

COMPLAINT

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

CONCERNING FAILURE TO COMPLY WITH COMMUNITY LAW

1. Surname and forename of complainant:

The Royal Society for the Protection of Birds (RSPB), a registered charity, operating within Scotland as RSPB Scotland; and

The Wildfowl & Wetlands Trust, also a registered charity

2. Where appropriate, represented by:

Director, RSPB Scotland (Stuart Housden) and WWT, Director of Conservation (Dr Debbie Pain)

3. Nationality:

Both complainants are charitable organisations based in and primarily operating in the UK.

4. Address or Registered Office:

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WWT, Slimbridge, Glos. GL2 7BT

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6. Field and place(s) of activity:

Nature conservation; based in the United Kingdom of Great Britain and Northern Ireland but both organisations are active globally, including across the flyways of the bird species affected by the matters that are the subject of this complaint.

7. Member State or public body alleged by the complainant not to have complied with Community law:

The United Kingdom of Great Britain and Northern Ireland, through the devolved Government of Scotland, the Scottish Government, and its agency Scottish Natural Heritage.

8. Fullest possible account of facts giving rise to complaint:

8.1 Context

Islay is the single most important wintering site for Greenland breeding geese that migrate to Europe, with two key populations, both listed under Annex 1 of the Birds Directive: Greenland barnacle geese and Greenland white-fronted geese. Five SPAs have been designated for geese on Islay, covering key roosts on the island.

These birds form mixed species feeding flocks on cultivated farmland on Islay (though much of this feeding habitat remains undesignated). This grazing has, over recent decades, had a negative impact on agricultural businesses on the island, which led to periodic conflict between conservation and agricultural interests in the 1990s. However, an approach based on national stakeholder consensus and Scottish Government investment in a Local Goose Management Scheme, combining management payments and goose scaring, with a limited number of licences to shoot barnacle geese for the purpose of scaring, brought a period of relative political stability and cross-sectoral agreement on the issue of geese on Islay. This in turn facilitated positive relations between Islay farmers and conservationists – with consequent progress on the conservation of other wildlife in the island, notably corncrake and chough.

Over the past three years, however, the Scottish Government has signalled its intent to abandon this consensual framework in favour of the active population reduction of barnacle geese on Islay through licenced shooting, ostensibly as an effort to reduce public expenditure on goose management in the longer term. Scottish Government and agency officials, in partnership with the National Farmers' Union of Scotland, have produced and started to implement the Islay Sustainable Goose Management Strategy 2014-2024 (Attachment 1), which aims to reduce goose damage by actively reducing the Islay barnacle goose population numerically by 25-30%, through licenced shooting.

The Complainants believe that the approach taken in the Strategy is insufficiently evidenced to ensure compliance with the Birds Directive, as transposed into domestic legislation in Scotland. We are concerned that the general approach adopted – deliberately reducing populations of protected wildlife species through killing as a low cost-solution where conflict emerges – may, through the precedent now emerging on Islay, become a standard approach to the management of other protected species and populations in Scotland, and thereafter elsewhere in the UK and possibly further afield.

For this reason, we make this Complaint on the basis of important procedural and evidential shortcomings, but with a long term view to precedents for the future management of protected wildlife species in Scotland.

8.2 Background

The population of wintering Greenland barnacle geese (*Branta leucopsis*) on the Scottish island of Islay has increased over the past half-century, stabilising since 2006/7 at around 40,000 birds. The last three years (2012/13 to 2014/15) has seen the population in the ‘decline’ phase of recent fluctuation around this level. This population growth and stabilisation is shown graphically in Figure 1.

