RSPB Scotland

Keith Brown MSP
Minister for Transport & Veterans
St. Andrew's House
Regent Road
Edinburgh
EH1 3DG

29th August 2013

Rosyth International Container Terminal Harbour Revision Order

I write concerning the recent decision by Scottish Ministers to submit the Rosyth International Container Terminal Harbour Revision Order to the Scottish Parliament, for approval by the affirmative procedure.

As outlined in the attached annex, it is clear that the Order is the principal consent for the Rosyth (RICT) scheme. **Given its scope and content, confirming the Order prior to appropriate environmental assessment of the effects of dredging would, in our submission, be unlawful**, by breaching the requirements of Part 1 of the EIA Regulations, and of regulation 48(1) of the Habitats Regulations. This requires Scottish Ministers to carry out an assessment "*before deciding to ... give any consent, permission or other authorisation for a plan or project*" that has similar implications for the integrity of European wildlife sites to those of the RICT scheme.

We wrote to Transport Scotland in May this year commenting on proposed revisions to the Order, urging most strongly that the Order should not be progressed until the applicant had submitted sufficient information to allow appropriate assessment of the all possible environmental effects of the dredging required for the project to proceed – including any impacts on the Firth of Forth SPA, Ramsar site and SSSI. Such an assessment is required to ensure that the possible impacts on the environment of the Firth are considered, assessed, and where possible minimised by mitigation. Failing that, if there are imperative reasons of overriding public interest and no alternative solutions, compensation would be required. This has not been done.

Accordingly, and most regrettably, the required information has not been forthcoming. Consequently, we believe that Scottish Ministers should withdraw the draft Order from the Scottish Parliament, until Marine Scotland, in consultation with SNH, have been able to complete their assessment of the effects and impacts of

Scotland Headquarters
2 Lochside View
Edinburgh Park
Edinburgh
EH12 9DH

Tel 0131 317 4100
Fax 01767 685008

rspb.org.uk

dredging. This will require additional information from the applicant. Only once this is forthcoming will it be possible to determine the degree to which the scheme poses a threat to the Firth of Forth SPA, Ramsar site and SSSI and their qualifying species, and to identify the further measures that might be needed to offset any remaining impacts. This would be entirely consistent with the applicant's wish that the scheme be viewed as meeting the requirements of National Development 6 ("Additional Freight Capacity on the Forth") in the second National Planning Framework for Scotland.

Unless this occurs, Scottish Minsters' proposed course of action is going against required legislation procedures, SNH's advice and the conclusions of the Inquiry Reporters. I should add that hitherto the Scottish Government has as a matter of policy (and law) followed the procedures set out in the Habitats Regulations and related EU Directives – so this Parliamentary order represents a notable departure from policy and practice.

All the above issues were clearly set out in RSPB Scotland's latest consultation response from May this year and in both sets of SNH's legal submissions to the Inquiry (attached to this letter for ease of reference). We have not repeated every point from those documents but request that you consider them all in their entirety.

In conclusion, I hope you are able to give this submission serious consideration and, as a result, withdraw or delay the Order. I look forward to hearing from you.

In view of his responsibilities for European wildlife sites, I am copying this letter to Paul Wheelhouse; and, as a courtesy, also to the main parties to the Inquiry.

Yours sincerely

Stuart Housden
Director, RSPB Scotland

cc.
Paul Wheelhouse MSP
Port Babcock Rosyth
Forth Ports
Joint Action Group
SNH

ANNEX: environmental assessment of dredging proposals for the Rosyth International Container Terminal (RICT) scheme - detailed comments by RSPB Scotland, August 2013

The Firth of Forth SPA

The Firth of Forth Special Protection Area (SPA) was classified under the EU Birds Directive by Scottish Ministers in October 2001. The Firth as a whole is the most important site for wintering and migrating waterbirds in Scotland. The SPA protects the most important areas of intertidal bird habitat within the Firth, extending to 6313.72ha, and supporting on average almost 100,000 birds.[1] The site's conservation objectives are to maintain the populations of the 28 species that comprise the SPA qualifying interests.

The RICT scheme

The Rosyth International Container Terminal is proposed by Port Babcock Rosyth (PBR), the harbour authority and company now running the former Rosyth naval dockyard. Landside development would be on brownfield land reclaimed during the 1980s, but never used, for the construction of nuclear submarines. PBR applied to Scottish Ministers for the Rosyth International Container Terminal Harbour Revision Order (the Order) in January 2011. A public inquiry was held into objections to the Order in early 2012. RSPB Scotland objected to the Order, and supported Scottish Natural Heritage's objection at the public inquiry.

The Inquiry Report was published in March 2013, and concluded that the RSPB and SNH concerns that insufficient information was available to allow proper assessment of the implications for the Firth of Forth SPA of the seaward aspects of the scheme were justified.

The Dredge

Article 8 of the Order bestows on the applicant the power to dredge an access channel to specific dimensions, as part of the scheme, and necessary for the proposed container terminal to be capable of operation:-

> "*...to form a turning area and channel 150 metres wide dredged to 9.5 metres below chart datum within the dredging limits, to allow vessels access to and egress from the works site*."

As is clear from the original application documents, the channel to be dredged is an integral part of the scheme as a whole. The terminal cannot operate without it. According to the Inquiry Report (the PLI report paragraph 13.284) this requires first a capital dredge of 700,000m^3, and then maintenance dredging "probably" every 4-6 months to keep the dimensions needed for the container terminal to operate. These dimensions are significantly larger than indicated in the original application, which stated a capital dredge of 60,000m^3 and maintenance dredging every 2 to 5 years.

[1] http://gateway.snh.gov.uk/sitelink/siteinfo.jsp?pa_code=8499

This is clearly a very significant intervention in the environment and is immediately adjacent to the Firth of Forth SPA, Ramsar site and SSSI which is home to many thousands of migrating birds at different times of the year, including mallard, shelduck, wigeon, curlew, lapwing and oystercatcher. It was in this context that we objected to the original application, and supported SNH's case at the inquiry, as the applicant had failed completely to address the issues posed by the new dredged channel. It is also clear that the Inquiry Reporters (set out in the PLI report paragraphs 13.342; 13.345) considered the principal obstacle to consent for the scheme to be an inability to carry out appropriate assessment of the dredged channel, which is entirely attributable to the applicant's failure to provide adequate, relevant information:

> "*For the reasons set out above in the context of the Habitat Regulations[2], the ES does not provide sufficient data to identify and assess the main effects which the dredging and the dredged channel would be likely to have on the environment. Further environmental information was provided at the inquiry, but again this is insufficient to identify and assess these effects*." (PLI report 13.345).

The Required Procedure

Scottish Ministers, as the competent authority for the Harbour Revision Order, have not required the applicant to provide this information, generally acknowledged to consist largely of industry-standard, site-specific computer modelling of potential alterations to wave, tide and sediment regimes[3] in order to complete the environmental assessments for this project (as required by both regulation 3 of the EIA Regulations[4] and regulation 48 of the Habitats Regulations when a plan or project is likely to have a significant effect on a SPA). The Inquiry established the dimensions of the channel, and the frequency of maintenance dredging. We see no reason why the necessary modelling cannot be carried out, as it should have been in support of the original application.

We note with concern that despite the absence of an appropriate assessment/ environmental statement of the effects of dredging, the Order has been submitted to the Scottish Parliament including Article 8(1)(a), empowering the applicant to dredge (as set out above).

Asking the Scottish Parliament to confirm the Order at this stage is not appropriate until the outcome of the assessment of the effects of dredging is known.

The Inquiry Reporters have clearly considered this and concluded as follows (the PLI report paragraph 13.341):

> "*It would be undesirable if that division of responsibility* [between Transport and Marine directorates of Scottish Government, for landside and seaward aspects of the scheme respectively] *were to lead to an outcome whereby authorisation was given for the land based works but the application for a marine licence was refused*".

[2] the Conservation (Natural Habitats &c.) Regulations 1994 (as amended)
[3] as identified by SEPA at paragraph 6.2 of their scoping response to Transport Scotland, 3rd August 2010
[4] the Town and Country Planning (Environmental Impact Assessment)(Scotland) Regulations 2011 and the Marine Works (EIA) Regs 2007 (as amended)

However, in spite of the Reporters' initial recommendation, this risk appears to us to be exacerbated by Article 17(10) of the draft Order, which makes activation of the Order conditional on the granting of marine licences under the 2010 Act, thus rendering the undesirable outcome identified by the Reporters a very real possibility, if the outstanding dredging issues are to be appropriately and independently assessed at this subsequent stage.

