

Phil Jones

From: Phil Jones [pmj@abertawe.co.uk]
Sent: 25 November 2014 23:50
To: Swansea Tidal PINS <SwanseaTidal@infrastructure.gsi.gov.uk>
Cc: Andrew Kelton FL <Andrew.Kelton@fishlegal.net>; Ray Lockyer PASAS <ray.lockyer@pasas.org.uk>; Lennard Powell Afan Valley AC <lennard.powell@ntlworld.com>
Subject: RE: EN0100049 Tidal Lagoon Swansea Bay - Extended Deadline 5 Submission by Pontardawe and Swansea Angling Society Ltd

Follow Up Flag: Follow up
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PASAS Deadline 6
Submission 20...

Please find attached our Deadline 6 Submission.

Our reference: 10026500

Phil Jones

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“And an ingenuous Spaniard sayes that both Rivers, and the inhabitants of the watery Element, were created for wise men to contemplate, and fools to pass by without consideration. And though I am too wise to rank myself in the first number, yet give me leave to free myself from the last, by offering thee a short contemplation, first of rivers, and then of fish: concerning which, I doubt not but to relate to you many things very considerable.”

Izaak Walton, “The Compleat Angler”, 1653

INTRODUCTION

1. The examination is coming to an unsatisfactory conclusion with many loose ends untied and important material inadequately scrutinised, because of the Examining Authority’s willingness to accommodate an applicant who submitted prematurely an inadequately prepared application without adequate consultation and contrary to the PINS guidance in Advice Note 16:

“The statutory requirements allow some flexibility for developers to determine the most applicable programme by which they will be able to comply most effectively with their duties. The overriding intention of the legislation is to ensure that detailed matters are consulted upon and solutions or mitigation negotiated with the local community, landowners, statutory consultees and local authorities before submission of the application for development consent.”

2. Even before it was accepted for examination, Fish Legal explained the problem with the application but their pre-acceptance submission was disregarded.
3. As a result, instead of the examination concentrating on residual disagreements after proper discussions with all interested parties, it has been a scramble to cobble together enough ad hoc stuff to keep opponents at bay while the 6 month examination clock ticked. TLSB bit off more than they could chew and have failed in the time available to show that they have correctly assessed the likely significant effects and provided proper mitigation for them.
4. Here we are, well after the anticipated date for the conclusion of such matters, responding to late environmental information and expecting more to be submitted today, to which we’ll be unable to respond. It’s completely unsatisfactory and we are already contemplating judicial review, if consent is given.

OUR REPRESENTATIONS

5. In our Deadline 2 submission (9th July):
 - a. We readily adopted comments in the applicant’s “*Accuracy and Limitations*” document about “*a clear distinction between precision and accuracy*” and “*the potential false impression of accuracy due to precision*”.
 - b. We set out the value of the salmon and sea trout fishery to us and of fishing in general to the community. (In our Deadline 5 submission, we mentioned a monetary value of about £2 million for the fisheries in the Tawe, Neath and Afan but since then several interested parties have said that’s probably a significant under-estimate.)
 - c. We challenged the project’s treatment as an NSIP. We have no reason to change our position. The applicant’s response didn’t address our point that “*capacity*” isn’t defined in the legislation and that “*in the context of the contribution that a project can make to national renewable energy needs, a station’s maximum achievable annual average production (46 MW in this case) is more relevant than the nominal capacity of the turbines*”.

