



UK Environmental Law Association's comments on Department for Transport's consultation on a draft National Policy Statement for Ports

Introductory comments

1. UKELA is the UK's foremost membership organisation working to improve understanding and awareness of environmental law, and to make the law work for a better environment. As such, UKELA has a keen interest in ensuring that the National Policy Statements facilitate proper application of domestic and European environmental legislation in relation to nationally significant infrastructure proposals.

2. We are concerned that there is a failure in the draft NPS to make clear what are matters of mere policy and what are the legal obligations on decision-makers, especially the "outcome-based" obligations under the EC Habitats Directive; what an authority "should" do can have rather different status.

3. We have particular concerns about how the policies are to be applied in relation to applications for port capacity that will or may affect the integrity of European sites. In order to meet the requirements of Articles 6(3) and 6(4) of the Habitats Directive, consent for such projects may only be granted '*in the absence of alternative solutions*' and '*for imperative reasons of overriding public interest*' (IROPI) and provided '*all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected*' are taken. It seems that the NPS is intended to provide the policy framework for considering these issues, with policies on need and benefits guiding the consideration of IROPI, and the policy on need also relevant to consideration of alternative solutions. We are concerned that this would result in projects being consented without proper consideration of alternative solutions (including projects already consented but not commenced or completed) and in circumstances that fall short of true IROPI (bearing in mind the approach taken in previous planning decisions and Commission decisions). As such, it could give rise to breaches of the Habitats Regulations and Habitats Directive, and legal challenges.

4. Similar concerns arise in relation to how the policies are to be applied in relation to applications for port capacity that will cause deterioration to the status of a water body under the Water Framework Directive (WFD), or a failure to achieve good status. Consenting such developments would cause a breach of the requirement under Article 4(1) for member states to prevent deterioration and aim to achieve good status (where this is set as the objective), unless they can be justified as meeting the conditions under Article 4(7). We do not consider that the draft NPS (in particular section 2.19) provides adequate guidance on how the IPC should approach consideration of the issues under Article 4(7). We assume the intention is that the IPC should apply the NPS policies on need and benefits

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when considering whether the reasons for the project are of overriding public interest and whether the beneficial objectives from the project cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option (under Article 4(7)(c) and (d) WFD). However, we question whether this would result in proper application of the Directive criteria.

Q1: Do you think the draft ports NPS provides suitable guidance to decision-makers on the question of what need there is for new port infrastructure?

a) General point about lack of clarity/tension within the guidance on how decision-makers should approach need

5. There is a lack of clarity as to how decision-maker should approach need, which is likely to cause problems (uncertainty, disputes etc) in practice. **1.12.1** – Requires decision-maker to ‘accept the need for future capacity to:

cater for long-term forecast growth in volumes of imports and exports by sea for all commodities indicated by the demand forecast figures set out in the MDST forecasting report accepted by Government, taking into account capacity already consented. The Government expects that ultimately all of the demand forecast in the 2006 ports policy review is likely to arise, though in the light of the 2008-09 recession, *not necessarily by 2030*’ [emphasis added]

6. ‘*Not necessarily by 2030*’ – There is a lack of clarity as to the timeframe for the MDST forecast demand. If not necessarily by 2030, then when? **1.11.4** says ‘the Government’s view is that the long-term effect [of the recession] will be to delay by *a number of years* but not ultimately reduce the eventual levels of demand for port capacity predicted in these forecasts.’ This does not clarify matters. The period over which projected increased levels of demand would arise is a key element of the forecast. If the increased demand levels are to be reached significantly later than 2030, then current need for additional ports provision would be significantly less pressing.

