

MMO CALL FOR EVIDENCE ON MARINE PROTECTED AREA ASSESSMENTS

Wildlife and Countryside Link consultation response

December 2016

Introduction

Wildlife and Countryside Link (Link) brings together 47 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over 8 million people in the UK and manage over 750,000 hectares of land. This response is supported by the following members of Link:

- ClientEarth
- Environmental Investigation Agency
- Friends of the Earth England
- Institute of Fisheries Management
- Marine Conservation Society
- MARINELife
- Whale and Dolphin Conservation

Link welcomes this opportunity to comment on the draft site assessments for those marine protected areas (MPA) in English inshore waters; however, for this response we are seeking to comment on high level matters that are applicable to all site assessments and as such, have selected particular questions from the online form to base our response on.

9. Do you agree with the conclusions of Part A of the assessment (i.e. the gear/feature interactions taken through to part B)? (Yes/No).

No

10. If you do not agree with part A, which aspects of the assessment you do not agree with: description of activities; description of designated features (eg location, extent or sensitivity); description of the impact of relevant activities on the conservation objectives of the site.

a. Description of activities

The assessment process seems to accurately identify those activities that are taking place within the various sites. However, there is some confusion about whether the assessments consider activities that do not currently, but might in future, take place at the different sites.

In section 3 of each Part A 'Test for Likely Significant Effects' assessment ("*Summary of draft assessment findings*") where a Part B assessment is yet to be carried out, the following statement is made: "*Thus far the MMO has identified those fishing activities that do not occur within the site. The remaining gear/feature interactions have been screened for those that a likely significant effect cannot be ruled out. The MMO is now assessing the remaining gear/feature interactions to understand whether there could be an adverse effect of site integrity from commercial fishing.*" This suggests that there will be no screening and



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"Wildlife and Countryside Link is a unique coalition of voluntary organisations concerned with the conservation and protection of wildlife and the countryside"

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therefore no appropriate assessment for any fishing activities that do not currently occur within the relevant site (even those that could potentially take place in future).

On the other hand, section 4 of the Part A assessments (“*Assessment process*”), says that “*MPA assessments include current and potential commercial fishing activities. To understand what the potential fishing activities are likely to be, we use historical fishing activity and expert opinion. Further information on potential activities is available on request.*” This statement is inconsistent with the statement made in section 3, suggesting that potential activities have in fact been considered.

The three Part B appropriate assessments that have been carried out indicate that no fishing activities not currently occurring at these sites, have been assessed. Broadly speaking, the justification for this in each case appears to be that the activity “*does not occur*” at the relevant site (with some of these conclusions apparently based on ‘expert opinion’ – see below for our comments on the reliability of this as a data source).

The MMO should rectify this inconsistency and ensure that potential activities are considered, in order to provide adequate future-proofing in view of the risk that these activities might in fact take place in future.

b. Description of the impact of relevant activities on the conservation objectives of the site

‘Initial Test’ ‘initial test’ assessment methodology

The assessments include an ‘Initial Test’ stage, which precedes the ‘Part A’ ‘Test for Likely Significant Effects’ stage and is not prescribed by the Habitats Directive. In our view, the questions raised in this ‘Initial Test’ stage are not appropriate and undermine the methodology of the assessments in the following ways:

- The question “*is the fishing activity occurring*” suggests that potential fishing activities will not be considered, raising questions about whether the assessments provide adequate future-proofing (see also our above comments about this).
- The question “*is the activity sufficiently regulated*” should not be asked at this stage. Mitigation should be considered only once it has been established that an activity is likely to have adverse effects on site integrity, in order to understand whether these adverse effects can be reduced or avoided altogether. Consideration of mitigation before this point might result in potentially damaging activities being screened out before the Part A ‘Test for Likely Significant Effects’ and Part B appropriate assessment stages.

The MMO should remedy these defects and amend the assessments accordingly, in order to ensure sound methodology.

