



Department
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Dear Mr Herbert

**PLANNING ACT 2008
PLANNING CONSENT APPLICATION – PROPOSED SWANSEA BAY TIDAL
LAGOON**

1. I am directed by the Secretary of State for Energy and Climate Change (the "Secretary of State") to advise you that consideration has been given to:
 - (a) the report dated 10 March 2015 of the Examining Authority, Simon Gibbs, John Lloyd-Jones, Dr Lillian Harrison and Dr Peter Widd ("the ExA"), which conducted an examination ("the Examination") into the application (the "Application") submitted on 6 February 2014 by DLA Piper on behalf of Tidal Lagoon (Swansea Bay) plc ("the Applicant") for a Development Consent Order ("the Order") under section 37 of the Planning Act 2008 ("the 2008 Act") for the Swansea Bay Tidal Lagoon ("the Development"); and
 - (b) representations received by the Secretary of State and not withdrawn in respect of the Application.
2. The Examination of the Application began on 10 June 2014 and was completed on 10 December 2014. The Examination was conducted on the basis of written evidence submitted to the ExA, seven issue-specific hearings, one open floor hearing, two compulsory acquisition hearings and a number of site inspections.
3. The Order, as applied for, sought development consent under the 2008 Act for the construction and operation of a tidal range generating station located within Swansea Bay, South Wales. The generating station would have a maximum installed electrical capacity of 320MW, which would be generated by 16 turbines set within a housing structure with sea walls

connected to the shore at two points which also form part of the Application (Work 2a in the Applicant's Draft Order). Other major works for which permission was sought by the Applicant as part of the Application were (set out in the Examining Authority's Report ("ER") at paragraphs 2.0.5 – 2.0.9):

- A western seawall (Work 1a in the Applicant's Draft Order), 2.7km long which would run from the turbine housing to the south western end of Swansea Docks. The seawall would be crested by a road and a footway and incorporate services, including grid connection cable (Work 5a – see below) slipways, jetties and access points with a landscaped area at the western end;
- Within Work 1a, operation and maintenance facilities, a visitor centre and/or viewing area (within an "offshore building");
- An eastern seawall (work 1b), 6.8km long running from the turbine house to make landfall at a point in front of the Swansea University Bay Campus. The seawall would be crested by a road and a footway and incorporate some services. The seawall would also include oyster spatting ponds;
- A turbine and sluice gate housing structure (Work 2) approximately 400 metres long and 70 metres wide containing up to 16 turbines and 10 sluice gates;
- A 275kV grid connection (Works 5a – j), some within the western seawall and some along the southern boundary of Swansea Docks and beside Fabian Way. The connection would then pass under the River Neath to reach a point connecting with the national grid at Baglan Bay sub-station;
- An onshore building (Work 6b) consisting of onshore operation and maintenance facilities but also including visitor orientation, boating facilities, boat storage, fish hatcheries and laboratories, maintenance workshops, spares store, control room and office accommodation;
- An extension of the long sea outfall from Swansea Wastewater Treatment Works (Work 3);
- A new eastern channel training wall in the River Neath (Work 4);
- An ultra violet storm water treatment facility (Work 8);
- Reclamation of land (Work 10) to establish a 5 hectare saltmarsh habitat area and 3 hectares of coastal grassland habitat area including pedestrian and cycle routes at the northern edge of the lagoon adjacent to land;
- Reclamation of land (Work 11) to establish a new coastal grassland and dune area of approximately 11 hectares close to the eastern landfall of the eastern seawall, including an information point to serve Crymlyn Burrows Site of Special Scientific Interest (SSSI); and,

- Proposed ancillary works which would include temporary and permanent offshore works necessary and ancillary in the construction, operation and maintenance of the authorised development: a cofferdam; dolphin piles, buoys, pipeline, training wall, habitat area and coastal grassland.
4. However, the Secretary of State notes that during the Examination changes were made to the Application by the Applicant to remove various parts of it (ER 2.1.1 – 2.1.26). She further notes that the ExA sets out at ER 2.1.15 that the Applicant had consolidated these changes within a revised Order that it submitted to the Examination on 4 December 2014.
 5. Published alongside this letter is a copy of the ExA's Report of Findings and Conclusions ("the Report") as amended by the Errata Sheet (Ref EN 010049) of corrections produced by the Planning Inspectorate and agreed by the ExA. The ExA's findings and conclusions are set out in chapters 4 and 5 of the Report, and the ExA's recommendation is at paragraph 8.17.1.

Summary of the ExA's Recommendation

6. The ExA recommended that the Order be made, on the basis of the provisions set out in Annex A to the Report.

Summary of the Secretary of State's Decision

7. The Secretary of State has decided under sections 114 and 120 of the 2008 Act to make, with modifications, an Order granting development consent for the proposals in the Application. This letter is a statement of reasons for the Secretary of State's decision for the purposes of section 116 of the 2008 Act and the notice and statement required by regulation 23(2)(c) and (d) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ("2009 Regulations").
8. The Secretary of State has also had regard to the Local Impact Reports ("LIR") submitted by the County and City of Swansea Council and the Neath Port Talbot County Borough Council and to the relevant local plans as well as to the environmental information as defined in Regulations 2(1) of the 2009 Regulations and to all other matters which she considers to be important and relevant to her decision as required by section 104 of the 2008 Act.

Secretary of State's consideration

9. The Secretary of State has carefully considered the Report and all other material considerations, including representations received after the close of the Examination. The Secretary of State's consideration of the Report is set out in the following paragraphs. All numbered references, unless otherwise stated, are to paragraphs of the Examination Report ("ER").
10. Except as indicated otherwise in the paragraphs below, the Secretary of State agrees with the findings, conclusions and recommendations of the

ExA as set out in the Report, and the reasons for the Secretary of State's decision are those given by the ExA in support of her conclusions and recommendations.

Need for the Proposed Development

11. The Secretary of State notes that there is no technology specific National Policy Statement for tidal range generating devices. However, after having regard to the comments of the ExA set out in Chapters 4 and 5 of the Report, and in particular the conclusions set out in Chapter 8, the Secretary of State considers that in the absence of any adverse effects which are unacceptable in planning terms, making the Order would be consistent with energy National Policy Statements (NPS) EN-1 (Overarching NPS for Energy), EN-3 (Renewable Energy Infrastructure) and EN-5 (Electrical Networks Infrastructure) which set out a generic national need for development of new nationally significant electricity generating and network infrastructure. The Secretary of State notes the reference in the Report (at ER 3.3.8) to the Ports NPS which was included in the Applicant's Planning Statement and that the ExA's comment at ER 8.5.1 that this NPS was deemed to be relevant and important.
12. The Secretary of State has also considered guidance issued by the Welsh Government in the form of 'Planning Policy Wales' and the Welsh Government's paper, 'Energy Wales: A Low Carbon Transition (2012)' and other relevant policy papers. The ExA (ER 8.3.3) notes that both Neath Port Talbot County Borough Council and the City and County of Swansea Council did not identify any conflict between the proposed Development and local policy. The Secretary of State considers that there is policy support for the proposed Development in terms of its contribution to the generation of renewable energy. Accordingly, the Secretary of State is satisfied that, taking all the above matter into account, the need for this development has been established.

