

ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

Wednesday 7 February 2007

Session 2

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ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

6th Meeting 2007, Session 2

CONVENER

*Maureen Macmillan (Highlands and Islands) (Lab)

DEPUTY CONVENER

*Eleanor Scott (Highlands and Islands) (Green)

COMMITTEE MEMBERS

*Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

*Rob Gibson (Highlands and Islands) (SNP)

Richard Lochhead (Moray) (SNP)

Mr Alasdair Morrison (Western Isles) (Lab)

Peter Peacock (Highlands and Islands) (Lab)

*Nora Radcliffe (Gordon) (LD)

Elaine Smith (Coatbridge and Chryston) (Lab)

COMMITTEE SUBSTITUTES

Mr Andrew Arbuckle (Mid Scotland and Fife) (LD)

Alex Fergusson (Galloway and Upper Nithsdale) (Con)

*Trish Godman (West Renfrewshire) (Lab)

Jim Mather (Highlands and Islands) (SNP)

Mr Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO ATTENDED:

Mr Andrew Arbuckle (Mid Scotland and Fife) (LD)

Bruce Crawford (Mid Scotland and Fife) (SNP)

Helen Eadie (Dunfermline East) (Lab)

Christine May (Central Fife) (Lab)

Mr Mark Ruskell (Mid Scotland and Fife) (Green)

Margaret Smith (Edinburgh West) (LD)

THE FOLLOWING GAVE EVIDENCE:

Captain Bob Baker (Forth Ports plc)

Sarah Boyack (Deputy Minister for Environment and Rural Development)

Les Douglas

Richard Evans (RSPB Scotland)

Charles Hammond (Forth Ports plc)

B Linden Jarvis

Dr Derek McGlashan (Forth Ports plc)

Dr Bob McLellan (Fife Council)

Morag McNeill (Forth Ports plc)

Judith Morrison (Scottish Executive Legal and Parliamentary Services)

Iain Rennie (Scottish Natural Heritage)

Stephen Walker (City of Edinburgh Council)

CLERK TO THE COMMITTEE

Mark Brough

SENIOR ASSISTANT CLERK

Katherine Wright

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 1

Scottish Parliament

Environment and Rural Development Committee

Wednesday 7 February 2007

[THE CONVENER *opened the meeting at 09:50*]

Petitions

Ship-to-ship Oil Transfers (PE956 and PE982)

The Convener (Maureen Macmillan): Good morning. I welcome committee members, witnesses and members of the public and press to this meeting of the Environment and Rural Development Committee. I remind everybody to switch off their mobile phones. [*Interruption.*] That phone going off was a timely warning. I also ask people to keep their BlackBerrys and other such devices away from the electronic equipment, otherwise we get strange noises—and that is not just committee members speaking.

I have received apologies from Elaine Smith, Richard Lochhead and Peter Peacock, but we have visiting members of the Parliament who have an interest in the subject. They are Bruce Crawford, Christine May, Mark Ruskell, Margaret Smith and Andrew Arbuckle. Other MSPs may come along as the meeting progresses.

Today's only agenda item is consideration of petitions PE956 and PE982, which relate to ship-to-ship oil transfers in the Firth of Forth. We will take evidence from four panels of witnesses representing the petitioners and various interested parties, concluding with the Deputy Minister for Environment and Rural Development. We have received written evidence from other parties, including the applicant, SPT Marine Services Ltd, and the Maritime and Coastguard Agency, neither of which was able to send witnesses today.

I welcome our first panel of witnesses, who represent the petitioners. They are Les Douglas, who will represent his wife, Mary Douglas, who submitted PE956 but is unable to appear today, and Linden Jarvis, who submitted PE982. We thank them for their written submissions, which have been circulated to members and which were helpful in directing our thoughts. As it is some time since the petitions were lodged, I invite the witnesses to make a short statement to update us on their views.

Les Douglas: My wife apologises for not being able to attend—ill health has prevented her from

coming. I will do my best to represent her commitment to and passion for the cause. She has asked me to read out a short opening address.

We, the people, are angry that our Firth of Forth, once known as the Scottish sea, is being threatened by a private company with a duplicitous role. Forth Ports plc must indeed be two faced. How can it possibly entertain ship-to-ship oil transfers and claim to be competent to carry out its duty of care? We are justly outraged that our taxes, work and wildlife can be disregarded so blatantly. It feels as if Forth Ports plc and Melbourne Marine Services, which I understand has been taken over, are thumbing their noses at the people, our Executive and European Union regulations that protect our wildlife. It feels as if we are in the hands of a private company that is prepared to play Russian roulette with the Firth of Forth and that does not care what happens to the environment and the beauty that it destroys. When we elected our Scottish Executive, we gave it our trust and power, which we now expect it to use. Please say no to the proposal.

B Linden Jarvis: I oppose the plans of Forth Ports and Melbourne Marine Services, primarily on environmental grounds. The ship-to-ship transfer of huge quantities of heavy grade Russian export-blend crude oil—REBCO—in the centre of the Forth estuary, close to the Fife and East Lothian coastline and beaches, would surely be dangerous and irresponsible and would invite damage to our coastline and fine estuary.

The estuary is a beautiful and highly sensitive environment. It has considerable marine life, which is regenerating, that includes seabirds, seals, whales, dolphins and porpoises—the many recent sightings have been widely publicised. The estuary also contains the Isle of May, the Bass rock and many special protection areas and marine environment high-risk areas.

Forth Ports and Melbourne Marine Services—now SPT Marine Services, because it was recently taken over and now has a Norwegian parent company—claim that great care will be taken. It appears that the Maritime and Coastguard Agency in Southampton has approved the oil spill contingency plan submitted by Forth Ports, although it called for many amendments and voiced many reservations in its initial report, which was published on 14 July 2006. The MCA repeatedly said that Forth Ports must have serious regard to the European Union habitats directive, which states clearly that European protected species—such as whales, dolphins and porpoises, all of which are present in the Forth—must not be threatened.

Forth Ports says in its submission to the committee:

"Forth Ports is required to comply with the Habitats Directive."

The company goes on to say that its responsibilities include

"the prevention of pollution and nature conservation."

How can Forth Ports square those responsibilities with allowing ship-to-ship oil transfer in the estuary? However great the care that was taken, a grave danger would remain. Even a small spillage can cause great damage to marine life and the environment, given the nature of REBCO, the speed with which it sinks and the difficulty of recovering it. If damage were to occur, the clean-up in the Forth estuary would be the responsibility not of Forth Ports but of the local authorities—Fife Council, East Lothian Council, and City of Edinburgh Council—and, ultimately, the taxpayer.

The benefits of ship-to-ship oil transfer to the Scottish and local economy would be negligible. The oil would simply be transferred from Russian tankers to vast supercarriers, for onward shipment to the far east. The operations would bring to Scotland only the serious probability of damage to its environment, marine life and coastline. Scotland would also incur the cost of the clean-up.

A viable and vastly superior alternative for ship-to-ship transfer exists at Scapa Flow, in an enclosed harbour with slow tidal waters. The area has 20 years' experience in such operations. Costs are lower and all the income goes to the local authority, Orkney Islands Council, which has responsibility for clean-up. The deballasting of tankers at Scapa Flow has to take place at sea, so that inland waters are not polluted with alien and damaging species. That is not the case in the Forth estuary: Forth Ports already allows deballasting. Under the ship-to-ship oil transfer plan, such operations and pollution would increase hugely.