Part A ‘Test for Significant Likely Effects’ methodology

Section 3 of each assessment identifies the ‘main pressures’ to features and associated supporting habitats. However, this is not the correct legal test. Instead, the assessments should identify each pressure that may have an adverse effect on site integrity, which should then be subject to a Part B appropriate assessment.

The MMO should remedy this defect and amend the assessments accordingly, in order to ensure sound methodology.

Failure to consider in-combination effects

The assessment process seems to accurately identify those gear-feature interactions that are, alone, most likely to have an influence on site integrity.

However, while in-combination effects appear to have been considered by the three Part B site assessments that have been carried out, there is an apparent failure to consider in-combination effects at the Part A 'screening for likely significant effects' stage for all sites.

Article 6(3) of the Habitats Directive ('HD') requires the likely significant effects of plans and projects on a European site to be considered "*either individually or in combination with other plans or projects*". We know that assessments carried out under Article 6(2) must achieve the same level of protection as those carried out under Article 6(3). This is because jurisprudence of the Court of Justice of the European Union has found that Articles 6(2) and 6(3) "*are designed to ensure the same level of protection*" (Case C-258/11, Judgment of the Court (Third Chamber) of 11 April 2013, *Peter Sweetman and Others v An Bord Pleanála [2013] ECR-000* (paras 32-33)), with Article 6(2) setting out 'the general obligation' of protection under Article 6, and Article 6(3) addressing the specific circumstances of a plan or project. Therefore, in-combination effects do need to be considered – at both the Part A and Part B stages. Draft guidance issued by Defra corroborates this approach, stating that a test for likely significant effects should "*identify the potential effects of the plan or project on the site, alone or in combination with other plans or projects*" (p.34, 'The Habitats and Wild Birds Directives in England and its seas: Core guidance for developers, regulators & land/marine managers', Defra, December 2012).

The MMO should take action to remedy this omission of in-combination effects and document its findings.

11. If applicable, do you agree with the conclusions of part B of the assessment? (Yes/No). NB there is no N/A option, so for sites where no part B has as yet been undertaken, this would need to be left blank.

No

12. If you do not agree with part B, which aspect of the assessment do you not agree with: description of activities; description of designated features (eg location, extent or sensitivity); description of the impact of relevant activities on the conservation objectives of the site.

a. Description of activities

We have some concerns about knowledge gaps regarding fishing effort within the site. Specifically, we are concerned that the MMO does not have definitive knowledge about the location and number of vessels using bottom-towed gears operating in these sites. VMS is recognised as the most accurate source of knowledge in this regard – however, this does not record use of the site by vessels less than 15m in length. This is a significant omission. Other knowledge sources (such as 'sightings data' and 'expert opinion') are not as reliable as VMS, as recognised by the MMO's own confidence scoring in these assessments.

Critically, the MMO often appears to rely on 'expert opinion' when reaching conclusions. The source of this data is never clearly explained, raising questions about its reliability. Indeed, the MMO's own confidence scoring of low-moderate demonstrates that this is not a reliable data source and therefore should not be relied on to reach conclusions that are critical to assessing fishing effort, and therefore gear-feature interactions, at these sites. Also, with regard to landings data, the MMO reasons in some assessments that "*Landings from all vessels were spatially attributed based on the patterns of fishing observed in vessels of 15m length or over. Therefore it was assumed that under 15m vessels show the same patterns of*

fishing as those 15m and over". We do not see the logic behind this assumption and disagree with the MMO's conclusion in this regard.

As a general point, the MMO states in several assessments that "*Individually, the fisheries evidence sources used in this assessment each suffer from limitations for example in terms of fleet coverage, confidence and age. However, when considered together they provide a consistent picture of mostly low levels of fishing activity.*" It is difficult to understand the basis for the MMO's conclusion that sources that individually each suffer from limitations can come together to create an accurate representation of fishing effort at a site. We do not agree with this reasoning.