The legal and policy context for the development

13. The Secretary of State notes that, during the examination, there was extensive correspondence between the ExA, the Applicant and the Welsh Government about which aspects of the Development proposed by the Applicant could be included in any Order that might be made without conflicting with the devolution settlement for Wales. The Welsh Government considered that the Secretary of State had no jurisdiction to include any facilities in any Order in Wales which could be considered as "amenity development" and the ExA consequently removed such facilities from the recommended Order. The Secretary of State agrees with the ExA's conclusion. The Welsh Government was silent on whether the proposed 275kV grid connection might be excluded from the Order despite the potential for this element of the project to be classified as 'associated development' (and thus fall outside the scope of the Planning Act process). The Secretary of State notes that, in the event the Order was to be made without these facilities, the Applicant would need to apply for consent for them to the appropriate bodies (see below) through the Town and Country Planning Act 1990. Nevertheless, she has decided that, for

legal reasons – the consideration that the grid connection is associated development and thus falls outside the Planning Act regime for projects in Wales – it would not be appropriate to include the grid connection in the Order as made.

14. The Secretary of State further notes that the Applicant sought the inclusion of powers in the Order that would extend the planning jurisdiction of both the City and County of Swansea Borough and Neath Port Talbot County Borough Council to the offshore elements of the Development. Such an approach would allow the local authorities to monitor, regulate and conduct enforcement activities at the lagoon. However the Welsh Government argued that the Planning Act does not allow the Secretary of State to grant such powers and that such jurisdictional extensions should only be made by it (for which there is a dedicated procedure under recent legislation enacted by the National Assembly for Wales. The ExA took a different view and included provisions to extend the jurisdiction of the two councils in the Order it recommended to the Secretary of State. The Secretary of State has considered this matter and concluded that it would not be appropriate to include the provisions to extend planning jurisdictions in the Order as made and they have thus been removed from the Order that is attached to this decision. The Secretary of State recognises that her decision will mean that the Applicant will have to avail itself of the process to change jurisdiction set out in the Local Government (Democracy) Wales Act 2013.
15. The Secretary of State notes that an Agreement between the Applicant, the City and County of Swansea Council, Neath Port Talbot County Borough Council and Associated British Ports was made on 8 December 2014 pursuant to section 106 of the Town and Country Planning Act 1990 (“the s106 Agreement”). The s106 Agreement contains provisions related to elements of the Development which have been deemed to be associated development or development which is outside the scope of the Planning Act. The s106 Agreement contains matters that, though not within the available Planning Act 2008 process, formed part of the consideration of the project as a whole. The Secretary of State considers that securing the delivery of these aspects of the project is material to the decision to grant development consent. Delivery of the s106 Agreement is ensured by Requirement 40 of the Order.

Adaptive environmental management and managing uncertainty

16. The Secretary of State is aware of the Applicant’s suggestion that, because the potential impacts of the project are “inherently evolving and involving uncertainty”, a process of adaptive environmental management (“AEM” – structured and rigorous decision-making which relies on constant monitoring of impacts and responses to them where needed) should be considered in dealing with them. Natural Resources Wales¹ (“NRW”) indicated it had little experience of using AEM but, while expressing concern that AEM should not be used instead of a “clear, upfront and

¹ A Welsh Government sponsored body which works to make sure the environment and natural resources of Wales are sustainably managed and used. As part of this remit, NRW advises Government on conservation matters.

enforceable mitigation plan”, set out 12 principles that should be adhered to when applying AEM to development planning. Fish Legal, an organisation set up to fight pollution of water courses and the marine environment also expressed concerns about the use of AEM.

17. The ExA concluded (ER 4.3.24) that the use of AEM in the case of the Development, particularly in relation to intertidal and coastal areas, was a reasonable and pragmatic approach. The Secretary of State agrees with the ExA’s conclusions for aspects of the marine environment where uncertainty cannot be ruled out, whilst supporting NRW’s view that, in general, an adaptive approach should not replace clear, upfront and enforceable mitigation plans.
18. As originally submitted, an Adaptive Environmental Management Plan (“AEMP”) only needed to be put in place before the authorised development in Part 1A of Schedule 1 of the Order was commenced. However, the Secretary of State considers that this would mean that other works (those in part 1B, including land reclamation and some piling activities) could be commenced. She has, therefore, amended the relevant Requirement in the Order so that none of the works can be commenced until an AEMP has been agreed and put in place.

Biodiversity, the biological environment and ecology including migratory and non-migratory fish

19. The Secretary of State is aware that concerns were expressed about the potential impact of the Development on migratory fish – salmon, sea trout and eel – which use the Rivers Tawe and Neath, particularly whether fish would still be able to navigate their way upstream once the lagoon was in place and whether the turbines could potentially kill many fish through entrainment.
20. She notes that the Applicant considered that there would be no significant impacts on most fish species and that there would be no direct obstruction to fish passage up and down the Tawe and Neath Rivers. However, she is aware that there was disagreement between parties about how potential impacts on fish should be modelled. The ExA considered that the Development’s impact on the ability of salmon spawned in the River Tawe to find their way back to their natal river remained unpredictable but did feel there was a risk that the number of salmon and trout finding their way back to the Tawe may fall. However, it concluded (ER 4.4.45) that the use of an AEMP which would lead to only a low level residual risk of an adverse effect on migratory fish should be weighed in the balance in the decision-making for the project. The Secretary of State agrees with this assessment.
21. There were also lengthy discussions during the examination about whether screens should be installed in front of the turbines to mitigate impacts on salmon and eels in particular. The Applicant argued that the use of screens would be detrimental to the operation of the turbines as, if the screens became blocked, they would prevent the full flow of water through the generating turbines. In this context, the Applicant requested

that the Eels (England and Wales) Regulations 2009 (“the Eels Regulations”) and the provisions of the Salmon and Freshwater Fish Act 1975 (“SAFFA”) should be disapplied for the Development to obviate a requirement to protect fish species. In Wales, this legislation is enforced by NRW.

