



RSB WS/3 Application of the Habitats Regulations

Town and Country Planning (Scotland) Act 1997
The Town and Country Planning (Notification of Applications) (Scotland) Direction 2007

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

PUBLIC LOCAL INQUIRY: Ref CIN/ABS/001

WRITTEN SUBMISSION

of the

RSPB Scotland

Scottish Wildlife Trust

Botanical Society of the British Isles

APPLICATION OF THE HABITATS REGULATIONS

**YTHAN ESTUARY, SANDS OF FORVIE AND MEIKLE LOCH SPECIAL
PROTECTION AREA AND**

THE YTHAN ESTUARY AND MEIKLE LOCH RAMSAR SITE

Introduction

1. The purpose of this submission is to inform the Inquiry of the current position of the RSPB / SWT / BSBI in respect of the application of the Conservation (Natural Habitats &c) Regulations 1994 (the Habitats Regulations) in relation to the application. It should be read as additional to, and in conjunction with, our other written submissions, particularly in respect of conditions and effects on birds other than the SPA. It is also supplementary to and does not replace our representations on the 'Appropriate Assessment Report' of October 2007. The response of SNH (dated 12th November 2007) to that report is also relevant and supported by the RSPB / SWT / BSBI.
2. The RSPB / SWT / BSBI have considered the document submitted by the applicants entitled "Information to Inform an Appropriate Assessment" May 2008 ('the May 2008 document' (**T16**)). The process of considering the effects of a plan or project on a European site or, as a matter of policy, a listed Ramsar site is set out in the Scottish Executive Circular *Habitats and Bird Directives: June 2000* (**RSB 57**)
3. In light of the content of the May 2008 document, we would draw the Inquiry's attention to the following matters. In referring to the SPA we include equivalent reference to the same interest features of the Ramsar site.
4. It is for the Scottish Ministers to assess the proposal under the Regulations, as the Competent Authority, informed and advised by the Reporters and SNH. It is our view that the requirements for consultation with SNH and, if considered appropriate, the public, in regulation 48(3&4) will be met by the Inquiry process. Whilst it is for the applicants to provide the necessary information to enable the Ministers to undertake the assessment of the project under the Regulations, it is for the Ministers to reach a conclusion at each step in the process. Because it is not possible to anticipate the Ministers' conclusions at each stage, the Reporters will need to address each step in regulation 48. It is, however, obvious that the development is not directly connected with or necessary to the management of the SPA (regulation 48(1)(b)).
5. In applying the steps or 'tests' in the Regulations, the Scottish Ministers will have regard to relevant guidance from the EC, referred to in the May 2008 document, especially *Managing Natura 2000 Sites* published in April 2000 (the subsequent

amendment of January 2007 is not relevant here)¹. They will also have regard to the judgments of the courts as to how the Habitats and Birds Directives (which the domestic regulations transpose) should be interpreted and applied. Of greatest relevance to this case is the judgment of the European Court of Justice in Case C-127/02 (7th September 2004), commonly referred to as the Waddenzee case, which is not referred to in the May 2008 document². In light of the applicant's inaccurate approach to 'appropriate assessment', described below, it may be that the authors of the May 2008 document were unaware of that ruling of the court, which is fundamental to the application of the Regulations.

6. The RSPB / SWT / BSBI do not intend to make legal submissions on the application of the Regulations in this case because: firstly, they believe the Scottish Ministers will correctly apply the Regulations, as they have done in other cases; and secondly, the applicant's submission of May 2008 has no legal status in the assessment and is not intended to be a legal document. The purpose of these representations is to draw attention to the flaws in the approach adopted by the applicants, thus ensuring that the Ministers are not misdirected in their approach.
7. The second paragraph in section 2.3 of the May 2008 document inaccurately expresses the basis of the Habitats Regulations assessment. It says "*The AA should be based on sound assessment of the issues and the judgement made should be beyond reasonable scientific doubt*". The basis of the assessment is more accurately expressed by quotations from the Waddenzee judgment as follows:

"any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects."

