

Date: 3rd April 2019
Our ref: Mooring Plots 3 and 4, Embankment Road.
Your ref: TCP/33682 - P/01338/18



Richard Holmes
Isle of Wight Council
County Hall
High Street
Newport
Isle of Wight
PO30 1UD

Stephen Treby
Natural England
1st Floor
Temple Quay House
2 The Square
Bristol
BS1 6EB
0300 060 1821

VIA EMAIL ONLY

Dear Richard,

**Brading Marshes to St. Helen's Ledges Site of Special Scientific Interest (SSSI)
Solent & Southampton Water Special Protection Area (SPA)
Solent & Southampton Water Area of International Importance under the Ramsar
Convention (Ramsar)
Solent and Isle of Wight Lagoons SAC
Bembridge proposed Marine Conservation Zone (pMCZ)**

**Location: Mooring Plots 3 and 4, Embankment Road, Bembridge, Isle Of Wight, PO355NS
Proposal: The use of the land for the stationing of two houseboats for tourism use and
associated operational development.**

Thank you for your consultation dated 5th February 2019 regarding the above application. The following constitutes Natural England's formal statutory response.

SUMMARY OF NATURAL ENGLAND'S ADVICE

REQUEST FOR ADDITIONAL INFORMATION

Natural England cannot fully assess this application as there is:

- Insufficient information on the potential direct and indirect impacts on birds through disturbance (intertidal mudflat and lagoon habitat)
- Insufficient information on the direct loss of intertidal habitat
- Insufficient information on the cumulative and in-combination impact (of increased visitor use as a result of increasing houseboat development and siting of houseboat car park) on adjacent lagoon/wetland habitats through disturbance and water quality.

Natural England therefore advise that your authority undertake an Appropriate Assessment of the application as is required under Regulation 63 of the Conservation of Habitats and Species Regulations 2017 of the impacts of the

Marine and Coastal Access Act 2009

The proposed works, as set out in the information provided, are sited within or close to Bembridge proposed Marine Conservation Zone (pMCZ).

Although not designated this pMCZ was consulted on in 2018 and therefore is a material consideration in planning matters. Having reviewed the evidence relating to the site we believe that the works will not hinder the conservation objectives of this site; so long as they are undertaken in strict accordance with the information provided by the applicant.

The Conservation of Habitats and Species Regulations 2017 (as amended) and The Offshore Marine Conservation (Natural Habitats, & c.) Regulations 2007 (as amended)

Water Quality Impacts

Currently there is insufficient information within the application for it to be able to be concluded that there will be no impact on the Solent and Southampton Water SPA OR the Solent and Isle of Wight Lagoons SAC through impacts on water quality. Bembridge Harbour currently has a moderate WFD classification for opportunistic macroalgae and therefore is considered to be in an unfavourable condition for water quality with respect to elevated nutrients.

With this enclosed harbour being vulnerable to elevated nutrients it is imperative that these houseboats together with the cumulative effects of other houseboats that may be housed at this location do not cause a further impact on the water quality through discharges of grey or black water. Elevated nutrients lead to an increase in algal blooms and a loss of intertidal feeding habitat for birds. Natural England recognises that holding tanks have been provided which are used by some vessels along Embankment Road to capture the 'black water'. This approach is fully supported by Natural England and we suggest that the use of a holding tank should be conditioned through planning. However, further evidence is needed to ascertain whether these holding tanks will be used and regularly emptied for appropriate treatment and that the houseboats in this application will not cause further deterioration of the site.

With respect to grey water Section 3.8 of the supporting Ecological Assessment suggests that, 'Grey water, from sinks and showers cannot at present be easily stored on-board or processed/recycled' and as such 'it will be discharged into the harbour, as will surface/roof water'. Grey water if comprised of detergents and other contaminants can have very high levels of nutrients including nitrates and phosphates which will further impact the unfavourable condition of the sites. Therefore, Natural England therefore does not consider grey water discharged into the harbour to be appropriate as it will not meet the conservation objectives of the site.

Recreational Impacts

Currently there is insufficient information in the application for it to be able to be concluded that there will be no impact on the Solent and Southampton Water SPA or the Solent and Isle of Wight Lagoons SAC through an increase in recreational pressure leading to the disturbance of birds and their supporting habitat (mudflat/lagoon) and potential impacts on the SAC habitat through trampling.

This site is within the Solent and Southampton Water SPA and will lead to a net increase in an accommodation type and occupancy identified in the Solent Recreation Mitigation Strategy. If your authority is unable to secure the appropriate contribution through the strategy then please re-consult us and our advice is likely to be amended to an objection.

