RURAL DEVELOPMENT COMMITTEE

AGENDA

21st Meeting, 2002 (Session 1)

Tuesday 24 September 2002

The Committee will meet at 2.00 pm in Committee Room 3.

1. **Item in private:** The Committee will decide whether to take item 4 in private.

2. **Cairngorms National Park:** The Committee will take evidence from the following Scottish Executive officials—
   
   Jim Halley, Environment and Rural Affairs Department
   
   John Nicolson, Environment and Rural Affairs Department
   
   Andrew Dickson, Environment and Rural Affairs Department.

3. **Subordinate Legislation:** The Committee will consider the following negative instrument—
   

4. **Work Programme:** The Committee will consider its future work programme.

Tracey Hawe
Clerk to the Committee
The following papers are attached or are relevant to this meeting:

<table>
<thead>
<tr>
<th>Agenda item 2</th>
<th>RD/02/21/1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agenda item 3</td>
<td>RD/02/21/2</td>
</tr>
<tr>
<td>The Conservation of Seals (Scotland) Order 2002 (<a href="#">SSI 2002/404</a>).</td>
<td></td>
</tr>
<tr>
<td>Correspondence from the Convener to the Minister for Environment and Rural Development</td>
<td></td>
</tr>
<tr>
<td>Response from the Minister for Environment and Rural Development</td>
<td></td>
</tr>
<tr>
<td>Cover note from the Clerk</td>
<td></td>
</tr>
<tr>
<td>Agenda item 4</td>
<td>RD/02/21/3</td>
</tr>
<tr>
<td>A paper from the Convener is attached (for Committee members only)</td>
<td></td>
</tr>
</tbody>
</table>
RURAL DEVELOPMENT COMMITTEE

Edinburgh
EH99 1SP

18 September, 2002

Ross Finnie MSP
Minister for Environment and Rural Development
Pentland House

Dear Ross

Conservation of Seals (Scotland) Order SSI 2002/404

The Rural Development Committee considered the above Order at its meeting yesterday. The Committee raised a number of queries regarding the Instrument and I would be grateful if you could provide some clarification on these matters.

Firstly the Committee notes that that the Order applies to common seals in the whole of Scotland, and grey seals in the Moray Firth. While noting the explanation provided in the Executive note attached to the Order, the Committee would be grateful for further information on the reasons for the distinctions drawn between the two species, and the reasons for making special provision for the Moray Firth area.

There appears to be some discrepancy between the cover-note provided to the Committee by the Subordinate Legislation Committee, (which states that the Order applies until 3 September 2003) and the Order itself, which provides that the Order shall stay in force until 3 September 2004. The Committee assumes that this is simply a typographical error, and that the Order will remain in force until 3 October 2004, as the Order itself provides. However, the Committee would be grateful for an explanation of why the period of two years was chosen for the Order to remain in force. Members wondered whether the season and cycle would be annual, rather than bi-annual, and would welcome an explanation on why the Order will stay in force for two years. On a related matter, the Committee would welcome clarification on whether the Order will remain in force for that time automatically, or whether, if the outbreak ceases, or does not eventuate, it will be revoked. The Committee would welcome an assurance that procedures are in place to ensure that the Order will be revoked at the earliest opportunity, should it not prove to be needed.

Members also wished to highlight their extreme concern at the fact that the Instrument was already in force, prior to parliamentary scrutiny taking place. It was noted that the Order came into force on 4 September, the day after being laid, in breach of Article 10 (2) of the Scotland Act 1998, (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999. The Committee recognises the
desire of the Executive to bring the Order into force as soon as possible after the ending of the close season on 31 August. However, the Committee remains deeply unhappy at being required to scrutinise legislation on a retrospective basis, after it has come into force.

The Committee would also welcome clarification on several legal points. Did the prohibition contained in the Order take effect as of 4 September, and therefore constitute a criminal offence, as of that date? If so, the Committee would be grateful if the Executive could indicate what steps it has taken to publicise the Order, and bring it to the attention of relevant groups such as fishermen. The Committee would also welcome the views of the Executive on whether someone who breached the prohibition prior to either a) having notice of it, or b) the Order undergoing parliamentary scrutiny, should be prosecuted. The Committee wishes to know what guidance would be offered to Lord Advocate in such circumstances, and hopes that the Executive will agree that persons should not be prosecuted in such circumstances.