¹ The document Managing Natura 2000 can be accessed at http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

² The Waddenzee judgment can be accessed at <http://eur-lex.europa.eu/Notice.do?pos=0&hwords=C-127%2F02~&page=1&lang=en&pgs=10&nbl=2&list=388664:cs,388639:cs,&checktexte=checkbox&visu=>

8. The Court ruled that a plan or project may be authorised only if a competent authority has made “certain” that the plan or project will not adversely affect the integrity of the site. *“That is the case where no reasonable scientific doubt remains as to the absence of such effects”*. The effects *“must be identified in light of the best scientific knowledge in the field”*. Competent national authorities must be “convinced” that there will not be an adverse effect and where doubt remains as to the absence of adverse effects, the plan or project must not be authorised, subject to the considerations in regulation 49 regarding the lack of alternative solutions and imperative reasons of overriding public interest.

Effects on Pink-footed Geese

9. The conclusions at the end of section 4.7 of the May 2008 document do not provide an answer to the tests that the Scottish Ministers will need to apply. They do not, in our view, represent an appropriate basis for the Ministers’ judgement. Even fundamental questions are unanswered in the document. In respect of the population of Pink-footed Geese using the SPA, there is no indication as to whether the applicants are suggesting that the Ministers will be able to conclude that there would not be likely to be a significant effect. Terminology such as ‘very low’ significance of impact is unhelpful and unknown to the Regulations and Directives. It implies, but does not explicitly conclude, that there would not be likely to be a significant effect on the geese. If that was the conclusion there would be no need to carry out an appropriate assessment as to the effects on site integrity. The May 2008 document purports to inform an ‘appropriate assessment’ and makes conclusions as to the effect on site integrity, so the authors must surely have concluded that there would be likely to be a significant effect, without actually recording this critical conclusion.
10. In terms of site integrity, the May 2008 document does not accurately address the test in regulation 48(5) when it refers to *“the proposed development will have a negligible impact on the integrity of the SPA.”* The question that the Ministers must answer is whether they can ascertain that there would not be an adverse effect on the integrity of the SPA. This embodies the precautionary principle. It is not a matter of demonstrating that there would be an adverse effect, but ascertaining that there would not be an adverse effect on site integrity. The test applies to the integrity of the site, defined in the second paragraph of Appendix A of Annex E of the 2000 Circular.

11. On the evidence available, it is the opinion of the RSPB / SWT / BSBI, that the proposed development would be likely to have a significant effect on the Pink-footed Geese, because of the reduction in available feeding and roosting areas and increased disturbance of the geese off site. This is consistent with the findings of the applicants' October 2007 'Appropriate Assessment Report' at section 9.0 where it describes the impact on Pink-footed Geese as "*of very major significance*".
12. The Scottish Ministers should therefore undertake an 'appropriate assessment' in consultation with SNH (and the public). They are entitled to consider how the development may be carried out and conditions and restrictions that can be imposed on any outline planning application, before concluding that assessment. The Ministers will need to have regard to the requirements of regulation 54(4) and satisfy themselves as follows. *Outline planning permission shall not be granted unless the competent authority are satisfied (whether by reason of the conditions and limitations to which the outline permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site could be carried out under the permission, whether before or after obtaining approval of reserved matters.*
13. On the evidence available, the RSPB / SWT / BSBI are of the opinion that the Scottish Ministers will not be able to ascertain that the development as proposed would not adversely affect the integrity of the SPA (in respect of the Pink-footed Geese) in the absence of mitigation measures.
14. The applicants offer mitigation measures, even though they say they are not needed. It is our opinion that these measures are needed to ascertain that there would not be an adverse effect on the SPA (Pink-footed Geese). If the Scottish Ministers are minded to grant outline planning permission it is our opinion that the requirements of regulations 48 and 54 can only be met if a condition is imposed, requiring details of a goose management scheme to be submitted to and approved by the planning authority and implemented in accordance with the approved details.

