



▲ Figure 1. View from Avonmouth dock. (©Thomas Appleby).

Return to Eden: management of an inshore and intertidal marine environment

Tom Appleby examines the consenting regime for The Bristol Port Company's proposed container port extension.

The United Nations definition of water security sets out its broad ambit:

*"the capacity of a population to safeguard sustainable access to adequate quantities of acceptable quality water for sustaining livelihoods, human well-being, and socio-economic development, for ensuring protection against water-borne pollution and water-related disasters, and for preserving ecosystems in a climate of peace and political stability"*¹

Realising water security therefore requires a range of legislative tools and, given the Water Framework Directive's coverage to one nautical mile seaward, covers a wide variety of aquatic environments. This work examines the effectiveness of the Habitats Directive at preserving aquatic and intertidal ecosystems in the face of a major infrastructure project.

In 2008 The Bristol Port Company (TBPC) submitted ambitious proposals for a deep-sea container terminal at Avonmouth to berth ultra-large container ships (see **Figure 2**). The proposal included the loss of a small area of intertidal habitat from within Natura 2000 sites protected under the Habitats Directive², the alteration of approximately 80 hectares of intertidal mudflat, which would affect seabed dwelling communities and the (potentially temporary) loss of 60 hectares of intertidal area to waders and waterfowl³.

In his Autumn Statement of 2011 the UK Chancellor of the Exchequer George Osborne announced: "We will make sure that gold-plating of EU rules on things like habitats aren't placing ridiculous costs on British businesses"⁴. But when Defra reviewed the application of the Habitats Directive in 2012 it found "that in the large

majority of cases the implementation of the Directive[s] is working well"⁵. The TBPC application was reviewed as part of that process, and as an influential project it is worth further exploration. (For another case study in the application of the Habitats Directive, see Barham (2003)⁶.

BACKGROUND

The Habitats Directive is certainly one of the most powerful pieces of environmental law currently on the statute books. Its core aims are exceptionally high. Though there are nuances, in lay terms sites protected by the Habitats Directive may not be developed if there

is an adverse impact on the site's conservation objectives unless there are imperative reasons of overriding public interest (IROPI), there is no alternative and there is compensatory habitat created as part of the development (see article 6 of the Habitats Directive).⁷