22. NRW expressed concerns about the impact of the project on salmon and trout migrating from the sea back to the river and argued that the SAFFA should not be disapplied. It considered that the project had a low risk of impacting on eels migrating back to the sea from the adjacent freshwater rivers and came to the view that the lagoon was not a diversionary structure for the purposes of the Eels Regulations and, on that basis, screens would not be required. Despite NRW’s argument, the ExA incorporated the Applicant’s provisions in the recommended Order to disapply both provisions. The Secretary of State considers that it is not appropriate to take powers from regulatory bodies by disapplying regulations designed to protect marine life and fisheries and that it should be left to the appropriate regulator to decide whether screens or other mitigation are required to enforce national and European legislation. She has, therefore, removed the proposed provisions to disapply the Eels Regulations and the SAFFA from the Order as made. In addition, she has strengthened the provision in the Order that provides protection for fish and shellfish through Requirement 33(1)(c) which requires installation of Acoustic Fish Deterrents on the turbines in advance of the operation of the scheme, together with a robust monitoring programme of fish impacts. Further, the Secretary of State has made an addition to the wording of Requirement 27(4)(d) to ensure action can be taken if agreed thresholds of impact are exceeded.

Navigation, shipping, ports and dredging

23. The Secretary of State notes that the ExA considered the potential impacts of the development on the ports of Swansea and Neath as their access channels lie immediately west and east, respectively, of the proposed lagoon walls. She notes that the Neath Port Authority was satisfied that, with suitable mitigation, the proposed Development would not significantly impact upon commercial or recreational navigation sailing to and from the port.
24. However, she is aware that Associated British Ports (“ABP”), which runs Swansea Port, had concerns about potential impacts on its operations and asked that a ship simulation study should be carried out by the Applicant to confirm the effects of wave reflection from the sea walls on vessels entering and leaving Swansea Port and that protective provision should be included in the Order. At the time of the submission of the ExA’s Report, the study had not been received. The Secretary of State understands the study has been completed and that ABP considers that further work will be needed to mitigate impacts properly and that this would probably not be concluded before any decision on the application is taken.
25. The Secretary of State notes that ABP did not anticipate any insoluble consenting or delivery issues and noted that protective provisions had

been agreed with the Applicant for inclusion in the draft Order. The company's position was that, provided these provisions were included in any Order that was issued, then it was content. One of the provisions (in Paragraph 4 of Part 1 of Schedule 5 of the draft Order recommended by the ExA) provides ABP with a power to approve plans for any specified work and that such works cannot be undertaken without that approval. The Secretary of State is of the view that, for sound legal reasons, this power is more properly reserved to her (to be exercised in consultation with ABP) and she has, therefore, amended the provision to reflect that.

26. The Secretary of State has also amended provisions related to the protection of ABP's interests to remove ABP's right to approve decommissioning plans as she considers that this is inconsistent with the statutory decommissioning scheme established under the Energy Act 2004, which reserves decisions on the approval of decommissioning plans to the Secretary of State, and with Article 43 of the as made Order which gives effect to the Act in this case.
27. In her consideration of the ExA's report, the Secretary of State noted concerns expressed by the Monkstone Cruising and Sailing Club (MCSC) about the impact of the proposed development on the Club's activities. She notes that, in response, the ExA proposed a Requirement for the recommended Order to ensure that the need for dredging of the MCSC marina was considered by the Applicant by way of a dredging mitigation and monitoring scheme. The ExA concluded, therefore, that the Club's concerns and those of other navigation stakeholders were adequately mitigated. The Secretary of State agrees with this conclusion and has included the dredging mitigation and monitoring scheme in the Order as made.
28. The Order as submitted by the ExA included provisions amending the jurisdiction of the two ports. The Secretary of State does not consider that such an amendment is within the powers afforded by the Act and she has removed them. As a consequence, in order to make the requested amendments, the Applicant will have to seek a Harbour Revision Order under the provisions of the Harbours Act 1964.

Welsh Marine Licence

29. A separate application has been made to NRW for a Marine Licence in respect of the proposed Development. The Secretary of State is aware that NRW is undertaking consultation on the licence application and that it will take a decision on it in due course. The Secretary of State does not consider that the later timescale for NRW's determination of the Marine Licence application precludes her from taking a decision on the development consent application.

Civil and Military Aviation and Defence Interests

30. The Secretary of State agrees with the ExA's conclusions in relation to these topics.

Climate Change Mitigation and Adaptation

31. The Secretary of State agrees with the ExA's conclusions in relation to these topics.

Coastal processes and environmental considerations

32. The Secretary of State notes that the ExA considered the potential impacts of the Development on Swansea Bay and concluded that the presence of the tidal lagoon would alter the Bay's characteristics, particularly on its western side where its character as a separate, more enclosed bay, would be accentuated. However, she also notes the ExA's overall conclusion on this matter was that it had not been provided with any evidence that any change on coastal processes as result of the Development would be so detrimental when weighed in the balance as to prevent development consent being given (ER 8.11.12). The Secretary of State considers that the ExA's argument is a reasonable one in this case. She also notes that effects on coastal processes warranted further consideration in the Habitats Regulations Assessment ("HRA") she has conducted due to likely significant effects on the dune feature of the Kenfig Special Area of Conservation ("SAC") – a site designated under the Habitats Directive. This is principally due to the interactions with dredged spoil to be disposed of in the Outer Swansea Bay deposit grounds. There were concerns that this could lead to a reduction or stopping of sand movement to Kenfig SAC thereby contributing to increased rates of beach lowering and loss of dunes and dune processes, see also paragraphs 69 – 70 below and the Secretary of State's HRA.

Contaminated sediments at sea and on land

33. The Secretary of State is aware that a number of representations were received about this matter, including from Swansea University and Geraint Davies MP (Swansea West). She notes the ExA considered that the proposed controls on development in the Construction Environmental Management Plan (CEMP) which would have to be prepared by the Applicant and approved by the relevant authorities in advance of construction taking place, together with the mechanisms to assess and address contamination in the proposed Requirement 12 in the Order, would ensure there was no significant risk of contamination from the Development. The Secretary of State agrees that suitable protection measures have been included in the Order as made to reduce any risks to an acceptable level.

Environmental consequences in relation to changes to coastal processes

34. The Secretary of State considers that there were a number of potential risks associated with the Development which could lead to a significant loss of habitat at a number of nationally and locally important sites – including the Blackpill, Crymlyn Burrows and Kenfig Pools and Dunes

SSSIs, which have protection in UK law against damage, and the Swansea Bay Site of Importance for Nature Conservation, a non-statutory designation for areas that are deemed high value in a biodiversity and substantive conservation context. She notes the ExA concludes that while the impacts of the proposed Development could be mitigated to some extent by way of provisions which would have to be agreed in accordance with an AEMP, the loss of habitat (which would be significant in some cases) was something that needed to be weighed in the planning balance. The Secretary of State accepts that these impacts are a negative aspect of the proposal but feels that, overall, the benefits of the project outweigh these. She notes that for a European site (Kenfig SAC), the test is different and under domestic and European law, she accepts she must be confident that there will be no adverse impact on the dune feature of the site. This issue is considered further in the Secretary of State's Habitats Regulations Assessment ("HRA") – see also paragraphs 69 - 70 below.