I am also opposed to the plan as a shareholder in Forth Ports. The short-term benefits to Forth Ports that would come from licensing fees and the securing of a complete supply line under its control, from the Russian Baltic to the far east, would be considerable, but in the medium to long term those benefits are far outweighed by the risks. The plan is opposed by every party in the Scottish Parliament, by every local authority, by every environmental body and by the public. When the inevitable spillage occurs, there will be a huge public backlash against the company. There will probably also be a legal claim against the company as the instigator of and policing authority for transfers.

As well as running in the face of mounting opposition among the public and parliamentary and other public authorities, Forth Ports is contravening the Conservation (Natural Habitats,

&c) Regulations 1994 by threatening European protected species. It faces penalties on that count. In addition, Fife Council is threatening legal action against the company if it proceeds with the plan. It is known that Forth Ports is likely to be the target of takeover bids from international corporations and syndicates, as it is the only remaining significant public trading port company. Who will be responsible when there is a spillage? Who will be the owners and directors of the company?

I appeal to the committee, the Scottish Parliament and the Scottish Executive not to allow the plan to proceed, to implement the legislation that is necessary to prevent it and to demand that Forth Ports applies to the Scottish Parliament for a licence, in view of the threat that the plan poses to European protected species. As a resident of Scotland and a Forth Ports shareholder—like four other members of my family—I appeal to the company to remember its duty of care and to withdraw this dangerous, highly contentious proposal in the interests of Scotland and of its environment and coastline. I call on all members not to run the risk of converting the great, beautiful Firth of Forth into the oil of Forth.

The Convener: Thank you for that powerful address.

10:00

Mr Ted Brocklebank (Mid Scotland and Fife)

(Con): I, too, congratulate the witnesses on their powerful, eloquent presentations. The committee wants to examine all the implications of the proposal. I will play devil's advocate and invite you to address a couple of issues. Everyone is extremely concerned about the possibility of an oil spill in the Forth. It would be catastrophic. How realistic is that possibility, given that over the past 20 years, ship-to-ship and ship-to-shore transfers of oil have taken place in Scapa Flow and Sullom Voe with very few difficulties, and given that the company involved claims that in the 10 years in which it has done such work there have been only three incidents, involving the spillage of something like four barrels of oil? On the face of it, it sounds as if there is little likelihood of a spillage occurring.

B Linden Jarvis: I believe that 95, 96, 97 or even 98 per cent of the time the operation is safe, but if something went wrong there could be a large spillage. There are seven or eight factors that can cause spillage, including changing weather conditions and the fast-flowing tidal waters in the Forth estuary. It would take only a small spillage to cause harm, because REBCO is heavy-grade crude oil that sinks quickly and is difficult to recover; once it sinks, it spreads to the beaches. The oil is pumped at high velocity, so if there were a valve failure or anything of that sort there could be a sizeable spillage, in which case the damage

would be enormous. In Scapa Flow there is a totally encircled harbour, with huge experience and umpteen emergency vessels and tugs on immediate call; the situation is much more secure. In the Forth estuary there are vast tidal waters and ever-changing weather conditions, so the situation is much more dangerous. One small spillage in such a highly sensitive environment would be extremely damaging.

Mr Brocklebank: Let us pursue the issue further. You will recall that 10 or 15 years ago an oil tanker foundered off the coast of Shetland, spilling thousands of tonnes of crude oil into the sea. Shetland is, if anything, more famous than the Forth for its wild bird habitat. Thousands of tonnes were spilled into the sea there, but a year later there was little or no apparent damage to the local ecology. I know that from personal experience, because at the time I made films and I made one about the spillage. The oil was quickly contained and dispersed, and a year later many people in Shetland said that the grass was growing greener as a result of the oil that had blown onshore, because it had acted as a fertiliser.

B Linden Jarvis: Do you believe that that would apply in the Forth estuary if thousands of tonnes of oil were spilled and it sank and spread to the beaches? The oil would be bound to affect marine life. The situation that you describe could not possibly apply in the Forth estuary.

Mr Brocklebank: Presumably there would be booms that would collar any spill, although at this stage I am not accepting that there might be one. If there were, surely the methods of containing oil that have been used at Sullom Voe and elsewhere would be just as effective in the Forth of Forth as they have been in other ports.

B Linden Jarvis: But the transfer at Sullom Voe is not ship to ship; it is at the quayside. It is ship to ship at Scapa Flow but in an encircled harbour.

Mr Brocklebank: With respect, it is ship to ship in many circumstances in Sullom Voe as well. Furthermore, the evidence is that, if anything, ship-to-ship transfer is safer than ship-to-shore transfer.

B Linden Jarvis: I do not believe that to be the case. I must also dispute the point about ship-to-ship transfer at Sullom Voe—I understand that it is just at the quayside.

Mr Brocklebank: We had evidence recently from someone at Sullom Voe who said that they would welcome the business if the company chose to take it there. He believed that Sullom Voe had expertise in both methods of handling oil.

That is probably enough from me at the moment. Thank you very much.

The Convener: We will move to Mark Ruskell.

Les Douglas: May I come in on that question, convener?

The Convener: Yes, of course. I beg your pardon—I should have asked you.

Les Douglas: First, the accident that Mr Brocklebank mentioned involved a much lighter crude oil, so it was easier to clean up and dispose of than the Russian oil would be.

Secondly, if there is an accident at Scapa Flow they can easily block off the harbour. I agree with Linden Jarvis on what would happen if there were an accident in the Forth. Ship-to-ship transfers are 97 to 98 per cent safe, but we must think about what happens in an accident—the pumping rate, the length of pipes and the amount of oil.

If there were a spill in the Forth, we would have, first, to notify Briggs Marine Environmental Services Ltd, which would have to load up the safety equipment, take it to the accident site and spread it out. We are talking about a delay of two, three or possibly four hours before we could start to protect the coastline and everything else. In our view, that delay would be unacceptable.

Mr Mark Ruskell (Mid Scotland and Fife) (Green): I, too, welcome you to the committee and thank you, as members of the public, for engaging with the Parliament on this issue.

Mr Douglas, I want to ask you about the detail of your petition. You call for an amendment to the Conservation (Natural Habitats, &c) Regulations 1994, which is the nub of the debate about who decides on, controls and regulates ship-to-ship oil transfers. On 17 January, the Scottish Executive brought amendments to those regulations to the committee, but they did not cover ship-to-ship oil transfers. The minister said that the Executive is examining the matter but that no timescale is attached to reviewing the regulations in relation to ship-to-ship oil transfers, which is what you suggest. What is your message to the minister on the urgency of introducing new regulations?

Les Douglas: I strongly suggest that there should be a delay—and I know that my wife would probably do that even more strongly. It is time to stop, think and check. We need to stop the transfers before they happen. We are talking about a big expanse of water that contains a lot of good wildlife, so it is worth taking a bit of time to think about the transfers. I would say, “Slowly, slowly.”

Mr Ruskell: You are talking about a decision on the particular operation?

Les Douglas: Yes.

Mr Ruskell: And would you see it as positive if regulations were introduced to change the law and

give the Executive more powers to take a decision over such transfers?