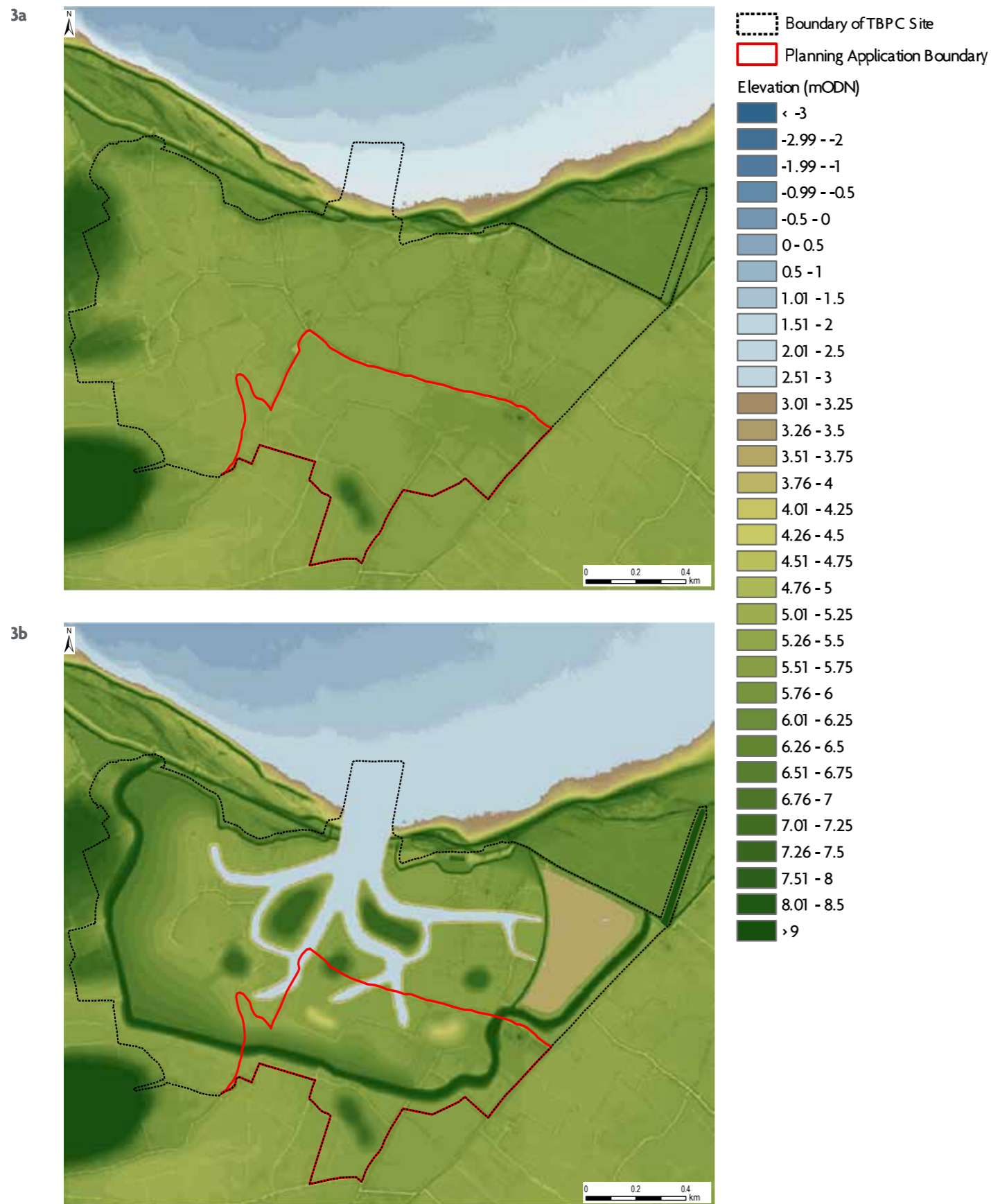
IROPI is only generally available if there are no priority habitats or species (though even then IROPI may still then be claimed for human health or public safety). Also, technically, the IROPI statement needs approving before a move for compensatory measures can be made. In reality they are usually done together but compensatory measures cannot be agreed until the IROPI has been approved. The exact nature of the compensatory measures, given the geographical conditions of an area, can also be an important area of discussion. There are 1,161 Natura 2000 sites in the UK, and marine sites cover an area of nearly 74,000 km², just under 10 per cent of the UK's exclusive economic zone. Many of these sites are in the inshore marine, estuarine and intertidal areas.

THE TBPC APPLICATION

On 22 July 2008, First Corporate Shipping Limited (the holding company for TBPC) submitted a formal application to the Department for Transport for a Harbour Revision Order to permit the creation of a deep-water container terminal at Avonmouth on the River Severn under the Harbours Act 1964. The Harbours Act requires compliance with the Environmental Impact Assessment Directive⁸ and the provision of environmental statements. In addition to environmental statements the Secretary of State for Transport, having decided that the project would have a significant effect on the Severn Estuary Special Area of Conservation (SAC) and Special Protection Area (SPA), also submitted the project for appropriate assessment⁹ in compliance with



▲ Figure 2. Existing foreshore at Bristol & the proposed terminal. (© The Bristol Port Company)



▲ Figure 3. 3a Current topography of the TBPC Steart Habitat creation site 3b Future topography of the TBPC Steart Habitat creation scheme. (©ABPmer)

the Habitats Regulations¹⁰. On the advice of both Natural England and the Countryside Council for Wales (since the potential impact was cross border) the Secretary of State found that it “cannot be ascertained that the project would not”¹¹ adversely impact on the integrity of the Severn Estuary Natura 2000 sites; and consequently noted the following potential impacts:

- permanent loss of a small area of intertidal habitat from within the SPA and SAC;
- the alteration of conditions that support seabed-dwelling animal communities within an area of approximately 80 hectares of intertidal mudflat due to increased accretion; and
- a resultant reduction, that could be temporary, in available feeding resources for waterfowl and waders, within the above intertidal area, of approximately 60 hectares of intertidal area due to potential changes in seabed life.

