

Closing Submission
On Behalf of
Scottish Natural Heritage

**Outline Planning Permission for
Golf Course and Resort Development on
land at Menie House, Balmedie, Aberdeen**

DPEA Reference CIN/ABS/001



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1. Introduction

- 1.1 The application before this inquiry, following its call-in by Scottish Ministers, is an outline planning application for a “Golf Course and Resort Development” at Menie Estate, Balmedie, Aberdeenshire (“the Application”) made by Trump International Golf Links Scotland (“the Applicants”) to Aberdeenshire Council (“the Council”) and dated 27 November 2006. The Application is Core Production (G)2.
- 1.2 Although accompanied by a “planning supporting statement” providing *inter alia* some indicative detail of the nature of the development and its components and although clarification of those components is found in the statement of case for the Applicants dated 5 May 2008, the Application itself is unchanged. The Environmental Statement (Core Production (G)3) is based on a routing plan that initially accompanied a detailed planning application (now withdrawn) for the championship golf course. Subsequently a revised course layout was submitted (T2) followed by a hole-by-hole analysis (T4). The importance of differentiating between the scope of the Application and the indicative documents lies in the matter of conditions necessary to constrain the development, a topic considered in Section 10 and also in recognising the limitations in the information before the inquiry (Section 2).
- 1.3 Parties to the inquiry were encouraged to limit their evidence on some matters to written submission. For the record, the written submission of SNH is dated 21 May 2008 and:
- (i) provides a planning and policy context for the oral evidence given to the inquiry relative to adverse impacts upon the Foveran Links

SSSI (“the SSSI”) and on coastal habitats to the south, to Annex 1 Habitats and to biodiversity interests.

(ii) updates advice from SNH on:

- Ythan Estuary, Sands of Forvie and Meikle Loch Special Protection Area (“the SPA”)
- bats and otters (both European Protected Species)
- badgers
- landscape and visual impacts, impacts in respect of recreation and access and sustainability issues.

In this submission we limit consideration of the SNH written submission to those elements that are a necessary background to or consequence of matters debated at the inquiry.

1.4 Rebuttal precognitions on behalf of the Applicants were not paginated. References to these rebuttals in this submission assume, for ready understanding, that numbering has been carried out.

2. Information Not Before the Inquiry

2.1 The Application lacks sufficient information on *inter alia*:

- ground conditions
- groundwater and wetlands
- cut and fill operations, including locations and volumes
- second golf course
- short game area
- the general location of infrastructure required for major golfing events

- 2.2 Subsequent applications on a multi-stage planning process judged likely to have a significant effect upon the environment would themselves now, following the Environmental Impact Assessment (Scotland) Amendment Regulations 2007, require to be subject to environmental assessment but such a procedure at the reserved matters stage is neither to be encouraged nor intended to limit the requirement for an appropriate level of information to accompany outline applications. Nor can it, in our submission, prevent the imposition of conditions in a grant of outline consent that are deemed to be appropriate and are being argued by the Applicants to be "mitigation". This, it is submitted, is an entirely sensible and pragmatic approach. The grant of an outline consent, particularly for a major high profile project, inevitably raises expectations that the development will be built and renders a subsequent refusal of reserved matters consent by the planning authority with the benefit of full information somewhat difficult to defend.
- 2.3 The absence of information on groundwater and wetlands is of particular concern. Dr. Tom Dargie readily acknowledged in cross examination (D Cockburn) the importance of groundwater in the dominance of processes set forth on page 139 of SNH 47. SNH notes in this respect the objection by SEPA contained in its written statement. We limit our observations on that submission and the response by the Applicants to stating that, if the Reporters reach the conclusion that there is sufficient information to judge the application, it is necessary to adopt a precautionary approach. Elements that have not been considered cannot simply be ignored and this is particularly necessary relative to the ecological impacts discussed in Sections 5-7 of this submission. The challenge therefore is to assess properly the likely impacts, including indirect impacts that would flow from such a development and ensure, for example, that the focus at the inquiry

on the championship course does not obscure the fact that **two** courses are planned, even if one remains largely unassessed because information is limited to its likely location as evidenced by a document which has now been superseded (T1).

3. Consideration of Alternatives

- 3.1 The non-technical summary of the Environmental Statement states under this heading that the initial global site search resulted in a shortlist of five of which three were in Scotland, one in France and one in Ireland. Mr Donald Trump (precognition, para. 5) states that in this process over 200 sites throughout Europe alone were investigated. The search criteria were six in number and in terms of the principal golf course are summarised by Dr. Martin Hawtree, ultimately appointed the lead architect after Menie was the chosen site, in his precognition at para. 2.1 as “*a world-class 18 hole championship links course, in traditional Scottish style, capable of one day hosting a major championship*”. Dr. Hawtree states also (precognition, para. 3.5) that it is not for him to question Mr Trump’s ambitions or dreams and for its part SNH adopts precisely that position. However it must be observed that in the context of alternatives, the Applicants proceeded in the full knowledge of the SSSI and the consequent implications for development thereon. It is noted that the fourth criterion in the consideration of alternatives is “favourable planning environment”.
- 3.2 Given that knowledge, the Applicants accept that at Menie the golf course “*could be placed elsewhere on the site and it need not enter the dune area at all, let alone the SSSI*” (Hawtree precognition, para. 3.1). Further Dr. Hawtree states (precognition, para 4.3) that “*With erudition and clever reproduction the site of the first nine holes plus additional non-SSSI land*

might produce another Cruden Bay, Murcar, Royal Aberdeen – all world-class golf courses”.

- 3.3 It is recognised that the opinion of the professionals in this area, being Mr Trump who is a highly experienced developer and Dr. Hawtree with his design experience in links golf courses, is that the location has superlative topography, landscape and drama and that this increases significantly in the SSSI section. However in our submission on the matter of alternatives the evidence of the Applicants themselves, whatever their obvious preference in golfing terms for the inclusion of the SSSI, points to the possibility of the creation of a world-class golf course at Menie avoiding the SSSI. Mr Boyd made clear on more than one occasion that his clients are uninterested in a consent which prohibits the use of the SSSI land but it is the decision by the Applicants to develop on the SSSI which triggers the obvious conflict between Mr Trump’s ambitions and the protection of the environment in respect of which SNH has a responsibility, especially in the light of the significant adverse effects that would occur.