Construction impacts in relation to land-based receptors

35. The Secretary of State notes that there were concerns about the direct and indirect impacts of the construction of the proposed Development on a range of land-based receptors.
36. She further notes that in assessing the construction process needed to take forward the Development, the ExA mentions that rock armour for the project would be sourced from a quarry in Cornwall, thus reducing the number of road movements necessary, and that this matter is secured by a Requirement which means that rock armour (and sediment) for the authorised works can only be imported by sea. See further consideration of this issue in paragraphs 88 – 89 below in response to representations submitted to DECC after the ExA's report had been received.
37. The ExA was concerned that the Order should contain specified requirements to protect local amenity, including those at the Swansea University Bay Campus which adjoins the land fall for the eastern sea wall, from construction impacts. Swansea University had concerns that noise and vibration from construction activities could disturb residential students on campus and that there was potential for vibration from piling to have an impact on sensitive scientific equipment at the University's College of Engineering. However, the ExA considered that mitigation would secure a reduction in impacts to the point where they were no longer significant. The ExA also concluded that impacts from traffic and transport and dust and other emissions would be mitigated by the measures set out in the proposed CEMP secured by Requirement 5 in the proposed Order. The Secretary of State agrees with this assessment.
38. Swansea Council raised concerns late in the examination about the potential impact of increased traffic flows along Fabian Way on a likely Air Quality Management Area along parts of that road. The Council, therefore, suggested that access to the onshore construction area should utilise an additional, existing road junction, to channel construction traffic. The Applicant considered that the "as proposed" access route did not

need to change. The ExA considered this matter (ER 4.12.62 – 4.12.66) and concluded that it would not make any changes to the Applicant's Order, reasoning that the Council's proposed option had not been considered in the Applicant's Environmental Statement and, therefore, the impacts of doing so on operations at AB Ports had not been assessed. The ExA argued that any decision to introduce a new access route would, therefore, be outside the scope of assessment of impacts that formed part of the consent application and could not be taken forward. The Secretary of State agrees with the position adopted by the ExA in considering these aspects of the construction of the proposed Development.

Construction impacts and the CEMP in relation to ecological receptors

39. The Secretary of State is aware that the construction of the proposed Development has potential to impact on marine mammals, principally harbour porpoise and grey seals, although other species are also potentially affected. The key construction activities that would impact on these species were considered to be piling, dredging and general construction works. The Applicant's Environmental Statement concluded that there would be a moderate impact on marine mammals from construction, but a number of other bodies – the Rhossili Working Group (RWG) and Porthcawl Environment Trust (PET), in particular – disputed this conclusion.
40. The Secretary of State notes that there was considerable discussion about the potential for mitigation measures to be put in place to minimise or avoid impacts which resulted in updates to the CEMP and the AEMP during the examination process. The ExA also proposed wording on Marine Mammal Mitigation for inclusion in the Order (ER 4.13.39) which relates to both construction and operation. The Secretary of State agrees with the inclusion of this Requirement but has made some minor changes to the wording. This is discussed in more detail in paragraph 98(c)(xi) below.
41. After the close of the examination, members of the Rhossili Working Group wrote to express their concerns over the impact of piling during the construction of the Development. The Working Group requested that piling should be restricted so as to avoid the calving period for harbour porpoise. The Secretary of State has considered these concerns and believes that the evidence presented during the examination indicates that the adoption of a Marine Mammal Mitigation Strategy, secured by Requirement 39 in the Order, can address those concerns. The Secretary of State also notes that a European Protected Species Licence will be required: this is discussed in more detail in paragraph 50 – 51 below.
42. The Secretary of State is further aware that there were also concerns expressed about potential impacts on other species, with much of the focus on the impact on sabellaria, a reef forming worm in the inter-tidal and sub-tidal areas, for which mitigation was offered. The proposed sabellaria mitigation options include the translocation of colonies that were found, but there were concerns about whether this would work given the scale of the translocation which far exceeds the pilot studies and the lack

of evidence of this type of compensation being successful. However, the ExA considers that mitigation by way of a Requirement in the Order would minimise impacts, although any impact would still be significant because of the loss of suitable habitat. The Secretary of State notes the potential impacts in relation to this matter but concludes that the mitigated effects are acceptable.

Operational impacts and the Operation Environmental Management Plan (OEMP) in relation to community receptors

43. The ExA felt there would be no matters arising from the operation of the development that would lead to significant impacts on the local community, providing that suitable mitigation was secured through the Order. The Secretary of State notes that the ExA indicates there are provisions in the Order that is recommended to her which will deliver the mitigation measures, particularly by way of Requirements 5 (Construction Environmental Management Plans and 23 (Major events) and she agrees, therefore, with the conclusions reached in this matter.

Operational impacts upon ecological receptors

44. NRW was concerned that the proposed development had the potential to have an impact on marine mammals. While the Applicant's Environmental Statement indicated that risks to marine mammals in the presence of the turbines was insignificant to minor, the ExA notes that confidence in the assessment of marine mammal behaviour around turbines was low because there was no empirical data.
45. The ExA's proposed wording on marine mammal mitigation for inclusion in the Order (ER 4.13.39) included elements in relation to both the construction phase and the operational phase. Initially, the Applicant did not agree to this inclusion, as it considered that the provision applied to events that were not predicted to happen. However, the Applicant subsequently indicated it could accept the proposed wording providing that the mitigation measures did not include the cessation of operation. The ExA accepted that the inclusion of any provision which jeopardised the continuous operation of the turbines would result in loss of energy generation and that this could impact on offers of funding.
46. The ExA goes on to say (ER 4.13.40) that it has taken a view of the balance between potential risk to marine mammals against the risk to the project if the turbines had to be switched off for a prolonged period. It concludes that, as the risk to marine mammals is not forecast in the Applicant's Environmental Statement, the shutting down of turbines for a maximum of 24 hours should not impact significantly upon the potential generation of electricity and includes in its recommended Order to this effect. The ExA recommended that the requirement for marine mammals is included in the final Order, with a minor addition so that any actions that are necessary in response to Potential Biological Removal ("PBR") do not include prolonged cessation of the turbines. In the unlikely event that limitation of operation is the only way to mitigate the impacts of the Development, the Secretary of State has removed this restriction from

Requirement 40 in order to ensure all options are available to protect marine mammals.

47. It is to be noted that the Applicant would still need to secure a European Protected Species (“EPS”) licence from NRW in respect of the potential impact of the construction and operation of the Development on marine mammals. This is discussed in more detail in paragraphs 50 – 51 below.
48. Similarly, the ExA considered that there were potential risks to diving birds from interaction with the turbines and potential impacts from the loss of feeding opportunities because of the loss of herring spawning post-development of the project. However, again, the ExA considered that suitable mitigation could be put in place, secured through the Operational Environmental Management Plan specified in Requirement 5 of the recommended Order, which would minimise risks.
49. The Secretary of State acknowledges that even with mitigation, there are risks to species within reasonable proximity of the operational project. However, she considers that the ExA’s analysis is a reasonable one and that the benefits of the Development outweigh the potential impacts. The ExA concludes that the benefits of the proposed Development outweigh the potential impacts on biodiversity.

