

Consultation on Dogger Bank possible Special Area of Conservation

Template for responding to the consultation

Your organisation (if applicable): **Wildlife and Countryside Link (Link)**

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Name of person responding to the consultation: **This response is supported by the following members of Wildlife and Countryside Link's Marine Legislation Working Group:**

- **Buglife – The Invertebrate Conservation Trust**
- **Royal Society for the Protection of Birds**
- **Whale and Dolphin Conservation Society**
- **The Wildlife Trusts**
- **WWF – UK**

NOTES

Please use this document to make your response to the formal consultation. It has one template which you will need to copy if you want to comment on more than one site. To make your response:

1. Download this document and save to your computer.
2. Fill in your name and address details above
3. Enter your responses in the boxes shown; use as much space as you need.
4. If you leave a box blank, we will assume you have no comment to make.
5. Send your completed form, complete with any additional data that you wish to submit, to the contacts shown on the back page of this document.

Hand written and hard copy responses will also be accepted.

If you have any difficulty accessing the document or have any special needs please contact us as shown on the back page.

Sites and their associated boundaries

SAC1) Do you support the scientific basis for the Dogger Bank site being put forward in this round of consultation?

Link **supports** the scientific basis for the Dogger Bank site being put forward under Annex 1 habitat 'sandbanks covered by water at all times'. Link, however, **does not support** the JNCC's interpretation of the SAC selection criteria as set out in the Explanatory Notes of Commission Decision 97/266/EC concerning a site information format for proposed Natura 2000 sites. In particular Link opposes the down-grading of the harbour porpoise from a qualifying feature to a non-significant population (grade D) within the Dogger Bank dSAC. Link strongly believes the harbour porpoise should be reinstated as a qualifying feature at this site. Please see text below (SAC 4) for a detailed analysis of our view.

SAC2) Please indicate if you have any scientific information, not already referenced in the SAC Selection Assessment document for Dogger Bank site, to support your response to SAC1.

No

SAC3) Do you have any information additional to that included in the SAC Selection Assessment document about the condition of Annex I habitats within the Dogger Bank site boundary that you would like to share with the JNCC?

No

SAC4) Do you have any further comments on the scientific selection of the Dogger Bank as SAC?

Yes.

Link welcomes this consultation on the selection of the Dogger Bank as a SAC. However we have concerns regarding the process and proposal for (i) Annex I habitat Sandbanks and (ii) Annex II species harbour porpoise (*Phocoena phocoena*). We outline our position on these issues individually below.

(i) Sandbanks: Link supports the proposal and scientific basis for the Dogger Bank site being put forward for the Annex I habitat sandbanks (which are slightly covered by sea at all times). We do, however, have some concerns relating to the process which has resulted in changes to the boundary and reduction in overall size of the pSAC from that articulated in JNCC Assessment Selection v4.0 (28.10.2008).

We note the difficulty in making a direct comparison of the boundary between the different versions (v4.0 and V6.0 (20.08.2010)) without GIS facilities, particularly given the variation in scale and the boundary coordinates not being numbered. However, significantly we note an area to the north/ north west of the pSAC being removed from that proposed in v4.0, resulting in a reduction in the site surface area from 15,057 km² in v4.0 to 12,339km² in v6.0. Link notes that the process and timeline to consultation phase has been complicated and drawn out, and the boundary issue has been subject to much debate (JNCC 09 P22).

We note the rationale for the change on boundary and size of the pSAC as articulated in JNCC 09 P22 – V20100728, Dec2009. We note the issue of determining boundary parameters has an arbitrary element to it and our understanding is that the difference

between v4.0 and v6.0 boundaries are that the former is based more on physical structure with less emphasis on biological community and the later being determined with greater emphasis on continuity of biological community and less on physical structure. We note and accept the JNCC review of the data in light of the two independent peer reviews and which now forms the boundary on which this consultation is being made.