7. ‘*Cater for long-term forecast growth ... taking into account capacity already consented*’ – Read in the context of section 1.11, there is confusion about exactly how decision makers should take into account both the long-term forecast growth in volumes of imports and exports, and capacity already consented. Statements elsewhere in section 1.11 however appear to suggest that decision-makers should presume a need for the extra capacity applied for by a developer generally/at a particular location – and therefore that existing and consented capacity and future projected demand is irrelevant (raising questions of consistency with the Habitats Directive: see further comments below). See for example the statements that future capacity is likely to exceed demand (eg last sentence of para **1.11.7**, penultimate sentence of **1.11.10**), that the market is the best mechanism for resolving

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the question of location for new port capacity (last sentence of **1.11.9**) and that the port industry and port developers are best placed to assess their ability to obtain new business and the level of any new capacity that will be commercially viable (last sentence of **1.11.10**).

b) Concerns about consistency with the requirements of the Habitats Directive

8. As noted in our introductory comments, we are concerned about how the policies are to be applied in relation to applications for port capacity that will or may affect the integrity of sites protected under the Habitats Directive. By way of elaboration, we make the following comments on specific parts of the guidance on need.

9. **Para 1.10.1** states that the government seeks, through the national ports policy, that it should:

“allow judgments about when and where new developments might be proposed to be made on the basis of commercial factors by the port industry or port developers operating within a free market environment”

However, there is an apparent tension between that policy and the similarly expressed intention to seek to:

“ensure all proposed developments satisfy the relevant legal, environmental and social constraints and objectives, including those in the relevant European Directives and corresponding national regulations.”

in that the obligations under the Birds and Habitats Directive require that all satisfactory alternatives must be considered. The European legislation is predicated upon the ability, and indeed the willingness, of government to be prescriptive as to the sites which may be developed for the purposes of port infrastructure. Under Article 6(4) of the Habitats Directive Member states have the discretion to identify imperative reasons of overriding public interest in relation to the location of ports and other infrastructure, and indeed are expected to be able to justify their locational decisions on applications to the European Commission to approve them where they affect priority habitats and species. While it is accepted that the commercial factors will be highly relevant to the achievement of successful port provision and maintenance, the suggestion that the context should be that of an entirely free market environment is not consistent with the requirements of the Directive. If the UK were effectively to delegate to the private sector the determination through market mechanisms of port locations that would appear to be an unlawful abrogation of the proper function of government under the Habitats Directive. We would therefore suggest that the draft guidance should contain appropriate guidance in relation to site selection, given the likelihood that most proposals will be made in sites which can impact on protected sites.

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10. The ‘policies’ set out in **paragraphs 1.10.1 and 1.10.2** cover both matters of policy and mandatory legal obligations. Thus the third bullet of 1.10.1 plainly reflects legal obligations, and many of the matters in 1.10.2 (expressed as things that new port infrastructure ‘should’ achieve) will also reflect legal requirements in particular cases. As noted in our introductory comments, legal obligations are of a different status to matters of policy and it would be helpful if the NPS made this clear.

11. **Paragraph 1.11.7** – There may be a question over the legality of going ahead with originally approved projects if others have started in the interim. On the basis that some further or amended approval/permit will almost certainly be necessary as the development actually goes ahead, these might not be lawfully available if the arrival of the new development means that there is no longer the shortage of capacity that provided the overriding reasons behind the original grant of the approval that is belatedly being put into practice.

12. **Paragraph 1.11.7** suggests that, notwithstanding the increase of port capacity allowed by outstanding consents is construed to be sufficient for 20 years demand as currently predicted, the IPC should consider it appropriate to allow to be brought forward other schemes in the short term: “There may therefore be opportunities for other developers to bring forward proposals for alternative or additional developments that satisfy demand that these consented developments are not meeting, as well as a continuing requirement for further new container capacity to meet anticipated longer term growth”. This might be taken to suggest that there is imperative reason of overriding public interest for yet further consents to be granted simply because alternative port development already consented has not yet been brought on stream, without any requirement to show that part of the consented developments will not be brought forward to meet the projected demand. The judgment “Thus, the capacity needed to provide for competition, innovation, flexibility and resilience can be delivered by the market, and is likely to exceed what might be implied by a simple aggregation of demand nationally.” seems simplistic, and apparently intended to enable port development that very seriously exceeds what is necessary to meet demand. The implication that this should be regarded as the justification for proceeding with further schemes affecting the integrity of European sites is concerning.