- d. We made the point that the project would generate very modest amounts of electricity and that the projected “*capacity factor*” didn’t compare well with other technologies. Tellingly, the applicant didn’t respond to these points.
- e. We set out our concerns about the likely detrimental effects of:
 - i. massive, unnatural flows in Swansea Bay interfering with normal migration routes and behaviour;
 - ii. fish (smolts, returning adults and kelts) being drawn into the turbines and killed;
 - iii. fish being drawn through the turbines into the impoundment and trapped;
 - iv. fish being driven away from the area by unfavourable conditions;
 - v. other miscellaneous and unpredictable effects.
- f. We criticised the applicant’s environmental statement – in particular the IBM turbine encounter modelling, the assessment methodology and the tables of likely effects.
- g. We challenged the applicant’s claim that “*broad scale estimates of fish numbers seem to indicate fairly stable populations*” and pointed out (and provided supporting detail) that NRW currently regard salmon stocks as “*at risk*” and sea trout stocks as “*probably at risk*” because of declines since 2010. The applicant’s responses were petty and insubstantial.
- h. We pointed out that the proposed limits of deviation allowed relocation of the turbine array in a way which would invalidate the fish encounter modelling. The limits of deviation have since been reduced but they still allow up to:
 - i. 42 metres movement and 15 degrees clockwise rotation to the west; and
 - ii. 175 metres movement and 21 degrees ant-clockwise rotation to the eastwhich we contend is enough to invalidate the turbine encounter modelling and therefore breaches “*Rochdale envelope*” principles.
- i. We pointed out that the WFD assessment was fundamentally flawed, drawing attention to:
 - i. errors in the identification of waterbodies – still not corrected in the latest WFD assessment submitted at Deadline 4 or in the Deadline 5 report on Article 4.7 derogation;
 - ii. failures to mention / assess likely impacts on the main river waterbody “*Tawe – confluence with Twrch to tidal limit*” – still not put right;
 - iii. omissions in respect of WFD articles 4.7 and 4.8 – later addressed (incompletely and incorrectly) in the Deadline 5 report on article 4.7 derogation.
- j. We asked the Examining Authority, if the DCO application is recommended for approval, to ensure that secure measures for our protection are included in the Development Consent Order, including:
 - i. requirements to implement any mitigation and offsetting measures devised as a result of discussions between the applicant, NRW, ourselves and other interested parties;
 - ii. proper monitoring, at the applicant’s expense, of the effects of the construction, operation and maintenance of the project;
 - iii. offsetting measures to counter an assumed level of harm (as in the case of the Cardiff Bay Barrage), whether or not demonstrated by monitoring, because of the possibility that monitoring might not identify true impacts;
 - iv. compensation arrangements to take effect if monitoring shows that fish and therefore our fishery have been harmed;
 - v. requirements to remedy any damaging effects of the project;
 - vi. security (eg in the form of a bond) to cover any liabilities which the developer, or any other entity to which responsibility is transferred, fails to honour.

Whilst a compensation provision (currently article 38) has been accepted in respect of item iv., most of the other measures requested remain unresolved because of the lack of time to address these matters properly.

We have no reason to change our position on any of these points. The applicant's responses have generally been evasive and disingenuous.

6. On 16th July we had a without prejudice meeting with the applicant at which, amongst other things:

- a. Further information about flows was promised. After reminders, some information was finally provided on 14th November (which we can supply, if requested) but it merely begs further questions and does not allay the concerns set out in our Deadline 2 submission. Indeed, it calls into question evidence given during the ISH on 18th September, because it uses "burst" swimming speeds for salmonids which do not apply in normal circumstances.

We drew attention in 5.9 of our Deadline 2 submission to the screens requirement in the Salmon and Freshwater Fisheries Act 1975 and to Environment Agency guidance, actually authored by Dr Turnpenny, which says that such burst swimming speeds "*will usually require high motivation by the fish, e.g. a startle response that might be caused by a strong stimulus (e.g. electric shock, sound pulse or strobe light flash)*".

AFD no longer forms part of the applicant's proposals so a whole area of the applicant's evidence is called into question by this late information which we have been unable to question effectively.

- b. Various offset / compensatory measures were discussed – eg, improvements to the Tawe Barrage fish pass. No proposals have been forthcoming. In fact, the measures proposed in the "DCO Heads of Terms" document submitted (without consultation and without our knowledge) as part of the application, which would have involved us and would have included Tawe Barrage measures, has quietly been dropped.
- c. We made comments, subsequently misquoted and used out of context, about possible future effects on rod catch returns of:
 - i. measures currently being taken to reduce exploitation of salmon and sea trout, which are likely to affect licence uptake; and
 - ii. an imminent review of the rod licensing structure (following separation of NRW from Environment Agency), which might have other unpredictable effects on licence uptake and the compilation of rod catch data.