Les Douglas: Certainly. As it appears to my wife Mary and a lot of other people, the situation could continue and nobody has the power to stop it. The Secretary of State for Transport in Westminster admits that he has no power, while the MCA admits that it can consider only oil spill contingency plans—it cannot stop the transfers. Because this is not a devolved subject, the Scottish Parliament cannot do anything, but using the Conservation (Natural Habitats, &c) Regulations 1994 you have the power. We urge you to use that power to stop such transfers going ahead until such time as the matter is cleared up.

I received the papers for the meeting a bit late last night, but it appears that Forth Ports has no authority to stop the transfers—it is a lawful business, so it can go ahead provided it is carried out under correct guidance and policy. What is lacking is the initiative from—dare I say it?—the Scottish Parliament to grasp the nettle and say, “Look, this is our land, this is our water, this is our livelihood. Let’s do something about it before it goes ahead.”

B Linden Jarvis: I question whether ship-to-ship transfers are a lawful business. Surely they contravene the European habitats regulations, in which case they are an illegal business. The transfers threaten European protected species. The European regulations are extremely clear in that respect.

Mr Ruskell: Is the issue about how the directive has been interpreted and the fact that the regulations need to be updated?

B Linden Jarvis: I am not a lawyer and I do not understand how European legislation is transposed into domestic legislation, but if Forth Ports proceeds, the European Parliament can take action against it and I understand that it intends to do so. I know that the matter has been taken to the European Parliament by Catherine Stihler MEP and Alyn Smith MEP and that the European Parliament has already advised that such transfers clearly contravene its regulations. It is not a lawful trade.

Mr Andrew Arbuckle (Mid Scotland and Fife) (LD): I add my congratulations to both petitioners on their powers of persuasion in their presentations.

Mr Jarvis is a shareholder of the company that is involved in the issue. What representations, if any, have you made as an individual shareholder? Is there an action group of shareholders with views similar to yours?

B Linden Jarvis: Some of the institutional investors to whom I have spoken are concerned,

but I am not at liberty to give their names. The answer to the first part of your question is that I wrote to Forth Ports to ask for detailed information and data and my request was refused completely in the letter from the company secretary, which I have with me.

Mr Arbuckle: You asked for data about the deal that is on the table.

B Linden Jarvis: That is right.

Mr Arbuckle: Was that a recent refusal? Did you apply under the Freedom of Information (Scotland) Act 2002?

B Linden Jarvis: It was fairly recent. I am looking in my papers for the letter—the correspondence was in May 2006. I was advised that the legislation—the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004—did

“not apply to Forth Ports PLC.”

Surely it should. Forth Ports stated that the 2002 act does not apply to it because it is a public limited company, not a public authority. The letter continues:

“The company is therefore not obliged to provide any of the information requested in your letter.”

It is signed by Morag McNeill, the group company secretary.

Mr Arbuckle: Although I accept your respect for the anonymity of the major investors, is their level of concern such that it might inhibit any possible takeover bid? You mentioned a takeover bid being a possibility.

10:15

B Linden Jarvis: I would not say that it was, unfortunately. I think that there is a live threat of a takeover bid for Forth Ports, which, as I said, is the only remaining significant trading port company. Other major companies have been taken over—the ports of Harwich and Felixstowe have been taken over by Hutchison Whampoa of Hong Kong, and Associated British Ports, which owned the ports of Ayr and Troon, has been taken over by a consortium led by Goldman Sachs. A recent Dow Jones newswire referred to Forth Ports as being very likely to be subject to a takeover bid. I have that newswire with me.

Mr Arbuckle: That would be a disturbing development.

The Convener: Before I invite Christine May to ask her first question, I welcome Helen Eadie as a visitor to the committee.

Christine May (Central Fife) (Lab): Good morning, gentlemen. I thank you both for your presentations. I have two questions. I will start with

the second, as it is allied to the point Andrew Arbuckle raised. It is to do with the reputation of companies. Companies' environmental and ethical policies can contribute to their reputation, which, I think Mr Jarvis will agree, is important in any takeover.

B Linden Jarvis: Yes, very.

Christine May: Do you consider that the controversy surrounding the proposal is likely to enhance the ethical and environmental reputation of Forth Ports?

B Linden Jarvis: Definitely not. Any company that was bidding for Forth Ports would carry out a due diligence search. The controversy surrounding the proposal would certainly come to light during that search.

Christine May: Is it your impression that that might lie behind some of the disquiet that has been expressed by some of the institutional investors to whom you have spoken?

B Linden Jarvis: No. I spoke to representatives of the institutional investors' environmental departments, and it was purely on environmental grounds that I addressed them.

Christine May: Is it your view that the environmental perception of Forth Ports is as important as the overall perception?

B Linden Jarvis: It is important but, in the short term, if Forth Ports can show that it has set up a complete supply line from the Russian Baltic to the far east under its complete control, that might add to the value of the company.

Christine May: My other question concerns the location of the proposed transfer activity. You might both be familiar with the anchorage at Methil. A lot has been made of the fact that oil and other materials are currently transferred off Hound point. Do you see a difference between the two locations that makes Methil significantly different?

Les Douglas: Yes, there are big differences. To start with, at Hound point, ships are alongside a jetty, and tugs and safety boats are in the vicinity. If anything happens, they are there within minutes. In the case of Methil, nobody would be there—from what we can understand. Ships would be relying on Forth Ports tugs. If those tugs were doing another job, they would have to finish it before they could sail down to Methil. If they were up at Grangemouth or in the area of the Forth bridge, they might take an hour or an hour and a half to arrive, even sailing at full speed, before they could start to do anything else.

Christine May: Would you be more reassured if Forth Ports said that there will be safety tugs there at all times when the transfer activities are being carried out?

Les Douglas: I would like no transfers to be carried out—as would my wife, Mary. If they do go ahead, a tug, a safety boat and equipment—by which I mean the collars that can be put out and inflated to control the spread of any oil—will need to be in place. There will also need to be a facility in close proximity for accepting any crude oil that is recovered. The tanks on recovery boats are of a limited size. If it is not possible just to go ashore and dump the oil somewhere, what will happen to it?

B Linden Jarvis: I would not be happy with ship-to-ship transfer in the centre of the Forth estuary. The environment is far too sensitive and the risks are too great. As I have repeatedly said, it takes only a small spillage to cause huge damage. The tidal waters are fast and weather conditions change. It is not the environment in which to do ship-to-ship transfers. Scapa Flow is infinitely better. It is better equipped, there is more experience of doing ship-to-ship transfers there and the environment is far better. In addition, Orkney Islands Council benefits, and it handles the clean-up in every way. The Forth Ports situation seems to me to be dangerous, and unfair to the local councils, community and taxpayers. Forth Ports appears to get all the benefits, but it will not handle any damage or costs of damage.

Christine May: Are you aware that the Forth estuary is classified, certainly locally, as open water, therefore ship-to-ship transfer there is potentially just as dangerous to the environment as the alternative that we have been threatened with, which is that if it does not go ahead in the confines of the Forth, it will happen outside the 12-mile limit?

B Linden Jarvis: Are you referring to Scapa Flow?

Christine May: No. A strong suggestion has been made to me that if consent is not given and the transfers do not go ahead in the Forth, it is perfectly legal to do it outwith territorial waters, which in the case of the Forth might not be that far away from where transfers are currently proposed to take place.

