

09 December 2019

Our Reference: [REDACTED] LOR001-0009  
Your Reference:

[REDACTED]@lemac.co.uk  
Direct Dial: [REDACTED]

Sally Thomas  
Director of People and Nature  
Scottish Natural Heritage  
Silvan House  
3rd Floor East  
231 Corstorphine Road  
Edinburgh  
EH12 7AT

Also by email [Sally.Thomas@nature.scot](mailto:Sally.Thomas@nature.scot)

Dear Ms Thomas

**Leadhills Estate  
Decision to implement a restriction on the use of General Licences  
Appeal**

**1. Introduction**

- 1.1 We act on behalf of Leadhills Estate and its owners, Leadhills Trust and Glengeith Trust.
- 1.2 On 26<sup>th</sup> November 2019, our clients received, via this office, a written decision to implement a restriction on the use of General Licences. That three page letter is attached to this Appeal Notice and is the Decision Notice against which the appeal is being taken. The restriction prohibits the use of General Licences 01, 02 and 03 on Leadhills land between 26<sup>th</sup> November 2019 and 26<sup>th</sup> November 2022. That letter makes clear that should our clients wish to appeal the decision, they have fourteen days from the date of the letter to do so. Our clients are advised that the appeal is to be submitted in writing to you.
- 1.3 The decision to implement the restriction, according to the notice "*has been made on the basis that the evidence provided to Scottish Natural Heritage by Police Scotland (and as disclosed to [Leadhills Estate] in our previous correspondence) is sufficiently robust to convince [SNH] that evidence of wildlife crimes in relation to wild birds has been found on and adjacent to Leadhills Estate*".
- 1.4 The Decision Notice, which is written by Nick Halfhide, Director of Sustainable Growth, goes on to state "*I have taken into account all of the relevant information provided by you in response to our original Notice*".

**2. Framework for implementation of General Licence restrictions**

- 2.1 The framework for the implementation of General Licence restrictions is governed by a document dated 6<sup>th</sup> October 2014 and available on the SNH website. It is entitled "*Framework for implementation of General Licence restrictions*".
- 2.2 The framework indicates that General Licences represent a relatively "*light touch*" approach to regulation, allowing persons to carry out activities without the need of applying for a specific licence. The rationale behind imposing a restriction on the use of General Licences is that light touch regulation should not apply

in situations where the regulator has lost trust or confidence. The framework document goes on to outline the approach which SNH have developed, with the Minister's approval, to implement restrictions on the use of General Licences. The Minister had asked Scottish Natural Heritage in 2013, when the framework was set up "to examine how and in what circumstances we can restrict the use of General Licences to trap and shoot wild birds on land where they have good reasons to believe that crimes against wild birds have taken place".

- 2.3 The General Licences contain the following wording "SNH reserves the right to exclude the use of this General Licence by certain persons and/or on certain areas of land where we have reason to believe that wild birds have been taken or killed by such persons and/or on such land other than in accordance with this General Licence".
- 2.4 SNH, according to the framework, have interpreted that as follows "It is the intention that where SNH has robust evidence that wild birds have been killed or taken or where there is intention to do so other than in accordance with a licence, SNH will exclude the area of land on which such evidence is found from General Licences 1, 2 and/or 3".
- 2.5 Under the heading "Evidence", the framework indicates that "Decisions to impose a restriction will only be based on evidence received from the police of an offence under the Wildlife and Countryside Act 1981 having been committed in relation to wild birds and/or where the terms of General Licences were not being complied with". They set out a number of examples of evidence recorded, which generally correspond with offences under the Wildlife and Countryside Act.
- 2.6 The framework goes on "The decision to restrict the use of a General Licence may be based on one or more pieces of evidence of this kind provided by Police Scotland to SNH and will be made on a case by case basis. In making a decision each piece of evidence will be assessed against criteria including:
- The strength of evidence that those activities had been carried out by owners or managers of that land
  - The number or frequency of such instances
  - The actual or potential conservation impact of those activities;
  - The age of the evidence.
  - Any history of previous, similar instances".
- 2.7 The framework then goes on to set out the proposed order of steps to be taken by SNH. The first step is a recommendation to restrict which is notified to owners and occupiers of the land in question. The notification is to include a summary of the evidence on which the recommendation is based and is to set out the reasons, the land to which the recommended restriction would apply and the duration of the recommended restriction. Reference is made to the possibility of a restriction being imposed to be discussed with the Crown Office and Procurator Fiscal Service to ensure that there is no risk to any potential prosecutions.
- 2.8 The framework allows the affected party to respond within 14 days of the notification. The affected party is to set out any reasons why they consider that a restriction should not be imposed. This, according to the framework, is to be reviewed by the Wildlife Operations Unit Manager in conjunction with the relevant Area Manager and Director of Operations and, where applicable, will write to the affected parties to confirm that no restriction will be imposed.
- 2.9 The framework explains that "where after considering any Responses that SNH continue to recommend a restriction, a restriction will be imposed".
- 2.10 The right to appeal is permitted within 14 days of the decision. The appeal must set out the grounds upon which it is proposed that an appeal be allowed.
- 2.11 The lodging of the appeal shall have the effect of suspending the restriction from the date the appeal is received by you until the date of the decision on appeal.



