Con|729|36

DUALCHAS NADAIR na h-ALBA
An Taigh Caispianach
Raon Gnothaich Bhruaich Chluaidh
Bruach Chluaidh
G81 2NR
Fòn: 0141-951 4488
Fax: 0141-951 4510

SCOTTISH NATURAL HERITAGE
Caspian House
Clydebank Business Park
Clydebank
G81 2NR
Telephone: 0141-951 4488
Fax: 0141-951 4510
e-mail:
forename.surname@snh.gov.uk

Our Ref: PF145/05

Tony Cruickshank
TWA Consultation
Transport Strategy & Legislation Division
2D – Dockside
Scottish Executive
Victoria Quay
Leith
EH6 6QQ

18th May 2006

Dear Tony,

PROPOSALS FOR A NEW APPROACH TO DELIVERING PUBLIC TRANSPORT INFRASTRUCTURE DEVELOPMENTS

Thank you for the opportunity to contribute to this consultation, which concerns procedures in which SNH has a close interest. We have already discussed various aspects of the new arrangements with colleagues in the Scottish Executive Transport Bill Team, and look forward to further liaison as the proposals take shape.

We would like to begin by highlighting a number of general points in relation to the proposals. These are followed by more specific responses to the points raised in the consultation paper.

General comments

We warmly welcome the proposal to reform the current Private Bill process, and believe that the suggested approach represents a substantial improvement on the current arrangements. In particular, the proposals could greatly increase the clarity of the procedures involved, in turn facilitating input from all interested stakeholders. This objective echoes the intention behind the planning reforms contained in the current Planning Bill. We would, however, suggest that further attention should be given to several aspects of the proposals before they are translated into draft legislation.

The proposals set out in this paper will generally apply to developments of considerable scale and complexity, with corresponding potential for positive and negative effects on local communities and on the environment. Such developments will in turn be subject to a wide range of regulatory regimes and will need to draw upon a corresponding diversity of technical expertise. The consultation document is commendably brief and focused, and perhaps in consequence does not fully indicate how all of these interests will engage with the proposed procedure. From SNH's standpoint, the limited scope to address natural heritage concerns is the greatest shortcoming of the existing Private

Bill process, and it will be very important to develop this aspect of the new proposals in more detail.

It will be essential to ensure that the new procedure allows the impacts of developments on the natural heritage to be identified and addressed before the critical decisions are taken, and preferably at as early a stage as possible. This must certainly occur before approval is granted, and this process should normally be well in hand by the time a proposal is submitted to Ministers. We strongly support the proposal in para. 4.14 that public bodies such as SNH, SEPA and Historic Scotland should be specified as bodies which require to be consulted prior to the application stage, in line with the changes to the planning system flowing from the current Planning Bill. Such engagement will be an essential prerequisite for the proper consideration of potential impacts.

Against this background, we would strongly recommend that several further points be addressed to ensure that this process operates effectively:

Clear guidance will be required on the complex interface between the new procedure and existing regulatory regimes, in particular the Environmental Impact Assessment (Scotland) Regulations, the Conservation (Natural Habitats etc.) Regulations and the planning process (including the GDPO and GPDO).
The procedure must allow for an iterative Environmental Impact Assessment (EIA), which incorporates the views of key stakeholders in order to optimise the siting and design of the proposed development, and this process should be reflected by the Environmental Statement (ES) that accompanies the promoter's application. This type of interactive EIA process is now well established in the context of other types of development and land use change.
The process must allow, where appropriate, for an appropriate assessment of potential impacts on Natura interests under the Habitats Regulations. This requirement is underpinned by the full weight of European legislation, and the assessment must be completed at a sufficiently early stage in the process to inform the eventual decision by Ministers.

These points were explored in depth in our written evidence to the Parliamentary Procedures Committee in September 2004, which is attached as an annex to this response.

To meet these requirements, there is a need for comparatively detailed information about the siting and design of proposed projects at the time of submission, to allow their environmental implications to be fully assessed. This is essential where Natura interests are involved.

In our view, proposals for consideration under the new system will not be analogous to outline planning applications. In most cases, the principle of such development will have been established at an earlier stage through the National Planning Framework and/or the National Transport Strategy. It is our view, therefore, that the level of detail on the proposal, or project specification, should be closer to that expected from an application for full planning permission.

