

## **Note of main discussion points and actions of LINK meeting to discuss how well Scotland is complying with the EU Birds and Habitats Directives.**

**Date:** 04.08.2014    **Venue:** RSPB Edinburgh    **Time:** 10.30 to 13.00 hrs

**Taking part:** Beryl Leatherland (chairing, SWLG, LINK trustee), Richard Evans (RSPB), Calum Duncan (MCS, Convenor LINK Marine TF), Pete Minting (ARC), Anne Youngman (Bat Conservation Trust), Tess Jones (BSCG), Gus Jones (BSCG, Cairngorms Campaign), Richard Luxmoore (NTS), Alice Farr (Buglife), Jeff Knott (WWT), Sarah Gregerson (ClientEarth, working with WDC & MCS,) Esther Brooker (LINK marine policy officer), Alice Walsh (LINK staff).

**Apologies** Bruce Wilson [SWT], Helen McDade [JMT], John Low [JMT], Mike Daniels [JMT], Sarah Dolman [WDT]

**Background:** The issue of 'appropriate assessment' under the Directives, and the perceived extent of failure to comply, was raised at the January network meeting. As a result, this meeting was arranged for information exchange and discussion and to explore any necessary steps that could be taken together.

**Presentation:** Richard Evans talked through his presentation ([slides are available](#) on the members' website and give details such as relevant articles and useful reference sites), and covered a range of matters including the aims of the Directives, the terminology involved, and the Natura tests i] Alternatives, ii] Imperative reasons of Overriding Public Interest [IROPI] considerations and iii] the feasibility of Compensation proposals.

Outline details of 2 case histories had been circulated in advance: by Pete relating to [natterjack toads](#), an EPS, at the Solway Firth; and by Beryl relating to the development of a [container terminal](#) involving considerable dredging at a site adjacent to part of the Firth of Forth SPA. [both available on the LINK members' website]

Questions and clarifications raised included:

Article 6.2 - the only exclusions to requirement for permissions (on land) are activities carried out in the conservation interest. Routine activities (ie maintenance dredging) require licensing, stated clearly in the guidance and case law. The [EC website](#) is an excellent resource for information, guidance and case law.

Appropriate Assessment [AA] – in Scotland this generally involves surveying the extent of habitat, species, number of individuals etc at a site. These baselines should be maintained. The potential impacts of the proposal are assessed. Mitigation and its likely effectiveness can be considered at this stage. The "likely significant effects" of the proposal have to be quantified. An assessment of possible impacts on "site integrity" relates to the acceptable level of loss, and this should be a very high level test. Usually the AA report provided by the developer needs to be scrutinised in depth and unpicked. As part of the EIA process NGOs can get involved at an early consultation stage and it is essential to comment in detail. It was suggested that it is useful for NGOs to get legal input if possible, on where developer's case is flawed (BSCG experience) to ensure a valid legal case can be made.

European Court of Justice case law mostly deals with cases where a proposal has not been subjected to adequate investigations leading to the production of the AA. Cases where there are procedural issues around such matters as giving adequate notifications, and thus time to comment/participation come under the Aarhus Convention.

Mitigation measures: There is no obligation on the decision maker to take mitigation measures at face value and as described in the AA – some clearly will not work. The issues of inadequate monitoring arrangements and the lack of an obligation to do this unless specified in planning conditions after the development goes ahead were also raised.

**General Discussion:** Some specific examples were raised for consideration:

The Lewis windfarm application failed on the Alternatives test – individual sites could not be said to undermine national targets as development was possible in other areas.

An example involving the IROPI test where Public interest (socio/economic) vs public interest (environment) considerations was the Trump golf development. Governments can ask the EC nicely for permission to override in the public interest. Case law on EC website in relation to these matters gives a good insight into their approach. Government must have full information to quantify impacts, and this is provided through the AA process. Message to gov = win, wins, in the public interest.

The Ribble example was described within Richard's presentation – in this case there is a danger of setting a precedent if it is not challenged in court. RSPB may appeal, though may not get permission to challenge it in the appeal court. Apparently, 20% trimmage of protected populations is already being factored into thinking on Marine Protected Areas.