Fishing effort has therefore not been mapped at the scale of resolution or accuracy that is required to effectively manage fishing in these sites. It will therefore be very difficult to make decisions about whether, and if so what, appropriate fishing management measures are needed for these sites.

b. Impact of relevant activities on the conservation objectives of the site

Assessment process sequence

Table 1 in each of the assessments appears to document the findings of the 'Part B' appropriate assessment for each site. However, for some sites, the Part B assessment has not yet been carried out. This raises significant questions about the soundness of the MMO's methodology when undertaking these assessments, as it suggests that the outcome of the assessments has been pre-determined.

Favourable conservation status

For the sites where a Part B assessment has already been carried out, we do not think that these properly assess the impact of potentially damaging fishing activities on the 'typical species' associated with the site.

The European Court has confirmed that the scope of 'favourable conservation status' extends beyond a site's designated features to include the 'typical species' associated with the site, which must therefore also be maintained at or restored to favourable conservation status (Case C-258/11 Sweetman, para. 39). Article 2 of the Habitats Directive requires that 'favourable conservation status' is achieved or recovered, for a site's designated or classified features. Therefore, effective management measures should allow for the natural recolonisation and recovery of habitats as well as maintaining what is there now.

The typical species associated with habitats are often sedentary, and sometimes mobile. Indeed many features of offshore sites support essential feeding, spawning habitats of common fish species, and feeding grounds of adjacent 'hauled out' populations of seals, and act as feeding grounds for diving birds. As such, recommendations for closures to control abrasion-related fishing, and associated 'take' of prey of such species has to be taken into account in the management of activities at the site(s). We haven't seen this assessment, either alone or in-combination with other impacts to the site(s).

The failure to consider impacts on 'typical species' is clearly inconsistent with the requirements of Article 6 HD and is a fundamental problem.

Precautionary principle

Our position is that fishing in a European Marine Site ("EMS") is a plan or project within the meaning of Article 6(3) of the Habitats Directive (see Case C-127/02 Waddenzee). However, Articles 6(2) and 6(3) are designed to ensure the same level of protection (Case C-258/11, Sweetman, paras 32-33). Therefore, whether or not it is agreed that fishing is a "plan or

project” for the purposes of Article 6, it is clear that fishing with bottom towed gear can only be undertaken in the site if there is certainty that it will not have an adverse effect on the integrity of the site. This means that the site must be preserved at, or restored to, ‘favourable conservation status’ (see above for information on the meaning of this).

Authorities must adhere to the precautionary principle when making decisions. Therefore, ‘certainty’ in this context means situations “where no reasonable scientific doubt remains as to the absence of such [adverse] effects” (our emphasis) (Case C-127/02 Waddenzee - answer to question 4 put to the Court). An authority therefore cannot decide not to ban a particular activity within an EMS if there is insufficient evidence forthcoming from its assessment to exclude the possibility of harm to site integrity arising out of that measure or activity.

The European Court has confirmed that in the case of permanent damage a small loss may still amount to a loss of site integrity (Case C-258/11 Sweetman).

Adaptive management

Each of the assessments includes several possible management options. Option 2 is “*introduce a monitoring and control plan within the site to monitor current and potential activities*”.

Although this option is not specifically identified as ‘adaptive management’, the option of introducing monitoring in order to better understand the potential impacts of certain activities on a site, is indicative of an ‘adaptive management’ approach. Such an approach is at odds with the precautionary management required by the Habitats Directive where there is a lack of understanding of the impact of fishing (or any other human activity).

Furthermore, this management option does not contain a clear *commitment* from the MMO to change management if deterioration or impact on site integrity is observed.

In addition, the roadmap set out in the proposals for monitoring the condition of the sites is very vague. In the Part B appropriate assessments, the MMO states that “*Monitoring of activity levels will occur through a combination of surface surveillance and ongoing monitoring of VMS and landings data*”. However, this data does not provide a comprehensive picture of fishing effort, as already explained above. A comprehensive monitoring regime paid for by industry would be needed, due to the expense of implementing such a regime.