Where Natura interests are involved, the level of detail must be sufficient to allow any potential effect on those interests to be fully assessed. A project likely to have a significant effect on a Natura site - Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) – can only be allowed to proceed if it can be demonstrated that the integrity of the site will not be adversely affected (unless there are overriding reasons of public interest why it should proceed). This can only be adequately considered if detailed information on the design, construction, maintenance and operation of the project is provided.

These considerations also highlight the need for close and early consultation with relevant bodies, including SNH. This is of particular importance when the assessment of impacts is dependent on additional survey work, which may only be possible at certain times of year (for example where migratory birds are involved).

Relatively detailed consultation will obviously carry with it resource implications for SNH, which have been explored to some extent in recent correspondence with SE colleagues. Significant commitments of staff time are inevitable when dealing with large and complex developments of this type, but our experience of the existing Private Bill process, and other large-scale EIA-related development, suggests that these can be substantially reduced if sufficient technical detail is available at the outset to allow any environmental issues to be clearly identified.

We would also highlight one further general point in relation to the proposed procedures. The existing Private Bill arrangements do not allow conditions to be attached to the approval of particular proposals, in the manner that routinely occurs with planning consents. Our experience suggests that this limits the scope for suggesting improvements to minimise natural heritage impacts, and SNH can often be placed in the difficult position of having to object in order to prevent detrimental effects which could be addressed through suitable conditions. The current modernisation of the planning system rightly places some emphasis on the application and enforcement of conditions to influence the design, construction and use of new developments, and similar considerations should logically apply to major transport infrastructure developments, which will often be of considerable size and potential impact.

Questions raised in the consultation paper

Q1: Are there any other transport works beyond rail, tram, guided busways and inland waterway developments that should be within scope and if so why?

As noted above, we welcome the proposed reforms, and there may indeed be a case for extending this approach to a wider range of infrastructure projects. The wider adoption of standard procedures should make the process easier for stakeholders to understand and, in turn, engage with. A broadly inclusive approval process might also facilitate the wider long-term goal of a fully integrated transport system, by ensuring that different types of infrastructure are considered on comparable terms and through similar institutional processes.

As suggested in the consultation paper, major harbour and trunk road developments might be strong candidates for this type of approach. Experience suggests that there is a particular need for better integration of provision for other modes, such as cycling,

with trunk road schemes, which will increase with the implementation of core path networks under the Land Reform Act.

Q2: What reasons exist for lengthening or indeed shortening the six month minimum designated statutory pre-application period between the promoter publicising initial proposals and presenting an application for an Order to the Scottish Ministers?

We welcome the proposed requirement to include SNH in statutory pre-application consultation, in line with the procedures that are being introduced through the current Planning Bill, and agree with the proposed six month period as a minimum requirement. While recognising the need for a defined timescale, our previous experience with Private Bills suggests that the resolution of natural heritage issues may take more than six months, because of the need to obtain and analyse relatively detailed technical information about the proposal, or to obtain further environmental information, bearing in mind that the necessary survey work may be subject to seasonal constraints. These requirements are of particular importance where Natura sites or European Protected Species are involved.

Q3: What process should apply to enable a promoter, without a statutory right, to enter land to conduct preliminary investigations?

The proposed procedures must include a mechanism to allow access for promoters, not least to prevent obstruction by landowners who may be opposed to the project - an issue which has arisen in relation to the Waverley Railway Bill. We do not have a strong view on how best to achieve this and the proposed certification process seems appropriate. For safety reasons, the chosen arrangement must provide for consultation with bodies such as Network Rail and British Waterways, which have operational responsibility for existing transport infrastructure.

Q4: What documentation should be supplied by the promoter in support of the application? Is there sufficient information contained within the proposals?

It is essential that sufficient information is made available, at an early stage, to assess the environmental implications of a particular proposal, not least because of the scale and potential impact of the developments concerned. Also, this will often be necessary to ensure compliance with EU legislation on Environmental Impact Assessment, and to allow Ministers to undertake an appropriate assessment where required by the Natura Regulations - thus allowing a proposal to satisfy the criteria indicated in paras 4.27-4.29.