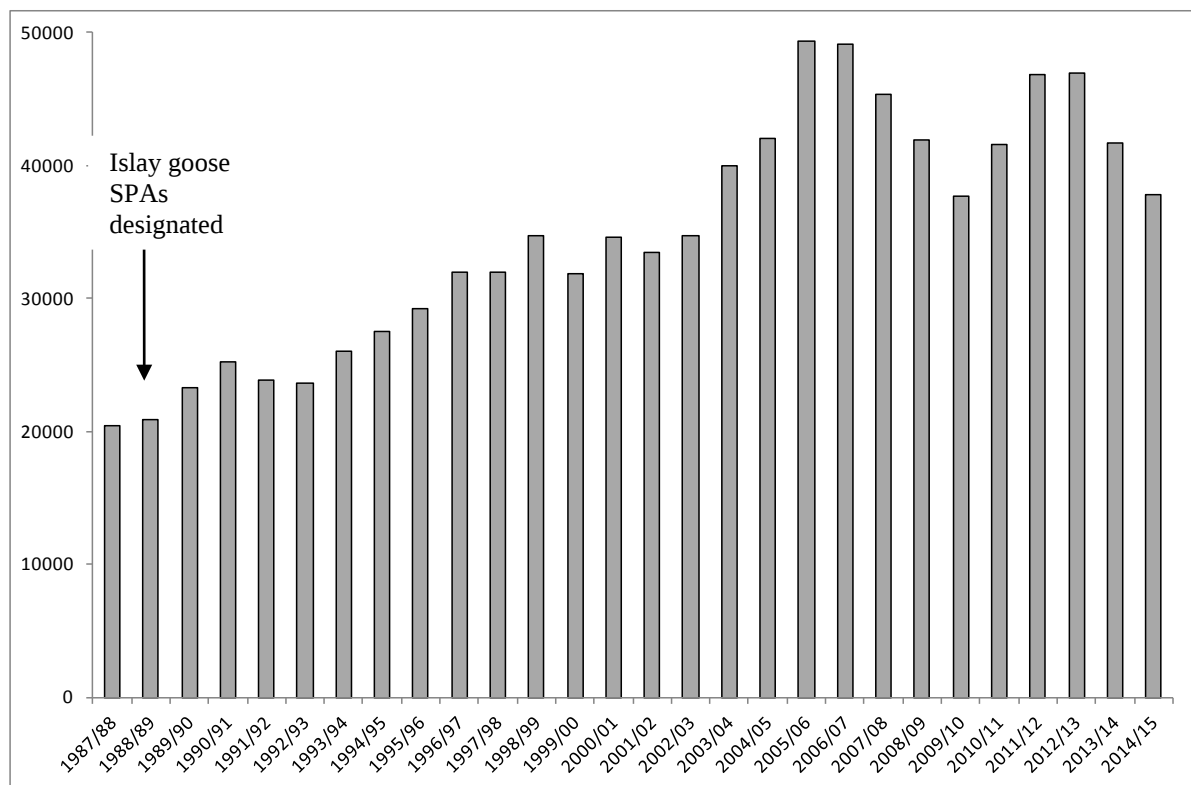


Figure 1: Population of wintering Greenland barnacle geese on Islay (mean of winter counts) 1987/88 – 2014/15 (data from SNH).

Islay is the winter home to around 70% of the whole Scottish population, which in turn comprises almost 80% of the world total for this distinct flyway population – thus more than half of the world population winters on Islay (Attachment 2). The barnacle goose is a migratory species listed under Annex 1 of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (the codified version of Directive 79/409/EEC as amended)(the Birds Directive).

The increase in barnacle geese, from World War II until their ‘peak’ in the early 2000s, is believed to be caused by a combination of protection under 20th century UK and EU legislation, and the improvement of feeding conditions as a result of increased nitrogen through fertiliser input on the island since the last world war (Attachment 3). However, the relationship between fertiliser input, goose numbers, and thence agricultural damage, is not simple (Attachment 4).

Islay also supports a high proportion of the world’s Greenland white-fronted geese (also listed under Annex 1 of the Birds Directive) in winter. Approximately one quarter of the world population is found on Islay – with another quarter wintering at other Scottish sites, and the remaining half of the total wintering in Ireland (Attachment 5). These geese often feed alongside barnacle geese in mixed flocks. In contrast to the barnacle goose, the world population of this sub-species has steadily declined over recent decades for, as yet, unknown reasons from 35,600 in spring 1999 to 20,800 in spring 2014¹. On Islay, numbers have declined from 13,560 to 5,093 over the same period (see Figure 2)².

