

Mehefin June 2010



**Cyfeillion
y Ddaear
Cymru**
**Friends of
the Earth
Cymru**

Gorsaf Bŵer Sir Benfro: Cwyn i'r Comisiwn Ewropeaidd

Pembroke Power Station: Complaint to European Commission

Cwyn gan Gyfeillion y Ddaear Cymru ynglŷn â methiant i gydymffurfio gyda chyfraith yr Undeb Ewropeaidd parthed Gorsaf Bwer newydd Sir Benfro ac Ardal Cadwraeth Arbennig Sir Benfro Forol

Complaint by Friends of the Earth Cymru concerning the failure to comply with EU law in respect of the new Pembroke power station and the Pembrokeshire Marine Special Area of Conservation

TO:

Commission des Communautés Européennes (Secretary-General)
B-1049 Bruxelles, BELGIUM
European Commission Office in Wales,
2 Caspian Point, Caspian Way, Cardiff, CF10 4QQ

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6. Field and place(s) of activity:

We are a long-established environmental campaigning organisation in Wales. We are a part of Friends of the Earth, England, Wales and Northern Ireland (www.foe.co.uk).

7. Member State or public body alleged by the complainant not to have complied with Community law:

The UK, including the Department for Energy and Climate Change, the Welsh Assembly Government and the Environment Agency.

8. Fullest possible account of facts giving rise to complaint:

9. As far as possible, specify the provisions of Community law (treaties, regulations, directives, decisions, etc.) which the complainant considers to have been infringed by the Member State concerned:

Overview

The Milford Haven Waterway, estuary and adjoining coast have been granted the highest legal protection currently possible: a special area of conservation under the Habitats Directive, and the UK's transposing regulations – and rightly so. The Pembrokeshire Marine Special Area of Conservation (PMSAC) came into official existence over five years ago, though the Habitats Directive's requirements had been ostensibly applied to it for several years before that.

However, Friends of the Earth Cymru has become increasingly concerned over recent years that significant industrial and other developments which affect the SAC have been approved by various UK authorities, without any, or any proper, appropriate assessment under Article 6 of the Directive. Sadly, it is little wonder that the PMSAC has an unfavourable conservation status.

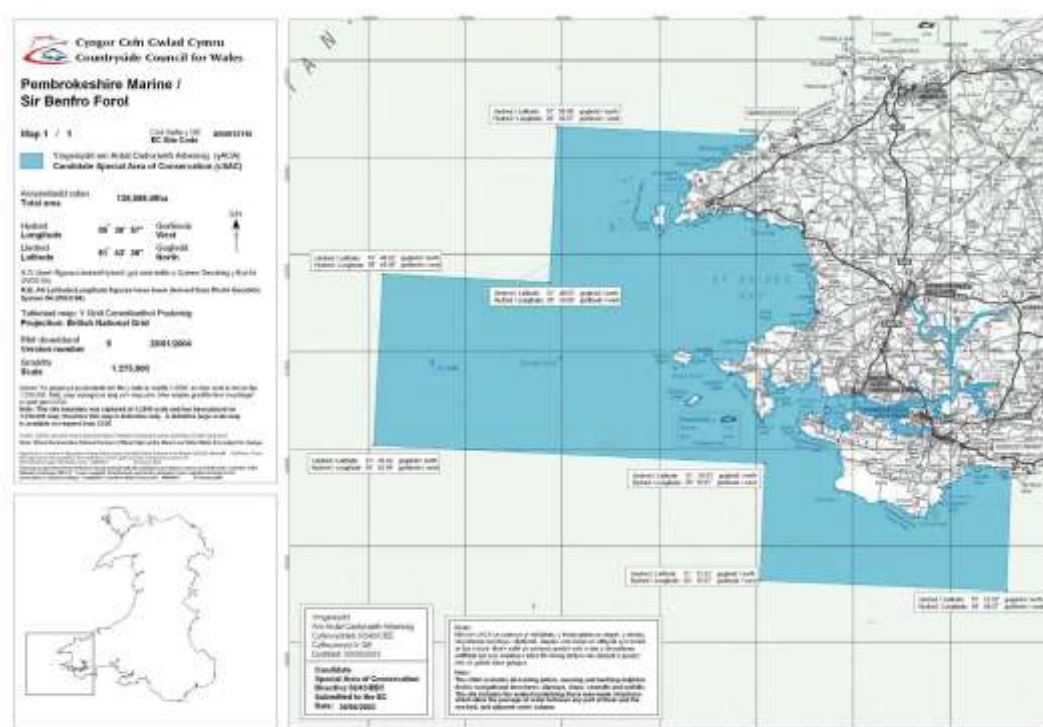
And now there is yet a further development. Since last year, construction of a new 2099 MW gas fired power station, and associated works, have been underway adjacent to, and in, the PMSAC. So the SAC is now being subjected to yet further pollution and damaging activities, whilst the regulatory processes remain unfinished; and the site faces the effects from the operation of this new power station for many years to come. Yet again, however, the UK authorities are not properly applying the legal protections required by the Habitats Directive – or those required by the IPPC Directive, and by the Water Framework Directive.

Enough is enough. We have therefore decided to complain to the Commission about violations by the UK of these three Directives in respect of the new Pembroke Power Station and the PMSAC.

In responding to Questions 8 and 9, in five parts below we:

- (1) provide a brief summary of the complaint;
- (2) explain the background;
- (3) note the UK's implementation of the Water Framework Directive as it relates to this site;
- (4) describe the current regulatory situation with respect to the power station; and
- (5) conclude with an elaboration of our complaint, grouped under eight headings.

Part 1: Brief summary



Map showing the Pembrokeshire Marine Special Area of Conservation¹

Milford Haven waterway is the largest ria-estuary complex in the UK, comprising around 34% of the UK resource of this estuary type. It is located in one of the most beautiful and visited parts of our country. According to the Joint Nature Conservation Committee it was primarily selected for SAC status on the basis of three relevant marine habitat types (estuaries; large shallow inlets and bays; and reefs), and two relevant species (grey seal and shore dock); with a further five relevant qualifying habitat types present (including coastal lagoons, a priority habitat), and with a further five relevant qualifying species (or sub-species) types (including lamprey, shad and otter).² The PMSAC has its own website³.

¹ This map is a copy of the map on page 14 of the Countryside Council for Wales' April 2005 "Regulation 33 Advice" document. This 240-page document has since been superseded by a new document dated February 2009, but is available here:

<http://www.pembrokeshiremarinesac.org.uk/english/downloads/Pembs%20Marine%20R33%20April%202005.pdf>. "Regulation 33 Advice" is a reference to Regulation 33 of the Conservation (Natural Habitats, &c.) Regulations 1994 (S.I. 1994 No. 2716) – the legislation that is intended to have transposed the Habitats Directive in England, Wales and Scotland – which requires the relevant nature conservation bodies to provide advice on the conservation objectives and potentially damaging operations in relation to an SAC. The Regulations in their original form are available here: http://www.opsi.gov.uk/si1994/Uksi_19942716_en_1.htm. The current version of the Regulation 33 Advice for the Pembrokeshire marine SAC is available here: <http://www.pembrokeshiremarinesac.org.uk/english/downloads/PM%20SAC%20R33%20Feb%202009.pdf>

² See here: <http://www.jncc.gov.uk/ProtectedSites/SACselection/sac.asp?EUCode=UK0013116>

³ <http://www.pembrokeshiremarinesac.org.uk/index.htm>

The Haven is also a centre for the petrochemical industry, and many polluting and damaging activities have affected, and potentially affect, the SAC habitat and species types. In recent years, for example, two liquefied natural gas (LNG) terminal developments have been given the go-ahead (without appropriate assessments)⁴. More detail on these aspects can be found in the Countryside Council for Wales' (CCW) Regulation 33 Advice for the PMSAC⁵. There is little wonder that the PMSAC is in unfavourable conservation status⁶.