We also seek clarification of what steps have been taken to ensure that the scientific approach taken to identifying both the boundaries and features of the UK Dogger Bank pSAC is consistent with those taken for the Dutch and German Dogger Bank (Sandbanks) SACs.

Link also notes with concern a recent pattern in the reduction of coverage of area for pSACs for sandbanks as they move through the consultation phase and query why this is. For example, in August 2010, the UK Government announced submission of 12 marine cSACs to the European Commission. Six of these sites (Bassurelle Bank, Haisborough, Hammond and Winterton cSAC, Inner Dowsing, Race Bank and North Ridge cSAC, Margate and Long Sands cSAC, North Norfolk Sandbanks and Saturn Reef cSAC, Shell Flat cSAC) include the feature 'sandbanks which are slightly covered by sea water all the time (1110). Between formal consultation on these sites as pSACs and their submission to the Commission as cSACs, 5 of these 6 sites were subject to what JNCC, Natural England and CCW described in their letter to consultees of 20 August 2010 as 'minor boundary changes as a result of ...consultation'. At first sight it would appear that the scale of these 'minor;' changes varied between sites, from an increase of over 9,000 ha at Margate and Long Sands cSAC to a reduction of over 72,000 ha at the North Norfolk Sandbanks and Saturn Reef cSAC. Crude calculations would suggest **a net loss of 107,461 ha of sandbank habitat** across these five sites between consultation and submission, for which, as far as we are aware, no adequate scientific justification has been given. Link, requests clarification on the scientific rationale for removing qualifying Annex I habitat from the boundaries of these candidate SACs.

(ii) Harbour porpoise

Link is deeply concerned that the status of the harbour porpoise at Dogger Bank has been downgraded from a qualifying feature in v4.0 to a non qualifying feature in v6.0. Moreover, we do not believe, on the basis of the rationale outlined in JNCC 09 P23 and in written correspondence to WWF (and other NGOs) dated September 2009, that the site selection criteria as set out in the Habitats Directive and Commission Decision 97/266/EC concerning a site information format for proposed Natura 2000 sites have been correctly applied in this instance.

It is settled case law of the European Court of Justice that Member States are required to implement a site based approach to maintaining Annex I habitats and Annex II species at Favourable Conservation Status (FCS) across the territory of the European Union in accordance with Articles 4 and 6 of the Habitats Directive. Legal advice procured by WWF reinforces this view, emphasising that Member States cannot discharge their duties in this regard through the adoption of "wider measures" (such as controlling by-catch) however valuable such measures may be. Downgrading the harbour porpoise to a non-significant population at Dogger Bank pSAC, leaves the UK in the deeply regrettable position of proposing no sites in which the harbour porpoise is identified as a primary reason for site selection or a qualifying feature. This is in stark contrast to the approach adopted by other Member States including, most notably, neighbouring territories in which the species occurs (see later).

Furthermore, it has become increasingly apparent to Link that non-scientific factors may be influencing the status of the harbour porpoise at this site. JNCC will be aware that the European Court of Justice has ruled, on numerous occasions, that Member States cannot

take account of economic, social or cultural requirements and regional and local characteristics when selecting and defining the boundaries of candidate sites (see, for example, Cases C-67/99 *Commission v Ireland*, C-71/99 *Commission v Germany*, C-220/99 *Commission v France* and C-371/98 *United Kingdom "First Corporate Shipping"* in which WWF-UK intervened in support of the UK Government. Any decision as to the status of the harbour porpoise on this site must be made on the basis of sound science alone.

In general, Link is concerned that the JNCC is interpreting the site selection criteria far too narrowly. Whilst we recognise and applaud the need to ensure decisions can be robustly defended, there is a danger that the criteria are being taken out of context and to perverse extremes. The criteria are not individual hurdles that must each be passed before progressing to the next. They are to be applied using expert judgment, as a whole and in the context of the precautionary principle, to the best available scientific data, in order to identify sites. Similarly, if there is no data to support a decision in relation to a particular criterion, it does not "score" a negative point – it is simply neutral until such data exists (or is collected).