13. Where consents have been given for existing port proposals which are capable of meeting the projected demand then, in the absence of demonstrating that they cannot or will not proceed, those consents do not appear to constitute satisfactory alternatives to the provision of further port capacity affecting the integrity of European sites. The suggestion in the NPS that additional consents must be provided in order that permitted capacity should substantially exceed demand does not appear, as a matter of law, to meet the test set by Article 6(4) of the Habitats Directive. Further, it seems improbable on the basis of previous decisions, that the European Commission would exceptionally approve a decision to consent

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port capacity in excess of projected demand where a priority species or habitat was affected. Previous UK decisions, for example in relation to Dibden Bay and Bathgate Bay have suggested that little weight should be given to long-term demand, which in the latter case was interpreted variously as beyond 2015 and 2017.

14. The present approach appears radically different from the perspectives of previous policy documents in this respect, for example in *Modern Ports: A UK policy*:

"Growing pains

2.4.6. This paper does not identify the ports where expansion should be authorised. The pressure for expansion is greatest at ports handling container and roll-on roll-off traffic. The main players in these sectors feel it most. Forecasts point to a prospective shortfall in freight ferry and container port capacity, although they do not tell us how it must be met or where.

2.4.7. Some ports need to increase capacity to meet future demand. This may require substantial new port development in a relatively small number of cases. Where there is a clear need, we will support sustainable port projects, but each case must be looked at in detail on its merits. Particular cases must be considered within the strategic context provided by regional planning guidance and the regional transport strategy. We will follow established approval procedures including hearing any objections.

2.4.8. Expanding ports face the challenge of sustainably accommodating demands for extra capacity. A proven strength of the ports industry is that capacity is flexible. The efficiency and intensity of facility use and ship turnaround times can substantially influence the throughput possible with the same infrastructure. The industry must exploit this flexibility.

2.4.9. If the port industry fails to meet demand or is prevented from doing so, shipping lines may divert primary services to overseas ports. This would make it harder to meet some objectives of integrated transport policy. The primary services would no longer collect and deliver UK trade to UK ports, adding the cost of transshipment in a foreign port to UK trade. A higher proportion would arrive in or depart from this country on road trailers. There would be a significant effect on the cost of UK trade, and thus on competitiveness, as well as on the volume and pattern of road traffic."

15. We consider that the *Modern Ports* approach would be readily reconcilable with the Habitats Directive obligations, and in some locations could be approved by the European Commission under Article 6(4).

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16. **Paragraph 1.11.12** sets out the government's conclusion that there is '*compelling need* for substantial additional port capacity over the next 20-30 years, to be met by a combination of development already consented, and development for which applications have yet to be received.' In the context of the preceding paragraphs, we are concerned that this statement will be taken to imply that major overprovision of port capacity would necessarily constitute imperative reasons of overriding public interest (in terms of Article 6(4) Habitats Directive). The Inspector's report in relation to the Dibden Bay inquiry stated:

"The second requirement set out in Regulation 49(1) is that the project must be carried out for imperative reasons of overriding public interest. It is in the context of this requirement that the prospect of alternative development proposals at other ports becomes relevant. If there is (or will be) ample provision at other UK ports for those categories of trade for which the Dibden Terminal would cater, then that is a matter to be weighed in considering whether the Dibden Terminal must be built for imperative reasons of overriding public interest."

The case for Dibden was based on predictions of a shortfall of local capacity by 2030, and this was not accepted as constituting IROPI in this context.

17. Secretary of State's decision in relation to Dibden Bay appears to make clear that alternatives did have to be excluded by evidence, and that:

45. The Secretary of State considers that these proposals are therefore firmer than was the case at the time of the Public Inquiries. The Secretary of State does not prejudice whether any of those developments would proceed but he concurs with the Inspector that, in principle, they are feasible and credible alternatives for meeting forecast national needs within the short to medium term. There is no reason at this stage to rule them out as not being capable in principle of providing the additional capacity for container handling in the South East of England which has been identified in the Inspector's Report.