This complaint concerns the ongoing approval process and decisions for the new 2099 MW combined cycle gas turbine Pembroke Power Station, as they relate to the PMSAC. Gas is to be supplied to the station via a new tunnel drilled through the rock under the Haven (mostly completed).

An appropriate assessment (AA) of the project on the integrity of the PMSAC, as required by the Habitats Directive, has not been completed, and yet already:

- construction consent has been given by the Department of Energy and Climate Change (DECC), work is underway and the site has already been affected;
- 'Best Available Technique' (BAT) has been 'indicatively' determined by the Environment Agency (EA); and
- the advice of the official nature conservation advisers, the Countryside Council for Wales (CCW), has been rejected, both by DECC and by the EA.

The EA's indicatively-determined BAT, a 'direct once-through cooling' water system, means that if confirmed the power station would abstract its cooling water from, and discharge its (often bleached) heated water at 8⁰ C above ambient temperature into, the PMSAC at Milford Haven at a scale equivalent to three times the combined average flow of the two main rivers draining into the Haven; and the waste heat would represent an energy loss equal to about 40% of Wales's current electricity demand⁷.

As the approval process and decisions are still underway, with impacts already occurring, and with a further public consultation having just closed, intervention by the European Commission now to uphold EU law may be effective in ensuring compliance by the UK authorities with both the Habitats Directive, the IPPC Directive and the Water Framework Directive, and is respectfully requested before commissioning of the station in the first quarter of 2011.

⁴ The Dragon LNG terminal, and establishment of the South Hook LNG terminal on an old oil refinery site, with associated jetty works, dredging and discharges.

⁵ This document is available at the link at the end of footnote 1 above.

⁶ Our tabulated summary of the condition and status of the PMSAC's qualifying habitats and species, based on information provided by the Countryside Council for Wales, and enclosed with our letter to the Minister dated 18th June 2010, is at Enc 28(ii).

⁷ FOE Cymru calculation, available here:
http://www.foe.co.uk/resource/consultation_responses/sustainable_heat_milford_haven.pdf

Part 2: Background

The regulatory process for the various activities associated with the new power station has been proceeding since 2005, involving several different consent procedures. These include:

- consent from central government (DECC) to construct and operate the power station;
- consent from the regulator (the EA) to make emissions into the environment, including into the PMSAC, under regulations transposing the IPPC Directive;
- consent from the regulator (the EA) to abstract water from the PMSAC ;

In addition, the Milford Haven Port Authority has already granted at least one dredging consent to enable preparation of the cooling water intake structure and outfall pipes, and to enable the jetty to receive construction loads; the Marine and Fisheries Agency (on behalf of the Welsh Assembly Government (WAG)) has already granted a sea spoil disposal licence; and we are endeavouring to ascertain the regulatory position relating to possibly contaminated run-off water which may have entered the PMSAC⁸.

These procedures are quite complex and have given rise to much documentation. We set out below a summary of our understanding of what has happened in relation to each of the three procedures bulleted above.

(1) Application for DECC consent, 2005

On 6th January 2005, RWE npower plc submitted an application to (what is now) the DECC, for the consent of the Secretary of State under section 36 of the Electricity Act 1989 to construct and operate the power station⁹. Under section 36, “a generating station shall not be constructed, extended or operated except in accordance with a consent granted by the Secretary of State.”¹⁰

An Environmental Statement was also apparently produced by RWE npower in 2005, but this seems not to have been regarded as adequate as in July 2007 an updated Consolidated Environmental Statement, replacing the previous one, was provided by the company¹¹.

⁸ We are concerned about this because RWE has stated that some of the drains and catchment channels have “fallen into disrepair”. This is particularly important because of two sources of contaminated water already originating on the site: from the old station’s tank farm; and from a large open-air void about 10 metres deep, being the turbine house basement of the former oil-fired power station (see Part 1, Chapter 6 (Land and Groundwater – Pembroke Environmental Permit Appropriate Assessment Supporting Document, February 2010), and Part II, Chapter 3 (Site Conditions and Contaminated Hazards - Pembroke Environmental Permit Appropriate Assessment Supporting Document, February 2010) (not enclosed).

⁹ And for a direction under section 90(2) of the Town and Country Planning Act 1990 that planning permission for the development be deemed to be granted

¹⁰ The Electricity Act 1989 can be read here:
http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1989/cukpga_19890029_en_1

¹¹ This is available electronically here:
http://www.marinemangement.org.uk/works/environmental_pembroke.htm

On 5th February 2009, DECC granted consent to construct and operate the power station (Enc 1 and Enc 2);¹² the construction contract with Alstom was announced in April 2009;¹³ work has begun;¹⁴ commissioning of the station is anticipated in the first quarter of 2011, with commercial operation due to start in 2012.

This power station would make a significant contribution to the UK government's wish to build new power stations for electricity generation: in its 2007 White Paper on Energy, it stated:

5.1.12 If we are to maintain levels of electricity generation capacity equivalent to those available today, then new power stations need to be built in good time to replace these closures and to meet increases in demand. On this basis, around 20-25GW of new power stations will be needed by 2020...

5.1.17 We therefore need to ensure that our policy and regulatory framework provides investors with the certainty and incentives to deliver sufficient, timely investment in a diverse mix of electricity generation capacity that is consistent with our environmental and security of supply goals....

8.3 In gas, as our reliance on imports increases, we need more import and storage infrastructure if we are to maintain reliable and affordable supplies of energy. If developers cannot secure planning permission for electricity generation projects and gas supply infrastructure projects in sufficient numbers in a timely fashion, the UK could be exposed to rising security of supply risks, with the potential for upward pressure on energy prices.¹⁵

The new power station would be located on the south side of Milford Haven, west of the site of an old oil-fired power station. This was finally demolished in 2003, though contaminated legacy of the old power station still exists, some of the cooling water infrastructure is said to remain in place and this has been identified by RWE as a reason supporting use of a 'direct once-through cooling' system for the new power station¹⁶. The site is adjacent to, and in effect borders, the PMSAC. The UK's regulations which transpose Article 6 of the Habitats Directive expressly apply to decisions under section 36 of the Electricity Act¹⁷.

As you will see from the decision letter in Enc 1 (paragraph 4.7) DECC states that CCW had indicated that (simple) onshore construction of the power station would *not* be likely

¹² A BBC report of the decision is here: http://news.bbc.co.uk/1/hi/wales/south_west/7872045.stm .

