

Appendix A

Consultation on proposed minor amendments to the Conservation (Natural Habitats, &c.) Regulations 1994

UKBCSE and Industry Response to the Consultation Questions

Question 1

Do you agree with the proposal to amend regulations 22 – 27 and Schedule 1 of the Habitats Regulations 1994 to provide that the powers to make special nature conservation orders can be used to restrict operations taking place on water as well as those on land in order to protect European sites?

The industry is committed to, and in many cases leaders in, environmental best practice. The industry agree that marine conservation is very important and support the principle of close scrutiny and possible exclusion of activities that are **proven** to cause irreversible harm to habitats and species in marine protected areas. However, the biggest threat to the marine environment is climate change, and so there is a need to balance protection of the local environment through conservation measures with protection of the global environment through measures to mitigate climate change.

It is important that Government, Natural England and the energy sector continue to work closely together to provide clarity on which energy technologies / developments and which protected features might potentially be able to co-exist within the range of differing marine protected area designations, whilst recognising that the level of protection, and therefore the possibility of sustainable development will vary across European Sites and MCZs.

Such a proactive approach will go some way to minimise the risk of the Secretary of State and / or Welsh Ministers being pressurised to issue SNCOs to frustrate the development or operation of major energy projects, in particular for Nationally Significant Infrastructure Projects being determined by the Infrastructure Planning Commission. Therefore, industry believes it is essential that suitable safeguards are built in to these Regulations to mitigate the risks of the proposed extension of powers being used inappropriately. These could include:

- A provision in the amended Regulations preventing the making or use of a SCNO to frustrate the implementation of a planning permission / other development consent, where the development has been the subject of an Appropriate Assessment by the competent authority pursuant to Regulation 48 in respect of its effect on the European Site in question.
- A provision preventing the making or use of an SCNO to prohibit or restrict an activity authorised by the Environment Agency or a local authority regulator under the Environmental Permitting (England and Wales) Regulations 2007.

- A provision in the amended Regulations preventing the use of an SCNO to prohibit or restrict an abstraction or discharge of water which is the subject of an abstraction licence or discharge consent under the Water Resources Act 1991 (as amended), where the abstraction or discharge in question has been the subject of an Appropriate Assessment pursuant to Regulation 48 in respect of its effect on the European Site in question.
- The broadening of the compensation provisions in Regulation 25 to cover all types of land or water, and established or customary activities, wherever they may be, which are affected by the SCNO, causing an economic loss to the owner, tenant or operator.

It is understood that the objectives of these revisions to the Habitats Regulations and support the principle of ensuring that the application of certain aspects of the existing Conservation (Natural Habitats, &c.) Regulations 1994 are applied equally to activities on water as well as on land. However, it is felt essential that in doing so Government consider the wider consequences.

Question 2

Do you agree with the proposal to amend regulations 22-27 and Schedule 1 of the Habitats Regulations 1994 to provide that the powers to make special nature conservation orders can be used to restrict operations taking place outside, as well as within, European sites?

Industry supports the principle of ensuring that activities within or adjacent to a European site do not cause irreversible harm to habitats and species in marine protected areas. However, in order to ensure that any restrictions on operations taking place outside a European site are only imposed when necessary, clarity is needed on exactly what activities outside a European site are expected to have the potential to damage or destroy flora, fauna, or geological or physiological features within a European site. Industry therefore urges Government to work with Natural England, industry and other key stakeholders to develop advice that will clarify scenarios where this might happen and the levels and assessment of impacts that will be implemented. This will support the establishment of a robust and transparent process that does not place undue burdens or uncertainty on sustainable development projects, whilst ensuring appropriate protection of European sites.

Additionally, there is a strong concern that the change of wording in the draft Regulations from “likely” to “is capable of” destroying or damaging the flora, fauna, or geological or physiological features by reason of which the land is a European site, lessens the burden of proof on the Statutory Nature Conservation Body to demonstrate that activities are damaging. This could have a far-ranging impact. We would urge Government to retain the original wording of “likely to” but just apply it to the marine environment in the way it is currently operating on land. The concept of “likely to” has a body of precedent and guidance associated, whereas the proposed new wording would be inconsistent and create uncertainty. Its retention will also avoid any unintended consequences of widescale prevention or stopping of sustainable activities outside European Sites, without a demonstrable reason.

Question 3

Do you agree with the proposal to introduce a two-stage process which involves the new stage of serving a notice on a person / persons proposing to undertake an operation capable of damaging a European site?

Within the context of the comments above, industry supports in principle the introduction of a two-stage process, on the basis of the retention of the existing “likely to” wording for both the noticing process and the Order process. Within the Consultation itself, explanation of the two-stage process specifically states (2) that “a notice would only be served where it appears that the operations are *likely* to destroy or damage the flora, fauna, or geological or physiographical features of the European site”. However, the wording in respect of the Order process, changes to “capable of....” which is both inconsistent and will create much greater uncertainty and risk of challenge to operations either within or outside a European site.

Question 4

Are there any other comments relating to the proposed amendments that you would like to make?

In relation to the detail of the proposed amendments, the phrase “to restrict operations” is used, but the consultation paper provides no definition or clarity over what may constitute an ‘operation’. Clarity on the definition of ‘operation’ would be welcomed as also would confirmation on whether this would result in a significant impact on the energy sector with respect to sustainable development within the marine environment.

Finally, the marine environment is very different from the land environment with much less known about varying features and indeed effects / impacts of sustainable development. All the industry therefore welcome the opportunity to support the SCNBs and Government in ongoing research and by providing data and establishing the impacts of varying technologies through joint assessment.

The views expressed in this paper cannot be taken to represent the views of all parts of all the companies in the UKBCSE. However, they do reflect a general consensus