

REPORT TO THE BOARD OF DIRECTORS OF COLCHESTER AMPHORA ENERGY LTD

Re. Putting the Company into Dormancy

1. EXECUTIVE SUMMARY

- 1.1 This report sets out for the Board’s formal consideration the options for the treatment of Colchester Amphora Energy Ltd (CAEL) and recommendations, for the Board’s formal determination, that CAEL is prepared for and placed into dormancy.
- 1.2 The recommendations set out under section 2 below reflect discussions and informal agreement to date between the Board, the Board of Colchester Commercial (Holdings) Ltd (CCHL), in its capacity as CAEL’s parent company, and Colchester City Council (the Council), as CAEL’s ultimate shareholder. The recommendations at section 2 are in consideration of the recommendations of the Chartered Institute of Public Finance (CIPFA), and advice received from Anthony Collins LLP (Anthony Collins) as regards CAEL.
- 1.2 On consideration of this report and having considered the matters set out in section 172 of the Companies Act 2006, if the Board is satisfied that the recommendations set out under section 2 are in the best interests of the company, the Board is invited to approve the resolutions set out at appendix 4 to effect the recommendations.

2. RECOMMENDATIONS

- 2.1 That CAEL is prepared for, placed into and maintained in a dormant state as set below under sections 6,7,8 and 9.
- 2.2 That CAEL’s contracts and agreements are transferred or otherwise dealt with in accordance with recommendations detailed in the table below and at section 8;

Agreement	Parties	Recommendation
Heat Pump Agreement	CAEL and GEA	Novate agreement: From CAEL/GEA To Council/GEA
Development Management	CAEL and Council	Instructions from the Council to CAEL to (i) suspend the

Services Agreement		agreement under clause 9 and (ii) authorisation for CAEL board to terminate the agreement under clause 10.1 if the suspension is for six months or more
Technical Consultancy Agreement	CAEL and WSP	Novate agreement: From CAEL/WSP To Council/WSP Novation agreement to incorporate terms and conditions of WSP's appointment from the GLA framework agreement
Facility Agreement	CAEL and Council	Terminate the agreement by Deed of Termination and Release to provide for simultaneous termination of the agreement and release from the debentures. Removal of charges from Companies House. Provision incorporated in the Deed of Termination and Release for the partial write-off of the outstanding loan.
Grant Agreement	CAEL and Council	No action required for dormancy
Concession Agreement	CAEL and Council	Terminate by Deed of Termination (mutual agreement)

- 2.3 That the employment of CAEL's staff is transferred in accordance with arrangements set out under section 8 below;
- 2.4 That Board resolves to approve the Board resolutions and the form and circulation of the shareholder resolutions set out in appendix 4 of this report to effect CAEL's dormancy.

3. INTRODUCTION

- 3.1 This report details the options and recommended course of action for the Board's consideration and determination as regards the treatment of CAEL in view of the recommendations contained in a report prepared by CIPFA following its review of the Council's companies.
- 3.2 The Board has previously considered the findings of the CIPFA report – Colchester City Council: *Review of the CCHL Companies* January 2023, which have also been considered by the board of CCHL and the Council. The report is appended (appendix 1).
- 3.3 The recommendations set out below are further in consideration of the advice of Anthony Collins as set out in their below detailed reports, which are also appended to this report:
- 3.3.1 Report to Colchester City Council - *CAEL: Governance and Decision-Making* May 2023 (appendix 2);
- 3.3.2 Report to Colchester City Council and Colchester Amphora Energy Ltd – *Agreements Review* July 2023 (appendix 3).
- 3.4 This report sets out those matters which have been discussed and informally agreed by the Board, CCHL and the Council, and in view thereof, the key issues for the Board's consideration and formal determination:
- 3.4.1 The CIPFA report and recommendations;
- 3.4.2 Winding up CAEL and the implications;
- 3.4.3 Placing CAEL into dormancy and the implications;
- 3.4.4 Preparing CAEL for dormancy;
- 3.4.5 The treatment of CAEL's agreements, assets, liabilities and staff;
- 3.4.6 Maintaining CAEL's dormant status;

3.4.7 Governance, decision-making and resolutions (the process and resolutions required to effect and subsequently maintain the dormancy of CAEL).

Subject to the Board's approval, the resolutions to effect the recommendations detailed in this report, are appended (appendix 4).

4. THE CIPFA REPORT & RECOMMENDATIONS

4.1 At section 5.3 of the CIPFA Report three broad recommendations for CAEL are advanced:

4.1.1 Recommendation 1. leave it CAEL as is (i.e. 'do nothing');

4.1.2 Recommendation 2. find an alternative delivery mechanism (i.e. wind up and dissolve CAEL);

4.1.3 Recommendation 3. put CAEL into a dormant state (i.e. CAEL will continue to exist as a company but will not carry on its business).

