to be carried out both in front of the proposed quay and Cherry Cobb Sands Channel.
- 13.19 The sea bed at North Killingholme comprises non-erodible glacial till (clay) overlain with erodible sand, gravel and silt. Cherry Cobb Sands Channel comprises sand and silt only. 500,000 cubic metres of the glacial till, approximately half of the total amount of till, will be deposited on land as infill material at the project site. The total amount of Capital Dredged material is 2,158,460 cubic metres of which 1,203,914 is erodible material and 954,545 cubic metres is non-erodible [PDC047, DCO Schedule 8 para 11-12]
- 13.20 MMO through the DML will control both Capital and Maintenance dredging. MMO will also specify where the dredged material is to be deposited. The licence requires both the Capital and Maintenance dredged erodible material to be deposited in HU80, an area just to the south of the Sunk Dredged Channel (SDC), and the non-erodible material in HU82 an area just to the north of the SDC.
- 13.21 ABPmer³⁴, raised concerns about the use of HU80 for the erodible material. His main concern in this matter was that the deposited material would lead to siltation in the SDC [REP026 ABPmer, para 1.5]. The applicant's assessment is that the sand and silt will disperse in the water column and –

'...represents a negligible impact on current maintenance dredging requirements in the Outer Humber Estuary.'
[REP056, EX 8.16: 8.6.17]

- 13.22 Similarly, an in-combination assessment of disposal areas HU81, HU83 both open together with HU82, all close together, show that:

'no impact in terms of maintenance dredging of the SDC is expected. Sedimentary impacts due to the AMEP disposal are negligible.'
[REP 056, EX8.7A: para 5.5.3]

- 13.23 Nevertheless the applicant proposes to undertake regular (possibly fortnightly) bathymetric surveys of the SDC.

³⁴ ABPmer admitted in cross examination that he is prohibited from the terms of his contractual arrangements with ABPmer from giving advice or evidence contrary to the interests of ABP or associated companies [HEA 039, Applicant's Summary, para 43]

- 13.24 ABPmer was also concerned about the effect on the morphology of the estuary by taking material from the middle of the estuary, i.e. the dredged arisings, and the possibility that depositing them in the lower estuary would lead to a knock-on effect on protected sites. However, the MMO is satisfied with the applicant's assessment of the morphology in EX 8.7 [REP056] and takes the view that any effects would be localised and would not result in any knock-on effects.
- 13.25 MMO has been concerned about the effects of gravel being put in HU80. MMO requested further modelling from the applicant both to determine what the impact on the hydrodynamic processes would be and also to assess what the changes to the benthic environment might be.
- 13.26 As already noted in regard to EX 8.7A, the disposal in HU80 should not affect the flow regime of the estuary. With the strong currents in this area, up to 4 knots, it is predicted that in a relatively short time (<60days) the gravel will travel up and down the estuary with the tide. Most will end up in a depression 3.5km south of IOT [REP056, EX10.8: paras 2.10.5 and 6]. This conclusion appears to have been accepted by the MMO as the gravel will be licensed for deposit in HU80.
- 13.27 The impact of smothering in HU80 due to Able alone is assessed to be –
- '... of negligible significance as a result of the benthic community's high recoverability.' [REP 056, EX 10.8: para 2.9.4].
- 13.28 However, it seems highly likely that the dredging for Grimsby RoRo will take place either just before or at the same time as the proposed NSIP. Because Grimsby RoRo arisings also contain gravel it was thought prudent to conduct an in-combination assessment. The applicant's study shows that –
- 'The in-combination impacts may however result in an extended duration of impact on the benthic communities and biotope complexes present...a precautionary assessment of minor adverse significance is considered appropriate.' [REP 056, EX10.8; paras 2.10.5 & 6]
- 13.29 To sum up, MMO is satisfied with the modelling done with respect to dredging, both capital and maintenance, and with the modelling of the flow regime and dispersal of the arisings in the deposit areas. On that basis MMO is prepared to license both the capital and maintenance dredging with the areas specified where this material can be deposited.
- 13.30 The Panel considers that these matters have been addressed adequately in the DML as well as continuing to be subject to future

licensing decisions that can be made within the context of the Marine EMMP.

The Outfalls of E.ON and Centrica

- 13.31 To the northwest of the proposed development there are two intakes/outfalls from nearby power stations. The E.ON outfall/intake is very close to the application site whilst the Centrica outfall/intake is somewhat further away. It is the predicted siltation at the outfalls which is of concern to the power station operator(s), and:

‘Supplementary reports EX 8.8, EX 8.9 (H R Wallingford, 2012) show 3-3.5m deposition predicted at the E.ON Outfall and with the risk of deposition over the longer term at the Centrica Outfall.’ [REP 056, EX 8.16: 8.6.50]

- 13.32 The applicant intends to deal with this by monitoring and plough dredging when necessary. These actions and the need for agreed trigger levels are incorporated as Requirement 38 of the 23 November draft DCO.
- 13.33 Provision for new outfalls is to be built into the quay. In the event that plough dredging is not working satisfactorily and these new outfalls are needed then subject to obtaining a further marine licence they can be brought into use.
- 13.34 The concerns of E.ON and Centrica are dealt with in the Protective Provisions as Parts 9 and 10, Schedule 9 of the DCO [PDC 037].
- 13.35 The Panel considers that the 23 November draft DCO now deals adequately with all these issues.

Adequacy of the Modelling

- 13.36 The initial modelling of the river regime was considered inadequate by almost all the interested parties including the MMO, EA, NE, C.RO and ABP. The major problems appear to have been that the original 2D modelling was carried out using the original design of quay and did not include Immingham Outer Harbour (IOH).
- 13.37 Further 3D mud transport modelling was carried out by H R Wallingford and reported in Supplementary Report EX 8.6. [ADD043 zip file] H R Wallingford confirmed that IOH had been included in this model along with the drag effects on the C. RO facility.
- 13.38 The mud modelling showed that there was a reduction in maintenance dredging required at the other berths in the vicinity, including C.RO, South Killingholme Jetty, IOT, HIT, Immingham Bulk Terminal and Immingham Outer Harbour. Moreover, there was no increase predicted in the drag effect at C.RO. However, a further 2D sand transport model showed ‘small impacts on adjacent berths’ [REP 056,

EX 8.7A]. Overall, the mud modelling taken together with the sand modelling predicts a reduction in maintenance dredging at nearby facilities.

13.39 ABPmer had many criticisms of the modelling of the hydrodynamics and sedimentation in the estuary, perhaps best summed up by his comments, 'The validation of the sediment model therefore remains questionable' [REP 016, Representations in relation to Supplementary Environmental Information and Applicant's Comments on Written Representations, Part 1,9.VII] and 'The new supplementary reports do little to answer questions raised on the reliability of the assessments of impacts made in the original ES' [Ibid 10].

13.40 MMO concludes differently –

'At the hearing the ExA asked the MMO whether it agreed with the reduced level of sedimentation at the berthing pockets suggested by the Applicant in Table 3 of Report EX 8.6. Mr Dean Foden from the Centre for Environment, Fisheries and Aquaculture Science (CEFAS), the MMO's scientific advisor, confirmed that the assertions looked reasonable ...The MMO confirmed that, in the light of the explanation provided by Dr Dearnaley, it no longer had a concern on this matter and did not feel that additional modelling was required.' [HEA 037, paras 2.8 & 2.9].

13.41 Given that further modelling work on the estuary has been carried out, that HR Wallingford has explained the significance of the results of this modelling and that MMO has accepted the findings and requires no further modelling, the Panel considers that these issues have been addressed adequately.

The Relationship Between MMO and HMH

13.42 HMH and MMO have very different responsibilities but nevertheless overlap to a certain extent within harbour limits. In considering the application and assessing the evidence before it, and in particular the provisions of the draft DCO and DML, the Panel has been anxious to understand the respective responsibilities and avoid any confusion about future responsibilities that might arise.

13.43 ABP, apart from its role as a port operator, is also the statutory harbour authority for the Humber. As harbour authority for the Humber Estuary, the ABP Board of Directors has delegated the roles of harbour authority to ABP Humber Estuary Services (HES) so that although the HMH is an employee of HES there is a clear distinction of responsibility between the ABP Board and HMH. Thus, HMH is responsible for implementing and upholding Codes and Acts as they relate to harbours. These include the Port Marine Safety Code (2009), Prevention of Oil Pollution (1996) the Navigation Bye Laws (1990), the

Merchant Shipping Act (1894) and the Pilotage Act (1987) amongst others.

- 13.44 MMO is an executive non-departmental public body established and given powers under the Marine and Coastal Act (2009) and is responsible for marine licensing, harbour revision and empowerment orders, including the OSPAR Convention (dredging) amongst others.
- 13.45 As already noted, it is MMO that would issue the licence for the quay to be built and licenses capital and maintenance dredging, also stipulating where dredged arisings are to be disposed of and in what annual quantities.
- 13.46 HHM has sole responsibility for traffic management in the Humber and conservancy (the river regime). To this end it is part of the General Conditions of the DML that HMM is to be consulted on all matters below the HW mark. [PDC037, DML, Part 4, para 13]. Furthermore, extensive Protective Provisions for HMM are given in Schedule 9 of the DCO.
- 13.47 The Panel is satisfied that whilst MMO and HMM both have their own clearly defined responsibilities in relation to the application these are complementary to each other within harbour limits. In finalising the draft DCO/DML the Panel has sought to ensure that the arrangements support a viable working relationship.

14.0 THE KILLINGHOLME LOOP

- 14.1 In the Panel's view the status of the possible Killingholme Loop is an important and relevant consideration, because of its possible significance for the development of the applicant's project but also other possible developments or requirements.
- 14.2 The Killingholme Loop is identified in the Freight Rail Utilisation Strategy (2007) [WRR010] as a possible additional line in the North Lincolnshire area providing additional capacity in particular to the Port of Immingham. One possible alignment for this new line would be along the spur of the former Barton and Immingham Light Railway from Immingham to Goxhill which currently runs through the site under application to the sites owned by C.GEN and C.RO.
- 14.3 The implications of this possible development are discussed in section 15. The policy context provided by NR in their answer to the Panel's questions is as follows [REP048] -
- 'Studies show that it is the only way to create significant additional capacity so that trains can get to the wider rail network without having to cross KIL1 in the Port of Immingham if the maximum foreseeable rail demand were to arise. It is the only feasible way that has been the subject of studies to create a through route out of the west end of the Port and therefore relieve capacity on KIL1. If customers require more trains then there may be a need for more capacity than KIL1 can cope with and therefore make the Killingholme Loop viable. The key issue is to create another route to the wider rail network that avoids KIL1 within the Port of Immingham hence the requirement to protect the route running through the AMEP site.'
- 14.4 Current proposals to protect the potential future capacity are driven by the Biomass market. This is a new market of which Britain has little experience to date - both in terms of its commercial potential and its logistics. However, information gained from our close links to the major electricity generators suggest that there is sufficient confirmed interest in conversion of plants to biomass generation to make it prudent for us to cater for a "high demand" case for this sector. The events of the next 5 - 10 years should determine whether this high demand transpires and whether we need to respond with greater network capacity.
- 14.5 NR accepts that the spending plans for the £200 million granted for freight schemes in Control Period 5 (2015 – 2020) do not include the Killingholme Loop currently, but NR observes that there is time for the priorities to change before the list of freight schemes currently under review is finalised in response to industry demand.

- 14.6 The applicant has challenged the basis of NR's claimed intentions for the Killingholme Loop, objecting [CAI021] that NR has no right to construct the Killingholme Loop – the route is not even safeguarded in the local plan, there are no planning approvals or applications, and the scheme might well be an NSIP in its own right requiring its own DCO. To obtain a DCO the applicant states that NR would need to undertake an environmental impact assessment, appropriate assessment, the compulsory purchase of additional land and the consideration of alternative solutions, particularly if they were unable to mitigate the intensification of the use of the route through the North Killingholme Haven Pits as part of the Humber Estuary SPA to the extent that they were unable to avoid an adverse effect on the integrity of the European site.
- 14.7 In the event this has become a matter to be considered primarily in relation to compulsory acquisition (section 18). The Panel's general conclusion, however, is that while the Killingholme Loop is far from being a definite requirement, nevertheless to protect that opportunity and to meet the concerns of potential rail users (C.RO and C.GEN) beyond the applicant's site the railway line should remain within the operational network.

15.0 ROAD TRANSPORT ISSUES

- 15.1 In its initial assessment of principal issues the Panel identified the impacts of the proposed development on land traffic and the adequacy of the proposed mitigation.
- 15.2 The applicant's road transport case is contained in its TA, which is set out at Annex 15.1 to its Environmental Statement (APP153). Its Framework Travel Plan is set out in ES Annex 15.2 (APP154).
- 15.3 Two SoCGs were produced in the course of the examination – one between the applicant and the Highways Agency (HA) on 21 May [PDC018], and one between the applicant and NELC [PDC022] on 25 July.
- 15.4 The Panel asked first round questions on this directed to the HA and the local authorities (PRC004, Questions 71 to 74), and held a Specific Issue hearing on road and travel issues on 22 October 2012. Both the applicant and ABP produced expert witnesses for this hearing.

Basis of calculation of traffic impacts

- 15.5 ABP have challenged the calculation of impacts on a number of grounds, including the proper use of WebTAG (and thus failure to comply with para 5.4.4 of the Ports NPS³⁵), a failure to include the developments included in the new Port Masterplan as committed development, a failure to calculate the impacts of the development when it 'reverted' to general cargo use and lack of detailed design. (HEA072 and ADD056, paras 54 *et seq.*)
- 15.6 The applicant's response is that the approach selected, using baseline data from the A160 /A180 SATURN model and A180/A1136 traffic survey, was agreed with the three relevant highway authorities - NLC, NELC and the HA - and does follow WebTAG guidance. An appropriate allowance for committed developments was agreed with the highway authorities.
- 15.7 This is substantiated in the two SoCGs, and the Panel accepts the assessment having regard to the concurrence of the three highways authorities is sufficient grounds for accepting this assessment. As the applicant notes, since the application was made several of the projects counted as committed developments have been withdrawn, notably the Drax Heron Renewable Energy Plant proposed at the junction of Rosper Road and Humber Road, which will have a significant effect at Junction C (Humber Road/Rosper Road) and Junction E (A160/Humber Road/Manby Road roundabout (HEA064, para 12 *et seq.*). The

³⁵ If a project is likely to have significant transport implications, the applicant's ES (see section 4.7) should include a transport assessment, using the WebTAG methodology stipulated in Department for Transport guidance,⁵² WebTAG for developments in Wales, or any successor to such methodology. Applicants should consult the Highways Agency and/or the relevant highway authority, as appropriate, on the assessment and mitigation. The assessment should distinguish between the construction, operation and decommissioning project stages as appropriate. (Ports NPS, para 5.4.4)

likelihood that the major works to the A160 will now proceed also offers more comfort.

- 15.8 As regards the application of WebTAG, the applicant argues that the five objectives for transport enshrined in WebTAG are followed through –
- the ES (Environment);
 - investigation into the accessibility through referral to the commitment to the provision of the Framework Travel Plan, which promotes sustainable transport choices and reducing the need to travel (Accessibility, Integration);
 - through accident analysis mitigation measures and the Stage 1 Road Safety Audit reports (Safety); and
 - through the applicants contribution to the implementation of measures to improve the movement and operations of the local and strategic road network; and
 - through the development contributing to the economic regeneration of North Lincolnshire and the South Humber Area (Economy). [HEA064, paras 48 and 49]
- 15.9 A particular and understandable concern for ABP is the possible impacts on the operation of the Port of Immingham.
- 15.10 ABP argues that in reaching its conclusion that the highway network can accommodate the proposed NSIP without causing detriment, the applicant has failed to make any allowance in its modelling for traffic generated by growth of the Port of Immingham; and that this omission invalidates the assessment, given that the Port Masterplan is a clear indication of ABP's intent and as such should count as committed development.
- 15.11 The applicant seeks to refute this (HEA064, paras 30 *et seq*). The applicant argues that the Port Masterplan does not comply with guidance for such documents, and that a Port Masterplan should properly be used to identify the adverse environmental impacts that it might cause, including traffic impacts, and then identify the mitigation measures that the Port itself will need to implement.
- 15.12 The Panel concludes that the ABP Port Masterplan is in effect prospective development, and as such should not count as committed development for the purpose of traffic impact assessments, and that the travel plan provisions together with the remedial works agreed with the highways authorities are an adequate and appropriate approach. Nevertheless, the Panel recognises the concern of ABP in relation to one of the country's most important ports, and has

therefore proposed to adopt paragraph 98(2) of Schedule 9 Protective Provisions. We do not expect this to prove onerous for the applicant.

- 15.13 ABP's concern that there has been no assessment of the impacts of the 'inevitable' 'reversion' of the port to a general cargo port has in our view no force. The use of the port is restricted in the DCO, and no change can take place without proper application. Given the capacity of the quay, this would under current provisions require a further application under PA2008. That would require a full environmental impact assessment, including the traffic impacts.
- 15.14 ABP's objection to lack of detailed drawings is covered by the form of the s.106 agreement (see below), which specifies them.
- 15.15 The Panel considers that overall the traffic impacts have been assessed comprehensively, using appropriate techniques and assumptions agreed correctly the three highways authorities; and that the necessary mitigation has therefore been assessed adequately.

