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Our ref: RMB/JAL/LEG 01-13/010/Able MEP

Your ref: TR030001



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Dear Mr Harris

Able Marine Energy Park
PINS Reference: TR030001
Natural England Unique Reference Number: 10015549

We refer to the Examining Authority's letter of the 17 October 2012 containing a Rule 17 request for further comments on the Report on the Integrity of European Sites.

In providing our comments below we have consulted with the Environment Agency (EA) and the Marine Management Organisation (MMO). Both these agencies are in agreement with the comments detailed below and unless otherwise indicated we would be grateful if the Examining Authority would, unless indicated, treat the comments below as a joint response from Natural England, the EA and the MMO. We have stated where the views expressed are solely those of Natural England, the EA or the MMO.

Overall comments

We are disappointed that the format suggested to the Panel in Natural England's written representation dated 29 June 2012 has not been adopted as this has made it difficult to determine whether the most recent information and work undertaken with the Applicant has been incorporated into this assessment. In particular, Natural England, the EA and the MMO found the tables difficult to follow and question the benefit of tabulating the information in this format as each table requires lengthy explanatory footnotes. It is our advice that the format utilised in the Statement of Common Ground (SoCG) on the shadow HRA (sHRA) better reflects the Habitats Regulations process.

The SoCG on the sHRA, dated 24 August 2012 is more current and more comprehensive than the assessment document prepared by PINS.

If the document is to be relied upon as an assessment under the Habitats Regulations by the Secretary of State, it is our advice that it must be amended to take account of the comments of the agreed position in the SoCG and the up-to-date position of the parties in relation to the information and assessment of nature conservation impacts.

Furthermore, the document is incomplete in that it does not cover the detail of mitigation and compensation – both requirements of the HRA process. The document ends with a table determining whether there is an adverse effect on the integrity of the designated sites but does not include any discussion as to whether these adverse effects can be mitigated, or whether (subject to the derogations of Regulation 62) compensation is required to maintain the coherence of the Natura 2000 network.

These are important points and it is our view that the document needs fundamentally revising and updating. This may be done in line with the models already provided to PINS by Natural England and supported by the other agencies.

Some further specific points on the document as it currently stands are made in the attached Annex. These points are illustrative of the difficulties that arise from the approach that has been taken but should not be taken as exhaustive.

Effects on Sites of Special Scientific Interest (SSSIs)

Whilst this does not form part of the HRA, *Section 28G of the Wildlife and Countryside Act 1981* (as amended) places legal obligations on certain authorities in relation to SSSIs. These authorities are known as *Section 28G* authorities. An authority to whom *Section 28G of the 1981 Act* applies, has a duty in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological or physiographical features by reason of which a SSSI is of special interest to:

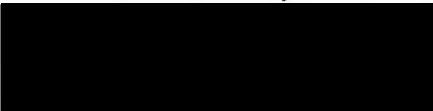
"take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest".

The SSSIs of relevance with regards to this application are the Humber Estuary SSSI and North Killingholme Haven Pits SSSI and therefore additional impacts on these SSSIs need to be considered by the Examining Authority. These impacts are already assessed in the agreed SoCG on the sHRA and we advise the Examining Authority to utilise this information when undertaking its assessment.

Regulation 9A of the Conservation of Habitats and Species Regulations 2010

With regards to whether there are any additional impacts on wild bird habitat beyond the boundaries of SPA, and non-SPA bird species as now covered under Regulation 9A of The Conservation of Habitats and Species Regulations 2010, it is Natural England's view that these impacts have already been assessed and mitigation will be provided through the terrestrial EMMP.

Yours sincerely



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Annex

It is difficult to compare the assessment of predicted impacts between those already agreed in the SoCG on the sHRA and those described in this assessment, as the same description has not been utilised. For example *“changes to water quality leading to changes in aquatic ecology”* and *“loss of foraging resource”* does not appear in the SoCG. Also, one predicted impact, *“change to intertidal habitat”* has a similar name to an impact described in the SoCG; *“indirect effects on intertidal mudflat”* but refers to a different impact; just the construction of the berthing pocket which will take place in the subtidal environment. In addition to this *“loss of foraging resources”* for birds only relates to indirect impacts on benthic communities, such as from dredging; however direct habitat loss would also clearly lead to a loss of foraging resource. This difference in the description of impacts also makes it difficult to determine which conservation objectives may be affected by the predicted impact.

