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Your Response

Below are the responses to this consultation. ***(SPS response is bold italic)***

Question 1

This question is in relation to Section 2.1 of the report. Please provide details of any evidence or data relevant to cumulative effects that you wish to highlight, specifically in terms of interactions between marine activities. Please include the title of the source, author and date:

We have prepared a table of projects relating to the Solent using the Natural England project classifiable. Unfortunately the table would not format in your template. It will be provided separately. We have also had the advantage of viewing the response to this questionnaire by ABP Mer. That reveals a degree of pragmatic experience and common sense. We believe MM0 would do well to give considerable weight to their views. Please note that we are concerned as to the quality of the database which will underpin CEA decisions and against which cumulative effects will be tested. There are considerable gaps in marine environmental and scientific data and knowledge. It is therefore imperative that the database is updated alongside developments in scientific work on the WFD and the MSFD. Meanwhile, work already completed in the Solent Disturbance and Mitigation Project 2012 cont. (Solent Forum) could be developed and widened to provide a Solent specific basis for environmental data already available, (while acknowledging that the some of some of the data used in the study is of variable quality and may need revisiting)

Question 2

Questions 2 to 12 relate to Section 4 of the report (assigning responsibility for cumulative effects). Please see page 10 of the report for a definition of 'responsibility' in the context of this work. Please provide your opinion on Option 1 (Equal responsibility) in terms of technical feasibility, general practicality, legal implications, and any other comments.

It would appear that Option 1 (Equal Responsibility) can only be used as a starting point. A glance at the variety of projects in Table 1 shows that equal responsibility in the end is likely to be grossly inequitable, and is likely to offer disproportionate advantage to large developers. It is unlikely to survive beyond the earliest meetings! At such meetings, the effects that need to be taken into account will be agreed to produce a list

Question 3

Please provide your opinion on Option 2 (Activity-specific effects) in terms of technical feasibility, general practicality, legal implications, and any other comments.

At first sight, Option 2 (Activity Specific Effects) works well for some activities provided that it is plain (and agreed by developer and the consenting bodies) that the activity will

not have particular effect. However, where there is doubt, the circumstances in which a precautionary approach is appropriate would need to be defined. This is reminiscent of the discussions that took place at the time the Habitats Regulations were introduced. A wording in the Guidance published at that time was widely accepted by developers and agencies, but appears to have fallen into disuse. Perhaps it should be considered again. It read • "This [the precautionary principle] can be applied to all forms of environmental risk. It suggests that where there are real threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used be as a reason for postponing measures to prevent such damage that are likely to be cost effective. • "It does not however imply that the suggested cause of such damage must be eradicated unless proved to be harmless and it cannot be used as a licence to invent hypothetical consequences. Moreover, it is important, when considering the information available, to take account of the associated balance of likely costs and benefits. • "When the risks of serious or irreversible environmental damage are high, and the cost penalties are low, the precautionary principle justifies a decisive response. In other circumstances, where a lesser risk is associated with a precautionary response that is likely to be very expensive, it could well be better to promote further scientific research than to embark upon premature action." The problem is that all too often, there is insufficient data for science to produce definitive answers. Indeed, at a recent conference relating to the development of MCZs, the scientific community argued that environmental protection is put at risk by an ever increasing demand for more detailed results that simply cannot be delivered in a reasonable time at an affordable cost. Therefore, it is extremely likely that we will have to resort to judgement, and to the use of the precautionary approach. So guidelines for the use of the Precautionary approach will be required. Failure to do this will result in a lack of confidence in the process by developers and NGO's.

Question 4

Please provide your opinion on Option 3 (Apportioning the effect(s)) in terms of technical feasibility, general practicality, legal implications, and any other comments.

Given the possible level of scientific uncertainty described in the previous question, an objective process for apportioning the effects will only be possible in a minority of cases. In reality the allocation of liability will be combination of judgement by consenting bodies and negotiation between developers. So defining the process will be important. We see no reason why a process cannot be devised that starts with Option I that leads into Option2 when Option 1 has been exhausted.

Question 5

Q5: Please provide your opinion on Option 4 (Scale of effect (spatial and/or temporal)) in terms of technical feasibility, general practicality, legal implications, and any other comments

Option 4 appears to be a toolkit to be used within option 3 when the circumstances allow it. The process should include criteria that should indicate when it should be applied.

Question 6

Please provide your opinion on Option 5 (Allocation of responsibilities based on application timeframe) in terms of technical feasibility, general practicality, legal implications, and any other comments.