B Linden Jarvis: That would not be a good thing either. Scapa Flow has huge capacity to handle transfers in a much better environment.

Les Douglas: Can I come back on that point?

The Convener: Very briefly, because one more member wishes to ask questions.

Les Douglas: I will be brief. I agree with Christine May that ships can transfer oil outside the 12-mile limit. I have done it many times, so I know what it is all about. Once you are outside the 12-mile limit, you are free. However, I do not honestly think that the company would accept that,

because to do it you would have to keep a 500,000 tonne vessel on the move. Fuel would be critical. They might be trying to browbeat you a little, if I may be so bold as to suggest that.

Secondly, at Scapa Flow the harbour-master has total control. If the weather is turning bad, he turns round and says, "Stop" and they have to stop. If they do not, they are moved out. In this case, Forth Ports and the harbour-master have no control. They have abrogated their responsibilities to what was Melbourne Marine Services and it has abrogated its responsibilities to the master of the pumping ship—not the adviser, but the master of the pumping ship. The way that agents transfer the use of some tankers, it will be a nightmare to try to trace, for insurance purposes, who was responsible at a particular time. That will greatly delay any recovery of costs.

The Convener: Margaret Smith will ask the last series of questions.

Margaret Smith (Edinburgh West) (LD): Thank you both for lodging the petitions in the first place and for your contributions this morning. Most of us share your frustration and concern about the role of Forth Ports. I will pick up on one of the points that Mr Jarvis made in his submission. It refers to the fact that Forth Ports

"has commissioned a new risk assessment"

but has not made it public. Do you believe that it has been made available to Scottish Natural Heritage or to any other Government bodies? The submission from SPT Marine Services gives certain assurances about the rules and regulations that will be put into force in respect of weather conditions, what would happen at certain times and when hoses would be disconnected and so on. Can you pick up on the question of risk assessment and say whether you believe that Forth Ports is making that information available to the relevant authorities?

B Linden Jarvis: I believe that Forth Ports is preparing a revised environmental impact assessment at the moment. Scottish Natural Heritage has told me that that is due shortly, although it cannot say when; I do not know what shortly means.

Margaret Smith: What about weather conditions? We are being told that the operations manual has various procedures and that there are requirements for tugs and various other people in certain weather conditions, and that in those conditions certain things will or will not take place. Are those assurances worth the paper they are written on?

B Linden Jarvis: I do not think that they are. Mr Douglas has already made that point. Who actually takes the responsibility for stopping the

operation if weather conditions change and become in any way dangerous? I am not clear about who makes that decision and when it should be taken.

Les Douglas: It is laid out in Melbourne Marine Service's submission as prepared by Aquatera. I cannot give you the page number offhand but it is in there and it is quite clear that the ultimate responsibility lies with the master of the pumping ship.

Margaret Smith: I understand that there is a threat of disturbing species protected under the European habitats directive. How many dolphins, whales and other protected species might be affected or under threat?

B Linden Jarvis: The major European protected species that are specified by the directive are whales, dolphins and porpoises. Recently, there have been numerous sightings of whales and dolphins in the Forth estuary that have been widely publicised. I have with me several clippings from the newspapers, but you will have seen them, I am sure.

Margaret Smith: I have a final question for Mr Jarvis. You mentioned several times the possibility of using Scapa Flow, quite understandably. Why does SPT Marine Services not want to use Scapa Flow instead of the Firth of Forth?

B Linden Jarvis: I cannot understand that at all. The only reason that I can think of is that it enables Forth Ports to have a supply line from the Russian Baltic to the far east under its complete control.

SPT Marine Services, the Norwegian parent company that has recently taken over Melbourne Marine Services, is hugely involved in Scapa Flow already, with REBCO and with the soon-to-be-undertaken liquefied natural gas project. SPT are therefore in situ up there and fully involved at Scapa Flow. The harbour-master at Scapa Flow has assured me that it has huge capacity, so there is no reason why transfers by SPT could not be done there. All the income would go to the local Orkney authority—and Scotland—and everything, including a clean-up operation would be under the local authority's control. It would be a vastly superior alternative.

The Convener: Thank you for your evidence. You may leave the table, but you are welcome to stay for the rest of the proceedings.

Les Douglas: Thank you very much, to one and all.

The Convener: You are very welcome.

I suspend the meeting briefly to allow the witness panels to change.

10:29

Meeting suspended.

10:30

On resuming—

The Convener: I welcome our second panel. Iain Rennick is the Scottish Natural Heritage area manager for the Forth and Borders; Richard Evans is the sites policy officer for RSPB Scotland; Dr Bob McLellan is head of transportation services for Fife Council; and Stephen Walker is acting head of environmental health for the City of Edinburgh Council. I thank those witnesses who made submissions to the committee. The clerks circulated them to members and we found them very helpful. We will go straight to questions from the committee.

Rob Gibson (Highlands and Islands) (SNP): I am interested in your views on the balance between trade and the environment. I am particularly interested in the argument that says that we will see increasing demand for ship-to-ship transfers between shipping from ports in the Baltic and Barents seas. Are you aware of the view of CEMO—the Centre for Estuarine and Marine Research—and the North Sea Commission that tighter regulation is required? In your view, is it likely that, in future, the large tankers that sail the world's seas will come into the North sea for their cargoes to be transhipped, or is it more likely that that will happen at points closer to the oceans, such as Scapa Flow?

Dr Bob McLellan (Fife Council): A number of issues arise from the question. Several countries that are close to where such ship-to-ship operations could take place have indicated that they do not want it happening on their doorstep. I refer to the Scandinavian countries—including Sweden and Denmark—and other countries such as Holland. The United Kingdom and the Firth of Forth were considered as possible sites for such transfers only after those countries had been looked at.

Obviously the Firth of Forth environment is precious. It has blue flag beaches and loads of designated sites. At the end of the day, the point was made in many of the submissions that such ship-to-ship transfers will bring no economic benefit to the local authority areas that are adjacent to the Firth of Forth or to Scotland as a whole. We are talking about a holding ground where smaller vessels will come in, offload their cargo to a bigger vessel, and then go on somewhere else. Perhaps others will get benefit, but there appears to be limited economic benefit to Scotland—in particular, the south-east of Scotland. I think that the figure for the jobs that may be created is in the low 10s—it is between 13 and 20 jobs.

We should contrast that with the situation in Fife where we have 600 people who are directly employed in the tourism industry, which is a £200 million a year industry. If ship-to-ship transfers were to go ahead in the Firth of Forth and an accident were to happen, it would have a dramatic environmental impact.

On the trade versus environment argument, as we heard earlier this morning, other locations are safer for such transfers to take place. The consultation was only on the oil spill contingency plans. We are concerned about that and about the fact that no risk assessment has been made as yet of the Firth of Forth versus Scapa Flow versus anywhere else in the UK or, indeed, anywhere else in Europe. Such a risk assessment should happen. In most of the things that we do nowadays, we carry out a risk assessment—we assess the probability of the risk happening and come to a decision that is based on that proper analysis. In this case, the process is the other way round. A site has been picked and people are saying, "If the oil spill plan is okay, we'll go ahead." In an iterative process like that, the answer can never be no, it will always be yes.

I have veered away from the question of trade versus environment slightly. However, given that a risk assessment was not done in the first place, the process has to go right back to that basic ground level.

