

Pagham Harbour proposed managed breach

Application: P/97/15/PL

4 January 2016

Dear Mr Davis

Please see as a separate attachment the RSPB's comments on this application.

The RSPB is acutely aware of the problems of coastal erosion being faced by the community at Pagham Beach, and is committed to working with all interested parties to identify a sustainable solution. We believe that such a solution is achievable whilst at the same time maintaining the local, national, European and international nature conservation importance of Pagham Harbour.

We have considered the current planning application carefully and in great detail, and have worked extensively with the applicants and their consultants. Whilst we believe that the application forms the basis of an acceptable solution, we are not entirely content that the accompanying Environmental Statement includes all the information, in the right form, to enable your Authority to make a decision, and in particular to carry out a full Habitats Regulations Assessment under the Conservation of Habitats and Species Regulations 2010 (the Habitats Regulations).

In recent discussions with the applicant's consultant's we have been informed that they accept our analysis and that further information will be provided to your Authority to inform its Habitats Regulations Assessment. Accordingly, whilst we currently reserve our position pending the provision of that further information, we do so in the expectation that the outstanding issues will be resolved.

Yours sincerely

Steve Gilbert

RSPB South East England Region

01273 763604

Town and Country Planning Act 1990

Application: P/97/15/PL

Proposal: Managed breach of shingle spit and blocking of adjacent tidal inlet channel with shingle barrier. Formation of shingle island within harbour following excavation of adjacent area of spit.

Response to the application by RSPB

4 January 2016

A. Introduction

1. Over the previous decade or so, the growth of the Church Norton spit across the mouth of Pagham Harbour has caused the inlet channel to cut into the Pagham Beach frontage, leading to major erosion of the beach in front of the houses in that location. This erosion is compounded during storm conditions, which can lead to the rapid removal of shingle from the frontage.
2. The RSPB recognises that the existing situation is of great concern to residents at Pagham Beach, and has provided input to the evolving process of seeking a sustainable solution to the problem. We have access to an extensive database of bird and other wildlife records relating to Pagham Harbour, which has been shared with the Applicant's agents to help inform the preparation of an Environmental Statement.

B. Background

3. Pagham Harbour is a site of local, national, European and international importance for wildlife. It is designated as a Local Nature Reserve, a Site of Special Scientific Interest, a Marine Conservation Zone, a Special Protection Area, and a Wetland of International Importance under the Ramsar Convention.
4. The SPA interests are breeding little and common terns and non-breeding dark-bellied brent geese, black-tailed godwits and ruffs (although the last species has not occurred in significant numbers at the site for many years). In addition, the UK SPA Review (*The UK SPA Network – Its Scope and Content* JNCC, 2001) includes non-breeding pintails as a qualifying feature.
5. The Ramsar site's avian interests are non-breeding dark-bellied brent geese and black-tailed godwits.
6. In addition, the site supports breeding ringed plovers and oystercatchers, and an assemblage of non-breeding waterbirds including dunlins, grey plovers, redshanks and curlews.

7. In June 2014, Natural England published updated site conservation objectives for the SPA/Ramsar site:

With regard to the SPA and the individual species and/or assemblage of species for which the site has been classified (the “qualifying Features”) listed below and subject to natural change:

Ensure that the integrity of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring:

- **The extent and distribution of the habitats of the qualifying species**
- **The structure and function of the habitats of the qualifying features**
- **The supporting processes on which the habitats of the qualifying species rely**
- **The population of each of the qualifying features, and**
- **The distribution of the qualifying features within the site**

These highlight, among other things, the requirement to maintain and, where necessary, restore the qualifying features of the SPA/Ramsar site and the structure and functions of the habitats that support them.

8. Since 1 February 2012 the RSPB has entered into a series of leases with other NGOs, public bodies and private landowners, and is currently the occupier of the land hatched blue on the attached plan. We manage some other areas of the Local Nature Reserve as agents for West Sussex County Council under the terms of a Service Level Agreement where they are the tenants of the land. We also provide a wardening service on some further areas where LNR agreements are in place with the owners and occupiers of the land.