4.2 The Board has previously agreed with CCHL and the Council that 'doing nothing' is not an option as uncertainty around the future of the Northern Gateway project, the heat network component of which was the purpose for which CAEL was set up, means the company has no current or medium prospect of continuing to meet its liabilities without relying on further financial support from the Council. As such, CAEL remaining in its current state is not considered further here.

4.3 Winding-up and dissolving CAEL has previously been considered and the Board, CCHL and the Council have agreed against this course of action in consideration of the implications of dissolving the company as set out below. However, for comparative purposes winding up CAEL as against placing the company into dormancy is briefly considered below.

4.4 CIPFA's recommended course of action is that CAEL be made dormant as this affords the greatest agility and allows for the consideration of longer-terms options including the potential 'resuscitation' of the company. Placing CAEL into dormancy is also the recommendation of Anthony Collins.

5. WINDING UP CAEL AND THE IMPLICATONS

5.1 Winding up CAEL is the process by which the company will be prepared for the submission of an application to voluntarily 'strike-off' the company from the register of

companies maintained by the Registrar of Companies (Companies House), and subsequently dissolved. The voluntary strike-off procedure is relatively quick and simple and is provided for under sections 1003 to 1011 of the Companies Act 2006 (CA2006). However, winding up the company involves significant preparatory work to be undertaken as detailed at below at paragraph 5.3.

5.2 While CAEL does not formally have to discharge all its liabilities before it is struck-off, in preparation for its voluntary strike-off CAEL's creditors must be notified of the company's intention to apply for voluntary strike-off and its directors will commit an offence if they are aware of liabilities and fail to notify known creditors.

5.3 In the process of winding up CAEL for voluntary strike off and before the strike off application is submitted, in addition to notifying the company's creditors of the proposed voluntary strike off, the Board will need to:

5.3.1 Obtain tax advice / undertake a full assessment of the company's existing tax liabilities;

5.3.2 Discharge / transfer the company's debts and financial liabilities;

5.3.3 Transfer the company's property and assets (tangible and intangible);

5.3.4 Provide for the transfer or otherwise of the company's staff;

5.3.5 Transfer (novate, assign) or terminate (if possible and appropriate) the company's contracts and commercial agreements;

5.3.6 Consider and effect how the company's share capital may be lawfully returned to CCHL / the Council, or how the share capital reduced before applying for strike off;

5.3.7 Consider and effect how any distributions may be made to CCHL / the Council;

5.3.8 Close bank accounts, cancel insurance policies etc.

Any property or rights in which CAEL has a beneficial interest immediately prior to its dissolution which have not been transferred will be deemed 'ownerless property' once the company has been dissolved and will pass to the Crown as a matter of law.

5.4 The application to voluntarily strike-off CAEL is made by the submission to Companies House of Form DS01 and the CA2006 specifies those who must be served with a copy of the application. The CA2006 also specifies the circumstances

in which CAEL would be unable to submit an application for voluntary strike off which include where, in the three months preceding the intended submission, the company has traded or otherwise carried on its business, disposed for value property or rights that the immediately before ceasing to trad or carry on it's business, the company held for such purposes, and engaging in any activity other than one that is necessary or expedient for the purpose of making the strike application, concluding the company's affairs or complying with a statutory obligation.

- 5.5 On being satisfied with CAEL's application for voluntary strike Companies House will register it on the company's public record and publish notification in the Gazette. Not less than two months after this publication, CAEL will then be dissolved by Companies House and will no longer exist. However, until Companies House publishes notification CAEL's dissolution, technically the company will still need to file accounts and any other such Companies House documents which fall to be filed during this period.
- 5.6 In certain circumstances, interested persons can also object to CAEL's application for voluntary strike off in the two months following its publication in the Gazette, and in further circumstances can apply for the company to be restored subsequent to its dissolution.
- 5.7 **The key point to be remembered is that save for exceptional circumstances, once CAEL has been dissolved it will cease to exist and cannot be resurrected. As such, if the same or similar circumstances arise for which CAEL was originally established or may be repurposed, it will not be possible to bring CAEL back to life and if necessary, an entirely new company will have to be established.**
- 5.8 **For the reasons set out above, it is recommended that CAEL is not struck-off and dissolved at this time.**

6. PLACING CAEL INTO DORMANCY AND THE IMPLICATONS

- 6.1 The alternative to winding up and dissolving CAEL recommended by CIPFA and Anthony Collins, and as yet the 'minded to' option of the Board, CCHL and the Council, is to place the company into a 'dormant state' for the purpose of Companies House.
- 6.2 As a dormant company CAEL will not, and indeed cannot, trade or carry on its business or any activities which generate income, but it will continue to exist as a

legal entity and can be revived in the future simply by recommencing its business. CAEL can remain dormant indefinitely unless and until it intentionally or inadvertently becomes active again, or is voluntarily struck off or the subject of compulsory strike off by Companies House. The company will become active again if it trades or undertakes activities other than its statutory filing requirements.