EPS Licence matters

50. The Secretary of State notes that marine mammals are a European Protected Species and that where any activity will result in the disturbance or killing of marine mammals, a licence permitting this will be needed to avoid committing an offence under the Conservation of Habitats and Species Regulations 2010. The Secretary of State notes, however, that the Applicant had not submitted an application for an EPS licence by the close of the examination nor by 28 April 2015 when NRW responded to the Secretary of State’s consultation letter of 14 April 2015.
51. NRW explained that there were a number of tests that had to be met before an EPS licence could be granted, including that there is no other satisfactory solution but to grant the licence. The Secretary of State is satisfied that it is not impossible for the Applicant to obtain such a licence noting that the failure to do so would effectively curtail the operation of the Development. However, the ExA considered that, with suitable mitigation, any impacts on harbour porpoise would be minimal and that if the Order was granted, then an EPS licence would probably be forthcoming. Given the consideration of any application for an EPS licence is not a matter for her, the Secretary of State does not consider she should adopt a position on how any application might be considered. She does note, however, that she has not been made aware of any absolute impediments to the grant of an EPS licence.

Statutory nuisance

52. The Secretary of State notes that the Applicant sought to disapply the defence of statutory nuisance. Swansea University raised concerns about the proposed disapplication and sought the inclusion of a Requirement in the Order to ensure approval of noise nuisance mitigation during construction and operation. However, the ExA, while understanding the University's concerns, stated (ER 4.17) that it agreed with the City and County of Swansea Council, Neath Port Talbot County Borough Council and the Applicant that provisions in the Order, together with measures in the CEMP which includes details on monitoring and mitigation for any impacts on human receptors and sets out a complaints procedure would provide suitable mitigation for Swansea University's concerns. The Secretary of State agrees with the ExA's consideration of this matter.

Flood risk

53. The Secretary of State agrees with the ExA's conclusion that any flood risk can be managed and mitigated.

Health

54. The ExA considered that there would be no risk to human health arising from the Development. The Secretary of State agrees with this conclusion.

Historic environment

55. The ExA considered that the historic environment, both onshore and offshore, would be adequately protected by way of mitigation measures secured in the Order. The Secretary of State agrees with this conclusion.

Seascape, landscape and visual impact assessment including lighting

56. The Secretary of State acknowledges that the proposed Development would utilise an existing technology in a novel way which brings with it new issues that need to be considered. She notes that, in this case, the seawalls impounding the tidal lagoon would rise approximately 4 metres above the level of high tide and would be 12.5 metres above the level of low tide. She also notes that the ExA considered that the visual impact of the proposed Development would be significant when viewed from certain locations close to the project, although the significance of the impact would diminish with distance. The local councils argue that the significance of the changes would be compensated by delivery of a scheme that provided opportunities to develop tidal range technology with education, visitor and other facilities. The Secretary of State notes that these facilities are not being included in the Order that she wishes to make because they fall outside the scope of the provisions in the Act and that they would, therefore, be subject to separate applications for consent made to the local councils. The Applicant has included the provision of these facilities in an Agreement between the City and County of Swansea Council, Neath Port Talbot Borough Council and ABP (and the Applicant)

made under section 106 of the Town and Country Planning Act and dated 8 December 2014.

57. The Secretary of State also notes that the Applicant's draft Order proposed a provision for the seawall to have an upper limit of deviation of 2 metres (that is, the scheme could be 2 metres higher than the anticipated height level). The ExA considered whether the limits of deviation proposed by the Applicant in the Order in relation to the height of the seawall had been properly considered in the Applicant's environmental assessment. The ExA states (at ER 4.21.51) that "the potential maximum height of the seawall [height] of 16m CD² is not stated as having been assessed in [the] Chapter 13 of the ES [Environmental Statement]". The Applicant (according to a document submitted to the examination by Swansea Council – REP-761) indicated that an increase in the height of the seawall from a maximum of 14m to 16m above chart datum would have to be approved in planning terms by both Swansea and Neath Port Talbot Councils. The Applicant is stated as having said that such an approval might have to be sought during construction or later.
58. The conclusions reached by the ExA on these matters were that visual impacts were inherent in any tidal lagoon scheme and were, therefore, generally acceptable. However, the ExA also noted that the proposed limits of deviation requested were not supported by reference to the Environmental Statement and the requested provision could not, therefore, be included in the Order. The Secretary of State accepts that the nature of energy generation projects means there are often visual impacts to a greater or lesser degree. In the case of the proposed Development, she considers that the ExA's view about the acceptability of the visual impacts is correct. She also agrees with the ExA that it would not be appropriate to allow a 2 metre upward deviation to the seawall given the absence of appropriate assessment within the Applicant's Environmental Statement.

Pollution control and other environmental regulatory regimes

59. As indicated above, the Applicant would need a number of other permissions before the project could be taken forward, including an Environmental Permit from NRW for a temporary concrete batching plant. The Secretary of State considers she has no reasons to believe that such permissions will not be granted in due course.

Safety and security

60. Swansea University raised concerns about the welfare of students in relation to the proximity of its Swansea University Bay Campus to the eastern seawall that forms the lagoon project. However, the ExA felt that there were sufficient protections in place to ensure that the risks to members of the public which might be faced during both construction and operation were acceptable on the assumption that students and other members of the public would behave in a reasonable and responsible

² "Chart datum" is a tide level that is so low that the tide will not frequently fall below it – approximately the Lowest Astronomical Tide. Water depths on charts and tide heights are measured from the plane of chart datum.

manner and that public access to the seawalls would be restricted if safety was likely to be compromised. The Secretary of State accepts the ExA's conclusions in this matter.

Socio-economic impacts

61. The Secretary of State notes the potential for impacts on a range of receptors and that the ExA considered the impacts of the construction and operation of the Development on jobs, commercial fishing, tourism and recreation, education and research. The ExA concluded that: there would be a beneficial impact on jobs; there would be no significant impacts on local commercial fishing interests; and that impacts on tourism would generally be positive. The Secretary of State accepts these conclusions and has sought to reinforce the local employment opportunities by including a provision in the Order to require the Applicant to submit to the relevant local planning authority for approval an employment and skills plan.
62. On education and research, the ExA notes that the classrooms and galleries have been omitted from the recommended Order as they do not form a necessary part of the generating station but the hatchery and laboratories do remain as part of the project (ER 4.24.25). A number of interested parties stressed the need for the project to have as wide a scope as possible to maximise its benefits. The ExA finds that there are social and environmental drivers to support the inclusion of education and research facilities in development projects (see ER 4.24.30 – 4.24.32) and finds that “development which addresses the needs not only of the economy but also of society and or the environment is particularly supported by Government policy”. However, it concludes that it is a matter for the Secretary of State to determine whether the inclusion of such facilities can be justified under the Planning Act and in line with the devolution settlement for Wales. The Secretary of State concludes that the classrooms and galleries have properly been omitted because they are associated development and do not form part of the generating station while she believes that provision for the hatcheries and laboratories should be included in the Order because facilities for environmental monitoring and mitigation should be integral to the Development.