B. Outline of RSPB response

9. The issue of primary biodiversity concern to the RSPB is the impact of the proposals upon breeding little terns, an SPA interest feature, both during the construction phase and during the post-construction “operation” of the new breach. This is discussed in more detail below.
10. Other biodiversity issues that are addressed below are:
 - Disturbance to other breeding birds during construction
 - Loss of or changes to habitat of other breeding birds post-construction
 - Disturbance to non-breeding birds during construction
 - Loss of or changes to habitat of non-breeding birds post-construction
 - Other impacts on biodiversity, including Defolin’s lagoon snail (an MCZ feature)
11. We also set out our recommended approach to the decision making process with regard to the application, with particular reference to the requirements of the

Conservation of Habitats and Species Regulations 2010 (“the Habitats Regulations”) and the role of mitigation and compensation in that context.

C. Impact of the proposals upon breeding little terns

12. The SPA site is designated for its breeding population of little terns, one of the rarest breeding terns. It was first designated in 1988 when the population was 15 pairs. The SPA Standard Data Form gives an average population of 7 pairs for the period 1992-1996, while the UK SPA Review site account states that the population reached 12 pairs in 1995.
13. Since then, numbers of breeding little terns at Pagham Harbour have varied widely from year to year. None bred between 1996 and 2006 inclusive, since when between three and 18 pairs have bred. The great majority of these have bred on the Church Norton shingle spit, in the early years in the vicinity of the proposed managed breach. Following the growth of the spit after 2002 the preferred breeding location moved to the north east, apparently as a result of the availability of recently accreted, bare shingle.
14. In 2015 18 pairs bred, fledging 16 young. This high rate of productivity is believed to have been greatly assisted by the provision of temporary fencing around the breeding location and a programme of intensive wardening, thereby reducing disturbance by people, particularly those with dogs, and the effects of terrestrial predators.
15. The implementation of the proposals will involve significant, albeit localised and time-limited, disturbance to the whole of the spit, which if carried out during the breeding season would be likely to have a major adverse impact upon the ability of little terns to breed successfully. It is imperative therefore that no implementation works take place during the period between April and August. See section I below concerning mitigation and compensation.
16. The excavation of an area of shingle to create the breach will result in the permanent loss of approximately 0.25 ha of potential breeding habitat. However, little terns have not bred in this specific location in recent years and it is therefore considered unlikely that this will have an adverse impact upon breeding success.
17. Of greater concern is the predicted loss, over a period of approximately 10 years, of the severed shingle spit following the excavation of the breach. Initially this will remain suitable for breeding, but is likely to be subject to higher levels of disturbance due to increased ease of public access from the Pagham end of the spit. With the predicted gradual erosion of the severed spit and the movement of this material north eastwards onto Pagham Beach, this area will become increasingly unsuitable for breeding terns and will eventually cease to be available. As the Environmental Statement acknowledges in section 8.2.8.1 and 11.2.2, this would represent an adverse effect on the integrity of the SPA that cannot be avoided. See section I

below concerning the decision-making process and the role of mitigation and compensation.

D. Disturbance to other breeding birds during construction

18. In addition to little terns, breeding common terns are a designated feature of the SPA. This species breeds on the existing tern island inside the Harbour and not on the Church Norton spit. However, the exclusion of construction during the period between April and August (see paragraph C.13 above) will avoid any possibility of disturbance to breeding common terns or other species (such as ringed plovers).

E. Loss of or changes to habitat of other breeding birds post-construction

19. As noted in paragraph C.15 above, the predicted erosion and eventual loss of the severed spit over a period of approximately 10 years will result in the removal of habitat currently used by nesting little terns. This is unlikely to affect the other SPA breeding bird interest, namely common terns.
20. Two other bird species nest on the spit in most years, namely oystercatcher (an Amber species of Conservation concern) and ringed plover (recently added to the Red list of species of conservation concern), but it is unlikely that the presence or otherwise of a shingle feature in this location is a limiting factor on the populations of these species either locally or at a larger scale.