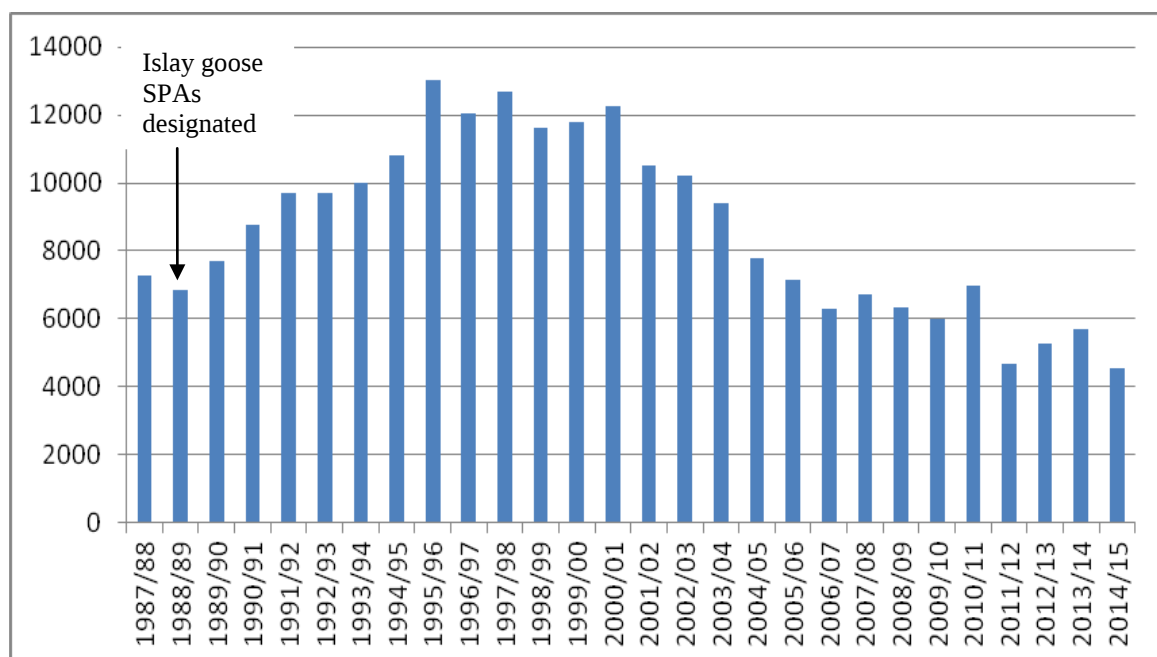


Figure 2. Total Islay population of Greenland white-fronted geese since 1987/88 (International Counts).

Soil and weather conditions on Islay are, compared to most other Hebridean islands, conducive to relatively large agricultural units and relatively productive operations. The impacts that barnacle geese have on the incomes generated is generally considered to have grown with the population increase.

¹ Greenland White-fronted Goose Study annual reports (e.g. Fox A.D. & Francis, I. (2002) Report of the 2001/2002 International Census of Greenland White-fronted Geese and Attachment 3.

² *Ibid*

Issues with Islay geese (primarily barnacle geese – being the more numerous) have been a long-standing cause of conflict between conservation and agriculture interests. There were public arguments through the late 1980s, and a Judicial Review (successful on appeal) against licences issued to shoot barnacle geese in SPAs was sought by RSPB and WWT in the 1990s (final decision issued in 2000³). However, over the subsequent 15 years public policy on Islay geese and the position of both RSPB Scotland and WWT have been generally in agreement. This agreement was primarily driven by a SNH-administered goose management scheme on Islay that provided management payments, funded by the Scottish Government, to farmers affected by geese grazing.

Until recently, this scheme was based on combined management payments to farmers, strategic non-lethal scaring, and the annual issuing of limited licences to shoot Greenland barnacle geese ('lethal scaring'). The complainants have consistently supported this general approach - but have expressed explicit opposition to the barnacle goose shooting licences on the grounds of satisfactory, non-lethal alternatives being available (in relation to Article 9 of the Birds Directive). The complainants' engagement was maintained via membership of the Islay Local Goose Management Group, a national stakeholders group (the National Goose Management Review Group ("NGMRG")) and its research advisory group (the Goose Science Advisory Group ("GSAG")).

In 2011/12, partly in response to tightening financial constraints, Scottish Ministers approved a doubling of the Islay bag limit (i.e. the total number of Greenland barnacle geese permitted under license to be shot in any year) – with the number shot rising from around 500 per year to close to 2000 per year⁴. This was intended to reduce the financial cost of the scheme – by reducing goose numbers and providing more intensive scaring, it was believed that payments to farmers could be reduced. Accordingly, the budget for the Islay scheme was cut – a decision that was highly controversial locally, and was subsequently reversed (although importantly the increased shooting, under licence, was not reversed).