Recent ports cases elsewhere in the UK have correctly included consideration of the Transport and Works Act order, Coastal Protection Act consent and the outline planning application, as required by the EIA and Habitats Regulations Legislation thus avoiding the issues now arising at Rosyth. These include consented proposals at Bristol and the London Gateway.

For all offshore windfarms Marine Scotland, and in England and Wales the Marine Management Organisation and National Infrastructure Directorate (through the Planning Inspectorate), consider the project in its entirety and the marine licence and the development consent order are included in those considerations at the same time again to avoid the issues now arising at Rosyth.

It clear from both English applications of the Birds and Habitats Directives and ECJ legal authorities (set out below) that the requirements of the EIA and Habitats regulations include consideration of construction and ancillary works needed for the operation of the project.

Thus a capital and maintenance dredge, without which the port could not operate is absolutely part of the project and any possible impacts arising from it, whether being decided by a different decision maker or not, needs to be considered as part of overall assessment of the project. The whole reason for regulation 52 of the Habitats Regulations is to avoid any difficulties with different decision makers separately considering different applications for the same project.

It is not permissible to defer consideration of an effect or an in-combination or cumulative effect of a plan or project until after the plan or project has been authorised. As explained by Sullivan L.J. in ***Brown v Carlisle City Council*** [2010] EWCA Civ 523 [2011] Env L.R. 5:

> *"39....The underlying purpose of the Directive is that the environmental effects of a development, including any cumulative effects, are considered at the earliest possible stage in the decision making process: see R. (on the application of Barker) v Bromley LBC [2006] UKHL 52; [2007] Env. L.R. 20 per Lord Hope at [22]. If a decision is taken to permit a development on the basis that any cumulative environmental effects of carrying it out will be considered at some future stage there is the danger that the developer will have obtained a "foot in the door". Even if the later assessment of the cumulative effects might otherwise lead to a conclusion that those effects were unacceptable, the local planning authority would be committed to the development for which permission had been obtained, and that commitment would be a relevant factor in deciding whether cumulative environmental effects which might have been regarded as unacceptable if they had been considered at the outset, must be accepted at the later stage given the prior commitment.*

40 In the present case, the s.106 Agreement leaves open the possibility of a completed but unoccupied Freight Distribution Centre. That possibility might well be an unlikely outcome for commercial reasons, but the fact that permission had been granted for the Freight Distribution Centre would be a relevant factor when deciding whether the cumulative environmental effects of the airport works, including the effects of the Freight Distribution Centre, were such as to justify a refusal of permission. Since the object of both the Directive and the Regulations is to ensure that any cumulative environmental effects are considered before any decision is taken as to whether permission should be granted, an assurance that they will be assessed at a later stage when a decision is taken as to whether further development should be permitted will not, save perhaps in very exceptional circumstances, be a sufficient justification for declining to quash a permission granted in breach of reg.3(2) and/or the Directive."

Guidance on the application of the requirements of regulation 48, the Habitats Regulations has been given by the EU Commission in *Managing Natura 2000* ("**MN2000**"). That guidance has been accepted and applied by the CJEU, for example in Case C-127 ***Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw ("Waddenzee")***.

MN2000 explains the broad meaning of the expression "any plan or project" at paragraph 4.3. It states that:

"*... the directive does not circumscribe the scope of either 'plan' or 'project' by reference to particular categories of either. Instead, the key limiting factor is whether or not they are likely to have a significant effect on a site.*

…

"Support for a broad definition of 'project' is reinforced, by analogy, if we refer to Directive 88/337/EEC on the assessment of effects of certain public and private projects on the environment (as amended by Directive 97/11/EC). That directive operates in a similar context, setting rules for the assessment of environmentally significant projects. Article 1(2) of Directive 85/337/EEC provides that 'project' means:

> "'the execution of construction works or of other installations or schemes – other interventions in the natural surroundings and landscape including those involved in the extraction of mineral resources."

"As can be seen, this is a very broad definition, which is not limited to physical construction. For example, a significant intensification of agriculture which threatens to damage or destroy the semi-natural character of a site may be covered."[5]

[5] In addition we refer you to a recent EU Commission Guidance note specifically referring to ancillary works http://ec.europa.eu/environment/eia/pdf/Note%20-%20Interpretation%20of%20Directive%2085-337-EEC.pdf

In addition, even though not enabled by a town and country planning consent, the principles of consenting the RICT scheme are clearly analogous. Therefore, we refer you to paragraphs 144-154 of Planning Circular 3/2011[6], and in particular:

> "*144. In cases where a consent procedure comprises more than one stage (a 'multi-stage consent'), one stage involving a principal decision and the other an implementing decision which cannot extend beyond the parameters set by the principal decision, the European Court of Justice has made clear that the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. (Cases C-201/02 and C-508/03 refer.) However, the courts have equally made clear that if those effects are* ***not identified or identifiable*** *at the time of the principle decision, assessment must be undertaken at the subsequent stage."*
>
> *145. If sufficient information is given with the application for planning permission (whether an application for planning permission in full, or for planning permission in principle), it ought to be possible for the authority to determine whether the EIA obtained at that stage will take account of all potential environmental effects likely to follow as consideration of an application proceeds through the multi-stage process. Furthermore, if when granting planning permission the authority ensures the permission is conditioned by reference to the development parameters considered in the ES, it will normally be possible for an authority to treat the EIA at the permission stage as sufficient for the purposes of granting any subsequent multi stage consents. In this way authorities can seek to minimise the risk that new environmental information comes to light at a later stage which, had it been known about previously, would have resulted in the principle decision being refused or which subsequently requires additional mitigation measures to be imposed."*

The Inquiry identified the effects of dredging as a major constraint, requiring further assessment. The information agreed to be required from the applicant would be "new environmental information", potentially having very significant implications for the viability of the project, with or without mitigation, and thus for the principal consent.

> *150. Where an application for multi-stage consent is received in respect of an EIA development for which an ES has previously been submitted, the provisions of regulation 23 (additional information and evidence relating to Environmental Statements) apply as they would in relation to an EIA application. The authority or the Scottish Ministers may, notwithstanding whether an ES has previously been revised or updated, require in writing the submission of such further information as is reasonably required to give proper consideration to the likely environmental effects of the development. In considering whether further information is required, the authority must examine the adequacy of the ES for the development as a whole in light of those matters which are now before them for approval. See paragraphs 125 – 126 for further guidance on the adequacy of statements. In practice, where sufficient information has been supplied with the application for planning permission, the need for further information should rarely arise.*

[6] http://www.scotland.gov.uk/Publications/2011/06/01084419/0

Scottish Ministers are clearly entitled to request more information from the applicant, before determining the Order. Given the likely significance of this information for determining any potential effects and therefore the necessity for mitigation measures for the project as a whole, or even the viability of the scheme, it would seem to be in the interests of all parties for Scottish Ministers to do precisely this.

This would be entirely consistent with SNH's advice in their July 2012 legal submission to the inquiry:

> *"2.4 It is therefore SNH's advice to Scottish Ministers that, in the absence of any assessment of the effects of the works as defined in the draft HRO, it cannot be demonstrated beyond reasonable scientific doubt that the draft HRO will not adversely affect the integrity of the Firth of Forth SPA. It should be noted that this advice is in addition to the conclusion and submission of SNH in its closing submission that:*
>
> - *"the Applicant has not conducted its assessment [of the effects of the Project upon the various coastal processes and on ornithology] with sufficient rigour and thoroughness;*
> - *"the assessment process is riddled with scientific doubts, insufficiencies and uncertainties;*
> - *"the Project has a likely significant effect upon the Firth of Forth SPA;*
> - *"Scottish Ministers cannot reasonably conclude that it has been demonstrated, beyond reasonable scientific doubt, that the Project will not adversely affect the integrity of the Firth of Forth SPA, and;*
> - *"it is not competent to make the Order requested, i.e. grant a form of consent that is conditional upon further works of assessment whether or not supported by the prospect of a future appropriate assessment that may be demanded in a different consent regime."*

At this stage therefore, the Scottish Ministers need to withdraw the draft Order from the Scottish Parliament, until Marine Scotland have been able to complete their assessment of the effects of dredging, for which they will require the additional information (set out above) from the applicant.