F. Disturbance to over-wintering or passage birds during construction

21. Aside from ruffs, which no longer occur at Pagham Harbour in significant numbers, two over-wintering and passage species are SPA interest features: dark-bellied brent geese and black-tailed godwits. In addition a number of other waterfowl make use of the harbour for feeding and/or roosting during the winter period, for example grey plovers and dunlins (both Amber species of conservation concern).
22. The construction phase will involve movements of plant, human access and sheet pile driving during a period of 9 -11 weeks at the beginning or end of the over-wintering period (probably in September – November 2016 or January – March 2017).
23. It is highly likely that these operations will lead to displacement of birds from the vicinity of the activity. The area over which this effect will be manifested is uncertain but monitoring of disturbance by machinery at a development in Saltend concluded that it is likely to be restricted to a 50 metre zone in each direction from the boundary of the activity (*Saltend Development Cumulative Impact Study*, Institute of Estuarine and Coastal Studies, 1997). On this basis approximately 3% of the area of the SPA would be affected.

24. In view of the relatively small proportion of the SPA affected and the limited duration of the works we consider the impact on over-wintering and passage birds to be short-term and low.
25. However, we would welcome further discussion with the Applicant's consultants to refine the construction period by identifying the least sensitive time during the suggested construction periods for the SPA/Ramsar site features during which the work could be carried out, so that these could be set out in an appropriate planning condition.

G. Loss of or changes to habitat of over-wintering or passage birds post construction

26. Three changes may conceivably affect over-wintering or passage birds post construction:
- changes in water levels within the harbour,
 - changes in the sedimentation regime, and
 - the probable creation of a temporary saline lagoon to the north-east of the breach.
27. The ES predicts that there will be two minor changes in the water level regime within the harbour, a short-term small reduction in spring and neap high water levels across the harbour in the period immediately after the breach is implemented, and a longer-term reduction in spring and neap low water levels, especially the former, as a result of more efficient drainage due to the inlet channel being much shorter. We consider it to be unlikely that either of these minor changes will have a significant impact on feeding or roosting waterbirds.
28. No significant changes to the sedimentation regime are anticipated. The RSPB accepts this conclusion.
29. It is likely that in the short term the distal end of the severed spit will re-connect with Pagham Beach, resulting in a saline lagoon forming behind it for a period of approximately 10 years until the spit erodes away. This may have a small temporary beneficial effect, for example by providing sheltered feeding opportunities for birds, including tern species. However, as the spit erodes over time, this temporary saline lagoon will not persist.

H. Other impacts on biodiversity, including Defolin's lagoon snail (a MCZ feature)

30. There appears to be no conclusive evidence that there is an extant population of Defolin's lagoon snail on the Church Norton spit (although specimens were found there in 2007), and based on surveys at the Fleet (Dorset) in 2012 and Pagham in 2009 and 2013 more sheltered saline water bodies appear to be its preferred habitat. If this is the case then it is unlikely that the construction of the breach will have an adverse impact on the species, or that there will be any significant impacts post

construction. However we recommend that sampling should be carried out in the proposed breach area in March 2016 to provide a clear understanding of whether or not the species is present, and that any subsequent advice from Natural England is acted upon.

31. We do not consider there to be any identified significant impacts on any other non-avian species.

I. The legal and policy framework and implications for the decision making process

32. The Pagham to East Head Coastal Defence Strategy (Environment Agency, 2009) adopts a policy of Adaptive Management for the Pagham Beach and Pagham Harbour mouth frontage. Adaptive Management is defined as “Managing complex coastal areas by monitoring changes and acting on them in a planned but flexible way, increasing our understanding over time”.
33. Pagham Harbour is a classified Special Protection Area under the EU Birds Directive (*Directive 2009/147/EC on the conservation of wild birds*) and the application site lies within and on the boundary of the SPA. Accordingly regulation 61 of the Conservation of Habitats and Species Regulations 2010 (“the Habitats Regulations”) applies.
34. Paragraph 118 of the National Planning Policy Framework extends the requirements of regulation 61 (and subsequent regulations) to, *inter alia*, listed or proposed Ramsar sites and any site identified as being necessary to compensate for adverse impacts on European or Ramsar sites. Pagham Harbour is a listed Ramsar site. The application site is approximately 4 km from the Medmerry Managed Realignment site, which provides compensatory habitat for impacts on European sites elsewhere in the wider Solent. The RSPB does not consider that the implementation of the proposal at Pagham Harbour would have any impact upon the Medmerry site.
35. For convenience the steps set out in the Habitats Regulations that it is necessary to consider are set out here:
- i. **Step 1:** Under regulation 61(1) (b), consider whether the project is directly connected with or necessary to the management of the European site. If not –
 - ii. **Step 2:** Under regulation 61(1) (a) consider, on a precautionary basis, whether the project is likely to have a significant effect on the European site, either alone or in combination with other plans or projects.
 - iii. **Step 3:** Under regulation 61(1), make an appropriate assessment of the implications for the European site in view of its conservation objectives. Regulation 61(2) empowers the competent authority to require the applicant to provide information for the purposes of the appropriate assessment. There is no requirement or ability at this stage to consider

