

Section 51 Advice in Respect of Habitats Regulations Assessment and Water Framework Directive for the Proposed Tidal Lagoon Cardiff Development (17 April 2015)

- 1.1 The information contained within this note is provided in response to the Habitats Regulations Assessment (HRA) and Water Framework Directive (WFD) information contained within the Proposed Tidal Lagoon Cardiff Scoping Report (the 'Scoping Report'), as issued to the Planning Inspectorate (the 'Inspectorate') on 2 March 2015. Tidal Lagoon Cardiff Ltd (the applicant) indicated that comments would be welcomed on the information provided in the Scoping Report in relation to HRA and WFD. As these matters are not addressed by the Secretary of State in the forming of the EIA Scoping Opinion, the Inspectorate has provided further advice on these matters.
- 1.2 The Inspectorate welcomes the opportunity to comment on draft documents, as this enables us to provide advice about any omissions or potential procedural risks for the acceptance or examination stages. This advice forms part of our pre-application service, details of which are available in the Inspectorate's [pre-application prospectus](#), which outlines the structured and facilitative approach to support that the Inspectorate can offer during the pre-application stage.
- 1.3 The Inspectorate's comments on the applicant's draft information are set out below. These comments are provided without prejudice to any decisions taken by the Secretary of State during acceptance or by the Examining Authority during examination, if the proposed development is accepted for examination.
- 1.4 Please note that reference to 'European sites' within this document is to Special Areas of Conservation (SAC), candidate SACs (cSAC), Special Protection Areas (SPA), Sites of Community Importance (SCI), potential SPAs (pSPA), Ramsar sites, possible SACs (pSAC), proposed Ramsar sites and sites identified, or required, as compensatory measures for adverse effects on any of the above sites.

Habitats Regulations Assessment (HRA)

- 1.5 The Inspectorate notes that European sites are located within and close to the proposed development. It is the applicant's responsibility to provide sufficient information to the Competent Authority to enable them to carry out a HRA if required. The applicant should note that the Competent Authority is the Secretary of State.
- 1.6 The applicant's attention is drawn to The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (as amended) (The APFP Regulations) and the need to include information identifying European sites which may be affected by a proposal. The submitted information should be sufficient for the Competent Authority

to make an appropriate assessment of the implications for the site if required by Regulation 61(1) of the Habitats Regulations.

- 1.7 The report to be submitted under Regulation 5(2)(g) of the APFP Regulations with the application should provide sufficient information first, to enable a formal assessment by the Competent Authority of whether there is a likely significant effect; and second, should it be required, to enable the carrying out of an appropriate assessment by the Competent Authority.
- 1.8 When considering aspects of the environment likely to be affected by the proposed development; including flora, fauna, soil, water, air and the inter-relationship between these, consideration should be given to the designated sites in the vicinity of the proposed development.
- 1.9 Further information with regard to the HRA process is contained within Inspectorate's Advice Note 10 available on the National Infrastructure pages on the Planning Portal website. The applicant's attention is also drawn to the comments of Natural Resources Wales (NRW) and Natural England in respect of HRA matters, as presented in Appendix 2 to the Secretary of State's Scoping Opinion.
- 1.10 The applicant is reminded that unless the applicant's No Significant Effects Report (NSER) or Habitats Regulations Assessment Report (HRA Report) concludes, that no reasonable scientific doubt remains 'identified in the light of the best scientific knowledge in the field', that the project will not adversely affect the integrity of any European site, the applicant's assessment will need to move to Stage 3 and 4 of the HRA process: consideration of alternatives, compensatory measures, and whether the project is justified by Imperative Reasons of Overriding Public Interest (IROPI).
- 1.11 The applicant's attention is drawn to the Inspectorate's Advice Note 10 in respect of HRA Stages 3 and 4. An assessment of alternatives should be provided which identifies and assesses the alternatives that have been considered. Alternative solutions can include a proposal of a different scale, a different location, and an option of not having the scheme at all - the 'do nothing' approach. Where it can be demonstrated that there are no alternative solutions to the proposal that would have a lesser effect or avoid an adverse effect on the integrity of the European site(s), the project may still be carried out if the Competent Authority is satisfied that the scheme must be carried out for IROPI and where adequate compensatory measures have been secured (see below). In cases where there are priority natural habitats or species affected by the development, the IROPI justification must relate to either: human health, public safety or beneficial consequences of primary importance to the environment; or any other imperative reasons of overriding public interest.
- 1.12 If the applicant concludes that adverse effects on the integrity of any European site cannot be ruled out, an assessment of compensatory measures must be included in the HRA Report which forms part of the

DCO application documents. Consultation must have been undertaken with the relevant SNCBs and landowners, and applicants are strongly encouraged to undertake this consultation as early as possible within the pre-application stage. The application will need to clearly demonstrate how the Secretary of State will be able to comply with his duty under Regulation 66 of the Habitats Regulations to secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.

