

TOWN AND COUNTRY PLANNING SCOTLAND ACT 1997

TOWN AND COUNTRY PLANNING (INQUIRIES PROCEDURES) (SCOTLAND)
RULES 1997 AS AMENDED



**OUTLINE PLANNING PERMISSION FOR GOLF COURSE AND RESORT
DEVELOPMENT ON LAND AT MENIE HOUSE, BALMEDIE, ABERDEEN**

WRITTEN SUBMISSION OF
SCOTTISH NATURAL HERITAGE

(DPEA REFERENCE CIN/ABS/001)

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1. Introduction

1.1 This written submission has been prepared by Scottish Natural Heritage (SNH). It specifically relates to our objection and advice regarding the proposed outline planning permission for a golf course and resort development on land at Menie Estate, Balmedie, Aberdeenshire. In accordance with the Pre Inquiry Meeting notes and the request of the Reporters to limit oral evidence, this submission deals with issues as identified by SNH in our Statement of Case, submitted 6th May 2008.

2. Role And Responsibilities Of Scottish Natural Heritage

2.1 SNH is a non-departmental public body, established in April 1992 by the Natural Heritage (Scotland) Act 1991, (“the 1991 Act”). The general aims and purposes of SNH are to:

- secure the conservation and enhancement of the natural heritage including its flora and fauna, geological and physiographical features, and its natural beauty and amenity;
- foster the understanding, appreciation and enjoyment of the natural heritage in Scotland.

2.2 The 1991 Act also stipulates that SNH shall “*have regard to the desirability of securing that anything done.....in relation to the natural heritage of Scotland, is undertaken in a manner which is sustainable*” (section1 (1)) and shall, in exercising its functions, take into account as appropriate *inter alia* the need for social and economic development and actual or possible ecological and other environmental changes to the natural heritage.

3. The Scope of this Written Statement

3.1 In our Statement of Case, details are provided of our grounds of objection and in relation to four further points of concern. This written statement, following the numbering of paragraph 4.1 of our Statement of Case, will provide:

- (i) A planning and policy context for our objection based on adverse impacts on the Foveran Links SSSI (“the SSSI”) and on coastal habitats south of the SSSI, Annex 1 Habitats and Biodiversity interests.
- (ii) Updated advice on:
 - The Ythan Estuary, Sands of Forvie and Meikle Loch Special Protection Area (SPA).
 - European Protected Species (Bats and Otters).
 - Badgers
 - Landscape and visual impacts, impacts in respect of recreation and access, and sustainability issues.

3.2 A further written statement will be submitted in respect of SNH’s consideration of conditions.

4. POLICY AND GUIDANCE CONTEXT FOR THE CONSIDERATION OF THE DEVELOPMENT

4.1 In its consultation response of 30 May 2007, SNH stated:

This development, specifically the championship golf course and associated infrastructure will have significant adverse impacts both to the coastal landform interest and the coastal vegetation within the Foveran Links SSSI and also to the sand dune habitats south of the SSSI. The Environmental Statement clearly states this. The vegetation types include habitats listed within Annex 1 of European Habitats and Species Directive. The construction of a golf course on this dune system will be contrary to the UK Coastal Sand Dunes Habitat Action Plan. SNH does not consider it possible to mitigate or compensate for the loss of this important habitat. SNH therefore objects to the proposal to construct a championship golf course in its current location. SNH can, however, see the potential to construct a single championship golf course on other adjacent land within the development site without causing significant impacts to this SSSI or sand dune habitats.

4.2 This written submission sets out a range of legislative and Government policy/guidance that is material to the determination of this case in the light of the impacts that would occur if the application was approved as proposed with the current allocation of land to the development of golf courses.

4.3 The planning application impinges on a significant area of sand dune habitat of high geomorphological and ecological interest, some of which is included within the Foveran Links Site of Special Scientific Interest. SNH will present oral evidence to the Inquiry that describes the interests of the SSSI and of the undesignated land to the south which are required for the development and in particular the golf course and will assess the impacts on such interests. This evidence will agree with the ES that there would be severe adverse effects on the geomorphology and ecological interests of the dunes.

The Protection of Sites of Special Scientific Interest (SSSI)

4.4 The highest level of nature conservation designation within the application site is the Site of Special Scientific Interest known as Foveran Links SSSI. This was notified under the provisions of the Wildlife and Countryside Act 1981 (as amended), and now falls under the provisions of the Nature Conservation (Scotland) Act 2004. Section 3(1) states that an SSSI must be of special interest by reason of any its natural features, which, in accordance with section 3(2), relate to any of its flora or fauna or geological or geomorphological features.

4.5 In determining whether or not a site is of special interest, section 3(3) states, *SNH must have regard to:*

(a) the extent to which giving notification under that subsection in relation to the land would contribute towards the development of a series of sites of

special scientific interest in Scotland representative of the diversity and geographic range of –

- i) Scotland's natural features*
- ii) The natural features of Great Britain*
- iii) The natural features of the member States*

4.6 In oral evidence to be presented to the Inquiry the witnesses for SNH will set out the reasons for the notification of the SSSI in respect of geomorphology and ecology (flora).

