



nature's voice

The Planning Inspectorate
National Infrastructure Directorate
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23 November 2012

Dear Sirs

Able Marine Energy Park - Planning Inspectorate Ref: TR030001
The RSPB - Registration Identification Ref: 10015550

The summary of case submitted by Able (and only just found on the website and not brought to our attention by the Applicant) is not just a summary of the case already put but contains new evidence, new documents and new points which have not previously been raised. This is impermissible. Our concern expressed orally and in our document supplied on Tuesday (20 November 2012) have proved well founded. The process adopted has resulted in the Applicant trying to answer the RSPB's points after the written stages and after the Issue Specific Hearing without the RSPB having any opportunity to respond. This is unacceptable.

The RSPB has not had time to assess the information provided and would plainly need time (which it does not have) to provide a proper response. However the following key points immediately jump out from the new evidence:

- a. The Applicant do (for the first time) a comparative exercise with other compensation schemes in the text and in Annex C. That exercise is superficial and misleading. It ignores the very different circumstances in which different proposals are worked up and considered: (1) the ecological function lost (or in most of the cases referred to disturbed) by the development; (2) the site specific challenges in replicating that lost – i.e. whether rapidly accreting shoreline, high sediment estuary; (3) the extent to which the compensation is pursuant to a tried and tested approach in such environments or is novel and untested; (4) the reasons why on the individual facts the RSPB and NE were satisfied with the compensation on offer. On all these matters the RSPB has been clear throughout that there is no valid comparison with any of the other examples. It is entirely inappropriate for new contrary evidence to be raised at this stage.

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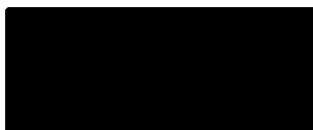
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- b. In any event Annex C is seriously wrong on the ratios. We have provided unchallenged (until now) evidence on the ratios many months ago. The correct ratios are in our evidence. More importantly looking at the overall ratio in isolation from the facts is wholly misleading. For most of the “comparables”, the harm covered both direct loss and areas disturbed. In most of the cases the areas where there was some disturbance (not outright loss) was a significant majority of the total area affected – see the 50ha out of 74ha at London Gateway (Shellhaven). At those sites there was at least 1:1 compensation even of areas which were only potentially disturbed (not lost). The read across from the data elsewhere to here is therefore wrong. We further note that in a number of these cases, there was no certainty of disturbance by accretion or otherwise but on a precautionary basis the maximum area that might be disturbed (not lost) was assessed and the whole of that compensated on a ha:ha basis. The result was that there was both new intertidal mudflat and the potentially but not necessarily disturbed and certainly not lost intertidal mudflat. The Applicant are comparing apples and pears.
- c. Further their analysis is comparing managed realignments with an RTE. For reasons gone into at length this approach is misconceived.
- d. In respect of the future possible loss of North Killingholme Marshes, there is no answer to the RSPB’s Mr Dixon’s point on the accretion to intertidal mudflat from sub-tidal. Further, it is asserted that there are other examples of accretion similar to that predicted at North Killingholme Marshes. No evidence is provided and the point is not accepted. In terms of the cliff (4.5m drop over a very short distance) even this late in the day no example is provided of this occurring anywhere else in the Humber.
- e. The Applicant now appear (although we query how this is carried through) to use invertebrate biomass from North Killingholme Marshes inflated by 20% to set a requirement for biomass at the RTE. A number of points arise: (1) there is no evidence anywhere that that level of biomass has been generated in any managed realignment never mind an RTE. There is no point having a target in respect of which there is no evidence it can be met and which on the contrary all evidence shows it cannot be met; (2) the 20% is not based on any scientific evidence but on Mr Saunder’s (NE) oral “say 20%” figure. The Applicant’s own evidence (please see Annex 35.6) shows that the growth in biomass between spring and autumn is much higher than this.
- f. A number of new points are made on carrying capacity – para 61 – 64. Our response attached at Appendix I addresses this. The RSPB has not had the opportunity to test the data provided which is not accepted.
- g. The data and argument on Knot are entirely new. At 5.30pm on the last working day before the Examination closes, the RSPB has no hope of understanding or responding to this new point.

