



nature's voice



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to support the case made by SNH, as it covered most of the main points of our original objection, which we have not withdrawn.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 Ministers may wish to require appropriate assessment to be carried out by Marine Scotland, as the best-qualified competent authority to do so¹, 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 recommend in the strongest possible terms 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 consent³ 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 consent⁴ 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 channel⁵, 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 provision⁷ 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 quantified⁸.

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,



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