4.7 National Planning Policy Guideline (NPPG) 14 sets out guidance on how the Government's policies for the conservation and enhancement of Scotland's natural heritage should be reflected in land use planning. As a national designation, the guidance given in paragraph 25 is relevant to this application and the impact that it would have upon the SSSI. This states:

*25. The presence of a national natural heritage designation is an important material planning consideration. This does not mean that development is precluded by the presence of the designation. Proposals require to be assessed for their effects on the interests which the designation is designed to protect. **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.***

4.8 The evidence that SNH will, through its witnesses present to the Inquiry is that the adverse impacts on the SSSI are such, as to both compromise the objectives of designation and its overall integrity. On the basis of the range of information available to SNH in assessing this application and noting that SNH is not qualified to comment in detail on the economic arguments put forward by the applicants, the SNH assessment was based on the opinion that the first of these tests could not be met and were not persuaded that the second of these tests in NPPG 14 could be met. Ultimately it will be for the Scottish Ministers to judge this second test - our concerns in relation to the threat to the objectives of the designation and its overall integrity led SNH to object to this proposal.

4.9 The adopted Aberdeenshire Local Plan policy with respect to SSSIs reflects the guidance given in NPPG 14. This states the following:

Policy ENV/2 National Nature Conservation Sites

Development that would have an adverse effect on a Site of Special Scientific Interest or a National Nature Reserve will be refused unless the developer proves:

- a) any significant adverse effects on the quality for which the area has been designated are clearly outweighed by social and economic*

- benefits of national importance;*
- b) the objectives of the designation and overall integrity of the area will not be compromised; AND*
- c) there is no alternative site for the development.*

Where development is allowed which could affect any of these designated sites, including beyond their boundaries, the developer must demonstrate that adequate measures will be taken to conserve and enhance the site's ecological, geological and geomorphological interest

- 4.10 This is a tighter requirement than set by NPPG14 which places an 'or' between the first two of these conditions; the Aberdeenshire policy appears to require that both (a) and (b) hold true. The evidence SNH will present orally at the Inquiry makes clear that the second condition is not met. With respect to the latter part of the policy, our oral evidence demonstrates that the measures proposed by the applicants with respect to mitigation and compensation are not adequate to conserve and enhance the site's ecological and geomorphological interest. It is the opinion of SNH that the application as currently submitted does not conform to the requirements of NPPG14 or the Aberdeenshire Local Plan policy with respect to the protection of the SSSI, its objectives and its integrity.

Policy And Guidance With Respect To Natural Heritage Interests Outwith Statutory Designations

- 4.11 The conservation of the natural heritage is not confined to sites/interests which are notified formally in accordance with legislation. There is much guidance on Government expectations with respect to this. Some of these expectations are derived in response to the obligations upon member States included within Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive)

- 4.12 The aim of the Habitats Directive is outlined in Article 2.1 which states:

“The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.”

- 4.13 Article 2.2 then goes on to state:

“Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.”

- 4.14 The habitats of community interest are defined in Article 1(c) and are listed in Annex I and the species of community interest are defined in 1(g) and listed on Annexes II, IV or V. Habitats and species listed on Annexes I and II form the basis of SAC selection. Species on Annex IV are referred to as European Protected Species in domestic Regulations and those on Annex V are those species whose taking in the wild may be subject to management measures.

4.15 There are four habitats listed on Annex I that are present within the development as follows:

2120 Shifting dunes along the shoreline with *Ammophila arenaria* (white dunes);

2130 Fixed dunes with herbaceous vegetation (“grey dunes”)*;

2140 Decalcified fixed dunes with *Empetrum nigrum**; and

2190 Humid dune slacks.

4.16 The middle two, indicated with an asterisk, are listed as priority species in the Habitats Directive which is of particular relevance when considering developments under Article 6(4) of the Habitats Directive. The priority status reflects their importance as outlined in Article 1(d) of the Directive which states:

“priority natural habitat types means natural habitat types in danger of disappearance, which are present in the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2;”

4.17 The “favourable conservation status of habitats” referred to in Article 2.2 is defined in Article 1(e)

“The conservative status of a natural habitat will be taken as ‘favourable’ when:

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

4.18 The principal approach towards achieving favourable conservation status for the habitats and species is set out in Article 3 of the Directive. This states:

“A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex 1 and habitats of species listed in Annex 2, shall enable the natural habitat types and the species’ habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range”.

4.19 This Natura 2000 network includes both Special Areas of Conservation, designated for habitats and species other than birds, and Special Protection Areas designated for their bird interests.

4.20 The requirement to establish a network of sites is transposed into UK legislation by Part II of the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended), referred to as the Habitats Regulations. For avoidance of doubt, SNH's view is that the Development does not include or directly affect a site designated under these Regulations. The potential indirect effects upon the nearby Ythan Estuary, Sands of Forvie & Meikle Loch SPA have been considered, and a report has been presented by the applicants as production T16. Our advice to Scottish Ministers is presented in Section 5 of this written submission.

4.21 While the Development does not directly include or affect an SPA or SAC, our evidence to the Inquiry has demonstrated that the Development area, does include habitats that are of high nature conservation value, and indeed are listed within Annex 1 of the Directive. The significance of this can be seen in the light of general aims within the Habitats Directive beyond those applying specifically to protected sites i.e. Special Areas of Conservation (SACs) and Special Protection Areas (SPAs).

4.22 Article 3(3) of the Habitats Directive states:

“Where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of landscape which are of major importance for wild fauna and flora as referred to in Article 10.”

4.23 Article 10 states:

“Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora.

Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or the traditional systems for marking field boundaries) or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species.”

4.24 The requirements of Article 10 are transposed into domestic legislation by regulation 37 of the Habitats Regulations (as amended). This states:

(1) For the purposes of the planning enactments mentioned below, policies in respect of the conservation of the natural beauty and amenity of the land shall be taken to include policies encouraging the management of features of the landscape which are of major importance for wild flora and fauna.

Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or the traditional systems of

marking field boundaries) or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species.

(2) The enactments referred to in paragraph (1) are—

(a) in the Town and Country Planning Act 1990, section 12(3A) (unitary development plans), section 31(3) (structure plans) and section 36(3) (local plans);

(b) in the Town and Country Planning (Scotland) Act 1972), section 5(3)(a) (structure plans) and section 9(3)(a) (local plans).

- 4.25 While Regulation 37 reflects the phrasing of Article 10, it is not comprehensive or exclusive in the guidance it gives on the identification of “features of the landscape which are of major importance for wild flora and fauna.” Linear and continuous structure is stated explicitly to apply to the types of features listed as examples. Examples of “stepping stones” include ponds or small woodlands and the references to these, together with the linear features, highlights the importance of small areas of natural habitats. It is therefore self-evident that larger areas of natural habitat are probably even more important and that their retention is in line with the broader purposes of the Directive set out in Article 2(1). It is also reasonable to conclude that areas of habitat listed within Annex 1 as of community interest, and that among those, those which are deemed to be priority habitats because they are in danger of disappearance, are of special importance for conservation and hence that significant areas of these should be considered “features of the landscape which are of major importance to wild flora and fauna”.
- 4.26 Further Government guidance on this approach to conservation of the natural heritage outwith designated areas is set out in the Government Circular No 6/1995 as amended 2000. Paragraphs 35 to 38 are of relevance here, and state:

Conservation Outside European Sites

35. Article 10 of the Habitats Directive requires Member States to endeavour, where they consider it necessary, in their land use planning and development policies to encourage the management of features of the landscape which are of major importance for wild flora and fauna. These features are those which, because of their linear and continuous structure or their function as "stepping stones" are essential for migration, dispersal and genetic exchange. Examples given in the Directive are rivers with their banks, traditional field boundary systems, ponds and small woods. The requirements of Article 10 are transposed by Regulation 37 of the Habitats Regulations.

36. Structure plans, local plans and Indicative Forestry Strategies prepared in accordance with the advice contained in SODD Circular 9/1999 should include policies that respect the need to conserve and enhance our natural heritage, in accordance with current national policy and the UK's international obligations. In particular, these policies should seek to improve the ecological coherence of the Natura 2000 network in accordance with the

requirements of Article 10. Regulation 37 requires that such policies shall include policies encouraging the management of features of the landscape which are of major importance for wild flora and fauna. Suitable planning conditions and obligations may serve to promote such management.

37. NPPG 14 sets out for planning authorities overall policy for the protection of the natural heritage in designated areas and the wider countryside.

38. The protection of SSSIs that do not qualify as European sites will also have an important contribution to make in meeting the requirements of Article 10 of the Directive and Regulation 37 of the Habitats Regulations. Scottish Ministers are considering what improvements may be made to the SSSI system.

NB: “improvements to the SSSI system” were made subsequently through the Nature Conservation (Scotland) Act 2004.

4.27 This guidance is relevant with respect to the conservation of habitats within the Foveran Links SSSI, and the Annex 1 habitats of major importance for wild flora and fauna which are found within the dunes outwith the SSSI. The evidence to be presented by SNH orally to the Inquiry will describe significant adverse effects on these habitats in a manner which is not in accordance with this guidance.

4.28 The Government’s policy on the importance of the wider countryside for the conservation of the natural heritage is further emphasised by *National Planning Policy Guidance 14, Natural Heritage*. Paragraph 46 states

“Our natural heritage is not confined to the various designated areas ... but is found throughout the countryside, in coastal areas and in many urban locations.”

4.29 Paragraph 47 specifically encourages the safeguard of the natural heritage beyond the boundaries of designated sites, and makes this a material planning consideration where it is relevant, albeit at a lower level of protection than that afforded to designated sites. It states

“Planning Authorities should seek to safeguard and enhance the wider natural heritage beyond the confines of nationally designated areas. The effect of a development proposal on the natural heritage can be a material consideration whether or not a designated area is likely to be affected. Though the level of protection afforded to natural heritage interests outwith designated areas will not normally be as high as that afforded to sites of national or international importance.

4.30 Paragraph 48 then refers to Article 10 of the Habitats Directive, and the “appropriate management of features of the landscape which are of major importance for wild flora and fauna with a view to **complementing and improving** (*emphasis added*) the ecological coherence of the Natura 2000 network.” Further on this paragraph states:

“Beyond the specific requirements of Article 10, the development of networks of statutory and non statutory sites and the landscape features which provide links from one habitat to another can make an important contribution to the conservation and enhancement of biodiversity and the quality of the local environment.”

- 4.31 Paragraph 49 lists a selection of features that may be of value in the development of habitat networks referred to in paragraph 48. This list specifically includes coastal habitats, which supports the opinion presented earlier in paragraph 4.26 that expanses of natural coastal habitats should be included and considered as “features of the landscape which are of major importance to wild flora and fauna”.
- 4.32 In our evidence to the Inquiry, SNH will set out orally, the value of the coastal sand dune habitats outwith the Foveran Links SSSI and the adverse impacts that would occur to them as a result of the development and their contribution towards complementing the Natura 2000 series and achieving favourable conservation status for the habitats involved.
- 4.33 The above guidance has been incorporated into the adopted Aberdeenshire Local Plan, and in policy Env/4. This states:

Aberdeenshire Local Plan

Biodiversity

Development that would have an adverse effect on habitats or species protected under British or European Law, or identified as a priority in UK or Local Biodiversity Action Plans, or on other valuable habitats and species, will be refused unless the developer demonstrates:

- a) that the public benefits at a local level clearly outweigh the value of the habitat for biodiversity conservation;*
- b) that the development will be sited and designed to minimise adverse impacts on the biodiversity of the site, including its environmental quality, ecological status and viability; AND*
- c) that there will be no fragmentation or isolation of habitats as a result of the development.*

Where there is evidence to suggest that a habitat or species of importance exists on the site, the developer may be required at his own expense to undertake a survey of the site’s natural environment. Where possible, developers should incorporate existing habitats and identify suitable opportunities for creating and restoring habitats, wildlife corridors and enhancement schemes, using best practice.