Financial viability

63. The Secretary of State notes that there were concerns, principally from ABP about the financial viability of the project. ABP, therefore, proposed that a fund should be established to guarantee that sufficient funding was in place to complete the project before development started. The Applicant set out in general terms how the Development might be financed. The ExA considered this matter and uses the test in EN-1 (the Overarching National Policy Statement for Energy) which sets out that, where the ExA considers the Applicant's assessment of financial and technical viability/feasibility has been properly conducted, then this issue is unlikely to be of relevance to decision-making, to consider this particular issue. The ExA considers that the EN-1 test has been met in the case of the Application and concludes that it should not, therefore, be necessary

to prove the existence of all necessary funds beforehand as this would be an unusual and unreasonable hurdle. The Secretary of State accepts that financial viability in respect of the completion of the whole project does not have to be demonstrated prior to the commencement of the Development.

Decommissioning

64. The Secretary of State is aware that a consultation document on a proposed Addendum to Government guidance on the decommissioning of offshore renewable energy installations was issued by the Department of Energy and Climate Change ("DECC") during the examination of the proposed Development and that the final version of the guidance was issued on 30 January 2015³. She notes that the Addendum was developed to ensure that existing requirements for the decommissioning of offshore renewable installations, as set out in the Energy Act 2004 and supporting Offshore Renewables Decommissioning Guidance, would apply to tidal lagoon generating stations. This extension of the guidance relates specifically to tidal lagoons attached to land, which fall outside the scope of the Act. The application of the Energy Act decommissioning provisions would be applied to the proposed Development by way of Article 42 in any Order that might be granted.
65. The Secretary of State notes the Applicant proposed that a decommissioning programme for the proposed Development should be limited to the turbines and sluice gates only and that it should be submitted to the Secretary of State prior to the operation of the scheme. She also notes that DECC's usual policy on these matters is that decommissioning programmes are submitted prior to the construction rather than the operation of offshore renewable energy installations. The Applicant also proposed that a decommissioning fund to provide for the removal of the devices would only be established at year 50 of the project's operation. This approach was reflected in the draft Order submitted by the Applicant. The Secretary of State also notes that a number of parties, including ABP, the City and County of Swansea Council and Swansea University were concerned that the Applicant should demonstrate that it had the funding available to construct and maintain the project. The Applicant argued that funding would be available at each appropriate stage of the development of the project and that the grant of consent would secure further guarantees of funding, with investors not committing to such funding unless they were content with the maintenance provisions.
66. The ExA concluded that the Applicant's wording in its draft Order, which would limit decommissioning to the turbines only, should be excluded from the Order. On the matter of when decommissioning funds should start to be made available, the ExA sets out (ER 4.26.31) that "as stated by the applicant the replacement of turbines is expected in around 50-years of life with arrangements for the replacement of cathodic protection every 10 years. These facts alongside the longevity of the Contract for Difference being expected at around 35 years together place question marks over the

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399561/addendum_to_guidance_on_decommissioning_of_orei_under_the_Energy.pdf

stated 120 year life of the project.....the Panel concludes that the SoS is likely to wish to consider an earlier commencement of payments into the maintenance fund than year 50 as and when the decommissioning scheme is considered for approval.”

67. The ExA considered, therefore, that the decommissioning of the proposed Development should be taken forward on the basis of the merits of the case being proposed rather than on the basis of the Applicant’s proposed limitations on timings and on scope. The Secretary of State considers that DECC officials should not be restricted in negotiating on her behalf with the Applicant over its decommissioning programme following the grant of consent. They should be open to set whatever decommissioning requirements are reasonable in the light of the information provided to them at that time. The Secretary of State therefore agrees with the ExA’s conclusions in this matter.

Habitats Regulations Assessment

68. Regulation 61 of the Conservation of Habitats and Species Regulations 2010 as amended (“the Habitats Regulations”) requires the Secretary of State to consider whether the proposed Development would be likely, either alone or in-combination with other plans and projects, to have a significant effect on a European Site as defined in the Habitats Regulations. If likely significant effects cannot be ruled out, then she must undertake an Appropriate Assessment (“AA”) addressing the implications for the European site in view of its conservation objectives. In light of any such assessment, she may grant development consent only if it has been ascertained that the project will not, either on its own or in-combination with other projects, adversely affect the integrity of such a site, unless there are no feasible alternatives and imperative reasons of overriding public interest apply (“IROPI” - a derogation under the EU Habitats Directive that allows projects to be consented even where there is an adverse effect on a European site).
69. The Secretary of State’s officials have undertaken a HRA which includes an Appropriate Assessment in respect of 10 sites where likely significant effects were identified. Of particular concern during the examination were impacts on protected sand dune features in the Kenfig SAC as a result of the disposal of material dredged from the lagoon. The HRA also considers whether authorising the project could prevent the impending future designation of marine sites in Wales for the protection of harbour porpoise. The Secretary of State notes that there is a proposed new marine site in the Outer Bristol Channel where high numbers of porpoise have been observed and which may be designated in the future. This was not considered in the Report on the Implications for a European Site, given that the location of the sites was only announced in February 2015 by NRW (i.e. after the close of the examination).
70. The HRA concludes that with mitigation, monitoring and adaptive environmental management plans in place, there will be no adverse effect on any European site. This was also the view of the ExA and NRW. With the marine mammal mitigation strategy in place, the HRA also concludes

that authorising the project will not affect scientific evidence which forms the basis for designating future sites in Wales for the protection of harbour porpoise. The necessary mitigation is set out in the HRA and secured in the Order. The Secretary of State considers that her duties under the Habitats Directive have been discharged.