46. The Secretary of State notes, in addition, the Inspector's references and conclusions concerning projected developments at Hunterston and Scapa Flow. He accepts that the location of the two Scottish projects referred to makes them in relative terms less realistic alternatives to a Dibden Terminal than would be the case with the aforementioned three southern English projects. The Secretary of State agrees with the Inspector's conclusion that the Isle of Grain is not credible as an alternative given the absence of formal proposals for development of container handling capacity there [36.335].

47. On the question of meeting a predicted short-term shortfall in capacity, the Secretary of State agrees with the Inspector's interpretation of guidance from the European
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Commission in Managing Natura 2000, which states that short term economic interests or other interests which would only yield short term benefits for society would not be sufficient to outweigh the long-term conservation interests protected by Council Directive 92/43/EEC of 12 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") [36.668]. He therefore concludes that a predicted shortfall in handling capacity for a short term should not be determinative in assessing imperative reasons of overriding public interest. "

By extension, to plan for overcapacity of consents on the basis that there is an overriding public interest would appear beyond the justifications that were considered acceptable (as a matter of interpretation of the Directive) in the Dibden Bay decision. We consider also that s. 40 of the Natural Environment and Rural Communities Act 2006 (NERCA) is potentially engaged in a process of this sort given that there is a reliance upon a stated overriding public interest.

Q3: Do you think the draft ports NPS provides suitable guidance to decision-makers on the economic impacts of port infrastructure?

18. We do not follow the meaning of 2.9.5 – ‘Good environmental quality of water bodies and beaches may also support local tourism and associated businesses, *supporting the weight that should be attached to fulfilment of Water Framework Directive requirements.*’ Is this a reference to application by decision makers of Article 4(7)(c), or some other provision of the Water Framework Directive? We would suggest that this point is elaborated to provide clarity.

Q9: Do you think the draft ports NPS provides suitable guidance to decision-makers on the impacts of port infrastructure on the natural environment?

Section 2.11 – Pollution control and other environmental consenting regimes

19. This states that the planning and pollution control systems are separate but complementary. In fact, the WFD now plays an important role in linking these systems. This is not acknowledged in the draft document. Further, it will need to be made clear in the NPS that there are certain situations (i.e. where the proposal will affect the ecological or chemical status of a water body) in which the WFD rather than EIA or Habitats Regulations might cause a project application to be refused.

Section 2.13 – Climate change mitigation

20. **2.13.9** does not explain why/how intertidal habitat creation might offset emissions.

Section 2.16 – Coastal change

21. We would suggest that this section makes reference to the WFD given the possibility that modification to the physical characteristics of water bodies due to ports developments

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may cause deterioration or a failure to meet good status, raising the issue of whether it can be justified under Article 4(7) of the WFD. 'WFD water bodies' should also be added to the list in Section 2.16.8.

22. **Paragraph 2.16.10** appears very sweeping. "The decision-maker should not normally consent new development in areas of dynamic shorelines where the proposal could inhibit sediment flow or have an impact on coastal processes at other locations. Impacts on coastal processes must be managed to minimise adverse impacts on other parts of the coast." Given that every development impacts coastal processes and affects sediment flow to a degree, this requires some modification/qualification. The avoidance of every dynamic coastal location may have the consequence that far more sensitive locations are taken for port development than would otherwise be the case. Criteria of this sort are concerning to the extent that they rule out alternatives to particularly sensitive sites.

23. **Paragraph 2.19.2** could usefully refer in particular to the potential for port development adversely to affect shellfish and other invertebrates and therefore to affect significantly whole ecosystems. Reference is made to the studies which have been carried out on vulnerabilities of shellfish populations to stress associated with coastal developments such as ports. Currently reference to the Shellfish Waters Directive 2006/113/EC is appropriate, given that under the Water Framework Directive member states are required to complete the compliance with the Shellfish Water Directive as a baseline for the latter.