Soon after, Scottish Government officials explicitly signalled their intention to shift the approach on Islay, moving from the management payment/strategic scaring approach, with limited licences for lethal scaring (killing some birds as a complement/enhancement to scaring), to an approach that seeks to actively reduce, by some 25-30%, the total island

³ The RSPB v. Secretary of State for Scotland, Court of Session: Inner House [2001] Env. L.R. 19, <https://www.scotcourts.gov.uk/search-judgments/judgment?id=0f7c87a6-8980-69d2-b500-ff0000d74aa7>

⁴ See attachment 1 – section 3.1.4, page 21.

barnacle goose population, and then actively maintain the population at that reduced level, through licensed shooting. This policy shift is enacted through the Islay Sustainable Goose Management Strategy 2014–2024 (Attachment 1), in which this population reduction is termed Adaptive Management, and which states (see Para 1.16, page 7):

“The strategy proposes that the extent of damage to crops is reduced by 25-35% across Islay. To achieve this it is proposed that the Islay barnacle population is lowered, in increments, to a minimum range of 28,000 to 31,000 geese and is then maintained at that level. This represents a maximum reduction of 25-30% of barnacle geese and it is thought that this, along with continued non-lethal scaring and development of new scaring techniques, will result in a comparable reduction in the current levels of damage to crops”.

Having failed to reach agreement on this new Islay Strategy, the complainants resigned membership of NGMRG and GSAG in December 2014 (Attachment 8).

The complainants do not deny that agricultural damage by wild geese occurs and that it can be serious for some farms. However, the relationship between Islay goose numbers/density and agricultural damage is not well understood. With regard to this limited objective, peer-reviewed evidence indicates that the relationship is not simple (Attachment 4). Despite the complainants’ repeated calls for research in this area to be undertaken, none has been done for almost three decades. This lack of information means that the new Islay Strategy relies heavily on circumstantial, opinion-based and subjective evidence.

8.3 Biological status of the species involved

Historical evidence, though generally anecdotal and requiring cautious interpretation, suggests considerable historic population fluctuations in Scotland’s wild geese, with indications of human factors playing a role as drivers. The species that principally concern us here – the barnacle goose and Greenland white-fronted goose – have both been regular, though to varying extents localised visitors to Scotland for many centuries.

By the mid-20th century, population declines in several wintering goose species prompted the introduction of legal restrictions on hunting. These restrictions were introduced by the Protection of Birds Act 1954 and applied throughout Scotland; however, exemptions

permitting the shooting of geese on Islay were made from 1955-1981. The Wildlife and Countryside Act 1981 superseded these provisions and removed the exemptions for Islay.

The Solway wintering (Svalbard-breeding) barnacle goose population in particular had been reduced to just a few hundred individuals following the Second World War, and showed a strong and immediate positive response to restrictions on commercial hunting. Later legislation is also likely to have benefitted these populations and, together with the post-war intensification of agriculture, which provides palatable, high protein forage for wild geese in winter, barnacle goose populations – both Greenland and Svalbard - have increased over recent decades with, latterly, apparent stabilisation on Islay.

The past two decades have seen a steady decline in the Scottish and global populations of Greenland white-fronted geese (Attachment 5). These post-war agricultural changes have been implicated in providing new, high protein food sources for geese (Attachment 3), leading to populations concentrating in specific areas – notably Islay and the Solway.

Scotland now hosts more than three quarters of the world population of Greenland and Svalbard barnacle geese, and half of the world's declining Greenland white-fronted goose population (Attachments 2 and 5). This makes migratory wintering geese, in global terms, one of the most important biodiversity features currently occurring in Scotland.

8.4 Relevant legislation

Articles 1, 2, 3, 4 (as amended by article 7 the Habitats Directive⁵), 5 and 9 of the Birds Directive have been principally transposed and implemented, in Scotland, by the Wildlife and Countryside Act 1981 (as amended) (**the WCA**), the Nature Conservation (Scotland) Act 2004 (as amended) (**the 2004 Act**) and the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended) (**the Habitats Regs**).

Both Greenland barnacle and Greenland white-fronted geese are subject to the general provisions applied to all wild birds, including those set out in Articles 1, 2, 3 and 5 of the Birds Directive. As a result, both species benefit from the general protection as set out in Part 1 of the WCA and since these species are not quarry species⁶ any proposed action to

⁵ EU Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

⁶ Neither barnacle geese nor Greenland white-fronted geese are listed on Annex 2 of the Birds Directive – and are therefore not on the list of species that may be hunted.

kill these species requires a licence to be granted in accordance with section 16, the WCA,(which partly transposes Article 9 of the Birds Directive).

