

App No: P/97/15/PL

Site Address: Church Norton Spit Pagham Beach Pagham PO21 4NJ

Description of Works: Managed breach of shingle spit & blocking of adjacent tidal inlet channel with shingle barrier.
Formation of shingle island within Harbour following excavation of adjacent area of spit.
This application is accompanied by an environmental statement

EIA /HRA Assessment

The Environment Strategy team have a number of concerns and comments on the Environmental Statement, particularly regarding uncertainties and examination of alternatives. These have implications for the Habitats Regulations Assessment (HRA) above and beyond the Requirements of the EIA Regulations.

The Environmental Statement (ES) has stated that there is a great deal of uncertainty within certain aspects of the proposals (Parag 8.2.8.2). As just one example with regards to Little Terns it has stated that there is 'a high likelihood of habitat change occurring for little terns', and the confidence in predicting future usage of the area by the bird is low. This low confidence raises concerns about whether the information provided for the purposes of EIA meets the criteria of providing "complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubts as to the effects of the works proposed on the protected site" that the recent 'Sweetman' judgement of the ECJ set down for Appropriate Assessment stage of HRA. The loss of habitat at the far end of the spit rolls back to Pagham Beach over 10 years or so and the increased accessibility of this area are the primary cause for concern from a biodiversity point of view in this application.

Furthermore the uncertainty that the breach will stay open raises uncertainty about the effects not just on the little tern habitat but also on the assessment for all the intertidal habitats within the Harbour on which the overwintering species depend. This in turn makes it difficult for the competent authorities to conclude at the appropriate assessment stage that there will not be an adverse impact. The council should pay due regard to Natural England's advice but the ES describes the impact on the terns as "up to moderate" before compensatory measures. From this alone the risk of granting permission under Article 6(3) ought to be evident. It is highly likely that a derogation under Article 6(4) will be required.

Of the three tests required to be met in order to use the derogation procedure, the information submitted may well be sufficient to meet the test of Imperative Overriding Public Interest, mainly because that test is a balance of the economic and social impacts of the risk of homes being lost against the environmental damage. However, the potentially short term nature of the advantages of the scheme are problematic in meeting this test.

The advice of Natural England on the suitability of the compensatory measures will be of critical importance to passing that test as the Secretary of State is legally responsible for securing those measures in the case of a derogation.

That leaves the issue of meeting the test of 'no alternatives'. The ES briefly examines the alternatives but very much from the point of view of the EIA regulations requirements rather than the more in-depth approach required for the Habitats Regulations Assessment. The project objectives are multiple and self-set, but the Defra Guidance (2012) makes it clear that for a Habitats Regulations test the objectives ought to be set at a more fundamental level. The guidance uses the example of the expansion of Southampton port. The project objectives there may well have included 'expansion of the port of Southampton', however the derogation test looked at the underlying aim of "how can port capacity in the south of England be expanded?" We would suggest that the underlying aim of the scheme here is 'how can homes in Pagham be protected from damage?' Objectives set around concerns about the appearance and amenity value of alternative measures would not be appropriate for a habitats regulations test that is concerned primarily with minimising the impacts on wildlife.

In our view there are alternatives that would defend the homes and be less damaging to the designated species of the SPA, particularly given the loss of little tern habitat and the increased access afforded to much of the remaining habitat on the former spit from the settlement of Pagham.

Direct intervention on Pagham beach may have drawbacks from a local amenity and appearance point of view but this should not form part of a HRA judgement. The short term nature of such alternatives should be compared to the uncertainty of an artificial breach closing up in a storm and to the possibility of a breach naturally occurring in time. Should the applicant wish to provide a fuller assessment of alternatives this would undoubtedly assist in the decision-making process. At this stage the competent authorities should also consider making a joint request for an opinion to the European Commission under Regulation 62(3) on the likelihood of meeting the derogation tests as this would reduce the risk of judicial review or other legal challenge at a later stage in the process.

Tom Day, Environmental Co-ordinator

07/01/16