This is probably the most difficult part of the whole process. Let us look at a series of cases: Case 1: Historic projects. Prior to the projects mentioned in table I, there were numerous projects in the Solent area that had an adverse environmental effect, and which would probably not have obtained consent under todays regulatory regime. To be specific • The construction of the new docks in the 1930s and the building of the container terminal in the 1950s have together had a severely adverse effect on the morphology of the river Test. • The construction of numerous marinas on the Hamble River, and in particular the canalisation of the river at Bursledon have, 'alone and in combination', had a significant adverse impact on the river and its Saltmarsh habitat. It would seem entirely impractical and unfair to try and unpick the mistakes of the past. Therefore, it would seem appropriate to draw a clear line at about 1992 (say, when the Habitats Regulations became effective). Further it would seem fair and reasonable that any project granted a formal consent and/or planning permission, and where the consent has been exercised, should not be considered in any new CEA unless of course further development is under consideration. Case 2: Current Projects The capital projects to dredge the Solent provide an interesting study. The starting point was the refusal of an application by ABP to construct a new container terminal at Dibden Bay in Southampton Water. In the decade since then, despite the recession, trade has grown, and container ships have doubled in size. It has taken most of the decade for ABP to obtain consent to redevelop 201-2 berths for the new larger ships, and to deepen and widen the approach channel to the port. The process was interrupted by the major change in process as a result of the creation of MMO. (Interruptions of the consent process arising from regulatory change are not uncommon. One remembers the inquiry into Terminal 5 at Heathrow which was interrupted at least twice by new EU and UK environmental law at great cost to the developer) When MoD decided to order two aircraft carriers, there was an imperative need to dredge the approach to Portsmouth. So, at first sight, there is a clear case requiring a CEA covering both the Southampton and Portsmouth dredge projects. That did not happen. Some process took place and any new 'rules' must be able to reproduce the result. It was reasonable to suppose that the Southampton project was so far through the process, and that appropriate compensation was in hand. To go back to square one at that stage would have been totally unreasonable, and against the national interest. Whatever process was adopted, it was plainly subjective and needed to take into account many factors including 'concepts' such as the national interest. Both Developers and NGO's need to understand how this process works, who is responsible at each stage, and what appeal opportunity may exist. The establishment of a clear process may also protect MMO and other government (and local government) bodies from judicial review. But this case study has more questions to pose. For the purpose of this discussion we discount any special rights, powers or exemptions that may apply to MoD. Let us suppose that the Portsmouth dredge was found to have a small impact in addition to the known impacts of the Southampton dredge. It would be theoretically possible for ABP to argue that such impacts would have been greater if the Southampton dredge were not taking place. Could it therefore claim a

contribution to the compensation it had been required to provide? The obvious answer would be that if it has been decided that it need not take part in the CEA then it cannot claim benefit from further process. This is just one illustration of the subjective rules that need to be devised and agreed in order for the process to become transparent. Case 3: Smaller projects. It is the case that an application to develop a marina at the old Husbands repair yard was submitted while the Dibden Bay inquiry was taking place. The project was near, but not in, an SSSI. The developer was told that the necessary cumulative effects study could not be carried out until the Dibden decision was known. It is unacceptable that development by smaller companies should be swamped by major developments. Some process is needed to allow smaller projects, where the scale of any impact is likely to be relatively minor, to be considered in some kind of procedural 'capsule'. (As an aside, the Husbands marina has still not proceeded because it is subject to some non- environmental objections) For the sake of clarity, it should be clear that had the Southampton dredge been at a much earlier stage in the consent process, then a CEA involving Southampton and Portsmouth would have been indicated. But now add in Cowes outer harbour, a project which has been under consideration for 100 years but for which funding has only just been obtained. It is self evident that this plus the 2 dredge projects above will have some impact on the tidal regime in the Solent, however small. But it only required a tiny change (a few millimetres) in tidal range to result in AB P being required to spend a significant sum on habitat creation to compensate. Even if a CEA is not possible (because the Southampton and Portsmouth Dredge project had been consented), it should be a requirement on both to provide any data needed to allow the third project assessment to be carried out. Free? At Cost? The rules need to be clear. So in summary this case illustrates a clear need for a process to be described and the criteria for each decision to be listed, as well as who will take the decision, and what appeal process may exist. Case 4 Known projects in the future. In the Solent there are several shown in the table, including • A new project on Dibden Bay • Some development of Marchwood Military Port is probable when it is sold by MOD to a new owner. • Fracking • Fawley power station rebuild Clearly, there will be insufficient data for these projects to be fully taken into account in any CEA currently taking place. That does not exclude such projects being noted in reaching a subjective decision as part of the process. For example, it could be argued that some port development at Dibden Bay is probable within 2-3 decades, which lends weight to the case for the main channel deepening project. However, such a view would be strongly contested by opponents of a development at Dibden. If fracking for gas is likely to take place in the Hampshire basin (whether it directly affects the Solent or not) it could lend weight to the replacement of the power station at Fawley with a gas fired power station (because all the power distribution sytem and wayleaves are already in place). Such a project may obviate the need for a new jetty for the import of gas. There are also pressures for the Fawley site to be cleared and allowed to return to nature. It may be that such pressures could increase to the point where it becomes a project for which a CEA would be appropriate. This would need to take account of issues of energy self sufficiency and sustainablity as well as the ecological opportunities. Note that, in the short term, there must be a slight possibility of an emergency project to bring the existing Fawley power station back on stream to plug the impending gap in the country's energy supply (i.e. to keep the lights on). That could require rapid decisions, for example, to dredge the approach channel at Ower Lake to allow some new plant to be delivered by sea. Under what circumstances could the CEA process be speeded up to deal with the emergency?

