Dear Sirs,

Consultation on proposed new management measures for Cardigan Bay - scallop dredging

1. ClientEarth is pleased to submit a response to the above consultation. ClientEarth works to ensure that special areas of conservation (SACs) are managed in a way that complies with the Habitats Directive.

2. The Habitats Directive establishes rules regarding activities and impacts affecting protected sites, such as Cardigan Bay SAC. Article 6 of the Directive sets out a number of provisions governing the conservation of sites like Cardigan Bay SAC, and the procedural requirements for managing human activities that could impact such a site.

3. The proposal is to re-establish 'a viable and sustainable scallop fishery within the Cardigan Bay SAC'. While it is not the case that a SAC should automatically become a 'no go' area for fishing, certain fishing gears and techniques have more impact on the marine environment that others. Scallop dredging is particularly destructive.

4. ClientEarth is concerned that scallop dredging in Cardigan Bay SAC (under any of the proposed permitting options) is likely to be incompatible with the application of Article 6. Therefore, if the Welsh Government moves ahead with these proposals, we will monitor the process closely.

Standard for the Habitats Regulations Assessment

5. We recognise that the Welsh Government has been clear that, as required by the Habitats Directive, it will undertake a Habitats Regulations Assessment (HRA) in respect of the proposals before allowing scalloping to recommence.

6. We understand this reference to mean that an 'appropriate assessment' will be undertaken, as required by Article 6(3) of the Habitats Directive. Such an assessment is required because scallop dredging is a plan or project that is likely to have a significant effect on the SAC. The appropriate assessment must assess whether scallop dredging will have an adverse effect on the integrity of Cardigan Bay SAC.

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1 Consultation document number WG26416, dated 26 November 2015.
2 Page 4 of the consultation document.
7. We remind the Welsh Government that, according to European jurisprudence, it can only authorise an activity affecting the SAC if it has made certain that the activity 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. The appropriate assessment will need to show that these tests can be satisfied.

8. In relation to these tests, we would like to underline the point that the concept of 'site integrity' is much wider than the protected features within the site.

9. The Habitats Directive is drafted so that the relevant consideration for the appropriate assessment is 'site' integrity, rather than the integrity of a specific habitat or species for which a particular site may have been designated. The phrase ‘integrity of the site’ is not defined in the Directive.

10. Article 2(2) of the Habitats Directive requires that measures taken pursuant to the Directive shall be designed to maintain or restore to favourable conservation status the habitats and species protected by the Directive. Given this, the intent of the legislators must have been that Article 6(3) would contribute to efforts to maintain or restore to favourable conservation status.

11. The definitions of 'conservation status' and the meaning of 'favourable' in Article 1 of the Habitats Directive make it clear that it is not just the state of the designated feature itself, but also of its relevant surroundings and influencing factors, which determines conservation status.

12. For example, in relation to protected species, conservation status includes the need to be a 'viable component of its natural habitat' and a requirement that 'there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis'. In relation to habitats, you need to look at the continued availability of 'the specific structure and functions which are necessary for [the habitat's] long-term maintenance'. Moreover, to determine the conservation status of a listed natural habitat you must also consider the conservation status of its typical species. The conservation status of a habitat will only be taken as 'favourable' if the status of its typical species is itself also favourable.

13. Additionally, Article 3(1) of the Habitats Directive requires the habitats of protected species to be maintained or restored at favourable conservation status. The 'habitats of species' are defined in Article 1(f) as 'an environment defined by specific abiotic and biotic factors, in which the species lives at any stage'. Again, this encompasses much wider factors than merely the protected species itself.

14. Therefore, the broad meaning of 'favourable conservation status' should be borne in mind when considering the concept of 'site integrity'.

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4 In respect of habitats see the definition in Article 1(e); in respect of species see the definition in Article 1(i).
15. Further, the Court of Justice of the European Union has provided clarification on the meaning of 'site integrity'. In its reasoning in the Sweetman case, the Court explains that, in order for the integrity of a site not to be adversely affected:

- the site needs to be preserved at a favourable conservation status; and
- that this entails 'the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site'.

16. Whilst the case of Sweetman itself concerns damage directly to an area of priority habitat, the logic applied by the Court also relates to other habitats. The judgment provides clear confirmation that consideration in the appropriate assessment of the ecological functioning of a site is necessary.

17. We also remind the Welsh Government that the precautionary principle must always be applied in the context of authorising plans or projects. This is because Article 6(3) prohibits an authority from approving a plan or project unless it has made certain that it will not affect the integrity of the site – as opposed to having to show proof that the plan or project will cause harm to the site to justify refusal of consent.