Only once this is forthcoming will it be possible to determine the degree to which the scheme poses a threat to the Firth of Forth SPA, Ramsar site and SSSI and their qualifying species, and what further measures might be needed to offset any impacts. This would be entirely consistent with the applicant's wish that the scheme be viewed as meeting the requirements of National Development 6 (Additional Freight Capacity on the Forth) in the second National Planning Framework for Scotland[7], so that it is possible to identify "*any measures necessary to minimise, mitigate or compensate for adverse effects on the environment*" prior to consent.

RSPB Scotland
August 2013

[7] http://www.scotland.gov.uk/Publications/2009/07/02105627/0

Appendix 1 – RSPB Scotland response to consultation on modifications to the Rosyth International Container Terminal Harbour Revision Order, May 2013

nature's voice

RSPB SCOTLAND
Scottish Headquarters
2 Lochside View
Edinburgh Park
Edinburgh EH12 9DH
Tel: 0131 317 4100
www.rspb.org.uk/scotland

BY E-MAIL ONLY

2nd May 2013

Dear Val

Port Babcock Rosyth – the Rosyth International Container Terminal (Harbour Revision) Order

Thank you for your letter of 19th March, drawing our attention to the report of the Public Local Inquiry held last year into the above order ("the HRO"). As you are no doubt aware, RSPB Scotland did not appear at the inquiry, electing instead to support the case made by SNH, as it covered most of the main points of our original objection, which we have not withdrawn. We assisted SNH throughout the inquiry and were present, as part of the SNH inquiry team, for most of the relevant inquiry sessions.

We are invited to comment on modifications now proposed to the HRO, and do so below.

First, however, we wish to note that we consider that our original objection (and that of SNH) on the grounds that the applicant Port Babcock Rosyth ("PBR") had failed to provide adequate information to allow an assessment of the effects of dredging on the Firth of Forth SPA ("the SPA") has been entirely vindicated by the Reporters' findings of fact. In particular, the inquiry report establishes that SNH's interpretation of the Habitats Directive and Conservation (Natural Habitats &c.) Regulations 1994 ("the 1994 regulations") was correct, as befits the statutory nature conservation body in Scotland.

The Reporters have found that an appropriate assessment of the effects of dredging on the SPA is required; and that the information provided by PBR is not sufficient to enable such an assessment to be carried out. This was the basis of the objections made by both SNH and ourselves.

The Reporters also suggest that Scottish Minsters may wish to require appropriate assessment to be carried out by Marine Scotland, as the best-qualified competent authority to do so[1], at the same time as determining the licences ("marine licences") required under the Marine (Scotland) Act 2010 to allow specific dredging activities to take place. This is a logical suggestion and we have no objection to it.

However, we are extremely disappointed at the suggestion that Scottish Ministers may make the (modified) HRO before the effects of dredging have been properly assessed, and we <u>recommend in the strongest possible terms</u> that this course of action is not followed, and that no further progress is made in determining the HRO, until completion of the appropriate assessment that the Reporters have found is required of the effects of dredging on the Firth of Forth SPA.

[1] Under regulation 51 of the Conservation (Natural Habitats &c.) Regulations 1994

Our reasons for this are as follows:

The HRO bestows on PBR a general power to dredge, within clearly specified limits. Marine licences are also required, that would specify the details of how dredging operations would be undertaken, and dredgings disposed of. These licences could (and we expect would) be varied over time, within the overall framework of the power to dredge bestowed by the HRO.

Making the modified HRO independently and in advance of determination of the marine licences could prejudice not only objective determination of the marine licences agreed to be required, but also appropriate assessment of all of the "marine" components of the whole RICT project.

This risks "salami-slicing"[2] the consenting process for the project, thus setting a dangerous precedent for other complex infrastructure projects, as well as potentially breaching both the Habitats and the Environmental Impact Assessment Directives, by failing to assess the impacts of the RICT scheme as a whole.

Dredging and maintaining a channel to the specification set out in the HRO is absolutely integral to the RICT project, which otherwise cannot proceed. This is abundantly clear from the description of the "RICT scheme" set out in the Environmental Statement ("the ES") and Report to Inform an Appropriate Assessment ("the RIAA"), submitted by PBR to support the application for an HRO in January 2011.

The marine licences required for dredging cannot be made (or are meaningless) without the power to dredge, that is bestowed by article 8 the HRO. Therefore, we are surprised and disappointed at PBR's strenuous insistence at the inquiry that assessment of dredging was not a prerequisite for Scottish Ministers to make the HRO, as well as by the subsequent suggestion of the inquiry reporters that this might in any way be an appropriate course of action to determine overall consent.

The HRO is, in effect, the development consent[3] for the whole RICT scheme. Dredging enabled by marine licences cannot extend beyond the parameters set out by article 8 of the HRO. Therefore, the HRO is clearly the principal consent[4] for dredging operations required for the RICT scheme, as well as for the landside activities. As such, it seems to us entirely inappropriate to defer an assessment of the effects of dredging from the RICT scheme on the SPA until marine licences are applied for, at the same time as continuing to progress the HRO.

It is plain, not only from the application documents, but also from PBR's statement of case for the inquiry, that the works to be authorised by the HRO include the dredged channel[5], and that consideration of the environmental effects of dredging could be expected to form a significant part of the inquiry.

The subsequent insistence by PBR's inquiry team that assessment of dredging could and should be deferred to a later stage is frankly perverse in the context of their equally strong insistence that the scope of the inquiry should be restricted to the HRO, and no other consent(s). It is also an astonishing line of argument to have been taken, in view of well-established domestic and European caselaw and guidance defining the scope of a "project" requiring EIA.

---

[2] ECJ C-142/07, Ecologistas, paragraph 44
[3] In the sense of Article 1(2) of the EIA Directive
[4] ECJ C-201/02, Wells, paragraph 52
[5] Paragraphs 1.4; 4.1(i); 6.2.1 – 6.2.8; 7.1

For the purposes of appropriate assessment under the 1994 regulations and Article 6 of the Habitats Directive, the scope of a "project" is no different from that of one subject to EIA.[6]

Thus, in the context of the EIA and the Habitats Directives, there appear to us to be only two logical and legally safe options for Scottish Ministers to take with the RICT HRO at this stage: (1) to proceed no further with the HRO until Marine Scotland have made an appropriate assessment of the effects of dredging on the SPA; or (2) to proceed with the HRO only after having deleted the present article 8 (power to dredge). The second option would presumably require PBR to apply for a new and separate HRO to bestow the power to dredge. Therefore, we recommend the first option (delaying determination of the HRO) as the more reasonable course of action.

If, as we suggest, Scottish Ministers were to delay determination of the HRO until an assessment has been made of the effects of dredging required as part of the RICT scheme, then there would be no need for the proposed new article 17(10), which is in effect a suspensive condition to ensure that no work permitted by the HRO commences until marine licences for dredging have also been issued.

While we understand the intention of article 17(10), we do not believe that it overcomes the difficulties we have set out above in relation to compliance with the EIA Directive, or potentially prejudicing objective determination of the marine licences required for dredging.

However, at the same time, if our recommendation were to be followed and determination of the HRO were to be delayed until marine licences for dredging can also be determined, following full assessment of the effects of dredging, then article 17(10) would be complied with by default. On that basis, therefore, we have no objection to its inclusion.

Most of the remaining proposed modifications to the HRO appear to us to have relatively little bearing on our objection.

However, we recommend that the new articles 22 and 23 be extended to provide for protective and remedial action respectively in the case of adverse effects from sedimentation or scouring on the SPA.

These further modifications could be taken into account in assessing the effects of the scheme under regulation 48 of the 1994 regulations, as well as clearly enabling Scottish Ministers to fulfil their obligations under Article 6(2) of the Habitats Directive in the event of damage occurring to the SPA in spite of an assessment under regulation 48 having predicted that there would be no adverse impact on integrity of the European site.

In summary, therefore, RSPB Scotland is content with the proposed modifications to the RICT HRO, **provided that the order is not progressed until such time as it is possible to make an assessment of the effects on the Firth of Forth SPA of the dredging works required for the RICT scheme, and that assessments are made of the RICT scheme as a whole**.