Further, the assessments do not clarify how the MMO will enable the decision-making process to assess the need for ‘future management’.

We therefore question whether the recommendations made by these assessments are appropriate to meeting the conservation objectives of these sites and therefore the legal requirements for the protection of the sites.

c. Site-specific comments where a Part 3 Appropriate Assessment has been undertaken, and a management option has been recommended

As a general comment, we would like to see a commitment from the MMO to consulting specifically on the decision that no additional management measures are required, for each of the three sites where a Part B appropriate assessment has been undertaken.

Land’s End and Cape Bank SCI

The outcome of this assessment is a recommendation that levels of potting and netting are monitored, and remain at current levels. There is a commitment to reviewing the assessment

for the site if levels of static gear deployed at the site exceed those observed in 2006-2013. Specifically, the assessment states that *“To ensure that the conservation objectives of the site are not hindered should future activity occur outside of this range, MMO will monitor activity at this site, and will review this assessment should certain conditions be triggered”* (p.4).

We have concerns about this recommendation, due to the following:

- There is a lack of clear information about the level of fishing in the site, due to lack of reliable data (see above our detailed comments on fishing effort).
- The assessment does not set out a clear plan for monitoring, instead seeming to rely on *“receipt of significant new information”* from an unspecified source.
- The assessment does not explain what mechanisms will be in place to allow the MMO to respond quickly to restrict or prohibit potting and/or netting if required. We have doubts about whether the MMO would be able to react sufficiently quickly in order to avoid deterioration to/damage of the site in the case that fishing effort at the site does increase. We assume there will need to be communication with the Cornwall IFCA as this is a site that lies across the 6-12nm boundary.
- The ability to react quickly in the case of increased levels of activity is particularly important given the potential sensitivity of the site’s ecology to static gears. In this regard, the Part B appropriate assessment concludes that *“Walmsely et al (2015) do note that there are limitations to all of the empirical studies, and gaps in evidence, particularly around longer term impacts”* (p.24). The MMO also refers to surveys undertaken at the site, concluding that these *“cannot definitively rule out negative impacts from fishing activities”* (p.25), although it blames this on the *“difficulties in sampling in the marine environment”* (p.25). This lack of knowledge should prompt a precautionary approach to management. Instead, the MMO seems to have drawn the conclusion that the lack of certainty about absence of adverse effects on the site, means that there are no such effects. This approach is plainly inconsistent with Article 6 of the Habitats Directive, which requires certainty about the absence of adverse effects on site integrity.
- See also above our comments on ‘adaptive management’, which is not consistent with the precautionary approach to management required by Article 6 of the Habitats Directive.

Outer Thames SPA

The outcome of this assessment is a recommendation to monitor current and potential activities within the site *“in line with the MMO’s Marine Protected Area Monitoring and Control Plan”*.

We have concerns about this recommendation, due to the following:

- There is a lack of clear information about the level of fishing in the site, due to lack of reliable data (see above our detailed comments on fishing effort). In addition, the data for patterns of Red-Throated Diver distribution and fishing vessel distribution for this site is not reliable. Samples sizes are poor, with just two days of data having been collected, and these being days with limited fishing effort.
- We do not think that the assessment properly considers the potential impact of reduced food supply from over fishing and damage to habitats on Red-Throated Diver. The amount of key Red-Throated Diver prey species removed by commercial fishing activities (either targeted or as bycatch) is not clearly understood (p.49). In addition, Natural England advises that *“loss of supporting habitat (such as sandbanks) by removal or smothering, may result in the loss of foraging sites and therefore the reduction of the*

food resource for the overwintering population. Thus the overwintering population is considered to be highly sensitive to physical removal of habitat and moderately sensitive to smothering” (p.25). The main pressure from towed fishing activity within the site to physical loss is from suction dredging, which the MMO argues is ‘limited’ – however, this does not mean that this will have no impact. In addition, the MMO argues that fishing with bottom-towed gears will be controlled in the adjacent site, Margate and Longsands. However, the draft bye-law proposed by the MMO prohibits fishing with bottom-towed gears only in certain small areas of the site, and leaves potentially vulnerable habitats open to damage from this activity.