- 1.13 In respect of the applicant's HRA report, the Inspectorate recommends that a table be included in the report, regardless of which stage of the HRA process reached, which identifies the mitigation or compensation measures that support the conclusions of the HRA and how these measures have been secured in the draft DCO. The applicant should ensure that any embedded mitigation (design) relied upon for the conclusions of the HRA forms part of the project secured by the DCO.

Appendix 2.1

- 1.14 In relation to Appendix 2.1, the Inspectorate has identified a number of errors in the applicant's definition of European sites. It is recommended that these errors are corrected in the HRA report to be provided with the DCO application. To clarify, the protection given by the Habitats Directive and the Wild Birds Directive is transposed into UK legislation through the Conservation of Habitats and Species Regulations 2010 (as amended) (the 'Habitats Regulations'). Sites of Community Importance (SCIs), Special Areas of Conservation (SACs), candidate Special Areas of Conservation (cSACs) and Special Protection Areas (SPAs) are protected under the Habitats Regulations. As a matter of policy, the Government also applies the procedures described below to potential SPAs (pSPAs), possible SACs (pSACs), Ramsar sites, and (in England) proposed Ramsar sites and sites identified, or required, as compensatory measures for adverse effects on any of the above sites. Attention is drawn to the Welsh Government's PPG Wales, at Paragraphs 5.3.8 to 5.3.10, and TAN5, at Paragraphs 5.2.2 and 5.2.3. The relevant policy for England is the NPPF, at Paragraph 118.
- 1.15 The Inspectorate welcomes the applicant's approach to undertake an initial high-level, pre-screening assessment of European sites and potential impact pathways from the project, and welcomes the proposal to discuss and develop this further as part of the Evidence Plan process for the project.
- 1.16 With respect to the tables included in Appendix 2.1, the Inspectorate advises that the applicant provide further explanation and definitions of the likelihood of an impact pathway occurring (i.e. provide a definition of 'no impact', 'impact unlikely', 'possible', and 'probable'). The applicant should also explain the difference between no impact and impact unlikely, and provide justification in the table footnotes for the conclusion of 'no impact'. The applicant should provide an explanation of the environmental effect categories that have been used, for example, define what effects are being considered under 'water quality effects'. It is

unclear from Appendix 2.1 whether the European sites identified as no impact pathway or impact unlikely would be presented in the final HRA report for the project. The applicant may wish to include the justification of exclusion of European sites in any HRA report provided with a DCO application; the ExA is likely to ask for the justification to be provided during the examination if it is not in the report.

- 1.17 The Inspectorate notes potential discrepancies and anomalies within the tables presented in Appendix 2.1. In the case of Pembrokeshire Marine SAC and Carmarthen Bay and Estuaries SAC, it is unclear why the project gives rise to 'alteration of coastal processes and sediment transport' but not 'habitat loss, degradation, fragmentation'. The Inspectorate strongly recommends that the potential impact pathways be discussed and agreed so far as possible with the relevant Statutory Nature Conservation Bodies (SNCBs) before the submission of the application. The Inspectorate notes that there are also a number of qualifying features missing or incorrectly identified within the list of European sites and their qualifying features. The Inspectorate advises the applicant to agree the European sites and their qualifying features with the relevant SNCBs.

Appendix 2.2

- 1.18 Appendix 2.2 to the Scoping Report identifies a number of SPAs and Ramsar sites that are considered most likely to be affected or which potentially may be affected, should measures to prevent or reduce any significant adverse effects on the environment or compensation for loss or reductions in the numbers of a Severn Estuary SPA and/or Ramsar qualifying feature not be fully possible. The Inspectorate notes that the SPAs and Ramsar sites identified include sites in England, Scotland and Northern Ireland. In the event that the applicant's HRA report in support of the project identifies potential for likely significant effects on European sites in England, Scotland and Northern Ireland, the applicant should consult with the relevant SNCBs of these countries in advance of the DCO application.
- 1.19 The Inspectorate draws attention to the Inspectorate's Advice Note 12 with reference to whether the proposed development is likely to have significant effects on the environment of another EEA State, and the role of developers in this respect. The applicant's attention is also drawn to the following DECC guidance regarding European sites and transboundary impacts, in the event that the applicant identifies effects on European sites outside of the UK: DECC (2015) [Guidelines on the assessment of transboundary impacts of energy developments on Natura 2000 sites outside the UK](#).

Appendix 2.3

- 1.20 The Inspectorate welcomes the applicant's proposed use of an Evidence Plan approach.