- 6.3 While it is dormant, CAEL is required to have a least one natural person as a director, who will remain bound by their statutory, common law and fiduciary duties as a company director, and the company will still be required to file with Companies House annual accounts (for a dormant company) and the company's annual confirmation statement. The composition of the Board during CAEL's dormancy and which director(s) are remain in office during the period will need to be decided.
- 6.4 Once CAEL informs HMRC that it is dormant, the company will no longer be required to pay corporation tax or file a tax return until it starts trading again.
- 6.5 For its purposes, Companies House will determine whether CAEL is and remains dormant. CAEL will become dormant when it has no significant accounting transactions recorded in the fiscal years for which it files accounts with HMRC and Companies House. Significant accounting transactions do not include filing fees or penalties paid to Companies House. A company which qualifies as 'small' under Companies House rules can file 'dormant accounts' without including an auditor's report, and as a subsidiary of CCHL / the Council, CAEL may also be otherwise exempt from audit requirements. CAEL is not required to notify Companies House if it becomes active again by recommencing trading or carrying on its business, as the first filing of accounts thereafter will show Companies House that the company is active again and as such it will no longer be considered dormant by Companies House.
- 6.6 The reactivation of CAEL would require the submission of an application to HMRC not less than three months before the company recommences trading or receiving income and also requires:
 - 6.6.1 registering for corporation tax no more than three months from the date of the reactivation notification to HMRC;
 - 6.6.2 submitting all company account to Companies House within nine months of CAEL's accounting reference date;
 - 6.6.3 submitting CAEL's tax returns to HMRC within twelve months of the company's accounting reference date.

- 6.7 **There are a number of advantages to placing CAEL into a dormant state rather than winding up and dissolving the company. As detailed above, such advantages include CAEL continuing to exist as a legal entity whilst it is dormant and as such it being possible to quickly and easily resurrect the company at any time – either for the purpose for which it was originally established or otherwise. It should also be easier and quicker to wind up and dissolve CAEL after a period of dormancy if to do so is subsequently determined as the best course of action, as much of the work undertaken in preparing the CAEL for dormancy will also be required for winding up the company in preparation for dissolution.**
- 6.8 **It must be remembered however if CAEL is placed into a dormant state, the filing requirements for a dormant company must be satisfied, and care must be taken not to reactivate CAEL inadvertently, as regardless of intention, once Companies House considers the company active again, all the company's various obligations will become live.**
- 6.9 **For the reasons set out above, it is recommended that CAEL is placed into dormancy for the immediate future.**

7. PREPARING CAEL FOR DORMANCY

- 7.1 Many of the steps required to be taken in preparation for CAEL to placed into dormancy are the same or similar to those which would be taken in winding up the company for voluntary strike off and dissolution. Preparing CAEL for dormancy will require:
- 7.1.1 tax advice / a full assessment of the company's existing tax liabilities;
 - 7.1.2 the company to cease trading or carrying on its business or any activities which generate the company income;
 - 7.1.3 the satisfaction of the company's debts and financial liabilities to the extent possible, and likewise to the extent possible, the collection of all monies due from creditors;
 - 7.1.4 the transfer to the Council or as appropriate the company's property, assets (tangible and intangible) and liabilities (see further section 8 below);
 - 7.1.5 the transfer (novation, assignment) or termination the company's contracts and commercial agreement (see further below section 8 below);

- 7.1.6 the transfer or otherwise of the company's staff;
- 7.1.7 considering and effecting how the company's share capital may be lawfully returned to CCHL / the Council, or how the share capital reduced before applying for strike off;
- 7.1.8 considering and effecting how any distributions may be made to CCHL / the Council;
- 7.1.9 considering and effecting the composition of the Board during the company's dormancy;
- 7.1.10 considering and effecting arrangements to ensure the required Companies House filings are undertaken during the company's dormancy;
- 7.1.11 notifying HMRC of the intention to make CAEL dormant, and submission of corporation tax return if required and the settlement of any outstanding corporation tax;
- 7.1.12 close payroll, bank accounts etc.

8. The Transfer of CAEL's Contracts, Agreements and Staff

- 8.1 Anthony Collins' advice as regards dealing with CAEL's various contracts and agreements is appended to this report (appendix 3) and their recommendations are summarised in the below table.