- In relation to disturbance impacts, we have concerns that the MMO has not properly considered the impacts of disturbance to the birds from vessels (assessed by Natural England as “*high*” (p.33)). For example, the discussion on page 34 is based on disturbance from a survey vessel. However, a survey vessel does not mimic what happens in response to a fishing vessel.
- We do not think that the assessment properly considers the potential impact of entanglement on Red-Throated Diver populations. There is no clear evidence, taken from independent observers, that this does not take place. In addition, the MMO argues that the birds avoid boats – however, this is irrelevant if the nets are long enough to extend beyond the boat and within the range at which the birds would approach a boat.
- The assessment does not set out a clear plan for monitoring.
- The assessment does not explain what mechanisms will be in place to allow the MMO to respond quickly to restrict or prohibit activities if required. We have doubts about whether the MMO would be able to react sufficiently quickly in order to avoid deterioration to/damage of the site in the case that fishing effort at the site does increase.
- See also above our comments on ‘adaptive management’, which is not consistent with the precautionary approach to management required by Article 6 of the Habitats Directive.

Inner Dowsing, Race Bank and North Ridge SCI

The outcome of this assessment is a recommendation to monitor current and potential potting and towed gear activities within the site.

We have concerns about this recommendation, due to the following:

- There is a lack of clear information about the level of fishing in the site, due to lack of reliable data (see above our detailed comments on fishing effort).
- It is unclear whether the current bye-law restricting fishing with towed gears in areas of known reef, has been updated to take account of the additional areas of reef discovered in July 2015 (referred to at p.4 of the assessment). Limitations in survey data mean that there could also be additional areas of reef at the site, that is not currently protected by the bye-law. We therefore question the basis for the decision not to consider this ‘red risk’ as part of this assessment.
- We also have some concerns about the decision not to manage fishing activities in some parts of the site that have moderate biological richness. The MMO seems to reach this conclusion on the basis that “at this site the biotope is found within areas of dynamic sand communities, and therefore is likely to contain more robust and recoverable species of the venerid family” (p.33). In the absence of detailed survey data, we do not agree that this conclusion can safely be drawn.

- Protection of more stable areas of sandbanks is required in order to allow habitats, and the typical species they support, to form mature communities. There is ample scientific literature that suggests that certain richer areas of the sandbanks can recruit and grow communities that support greater biodiversity. For example, the assessment provides no scientific evidence that Sabellaria reef will not form in areas outside the 'core' reef areas identified in the current maps made by JNCC. Further, no evidence is provided to say that reef crusts will not form in areas outside of these parts of the site. The lack of evidence in this regard should prompt a precautionary approach to decisions about management options.
- The assessment does not set out a clear plan for monitoring.
- The assessment does not explain what mechanisms will be in place to allow the MMO to respond quickly to restrict or prohibit activities if required. We have doubts about whether the MMO would be able to react sufficiently quickly in order to avoid deterioration to/damage of the site in the case that fishing effort at the site does increase.
- See also above our comments on 'adaptive management', which is not consistent with the precautionary approach to management required by Article 6 of the Habitats Directive.

Conclusion

There are some significant flaws in the methodology for these assessments that need to be remedied.

In addition, for the sites where Part B appropriate assessments have been undertaken, we have concerns about the 'adaptive management' approach favoured by the MMO. Such an approach is not consistent with the precautionary management required by Article 6 of the Habitats Directive. At the very least, the MMO needs to: (i) set out a clear roadmap for monitoring and enforcement in these sites; and (ii) a clear process for, and commitment to, implementing management measures, should these be needed in future.