In addition, both species are listed on Annex 1 of the Birds Directive due to their conservation status (see above) meaning that “special conservation measures”, and in particular the classification of Special Protection Areas (SPAs) are required for them. On Islay, there are three SPAs classified for barnacle geese, and four for Greenland white-fronted geese (there being five in all, of which two are for both species). These SPAs are all underpinned by SSSIs⁷, notified (now) under the Nature Conservation (Scotland) Act 2004 (originally under the previous section 28 of the WCA).

Any killing of these SPA species, under a programme approved by the Scottish Government and SNH, would constitute a “plan or project,” and must be carried out in accordance with Regulation 48, Habitats Regulations, which transposes the key project assessment parts of the Article 6 the Habitats Directive. In addition, any killing of these geese, by individuals (farmers, or SNH staff/contractors) also requires a licence under section 16 of the WCA (implementing, in part, Article 9 of the Habitats Directive).

8.5 Proposed “Adaptive Management”

The suggested *Adaptive Management* of (Greenland) barnacle geese on Islay may not be incompatible with the protective legal obligations for this, and other, species. However, it would need to pass all the relevant tests and, in our view, this would be most problematic. As we see it, the key tests are:-

1. Section 16 Licences

- (a) Any section 16 WCA licence or any plan involving a number of such licences **must be for the purposes prescribed**; namely “to prevent serious damage to crops, livestock, etc.” and must be *fit for purpose* thus requiring evidence that the proposed measures will reduce the serious damage to the crops/grass.

- (b) Any section 16 licence may only be granted by the licensing authority if it can be satisfied that, as regards that purpose, **there are no other satisfactory solutions**.

⁷ SSSIs, or Sites of Special Scientific Interest, are land notified under the Nature Conservation (Scotland) Act 2004 (or its predecessor, the WCA). The operation of this domestic designation, where it is also an SPA, has to comply with requirements of the Birds and Habitats Directives by virtue of the Habitats Regs.

(c) In granting a section 16 licence, as we understand it, the licensing authority must have regard to its overall responsibilities under the Birds Directive, especially the requirements set out in Article 4 for Annex I species including maintaining those species at **favourable conservation status** both within SPAs and overall within the Member State. Although, to date, the UK administrations have failed to define favourable conservation status at a UK-wide, country or site level for any of its wild bird species based on recent data for these species we think it would be possible to do so.

(d) Although we understand that any section 16 licences would relate to (Greenland) barnacle geese, it should be noted that these species are regularly found side by side with the scarcer and more endangered Greenland white-fronted geese, as they feed in mixed groups. Therefore, this consideration of Article 4 requirements (including favourable conservation status) should include all possible effects on Greenland white-fronted geese from the proposed measures.

2. Reg 48 Habitats Regs Requirements

(a) In addition to the licensing provisions above the proposed measures need to be considered for any effects they might have on the SPAs or the species for which those are classified. This will be needed to avoid disturbance or deterioration to these sites and is required by Regulation 48 of the Habitats Regulations. It is our view that there is a strong likelihood of likely significant effects on the SPAs and their species and therefore an appropriate assessment of the measures must be carried out taking account of the SPA and their species' conservation objectives. The measures may only be approved **if it can be ascertained that there will be no adverse effect on the integrity of the sites and their qualifying species.**

(b) Although we understand that any section 16 licences would relate to (Greenland) barnacle geese, it should be noted that these species are regularly found side by side with the scarcer and more endangered Greenland white-fronted geese, as they feed in mixed groups. Therefore, the appropriate assessment, in relation to the SPAs classified for both species or for Greenland white-fronted geese only, should include all possible effects of the proposed measures on Greenland white-fronted geese.

(c) In addition to these Regulation 48 consideration, the requirements of the 2004 Act must also be complied with in relation to the SSSIs. In particular, the general duty on public bodies (section 12), the operations by public bodies (if licensed shooting carried out by SNH staff) (section 13) and consents by regulatory authorities (if SNH licence others to carry out shooting) (section 15). Moreover, Regulation 3(2) of the Habitats Regs, requires Scottish Ministers and SNH to exercise these, and other relevant, functions in a manner that secures compliance with the Habitats Directive.

8.6 Impact on (Greenland) barnacle geese

Below we set out the approach and information/data that, we believe, should have been secured to inform a robust application of these tests in relation to the new Islay strategy, and which we maintain were not sufficiently in place.