- 1.21 In England, an Evidence Plan is a formal mechanism to agree upfront what information the applicant needs to supply to the Inspectorate as part of a DCO application. The Evidence Plan will help to ensure compliance with the Habitats Regulations. It will also help the applicant meet the requirement to provide sufficient information (as explained in Advice Note 10) in their application, to enable the Secretary of State to decide whether the application is of a satisfactory standard for acceptance and whether an appropriate assessment is required.
- 1.22 In Wales there is no formal Evidence Plan process. However, the Inspectorate welcomes the applicant's intention to follow a similar process and the engagement with SNCBs in this process. The Evidence Plan does not preclude additional evidence being asked for by the Examining Authority at the examination stage or the Secretary of State at the Appropriate Assessment stage.
- 1.23 The Evidence Plan proposed in Appendix 2.3 includes not only HRA matters but also those pertaining to the WFD and MZCs. Although this extends the normal remit of the Evidence Plan process, the Inspectorate considers that there are benefits to combining these issues together due to the overlapping nature of the assessments. The applicant must ensure that drivers from the other assessments do not influence the requirements for the HRA evidence base. The evidence required for the HRA should be distinct from that required for the WFD and MCZ assessments. The Inspectorate reminds the applicant that sufficient evidence must be supplied with the DCO application in respect of the HRA, WFD and MZC. The applicant should not rely on data collection after submission to inform their assessments e.g. through the proposed Adaptive Environmental Management Plan (AEMP).
- 1.24 The proposed Evidence Plan process indicates that engagement with non-statutory bodies may be undertaken. Environmental Non-Governmental Organisations (NGOs) may hold data and evidence that may be relevant to the assessment of an NSIP under the Habitats Regulations. It is best practice to involve environmental NGOs at an early stage of pre-application, including by seeking their views on an Evidence Plan. The Inspectorate encourages the applicant to engage widely with stakeholders as part of the Evidence Plan process.
- 1.25 The Inspectorate discourages the use of loose phrasing such as 'where appropriate', 'where possible', 'best endeavours' to ensure certainty is provided to stakeholders with regard to the evidence that is being collected to inform the HRA, WFD and MZC assessments.
- 1.26 The Inspectorate supports the formation of a marine mammal Expert Working Group as part of the Evidence Plan process, in light of the potential for new European sites to be designated for harbour porpoise in UK waters.
- 1.27 The applicant's attention is drawn to the comments made on Appendix 2.1 above with regard to the correct identification of European sites. The Inspectorate reminds the applicant that likely significant effects must be

considered on the Ramsar sites as a whole, rather than only considering those species and habitats that have not been considered as part of an SAC or SPA.

- 1.28 The Inspectorate notes the applicant's request that the SNCBs ensure their advice is consistent between this project and other NSIPs. The applicant should not place reliance on adopting an identical approach to previous NSIPs, such as Tidal Lagoon Swansea Bay. The different geographic location, scale, and complexity of the proposals mean that although similarities in approach may exist, it would not be appropriate to replicate previous work.
- 1.29 The Inspectorate draws the applicant's attention to PINS Advice Note 10 with regard to those projects the Inspectorate believes should be considered for in-combination effects with the proposed development. Note that this list is not exhaustive. The Inspectorate recommends that a transparent screening process for the identification of cumulative/in-combination projects and plans is adopted for the project, clearly setting out the basis/thresholds for inclusion/exclusion of particular projects or plans. The Inspectorate would expect other tidal lagoons to be considered to an appropriate level of detail. It would not be appropriate to exclude reasonably foreseeable developments, particularly those being brought forward separately by Tidal Lagoon Power Ltd.
- 1.30 The Inspectorate notes that whilst the AEMP is referred to in respect of the Evidence Plan process, no specific reference has been included to the Ecosystem Enhancement Project (EEP) referred to in the Scoping Report. The Inspectorate recommends that the EEP also be included in the Evidence Plan discussions.

Water Framework Directive

- 1.31 The aim of carrying out a WFD Assessment is to determine if specific components or activities related to the planned development will either compromise the attainment of good ecological potential and good chemical status of any waterbody or result in deterioration of its status.
- 1.32 The Inspectorate notes that the Project is likely to affect waterbodies designated under the WFD (Directive 2000/60/EC) and welcomes the applicant's proposal to submit WFD screening and compliance reports in support of the DCO application. Each specific component of the scheme, that may interact with or pose a potential risk to a water body, needs to be identified and its potential impact assessed. Therefore there should be a description of the specific component or activity being assessed. The potentially impacted waterbodies should also be identified and baseline data provided on each water body or water bodies. There should be sufficient information to enable the decision maker to assess the potential impacts of the Project on the status of WFD waterbodies in accordance with the requirements of the WFD. The cumulative nature of impacts should be assessed.

- 1.33 The Inspectorate advises that the applicant collect data to identify all affected waterbodies, not just waterbodies for which the development would require derogations under Article 4(7) of the WFD.
- 1.34 Where an adverse impact is identified on a waterbody that could cause a deterioration in its WFD status, or could prevent actions that are required to raise the WFD status of the waterbody, the project must be assessed and justified in the context of the actions proposed to mitigate the adverse impact on the status of the waterbody or to fully justify a derogation of those requirements based on relevant regulatory criteria. The applicant is directed to the requirements of the WFD in respect of any Article 4(7) derogation, together with Article 4(8) and 4(9) and should ensure that the WFD reports include the information necessary to demonstrate that the conditions of the WFD derogation can be met.
- 1.35 The Inspectorate recommends that the detailed scope and content of WFD Screening and Compliance documents are agreed with the relevant SNCBs, including NRW and the Environment Agency, before submission of the application.