- 4.34 Evidence presented by SNH demonstrates that the development would have an adverse effect on the types of habitat outwith the SSSI that are covered by this policy, and would also result in fragmentation of habitats. The ES agrees that adverse impacts would occur to these important habitats. While the applicants

have made some attempts to reduce impacts on these habitats, and have proposed some mitigation schemes, SNH will give evidence that the proposals for mitigation are unlikely to be effective in reducing the impacts to a level that is in compliance with this policy.

4.35 Aberdeenshire have also applied local designations to much of the area that would be affected by the development. These are termed Sites of Interest to the Natural Sciences (SINS). Policy Env/3 refers to this local designation as follows:

Other Recognised Nature Conservation Sites

Development that would have an adverse effect on a Site of Interest to Natural Science, will be refused unless the developer proves:

- a) its public benefits at a local level clearly outweigh the nature conservation value of the site; AND*
- b) there is no suitable alternative site for the development.*

Where development is allowed which could affect any of the above designated sites, including beyond their boundaries, the developer must demonstrate that adequate measures will be taken to conserve and enhance the site's ecological, geological and geomorphological interest.

4.36 This policy again requires the condition that there is no suitable alternative. The evidence given by SNH on the likely ineffectiveness of the mitigation measures proposed is again relevant to this policy, as, our evidence to the Inquiry will indicate, they do not comply with the requirement to demonstrate adequate measures to conserve and enhance the site's ecological and geomorphological interest.

NPPG 13 Coastal Planning

4.37 Further Government advice is given on planning for coastal areas within NPPG 13. Paragraph 1 states that this guidance sets out how planning can contribute to achieving sustainable development and also maintaining and enhancing biodiversity on the coast; it also highlights how planning authorities need to distinguish between policies for the developed, undeveloped and isolated coast, and identifies the action to be taken by planning authorities in their development plans and in development control decisions.

4.38 In paragraph 23, it states:

As relatively few types of development require a coastal location, the undeveloped coast should generally be considered for development only where:-

- *The proposal can be expected to yield social and economic benefits sufficient to outweigh any potential detrimental impact on the coastal environment*

- *There are no feasible alternative sites within existing settlements or on other previously developed land.*

4.39 This guidance is followed by Aberdeenshire Council in the adopted Local Plan, policy Env/6. This states:

Development on Undeveloped Coast will be refused unless:

- d) the social and economic benefits clearly outweigh any adverse environmental impact;*
- e) there is no suitable alternative site for the development; AND*
- f) it respects the character, environment and amenity of the surrounding area.*

In all cases:

- g) development shall be prohibited on any parts of the coast that are identified as at risk from flooding or erosion;*
- h) where applicable, the development must conform to policy Gen/4 (Infill Development) or the relevant Green Belt or Countryside policy;*
- i) satisfactory account must be taken by the developer of locating the proposal in an existing settlement on brownfield land or in disused buildings;*

4.40 In relation to the Development, conditions e) and f) are particularly relevant as the evidence of the three witnesses for SNH, and the assessments presented in the ES have clearly indicated that the development does not respect the character, environment or current amenity of the area as presented by the sand dunes both within and outwith the SSSI boundary.

Biodiversity Duty on Public Bodies and Officials

4.41 The UK is a signatory to the United Nations Environmental Programme Convention on Biological Diversity 1992 (“the Convention”).

4.42 The duties imposed by the Convention are enacted in Scotland by the Nature Conservation (Scotland) Act 2004. This provides as follows:

“1. Duty to Further the Conservation of Biodiversity

- (i) It is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions.*
- (ii) In complying with the duty imposed by sub-section (i) a body or office-holder must have regard to –*
 - (a) any strategy designed under section 2(1), and*
 - (b) the United Nations Environmental Programme Convention on Biological Diversity of 5 June 1992 as amended from time to time (...)*

2. **Scottish Biodiversity Strategy**

(i) *The Scottish Ministers must designate as the Scottish Biodiversity strategy one or more strategies for the conservation of biodiversity (...)*

4. *Within one year of a strategy being so designated , the Scottish Ministers must publish in such manner (...) as they think fit, lists of –*

(a) *species of flora and fauna, and*

(b) *habitats,*

considered by the Scottish Ministers to be of principal importance for the purpose mentioned in Section 1(1)".

4.43 In accordance with the Act, The Scottish Biodiversity Strategy was published in 2004 under the title, "*Scotland's Biodiversity It's In Your Hands*". The need for a strategy is set out on page 6, which states:

We need a strategy to ensure that biodiversity is conserved for the sake of our economy and future generations. Biodiversity conservation is an important dimension of sustainable development and a key measure of our success in achieving it.