extraneous (non-conservation e.g. economics, renewable targets, public safety etc) matters in the appropriate assessment.

iv. **Step 4:** Pursuant to regulation 61(5) and (6), consider whether it can be ascertained that the project will, alone or in combination with other plans or projects, adversely affect the integrity of the European site, having regard to the manner in which it is proposed to be carried out, and any conditions or restrictions subject to which the authorisation might be given.

v. **Step 5:** In light of the conclusions of the assessment and in accordance with regulation 61(5) and (6), the competent authority shall agree to the project only after having ascertained that it will not adversely affect the integrity of the European site, alone or in combination with other plans or projects.

vi. **Step 6:** In accordance with regulation 62, a competent authority may only derogate from regulation 61 where there is an absence of alternative solutions and it is satisfied that there are imperative reasons of public interest to override the protection of the European site and, in accordance with regulation 62, that the necessary compensatory measures have been secured that protect the overall coherence of the Natura 2000 network.

Implications for the decision-making process: alternative solutions and imperative reasons of overriding public interest

36. Section 2 of the ES sets out the case for Project Need and Alternatives. It also includes sections setting out the Applicant's consideration of alternative solutions and imperative reasons of overriding public interest in relation to regulation 62 of the Habitats Regulations.

37. The RSPB considers this section needs further work in order to ensure the Councils, as the competent authorities, are able to complete their Habitats Regulations Assessment. At present the ES does not set out all the necessary information required by the Councils.

38. We recommend the following changes be made to ensure that the text is fully addressing the tests on alternative solutions and imperative reasons of overriding public interest:

- In section 2.1.3 (Proposed Community Project and its Objectives) distinguish clearly between those objectives that are genuine public interest objectives (and therefore relevant to the alternative solutions and IROPI tests) and those that are project-level objectives only. For example, the RSPB would consider that the public interest objectives could include those relating to public safety e.g. achievement of larger and longer-term coastal defence benefits, whereas those relating to the site's amenity value are not. Public interest objectives might also include the need to avoid the risk of further and uncontrolled damage to the SPA/Ramsar site through unmanaged breaches. Please note that relative costs of different options are not relevant at the alternative solutions stage.
- In section 2.2 (Alternatives) include a section that specifically addresses the alternative solutions test (as opposed to alternatives in their ES sense). This section should compare the possible alternative solutions to meet the stated public interest objectives

and set out how the proposed solution will be the least damaging (or at worst cause equivalent damage) to the SPA/Ramsar features of the various alternative solutions identified that could meet the public interest objectives. At present, the information provided alludes to this, but does not yet provide a clear description that would enable the Councils to conclude that there is no alternative solution to the proposal. This may require an additional table to Table 2.1 that addresses only the alternative solutions issue.

- Include a new sub-section that summarises the justification for imperative reasons of overriding public interest in light of the amended sections described above.

39. Once these are revised, the RSPB would be happy to update its comments on this key section.

Implications for the decision-making process: compensatory measures

40. The RSPB agrees with the statement (section 2.2.1.3) in the Environmental Statement supporting the application that, having regard to the fact that the proposal will lead to a significant change in the physical functioning of the SPA/Ramsar site, and have implications for SPA interest features, that it has a Likely Significant Effect and that accordingly an Appropriate Assessment is required.