¹³ http://www.alstom.com/pr_corp_v2/2009/corp/57759.EN.php?languageId=EN&dir=/pr_corp_v2/2009/corp/&idRubriqueCourante=23132&cookie=true

¹⁴ See a BBC report here: http://news.bbc.co.uk/1/hi/wales/south_west/8038632.stm

¹⁵ Meeting the Energy Challenge, A White Paper on Energy, May 2007 (CM 7124), available here: <http://www.berr.gov.uk/files/file39387.pdf>

¹⁶ See the Consolidated Environmental Statement (July 2007), section 2.3.4: http://www.marinemangement.org.uk/works/documents/environmental_statements/pembroke/02.pdf ; and section 1.2.2 (third bullet) of Appendix A1.2.2: http://www.marinemangement.org.uk/works/documents/environmental_statements/pembroke/appendices/2-2.pdf

¹⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (as amended), initially transposed by The Conservation (Natural Habitats, &c.) Regulations 1994, (No.2716) available here: http://www.opsi.gov.uk/si/si1994/Uksi_19942716_en_5.htm#mdiv71; now transposed by The Conservation of Habitats and Species Regulations 2010 (No. 490), available here: http://www.opsi.gov.uk/si/si2010/plain/uksi_20100490_en#pt6-ch7

to have significant effects on the PMSAC, but DECC states that it carried out its own judgment of the likely effects of construction, and agreed with CCW. In its judgment of the likely effects of onshore construction, DECC states (uncorrected):

4.5 The construction of the onshore works cannot occur at the same time as operational aspects (i.e. emissions water, abstraction of water and emissions to air cannot take place until the plant construction is substantially complete) so there is no mechanism that suggests that significant incombination effects are likely to bridge the distinct construction and operational phases of this project.

4.6 As a result, the judgment of incombination effects relates only to the construction of the pipeline and the dredging of the colling water intake and outfall because these activities are likely to occur concurrently with the construction of onshore works.

4.7 Disturbance is not considered incombination because the onshore construction works shall be effectively screened from the majority of the Pembroke mSAC by virtue of the sites topography. Furthermore, construction work shall comply with BS 5228 (BSI, 1997b) with particualr reference to part 1: Codes of Practice for Basic Information and Procedures for Noise Control.

DECC also states (uncorrected):

7.3 CCW requested that DECC undertake an 'overarching' Appropriate Assessment; however CCW concerns focused on the operational impacts which are regulated by EAW. Neither the habitat regulations nor welsh planning policy support CCWs request.

In our submission, CCW's request for an overarching AA was quite correct.

We also draw your attention to the assertion in this letter that:

The Secretary of State is under no obligation to consider BAT when considering a section 36 application.

This is a remarkable statement in respect of an obligation on the United Kingdom as a result of EU law, and is an example of the way in which protections under EU law have been side-stepped in this case.

It should also be noted that DECC's consideration of the 'in combination' assesment does not demonstrate an understanding that the consequences for an SAC's habitat and species (including tycpial species) need to be combined, and also that the timing and duration of these consequences and of the activity leading to them may not necessarily coincide. For example, construction impacts such as discharge of contaminated waters may have effects on SAC features that persist well beyond the time at which the power station becomes operational, and so act 'in combination' with operational impacts.

(2) Application for IPPC consent, 2006

Council Directive 96/61/EC concerning integrated pollution prevention and control (the IPPC Directive) (as amended) applies to this power station.

In April 2006, we understand that RWE npower submitted Stage 1 of their pollution control permit application to the Environment Agency (EA). The application was made under The Pollution Prevention and Control (England and Wales) Regulations 2000 (SI 2000 No. 1973)¹⁸, which have since been superseded.¹⁹

¹⁸ Available here: <http://www.opsi.gov.uk/si/si2000/20001973.htm>

¹⁹ Initially by The Environmental Permitting (England and Wales) Regulations 2007 (SI 2007 No. 3538) (available here: http://www.opsi.gov.uk/si/si2007/uksi_20073538_en_1); and now by The Environmental

It seems that the EA began consulting with CCW during 2006²⁰. It appears that the EA considered that the project is likely to have a significant impact, both alone and in combination with (some) other plans or projects, on the PMSAC, and should therefore be subject to an AA.

It appears that in response to the company's application, the EA considered that the direct once-through water cooling system proposed by the company would constitute BAT, in accordance with its Sector Guidance Note (see Enc 3). As such a system requires both the abstraction of water from, and the discharge of water to, the PMSAC, the EA realised that an AA had to be undertaken under the Habitats Directive, but decided to do so only, at this stage, in relation to the discharge - and as you will see from Enc 3 the EA stated in June 2008 that it:

would expect no adverse effect to the integrity of the Pembrokeshire marine SAC or the Afonydd Cleddau Rivers SAC as a result of cooling water discharge from the currently proposed Pembroke power station. (original emphases omitted).

The EA's opinion was contrary to the advice of CCW. In its first version of the so-called AA (see Enc 4) sent to CCW in October 2007, the EA had proposed a finding of no adverse effect on integrity. In November 2007 (Enc 5), CCW objected to the finding, mentioning some twelve areas of main concern, and concluding:

It is with some regret that we have to disagree with your conclusion. We had offered on numerous occasions to discuss both the scope and the assessment with relevant EA staff, but our offers were never taken up: we unfortunately find ourselves with very different conclusions.

As will be seen from Enc 5, these main concerns included no systematic assessment of the proposal against each of the conservation objectives; assessing impact on habitat features only based on area; considering only direct effects; under-estimating the area of SAC affected both by a rise in ambient temperature and for Total Residual Oxidant (TRO); not taking account of the high volume of water that will cumulatively be subject to high levels of TRO on its way through the cooling system; and not properly assessing the in-combination impacts.

A second version of the so-called AA was produced by the EA (not enclosed) in which the EA continued to find no adverse effect on integrity. Whilst some changes had been made, CCW maintained its position in March 2008, as most of its main concerns had not been addressed (Enc 6).

In response to this letter, on 4th April 2008 the EA wrote to CCW stating that it had changed its mind, in the following terms:

having given due consideration to the points raised, we have revised our conclusion to state that we cannot conclude that there will be 'no adverse effect'...Therefore, we will be issuing a letter to RWE to inform them that we will not be able to approve the proposal for Pembroke power station as presented in Phase 1 of their PPC

Permitting (England and Wales) Regulations 2010 (SI 2010 No 675) (available here: http://www.opsi.gov.uk/si/si2010/uksi_20100675_en_1) - hence the term an 'EPR licence'.

²⁰ Under the Pollution Prevention and Control (England and Wales) Regulations 2000 (SI 2000 No. 1973), Schedule 4, Part II, paragraph 9, in the case of an application for a pollution permit where the operation of the installation 'may involve an emission which may affect' certain sites, including SACs, where the site is in Wales the EA as the regulator must give notice to CCW.

application. In response to this RWE may wish to revise their proposal for our further consideration. (Enc 7)

Despite this change of mind by the EA, on 14th April 2008 CCW informed the EA that they still had outstanding concerns, reiterated their view that the project should be considered in its entirety, and stated that:

We are still not convinced that this appropriate assessment is entirely compliant with the Conservation (Natural Habitats, etc.) Regulations 1994 (Enc 8)

On 6th June 2008 however, the EA wrote to CCW, having changed its mind again:

Since that time [i.e., since the EA's letter of 4th April 2008] we have received additional information from RWE to address our concerns and as a result we have concluded that we are able to conclude that we would expect no adverse effect to the integrity of the Pembrokeshire marine SAC or the Afonydd Cleddau Rivers SAC as a result of cooling water discharge from the proposed Pembroke power station. As a result the attached letter has been sent to RWE today. (Enc 9).

The additional information from RWE appears to have been, or to have included, a report on the impacts on lamprey and bottom-feeding fish, and scour damage (Enc 10). As far as we can tell, although this additional information from RWE is dated 'April 2008', it does not appear to have been provided to CCW in advance of the EA's letter of 6th June 2008.