We also need a strategy to ensure we meet our international obligations. The Convention on Biological Diversity is a 1992 United Nations agreement, to which the UK is a signatory, which commits us to "the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the utilisation of genetic resources". To take forward the Convention, the European Union has set an objective in the 6th EU Environmental Action Programme "to protect and restore the functioning of natural systems and to halt the loss of biodiversity in the European Union" by 2010. It is vital that we play our part in Scotland in meeting that commitment.

4.44 The evidence of SNH agrees with the findings of the ES that the Development as currently proposed would be in direct conflict with the aim of protecting and restoring the functioning of natural systems, because it would disrupt the natural dynamism of the site and its interplay with the ecology of the habitats of the site. Biodiversity would be lost from the dune system both within the SSSI and outwith the SSSI boundary to its south.

4.45 The Scottish Biodiversity List was published within one year of designation of the Scottish Biodiversity Strategy in 2005. The title given to the list is:

The List of Species and Habitats considered to be of Principal Importance for the purpose of Biodiversity Conservation in Scotland

4.46 The introduction to the list is as follows:

The Scottish Biodiversity List is a list of flora, fauna and habitats considered by the Scottish Ministers to be of principal importance for biodiversity conservation.

The development of the list has been a collaborative effort involving a great many stakeholders overseen by scientists from the Scottish Biodiversity Forum. Completion of the list is an exciting development as it is the first time such a stocktake has been done in Scotland.

The Scottish Biodiversity List is a tool for public bodies and others doing their Biodiversity Duty and is an important source of information and guidance for all.

4.47 The Scottish Biodiversity List comprises four categories:

1. Terrestrial and fresh water species
2. Terrestrial and fresh water habitats
3. Marine species and habitats
4. The species and habitats identified as important by the Scottish public in a social survey.

4.48 The list is used to guide decision makers in public bodies to implement their duty to further the conservation of biodiversity in Scotland when carrying out their formal functions. This applies to the exercise of Development Control functions by all public bodies.

4.49 This list of habitats considered to be of principal importance for biodiversity conservation includes habitats of types SD12, SD13, SD16, possibly SD17 and H11 as classified through the National Vegetation Classification, which are all terrestrial and fresh water habitats identified as occurring within the dune system, either within or outwith the SSSI. SNH agrees with the ES that the Development would result in adverse impacts to these community types.

4.50 In the matter of the Development, the decision makers which will include the Reporter for this Inquiry and Scottish Ministers, are subject to the Biodiversity Duty and need to consider this duty in their decision making process.

5. THE YTHAN ESTUARY, SANDS OF FORVIE AND MEIKLE LOCH SPECIAL PROTECTION AREA (SPA) AND RAMSAR SITE

- 5.1 In the Statement of Case, SNH highlighted that our advice to both Aberdeenshire Council and subsequently to the DPEA was that there was a likely significant effect on the qualifying interests of the SPA and that an appropriate assessment is therefore necessary under Regulation 48 of the Conservation (Natural Habitats &c.) Regulations 1994 (as amended).
- 5.2 The applicants have submitted to the Inquiry a document entitled "Information to Inform an Appropriate Assessment" May 2008 (Ref: T 16). This document has incorporated the TIGLS response to comments and advice from SNH on previous draft versions. We would ask that this revised report and the previous report are considered along with all correspondence from SNH to Aberdeenshire Council, DPEA and the applicants on this issue.
- 5.3 We are also concerned that despite drawing the applicant's attention to the incorrect use of terminology and also the required steps in the tests of the Regulations, inaccuracies remain.

SNH Advice

- 5.4 **SNH's advice is that this proposal is likely to have a significant effect on the qualifying interest(s) of the site.** On the basis of the information provided and appraisal carried out, SNH advises Scottish Ministers as the competent authority for the purposes of the Appropriate Assessment that in its judgement the proposal will not adversely affect the integrity of the SPA, subject to conditions, and any legal agreement(s), to achieve the following:
- a) The submission of a goose management scheme, to the planning authority for its approval. The scheme should incorporate the measures outlined in section 4.8 of the May 2008 report and be implemented in accordance with that approval. The planning authority should seek further SNH advice on finalising the details of the goose management scheme before approval.
 - b) The provision of a detailed public access plan including details of access on the Menie Estate, the provision of open space within the development and the improvements of and access to semi natural open spaces within the Estate. These measures are outlined in section 5.10.1 of the May 2008 report. SNH should be consulted further upon the detail of these measures.
- 5.5 Full details of the conditions to be attached are detailed further within a separate statement from SNH regarding conditions.

5.6 The appraisal referred to above considered the impact of the proposals on the following factors:

a) Population (Pink footed Geese) as a Viable Component of the Site

5.7 The analysis demonstrates that the proposed development area is important periodically to pink footed geese as both a roost and feeding area, based on geese numbers and the proportion of the population of the SPA using the proposed development site. It is also noted that wintering geese in the north-east of Scotland are mobile and have a large resource available, including both alternative feeding areas and roosting sites.

5.8 Consideration has been given to the impacts from the development on feeding and roosting of pink footed geese. In respect of feeding, SNH concludes from the data collected from the field visits and additional contextual data including evidence from previous radio tracking studies, that should the development be consented, an adverse effect on integrity could be avoided through the imposition of conditions to implement mitigation and compensation measures.