Rob Gibson: Do other witnesses have any comments on that?

Iain Rennick (Scottish Natural Heritage): I ducked your question because I am not competent to talk about the commercial aspects of oil transport. However, in this case, the presence of European wildlife sites means that there can be no trade-off between the environment and business, because it must be shown that there will be no damage to the environment of those sites before the project can proceed.

Stephen Walker (City of Edinburgh Council): Local authorities face not so much a potential disaster, but something that they must take on the chin. We are faced with having to deal with any clean-up, but we get no payment to increase our preparedness and we would have to carry out the clean-up at our own cost, while hoping that compensation would be paid at some stage down the line. We are faced with a large risk and are expected to up our resources and preparedness without any direct support.

Richard Evans (RSPB Scotland): I will add a tiny bit to what Iain Rennick said. The habitats directive and the Conservation (Natural Habitats, &c) Regulations 1994 (SI 1994/2716) allow the public interest to be taken into account at the very end and only after all the other tests have been

passed. The first step is to assess whether there is an impact on the site. In this case, that applies to birds and seals on the Isle of May. If there is an impact on the integrity of the site, the next step is to determine whether there are alternative solutions to the proposal. If there are no alternative solutions, the competent authority may still wish to consent to a programme that damages a European wildlife site. It is enabled to do so in some circumstances only at that point and on the ground that there are overriding reasons of public interest, which is an extremely difficult test to pass.

Mr Brocklebank: A number of the members who are present represent areas that immediately adjoin the Forth and the last thing that any of us want is any kind of pollution or damage to our wonderful beaches and seabirds. However, I have already cast myself in the role of devil's advocate. The witnesses from SNH and the RSPB have said that the project must be in the public interest and that we must not endanger the protected sites, but is it not a fact that SNH finds the proposals and the oil spill contingency plan to be, in its words, broadly acceptable?

Iain Rennick: In reply to the Maritime and Coastguard Agency's consultation, we said that we found the oil spill contingency plan acceptable, but that is obviously different from saying that we find the overall project acceptable. The contingency plan deals with what happens in the event of an incident and what procedures will be enacted to get mitigation and control measures in place to deal with the incident. We were content with the steps that were set out in those plans, but that is different from saying that we are content with the overall proposal at this stage.

Mr Brocklebank: I understand that. I have a slight bend on that question for Richard Evans. There are all kinds of industrial activity on the Forth. We already have a refinery and at least one power station on the river, but we have wonderful sea life—killer whales in recent times—and seabirds. It is claimed that the risk is small, so would the project make much more difference to the impact that the industrial activity that already goes on in the Firth of Forth has on seabirds?

Richard Evans: The fundamental difference between the proposal and the current levels of oil activity in the Firth of Forth is that it is proposed to transfer large volumes of oil in a completely new location within the firth where there are currently low levels of oil activity. As far as I know, there is no transfer of oil in the location and the only activity that takes place is that tankers sometimes anchor there before moving to Hound point and other places. The location is much closer to the parts of the firth—the qualifying-interest European wildlife sites—that are heavily used by the species of birds that are most at risk should oil be spilled

on the water. I am talking about breeding seabirds, principally from the Bass rock and the Isle of May, and wintering waterfowl—such as eider ducks, divers, grebes and scoters—which spend all their time in winter on the water, where they are at risk should oil get there. There is a fundamental difference between the current situation and the situation as it would be should consent be given to the proposal.

Christine May: Good morning, gentlemen. You will be aware that I represent Central Fife and that the proposed location of STS transfers falls in my constituency. You will probably also be aware of the very real frustration among many in the community—we heard it expressed by the first panel of witnesses—that there appears to be no coherence to the legislation so that this sort of activity can be properly regulated and controlled. We are now exploring whether the habitats legislation can give the degree of regulation that will ensure that there will be no damage. Are you content that the requirements of the habitats legislation are satisfied by the oil spill contingency plan required under the current regulations? I direct that question particularly at SNH.

Iain Rennick: We are satisfied that there is a process in place. General duties placed on Forth Ports require it to assess the environmental impact of a project and to reach a decision based on that assessment. We are satisfied that that process is in place and that Forth Ports is going through that process at present. It has accepted its responsibilities as a competent authority under the habitats directive and it is undertaking appropriate assessment. We are content that Forth Ports is following the letter of the law, even if aspects of it may not directly apply at present. We welcome the fact that the issue is to be reviewed by the Executive, because that will eliminate some of the confusion.

Christine May: I note that you have not answered my specific question. I will take that as a no.

Iain Rennick: Was that specifically in relation to the oil spill contingency plan?

Christine May: Is it possible for the requirement under the habitats legislation not to do any damage to be upheld, given that the only regulatory regime that governs this activity can never guarantee 100 per cent that there will be no spill of oil?

Iain Rennick: Before approving the project, Forth Ports, as competent authority, has to guarantee that there will be no damage to the integrity of the European wildlife sites. That process is what it is going through at present.

Christine May: Okay. Can I get comments from other members of the panel?

Dr McLellan: What concerns me is that the Maritime and Coastguard Agency effectively approved the plans on 25 August 2006, yet we now hear that discussion is still ongoing between Forth Ports, which will make the decision, and SNH. I would have thought that that whole process should have taken place before the MCA made its decision last August. What we have now is a process that is done, but has begun again. It is a peculiar way to go about giving the go-ahead.

Richard Evans: Iain Rennick referred to the general duty under the habitats regulations, which is what binds Forth Ports in this instance. It is worth pointing out to committee members, if they are not already aware, that in effect a twin-track process is set out by the habitats regulations. Some types of consenting regime are covered by a detailed step-by-step process that is set out in part IV of the regulations. Town and country planning, electricity and most developments that the RSPB comes up against are covered by part IV. However, most marine consents—including ship-to-ship transfers—are covered only by a general duty. That was found to be lacking by the European Court of Justice in respect of water abstraction projects and the assessment of development plans. The Executive and the authorities in England and Wales and in Northern Ireland consulted last year on amendments to the habitats regulations to address specifically those shortcomings. We believe that the UK is vulnerable to further complaint to the European Commission on an interpretation of that judgment. The scope of part IV of the regulations should be broadened to encompass as many consenting regimes as possible.

Christine May: Is it your understanding that the Government does not propose to extend part IV of the regulations to cover such marine activities?

10:45

Richard Evans: I understand that a further review will be undertaken, but I am not aware of a firm commitment to take action on the back of any review.

We need to level the playing field for all competent authorities. Another thing that would make a difference would be to have a more coherent system for addressing development proposals in the marine environment. Marine legislation for Scotland and the UK would help to level the playing field to ensure that everyone is playing by the same rules.

Finally, I am of the opinion that the lack of UK ship-to-ship transfer regulations is not helpful in this case. If regulations provided specific guidance on how to apply the habitats directive, that would help competent authorities in determining consents.

Mr Ruskell: I have a few questions for SNH.

As the competent authority under the habitats directive, Forth Ports is required to produce an appropriate assessment of the environmental impacts of the proposal. Who is responsible for gathering the data that are used in such an appropriate assessment?

Iain Rennick: The developer has the responsibility to demonstrate to the competent authority that its proposal will have no adverse effects on the European sites. The responsibility for gathering data to prove that negative, as it were, is on the developer. In this case, that is SPT Marine Services.