4. The Roles and Responsibilities of SNH

- 4.1 The general statutory aims and purposes of SNH and its related role and responsibilities are summarised in both the Statement of Case and the Written Submission from SNH and need not be repeated.
- 4.2 SNH was consulted on the application and its Environmental Statement by the Council. Setting aside other elements of advice within the consultative replies from SNH dated 30 May and 16 August 2007 referred to in 1.3 hereof and upon which oral evidence was not provided at this inquiry, SNH concluded that the development, specifically the championship golf course, will have significant adverse impacts on the SSSI and the sand dune habitats immediately to the south. SNH drew attention to the

conclusions of the Environmental Statement in that respect. SNH did not consider it possible to mitigate or compensate for such impacts and concluded that both the objectives of the SSSI designation and its overall integrity were compromised. It is submitted that on the basis of the ES alone, such a conclusion is unsurprising. This brings into focus certain policy considerations, specifically paragraph 25 of NPPG 14 and related policies within the development plan. It should be explained that SNH is not qualified to comment in detail on the economic arguments upon which the Applicants rely at this inquiry and has not presented evidence on these but in Section 8 we will discuss both of the tests within NPPG 14.

5. The SSSI and Predicted Impacts

5.1 General

5.1.1 The SSSI encompasses the whole of Foveran Links and Drum Links, together with the northern end of Menie Links (“North Menie”), which latter area occupies the southern third of the SSSI and upon which nine holes of the championship golf course would be built. As can be seen from the citation of the SSSI (SNH 1) it qualifies in terms of both its geomorphological and ecological interest.

5.1.2 In respect of both the importance of the geomorphological and ecological interests and the impacts predicted should development proceed (but with the important exception of “mitigation”), it became clear that there is substantial agreement between the advisers representing respectively the Applicants and SNH. The parties are agreed:

- (i) on the importance and nature of the landforms and their formative progresses as evidenced by:

“The key to the geomorphological interest at North Menie lies in the ongoing dynamism, unfettered movement and scale of the main sand sheet and this has resulted in the development of a classic assemblage of landforms and dune habitats that are dependent on this dynamism” (Hansom – precognition, para. 14).

“... there is little disagreement that Menie is an excellent example of both mature and evolving dynamic dune and links landforms, which exhibit good examples of past and present processes... It also contains some of the best examples in the UK of mobile sand forms at different stages of geomorphological evolution.” (rebuttal – Ritchie, page 1 - general overview).

- (ii) on the significance of the stabilisation processes proposed as evidenced by:

“The proposed development... requires the wholesale stabilisation of the bare sand dune surfaces and arresting the dynamic processes that give rise to them... The proposed development will therefore result in the destruction of the geomorphological interest” (Hansom – precognition, para. 24)

“If this (meaning the need to stabilise the open unvegetated sand dome and most contiguous areas) is done, then a major element in the reason for site designation i.e. dynamic and relatively rapid but variable movement in a generally northwards direction, would cease. There is no disagreement between developer and objectors on this specific concern. It is also agreed that this golf course design requirement crystallises the question whether or not sufficient geomorphological interest remains in this North Menie area to continue to justify the appellation SSSI.” (Ritchie – precognition, page 7)

(iii) on the resultant ecological impacts as evidenced by:

“When the processes are seriously disrupted by this stabilisation, the overall biological interest will be very seriously compromised, probably to the extent that denotification of the southern section of the SSSI would be proposed” (Angus – precognition, para. 86).

“There is much general agreement between this SNH precognition (i.e. that of Mr Angus) and the Applicant’s habitat baseline information and interpretation for the development area.” (Dargie - rebuttal – Page 1 general overview).

“Likewise, there is further agreement on the severe adverse impacts of development for golf within the dune sector at Menie” (Dargie – rebuttal – page 7 general overview).

5.1.3 From this remarkable level of agreement two specific conclusions emerge with clarity, namely:

- Contrary to Mr Trump's evidence (precognition, para. 16) the Applicants have not taken the advice nor accommodated the concerns of their environmental advisers.
- The integrity of the SSSI is (to put it no higher) severely compromised.

5.1.4 On the first point it is clear from their evidence that Professor Ritchie and Dr. Dargie advised the Applicants to avoid the SSSI in their golf course proposal. Dr. Dargie states so specifically (precognition, para. 3.4) and indeed includes also in that embargo the dunes to the south. In cross examination (D Cockburn) he confirmed that his opinion on this matter was unchanged. Dr. Hawtree accepted (xx D Cockburn) that his various changes to the layout and which resulted in production T2 were dictated by golfing considerations. Any possible benefits (e.g. avoidance of the Sandend Dunes) or disbenefits (increased use of dune slacks) were consequences of the application of these golfing considerations.

5.1.5 On the matter of the compromising of the objectives of designation and overall site integrity, Professor Ritchie states that a major element in the reason for site designation, i.e. its dynamism, would cease. Indeed he questions its continued designation although, as will be recalled, he declined to answer his own question despite several attempts to

encourage him to do so. Dr. Dargie's clear advice to avoid the SSSI is based on his conclusion that the development "*was a very significant threat to site geomorphological and ecological integrity*". (precognition, para. 3.3). These are the expressed views of the advisers of the Applicants and they are shared by all three of the SNH witnesses, and by Dr. Gore for the Council (see para. 8.2 hereof). Unlike some inquiries with more difficult judgements required on these matters having regard, for example, to the extent of the affected area relative to the site, the predicted impacts at Menie are substantially above that of compromising the objectives and overall site integrity to the point of questioning the continuation of designation. We accordingly invite the Reporters to hold, irrespective of "*mitigation*", that the objectives of designation of the SSSI and its overall integrity would be compromised, and indeed fundamentally so, by this development proposal. Indeed we argue in paragraph 7.1 hereof that the correct approach is indeed to reach a conclusion on impacts prior to a consideration of any offers of compensation.