This late evidence is a result of the flawed process pursued by the Applicant in this case and the late amendment of its proposals. It confirms the RSPB’s concerns on the process.

Yours faithfully



Rosie Sutherland
Legal Adviser

**Appendix I
Examining Authority's
Rule 17 Request dated 15 November 2012
Response by the
Royal Society for the Protection of Birds**

23 November 2012

Planning Act 2008

In the matter of:

**Planning Application for construction of the Able Marine Energy Park on the
South Bank of the River Humber at Immingham, North Lincolnshire**

**Planning Inspectorate Ref: TR030001
Registration Identification Ref: 10015550**



THE RSPB RESPONSE TO THE EXAMINING AUTHORITY'S RULE 17 REQUEST

1. The Examining authority requested on 15 November 2012 from Natural England, the Environment Agency, the Marine Management Organisation, the Applicant and the RSPB:

“Would the parties please give their views on how the protection of the ‘overall coherence of Natura 2000’ [Article 6(4) of the Habitats Directive 92/43/EEC] should be interpreted and applied in the present case?”

SPA and SAC

2. The RSPB wishes to remind the Examining Authority that it is only covering SPA issues in this examination and hence its focus on issues relating to the Humber Estuary SPA and its designation species. This is being raised again now as there is a difference between the requirements for the SPA network and the SAC network.
3. The SAC requirement is to designate a network that is representative of the Habitats Directive¹ habitats and species and there is no requirement to designate all qualifying areas. This is why there are qualifying areas which are not protected and why therefore a new SAC can be classified to compensate for one that is lost.
4. As highlighted in Defra draft Guidance on the Habitats Directive on the application of Article 6(4) page 5, para 21 (and its accompanying footnote 4) SAC can be compensated by way of a new site being classified since as set out above the requirement for SAC *species* is not that all the most suitable territories have to be classified but instead that a representative network of those species is created.

SPAs

5. However, the Birds Directive² requires that the ‘most suitable territories’ be designated and therefore if an area is a ‘most suitable territory’ it should already be designated as an SPA.

¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (consolidated).

² Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version).

6. Article 4(1) and (2) state (as transposed in Regulation 12A of the Conservation of Species and Habitats Regulations 2010 (as amended) (**the Habitats Regs**)):

“4(1) The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat **in order to ensure their survival and reproduction in their area of distribution.**

In this connection, account shall be taken of:

- (a) species in danger of extinction;
- (b) species vulnerable to specific changes in their habitat;
- (c) species considered rare because of small populations or restricted local distribution;
- (d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States **shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area** where this Directive applies.

4(2) **Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes.”** (emphasis added)

7. This duty to identify and designate the ‘most suitable territories’ for Annex I and migratory birds, is to deliver an ecologically coherent network of SPAs. The EU Commission needs to be able to satisfy itself that the UK SPA network forms a coherent whole that meets the protection requirements of Annex I and migratory species in the geographic sea and land area where the Birds Directive applies (Article 4(3) of Birds Directive).
8. However it is worth noting that not only due to the SAC being affected by the Applicant’s proposals but also due to article 6(3) and 6(4) also being applied to SPAs (please see article 7 Habitats Directive) all aims and objectives of both Directives need to be considered as a result of the new regulation 9 the Habitats Regs which states:

“9.— Duties relating to compliance with the Directives

- (1) The appropriate authority [the SoS in this case], the nature conservation bodies and, in relation to the marine area, a competent authority **must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the** [Birds and Habitats] **Directives.**

- (2) Paragraph (1) applies, in particular, to functions under the following enactments—

.....

the Natural Environment and Rural Communities Act 2006,
the Planning Act 2008,
the Marine Act, in particular any functions under Parts 3, 4, 5 and 6 of that Act (marine planning, marine licensing, nature conservation and management of inshore fisheries, respectively), and
these [Habitats] Regulations.

- (3) Without prejudice to the preceding provisions, a competent authority [the Examining Authority due to having to report to the SoS and the SoS in this case], in exercising any of their functions, must have regard to the requirements of the [Birds and Habitats] Directives so far as they may be affected by the exercise of those functions.”