The Secretary of State was satisfied that there were overriding reasons of public interest to justify the port development going ahead, and this included looking at alternatives and commenting on the national provision of and demand for port infrastructure, and in particular that an agreement between TBPC, the Royal Society for the Protection of Birds (RSPB), the Environment Agency and Natural England was sufficient to ensure the production of compensatory habitat.

THE AGREEMENT OVER COMPENSATORY HABITAT

The agreement over compensatory habitat between TBPC, a national environmental charity and two non-departmental public bodies in advance of the application under the Harbours Act shows how effective early and thorough engagement with regulators and potential opponents to a scheme can be. UK legal processes are too often characterised by their adversarial nature, and this can lead to a trap where the enmities developed by the process overshadow the intended spirit of the legislation. In this case the benefit brought to TBPC was that the company avoided an expensive public inquiry¹² (something very rare for port developments) and, by directly working with organisations that might have objected to their proposals, came to a mutually satisfactory scheme on 22 December 2008; doubt was removed from the process.

ACCEPTANCE OF IROPI AND COMPENSATORY MEASURES

Multiparty agreements on poorly defined substance can be difficult to draft; for various complex reasons of contract law it is hard for lawyers to include areas within agreements that remain to be resolved (but courts’ attitudes in the area are softening – see *MRI Trading AG v Erdenet Mining Corp*¹³). However, the 2008 agreement provided that TBPC would seek out a satisfactory

scheme, and obtain the necessary land ownerships and regulatory consents before commencing works on the main scheme. **Figure 3** shows the Steart Compensation Scheme proposed by TBPC.

The scheme involves purchasing low-lying farmland in the Steart Peninsula, building new sea defences around the periphery of the site, creating a breach in the existing sea defences and creating an area of at least 120 hectares of intertidal estuarine environment on the site. TBPC used a partnership approach with the environmental NGO, the RSPB, in developing the design, delivery and future management of the site. This brought additional expertise to the scheme both in terms of protection of biodiversity and in ameliorating local concerns. TBPC also worked closely with the Environment Agency, which was undertaking a neighbouring wetland creation project as compensation for flood defence works¹⁴.

Key to the compensation requirements was that the new intertidal habitat must be created and functioning prior to adverse impacts occurring at the Avonmouth container terminal site. This was an expensive and contentious issue; the timing of the completion of the compensatory package in the scheme of works could pose real financial constraints on the project, and there is a commercial risk that, in conceding the necessity for a functioning compensatory package prior to the main development, TBPC have set a very high standard for other developments in the UK. The Defra guidance on this issue states that “where possible, compensation measures should be complete before the adverse effect on the European site occurs”¹⁵. So the issue would not appear to have been settled.

IMPLEMENTING THE STEART SCHEME

In some sense, though, the creation of the obligation merely replaced one set of applications with another. Indeed, perversely, in many aspects the Steart scheme involves a more complex legal process than that of the container terminal project. With the container terminal the areas of land that are not within the ownership of TBPC belong to either the Crown Estate or the Swangrove Estate and thus any land ownership issues involve few participants.

For a compensatory package, finding the right land parcel in single ownership is likely to be impossible; so purchase, rental agreements, or options need to be drawn up with all the individual land owners and their legal representatives. If any of the land owners are difficult to persuade (and it only takes one to hold up the process) there are provisions for compulsory purchase within the Harbours Act, but compulsory purchase under English law is notoriously slow and complicated, and could ultimately involve revisiting the Harbour Revision Order process itself and a public inquiry.

Furthermore, whereas the Harbour Revision Order took place before the implementation of the Marine and Coastal Access Act 2009 (MACA), the application for consent at the Steart Scheme did not. MACA changed the marine licensing regime. On the face of it the abolition of the need for Food and Environmental Protection Act licensing and Coastal Protection Act licensing should have made the process simpler; there would need to be only a single marine licence rather than two, but marine licensing under MACA has a far wider remit, so in practice it is more complex.

Additionally, because marine licensing applies to the high-water mark and planning in England and Wales to the low-water mark, for the intertidal area there is double licensing. Under the Town and Country Planning Acts planning permission was required from the local authority (in this case two, since the Steart unfortunately straddles a local authority boundary), and a marine licence was required from the Marine Management Organisation under the MACA. This led to three very similar applications to differing public authorities (with the associated duplication of effort and administrative burden for the developer and statutory consultees). These rank as new applications and need to stand or fall on their own merits, regardless that they are in fact environmental compensatory packages for an already approved scheme.