The final AA discharge document from the EA (that we have seen), maintaining its 'no adverse effect on integrity' finding, was made on 2nd September 2008. It includes the following remarkable statements on 'Monitoring':

RWE NPower have stated in their ES that continuous automated monitoring would be carried out and following these findings then further surveys may be undertaken. Many other monitoring proposals for ecology are listed in the ES Section 6.10.4, including the ecological for thermal effects [sic] in the haven proposed by Langford et al (1998). There is a commitment within the application that RWE will pursue each of the recommendation [sic] made in this paper that are deemed appropriate by the EA and/or CCW.

However, monitoring would only be required if there was doubt on whether there was an adverse affect on the Pembrokeshire marine SAC. The Habitats Directive requires that before a new project is permitted that the Regulatory body are satisfied that there will be no adverse affect on the designated SAC. Therefore, at [sic] a result of this appropriate assessment no environmental monitoring would be required as part of any permit issued. (Enc 11, page 27 – emphasis added).

CCW remained, and as we understand it remains, concerned that its advice was not followed. In June 2008, it received an independent report from Cambrensis Ltd., which concluded that in relation to BAT the EA was under a legal obligation to consider the latest scientific information concerning direct once-through cooling, and that the so-called AA was 'far from complete', and which appears to have been sent to the EA (Enc 12(i) – Cambrensis report, CCW cover note ; Enc 12(ii) – full Cambrensis report).

The Cambrensis report notes, in particular (at paragraph 1.7):

On IPPC, the guidance of what should be considered 'best available techniques' or BAT is not fully up to date. We conclude that both the developer and EAW should fully consider alternatives to direct cooling for this installation at this site, particularly give [sic] significant developments in BAT since the European BREF guidance was last assessed in 2001, particularly in the USA, where they no longer regard direct cooling as best available technologies for coastal power stations, but also given the examples of successful application of alternative technologies within

the UK. The EAW will be under a legal obligation to take these developments into account in any event.

An update on the continuing procedure in relation to this aspect of the regulatory process is given in Part 4 below (The current situation).

(3) Application for a water abstraction licence, 2008-09

This application, for ‘non-evaporative cooling’, appears to have been made either in March or April 2008. With the so-called AA on the discharge neatly carved out, and passed through, the EA started to put into place the next stage of the ‘divide and pollute’ approach by carrying out a so-called AA for the abstraction.

On 24th June 2008, the EA and CCW met to discuss the EA’s screening exercise for the assessment in respect of the abstraction licence (Enc 13), and CCW proposed several amendments (Enc 14). CCW also asked the EA to explain how they were going to make an overall appropriate assessment for the SACs (Enc 15), and provided them with a non-exhaustive list of 13 plans and projects affecting the SACs (Enc 16).

The EA’s response, however, by e-mail dated 11th August 2008, was that as CCW’s proposed amendments apparently involved changes to the water resources sensitivity matrix agreed by EA, CCW and English Nature in 2001, the amendments could not be accepted by the EA (Enc 17). It will be noted that since 2001, conservation objectives for the SACs have been put in place, and the European Court of Justice ruled in 2005 that the UK had unlawfully failed to transpose Article 6.3 and 6.4 of the Habitats Directive in respect of water abstraction²¹. This was followed by the EA’s AA dated 26th August 2008 for the PMSAC, concluding as follows :

For all of the potential hazards on the interest features of the SAC, the information supplied by the applicant has shown that although there is the potential for some localised effects, the scale is insignificant in terms of the overall SAC integrity and there is no one interest feature that will reduce in favourable condition status due to the proposed application. (Enc 18)

On 23rd September 2008, CCW, being particularly concerned about entrapment, rejected the EA’s conclusion, in the following terms:

- **The scope of the assessment does not cover all the potential impacts as identified by the conservation objectives (COs) for the site, and consequently fails to properly assess the impacts of this proposal either “alone” or “in-combination”.**
 - **There is a lack of consideration of the consequences of the proposal in view of the COs for the site’s features and their components/attributes.**
- The appropriate assessment does not therefore support a conclusion that this proposal will not adversely affect the integrity of the Pembrokeshire Marine SAC. Our view remains that many of the Pembrokeshire Marine SAC’s conservation objectives will not be met in the long-term as a consequence of this project.** (Enc 19).

The EA’s response to CCW’s rejection of its conclusion was to initiate a ‘Dispute Resolution’ procedure (Enc 20). Minutes of an October meeting within this procedure are provided herewith (Enc 21), after which a second version of the EA’s assessment for the abstraction licence was prepared, in which the EA maintained its conclusion, and rejected CCW’s concerns, in the following overall terms :

²¹ C-6/04, *Commission v. United Kingdom*.

Although there is flexibility within the generic sensitivity matrix table to allow site specific situations to be captured, the EA expect the advice provided by CCW or Natural England (NE) to be robust and substantiated so that out [sic] staff are supported and working with best available information. Without this, the robustness of our Habitats Directive work is potentially undermined. In this instance we do not view the proposed CCW changes as robust or substantiated. We believe the advice provided is overly-precautionary, unsuitable for our appropriate assessment and takes an unrealistic view of the risks posed by the proposed abstraction. This is especially the case for estuaries/reefs/caves features. (Enc 22, page 8, emphasis added²²)

The minutes of the final dispute resolution procedure meeting on 3rd December 2008 record the differences between CCW and the EA in the manner in which the assessment is being conducted, and record in respect of changes to the sensitivity matrix that:

The Agency and CCW have agreed to disagree on this matter. (Enc 23)

On 8th December 2008, CCW wrote to the EA setting out its post-dispute resolution position:

The Countryside Council for Wales (CCW) has considered your amended appropriate assessment (version 2) for the above application and would like to advise you that we remain unable to agree with your assessment or the subsequent conclusion of no adverse effect on site integrity...

*** The scope of the appropriate assessment still does not cover all the likely significant impacts, those likely to undermine the conservation objectives (COs) for the site, and consequently fails to properly assess the impacts of this proposal either 'alone' or 'in-combination' and therefore fails to meet the requirements of the Habitats Regulations. Of particular concern is the failure to address entrapment impacts on habitat features, and the consequent deficient consideration of this same issue in relation to impacts on prey availability of the species features.**

The reason for this situation appears to be EAW's preference to adhere to internal guidance rather than to acknowledge and give due consideration to the current scientific understanding of entrainment and impingement impacts.

*** There is a lack of consideration of the consequences of the proposal in view of the COs for the site's features and their componenets/attributes. In particular the assessment does not appear to identify nor draw clear conclusions regarding the consequences of the abstraction, both alone and in combination with other plans and projects, to the achievement or maintenance of favourable conservation status.** (Enc 24)

Meanwhile, CCW sought legal advice and was provided with this on 12th December 2008 (Enc 25). The legal advice concludes²³:

- 1. The failure to consider all identified likely impacts of a plan or project on SAC features as part of the AA is not compliant with the Habitats Directive/Regulations.**
- 2. A failure to give full consideration to all identified impacts likely to have a significant effect within an in combination assessment (even if individually they have been ruled out as not having an adverse effect) is not fully compliant with the Habitat Directive/Regulations, as this fails to consider the total potential cumulative effect.**

²² A second version of the so-called AA dated 18th November 2008, but excluding the in-combination assessment, was also prepared by the EA, but is not provided herewith.

²³ We understand that no legal challenge was in the event made by CCW (or by anybody else).

3. Any AA should fully consider the potential effects in light of all of the site’s conservation objectives to determine if an adverse effect is likely to the site’s integrity.

