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

Your ref: TR030001



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Dear Mr Baker

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

We refer to the Examining Authority's letter of 15 November 2012 containing a Rule 17 request for further information, as follows:

“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?”

In providing our comments below we have consulted with the Environment Agency (EA) and the Marine Management Organisation (MMO). Both the EA and the MMO have confirmed that they are in agreement with the comments made below.

1. These comments should be read together with Natural England's written summary of oral representations made by Natural England at the Specific Issue Hearing on the compensation proposals (Monday, 12 and Tuesday, 13 November 2012) and submitted to the Examining Authority on 16 November 2012.
2. The Panel asks specifically about how “overall coherence” should be interpreted. There is no legal authority on this point, although there is some guidance. Of most direct relevance are the European Commission's *Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC* (2007) (“Art.6(4) guidance”) and *Managing Natura 2000 Sites* (2000) (“MN2000”). First, it is clear that what is meant is *ecological* coherence (see Art.3(3) of the Habitats Directive and pp.11-12 of the Art.6(4) guidance). Secondly, the reference is to *overall* coherence. Therefore it necessarily applies to the wider network rather than the individual site. However, the assessment of overall coherence in a particular case depends on a number of site-specific factors:
 - a. The conservation objectives of the site;
 - b. The number and status of protected habitats and species within the site;
 - c. The role site plays in ensuring the geographical distribution of protected habitats and species.
3. The Art.6(4) guidance notes that compensation should therefore “refer to the site's conservation objectives and to the habitats and species negatively affected in comparable proportions in terms of

number and status.” Ultimately, “the role played by the site concerned in relation to the biogeographical distribution has to be replaced adequately.”

4. Compensation must replicate in the wider network the ecological function that is harmed at site level.
5. Natural England’s position is that the network is coherent where conservation objectives are being met in the individual Natura 2000 sites which comprise it. If those conservation objectives are harmed the need for remedial action arises. It is also important to recall that where compensation is provided at a new location or an area outside of the existing Natura 2000 network, that area “must be designated as [a] Natura 2000 site itself and be subject to all the requirements of the ‘nature’ directives” (see p. 18 of the Art.6(4) guidance). The coherence of the Natura 2000 network is secured when the offsetting habitat is incorporated into the network through designation as a Natura 2000 site or extension.
6. In the context of impacts upon wild and migratory bird species (where the Wild Birds Directive applies) MN2000 states that *the overall coherence of the network* is ensured if:
 - compensation is ensured 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.”¹
7. It is possible that compensation might focus on species reintroduction programmes (etc) but normally they relate to *habitat creation or enhancement*. For birds, the habitat created should be “favourable to bird species” (p.45 of MN2000). The key point is that compensatory habitat is provided that is available to birds and is functionally effective to ensure their continued success in the Natura 2000 network. In the estuary context section 3.3.4 of the European Commission’s guidance document *The Implementation of the Birds and Habitats Directives in estuaries and coastal zones* (2011) provides that compensatory measures must accomplish the ecological function necessary to support the affected species.

Application of guidance to this case

8. In this case, there are a number of predicted impacts associated with the proposed development. A number of these have been resolved during the examination process by the provision of mitigation and further information by the Applicant.² As a result, Natural England can advise in respect of these potential impacts, that the conservation objectives for the SPA and SAC will not be undermined, so that Art.6(4) is not engaged.
9. However, there are a number of predicted impacts which it is not possible to provide mitigation and therefore will require compensation, should the other derogations in Regulation 66(3) of the Habitats Regulations be met. The most important of these is the loss of mudflat at North Killingholme Marsh (NKM). As Natural England has stated throughout this case, the mudflat at North Killingholme Marsh (NKM) plays an important role in supporting a very large number of waterbirds. These are protected by Art.4(2) of the Wild Birds Directive and by the conservation objectives of the site. The numbers of birds (in particular black-tailed godwit) is of international significance. Mudflat is also protected as part of the intertidal estuary feature of the SAC. The impact of the new quay would amount to harm to the coherence of the Natura 2000 network that requires remediating.
10. The key impact is to black-tailed godwit during the autumn moult (and seven other bird species). As noted above the compensatory measures must accomplish the ecological function necessary to support the affected species. They should therefore provide sufficient confidence that the species will utilise the

¹ P.12 of the Art 6(4) guidance reflects this language regarding the concept of ‘overall coherence of the network’ in the context of the Birds Directive. To this list it also adds the example ‘*compensation fulfils the same purposes that motivated the site’s designation in accordance with Article 4(1) and 4(2) of the Birds Directive*’. The Art 6(4) guidance should be read in conjunction with the *Managing Natura 2000* document.

² For example, Natural England has worked with the Applicant to agree piling restrictions which will avoid significant disturbance to SPA birds, and the provision of an area of wet grassland (Area A) which will provide replacement terrestrial habitat.

compensatory habitat. For this, the ecological function provided by the site which is to be lost (the mudflat at NKM) must be replicated in order for the decision-maker to be confident that the coherence of the network will be maintained.

11. Natural England's outline position submitted on 9 November sets out the elements of the updated compensation proposals (EX28.3) which are agreed. Natural England's advice is that these compensation measures are capable of meeting the requirements of the Habitats Regulations with regards to habitat extent and quality; however, this is qualified by a number of significant risks that need to be taken into account by the Panel and the Secretary of State in considering the Applicant's compensation proposals.
12. As set out in paras.7-8 of Natural England's 16 November submission, there are uncertainties given (i) the limited habitat extent, (ii) the mechanisms to ensure the habitat is of sufficient quality (a matter that relates to the ecological function of the compensation), (iii) the implementation of the habitat, and (iv) the time lag.
13. In relation to habitat extent, the Art.6(4) guidance (p.18) notes that generally higher ratios of compensatory habitat should be provided to that lost ("well above 1:1"): "compensation ratios of 1:1 or below should only be considered where 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".
14. In relation to the time lag, as stated at paras.36-46 of Natural England's written summary of 16 November 2012, this is an important issue which needs to be taken into account by the Panel and the Secretary of State when considering the Applicant's compensation proposals and the need to ensure overall coherence. There is a risk that an internationally important population of black-tailed godwit will suffer irreversible harm as a result of this time lag. This would undermine both the SPA's conservation objectives and the coherence of the wider network
15. The Applicant has raised the issue of carrying capacity for black-tailed godwit and other species within the SPA. Natural England does not consider this to be a matter that can be given much weight when considering the adequacy of the compensatory measures proposed in circumstances where it is accepted that harm will occur to a large number of birds. If carrying capacity could be relied upon in assessing the need for and adequacy of compensation, areas of protected habitat could be developed without any compensation being provided, which would be contrary to the objective of the Habitats Directive and guidance that there should be 'no net loss' to nature conservation interests. In any case the Applicant has not provided any detailed assessment of the carrying capacity of the Estuary.³
16. The focus of the Panel and the Secretary of State's analysis should be on the compensatory measures proposed and their likely adequacy. Long-term security is provided by the fact that in due course the compensation area would be designated as part of the SPA and SAC.

Yours sincerely

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³ Indeed the Applicant states in its Summary of Case of the hearings on 12 and 13 November 2012 that this would simply not be possible to do (see paragraph 62).