Article 4 obligations and SPA boundaries

9. Within the UK there are no sufficiently clear, precise, targeted or binding special conservation measures as an alternative mechanism to SPA designation to meet its Article 4 obligations and therefore SPA designation is the sole means by which the UK meets those obligations to “secure the survival and reproduction of [Annex I and migratory] species in their area of distribution”.
10. In addition in the UK SPAs are designated with extremely tight boundaries and no buffer zones (unlike for example Holland where there are buffer zones around all their SPAs) meaning therefore that every area within the UK SPAs has been included due to it contributing to the integrity of the site and that site’s designation species. Due to this and the requirement that all the most suitable territories are designated if any part loses its ecological function (directly or indirectly) then needs to be fully/entirely replaced to ensure SPA network maintained.
11. We wish to highlight the RSPB’s response (dated 1 November 2012) to the Examining Authority’s Rule 17 Request dated 23 October 2012 where the international, European and national importance of the Humber Estuary SPA and North Killingholme Marshes is set out (paras 1.4 to 1.6 and 1.9):
- “1.4 By comparison, from the latest published WeBS figures (2009-10) (Annex I attached, page 3) the GB maximum population (i.e. 5 year mean peak) is 34,977 and Northern Ireland maximum population is 1,748 meaning that the UK maximum population is 36,725).

- 1.5 The top five sites for black-tailed godwits (please see EX 28.3 part 2 Table 1-6) are (based on 5 year mean peak:

The Wash	9,265
Thames Estuary	5,737
Dee Estuary (England & Wales)	4,811
Ribble Estuary	4,453
Humber Estuary	4,180
Total	28,466

- 1.6 So there is 82% of GB maximum population found at just 5 sites, with 92.38% of GB population on the top 7 sites (Annex I attached, page 4). The Humber Estuary alone supports 12% of the GB population.

.....

- 1.9 The relatively simple implementation of conservation measures on existing sites contrasts with the difficulties associated with attempting to replicate these sites' ecological function on new compensation sites. North Killingholme Marshes holds 5.4% of the international population of the Icelandic race of black-tailed godwits, and North Killingholme Haven Pits over 8% (Annex B2 of RSPB's Written Representations, 29 June 2012, Dr Prater's proof of evidence, page 3, para 3.1). The important of the ecological functions provided by these two sites is clearly shown by the densities of black-tailed godwits that use them and cannot be easily recreated, as the RSPB has demonstrated in its criticisms of the compensation measures to date."

12. As we have already set out in the RSPB's Summary of its oral case presented³ it is inappropriate to suggest there is space within this SPA to absorb displaced birds (please see paras 37-46) due to spare carrying capacity and therefore we will not repeat this point here.

EU Guidance on Article 6(4)

13. Whilst we appreciate that extensive reference from all sides has been had to the EU Guidance⁴ we recommend that consideration is also given to pages 10 to 18.

14. For example the box on page 11 where it clearly states that:

"The compensatory measures constitute measures specific to a project or plan, additional to the normal practices of implementation of the "Nature" Directives. They aim to offset the negative impact of a project and to **provide compensation corresponding precisely to the negative effects on the species or habitat concerned**. The compensatory measures constitute the "last resort". They are used only when the other safeguards provided for by the directive are ineffectual and the decision has been taken to consider, nevertheless, a project/plan having a negative effect on the Natura 2000 site." (emphasis added)

³ Submitted 20 November 2012.

⁴ EU Commission Guidance on Article 6(4) of the Habitats Directive, January 2007.

15. And on page 12 under the subheading *Overall coherence of the Natura 2000 Network*:

“Having said this, it is clear that the importance of a site to the coherence of the network is a function of the conservation objectives of the site, the number and status of the habitats and species found within the site, as well as the role the site plays in ensuring an adequate geographical distribution in relation to the range of species and habitats of species concerned.”

16. We have made extensive submissions on the importance of North Killingholme Marshes (and “the package” with North Killingholme Haven Pits).

17. The guidance goes on:

“Art. 6(4) requires to “protect” the overall coherence of Natura 2000. Thus, the Directive presumes that the “original” network has been coherent. If the exception regime is used, the situation must be corrected so that the coherence is fully restored.

With regard to a plan or project, the compensatory measures defined to protect the overall coherence of Natura 2000 network will have to address the criteria mentioned above. This would mean that compensation should refer to the site's conservation objectives and to the habitats and species negatively affected in comparable proportions in terms of number and status. At the same time the role played by the site concerned in relation to the biogeographical distribution has to be replaced adequately.