In practice, it would be difficult for the Bill to specify the information required in relation to various types of application. The simplest approach might therefore be to indicate that the necessary level of detail should be agreed between the promoter, statutory consultees, planning authorities and, perhaps, Scottish Ministers.

Q5: What are the implications of reducing the time period for objections from 60 to 42 days?

We are not convinced that the time period for objections should be reduced, not least because the proposals concern substantial developments which may raise complex environmental and wider issues. We would not, however, be unduly concerned about such a reduction subject to assessment of the application by Ministers according to the criteria suggested in paras. 4.29 to 4.33.

We would naturally hope that the suggested process for prior engagement with statutory consultees would allow any major concerns to be addressed before the application is submitted. It would be helpful, however, to clarify whether SNH and other statutory consultees would be able to object to proposals at this later stage, for example where significant unresolved concerns remain about potential impacts on Natura interests.

Q6: Are there any reasons why, once the Scottish Ministers have determined that the application meets the procedural conditions and the specified criteria conditions, that the application should be considered by the Scottish Parliament prior to a public examination of the objections?

This is essentially a matter of Parliamentary procedure and we would not express a particular view.

Q7: Are there any reasons for extending Parliamentary consideration and approval of projects beyond those contained within the NPF? Do you agree that it should also be possible for the Scottish Ministers to designate other transport-related projects not in the NPF for Parliamentary consideration should they see fit?

There would appear to be some practical benefits to this option, which could allow Parliamentary scrutiny of proposals which arise out of phase with the four year review cycle of the National Planning Framework, or which acquire unforeseen importance over time. However, the NPF should retain a primary strategic role in identifying the need for developments of national importance, in a broad context which includes national social, economic and environmental considerations and other infrastructure provision. It is important that this role should not be undermined by over-frequent use of this approach to approve 'extra-curricular' developments.

I hope that these comments are helpful, but please contact Mark Wrightham (01463 667922; mark.wrightham@snh.gov.uk) if it would be helpful to discuss any of the above in more detail.

Yours sincerely,

John Thomson
Director of Strategy & Operations West

Annex: Evidence by Scottish Natural Heritage to Procedures Committee on Private Bill Procedures – September 2004

1. Introduction

1.1 The function of SNH as Scotland's statutory adviser on the natural heritage was established by the Natural Heritage (Scotland) Act 1991 which set forth the general aims and purposes of SNH as:

" (a) to secure the conservation and enhancement of: and
(b) to foster understanding and facilitate the enjoyment of,
the natural heritage of Scotland; and SNH shall have regard to the desirability of securing that anything done, whether by SNH or any other person, in relation to the natural heritage of Scotland is undertaken in a manner which is sustainable" (Section 1.(1))

The natural heritage is stated in the Act to include:

"*the flora and fauna of Scotland, its geological and physiographical features, its natural beauty and amenity*" (Section 1(3)).

1.2 In order that SNH fulfils these purposes and accordingly to take into account the natural heritage in decision making processes which could affect it (whether positively and negatively), SNH has been given a statutory role in responding to national planning policy consultations, to emerging development plans, to planning applications and, in general, to development control. The principal pieces of legislation, primary and secondary, that create and regulate the duty to consult SNH are found in:

The Town and Country Planning (Scotland) Act 1997; ("the Planning Act")
The General Development (Procedure) (Scotland) Order 1992 ("the GDPO");
The General Permitted Development (Scotland) Order 1992 ("the GPDO")
The Environmental Impact Assessment (Scotland) Regulations 1999; ("the EIA Regulations")
The Conservation (Natural Habitats, Etc) Regulations 1994 ("the Habitats Regulations")

In broad outline, the purpose of this legislation is to ensure that, prior to any decision being taken to enable development to proceed, all potential impacts on the natural heritage are identified and assessed and that the advice of SNH is available to the decision maker. This procedure would allow modifications to the proposals which might avoid, reduce or mitigate against adverse impacts and in certain cases compensate for them. In certain instances there are further requirements of the decision maker should the intended decision be contrary to the advice of SNH.