There are a number of mistakes in the document. For example the reference to the Applicant's shadow Habitats Regulations Assessment paragraphs 3.2.9-3.2.12. This section does not mention mitigation and we are concerned that information from a document dated December 2011 is referred to without indicating how or whether the considerable amount of additional information submitted and further work done since this date has been taken into account. The correct reference for mitigation should be the SoCG on the sHRA, section 3.3.1. The in-combination assessment is incorrect; the Habitats Regulations require that an assessment should be made *“either alone or in combination with other plans and projects”*. This document undertakes the assessment alone and in combination. For example Matrix 2 recognises there is a likelihood of significant effects on the intertidal mudflats and sandflats arising from habitat loss; however Matrix 2A states that when this impact is considered in-combination with other plans and projects that result in habitat loss, there is no likelihood of significant effects. Logically this is not possible. In addition there is no in-combination assessment provided for the SPA. Footnote k under Matrix 1 is difficult to understand.

With regards to in-combination effects, Natural England is satisfied that the additional information (EX11.33 and EX44.2) adequately assesses impacts on curlew and lamprey. The EA believes there are potential impacts from the disposal of inerodible deposits in HU082 and further representations on this issue will be made by the EA in due course. Natural England, the EA and the MMO are still considering the material provided on other potential dredging impacts, but are hopeful that these can be resolved shortly.

It is stated that *“The applicant has defined a likely significant effect for impacts on bird populations...as being a reduction of 1% or less in the population”*. This is not what is required by the conservation objectives. The correct criteria are provided in the SoCG on the sHRA in section 3.6.1.

Matrix 1

This states there is no likelihood of significant effects on avocet or marsh harrier; however this is inconsistent with the agreed SoCG on the sHRA.

- Footnote b - This states that more than 1% of the Humber Estuary population uses Killingholme Marshes foreshore and will be displaced. Footnote b is found in the matrix under *“disturbance and displacement through increased noise or lighting”*; therefore Natural England assumes this refers to the functional loss of 11.6ha of intertidal habitat to the south of the quay, however this should be clarified.
- Footnote c - Natural England does not agree there is no likelihood of significant effects on North Killingholme Haven Pits from construction and operational disturbance; this is why we are discussing a suitably worded requirement with the Applicant. It is unclear why bar-tailed godwit and black-tailed godwit are assigned footnote c rather than b.
- Footnote h - This discusses the impact of the thermal plume but it is found in the matrix under *“loss of foraging resources”* which covers a range of impacts; changes in suspended sediment concentrations as a result of piling, dredging and release of contaminated sediments; there is no audit trail of whether these predicted impacts will have a significant effect.
- Footnote k - This footnote does not appear to reflect the latest information from the Applicant in terms of the potential projects that may have in-combination effects. The Applicant has submitted further in-combination evidence in EX44.2 along with further baseline information (EX28.3).

Matrix 2

The conclusions for grey seals and river lamprey are inconsistent with the agreed SoCG on the sHRA which states that there is a likelihood of significant effects from disturbance. The Applicant has worked with Natural England, the EA and the MMO to agree conditions to avoid an adverse effect on site integrity. This does not mean there is no likelihood of significant effects, which is a different test under the Habitats Regulations. The form of assessment should follow that in the SoCG.

In relation to changes to intertidal habitat, no assessment has been provided for “*mudflats and sandflats not covered by seawater at low tide*” when in actual fact this is the intertidal habitat.