- 5.1.6 Before leaving this overview of the key matters of agreement between the parties in order then to discuss some areas of divergence, particularly "*mitigation*" it is worth recalling the evidence of Mr Trump on dune stabilisation. We have noted Mr Trump in evidence (xx L Cockburn) to claim that strong winds "*could blow the dunes off the face of the earth*", before continuing to the effect that the dunes were indeed stabilising. Reference was made by Mr Trump to his preserving the site at his expense. Professor Ritchie's response (xx D Cockburn) was that "*a fantastic hurricane could move a lot of sand*". Of course "*move*" is different from "*remove*" but in any event

Professor Ritchie accepted that the stabilisation process was required for the development and not for any other reason. On the opinion expressed by Dr. Dargie that much of the present dune dynamism would largely disappear before the end of this century (rebuttal, page 1) Professor Ritchie confirmed (xx D Cockburn) that this natural process would be of considerable geomorphological interest and that he could not say over what timescale it might occur. In our submission these points can be summarised this way. The stabilisation cannot be portrayed as anything other than a specific requirement of the development proposed and the removal of the dynamism (as opposed to allowing nature to take its course over an unknown period) constitutes the deliberate excision of the major geomorphological interest which in turn produces severe ecological impacts.

5.2 Geomorphological Issues

- 5.2.1 The question arises about the extent of any possible mitigation of geomorphological impacts. These would appear, according to Professor Ritchie (rebuttal, pages 1 and 2), to be restricted to the use of the minimum required area, limiting topographic changes and a suggestion of restoration of landforms. Setting aside the absence of dynamism, Professor Ritchie conceded that there was no current proposal for such restoration and Dr Hansom emphasised the absence of any attempt at geomorphological mitigation. It is accepted by SNH that the avoidance of the Sandend Dunes (T2) constitutes an improvement on the layout in T1 but this area (c.2-3 ha) is very small in comparison with the Menie sand sheet (11.4 ha) and it is "*much less mobile*" (Hansom, oral examination in

chief) and much less important than the Menie sand sheet. We are invited by Dr. Hawtree (precognition, para. 2.4) to accept that his layout resulted in a halving of “*earth movement*” but he conceded (xx D Cockburn) that there was no support for that contention before the inquiry. Indeed he accepted the lack of any drawing before the inquiry showing the footprint of the golf course. In any event it is submitted that the amount of cut and fill operations (or “*topographical smoothing*”) will on any sensible view be very substantial. Production T4 at para. 3.11 stated that, as with the front nine holes, all tees, fairways and greens for the back nine holes within the SSSI “*require construction, stabilisation and cut and fill construction techniques*”. Reference is also made to para. 20 of the precognition of Dr. Hansom. The inquiry was given a partial insight into the scale of the likely operations by reference to evidence about hole 14. It was put to Professor Ritchie that the creation of the tees for this hole requires the raising of the surface by 7.5m. He accepted that this might be correct but was unable to be more specific. It was left to Dr. Hansom to confirm that his figures were derived from a digitised version of T2 and he added that sand movements “*of biblical proportions were likely to be involved.*” It is noted that Dr. Hansom’s evidence on these figures was not challenged.

5.2.2 That leads to a detailed chapter of evidence on the matter of the ever moving northward “*gap*” in the coastal dune ridge, whether and to what extent it is closed, the possibility of further northwards progression, instability issues, the connected subject of the “*condition*” stated to be acceptable to the Applicants to avoid touching the coastal dune and the proximity of the course to that coastal dune edge. Of

particular relevance was SNH 53, containing a video fly-through and oblique images of the Digital Terrain Model of the Menie Dunes. This was a late production due to its total dependence on data sets from the Applicants, the last part of which was received by SNH on 27 May 2008. This production was not greeted with enthusiasm by the legal advisers for the Applicants although Professor Ritchie thought it helpful (xx D Cockburn). The reason for the vertical offset of 4m for the video and 2m for the oblique views (which it is understood is industry standard) was explained and parties including the Reporters now also have for comparison a later version enhanced to a factor of 1. In our submission SNH 53, viewed with sensible caution, is a very useful tool in understanding the likely topography of the golf course and is of particular relevance to hole 14. It is not intended to achieve any greater purpose. The points that arose in this chapter of evidence are these:-

5.2.2.1 Although agreeing that there has been a longstanding northward migration of processes with the axis of activity moving north, Professor Ritchie considers that with the closure (as he sees it) of the identified "*blow out*" gap, it is to be expected that, partly due to the height of the coastal dune ridge, no new sand feed from the beach is likely. Dr. Hansom does not consider the gap to be fully closed and, moreover, he points to areas of instability immediately to the north of the gap following erosion of the higher dunes to which Professor Ritchie refers. In his opinion this instability is likely to be the precursor to a continuation of the process as described and a later emergence of

a further gap, north of the existing one. Reporters will now have had the benefit of an accompanied site visit to assist them in their judgment in this respect and in reaching that judgment, they will no doubt reflect on the terms of Appendix 6-3 to the ES where in relation to recommendations for the future the following statement appears *“It would appear essential that this coastal stretch (this is a 150m stretch of coastline immediately to the north of the present blowout) is monitored closely since past trends, indicating a progressive northwards displacement in the position of coastal blowouts, would point to this area as the area in which a new blowout might develop in the future”*. We submit that it is difficult to reconcile this statement with Professor Ritchie’s answers in cross examination.