On 22nd December 2008, we understand that the EA issued an abstraction licence to RWE, valid until 2025, to abstract from the PMSAC 144,000 cubic metres per hour, 3,456,000 cubic metres per day, and 1,200,000,000 cubic metres per year, at an instantaneous rate not exceeding 40 cubic metres per second – the rates requested by the company. On 3rd February 2009, this licence was apparently amended and reissued at the request of RWE. The amended licence is included as Enc 26, and it will be noted that the EA states that :

The effect of the amendment is to rectify administrative errors present in the original licence.

We cannot confirm this, as we have not seen the original licence.

A chronology of the events relating to the abstraction licence was also attached to a letter sent by the head of the EA in Wales to the head of CCW on 24th February 2009 (Enc 27). In that document, the EA states :

It is our view that there is no obligation to assess the effects of the plan or project on non-designated features.²⁴ The Environment Agency has considered the effects on designated features within the Pembroke Marine SAC (Le. otters, shad and lamprey) having regard to EU and national policy. The requirement to consider non-designated features may, however, arise where these features are adversely affected by the plan or project and this in turn affects the ecological balance of the designated features of the marine SAC as this may lead to an undermining of the site's conservation objectives....

Part 3 : the Water Framework Directive

Before explaining the current regulatory situation in respect of the power station, we briefly note here how the UK has implemented the Water Framework Directive (WFD) in respect of the site.

In December 2009, the WAG Minister approved the Western Wales River Basin Management Plan²⁵, a draft of which had been prepared by the EA.

In that plan, achieving good ecological status by 2015 for the Milford Haven Inner and Outer water bodies (which are a substantial part of the PMSAC) is stated to be “disproportionately expensive”, and not to be achieved until 2027²⁶. The disproportionate expense appears to relate to nutrient deposition from agriculture, which will be added to by the operation of the power station.

²⁴ This footnote has been inserted to point out that ‘non-designated features’ is a potentially misleading term, and is discussed further below in Part 5(3).

²⁵ The relevant documentation can be accessed from here: <http://wfdconsultation.environment-agency.gov.uk/wfdcms/en/westernwales/Intro.aspx>

²⁶ See Annex B, pages 1050 and 1082, at the above link.

Moreover, the plan also states that favourable conservation status (FCS) for the PMSAC need not be achieved until 2021²⁷.

It is very difficult to understand how FCS for PMSAC is supposed to be capable of being attained in 2021, when good ecological status for a substantial part of the site is not be achieved until 2027.

We consider that the UK's approach in this respect violates the WFD and we discuss this further in Part 5(8) below.

Part 4: The current situation

In February 2010, RWE submitted to the EA the final phase of its application for an environmental permit. Public consultation closed recently.

At the same time as filing this complaint, Friends of the Earth Cymru submitted its response to that consultation (Enc 28(i)), and wrote to the relevant Minister asking for her to call in the application, in order to facilitate compliance with EU law (Enc 28(ii)).

Part 5: Our complaint

We are concerned that the protection afforded by Article 6.3 of the Habitats Directive for (in particular) the PMSAC has not been provided by the UK authorities.

We complain that:

(1) the construction consent was issued before an AA was completed.

DECC did not carry out any kind of AA when it gave its consent for construction and operation of the power station. Moreover, it is disingenuous and tendentious to suggest that 'construction' of the power station can be separated from its operation for Article 6.3 purposes.

The effect of this 'regulatory slicing' is that construction of the power station has been regarded as a project in its own right, whereas in reality the project is to put in place a new power station generating electricity - with obviously significant effects, even before consideration of other plans and projects that affect the PMSAC. Our impression is that DECC wants to get this power station up and running and has sought to find a way of least resistance through the Habitats Directive's requirements.

This is an important point because, of course, the obvious effect (and purpose) of an early construction consent is to give a green light for actual work to proceed, and for the company to sign contracts and incur expenditure. There will be clear reluctance on the part of the authorities at a later date to find that the power station would or could adversely affect the integrity of the site, not least because of concerns about compensation claims from the company (though we assume the EA will have sought to protect its position). An AA should not be made under such conditions.

²⁷ See Annex D, page 154, at the above link (and page 89 for a similar postponement in respect of the Afonydd Cleddau Rivers SAC).

We submit that DECC's consent could only lawfully have been given after, and subject to the findings of, **one** AA (as argued for by CCW, and supported by WAG) – i.e., of the construction, operation and decommissioning of the power station, including its expected emissions and discharges into the environment and its water abstraction needs, and associated works (such as dredging and sea disposal), and in combination with all other plans and projects that already affect, and will or could affect, the PMSAC.

This is not the first time this concern about 'regulatory slicing' has been raised. In the context of the significant South Hook LNG development, where CCW's advice for an AA was also ignored, the Pembrokeshire Coast National Park Authority commented:

"This plan or project had the potential to cause significant damage to the marine SAC, and to specific features. Whether or not it has is for others to comment on. It is a huge development entailing massive investment and very complex civil engineering above and below low water mark. It raised searching questions as to the efficacy of the current piecemeal, highly sectoral approach which characterises the way in which such projects are dealt with in the UK, in terms of delivering requirements of European and National legislation."²⁸ (emphasis added)

The Commission might consider that DECC's failure in the present case in this regard has been contributed to, at least in part, by the transposing regulations for the Habitats Directive in England, Scotland and Wales. Under Regulation 61(1) of The Conservation of Habitats and Species Regulations 2010, an AA is required on a 'consent' basis, not on a 'project' basis. The transposing regulations subtly - and arguably, in the first instance, necessarily - change the project basis of the Habitats Directive protection from an on-the-ground, actual reality basis into a consent-based protection – i.e., to a bureaucratic, official procedure basis. In reality, it is a project which does harm, not a consent procedure.

It might be considered that Regulation 65 of the transposing regulations, entitled 'Co-ordination where more than one competent authority involved', could help to rectify this problem. It provides that the duty in Regulation 61(1) on a competent authority to undertake an AA does not require the "competent authority to assess any implications of a plan or project which would be more appropriately assessed under that provision by another competent authority". However, this free-standing, opaque and limited provision falls quite short of ensuring that an AA of the project as a whole, and in-combination with other plans and projects, must be conducted. Moreover, it also appears to be a provision that can be interpreted as narrowing, rather than as extending, the scope of an AA²⁹.

Of course, there needs to be an official procedure or procedures in order to implement a project, but if there is no (additional) requirement in the transposing law for a Member State to ensure that a project *as a whole* does not adversely affect the integrity of a site, then both the spirit and the terms of the Habitats Directive are violated in our view. It seems to us that the transposing regulations should contain a provision requiring an AA

²⁸ Quoted in 'Protecting nationally important marine biodiversity in Wales', a Report to Wales Environment Link by The Marine Life Information Network for Britain and Ireland, November 2008 (not enclosed, available on request)

²⁹ DECC's view of this provision (see Enc 1, paragraph 4.3), that where "parallel regulatory regimes apply to a project, the assessment process does not have to be duplicated", exemplifies the point and seems not able to conceive of the project as different from the regulatory regimes.

of a project as a whole, incorporating all aspects of a project that might affect the integrity of an SAC, plus all in-combination effects.

(2) the in-combination component of the assessment has not been properly conducted

As well as approaching the AA in a piecemeal fashion, the UK authorities have failed to conduct an overall assessment of the effects of the project in combination with all other plans and projects that affect the PMSAC, as required by Article 6 of the Habitats Directive. This is a critical duty that is intended to ensure that the cumulative effects of the various activities that affect the SAC are considered, alongside the site's conservation objectives. It is especially relevant in respect of the PMSAC which is already subject to significant industrial, commercial and urban activity.