24. **2.19.4** – The meaning of the fourth bullet point is unclear. What is the significance of the reference to the Water Framework Directive? Is it simply noting that water bodies and protected areas are WFD terminology? Or is it intended to capture a particular kind of impact under the WFD – eg an impact that will affect achievement of environmental objectives? As currently drafted, the bullet is odd in that it appears to capture impacts already covered in the previous three bullet points.

Q10: Do you think the draft ports NPS provides suitable guidance to decision-makers on the impacts of port infrastructure on biodiversity?

25. **Para 2.2.10** seems ambiguous in relation to damage to nature conservation interests. First, it appears that the decision-maker can determine that the benefits of the scheme outweigh all the harms, notwithstanding that they cannot be or are not mitigated or compensated. It is only required to refuse if "those impacts cannot adequately be avoided, reduced or compensated for". The use of the weak term "adequately" allows a view to be taken as to the extent to which impacts on for example a European site, a habitat type or a species need to be compensated. The proposition in the same paragraph that: "The decision-maker *should pay particular attention to* proposals which may have adverse impacts on sites or species of national or international importance" is not sufficient to capture and ensure compliance with the mandatory requirements of the Habitats Directive.

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26. Paragraph **2.10.4** states: “In cases where the EIA Directive does not apply to a project, and an ES is not therefore required, the applicant should instead provide information proportionate to the project on the likely significant environmental, social and economic effects. References to an ES in this NPS should be taken as including a statement which provides this information, even if the EIA Directive does not apply.” It seems difficult to envisage how a port project which came within the scope of the IPC planning regime could not be subject to environmental impact assessment. The strong emphasis on “proportionate” information given the sensitive location of most new port projects appears unhelpful. We consider it would better help decision makers ensure proper consideration is given to factors that may raise issues of EU law compliance for the information provided to be proportionate to the sensitivities of the site, not to the project. In this respect, we note the differently phrased guidance at 2.12.4 that applicants should provide ‘environmental information proportionate to the scale, nature and location of the infrastructure where EIA is not required’. We would suggest that the guidance is consistent on this issue to avoid confusion, and has regard to the s40 NERCA duty previously mentioned.

27. We would suggest expanding the summary at paragraph **2.12.3** to give a fuller picture of the potential impacts of port development for nature conservation. To give a couple of examples, serious damage is done by air pollution from vessels to sensitive habitats. Further, the wash from ships’ propellers can, without dredging, cause damage to benthic ecosystems and sterilise whole areas, as has occurred for example in Loch Ryan.

28. **Para 2.12.8** gives general guidance in relation to nature conservation interests: ‘As a general principle, and subject to the specific policies below, development should aim to avoid significant harm to biodiversity and geological conservation interests, including through mitigation and consideration of reasonable alternatives: where significant harm cannot be avoided, then appropriate compensation measures should be sought.’ We consider this weak, in that ‘sought’ implies requested, not obtained (as is required as a matter of law where the Habitats Directive is engaged). We consider “Biodiversity interests’ a poor description of the totality of habitat, species, environmental quality and linkages which should be sought to be protected.

29. We would also suggest that **2.12.8** paragraph clearly states the requirement of the s 40 NERCA statutory duty to have regard to biodiversity

30. Given the very different levels of legal protection for geodiversity and biodiversity, to rank biodiversity with geodiversity seems misleading, and could be a mistake (paragraph **2.12.5** refers to “biodiversity and geological conservation interests”). It may be that port development will result in exposures of strata and opportunities for study of it. It is less likely to have an adverse impact on geoconservation except by making strata permanently inaccessible for study by being obscured by fixed structures which are part of the port

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developments concerned.. If the reference had been to geomorphology, the pairing would have had some sense to it, but even so, with the exception of sites where port development would not be contemplated in any circumstances (and where for example there has been a designation under the World Heritage Convention), the pairing is entirely disproportionate. Geological special scientific interest is not subject to any absolute protection even under UK legislation, and may be overridden by a consenting authority on the basis of material considerations. It is not appropriate for the NPS to direct the IPC in relation to geological conservation in a way which in practice equates the interest of geologists in studying particular strata with the priority which must be afforded to Natura 2000 sites as a matter of law. Geological features of national interest rely on the SSSI provisions for their protection and management. Sites of international geological importance (which are all SSSI) are not subject to additional provisions.