.....

The *‘Birds’ Directive* does not provide for bio-geographical regions, or selection at Community level. However by analogy, it could be considered that *the overall coherence of the network* is ensured if:

- compensation fulfils the same purposes that motivated the site's designation in accordance with Article 4(1) and 4(2) of the Birds Directive;
- compensation fulfils the same function along the same migration path;
- the compensation site(s) are accessible with certainty by the birds usually occurring on the site affected by the project.”

18. The box on page 13 states:

“In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: a) address, in comparable proportions, the habitats and species negatively affected; b) provide functions comparable to those which had justified the selection criteria of the original site, particularly regarding the adequate geographical distribution. Thus, it would not be enough that the compensatory measures concern the same biogeographical region in the same Member State.

The distance between the original site and the place of the compensatory measures is not necessarily an obstacle as long as it does not affect the functionality of the site, its role in the geographical distribution and the reasons for its initial selection.”

19. Under the subheading 1.5 Criteria for designing compensatory measures, 1.5.1 Targeted compensation (page 16):

“...Once the biological integrity likely to be damaged and the actual extent of the damage have been identified, the measures in the compensation programme must address specifically those effects, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are preserved in the long term. Thus, these measures should be the most appropriate to the type of impact predicted and should be focused on objectives and targets clearly addressing the Natura 2000 elements affected. This requires that measures clearly refer to the structural and functional aspects of the site integrity, and the related types of habitat and species populations that are affected.

.....

.....in designing compensation, clear objectives must be established:

- Identify the total numbers of species affected
- Identify the principle species affected and the broad proportion of the total population(s) that these occur in;
- Identify the principle function(s) of the habitats that will be adversely affected that the species depend on e.g. feeding, roosting, etc;
- Identify the likely populations of species and the habitat functions at favourable conservation status;
- Identify the measures needed to offset the damage to the habitat functions and species affected so that they are restored to a state that reflects the favourable conservation status of the area affected.

Any uncertainty over the precise nature and/or magnitude of the adverse effects should be thoroughly tested. Where appropriate, a precautionary approach should be adopted and the assessment of adverse effect based on a worse-case scenario.”

20. 1.5.2. Effective *compensation* (which is already in Applicant’s summary below para 19). And on page 17 under heading 1.5.4. Extent of compensation:

“The extent required for the compensatory measures to be effective has a direct relationship to the quantitative and qualitative aspects inherent to the elements of integrity (i.e. including structure and functionality and their role in the overall coherence of the Natura 2000 network) likely to be impaired and to the estimated effectiveness of the measures.

Consequently, compensation ratios are best set on a case-by-case basis and must be initially determined in the light of the information managed during Article 6(3) assessment and ensuring the minimum requirements to meet ecological functionality. The ratios may then be redefined according to the results observed when monitoring the effectiveness, and the final decision on the proportion of compensation must be justified.

There is wide acknowledgement that ratios should be generally well above 1:1. Thus, compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time (e.g. without compromising the

preservation of the habitats or the populations of key species likely to be affected by the plan or project).”

Conclusions

21. In order to be able to allow development to harm a SPA then compensation measures must be secured to enable the coherence of the network to be maintained. Since all of the most suitable territories need to be designated the loss of any one of them or any part of them needs to be fully and entirely replicated in order to maintain the coherence of the SPA network.
22. Allowing development to occur despite its adverse effects on a SPA is only permitted if compensation measures are proposed that will *compensate* for the impacts resulting from the development. Reliance on re-distribution of species within the remaining part of the SPA is not compensation and is impermissible in principle.
23. In this regard it is worth noting that application of regulations 62 and 66 of the Habitats Regs are actually fairly limited and since 2001 there have been only approximately 15 project applications that have had regulations 62 and 66 considered for them (this excludes all the Environment Agency projects for - for example coastal protection projects, flood defence works etc). The facts here are of the direct loss of a key habitat for a key species on the SPA.

APPENDIX II

The RSPB comments on the CEMMP submitted 20 November 2012

The RSPB thought it may be of assistance to include a few comments on the latest draft of the CEMMP (submitted by Able on 20 November 2012). However please note that these comments are limited to a few head line points due to the limited time available until the end of the Examination period.