5.2.2.2 Professor Ritchie (rebuttal, page 3) expresses his disagreement with Dr. Hansom’s statement that the coastal dune is very close to the 14th fairway and in cross examination (D Cockburn) he estimated that the distance involved would be 30-40m. However in oral examination in chief Dr. Hansom stated that the distance from the centre line of the coastal dune ridge to the edge of the *“transition area”* (i.e. part of the *“corridor of play”* according to Dr. Hawtree in his precognition at para. 2.8) was 7m. The distance to the edge of the fairway was 21m and there was no doubting these figures because they were ascertained from T2 in digitised form. The figures were not challenged and I invite the Reporters to accept them.

There was another unchallenged figure. Dr. Hansom stated that this fairway, where nearest to the coastal dune ridge, is to be constructed at 2m below the current level.

5.2.2.3 The current instability in the coastal dune ridge would be exacerbated in the longer term by any return, following an accretionary period at Menie, of the historical erosional trend upon which matter Professor Ritchie and Dr. Hansom did not agree. But even lacking such an increase in length of the currently eroding coast, the significance of the figures referred to in para. 5.2.2.2 is in their strong indication of intervention being required at some point in the future to protect hole 14 with the consequent impact on the coastal dune and beach processes.

5.2.2.4 That possibility contrasts sharply with the situation at Machrihanish Golf Course about which Mr Boyd cross examined Dr. Hansom. Firstly it should be acknowledged that, unlike all other examples of golf courses located largely on an SSSI in Scotland whose common feature is the presence of the course pre-dating by decades the SSSI designation, Machrihanish has recently been consented on the site of an existing SSSI. This was demonstrated by the oral examination in chief of Mr Jonathan Hughes of SWT by Mr Tyldesley. All applications for planning permission required to be judged, including by SNH, on their individual merits and in cross examination both Dr. Hansom and Mr Angus explained the initial

opposition of SNH to the proposal, the detailed negotiations over a substantial period and the very substantial changes made to the proposal. By contrast, at Menie the Applicants have rejected all attempts at negotiation over the location of the golf course and in so doing have ignored the advice of their own environmental consultants. Whatever the detail (let alone the particular designated interest) the attempt by Mr Boyd to draw a comparison between Machrihanish and Menie on the basis of a similar embargo on touching the coastal dune and beach processes failed. It failed because, in contrast to the present proposals, Machrihanish has been “*future-proofed*” by the construction at this time of alternatives to those parts of the course under any possible future threat. In the sense of its ability to change layout, the course is itself mobile. Any proposal to site a golf course on an existing SSSI presents a substantial challenge but the circumstances at Machrihanish point, in our submission, to SNH’s ability to adopt an approach dictated by the precise circumstances before them.

5.3 Ecological Issues

5.3.1 General

In this section we deal with any points from the ecological evidence that are worthy of note despite the broad measure of agreement to which reference is made earlier. We exclude from it the subject of “*mitigation*” dealt with at Section 7. This

Section 5 deals only with the SSSI but in the ecological evidence presented at the inquiry there was not such a sharp distinction maintained. In what follows we have tried to indicate where the evidence relates also to the Annex 1 Habitats to the south (i.e. South Menie) dealt with briefly in Section 6 hereof.

5.3.2 Dune Slacks

It is worth recording, due to some confusion, that four categories of coastal dune habitat occur at Menie (Mr Angus – precognition, para. 23) of which there are three (not mobile sand) which are relevant to any discussion on translocation, these being grey dunes, dune heath (crowberry on this site) and dune slacks. The importance of the ecology of the dune slacks is common ground between parties, the difference being limited to whether (Mr Angus – precognition, para. 46) the site (this meaning the whole championship golf course site) is likely to have the best range in Britain or (Dargie – rebuttal, page 7) one of the best four. It matters not greatly. Also a matter of minor dispute was the assertion by Mr Angus (precognition, para. 49) that, assuming no significant change at other sites since 2000, the site has 98.67% of Scotland's resource of young dune slack (SD 13). In our submission, given Mr Angus' caveat, the statistic is correct, as was conceded (xx L Cockburn for RSBP/SWT/BSBI) and represents the best information presently available. On any view there is an extremely high value to be attributed to the young dune slack at Menie in the overall Scottish resource.

5.3.3 Dr. Dargie took issue (rebuttal, page 2) with the use of the word “*destroy*” in the context of dune slacks and the potential for confusion about the extent of the slacks “*affected*” (to use a neutral word) became apparent with reference to Dr. Dargie’s approach on the basis of polygons (rebuttal, page 2) and the identification by Mr Angus of planned holes (precognition, para. 51). This led to new production T70. SNH accepts this as a reasonably accurate representation of the dune slack area affected by **direct** impacts but several observations are pertinent:

- On that production the use of the word “*destroy*” is very restrictive, being confined to total removal. A casual glance at, say, hole 15 would suggest the destruction of large areas.
- Table 3 of T4 shows that 2.91 ha of dune slack is lost from a total of 11.4 ha. Of that 1.68 ha of young dune slack from a total of 3.78 ha is lost, ie 44.3%.
- No account is taken of indirect effects which it will be argued in paragraph 5.3.5 are of particular significance in respect of dune slacks.

5.3.4 Indirect Effects

Dr. Dargie deals with these in a few lines at paras. 7.45 to 7.49 of his precognition and by reference to an equally brief passage in ES at page 109. Given the acknowledgement by Dr. Dargie as to the absence of research (precognition, para. 7.46) one understands his difficulty in being more specific but

that comes back to the limitations in information described in Section 2. The following points are worth mentioning:

- The information on ground conditions and the groundwater resource is limited to a very preliminary report (T64) about which Dr. Dargie was cross examined. This production discloses the need for artificial drainage (6.3.1.2). On the debate about the presence of peat (and acknowledging Dr. Dargie's criticisms of figure 71236/00411 in cross examination) a link between peat and dune slacks is entirely possible and no investigations on the presence of peat in the planned receptor areas has been conducted. The possibility of the use of the groundwater resource for irrigation is advanced (7.7). On these matters generally in our submission the absence of information renders any conclusions about the future of the dune slacks that remain after development, let alone translocation of dune slacks, highly speculative.
- No information is available on construction activities but the huge scale of this development and potential cut and fill operations cannot be denied nor can the prospect of substantial damage being done. For example, returning to T70, the removal by machinery and vehicles of dune slacks for translocation must make adjacent areas of dune slack susceptible to damage.
- The absence, not just of detail, but of any mention whatever in the context of Mr Trump's ambitions for a course capable of hosting a major event, (one of the six criteria for site selection) of spectator areas, grandstands,

hospitality tents, tented villages and all the other paraphernalia of a major golf event is illuminating. Such items of “*infrastructure*” must be placed somewhere and some form of damage, including from general spectator movement, must occur no matter how careful the planning when so much of the ground is sensitive to impacts that would arise.