5.9 With regard to roosting, the appraisal report identifies that a nocturnal goose roost has been established at Menie since at least 1998 and from the field visits it is demonstrated that the use of this roost is not a one off. This use of Menie as a satellite roosting area has been considered in comparison with the use of the main roost sites within the Ythan Estuary SPA, and also in relation to any potential time or conditions related requirements of the geese. From the evidence presented, the use of this satellite roost, does not correlate strongly with night time feeding in the development area nor does it correlate with the availability of feeding during the build up before their spring migration time. The use of the roost appears to be more sporadic and opportunistic for birds flying from the south. There is no evidence to suggest that it has a key function to play during certain conditions at the main roost areas within the SPA. As the satellite roost appears to be additional rather than integral to the essential roosting requirements of geese using the SPA, SNH advises that if the development was to be consented, an adverse effect on integrity of the SPA could be avoided through the use of conditions (as indicated above) to adequately compensate for the disturbance, or possible loss of the roost area.

b) Potential for Disturbance of the Species

5.10 The Ythan Estuary, Sands of Forvie and Meikle Loch SPA is approximately 3km north of the proposed development. In our consultative response in 2007, SNH identified that the development of the resort was likely to have a significant effect on the SPA through increased disturbance to the qualifying interests, through an additional number of visitors visiting the SPA.

5.11 Consideration has been given to the methodology for the calculation of these additional visitors numbers and whilst a number of assumptions have been used, it is our advice that if the development was to be consented, then an adverse effect on integrity could be avoided through the use of conditions covering in detail the mitigation measures identified in section 5.10.1.

5.12 Conditions would require the detailed submission and approval of a public access strategy for Menie estate, including details of open space, and improvements to existing areas of semi natural ground to increase the capacity for recreational activity within the development area itself.

5.13 It should be noted that the Scottish Government is required to undertake an appropriate assessment of the implications of the proposal for the site in view of the site's conservation objectives for its qualifying interest(s). This assessment may be based on the above appraisal by SNH but you may wish to carry out further appraisal before completing the appropriate assessment.

6. EUROPEAN PROTECTED SPECIES

Legal Position

6.1 Regulations 39 and 43 of The Conservation (Natural Habitats &c.) Regulations 1994 (as amended) (Habitats Regulations) provide full protection for certain animal and plant species. The species identified above are referred to as European protected species and are listed on Schedules 2 (animals) and 4 (plants) of the Habitats Regulations.

6.2 This means it is illegal to:

- Deliberately or recklessly capture, injure or kill a European protected species of wild animal or to deliberately or recklessly (i) harass an animal or group of animals; (ii) disturb an animal while it's occupying a structure or place used for shelter or protection; (iii) disturb an animal while it's rearing or otherwise caring for its young; (iv) obstruct access to a breeding site or resting place, or otherwise deny the animal use of the breeding site or resting place; (v) disturb an animal in a manner that is, or in circumstances which are, likely to significantly affect the local distribution or abundance of the species to which it belongs; (vi) disturb an animal in a manner that is, or in circumstances which are, likely to impair its ability to survive, breed or reproduce, or rear or otherwise care for its young
- Deliberately or recklessly take or destroy its egg
- Deliberately or recklessly disturb any cetacean
- Damage or destroy the breeding sites or resting places of such animals
- Deliberately or recklessly pick, collect, cut, uproot or destroy European protected species of wild plant

6.3 Where it is proposed to carry out works which will affect European protected species or their shelter/breeding places, whether or not they are present in these refuges, a licence is required from the licensing authority (in this case likely to be Scottish Government). It is strongly advised that you refer to the Scottish Government information on the current interim licensing arrangements, which can be found in the document *European Protected Species, Development Sites and the Planning System: Interim Guidance for Local Authorities on Licensing Arrangements*, (October 2001) before applying for a licence. Copies of this are available at <http://www.scotland.gov.uk/library3/environment/epsg-00.asp> or by writing to

the Landscapes and Habitats Division, Scottish Government Rural Directorate, Room GH 93, Victoria Quay, Edinburgh EH6 6QQ or by telephoning 0131 244 7140.

- 6.4 As highlighted in the Interim Guidance, three tests must be satisfied before the licensing authority can issue a licence under Regulation 44(2) of the Conservation (Natural Habitats &c.) Regulations 1994 (as amended) to permit otherwise prohibited acts. An application for a licence will fail unless all of the three tests are satisfied. The three tests involve the following considerations:
- Test 1 - The licence application must demonstrably relate to one of the purposes specified in Regulation 44(2) (as amended). For development proposals, the relevant purpose is likely to be Regulation 44(2)(e) for which Scottish Government is currently the licensing authority. This regulation states that licences may be granted by Scottish Government only for the purpose of *“preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment.”*
 - Test 2 - Regulation 44(3)(a) states that a licence may not be granted unless Scottish Government is satisfied *“that there is no satisfactory alternative”*.
 - Test 3 - Regulation 44(3)(b) states that a licence cannot be issued unless Scottish Government is satisfied that the action proposed *“will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range”* (Scottish Government will, however, seek the expert advice of Scottish Natural Heritage on this matter).
- 6.5 Consideration of European protected species must be included as part of the planning application process, not as an issue to be dealt with at a later stage. Any planning consent given without due consideration to these species is likely to breach European Directives with the possibility of consequential delays or the project being halted by the EC, as has happened previously.
- 6.6 In SNH’s formal consultation response of 30 May 2007 to the proposed development, we provided advice to Aberdeenshire Council as the then determining authority in order to assist them in considering the impacts of the proposed development on these protected species and comply with relevant legislation. We recommended that further information was required to determine the impact of the proposal on each of the species.
- 6.7 In July 2007 TIGLS submitted additional information as a “Response” to comments and queries made by Aberdeenshire Council and various consultees, including SNH. This additional environmental information included survey reports for bats and otters (appendices 6 and 7, respectively).
- 6.8 SNH’s advice is provided below.

