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Cc: Jim McKie, Marine Scotland
Michael Coyle, Marine Management Organisation
Stephen Brooker, Marine Management Organisation
Nigel Gooding, Defra

12th February 2014

Dear Ian

Response to Marine Scotland on reducing corkscrew seal deaths

Thank you for your letter dated 29th October 2013 regarding propeller injuries and mortalities of protected marine mammals.

We would like to respond to your comments as follows:

1. Precautionary management is required

We recognise and support the intensive research that the Sea Mammal Research Unit (SMRU) is conducting to progress the corkscrew injury issue, under contract to Marine Scotland. We also recognise that having a complete understanding of the propulsion system responsible for the mortalities and injuries will ensure that the most effective mitigation measures are adopted.

However, we would strongly urge you to act on the best available evidence - that certain kinds of ducted propellers kill and injure marine mammals. We urge MS to introduce mitigation measures immediately to minimise the risk of marine mammals being injured or killed by ducted propellers.

Harbour seals are listed in Annex II of the Habitats Directive, which means that the UK Government, and by virtue of devolution the Scottish Government, is under a legal obligation to introduce measures – in accordance with the Directive - to ensure its populations are maintained or restored to Favourable Conservation Status (FCS).¹ The principal measure through which FCS is to be achieved for Annex II species is through the obligations to



designate and manage Special Areas of Conservation (SACs) under Articles 3 - 10 of the Habitats Directive. To the extent that measures taken by the Scottish Government fail to maintain or restore FCS, this will arguably constitute an infringement of the Habitats Directive.

As raised in our letter dated 27 September 2013, the harbour seal population off the east coast of Scotland is dramatically decliningⁱⁱ. At the UK-wide level, the UK's 2007-2013 reporting under Article 17 of the Habitats Directive concluded that the national harbour seal population was 'unfavourable – inadequate'. Whilst population declines are likely to be due to more than one factor, existing Agencies guidance identifies that for some populations off the east coast (including that from the Firth of Tay and Eden Estuary SAC), mortalities resulting from corkscrew injuries are contributing substantially to a population level effect.

By failing to maintain the harbour seal population at FCS, the UK Government is therefore arguably in breach of the Habitats Directive. Your response to our letter stating that the Scottish Government will not currently attempt to introduce any mitigation measures in respect of a known cause of mortalities for a declining Annex II species is a continuation of that breach and is a failure to provide precautionary management as required under the Habitats Directive. Attempts to rectify these breaches must therefore be made immediately.

We also draw your attention to Article 191(2) of the Treaty on the Functioning of the European Union (TFEU)ⁱⁱⁱ which requires that European environmental policy is based on the precautionary principle and on the principle that preventative action should be taken. The precautionary principle is therefore one of the foundations of the high level of protection pursued by European policy on the environment. In order to achieve FCS, it is with reference to the precautionary principle that the Scottish Government must implement the Habitats Directive. This was confirmed in the *Waddenzee*^v case and more recently in *Sweetman*^v in respect of the measures prescribed in Article 6.

2. Use the best available evidence to inform management measures

The Marine Management Organisation (MMO) also responded to our letter on 31 October 2013. In the MMO's response, we were helpfully informed that the research has shown that some designs of ducted propeller do not produce the unusual injuries. This is a significant finding and should immediately lead to relevant mitigation measures. Our proposals for adequate mitigation are provided below.

3. Suggestions for immediate mitigation measures

In light of the available evidence, to reduce marine mammal mortalities and injuries and ensure compliance with the Habitats Directive and the precautionary principle, we suggest that the following mitigation measures are deployed with immediate effect:



- a. Restrict the use of all ducted propellers, other than those known *not* to cause the relevant injuries in areas where injuries have been recorded at the most significant levels and where seal populations appear to be worst affected by these injuries, and especially in the vicinity of the Firth of Tay and Eden Estuary SAC, with immediate effect.
- b. Introduce policies to limit the use of all ducted propellers, other than those known *not* to cause the relevant injuries to marine mammals, providing explicit guidance for all vessel skippers, with the aim of minimising ducted propeller use (where an anchor could be used instead, for example) in the vicinity of SACs.

