



## ENGLAND

### The Wildlife Trusts

*The Kiln  
Waterside  
Mather Road  
Newark  
Nottinghamshire  
NG24 1WT  
Tel (01636) 677711  
Fax (01636) 670001  
Email  
info@wildlifetrusts.org*

*Website  
www.wildlifetrusts.org*

Giles Scott  
DECC, 3 Whitehall Place  
London SW1A 2AW

BY EMAIL

10<sup>th</sup> May 2016

Dear Giles,

**Planning Act 2008 and the Infrastructure Planning (Examination Procedure) Rules 2010 - Application by SMart Wind Limited for an Order Granting Development Consent for the Hornsea Offshore Wind Farm (Zone 4) – Project Two**

**REQUEST FOR COMMENTS ON THE APPLICATION FOR THE PROPOSED HORNSEA PROJECT TWO OFFSHORE WIND FARM- EN010053**

Our ref: 10031157

We are writing in response to your request for comments on the Applicant's further information for the purposes of an HRA of the likely effects of the Project on the harbour porpoise Southern North Sea pSAC.

We welcome the further information provided by the Applicant, but note their own caution that the information already gathered was for a different purpose and may not necessarily be directly applicable to carrying out an HRA. We believe this indicates there cannot be a high level of certainty in determining the conclusions of the HRA, based on the information provided.

We also welcome a move away from carrying out an assessment against the Management Unit population and a move towards a site based assessment. However, we have a number of concerns about the process the Applicant has taken and therefore the conclusions they have reached. Some of our concerns result from the information presented in the JNCC pSAC consultation documents, which has subsequently been used by the Applicant. For further detail on this, we refer you to our response to the pSAC consultation (attached at Annex 1).

We agree that the immediate effect of disturbance is a temporary loss of habitat and that, as such, an HRA should consider the area of the pSAC from which porpoise would be excluded. However, we do not agree that this should be all that is considered and that there should be no consideration of the numbers of animals affected. This should form a fundamental component of the determination of the significance of an impact; both on the species as a viable

**Patron**  
*HRH The Prince of Wales  
KG KT GCB OM*  
**President**  
*Simon King OBE*

*Royal Society of Wildlife Trusts  
Registered Charity no. 207238  
Printed on environmentally  
friendly paper*

component of the site and in terms of the specific disturbance objective. It is also relevant when considering the longer term impacts on individual fitness and the in-combination impacts from multiple projects. We believe this is especially important in the consideration of the Hornsea 2 application, where there will be potentially thousands of animals being impacted and displaced from an area which is clearly of high importance for the species (as shown by the Applicant's surveys and the identification as a pSAC). The potentially highly significant cumulative impact of multiple wind farms across the wider North Sea harbour porpoise populations has recently been highlighted in a Dutch government commissioned study (Heinis, de Jong & Rijkswaterstaat Underwater Sound Working Group<sup>1</sup>). Cumulative impacts on the pSAC could be just as, if not more, significant in terms of numbers of animals.

As detailed in our consultation response, we dispute the conclusion that the harbour porpoise is in Favourable Conservation Status in the North Sea. We therefore dispute the assumption that a 'significant portion' would be 20% and 'significant period of time' would be 6 years. We have seen no evidence to support the choice of these figures, which appear to have been presented as arbitrary thresholds. They also do not take into consideration any other anthropogenic impacts which are affecting the species, such as bycatch and pollution. **We do not agree that, without further justification, it is appropriate to conclude no adverse effect on site integrity using these figures alone.**

We note that the calculated areas of the pSAC which would be impacted are representative of each pile (with the amount of overlap depending on the location of the pile); it would not be a one off impact on the site, but a repeated disturbance of up to 10.69% of the site. It is widely accepted, and was acknowledged in the Applicant's Environmental Statement (ES), that there are high levels of uncertainty as to how soon porpoise would return to the area. It is also acknowledged in the Applicant's ES, that population levels in the area would not be anticipated to return to normal until cessation of all piling. Therefore when determining the temporal impact, it should be accepted that porpoise would be excluded from the area for the duration of the piling process; i.e. 5 years, rather than just the 1.32 years of actual piling. **We therefore do not agree that, even if the thresholds were deemed appropriate, the Project is 'well within' these acceptable thresholds. Subsequently, we do not agree that it can be concluded with 'a high degree of confidence' that there will be no adverse effect on site integrity from the Project alone.**