Use of the Bangor Study

18. The consultation document makes reference to the 'Scallop Fishing Intensity Experiment' by Bangor University (the Bangor Study). ClientEarth would be very concerned if the Welsh Government and its advisors relied solely on this study’s findings when undertaking the appropriate assessment.

19. Further, as explained in paragraphs 10 and 15, the concept of 'site integrity' is closely tied to the concept of 'favourable conservation status'. Therefore, the appropriate assessment will need to consider the question of what this would look like for Cardigan Bay SAC.

20. It is our understanding that the Bangor Study has not looked at what 'favourable conservation status' means for Cardigan Bay SAC, nor measured the impact of the scallop dredging undertaken in the course of the experiment against this baseline. Instead, the impact was assessed against the condition of the SAC after a period of intense scallop dredging (i.e. before the 2010 scallop order ban), which we strongly doubt can be considered 'favourable conservation status'.

21. While the Bangor Study seems to show that the physical effects of scallop dredging are temporary, it is relevant to recall discussions on the meaning of 'temporary' in the context of cases decided in the European Court. In Sweetman, the Advocate-General discussed the hypothetical example of a pipeline across a protected site which leads to temporary disturbance which is capable of being 'fully undone – in other words the site can be restored to its proper conservation status within a short period of time', on which facts she would not have been inclined to find an adverse effect on the integrity of the site. This example relates to a 'one off' impact, whereas scallop-dredging is a repeated

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5 See para. 39 of the Judgement of the Court in Sweetman.
6 Page 2 of the consultation document.
7 See paras 58-61 of Advocate-General Sharpston’s opinion in Sweetman.
activity. Each season scallop dredging will reduce the abundance and biomass of organisms anew and repeat the damage to the seabed.

22. The decision-makers in relation to these proposals will need to be clear that the effect of scallop-dredging can be fully undone, such that the habitats and species in Cardigan Bay SAC can quickly return to favourable conservation status. ClientEarth has strong doubts that this would be possible.

Clarity around the Welsh Ministers’ obligations

23. We are also concerned by certain references in the consultation document which suggest that there may be a misunderstanding within Welsh Government of the requirements of the Habitats Directive.

24. On page 2, the Welsh Ministers’ legal obligations are framed as ‘to protect the designated features of SACs’. Acknowledging that the content of the consultation document may have been simplified due to its public facing nature, we would like to highlight that the Welsh Ministers’ obligations extend beyond a duty to protect only the designated features of the SAC. In particular:

- In their decision whether to allow scallop dredging in Cardigan Bay SAC, Welsh Ministers are required by the Habitats Directive to protect the ‘integrity’ of the SAC, which is broader than the protected features - see paragraphs 8-15 above;
- Given the overarching objective of the Directive, the obligation for Welsh Ministers is to ensure that natural habitats and species of community interest are maintained or restored to favourable conservation status - which as explained in paragraphs 11-13 above relates to more than just the state of the features themselves; and
- Other pieces of law, such as the Marine Strategy Framework Directive, also impose obligations to do more than simply protect designated features of SACs.

Refuting arguments reported as advanced by the fishing industry

25. It would appear from the consultation document that certain arguments, reported as coming from the fishing industry and not publically refuted in the context of the consultation, have gained sufficient traction to prompt the authorities to consider establishing a scallop fishery within the SAC. We contend that these arguments may also be based on a misunderstanding of the law.

26. On page 2, the consultation document reports concerns that the current restrictions are ‘disproportionate’. If this reflects a suggestion that socio-economic interests are material to the decision as to whether (and if so which) management steps are necessary, then we believe this is a misreading of the obligations imposed by the Habitats Directive.

27. The decision on whether management measures, such as spatial or temporal restrictions, are necessary is determined by the tests (relating to ecological considerations) set out in Article 6. As emphasised above, where there is insufficient

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8 See Articles 2(2) and 3(1) of the Habitats Directive.
evidence for certainty, a precautionary approach must be taken and authorisation for scallop dredging will have to be refused.\textsuperscript{9}


29. In the words of the Advocate-General in \textit{Waddenzee}, ‘thus, in Article 6(3) and 6(4) of [the Habitats Directive] the community legislature itself set out the relationship between nature conservation and other interests. Consequently no failure to observe the principle of proportionality can be established’.\textsuperscript{10}

30. Therefore, we will look carefully at the use of any argument relating to ‘proportionality’ as a justification of any Welsh Government decision on the appropriate way forward for the management of Cardigan Bay SAC.

31. If there are questions in relation to this consultation response, please do not hesitate to contact me.

Yours faithfully,

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\textsuperscript{9} See para. 57 of the Judgment of the Court in \textit{Waddenzee}.
\textsuperscript{10} See para. 106 of Advocate-General Kokott’s opinion in Waddenzee.
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