In our submission, no consent for the project should have been, and no future consent should be, granted until an AA of the entirety of the project, which takes into account the cumulative impacts of all plans and projects that currently, and will in the future, affect the PMSAC, has been undertaken.

(3) the proper approach in conducting an AA has not been taken, particularly in respect of typical species

An AA must be made of the implications of a plan or project for the SAC, in view of the SAC's conservation objectives. It is not possible to carry out an AA properly, in our submission, if its context and detailed legal underpinning are not thoroughly understood, as otherwise the AA will not address the correct questions. Because we have not seen this demonstrated in the so-called AAs conducted here, and in the light of the EA's sadly defensive, unclear, and on our assumption wrong (see below), statement that 'It is our view that there is no obligation to assess the effects of the plan or project on non-designated features' (Enc 27), and its apparent intransigence in adhering to an agreed 2001 sensitivity matrix, we set out below what we regard as the proper approach and analysis.

A site is designated as an SAC as a contribution to an EU-wide network which must enable the natural habitat types and the species' habitats' concerned to be maintained (or restored) at a favourable conservation status (FCS) within their natural range³⁰. Once listed it is deemed to be a 'site of Community importance', which means that it is a:

site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute

³⁰ This is the effect of Article 3: '1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range. The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC. 2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.'

significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

The contribution that the PMSAC must therefore make to the network is to be achieved by ensuring that its eight designated natural habitat types (and their typical species) and its seven designated species' habitats are maintained (or restored) at an FCS. This is done by setting 'conservation objectives' for the site. Although the term 'conservation objectives' is not defined in the Directive, it is difficult to imagine what it might mean if it does not mean objectives designed to maintain or restore these habitats and species to favourable conservation status (FCS).

Different definitions of 'conservation status', and of FCS, are provided in the Directive for habitats and for species. As these definitions are critical for the proper conduct of an AA, we set them out in full below (from Article 1(e) and (i) of the Directive (as amended)):

(e) conservation status of a natural habitat means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservation status of a natural habitat will be taken as 'favourable' when:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable as defined in (i);..

(i) conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The conservation status will be taken as 'favourable' when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

Therefore, before an AA can be conducted here in respect of the PMSAC, in our view the relevant authority (in this case CCW) must have determined:

* which of the three 'contribution criteria' for a site of Community importance applies or apply to the PMSAC, including possibly all three, and including possibly differentiating between each of the eight designated habitat types and each of the seven designated species;

* for each of the eight habitat types, whether it considers that:

- (i) its natural range and the areas it covers is stable or increasing;
- (ii) the specific structure and functions necessary for its long-term maintenance exist;
- (iii) if they do exist, whether they are likely to continue for the foreseeable future;
- (iv) the population dynamics data on each of the habitat types' typical species indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats;

- (v) the natural range of each typical species is being reduced or is likely to be reduced in the foreseeable future;
- (vi) there is a sufficiently large habitat to maintain each typical species' populations on a long-term basis; and
- (vii) there will continue to be such a sufficiently large habitat on a long-term basis.

- * and, for each of the seven species' habitats, whether it considers that :
- (i) the population dynamics data on each of the species indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats;
 - (v) the natural range of each species is being reduced or is likely to be reduced in the foreseeable future;
 - (vi) there is a sufficiently large habitat to maintain each species' populations on a long-term basis; and
 - (vii) there will continue to be such a sufficiently large habitat on a long-term basis.

These determinations will have made clear what contribution the PMSAC is supposed to be making, whether all components of both FCS definitions have been met (as they must be for an FCS finding), and thus whether each designated habitat (and its typical species), and each designated species, are currently maintained at FCS. Thereafter, the basis for setting the site's conservation objectives will be clear, and the basis for carrying out the AA of the power station's (and in-combination) impacts clear.

We recognise that the approach set out above involves a significant effort on the part of the public authorities, not least in respect of identifying, and evaluating the status of, typical species. There is no doubt, however, that this is what the Directive requires. Often, there will be little information available, and this is when it will be necessary to consider application of the precautionary principle.

There is every doubt in our mind (assuming that by 'non-designated features' the EA is referring to typical species) that its view that they must only be considered where they 'are adversely affected by the plan or project and this in turn affects the ecological balance of the designated features of the marine SAC as this may lead to an undermining of the site's conservation objectives' is wrong. For the EA's statement (on our assumption) to be correct, it would be necessary to read into the FCS definition for habitats (and, by incorporation, into the FCS definition for species) some kind of 'reduced ecological balance' test (and even a pre-finding of adverse effect!), and we cannot see any justification for this. If our assumption about the EA's statement is wrong, then we do not understand what the EA means when it uses terms such as 'non-designated features'. Indeed, the use of terms not used in the Directive leads to confusion, and here evidences what we regard as a misunderstanding of the Directive's requirements³¹.

We salute the efforts of the EA to protect SACs. The work, knowledge and expertise that they have put into so much of the documentation – for example, the EA's Handbook – is admirable. None of this, however, justifies non-compliance with the Habitats Directive.

³¹ It seems that the EA's confusion might start with section 4.2.1.2 of Chapter 4 of its Habitats Directive guidance (Enc 29), which does not demonstrate an understanding of how typical species are to be treated in accordance with the Directive's definitions. ("Stage 2, Step 2 - Identify the interest features of the European site. The interest (or qualifying) features are identified in the citations for each European site. There will be a conservation objective for each feature. These can be obtained from your Area Habitats Directive Co-ordinator, FRB staff or the Habitats Directive Database. If the conservation objectives are not yet available, advice should be sought from the relevant Natural England/CCW officer.")

We therefore respectfully request the Commission to intervene in order to ensure that the AA in respect of the PMSAC is conducted correctly, particularly in respect of typical species.

(4) the UK is not properly applying the level of certainty needed to determine no adverse integrity effect

We note with much concern that the EA described the advice of the official nature conservation advisers (in relation to the abstraction licence AA) as ‘overly-precautionary, unsuitable for our appropriate assessment and [the advice] takes an unrealistic view of the risks posed by the proposed abstraction’ (Enc 22). Rather, we consider that CCW has repeatedly sought to apply the requirements of the Habitats Directive properly.

The EA has issued comprehensive and detailed guidance in relation to its implementation of the Habitats Directive³². We commend it for doing so, and for its transparency in publishing this guidance.

As will be seen from page 16 of Chapter 4 of the guidance (Enc 29), the ‘certainty’ finding of the European Court of Justice in *Commission v Italy*, in relation to no adverse integrity effect, is recognised³³. In addition, the guidance also (correctly) notes that the precautionary approach was ‘more strongly’ stressed by the ECJ in this respect, in comparison to a UK judge’s comments³⁴, namely in its 2004 judgment in the *Waddenzee* (Dutch cockling) case:

56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

57. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

58. In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (see Case C-157/96 National Farmers’ Union and Others [1998] ECR

³² See here: <http://www.environment-agency.gov.uk/business/regulation/101795.aspx>

³³ See paragraph 58 of the judgment (Case C-304/05, 20th September 2007): the AA ‘must be organised in such a manner that the competent national authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, where doubt remains as to the absence of such effects, the competent authority will have to refuse authorisation (see, to that effect, *Waddenzee*, paragraphs 56 and 57, and *Castro Verde*, paragraph 20).’

