TIDAL LAGOON SWANSEA BAY’S COMMENTS

1. This area has been identified by the WWF as an A/B site of importance to the Harbour Porpoise, an Annex 2 and 4 species, where the Developer intends to carry out Percussion and Vibro Piling 24 hours a day.

TLSB’s Comment(s)

1. Identification by the WWF does not result in statutory protection for a given habitat or species. Furthermore, the above statement is imprecise as to the area in question and does not reflect the current status of activities comprised within the Project - it is no-longer proposed to carry out 24-hour percussion piling activity.

2. Harbour porpoise is listed on Annex II of the Habitats Directive and therefore protected through the designation and management of SACs in order to meet the conservation objectives of the species/site. However, the Outer Bristol Channel (which may include Swansea Bay) has not yet begun the designation process to become a SAC, as such it is outside the HRA process.

3. Nevertheless, in line with the precautionary principle, a shadow HRA has been prepared for harbour porpoise and this has been submitted with these written representations.

4. TLSB are confident that a detailed and robust assessment of potential effects on harbour porpoise has been undertaken within the ES. The assessment uses a worst case assessment taking into consideration the high level of importance and high level of protection they are afforded under a range of UK and European legislation as stated at paragraph 10.5.1.3 "Throughout the impact assessment all marine mammal species are considered to be of high importance given the high level of protection they are afforded under a range of UK and European Legislation"; and at 10.5.1.2 "in the absence of dedicated effort based survey data for the inner part of Swansea Bay and using a precautionary approach, the assumption has been made that harbour porpoise occur at similar frequencies to other parts of Swansea Bay such as Port Talbot." Therefore, the assessment proceeds on a prudent and conservative basis.

5. As stated in the submission in respect of the construction of the temporary cofferdam, submitted to the Examining Authority on 4 June 2014, TLSB now intends only to pursue seawall construction techniques using sediment/quarry run and rock armour as a method of constructing the cofferdam. It no longer proposes construction of a twin wall sheet piled cofferdam. Therefore, piling of a cofferdam structure as described in the ES will no longer be required for this part of construction, with a commensurate and material reduction in piling activity. A slurry wall will still need to be piled into the temporary bund. This wall will be installed from and through the top of the temporary bund by vibrating a H-beam into the ground and pulling it back while jetting grout into the structure. This creates an impermeable cut-off within the temporary bund wall. In contrast to the piling required for the sheet pile cofferdam...
(assessed as worst case in the ES), this piling will require vibration piling only, and, although offshore, will be undertaken using land based equipment in the dry of the temporary cofferdam. It will be a 24/7 activity, although the duration will be 6 weeks, rather than 6 months, and this would occur intermittently rather than non-stop.

6. In addition to this there will be some marine offshore piling principally associated with the navigation safety piles. These works will be daytime only and will take about 15 days in total. An assessment of the effect these works and appropriate mitigation is provided in response to ExA Q 3.8 and has been reproduced below for ease of reference.

7. The following mitigation measures and monitoring will be implemented during the installation of the dolphin piles:

i. Monitoring and mitigation would be undertaken during any vibro-piling or impact piling following the guidelines highlighted in the JNCC “Statutory nature conservation agency protocol for minimising the risk of injury to marine mammals during piling” (JNCC, 2010);

ii. Installation of dolphin piles would be during daylight hours only;

iii. For vibro and percussive piling for dolphin piles, establishment of a ‘mitigation zone’ of radius 500m around the piling site, prior to any piling;

iv. Within this mitigation zone, detection would be undertaken by a Marine Mammal Observer (MMO) and acoustically using appropriate Passive Acoustic Monitoring (PAM) equipment;

v. Both the observers and equipment will be deployed at least 20 minutes before any piling is due to commence;

vi. Any piling will not commence if marine mammals are detected within the mitigation zone or until 20 minutes after the last visual or acoustic detection;

vii. The MMO/PAM operative should track any marine mammals detected and ensure that they are satisfied that the animals have left the mitigation zone before they advise the crew to commence percussive piling activities.

viii. Piling will commence using an agreed soft start procedure for at least 20 minutes (the gradual increase of piling power, incrementally, until full operational power is achieved). The soft-start procedure will vary according to hammer and pile design and other factors.

8. With these measures in place, residual impacts on marine mammals from construction noise are assessed as being of minor adverse significance.