We are content with the suggestion that Marine Scotland be nominated the competent authority to carry out this part of the appropriate assessment of the whole project, in combination with any effects of the licences also required for dredging under the Marine (Scotland) Act 2010.

We also note, with no satisfaction, that the consequence of the failure of PBR and their advisors to have any serious regard to our original objection to the HRO has been to delay the entire assessment and consenting process by more than two years,

[6] ECJ C-127/02, Waddenzee, paragraph 26

as the more detailed information on the effects of dredging requested by us in March 2011 is still entirely lacking. We trust therefore that Marine Scotland will insist on its provision[7] in order to enable the proper assessments to be made.

The Reporters have found that the proposed scheme would provide significant national economic benefit, and that it is supported by the second National Planning Framework for Scotland. By definition, this is a high level of public interest. Depending on the findings of the appropriate assessment now proposed to be carried out by Marine Scotland, it is conceivable that Scottish Ministers might determine that this level of public interest outweighs that of maintaining integrity of the SPA, and (provided all of the conditions are met) that the scheme may be consented under regulation 49 of the 1994 regulations. In those circumstances, there would be a requirement to put in place compensatory measures to guarantee the coherence of the Natura 2000 network. The type and extent of habitat potentially affected by the RICT scheme mean that, should it be necessary, compliance with this measure should be feasible, provided the impact to be compensated has first been quantified[8].

Finally, we note the likelihood of other Scottish harbour schemes also with the potential to affect estuarine SPAs coming forward in the near future. We would welcome the opportunity to discuss with Transport Scotland whether RSPB's wider experience of assisting with the assessment and consenting process for similar schemes in other UK countries could also be of assistance in a Scottish context, in order to avoid lengthy and costly delays to the consenting process here, for schemes to which considerable public interest may also be attached.

We trust you find these comments helpful. Please do not hesitate to contact me at our Edinburgh office if we can be of further assistance.

Yours sincerely,

Richard Evans
Senior Conservation Policy Officer
richard.evans@rspb.org.uk

Cc Iain Rennick (SNH)
Derek McGlashan (Forth Ports)
Sue Hamilton (Joint Action Group)
Beryl Leatherland (Joint Action Group)
Claire Smith (RSPB Scotland)

[7] Under regulation 48(2) of the Conservation (Natural Habitats & c.) Regulations 1994
[8] ECJ C-304/05, C v Italy, paragraph 83; C-404/09 C v Spain, paragraph 110

Appendix 2a: legal submission by Scottish Natural Heritage to the RICT public local inquiry, March 2012

APPENDIX 3

THE HARBOURS ACT 1964

ROSYTH INTERNATIONAL CONTAINER TERMINAL (HARBOUR REVISION) ORDER

LEGAL SUBMISSIONS ON BEHALF OF SCOTTISH NATURAL HERITAGE

22 MARCH 2012

Scottish Natural Heritage
All of nature for all of Scotland

Scottish Natural Heritage
Silvan House 3rd Floor East
231 Corstorphine Road
Edinburgh
EH12 7AT

Website: www.snh.gov.uk

Archibald Campbell & Harley WS
37 Queen Street
Edinburgh
EH2 1JX

Website: www.achws.co.uk

1. INTRODUCTION

1.1 This is a legal submission on behalf of Scottish Natural Heritage ("SNH") in relation to the procedures applicable to European Sites[99] in the particular context of the application by Port Babcock Rosyth Limited ("the Applicant") for a Harbour Revision Order ("the Order") under the Harbours Act 1964 to enable the development of the Rosyth International Container Terminal ("the Project"). It should be recorded for the purposes of ready understanding of the application of the requirements of the Habitats Directive[100] that the Project encompasses all that is defined in the draft Order and which would be thereby consented on the making of the Order (see paragraph 2.3 of the Closing Submission to which this forms Appendix 3 ("the Closing Submission").

1.2 This legal submission for SNH is limited in the manner and for the reasons given in the Closing Submission at paragraph 3.28.

1.3 The role and responsibilities of SNH are described in the SNH Statement of Case but in relation to European Sites it is worth recording here that SNH, along with Scottish Ministers and others, has a statutory duty in terms of Regulation 3(2) of the Habitats Regulations to *"exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive".*

2. LEGISLATION RELATING TO EUROPEAN SITES

2.1 The proposal for the Project has the potential to affect three European Sites, namely the Firth of Forth Special Protection Area, the Forth Islands Special Protection Area and the River Teith Special Area of Conservation. However, as detailed in the Closing Submission, the principal concern of SNH relates to the first site. Evidence at the inquiry was therefore focussed on the Firth of Forth SPA under the Birds Directive[101] but, as explained in paragraph 2.10 hereof, those provisions of that Directive which are important to the considerations before this inquiry were amended by the Habitats Directive. Accordingly, it is appropriate to consider the latter first.

---

[99] The Conservation (Natural Habitats &c.) Regulations 1994 (as amended) Regulation 10
[100] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna
[101] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009

2.2 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."*

2.3 Article 2.2 provides that:

"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."

2.4 Finally Article 2.3 states:

"Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics."

2.5 These general aims are then refined through Article 3.1 which requires that:

"*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 I and habitats of the species listed in Annex II, 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*."

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC."

2.6 Article 6 defines what is required of Member States for Special Areas of Conservation ("SACs"). Article 6.1 refers in general to the establishment of necessary conservation measures.

2.7 Article 6.2 requires that:

"Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objective of this Directive."

2.8 Article 6.2 states in general terms what needs to be achieved with regard to a Natura site. When developments are proposed it is necessary to consider whether they have the potential to have any impact on a site. It is therefore important to see if there is a possible connectivity between the site and the development. As the nature of development and factors affecting the qualifying interest of a site are variable, it is not possible to be prescriptive as to what needs further consideration. If, having regard to sound ecological principles, an initial consideration suggests that there may be a link between the development and a Natura site then it is necessary to proceed to the next level as required by Article 6.3. It prescribes the steps that must be followed to ensure that plans or projects do not adversely affect the integrity of the site. It states that:

"*Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public*."

2.9 Article 6.4 of the Habitats Directive (referred to as the "provisions of paragraph 4" in the previous paragraph) provides for the consideration of other issues, including those of socio-economic importance, after the appropriate assessment is completed and states that:

"*If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.*

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

2.10 Such paragraphs of the Habitats Directive outline the provisions required for consideration of plans or projects affecting SACs. However, Article 7 thereof amends the Birds Directive as follows:

"Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect to areas classified pursuant to Article 4(1)…"

2.11 It should be recorded that Directive 79/409/EEC was replaced by a codified version [102] incorporating the amendments of the Annexes to the Birds Directive which had been adapted on a number of occasions in response to scientific and technical progress and to the successive enlargements of the European Union. This is Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds. It should, however, be noted that the wording of Article 4(4) of the Birds Directive is unchanged.

2.12 Article 4(1) of the Birds Directive refers to the need for Member States to *"…classify in particular the most suitable territories in number and size as special protection areas…"*

2.13 The Habitats Directive has been transposed into domestic legislation by the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended) ("the Habitats Regulations")[103]. Regulation 48 indicates a number of steps to be taken by the competent authority (in this case, Scottish Ministers) before consent can be granted for the Project by the making of the Order. In 2010 the European Union issued guidance[104] ("the EU 2010 Guidance") which helpfully identified the following three broad stages in this step-wise procedure:

- Stage one: Screening
- Stage two: Appropriate Assessment ("AA") and
- Stage three: Derogation

Stage three (allowing consent for reasons of overriding public interest despite a negative assessment) has no application at this inquiry.

---

[102] SNH A1
[103] CD A8
[104] EU Energy developments and Natura 2000; October 2010

2.14 Although the EU 2010 Guidance is directed towards energy developments, that part dealing with the division of the procedure into three stages and the flow chart (Figure 11) have more general application. I now turn to the various steps in the two relevant stages.

3. STAGE ONE: SCREENING

3.1 *Step 1:* Consider whether the Project is directly connected to or necessary for "the management of the site" by which it is accepted that this refers to the purposes of nature conservation.