We are extremely disappointed with the information provided regarding in-combination effects. Whilst we appreciate that in-combination assessments are not easy, especially with a number of unknowns, **we do not believe that the Applicant has presented enough information to be able to conclude no adverse effect on integrity with any degree of confidence or certainty.** We note that the only presentation of figures from other wind farms is done so in a footnote and even then no attempt is made to calculate the total area of overlap of the pSAC of multiple projects in any given year.

---

1

[https://www.noordzeeloket.nl/en/Images/Framework%20for%20assessing%20ecological%20and%20cumulative%20effects%20of%20offshore%20wind%20farms%20-%20Cumulative%20effects%20of%20impulsive%20underwater%20sound%20on%20marine%20mammals\\_4646.pdf](https://www.noordzeeloket.nl/en/Images/Framework%20for%20assessing%20ecological%20and%20cumulative%20effects%20of%20offshore%20wind%20farms%20-%20Cumulative%20effects%20of%20impulsive%20underwater%20sound%20on%20marine%20mammals_4646.pdf)

We agree that it is unlikely that all the projects listed would be constructing at the same time, but there are a number of projects which are predicted to overlap in construction time. Indeed, in the Cumulative Impact Assessment in the Applicant's ES they presented information on overlap of expected construction times. We also acknowledge that final design schemes may vary, but each project in question has a predicted, realistic worst case scenario, on which basis they have been granted consent. Therefore we believe that a greater effort should be made to consider what possible in-combination effects would look like, in order to be able to conclude, beyond reasonable doubt, whether there would be an adverse effect on integrity. **We do not agree that to try to do so could risk a Type 1 error being made; indeed not to do so would mean that obligations under the Habitats Regulations would not be met.**

It is a fundamental requirement of the Habitats Regulations that a consent decision has to be made having ascertained that there will be no adverse effect on integrity of any European site. If an adverse effect on integrity cannot be ruled out, consent can only be given in the absence of alternatives, meeting IROPI criteria and with compensatory measures provided for. **We therefore strongly disagree with the suggestion that the provision for ensuring no adverse effect on integrity is deferred to an additional condition in the Deemed Marine Licence. This would then only be enacted after consent had been given; we believe that a decision on consent should not be made until no adverse effect on integrity can be concluded.** We made a similar representation in our response to the East Anglia ONE non-material change variation request.

Together with Whale and Dolphin Conservation (WDC) and WWF, we are currently in the process of seeking independent legal advice on a number of matters surrounding the implications of the harbour porpoise pSAC designations. This includes consideration in HRAs/AAs and subsequent NSIP consent decisions. We would be keen to discuss this further with you, both in relation to the Hornsea 2 consent decision, reviews of consent and new applications.

Yours sincerely,



Joan Edwards  
Head of Living Seas  
The Wildlife Trusts

## **Annex 1 – The Wildlife Trusts Response to the JNCC harbour porpoise pSAC consultation**

JNCC Marine Species Advice Team,  
Inverdee House,  
Baxter Street,  
Aberdeen, AB11 9QA

3<sup>rd</sup> May 2016

Dear JNCC,

### **RE: Harbour Porpoise Possible Special Areas of Conservation (SAC) Consultation**

The Wildlife Trusts (TWT) welcome the opportunity to respond to this consultation. There are 47 individual Wildlife Trusts covering the whole of the UK and the Isle of Man and Alderney. Together TWT are the largest UK voluntary organisation dedicated to protecting wildlife and wild places everywhere – at land and sea. We are supported by more than 800,000 members. Every year TWT work with thousands of schools and welcome millions of visitors to our nature reserves and visitor centres. We have over 150 coastal and marine wildlife reserves, providing havens for a huge range of marine and coastal species and over 15 coastal and marine visitor centres providing great places to learn about marine life.