- Parts of the dune slack areas not “*affected*” on T70 are still part of the golf course and will suffer a degree of play. It should be recorded that there was some new, but general, evidence during examination of the economic evidence of the likely number of rounds in the future on the championship golf course being of the order of 40,000 on an annual basis.

5.3.5 The indirect effects extend far beyond those identified of increased nutrient levels and the disappearance of rabbits. They have been under-assessed to the point in some cases of being ignored, in substantial part caused by the absence of an understanding of the groundwater regime. But in any event in conclusion on the matter of indirect effects I draw attention to paragraph 9.2 in Dr. Dargie’s precognition where as part of his final conclusion he states continued reservations about the scale of possible long-term indirect effects which could be severe to moderate although this conclusion seems limited to effects from golf course management. In that event his conclusion does not include anything about long-term indirect effects from any other cause.

6. Interests outwith the SSSI

- 6.1 For understandable reasons the focus at this inquiry has been on the SSSI upon which the back nine holes of the golf course are to be constructed. The front nine holes lie to the south outwith the SSSI which is more stable and arguably of less interest for geomorphology (Hansom – precognition, para. 22). But South Menie contains Annex 1 priority habitats of high quality. Mr Angus asserts that the SSSI plus South Menie have a combined value greater than the sum of the parts (precognition, para. 13). Indeed there is broad agreement on the value of these habitats with Dr. Dargie stating (rebuttal, page 1) that “... *there is general agreement on the importance of Foveran Links SSSI and dune habitat south of the SSSI boundary which are regarded as SSSI quality.*” The focus on the SSSI should not be allowed to obscure the impacts on South Menie. These include concerns about hole 3 which reflect the generality of arguments similar to those described with reference to hole 14, on instability issues and difficulties for avoidance of intervention works to the coastal edge. Hole 4 overlaps on to the northward migrating flank of the Balmedie sand sheet and issues of stabilisation on this southern sand sheet emerge. On the ecological front the arguments reflect those previously deployed for North Menie including the importance of the dune slacks, the information from T70 and indeed also the generality of evidence on indirect impacts. For bio-diversity impacts, reference should be made to the SNH written submission.
- 6.2 Dr. Dargie freely accepted that he had no information about the second golf course and had not assessed it although he did offer a general comment (precognition, para. 7.3) that it will be a shorter course with impacts smaller in scale and thereby producing smaller overall effects. That may or may not be correct but it is, we would submit, reasonable to presume that there will be highly significant impacts, direct and indirect,

attendant upon the creation of another course on the dunes no matter in what precise location, completely additional to those on which the inquiry focused

- 6.3 The reporters are referred to the written submission from SNH (paragraphs 4.12 – 4.37) for the policy context in assessing these impacts.

7. **Mitigation/Compensation**

- 7.1 Mitigation has been defined as “*measures taken to avoid or reduce negative impacts*” (SNH 45, glossary), this being referred to in Mr Rooney’s precognition at paragraph 29. Compensation is separate from mitigation and is there defined as “*measures taken to make up for the loss of, or permanent damage to, biological resources through the provision of replacement areas. Any replacement area should be similar to or, with appropriate management, have the ability to reproduce the ecological functions and conditions of those biological resources that have been lost or damaged*”. This distinction is not just a matter of semantics. What requires to be assessed against policy (eg NPPG 14) are the adverse effects of the development. The development is contained within the Application and, in this iterative process, any elements of mitigation that have been identified. Only when that procedure is completed can one consider what measures in compensation are possible and may be a material consideration. Against that background, I now consider the various elements that are being offered by the Applicants as “mitigation”.
- 7.2 The only possible mitigation of geomorphological impacts that has been suggested is in essence a restriction to the use of the minimum required area. This has already been dealt with at paragraph 5.2.1.

- 7.3 Dr. Dargie agreed in cross examination (L Cockburn for RSPB/SWT/BSBI) that MEMAG was not per se mitigation despite references to that effect such as in Table 6.5 in the ES. The role of this body, if formed in accordance with the proposals contained in the ES appendix, is limited to monitoring and advice and the extent of its influence cannot be easily judged. Mr Angus (xx Boyd) explained that, given SNH's opposition to the development on the SSSI, the extent to which SNH could offer future advice to or involvement with MEMAG could not be judged until the terms of any such planning permission and the ability of MEMAG to assist in material reductions of environmental damage could be assessed. That was a matter for the future. The portrayal of that approach in the line of questioning pursued by Mr Boyd as a refusal of SNH to co-operate was, with respect, mischievous.
- 7.4 Dr Dargie was cross examined on his portrayal (rebuttal – page 3) of dune stabilisation as mitigation on the basis of creating replacement grey dune and held to his stated opinion. It is clear from all of the evidence, including that of Dr Dargie, that dune stabilisation is a hugely damaging operation. In our submission the grey dune and heath so established as an inherent part of that damaging exercise cannot logically qualify as mitigation.
- 7.5 In his precognition Dr. Dargie (para. 8.2) under the heading of "Mitigation of Effects" states that *"My case, in outline, is that sufficient suitable ground is available within and outwith Foveran Links SSSI to re-establish all habitats likely to be lost to development. I propose habitat translocation... as the main technique"*. In my submission this is compensation by translocation and it is on that basis that the rest of this submission proceeds.
- 7.6 Any consideration of translocation proposals must start with Dr. Dargie's stated reason for advancing them in the face of his earlier and unchanged