3.2 *Step 2:* Consider whether the project, alone or in combination, is likely to have a significant effect on the site. This is commonly called "the LSE test". This step applies only to the qualifying interests and the decision is informed by the site's conservation objectives. It is submitted that the proper application of the LSE test allows the removal at an early stage of the need for further consideration of those proposals that clearly have no connectivity or likelihood of impact, or that are obviously not going to adversely affect the integrity of the site. If, at this early stage, it is recognised that a number of unknowns need further survey work or consideration, this would indicate LSE. However, there will be cases where more information would help to clarify this judgement. Indeed, this need was recognised in 2007[105] with the addition to the end of Regulation 48(2) of "…*or to enable the competent authority) to determine whether an appropriate assessment is required".*

3.3 It is also necessary within Step 2 to consider whether there are any other developments that need to be considered in conjunction with the Project.

3.4 It has sometimes been argued by those seeking consents that the requirements of establishing LSE are demanding. This turns on arguments about the plain meaning of "likely" and "significant". On the former, it is argued that likelihood means probability, not possibility, and that the latter means an order of magnitude greater than ordinary.

3.5 Such interpretations do not appear to find support from any guidance documents. On "likely", Managing Natura 2000 Sites The Provisions of Article 6 of the Habitats Directive 92/43/CEE ("MN 2000 Sites") at paragraph 4.4.2 refers to the safeguards set out in Article 6(3) and (4) being triggered not by a certainty but by a likelihood and, with reference to the precautionary principle, states that it "is unacceptable to fail

[105] Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2007, Regulation 18

to undertake an assessment on the basis that significant effects are not certain." The European Commission produced a summary of legal cases in 2006[106] which supports this interpretation. For example, at page 36:

"…Article 6(3)…subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there will be a probability ***or a risk*** *(emphasis added) that the latter will have significant effects on the site concerned."*[107]

3.6 With reference to the precautionary principle described as one of the foundations of the high level of protection pursued by Community policy by which the Habitats Directive must be interpreted, it continues: "*such a risk exists if it cannot be excluded on the basis of objective information that the project will have significant effects on the site concerned. Such an interpretation, which implies that in the case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that…projects which adversely affect the integrity of* the site are not authorised..."

3.7 Such guidance is reinforced by the important judgement in Waddenzee[108] which has helped to clarify the correct interpretation of LSE. Paragraph 45 states that *"…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 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."* Paragraph 49 adds *"…where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site."*

3.8 On the interpretation of "significant", in some cases those representing developers in have argued that an AA will be necessary only if *inter alia* the impact was shown to be significant. In my submission the reverse is true as demonstrated in paragraphs 3.5/3.6. An AA must be undertaken unless **the risk of** significant effects can be excluded. Where the effect of a project is likely to undermine the conservation objectives of the site it must necessarily be considered to result in LSE. In that connection it is appropriate to draw attention to the decision in Commission v

---

[106] Nature and Biodiversity Cases: rulings of the European Court of Justice European Commission 2006
[107] See case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging;* Judgement of the Court of 7 September 2004, paras. 57 and 61 and confirmed in C-6/04 *Commission v. UK*
[108] Case C-127/02 [2005] Env. L.R. 14

Ireland[109] decided in 2007 where the Government of Ireland, after stating that the works in question within the Glen Lough SPA were merely maintenance works on existing drains which did not have a significant impact on the habitats of the SPA, was found to have infringed the first sentence of Article 6(3) by its failure to assess the impact of the works on the conservation objectives of the SPA. In that case, therefore, something as relatively minor as the maintenance of drains in an SPA was determined to constitute LSE, thereby triggering the next step, i.e. an appropriate assessment.

3.9 An approach that makes the establishment of LSE (Step 2) more demanding would have the effect in some cases of (i) advancing to Step 2 the evaluation of the effects of a proposal that should form an A.A. at Step 3 but at a level of scrutiny below that required at Step 3, (ii) thereby eliminating AA and (iii) reversing the burden of proof. It is respectfully submitted that this is wholly inconsistent with the precautionary principle.

3.10 For reasons detailed in the Closing Submission it is assumed that the Applicant accepts that there is LSE in the case of the SPA. There is no notice of an argument to the contrary. However, certain questions directed by Ms Wilson in re-examination of Dr Gilchrist might have been intended as support for an argument, although not hitherto specified, that at the LSE test one should identify any individual elements of the project that caused LSE; identify and, by implication, exclude any other elements judged not to cause LSE from future consideration in the AA. If that were to be put to this inquiry it is in my submission totally without a basis in law. Step 2 requires a consideration of whether a plan or project "is likely to have a significant effect on a European site", no more, no less. Whether there may at that stage be one or many forms of impact is irrelevant; all that is required to trigger Step 3, namely an AA, is LSE. Although the focus of an A.A. is likely to be on those qualifying interests upon which there is judged to be LSE, the AA is "of the implications for the site in view of that site's conservation objectives."[110] In no sense is the ambit of the AA constrained.

3.11 Finally on LSE, it is recorded that the competent authority (in this case Scottish Ministers) needs to consider the Project inclusive of any mitigation measures that form part of it. However, an AA would be necessary where the efficacy of the mitigation measure was in doubt.

---

[109] Case C-418/04
[110] Regulation 48(1)

4. STAGE TWO – APPROPRIATE ASSESSMENT

4.1 *Step 3:* If the decision on Step 2 is LSE, then appropriate assessment must be undertaken. This must be made in view of the conservation objectives of the site.

4.2 It is the obligation of the competent authority to consult SNH on the assessment and have regard to its representations.[111] In that respect it should be noted again that Regulation 3(2) of the Habitats Regulations requires that *inter alia* SNH *"shall exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive."*

4.3 For the purposes of an AA it is required that "*detailed information should be gathered on the site's ecological features and conservation objectives, and on the potential impacts of the plan or project on these conservation objectives"* to enable "*an assessment to be made on whether or not the plan or project, alone, or in combination with other plans or projects, will have an adverse impact on the integrity of the Natura 2000 site."*[112] This is a more robust level of scrutiny than the LSE test such that the Habitats Regulations include a statutory role for the Nature Conservation bodies and provide for public consultation where appropriate. It is consistent with an intention to allow at that earlier stage the removal from consideration of projects that have no likelihood of impact and the submission of those that remain to more detailed scrutiny. It follows that, with reference to paragraph 3.9 above, the "detailed information" at Stage two cannot exclude any information bearing upon potential impacts, whatever may have been the assumptions at the LSE test.

4.4 *Step 4:* In the light of the assessment, the competent authority must decide whether it can be ascertained that the proposal "will not adversely affect the integrity" of the site, having regard to the manner in which it would be carried out and to any conditions or restrictions subject to which the consent must be granted.[113] As is stated in the EU 2010 Guidance[114] "*The burden of proof is on demonstrating that there will be no adverse effects on the integrity of the site*" consistent also with Regulation 48(2) requiring the applicant to provide such information as the competent authority may require.

---

[111] Reg. 48(3)
[112] EU 2010 Guidance, page 65, Stage 2: Appropriate Assessment
[113] Reg. 48(5), (6)
[114] Page 65

4.5 This requirement of proof of the negative reflects the degree to which the precautionary principle is written into the Habitats Directive. The Waddenzee judgement states at paragraph 61:

"…all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of…for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."

4.6 It is submitted that the use of words such as "*the best scientific knowledge in the field"* demands that the competent authority can ascertain the absence of adverse effects ion site integrity only if the intensity and standard of the work to inform the AA is high.

4.7 Some of Ms Wilson's questions appeared to be directed towards ascertaining whether the representations of SNH under Regulation 48(3) were founded on (a) a conclusion of adverse effect on site integrity or (b) an inability to rule out such an effect. Such a distinction does indeed exist in logic but as is clear from the EU 2010 Guidance at page 83, these two possibilities **together** form **one** of the two conclusions identified and lead to a refusal of consent unless changes to the Project and/or mitigation measures could avoid or eliminate the predicted adverse effects.

4.8 No definition of integrity is provided in the Habitats Directive but Article 6.3 refers to the need to assess the proposals "…*in view of the site's conservation objectives*. " Integrity is defined in Circular 6/1995 (revised 2000)[115] and also in its English equivalent as follows:

"The integrity of a site is a coherence of its ecological structures and function, across its whole area, which enables it to sustain the habitat, complex of habitats and/or the levels of the species for which it was classified."