(a) “For the purposes prescribed”

Originally produced in 2004, the EU Commission *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (the EU Guidance)⁸ provides guidance on how Member States should be reflecting the principles laid down in the Birds Directive in their national measures for regulating hunting, including guidance on derogations. In 2007, the EU Guidance was updated in light of recent judgments of the ECJ relevant to hunting under the Birds Directive.

Paragraph 3.5.7 of this EU Guidance states-

“The third reason for derogation under subsection (a) concerns the prevention of serious damage to crops, livestock, forests, fisheries and water. This derogation, which is intended to regulate ‘damage-causing birds’, has a number of dimensions. **Firstly, it clearly relates to economic interest. Secondly, it is intended to prevent damage; therefore it is not a response to already proven damage but of the strong likelihood that this will take place in the absence of action. Thirdly, there must be a basis for concluding that damage will be serious in the absence of action.**” (emphasis added)

⁸ http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/hunting_guide_en.pdf

Thus, it should be noted that clear evidence of serious damage, or its likelihood, is required and that this evidence must be scientifically robust. It also states (see para 3.5.11) that minor damage is not sufficient and that damage must be serious.

Any scheme of Adaptive Management, or process for licensing further killing, must therefore contain evidence that serious damage is occurring or is highly likely to occur, and that licences are limited to those cases where such damage is occurring or is likely to occur. Furthermore, the damage or likely damage must be likely to be prevented by the actions carried under the derogation/licence. This, therefore, means that a process must be in place to monitor damage/likely damage, and record its nature and if/how it has been prevented. No such evidence or monitoring is in place.

(b) No other satisfactory solution

As set out in section 16 of the WCA Act, no licence is permissible unless there is “no other satisfactory solution”. This implements the provision in Article 9 of the Birds Directive.

The EU Guidance (para 3.4.10-12, *ibid*) also states:-

“...where another solution exists, any arguments that it is not “satisfactory” will need to be strong and robust...”

“It is...clear that another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behaviour by the beneficiaries of the derogation...”

“...it seems reasonable to state as a general proposition that any determination that another solution is unsatisfactory should be based on objectively verifiable factors, and that close attention needs to be paid to the scientific and technical evaluation of these...”

There are, at least, two issues raised by this requirement. First, it is important to identify the “problem” to which it is purported that there is “no other satisfactory solution”. If, for instance, the “problem” is a loss of incomes to farmers, it is self evident that another satisfactory solution exists – that is, the provision of payments to farmers. In recent years, until the funding was reduced, the recent goose management schemes on Islay provided such financial payments to ensure that such losses were mitigated. Any

proposal to manage geese by means of licences would need to demonstrate why this erstwhile “satisfactory solution” no longer exists.

Second, for over ten years (in relation to the limited number of licences issued as part of the recent goose management scheme), RSPB Scotland and WWT have been urging the Scottish Government and SNH to undertake research to examine the relative impact on (grass/income) losses of non-lethal scaring against that of lethal scaring (i.e. killing). This has been a basis of our objections to the current issuing of barnacle goose licences, discussions at NGMRG and our formal submissions on the matter (see, for example, the RSPB Scotland response to the 2010 Survey of National Goose Policy Stakeholders – part of the last full review of goose policy in Scotland, Attachment 6). Despite these objections, to date, no adequate research to address this question has been conducted or commissioned⁹. Without information to answer this question, no decision maker is in a position to determine safely that non-lethal scaring is not another satisfactory solution.

(c) Favourable conservation status

In explaining Article 9, para 3.1.1 of the EU guidance (*ibid*) states:-

"A limited number of activities normally prohibited under the Birds Directive (Articles 5-8) are permissible by way of...derogations, where particular problems or situations exist or may arise. The possibilities for use of these derogations are constrained. **They must be justified in relation to the overall objectives of the Directive** and comply with the specific conditions for derogations described in Article 9." (emphasis added)

These overall objectives include those set out in Articles 1 and 2, which should be further read to mean that hunting (or derogations) must be “compatible with the maintenance of the population ... at a satisfactory level” (preamble point 17) as well as the more specific requirements set out in Article 4 for these Annex I species.