9. In addition, an Adaptive Environmental Management Plan (AEMP), has been submitted in parallel with this document. TLSB is committed to monitoring the effect on harbour porpoise as proposed in the AEMP, paragraph 8.1.0.3.
10. Monitoring will be undertaken to collect further information on the usage of the Swansea Bay area by marine mammals. Data will be collected on the potential effects of construction noise, principally impact/percussive piling (if undertaken at all). Once operational, the potential noise effects of the operation of the turbines and the potential risk of collision will be examined. This is detailed further in sections 8.3, pre-construction, 8.4 Construction, 8.5 Operation.

11. Harbour porpoise is also listed on Annex IV of the Habitats Directive, and is therefore afforded strict protection against deliberate disturbance, injury or mortality whether it is within or outside a SAC. TLSB will continue discussions with NRW (MLT) to determine the conditions under which an EPS licence will be required (as identified at a number of places in Chapter 10 of the ES).

2. The UK Government signed a treaty in 1992 on the conservation of wild fauna and flora namely Article 130 thereof.

“In order to ensure favourable conservation status for the species, there is a legal obligation to designate a suite of sites. These sites must be large enough to encompass important areas for breeding, feeding etc, and well placed throughout the territory”.

TLSB’s Comment(s)

1. The possible future designation of Swansea Bay as part of the Outer Bristol Channel as a SAC would not alter the assessment provided in the ES. As discussed above it is considered that a robust and fair assessment has been undertaken, based on worst case principals.

2. In addition, in line with the precautionary principle, a shadow HRA has been prepared for harbour porpoise and this has been submitted with these written representations (5 August 2014). This demonstrates that, even if the Outer Bristol Channel were to be designated as a SAC as postulated, its integrity would not be adversely affected by the Project. As such, there would be no impediment to the grant of development consent.

3. The UK Government failed to include any sites in the UK, on the EU list of sites for due consideration as a Special Area Conservation Site (SACs) which ultimately has resulted in Infringement charges on the UK Government by the EU Commission.

TLSB’s Comment(s)

1. This is not a matter that requires consideration in this examination. However, as noted at 1 and 2 above, even if the Outer Bristol Channel had been designated as a SAC as postulated, its integrity would not be adversely affected by the Project. As such, there would be no impediment to the grant of development consent.

4. This anomaly has led to the Porthcawl Environment Trust (PET) making a Formal Complaint to the EU Infringement Unit on the grounds that the UK government were non-compliant with Article 4(1) of the Habitats Directive 92/43/EEC. Ultimately this became the lead case. The Planning Inspectorate (PI) has a copy of this letter.

TLSB’s Comment(s)
1. This is not a matter that requires consideration in this examination. However, as noted above, even if the Outer Bristol Channel had been designated as a SAC as postulated, its integrity would not be adversely affected by the Project. As such, there would be no impediment to the grant of development consent.

5. *The argument of the Developers ultimately became a loophole:*-

*With reference to the Developers of the Outer Bristol Channel (OBC) past and present who wish to Percussion Pile Drive or in juxtaposition with Vibro Piling to continue 24 hours a day in an area that has been identified by the WWF as an A/B site of importance to the Harbour Porpoise i.e. a Breeding Site and Resting Place.*

‘Pile Driving’ Please refer to a letter from Mr Garcia Burgess who at that time was the Head of the Infringement Unit of the EU Commission, the PI have been supplied with a copy of the letter.

**TLSB’s Comment(s)**

1. Please see response provided to point 1, which explains why piling is no longer an element of the Project likely to result in material adverse effects upon marine mammal receptors.
The Argument

6. It is the view of the Developers, past and present, that there is no need to undertake an Appropriate EIA pursuant to Article 6 (2) of the Habitats Directive92/43/EEC because the site has not been designated as a SACs.

TLSB’s Comment(s)

1. TLSB has undertaken a thorough, conservative and robust assessment under both EIA and HRA regimes - the correct term (from the Directive and the Habitats Regulations) is "appropriate assessment", not "appropriate EIA", and an appropriate assessment is contained in TLSB's shadow HRA (submitted with these written representations). As a result there is no impediment to granting development consent for this Project.