31. We consider **paragraph 2.12.9** expresses inadequately the priorities in nature conservation affected by port development: “In taking decisions, the decision-maker should ensure that appropriate weight is attached to designated sites of international, national and local importance; protected species; habitats and other species of principal importance for the conservation of biodiversity; and to biodiversity and geological interests within the wider environment.” By linking international and local designations in the same formulation, no distinction is drawn between the strict tests applicable to derogation from mandatory requirements under European law and mere local interest as a material consideration.

32. **Paragraph 2.12.20** states: “Where the applicant cannot demonstrate that appropriate mitigation measures will be put in place the decision-maker should consider what appropriate requirements should be attached to any consent and/or planning obligations entered into.” This places no burden at all on the decision-maker to attach requirements to the consent. In order to ensure compliance with the Habitats Directive, guidance should drive the incorporation of measures for the protection and conservation of habitats, species and linkages into the centre of the decision-making processes, and should require that the measures attached to decisions should be robust and ensure the outcomes required to meet nature conservation objectives and obligations without qualification.

33. **2.12.22** indicates that capital dredging ‘will need to be tested under the Water Framework Directive’. The meaning and relevance of this statement is unclear, and should be clarified. From the viewpoint of hydromorphological changes, capital dredging may need to be assessed under Article 4(7) of the WFD (this is important because Article 4(7) only applies if the modification will affect status at the level of the water body). However, if the issue of concern is contamination, the strict ‘no deterioration’ requirement of the WFD may prevent the dredging from going ahead. Also, it is important to note that any physical modification (not only capital dredging) could potentially require assessment under Article 4(7).

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Q12: Do you think the draft ports NPS provides suitable guidance to decision-makers on the key considerations to inform the assessment of future port development applications?

34. We do not consider the NPS gives adequate guidance to decision makers on how to ensure compliance with the Water Framework Directive. We have set out in our introductory comments our concerns about application of the NPS to developments that will cause deterioration or a failure to achieve good status. The passing reference in parentheses to Article 4.7 in para **2.19.7** gives no guidance on how to apply the detailed criteria in Article 4.7. These criteria *will have to be satisfied* in order to avoid breaching Article 4(1). Merely 'having regard to' Article 4.7 will not ensure compliance. More generally, merely giving impacts that would have adverse effects on WFD environmental objectives 'more weight' when considering consent applications will not ensure WFD compliance (see **para 2.19.6**).

35. Further, in Section 2.10, it needs to be recognised that both the Habitats Directive and Article 4(7) of the WFD set out specific requirements for the assessment of certain developments, activities, etc. and that the outcomes of these assessments will affect decision making.

36. See also comments above on the NPS as a means of ensuring compliance with the Habitats Directive.

Q15: To what extent do you think the draft ports NPS as a whole provides suitable guidance to decision-makers to help them make decisions about development consent applications for new port applications? Please consider this in relation to both potential decision-makers:

- a) The IPC for port applications over the NSIP threshold; and**
- b) The future Marine Management Organisation for port applications under the NSIP threshold.**

37. See more detailed comments above, including response to Question 12 in respect of the need for the NPS to recognise that the decision maker will have to ensure compliance with the Water Framework Directive.

38. The draft is not consistent in terms of how and when the NPS might apply to decisions taken by the MMO or (presumably) to those taken by others (e.g. local planning authorities). In Section 1.2.1 it states that the NPS may also be a relevant consideration for the MMO. Section 1.2.2 then confirms that the NPS 'explains to planning decision makers the approach they should take to proposals' and indicates various important considerations. Section 2.1.2 meanwhile states that 'most of the guidance below will apply to all decision

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makers. Where intended to apply to the IPC, it is specifically mentioned'. It should be made clearer in Section 1.2 that the approach and principles set out in the NPS 'should' or 'should usually' also apply to decisions made by others (notably the MMO and local authorities). This would help to reduce uncertainty and improve consistency.

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