

Date: 14 November 2019

Our Ref: 300191

Your Ref: P/00637/14



Dear Russell Chick

Proposal: Appropriate Assessment consultation for Sites at Duver Marina the Duver St Helens Ryde PO33 1YB, Bembridge Marina Embankment Road Bembridge, Selwyn Boatyard and the Old Boathouse Embankment Road Bembridge Isle Of Wight

Thank you for consulting Natural England on the Appropriate Assessment for the above proposal. Your email was received by this office on 9th October 2019. This letter is Natural England's formal consultation response under Regulation 63(3) of *The Conservation of Habitats and Species 2017* (referred to within this letter as the *Habitat Regulations 2017*).

SUMMARY OF NATURAL ENGLAND'S ADVICE

NO ADVERSE IMPACT ON INTEGRITY HAS NOT BEEN ASCERTAINED WITH CERTAINTY BEYOND REASONABLE SCIENTIFIC DOUBT

As submitted Natural England consider it will:

- have an adverse effect on the integrity of Solent and Southampton Water Special Protection Area(SPA), Solent and Isle of Wight Lagoons Special Area of Conservation (SAC), Solent Maritime Special Area of Conservation (SAC)
- Have an adverse impact on the integrity of the Solent and Southampton Water Ramsar Site, which is afforded the same protection under national policy as if it was protected under the Habitat Regulations 2017.

1 CONTEXT

The application site lies within close proximity of Solent and Southampton Water SPA, Solent and Isle of Wight Lagoons SAC and Solent and Southampton Water RAMSAR site.

The SPA is designated for its international importance of wintering waterfowl and waders and breeding birds. The SAC is designated for its international important habitats and species. The RAMSAR site designation shares many of the features of the SPA and SAC on account of their international importance and the government's commitment to safeguard them for the future under the RAMSAR convention.

The proximity of the European sites (SPA and SACs) raises considerations on the requirements of the Habitats Directive 1992 for these sites to be maintained or, where necessary, restored at a favourable conservation status (Article 3 (1)). Determination of the application should be undertaken with regard to the requirements of Habitat Regulations 2017, in particular Regulations 63 and 64; and also legislative and policy considerations on the protection, conservation and enhancement of the special interest features.

The proposal is not directly connected with or necessary to the management of the European sites. In our view this proposal is of a nature that, in its context with the European sites and the vulnerability of interest features to residential development effects and others, is likely to have a significant effect both on the SPA and the SAC, at least in combination with other plans and projects. We are of the same view on significant effect for the Ramsar site as this shares many of the interest features of the SAC and SPA.

Following European case law, namely; *People Over Wind and Sweetman vs Coillte Teoranta* (ref: C-323/17), Natural England agree with the competent authority's decision that the proposed development is more likely than not to adversely affect the integrity of the designated sites in the absence of mitigation and an Appropriate Assessment is appropriate in this instance.

Following the decision to carry out an Appropriate Assessment of the application and the mitigation measures proposed by the applicant, your authority must ascertain that the proposal in its entirety will not adversely affect the integrity of the designated sites at least in combination with other plans or projects. This conclusion must be made with the best available evidence at the time of the decision. Should your authority be unable to conclude no adverse impact on integrity in an appropriate assessment, alternative solutions and consideration of Imperative Reasons of Overriding Public Interest should be had to inform your decisions.

A considerable amount of time has passed between the last statutory letter of advice from Natural England in 2015 when our objection was removed and the present time under which the decision is to be made by your authority. Within this period of time, additional evidence has come to light regarding the condition of the designated site features, the cumulative pressures under which they are exerted and clarifications to our interpretation of the Habitat and Wild Birds Directives.

Based on the information which has come to light since our last correspondence in 2015, the absence of a decision being made for a considerable period of time and the need for an Appropriate Assessment in advanced of a decision being made, Natural England are unable to concur with the findings in the Appropriate Assessment dated September 2017 and the 2019 addendum as submitted. These are further explained below.