41. The RSPB further agrees with the ES that the predicted impacts on the SPA breeding little tern feature cannot be mitigated and comprise an adverse effect on the integrity of the SPA.

42. The application incorporates the creation of a new shingle island within the harbour, formed by the deposit of material upon an existing concrete revetment, to create a new breeding habitat for little terns. The ES incorrectly describes this as mitigation (e.g. page 16 of the Non-Technical Summary), but later correctly describes it as compensation (ES section 11.2.2, page 249). It should correctly be considered as a compensatory measure. As determined by the European Court of Justice judgement in the *Briels* case (Case C-521/12 *Briels v Minister van Infrastructuur en Milieu* 2014), where the predicted adverse effect cannot be avoided, the provision of alternative habitat for the impacted feature elsewhere within the boundary of the SPA should be regarded as compensation. It is predicted that the habitat supporting breeding little terns will be lost as a consequence of the proposed development and therefore it must comprise an adverse effect on the SPA that cannot be avoided.

43. The RSPB considers that, if appropriately designed and subject to ongoing management, notably vegetation control and anti-predator fencing, the support of appropriate wardening, and clarification of who is legally responsible for the compensatory measures, the proposed creation of a new shingle island within the harbour would be likely to provide suitable habitat to replace that which would be lost as the existing spit gradually erodes. The precise design of the island and the means of implementing its creation would need to be agreed with Natural England and the RSPB, and any consent should be conditioned accordingly.

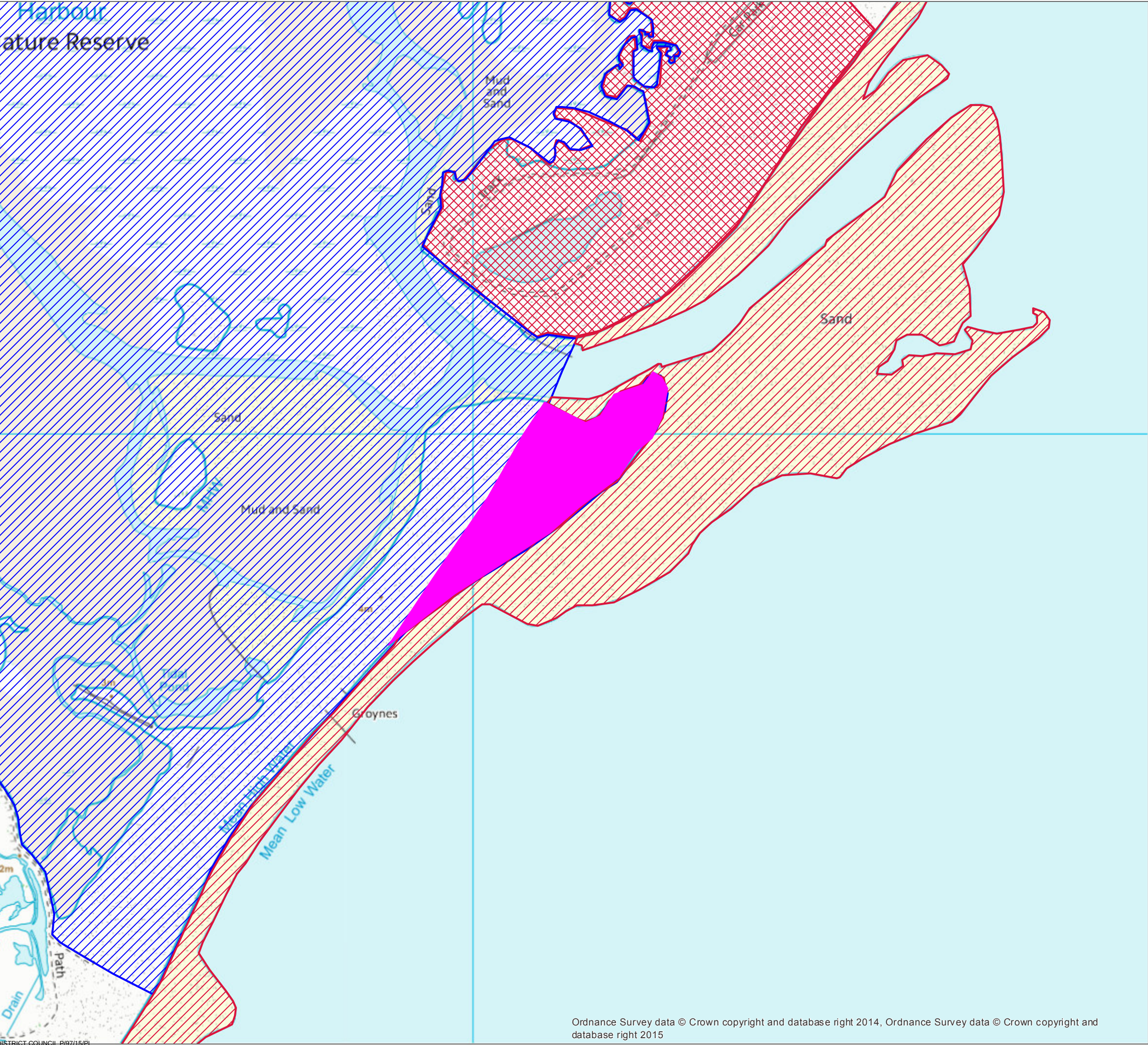
44. In line with UK and EC guidance on compensatory measures, the new habitat should be provided in advance of the predicted adverse effect. The RSPB would welcome working with the Applicant and their consultants, the Councils and Natural England on an appropriate planning condition and associated agreement setting out the aims and objectives of the compensatory measures, along with the proposed construction methods and timetable in relation to the predicted impacts, appropriate management and monitoring measures.