The Committee would be grateful for a response at the earliest possible opportunity. As the Committee has indicated a desire to discuss the Instrument again next week, I would be grateful if you could let me know as soon as possible if a response could be provided prior to Tuesday 24 September.

Yours sincerely

Alex Fergusson
Convener
Rural Development Committee

Tel: 0131-348 5636
Introduction

The Committee considered this Instrument at the meeting of 17 September. A number of queries were raised in relation to the policy of the Instrument, and the procedures for the laying of the instrument, and subsequent parliamentary consideration.

The Committee agreed to seek clarification on these points from the Executive, and a copy of the letter from the Convener is attached for members’ information. The response from the Scottish Executive will follow as soon as it is received. A note outlining the relevant procedures for parliamentary consideration of the Instrument, and the procedures associated with the 21 –day rule is attached below.

A copy of the Instrument is also attached.

Procedure for Parliamentary consideration of the Instrument

The Instrument is subject to annulment procedure. Therefore it will become, or remain, law unless the annulment procedure is activated to prevent it. In the case of the above instrument, it came into force on 4 September, the day after it was laid.

In order to annul a negative instrument, an MSP must, (whether or not a member of the lead committee), lodge a motion proposing to the lead committee that it recommend that “nothing further is done” under the instrument. This is called a motion for annulment (Rule 10.4). Rule 10.4.1 provides for a member to do so no later than 40 days after the instrument is laid, however, in practice the lead committee has to report to the Parliament within the same period so the member will need to propose a motion well within the 40 days. The Rural Development Committee is required to report to the parliament by 7 October, so any motion to annul should be lodged well before this date, in order to allow the Committee to consider the motion.

Where a lead committee has debated such a motion and voted to recommend that the instrument be annulled, it reports to the Parliament setting out its recommendations and the Bureau must by motion propose within the 40 days that nothing further be done under the instrument. The matter will then be decided in Parliament.

21-day rule for Negative Instruments

Article 10(2) of the Order provides that negative instruments should be laid before the Scottish Parliament not less than 21 days before the instrument is due to come into force. Where an instrument is laid before the Parliament less than 21 days before it is due to come into force, the Executive must explain by letter to the Presiding Officer why this procedure has been breached.

A letter to the Presiding Officer accompanies the Instrument in question, explaining that the Executive believed there was a need to introduce the order urgently, to provide protection for the seal population, in the light of the phocine distemper virus. The 1970 Act already provides for close seasons for common and grey seals, and the current close season for common seals ended on 31 August. The Executive therefore believed it was important for the instrument to come into force as soon as possible after this date. The Rural Development Committee may consider the question of whether the reasons set out in the letter for breach of the procedures are adequate. If the Committee believes that these reasons are inadequate, this can be reflected in the report of the Committee to the Parliament, as outlined below.

**Negative instrument reports**

Under Standing Orders (Rules 10.4.3 and 10.6.4), committees must report to the Parliament on all instruments referred to them. Even if they have no recommendations to make they must report that fact.

Where a lead committee passes a motion that a negative instrument be annulled, it must report to the Parliament its recommendations, within the 40 day period of the instrument being laid. In the case of this instrument, the Committee must report by 7 October. In the case of a negative instrument where a motion to annul has been considered by the committee, the committee should report a summary the consideration of the motion and the result of the vote. Where a committee does not wish to annul a negative instrument but wishes to comment, this may be included in the committee’s report on the instrument along with the statement that it has no recommendations to make.

Tracey Hawe
Clerk
Rural Development Committee
September 2002
I write in response to your letter of 18 September seeking clarification on a number of queries raised by the Rural Development Committee regarding the above instrument.

Background
The Scottish Executive considered it essential to introduce these measures to protect sensitive and potentially vulnerable common and grey seal populations in the areas specified from the pressures represented by shooting during a period when they are likely to be affected by phocine distemper virus (PDV). This decision was based on scientific advice from our statutory advisers, the Natural Environmental Research Council, Fisheries Research Services and Scottish Natural Heritage, about the likely affects of PDV on the seal population. It was also considered necessary to ensure compliance with Community obligations, in particular under the Habitats Directive.