- Footnote b - This footnote does not appear to use the most up to date information on habitat loss and gain. The tables in Annex B of the SoCG on the sHRA are the figures that are agreed, not those within Annex D of the sHRA. With regards to the potential impact on benthic ecology from the disposal of gravel material to site HU080, the MMO is currently considering the additional environmental information provided by the Applicant
- Footnote c - The changes in morphology in the dredge disposal area are not yet agreed; the Environment Agency is currently reviewing EX8.7A, and will be able to comment in due course as to whether there are any potential impacts.
- Footnote e - We have had difficulty in understanding this footnote which states “*no reduction in area or in quality*”. Whilst intertidal mudflats may not be affected by water quality issues, they will clearly be affected by a reduction in area.
- Footnote h - ‘Dredging’ - Monitoring and mitigation strategy for EON and Centrica outfalls – Natural England, the EA and the MMO are satisfied with the requirement suggested at paragraph 34, Schedule 11 of the most recent draft of the DCO.
- Footnote h - ‘Dredge disposal, 3rd bullet point’ - With regards to potential impacts from the disposal of gravel material to site HU080, the MMO is currently considering the additional environmental information provided by the Applicant and will provide comments in due course.
- Footnote h - Final bullet point - The EA is currently reviewing the additional information supplied by the applicant, including EX8.7A and EX10.8 and will comment in due course on its position regarding the transfer of material from the middle estuary to the outer estuary.
- Footnote i - The first part of this explanatory footnote refers to the suspended sediments arising from dredge disposal. The EA is currently reviewing EX8.7A and will comment in due course as to whether its view on this changes as a result of this additional information.
- Footnote j - The EA is currently reviewing the additional information supplied by the applicant, in particular EX8.12A with regard to the berthing pocket. When this assessment is complete the EA will provide any additional advice where necessary.
- Footnote k - The EA is currently reviewing the additional information supplied by the applicant, in particular EX 8.12A, and will respond on this point in due course.

Please also see the comments above about changes to intertidal habitat and the berthing pocket.

- Footnote h - given the statements provided in this section, and the assessment of dredging in the agreed SoCG on the sHRA, Natural England advises that it is not possible to rule out the likelihood of significant effects. In addition the EA has advised that the Applicant should provide 10ha (EA submission of 29th June 2012, paragraph 4.24) of intertidal habitat as compensation for indirect impacts caused by the presence of the new quay.
- Footnote i - Natural England is not only concerned about the potential effects of sediment plumes on grey seals and lamprey, but also on the benthic communities.

In relation to effects on integrity it is unclear why the information from the shadow Appropriate Assessment carried out by the Applicant (Able Marine Energy Park Habitats Regulations Assessment Report dated

December 2011) has been utilised to populate the matrices rather than the more recent agreed assessment of impacts in the SOCG on the sHRA.

Matrix 2A

Footnote d - The compensation for the Humber Flood Risk Management Strategy does not offset losses from development, but losses arising from coastal squeeze and any direct losses arising from EA flood defence works. With regards to the points raised about the in-combination effects, the EA is currently reviewing the additional information, in particular EX44.2 and EX8.7A, and will provide further advice in due course.

Matrix 4

There is no explanation of the symbol (\$) next to a number of species in the table.

Footnote e - The position in the SoCG of the sHRA is that there may be an impact on birds at North Killingholme Haven Pits (see also in footnote h and i). This paragraph is misleading as there are eight SPA species for which it is not possible to rule out an adverse effect on site integrity and therefore must be considered further. The term 'key species' used in Natural England's written representations is taken directly from the Examining Authority's written question 96 "*Key species identified as likely to be affected by the proposed development are the black-tailed godwit, redshank and curlew*". This is also referred to in footnote g and h.

Footnote j - The EA would point the Examining Authority to its submission of the 7 September 2012, paragraphs 2.1-2.4 where it confirms that it agrees with both the short-term and long-term losses as set out in the Tables within the agreed SoCG on the sHRA. We presume that the Examining Authority reference to the EA not accepting the long-term losses in the application refers to an earlier position in the application process, which the EA has now worked with the Applicant to resolve.

Footnote k - This figure should read 11.6ha – see table 3.1 in the SoCG on the sHRA

Footnote l - Please refer to Natural England's submission on the draft DCO dated 26 October 2012; requirement 20 and 38.

Matrix 5

We assume footnote a is the bold text under the matrix; this should be clarified. Please refer to response contained under Matrix 4 Footnote j above for the EA's latest position in respect of long-term losses.

Footnote c - The conclusion is inconsistent with the agreed SoCG on the sHRA; an adverse effect can only be avoided by the provision of mitigation.

Matrices for the Ramsar site - Natural England, the EA and the MMO advise that once the amendments are made to the SAC and SPA matrices, these can be utilised to populate the Ramsar matrices as the designated site features are the same – see paragraph 3.1.3 in the SoCG on the sHRA.