J. Summary and Conclusion

45. The application raises a number of issues and concerns with regard to impacts upon biodiversity, in particular the bird species that are SPA/Ramsar features.
46. The RSPB's principal area of concern is in relation to the population of breeding little terns, whose existing breeding site is likely to gradually erode and ultimately disappear over a period of about a decade if the proposal is implemented.
47. The RSPB considers that the proposed works would have a Likely Significant Effect on the SPA/Ramsar site and that it is necessary for the Competent Authorities to undertake an Appropriate Assessment.
48. The RSPB agrees with the Applicant that the predicted impacts on the habitat of breeding little terns mean that an adverse effect on the integrity of the SPA cannot be avoided. Therefore it is necessary for the Councils to consider the tests of alternative solutions and imperative reasons of overriding public interest (regulation 62) and compensatory measures (regulation 66).
49. The RSPB considers that the information provided on alternative solutions and imperative reasons of overriding public interest needs revision in order to ensure that the Councils, as Competent Authorities, are able to complete their Habitats Regulations Assessment. The RSPB has set out suggested changes needed to the relevant sections of the ES in order to ensure the Councils have the necessary information to address regulation 62. Once these are revised, the RSPB would be happy to update its comments on this key section.
50. The Applicant has proposed the creation of a new shingle island within the harbour as a compensatory measure to provide suitable habitat for breeding little terns. The RSPB considers that if appropriately designed and subject to ongoing management, notably vegetation control and anti-predator fencing, the proposed compensatory measures would be likely to provide suitable habitat to replace that which will be lost as the existing spit gradually erodes.
51. The RSPB would welcome working with the Applicant and their consultants, the Councils and Natural England on an appropriate planning condition setting out the aims and objectives of the compensatory measures, along with the proposed

construction methods and timetable in relation to the predicted impacts, appropriate management and monitoring measures.

52. The RSPB recognises the seriousness of the erosion problems at Pagham Beach and the need to secure a sustainable solution to these problems. The RSPB is committed to working with the Applicant and other interested parties to resolve the concerns set out above and to come to a satisfactory conclusion.



Legend:

- Areas Removed from Declaration
- Crown Estate Freehold
- EA Non Op Freehold
- PBHL Freehold 1

Acknowledgements & Notes:

Created by: RSPB
© Crown Copyright. All rights reserved. RSPB licence 100021787 © Crown Copyright, RSPB Permit Number: 60271.



Map scale = 1:4,968

Date printed: 03/12/2015