2 THE OPINION OF THE STATUTORY NATURE CONSERVATION ORGANISATION

2.1 NEW EVIDENCE OF FUNCTIONALLY LINKED LAND AT THE DUVER Construction Phase

Section 5.1 of the September 2017 Appropriate Assessment identifies that at the time of writing the land directly adjacent to the Duver site is not used by water birds and that the existing high noise and activity use removes the likelihood of an impact to the designated site through disturbance rendering a time restricted planning condition on the construction phase unnecessary. Since the time of writing, the land adjacent and within the site has become classified as secondary support habitat to the SPA (functionally linked land - FLL). This was identified and made publicly available on the Solent Recreation Mitigation Partnership Website. There is no evidence that the birds that use this area are habituated to loud noises and should be considered susceptible to disturbance unless additional evidence suggests otherwise. In the absence of a time constraint on the permission or additional details as to what measures will be taken to remove the likelihood of disturbance to wintering birds from works directly adjacent to the FLL and any other highly disturbing activities such as demolition as a result of implementing this permission may adversely affect the integrity of the designated site through displacing birds during the construction phase. Natural England do not agree with the conclusions of the Appropriate Assessment on this point in the absence of additional information.

Loss of Functionally Linked Land

The slipway forms part of the FLL where the application proposes to build an office, toilet and shower block. Brent Geese often use structures such as slipways to feed on algae and as a roosting space which is likely to be the reason for inclusion within the FLL boundary. The application will result in the loss of approximately 150m² of functionally linked land. Section 2.5 of the addendum suggests that there would be no material difference than what was assessed in 2017. Natural England do not consider that loss of 150m² of functionally linked land of an internationally designated site to be inconsequential. Natural England advise that the Appropriate Assessment has not ruled out an adverse impact on the integrity of the SPA and RAMSAR as a result of this loss beyond reasonable scientific doubt. Further information should be provided on the extent to which the features of FLL are currently used by SPA bird interests and, if necessary, how the loss of those functions (eg feeding, roosting) might be replaced or mitigated elsewhere.

Furthermore, there has been no consideration that the development itself at the Duver within close proximity to this newly identified FLL will have direct impacts on the use and availability of the area for the birds as a direct result of the infrastructure that will be installed. Some species of notified wintering birds have been shown to be averse to foraging adjacent to tall structures due to the perceived risk of predation. The new toilet block and office, although not a tall structure for a building, will be sited on top of the sea wall towering over the intertidal area and may displace certain species of notified wintering birds. This may or may not be of significance but it is a real risk and has not been considered in light of the new evidence.

The direct loss of FLL and the potential loss of function adjacent to the toilet and office has not been assessed in the Appropriate Assessment. Natural England do not agree with the conclusions of the Appropriate Assessment on this point in the absence of additional information.

2.2 NEW EVIDENCE OF ANTHROPOGENIC PRESSURES ON AND AROUND THE OLD RAILWAY

Direct and indirect impacts of the Bembridge Marina Carpark

As a result of discussions with the RSPB site manager of the Brading Marshes Nature Reserve and designated sites in relation to other residential applications along embankment road within the last year, it has been brought to Natural England's attention that there are substantial recreational pressures along the old railway that is likely to be compromising the conservation objectives of the SPA, SAC and RAMSAR features. Your authority have been made aware of this cumulative pressure through consultations on other applications within close proximity. The proposed Bembridge marina carpark lies directly adjacent to the SSSI, SPA and RAMSAR designated sites. The old railway track follows the boundary of the proposed carpark. The parking spaces appear to exceed the existing parking provision that is lost as a result of the development and is likely to result in a substantial increase in recreational activities on the designated sites. As submitted there are no mitigation measures identified to dissuade users of the new car park from accessing the railway directly, thereby increasing the attractiveness of the site for recreational access with dogs. The use of the site by cars is also likely to further disturb the surrounding SPA birds from lights at night during the winter should sufficient screening not be in place and secured. No analysis or mitigation measures have been submitted in the Appropriate Assessment to address this point. Natural England are not convinced that the carpark within the application as submitted will not add further pressures to the disturbance of wintering birds which are already under substantial cumulative pressures from existing uses as has been identified by the RSPB recently. Natural England do not agree with the conclusions of the Appropriate Assessment on this point in the absence of additional information.

2.3 NUTRIENTS

Need for Nutrient Neutrality

The water environment within the Solent region is one of the most important for wildlife in the United Kingdom. The Solent water environment is internationally important for its wildlife and is protected under the Water Environment Regulations and the Conservation of Habitats and Species Regulations as well as national protection for many parts of the coastline and their sea. There are high levels of nitrogen and phosphorus input to this water environment with sound evidence that these nutrients are causing eutrophication at these designated sites. These nutrient inputs are currently caused mostly by wastewater from existing housing and agricultural sources. The resulting dense mats of green algae are adversely impacting on the Solent's protected habitats and bird species.