Water Framework Directive

71. The Water Framework Directive (WFD) provides for the management of all inland surface waters, groundwater and coastal waters in order to prevent and reduce pollution, promote sustainable water use, protect the aquatic environment, improve the status of aquatic ecosystems and mitigate the effects of floods and droughts. The Directive also sets the objectives for all water bodies classified under it and creates a mechanism through which each signatory has to aim to bring its water bodies to acceptable standards. Signatories to the Directive are required to report back to the European Commission on progress on a 6-yearly basis through River Basin Management Plans ("RBMPs").
72. If a project will result in a water body failing to meet its required status under WFD, then the competent authority that is responsible for authorising the project must make sure that the conditions for a derogation under Article 4.7 of the Directive are satisfied. Furthermore, an assessment must also be carried out under Articles 4.8 and 4.9.
73. The proposed development is located within the Swansea Bay Coastal waterbody which is defined in the Western Wales RBMP as a Heavily Modified Water Body ("HWMB"). A HWMB is a surface water body that does not achieve 'Good Ecological Status' because of substantial changes to its physical character due to human use. The WFD, therefore, sets out objectives for HMWBs to achieve Good Ecological Potential ("GEP"). Based on the submissions from the Applicant, the advice from NRW and the recommendations from the ExA, the Secretary of State accepts that the proposed Development places the Swansea Bay Coastal waterbody at risk of not meeting its Directive objective of GEP. The addition of artificial structures within Swansea Bay will have hydromorphological consequences and dredging will affect a large area with consequences for benthic invertebrates. The proposed Development is also incompatible with a number of RBMP mitigation measures and, therefore, derogation under Article 4.7 is required.
74. The ExA highlights the need for a WFD derogation as "...one of the most significant, novel features of this case" (ER para 5.1.2). There is limited experience of applications for derogation under Article 4.7. NRW advised that a derogation under the Directive is unprecedented in a coastal or estuarine water body in the UK (ER para 5.1.21).
75. There are a number of tests that must be met to secure an Article 4.7 derogation:
 - a. all practicable steps are taken to mitigate the adverse impact on the status of a body of water;

- b. the reason for those modifications or alterations are set out in the relevant river basin management plan;
 - c. the reasons for these modifications or alterations are of overriding public interest and/or have benefits in relation to human health, human safety or sustainable development; and,
 - d. whether there are other ways of achieving these outcomes which would be a significantly better environmental option [which are technically feasible and not of disproportionate cost].
76. The volume of information submitted by the Applicant at a late stage of the examination and the limited time to secure further detail was a concern for NRW. NRW questioned the reliability of the Applicant's modelling, particularly on the consequences for the intertidal zone and disruption to migratory fish. Whilst drawing attention to the limitations of the Applicant's analysis, NRW nevertheless advised that it considered that a reasonable case had been made for steps to mitigate adverse impacts on the water body and for the project being of overriding public interest (tests a. and c. above). Should consent be granted for the project, the modifications would be reported in the next publication of the Western Wales RBM (test b. above).
77. In the absence of a national strategic plan for tidal range developments, NRW advised that it does not have evidence to demonstrate that there are no significantly better environmental alternatives that could achieve the same outcome (test d. above). In particular, it advised that relocating the turbines within the lagoon wall would reduce environmental impacts. NRW's advice is that three out of four tests for an Article 4.7 derogation of the WFD are met, with remaining concerns about the availability of alternative, better, options not having been considered.
78. The ExA's conclusions are that the requirements of Article 4.7 have been met. Regarding alternatives (test d.), none of the sites that would have been investigated as part of the alternative locations study would likely to be a significantly better environmental option and the environmental benefit to be gained from placing the turbines in a different location within the proposed lagoon wall is marginal and not "significant". The Secretary of State notes the outstanding differences between NRW and the Applicant on a number of matters, including alternatives, but ultimately concurs with the ExA's conclusion that all Article 4.7 derogations tests are passed.
79. The Secretary of State's officials have assessed the matters raised by the Applicant, NRW and the ExA in her WFD assessment which is issued at the same time as this letter. This includes an assessment of the information on the case for overriding public interest and the contribution of the project to sustainable development. The Secretary of State considers that there is a reasonable case to support the grant of a derogation under Article 4.7, recognising that there will be a deterioration in the water status of the Swansea Bay HWMB. The WFD assessment also concludes that the requirements of Article 4.8 and 4.9 of the WFD have been met: the objectives of a water body in the same river basin district are not permanently excluded/compromised and the project is

consistent with the implementation of other EC environmental legislation. This is also the view of the ExA.

80. Given the length of the intended operational period of the proposed Development and the uncertainties about how the marine environment will change over time, the Secretary of State has included an additional Requirement in the Order to prevent the commencement of the project until a water framework strategy document has been submitted to and approved by NRW. This aims to establish a mechanism to ensure ongoing WFD compliance.
81. As part of her WFD assessment, the Secretary of State's economists undertook an economic assessment of the project, using publicly available information to assess the economic case for it. Their advice was that the local economic benefits should be secured to make the case and for this reason, a Requirement has been included in the Order to require the Applicant to produce an "employment and skills plan" setting out opportunities for local employment and procurement of goods and services (Requirement 41). The economic assessment also identified that the Applicant's modelling to demonstrate the economic case for this test is sensitive to the level of subsidy provided to this project. If set too high, this additional societal costs could offset the economic benefits. (A detailed analysis of the economic costs and benefits and due diligence is being undertaken separately as part of the negotiations on a possible Contract for Difference for the proposed Development and will need to be completed to the Secretary of State's satisfaction to inform any future decision on committing public funds to tidal lagoon technologies.)
82. Having considered all the information available to her, the Secretary of State is satisfied that the tests which must be passed in order to secure derogation under Article 4.7 of the Directive (set out in paragraph 75 above) have been met. She also considers that the requirements of Article 4.8 and 4.9 of the Directive have been met. In those circumstances, she considers that she can make the derogation in respect of the Development.
83. The Secretary of State notes that there is no need to seek an authorisation for the derogation under Article 4(7) – it is a decision for the Secretary of State as the competent authority. Further, she is not separately required to notify the European Commission of the derogation: the Welsh Government will notify them of the change of water body status as part of the reporting on the implementation of the RBMP. In Requirement 42, provision is made to ensure compliance with the Water Framework Directive.

Compulsory acquisition and related matters

84. The ExA considered whether the evidence provided during the examination justifies the grant of compulsory acquisition powers sought by the Applicant having regard to the statutory and other requirements and representations made by affected parties. There were a number of representations to the compulsory acquisition of land for the project which

were sustained throughout the examination. These were from: St Modwen Properties plc, Swansea University, ABP, Baglan Operations Limited and Intertissue Limited. The grounds for concern included whether the outright acquisition of land was necessary, the adequacy of funding for the acquisition, the siting of sensitive equipment essential to the functioning of the Baglan site and the possibility that land acquisition would compromise existing service easements critical to one of the developments.

85. In considering these matters, the ExA concluded that with the exception of four plots (three within ABP's property and one within Baglan's) all other compulsory acquisition requests were justified. The ExA excluded the four plots because it determined that those on ABP's land were no longer needed in the light of modifications to the Development and that the plot on Baglan land was not essential as an alternative was available which did not include the sensitive equipment mentioned above.
86. In the Order recommended by the ExA, there was provision for underground cabling with a voltage of 275kV between the generating station and the grid connection point at Baglan Bay. As indicated in paragraph 13 above, the Secretary of State considers that the particular works in question fall outside the powers in the Planning Act 2008 and she has, therefore, removed them from the Order that is being made. Consequently, any compulsory purchase plots related to the grid connection route have been removed from the Order.
87. The Secretary of State agrees with the ExA's conclusions in regard to this matter.