Question 7

Please provide your opinion on Option 6 (Precedents in previous development applications) in terms of technical feasibility, general practicality, legal implications, and any other comments.

Clearly, precedents are important; but with a rapidly changing regulatory environment, the validity of past precedents is significantly weakened. It is probable that any consent decision granted before 2 years after the creation of MMO is likely to have little relevance as a precedent.

Question 8

Please provide your opinion on Option 7 (Developer forums hosted by MMO) in terms of technical feasibility, general practicality, legal implications, and any other comments.

If, as we believe, this is a description of a negotiation process, then it is highly desirable. If we are dealing in a world where science is incomplete (as seems likely), then 'buy in' to any decisions is preferable to endless judicial review cases. This means that forums may have a significant role. However, it may be necessary for there to be guidance on the way they are conducted in order to reduce the risk of judicial review.

Question 9

Please provide your opinion on Option 8 (Consultation with industry bodies) in terms of technical feasibility, general practicality, legal implications, and any other comments.

Clearly, consultation with industry bodies is desirable, but some caution is needed. Industry bodies (and user groups such as RYA) always need to have regard to the risk of creating national precedents. This tends to make them less flexible. We may need to create a climate in which local decisions do NOT create national precedents

Question 10

In your past experiance, how has it been decided who the responsibility for cumulative effects lies with?

Generally it would appear that the environmental agencies 'blackmail' the developers into offering massive compensation projects for impacts that are uncertain. It is almost invariably true that the primary responsibility for cumulative effects is imposed on developers. This creates interesting (and as yet unresolved) questions about where liability lies when the cumulative effects are a combination of public (e.g flood defence) and private sector developments. For example, in the Solent area we see the Medmerry habitat creation project. This is seen as compensation for undetermined public projects in the Solent area (such as flood defence). It is, in fact, one of the very first habitat banking projects. Bearing in mind that the statutory obligation to provide compensation under European law rests in UK government, it is far from clear why private sector developers cannot claim that Medmerry has already provided compensation for their projects.

Common sense suggests that a developer should fund the compensation for his project, but it would make sense to set out the rules under which a developer could purchase a share of compensation created by the public sector. That this should be done arises from the desirability of compensation being provided on the large scale rather than piecemeal

Question 11

Does your organisation currently use any procedures or processes that are the same as, or similar to, the options in Section 4?

Solent Protection Society is an observer, not a developer.

Question 12

Are there any additional options for assigning responsibility that you would like to suggest?

No

Question 13

Questions 13-15 relate to Options discussed under Section 5 of the report (a strategic framework for cumulative effects assessment). Please provide your opinion on Option 1 (Source-led approach) in terms of: - The ease with which you think it could be used; - How technically sound the outcome is likely to be; - The flexibility; - Any weaknesses; and - Any other comments.

- The ease with which you think it could be used;

Option 1 is completely dependent on the availability of adequate scientific data. In the case of MCZs we have already seen that practitioners have argued that it cannot provide the science in sufficient detail, and that broader brush approaches are required. - How technically sound the outcome is likely to be; The most probable outome will be that science an inform the decision, but in the end, it will be a judgement - The flexibility; - Any weaknesses; and - Any other comments. See previous answers

Question 14

Please provide your opinion on Option 2 (DPSIR approach) in terms of: - The ease with which you think it could be used; - How technically sound the outcome is likely to be; - The flexibility; - Any weaknesses; and - Any other comments.

- The ease with which you think it could be used;

We have argued earlier that a process approach is the most likely to succeed. Inevitably, the end result will often require judgement . The example of the Resource management Act in New Zealand may offer some lessons (though it is seriously flawed when dealing with multiple projects). One aspect, however, is the introduction of an environmental court. It is rare for projects to get as far as a formal court hearing, with solutions being

agreed and negotiated beforehand. Australia has something similar. - How technically sound the outcome is likely to be; - The flexibility; - Any weaknesses; and Care is needed to make sure that a process that is designed to handle major developmnts is not imposed on smaller simpler projects which cannot stand the time, technical expertise or costs involved. - Any other comments. We have nothing further to add to the responses already made

Question 15

Please provide your opinion on Option 3 ('Bottom-up' or systems approach) in terms of: - The ease with which you think it could be used; - How technically sound the outcome is likely to be; - The flexibility; - Any weaknesses; and - Any other comments.

- How technically sound the outcome is likely to be; Do we know enough about ecosystems and how they work in the marine environment to make this work?

Question 16

Please share any other comments you have on the initial directions proposed within the report.

None