4.9 Reference to this definition appears in *inter alia* the EU 2010 Guidance on page 82 which also refers to a quality or condition of being whole or complete and a sense of resilience and ability to evolve in ways that are favourable to conservation. It is sometimes argued that if the area of a European site that is affected by a proposal is small in relation to its overall size, the integrity of the site will not be adversely affected. It is submitted that the correct approach must be that provided in the

[115] Annex E, Appendix A paragraph 2 SNH B1

guidance, not that of a simple comparison of relative size. Of a series of cases to that effect, that of Commission v Italy[116] is worthy of mention. The damage affected 7,000 square metres of an SPA comprising the whole of the Stelvio National Park in the Italian Alps extending to 59,809 hectares. The affected area was approximately 0.001% of the whole. Nevertheless the court held that the national authorities of Italy should not have allowed consent for the project without an A.A. as the works were likely seriously to harm the integrity of the SPA and that by allowing the development to proceed they had failed to take the appropriate steps to prevent deterioration of the SPA.

4.10 The concept of integrity is discussed in section 4.6.3 of MN 2000 Sites by stating that:

"The integrity of the site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the site's conservation objectives."

4.11 Although conservation objectives for European sites are site specific the approach taken when preparing these is set out below. Specific guidance for the content of conservation objectives has not been produced by either the EC or the Scottish Government. However, MN 2000 Sites states[117] that it should be based on the "significant" interests which are referred to as the qualifying interests. At section 2.2.3 it refers to the need to apply the criteria (i.e. for favourable conservation status) to the site as well as to the network level. The network level is the total resource of a habitat or species within and outwith sites. It should be noted that the Scottish Government has endorsed the approach that SNH has used in developing conservation objectives.

Conservation objectives for SPAs

a) To avoid deterioration of the habitats of the qualifying species (list) or significant disturbance to the qualifying species, thus ensuring that the integrity of the site is maintained.

b) To ensure for the qualifying species that the following are maintained in the long term:

- Population of the species as a viable component of the site
- Distribution of the species within the site
- Distribution and extent of habitats supporting the species

[116] case C-304/05
[117] s.4.5.3

- Structure, function and supporting processes of habitats supporting the species
- No significant disturbance of the species

The first part (a) of the objectives reflects the requirements of Article 6(2) of the Habitats Directive, which is to avoid deterioration within a Natura site. The second part (b), and subsequent bullet points, provides more detail as to the component parts of the integrity of the site that are considered when considering the steps referred to in Article 6.3. The bullets provide more detail of the ecological aspects that need to be considered. The first three of the bullet points reflect the definition of favourable conservation status for species as provided in Article 1 (i) of the Habitats Directive. The fourth bullet reflects the definition of favourable conservation status for habitats and this complements the third bullet. The final bullet again reflects the text of Article 6.2 of the Habitats Directive

4.12 It is sometimes argued that, provided that a site could continue to contribute to wider favourable conservation status, some damage is acceptable. This is not so. It is stated in MN2000 (4.6.3) that "*It is not allowed to destroy a site or part of it on the basis that the conservation status of the habitat types and species it hosts will anyway remain favourable within the European territory of the Member State".*

4.13 *Step 5:* Unless the competent authority, having carried out the AA and having regard to any agreed mitigation, is able to conclude that the integrity of the site will **not** be adversely affected, the Project cannot be consented.

4.14 The position of SNH at this inquiry is that the environmental information produced to inform the AA lacks the form of detail required to enable the competent authority to ascertain that the Project will not adversely affect the integrity of the SPA, a position which given the evidence of Dr Brampton in particular (see, for example, the Closing Submission at paragraph 4.9) may reasonably be assumed to have been recognised by the Applicant. Indeed it must be recorded, with reference to paragraph 1.1 hereof, that the Project includes (a) a very substantial area, the new extent of which has been identified in late Document [Sheet VII Ports Limits, Works Site and Dredging Limits Overlay: Rev A - Proposed modification to Ports Limits, Works Site and Dredging Limits Overlay] in which dredging operations could take place and in respect of which little environmental information has been produced (b) plans produced in respect of the location and extent of dredging are no more than "indicative" and (c) the works proposed in respect of contaminated land although, on this matter, SNH was precluded from participating in the inquiry.

4.15 Given the foregoing, it may be argued for the Applicant that the Order may nevertheless safely be made on the basis of other consent procedures to which the Project may be subject and which themselves would be the subject to the provisions of Regulation 48 of the Habitats Regulations. It is respectfully submitted that, aside from some references to the need for future licensing by Marine Scotland and SEPA, the Applicant has given no indication of this argument, let alone by reference to Regulations 60-63 of the Habitats Regulations. The difficulty of preparing legal submissions in a vacuum is mentioned in the Closing Submission but I turn now to a relatively brief consideration of this putative argument and subject to a reservation of the right to make further submissions after the Hearing session.

4.16 On behalf of SNH I submit that the Project cannot be consented by the making of the Order unless Scottish Ministers have been able to conclude (and contrary to the representations of SNH) that there will be no adverse effect upon the integrity of the SPA[118]. Any consent, including in this case, the Order, cannot be made conditional upon further survey work/assessments and the like or in reliance that there will be a subsequent AA.

4.17 The substantive requirements of the Habitats Directive are clear and, as transposed into domestic law by Regulation 48(1), direct *inter alia* that "**before** deciding to give any consent" for a project with LSE, a competent authority shall undertake an AA and (Regulation 48(5)) "the authority shall agree to the plan or project **only after** having ascertained that it will not adversely affect the integrity of the European site". [emphases added]. It makes no provision for that conclusion to be in any sense dependant or conditional upon future appropriate assessments or by a form of rolling CEMP which, along with changes proposed for the Order (at present principally to Clause 17), is for discussion at the Hearing session. It may be argued by the Applicant that the Project has a level of complexity that renders it difficult to produce all of the required information at this stage. It is not for SNH to comment on that matter in detail but, as David Elvin Q.C. commented in 2004[119], "compliance with the Habitats Regulations is not optional". The ambit of the Order is the whole Project and that is the subject matter of the AA. It is also appropriate to mention that two large infrastructure projects were consented in relatively recent times by Scottish Ministers where it was judged in each (and such were the representations of SNH) that there was no adverse effect upon site integrity. These were the Aberdeen Western Peripheral Road and the Beauly/Denny transmission line. Enough information was available to reach such a conclusion in respect of both the works involved and in the

[118] para. 4.11
[119] J.P.L.2004 Supp. (Occasional Papers No 32), 11-40 at 82

construction methods identified in a document that is the broad equivalent of the CEMP.

4.18 Where a project requires assessment under Article 6 of the Habitats Directive, it is likely to require also an EIA but these assessments are independent of each other[120]. The differences were highlighted by the Advocate General in *Commission v. Austria*[121]

> *"The EIA Directive contains procedural provisions designed to ensure that the consideration given to environmental issues is improved. It sets no binding environmental standards, so that it does not oblige the competent authorities to draw particular conclusions from the findings of the environmental impact assessment. The influence of the environmental impact assessment stems above all from the fact that the authorities, developers and the public are informed at an early stage about environmental issues and the project can as a result subsequently be adapted….to meet these concerns"*
>
> *The Habitats Directive, by contrast, lays down substantive requirements regarding approval of a project, which are intended to be served by the procedure envisaged in Article 6(3) and (4) of the Habitats Directive following an impact assessment followed, if necessary, by the examination and consideration of alternatives. As a rule, this procedure prevents the integrity of a protected area from being adversely affected."*

A very similar statement emanated from the EC on 26 March 2007[122] in these terms:

> *"…it should be stressed that the EIA Directive contains procedural provisions designed to ensure that the consideration given to environmental issues is improved, while the Habitats Directive lays down substantive requirements regarding approval of a plan or project, which is intended to be served by the procedure envisaged in Article 6(3) and (4) of the Habitats Directive "*

4.19 The EIA procedure recognises the need for early assessment of impacts such that multi-stage consent procedures in planning applications are defined in the EIA Regulations of 2011 at Regulation 2 and feature in Circular 3/2011 at paragraphs 144 – 154. By analogy that is what may be envisaged in this case. The genesis of these provisions in respect of EIA lies in two English cases which gave rise to the phrase "the Rochdale Envelope" after two cases involving Rochdale MBC and in consequence of rulings by the ECJ[123] that the effect of a project on the environment

---

[120] Circular 3/2011: The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 at paragraph 93
[121] Case C-209/04
[122] Commission Staff Working Document – Accompanying Document to Communication From Commission Trans-European Networks: Toward An Integrated Approach {COM (2007) 135 final}
[123] C- 201/02: Reference for ruling in the Queen on application of Delena Wells and C-508/03 Commission v U.K

must be identified and assessed at the stage of the principal decision. Paragraph 144 of the Circular starts with "If sufficient information is given with the application for planning permission", and explains that authorities can minimise the risk of the later emergence of new environmental information, I submit that in essence the thrust of this guidance is to tell the decision maker to (a) insist that the identification and assessment of environmental information is conducted at the front end of the process and (b) should any such effects not be identified or identifiable at that time, to require further information and assessment at the subsequent stage. The obvious risks to a development of the emergence of new information at a later stage in the process is mentioned.