- 2.12 For the avoidance of doubt, this appeal lies against the whole restriction area referred to on page 3 of the Decision Notice. That restriction area is believed to cover the whole of Leadhills Estate. We understand, therefore, that this appeal will suspend the decision until the outcome of the appeal.
- 2.13 The framework, therefore imposes a number of considerations which are required on the part of SNH before a decision to restrict can be made. Those requirements include the following: -
- 2.13.1 The restriction requires SNH to take account of the wording within the General Licence which states "*SNH reserves the right to exclude the use of this General Licence by certain persons and/or on certain areas of land where we have reason to believe that wild birds have been taken or killed **by such persons** (our emphasis) and/or on such land other than in accordance with this General Licence*". The framework therefore envisages a link between a breach of the General Licence and the individual who perpetrated such a breach.
- 2.13.2 SNH also requires to follow the framework in being satisfied that it has "*robust evidence that wild birds have been killed or taken or where there is intention to do so other than in accordance with a licence*".
- 2.13.3 It is submitted that in this case, there is a lack of "*robust evidence*".
- 2.13.4 The decision to restrict "*will only be based on evidence received from the police*". Examples of such evidence include: -
- Illegally killed birds being found on the land in question,
  - Illegal poison and/or pesticides being found on the land in question,
  - Cross compliance decisions where the Single Farm Payment has been withdrawn,
  - Illegal placement, design or use of traps,
  - Vicarious liability convictions. In this case, only one of these heads applies "*illegal placement, design or use of traps*". In other words, none of the other heads of claim apply.
- 2.13.5 The additional considerations which the framework requires the decision maker to take account of are: -
- The strength of evidence that those activities have been carried out by owners or managers of that land. In this case, the Decision Notice states, in terms "*Please note that this restriction does not infer responsibility for the commission of crimes on any individuals*".
  - In addition, the framework requires SNH to take account of "*the actual or potential conservation impact of those activities*". As expanded below, the conservation impact was covered extensively in paragraph 4 of the Estate's letter of 21<sup>st</sup> November 2019 under the heading "*Ecological implications and impact*".
- 2.13.6 The decision to restrict is to be based upon the following important criteria: -
- Whether wild birds have been killed and/or taken.
  - Responses provided by the affected party (as discussed between the Wildlife Operations Unit Manager, the relevant Area Manager and the Director of Operations).
- 2.13.7 The framework appears to recognise that any new evidence can be taken into account, under the heading "*Extending a period of restriction*".
- 2.14 In summary, under the framework, SNH needs to make any decision based on all of the above considerations, both individually and cumulatively. It is submitted that SNH has failed to do so.
- 2.15 Those grounds are set out in more detail in paragraph 3 below.