³⁴ In 1998, in *WWF UK & RSPB v. Scottish Natural Heritage, the Secretary of State for Scotland et al.* (the Cairngorms SAC railway case), a judge said in relation to the degree of certainty concerning a finding of no adverse integrity effect under Article 6.3 and the UK’s transposing regulations: ‘There never can be an absolute guarantee about what will happen in the future, and the most that can be expected of a planning authority, as a competent authority under the regulations, or of SNH, as the appropriate nature conversation body, is to identify the potential risks, so far as they may be reasonably foreseeable in light of such information as can reasonably be obtained, and to put in place a legally enforceable framework with a view to preventing these risks from materialising.’ The judgment is available here:

<http://www.bailii.org/scot/cases/ScotCS/1998/38.html>. We should add that we agree with the judge that there never can be an absolute guarantee, and we do not submit that an absolute guarantee of no adverse integrity effect is required. Certainty and conviction that no adverse integrity effect will arise, however, is a different issue.

I- 2211, paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision. 59. Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, by analogy, Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-0000, paragraphs 106 and 113).

However, the guidance does not draw attention to the ECJ's requirement for certainty and conviction of no adverse integrity effect in those parts of the guidance most closely linked to the implementation of the Directive – in particular, not in the summary procedure in Figure 4 in Chapter 4, or in Appendix 12 (being the guidance's methodology section for the relevant AA stage – see Enc 30 (which the EA has informed us is being amended)). Indeed, the opening paragraph of Appendix 12 could be read as tilting the other way, as it states:

The purpose of the Stage 3 appropriate assessment is to establish whether it is possible to conclude that our permissions have no adverse effect upon the integrity of a European site.

We submit that an accurate formulation of that opening paragraph would read:

The purpose of the Stage 3 appropriate assessment is to establish whether we are certain that our permissions will not adversely affect the integrity of a European site.

Or, in the words of the Commission Guidance document:

the emphasis for assessment should be on objectively demonstrating, with supporting evidence, that..there will be no adverse effects on the integrity.³⁵

Or, coming at the issue from the 'opposite end', again in the Commission's words:

The provisions of Art. 6(4) apply when the results of the preliminary assessment under Art. 6(3) are negative or uncertain. That is:

- 1. The plan or project will adversely affect the integrity of the site [or]**
- 2. Doubts remain as to the absence of adverse effects on the integrity of the site linked to the plan or project concerned.³⁶**

We consider that it is incumbent on all UK competent authorities, including the EA, not simply to mention the ECJ's requirement of certainty and conviction of no adverse integrity effect, and where the benefit of the doubt lies, but also to ensure that this clear interpretation of the meaning of Article 6.3 is implemented in the relevant parts of the guidance. If the guidance did so, we would not have expected the kind of characterisation of the advice of the official advisers made by the EA.

³⁵ Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC, November 2001, available here: http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf

³⁶ Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, January 2007, available here: http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

(5) the advice of the official advisers has been rejected

This is a more general issue, compared with our complaint under (4) above.

We are very concerned that the advice of the official nature conservation advisers, CCW, was both rejected and side-stepped by DECC, and was rejected by the EA. The apparent failure of the EA to take into account latest scientific information is particularly concerning.

CCW is an adviser, and not a decision-maker. Its expertise in relation to the requirements of the Habitats Directive is clearly greater than the expertise of DECC and of the EA in this respect. In a recent case involving the Habitats Directive and Natural England (NE), CCW's counterpart in England, the judge stated that:

it would have required some cogent explanation in the decision letter if the [Minister] had chosen not to give considerable weight to the views of NE.³⁷

The same applies here, and we have not seen a cogent explanation from the EA. Certainly, the characterisations of CCW's advice in the so-called AA for the abstraction licence, the 3rd December 2008 minutes of the resolution dispute procedure (Enc 23), and the 'agreement to disagree', do not amount to a cogent explanation.

The impression we have gained is that CCW's upholding of the Article 6.3 requirements has been seen as an obstacle to the policy aims of DECC, and to the regulatory aims of the EA, rather than as a legitimate constraint on the formulation and delivery of those aims. We respectfully submit that intervention by the Commission now will help the UK decision-makers realise that the protections provided by the Habitats Directive must be complied with.

(6) Failure to require environmental monitoring

We find it astonishing that the EA has stated that 'no environmental monitoring would be required as part of any permit issued' (Enc 11, page 27). This would be a remarkable statement in relation to any industrial activity significantly affecting the environment. If this was to eventuate in respect of those parts of the European environment deemed worthy of the highest form of legal protection, it would be a gross dereliction of duty on the part of the UK under the Habitats Directive.

We respectfully request the Commission to intervene to ensure that the EA does not implement this statement.

(7) the staged application procedure for consent under the IPPC Directive undermines the environmental protection provided by that Directive, and by Article 6.3 of the Habitats Directive

This new power station is proceeding despite the advice of the government's relevant advisers that the integrity of the PMSAC will be adversely affected, and despite the legal protections for the environment contained in Article 6.3 of the Habitats Directive, and

³⁷ Mr Justice Sullivan, in *The Queen on the application of Hart District Council v Secretary of State for Communities and Local Government*, [2008] EWHC 1204 (Admin). The judgment is available here: <http://www.bailii.org/ew/cases/EWHC/Admin/2008/1204.html>

also in the BAT provisions of the IPPC Directive. In our submission, this unfortunate situation involves both issues of transposition and of implementation.

We submit that ‘indicatively determining’ BAT on the basis of an incomplete AA cannot be justified. It is impossible to assess the environmental impacts for the purposes of BAT until such a complete AA has been conducted, otherwise the legal protections for an SAC are seriously undermined.

We consider this to be initially a transposition point, in respect of either, or even both, Directives. On the one hand – as already pointed out - the transposing regulations for the Habitats Directive require an AA on a consent basis, not on a ‘project’ basis (as required under the Habitats Directive). On the other hand, this could also be seen as a transposition point in relation to the IPPC Directive, in that, via the staged application procedure (which is not provided for in the IPPC Directive) the environmental impact aspect of a BAT determination is being effectively decided on before the environmental impacts have been fully addressed. This view does not depend on the protection status of the environmental media into which the emissions are made, but would obviously apply even more so in respect of an SAC.

Further, this is also an implementation point. Clearly, if the EA is effectively to determine BAT in the context of an SAC before a complete AA has been conducted, then the key obligation in the Habitats Directive to conduct an AA of a project is not being properly adhered to.

We suspect that the UK’s response to this point might be that the EA has not formally determined BAT yet, as this is a staged application, and that this will not be done until the EPR licence is issued. This would be disingenuous, as it would be using form to conceal reality. The EA has already determined no ‘adverse integrity effect’ (AIE) for the direct once-through cooling discharge; and no AIE for the abstraction, plus no AIE from the in-combination effect of the plans and projects considered in the abstraction assessment, and has already issued the abstraction licence. And the section 36 construction and operation consent is already in place. As these three ‘no AIE’ findings are intended to feed into the next so-called AA, unless the EA finds that there are other reasons leading them to make an AIE or a different BAT finding, the EPR licence will be issued with direct once-through cooling as BAT. This ‘slicing up’ of the AA, seriously undermines both the effectiveness of the AA to protect the SAC, and of the determination of BAT to protect the environment. Moreover, it makes a mockery of the further public consultation, as the possibility that the EA has a genuinely open mind on the questions subject to the further consultation is put into question.

We therefore consider that the staged application procedure for consent under the IPPC Directive undermines the environmental protection provided by that Directive, and by Article 6.3 of the Habitats Directive, and respectfully request the Commission to intervene to ensure that they are not undermined.

(8) The Water Framework Directive has not been properly applied, and further breaches are possible

As noted in Part 3 above, achieving good ecological status for a substantial part of the PMSAC by 2015 has been deemed to be “disproportionately expensive”, and not to be achieved until 2027; and FCS for the site is not to be achieved until 2021. A similar approach has been taken in respect of the Afonydd Cleddau Rivers SAC.