Impacts on Royal Mail operations

- 15.16 Royal Mail did not engage with the examination until some time after it had commenced.
- 15.17 Royal Mail raised concerns about the potential adverse impact on its operations caused by increased traffic at Junction N, the Pelham Road/A1173 junction associated with the proposed NSIP development. In particular it was concerned about the effect this would have on its deliveries to its Immingham Delivery Office.
- 15.18 Royal Mail requested, in a written submission dated 25 October 2012, that a protective provision for Royal Mail is included within the DCO. It was requested that this protective provision requires the submission of details of a scheme for improvements to the A1173 / Pelham Road mini-roundabout to the local highways authority for approval, following consultation with Royal Mail, and thereafter the implementation of such scheme in accordance with the approved details prior to the proposed NSIP development being brought into use. (HEA071) This has been included as para 93(1) of Schedule 9 to the DCO.
- 15.19 In PDC056 Royal Mail has confirmed that it considers that the requirements of these amendments will ensure that its operations in the area, and in particular its operations out of the Immingham Delivery Office, are protected. [PDC056]
- 15.20 The Panel considers that this issue has been resolved satisfactorily.

(c) travel plan

- 15.21 In its response to first round Questions, the HA, writing with the agreement of the two local highways authorities, stated that while the travel framework plan submitted with the application ‘... is a good foundation to work from ..’, there were shared concerns about the high level of responsibility placed upon end-users; and that there was a need to ensure that proper mechanisms for implementation were incorporated, and that targets for achievement should be set from the outset.
- 15.22 The Panel shared this concern, and we explored it at the Specific Issue hearing. In the event the applicant has amended the requirements of the DCO to prohibit the commencement of the development until a construction travel plan and a travel plan have been submitted to, and approved by, the relevant planning authority.
- 15.23 This is expressed as Requirement 25 of Schedule 11 to the DCO.
- 15.24 The Panel regards this as appropriate and adequate.

(d) s.106 agreement

- 15.25 NELC have identified a need for junction improvements at the A1173/Kiln Lane junction.
- 15.26 NLC have similarly identified a need for junction improvements at the Rosper Road/Humber road junction.
- 15.27 In both cases this mitigation has been agreed by the applicant. At the close of the examination the parties had produced a signed s.106 [PDC062], specifying the necessary road works, referencing them with appropriate drawings and covering the provision of the works to the value of £1,423,000.
- 15.28 The Panel consider the s.106 to be appropriate and necessary to deliver the project.

16.0 RIGHTS OF WAY

16.1 The applicant proposes to close sections of public footpath running along the top of the seawall on both the north and the south side of the Humber. In both cases replacement routes are proposed.

16.2 The authority for stopping up the rights of way, which is only to operate after certification of the replacement rights of way by the relevant local highway authority, is established by Article 19 of the DCO which refers to Schedule 536. Schedule 5 of the DCO sets out the lengths of footpath to be closed and the routes replacing them, relating both the closures and replacement routes to the Rights of Way Plan. The Rights of Way Key Plan is at APP289 and 12 more detailed plans are at APP290 to 301.

District of North Lincolnshire Footpath 50

16.3 Paragraph 4.6.1 of Chapter 4 of the ES [APP059] describes how a public Right of Way along the top of the existing flood defence wall within the application site is to be closed and diverted around the perimeter of the site. The details of the diversion are shown on 8 detailed Rights of Way Plans [APP290 to APP297]. The overall route of the inland diversion and details of typical sections are shown at APP033 and APP034.

16.4 There have been no objections to this diversion. Although the diversion is a lengthy one, retention of a footpath along the existing alignment would not be a practical proposition. The Panel considers that closure of the footpath on the old seawall would be warranted if the proposed NSIP development is to take place and that if it is to be closed then a right of way should be created along the diversionary route which will provide continuity for a route close to, although not alongside, the estuary.

District of East Riding of Yorkshire Paull Footpath 5

16.5 Paragraph 28.2.16 of Chapter 28 of the ES [APP083] describes the proposal for diverting the public right of way (Paull Footpath 5) that follows the top of the existing seawall at Cherry Cobb Sands. The replacement route runs along the base of the landward side of the realigned flood defence embankment. The details of the diversion are shown on four detailed Rights of Way Plans [APP298 to 301].

16.6 Interference with the footpath is the result of the need to breach the seawall at the compensation site to allow for ingress and egress of tides. Paragraph 28.2.17 describes two other options for realignment of this public right of way that were considered but rejected: continuing the public right of way along the old seawall, with a bridge

³⁶ In the November 23 version of the DCO, Article 19 incorrectly refers to this on one occasion as Schedule 3.

over the breach, and running a footpath along the top of the realigned embankment.

- 16.7 The East Yorkshire and Derwent Ramblers [ADD033, ADD063 & HEA023] have objected to the proposed realignment on the basis that walkers should be allowed to benefit from views over the estuary from the top of the re-aligned embankment. This opinion is shared by Mr Simon Taylor [WRR028 & HEA085]. ERYC's LIR suggests two routes with a low level route used at times of year when disturbance to birds might be considered to have adverse consequences.
- 16.8 In paragraph 28.2.17 of ES Chapter 28 [APP083], NE's view is quoted as being that users of a footpath on the realigned embankment could disturb birds utilising intertidal habitat. It is also stated that there would be access from the low level footpath to bird hides at the top of the embankment. The public would be able to view the estuary and new inter-tidal area from various vantage points but impact on wildlife would be minimised.
- 16.9 The applicant's changes in compensation proposals raise the prospect of part of the re-aligned footpath lying between two areas being developed to benefit wildlife and this prompted the Panel to ask a Rule 17 Question to Able on 22 October [REP072], asking whether this had any implications for the detailed location and/or design of this footpath?
- 16.10 The applicant's response, dated 2 November [REP089], was that 'The footpath diversion proposed in the application ...remains the most appropriate option.' The letter provides details of what is proposed with the emphasis on how disturbance to birds can be minimised while promoting viewing facilities over both the intertidal habitat and the wet grassland. The overall conclusion is that 'Whilst affording good views, the viewing facilities will be distant enough from key areas used by the birds to reduce the risk of disturbance to them.'
- 16.11 The Panel considers that with the creation of a breach in the flood defences at Cherry Cobb Sands and with the provision of a new route associated with the realigned flood defence wall, closure of the footpath on the old seawall would be warranted. The point at issue is whether the new route should be on the top of the floodwall or at a low level.
- 16.12 The Panel considers that the issues around potential disturbance to birds using newly created inter-tidal habitat at Cherry Cobb Sands are particularly weighty considerations in this instance. The chances of developing an area that attracts wading birds, and particularly the BTG that would be displaced by the proposed NSIP development, will be increased if human disturbance is kept to a minimum. The proposed low level alignment of the footpath inland of the new flood embankment would achieve this. At the same time the provision of hides that are located at vantage points and made readily accessible

from the new footpath would go some way to providing opportunities for those walking beside the estuary to enjoy some of the wider views that the Ramblers seek to maintain. The Panel accordingly support the applicant's proposals for positioning the re-aligned footpath inland of the new flood defence embankment.

17.0 CONCLUSIONS AND RECOMMENDATIONS

- 17.1 The Panel considers that the application conforms with the policy objectives set out in the NPSP, and supports the objectives of the Overarching Energy NPS (EN1) and the Renewable Energy Infrastructure NPS (EN3).
- 17.2 The Panel considers that the application satisfies all legal and regulatory requirements, including the international obligations of the United Kingdom Government.
- 17.3 The Panel considers that the application demonstrates that there are no realistic alternatives with lesser impacts on the European sites, and that there are IROPI in terms of the Habitats Regulations requirements that justify its consent.
- 17.4 The project can proceed without putting the UK in breach of the Habitats Directive – the coherence of *Natura 2000* can be protected through the implementation of the compensations proposals as now developed. The agreement and application of the three EMMPs is critical to this compliance, given the highly complex and dynamic environment in which the project would be developed.
- 17.5 The Panel considers that the project conforms with local plans.
- 17.6 The Panel judges that the test in s.104(7), that the adverse impact of the development should not outweigh its benefits, is met fully. The Panel conclude that the benefits of this development, if fully realised, would be of major significance. This project has the potential to make a very significant contribution to the local, regional and national economy; support the development of offshore wind as a contribution to sustainable energy and carbon reduction; and to provide new employment opportunities and sustain existing employment in a disadvantaged area.
- 17.7 The Panel therefore recommends that the Secretary of State should give consent to the application.
- 17.8 The following sections deal with the Compulsory Acquisition and Development Consent Order necessary to give effect to that.

18.0 COMPULSORY ACQUISITION

The Request for Compulsory Acquisition Powers

- 18.1 The Statement of Reasons [APP306] was submitted as part of the original application, and remained unchanged during the examination.
- 18.2 The Book of Reference and the Land Plans submitted with the original application were both subject to significant change during the course of the examination. The final version of the Book of Reference and Land Plans are those submitted on 23 November [PDC041]. Removal of land from compulsory acquisition has been in several cases accompanied by amendment to the Schedule 9 Protective Provisions in the draft DCO.

The purpose for which the land is required

- 18.3 The specific purposes for which the applicant requires each parcel of land are set out in the Statement of Reasons (APP306, para 5.11).
- 18.4 As a result of negotiations continuing through the examination period a significant number of the original parcels have been withdrawn, and the remaining parcels are as follows -
- 18.5 Quay
08001 (part), 09001 (part)
- 18.6 On-site manufacturing and storage
03003 (part), 03004 (part), 03005 - 03012, 03016 - 03023, 04002, 04003, 04005 - 04013, 04015 - 04024, 04026 - 04032, 05002 - 05022, 05029 - 05042, 08001 (part), 09001 (part)
- 18.7 Environmental mitigation
02002 - 02007, 03002-03004 (part), 05044, 06006
- 18.8 Residential properties to remain unoccupied
03012, 03024, 03025
- 18.9 Highway and sewage works
01001, 01002, 01003, 02001, 03001, 04001, 05001, 06001, 06002, 06003, 06004
- 18.10 Flood defence works
02009, 02010, 02011, 02012, 02013, 03026, 03027
- 18.11 Railway

03028A, 04033A, 04034A, 04035A³⁷

18.12 Capital dredging

08001 (part) and 09001 (part)

Compensation Site – Cherry Cobb Sands

18.13 The land previously associated with the compensation site in the East Riding of Yorkshire (parcels 10001 – 10007, 11001 – 11004, 12001 – 12007, 13001 – 13004, 14001 – 14009) has been withdrawn on the basis that the applicant states that it has concluded an arrangement to purchase the land from The Crown Estate.

18.14 The further land required for the temporary wet grassland is the subject of a separate planning application to the ERYC, and therefore does not form part of this application.

The Requirements of the Planning Act 2008

18.15 Compulsory acquisition powers can only be granted if the conditions set out in sections 122 and 123 of the PA2008 are met.

18.16 Section 122 (2) requires that the land must be required for the development to which the development consent relates or is required to facilitate or is incidental to the development. In respect of land required for the development, the land to be taken must be no more than is reasonably required and be proportionate.³⁸

18.17 Section 122(3) requires that there must be a compelling case in the public interest which means that the public benefit derived from the compulsory acquisition must outweigh the private loss that would be suffered by those whose land is affected. In balancing public interest against private loss, compulsory acquisition must be justified in its own right. But this does not mean that the compulsory acquisition proposal can be considered in isolation from the wide consideration of the merits of the project. There must be a need for the project to be carried out and there must be consistency and coherency in the decision-making process.

18.18 Section 123 requires that one of three conditions is met by the proposal³⁹. We are satisfied that the condition in s.123 (2) is met

³⁷ 03028A, 04033A, 04034A, 04035A are new easements to be created replacing land to be compulsorily acquired

³⁸ Guidance related to procedures for compulsory acquisition DCLG February 2010

³⁹ (1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that one of the conditions in subsections (2) to (4) is met.

(2) The condition is that the application for the order included a request for compulsory acquisition of the land to be authorised.

(3) The condition is that all persons with an interest in the land consent to the inclusion of the provision.

(4) The condition is that the prescribed procedure has been followed in relation to the land.

because the application for the DCO included a request for compulsory acquisition of the land to be authorised.

- 18.19 A number of general considerations also have to be addressed either as a result of following applicable guidance or in accordance with legal duties on decision-makers –
- all reasonable alternatives to compulsory acquisition must be explored
 - the Applicant must have a clear idea of how it intends to use the land and to demonstrate funds are available; and
 - the Panel must be satisfied that the purposes stated for the acquisition are legitimate and sufficiently justify the inevitable interference with the human rights of those affected.

How the Panel examined the Compulsory Acquisition issues

- 18.20 The Panel asked two rounds of questions, of which two in the first round [PRC004] and fifteen in the second round [PRC010] were specifically directed at compulsory acquisition. In addition the Panel asked two Rule 17 Questions (REP075, REP082) relating to compulsory acquisition.
- 18.21 Several of the affected persons gave notice under s.92(3)⁴⁰ of their wish to be heard at a compulsory acquisition hearing. Accordingly, a hearing was scheduled for 16, 17 and 18 October 2012 in Grimsby. The Panel decided that because of the complexity of the issues, and the number of affected parties, three days were appropriate.
- 18.22 The Lead Member of the Panel was appointed to consider whether the Secretary of State could be satisfied about the matters in s.127 relating to statutory undertakers' land and to make a recommendation about whether or not a certificate under s.127 could be issued by the Secretary of State in the event that representations are maintained. The s.127 hearing was run concurrently with the compulsory acquisition hearing. A separate hearing relating specifically to the interests of Anglian Water and the protections given by s.138 was held on 21 November 2012. The s.127 enquiries are the subject of separate reports.
- 18.23 In addition the accompanied site visit on 23 October 2012 (PRC013) looked at both the land proposed to be acquired on the main site and the compensation site.

⁴⁰ (2) The Examining authority must fix, and cause each affected person to be informed of, the deadline by which an affected person must notify the Secretary of State that the person wishes a compulsory acquisition hearing to be held.

(3) If the Secretary of State receives notification from at least one affected person before the deadline, the Examining authority must cause a compulsory acquisition hearing to be held.

The Applicant's Case

The general case

- 18.24 The applicant maintains that there is a compelling case in the public interest for the project as a whole to go ahead, as this applies to all parcels subject to compulsory acquisition (CA1021).
- 18.25 The need for all forms of electricity generation is expressed in the Overarching Energy NPS EN-1 as 'urgent' and the UK also has an obligation to ensure that 15% of all energy consumption, not just electricity, is from renewable sources by 2020.
- 18.26 The applicant states that the project will provide one of the most significant contributions to the realisation of offshore marine energy in the UK and this is clearly in the public interest. Given the urgency of electricity generation and the renewable energy targets set out in the UK's Renewable Energy Action Plan (2010), the applicant argues that there is a compelling case in the public interest for the project as a whole. The proposed NSIP will help to fulfil the UK government's renewable energy ambitions and encourage the development of a cluster of renewable energy-related industry on Humberside.
- 18.27 The associated development within the project would provide for the manufacture of marine energy components. The ability to deliver a port project of this scale with the associated benefits is not readily available elsewhere in the UK (see examination of alternatives at Chapter 6 of the ES). The need for this development is particularly time-sensitive as the Crown Estate procures the development of its Round 3 wind energy sites.
- 18.28 The applicant has also advanced the case that the nature of the project is that there should be several manufacturers operating on the main assembly site; and that because they are operating to their own individual programmes it is necessary to have a quay of a size that permits them to be loading and unloading manufactures and components at the same time as other tenants.
- 18.29 The applicant cites in support of its case (APP307) the fact that the site was identified in Department of Energy and Climate Change's (DECC) *UK Offshore Wind Ports Prospectus* (September 2009) as being –
- '... an ideal location for development for both offshore construction and manufacturing. It is located centrally on the east coast with good existing links and it is envisaged that the development will include new quays specified to meet the occupier's requirements.'

The scale of development

- 18.30 The applicant argues that without a single manufacturing and delivery hub such as the proposed NSIP, the required quantity of offshore wind energy infrastructure is unlikely to be delivered from within the UK and that therefore the need for the proposed NSIP to be as large as possible is compelling.
- 18.31 The applicant accepts that there are constraints on the size of the quay that can be accommodated, because of the two existing harbours: the HST and the South Killingholme Oil Jetty, part of the Port of Immingham, and is also close to cooling water outflows for two generating stations. The applicant considers that the largest length of quay that can be practicably accommodated without affecting the quays or generating stations is 1 279 m.
- 18.32 The applicant bases the case for further land acquisition on a calculation as to what is the appropriate amount of onshore land required to support a quay of that length.
- 18.33 The applicant assumes that –
- (a) the quay will be divided into six 200 m berths; an additional berth is proposed for specialist vessels that can transport fully assembled offshore wind turbines; and
 - (b) four of the quay berths and the specialist berth will be used as construction quays for wind turbines, one quay berth will be used for turbine foundations and one for general import and export of required or surplus parts or raw materials.
- 18.34 The applicant then estimates that -
- (a) a single berth can handle the assembly and export of around 100 complete wind turbines each year. The five proposed berths for OWTs would therefore have the capacity to handle around 500 complete units per annum;
 - (b) 10-15ha of manufacturing space would be needed to produce 200 nacelles per year; 20-25ha to produce 200 blade sets and 20-25ha to produce 200 towers. 2-4ha would be needed for smaller components and 5-6ha for nacelle covers. In addition each berth would need approximately 5ha of land for storage and component assembly.

