



Department
of Energy &
Climate Change

Guidance on when new marine Natura 2000 sites should be taken into account in offshore renewable energy consents and licences

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Summary

This guidance is designed to assist developers and holders of offshore renewable energy consents and licences to understand how these will be affected by the provisions applying to new marine Natura 2000¹ sites in the planning process for offshore renewable energy developments. It sets out the views of the Department of Energy and Climate Change (DECC), Marine Scotland (MS-LOT), the Marine Management Organisation (MMO) and Natural Resources Wales Marine Licencing Team (NRWMLT) as the relevant competent authorities for these purposes.

Scope

It is expected that this guidance will be most relevant for developers and operators who already hold a Development Consent Order (DCO) under the Planning Act 2008 (in England and Wales only) or a Section 36 consent under the Electricity Act 1989 (across the UK) and associated deemed marine licences or marine licences, for renewable energy infrastructure within the marine environment, or are in the process of applying for one. It is also intended to inform others with an interest in such consents and licences. The views expressed in this document are not a substitute for taking the advice of suitably qualified professionals, as appropriate. It is non-statutory and is not comprehensive and should be read alongside the relevant legislation.

Background

The Habitats Directive (92/43/EEC) and the Birds Directive (2009/147/EC) require that sites for certain species and habitat types are protected. These form part of the network of sites known as the Natura 2000 network. Special Areas of Conservation (SACs) are designated to conserve habitats and species which are of European importance, which are listed in Annex I and Annex II of the Habitats Directive. Special Protection Areas (SPAs) are classified to protect rare and vulnerable birds and regularly occurring migratory birds of European importance as listed in Annex 1 of the Birds Directive.

¹ The Natura 2000 Network is the EU-wide network of nature protection areas established under Council Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna ("the Habitats Directive").

Where there are proposals for the designation of new or amended SACs under the Habitats Directive, and for the classification of new or amended SPAs for various bird species under the Birds Directive, these sites become possible SACs (pSACs) or potential SPAs (pSPAs) when they have been approved by Ministers for formal consultation. In Scotland they are pSACs or pSPAs when the sites are announced by Scottish Ministers. The terms pSAC and pSPA equally apply to new sites and proposed modifications to existing sites e.g. a proposed extension to an existing site, or the addition of new qualifying habitats and species.

Sites become candidate SACs (cSACs) when the sites have been submitted to the European Commission for inclusion in the Natura 2000 network of protected areas, and become SPAs when the site has been formally classified by the Secretary of State², Scottish Ministers or Welsh Ministers.

Article 6(2) of the Habitats Directive requires that appropriate steps are taken to avoid deterioration of natural habitats and habitats of species and significant disturbance to species on those sites and Article 6(3) requires Member States to consider the likely effects of proposed plans and projects before agreeing to them. These obligations are transposed into UK legislation through The Conservation of Habitats and Species Regulations 2010 (as amended), The Conservation (Natural Habitats, &c.) Regulations 1994 (as amended in Scotland) and The Offshore Marine Conservation (Natural Habitats etc.) Regulations 2007 (as amended), collectively referred to below as the 'Habitats Regulations'. These require that all plans and projects likely to have a significant effect on the UK Natura 2000 sites must be subject to an appropriate assessment of the implications for that site in view of the conservation objectives set for it.

Consideration of new marine SACs and SPAs in planning decisions for offshore renewable energy infrastructure

How new marine SACs and SPAs will affect planning consents

This will depend on whether consent has already been granted for a project, whether it is operational, or completed, or whether it is an application yet to be determined. Different scenarios are set out below for projects which may be affected by the designation of new or amended SPAs and SACs. Table 1 summarises at what stage of the designation process projects will become affected.

Projects currently going through the consenting process

- 1. The application is in the planning or consenting process (Planning Act 2008 and Section 36 of the Electricity Act 1989 (and associated marine licence under the Marine and Coastal Access Act 2009 or the Marine (Scotland) Act 2010)) (this**

² SAC selection process: <http://jncc.defra.gov.uk/page-1460>, SPA selection process: <http://jncc.defra.gov.uk/page-162>

includes applications that are at Planning Act 2008 pre-application and acceptance stage)

The relevant competent authority when considering an application for a plan or project will need to take into account all European sites and offshore European marine sites, when considering the likely significant effect of the proposed project, alone or in combination with other plans or projects. As a matter of policy, proposed or amended sites will be treated as if they have been formally designated or classified, from the point that they are a possible SAC or potential SPA. This is in accordance with domestic policy³.

Developers should take advice from the Planning Inspectorate (PINS), MS-LOT (in Scotland), Natural Resources Wales Marine Licensing Team (in Welsh Territorial Waters), the MMO and the relevant Statutory Nature Conservation Bodies (SNCB) on the scope of the Habitats Regulations Assessment Report (HRA Report) they are required to undertake, in order to ensure that they adequately address all likely significant effects and adverse effects on integrity of all European sites and European offshore marine sites (including pSACs, pSPAs and cSACs).