Bats

6.9 The constraints on licensing attached to Regulation 44 (3) (b) of the Habitats Regulations apply to bats.

SNH assessment of the proposal with respect to bats

6.10 In our response of 30 May 2007, we advised that bats will form roosts in buildings and in large trees, with holes. It was not clear from the Environmental Statement whether any buildings were to be demolished or altered, or if any trees suitable for bats were due to be felled. If this was the case, SNH advised that should be surveyed for bat roosts at the earliest opportunity and prior to determining whether planning permission should be given. The survey should be carried out by a suitably experienced person.

6.11 If no buildings were due to be demolished or altered, and no mature trees to be felled, the proposed development would not have any impact on bats.

6.12 In our letter of 16 August 2007 commenting on the additional environmental information, we noted that the further survey report for bats related to application reference APP/2006/4607 for conversion of Menie Park Steading to a Marketing Suite. SNH provided comment on that report in a separate letter, dated 4 September 2007, as follows:

*The survey identified 3 bat roosts in the Menie Park Steading consisting of small numbers of both species of pipistrelle bats (*Pipistrellus pygmaeus* and *P. pipistrellus*).*

SNH Advice with respect to bats

6.13 The conversion would cause disturbance to a European protected species or their shelter / breeding places, whether or not they are present in these refuges, therefore a licence is required from the Scottish Government before work can commence.

6.14 SNH supports the recommendations in the bat survey report and advises that they be incorporated into conditions attached to any planning consent:

- the bat roost sites should be retained as detailed in the bat survey report;
- demolition of the central section of the steading, which supports the bat roosts, should be timed either mid-September to November or March to mid-May;
- timber treatment in the refurbished building should use only chemicals known to be safe for use in bat roosts; and
- all roof slates and panels should be removed by hand as it cannot be guaranteed that bats will not be found during demolition works.
- workmen should be made aware of the possibility of finding bats and that if any are found, work should be halted immediately and advice sought from SNH. Any bats should be handled with care using gloves and put safely in a box until advice is received.

Otters

SNH assessment of the proposal with respect to otters

- 6.15 In its response of 30 May 2007, SNH noted that the Environmental Statement stated that otters make regular use of 3 watercourses that pass through the development site. No otter holts or couches were found and SNH welcomed the mitigation measures proposed, should permission be given. However, the ES did not provide a map of the watercourses surveyed, nor did the survey include the full extent of the Development area which included the future housing and proposed golf courses and a suitable buffer area around the site. Prior to any permission being granted, SNH advised that the applicant be asked to provide this information.
- 6.16 The subsequent otter survey report submitted in July 2007, submitted in the supplementary information, extended over a greater area than the original survey and found that although there was still evidence that otters occur on Menie Estate, there was no evidence of any resting sites used by otters on the proposed development site.

SNH advice with respect to otters

- 6.17 SNH supports the recommendations in section 6.1 of the additional information, which sets out the intention to, where possible, enhance the wildlife value of burns and provide at least two new holts for otters and also recommends that it be a condition of any planning consent that a management plan for otters incorporating these recommendations is developed and implemented.

7. BADGERS

- 7.1 Badgers and their setts are protected in Britain by the Protection of Badgers Act 1992, as amended by the Nature Conservation (Scotland) Act 2004, whereby it is an offence to wilfully take, kill or injure a badger: to obstruct, destroy or damage a sett or to disturb a badger whilst occupying a sett, with intent or recklessly. A sett is defined in the Act as any structure or place, which displays signs indicating current use. The 1992 Act provides for licenses to be issued for certain activities which would otherwise be prohibited. SNH is the licensing authority for sett interference or disturbance to a sett, which may result from land development.
- 7.2 In SNH's formal consultation response of 30 May 2007, SNH noted that the ES identified a main and outlier badgers setts within the proposed development site, indicating that the area is used by a social group of badgers. SNH advised there was insufficient information currently available to assess the impact the development may have on badgers. In particular:
- The ES and accompanying badger report did not provide a map of the area surveyed, to show whether this was adequate or whether it included the

extension to the development (future housing and golf course) with a suitable buffer area around the site.

- There was insufficient assessment of the impact of the proposed development on the badger setts identified in the survey. As well as direct impacts on setts and loss of habitat, indirect impacts should be considered such as risk of encounters with hazardous materials e.g. oils; illumination potentially affecting behaviour; use of pesticides and fertilisers altering the balance of available prey species; presence of accessible food waste encouraging wild mammals to alter their diets and possibly cause a nuisance; foraging of badgers on landscaped areas and residential gardens.

7.3 SNH also advised that badgers are territorial animals and there may be other badger social groups in the vicinity of the proposed development. Any requirement to exclude badgers from a badger sett to make way for development, could only be carried out under licence and may require further survey to identify neighbouring social groups of badgers, boundaries of territories, and the potential impacts of excluding badgers.

7.4 In our letter of 16 August 2007 regarding the additional environmental information, SNH did not provide comments on badgers as they are not European Protected Species which determining authorities are required to consider when deciding applications. SNH therefore provides new advice below.

SNH's advice with respect to badgers

7.5 A further badger survey was carried out from 4-6 June 2007. In addition to providing an update of the status of the setts identified in the previous survey, the second survey identified a new annex sett. The distance of this sett from the main sett is approximately 1.2km which suggests that more than one badger social group may occupy or utilise Menie estate.