The extent of manufacturing activity

- 18.35 The applicant argues that another objective is to create a significant socio-economic benefit for a relatively deprived region of the UK, so that the development should allow for as much as possible of the

component parts of the exported turbines to be manufactured on the site.

- 18.36 The proposed development would provide for the production of 600 nacelles (30-45ha), 400 towers (40-50ha) and 300 blade sets (40-50ha) per year. In addition to this, a foundation factory (20ha) and several supply chain factories (35ha) are also proposed together with an overflow storage area (20ha). The application allows for around 15 percent of the land area to be needed for roads, drainage ditches, boundary fencing, landscaping and other infrastructure between 217ha and 258ha would be required.
- 18.37 The applicant submits that this calculation justifies the 223ha to be provided.

Individual interests

Mrs Harper and Mr Revill

Parcels 03024 and 03025

- 18.38 Mrs Harper and Mr Revill live respectively in North Low Lighthouse and The Lookout in Station Road, described in the Statement of Reasons as 'Residential properties to remain unoccupied'.
- 18.39 The applicant's case is that the amenity of these residential occupants, even allowing for the maximum mitigation that could be reasonably be provided, would be significantly adversely affected by the construction and operation of the proposed NSIP in terms of noise, vibration and light pollution amounting to a possible actionable nuisance. There would also be a significant adverse affect upon the visual amenity of the properties.
- 18.40 At the compulsory acquisition hearing on 16 October the applicant called expert witnesses for noise and vibration, visual impact and lighting and air quality. The evidence given regarding noise and vibration from the development during construction and from noise and light during operation was that it would be likely to reduce amenity to a level where complaints were likely. Reduction in existing air quality would not be significant enough on its own to justify acquisition but acts as a cumulative effect with the other amenity impacts.
- 18.41 The applicant noted that paragraphs 10.2.2 and 10.2.3 of the SoCG between the applicant and NLC (the relevant environmental regulatory authority) stated the following -

'10.2.2 It is agreed that the residents of these three properties would suffer significant adverse environmental impacts if the development went ahead with the properties remaining occupied

10.2.3 The Statement of Common Ground is based on the assumption that Able will secure the removal of residential use from the three properties mentioned above.'

- 18.42 The Panel enquired as to whether the occupiers were themselves concerned by the reported reduction in the level of amenity. The applicant responded that the properties could be sold and future occupiers might seek to prevent nuisance. Existing owners might also say that the noise and vibration was worse than they anticipated.
- 18.43 The applicant argued that although the DCO excluded action under s.81 of the Environmental Protection Act 1990 (EPA1990) it did not exclude actions for private nuisance; nor did it prevent the local authority issuing an abatement order requiring the abatement of any nuisance (s.80 EPA1990). A failure to comply with such an order without reasonable excuse is a criminal offence (subject to certain statutory defences). A local authority is under a general obligation to issue an abatement notice if it considers that a statutory nuisance has occurred.
- 18.44 The applicant argues further that the principal remedy for civil nuisance action is injunctive relief that puts a stop to the nuisance. Any such injunction, or indeed abatement order issued under s.80 of EPA1990, could result in specific operations at the Able Marine Energy Park having to be suspended or discontinued. Such a risk was clearly incompatible with the commercial viability of the project and would threaten the delivery of the project.

Possible alternatives to compulsory acquisition

- 18.45 The applicant contends that even if the DCO were to be amended so as to remove any possibility of a claim for nuisance or action by the local authority there would be serious issue as to whether - in the absence of compulsory acquisition of the property in question - there would be compliance with article 8 of the European Convention of Human Rights and/or article 1 to the first protocol to the Convention.
- 18.46 The applicant has sought to acquire the land by negotiation, and these negotiations continued during the examination. The applicant submitted evidence in November 2012 to suggest that Mrs Harper and Mr Revill [REP096, Table 1] had not yet produced valuations of their properties and that this was frustrating negotiations.

s.122 case

- 18.47 In summary, the applicant contends that if these parcels were not acquired there would be significant impacts on the amenity of Mrs Harper and Mr Revill, or subsequent owners or occupiers of the properties, and they might be able by means of an injunction to prevent the project from being constructed or operated, and that this constitutes a compelling case for the acquisition of the land.

Bethany Jayne Ltd

Parcels 03009, 03010

- 18.48 Parcel 03009 constitutes a section of Station Road⁴¹ giving access to property held by Bethany Jayne, and 03010⁴² is a yard forming part of the storage facility that Bethany Jayne own and lease.
- 18.49 The land to be acquired is required for on-site manufacturing and storage. It is situated within the area shown for this purpose on the lands and works plans (APP208; APP224).
- 18.50 The main storage facility owned by Bethany Jayne at the former Station House is however excluded from the proposed acquisition, and the applicant made a commitment to maintain Bethany Jayne's access, covered by a Protective Provision in the DCO.

Possible alternatives to compulsory acquisition

- 18.51 The applicant has sought to acquire the land by agreement, and this continued through the examination. The applicant reported in November 2012 [REP052, table 1] that it had submitted an improved offer (29 October 12) but this was rejected four days later. In a subsequent conversation the surveyors acting on behalf of Bethany Jayne Limited explained that their client '... would negotiate at such a time as a CPO was granted'. [ibid]

s. 122 case

- 18.52 The applicant submits that Station Road is not currently suitable as an access to the proposed industrial development. A new road will be constructed broadly following the vertical and horizontal alignment of the existing road, but it will be wider and have a new pavement that is reinforced for the additional traffic. The new highway will incorporate a service corridor and a footpath. It will also have the benefit of a much improved surface water drainage system. The new road will be partly on the existing Bethany Jayne land and partly on the applicants existing landholding.
- 18.53 The applicant states that acquisition of the Bethany Jayne land is therefore necessary to provide a new access road that is fit for the purposes of a marine energy park and where the significant users of that road will be port related traffic and not the existing users. [REP052, Question 61]
- 18.54 The applicant further states that it is not viable for the applicant to simply acquire rights over the existing road. To function effectively and have the necessary development flexibility, the land needs to be under the control of the applicant

⁴¹ Private road (Station Road), grass verges, hedgerows, drain and bed thereof and hardstanding

⁴² trees, shrubbery, hedgerows, scrubland, storage yard

Network Rail Infrastructure Ltd

Previously Parcels 03013, 03014, 04004, 04024, 04025, 05023 (part), 05024, 05025, 05026, 05027, 05028

Now Parcels 03028A, 04033A, 04034A, 04035A

- 18.55 In the initial application the land belonging to NR sought by the applicant was parcels 02008, 03013, 03014, 03015, 04004, 04013⁴³, 04014, 04024, 04025, 05023, 05024, 05025, 05026, 05027, 05028 and 07001, the full extent of the railway line through the application site and up to the limit of the existing tracks. This was subsequently reduced to exclude ABP's proposed head-shunt to the south and the section of track beyond the main site boundary to the north.
- 18.56 The applicant's case is that these parcels of land are required for the development because without it the Order land would effectively be severed.
- 18.57 The applicant and NR were in negotiation throughout the examination. The applicant claims, and the Panel concurs, that NR's position appears to have changed during the course of the examination. This may be due to concerns about its contractual commitment to potential customers (notably C.RO) on the current KIL1 and the implications for intensified use if KIL2 were to be constructed. This has led NR to seek to impose more stringent conditions relating to level crossings along the part of KIL1 that runs through the project site.
- 18.58 The applicant accepts that that the project would still be viable without the compulsory acquisition of the NR land, but argues that there would be a significant impact on the benefits which the project can deliver and the speed at which it can deliver those benefits. The applicant put the case at the hearing that the failure to acquire this land would have a significant adverse impact on the flexibility, speed of delivery and attractiveness of the project.
- 18.59 The applicant argues that the construction of bridges is unnecessary and would reduce the public benefit of the proposed NSIP by taking up valuable space that would otherwise be used to deliver marine energy manufacturing, assembly and storage, and this would also reduce the attractiveness of the project to customers.
- 18.60 In summary, the applicant's view is that there is a compelling case in the public interest for the proposed NSIP as a whole to take place and being able to cross the railway at discrete locations is an essential and compelling element of the proposed scheme as access to the quay is a key part of the project and is vital for those operating on the site.

⁴³ This later proved to be owned in fact by Anglian Water

Possible alternatives to compulsory acquisition

18.61 The applicant has given evidence relating to discussions with NR about alternatives to compulsory acquisition⁴⁴.

18.62 At the Hearing the applicant reported to the Panel on the Heads of Terms (HoTs) proposed by NR that relate to crossing the railway land. Two alternative solutions have been offered in the HoTs –

Alternative 1 - a single new heavy duty level crossing if, amongst other things, the applicant closes four existing level crossings, and provides a replacement bridge for the crossing known as 'Regents Oil' which is located on Station Road. NR would retain ownership of the land and the track save for the easement to cross the line at the new level crossing, and no further level crossings of the track would be permitted within the application site; any other crossings of the track would have to be via bridges.

18.63 On this the applicant observes that NR's position on the conditions for permitting one new level crossing had changed over time: in its offer to the applicant of 7 September, NR required the closure of one existing level crossing before granting the new one; by 2 October this had increased to two, and in its latest offer of 15 October this had increased to four. The applicant regards this as unreasonable.

Alternative 2 - NR would agree to the lease of the land and their infrastructure to the applicant on condition that, among other things, the applicant 'secure powers to build the operational railway comprising the Alternative Killingholme Loop Scheme', and on condition that 'Network Change is in place to remove the section of KIL2 which runs through the site of the Proposed Development'. The benefit of this to the applicant would be that NR would no longer prevent more than one level crossing being provided.

18.64 The applicant's response to this is that NR does not currently have any powers to construct KIL2. KIL2 would probably require its own Development Consent Order. But until the Killingholme Loop is shown to be needed, which it is not currently, an application for an alternative route could not be shown to be needed and would thus be doomed to failure. The applicant contends that it is therefore unreasonable and pointless to require Able Humber Ports to fund an alternative application for a DCO at a likely costs of several million pounds. Accordingly that condition is neither proportionate nor reasonable.

⁴⁴ The promoter should be able to demonstrate to the satisfaction of the decision-maker that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored and that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose and is necessary and proportionate' - 'Planning Act 2008 Guidance related to procedures for compulsory acquisition' (February 2010)

- 18.65 The applicant also objects to the condition relating to Network Change, on the grounds that it appears to provide all parties with a right to veto proposals. In the applicant's view ABP would be one such party and bound to frustrate the process and prevent the lease being made if at all possible.
- 18.66 The applicant therefore maintains that NR has not offered reasonable alternatives to compulsory acquisition. The applicant is however prepared to limit the powers to be acquired to the creation of easements to permit the construction of level crossings.

s.122 case

- 18.67 The applicant summarises the s.122 case for this land as being that it is required for the development because without it the Order land would effectively be severed. The construction of bridges is unnecessary and would reduce the public benefit of the proposed NSIP by taking up valuable space that would otherwise be used to deliver marine energy manufacturing, assembly and storage, and this would also reduce the attractiveness of the project to customers

The foreshore

ABP as Humber Conservancy Authority

Parcels 08001 (part) and 09001 (part)

- 18.68 The river-bed and foreshore up to the mean high water mark are leased to ABP under a 999 year lease held from The Crown Estate in right of the conservancy function exercised by the HMH. This is a separate statutory undertaking to the operation of the Port of Immingham by ABP [REPO61, para 8]
- 18.69 It should be noted that in the examination HMH had his own legal representation separate from ABP. But the negotiations over a sub-lease for these two foreshore parcels involved the solicitors who act for ABP on property.
- 18.70 The applicant states that it needs to obtain ownership of the land where the quay will be situated. This could be either through acquiring part of the Humber Conservancy Authority's lease from the Crown (a 999 year lease dating from January 1869) or by the under-leasing of the land from the Conservancy Authority (the Harbour Master).
- 18.71 The acquisition of the lease would require the consent of The Crown Estate. The applicant states that the Crown Estate is prepared to give consent provided that the applicant agrees that the lease can be replaced with a modern version that the two parties would agree together, subject to arbitration in case of dispute.

18.72 In response to a Rule 17 Question from the Panel the solicitors for The Crown Estate stated that the applicant has advised them of the intention to include in the draft DCO Article 30(4) to the effect that –

‘No interest in the Crown Land may be acquired under this article [compulsory acquisition of land] unless the appropriate Crown Authority consents to the acquisition.’

18.73 The Crown Estate has requested that Article 30(4) should be included in the Order as drafted, thereby enabling The Crown Estate to consider, if appropriate, whether, and if so how, any leasehold interest to Able can be granted on suitable terms. The appropriate article is in the final draft of the DCO as Article 30(3). (REP103)

Possible Alternatives to Compulsory Acquisition

18.74 The applicant has sought an alternative to compulsory acquisition. HMH originally offered, and the applicant accepted, the principle of an under-lease. It became apparent however at the hearing on 17 October 2012 that little progress had been made in drawing up or negotiating such an under-lease.

18.75 In the event it appears that the applicant only received all the documentation that they sought on 20 November 2012, a few days before the end of the examination, and that there remained certain ‘fundamental questions’ about the terms being offered [ADD055, paras 176 *et seq*]. The applicant therefore restates the position in their closing submission [ADD055] that it has no alternative than to seek the compulsory acquisition of the relevant part of the ABP lease.

s.122 case

18.76 The applicant contends that the s.122 case for compulsory acquisition is satisfied because these parcels are necessary for the quay, the central part of its project. If there is a compelling case in the public interest for the project as a whole then it follows that there is such a case for acquiring the land where the quay will be situated.

The triangle site

Associated British Ports

Parcels 03020, 03021, 03022 and 03023

18.77 The applicant seeks to acquire the 4.78 hectare triangle of land (‘the triangle site’) that these parcels constitute from ABP for part of the onshore manufacturing, assembly and storage of components and parts for offshore marine energy infrastructure that form part of the proposed NSIP.

- 18.78 The specific purposes for which this land would be used are external storage, the siting of a pumping station and associated drainage ditches and for quay access (the parcels immediately about the proposed quay), as shown on the indicative master plan submitted with the application[APP036] and Lands Plan 3 [APP202].
- 18.79 The Book of Reference submitted by the applicant with the application records the owner of parcels 03022 and 03023 to be 'unknown' (other than the footpath crossing the latter). At the Compulsory Acquisition hearing ABP's solicitor stated that ABP had now registered the land as the presumptive owner, such ownership being confirmed if unchallenged for twelve years.
- 18.80 The applicant maintains that the triangle site is required to enable a cohesive site configuration to be achieved on the scale proposed, with full access along the length of the quay to and from the onshore land. The scale of the development is necessary in order to address the scale of the need by the offshore wind sector as set out in national and European policy. If the triangle site were omitted, and the frontage left undeveloped to provide for the possibility of the current owner developing the site in the future, then the quay would need to be reduced to two-thirds of its length and scale of the terrestrial development. Access to the quay would also be reduced significantly.
- 18.81 The applicant also argues that the balance of the needs for the offshore energy sector would have to be provided elsewhere, at another port, and this would result in a more fragmented industry based at less optimal locations which would have less chance of being realised. (These alternatives are discussed in Chapter 5 and Annexes 6.1 and 6.2 of the ES – see APP061, APP113 and APP114.)

Able Humber Ports Ltd

Parcels 02004 – 02007, 03002 - 8, 03011, 03016 – 19, 04002 - 3, 04005, 04007- 04013, 04015 – 18, 04021 – 23, 04026 – 32, 05002 – 22, 05029 – 38, 05043 – 4, 06006

- 18.82 This land, which constitutes a significant part of the main site, is held by the applicant. Its acquisition, to clear title, is not contested.

National Grid, E.ON, Centrica and Anglian Water

- 18.83 National Grid's interests are described in WRR009.
- 18.84 E.ON's interests are described in WRR008, page3.
- 18.85 Centrica's interests are described in CAI035.
- 18.86 Anglian Water's interests are described in WRR012.

- 18.87 The applicant seeks powers to extinguish the rights of five statutory undertakers who have the right to install and maintain apparatus in the Order land: NR, NG, E.ON, Centrica and Anglian Water. During the examination the applicant confirmed that it does not intend to remove any apparatus. [CAI021, paras 131 *et seq.*]
- 18.88 On 10 October 2012 the applicant applied to the Secretaries of State for Energy and Climate Change, Transport, and Environment, Food and Rural Affairs for a certificate under s.127 of PA2008 for the compulsory acquisition of statutory undertaker's land. [CAI038]
- 18.89 The applicant has sought to meet the concerns of these statutory undertakers with a revision of Article 42 of the draft DCO. This now states that compulsory acquisition of statutory undertakers' rights can only be exercised if it is necessary for the purpose of carrying out the development, in order to mirror the test before the Secretary of State and thus ensure that the extinguishment can only take place on that condition.
- 18.90 However, notwithstanding the amended article proposed by the applicant the Secretary of State will also need to be satisfied in accordance with s138 (4) (a) before making the DCO that the extinguishment is necessary for the purposes of carrying out that development. It is the Panel's view that the applicant has made the case that such extinguishment is necessary for the purpose of carrying out the development.
- 18.91 ABP also argues that the land at the triangle site which the applicant seeks to acquire is land to which the provisions of s.127 should apply.