This has two interesting consequences. Firstly the compensatory package itself required environmental impact assessment under the EIA Directive and secondly planning permissions involved further considerations removed from the main application.

SECOND ENVIRONMENTAL IMPACT STATEMENT

Because the Steart proposals involved significant change in land use and alterations to the line of the foreshore, the local authorities insisted on the preparation of an environmental statement. The site is close to a number of SPAs and SACs so this led to a further appropriate assessment for the compensatory scheme under the Habitats Directive. As a matter of fact, with the incorporation of mitigation measures, the Steart proposal was deemed to have no adverse impact on the integrity of the affected sites so was allowed to proceed, but it did raise the spectre of the requirement of a further compensatory package to compensate for the compensatory package. This also showed one of the key shortcomings in the current approach: an application to a local authority for a nature reserve operates at a different scale and speed to a major infrastructure development, and yet the whole port development miles up the coast is in fact tied to the speed of the paperwork of this related application.

PLANNING CONDITIONS

Because creation of the reserve on the Steart Peninsula was treated by the local authorities as a new application,

inevitably a further suite of considerations and obligations crept in. In this case both local authorities were keen to create car parking and a visitor centre¹⁶. In some sense this could be detrimental to the very success of the compensatory package in supporting estuarine birds; encouraging large numbers of people to the site is likely to cause disturbance and interfere rather than enhance the environmental side of the scheme.

FURTHER LICENCES AND CONSENTS

As well as planning and the marine licence for the compensation scheme, TBPC have to obtain:

- consents for the creation of the breach, contamination released during the breaching work and the disposal of any waste material arising from the site;
- Footpath Closure/Diversion Order – for changes to the coastal footpath;
- protected species licence – for moving badgers, newts and other species affected by the works; and
- common land consent – to alter access and undertake works on common land.

In short, the environmental compensation scheme is likely to require more consents than the major port redevelopment work itself. TBPC have not yet completed this process and it remains to be seen how difficult in practice these licences are to obtain, but the sheer number of consents is an issue for the effectiveness of the compensatory scheme. Some of the consents are routine, but a contentious application to move a public footpath, for instance, can be a time-consuming process.

CONCLUSIONS

The partnership approach between the RSPB, the government's statutory nature conservation advisor and the applicant was an excellent way of approaching this application; it ensured that the scheme met the stringent environmental requirements, and removed doubt from the process. In this case it even had the benefit of avoiding a public inquiry that could have been drawn out and costly. But the application of the Habitats Directive is still exceptionally complex, not because of the environmental regulation but because of three key latent issues within UK governance generally:

- the sheer number of consenting requirements left the scheme vulnerable to government and regulatory reorganisations (whether they are because of devolution, new legislation or budget cuts);
- there is a duplication of regulation in the intertidal area; and
- the strength in the UK of private property rights

and the lack of clear compulsory acquisition powers associated with the directive make the assemblage of land for the environmental compensation scheme a very difficult task.

TBPC have managed to overcome these obstacles by working in partnership with the local authorities, the statutory nature conservation bodies and the RSPB, and this has enabled them (at least to date) to navigate their way through the complexity of the regulation. However the development remains to be completed, and lack of consistency in government remains one of the key obstacles. The Major Infrastructure Environment Unit¹⁷ may alleviate some of these issues, as will the coastal concordat¹⁸ between differing English public bodies, but major issues still exist for developments that straddle public authorities' boundaries, and national boundaries.

It is a relief that the Habitats Directive did not receive significant criticism from Defra's review. The directive is one of the first pieces of legislation that protects large parts of the environment for its own sake. It marks a fundamental shift in human relations with the environment. The acceptance by corporations that this reflects the social norm of our times is something of which our generation should be proud. When asked about the process in August 2014, Sue Turner, communications director of TBPC, commented:

“We support the principle of the Habitats Directive and are committed to promoting the sustainable growth of Bristol Port, but there needs to be a level playing field between us and our competitors and the rules need to be applied in the same way for all European developments.”

It is this shift in attitude to the environment in general that underpins a moral acceptance of the need for water security.

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