### 3. Grounds upon which it is proposed that the appeal be allowed

#### 3.1 *Insufficient evidence and lack of robust evidence.*

In our letter of 21<sup>st</sup> November 2019 on behalf of the Estate, we sought additional evidence from SNH. That has not been provided.

- 3.1.1 In order for the Estate to suffer the penalty of a restriction, it is incumbent upon SNH to be satisfied that the evidence presented to it includes criteria which includes that *"those activities had been carried out by owners or managers of that land"*.
- 3.1.2 Although it is accepted that there appear to be six specific incidents (9<sup>th</sup> and 31<sup>st</sup> May 2017, 20<sup>th</sup> January 2018, 10<sup>th</sup> January, 11<sup>th</sup> May and 10<sup>th</sup> June 2019), none of these incidents, taken individually can lead to the conclusion that there is robust evidence of the kind required by the framework to restrict the General Licence.
- 3.1.3 The first incident (9/5/17) is based on an unidentified individual and led to no supportive forensic evidence, which is almost beyond comprehension.
- 3.1.4 The second incident (31/5/17) involves an unknown and unidentified individual. It is believed that the individuals concerned have an axe to grind with the Estate. The idea of an individual cognisant of the law shooting and killing a bird of prey in broad daylight and leaving the evidence of that on the ground is highly improbable. This is another example of a *"lack of robust evidence"*. SNH do not appear to have requested from the police any more than the brief summary provided.
- 3.1.5 The incident on 20/01/18 relates to an incident off Leadhills Estate. The perpetration of the offence could not have happened on Leadhills ground (the location being beyond 200 metres of areas managed by employees of Leadhills Estate).
- 3.1.6 Incident (10/01/19). The video evidence is available online. There is no supportive evidence whatsoever that anyone committed a criminal offence. The General Licence requires the removal of a buzzard from a multi catch trap. There is no evidence whatsoever that the individual on the video killed the buzzard. The bare evidence alone, in fact supports the buzzard being released from the trap. This is another example of a presumption of guilt and imposition of a penalty when there is no justification for doing so.
- 3.1.7 Incident 11/05/19. On the face of it this is clearly a very serious incident and one which falls within the categories of *"examples of evidence"* which the framework envisages namely – *"illegal placement .. or use of traps or methods that are not in compliance with the requirements of the General Licences"*. There remains a lack of robust evidence which can in any way be linked to the Estate which SNH appear to have failed to take into account. Exculpatory evidence will be dealt with further below. In this case, however, the lack of robust evidence fails to take account of the fact that an individual connected to the Estate would have acted so naively and recklessly again in broad daylight. SNH do not appear to have sought or obtained forensic reports in support of the decision to restrict based on this case. SNH appear to have failed to take account of the three semi-permanent raptor workers on the Estate, who appear not to have preserved the evidence or taken steps to assist in the discovery of the suspect, which could have included placing a camera on the nest, preserving the crime scene and involving the police from the outset. The lack of robust evidence is further supported by our letter at paragraph 2F.24 which questions the fact that the second spring trap was not set (the safety catch was applied). All of these are an indication of a lack of robust evidence and interference by third parties not connected to the Estate. Notwithstanding that, SNH have imposed a restriction on the owners and managers of Leadhills Estate in the face of a lack of robust evidence, all as set out in detail in our letter of 21<sup>st</sup> November 2019.
- 3.1.8 Incident 10/06/19). The deceased hen harrier was found approximately 400 metres from the Leadhills boundary and not on Leadhills ground. That is a lack of robust evidence of any activity

involving Leadhills Estate. It is very clear that the framework for the general restrictions require evidence to relate to incidents "*on certain areas of land*", which are clearly designed to relate to the Estate itself. This finding and the alleged incident appears to have occurred on another piece of land altogether.