Availability of funds for compensation

- 18.92 The applicant's submission following the Compulsory Acquisition hearing (CAI022) includes a further representation on funding. This has an organogram that shows the relationship between Elba Group Ltd, which has its registered office in Jersey, and the applicant Able Humber Ports Ltd. Essentially the Holding Company (Elba Group Limited) owns all of the shares in Elba Securities Limited, which in turn owns all of the shares in Able Humber Ports Limited (AHPL).
- 18.93 The document also provides a digest of the accounts of Elba Group Ltd produced by its accountants Ernst & Young which seeks to demonstrate that it has sufficient funding for the companies' contribution to the financing of the project as a whole, and will be able to fund compulsory purchase compensation and s.106 contributions out of its own funds. Elba Group's financial position shows net assets of £370m (the largest component of which is investment and development property valued at £337m as of March 2012), cash at bank amounting to £17.5m, no third-party debts or liabilities, a pre-tax profit of £9.6m in 2011.

- 18.94 The document deals with the cost of compensation for the remaining parcels of land subject to compulsory purchase, which has been calculated by surveyors to be around £1.7m. This is stated to be around 10% of Elba Group Ltd's available funds.
- 18.95 In order to provide the equivalent comfort that the payment of compensation will be guaranteed to be paid as was the case for the Rookery South project, the applicant provided on 21 November a unilateral s.106 undertaking with a parent company guarantee [PDC062].
- 18.96 Under this agreement the applicant covenants with NLC not to implement the proposed NSIP, nor to exercise any powers of compulsory acquisition authorised by the DCO, unless and until -
- (a) a parent company guarantee has been provided substantially in a form agreed by NLC acting reasonably) by a Group Company approved for this purpose by NLC; or
 - (b) alternative security in a form approved for that purpose by NLC including but not limited to a bond, bank guarantee or policy of insurance.
- 18.97 The applicant also covenants not to take any steps to place Able Humber Port Limited into administration or liquidation (subject to any overriding statutory duty).
- 18.98 The applicant confirmed to the Panel that the land still subject to compulsory purchase is 67.58 ha (15.53%) of the total required. If the applicant were to conclude the negotiated settlements with NR and the HMM, this would reduce to 6.74ha (1.55%).

Applicant's case – summary

- 18.99 The applicant's summary of its case for compulsory acquisition (ADD055) is that the IROPI test that justifies the proposed NSIP is not in dispute. It is the applicant's submission that those imperative reasons for which this development is required also constitute a compelling case in the public interest justifying the compulsory acquisition of the land required in order for the AMEP proposal to be delivered.

The Objectors' Cases

ABP as Humber Conservancy Authority

- 18.100 HMM's objection to compulsory acquisition on behalf of the Conservancy Authority (a separate statutory function of ABP) is set out in detail in CAI024.

- 18.101 HMH argues that a compelling case for powers of compulsory acquisition of (in ABP's case) a 999 year leasehold interest cannot be made out if the applicant's development can be constructed and operated in a viable way with the applicant being granted an under-lease and the head lessee (ABP) is willing to commit to grant one at the appropriate time.
- 18.102 Subject to the 'special treatment' of the riverbed and foreshore in front of the 'triangle land' HMH has confirmed an in principle agreement on behalf of the Conservancy Authority to the grant of such an under-lease to the applicant. HMH states that he is willing to negotiate detailed terms comparable to leases to other statutory harbour authorities with port facilities in the Humber.
- 18.103 The grant of an under-lease would allow for the applicant to be legally obliged to comply with provisions that HMH regards as essential for the proper performance and protection of his statutory functions, over and above the protective provisions sought by HMH. If the applicant does not agree these terms in an under-lease, HMH would wish to see further protective provision in the DCO to give the same level of directly enforceable protection for his functions as would flow from the under-lease.
- 18.104 HMH has noted that there is a clear conflict between the applicant and ABP. HMH cannot take sides. HMH has expressed this in terms of the danger of influencing the decision-maker in deciding land use.
- 18.105 For this reason, HMH is 'unable to commit' to agreeing with the Applicant an under-lease of ABP's leasehold in the riverbed and foreshore in plot 09001 in front of the triangle land (parcels 03020, 03021, 03022 and 02033), although he remains willing to co-operate fully with whoever is authorised in due course to develop this land.
- 18.106 HMH notes that the applicant has confirmed that it still wishes to pursue an alternative to compulsory acquisition for the rest of parcels 08001 and 09001. The terms agreed in relation to that land could apply to the rest of parcel 09001 if the applicant were to acquire the triangle site.
- 18.107 HMH states that parcels 08001 and 09001 are held only for the purpose of carrying out of the Conservancy Authority's statutory undertaking. HMH is opposed to the issue of a certificate under s.127⁴⁵.

⁴⁵ (2) An order granting development consent may include provision authorising the compulsory acquisition of statutory undertakers' land only to the extent that the Secretary of State—

(a) is satisfied of the matters set out in subsection (3), and
(b) issues a certificate to that effect.

(3) The matters are that the nature and situation of the land are such that—

(a) it can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or

- 18.108 The two conditions set out in s.127(3)(a) and (b) are that the nature and situation of the land must be such that it can be purchased and not replaced without serious detriment to the carrying on of the undertaking or can be replaced by other land without serious detriment to the undertaking.
- 18.109 In relation to s.127(3)(b) HMH maintains that there would be a clear and serious detriment to the Conservancy Authority in the lack of control over the land that would flow from compulsory acquisition. HMH gives the example of his responsibility for the health and safety of his pilots operating in the river. The responsibility will remain even if the ownership and control of the land concerned passes to someone else. His undertaking would be compromised if he were unable to ensure the safety of the works themselves for his pilots and other river users and also, for example, were a vessel to break free from the quay because of a damaged but not yet “decayed” bollard.
- 18.110 HMH is also concerned that without provision for the reversion of the land in the event of the Able Harbour Authority ceasing to exist, there would be a serious detriment in having a gap in the Conservancy Authority’s interests along the river for which it is responsible. Although the reversion could conceivably be dealt with in the DCO, it would be a novel provision and something that all concerned would wish to avoid⁴⁶.
- 18.111 In relation to s.127(3)(c), HMH notes that there is no replacement land.

Network Rail

- 18.112 NR’s continued opposition to compulsory acquisition of the railway line through the application site is set out in detail in CAI010 and CAI027⁴⁷. NR’s submission following the final DCO hearing, HEA114, is also relevant.
- 18.113 In summary NR disputes the applicant’s claim that the Killingholme Branch is in effect abandoned. NR emphasises the possible requirement for the Killingholme Loop to meet future demand from ABP, C.RO and C.GEN, and says that it has had extensive discussions with prospective clients.
- 18.114 NR contends that the applicant has not shown why the level crossings cannot be replaced with bridges.
- 18.115 NR objects that the applicant has not presented any assessment of comparative level crossing safety risk between the *status quo* and its

(b) if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking.

⁴⁶ See Part 1 of Schedule 9 of the draft DCO. HMH has not actually proposed a reversionary clause but seeks to limit powers of compulsory acquisition to requiring the granting of an under-lease.

aspirations for the application site, so that there is no evidence that the compulsory acquisition of the railway would facilitate the operation of the application site.

18.116 NR claim that the applicant has not provided a proper explanation as to why NR's offer for an easement over KIL2 to build and operate a level crossing is not acceptable.

18.117 Finally, NR points out that, should the applicant consider that a compulsory acquisition of the land would enable it to construct more than one level crossing, in fact statutory constraints on the building and operating of new level crossings would apply. So the applicant has not proved that it can gain any operational advantage from the compulsory acquisition.

Bethany Jayne

18.118 Bethany Jayne made representations (WRR005) to the effect that they did not believe the applicant had made a convincing case as to why their land should be acquired; that alternative access ought to be possible; that the loss of 03009 would restrict their operation and force them to look for alternative property elsewhere.

Associated British Ports

18.119 ABP has maintained objections to compulsory acquisition throughout the examination. Their objections are summarised in their closing submission, ADD056, and relate to concerns about –

1. funding
2. the implications for the Killingholme Loop
3. the loss of the triangle site

18.120 ABP's concerns in regard to funding are that the original funding statement did not contain sufficient information, and that the further information provided does not include company accounts, does not provide information about shareholders and is supported only by a letter from a firm of accountants who are not the company's auditors, which provides only selective information and which largely depends on assets which may comprise more development properties than investment properties.

18.121 ABP maintain that the applicant has failed to demonstrate that it needs to acquire the NR land in order to deliver the project. Specifically, ABP agree with NR that Able has not shown why the project could not use the four bridges shown in the drawing attached to its response to the Panel's Second Round Question 29 (REP052).

18.122 ABP's objection to the acquisition of the triangle site, including the right of way to the public highway, rests on its own plans for the use of this land.

18.123 During the course of the examination (in October 2012) ABP completed its Port Masterplan (ADD034) in which it sets out its intentions for the further development of Immingham. In this plan the triangle site is shown as the landward location of the proposed WDJ. ABP propose to meet future demand for biomass by redeveloping the existing Immingham Gas Jetty.

18.124 ABP argue that this is a long-standing plan, that work has begun on the EIA (and that the impact would be less than the Able proposal) and a Harbour Revision Order, and that no compulsory acquisition is involved. ABP believe therefore that the Secretary of State should support WDJ as a project in preference to the applicant's proposal.

18.125 ABP also argues that the pumping station that Able propose to put on part of the triangle site could go to either of two alternative locations, and that there is therefore no compelling case for its acquisition; and that Able has failed to demonstrate conclusively why it could not function with a shorter length of quay which did not require the triangle site.

18.126 ABP state that the land constituting the triangle site was acquired solely for the purpose of port development, and that s.127(1) therefore applies. In relation to the provisions of s.127(2) and (3)⁴⁸ ABP argues that –

1. the land was acquired in 1967 by the British Transport Docks Board (ABP's predecessor) for the purposes of port development and has not been used for any other purpose;
2. the proposed WDJ is a crucial development for the Port of Immingham, that this is the only remaining undeveloped site in the portfolio with river frontage and that it is ideally located in relation to pipelines and caverns. As such its loss would represent serious detriment to the statutory undertaker;
3. there is no other land owned by or available to ABP that could replace this site for the WDJ.

⁴⁸ (2) An order granting development consent may include provision authorising the compulsory acquisition of statutory undertakers' land only to the extent that the Secretary of State—
(a) is satisfied of the matters set out in subsection (3), and
(b) issues a certificate to that effect.

(3) The matters are that the nature and situation of the land are such that—
(a) it can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or
(b) if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking.

18.127 On these grounds ABP argue that a s.127 certificate can not lawfully be issued.

C.RO and C.GEN

18.128 Although these are separate entities with separate interests, they are represented by the same legal advisers. Their objections are set out in full at CAI021.

18.129 The essence of the C.RO and C.GEN case is that in their view the applicant does not need to acquire the railway to cross it, because the applicant has already said that the scheme remains viable even without level crossings – thus there is an alternative.

18.130 They maintain that the harm that the acquisition would do to the interests of C.GEN and C.RO is a powerful consideration against it. C.RO and C.GEN have sought protective provisions that in the event that the applicant is given powers of acquisition for the railway that it should be required to form a joint operating company with C.GEN and C.RO.

18.131 They also share concerns about the funding of the project and of compulsory acquisition.

National Grid, E.ON, Centrica and Anglian Water

18.132 There were negotiations between the applicant and the statutory undertakers during the period of the examination.

18.133 E.ON, Centrica and Anglian Water raised concerns about the effect of the powers of compulsory acquisition on their respective intake and outfalls. [WRR008, RRP062 and WRR012 respectively].

18.134 Centrica had additional concerns about the effect of the compulsory acquisition powers on its use of a private road (Station Road).

18.135 Both Centrica and Anglian Water were concerned about the impact on their condensate pipelines. The applicant states that these will not be moved or affected by the project. [ADD055, para 182 et seq]

18.136 The applicant has sought to address all these concerns by agreeing not to remove or divert the existing infrastructure.

18.137 The applicant has now agreed with E.ON, Centrica and Anglian Water that it will not acquire the existing legal rights until agreed new rights are in place, provided they do not unreasonably withhold agreement (this will be subject to arbitration). These protective provisions are contained within paragraph 74, 79 and 88 of Schedule 9 to the DCO.

18.138 NG's concerns related to the pylon and electric lines crossing the Order land. The applicant has now agreed not to remove or divert the existing infrastructure and has agreed not to acquire the legal rights

until agreed new rights are in place, provided NG does not unreasonably withhold agreement (again, subject to an arbitration clause). These protective provisions are contained in paragraph 70 of Schedule 9 to the DCO.

The Panel's Conclusions

- 18.139 The Panel's approach to the question whether and what compulsory acquisition powers it should recommend to the Secretary of State to grant has been to seek to apply the relevant sections of the Act, notably s.122 and s.123, the Guidance⁴⁹, and the Human Rights Act 1998; and, in the light of the representations received and the evidence submitted, to consider whether a compelling case has been made in the public interest, balancing the public interest against private loss.
- 18.140 The Panel understands, however, that the draft DCO deals with both the development itself and compulsory acquisition powers. The case for compulsory acquisition powers cannot properly be considered unless and until the Panel has formed a view on the case for the development overall, and the consideration of the compulsory acquisition issues must be consistent with that view.
- 18.141 We have shown in the Conclusion to the preceding section that the Panel has reached the view that development consent should be granted. The question therefore that we address here is the extent to which, in the light of the factors set out above, the case is made for compulsory acquisition powers necessary to enable the development to proceed.
- 18.142 This has not been a simple or straightforward matter. The case for compulsory acquisition has been contested as vigorously as any other aspect of the case, and the contending parties have made generous use of legal advice. The Panel has had to look at legal submissions arguing quite contrary viewpoints.
- 18.143 It has also been clear that for the compulsory acquisition case, again as for other parts of the overall case, there has been change in material fact as the examination has developed. This has been partly attributable to the success or not of various negotiations pursued by the applicant; but partly also to changes introduced, directly or indirectly, by other parties to the case.

The public benefit

- 18.144 The applicant grounds the case for compulsory acquisition in the NPSP, the Overarching Energy NPS and the Renewable energy Infrastructure NPS.

⁴⁹ Planning Act 2008, Guidance related to procedures for compulsory acquisition

18.145 The Ports NPS states –

‘[D]espite the recent recession, the Government believes that there is a compelling need for substantial additional port capacity over the next 20–30 years, to be met by a combination of development already consented and development for which applications have yet to be received.’

18.146 The Ports NPS further states –

‘[W]hen determining an application for an order granting development consent in relation to ports, the decision-maker should accept the need for future capacity to support the development of offshore sources of renewable energy.’

18.147 The Panel considers that, taken together, these provide a clear statement of public policy that amounts to a *prima facie* case of public benefit for this application.

18.148 The Panel also gives weight to the IROPI case made by the applicant in the ES in relation to the Habitats Regulations, which has not been disputed and which has many similarities with the case accepted by the Secretary of State in relation to Green Port Hull [ADD065]. The IROPI case is summarised in para 8.6.24 of the Habitats Regulations Assessment Report [APP310] as being a compelling case that the overriding public interest to -

- decarbonise the means of energy production;
- secure energy supplies from indigenous sources;
- manufacture large scale offshore generators;
- grow manufacturing in the UK; and
- regenerate the Humber sub-region

- which outweighs the loss of 45 ha of part of a *Natura 2000* network, but equally in the Panel’s view demonstrates significant public benefit that should be considered in the case for compulsory acquisition.

18.149 The Panel also notes the evidence of the LEP [HEA025 and ADD081], the local Members of Parliament [HEA028] and North Lincolnshire and North East Lincolnshire Councils [HEA026] as to the national, regional and local significance of this proposed development.

Alternatives

18.150 The DCLG Guidance requires (para 20) that –

‘The promoter should be able to demonstrate to the satisfaction of the decision-maker that all reasonable

alternatives to compulsory acquisition (including modifications to the scheme) have been explored...'

18.151 The Panel has considered this in terms of the selection of the site, the scale of the development proposed, the specific characteristics of the development and then in relation to the proposed acquisition of each parcel of land (in the sections on those parcels).

The site selected

18.152 The first question here is whether the site identified is itself appropriate, or whether an alternative site should have been selected. This is addressed in detail in Section 7 of the Habitats Regulation Assessment Report (APP310).

18.153 The Panel concludes that the case for this site is properly made in the examination of alternatives in the ES.

Scale of development

18.154 The Panel has considered the possible question of whether the scale of the development has been justified. If, for example, the manufacturing area could be significantly smaller then it might be capable of being developed on the east of the railway line, possibly obviating any compulsory acquisition of assets or rights from NR. If the quay could also be smaller then the triangle site owned by ABP might be excluded, thus removing the conflict relating to the proposed WDJ.