1.3 The Private Bills Procedure is very different from that of a planning application (or similar proposal such as under the Electricity Act 1989). It is highly complex, it is a process that is still developing and SNH is unaware of any guidance beyond that of the Scottish Parliament's Guidance on Private Bills updated in March 2004 ("the Guidance"). The concerns of SNH as expressed in this submission are based on certain assumptions and understandings of the complex legalities involved and SNH

does not exclude the possibility that some concerns might be allayed by a more complete understanding on its part of this emerging procedure.

2. The Private Bills Procedure

2.1 A Private Bill is introduced for the purpose of obtaining for the promoter, powers or benefits in excess of or in conflict with the general law. It appears that the procedure is currently being used primarily, if not exclusively, for major transport projects. The procedures are considered appropriate, not because of the absence of statutory remedies by other means, but because of the variety and complexity of the required permissions. In the absence of the Private Bills Procedure, such permissions would include compulsory purchase of substantial areas of land, planning permissions (possibly from more than one planning authority), variations and terminations of a variety of land interests, including rights of way, avoidance of legal nuisances and so forth. It is in the context of such large scale Private Works that this submission is made. By their very nature, these complex works have the potential for natural heritage consequences of greater significance than many planning applications.

2.2 In the absence of the Private Bills procedure, the principal consent required with implications for the natural heritage is that of planning permission. As prefaced in paragraph 1.2 that procedure secures the involvement of SNH (and other statutory consultees) in terms of such as:

Article 15 of the GDPO;
Regulation 14 of the EIA Regulations;
The provisions of Part IV of the Habitats Regulations.

This would ensure that environmental impacts were addressed from project inception to final design prior to any consent being granted, and if consent was granted, to the monitoring of residual impacts and ensuring that conditions imposed on the grant of consent and / or legal agreements were appropriately framed. In particular, where a European Site is involved, the Habitats Regulations (Regs 48-53) impose strict controls with helpful explanatory guidance including flowcharts contained in Circular 6 / 1995 (Revised 2000). The Private Bills Procedure however is, so it seems to SNH, substantively different.

2.3 The concern of SNH is that the procedures may not allow for the timely identification of potential harm to the natural heritage and opportunity for modifications to avoid harm **before** the Bill is enacted. It is recognised that the role of the Parliament is that of legislating, but Private Bills are advanced in the private interests of the promoter, thereby calling for procedures that are both Parliamentary and quasi judicial in character. The elements of the procedure which are parallel to the regime briefly described in paragraph 2.2 in a planning application appear to SNH to be these:

2.3.1 Works authorised by an Act of the Scottish Parliament ("ASP") are permitted development (Article 3 and Class 29 of Part 11 of Schedule 1 to the GDPO). Development authorised by an ASP is not permitted if (broadly) it relates to a building operation unless the prior approval of the planning authority in respect of the detailed plans and specifications is first obtained.

2.3.2 Regulation 47 of the EIA Regulations inserts into Article 3 of the GPDO provisions which would appear to apply certain requirements of environmental impact assessment, failing which any development is not permitted. However, development authorised in terms of Class 29 (1)(a) and (b) of Part 11 (and that includes an ASP) is excluded by Article 1.5 of the EIA directive which disapplies it to projects, the details of which are adopted by a specific act of national legislation. Accordingly, in general, the GPDO is amended to ensure that EIA takes place in the unlikely event that any development, otherwise permitted, falls within Schedule 1 or Schedule 2 to the EIA Regulations but the type of permitted development authorised by an ASP would appear to be outwith the EIA procedure. A Bill for Private Works of the nature with which SNH is concerned is to be accompanied by an environmental statement (an"ES") containing all of the information set out in Schedule 4 to the EIA Regulations (Annex N of the Guidance).

2.3.3 A grant of permitted development rights in terms of Article 3 of the GPDO is subject to Regulations 60-63 of the Habitats Regulations. These are relevant to development that is permitted as opposed to the subject of a planning application. The procedure is that a party intending to rely on such permitted development rights may ask SNH for its opinion on whether the development is likely to have a significant effect on a European site not directly linked to its conservation management. The "local planning authority" is entitled, having obtained the opinion of SNH, to approve the development only after having ascertained that it will not affect the integrity of the site.