7.6 The second survey does not assess the impact of the components of the proposed development on badgers. However, the additional information states (section 6.1) that *"on the ground mitigation of any direct effects by TIGLS will ensure that there is no intrusion to within 30m of any sett thereby ensuring that a licence will not be required"*. Further, that, *"In order to minimise indirect effects, TIGLS will commission a Badger Protection Plan prior to commencement of works. This plan will aim to protect setts, identify a strategy to maintain foraging habitat, create new foraging habitat, maintain current preferred pathways and recommend long-term options for maintaining badgers at Menie through iteration at the detailed design stage."*

7.7 SNH considers that the proposed development site is sufficiently large to be able to accommodate the badger setts as well as the built development. Aspects of the badger development would result in a loss of foraging ground for badgers, but there are other neighbouring areas that the badgers will have access to for foraging, for example, land to the north. Since this is an application for outline permission, it should be possible to carry out the development in a manner that complies with the Protection of Badgers Act. SNH advises that if the application

is consented, a condition should be attached requiring details of a badger protection plan to be submitted as part of the reserved matters application. That badger protection plan should consider:

- impacts to the badgers arising from construction and operation of the development,
- identify how setts will be protected, and
- identify a strategy to maintain and create foraging habitat.

7.8 A constraint on badgers foraging ground could lead to foraging by badgers and the creation of new setts on the golf courses and lawns/gardens for the club house, hotel and apartments.

8. LANDSCAPE AND VISUAL IMPACT ADVICE

8.1 In the SNH consultation response of 30th May 2007, we identified that landscape and visual impacts were a point of concern. SNH did not object to the proposals on the basis of the landscape and visual impacts, but made a number of comments to assist the determining authorities in their consideration of the Development. Our comments have not changed and can be summarised as follows:

- *“The proposed development would result in a significant loss of distinctive landscape character and quality that is recognised in the designations of Undeveloped Coast and an Area of Landscape Significance.*
- *The proposed development would have significant adverse impacts on landscape character.*
- *The adverse significant visual impacts of the development extend outwith the immediate site to the wider study area between Balmedie and Newburgh.*
- *There is no evidence within the ES of a design philosophy and statement, as recommended in guidance set out in PAN 68 Design Statements.*
- *There is no evidence within the ES that an iterative and masterplanning approach to consider the capacity of the landscape to accommodate different scales of development has been adopted.*
- *Design opportunities, which reflect the landscape character, quality and visual amenity of the area, have not been adequately explored and a reduction of adverse landscape and visual impacts has not been addressed to an acceptable level.*
- *The appropriateness of the landscape mitigation scheme requires further consideration.”*

8.2 In addition, there have been no further details or consideration provided in any of the supplementary information in relation to the landscape and visual impacts, other than to state the applicants’ willingness to work with Architecture and Design Scotland, regarding the design and setting of the resort’s built environment.

9. RECREATION AND ACCESS ADVICE

9.1 In the SNH consultation response of 30th May 2007, SNH identified that recreation and access issues were a point of concern. SNH did not object to the proposals on the basis of potential recreation and access impacts, but made a number of comments to assist the determining authorities in their consideration of the Development. Our comments have not changed and can be summarised as follows:

“In summary,

- *the development of the future golf area in particular raises several significant issues relating to recreation and access, namely:*
 - *restriction of access rights, the loss of recreational opportunities, and the loss of a valuable environmental education resource*
 - *adverse effects on the experience of recreational users, especially those seeking the isolation and naturalness of an area of undeveloped coast*
- *the ES does not fully assess current use of the proposed development site and how recreational users’ experience of the area would change as a result of the proposed development*
- *SNH considers that inadequate consideration has been given to measures to mitigate the identified impacts on recreation and access*
- *SNH welcomes some proposals, in particular, the intention to produce an access strategy or plan in order to facilitate safe and responsible public access. If permission is given, this should be produced at an early stage so that it is integrated into the detailed design plans.”*

10. PLANNING POLICY AND SUSTAINABILITY ASSESSMENT

10.1 In the SNH Response of 30th May 2007, we identified that we have a number of concerns in regard to the assessment against planning policy and sustainability as detailed in the Environmental Statement. In summary, our points of concern were as follows:

“The Planning Statement cites very few policies, and presents a subjective and overly positive assessment of planning policies. The assessment in the ES, Chapter 9, is more comprehensive, but both assessments are selective in their identification of policies.

The ES assessment highlights the difficulties of compliance with housing policies. It is less forthcoming on the lack of compliance with natural heritage, coastal, sustainability and other environmental policies. Moreover, in interpreting the conclusions of other chapters of the ES selectively it thereby overestimates the level of policy conformity. This is a failing and significantly underestimates the level of potential policy conflict.

The sustainability assessment does not provide an objective assessment of the impacts of the development. It assumes that negative impacts on the environment can be outweighed by positive social or economic benefits. The definitions and references used are significantly out of date. SNH disagrees with some aspects of the assessment.

The sustainability assessment significantly underplays the impacts of the development and appears to contradict the conclusions of other chapters of the Environmental Statement. The study does not present an assessment of the full range of social, economic and environmental benefits and dis-benefits. Therefore it is unable to identify areas of conflict. It does not seek to minimise negative impacts nor to enhance positive effects.

SNH would expect that a major and high-profile development such as this would respond positively to the challenges of sustainability and climate change and actively seek ways to promote excellence in the location, design, construction, management and use of such developments. This approach would be more in keeping with the policies of SPP1 on sustainable development. “

10.2 Our consideration of these issues has not changed substantially since the submission of our consultation response in May 2007.