More generally, to raise the profile of the issue within all sectors of the shipping industry, including through the International Maritime Organisation (IMO), by providing educational materials that explain the current situation and what can be done to minimise impacts.

Implementing the above management measures would go some way to rectify the existing breaches to Article 2(2) of the Habitats Directive in respect of the harbour seal and attempt to restore the population to FCS.

4. Additional actions

We also recommend the following further actions:

- a) We would like to work with the MMO and MS to further develop and implement a clear strategy to halt and reverse the declining trend in harbour seal populations and enable the UK to meet its European responsibilities. The Scottish Seal Forum and the Moray Firth Seal Management Group are both important groups that could assist to achieve this goal. The former has not met since 2010 and the latter would benefit from more meaningful NGO participation and we would welcome our further involvement in these two groups.
- b) In respect of the ongoing research and to assist a precise understanding of the mortalities and injuries, if it has not already been considered, we have requested that the MMO investigate whether the absence of reported injuries in Norfolk between Winter 2009/2010 and January 2013 was correlated with the known absence of any regular vessel(s) operating in the area during this period. This could help to identify the vessel (and so propeller type) that caused the corkscrew injuries that occurred at these times.
- c) Beach patrols are an essential component of a monitoring strategy to more accurately understand the level of mortalities in those areas worst affected and we consider this a statutory responsibility. Although we are happy to discuss providing beach support, we do not currently have a presence in those areas where

corkscrew injuries are having the biggest impacts. We would welcome the opportunity to discuss this as part of a wider solution.

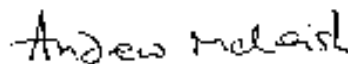
In addition, we would welcome more details on the nature of your discussions with the UK Chamber of Shipping on this issue to date.

We look forward to receiving a response to our letter as soon as possible.

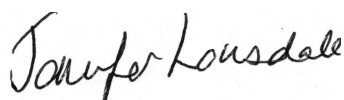
Yours sincerely



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Whale and Dolphin Conservation



Andrew McLeish, Development Manager
MARINElife



Jennifer Lonsdale, Director
Environmental Investigation Agency



Phil Dyke, Coast and Marine Advisor
National Trust




Mark Simmonds, Senior Marine Scientist
Humane Society International



Libby Anderson, Policy Director
OneKind



Margaux Dodds, Director
Marine Connection



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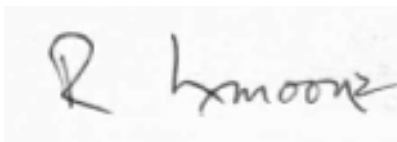
Calum Duncan, Scotland Programme Manager
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Sarah Gregerson
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ⁱ See Article 2(2) Habitats Directive for the overarching objective for Member States to reach and maintain 'favourable conservation status', natural habitats and species of wild fauna and flora of Community interest'; see also Article 3(1) which sets out specific measures required to enable Annex II species to reach or maintain 'favourable conservation status'.

ⁱⁱ Thompson, D et al. (2013) 'Current state of knowledge of the extent, causes and population effects of unusual mortality events in Scottish seals. Report to Scottish Government. Marine Mammal Scientific Support Research Programme MMSS/001/11. Available online at: <http://www.smru.st-and.ac.uk/documents/1282.pdf>; Sparling et al. (2012) Baseline seal information for the Forth and Tay Offshore Wind Developers Group (FTOWDG) area. Available online at: http://77.68.107.10/Renewables%20Licensing/MRP_NNG_Offshore_Windfarm/ES/Appendices/Appendix%2013.4%20-%20SMRU%20Seal%20Characterisation.pdf; and Deaville, A. Et al (2013) Turning the screw: shipstrike in UK stranded cetaceans. Abstract submitted to and presentation made at the 27th European Cetacean Society Conference, Setubal, Portugal.

ⁱⁱⁱ Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/79.

^{iv} Case C-127/02, see para 44

^v Case C-258/11, paras 40 and 41.

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