Link is concerned that the JNCC's apparent change of position appears to rest solely on the interpretation of one of the site selection criteria i.e. the criterion relating to the size and/or density of the population in relation to both national populations and populations in neighbouring areas.

Link believes that, in line with other Member States, a more precautionary, pragmatic and case by case approach is needed for designating candidate sites for aquatic and wide ranging mobile species.

Link notes that different Member States have taken different approaches to proposing sites for the harbour porpoise. However, consistent amongst other Member States, is the development of datasets and research in potential areas as indicated by initial data analysis on harbour porpoise populations. Link questions the general lack of research effort in relation to harbour porpoise where they have been identified as a possible feature in a site proposed for another habitat or species, or in developing work on clarifying potential harbour porpoise 'hotspots'.

As discussed at the recent Marine N2K Experts meeting in September 2010, there appears to be an expectation, particularly in relation to transboundary sites, for consistency across Member State approaches, and we note that that both the Netherlands and Germany have put forward the harbour porpoise as a qualifying feature for their portions of the Dogger Bank.

It is Link's understanding that:

- The UK cannot lawfully decline to list the harbour porpoise as a qualifying or arguably a primary reason for the selection of the Dogger Bank cSAC, even though it regularly supports between 2-4% of the national population, on the basis that the density of the population is no greater than the neighbouring areas.
- It is not lawful for the UK to rely on "wider measures" in order to achieve or maintain favourable conservation status for the harbour porpoise as an Annex II species.
- The UK cannot lawfully decline from listing the harbour porpoise as a qualifying feature on the Dogger Bank cSAC site details on the basis of observed population density being no greater than neighbouring areas.
- The implications of the JNCC's proposed approach are potentially significant. The recorded lack of importance of the harbour porpoise would be reflected in the

priorities to be established for the site pursuant to Article 4(4) of the Directive following adoption of the site, and in the conservation measures to be established under Article 6(1). This would in turn feed through into the appropriate assessment of any relevant plan or project under Article 6(3), how the site's conservation objectives are affected, and whether the integrity of the site would be regarded as adversely affected. Further, it would feed through into the obligation under Article 6(2) to take steps to avoid deterioration of the habitat and avoidance of disturbance of the harbour porpoise as a species for which the area had been designated.

Finally, Link believes, at the very least, that harbour porpoise should be reinstated as a qualifying feature at the proposed Dogger Bank site. Indeed, on available data there is an arguable case for the harbour porpoise to be identified as a primary reason for selection.

Associated Impact Assessment

IA1) Do you have any further information on assessing the value of goods and services for European habitats for the Impact Assessment for Option 1: Designate the site?

No

IA2) Are there any other significant activities at Dogger Bank that the IA has not identified?

IA3) Can you provide any information to inform estimates of what vessels would do in response to closing Dogger Bank or part of it to certain types of fishing methods?

No

IA4) Can you provide any information to improve the assessment of the costs (and wider impacts) of selecting Dogger Bank?

No

IA5) Can you provide any information to improve the assessment of benefits of selecting the Dogger Bank?

No

IA6) In assessing the benefits, we do not take account of the role of the feature (i.e. habitat type) in supporting the wider ecosystem. Can you provide information on the importance of any of the features in supporting the wider ecosystem?

IA7) How much time do you think a business might typically take to familiarise themselves with the implications of offshore SAC designation if implemented? (If you represent a particular sector, please make your answer specific to that sector)

IA8) Are there significant unintended consequences associated with the Options (Baseline: do nothing or Option 1: designate the site) that have not been identified in the IAs?

IA9) Do you agree with the assessments of impacts on small businesses and can you provide any further information?

IA10) Are there any other aspects of the IA on which you would like to comment or where you are able to provide further information?