Common Seals
In 1988 over 18,000 common seals died across Northern Europe as a result of PDV. In Scotland around 1,300 died, with the greatest concentrations of dead strandings taking place in Orkney (601), the Clyde (423 – though experts consider that many of these may have been carried by tides from Ireland), the Moray Firth (116) and the Tay (77). In terms of proportions of common seal populations which are estimated to have died around Scotland during 1988, the Moray Firth population was most badly affected, losing around 13%. It appears that the spread of the current outbreak is following a similar pattern to 1988. In these circumstances it is important to remove any additional human pressure on a vulnerable population and the Order therefore applies to common seals throughout Scotland.
**Grey Seals & Moray Firth**

In 1988 grey seals proved less susceptible to PDV with no noticeable impact on their overall populations, thus it was not considered appropriate to introduce an Order for them across Scotland. There is, however, a real danger of confusing the two species particularly where there is a mixed common/grey seal population. Scientific advisers expressed serious concern that accidental shooting or disturbance could put additional pressure on local common seal populations which are thought to be particularly vulnerable. The Moray Firth, where common seal population figures indicate a recent local population decline, is the only area where current evidence suggests that there is such a risk and the Order therefore only applies to grey seals in that area.

**Duration & Review**

It is assumed that the date contained in the cover-note provided by the Subordinate Legislation Committee was simply a typographical error. The Order itself states, as intended, that it shall stay in force until 3 September 2004. This period was selected based on the timing of common seal population surveys. These are undertaken in August, during the annual moulting and pupping period, when the highest proportion of these seals are hauled out on land. The most recent survey of common seal populations was completed in August 2002 prior to the spread of PDV to UK waters. The next survey in August 2003 will provide the first complete picture of the impact of PDV on these populations. If, as in 1988, the effect on these seals is severe the Order will need to remain in force to allow the population to recover. It will not be until the following survey, in August 2004, that we will have an indication of whether the common seal population is showing signs of recovery or not. It will not be until then that the Executive will be able to consider whether the Order should be allowed to lapse or whether we should seek to renew the Order and, if so, for what period of time.

As I made clear in the Executive’s press release on the Order, if PDV does not, in fact, spread to Scottish waters the Executive will of course review the requirement for this Order. The opinion of our advisers, based on the most recent evidence available, is that the virus is still expected to reach Scottish water in the next month or so.

**21 Day Rule**

The Executive fully accepts the sense and propriety of the 21 day rule which usually applies before an instrument comes into force. It is recognised, however, that occasionally it is necessary to act quickly in a very few cases to bring legislation in earlier than this timetable allows. The reason for not complying with that article in this specific case was the need to introduce this conservation order urgently in order to provide additional protection against human pressure on common seals in light of the imminent arrival of PDV in Scotland. The 1970 Act prescribes close seasons for both common and grey seals. Outwith these periods seals can be shot legally, provided the individual holds a valid firearms licence and uses the appropriate firearm. The close season for common seals ended on 31 August and it was therefore important that this instrument, prohibiting the killing, injuring or taking of common seals in Scotland, came into force as soon as possible after the open season resumed. In addition, it was considered appropriate that the Executive should introduce this Order as soon as possible after the end of the close season in order to ensure compliance with its obligations under the EU Habitats Directive.

Clearly it would be our intention to ensure that any future amendments to this Order – either to revoke it or to renew it – would be brought forward in observance of the 21 day rule.

**Informing Stakeholders**

My officials issued letters to a broad range of fishery and fishfarming interests informing them, prior to the end of the close season, of the intention to introduce this Order. They followed this up by confirming to these bodies the coming into force of the Order on 4 September and provided them with a copy of the press release. The press release was issued to the media on 4 September and was picked up both general and specialist press.
Prosecutions
It is not for the Executive to advise the Crown Office on whether or not to proceed with individual prosecutions. This would be a matter for the Crown Office to decide and any decision would be made according to the individual circumstances of each case.

I hope that this answers the Committee’s queries fully and that they are reassured that there was good reason for bringing the Order into effect on an accelerated timescale given the exceptional circumstances arising from this disease outbreak.

ROSS FINNIE