Marine situations: these are a different case entirely, where activities do not come under planning law, and thus are currently not controlled. The precautionary principle is not clearly applied and damaging activity, if stopped, is done so after the damage has occurred. Only a handful of areas have any control measures in place. Operations Requiring Consents [ORCs] are not applicable in marine sites. HRA 6[3] doesn't apply to fishing [as it is not a plan or project], so considerable damage can ensue. ClientEarth/MCS/WDC have recently made efforts to challenge this state of affairs in court, and this has shown that officials in England now realise they have had a charmed existence – so the situation is challengeable. There is a need to push for cases to go through appropriate assessment, and to challenge government to work out what that means, and to follow requirements.

Concerns were also raised about site management and the need to give consideration to adding more sites [or species to existing sites] in both the sea and on land.

Viking windfarm case Shetland: this raised the issue of Scottish ministers giving more weight to developers than to their statutory nature conservation advisors, [among other points].

It was suggested that SACs designated for certain species could/should have other priority species added – eg wildcat, natterjack toad, capercaillie. Additionally concerns were raised that there are limited resources available for information gathering on habitats and populations [it is important to have accurate baselines in these areas]. Gus described exchanges involved in the recent consideration of providing Green Bridges for wildcat [and other species] at points along the A9.

**Review of EU Natura legislation** – Richard gave the alert to be aware that this important review is imminent. [Fitness check](#) - timeline:

- Launch of a Study Contract to support the Commission in collecting and assessing evidence for the fitness check (March/April 2014 to autumn 2015)
- Public internet consultation (end 2014/start 2015)
- EU assessment of Article 17 Habitats Directive and Article 12 Birds Directive national reports (first half of 2015)
- Stakeholder meeting at Green Week (June 2015) or another appropriate forum to discuss the preliminary outcome of the assessment
- The Commission will report on the findings of the Fitness check at the end 2015/early 2016.

It was emphasised that there is a need for LINK members to engage with this review, either as LINK, as individual members, or both. The threats are obvious. There would be an opportunity to raise this at the Joint LINKs Conference on 22/23 October this year. We are already aware that there are major pressures from developers across the EU to relax measures, and this also has appeal for some governments. It is very important that any criticisms of how the legislation is working do not undermine what is currently specified in the Directives – we have good legislation which shouldn't be unpicked.

**Action: ALL at a future date once known.**

#### **Next steps and action points:**

Before deciding further we need more clarity of where the common threads are, eg, is there a question of lack of appropriate guidance, poor implementation of the processes involved, or problems with the application of the law [failure to follow the requirements of the AA, failure to apply the Directives' fitness tests]? In order to establish this and to quantify issues it would be necessary to examine as full a range of cases as possible. There seemed to be knowledge of several possible examples among the participants at the meeting and Beryl volunteered to do an initial collation of members' case studies. It was recognised that it is also important to recognise examples of good cases showing how the Directives have been used well.

**Action: ALL to send synopsis of case studies to Beryl. Beryl to examine and collate**

Site condition monitoring – not in scope of this initial analysis though RSPB is interested.

**Action ALL: Send relevant information on such cases to Richard Evans.**

**Other groups within or associated with LINK:** The matter could be raised at the network event in August and Alice will ask Jen to put it on the agenda. **Action: Alice**

These matters could also be discussed, as mentioned above, at the Joint LINKs Conference in October, which Sarah and Jeff would be attending in person. There is probably a need for strong support for Directive compliance from many directions. The group within LINK that would normally consider such matters is the Governance Group; they have expertise in tactics and advocacy, and there could be discussion with its members. There is similarly scope to use our membership of the European Environment Bureau [EEB] and the IUCN for the same purposes, and to raise specific issues. Stuart Brooks [JMT] is the LINK rep on the IUCN UK Committee. Andy Myles (LINK staff) attends EEB AGMs annually. There is a meeting with DG environment in London on the 30<sup>th</sup> October at which Mary Church is

representing Scottish LINK and this may be a relevant matter to raise. The Environmental Law Centre is a possible source of lawyers to consult with; and there had been disagreement expressed with some judicial decisions during the meeting.

**Action Points: Beryl to brief Mary Church attending for SEL; and to discuss with Stuart Brooks**

Sarah [SG] endorsed the concerns about poor implementation in the marine environment already expressed and anxieties about the imminent Directive review. She emphasised that we must retain the level of legislation that we have as well as having ambition. Her final comments here are very appropriate.

Thanks were given to Alice for organising the logistics while Richard and Beryl were on holiday, the RSPB and their staff for hosting us and assisting with teleconferencing for Sarah and Jeff, and to Richard for his very appropriate and informative presentation.