It is Natural England's view that there is a likely significant effect on the internationally designated sites (Special Protection Areas, Special Areas of Conservation, potential Special Protection Areas) due to the increase in wastewater from the new developments coming forward where the discharge is within the Solent catchment. The uncertainty about the impact of new development on designated sites needs to be recognised for all development

proposals that are subject to new planning permissions and have inevitable wastewater implications. These implications, and all other matters capable of having a significant effect on designated sites in the Solent, must be addressed in the ways required by Regulation 63 of the Conservation of Habitats and Species Regulations 2017. Further detailed information has been made available to your authority dated June 2019; **ADVICE ON ACHIEVING NUTRIENT NEUTRALITY FOR NEW DEVELOPMENT IN THE SOLENT REGION.**

Following the outcome of the Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu (C-293/17) European Court of Justice ruling, when an international designated site is unfavourable for nutrients, any addition to this unfavourable state should be deemed as an alone impact in an Appropriate Assessment.

Discharges to Sandown Waste Water Treatment Works

Nutrients and waste water are not referenced or addressed in the Appropriate Assessment for this application contrary to the advice circulated earlier this year. Should the waste water be discharged from all developments to the Waste Water Treatment Works at Sandown then Natural England have no further concerns on this matter on the condition that this is secured through planning obligations and that if the situation changes following the grant of permission that a nutrient budget must be submitted in writing and approved by your authority. A planning obligation to this effect should be deemed as a mitigation measure to avoid the possibility that the waste water will not be discharged by any other means. As such, the details of such a condition and the infrastructure that will be serviced by the treatment works at Sandown should be explicitly identified within the Appropriate Assessment. In the absence of sufficient control measures there remains an uncertainty as to where the waste water will be discharged to. Natural England do not agree with the conclusions of the Appropriate Assessment on this point in the absence of additional information.

Discharges to other Waste Water Treatment Works

Natural England note that a Package Treatment Works is proposed at the Duver Site. The source of the discharges to this treatment plant has not been assessed in the Appropriate Assessment accompanied by a nitrogen budget and mitigation package to ensure nutrient neutrality is achieved. Natural England do not agree with the conclusions of the Appropriate Assessment on this point in the absence of a nitrogen budget that shows neutrality in accordance with the methodology.

2.4 WATER RESOURCES

The Southern Water review of consents by the Environment Agency which has been ongoing over the last few years has resulted in a commitment to a water usage of 100 litres per person per day use from new development in combination with compensation measures approved by the Secretary of State on the Meon River. To enable your authority to rely on the Habitat Regulation Assessment and Appropriate Assessment of the water companies Water Resource Management Plan, new development must achieve this water efficiency measure through grey water recycling or other measures. No reference has been made to the water efficiency measures expected of this development nor have any specific infrastructure measures that will enable this achievement for perpetuity. Natural England do not agree with the conclusions of the Appropriate Assessment on this point in the absence of additional information.

2.5 POLLUTION

Security of surface water measures within the Marina Carpark

The marina carpark at Bembridge is proposed on land within flood zone 2 and 3. Section 2.1 of the 2019 Appropriate Assessment addendum identifies the risks to the water environment from a carpark. While Natural England anticipate that the proposed condition (16) is suitably precautionary in that it will prevent the commencement of the development until an acceptable scheme is submitted and approved, there is insufficient evidence submitted to be certain that a mechanism exists that will suitably safeguard the water environment from flood events. For example, given the size and locality of the carpark, the potential risks of oil contamination from the carpark may justify the need for an oil interceptor, however no information is provided on how an oil interceptor could function during a flood event, or the frequency of flooding and the extent to which the failure of the oil interceptor would risk harm to the designated sites.

Natural England would advise that measures will be required to secure the long term maintenance and management of the pollution prevention SUDs specifically for the safeguarding of the designated sites adjacent. This should include secured provision for the management and monitoring of the SUDs for perpetuity, along with any necessary step in rights to ensure the necessary maintenance works are completed. In the absence of these safeguards Natural England do not agree with the conclusions of the Appropriate Assessment on this point.

It is not recognised in the Appropriate Assessment that the parking is intended for motor vehicles only and not for the storage and maintenance of boats in the winter. The storage and maintenance of boats or other marine infrastructure have different contamination risks to that of cars which are not captured by oil interceptors. Considering that the carpark will be for the private use of the Marina and its members, the likelihood that using the carpark for boat storage in the winter is high. No measures have been identified in the Appropriate Assessment to either remove the risk of contamination from marina related pollutants such as antifouling agents and paint, nor has it been identified that the carpark will be restricted to cars only. This remains an unmitigated pollution risk within the application and has not been assessed in the appropriate assessment. Natural England do not agree with the conclusions of the Appropriate Assessment on this point in the absence of additional information.