3. **Issues**

3.1 Absence of Formal Consultation

As identified in paragraph 2.2, SNH is entitled in the case of a planning application to be statutorily consulted in appropriate cases under the GDPO, the EIA Regulations and the Habitats Regulations. In sharp contrast, although the Private Bills procedure requires public advertisement (Annex H to the Guidance) and notification for those with an interest in heritable property (Annex G of the Guidance) there is no requirement upon the promoter of the Bill or the Scottish Parliament as the decision maker to consult SNH (or the other statutory consultees for environmental matters). Accordingly, SNH will become aware of a Private Bill only if a member of staff notes a press advertisement or visits the website of the Scottish Parliament. This is a procedure highly susceptible to administrative oversight which could result in an inadequate timescale for SNH to provide its opinion or worse, to a proposal being wholly overlooked. Accordingly, this procedure could prevent the proper identification and assessment of the impacts upon the natural heritage with consequences for its protection and the quality of the wider environment. It may also have consequences for development of the project through delays or unforeseen costs. Further, it should be noted that, strictly, the only method by which SNH could draw to the attention of the Private Bill Committee the natural heritage interest of a site is by "registering an objection", even although the position of SNH may be that of support for the principle of the proposal.

3.2 "Prior Approval"

Reference is made in paragraph 2.3.1 to the necessity for prior approval of the planning authority to ensure that the works qualify as permitted development. However, this appears to provide to the authority a limited control usually restricted to discussions about minor elements of design. Further, we are uncertain about the form of application for such approval, let alone the procedure adopted (including any consideration of environmental issues) by the planning authority. We are unaware of any guidance on this subject. SNH is concerned that with large scale projects potential impacts may also be large scale and the requirement for prior approval is insufficient to identify and remedy these. To remedy impacts may necessitate substantial alterations to the design of the project, for example the partial re-routing of a railway line or significant changes to working methods. This is linked to the questions of the absence of statutory consultation and the quality of the environmental information (see paragraphs 3.1 and 3.3). it should also be recorded that this is one of the areas in which the identity of the project promoter and the planning / local authority may be identical.

3.3 EIA and Related Issues

In paragraph 2.3.2 we referred to the disapplication by the EIA directive of the EIA Regulations for an ASP and given the terms of Paragraph 160 of Circular 15/1999, in the comments that follow SNH has made the assumption that the Private Bills procedure is not subject to environmental impact assessment but is limited to the production of an ES. We consider elsewhere the form of assessment that may be required by the Habitats Regulations. Thus, the matters that concern SNH in connection with EIA are relevant here, even if no European site is involved.

3.3.1 The absence of the EIA procedure means that there are no consultative procedures drawn from Regulation 14 of the EIA Regulations, increasing the risk of administrative oversight.

3.3.2 An ES in isolation is very different from the process of environmental impact assessment. The latter is the whole process of collecting and analysing environmental information, including the advice and recommendations of statutory consultees such as SNH regarding modifications necessary to protect the environment. The EIA process and the development of the proposals are intended to be linked and iterative. If the EIA identifies an aspect of the project that is harmful, it can be abandoned, changed or modified. By contrast, the ES is a written report on the state of the environment at its production date and how this may be affected by the development, what impact may arise, how significant it is and how it will be avoided, reduced or mitigated.

3.3.3 The absence of a formal statutory EIA process bears upon concerns about the quality and quantity of information within the environmental statement. The experience of SNH to date would suggest that the level of information accompanying a Private Bill is insufficient to assess properly the range and level of potential impacts on the environment. For example, from the information provided with a Bill to open a railway line, it may be possible to deduce that all trees on the line of the railway will be removed. Without information on the working area for machinery used to re-profile embankments, it is not possible to calculate the extent of the area on one or both sides of the line where trees need removed or will be irreparably damaged; nor is it possible

to identify the whereabouts and significance of damage to groundwater systems. SNH recognises that providing detailed information on a project comes at considerable cost to the promoter, but such information nevertheless is necessary to assess properly the environmental impact. The challenge to promoters and statutory agencies alike is to agree the level of information in each case. The procedures developed for taking forward proposed projects through the planning system allow for this to happen.