4.20 Lastly, having considered the various steps in the procedure, it is appropriate to make brief mention of the Oxford Brookes methodological guidance[124] used by Dr Peter Gilchrist in his assessment. This is not guidance favoured by SNH (and the other Nature Conservation Bodies) for *inter alia* these reasons:

- The flow chart is flawed as :
  - It fails to mention at step 2, a possible combination with other plans or projects
  - The question "will the PP adversely affect the integrity of the site" fails to recognise the negative nature of this step, a fundamental error also found in Circular 1995 (revised 2000) and in MN 2000. This is to be contrasted with the flow chart in the EU 2010 Guidance
  - The error just identified is not precautionary and the guidance pre-dates the decision in *Waddenzee*
- It pre-dates the "Dilly Lane" judgement requiring that in the LSE test, mitigation measures included in the project should be taken into account. [125]

4.20 Finally on Step 5, the submission of SNH at this point, subject to the terms of the Hearing session, is that Scottish Ministers are required by the Habitats Regulations to decide at the stage of the application for the Order if an absence of adverse effect upon the SPA has been demonstrated and cannot, by reference to other required consent procedures, make the Order conditional upon further appropriate assessments

Louise Cockburn

22 March 2012

---

[124] APP Q24
[125] R. (on the application of Hart DC) v Secretary of State for Communities and Local Government [2008] 2 P. & C. R. 16

APPENDIX

References

Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC (2000)

http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC (2007)

http://www.espo.be/downloads/archive/9e04015a-32b3-4755-94bc-36d0bd699a01.pdf

The Conservation (Natural Habitats, &c.) Regulations 1994

http://www.legislation.gov.uk/uksi/1994/2716/made/data.pdf

The Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2007

http://www.legislation.gov.uk/ssi/2007/80/pdfs/ssi_20070080_en.pdf

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna flora

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML

Circular 3/2011: The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011

http://www.scotland.gov.uk/Publications/2011/06/01084419/0

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:020:0007:0025:EN:PDF

EU Energy Developments and Natura 2000 (October 2010)

http://ec.europa.eu/environment/nature/natura2000/management/docs/Wind_farms.pdf

Nature and Biodiversity Cases rulings of the European Court of Justice (EC 2006)

http://ec.europa.eu/environment/nature/info/pubs/docs/others/ecj_rulings_en.pdf

C-127/02 – Link takes you to case summary page

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C-

127%2F02&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100&Submit=Submit

C-6/04 - Link takes you to case summary page

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C-6%2F04&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100&Submit=Submitt

Case C-418/04 – Link to Judgement

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0418:EN:HTML

Case C-304/05 – Link to Judgement

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0304:EN:HTML

Case C-209/04 – Link to Judgement

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0209:EN:HTML

Case C-201/02 – Link to Judgement

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0201:EN:HTML

Case C-508/03 – Link to Judgement

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0508:EN:HTML

Commission Staff Working Document – Accompanying Document to Communication From Commission Trans-European Networks: Toward An Integrated Approach {COM (2007) 135 final}

http://tentea.ec.europa.eu/download/calls_2009/COMM_PDF_SEC_2007_0374_1_EN_DOCUMENTDETRAVAIL.pdf

Lewis wind farm decision letter – link to page that gives access to letter – no direct address for letter

http://www.scotland.gov.uk/Topics/Business-Industry/Energy/Infrastructure/Energy-Consents/Applications-Database/Wind/Lewis-Decision-Index/Lewis-Wind-Farm-Decision

Circular 6/95 - Link to contents page

http://www.scotland.gov.uk/library3/nature/habd-00.aspp

Appendix 2b: legal submission by Scottish Natural Heritage to the RICT public local inquiry, July 2012

Rosyth International Container Terminal (Harbour Revision Order)

Appendix to Further Submission on behalf of Scottish Natural Heritage

1. INTRODUCTION

1.1 This is a further legal submission for Scottish Natural Heritage ("SNH") presaged in that dated 22 March 2012 ("the First SNH Legal Submission") and following upon the closing submission for the applicant dated 12 April and 3 May.

1.2 The submission for SNH in respect of the evidence led at the inquiry are contained in the closing submission to which the First SNH Legal Submission is an appendix.

1.3 The submission is directed towards two arguments of the applicant (upon which no substantive indication was given to the inquiry[22]) that are now set out in its closing submission, to the broad effect that:

1.3.1 the possible impact of any elements of a plan or project should be excluded from consideration for the purposes of Regulation 48 of the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended) ("the Habitats Regulations") if they fall also within the aegis of another competent authority, thereby deferring Habitats Regulations decisions on these, and;

1.3.2 that there is no requirement for an appropriate assessment ("AA") in this case because of an absence of likely significant effect ("LSE").

1.4 Unless stated otherwise references to paragraph numbers are to those in the applicant's closing submission.

2. THE SCOPE OF THE ASSESSMENT OF A PLAN OR PROJECT

2.1 There is a theme within the applicant's closing submission that implies that the process of assessment under the Habitats Regulations is relevant to the EIA process and, by implication, subordinate thereto.[23] In my submission this is wrong and serves to obscure the procedure. As is briefly acknowledged in paragraph 8.14, these regimes are entirely separate in law. But they are also very different. Reference is made to the SNH First Legal Submission at paragraph 4.13 where the differences are explained including the substantive requirements of the Habitats Directive in contrast to the procedural provisions of the EIA Directive. Although in practice it may in many cases be "appropriate to make use of the environmental information contained in the ES"[24], the

[22] See paragraphs 3.10 and 4.15 of the First SNH Legal Submissions

[23] see for example paragraph 2.47

[24] paragraph 8.14

competent authority requires to assess if there is LSE and if so, to carry out an appropriate assessment. For each of those purposes the applicant for consent shall provide to the competent authority such information as may be required. The form in which that information is presented is, unlike an EIA, not mandatory. In this procedure the competent authority is not constrained by the contents of the ES: the absence of proper identification in the ES (or the Report to Inform an Appropriate Assessment) of an effect identified by objectors does not eliminate such effects from the assessment. The link between these two procedures is the practical, not legal, one that the ES may contain much information that is useful.

2.2 The applicant's argument of an "inter-relationship" between the work for these legally separate assessment procedures refers [25] to this being recognised in European Guidance and in the *Hargreaves* case in England upon which I comment later. No detail is offered about the EU guidance concerned. It is enough to state at this juncture that the information needed for consideration in terms of the Habitats Regulations *may* in any particular case be different from that required for EIA.

2.3 In paragraph 8.23 it is argued that Regulation 48 of the Habitats Regulations should be given a purposive interpretation and not be "subject to strict interpretation". The difficulties in that approach are that this is a statutory provision, clear in its terms. There is no ambiguity. But on the matter of the purposes of the provision, the aims of the Habitats Directive are set forth in Section 2 of the First SNH Legal Submission and, one can usefully add, the preamble to the Habitats Directive setting out the purposes includes "whereas ***an*** (emphasis added) appropriate assessment must be made of any plan or programme…". The purpose of Article 6(3) and of Regulation 48(1) is clear[26] , namely the need to submit the plan or project requiring consent to identified procedures of scrutiny before consent may be granted. It does not state, nor in my submission admit of any possibility, that parts of a plan or project for which consent is sought can be eliminated from consideration on the basis of an expectation that a different consent regime may subsequently become involved at an indeterminate future date. That the plan or project is to be considered in combination with others reinforces the concern to ensure that the decision is based on a complete view of impacts on site integrity.