Agreement	Parties	Recommendation
Heat Pump Agreement	CAEL and GEA	Novate agreement: From CAEL/GEA To Council/GEA
Development Management Services Agreement	CAEL and Council	Instructions from the Council to CAEL to (i) suspend the agreement under clause 9 and (ii) authorisation for CAEL board to terminate the agreement under clause 10.1 if the suspension is for six months or more

Technical Consultancy Agreement	CAEL and WSP	Novate agreement: From CAEL/WSP To Council/WSP Novation agreement to incorporate terms and conditions of WSP's appointment from the GLA framework agreement
Facility Agreement	CAEL and Council	Terminate the agreement by Deed of Termination and Release to provide for simultaneous termination of the agreement and release from the debentures. Removal of charges from Companies House. Provision incorporated in the Deed of Termination and Release for the partial write-off of the outstanding loan.
Grant Agreement	CAEL and Council	No action required for dormancy
Concession Agreement	CAEL and Council	Terminate by Deed of Termination (mutual agreement)

8.2 **It is recommended that the agreements detailed in the above table are transferred according to the recommendations detailed in the table.**

8.3 CAEL currently has a single employee – Mr Michael Woods whose employment will transfer pursuant to agreed arrangements.

9. MAINTAINING CAEL'S DORMANT STATUS

9.1 As detailed above, once CAEL is dormant there are a number of obligations which must be satisfied to maintain the company's dormant status:

9.1.1 the company must have at least one director who is a natural person;

9.1.2 the company must file with Companies House annual accounts for a dormant company (with an auditor's report if required);

9.1.3 the company must file with Companies House its annual confirmation statement;

9.1.4 the company must not trade, carry on its business or receive income.

The directors will be liable for failing to file the company's annual accounts and confirmation statement as required.

9.2 During the period of its dormancy CAEL will be considered active / reactivated and as considered for corporation tax purposes if, whether intentionally or not, the company engages in any of the following activities:

9.2.1 trading, carrying on its business or professional activities;

9.2.2 buying / selling goods with the intention of making a profit or create a surplus;

9.2.3 provides services;

9.2.4 earns interest;

9.2.5 manages investments;

9.2.6 receives an income.

10. GOVERNANCE, DECISION-MAKING AND RESOLUTIONS

10.1 Anthony Collins' report on the governance and decision-making process to effect the dormancy of CAEL is appended (appendix 2). In summary, in consideration of the Board approving the recommendations set out above under section 2, and their subsequent approval by the CCHL board and ultimately the Council, the procedure is as follows:

10.1.1 the Board approves the CAEL Board resolutions and the form and circulation of the CCHL shareholder resolutions and the Council shareholder resolutions at appendix 4 to the CCHL board (in its capacity as the board of CAEL's parent company) with the recommendation that the CCHL board likewise

approves the CAEL board resolutions, CCHL shareholder resolutions and Council shareholder resolutions and recommends their approval by CCHL as the first instance shareholder of CAEL;

10.1.2 the CCHL board approves the CAEL Board resolutions, the CCHL shareholder resolutions and CCC shareholder resolutions at appendix 4 and approves their circulation to CCHL as CAEL's first instance shareholder with the recommendation that they are approved and circulated to the Council as CAEL's ultimate shareholder with the recommendation that Council approves the resolutions.

10.1.3 the Council in its capacity as CAEL's ultimate shareholder approves the resolutions.

10.2 The Council's shareholder function is ultimately exercised on behalf of the Council in the whole by the Cabinet, or delegated as it deems fit, in consideration of the recommendations of the Council's Audit and Governance Committee.

10.3 **The Board is recommended to approve the CAEL Board resolutions and the form of and circulation to the shareholder of shareholder resolutions at appendix 4.**

11. **SUMMARY**

11.1 For the reasons set out above, it is recommended that CAEL is placed into a dormant state.

11.2 On the Board being satisfied that CAEL being placed into a dormant state in accordance with the recommendations set out in this report, the Board is invited to approve the Board resolutions, and the form and circulation of the shareholder resolutions, attached at appendix 4.

Appendix 1

Colchester City Council: *Review of the CCHL Companies*, CIPFA, January 2023

[place holder]

Appendix 2

Report to Colchester City Council - *CAEL: Governance and Decision-Making*, Anthony Collins, May 2023

[place holder]

Appendix 3

Report to Colchester City Council and Colchester Amphora Energy Ltd, *Agreements Review*, Anthony Collins, July 2023

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Appendix 4

CAEL Board Resolutions and CCC Shareholder Resolutions

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