2. The examination for an application has closed for Planning Act 2008 consents, but a decision has not yet been made, or an application has been submitted, but a decision has not yet been made for Electricity Act 1989 consents (and associated marine licences under the Marine and Coastal Access Act 2009 or the Marine (Scotland) Act 2010)

The competent authority must either be satisfied that there will be no adverse effect on the integrity of European sites or European offshore marine sites (including pSACs and pSPAs) before taking a decision on an application, or, if there is an adverse effect on integrity, be satisfied that the tests of no alternative solution and Imperative Reasons of Overriding Public Interest (IROPI) in Article 6(4) of the Habitats Directive can be met.

Under the Planning Act 2008, if the Secretary of State considers that further evidence is required to inform this view, then during the 3 month decision-making phase, the Secretary of State can request further information from the Applicant and interested parties. This is a transparent process whereby questions and responses are posted on the project pages of the Planning Inspectorate's infrastructure planning portal <http://infrastructure.planningportal.gov.uk/>

Under section 36 of the Electricity Act 1989 (and the relevant legislation for the associated marine licence) Marine Scotland, NRWMLT and the MMO can go back to the Applicant and interested parties at any stage of the process to request more information, before taking a decision on an application.

Projects that already hold a Section 36 consent (the Electricity Act 1989) or a DCO (the Planning Act 2008).

1. Review of existing consents

Once the European sites and European offshore marine sites become candidate SACs (cSACs) or SPAs, existing consents must be reviewed by the relevant competent authority "as soon as is reasonably practicable". The competent authority is under an obligation to reconsider and review consents for projects that are likely to have a significant effect on a new European site or

³ National Planning Policy Framework (paragraph 118): www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/2116950.pdf , National Policy Statement EN-1, Scottish Planning Policy (paragraph 210), the UK Marine Policy Statement (paragraph 3.1.3) and the National Marine Plan for Scotland (paragraph 4.45))

new European offshore marine site by undertaking an appropriate assessment of the implications for the site in view of that site's conservation objectives and must affirm or, if necessary in view of the adverse effect, modify or revoke the consent.

Consents that will need to be reviewed

This will depend on the location and status of the project when the sites become cSACs or SPAs. In all cases, only consents or licences which are likely to have a significant effect on a cSAC or SPA, either alone or in-combination with other plans or projects, will need to be reviewed.

Energy Consents within 12 nautical miles

- **DCOs granted under the Planning Act 2008**

DCOs for projects located inside of the outermost extent of the territorial sea, which are **not completed** before a site becomes a cSAC or SPA will need to be reviewed (regulation 82(1)(a) of the Conservation of Habitats and Species Regulations 2010 (as amended)).

Works are to be treated as **completed for this purpose when the marine works authorised by the development consent have been completed, by which it is meant fully built out.**

- **Consents granted under the Electricity Act 1989**

Consents under section 36 for projects located inside of the outermost extent of the territorial sea which are **not completed** before a site becomes a cSAC or SPA will need to be reviewed (regulation 86(3) and (4) of the Conservation of Habitats and Species Regulations 2010 (as amended)). Works, are to be treated as **completed for this purpose when a generating station is first operated under the consent** (regulation 86(4) of the 2010 Regulations), by which it is meant to generate and export electricity. Under regulation 88(3), any variation or revocation will not affect anything done under the consent or direction prior to the revocation or variation taking effect.

Energy Consents beyond 12 nautical miles

- **DCOs granted under the Planning Act 2008 and consents under Section 36 of the Electricity Act 1989**

DCOs and section 36 consents for projects beyond the territorial sea, will be reviewed after a site becomes a cSAC or SPA (regulation 27(6) of the Offshore Marine Conservation Regulations 2007). However, nothing in the review will affect anything done in pursuance of the consent before the site became a cSAC or SPA, and cannot require the taking down or amendment of works that are built.

Questions and Answers

What is the purpose of a review?

The purpose of the review is to establish whether implementation or the completion, of a consent or licence is likely to have a significant effect or an adverse effect on the integrity of a new European site or European offshore marine site. Holders of DCOs, consents or marine licences should provide as much information as may reasonably be required for the purpose of the review. The information required could relate to environmental information or information about the proposal and may include information which is already available or information from new surveys which may need to be undertaken. The relevant SNCB can advise on what information is already available and what may be required.

What will happen as a result of the review?

If the competent authority considers that likely significant effects can be ruled out, then the review is complete for that consent or licence. If they cannot be ruled out then an appropriate assessment will be required to assess whether there will be an adverse effect on the integrity of the site. This appropriate assessment must then lead to the affirmation, modification or revocation of the consent as appropriate.

If there are imperative reasons of overriding public interest (IROPI) under Article 6(4) of the Habitats Directive these would be considered as part of the review.