These factors undermine the applicant's proposal to use rod catch returns as the main method of monitoring effects of the project.

7. On 25th July TLSB sent us unexpectedly and without prejudice a draft Statement of Common Ground which wholly misrepresented our position. Despite our protestations, they subsequently submitted that draft on 1st September and it was published on the PINS website. We wrote to the ExA on 11th September complaining about that and about the way in which the ExA was allowing the applicant to submit new information.

8. In our Deadline 3 submission (5th August):

- a. We acknowledged the support given to us by the City and County of Swansea in the Local Impact Report (paras 13.5 to 13.10).
- b. We supported the representations made by NRW.
- c. We challenged many statements made by TLSB in their Deadline 2 responses to the ExA's Written Questions.

TLSB don't appear to have responded to our Deadline 3 submission.

9. In our Deadline 4 submission (7th October):

- a. We detailed the problems with the Deadline 3 (5th August) versions of the AEMP and WFD Assessment. Updated versions were submitted that same day.
 - b. We made a case for a protective provision in the DCO to compensate owners etc of fisheries injuriously affected by the project. Article 38 has now been included but it can only be effective, if there are secure and reliable monitoring arrangements, capable of detecting harm to the fisheries.
10. In our Deadline 5 submission (28th October):
- a. We detailed the continuing problems with the Deadline 4 (7th October) versions of the AEMP and the WFD Assessment.
 - b. We discussed the lack of baseline data for salmon and sea trout and monitoring, mitigation and offset requirements.
 - c. We provided our own common-sense illustration of the ways in which salmon and sea trout are likely to interact with the turbines, in response to the attempts by the applicant's fisheries experts to baffles us all with science during the Issue Specific Hearings in September.
 - d. We concluded that:
 - i. as we had said all along, the applicant had submitted its consent application prematurely, before all the necessary preparation had been done;
 - ii. the latest versions of the AEMP and WFD Assessment were defective and there was insufficient time left to put things right.
11. In our (Extended) Deadline 5 (4th November) submission we detailed the continuing problems with the Deadline 5 (28th October) versions of:
- a. the AEMP; and
 - b. the report WFD article 4.7 derogation.

We have received no response to either.

FINAL SUBMISSIONS

12. MITIGATION / OFFSET

- a. Current proposals fail to meet the requirements set out by us at the outset and repeated in para 5.j above:
- b. We believe that the project is likely to harm salmon and sea trout. The applicant has failed to propose any mitigation / offset measures to counter the harm which even its own modelling predicts.
- c. We believe that, as in the case of the Cardiff Bay Barrage, where lessons had been learned from the Tawe Barrage, there should be a package of measures:
 - i. to compensate for an assumed level of harm, equal to the minimum detectable level;
 - ii. to remedy / compensate for any actual harm established in excess of that.
- d. No such measures are proposed either in the AEMP or in the DCO. The applicant's latest response to this point, in the "*Note addressing mitigation actions and acceptance for / rejection of inclusion in AEMP*" submitted on 4th November, merely says "*TLSB does not predict there will be significant impacts on fish populations as a result of the Project.*" We are not satisfied with that response.

13. MONITORING

- a. For the reasons set out in earlier submissions and in today's Fish Legal submission, we believe the monitoring proposals to be completely unsatisfactory.

- b. We repeat our earlier requests for the provision of fish counters at appropriate locations.

14. DRAFT DCO

- a. We welcome and support the points made in today's Fish Legal submission – particularly in relation to Article 38.
- b. We object to article 49(3) in the DCO which says that "*No requirement to provide screens under section 14 of the Salmon and Freshwater Fisheries Act 1975(c) shall apply in respect of the authorised development.*" This provision, which has apparently been included as a result of para 5.9 in our Deadline 2 submission, should be deleted. It is perfectly proper to leave the granting (or withholding) of any exemption, subject to appropriate conditions, in the hands of NRW. They are the proper body to manage such matters and their hands should not be tied in the DCO.

Pontardawe and Swansea Angling Society
25th November 2014