It is noted that the marine related works for the floating toilet block is not included within section 5.4-5.5 of the 2017 appropriate assessment with regard to the materials used and risk of contamination of the marine environment which is hydrologically connected to the designated site. Natural England do not agree with the conclusions of the Appropriate Assessment on this point in the absence of additional information.

2.6 RECREATIONAL PRESSURES ALONE AND IN COMBINATION

Solent Recreational Mitigation Strategy

It is recognised that the Appropriate Assessment identifies that a contribution will be taken proportional to the residential increase within 5.6km of the Solent and Southampton Water SPA towards the Solent Recreational Mitigation Strategy administered by Bird Aware. It is however absent from the Appropriate Assessment the details of this contribution. To enable Natural England to review the assessment and its compliance with the definitive Bird Aware strategy, a brief summary of the number of additional dwellings, what rate will be applied

and how it will be secured is required. In the absence of this information Natural England cannot agree with the conclusions of the Appropriate Assessment as submitted.

Additional recreational mitigation due to proximity and nature of the development

The additional mitigation towards access management and monitoring has been previously agreed to be a necessary for the likely recreational impacts to the designated features of the sites due to the proximity of the development to the designated sites, the absence of non-designated alternative recreational greenspace and the sensitivity of Brading Marshes and Bembridge Harbour to recreation. It is proposed that the Harbour Authority is responsible for delivering this measure. It is specified what types of measures will be delivered although there is no reflection as to how much time will be spent per year at appropriate times in and around the harbour to deliver these measures. There is no indication that the individuals that deliver the measures are experienced or qualified to deliver the message to the user groups in an appropriate manner. There is no identified mechanism to report on the findings and mitigation delivered each year or to be consistent with the Bird Aware warden scheme. There is no mechanism identified to secure step in right funding for the authority (or delegated persons) to deliver the mitigation should the legal agreement/conditions be breached nor is there funding available to draw down on for enforcement should the authority need to use the step in rights as is usually expected for Habitat Regulations mitigation. Natural England consider this additional mitigation measure above and beyond the contribution to Bird Aware as essential to enable the development to be acceptable under the Habitat Regulations due to the specific circumstances. There is no level of detail as to how this will be secured and that it is likely to be delivered for perpetuity by capable individuals to deliver the message. In the absence of this information Natural England cannot agree with the conclusions of the Appropriate Assessment as submitted.

2.7 CERTAINTY THAT THE SILT POND RESTORATION AND MANAGEMENT WILL BE SECURED FOR PERPETUITY

The silt pond is agreed as a necessary measure as part of the mitigation package to increase the resilience of the SPA and Ramsar features at times of stress and anthropogenic recreational pressures. A yearly management plan for the mowing of grassland and scrub is offered to improve the structure of the habitat for SPA birds. No suitable planning conditions have been identified to secure an establishment and maintenance plan for the area prior to commencement of the development and completed prior to commencement. No mechanisms have been identified for the security of these management and monitoring measures for perpetuity. As indicated above, the Harbour Authority is proposed to carry out the management of the site. Funding for a year's maintenance, funding for enforcement and council step in rights have not been identified as is expected for management and monitoring of mitigation measures under the Habitat Regulations. In the absence of this information Natural England cannot agree with the conclusions of the Appropriate Assessment as submitted.

3 TECHNICAL NOTE

Under Regulation 63 (3) of the Habitat Regulations 2017 your authority must have regard to any representations made by Natural England on the conclusions of the Appropriate

Assessment. This is further explained under regulation 63 (5) that the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

National and European case law has further clarified the need for consultation with the conservation body and the duty to have regard for the representations made. Most recently European court of Justice ruling handed down in November 2018, *Holohan and Others* (C 461/17), specified under paragraph 52 that if the competent authority is minded to ignore an expert opinion of the Nature Conservation body, the Appropriate Assessment must evidence that an adverse effect on the integrity of the designated sites and their features is ruled out beyond reasonable scientific doubt.

If you have any queries relating to the advice in this letter please contact me on 02082257423.

Should the applicant wish to discuss the further information required and scope for mitigation with Natural England, we would be happy to provide advice through our [Discretionary Advice Service](#).

Yours sincerely

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