2. I hold an existing DCO, Section 36 consent or Marine Licence, but need to discharge conditions before it can be implemented

Where a project has been consented but needs to discharge conditions before it can be implemented, which require the approval of a public body (e.g. the acceptance of a marine mammal mitigation plan), then as a matter of government policy, pSACs and pSPAs should be considered as if they are designated or a classified European site or European offshore marine site, and any possible likely significant effects (and adverse effects on integrity), of discharging the condition on the new European sites would need to be considered.

3. I hold an existing DCO, Section 36 consent or Marine Licence and wish to vary or amend it

Where a project has been consented but a variation or amendment is sought, then as a matter of government policy, pSACs or pSPAs should be considered as if they are a designated or classified European site or European offshore marine site, and any possible likely significant effects (and adverse effects on integrity) of the proposed changes in the variation or amendment, on the new European sites, would need to be considered.

What are the next steps for my consent?

A review of existing consents must be undertaken as soon as is reasonably practicable after the sites have become cSACs or SPAs. The competent authorities are considering how best to take this forward and will announce how they intend to do this after the UK government has submitted the cSACs to the European Commission for adoption and the SPAs have been formally classified by the Secretary of State, Scottish Ministers or Welsh Ministers.

Glossary

- **Candidate SACs (cSACs)** are sites that have been submitted to the European Commission, but not yet formally adopted.
- **Competent authority** is any Minister, government department, public body, or person holding public office who is entitled to give authorisation of consent to a plan or project.
- **Department of Energy and Climate Change (DECC)** works to make sure the UK has secure, clean, affordable energy supplies and promote international action to mitigate climate change. The Secretary of State for Energy and Climate Change is the consenting authority for offshore renewable generating stations above 100MW.
- **European offshore marine sites** are Special Areas of Conservation (including candidate Special Areas of Conservation), Sites of Community Importance or Special Protection Areas that are located in the offshore marine area, which is defined as any part of the seabed and subsoil situated in any area designated under section 1(7) of the Continental Shelf Act 1964; and any part of the waters within British fishery limits (except the internal waters of, and the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man).
- **European sites** are Special Areas of Conservation (including candidate Special Areas of Conservation), Sites of Community Importance and Special Protection Areas within the United Kingdom and the adjacent territorial sea.
- **Marine Management Organisation (MMO)** is an executive non departmental public body that licenses, regulates and plans marine activities in the seas around England so that they're carried out in a sustainable way.
- **Marine Scotland (MS-LOT)** Marine Scotland is a Directorate of the Scottish Government and is responsible for the integrated management of Scotland's seas. The Marine Scotland Licensing Operations Team (MS-LOT) are responsible for marine licences and consenting offshore renewable generating stations under section 36 of the Electricity Act 1989 in Scottish Waters, which have been determined by Scottish Ministers.
- **Natural Resources Wales Marine Licensing Team (NRWMLT)** determines marine licence applications on behalf of the Welsh Ministers. Natural Resources Wales is a Welsh Government sponsored body.
- **Possible Special Areas of Conservation (pSACs)** are sites that are formally being consulted on.
- **Potential Special Protection Areas (pSPAs)** are sites that are formally being consulted on.
- **Sites of Community Importance (SCIs)** are sites that have been adopted by the European Commission but not yet formally designated by the government of each country.
- **Special Areas of Conservation (SACs)** are sites that have been adopted by the European Commission and formally designated by the government of each country in whose territory the site lies.
- **Special Protection Areas (SPAs)** are sites that have been formally classified by the Secretary of State, Scottish Ministers or Welsh Ministers.
- **Statutory Nature Conservation Bodies (SNCBs)** are the Government's advisers on nature conservation; they are Natural England (England), Scottish Natural Heritage (Scotland) and Natural Resources Wales (Wales).
- **Territorial sea** is the area within 12 nautical miles of the baseline (usually low water mark along the coast, or lines enclosing bays or inlets).

Table 1 Summary of the stage of the designation process when projects will be become affected

Stage in consenting process		Status of designation when it becomes a material consideration	What it means for you
In planning process	Prior to the decision phase (pre app/examination)	pSAC/pSPA	Information would need to be submitted to allow a Habitats Regulations Assessment (HRA) on impacts to the site's conservation objectives.
	In decision making phase		Supplementary information may need to be submitted to allow an HRA on impacts to the site's conservation objectives, prior to a decision
Have consent	With conditions that need to be discharged	pSAC/pSPA	Information may need to be submitted to allow an HRA on impacts to the site's conservation objectives from discharging the conditions
	Review of whole consent against the sites conservation objectives:		
	Within 12nm		
	Under the Planning Act 2008	cSAC/SPA	Unless all works are completed.
	Under Electricity Act 1989		a) Unless after first export, then whole consent is exempt. b) A review would not affect works already completed.
	Outside 12nm		
	Under the Planning Act 2008 and Electricity Act 1989		A review would not affect works already completed.
	Variations/amendments to existing consents	pSAC/pSPA	Information may need to be submitted to allow an HRA on impacts to the site's conservation objectives

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