TWT have a vision for Living Seas where:

- Wildlife and habitats are recovering from past decline as our use of the seas' resources becomes environmentally sustainable.
- The natural environment is adapting well to climate change, and ocean processes are helping to slow down climate change.
- People are inspired by marine wildlife and value the sea for the many ways in which it supports our quality of life.

Key to achieving this vision is the goal of creating an effective network of Marine Protected Areas (MPAs) in UK waters and this is set out in one of our four major delivery themes:

- **Marine Protected Areas (MPAs) and wildlife.** We will drive forward the creation of effective MPA networks and promote conservation of threatened habitats and wildlife throughout UK seas.

**Question: Do you support the designation of the possible harbour porpoise SACs included in this consultation?**

TWT strongly support the designation of all the possible harbour porpoise SACs in the consultation.

TWT have long advocated that marine mammals need to be included in the MPA network, to ensure that it is ecologically coherent and representative of all species in need of protection. This is a principle which has also been set in the European Habitats Directive. In support of this principle, in 2014, TWT produced a report<sup>2</sup> calling for spatial protection for marine megafauna, including harbour porpoise.

We therefore believe that the designation of these SACs for harbour porpoise is a vital tool, complementing other wider measures, with ecological and legal justification, for the protection of the species. As such, this consultation is a welcome first step to achieving this added protection. Given the significant delay there has been to the UK's designation of harbour porpoise SACs, we urge a swift submission of these sites to the Commission and subsequent designation.

We recognise that designated sites are only one tool to protect the harbour porpoise and that they sit alongside other important conservation measures. We note the intention to update the UK Conservation Strategy for Harbour Porpoise. This has not been updated since its creation in 2000 and yet there has been considerable change to the threats porpoise face and understanding of their populations since then. We would therefore hope that this update is quickly forthcoming.

**Question: Do you agree that the analysis and evidence underpinning the proposed sites support and justify their designation?**

We agree that the analysis and evidence provided supports the designations and that they are justified by robust scientific evidence. Whilst there will always be a need for more data, the identification of these sites has been informed by over 545 effort related surveys over an 18 year period. It can be seen as the best available evidence and we believe that both the data and subsequent analysis is of a high enough standard to justify the designation of the sites.

Although we agree with the approach to link sightings to environmental variables as a method for predicting areas of persistent high density, we would request clarity on the reasons for inclusion of shipping as an anthropogenic variable for the modelling process. This results in no measures being anticipated for shipping, as it is assumed that the areas of high density are not being impacted by this activity. This may be a false assumption.

---

<sup>2</sup> Batey, L. & Edwards, J (2014) Megafauna hotspots: The missing link in our network of Marine Protected Areas. Spatial protection for whales, dolphins, porpoises and basking sharks recommended by The Wildlife Trusts, 29pp

We believe that the conservation objectives should have more specificity and direction with regard to the specific sites. They are, at present, very general and merely reflect the broad obligations under Article 6(2) of the Habitats Directive. Instead they should take into consideration the specific needs and pressures of the individual sites to restore and maintain them in favourable conservation status (FCS). We hope that the conservation objectives will continue to be developed and would welcome further discussions on this in due course. Nevertheless, we welcome the recognition of the need to consider disturbance in the conservation objective 'there is no significant disturbance of the species'. We believe that further guidance will be needed on what this conservation objective means for some activities, particularly those producing underwater noise such as pile driving and acoustic deterrents such as 'pingers'. The variety of pingers available means a blanket approach would not be suitable. For example the 'banana pinger' (as detailed further below) has been shown to have no long term behavioural implications, displacement or habituation. This is in contrast to other devices which have a higher acoustic output and may well cause disturbance. However we would not support defined thresholds for what constitutes a significant effect. These would likely be arbitrary, given the lack of evidence as to the level of disturbance which has significant consequences, and not take account of the specific nature of the SAC (for example porpoise density) or activity in question. It has been shown in case law that for the parallel process of determining what degree of habitat loss or damage is 'significant', that there can be no overarching definition and that each case should be assessed on its own details.