There is a direct connection between the recreational impacts from houseboats and the lagoon SAC which also supports SPA bird features. The abandoned railway line is the closest and most convenient piece of accessible greenspace that occupants have on their doorstep. As a result houseboat users routinely walk across the lagoon (although it is not a public right of way) to access the abandoned railway line as it is a popular dog walking route. This has resulted in substantial harm to the lagoon SAC habitat from trampling and enrichment from dogs. It is also having an adverse impact on the SPA bird features on the lagoons. The additional housing boats will potentially add further to this disturbance impact.

The application identifies two parking spaces allocated to the houseboats. It is unclear to Natural England if this application is requesting planning permission for the use of land identified in the red line boundary as parking space or if the area in question is deemed to have permission for parking already and the application merely connects the two for clarity. To the best of Natural England's knowledge planning permission for the formation of the existing carpark under P/01438/05 (TCP/14001/S) was subject to pre-commencement conditions including protective measures to the designated sites which do not appear to have been completed. Natural England require additional information on the relationship of this application and the application in 2005 and the lawfulness of the existing land use to enable us to advise your authority on the likely impacts to the designated sites and the scope for mitigation.

Loss of intertidal mud flat

Currently there is insufficient information in the application to conclude that there will be no impact of the Solent and Southampton Water SPA through a loss of intertidal mudflat. Section 3.3 of the Ecological Assessment takes into account the 105m² footprint of each vessel and section 4.8 takes into account an additional 0.24m² loss of intertidal mudflat through the installation of the supporting spud legs. This permanent loss of SPA supporting habitat (mud-flats) is considered, according to the application, 'inconsequential to the functioning of the estuary and its ecology.' The site has been altered by its history of previous use and by more recent site works. However, due to the dynamic nature of the harbour and given sufficient time we anticipate that if the plots were left vacant, the site would likely recover. As well as this direct loss of foraging habitat, there is an additional indirect loss of foraging habitat given that birds are less likely to forage directly adjacent to large manmade structures. The application thus far submitted does not fully substantiate the impact on notified features or propose mitigation.

In-combination effects

In addition the Isle of Wight Council will need to consider the impacts of this proposal in combination with other plans and projects. There are a number of proposals within Solent and Southampton Water SPA currently that propose to increase berthing and housing that may have potential impacts on the SPA through loss of habitat, disturbance and water quality.

Natural England's Solent and Southampton Water SPA and Solent and Isle of Wight Lagoons SAC Conservation Advice packages provide advice on how activities may affect the conservation objectives of the site that may assist further with providing information for this appropriate assessment.

Caselaw and requirement for an Appropriate Assessment

The recent ECJ ruling (People Over Wind & Sweetman v Coillte Teoranta (Case C-323/17)) concluded that mitigatory measures cannot be taken into consideration when considering the Likely Significant Effects of proposals on European wildlife sites (and Ramsar sites as a matter of Government policy) and must be considered at the appropriate assessment stage. Due to the perceived additional impacts relating to the input of grey water, additional recreational pressures and the loss of intertidal mudflat Natural England is unable to rule out a Likely Significant Effect and therefore advise that your authority undertake an Appropriate Assessment of the application as is required under Regulation 63 of the Conservation of Habitats and Species Regulations 2010. Natural England can provide further information on this process if required.

We also advise consideration of the following case law studies from the ECJ in your determination: In light of recent caselaw (Sweetman (2003) and Grace and Sweetman case) any risk of a reduction in a European habitat (including within a SPA) should be judged to have a likely significant effect and the full significance of its impact should be tested by an appropriate assessment by the competent authority. Small but measurable impacts cannot be dismissed of no or little consequence and factors such as whether the habitat loss may indirectly affect the wider supporting structure, function and supporting processes of the habitat or whether a history of creeping cumulative loss of the same habitat need to be considered.

Other rulings (Sweetman, Briels, Hilde Orleans and Grace and Sweetman) have highlighted that even small scale loss of habitat cannot be directly mitigated for as habitat creation and enhancement should be regarded as compensation. Natural England therefore advise more information is required to assist the competent authority with their appropriate assessment to understand the value of this habitat to birds in this area and how this loss may have impacted on the conservation objectives of the site both directly and indirectly. The applicant should consider whether the house boats footprint into the SPA could be repositioned or designed so as to result in a reduction in loss of habitat and impact on the conservation objectives of the site.

T.C. Briels and Others v Minister van Infrastructuur en Milieu in 2014 and Hilde Orleans and others v Vlaams Gewest in 2016 concluded that you cannot mitigate for a loss of habitat within the site by improving or creating habitat elsewhere (either before or after the plan or project).