18.155 The Panel has come to the view, however, that it can only deal with the application before it, in its totality (acknowledging the changes that have taken place in the course of the examination). It is not for the Panel to consider amendments to the scheme or a recalculation of the requirements based on the applicant's assumptions or any other assumptions. The Panel considers that on balance the applicant's assumptions and calculations are reasonable. The applicant has not stated, nor is it obliged to state, the commercial calculations behind it. But the objective of the proposed development is clear: to create a quay and supporting manufacturing area which is capable of supplying a very large part of the potential offshore wind requirements in the North Sea – to maximise the potential of the site, not to economise on it.

18.156 Thus the justification for each parcel has to relate to the scheme as put forward by the applicant, and whose overall case the Panel accepts.

The specific characteristics of the site

18.157 The proposed development put forward by the applicant is based on the maximum quay length supported by an essentially regular shaped

area of associated development behind it, given the constraints of existing major land uses adjacent, with access to the road network by the shortest and most direct routes [ES Chapter 4, APP059].

- 18.158 The Panel considers that this is a logical approach which seeks to make the most efficient use of the site. There is no reason to conclude that any parcel of land has been added gratuitously to the land sought.
- 18.159 This is also relevant to the consideration of the relationship of the overall development to the railway line. The railway line bisects the site. For the potential of the site to be realised the applicant must be able to operate effectively across the railway line, otherwise the area to the west of the railway line is effectively ruled out of the development. The critical question then becomes whether this can be done by constructing bridges; if not the applicant must have access across the railway line.
- 18.160 The Panel notes, however, that at the request of ABP the land adjacent to the existing line required for ABP's head-shunt (KIL3) has been removed from the project requirement.

Funding

- 18.161 The Panel notes the guidance that -

'This statement should provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required⁵⁰.'

- 18.162 That cannot mean that the funding statement required for compulsory acquisition should be a surrogate for testing the economics of the project as a whole.
- 18.163 The Panel notes that several of the parties, notably ABP (ADD056, paras 61 *et seq*) but also C.GEN and C.RO (CAI029, dated 19 November), continue to express concern about the adequacy of the funding information that the applicant has made available. A particular focus of this concern is the lack of certified accounts, and the fact that the parent company is based outside the United Kingdom. C.GEN and C.RO note the analogy with the development consented at Rookery South, where the parent company for the development vehicle was also based outside the United Kingdom (in the case of Rookery in the United States, in the case of the applicant in Jersey), where the parent company was required to put in place the guarantee prior to the close of the examination.

⁵⁰ Planning Act 2008, Guidance related to procedures for compulsory acquisition, para 33

18.164 The applicant has provided in a unilateral undertaking [PDC062, dated 21 November] not to implement the development or exercise any powers of compulsory acquisition until apparent company guarantee is provided in the form attached to the agreement, 'or in such other form as may be approved by NLC acting reasonably' (para 4.2 of the s.106); or alternative security that NLC might reasonably require, including bank guarantees, bonds or insurance policies.

18.165 The Panel did not have the opportunity to ask questions about the form of the unilateral undertaking offered on 21 November. The Panel notes however that the guidance is limited to the statement that –

'Promoters should be able to demonstrate that adequate funding is likely to be available to enable the promoter to carry out the compulsory acquisition within the statutory period following the order being made, and that the resource implications of a possible acquisition resulting from a blight notice have been taken account of⁵¹.'

- and that the obligation is on the applicant to judge what the decision maker will consider adequate.

18.166 The Panel considers that what the applicant has provided needs to be assessed in an appropriately proportionate way in the context of the application. The applicant estimates the total value of the land still to be acquired at £1.7m. This has not been challenged, and the Panel see no reason to doubt it. As a proportion of the overall costs in front of the applicant should the scheme proceed this is relatively small, and as an absolute figure in terms of cash to be found (either from the applicant's own resources or from commercial borrowing) to enable the project to proceed it is not particularly large. Even if the estimate for land acquisition is an under-estimate by, say, 50% the same would be true. The Panel certainly does not consider that the level of risk involved is so high that development consent could or should reasonably be refused.

18.167 The Panel also notes that it is within the power of NLC to either require amendment to the parent company guarantee or seek some fungible alternative. The Panel consider that the council is thus in a position to satisfy itself that sufficient funding for the compulsory acquisition and any possibility of claims for blight is in place throughout the development phase of the project.

18.168 Accordingly the Panel's view is that on balance the applicant has done enough to satisfy the requirements in relation to funding.

⁵¹ CLG Guidance, para 34

Human Rights Act considerations

18.169 The applicant considers that the articles of the European Convention on Human Rights (incorporated into the Human Rights Act 1998) of relevance are:

(i) Protocol 1, Article 1 – right to the peaceful enjoyment of possessions, except in the public interest and subject to the relevant national and international laws;

(ii) Article 6 – right to a fair and public hearing; and

(iii) Article 8 – right to a private and family life.

18.170 The applicant sets out at paragraph 5.25 *et seq* of the Statement of Reasons [APP306] how it has weighed the interference with these Convention rights arising from the exercise of the compulsory acquisition powers with the potential public benefits if the DCO is made.

18.171 Having regard to the relevant provisions of the Human Rights Act 1998 we have considered the individual rights interfered with and are satisfied that in relation to Article 1 of the First Protocol and Article 8 the proposed interference with the individuals' rights would be lawful, necessary, proportionate and justified in the public interest. We do not consider that Article 6 is breached.

Mrs Harper and Mr Revill

18.172 Mrs Harper attended the Compulsory Acquisition Hearing, and was invited by the Panel to speak, but declined to do so. Mr Revill did not attend the hearing.

18.173 The Panel concludes that the case made by the applicant as to why it would not be reasonable to leave these two parcels outside the development is sound, both in terms of the detriment that they or future residents would suffer and the possibility that they would then seek a remedy through an injunction that might frustrate the development or operation of the scheme.

18.174 The Panel consider that the land is required for the development because that risk needs to be removed. The public interest is served because the major public benefit from the development might otherwise be frustrated.

Bethany Jayne

18.175 Bethany Jayne did not attend the hearing, and the applicant reported that an agreement on protective provisions had been reached with them.

- 18.176 The applicant has drafted protective provisions in relation to the property of Bethany Jayne that remains outside the Order Land that are satisfactory to Bethany Jayne Ltd, which has been confirmed by the solicitor acting for Bethany Jayne (CA1021, Annex).
- 18.177 The Panel consider that the land is required for the development because these parcels are inside the proposed manufacturing and storage area, and to leave them would impose a severe constraint on the development of the site and its subsequent operation. The public interest is served by the need to develop the site fully and efficiently to achieve the full public benefit of the scheme. The interference with the private interests of Bethany Jayne is limited to the loss of the use of the land adjacent their storage: their interests in the access are covered by the protective provisions agreed.

ABP Ports as the Humber Conservancy

- 18.178 The Panel notes that the Humber Conservancy Authority (the Harbour Master Humber) exercises a public function and is not personally and directly affected.
- 18.179 As to the argument that there is no alternative land to the two parcels that Able seeks to acquire, the Panel concludes that this is not relevant: the Harbour Master's functions are defined in relation to the operations in the estuary, and if an area of water is removed from the estuary then his responsibilities are correspondingly decreased: he does not need more land as compensation for that loss of responsibility.
- 18.180 The Panel notes that HMH does not in effect dispute the need for the applicant to have this land, only the terms under which it should be acquired.
- 18.181 The Panel notes and understands that HMH would prefer to grant an under-lease so as to retain more control in relation to the operation of the new harbour authority that would be created. The Panel notes that the applicant has no objection to an under-lease, and has sought to negotiate such a grant.
- 18.182 It is not certain, however, that HMH would grant a sub-lease for the whole of the quay land, or only for that part that is not in front of the ABP triangle. What is certain is that at the close of the examination HMH had not granted an under-lease and declared himself unable to do so.
- 18.183 The Panel notes that HMH is ultimately an employee of ABP, and that in itself places him in an invidious position in this context.
- 18.184 The Panel does not see a need to reach a view on the reasons why those negotiations had not reached a successful conclusion by the end of the examination. We understand why HMH prefers an under-lease

to compulsory acquisition of the lease, and we concur. But the acquisition of these parcels is central to the scheme, and unless and until the applicant has the use of them the scheme cannot proceed.

- 18.185 On that basis the Panel concludes that powers of compulsory acquisition should be given to the applicant for these two parcels. They are clearly required to facilitate the development. The public interest is that the scheme will be wholly frustrated if the applicant does not acquire them, and all the public benefit will be forfeit.

Network Rail

- 18.186 The Panel notes that the application started the application on the basis that NR were prepared to sell the alignment. It appears that NR has changed its mind both about the extent to which the line needs to be kept within the network and about the extent of the restrictions which should be imposed.
- 18.187 It appears to the Panel that NR's concerns about the safety of level crossings on the line have grown and at the end of the examination were possibly over-stated, given the facts that there will be no public access to the development site (unlike now), and the frequency of trains operating now is nil, even with the Able development will be limited and may never grow. KIL2 is at present an aspiration.
- 18.188 C.RO and C.GEN have an interest in KIL1 by C.RO and C.GEN and ABP in KIL2 (possibly also C.RO and C.GEN). The excision of the head-shunt land protects ABP's interests in KIL3.
- 18.189 The Panel understands the reasons why NR feels a responsibility to protect both current (C.RO) and potential future (ABP and C.GEN) rights. But the Panel has to be mindful that C.RO is not exercising that right at present, and that the basis on which the future traffic justifying KIL2 might develop is disputed by the applicant; and is certainly somewhat speculative.
- 18.190 As we have noted, the applicant must have adequate access to be able to operate across the railway line. The critical question is whether this requires acquiring rights across NR's property, which NR is not prepared now to grant on terms that the applicant regards as acceptable, or whether it can achieve its requirements with bridges.
- 18.191 The applicant said in answer to the Panel's first round question that –
- 'NR has stated that if the line remains within the network and on its current alignment, grade separated crossings will be required to cross it. This is not reasonably practicable for the intended purpose of the site ...'(REP024, Q46).
- 18.192 The Panel pressed this point in its second round questions, in which we asked whether, given NR's insistence on grade-separated

crossings, '... the development of the Marine Energy Park on the scale and extent proposed [is] a viable proposition?'

18.193 The applicant responded (REP052, Q50) with an indicative masterplan, drawings and some calculations. The applicant's summary was that –

'... AMEP remains viable with whatever crossings are required, but the construction of bridge crossings would give rise to –

a. Significant abnormal costs that are, given the evidence available to the Applicant, not reasonable. This, in turn, would be reflected in less competitive offers to prospective tenants.

b. The footprint occupied by the bridge approaches would be significant, provide a constraint to traffic movements across the site and reduce the external storage areas available. Again, this would result in a less attractive site to prospective tenants.

18.194 ABP, C.RO and C.GEN have all sought to argue that the acquisition of land or rights for level crossings is desirable and that the 'compelling case in the public interest' test is not met [ADD056, para 70 *et seq*].

18.195 The Panel's view is that the interests held by C.RO, C.GEN and ABP are protected fully if the line remains in the operational network, as the applicant now proposes.

18.196 The applicant has indeed demonstrated that the development and operation of the site is theoretically possible through the construction of bridges; but the applicant has also demonstrated to the satisfaction of the Panel that this would have a significant impact on the development, since the bridges might occupy 'up to 9 hectares each' (REP052, figure 6.1; ADD057, para 165).

18.197 The first test in s.122 is that the land 'is required to facilitate or is incidental to that development', and the Panel considers that the need for level-crossings undoubtedly facilitates the development.

18.198 The second test is the compelling case in the public interest for the land to be acquired compulsorily. Weighing the nature of the land to be acquired – four easements which will not reduce or restrict the use of the railway line or otherwise significantly diminish NR's assets – against the public benefit represented by the scheme, which would be materially reduced by the loss of part of the site to bridges and the additional constraints on movement around the site – the Panel conclude that the compelling case in the public interest does exist.

18.199 The Panel notes the point made by NR in para 18.117 above that even acquiring the easements does not ensure that there will be level crossings, but believes that there must be scope for the applicant and NR to reach some sensible accommodation.

Triangle site

Associated British Ports

- 18.200 As a statutory undertaker, ABP correctly contends that it represents a public interest as well as being a commercial entity.
- 18.201 The Panel accepts that the triangle land is land acquired by ABP solely for port development, although not yet ever used for that purpose, and that s.127 should therefore apply.
- 18.202 The Panel is not persuaded that the WDJ should be seen as a direct and equivalent competitor. Despite ABP's representations, the production of the Port Masterplan and the draft Harbour Revision Order the WDJ is clearly still at an early stage of project development. It is not certain that it will proceed⁵². The WDJ may be required to support the further development of the undertaking, but the acquisition of the triangle site at this time would not obviously cause serious detriment to the carrying on of the undertaking. The Panel must conclude that it would cause little or no detriment to the current undertaking. The detriment is potential rather than certain – it is in the future; it will not arise if the demand does not arise; it may not arise if other sites for the WDJ within the ABP estate can be used [ADD034, paras 7.36,.7.37,7.38 and above]
- 18.203 So while the Panel understands fully why ABP would not wish to lose this potentially valuable asset, we have had to consider the balance of interests here.
- 18.204 The triangle site is required for hard standing to store components and the siting of a pumping station but it also leads onto a section of the quay. Without this triangle of land it appears that approximately 250m of quay could not be built or accessed, and approximately 10,000 square metres of hard standing could not be built. Not only would this significantly reduce the size of the development but would also inevitably reduce the flexibility needed to move the very large components involved in the manufacture of wind turbines around. Moreover, with 250m less quay this would presumably mean that in practical terms that one less ship could be handled at a time
- 18.205 The Panel considers that there is a clear case under s.122(2)(b) to conclude that the land is required to facilitate the development of the proposed NSIP. We accept the argument made by the applicant for the maximisation of the potential of the site, and that this depends first and foremost on maximising the quay area, and that the triangle site forms an integral part of the applicant's plans, since it would be used for external storage behind the quay, access to the quay, the siting of a pumping station and associated drainage ditches (APP035;

⁵² The Panel notes, but has not sought to assess, the arguments from the applicant that this demand will not in fact arise – see ADD057 paras 114 *et seq*

ADD055 para 112). ABP have sought to argue that the pumping station might be sited elsewhere; but it would still be a land requirement that the applicant would then wish to replace elsewhere; and the Panel has accepted that the scheme should be considered as a whole. The applicant's case for the triangle site is in our view as strong as for any and all of the other land required for the main development site.

18.206 On balance therefore we consider that the public interest which is served by the development as a whole applies equally to the triangle site, and given the scale of the public benefit represented in this project that the public interest for this land to be acquired is compelling.

The Panel's Recommendations on the Request for Compulsory Acquisition Powers

18.207 With regard to s.122(2) of PA2008 the Panel is satisfied that the legal interests in all parcels described and set out in the revised Book of Reference and on the revised Land Plans are required in order to implement the development.

18.208 With regard to s.122(3) the Panel is satisfied in relation to the application that –

- development consent for the development should be granted
- the Ports NPS is to be considered the pre-eminent policy
- the Ports NPS requires the 'need' case to be accepted
- the arguments for IROPI set out to meet the Habitats Directive requirements are equally compelling and applicable
- there are no sites which are alternatives to the Able site
- the funding is adequate and can be made sufficiently secure
- the interference with human rights is lawful, in the public interest and proportionate

18.209 With regard to the incorporation of other statutory powers pursuant to s.120(5)(a) the Panel is satisfied that, as required by s.117(4) the DCO has been drafted in the form of a statutory instrument, and that no provision of the DCO contravenes the provisions of s.126 which precludes the modification of compensation provisions.

Considerations under s138

- 18.210 The DCO authorises the compulsory acquisition of land in which Eon, Centrica and Anglian Water have, or may have, a right to keep apparatus.
- 18.211 The applicant has agreed protective provisions and) has sought to limit the power of acquisition to circumstances in which extinguishment, removal or repositioning of statutory undertaker apparatus is necessary for carrying out the authorised development. However, the statutory undertakers did not withdraw their representations before the end of the examination.
- 18.212 The DCO may only include provision for the extinguishment of rights/removal of apparatus if satisfied that it is necessary for the purposes of carrying out the development and the relevant Secretary of State has consented if a representation is not withdrawn.
- 18.213 In the event that the statutory undertakers do not notify the Secretary of State that their representations are withdrawn it is the Panel's view that the applicant has demonstrated that such extinguishment/removal is necessary [ADD055] for the purpose of carrying out the development and recommends that the Secretary of State⁵³ consents to the inclusion of the compulsory acquisition provision.

Considerations under s128

- 18.214 If a representation containing an objection to the compulsory acquisition of land acquired by a statutory undertaker is made before the completion of an examination and is not withdrawn a DCO is subject to special parliamentary procedure. The Panel anticipates that the representation (containing an objection) of at least one statutory undertaker will not be withdrawn and the provisions of the Statutory Orders (Special Procedure) Act 1945 will apply.⁵⁴

Considerations under Section 135

- 18.215 The Crown Estate in its Relevant Representation (RRP025) stated that

—

‘We wish to make clear that no consent has been given by The Crown Estate to compulsory acquisition of any interest in Crown land pursuant to Section 135(1) of the Planning Act 2008. However The Crown Estate have carried out a formal procurement process in respect of the Site and invited tenders, following which The Crown Estate are now in discussion with

⁵³ In the absence of agreement as to which Secretary of State should consent it will be for the Treasury to determine the question.