advice to the Applicants to avoid the SSSI and land to the south. He states (rebuttal, page 12) *“This witness is not prepared, if permission is granted, to see large areas of key dune habitat buried beneath the development footprint simply because a near-natural system is not allowed to be changed into a mix of natural, high-quality translocated zones and golf development due to nature conservation purism.”* In cross examination (D Cockburn) it became clear that his continued involvement with the project owed nothing to any degree of enthusiasm to see a golf course on the SSSI but to the very reverse. So concerned was he for the grant of a consent without any translocation requirements that he continued to work for the Applicants to argue that *“habitat translocation could be used with a high measure of success”* – (rebuttal, page 11). The implied criticism of SNH for displaying *“nature conservation purism”* is utterly illogical in the face of Dr. Dargie’s own advice. With that overview I now consider some detailed evidence on translocation.

7.6.1 As was clear from cross examination, the conclusion reached by Dr. Dargie on the extent to which severe direct effects on habitats would be reduced was inconsistently stated in T50 (page 26), summary precognition (para. 4.5) and precognition (para. 9.1). We understood him to settle on a reduction (following *“mitigation”*) to moderate in the short term and to slight to moderate in the medium to long term. Whatever that final position we submit that the approach is itself flawed on the basis of the arguments advanced in paragraph 7.1. Support is apparent from T53. This was a late production being a best practice guide (Anderson) to habitat translocation to which Dr. Dargie in his rebuttal (which introduced the prospect of a production) referred on page 5 (twice), page 8 (where the word *“authoritative”* appears) and page 10. Production T53 states (3.2.2) that *“In assessing the impact of habitat loss in an EIA,*

“translocation should not be considered as reducing the damage to a site sufficiently for the category of impact” (major to intermediate for example) “to be reduced”.

7.6.2 Before discussing Dr. Dargie’s expectations of success it is important to ascertain the criteria for gauging success. We understood this to be the continued survival and succession of the NVC plant species concerned. It is submitted that this measure of success is a poor substitute for the continuation (as opposed to the deliberate cessation) of the delicate subtle and natural processes which Dr. Dargie agreed (xx D Cockburn) were involved. He referred (precognition paras. 5.39 and 5.40) to three sets of differing trends resulting from the contrasting processes of surface instability and surface stabilisation.

7.6.3 We now turn to the question of the likelihood of the translocation achieving that limited success. From the cross examination of Messrs Angus and Rooney the Applicants seem to lay great store by the experience of Dr. Dargie. It is no part of the approach of SNH to question this witness’s considerable experience. However we submit that one will search in vain for any external support before this inquiry for the optimism expressed by Dr. Dargie in claiming 66% success in the short term and near 100% success in the medium to long term for *“habitats established in receptor areas”*, a phrase to which we return when dealing with these estimates. All that follows supports the much more cautious and pessimistic approach of Mr Rooney:

- In oral examination in chief Mr Rooney pointed to a series of passages in T53, from the *“health warning”* as

early as the introduction and also in Section 2 that translocation could go wrong, to the high risk of failure, formidable difficulties such as “*matching*”, not “*near matching*” (Dargie rebuttal page 4) donor and receptor sites, to the need for proper site investigations, to the reduction in nature conservation value where (as here) the habitat represents critical natural capital, to the high failure rate due to hydrological issues and such like. Rehearsal of the detail is unnecessary because in reading this production the message is crystal clear. Dr. Dargie accepts that translocation is a last resort. Paragraph 2.5.5 of T53 encapsulates much of Mr Rooney’s argument. It is a last ditch effort to salvage something.

- There are two separate passages in Dr. Dargie’s rebuttal about literature in support of his thesis (pages 3 and 4). In respect of the former which relates to dune slack habitats, Dr. Dargie was invited in cross examination (D Cockburn) to list the relevant material for checking by Mr Rooney. None was forthcoming but Dr. Dargie did acknowledge the absence of such literature relative to dune slacks in contrast to habitat translocation generally. But this is very different from claiming (as he does in his rebuttal) that “*there is a good literature field available to assist on both habitat translocation and soil-vegetation relationships in dune slacks.*” Mr Boyd returned to the subject of helpful literature in cross examination of Mr Rooney about his assertion (Rooney – precognition, para. 45) that dune soils as a whole are notoriously understudied and poorly understood. Mr Rooney’s

detailed reply with reference to each known publication both to the number of pages devoted to the subject and the quality of its consideration was quite memorable and in our submission that matter was laid to rest.

- One can easily conclude therefore that there is no external evidence to support Dr. Dargie's contentions. On the contrary the whole thrust of T53 supports the much more cautious and pessimistic view of translocation offered by Mr Rooney.

7.6.4 Nor are the particular circumstances of the translocation envisaged at Menie remotely routine. The following is a snapshot:

- 19.4 ha of key dune habitats will be lost within the SSSI alone. Even if one accepts the figures in Dr. Dargie's precognition (paras. 8.7 to 8.9) 8.6 ha will be translocated (with a margin of safety in respect of available but uninvestigated receptor sites of only 0.7 ha). This is a massive project on an unprecedented scale.
- Development of specialist equipment is needed (T50, page 26). However Dr. Dargie seemed to suggest in cross examination that this requirement (no doubt raising questions about uncertainty of outcome, trialling and timescales) may no longer be necessary having regard to the "*shovel*" illustrated at plate 612 on page 54 of T53. This is a remarkably late change of position given that his rebuttal of June 2008 repeats the same

requirement at page 5. Nor is it accompanied by any precise consideration by Dr. Dargie of the logistics. This was clear (xx L Cockburn for RSPB/SWT/BSBI) in the context of approximately 35 ha when a huge number of "shovelfuls" was seen to be necessary, let alone the vehicle trips required to avoid double handling (see the panel at 6.1 on page 50 of T53).