2. The case of Humber Sea Terminal v Secretary of State for Transport [2006] Env L.R. 4 addresses the situation where a site is suitable for SAC (or Special Protection Area ("SPA")) designation and a project is proposed. It is authority in English Law for the proposition that even if a site is worthy of designation, provided that the terms of the Habitats Directive are observed, there is no restriction preventing the grant of a development consent. Given that a proposed SPA is much more certainly of designation-worthy quality than the postulated Outer Bristol Channel SAC, there is no restriction upon the grant of development consent absent a designation.

3. TLSB has further ensured that no such obstacle to development consent arises since its shadow HRA addresses the situation as if an SAC had been designated. Thus, the Secretary of State is not only unrestricted by legal impediment but has the information necessary to reach conclusions on this topic.

7. That view is technically correct. However:--

The Habitats Directive makes a provision for such cases i.e. ‘In Exceptional Cases’ pursuant to Article 5 thereof. It is clear that the Developers have overlooked this part of the Habitats Directive 92/43/EEC.

TLSB’s Comment(s)

1. Please see response to points 3 and 6 above.

2. Even if this matter were correct, TLSB has proceeded on the basis (without prejudice to the need to do so or whether it is appropriate in any way) that the Outer Bristol Channel would be designated as a SAC. As such, it has performed a shadow HRA (submitted with these written representations), which proceeds on the basis of a postulated designation.

3. This means that, having sufficient information, the Secretary of State can proceed to consider the application in respect of the Project irrespective of the status of the Outer Bristol Channel as a SAC (or otherwise) and irrespective of the state of any proceedings initiated by, or consultation required with the Commission.

To quote Article (5)[ i.e. in Exceptional Cases]

8. Where a national list as referred to in Article 4(1) fails to mention a site hosting a priority national habitat type, or priority species, on the basis of relevant and reliable scientific information it considers to be essential to the maintenance of that priority habitat type, or for the survival of that particular species’.
TLSB's Comment(s)

1. Please see responses above.

9. A bilateral consultation procedure shall be initiated between the member states and the Commission for the purpose of comparing 'scientific data' used by each.

TLSB's Comment(s)

1. Please see responses above.

10. Article 5(4) During the consultation period and pending council decision, the site shall be subject to Article 6 (2) i.e. Plans and Projects. An appropriate EIA must be undertaken where the three tests must all be passed and duly met before the grant of an ‘EU Derogation Wildlife Licence’.

TLSB's Comment(s)

1. A consultation period has not yet commenced with respect to any infringement proceedings under Article 4(1). Even if that were the case, TLSB has proceeded conservatively in carrying out a shadow HRA, including an "appropriate assessment" (the correct term, rather than "appropriate EIA") and there is sufficient information before the ExA and Secretary of State for the purposes of determining this application.

2. Article 6(2) states: ‘Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive’.

3. The above is the test applied in TLSB's shadow HRA.

4. As harbour porpoise is also listed on Annex IV of the Habitats Directive, it is therefore afforded strict protection against deliberate disturbance, injury or mortality whether it is within or outside a SAC. TLSB will continue discussions with NRW (MLT) to determine the conditions under which an EPS licence will be required (as identified at a number of places in Chapter 10 of the ES).

11. It must be established that:-

- The Harbour Porpoise is an ‘EU protected species’ listed in both Annex 2 and 4 of the Habitats Directive 92/43/EEC. Therefore it will require an EU Derogation Wildlife Licence. In order to derogate from Article 12 (1), a system of strict protection, the three tests laid down in Article 16 must all be passed.

- The Outer Bristol Channel has been identified as an A/B site of importance to the Harbour Porpoise. Therefore it will require an EU Derogation Wildlife Licence.

- To Percussion Pile Drive, or to Vibro Pile 24 hours a day would require an EU Derogation Wildlife Licence as it would be considered ‘Unlawful’ pursuant to the Habitats Directive 92/43/EEC, as would the use of noisy acoustic deterrents.

TLSB's Comment(s)
1. Please see response to point 1. A derogation licence is not required for the reasons explained in this submission.

12. It would be the duty of Porthcawl Environment Trust to submit a formal complaint to the EU Infringement Unit of ‘Non-Compliance’ with Article 5 (4) of the Habitats Directive, if the Planning Inspectorate sees fit to recommend the granting of a DCO in respect of the Tidal Lagoon in Swansea Bay in the Outer Bristol Channel, [an A/B site of importance to the harbour porpoise] where the Developer intends to carry out pile driving of any description 24hrs a day.

TLSB's Comment(s)

1. Please see previous responses. Piling of the nature described above is no-longer proposed.