⁵⁴ Subject to any amendments made and transitional arrangements secured by the Growth and Infrastructure Bill when enacted.

Able as to the possible acquisition of the Site by agreement, pursuant to paragraph 5.17 of the Statement of Reasons.'

- 18.216 The Crown Estate informed the Panel on 15 November that it confirmed that '...The Crown Estate has agreed a formal option for Able to purchase that land.' (ADD020).
- 18.217 Article 30 (3) ensures that no interest in Crown land may be acquired compulsorily unless the appropriate Crown authority consents to the acquisition.

19.0 DRAFT DEVELOPMENT CONSENT ORDER AND MARINE LICENCE 040213

- 19.1 The draft DCO, the draft DML and the two s.106⁵⁵ agreements constitute the approval sought for the proposed development.
- 19.2 These documents set out the authority to be given to the applicant, including the permanent or temporary compulsory acquisition of land and interests in land, the obligations that the applicant is prepared to accept to facilitate the development, the further approvals that are required before particular works can commence, the protective provisions necessary to safeguard the interest of other parties and the requirements (analogous to planning conditions) that are imposed on the exercise of the authority.
- 19.3 The draft DCO and DML [APP008] submitted as part of the application indicated to the Panel the complexity of the proposal. Accordingly we scheduled two Specific Issue hearings on these documents – one on 12 July 2012 at the start of the examination to assist us and interested or affected parties to understand how the documents were intended to work, and a second over two days at the very end of the examination (21 and 22 November 2012) to consider the final version.
- 19.4 The Panel made it clear at the first hearing that it was considering draft documents on a without prejudice basis, in that even if the Panel recommended against the granting of consent we would still need to provide the Secretary of State with a draft DCO and other documents in case he decided against our advice.
- 19.5 In fact, the applicant produced six versions of the DCO in the course of the examination: the original December 2011 version [APP008] with the application; a second June 2012 version [REP002, pages 248 - 317] was tabled for the 12 July hearing; a third August 2012 [REP008 pages 162 - 330] following the first hearing; a fourth version in early October 2012 [PDC028]; a fifth version in late October [PDC032]; and a sixth version on 23 November following the 21 and 22 November hearing [PDC037].
- 19.6 All versions were subject to extensive comments, objections or requests from other parties. The protective provisions in particular have developed significantly during the course of the examination.

The Order

- 19.7 The applicant's sixth version is at PCC037. The Panel's submitted version is the sixth version and is at Appendix K.

⁵⁵ S.106 of the TCPA, applied under s.120(5) of PA2008

- 19.8 In its final form the draft Order has 60 articles and 11 schedules. It is substantially the same as the applicant's sixth version, but with some further amendments proposed by the Panel.
- 19.9 The authorised development is described in Schedule 1. The Nationally Significant Infrastructure Project is described as 'a quay of solid construction' and identified as Work No 1.
- 19.10 The other works are all categorised as Associated Development. Work No 2 is improvement work to the junction of Humber Road and Rosper Road. Work No 3 is the provision of a passing loop on the Killingholme Branch. Other associated development in North Lincolnshire is described as dredging works; provision of onshore facilities for manufacture, assembly and storage; improvement works to Rosper Road and the A160; surface and foul water disposal arrangements; lighting; parking; ecological mitigation; and the re-siting of apparatus.
- 19.11 Associated development in the East Riding of Yorkshire is identified as the development of compensatory environmental habitat, to include dredging and tidal works (the RTE scheme) licensed in accordance with Schedule 8, the DML; and the dredging of the Cherry Cobb Sands breach.⁵⁶

Deemed Marine Licence

- 19.12 Schedule 8 is the DML, which sets out the conditions for the construction of the quay, the provision of temporary dolphins, the infilling of the berthing pocket, the construction of the pumping station, the creation of the compensation site at Cherry Cobb Sands through the breaching of the sea-wall, capital dredging and maintenance dredging.
- 19.13 Throughout the examination the Panel took the view that since the enforcement of this licence would be the responsibility of MMO, the Panel should place a high degree of reliance on MMO's views. All drafting changes proposed by MMO to Schedule 8 have been accepted by the applicant and the Panel.

Protective Provisions

- 19.14 Schedule 9 contains the protective provisions for statutory undertakers. Numbered as Parts, these are for –
1. Humber Conservancy
 2. Environment Agency
 3. Highways Agency

⁵⁶ As noted elsewhere, the temporary wet grassland adjacent to Cherry Cobb Sands are the subject of a separate application to East Riding of Yorkshire Council.

4. Network Rail
5. C.GEN Killingholme Ltd
6. C.RO Ports (Killingholme) Ltd (as a statutory harbour authority)
7. Phillips 66 Ltd⁵⁷
8. National Grid
9. E.ON UK plc
10. Centrica plc
11. Anglian Water
12. Bethany Jayne Ltd
13. Royal Mail Group Ltd
14. ABP (in its capacity as harbour authority for the ports of Immingham and Grimsby)

- 19.15 It was evident from an early stage that the negotiation of protective provisions would be a complex and contested process. At the first hearing on the draft DCO the Panel requested all parties who sought amendments to the protective provisions relating to them to send appropriate drafts to the applicant so that there was complete understanding as to what was being sought. This facilitated discussion, but did not reduce it.
- 19.16 At the second hearing (21 and 22 November) the entire suite of documents - the fifth iteration [PDC031, 032 & 033], which had been circulated by the applicant in late October - was examined on a clause-by-clause basis. The Panel is satisfied that all parties have had an adequate opportunity to consider the detail of what is being proposed, and indeed to discuss it.
- 19.17 The applicant then submitted a final (sixth) version [PDC037] on 23 November before the close of the examination. Many, but not all, of the measures sought before or during the second hearing have been agreed by the applicant. Any changes to the sixth version of the draft DCO in the attached schedule arise either from matters discussed at the two-day hearing in November or from minor changes to improve wording or correct minor errors.

⁵⁷ Formerly Conoco

Status of the model provisions

- 19.18 There was some uncertainty throughout the examination as to the status of the model provisions. (ABP refers to this specifically in HEA109, para 8 *et seq.*) The requirement to have regard to the model provisions was repealed by the Localism Act. This application, of course, was made before the Localism Act took effect, so it necessarily did have regard to those model provisions.
- 19.19 The Panel takes the view that the abolition of the need to have regard to the model provisions should not have any substantial retrospective effect on the application. The Panel accepts that each provision must be justified on its own merits and necessity; but the fact that the model provisions are not part of the current legal framework does not make them any less sensible as a starting point for the development of a provision.

Article 2 Interpretation

- 19.20 C.RO [HEA107] and C.GEN [HEA111] seek to have the definition of 'authorised development' restricted by the deletion of the words '[and] any other development authorised by this Order'. The applicant maintains that these are essential and therefore should not be removed. The Panel agrees with the applicant: in the event of any question as to whether work is authorised the onus will be on AMEP to prove that work is indeed authorised.
- 19.21 The HMH [HEA105] suggests that it would be desirable for the deposit sites specified in the marine licence to be shown in a plan and that a definition of 'Deposit Location Plan' should be added. But on the basis that MMO is satisfied that dredging is adequately covered by the marine licence, the applicant maintains that this is unnecessary. The Panel agree with the applicant: MMO has ultimate responsibility for managing the dredging.
- 19.22 C.GEN and C.RO seek a new definition of "limits of deviation". The applicant argues that this is covered by article 6, limits of deviation. The Panel agree with the applicant that this should be sufficient for all practical and legal purposes, but the Secretary of State may feel that an additional definition along the lines –

"limits of deviation" mean the limits for deviation of any works as set out in Article 6

- would conclude the point.

Article 10 Maintenance of authorised development

- 19.23 ABP proposed at the second hearing that in Article 10 the term 'within the limits of the harbour' should be amended. The applicant's response was that the expression had already been restricted beyond

the Model Provisions (MP) in response to points raised at the first hearing. ABP have not pursued the point in their final submission [ADD056].

Article 11 Provision of works

- 19.24 C.GEN and C.RO wish to add 'subject to paragraph (3) below' to the start of Article 11. The applicant argues that this is unnecessary. The Panel concurs: this would not improve the force or the sense of the current draft.
- 19.25 C.GEN and C.RO also seek to delete the words 'railway lines' in paragraph 11(1) on the grounds that a passing loop is part of the works to be authorised. The applicant argues that there are already protective provisions in place with regard to the railway and this form of words adheres to that used in the London Gateway Port Harbour Empowerment Order 2008, No 1261⁵⁸.
- 19.26 The Panel concurs: the protective provisions relating to the railway line and its prospective users are extensive and specific, and the inclusion of railway lines would be consistent with the other types of possible works set out in the Article.
- 19.27 ABP proposed at the second hearing that the power given by Article 11(1) should be restricted to the limits of deviation for that work. The applicant argues that the expression has already been restricted, and that the proposal goes beyond that set out in the model provisions. The Panel agree that further restriction is unnecessary.
- 19.28 ABP also proposed at the second hearing that Article 11(3) – the application of Article 3 and Part 17 of Schedule 2 of the General Permitted Development Order - should be deleted. The applicant argues that this is suggested in the model provisions, and that to remove it would create a restriction that goes beyond that which the Secretary of State considers is normal under the Harbour Act 1964. The Panel does not feel able to comment on that claim, but agrees that this would be an unreasonable restriction.

Article 13 Consent to transfer benefit of Order

- 19.29 HMM has raised [HEA105, para 40 *et seq*] particular concerns about this Article. His concern is that 'the benefit of the provisions of the Order' does not readily identify statutory functions against physical asset, either of which might be transferred or leased. It would not be difficult for the whole statutory undertaking and its physical assets to be fragmented among different entities and interests. HMM regards this as a particular risk in this case, given the scale and design of the development which would lend itself more readily to fragmentation than other port developments on the Humber.

⁵⁸ London Gateway Port Harbour Empowerment Order 2008, No. 1261.
(Source: <http://www.legislation.gov.uk/uksi/2008/1261/article/10/made>)

- 19.30 HMH's concern is that following construction, parts of the development could be transferred or leased that would include part of the statutory undertaking, potentially creating a number of statutory harbour authorities in that area of the estuary, each with its own statutory functions.
- 19.31 Against the applicant's contention that any harbour authority could do this, HMH cites the decision of King J in the recent case of R (on application of Humber Oil Terminals Trustee Ltd) v Marine Management Organisation [2012]⁵⁹, from which he argues that King J formed the view that the Act had been drafted specifically to avoid a proliferation of harbour authorities, and was in fact reasonably clear on that point, and that although this is an application under a different Act, the same principle should apply.
- 19.32 The Panel acknowledges the concern and the difficulty; but on balance we think the fact that exercise of this power requires the consent of the Secretary of State who no doubt would engage in appropriate consultation before reaching a decision, should be an entirely adequate safeguard. We have not changed the applicant's wording which is based on the former model provision.

Article 14 Guarantees in respect of payment

- 19.33 Various parties (ABP, C.RO and C.GEN) raised concerns about funding in the context of both compulsory acquisition powers and the draft DCO in relation to (a) the need for adequate security, and (b) the need to extend this to a guarantee for the whole development. It has also been suggested that Article 14 should be extended to cover the temporary wet grassland and the possible East Halton grassland.
- 19.34 The Panel states in the section of the report dealing with compulsory acquisition that it believes that the provisions in the unilateral s.106 agreement with NLC requiring the applicant to provide a parent company guarantee or an equivalent bond should be sufficient and proportionate.
- 19.35 The Panel considers that requiring the guarantee to extend to the costs of the whole development would be a novel and dangerous precedent, and unreasonable and impracticable.
- 19.36 The applicant argues that it would be inappropriate to extend the provisions of the Article to land outside the project boundary, and the Panel concurs.
- 19.37 The argument was also made that the approval of the guarantee should be from the Secretary of State, rather than the local planning authority, on the grounds of the residual liability of the state for

⁵⁹ EWHC 3058 (QB).

matters relating to the Habitats Directive. The applicant seeks to refute this on the grounds that –

(a) public authorities are emanations of the State and bear the same duties; and

(b) if it were the case that any development which engaged the EU Habitat's Directive should be entrusted to the Secretary of State the '... we would have the position where no development at all could be consented to by a local authority.' (HEA110, para 7.4)

- 19.38 The second statement may veer towards hyperbole, but the Panel concurs that this again would be an unnecessary and dangerous precedent.

Article 19 Public Rights of Way

- 19.39 The proposed closure and diversion of District of North Lincolnshire Footpath 50 is unopposed. Objections made to the proposed alignment of the East Riding of Yorkshire's Paull Footpath 5 are considered above. The Panel endorses the wording of Article 19 in the 23 November Draft DCO [PDC037] but has altered the incorrect reference to Schedule 3 to refer to Schedule 5.

Article 26 Lights on tidal works etc. during construction

- 19.40 HMH (HEA105) argues that although the model provisions do not include a precedent for failure to comply, the Localism Act 2011 has amended section 120 and Schedule 5 of the Planning Act 2008 to allow for the imposition of certain penalties.
- 19.41 HMH states that there is ample precedent for the imposition of such penalties⁶⁰. HMH is concerned that this is a busy river and there is a risk of danger to navigation from breach of this Article, and that might result in loss of life and vessels.
- 19.42 The applicant's counter to this is that HMH has not provided the strong evidence base necessary to justify the case for criminal sanctions and that this sanction ' ... is not found in similar orders' (HEA110, para 10.1) .
- 19.43 The relevant section of Article 18 of the London Gateway order reads thus–

(6) The Harbour Authority shall be liable—

(a) on summary conviction to a fine not exceeding the statutory maximum; or

⁶⁰ HMH cites as examples Article 12 (Offences) of the River Humber (Upper Burcom Tidal Stream Generator) Order 2008 (made under the Transport and Works Act 1992) and Article 18 of the London Gateway Port Harbour Empowerment Order 2008 (made under the Harbours Act 1964), which apparently authorised a very similar scheme in the River Thames.

(b) on conviction on indictment to a fine, for a failure to comply with a direction given under this article⁶¹.

- 19.44 This point was raised late in the examination, and the Panel do not feel that they have enough tested evidence on which to make a recommendation to the Secretary of State. If the Secretary of State judges that current best practice is to have such a provision, then the Panel suggest that the London Gateway model would be appropriate.

Article 30 Compulsory acquisition of land

- 19.45 C.GEN and C.RO seek to have the acquisition of the railway removed from this article, and draw attention (HEA107, para 1.28 *et seq*)) to what they consider to be confusion on the part of the applicant as to how easements to its satisfaction can be granted without powers of compulsory acquisition.
- 19.46 The Panel's recommendation, consistent with its views set out in the section in this Report on compulsory acquisition is that easements are an appropriate, proportionate and necessary solution. If NR will not grant them willingly, then compulsory acquisition of those rights is necessary. The interests of C.RO and C.GEN in relation to the railway are in our view properly and adequately covered in the respective Protective Provisions, as are those of NR. Accordingly we recommend the retention of those powers in this Article unless by the time that the Secretary of State comes to take his decision he has been notified by the parties that the easements have been negotiated.
- 19.47 HMM continues to seek the exclusion of the land he holds by lease from the Crown from compulsory acquisition. The Panel has set out in the section on compulsory acquisition why we believe that the applicant must have powers to acquire this land if an under-lease has not been negotiated.
- 19.48 HMM has sought to argue that, similar to the proposed easements, an under-lease could be brought about through the exercise of compulsory acquisition powers HEA105, para 14 *et seq*).
- 19.49 There is precedent for restricting the exercise of compulsory powers of acquisition to the acquisition of a lease. It is to be found in the protective provisions for the benefit of Heathrow Airport Limited at paragraph 3(1) of Schedule 4 to the Piccadilly Line (Heathrow Extension) Order 20023 (an order made under the Transport and Works Act 1992). The relevant paragraph follows -

'The Company shall not under the powers of this Order acquire compulsorily any airport property except a leasehold interest in such land together with such ancillary easements or rights as are reasonably required for the purposes of the authorised

⁶¹ http://www.legislation.gov.uk/uksi/2008/1261/pdfs/ukxi_20081261_en.pdf

works, or obtaining access thereto, in such position and upon such terms as may be agreed with the authority.'

- 19.50 The Panel has been advised that there is at least serious doubt as to whether PA2008 provides such powers to the Secretary of State; and even if it does, then the need to include HMH's land within the scope of compulsory acquisition would remain.

Article 31 Power to override easements and other rights

- 19.51 C.GEN and C.RO seek additional text to ensure that no agreement that they have with NR can be overridden. Since the Panel is only recommending that easements for level crossings should be granted to the applicant, and that the railway should remain within the operational network, we do not consider this necessary.

Article 33 Time limit for exercise of authority to acquire land compulsorily

- 19.52 ABP argues that the time limit in Article 33(1) for exercising authority to acquire their land should be reduced from five to three years in consideration of their active proposals to develop that land for the WDJ.
- 19.53 The applicant argues (*inter alia*) that ABP's circumstances are not exceptional; that other parcels of land may be subject to future development by their current owners; and that since ABP's plans are still at the proposals stage, ABP will actually suffer less prejudice than other landowners (unspecified) whose business is already established.
- 19.54 The Panel considers that the five years to complete acquisition derived from the model provisions is reasonable for a project of this scale, and that it should apply equitably to all landowners involved. We note in passing that as stated elsewhere we are not persuaded that this is the only site for the WDJ, or if it was that it should have precedence over this current application.