Mr Ruskell: Has SNH asked the developer to provide that information for the appropriate assessment?

Iain Rennick: We have been involved at various stages in commenting on the environmental statement that informs the appropriate assessment. As part of that process, we have highlighted where we perceive that there are gaps in the data in the environmental statement that need to be filled before an appropriate assessment could conclude that the proposal would have no adverse effect on the sites.

Mr Ruskell: What are the main gaps in that appropriate assessment?

Iain Rennick: There is an absence of information on some species that are protected in the Forth. For example, information has not been provided on the distribution of such species at different times of the year and in different parts of the Forth or on movements across the area. Filling all those gaps would help an assessment to be made of whether, in the event of an incident, there would be an impact on those species.

Mr Ruskell: Why have such data not been gathered? What are the main reasons for those data not being part of the appropriate assessment, given that the competent authority has a legal duty to ensure that such matters are assessed?

Iain Rennick: That question probably needs to be put to the developer. All that we can do is point out the gaps in the data and in the analysis and ask that those be filled either by existing data or, if required, by a new survey.

Mr Ruskell: Is it fair to say that the assessment considers the likelihood of an oil spill or other such incident occurring but does not focus on what impact such an incident would have on the environment?

Iain Rennick: Both the likelihood of an incident and its impact if it were to occur would need to be included for an assessment to conclude that a development would have no adverse effect on the European sites.

Mr Ruskell: In your view, is the impact part of the assessment currently missing?

Iain Rennick: Yes, we have said that about the environmental statement at various stages. We have said that there needs to be more analysis of what the impact could be under different scenarios.

The Convener: Do other panellists want to comment on that? If not, we will move on to Eleanor Scott's question.

Eleanor Scott (Highlands and Islands) (Green): As one of the few MSPs here today who is not from Fife, I hope that people will forgive me if I am behind the times on some of the issues. I am just learning about the issue that my colleagues have lived with for a while.

I recognise that a competent authority must make the decision about who is charged with enacting the habitats directive. Does the panel feel that there is a problem with the competent authority being an organisation that will have a commercial involvement in the process and which, to put it bluntly, stands to make a lot of money if ship-to-ship transfer goes ahead?

The Convener: Dr McLellan is nodding.

Dr McLellan: That is correct. It is entirely appropriate for Forth Ports to consider ship-to-ship transfer and, if it feels that such operations would benefit the company and its shareholders and could be carried out safely, to conclude that it wants to go ahead with the proposal. On the other hand, it is competent for local authorities and other bodies to ask why such operations should be carried out in their back yard, if they feel that, rather than any benefit, there would be only the disbenefit of risk. That is the impasse that has been reached in the debate over the past few years.

The present legal framework is not correct. Under regulation 44 of the Conservation (Natural Habitats, &c) Regulations 1994, which relates to the granting of licences, the Executive could play a role by requiring the attachment of conditions, but the harbour byelaws, which for most of the harbours in Fife deal with issues such as bathing and litter in the harbour, are not adequate to deal with the transfer of 500,000m³ of oil between two anchored ships in the Firth of Forth. The legal framework needs to be re-examined.

I am not a legal person, but even if the regulations on oil pollution preparedness—which I think were developed in 1999—had come to be, they would have dealt only with ship-to-ship transfer outwith harbour areas and it would not have been appropriate to use them in relation to areas that fell within the confines of port authority control. That concerns me as well. We are where

we are but, as someone mentioned earlier, that should not mean that a decision is rushed into. The situation can still be rescued and the issue tackled sensibly.

The Convener: Does anyone on the panel have anything to add to that?

Richard Evans: The RSPB's members have a certain amount of difficulty in understanding the situation in that they perceive there to be conflict of interest. I believe that Fort Ports is under a legal obligation to carry out its duties and that it must separate its responsibilities, but there is an absence of transparency about how it does that. Our members, who to an extent could be said to represent the wider public, find that difficult to understand.

Eleanor Scott: If ship-to-ship transfer goes ahead and is subsequently found to be in breach of the habitats directive, what would the consequences be? What would be done to whom as a result of the directive having been breached?

Iain Rennick: I guess that, ultimately, the Executive would bear the responsibility and infraction proceedings could begin against the United Kingdom Government.

Eleanor Scott: So although the Executive has not had a role in deciding whether the proposal goes ahead, it would be the body that would be found to be in breach of the habitats directive.

Iain Rennick: That is my understanding.

Nora Radcliffe (Gordon) (LD): I want to pursue Mark Ruskell's line of inquiry about the environmental impact assessment, which I gather Aquatera was contracted to prepare for the developer. Aquatera is described as a Scottish environmental consultancy company, which is a very wide description. Can anyone give us a steer on the company's expertise?

Iain Rennick: All that I can say is that we have had dealings with Aquatera in commenting on the environmental statement.

Nora Radcliffe: Is it a specialist company? I know nothing about it, so I wondered whether anyone could enlighten us.

Iain Rennick: I had not come across the company before, so I could not comment on its previous experience.

Dr McLellan: I have no experience of dealing with it, but the answer to the converse of the question is that for most things that we do nowadays, we have independent checks. All the information that has been put forward on behalf of the promoter, SPT Marine Services, should be subject to an independent check by the Maritime and Coastguard Agency or another suitable body to ensure that all the modelling on any spills is

accurate. In its submission, SPT Marine Services admits that the chance of something happening is a third higher if it goes ahead with what is proposed. We accept that, but that has not been challenged by anybody else, and we have made that point to the MCA.

Nora Radcliffe: I suppose that the independent check was running the proposals past SNH. It sounds as though SNH was not particularly happy with the environmental impact assessment. Is that assessment deficient?

Iain Rennick: We have commented a number of times on where we see deficiencies in that document and have asked for them to be addressed. Some of those concerns remain and have not been addressed.

Richard Evans: The RSPB has some knowledge and experience of Aquatera, mainly from the work that it has done on scoping renewable energy capacity in Orkney. It also undertook a big piece of work for Highland Council to examine where renewables facilities could be sited in the Highland region. As far as I am aware, it is a small company based in Orkney, a place where Captain Taylor of Melbourne Marine Services also has strong connections. That might be a link, although that is just speculation.

Nora Radcliffe: I saw in the documents that modelling of what would happen if there was an oil spillage is based on a volume of 12m^3 . I read elsewhere said that the oil is pumped at 1 tonne per second. How much does 1m^3 of oil weigh?

Dr McLellan: I am not overly metric, but I think that, for most of the oils that we deal with, 1m^3 is approximately equivalent to 2 tonnes—the weight is between 1.8 times and twice the volume.

Nora Radcliffe: So we are talking about something that would take a few seconds to spill, and that is what we have modelled the spillage on. I just wondered if anybody had challenged the oil spill contingency plan on that basis.

Dr McLellan: We have challenged it greatly. As I mentioned earlier, if the vessels can take $500,000\text{m}^3$, the ultimate oil spill could be the complete vessel. We certainly raised that point on several occasions before the MCA agreed that the oil spill contingency plan was okay.

That is why I said that the independent check should not just be environmental but should be technical. Fife Council, in conjunction with the City of Edinburgh Council and East Lothian Council, has in the past couple of weeks engaged an independent technical consultant to tie into our on-going legal advice, to challenge from an expert witness perspective some of the points that have come out in the approved oil spill contingency plan.