**Question: Do you have any comments on the socio-economic impact assessment report for any of the sites?**

We have limited comments to make on the socio-economic impact assessment as its outcome should not be a consideration for the designation of the sites. The Habitats Directive (Annex III) is clear that only scientific criteria should be used as a basis for classifying sites. Whilst the socio-economic assessment provides a useful indication of potential costs to various sectors, there is a risk that, by consulting on the report, it may lead to socio-economic considerations affecting the designation of the sites. We trust that this will not be the case and that the sites will be taken forward for designation based solely on the scientific justification.

Nevertheless, we believe that the summary cost/benefit analysis is too dismissive of the potential benefits the sites could bring. Whilst we accept the benefits are difficult to monetise, the detailed analysis highlights a previous study suggesting that the recreational and non-use benefits could each be in the region of £millions.

We would also query the indications of costs to the offshore renewables sector and suggestions of possible management measures under the various scenarios. The minor difference in costs between the lower and intermediate scenarios, and the justification in the text, suggests that

actual mitigation measures to reduce noise are considered unlikely. Together with the suggestion that the upper scenario is unlikely, the only scenario which states that significant restrictions on noise would be incurred, this gives rise to concerns regarding the current approach to the management of the sites for this activity. As previously stated, we do not believe the socio-economic impacts should be a consideration for the designation of sites, but would welcome further discussion on these aspects of the implications of sites.

We further note that the costs attributed to the commercial fishing sector range from £0 in the lower scenario to £855k in the intermediate scenario, primarily due to the requirement for pingers. We believe that a requirement for pingers will be highly likely, especially in the Bristol Channel Approaches and possibly areas of the Southern North Sea pSACs. Work by the Cornwall Wildlife Trust<sup>3</sup> has shown that the 'banana pinger' is a practical and effective way of reducing porpoise bycatch. However, due to the potential disturbance impact from some pingers, we urge that other bycatch mitigation measures are also explored, such as temporal or spatial restrictions and gear modification. If these are not possible, or are not sufficient to reduce a significant impact, we would suggest that banana pingers on all set net fisheries in the site would be required.

**Question: Do you wish to make any further comments not covered by the previous questions?**

We query the use of the SCANS II estimates to estimate abundance within the SACs. We do not believe that using a snapshot survey estimate which covers a larger geographic area provides a robust estimate for the population within a site. This is particularly relevant for sites which have been shown to be important in winter, as the SCANS surveys were done in July. The modelling exercise was done specifically to identify areas of persistent higher density and hence identify areas which are more important than the surrounding areas. Using the SCANS estimates for the SAC population estimates essentially 'averages out' the numbers and does not give a true reflection of the number of animals using the site. We do not agree with various comments throughout the consultation that 'the mobile nature of this species means that the concept of a 'site population' may not be appropriate for this species'. We believe that a robust 'site population' will be required to adequately carry out HRAs for activities as well as to determine whether the sites are stable and not declining, in order to contribute to the wider maintenance/recovery of the FCS of harbour porpoise.

We question the conclusion that the UK harbour porpoise population is at FCS, which, although should not directly influence designation of sites, has implications for management of them. We note that the Conservation Literature Review states that '*With regard to the status of harbour porpoises in UK waters, there is a broad-scale lack of data on year-round seasonality in*

---

<sup>3</sup> [http://www.ascobans.org/sites/default/files/document/NSG4\\_Inf\\_4.3\\_BananaPinger.pdf](http://www.ascobans.org/sites/default/files/document/NSG4_Inf_4.3_BananaPinger.pdf)

*numbers and distribution and information on immigration and emigration to and from neighbouring MUs, with only limited data on demographical trends (fecundity and annual survival) and diet. Collecting these ecological data (which inform vital rates) is not easy, but they are necessary if population trends are to be explained or forecast, and conservation status assessed accurately.*' Coupled with the fact that all other Marine Atlantic Member States reported harbour porpoise assessments of 'unfavourable – inadequate' or 'unfavourable – bad' (with the exception of the UK, Ireland and Denmark), we believe that there is considerable uncertainty as to the conservation status of harbour porpoise.