Article 43(A) Reverter to ABP

- 19.55 ABP proposes that there should be a new 'reverter clause' allowing them to take back the triangle site if it is not actually developed by the applicant.
- 19.56 ABP argues that there is precedent for this in the River Thames (Hungerford Footbridges) Order 1999⁶², although it appears to the Panel that this is not actually analogous: the Hungerford case applies

⁶² Schedule 10, Part 2, para 21(2) –

If any or all of the footbridges and ancillary works constructed under, in or over the river under the powers of this Order cease to be highway and are permanently removed, there shall revert to the Port Authority, at no cost, any interest of the undertaker in the airspace and riverbed in or over the river previously occupied by such structures.

if the footbridges and works are removed, not if they had not been built.

- 19.57 The applicant opposes this clause, on the grounds (*inter alia*) that ABP has advanced no evidential basis for it. The argument that they seek to develop the land is undermined by the fact that it has not been in use for over forty years. If in the alternative there were a compelling case for the land for a port then ABP would be able to acquire the land either by agreement or compulsorily
- 19.58 In order to judge whether s127 applies in relation to the compulsory acquisition of ABP's land, it is necessary, as a preliminary matter, to decide whether ABP had acquired the land for the purposes of their undertaking [see Appendix D]. However, in the context of determining whether it would be appropriate to provide a reverter clause, the question for the Panel has been the extent to which ABP's plans for future development of their operational land have crystallised.
- 19.59 The Panel's conclusion is that, although it is entirely reasonable for ABP to look for ways to develop the assets in their estate we accept the applicant's arguments that there is a long way to go from the finalisation of the Port Masterplan in October 2012 to detailed development proposals. In view of this uncertainty and, given the discussion of the proposed article in the second hearing which failed to result in drafting (see Appendix J) that was both equitable and certain in its effects, the Panel does not on balance feel able to recommend that the reverter article should apply.

Article 48 Railway network

- 19.60 The applicant notes (HEA110 para 16.1) that in the event of the Secretary of State authorising compulsory acquisition of the easements sought, which is the Panel's recommendation, this Article ceases to be necessary.
- 19.61 NR in any event object strongly to Article 48 (HEA114, paras 2.2 *et seq*), on the grounds that –
- (a) Article 48(1) seeks to undermine the Railways Act 1993, s.6 of which makes it a criminal offence for any person to act as the operator of a railway asset unless he is authorised to be the operator of that railway asset by a licence or he is exempt by virtue of s.7 from the requirement to be so authorised. Should the Applicant attempt to operate the railway this would also be a criminal act of trespass under the British Transport Commission Act 1949;
 - (b) Article 48(2) seeks to deem a function of the Office of Rail Regulation (ORR) and NR. This seeks to impute to the ORR a discretion to reach an agreement in order to circumvent the

normal regulatory procedures. NR submits that the draft DCO has no legislative basis for such a provision.

Article 51 Permitted development rights

- 19.62 At the second hearing ABP sought to argue that this article is confusing as, by reference to the area of jurisdiction, it grants operational land status to an area of water beyond the quay edge.
- 19.63 The applicant argues that the provision is more limited than that provided for in the model provisions and only extends the operational land to an area 100m beyond the quay.
- 19.64 The Panel concurs with the applicant, and considers that it is necessary and proportionate to treat the area involved as operational land.

Article 57 Certification of Plans

- 19.65 ABP argued at the hearing that the design drawings also should be certified. The applicant opposes this, on the grounds that these are likely to change. The Panel takes the view that Requirements 3B and 4 provide adequate safeguards.

Schedule 1 Authorised Development

- 19.66 There was considerable discussion at the second DCO hearing as to whether Schedule 1 as drafted by the applicant was sufficiently specific.
- 19.67 The applicant has made further changes, and the Panel consider that in its current form, and read in conjunction with Requirements 3B and 4, the Schedule is appropriate and adequate. The works agreed for Pelham Road are covered by a unilateral undertaking by the applicant.

Schedule 8 Deemed Marine Licence

- 19.68 As noted before, without in any way resisting its responsibility for the examination of the draft DML, the Panel has given considerable weight to the views of MMO as the body that would be responsible for the enforcement of the licence.
- 19.69 The detailed reasons for the conditions to be applied are set out by the MMO in Appendix 1 to their final submission [HEA112]. The applicant states that it has incorporated all the MMO's requests in the final version [PDC037]
- 19.70 There is one point in the applicant's final draft which is at apparent variance with MMO's stated position in Appendix 1. This relates to the amount of rock and gravel that may be placed in the berthing pocket. MMO had previously stipulated not more than 250,000 tonnes (para 61). In paragraph 6 of the licence this is shown as 300,000 tonnes. It

may well be that the applicant reached an agreement with MMO that the organisation was unable to confirm to the Panel before the close of the examination only three days after the hearing. The Secretary of State will wish to be satisfied that the licence meets MMO requirements.

- 19.71 In respect of paragraph 33, HMH seek to add the condition that the applicant should provide an oil spillage plan that is compatible with 'Humber Clean'. The applicant opposes this, on the grounds that it is an entirely new request made only on the last day of the hearing, and that there is in any event a statutory mechanism which addresses this point.
- 19.72 The Panel's view, however, is that if this is a standard requirement for harbour operators on the River Humber then it should reasonably apply here as well. We consider, however, that this should more appropriately be a Protective Provision, and therefore have added this as a new paragraph 24 in Part 1 of Schedule 9.
- 19.73 In respect of paragraph 34 HMH has sought a stipulation that an application to issue a Notice to Mariners be made through him [HEA105, para 73]. This is resisted by MMO [HEA111, para 10] and the applicant. The Panel considers we should be guided by MMO and do not support the change
- 19.74 C.RO [HEA107] has sought to ensure that the interface between its marine licence and that to be given the Able Humber Ports Ltd should be managed. The MMO took the view that this was a matter for Protective Provisions, with which the Panel agrees.
- 19.75 ABP [HEA109, paras 28 and 29] argued at the second DCO hearing that the conditions relating to piling (paragraphs 37 to 41) should be the same as these applied to Green Port Hull⁶³.
- 19.76 This was not supported by either EA or MMO. The point was made that the two developments were different schemes in different locations, and the appropriate conditions had been assessed separately for each. Although ABP continue to argue that the two agencies should be required to justify the differences, and that without that evidence the two schemes should have equivalent conditions, the Panel can see no merit in that argument. The piling conditions have been formulated in relation to the circumstances of this case and are clearly expressed.

Schedule 9 Protective Provisions

Part 1 – for the protection of the Humber Conservancy

- 19.77 HMH has sought [in HEA105 paras 78 et seq and the attached version of the draft DCO] extensive amendments to Article 3 to extend its

⁶³ Hull City Council had previously made the same request

rights to be consulted. The applicant has substantially accepted them and the Panel is content with this Article as now drafted.

- 19.78 HMH seeks amendments relating to the powers of compulsory acquisition [HEA 105, paras 80 et seq]. HMH's Appendix 1 is repeated here as Appendix I. It includes amendments required in lieu of an agreed under-lease of the Conservancy Authority's riverbed and foreshore.
- 19.79 HMH has constructed two scenarios. In the first of these scenarios, if the Secretary of State were to grant the Applicant powers of compulsory purchase over the two foreshore parcels (08001 and 09001) then HMH seeks all the protective provisions in Appendix I.
- 19.80 In the second scenario, if the Secretary of State were to grant compulsory powers over plots 08001 and 09001 but decline to include sub-paragraph 25(1) to (3) in the protective provisions, HMH would still seek the provisions numbered 25(4) to (12) so as to achieve the same degree of protection in key areas that he would enjoy as landlord.
- 19.81 HMH states that in the event that the Secretary of State decides not to authorise the compulsory acquisition sought, as amended, then HMH would seek an exclusion for plots 02013, 10007, 11004, 12004 and 13004 in the body of the DCO as well as these equivalent under-lease provisions in relation to plots 08001 and 09001.
- 19.82 It may well be that by the time the Secretary of State comes to make his decision a suitable under-lease will have been negotiated to the satisfaction of both parties and notified to the Secretary of State by the parties.
- 19.83 The Panel notes the applicant's observation that the reason why the under-lease has not been agreed is because there had been no indication of its length or rent. Appendix I puts forward a term of 'not exceeding 60 years'. For obvious reasons it says nothing about rent levels.
- 19.84 At the second hearing and in its subsequent submission (HEA110, para 22.3) the applicant has resisted this proposal on the grounds that the provisions are new and that the same law firm is acting for both HMH and ABP over the under-lease.⁶⁴
- 19.85 The Panel restates its understanding that there is doubt about whether PA2008 creates the power to grant leases. But even if it does, the Panel's considered view is that the new provisions proposed by HMH are not reasonable: they are, as the applicant notes, an attempt to negate the powers of compulsory acquisition. As the Panel has said in the section on compulsory acquisition above, if the applicant cannot

⁶⁴ HMH's separate legal advisers for other all purposes state that a 'Chinese wall' is in operation within that firm.

acquire the two foreshore lots then the project is completely frustrated. The evidence before us, and accepted in part by HMH's own advisers despite statements at the second hearing, is that the applicant has sought to negotiate an under-lease but that HMH has not been in a position to conclude terms. We have concluded above that the sanction of compulsory acquisition should apply.

- 19.86 If the Secretary of State goes against our advice on this point, then the Panel would advise strongly that he considers carefully the length of any under-lease stipulated in the additional protective provisions: in our view a term of not less than 100 years, the estimated life of the quay, would be appropriate for a proposal of this scale.
- 19.87 HMH also seeks amendments to provision 23 relating to the transfer of the benefit of the order, to the effect that Able Humber Ports Ltd would not be able to make application to the Secretary of State to transfer the undertaking under Article 12 without first gaining HMH's consent; with HMH able to refuse that consent if he considers that the proposed transferee or lessee has not demonstrated the financial or other competence needed to assume the statutory functions and the liabilities relating to the authorised development that would go with the transfer or lease.
- 19.88 The Panel consider this to give HMH in effect unrestricted powers to refuse consent, and as such to be unreasonable. In any event, the necessity for such a provision has not been demonstrated and the Panel repeats its view that the Secretary of State should exercise this power alone, consulting other interested parties as necessary.
- 19.89 As noted in the previous section, the Panel has added HMH's requirement to see any oil spillage plan before submission to the Maritime and Coastguard Authority as new paragraph 24 -

'The Harbour Authority must consult the harbour master before submitting any oil pollution emergency plan to the Maritime and Coastguard Agency and must ensure that any such plan is compatible with the Conservancy Authority's existing plan known as "Humber Clean" or such other plan as supersedes "Humber Clean".'

Part 2 – For the protection of the Environment Agency

- 19.90 EA stated in its original Written Representation [WRR016] and in its final submission [HEA113] that it would require legal obligations in relation to flood risk issues for both the AMEP and Cherry Cobb Sands sites, and also that it believed that compensation for residual adverse effects of piling on salmon should be provided by the applicant. It was EA's view that it would prefer to deal with these issues in separate legal agreements.

- 19.91 Negotiations continued throughout the examination. Agreement had not been reached at the time the examination closed, although in final submissions both the EA and the applicant expressed confidence that agreement could be reached, and if so they would notify this directly to the Secretary of State.
- 19.92 In the event that the Secretary of State has not received this agreement, then the EA seeks additional requirements under Schedule 11 and additional protective provisions under this schedule. These are set out at Appendix B to HEA113.
- 19.93 The Panel has not had the benefit of any submissions from any other party, including the applicant, on these additional provisions, although presumably its terms follow closely the legal agreement that EA seeks to conclude with the applicant. The Panel's view is that the provisions are appropriate, adequate and not unduly onerous. If the legal agreement has not been lodged with the Secretary of State, then we recommend that he adopts these provisions.

Part 4 – For the protection of Network Rail

- 19.94 These provisions have been developed substantially in discussions between the applicant and NR. There are however two outstanding matters and, unless these are resolved, NR is not prepared to withdraw its s.127 representation.
- 19.95 The provisions as drafted omit what NR regards as two fundamental aspects of protection that in its view are typically included in legislation authorising infrastructure projects -
- (a) the requirement that the powers to compulsorily acquire land or rights over land can only be exercised with the consent (not to be unreasonably withheld and may be subject to conditions) of NR; and
 - (b) an indemnity in respect of claims arising in respect of a specified work;
- 19.96 These were set out in paragraphs 36(3) and 45 of Annex 1 to NR's Paper of Amendments submitted on 25 July 2012 [PDC042].
- 19.97 The applicant's position [HEA110 paras 22.7 and 22.8] is that given the case advanced by NR at various stages of the hearings, the applicant cannot accept that "reasonably withheld" would be applied in the proper way, and would be likely to present an insurmountable obstacle.
- 19.98 The applicant also resists (as with respect to similar applications from other parties) the proposed indemnity clause. The applicant argues that parties can resolve any such matters through the courts. There is a danger with an indemnity clause that an indemnified body might

reach an unreasonable settlement with the third party, which would then be passed on to the applicant.

19.99 Against this NR argues that the standard indemnity proposed –

(a) relates to costs, charges, damages and expenses ...“reasonably and properly incurred” by NR [PDC042, paragraph 45(1)];

(b) requires NR to give the developer reasonable notice of any claim or demand [PDC042, paragraph 45(2)0];

(c) prohibits NR from settling any claim or demand, or reaching a compromise in respect of it, without the prior consent of the developer [PDC042, paragraph 45(2)].

19.100 The Panel’s view on NR’s wish to make the exercise of compulsory acquisition powers subject to its consent is consistent with its view on the Harbour Master’s desire for similar restrictions: it subverts the purpose of the sanction of compulsory acquisition and would have equal effect in frustrating the development. The Panel accepts the applicant’s case for easements, agrees with the applicant that NR’s position has changed during the examination and believes that with the sanction of compulsory acquisition of the easements a sensible and safe solution to the requirement for crossings can be reached.

19.101 The Panel’s view on the proposed indemnity clause is that if NR (and others) follow the approach of consulting the developer of its own volition then it can achieve the same effect; and if agreement cannot be reached then even with the indemnity the matter could still end up in the courts.

19.102 If, however, the Secretary of State goes against the Panel’s recommendation on this second point, then in equity the same indemnity clause should be applied in all the parts of the Protective Provisions.

19.103 NR has not withdrawn its s.127 representation

Part 5 For the protection of C.GEN

19.104 C.GEN is in the course of working up a proposal for an Integrated Gasification Combined Cycle (IGCC) Power Station, with an output up to 430MW, at North Killingholme on land adjacent to the existing Killingholme Gas Power Stations of E.ON and Centrica, and the C.RO Terminal. The process involves the gasification of solid fuel, and the Killingholme Branch would clearly be a possible route for the delivery of that fuel. The project is still at an early stage of development, although the Planning Portal still shows Q1 2013 as the date for an NSIP application.

19.105 C.GEN [HEA111] objects to compulsory acquisition of the railway by the applicant. Should the Secretary of State decide that the applicant be granted powers of compulsory purchase over the railway, then C.GEN maintains that the applicant should not be entitled to exercise those powers unless and until it has entered into an agreement with C.RO and C.GEN for joint control and operation of the Railway, and at the absolute discretion of C.RO and C.GEN.

19.106 C.GEN's final position in relation to the proposed protective provisions is set out in an additional representation dated 23 November 2012 [ADD059]. C.GEN propose a new provision, paragraph 47A, to secure the joint operation of the railway if compulsorily acquired.

19.107 In the 23 November version of the DCO [PDC037] the applicant proposes in paragraph 48 that C.GEN should not 'unreasonably' be prevented from having access to railway. Paragraph 49 is a provision that would protect C.GEN from 'unreasonable' interference with, or 'unreasonable' prevention of, C.GEN's use of the railway line for up to five trains each day⁶⁵.

19.108 The applicant proposes in paragraph 48 that C.GEN should not 'unreasonably' be prevented from having access to railway; and in paragraph 49 a provision that would protect C.GEN from 'unreasonable' interference with, or 'unreasonable' prevention of, C.GEN's use of the railway line for up to five trains each day⁶⁶.

19.109 C.GEN objects to this use of unreasonable/unreasonably in both paragraphs. C.GEN also seeks in paragraph 51A a standard indemnity clause.

19.110 The Panel's view in relation to the proposed paragraph 47A is, again, that the railway should remain in the operational network under NR.

19.111 As to the qualification of reasonable excuse in paragraphs 48 and 49, the Panel observes that a working agreement between the two parties requires both to behave reasonably, so the applicant's proposal is not unreasonable.

19.112 The Panel is unconvinced of the necessity or practicability of the indemnity clause.

19.113 The applicant and C.GEN have agreed the paragraphs relating to use of Rosper Road.

19.114 C.GEN's s.127 representation had not been withdrawn at the end of the examination.

⁶⁵ Commentary in the tracked changes version of PDC039 indicates that the figure of 5 trains a day is based on C.GEN's own preliminary environmental information.

⁶⁶ This is based on C.GEN's own preliminary environmental information.