- There is a complete lack of information, particularly on the matter of the groundwater regime. There is little information on either the donor or the receptor sites to determine suitability and even if some receptor sites were found to be suitable there appears to be a very small margin for safety in site availability.

- The highly important wet dune slacks, particularly young dune slacks, pose acknowledged problems due in part to their composition (Angus – precognition, para. 51). Indeed more generally in respect of translocation in the tiny trials conducted to date (not involving young dune slacks) success has been mixed. These trial sites were viewed on the site visit. They are not “*translocation trials*” because the turves were replaced in the sites from which each was taken. Any questions about matching of donor and receptor sites have not therefore been addressed by these trials.

7.7 Despite the inherent difficulties (T53) and the specific problems (paragraph 7.4 hereof) and in the absence of any material to support his figures, Dr. Dargie reaches a remarkable conclusion of a “*success*” rate of 66% in the short term converted, following remediation, to nearly 100% as

being “*possible in the medium to long term*”, (the latter figure has emerged since T50 which is silent on that subject). These are quite remarkable expressions of confidence, entirely different from Mr Rooney who refuses to be drawn into precise figures but expresses himself not confident in relation to grey dune and crowberry and highly pessimistic in relation to dune slacks. Dr. Dargie’s evidence (xx D Cockburn) also demonstrates in our submission that his precognition on these statistics is misleadingly expressed. In paragraph 8.31 the figures relate clearly to “*success for habitats established in receptor areas*”, i.e. all three habitats taken together. In cross examination it became clear that he required to exclude from such figures the dune slacks requiring translocation because he accepted that they could prove more difficult. Indeed he said that he was not at all sure about dune slacks and had no “*confidence limit*” for young dune slack without going through the testing process relative to the equipment and receptor area. Of course the loss of even a small area of young dune slack (see para. 5.3.2 hereof) is important. However all of these judgments about “*success*” rates proceed on the basis of periods that Dr. Dargie asserts are appropriate. He rejects Mr Rooney’s “*inter-generational*” view of dune development. However shoreline management planning requires the longer view nor can it be denied that this golf course development is a long term investment. Accordingly in our submission Mr Rooney is entirely correct in his approach and that “*the proposal for this golf course fails to take an inter-generational sustainable view, particularly in the mitigation, translocation and compensation measures proposed for the geomorphological and ecological site interests*” (Rooney – precognition, para. 22).

- 7.8 We close this section by referring you to the conclusion in Dr. Dargie’s precognition. He states in the very last paragraph that it will be a much changed dune landscape and that the results of translocation would be a

highly modified dune habitat mosaic within a two course golf landscape. Of that there can be no doubt.

8. Policy

8.1 General

The Applicants acknowledge (Statement of Case, para. 8) that the proposal is a significant departure from the development plan and have contented themselves by agreeing with the statement of the relevant policies prepared by the Council. Their argument (para. 9) is that *“Notwithstanding the acknowledged development plan departure, the applicants’ position is that other material considerations justify approval of the application”* and agreement is expressed with the Council that *“... this is an occasion where the social and economic benefits are of national importance and that these do override the adverse environmental impacts”*. A very similar phrase - *“clearly outweighed by social or economic benefits of national importance”* - appears in national guidance (NPPG 14, para. 25) and we accordingly start this brief policy section at that point and subject to the observation that, unlike the Applicants who have offered neither oral nor written evidence on policy, SNH’s policy evidence is contained in its written submission of 21 May which is referred to for its detail.

8.2 National Policy

National designations such as SSSIs are protected in paragraphs 24 and 25 of NPPG 14. For the record paragraph 25 contains the following (emboldened in the original version):

“Development which would affect a designated area of national importance should only be permitted where:

- *the objectives of designation and the overall integrity of the area will not be compromised; or*

- *any significant adverse effects on the qualities for which the area has been designated are clearly outweighed by social or economic benefits of national importance”*

The proposed development fails the first test (see para. 5.15 hereof). This failure was acknowledged by Dr. Gore for the Council (xx L Cockburn) who said that she took at face value the last paragraph of Section 6.0 on page 43 of the ES to the effect that stabilisation of the sand dome would concern SNH and others and that this might require a review of the southern boundary of the SSSI. The second test contains an inherent balance between (i) the impacts and (ii) the social or economic benefits, each of national importance. SNH presents no detailed economic arguments and recognises that the second test is a matter of judgment on *“national importance”* for Scottish Ministers following recommendations of the Reporters. However we submit that in considering this test the following matters need to be addressed:-

- the extent of the *“significant adverse effects”*. The impacts on the SSSI go far beyond being *“compromised”*. Such impacts are so severe that it has led several witnesses (including those for the Applicants) to question the possible denotification of the Menie part of the SSSI (which Dr. Hansom referred to as the "jewel in the crown") and indeed reference has just been made to Section 6.0 of ES on that matter. It is difficult to make comparisons among SSSIs because of their different qualifying interests but it should be recorded that the

SSSI can be considered as “*critical natural capital*” (see para. 7.5.3 hereof) which cannot be replaced or recreated elsewhere. This was a matter raised by Dr. Martin Auld for the RSPB in cross examination by Mr Boyd. This is the measure of the adverse effects.

- These adverse effects need to be “***clearly outweighed***” by benefits of national importance and the burden of proof lies with the Applicants.

- Others will debate the scale and spatial spread of the economic benefits. In our submission the test of national importance is very demanding. No definition of such appears before the inquiry but it is hard to resist the conclusion, on the basis of the cursory treatment, particularly the absence of any reference to the second test, by Dr. Gore of NPPG 14 in her precognition, that the Council has not applied its mind to what constitutes a benefit of national importance. But neither have any of the witnesses for the Applicants. Indeed nowhere in the Applicants case presented to the Inquiry do any of the witnesses refer to NPPG 14.