We also have concerns that at this stage that all indications from the consultation documents are that activities only need to be considered in terms of impacts on the FCS of the population as a whole or impacts at the Management Unit (MU) scale, rather than in relation to the site. In particular, we do not agree with the statement in the Southern North Sea Selection Assessment document that; *'It is therefore not appropriate to use site population estimates in any assessments of effects of plans or projects (i.e. Habitats regulation Assessments), as these need to take into consideration population estimates at the MU level, to account for daily and seasonal movements of the animals.'* Although not relevant for this consultation, which should be based solely on the scientific justification of designation, we would be pleased to discuss with you our concerns relating to the implications of the designations for HRAs at a later date. We have previously raised this issue during Examination by the Planning Inspectorate of the Hornsea 2 wind farm<sup>4</sup>, as have Natural England<sup>5</sup>. In brief, we believe that HRAs need to assess the impact at the site level, rather than the population level. This would be in line with HRAs for other mobile species such as seals and birds. There is also legal precedent for this approach, as tested in the RSPB vs Secretary of State for Scotland, July 2000<sup>6</sup>.

We have concerns that the sufficiency targets of 20% abundance of UK MU population in SACs have not been met. The North Sea MU is only just below the target at 18%, but the Celtic and Irish Seas MU is well below at 14%. Overall, for the two MUs in this consultation, the coverage is only 16%. We have a number of comments to make regarding sufficiency:

- These sites alone should not be considered adequate to meet the requirements of the Habitats Directive and we would question whether they would be considered sufficient by the European Commission. The link provided in the supplementary note regarding what the Commission has considered sufficient for other Member States does not adequately explain how the conclusions of sufficiency were reached and further clarification on this would be welcomed.

---

<sup>4</sup> <http://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/projects/EN010053/Events/Deadline%20-%20-%2012-11-2015/The%20Wildlife%20Trust.pdf>

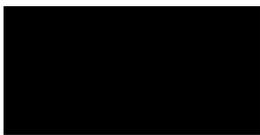
<sup>5</sup> <http://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/projects/EN010053/Events/Deadline%20-%20-%2012-11-2015/Natural%20England%E2%80%99s%20response%20for%20Deadline%20.pdf>

<sup>6</sup> <https://www.scotcourts.gov.uk/search-judgments/judgment?id=0f7c87a6-8980-69d2-b500-ff0000d74aa7>

- If it is deemed that there are no suitable additional sites based on the modelling work that has already been completed, we believe that further data collection and evidence gathering will be needed to identify sites. Given that the cut off date for data into this process was 2011 and that it is likely there has been a significant amount of data collected since then, we advise that further work is done to identify additional sites. However we do not believe that this should delay the designation of the sites in this consultation.
- We believe that there are potential inshore sites which merit further investigation and that land based data should be given greater consideration for designation of areas which may be important for breeding. We would welcome more guidance on what would be required of land based data to make it more suitable for identifying sites. We are aware of additional areas of high porpoise density in Lands End/ St Ives and Scarborough where we would welcome further conversations regarding data requirements. We also understand that there is evidence to support the extension of the northern strip of the North Channel site out to the 12nm limit and refer you to the response from Ulster Wildlife for more detail. Again, we do not believe that this should cause a delay to the designation of the current sites.

Although not directly relevant to this consultation, we are pleased to see the announcement of a consultation on a proposed site in Scottish waters. This appears to be adequate to address the sufficiency requirements for the West Scotland MU. However, we still have concerns as to the lack of sites in the Scottish waters of the North Sea MU. The original modelling identified potential sites in the outer Moray Firth which would be both important in their own right but also contribute to reaching the sufficiency target for the North Sea MU.

Thank you for consideration of our submission,  
Kind regards,



Joan Edwards  
Head of Living Seas  
The Wildlife Trusts