These European rulings are a material consideration in your screening and assessment of the potential impacts under the Habitat Regulations for which you may wish to seek your own legal advice on the likely implications to this application determination in addition to our advice.

Wildlife and Countryside Act 1981 (as amended)

We can confirm that the proposed works are located within Brading Marshes to St. Helen's Ledges SSSI the interest of which at this location is also littoral sediment and ornithological interest. Natural England recommends that the Isle of Wight Council does not provide permission for this activity on the grounds that the application, as submitted, is likely to damage the interest features for which Brading Marshes to St. Helen's Ledges SSSI has been notified as the erection of permanent or temporary structures (23) is listed under the Operations likely to damage the special interest (OLD2000221). The impact on these features and possible mitigation is the same as outlined above for the SPA.

If the Isle of Wight Council is minded to grant consent for this application contrary to the advice relating to recommendations as contained in this letter, we refer you to Section 281 (6) of the Wildlife and Countryside Act 1981 (as amended), specifically the duty placed upon the Isle of Wight Council requiring that you;

- Provide notice to Natural England of the permission, and of its terms. This notice should

include a statement of how (if at all) the Isle of Wight Council has taken account of Natural England's advice; and

- Shall not grant a permission which would allow the operations to start before the end of a period of 21 days beginning with the date of that notice.

NERC Act 2006

The consultation documents indicate that this development includes a loss of intertidal mudflat habitat of principle importance as listed on Section 41 of the Natural Environmental and Rural Communities (NERC) Act 2006. Section 40 of the NERC Act 2016 places a duty on government bodies to conserve and enhance the environment. This includes Local Authorities and organisations such as the MMO and Natural England. The loss of this valuable habitat in the absence of a substantial package of mitigation would be contrary to these duties without due regard.

Loss of Priority mudflat

The application suggests the removal of debris from the houseboat plot. We speculate that the combined removal of tyres and other paraphernalia associated with the plots original vessel will go some way to offsetting the direct intertidal habitat loss. However this has not been measured and as such further assessment is required.

The National Planning Policy Framework is a material consideration in determining an application and states;

- Paragraph 8 identifies net gains for the environment/biodiversity as one of the three essential pillars required to achieve sustainable development through the planning system that should be pursued in a mutually supportive way to the social and economic needs. This application is proposing substantial harm to the environment as submitted.
- Paragraph 170 states that "Planning policies and decisions should contribute to and enhance the natural and local environment by minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures". This application is proposing a loss in biodiversity and is likely to result in the loss of a substantial area of priority habitat.
- Paragraph 175 identifies that if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused. Opportunities to incorporate biodiversity improvements in and around developments should be encouraged, especially where this can secure measurable net gains for biodiversity. No mitigation or compensation has been identified within this application to ensure measurable net gains for the environment are achieved.

The loss of any area of priority habitat should be considered as substantial in the context of paragraph 175. Notwithstanding the consideration of this application under the Habitat Regulations 2017 and the Wildlife and Countryside Act 1981 (as amended), in the absence of mitigation or compensation for this significant loss of priority habitat, the application is deemed to be unacceptable under national planning policy.

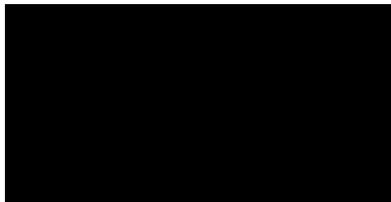
In addition, when assessing this development and what conditions will be required if the MMO is minded to grant a licence, the IoWC should also consider ecological enhancements to biodiversity that the applicant can bring forth through this development. The 'environmental net gain' principle is one of the key actions noted in Defra's 25 Year Environment Plan. Additionally, Section 40 (1,3)

of the Natural Environment and Rural Communities (NERC) Act, sets out that “Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity”. Conserving biodiversity is thereby defined as “restoring or enhancing a population or habitat”. This requirement to consider how developments can enhance biodiversity applies to the Marine Management Organisation and local authorities responsible for granting any licences.

As per the Draft Island Planning Strategy Development Plan any applications for development should include adequate and proportionate information to enable a proper assessment of ecological considerations by demonstrating how a net gain for biodiversity will be achieved.

If you have any further queries with regard to this matter, please do not hesitate to contact me.

Yours sincerely,



Stephen Treby
Lead Adviser – Dorset, Hampshire and the Isle of Wight.
Natural England

Office: 0300 060 1821

Mobile: 07824 600389

Email: stephen.treby@naturalengland.org.uk