- In our submission regard needs to be paid not only to the current economic wellbeing of the local area but also to the nature of the development. Irrespective of the economic benefits and the understandable local support including from the business community, the development remains a commercial leisure development being cross-funded in part by a proposed residential development which does not need to be located on the SSSI to be of world-class standard (para. 3.2 hereof).

- Lastly on the subject of national guidance, we refer the Reporters to the SNH written submission, particularly the evidence on NPPG 13 – Coastal Planning.

8.3 Development Plan

Given that the Applicants rely on material considerations, we can confine this closing submission to one point. Policy ENV/2 of the local plan reflects NPPG 14. However it goes further by requiring proof that both of the tests similar to those in NPPG 14 are met and further that there is no alternative site for the development. In our submission the application fails all three tests.

8.4 Policy Conclusion

In conclusion on the matter of policy the balancing exercise contained in NPPG 14 and in relation to policy ENV/2 is between two elements of “*national importance*” but in respect of the SSSI, there is no doubting that its qualification, let alone the possibility of its future qualification as a GCR site, are dependent on strict designation criteria (see paragraphs 4.4 and 4.5 of the SNH written submission). By contrast there is no clear test, and certainly no evidence of such before this Inquiry for ascertaining whether economic benefits are of national importance, let alone any evidence to prove that such benefits will “clearly outweigh” the adverse effects.

8.5 In terms of the application by the decision makers of Section 25 of the 1997 Act, the position of the Applicants is simply that the material consideration of the economic benefits claimed for this development should override policy. SNH does not agree.

9. Miscellaneous

In this section we deal with a number of matters that can conveniently be grouped together as follows:-

9.1 In the evidence of Mr Angus he provided his ranking in terms of law and policy in relation to natural heritage designations relevant to the development site. It will be appreciated that SNH has at the inquiry focused on habitats, not individual species for which there are other applicable consent regimes. The ranking for habitats is:

- (i) The SSSI;
- (ii) Annex 1 priority habitats within SINS;
- (iii) Annex 1 non-priority habitats within SINS;
- (iv) Annex 1 priority habitats outwith SINS;
- (v) Annex 1 habitats outwith SINS;

9.2 On the matter of consents relevant in the event of a grant of planning permission, we refer you to SNH's written submission but the following occur:

9.2.1 The granting of consent in terms of Regulation 48(5) of the Habitats Regulations of 1994 in respect of the SPA. SNH's advice is contained in Section 5 of its written submission to the effect that any adverse effect on the integrity of the SPA can be avoided through the use of identified conditions.

9.2.2 SNH's advice on the matter of bats is contained in paras. 6.9 to 6.14 of the written submission with the latter paragraph identifying the relevant conditions.

9.2.3 Similarly SNH's advice on the protection of badgers is contained in paras. 7.5 to 7.8 of the written submission.

9.2.4 There will of course be other consent regimes including those relevant to SEPA, Scottish Water and Transport Scotland.

9.3 There have been a number of references throughout the inquiry, particularly by Mr Trump, Dr. Dargie and Mr Bell to there being some form of net environmental benefit should consent be granted for this proposal. Given the acknowledged impacts on the SSSI and the Annex 1 Habitats this is a generalised judgment which owes nothing to any careful evaluation that is before the inquiry and SNH is wholly content to rely on the detailed evidence that has been presented.

10. Conditions

Our comments relate to a set of proposed conditions dated 25 June and can be summarised in this manner:

10.1 General

Although accepting that any conditions imposed by Scottish Ministers will be designed to meet the tests of Circular 4/1998, we are bound to repeat our concerns expressed to the Council that greater clarity would follow from the avoidance of a degree of duplication among certain conditions, the use of a definitions clause and an identification of the conditions not yet agreed (and by whom), although the situation will be become clearer following all of the closing submissions.

10.2 Specific Conditions

The only specific conditions upon which we have comments are 3, 24 and 28. The issue surrounding 3 and 24 is connected. SNH is concerned, having regard to the terms of paragraph 1.2 of this closing submission, to

ensure that the development of the championship golf course (however defined) is constrained by a condition imposed by Scottish Ministers and not left entirely to the application for reserved matters controlled by the Council. Much time at this inquiry has been devoted to the “*mitigation*” proposed by the Applicants and which is largely the result of a golf course layout in T2 and a subsequent hole-by-hole analysis in T4 of which the layout plan is part. Accordingly we welcome new condition 24 as a matter of principle but it lacks force and clarity as presently drafted and its relationship to condition 3 also requires clarification. T2 is no more than a layout plan. The claimed consequences of that plan are evident only from T4, although there remains an absence of proper information. At the very least clause 24 requires drafting that secures compliance with T4 save for minor variations approved by the Council and following consultation with SNH. But, as mentioned, condition 24 needs to be related to condition 3 and SNH has no strong views about the best method of achieving that. It would however be possible to eliminate condition 24 in its entirety and deal with it in condition 3 by requiring that the reserved matters incorporate the championship golf course layout and details available from T4. Finally on these two conditions, it was agreed by Dr. Hawtree that this golf course will not include any American-style “*cart tracks*” although there will require to be tracks for maintenance vehicles. It might be sensible within what is currently (g) of the reserved matters to include internal access ways and which for the avoidance of doubt will not include any cart tracks (or similar definition).

On Condition 28, it is necessary in the view of SNH to have the coastal dune ridge defined on a plan which itself forms part of the consent rather than rely on a subsequent plan agreed by the planning authority, even in consultation with SNH.

11. Overall Conclusion

The advice of SNH to Scottish Ministers on the level of adverse environmental impacts caused by this development, particularly to the SSSI and land immediately to the south containing Annex 1 habitats, has been clearly and unequivocally expressed. In our submission the Reporters should be very slow to recommend to Scottish Ministers that consent be granted for this commercial development based solely on an argument that the claimed economic benefits should override a decision that accords with the development plan, not only in the specific circumstances of this case, but having regard to the resultant vulnerability visited on other nationally designated sites from large scale commercial development.

David Cockburn
Louise Cockburn
July 2008