- 3.1.9 The decision letter is very brief and does not appear to set out what SNH consider to be "*robust evidence*", other than reference to the Police Scotland summaries, which are dealt with above.
- 3.1.10 The request for further information led to SNH providing information in Annex 2 of their letter of 26<sup>th</sup> November 2019. Annex 2 only provides information on locations and two corrections of grid references. The Annex states "*any requests to access documents or material relating to these incidents should be made directly to Police Scotland*". That indicates that SNH have not made any such requests to Police Scotland as they ought to have done.
- 3.1.11 SNH appear to have failed to take account of the fact that not one of the incidents referred to led to any individual being charged by the police, let alone reported to the Procurator Fiscal.
- 3.1.12 The Wildlife and Countryside Act permits a vicarious liability prosecution to proceed against a landowner or land manager without proceedings being taken against an individual considered to be the original offender. No such report or prosecution occurred in this case.
- 3.1.13 Cumulatively, there is therefore a significant lack of robust evidence, which justifies either SNH imposing a sanction on landowners and land managers or losing trust or confidence that a light touch approach to regulation cannot be continued.

### 3.2 ***Failure to provide reasons.***

It is submitted that SNH have a duty to provide reasons for the decision. They have failed to do so.

- 3.2.1 Their decision letter states the following reasons: -
  - a. Evidence provided to SNH by Police Scotland and disclosed in previous correspondence being sufficiently robust to convince SNH that evidence of wildlife crimes in relation to wild birds have been found on and adjacent to Leadhills Estate.
- 3.2.2 We have set out above the basis upon which there is a lack of robust evidence to justify the restriction.
- 3.2.3 Furthermore, SNH states "*I have taken into account all of the relevant information provided by you in response to our original Notice*". We will address that in more detail below under sub paragraph 3.3, but in summary, SNH have not addressed the submissions in any meaningful way. SNH were provided on 21<sup>st</sup> November 2019 with a seventeen page letter and ten supporting documents which included not only forensic evidence relating to the incidents, but also extensive steps taken by Leadhills Estate which should have reinforced SNH's confidence that a light touch approach to regulation would be appropriate on Leadhills. It is widely recognised now by the law that a duty to give reasons by a decision making public body is extremely important, both to show that the decision makers have acted fairly and rationally and for proper lawful purposes. Furthermore, it is procedurally unfair for a decision maker to give an adverse decision without giving reasons for it and secondly a decision which is not buttressed by the discipline of reasons may prove to be an irrational one, in the sense that it has not been addressed to proper relevant considerations or has been informed by improper considerations.
- 3.2.4 Furthermore, the framework document affords the affected party the right to respond to a notification. That framework requires the decision maker to review the written response. The response to the extensive document provided by Leadhills Estate is a one line sentence in the Decision Notice. All of that betrays procedural unfairness to the detriment of the interests of the owners and managers of Leadhills Estate.

### 3.3 **Failure to take account of Leadhills' submissions and supportive exculpatory evidence.**

- 3.3.1 The Decision Notice against which this is appealed has dealt with those submissions as follows "*I have taken into account all of the relevant information provided by you in response to our original Notice*".
- 3.3.2 SNH give no further reference whatsoever to the detailed submissions provided by Leadhills Estate on 21<sup>st</sup> November 2019, with supporting evidence.
- 3.3.3 The submissions and evidence provided by Leadhills Estate in our letter of 21<sup>st</sup> November 2019 is substantial, substantive and does not appear to have been taken into account. The decision by SNH was published five days after that letter.
- 3.3.4 The decision maker in the appeal is asked to review and take into account all of the information, submissions and evidence provided in that letter. We do not intend to rehearse all of the exculpatory information and evidence provided in that letter, other than to reiterate the following considerations: -
- a. At least two of the incidents appear to have occurred off Leadhills ground altogether and should have been excluded from the decision to restrict.
  - b. On the incidents which are alleged to have occurred on Leadhills ground, no individual has been charged, prosecuted or convicted.
  - c. SNH do not appear to have taken account of the fact that some of these incidents may well have been perpetrated by third parties who have an axe to grind with the Estate (in particular incident F).
  - d. SNH appear to have failed to take account of, or have taken insufficient account of the fact that those reporting the incidents may not be impartial (incidents A, B, D, F and G).
  - e. SNH appear to have failed to take account of, or have taken insufficient account of the full cooperation by the Estate with police inquiries.
  - f. SNH appear to have failed to take account of, or have taken insufficient account of the Estate's systems, protocols and compliance, which are summarised in paragraph 3 and supported by the supporting documentation.
  - g. Failure to take account of the clear evidence of interference and vandalism on the Estate, suggesting third party nefarious activity and interference.
  - h. The Director is invited to give full consideration of the submissions contained in the said letter of 21<sup>st</sup> November 2019 and to reverse the first instance decision in light of those considerations.