In June 2002, the Scottish Executive Development Department issued to all Heads of Planning guidance on the EIA directive, the minimum requirements of the EIA Regulations and outline planning applications. This guidance stressed the necessity of planning authorities obtaining sufficient information on outline applications in order to screen them properly and evaluate impacts to the environment. The guidance note referred to certain relevant Court cases including *R.v Rochdale MBC ex parte Milne (2000)*. With reference to that case the guidance states:

"the Judge emphasised that the directive and regulations required the permission to be granted in the full knowledge of the likely significant effects on the environment. This did not mean that developers would have no flexibility in developing a scheme. Such flexibility would have to be properly assessed and taken into account prior to granting outline planning permission. He also commented that the EIS need not contain information about every single environmental effect. The directive refers only to those that are likely and significant. To ensure it complied with the directive, the authority would have to ensure that these were assessed before it could grant planning permission".

Although Private Bills appear to be exempt from the EIA directive, the view of SNH is that this judgement can be taken as a measure of the importance of ensuring the impacts of the development are fully understood prior to a decision. To understand the likely and significant impacts, it is necessary to have appropriate detail on the proposed development relative to its construction, operations and (possibly) maintenance. A statutory process for consultation, involving screening and scoping, with SNH (and no doubt SEPA, HS and other agencies) would assist the promoter of a Private Bill to identify those aspects of the development that need to be presented in detail as well as the likely significant impacts that require investigation.

3.4 Guidance

As already mentioned (para 1.3), the current procedure is complicated and in certain respects it is possible that SNH may be misunderstanding it. It is likely that other parties, and possibly even promoters, experience difficulty. SNH believes that the procedure for Private Bills would benefit from simplification, especially when they are inextricably linked to other complex procedures such as the GPDO, the EIA Regulations and the Habitats Regulations. An example was experienced by SNH in regard to a Private Bill for a railway line where footnote 10 of the promoter's Supplementary Memorandum states:

"The responsibility arises by virtue of Article 3 of the Council Directive 92/43.EEC ("Habitats Directive"). This is directly applicable to the Scottish Parliament. The Conservation (Natural Habitats Etc) Regulations 1994 ("Habitats Regulations") do not apply to the private bill process but for convenience the terminology of the Habitats

Regulations has been adopted and it has been assumed that the basis of assessment will be in accordance with the Habitats Regulations".

The interpretation of SNH is that the relevant "Article 3" is Article 3 of the GPDO (see para 2.3.1) and thereby grants permitted development rights for development authorised by an ASP. However, Article 3 states that such permitted development rights are "subject to Regulations 60-63 of the Habitats Regulations", an interpretation which the parliamentary agents for the promoter do not appear to share despite the terms of Paragraphs 47-49 of Circular 6/1995 (Revised 2000).

3.5 The Habitats Regulations

In paragraph 2.3.3, we referred to the grant of permitted development rights subject to Regulations 60-63 of the Habitats Regulations. If, despite confusion (see Para 3.4) SNH is correct in its interpretation, consideration is required to the operation of the Habitats Regulations in the Private Bills procedure, particularly in matters of timing. The purpose of Regulations 60-63 is that of ensuring that any permission granted by the GPDO does not breach the Habitats Directive, whether for site-based measures or for species protection. Guidance highlights the need for compliance with the aims of the directive prior to any decision being made (see eg "European Protected Species, Development Sites and the Planning System: Interim Guidance for Local Authorities and Licence Arrangements"). The Circular already mentioned contains at Appendix C of Annex E a flowchart of the process that developers should follow in respect of Regulations 60-63. In essence, a proposal likely to have a significant effect on a European site will, at either the request of the developer or the local planning authority, depending upon circumstances, be submitted to SNH for its opinion. If SNH concludes that the proposal is likely to have such an effect, the planning authority must carry out an appropriate assessment of the implications for the development in view of the conservation objectives of the site. If the conclusion of that assessment is in the negative, no planning application is required presuming the proposal meets all permitted development criteria. If the reverse applies, the planning authority cannot approve the development which is therefore not permitted as required by the GPDO. With that brief background, we turn now to certain specific matters:

3.5.1 Regulation 60 has the effect of imposing on the permission for the proposal conferred by the GPDO a condition preventing development being **started** prior to the written approval of the planning authority. The promoter of the Bill has no statutory obligation to take any action which would lead (in relevant cases) to an appropriate assessment for the purposes of the Habitats Regulations. The promoter provides only an ES (legally separate from an appropriate assessment and in respect of which our comments appear in Paragraph 3.3), obtains the Royal Assent to the Bill and thereby *inter alia* obtains permitted development rights subject to the Habitats Regulations. At a later stage when convenient, the developer with all the authority conferred by the ASP, can then turn his mind to obtaining the approval under Regulation 60. In that respect, the ASP may have provided that, for the purposes of the Habitats Regulations, the competent authority is the Scottish Parliament. This may eliminate any further involvement of the local planning authority although SNH does note that, in contrast to Regulations 48-53, all references in Regulations 60-63 are to the "local planning authority" as opposed to the competent authority.

3.5.2 If the procedure allows the promoter to defer action under the Habitats Regulations until after the Bill becomes an ASP, SNH could find itself advising Scottish Ministers that no written approval of the local planning authority (or Scottish Ministers) should be given for a project where an ASP provides all other necessary consents after substantial expense, public involvement and publicity. This would be highly unfortunate. Even if the advice of SNH fell short of outright objection and was to the effect that modifications to the proposal might enable it to comply with the Habitats Regulations, such modifications might be beyond the ambit of the ASP; in that event, further legislation might be required with the attendant costs, including those caused by delay.

3.5.3 It may be said that it is open to the promoters to invoke the procedures of Regulations 60-63 prior to the Bill being enacted and that the production of an ES will provide the appropriate level of detail, initially for SNH to offer its opinion and subsequently for the decision maker to make the appropriate assessment and reach a conclusion. However, the decision maker prior to enactment is the local planning authority and SNH has no experience yet of being asked for its opinion either by the developer under Regulation 61(2) or by the local planning authority under Regulation 62(4). This is linked also to previous points (para 3.3.3) regarding the quality and quantity of the information in the ES, a matter mentioned also in paragraph 3.6.

3.6 Conditions Etc

3.6.1 The ASP may identify (but only in general terms) conditions that need to be fulfilled by the developer when the details of the project are worked up, when contracts are in place and so forth. This raises two issues, namely:

(i) whether prior to enactment the Bill provides enough information to identify all relevant conditions; and

(ii) the method of enforcement and the identity of the enforcer.

A means used to date has been a legal agreement among the promoter, SNH and SEPA requiring them to work together to identify possible significant impacts as the detailed design of the project progresses and to identify and implement proposals to avoid or mitigate such impacts, including by modification of the proposal. This begs the question again about the adequacy of the information prior to enactment as such modifications may be outwith the scope of the ASP and, in any event, agreement among these parties could not be guaranteed as new information was gathered.

3.6.2 There are also certain difficulties with agreements under Section 75 of the Planning Act. Such agreements require to be between a planning authority and a person with an interest sufficient to bind the land. SNH is neither. Until the promoter acquires following the ASP, the promoter may not own the land either. SNH is primarily an advisory agency and must be cautious about adopting a regulatory role. Further, the identification and assessment of impacts to the natural heritage after a decision is made and the agreement regarding measures by which such impact could be avoided or mitigated will be much more time consuming and expensive than conducting such an exercise (as is normal under the planning regime) as an integral part of the decision

making process; it must be asked whether this is an appropriate way for the resources of a publicly funded agency like SNH to be used.

Summary of SNH's Concerns

SNH is concerned at:

1. The absence of guidance on the complex procedures for processing a Private Bill, including the relationship between the Private Bill procedure, planning law and the Habitats Regulations. An explanatory memorandum produced by the promoter, no matter how well intentioned, does not fulfil that role.

2. The absence of a formal statutory consultation of SNH, SEPA and Historic Scotland.

3. The substitution of an ES for an EIA process leading to enhanced risks of inadequate information / consultation.

4. The compounding of the risks at 3 where the Habitats Regulations are involved.

5. The prospect of the Habitats Regulations being applied after enactment.

6. Enforcement difficulties caused by the concerns expressed at 3, 4 and 5, the more likely if the ASP does not deal in sufficient detail with conditions.

7. The potential for legal challenges in circumstances where the local authority could also be any one or more of the following, namely: the promoter, the local planning authority, the competent authority, a party owning some of the land, the ultimate developer.