Other Matters

Representations received after the close of the ExA's examination of the Application

Representations Received After the Close of the Examination

88. The Secretary of State received a number of representations after the ExA's report was submitted to her. Many raised concerns about the proposed use of the presently closed St Keverne quarry in Cornwall as the source of rock armour for the lagoon project; but there was also correspondence about the technical viability of the proposed development.
89. A number of correspondents were concerned that the Applicant, through a related company which owns the St Keverne quarry, was looking to re-open it and extend it through the construction of new jetty facilities to allow the export of rock to Swansea by sea and related infrastructure. The concerns were that the re-opening of the quarry would have significant local impacts and that construction of jetties and the related vessel movements would have an impact on a recently designated Marine Conservation Zone off the Cornish coast. However, the Secretary of State understands that the use of the quarry is covered by an extant planning permission issued by Cornwall County Council while the

construction of any new jetties is the subject of an application for a Marine Licence to the Marine Management Organisation. Given that these matters fall outside the locus of her decision-making, she does not consider that they should weigh in her decision-making on the proposed Development.

90. There were also representations made to the Secretary of State about the Contacts for Difference negotiations that officials in DECC have been undertaking with the Applicant to determine whether financial support for the lagoon project was justified. This matter has been dealt with completely separately from the Planning Act application that the Secretary of State has determined. Given that the Contract for Difference negotiation is a separate issue which does not have a bearing on the planning application, the Secretary of State does not consider this is a matter to weigh in her consideration here.
91. There were also representations received about the technical feasibility of the Development with concerns that the operation of the turbines would be hampered by the effects of siltation over prolonged periods of time. While noting these concerns, the Secretary of State is aware of the need to maintain dredging around the turbines but has not been made aware of any obvious reasons why the Development would not be able to operate for technical reasons.

General Considerations

Equality Act 2010

92. The Equality Act 2010 introduced a public sector "general equality duty". This requires public authorities to have due regard in the exercise of their functions to the need to eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited under the Act; advance equality of opportunity between people who share a protected characteristic and those who do not; and foster good relations between people who share a protected characteristic and those who do not in respect of the following "protected characteristics": age; gender; gender reassignment; disability; marriage and civil partnerships⁴; pregnancy and maternity; religion and belief; and race. The Secretary of State is satisfied that there is no evidence of any harm, lack of respect for equalities, or disregard to equality issues in relation to this Application.

Human Rights Act 1998

93. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights, by the Development and compulsory purchase powers. The Secretary of State notes that the ExA concludes that the proposed interference with the human rights of individuals would be for legitimate purposes that would justify such interference in the public interest and to a proportionate extent. The Secretary of State agrees that the ExA's rationale for reaching its

⁴ In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

conclusion, as set out in ER 6.14.5, ER 6.15.3, 6.21.2 and 8.14.2 provides a justifiable basis for taking the view that the grant of development consent would not violate any human rights as enacted into UK law by the Human Rights Act 1998.

Section 40(1) of the Natural Environment and Rural Communities Act 2006

94. The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting development consent. The Secretary of State is of the view that the Report considers biodiversity sufficiently to accord with this duty.

Secretary of State's conclusions and decision

95. For the reasons given in this letter, the Secretary of State considers that there is a case for authorising the Application, given the national need for the proposed Development and that the potential adverse local impacts of the Development do not outweigh the benefits of the scheme.

96. The Secretary of State notes that in addition to the Order, the Development would need a Marine Licence from NRW to ensure further protection for the marine environment during its operation. The Applicant has submitted an application to NRW which is currently being considered. The Secretary of State notes, however, that the Applicant will not be able to commence construction of the offshore elements of the generating station until NRW are satisfied that stringent environmental conditions are met and that appropriate monitoring of environmental impacts will be required during the operation of the generating station.

97. The Secretary of State has therefore decided to accept the ExA's recommendation in paragraph 8.17.1 of the Report to make the Order granting development consent and to impose the requirements recommended by the ExA, but subject to the modifications described below. In reaching this decision, the Secretary of State has had regard to the Report as amended by the Errata sheet referred to in paragraph 4 above, and to all other matters which he considers important and relevant to his decision as required by section 105 of the 2008 Act. The Secretary of State also confirms for the purposes of regulation 3(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 that he has taken into consideration the environmental information as defined in regulation 2(1) of those Regulations.

Modifications to the Order

98. As set out above, the Secretary of State has made a number of amendments to the ORDER recommended by the ExA. In summary, these are:

(a) The removal of:

- (i) Provisions disapplying the Eels Regulations and the Salmon Act
- (ii) Provisions extending the jurisdictional boundaries of City and County of Swansea Borough Council and Neath Port Talbot County Borough Council;
- (iii) Provisions restricting the ports of Neath and Swansea;
- (iv) Provisions related to Associated Development; and,
- (v) Certain protective provisions for ABP and the Port of Neath;

(b) The addition of:

- (vi) A requirement ensuring the delivery of the section 106 Agreement of 8 December 2014 agreed between the City and County of Swansea Council, Neath Port Talbot County Borough Council, ABP and the Applicant (Requirement 40);
- (vii) Water Framework Directive compliance (Requirement 42);
- (viii) A Requirement (41) to require the production of an employment and skills plan;

(c) Amendments to:

- (ix) Requirement 27 (Fish and Shellfish Mitigation Strategy) to ensure appropriate mitigation is included;
- (x) Requirements on Construction Environment Management Plan and the Adaptive Environmental Management Plan to extend their scope; and,
- (xi) The Requirement on Marine Management Mitigation Strategy to allow for greater compliance with wildlife protection laws.

Challenge to decision

99. The circumstances in which the Secretary of State's decision may be challenged are set out in the note attached at the Annex to this letter.

Publicity for decision

100. The Secretary of State's decision on this Application is being publicised as required by section 116 of the 2008 Act and regulation 23 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

Yours sincerely



Giles Scott
Head of National Infrastructure Consents and Coal Liabilities

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 of the Planning Act 2008, an Order granting development consent, or anything done, or omitted to be done, by the former Infrastructure Planning Commission or the Secretary of State in relation to an application for such an Order, can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Order is published on the website below. The Swansea Bay Tidal Generating Station Order 2015 as made is being published on the date of this letter on the Planning Inspectorate's website at the following address:

<http://infrastructure.planningportal.gov.uk/projects/wales/tidal-lagoon-swansea-bay/>

These notes are provided for guidance only. A person who thinks they may have grounds for challenging the decision to make the Order referred to in this letter is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London, WC2A 2LL (0207 947 6655)