⁹ One research study on the issue of lethal and non-lethal scaring has been commissioned by the Scottish Government – from BTO Scotland (Attachment 7). This did not experimentally assess damage to grazing or to farm incomes, and concluded that it was not possible to answer key questions relating to the relative effectiveness of different shooting/scaring activities, as SNH data had been collected in ways not suitable for appropriate analysis.

(d) Requirement to ascertain no adverse effect on the integrity of the site

As indicated above, three of the SPAs on Islay are classified with *inter alia* (Greenland) barnacle geese as a qualifying feature. Given the size and geographic distribution of the SPAs classified for geese, any management measures to the population of geese on Islay may affect the sites' populations. Therefore, as set out above, any such proposals will require an "appropriate assessment" taking account of the SPAs and their species' conservation objectives in accordance with Regulation 48, Habitats Regs.

As some of the SPAs include roosts (whose geese feed elsewhere) and/or feeding grounds (for geese roosting elsewhere), the assessment will need to take into account such movements, and include any licences outwith these of sites that affect such birds.

Before any decision to approve such management measures, the decision maker will need to show that the proposal does not adversely affect the integrity of any of the SPAs and their species, as mentioned above including consideration of any possible effects on the other SPA designation species particularly the Greenland white fronted geese due to many flocks of barnacle geese including these rarer more threatened species. If it is not possible ascertain that the sites and their species will not be adversely affected, approval could proceed only in the "absence of alternative solutions", if necessary for "imperative reasons of overriding public interest", and subject to the provision of adequate "compensatory measures".

In addition as set out above, consideration (in a manner that secures compliance with the Directives) is required as to whether these operations are likely to damage the SSSI and its features before a licence could be issued.

8.7 Impact on Greenland White-fronted geese

As indicated above, a large proportion of the world's population of Greenland white-fronted geese also overwinter on Islay, and are often found in close association with the Greenland barnacle geese. Thus, the consideration of the proposals in relation to the overall objectives of the Directives, and the favourable conservation status of barnacle geese, must also consider the impact on, and favourable conservation status of, Greenland white-fronted geese. In addition, for two of the SPAs, both species are

qualifying features and accordingly, the appropriate assessment for any proposal must address the impact on the integrity of these sites for Greenland White-fronted geese.

Other species that are qualifying features of Islay SPA and/or SSSI sites (e.g. whooper swan and chough), which might be affected by any Adaptive Management activities, should also be formally assessed to determine potential effects at the outset and only excluded from consideration if no impacts are identified. Monitoring of these species should be in place so that unforeseen impacts can be detected; no clear plans are in place, to our knowledge.

9. Steps taken at country (Scotland) and Member State (UK) level

The decision to implement this newly adopted strategy is an executive decision by the Scottish Government and/or its agency Scottish Natural Heritage¹⁰. This decision was taken, despite the historical engagement by the complainants in the development of public policy towards geese management (see 8.1 above). Furthermore, the complainants have been in regular dialogue, over at least the past two years, with Scottish Ministers (see correspondence, attachment 8), over the plans to develop a new management strategy for Islay geese. This correspondence was complemented by regular communication with officials of both the Government and Scottish Natural Heritage. This communication was both bilateral and through the NGMRG (see above); once the decision to adopt the strategy that is subject to this complaint, the complainants took the view that membership (and implied support for the strategy) was no longer tenable and resigned our membership of both NGMRG and GSAG.

As an executive decision by a Minister and/or their agency, there is no domestic administrative appeal procedure. Moreover, the only legal course of redress available to RSPB Scotland and/or WWT is Judicial Review with its limited remit of procedural and not “substantive” matters¹¹.

¹⁰ See announcement, by SNH, at <http://www.snh.gov.uk/land-and-sea/managing-wildlife/managing-geese/islay-geese-project/> which would have been agreed to by Scottish Ministers – as well as RSPB Scotland correspondence with Ministers at Attachment 8.

¹¹ Article 9 of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 specifically gives members of the public and environmental organisations, “...rights of access to the courts (or to administrative procedures) to challenge the legality of decisions by public authorities to grant consent for a wide range of activities affecting the environment, as well as other acts or omissions which are contrary to national environmental laws. Article 9(4) provides that these rights of access should meet a number of requirements, including that they “provide adequate and effective remedies” and “are fair, equitable, timely and not prohibitively expensive...” (page 21,

In addition, Judicial Review of this change of policy position could be premature as it is not yet known exactly how the change in policy will be implemented and therefore the full extent of all potential issues. However, to wait for the first licence application decision could potentially be too late as well as insufficient due to the limits of Judicial Review considering just one (the first) licence. Moreover, Judicial Review is a potentially very costly mechanism (or, at least, risks very high costs). For reasons of cost (or risk of costs), neither RSPB Scotland nor WWT engage lightly in Judicial Review, especially as (for RSPB Scotland) at the time when possibly a review of this issue might be sought, it was already engaged in another case with potentially high costs¹².