Nora Radcliffe: One of the earlier witnesses pointed out the difference between certain types of crude oil and said that the oil in question is particularly heavy and polluting.

Iain Rennick: The plans deal with different scales of spill. We have said that the modelling work needs to consider different scenarios and scales of spill, although the size of the spill does not necessarily determine its impact. As one of the previous witnesses said, a small spill in the wrong location at the wrong time could be significant.

Margaret Smith: I want to pick up on something that Bob McLellan said. It is the nub of the issue for many of us who represent coastal constituencies, not all of them in Fife. Your view is that the decision rests ultimately with the Scottish Executive under the habitats directive and that, apart from Forth Ports, it is the only body that can influence the decision in any way. My key question to you all is this: who could stop the transfers and how? Is it only the Executive under the habitats directive that could do that, or is there any other way in which the transfers could be stopped?

Iain Rennick: The extent to which the Executive could intervene is unclear. That is one of the uncertainties about the application of the 1994 regulations to the proposal. It is uncertain whether the Executive could intervene and stop the proposal, and it would not be for us to say whether it would want to do so.

Ultimately, Forth Ports as the competent authority has the responsibility for taking the decision. It could be challenged in the courts, but that would be the only challenge mechanism if somebody wanted to prevent the project from going ahead.

11:00

Dr McLellan: The three councils to which I referred have been taking legal advice and have employed senior Queen's counsel since December 2005. There are a number of ways that a challenge could be made. Ultimately, only the courts would decide the outcome, but the generic point is that all parties must fulfil their obligations under the different regulations, including the habitats directive.

Was the MCA's decision of 25 August 2006 properly made? We are aware of a lot of information that was made available not much before 25 August, and the MCA has now admitted to us that it did not have that information when it made the decision.

As I mentioned a few minutes ago, there are a number of technical issues with the competence or otherwise of the arrangements that are in place. For example, tugs will be in place only at the

beginning and end of operations, not 24/7 while operations take place. What if something happens in between? Where will the tugs be placed? How quickly would they be able to get to any incident? Weather conditions are another issue.

There are many technical issues as well as legal ones. We do not want to go to court any more than anybody else does, but we have done the preparatory work for that and, should operations go ahead, it might be the only way that the technical questions will be answered.

Margaret Smith: Richard Evans said that the habitats directive allows such a plan or project to go ahead only if no alternative is available or if there are imperative reasons for overriding the public interest. What is your understanding of an acceptable alternative? Would it be an acceptable alternative to undertake ship-to-ship transfer somewhere else in Scottish waters—for example, at Scapa Flow—or would the alternative have to be geographically close to the proposed site? What is your understanding of the scope of acceptable alternatives?

Richard Evans: The scope varies according to the scale of the project. Take the decision on the proposed extension of Southampton harbour at Dibden bay as an example. One of the reasons why the Secretary of State for Transport decided that that development should not go ahead was that alternative solutions existed elsewhere in the south-east of England, so I think that, in this instance, there is a strong argument that Scapa Flow would be an alternative location. It is also worth pointing out that Scapa Flow does not have the same level of wildlife interest, so many of the questions that arise in the Firth of Forth simply do not arise there.

Helen Eadie (Dunfermline East) (Lab): As the gentlemen perhaps know, I represent the area upstream from Christine May's constituency and my constituency has a site of special scientific interest at North Queensferry.

To return to the point that Stephen Walker made, I am particularly concerned about the councils being left to pick up the tab should there be any incidents. Is there any provision such as we have in other types of development? For example, if developers are building in an area, they are required to put up a bond to cover against the eventuality of something going wrong. Association of British Travel Agents travel bonds are another example. Could the Scottish Executive apply a bond in the licence? It would need to be a major bond. We have seen instances of pollution elsewhere in the world that have cost phenomenal amounts of money, so a bond would be an important condition that I would ask the Scottish Executive to enforce. Would that be practical and feasible?

Stephen Walker: It is a normal insurance requirement. What worries the local authorities is that even the smallest of spills would cost them substantial resources, manpower and materials that they do not stockpile. We have no resources; we can only train our staff and put a plan in place. In the end, we would have to fork out taxpayers' money in the hope that the compensation would come through from the International Tanker Owners Pollution Federation under the insurance requirements on the industry. We also know that there have been tremendous delays in those payments coming through in the past. That is a serious concern for the City of Edinburgh Council and I am sure that my colleagues in neighbouring authorities share that concern.

Dr McLellan: I understand that the local authority has not yet recovered all the costs arising from the vessel accident that happened in 1993 off Shetland—it is a long time from 1993 to 2007. After all that time, an authority should not still be seeking to recover costs.

It should be noted that there is no obligation on local authorities to do a clean-up. Under section 138 of the Local Government Act 1972, local authorities have only a voluntary responsibility to do that. The dilemma is that, if the local authorities do not do the clean up, who will? If an incident happens, the normal obligation is for an authority to try to clean up the area as soon as possible. The worry for authorities then becomes the recovery of costs.

Perhaps a licence is required under the habitats directive and regulation 44 of the 1994 regulations, or whatever. There may be ways in which to do this, over and above the international rules and regulations. I am not sure, but it would be nice to know that something is in place. The easiest way to ensure that such spillages do not happen is for ship-to-ship transfer not to take place in the first instance.

Iain Rennick: If a bond were required, it would be an admission that there would be damage to a European site. The bond would therefore come into play only if the proposal passed the final stages that Richard Evans outlined earlier. A bond may be appropriate if there are no alternatives and if there are overriding reasons of public interest why the project should go ahead. In the earlier stages, a bond would not be appropriate because it would be seen as an admission of potential damage to a site.

Ted Brocklebank spoke about a case off Shetland. I was not involved in it, but I understand from colleagues that we were very lucky on that occasion. The weather and sea conditions were such that the oil dispersed naturally and away from the shoreline, by and large. Luck had a big part to play in the limited damage that was caused.

Helen Eadie: I am very concerned about the matter. Together with my Fife colleagues Christine May, Marilyn Livingstone and Scott Barrie, I submitted a petition to the European Parliament on the issue, with the help of Catherine Stihler MEP. The petition is currently before the European Parliament. The briefings that Richard Evans of the RSPB made to the committee were enormously helpful. I ask him to expand a little on the issue of conflict of interest, which is at the core of our petition. I refer to the issue of Forth Ports being both poacher and gamekeeper.

The Convener: Given that we dealt with some of that earlier, I ask Richard Evans to be brief.

Richard Evans: I will have to repeat myself because the question is so direct. This matter is very much one of people's perception of conflict of interest. What seems to be lacking in the way in which Forth Ports distinguishes its role as a regulator and its role as a public limited company in making money is transparency. Personally, I do not believe that there is a conflict of interest. The perception that there is one is extremely powerful and I am not sure how to fix it. I think that Forth Ports may find itself in this difficult position because of the way in which things have rolled on since the Ports Act 1991, which enabled private companies to take on the regulatory duties of harbour authorities.

Bruce Crawford (Mid Scotland and Fife) (SNP): I am sorry that I was not here at the beginning of the evidence-taking session.

First, I will pick up on the last point, on conflict of interest. The Harbours Act 1964 is a primary piece of legislation in this regard, as is the Ports Act 1991. I think that Forth Ports finds itself in a pretty invidious position. It was privatised under legislation that was passed by the Tories, but I do not think that anyone thought then about what requirements might subsequently be placed on it as a public authority. In your view, should the law on that matter be sorted out?