Part 6 For the protection of C.RO

- 19.115 C.RO's final position on the protective provisions is set out in ADD060 and HEA107.
- 19.116 C.RO has access to the railway network, although currently they make no use of it. It is the Panel's understanding from the evidence of C.RO, supported by the state of the facilities that the Panel saw on the accompanied site visit, that C.RO keeps the possibility of rail freight access under active consideration. It is the Panel's understanding from NR's evidence that if C.RO were to seek the resumption of rail freight services then NR would be obliged to ensure that a rail freight operator could provide that service.
- 19.117 C.RO's unmet requests include a proposed paragraph 59A under which the applicant would not allow vessels associated with the construction of the authorised development to obstruct or remain in the approach channel when vessels are arriving at, and sailing from the C.RO terminal, with C.RO committing to provide sailing schedules to the applicant.
- 19.118 C.RO's proposed paragraph 59C would require the applicant not to dredge in the approach channel to the C.RO terminal C.RO Ports Killingholme without prior approval and subject to any conditions C.RO might attach, with C.RO's approval not to be unreasonably withheld or delayed.
- 19.119 C.RO also seeks the same provisions in relation to railway ownership and operation as C.GEN, and the same indemnity. As with C.GEN the same provisions relating to Rosper Road have been agreed.
- 19.120 In regard to the proposed paragraph 59A, the Panel sought the views of the HMH as to whether he was satisfied that there was sufficient separation between the operational areas of the two ports, notably the point in the river where the vessels approaching the C.RO terminal turn to dock. [HEA109]
- 19.121 HMH states [HEA105 para 85] that he is concerned that the location of C.RO's six berth facility means that it will be particularly affected by the construction and operation of the proposed development. The overlapping jurisdictions, approach channels and marine licences of the two operators make this a unique situation. HMH generally supports the proposition that, as C.RO is the existing operator, it is incumbent on the applicant to accommodate C.RO's activities rather than the other way round. For this reason he has been keen for the parties to reach an agreement that would govern their areas of interface in the event that the DCO is made. In the absence of such formal arrangements, he supports C.RO's proposed protective provisions.

19.122 The Panel consider that HMH's views on navigational matters should carry significant weight, and accordingly we recommend the inclusion of C.RO's proposed paragraph 59A –

59A. (1) The undertaker shall not allow vessels associated with the construction of the authorised development to obstruct or remain in the approach channel when vessels are arriving at, and sailing from CPK.

(2) C.RO shall provide the undertaker with a schedule of movements to which paragraph 59A(1) applies on a [weekly] basis and shall give the undertaker reasonable notice of any changes to scheduled sailings or other vessel movements of which it has informed the undertaker.

19.123 In regard to the proposed paragraph 59C, the Panel notes the views of the MMO [HEA112, para 8] that 'It is content that, as regulator, it would be able to police the terms of both licences' but that 'The MMO understands C.RO's concerns and if the Panel are satisfied that CRO requires protection the MMO does not disagree.'

19.124 The Panel finds this a difficult judgement to make. On balance, given that MMO does believe that it would be able to police both licences, and given that there is no doubt that either party would complain immediately to MMO if it thought the other was infringing its licence, we do not think this provision is necessary.

19.125 The Panel's views on the provisions relating to the railway and the indemnity clause are the same as for C.GEN.

19.126 C.RO has not withdrawn its s.127 representation.

Part 8 For the protection of National Grid

19.127 NG's final position is set out at HEA106.

19.128 By the close of the examination it was common ground between the applicant and NG that the applicant has no intention of acquiring any NG interests in the Order Land or of interfering with any of NG's equipment, or extinguishing any rights currently enjoyed by NG over the Order Land. Thus neither s.127 nor s.138 applies in this case.

19.129 NG would normally seek to sign asset protection documents setting down the standards which should be followed when development is carried out near NG assets, in this case a high pressure gas pipeline.

19.130 The draft agreements were not submitted to the applicant until a late stage, so at the close of the examination the two sides had not managed to reach formal agreement.

19.131 NG has thus provided a new protective provision which is included in the 23 November draft of the DCO [PDC037]. The applicant states [HEA110, para 22.16] that it has accepted these paragraphs with the exception of the proposed indemnity clause and the proposed payment of expenses for approval of plans, although paragraph 79A would provide repayment to NG for other expenses that it might incur.

19.132 The Panel considers that the resulting protective provisions are necessary and proportionate. If, however, the two sides do submit a signed asset protection agreement this section may no longer be necessary.

Part 9 For the protection of E.ON UK PLC

19.133 The protective provisions relating to E.ON are agreed, and this is confirmed by E.ON in PDC058 and HEA104, and by the applicant in para 22.18 of HEA110. They are included in October and November drafts of the DCO.

19.134 E.ON had concerns in relation to its existing easement which give E.ON rights to connect its intake and outfall pipes from Killingholme Power Station to the River Humber. The proposal works involve works in the vicinity of these pipes and there would be a need for the applicant to reduce the size of the easement corridor.

19.135 The two parties both confirm that agreement has now been reached between the applicant and E.ON on terms for a new easement that will allow the pipes to remain *in situ* and also includes provision for working in the vicinity of these pipes. This agreement has not been formally executed by the parties but there are no outstanding matters remaining to be negotiated.

19.136 The Panel considers that the provisions put forward are appropriate and proportionate.

19.137 E.ON states [HEA104, para 1.3] that they are unable to withdraw their representations in relation to s.127 and s.138 until the execution of the new easement. These representations thus remain before the Secretary of State. However E.ON states that, as soon as the new agreement has been signed, they will notify the Secretary of State that they withdraw their s.127 and s.138 representations.

Part 10 For the protection of Centrica

19.138 Centrica has requested several amendments to the October draft of the DCO as set out in a letter written on 25 October 2012 [PDC046]. The November draft of the DCO takes many of these changes on board.

19.139 The Panel consider that Centrica's concerns about protecting its works are covered by the provision in paragraph 80(1) that the applicant

must agree a construction method statement with Centrica, and accept the applicant's case that points of construction detail should be settled in discussion rather than specified in the provisions.

19.140 The Panel also considers that the need to monitor outfalls is covered properly in Requirement 34 of Schedule 11.

19.141 Centrica has also requested that its private access road be protected. The Panel consider this to be reasonable, and have therefore put forward a modified version of Centrica's proposal as paragraph 81A that allows for Centrica to give consent on its own conditions.

Part 11 For the protection of Anglian Water

19.142 At the very end of the examination the two parties agreed a new set of protective provisions as set out in Part 11 in the November draft of the DCO [PDC037]. A notable feature is paragraph 90, which requires that the applicant would only exercise its powers of compulsory acquisition as a last resort and following arbitration.

19.143 The Panel considers that the provisions put forward are appropriate and necessary.

19.144 Anglian Water had not however confirmed to the Panel before the end of the examination that it wished to withdraw its s.138 representation. The Secretary of State will wish to be satisfied on the final state of negotiations with Anglian Water.

Part 12 For the protection of Bethany Jane Ltd.

19.145 The parties have agreed the revised drafting included in the DCO.

19.146 The Panel considers that the provisions as drafted in PDC037 are appropriate and necessary.

Part 13 For the protection of the Royal Mail Group Ltd

19.147 Royal Mail has confirmed in a letter dated 16 November 2012 [PDC056] that it has no objections to the 26 October 2012 version of the draft DCO. It is satisfied that these provisions will ensure that its operations in the area, and in particular its operations out of the Immingham District Office, are protected.

19.148 Royal Mail requested that the improvement works to Pelham Road be included in Schedule 1, but the applicant maintains that this is unnecessary because the works are covered by a unilateral undertaking and endorse the provisions relating to Royal Mail in PDC037.

Part 14 For the protection of A.B. Ports

- 19.149 The negotiation of protective provisions between the applicant and ABP has been contentious.
- 19.150 ABP sets out its requirements in its Further Representation of 2 August 2012, and a complete revision of the applicant's version 5 of the draft DCO dated 26 October 2012 and an accompanying commentary, dated 16 November 2012 [PDC057]. For ease of reference ABP's revision is attached as Appendix G.
- 19.151 ABP's proposed paragraph 96 deals with ABP's concerns about siltation or erosion that might be caused by the proposed development, which could impede access or cause damage to facilities at the Ports of Immingham or Grimsby. ABP maintains that provisions of this sort are included on a routine basis in Orders or Acts of Parliament which could affect a statutory harbour authority, and these particular provisions are based on the protection which has been secured by ABP in the various orders authorising harbour works for what is now the C.RO Terminal. ABP's position is that it would be appropriate for specific protection for statutory port operators to be addressed and enforced as it always has been, through specific protective provisions rather than a marine licence.
- 19.152 MMO states [HEA112 paras 16 to 21] that it does not consider it necessary to include the protective provisions proposed by ABP in this draft paragraph 96. The appropriate regulatory tool to deal with these matters is the DML which the MMO is able to enforce.
- 19.153 The Panel notes that MMO has been brought into existence (since the development of the C.RO Terminal) specifically to manage (*inter alia*) dredging in harbours. The Panel, as before, places a good deal of reliance on the responsibility of the MMO to manage the DML, and therefore we do not consider that this provision is necessary.
- 19.154 ABP's draft paragraph 97 is intended to secure that the proposed NSIP's construction traffic should not obstruct or interfere with traffic to and from Immingham and Grimsby. ABP argue that although HMH will have overall control over the passage of vessels in the interests of safety, it is not his function to prevent the considerable potential commercial damage which could be caused by extensive delays caused to regular users of the ports of Grimsby and Immingham and that is why specific protection is required.
- 19.155 This was discussed at length in the hearing, and expanded in HMH's written submission (HEA105). HMH explained that in the day to day exercise of his statutory functions, HMH would in any event ensure that construction or dredging vessels keep clear of vessels arriving at and leaving C.RO's berths and those of ABP.

19.156 HMH was asked to confirm in the hearing, and did so confirm, that he has the necessary powers to accomplish this and, in practice, it is unlikely that any conflict would arise. But HMH felt that the question that he had been asked did not deal with the entirety of the situation. In his view the fact that he has the power to give directions does not mean that the responsibility for giving precedence to commercial vessels should not properly rest with the applicant who would be operating the vessels that have the potential to cause the obstructions.

19.157 HMH states that he is aware that protective provisions of the kind sought by C.RO and ABP are well-precedented and do more than give comfort to the recipient, since they establish the respective responsibilities and liabilities of the operators concerned and they make it easier for HMH to fulfil his own role without it giving rise to conflict or dissatisfaction.

19.158 The applicant regards any change as unnecessary, but the Panel, as before, place significant weight on the views of HMH in matters of navigation and vessel management: it is his job and his ultimate responsibility. The Panel also appreciates that the Port of Immingham is a very important facility for shipping, and that vital cargoes come and go through it.

19.159 The Panel therefore concludes that as for C.RO, a protective provision safeguarding ABP's interest in this respect is a reasonable requirement. We therefore propose that the Schedule include a new paragraph 97, slightly amended (italicised section) from the terms that ABP seek –

‘In exercising the powers of the Order to construct the authorised development the undertaker shall *use all reasonable endeavours* to ensure that the movement of construction vessels does not obstruct or interfere with the operation of the Ports of Immingham and Grimsby.’

19.160 We do not propose the same terms that we support for C.RO because C.RO relies on scheduled services.

19.161 ABP seeks to amend the October version of paragraphs 98(1) and (2) to guarantee its access over Station Road and to be consulted before the applicant carries out any works on Rosper Road, the Humber Road, the A160 or the A180 consult AB Ports, ‘... and shall in carrying out the works or exercising such power ensure that access to the Port of Immingham is not materially impeded.’

19.162 The applicant resists this on the grounds that it does not accept that ABP should have rights over Station Road because the applicant seeks to acquire the rights to the land at the end of the road. The applicant notes that this amendment was made very late in the examination

and was not part of ABP's original request when discussing the head-shunt.

19.163 The Panel concurs that ABP has not shown a conclusive case why it should have such extensive protection in relation to Station Road: the head-shunt is essentially a railway operation. The Panel thinks that the October draft of the DCO is adequate as drafted. This does relate, however, to the Panel's recommendation that the triangle site should form part of the compulsory acquisition: if the Secretary of State decided against that, then it would probably be necessary to revisit the drafting of this provision.

19.164 The Panel does, however, consider that ABP's proposed paragraph 98(2) is expressed in proportionate and reasonable terms, and is consistent with and analogous to the provision that we support above related to marine traffic. We therefore propose that the Schedule include a new paragraph 98(2) in the terms that ABP seek –

'The undertaker shall before carrying out any works or exercising the powers of article 14 in relation to the Rosper Road, the Humber Road, the A160 or the A180 consult AB Ports and shall in carrying out the works or exercising such power ensure that access to the Port of Immingham is not materially impeded.'

19.165 ABP state that its proposed paragraph 99 simply follows on from the other provisions and provides for payment of costs and losses incurred as a result of sedimentation or erosion caused by the works, for costs incurred in establishing whether this has occurred, and if obstruction to marine or land access is caused by breach of paragraphs 97 or 98.

19.166 ABP seeks to argue that this reflects the indemnities that are normally included for statutory undertakers, reflecting the fact that costs and liabilities incurred in the discharge of a statutory undertaking are not appropriately addressed by the normal statutory compensation code for landowners applied by the Order.

19.167 The Panel however take the same view here as for NR and other statutory undertakers: that indemnity provisions do not obviate or even reduce the prospect of litigation.

Schedule 11 Requirements

19.168 The Requirements have also been subject to extensive revision and development in the course of the examination. The Panel's comments here are restricted to those points of which we think the Secretary of State should be particularly aware or which we feel still require consideration.

19.169 In Requirement 1 the definition of the ES has been expanded at the request of NE. The Panel notes that Article 57 requires the complete

document to be certified. We consider that the definition now offered is adequate and appropriate.

- 19.170 Requirement 2 requires the development to commence within seven years of approval. The model provisions do not provide a figure. The Panel consider seven years a reasonable length of time given the scale and complexity of the scheme, particularly in relation to the compensation requirements.
- 19.171 The cargo restriction in Requirement 3A(1) has been contentious throughout the examination. ABP, with C.RO's and C.GEN's 'broad agreement', has continually challenged the restriction as insufficiently precise and failing to ensure conformity with the ES prepared by the applicant.
- 19.172 The applicant argues that restriction of the definition to 'offshore wind industry' sought by ABP would be unreasonable; that the facility is for marine renewable energy infrastructure, and this is the basis on which the environmental assessment was undertaken. The definition that the applicant offers in the 23 November version of Schedule 11 [PDC037] actually specifies 'offshore renewable energy'.
- 19.173 Requirement 3A(2) further restricts the associated development set out in Schedule 1 to 'offshore renewable energy' in line with Requirement 3A(1).
- 19.174 On balance the Panel considers that either 'offshore renewable energy' or 'marine renewable energy' should be adequate and appropriate, and tie the development sufficiently to the environmental assessment. Either would prevent the quay from being used for general cargoes or the associated development being used for general manufactures, and indicate sufficiently clearly the purpose to be served without being unreasonably restrictive.
- 19.175 Requirement 3A(3), dealing with possible modifications to the preceding restriction, has also been controversial. ABP has argued [HEA109, 41 *et seq*] that any change in the use of the facility should be a matter considered and decided by the Secretary of State; that PA2008 ensures in s.153 and Schedule 6⁶⁷ that jurisdiction remains with the Secretary of State.
- 19.176 The applicant seeks to argue that it is not seeking powers to amend the DCO but to ensure [HEA110, para 23.7] that 'any free-standing additional consent will not be in breach of [the] DCO'.
- 19.177 The Panel is not persuaded by the applicant's argument that the requirement is necessary. What is more, Requirement 3A(3) should not fetter the LPA's discretion to enforce any breach of the DCO. We therefore recommend that Requirement 3A (3) should be removed

⁶⁷ s.2 of Schedule 6 limits the Secretary of State's power to do so to changes which are 'not material'.

- 19.178 Requirement 3B now provides for detailed design drawings that supplement the drawings in the application documents to be approved by the local planning authority. The Panel consider this an appropriate and adequate provision that does not give the applicant power to make a material change to the application.
- 19.179 Requirement 17 is of critical importance to the application. It provides for the applicant to complete all three EMMPs (compensation, marine and terrestrial) to the satisfaction of the statutory bodies (NE and MMO as appropriate) before development can commence. These plans may require further baseline surveys to supplement the existing surveys in the ES. As noted elsewhere the Panel consider these plans critical to the management of the environmental impacts and compensation requirements in a complex and highly dynamic environment.
- 19.180 Requirement 19(1) (previously 17(4)) provides that construction of the quay shall not start until seven months after the construction of the permanent compensation site, and Requirement 19(2) previously 17(5) commits the applicant to use 'all reasonable endeavours' to make the breach for the permanent compensation site within fifteen months of the start of construction of the quay. The word 'all' is a Panel addition. These requirements both relate to the programming of works and so have been placed under a new heading 'Programming of Works'. EA's specific requirements in relation to the breach are set out in Requirement 41.
- 19.181 The Panel consider that these programming commitments, taken with the rest of Requirement 17, are appropriate and necessary.
- 19.182 Requirement 25 has been developed in the course of the examination to meet the concerns of the Panel that travel plans for both the construction and operational phases should be robust and implemented.
- 19.183 Requirement 37, dealing with sedimentation and siltation at Stone Creek, has been amended to include EA among those to be consulted before the LPA approved any scheme.