

Mr Alasdair Graham
Transport Scotland
Buchanan House
58 Port Dundas Road
Glasgow
G4 0HF

Your Ref: A90 AWPR

Our Ref: CNS TR AWPR

Date: 8th August 2008

Dear Mr Graham

**Aberdeen Western Peripheral Route (AWPR)
River Dee Special Area of Conservation (SAC)
The Conservation (Natural Habitats, etc.) Regulations 1994 (as amended)
Appropriate Assessment Appraisal Report
European Protected Species - Otter**

Thank you for sending SNH a copy of the appropriate assessment appraisal report for comment. This letter provides updated advice from SNH, but should be read in conjunction with our previous responses of 9th March 2007 and 14th December 2007 to the Environmental Statements and also 5th June regarding the draft Species Management Plans. I apologise for the delay in providing this advice, but as you may have been aware I have been heavily involved in PLI work since April.

Background

The requirement for an appropriate assessment appraisal report has been highlighted by SNH in our previous responses. This is due to the requirement for the AWPR to bridge the River Dee, which is designated a Special Area of Conservation (SAC) for salmon, otter and freshwater pearl mussel. In our earlier responses we have advised that there is likely to be a significant effect on these qualifying interests of the SAC from the construction and operation of a road bridge across the River Dee, hence further consideration is required.

The appropriate assessment appraisal report provides additional information not previously provided in either of the Environmental Statements (ES). This information has allowed SNH to assess and consider further the impact of the construction and operation of the River Dee crossing on the qualifying interests associated with the SAC designation, both directly and indirectly, and we are now able to provide our advice.

We welcome the provision of the report prepared by Jacobs and commend its thoroughness and exploration of the impacts associated with the construction and operation of the proposed AWPR. The consideration of impacts, with and without the proposed mitigation, has been extremely helpful in our consideration and appraisal as to whether or not the River Dee crossing and AWPR construction activities would have an adverse effect on the integrity on salmon, freshwater pearl mussel and otters within the SAC.

SNH Advice

SNH's advice is that this proposal is likely to have a significant effect on the qualifying interest(s) of the site. However SNH would further advise Transport Scotland and subsequently the Scottish Ministers that on the basis of the information provided and appraisal carried out to date, that if the proposals are undertaken strictly in accordance with the following conditions / legal modifications, then the proposal will not adversely affect the integrity of the site.

- a) Construction and Mitigation Method Statements to be agreed and incorporated in the Construction Contract documentation, including the New Works Regulations, and implemented for the following:
 - River Dee,
 - Kingcausie Burn
 - Burnhead Burn
 - Blaikiewell Burn
 - Milltimber Burn
 - Minor Watercourses

Any amendments to these or the more detailed Construction Method Statements prepared by the contractor(s) must be agreed prior to works commencing with SNH and SEPA.

- b) Species Management Plans to be finalised and implemented and set out in the Construction Contract documentation, including the New Works Regulations and Contract Specification.
- c) The appointment of an independent team of experienced and relevantly qualified Ecological Clerk of Works (ECOWs) to oversee the construction activities. All such appointees should have the authority to halt works, monitor and report on the implementation against agreed Method Statements. The appointment of such a team should cover pre, during and post construction periods and will involve the contractor(s) advising the ECOWs of any changes and they in turn inform and seek agreement from SNH, SEPA and Transport Scotland, prior to any changes to working methods occurring.
- d) All relevant monitoring equipment is supplied and operational prior to the commencement of works and is regularly checked and maintained e.g. turbidity probe and relevant personnel are trained in the use of and analysis of data collected. All such data should be regularly reported.
- e) The warning trigger value and absolute maximum value for turbidity for works in the River Dee will be agreed prior to any works commencing on site with SNH and SEPA, as identified in the report.

The appraisal referred to above includes the *Report to Inform the Appropriate Assessment*, Jacobs April 2008 and our consideration of this report in relation to the individual qualifying interests and the conservation objectives for the site:

Atlantic Salmon

Potential impacts include:

1. Water quality deterioration from construction
 - Sediment runoff leading to short term deterioration or long term loss of spawning habitat
 - Pollution run off from construction leading to death or damage to salmon
 - Pollution arising from operational drainage resulting in damage/ mortality or loss / deterioration of habitat
2. Underwater transmission of noise / vibration during construction and artificial lighting during construction / operation which may cause disturbance, barriers to fish migration, habitat changes and physical damage to fish.

Freshwater Pearl Mussels

Potential impacts include:

1. Water Quality Deterioration
2. Habitat deterioration
3. Impacts on larval hosts (salmon)

Otter

Potential impacts include:

1. Direct mortality during construction / operation
2. Disturbance – noise and light
3. Construction of bridges and culverts (fragmentation of habitats and barriers to movements)
4. Destruction / changes to riparian habitats
5. Reduction in distribution and abundance of freshwater prey.

All impacts are considered to be short term and relate to the construction period only.

Detailed consideration of each of the draft Watercourse Construction Method Statements within the Report and also the individual Species and Habitat Management Plans provide sufficient evidence to indicate adequate mitigation measures can be secured to avoid adverse effects on integrity for each of the qualifying interests of the River Dee SAC.