### 3.4 **Failure to consider fully the impact on conservation.**

- 3.4.1 The framework makes clear that the decision to restrict includes criteria which involves "*the actual or potential conservation impact of those activities*".
- 3.4.2 SNH appear to have taken no account whatsoever of the conservation or ecological impact either of the alleged activities or of the imposition of the restriction.
- 3.4.3 There does not appear to be any impact on the conservation impact of the alleged activities set out in any of the documentation provided by SNH.

3.4.4 Per contra, the impact of the decision to restrict is potentially very significant. Reference is made to paragraph 4 of the submission letter of 21<sup>st</sup> November 2019 and the supporting documentation (in particular the Clyde Valley Wader Survey Reports).

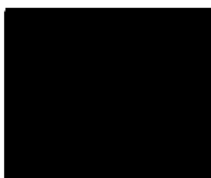
**3.5 Failure to take account of prejudicial media involvement in the prior decision.**

3.5.1 By letter dated 18<sup>th</sup> November 2019 to SNH, SNH were alerted, in advance of their decision letter, to extraneous material made available online, which tended to indicate that: -

- a. Material had been leaked to the media; and
- b. That a decision had already been made. This is refuted by SNH in its covering email of 26<sup>th</sup> November 2019. The Director is invited to take account of the letter of 18<sup>th</sup> November 2019, to reconsider it and to carry out an investigation into: -
  - i. How this information was leaked in the first instance and to report back to Leadhills Estate; and
  - ii. To review the wording of both the raptor persecution website and [REDACTED] in assessing the Estate's concern that the matter had already been determined prior to a final submission letter of 21<sup>st</sup> November 2019.

**4. Conclusion and overview**

- 4.1 The decision to restrict the General Licence is unfair, arbitrary, based on a lack of evidence and fails to take account of substantial and substantive submissions made by Leadhills Estate. There is no indication whatsoever that SNH has considered any physical or documentary evidence, other than the brief summaries provided by Police Scotland. The control of wild birds is governed by SNH General Licences, which the Estate has consistently adhered to (as set out to SNH in its supporting documentation). The police report itself provides that, in spite of investigation by the police, no individuals were charged, prosecuted or convicted. No report was sent by the police to the Procurator Fiscal's Office even for consideration.
- 4.2 It is therefore manifestly unfair and unsound in law for SNH to have restricted the Open General Licences in the face of that information.
- 4.3 There is no reason why SNH should have lost trust and confidence either in the Estate's practices or that light touch regulation could continue to operate on the Estate.
- 4.4 The means by which SNH has reached a decision appears to be both procedurally unfair and in breach of the Estate, its owners' and managers' European Convention rights.
- 4.5 SNH have failed to take account of extensive exculpatory evidence produced by Leadhills Estate as part of its process.
- 4.6 SNH have failed to take account of the conservation and ecological impact of this decision.
- 4.7 The decision appears to have been prejudged on the basis that the decision was leaked unlawfully online (the Estate still does not know how that information was released, but it appears to be in clear breach of the Data Protection Act).
- 4.8 SNH have failed to give or set out reasons for its decision.
- 4.9 In all of the circumstances, the decision should be reversed and the Open General Licence should be reinstated.
- 4.10 The Estate will be happy to clarify any issue arising from the attached paperwork.



4.11 For the avoidance of doubt, all of the documentation in the original submission was provided at first instance and is provided again here. The Director is asked to take full account of all of that evidence in support of this appeal.

Yours sincerely



Levy & McRae

Enc.