2.4 On the matter of authority[27] the relatively recent case of *Cornwall Waste Forum*[28] is relevant. This was a judicial review challenging the grant of a planning permission for a Waste from Energy plant advanced by objectors

[25] paragraph 8.15

[26] see paragraph 4.14 of the First SNH Legal Submissions

[27] Paragraph 10.46

[28] *Cornwall Waste Forum v Secretary of State for Communities and Local Government* [2011]EWHC 2761

concerned about air emission impacts on two SACs. At issue were the respective roles of the Secretary of State (granting planning permission) and the Environment Agency (granting an environmental permit). The court held that the effect of air emissions was a planning matter and not wholly one for EA. On the matter of authority[29] the paragraph offers no support for having eliminated elements of the project from consideration. The acknowledgement in the first sentence of paragraph 10.49 is indeed unsurprising given the *Waddenzee* decision[30] but "may suggest" should be replaced by such as "makes it clear". Remarkably, the second half of that same sentence roundly rejects the notion that this seminal case has general application and such support as can be found for that stance[31] is based on the false assumption that decisions on EIA and HRA are based on the same principles and tests. The reference[32] to "competent national authorities" is not significant as it is aimed at all member states and most of the language of the Directive is in the plural.

2.5 There is also an assertion that dredging is entirely a matter for Marine Scotland ("MS") and that it will be the competent authority in relation to the Habitats Regulations. It is accepted that MS (as the letter of 17 August 2010 states) need to be consulted and that an application to that body for a licence under the Marine (Scotland) Act 2010[33], whenever made, will trigger its consideration of the project in terms of *inter alia* the Habitats Regulations. However, that cannot happen until an application is made for a licence and there is an application now for a project that includes the need for a dredging channel. As is acknowledged[34] the HRO will grant the power to carry out dredging. In this respect it is analogous to the grant of planning permission in principle. Reference is made to the First SNH Legal Submission at paragraph 4.15. On the matter of Regulation 52[35] dealing with co-ordination among competent authorities, the prudent method adopted elsewhere is to apply for HROs simultaneously with other associated consents. The reference to the 2007 EIA Regulations is another example of the conflation of these and the Habitats Regulations.

3. LSE AND AA

3.1 The First SNH Legal Submission identifies at some length the various stages and steps of a "step-wise" procedure. Those steps upon which I now focus are those arising from the closing submission for the applicant, being numbers 2 (LSE),

[29] paragraph 10.46

[30] SNH A2

[31] paragraph 10.50

[32] paragraph 10.49

[33] CD A6

[34] paragraph 10.52

[35] Paragraph 10.54

one of the screening steps and 3 (AA), the first of the Assessment stage. It is argued for the applicant[36] that there is no LSE and thereby no need for an AA.

3.2 This starts in paragraphs 8.40-41 where reference is made to some conclusions in *Waddenzee*: on those there is no material issue. The attention of the Reporters is drawn in that regard to Section 3 of the First SNH Legal Submission. Attention then focuses on the question of mitigation. It seems that parties agree on the point that, for the purposes of determining LSE, a project should be considered inclusive of any mitigation measures forming part it However, what is left unstated in the applicant's closing submission with reference to the *Hart* case is that effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported. In both the *Hart* and *Hargreaves* cases the nature conservation body was satisfied that the likely effects would be neutralised by the proposed mitigation measures. As stated in the First SNH Legal Submission an AA would be necessary where the efficacy of the mitigation measures was in doubt.

3.3 It is argued on the basis of the *Hargreaves* case[37] that

3.3.1 there is reasoning in the judgement that no AA was required which is "instructive" for present purposes, and:

3.3.2 for screening the first stage is an identification of impacts to be considered for screening.

The precise reasoning in 3.3.1 is not identified, perhaps because the inquiry concerned a scheme that appears to have been subject to a previous AA, where Natural England had agreed that a revised AA was unnecessary and where the individual circumstances dictated the reasonableness of the decisions taken. On the matter of 3.3.2, the judge was merely stating that the screener was trying to say that there were identifiable impacts that needed to be considered in judging whether there was LSE.

3.4 As to the assertions about the standard of proof[38], one looks to the Habitats Directive. Article 6(3) is one way in which the aim of 6(2) is delivered and therefore every decision must be directed to that aim. Unless there is LSE there is no AA. For LSE one has to be sure that the project is not likely to undermine the conservation objectives. "Likely" is dealt with in the First SNH Legal Submission at paragraph 3.5. If the argument is that the standard of proof to establish LSE (i.e. to avoid AA) is less demanding than that for an AA, the effect is to allow certain effects which would be regarded in the AA procedure to be significant (whatever might be the decision on site integrity) to escape further

[36] but see paragraph 3.10 of the First SNH Legal Submission and paragraph 4,6 of the precognition of Dr Gilchrist

[37] paragraph 8.43

[38] Paragraphs 8.46 and 8.47

consideration at that level of scrutiny. The aims of the Habitats Directive are consistent and that requires an application of the same degree of rigour at all stages.

3.5 In the very lengthy closing submission for the applicant there is a refrain which suggests that unless it has been demonstrated by SNH (or others) at an early stage that there is an effect shown to be likely and significant, there is an absence of fair notice and, impliedly, that effect can safely be ignored. However, although it is recognized and accepted that objectors (and developers) should all co-operate in relation to the procedure, the party conducting the assessment is the competent authority with the powers to require the applicant for consent to submit appropriate information [39]. It is not for SNH to produce such information, certainly in regard to detailed measures intended to mitigate likely effects.

3.6 Where the *Hargreaves* case may be of interest is the claimant pointing to correspondence from the European Commission expressing in 2008 some concern about the possible effect of the *Hart* case. One commentator has suggested that the issue is likely at some point to come before the ECJ which may struggle with that case on the basis that the two steps of LSE, followed by an AA on site integrity are lost if developers are allowed to fight their case on LSE alone. In this respect, attention is drawn to paragraph 3.9 of the First SNH Legal Submission.

3.7 It is asserted in the applicant's closing submission[40] that SNH has adopted an entirely flawed approach to Article 6 and that[41] their approach "intertwines the first stage…with the standard of proof of that relates to the second stage" and such like. It is submitted that the errors are those of the applicant and its team. The statement that the case of SNH is predicated on the proposition that the application will fail unless the applicant "has demonstrated beyond reasonable scientific doubt that risk of any likely significant effect on the SPA has been excluded" is unsustainable: this is some form of amalgam of two steps (they are not tests as claimed) whose genesis is **not** to be found in submissions made for SNH. The argument by SNH that an AA is required follows from the application of the procedure set out in the First SNH Legal Submission. By contrast the legal argument now advanced by the legal team for the applicant flies in the face of the RIAA and statements from the authors thereof that an AA is required.

3.8 In my submission an expansion (in time and detail) of the LSE step with the production of information of the nature required of an AA but aimed by an applicant for a consent at avoiding the AA step is incompatible with the

[39] see para.2.1 hereof

[40] For example paragraph 8.46

[41] Paragraph 10.43

precautionary principle, given the burden of proof in the latter. The "drip by drip" nature of the production of information, particularly if an RIAA is produced, only to be utilised for an LSE test is a manipulation of the legislation and has the propensity to allow the granting of consents that would not be allowable in terms of Regulation 48(5). An example is found in paragraph 10.60 where there is an explanation provided for the curious phrase "postulated likely significant effect". This is based on an alleged failure by SNH to provide "a scientific assessment that demonstrates a particular potential impact would result in a likely significant effect". This despite the production of an RIAA on behalf of the applicant demonstrating an acknowledgement of LSE.

4. CONCLUSION

The very lengthy arguments advanced on behalf of the applicant are directed towards:

(i) fighting their case on the basis of the LSE test and;

(ii) obtaining consent in principle for dredging operations while eliminating them from present consideration.

In my submission their focus on EIA to the relative exclusion of HRA serves only to confuse matters. On the first point the purpose of the LSE step is to allow the early removal from consideration of those proposals which do not pose a risk and submit the rest to a more detailed scrutiny. That step-wise procedure will be lost if the focus is on producing a drip-feed of information ostensibly to inform the LSE decision after, for example, the production of an RIAA. This avoids the strictures of Regulation 48(5). In this case it is combined with arguments that there is a less demanding standard of evidence at the LSE step and implications that it is for objectors to identify effects they claim to be significant and provide a scientific case for that conclusion. On behalf of SNH I submit that this approach is wholly erroneous.

In terms of point (ii) I submit that for the reasons herein argued, the terms of the Habitats Directive and Regulations require the project as a whole to be subject to appropriate assessment.

Louise Cockburn

6 July 2012