Effects of disturbance to birds

15. The conclusions of the May 2008 document are equally unclear in respect of the disturbance to the SPA birds. The conclusions expressed in section 7 of the

document do not address the tests in the Regulations and are unhelpful to the Scottish Ministers. They do not provide a proper basis for an appropriate assessment.

16. On the evidence available, it is the opinion of the RSPB / SWT / BSBI, that the proposed development would be likely to have a significant effect on the SPA because of the potential for increased disturbance to feeding, resting, roosting and breeding birds on the SPA. The Scottish Ministers should therefore undertake an 'appropriate assessment' in consultation with SNH (and the public). They are entitled to consider how the development may be carried out and conditions and restrictions that can be imposed on any outline planning application. The Ministers will again have to satisfy themselves that they can grant an outline planning permission consistently with the requirements of regulation 54(4) quoted in paragraph 12 above.
17. On the evidence available, the RSPB / SWT / BSBI are of the opinion that the Scottish Ministers will not be able to ascertain that the development as proposed would not adversely affect the integrity of the SPA (in respect of significant disturbance) in the absence of mitigation measures. Contrary to the suggestion in section 5.10.2 of the May 2008 document, existing management practices of SNH on the NNR are in no way mitigation measures for the development, they are part of the baseline of circumstances that prevail and against which the effects of the development must be assessed.
18. The applicants offer various forms of mitigation in section 5.10.1. It is our opinion that these measures are needed to ascertain that there would not be an adverse effect on the SPA (significant disturbance). If the Scottish Ministers are minded to grant outline planning permission it is our opinion that the requirements of regulations 48 and 54 can only be met if conditions are imposed, requiring details of the provision of appropriate forms of open space, the improvement of access on the Menie Estate and enhancing the recreational attraction and capacity of existing semi-natural open space (along the lines suggested in section 5.10.1) to be submitted to and approved by the planning authority and implemented in accordance with the approved details.
19. The conditions that would be required, in our opinion, to enable the Scottish Ministers to ascertain that there would not be an adverse effect on the integrity of the SPA, as a result of the proposed development alone, or in combination with other plans and

projects, are set out more fully in the RSPB / SWT / BSBI written submissions on Conditions.

20. Whilst we submit that the Scottish Ministers may ascertain that there would not be an adverse effect on the integrity of the SPA, there would, nevertheless be a significant effect on the birds of the SPA (or an appropriate assessment would not have been required). This effect should be seen in context, as described in the letter from RSPB to Aberdeenshire Council dated 9th November 2007 (**RSB 32a**). We reiterate some of the points made in that letter. *“The assessment of the significance of the loss of a regular feeding area and roosting pond for thousands of Pink-footed Geese can be debated. It has to be seen in the context of wider land use change, including the planned numbers of wind turbines, tree planting, urban expansion and other developments that are incrementally removing suitable farmland from the winter range of the geese that use the Ythan Estuary/Meikle Loch area. The reference made in the report to the numbers of geese shot is misleading – this argument is used by every developer. Habitat loss, disturbance and displacement effects are additional to the impacts of shooting, so habitat loss is not justified by the fact that more birds might be shot in total in the area.*”
21. *“..... the loss of an area that is a significant functional part of the wintering area of the geese adds to the overall negative environmental impacts on the Menie area already identified by the EIA. The development proposals therefore not only damage or destroy part of a nationally important SSSI, but also bring about negative impacts on the overall bird interest of the wider estate and may have negative impacts on qualifying species relevant to the nearby SPA. This additional negative impact should be taken into account in determining the application.”*
22. The effects on European protected species, in this case bats and otters, are considered in the Written Submission on Ecology, Habitats and Species (**RSB WS/2**). It will be a matter for SNH to advise as to whether a licence under the Habitats Regulations may be required and the likelihood of such a licence being granted.