However, under WFD Article 4.1(c), Member States must achieve compliance with any standards and objectives at the latest by 2015, unless otherwise specified in the EU legislation under which the individual protected areas have been established; and under Article 4.2, where “more than one of the objectives under [Article 4.1] relates to a given body of water, the most stringent shall apply”.

We first submit that the possibility of extending the 2015 deadline in respect of water quality standards and objectives under the WFD that are necessary to meet the conservation objectives of an SAC is not permitted.

It might be said that Article 4.4 does allow the deadline to be extended, because it provides that deadlines “established under [Article 4.1] may be extended for the purposes of phased achievement of the objectives for bodies of water” (subject to certain provisos, of which more below), and Article 4.1(c) refers to the 2015 deadline.

However, the provisions relating to the other two categories referred to in Article 4.1 – surface waters and groundwater - all include express reference to the possibility of deadline extension; whilst the third category, protected areas (such as SACs), does not. Rather, the qualifier for protected areas is that the 2015 deadline is fixed unless (for SACs) the Habitats Directive specifies otherwise (which it does not); and Article 4.2 provides as cited above.

As there is no deadline in the Habitats Directive as to when FCS must be achieved, then in our submission it is not possible for a Member State to extend the 2015 deadline in the WFD if this would have the effect of (further) delaying attainment of the conservation objectives of an SAC.

Secondly, without prejudice to our first submission, we note that in any event postponement is only allowed under the WFD if several preconditions are met, and some of these have not been demonstrated to have been met, including that:

(a) no further deterioration occurs in the status of the water body (whereas, for example, the new power station will increase sea temperature and thus the rate of plant growth and eutrophication, exacerbating the already-existing nutrient problem, as well as having other negative effects)³⁸;

(b) extension of the deadline, and the reasons for it are specifically set out and explained in the plan (the sketchy and vague two-sentence ‘explanation’ and a minimal reference to a land management scheme to be made operational by the WAG no later than 2012, explains little);

In addition, a programme of measures must be established under Article 11, with at least basic measures which must be complied with, and these include:

- BAT under the IPPC Directive being implemented;

³⁸ This is similar to the obligation on Member States in Article 6.2 of the Habitats Directive to “take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.” which, we submit, is also being violated.

- “more stringent emission controls shall be set” if needed to meet quality standards or objectives (Article 10.3; for example, CCW has already raised concerns about the Total Residual Oxidants the power station will discharge; RWE reported “slightly” excessive copper levels in its 2007 environmental statement);
- measures to promote an efficient and sustainable water use in order to avoid compromising the achievement of the objectives specified in Article 4 – clearly a relevant consideration in relation to the direct once-through cooling system determination.

In our submission, the WFD has not been properly applied in respect of the PMSAC, and granting an environmental permit for this power station on the basis of direct once-through cooling would lead to a further breach of the WFD.

10. Where appropriate, mention the involvement of a Community funding scheme (with references if possible) from which the Member State concerned benefits or stands to benefit, in relation to the facts giving rise to the complaint:

N/a

11. Details of any approaches already made to the Commission's services (if possible, attach copies of correspondence):

We have not made any previous approaches.

12. Details of any approaches already made to other Community bodies or authorities (e.g. European Parliament Committee on Petitions, European Ombudsman). If possible, give the reference assigned to the complainant's approach by the body concerned:

We have not made any such approaches.

13. Approaches already made to national authorities, whether central, regional or local (if possible, attach copies of correspondence):

13.1 Administrative approaches (e.g. complaint to the relevant national administrative authorities, whether central, regional or local, and/or to a national or regional ombudsman):

We have not made any such approaches yet, though see Enc 28(i) and (ii).

13.2 Recourse to national courts or other procedures (e.g. arbitration or conciliation). (State whether there has already been a decision or award and attach a copy if appropriate):

We have not had recourse to courts or other such procedures yet.

14. Specify any documents or evidence which may be submitted in support of the complaint, including the national measures concerned (attach copies):

Please see the Enclosures, as described under Questions 7 & 8 above. We have provided url links to relevant national legislation.

15. Confidentiality:

We authorise the Commission to disclose our identity in its contacts with the UK authorities.

16. Place, date and signature of complainant/representative:

Signed in Cardiff on 18th June 2010 by:

Signature:.....

Name: Gordon James

Job title: Director, Friends of the Earth Cymru

(Explanatory note to appear on back of complaint form)

Each Member State is responsible for the implementation of Community law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. Under the Treaties, the Commission of the European Communities is responsible for ensuring that Community law is correctly applied. Consequently, where a Member State fails to comply with Community law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and, if necessary, may refer the case to the Court of Justice of the European Communities. The Commission takes whatever action it deems appropriate in response to either a complaint or indications of infringements which it detects itself.

Non-compliance means failure by a Member State to fulfil its obligations under Community law, whether by action or by omission. The term State is taken to mean the Member State which infringes Community law, irrespective of the authority - central, regional or local - to which the non-compliance is attributable.

Anyone may lodge a complaint with the Commission against a Member State about any measure (law, regulation or administrative action) or practice which they consider incompatible with a provision or a principle of Community law. Complainants do not have to demonstrate a formal interest in bringing proceedings. Neither do they have to prove that they are principally and directly concerned by the infringement complained of. To be admissible, a complaint has to relate to an infringement of Community law by a Member State. It should be borne in mind that the Commission's services may decide whether or not further action should be taken on a complaint in the light of the rules and priorities laid down by the Commission for opening and pursuing infringement procedures.

Anyone who considers a measure (law, regulation or administrative action) or administrative practice to be incompatible with Community law is invited, before or at the same time as lodging a complaint with the Commission, to seek redress from the national administrative or judicial authorities (including the national or regional ombudsman and/or arbitration and conciliation procedures available). The Commission advises the prior use of such national means of redress, whether administrative, judicial or other, before lodging a complaint with the Commission, because of the advantages they may offer for complainants.

By using the means of redress available at national level, complainants should, as a rule, be able to assert their rights more directly and more personally (e.g. a court order to an administrative body, repeal of a national decision and/or damages) than they would following an infringement procedure successfully brought by the Commission which may take some time. Indeed, before referring a case to the Court of Justice, the Commission is obliged to hold a series of contacts with the Member State concerned to try to terminate the infringement.

Furthermore, any finding of an infringement by the Court of Justice has no impact on the rights of the complainant, since it does not serve to resolve individual cases. It merely obliges the Member State to comply with Community law. More specifically, any individual claims for damages would have to be brought by complainants before the national courts.

The following administrative guarantees exist for the benefit of the complainant:

- (a) Once it has been registered with the Commission's Secretariat-General, any complaint found admissible will be assigned an official reference number. An acknowledgment bearing the reference number, which should be quoted in any correspondence, will immediately be sent to the complainant. However, the assignment of an official reference number to a complaint does not necessarily mean that an infringement procedure will be opened against the Member State in question.
- (b) Where the Commission's services make representations to the authorities of the Member State against which the complaint has been made, they will abide by the choice made by the complainant in Section 15 of this form.
- (c) The Commission will endeavour to take a decision on the substance (either to open infringement proceedings or to close the case) within twelve months of registration of the complaint with its Secretariat-General.
- (d) The complainant will be notified in advance by the relevant department if it plans to propose that the Commission close the case. The Commission's services will keep the complainant informed of the course of any infringement procedure.