Therefore the complainants do not think that pursuing these issues through a Judicial Review of either the policy decision or once licences are considered would resolve the issues outlined above. In addition, notwithstanding the appropriateness of Judicial Review, such a remedy would have been (or could have been) “prohibitively expensive” to one or both of the complainants. The combination of the narrow procedural basis of Judicial Review as well as the potentially “prohibitively expensive” nature of such proceedings is, in our view, a failure to comply with the Aarhus Convention¹³ (as adopted by the EU).

Thus, in our view, the complainants have exhausted all domestic, administrative available to them to address this issue.

<http://www.scottish.parliament.uk/Research%20briefings%20and%20fact%20sheets/SB09-75.pdf> with the main grounds for Judicial Reviews being illegality, procedural unfairness and irrationality (as explained at pages 11-12).

¹² In the event, the costs for this other case have been limited by a Protective Expenses Order (attachment 9). However, it should be noted that such PEOs are individual to each case and it could not be certain that such would be granted in another case such as a Judicial Review of the decisions complained of here.

¹³ United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998

10 Conclusions

The Islay Sustainable Goose Management Strategy 2014–2024, now approved and being implemented by the Scottish Government (and its agencies), represents, in the opinion of the complainants, a breach of EU legislation. In particular, the granting of licences to shoot Greenland barnacle geese in fulfilment of this strategy will, we believe, contravene the EU Birds Directive (2009/147/EC), as:

- The purpose for which they are/will be issued is either unclear and/or is not permitted under Article 9 and, in particular, has the explicit objective of reducing populations of an annex 1 species by 25-30% with insufficient evidence or justification linking this to purposes permitted under Article 9;
- They have been/will be issued when it is unclear and unproven that there is “no other satisfactory solution; and/or another satisfactory solution (that is, a fully resourced management scheme) is available;
- They have been/will be issued without a full appraisal on the favourable conservation status of the species concerned (and/or the Greenland white-fronted geese that occupy similar areas); and/or
- They have been/will be issued without an appropriate assessment on the impact on the SPAs classified for the protection of this species (and/or Greenland white-fronted geese) nor consideration of likely damage to SSSI features.

In addition, the UK and Scottish Governments’ failure to comply, in full, with the Aarhus Convention (as adopted by the EU) makes it impossible for the complainants to challenge the substance of this decision except by making this Complaint.

Documents attached for reference.

Attachment 1	Islay Sustainable Goose Management Strategy 2014–2024 (produced by SNH).
Attachment 2	Mitchell, C. & Hall, C. 2013. Greenland Barnacle Geese <i>Branta Leucopsis</i> in Britain and Ireland: Results of the International Census, Spring 2013. WWT Report, Slimbridge.
Attachment 3	Percival, S.M. 1993. The effects of reseeding, fertiliser application and disturbance on the use of grasslands by barnacle geese, and the implications for refuge management. J Appl. Ecol. 30: 437-443. Courtesy of JSTOR.
Attachment 4	Percival, SM. & Houston, D.C. 1992. The effect of winter grazing by barnacle geese on grassland yields on Islay. Journal of Applied Ecology 29: 35-40. Courtesy of JSTOR.
Attachment 5	Fox, T., Francis, I., Norriss, D & Walsh, A. 2014. Report of the 2013/2014 International Census of Greenland White-fronted Geese. Report of the Greenland White-fronted Goose Study.
Attachment 6	RSPB Scotland response to the 2010 Survey of National Goose Policy Stakeholders.
Attachment 7	Douglas, D., Austin, G., Wernham, C. & Rehfisch, M. 2009. Analysis of Islay goose datasets to determine the effects of scaring and management factors on goose distributions: Phase II. BTO Research Report No. 529. BTO Scotland.
Attachment 8	Copies of correspondence from RSPB Scotland to the Scottish Minister for Environment and Climate Change, including letter of resignation from NGMRG etc.
Attachment 9	Opinion of Lord Jones in the cause of RSPB v Scottish Ministers, 12 May 2015.