Specific mitigation measures include:

- Timing, phasing and duration of works,
- Avoidance of in channel works where salmon and freshwater pearl mussel have been recorded
- Pollution prevention measures
- Sediment control measures
- Adherence to best practice working measures
- Employment of ECOWs
- Recording and agreement on water turbidity and sediment loading for short and long term periods
- No direct drainage run off into the watercourses during operation of the road
- Provision of temporary construction SUDS ponds and final operational SUDS ponds
- Soft start procedures for drilling
- Monitoring of piling operations in channel
- Timing and extent of drilling operations
- Directional use of lighting and timing of lighting and hours of working
- Retention and recreation of riparian vegetation buffer strips

European Protected Species - Otter

As well as being a qualifying interest of the River Dee SAC, otters are also a European Protected Species and further consideration is required under the Habitat Regulations. The extent and density of otters within the River Dee is high, with the population also recorded as being of high quality. Otters use different habitats within their home range. Home ranges can extend to 10-20km, however in the Dee where the density is high; there has been no robust method in calculating the number of home ranges and therefore number of individuals using the wooded, banks, marshy areas and islands. The area surveyed for the AWPR is calculated as supporting 1-3 individuals, with significant otter activity recorded including foraging, commuting, lying up and breeding.

Regulation 44 (3) (b) of the Conservation (Natural Habitats &c.) Regulations 1994 as amended, states that a licence cannot be issued unless the licensing authority is satisfied that the action proposed "will not be detrimental to the maintenance of the population of the species concerned at favourable conservation status in their natural range".

In this particular case, the proposed destruction of a couch has been assessed in the light of the FCS of otters based on the following:

Otters are present and recovering in the north east of Scotland. Within the River Dee they are at a high density. Whilst there may be short term impacts on this particular stretch of the River Dee system, these are restricted as there will be a buffer zone of 8m maintained between the river edge and the construction works

It is therefore SNH advice that the effect of the proposed action would not be detrimental to the maintenance of this species at a FCS within its natural range.

Comments on otters as European Protected Species along the rest of the route can be found in our previous consultation responses.

Conclusion

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

Further details on the legislative requirements are attached as an annex to this letter and I also enclose for information the more detailed Natura appraisal carried out by SNH for information.

Please do not hesitate to contact me if there is anything in the above which is unclear, or if further advice is required in relation to this process.

Yours sincerely

Erica Knott
Policy and Advice Manager, Casework Support

Encs

Annex A

Legislative Requirements for European Sites River Dee Special Area of Conservation (SAC)

The site's status as a SAC under the EC Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna (the "Habitats Directive"), means that the Conservation (Natural Habitats, &c.) Regulations 1994 as amended, (the "Habitats Regulations") apply. The requirements are summarised in Circular 6/1995 as amended June 2000 and include, at paragraph 12,

"The Regulations (48) require that, where an authority concludes that a development proposal unconnected with the nature conservation management of a Natura 2000 site is likely to have a significant effect on that site, it must undertake an appropriate assessment of the implications for the conservation interests for which the area has been designated."

The need for appropriate assessment extends to plans or projects outwith the boundary of the site in order to determine their implications for the interest protected within the site.

Under regulation 48 of the Habitats Regulations, this means that Transport Scotland and subsequently Scottish Ministers, as the competent authority, have a duty to:

- determine whether the proposal is directly connected with or necessary to site management for conservation; and, if not,
- determine whether the proposal is likely to have a significant effect on the site either individually or in combination with other plans or projects; and, if so, then
- make an appropriate assessment of the implications (of the proposal) for the site in view of that site's conservation objectives.

The competent authority can only agree to the proposal under regulation 48 after having ascertained that it will not adversely affect the integrity of the site. If this is not the case, and there are no alternative solutions, the proposal can only be allowed to proceed if there are imperative reasons of overriding public interest, which in this case can include those of a social or economic nature. If it is proposed to approve the plan on the grounds of imperative reasons of overriding public interest then regulation 49 states that you must inform Scottish Ministers and you must not issue approval for a period of 21 days after receipt by Scottish Ministers unless notified otherwise. If proposals are allowed to proceed in accordance with regulation 49 then it should be noted that regulation 53 requires that Scottish Ministers shall secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected

European Protected Species – Legislative Requirements Otters

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

This means it is illegal to:

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

Where it is proposed to carry out works which will affect European protected species or their shelter/breeding places, whether or not they are present in these refuges, a licence is required from the licensing authority (in this case the Scottish Government).

As highlighted in the Interim Guidance, three tests must be satisfied before the licensing authority can issue a licence under Regulation 44(2) of the Conservation (Natural Habitats &c.) Regulations 1994 (as amended) to permit otherwise prohibited acts. An application for a licence will fail unless all of the three tests are satisfied. The three tests involve the following considerations:

- Test 1 - The licence application must demonstrably relate to one of the purposes specified in Regulation 44(2) (as amended). For development proposals, the relevant purpose is likely to be Regulation 44(2)(e) for which Scottish Government is currently the licensing authority. This regulation states that licences may be granted by Scottish Government only for the purpose of *“preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment.”*
- Test 2 - Regulation 44(3)(a) states that a licence may not be granted unless Scottish Government is satisfied *“that there is no satisfactory alternative”*.

- Test 3 - Regulation 44(3)(b) states that a licence cannot be issued unless Scottish Government is satisfied that the action proposed “*will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range*” (Scottish Government will, however, seek the expert advice of Scottish Natural Heritage on this matter).

Consideration of European protected species must be included as part of the application process, not as an issue to be dealt with at a later stage.