Steering Group

Para 6 It would be worth including a dispute resolution process within the procedures for the Steering Group so that should the need arise there is a procedure in place. We would recommend arbitration.

Environmental Baseline – North Killingholme Marshes

Para 8 Table 1 uses the data from Annex 10.1 – thereby defining the May 2010 benthos survey as suitable. It has now been agreed that a further survey will be carried out in the more appropriate month of September to ensure there is an appropriate baseline from North Killingholme Marshes (**NKM**) for invertebrates. In addition it needs to be agreed what needs to be covered by that September survey to ensure that benthic invertebrates both in the development area and outside it are clearly shown and the development site data used.

Environmental Impacts – Bird Species

Para 11 Table 3 provides bird numbers but it is inappropriate to use the data in this table for the Humber Estuary SPA for several reasons:

1. The up to date WeBS data should be used as the baseline – i.e. 2006/7-2010/11. Not only is this available but it includes the year of Through The Tide Counts (**TTTCs**).
2. The years chosen to include in the range must be those the BTO includes as acceptable counts – some of those in Table 3 are not so accepted by the BTO.
3. The mean should also be included not just extremes of range.

As a sample we have extracted the accurate and correct data for the Humber Estuary SPA as follows:

Species	Minimum	Mean	Maximum
Avocet	486	760	1159
Bar-tailed Godwit	1490	3111	5926
Black-tailed Godwit	3828	4351	5323
Curlew	3037	4005	5180
Dunlin	14951	16842	18622
Lapwing	11700	15296	19403
Redshank	3204	4007	4716
Ringed Plover	1415	1981	2547
Shelduck	4823	5588	6137

Baseline - Cherry Cobb Intertidal

Para 19 Table 4 is not part of EX34.2 as claimed and appears to be additional data from elsewhere. In addition please note that the data in EX34.2 is not appropriate to use due to:

1. it is 9 year old data;
2. it does not specifically identify Cheery Cobb Sands (**CCS**) data within it (the data are cluster group 3.1 and 4 but not identifiable as such); and
3. it only relates to mid shore.

So it is not possible to use EX34.2 for relevant species' abundance.

Para 20 It not appropriate as it is only included to try and make a point which is not correct due to there being no specific data to support it.

Objectives

Regulated Tidal Exchange

Rationale and Objectives

Para 43 Reference to a 20% uplift is not justified and may be an underestimate please see Annex 35.6 which gives a range of normally 25-40% but also quotes references for 53-100% removal. So, relying on 20% is inappropriate.

Objectives

Surely the headline point here is that there is no point including a target if there is no evidence that (however much care you put in) it can be reached. Able have now agree to a new September survey – please see comments made above in relation to para 8.

Wet Grassland and Open Water Area

Rationale

Para 49 States that the location of the roost will mean that CCS foreshore can be utilised further and a comparison made with NKM and North Killingholme Haven Pits (**NKHP**) – it needs to be made clear that the open water/roost in CCS wet grassland is primarily to support Black-tailed Godwits feeding in the RTE, not the existing CCS foreshore mudflats and to rely on that area is not an appropriate compensation measure.

Birds

Rationale

Para 59 States that once functioning the compensation site will be required to support **up to** the peak count of birds displaced from NKM (as set out in Table 3 – see comments above in relation to that table). This wording is meaningless – a level of birds well below the numbers at NKM would still meet this only operative requirement.

Para 60 There is a need to define where the WeBS data and any other data are from and what it covered, before using them. The WeBS data for NKM do not cover many of the main numbers of most species (Dunlin, Redshank, Curlew, Ringed Plover, and Bar-tailed Godwit) using the area as they are high tide counts when many species go elsewhere and most are not on NKHP. So any WeBS data here are highly inaccurate for the purposes of considering the changes post construction.

It might be better for CCS but as said before CCS/Paull Holme Strays mudflats are counted as a single unit.

WeBS is much better here for the whole Humber and is the only sensible source for that.

Objectives

Obj B1 Bullet 1 While it is important for context that Humber waterbird assemblage and populations are considered, it cannot be an Able target. So this needs to be omitted from this objective table whilst keeping reference in the CEMMP to the whole Humber for context.