My other questions are for Iain Rennick, although others may also wish to respond to them. In his letter to the Public Petitions Committee of 14 August 2006, Iain Rennick makes specific mention of the need to assess the impact on European protected species such as whales and dolphins. I understand that Mark Ruskell has already asked about that assessment process. At the end of the second last paragraph of the letter, Iain Rennick states that the assessment

"will clarify whether a licence will be required, and inform the Scottish Executive's consideration of any licence application, should one be required."

I understand that SNH has considered regulation 44 of the 1994 regulations and article 6(3) of the habitats directive. However, after the

recent episode of the killer whale in the Firth of Forth, some investigations were carried out to get advice from the European Union on the matter. That advice states:

"The Killer Whale (Orca), as with all cetacean species naturally occurring in the EU, is an Annex IV species under the Habitats Directive (Directive 92/43/EC) and therefore falls under the protection of Article 12 of the Habitats Directive and therefore the authorities should have regard to its protection in any decisions they take."

The advice from the EU covers issues outwith article 6(3), which deals with breeding grounds and so on. What cognisance has been taken by SNH of article 12 in its advice to ministers?

Also, given that Iain Rennick said earlier that there was a question mark over whether the Scottish Executive had a role in the issue, will he comment on the answer that was given in the House of Commons by the minister with responsibility for such issues on 25 July last year? Dr Ladyman stated:

"Furthermore, under regulation 44 of the Habitats Regulations, there is provision to license activities that could disturb a European protected species, or damage or destroy breeding grounds or resting places. As this is for a devolved purpose, it is the responsibility of the Scottish Executive to determine whether a licence would be required for ship-to-ship transfer in the Firth of Forth."—*[Official Report, House of Commons, 25 July 2006; Vol 449, c 1308W.]*

Frankly, that issue seems quite clear.

If a proposal comes within the terms of article 6(3) or article 12 of the directive, what circumstances and conditions would need to prevail for the Scottish Executive to decide that a licence was required? In what circumstances would it refuse to grant such a licence?

Iain Rennick: My earlier comment on the Executive's role was in relation to the European sites issue. I apologise. The Executive's role seems to be broader than that.

The Executive is responsible for licensing arrangements for a small number of species under the annexes that have been mentioned. Those species are referred to as European protected species. In the context of the proposal for the Firth of Forth, we think that the only European protected species that might be affected are cetaceans—whales, dolphins and porpoises.

The question whether the Executive would require a licence depends on a judgment on whether the proposal would lead to deliberate or reckless damage to those species and whether the breeding sites or resting places of those species would be likely to be damaged as a result. Obviously, that judgment depends on data and information as to the presence of such species in the area and whether there are breeding places and resting places that might be affected.

Up till now, our role has been to highlight that issue and to argue that the data that are currently presented in the environmental statement are inadequate. We have pointed the environmental consultants to other data sources that we believe should be consulted before reaching a judgment on the issue. That evidence will help to inform the Executive's decision on whether to grant a licence. That is the position that we are in at the moment. We have raised those issues, we have suggested other data sources that must be consulted in presenting that evidence and we are waiting to see whether that is carried out.

Bruce Crawford: I have just a couple of follow-up points. Considering article 12 of the habitats directive, which concerns having regard to the protection of any such species, what specifically have the Scottish Executive and SNH been doing in terms of the general impact on cetaceans?

11:15

Iain Rennick: We have highlighted that in our comments on the environmental statement and drawn attention to the need for additional data and analysis when they are required so that the impacts can be assessed.

Bruce Crawford: The words that you used were, I think, "deliberate" and "irresponsible"—

Iain Rennick: Deliberate or reckless.

Bruce Crawford: Those words are causing everyone some problem, because an accident might happen without anything having been done deliberately. Does "deliberate" mean someone standing on the top of a ship pouring out barrels of oil, or does it mean something that happens by accident but could have been anticipated?

The environmental impact assessment carried out by Aquatera and the accident risk management outlined a number of areas of risk. In particular, they mentioned mother and daughter ship collision, saying that there was evidence for why it might not happen but accepting that it could. More specifically, they noted a risk from operational transfer spillages, saying that such a spillage is likely to happen about once every 20 years up to a maximum of 10 tonnes.

That seems to be an acceptance of a degree of risk. Although 10 tonnes is not as massive as the whole ship going down, it would cause a considerable problem in this part of the world, whether or not the spillage was deliberate. With that knowledge, what advice will SNH give to the Scottish Executive?

Iain Rennick: The phrase "deliberate or reckless" is obviously crucial. No one would suggest that there would be deliberate or reckless damage to the species in question. If a spill

occurred and damage was done, there are provisions concerning whether any legal action would follow. There are exclusions based on whether the event could have been foreseen, what steps were put in place to prevent it, and what measures were then taken to clear it up.

Forth Ports and the developers would obviously argue that they are putting in place measures to comply with those requirements. Ultimately, we require further data on the presence of the species in and around the area where the transfers will take place before we can reach a judgment about whether the Executive should intervene.

Bruce Crawford: Can you give us any timescale for when those data might become available? Forth Ports has said that it will consult stakeholders on the issue. Who might those stakeholders be? I guess that SNH will play a crucial role in giving advice on how wide that consultation should be and how long it will take.

Iain Rennick: I cannot give an answer on timescale. As I have said, we have highlighted in our comments on the environmental statement a range of concerns, including the need to address the absence of data. Our last comments were early last year, and the issues have not been addressed since then. I cannot say what the timescale is because we have not been told. Our concerns remain outstanding.

We have had no role whatever in the decision on whom Forth Ports will consult as stakeholders. It has a statutory responsibility to consult us, and it has done that. We have not been asked for an opinion by Forth Ports on whom it should choose to consult thereafter.

Bruce Crawford: But I would hope that you will advise it on who that should be.

Iain Rennick: Once Forth Ports gets to that stage, if we have a concern that the consultation is not wide enough, we will make it known.

The Convener: What other data sources are there? Where are you pointing the Executive and Forth Ports to so that they can get the data? Do enough sources exist to give us a true picture of the presence of cetaceans in the Forth?

Iain Rennick: The specific sources that we pointed them towards are the Joint Nature Conservation Committee office in Aberdeen, which maintains records about the coast; the sea mammal research unit in St Andrews; and the local record centres in Fife and the Lothians that collect environmental data and are funded by SNH through grant aid. Those centres record, for example, public sightings of cetaceans in the Forth. Those are the main data sources that we would want to be consulted.

The Convener: Would those be sufficient to give a true and up-to-date picture?

Iain Rennick: It is impossible to say without having seen data from those sources. We have not asked for a further survey to be done because it would be premature to do so in advance of seeing what data exist and whether they are adequate for the purpose.

The Convener: Andrew Arbuckle has indicated that his question has been overtaken, but Mark Ruskell has something to ask. I hope that it is a short question, because I want to wind up this evidence-taking session.

Mr Ruskell: What impressions do the RSPB and the councils have of the way that Forth Ports, as a competent authority with statutory responsibilities, has been consulting?

Richard Evans: RSPB Scotland was involved at the outset, when the project was first scoped. The developer's consultant contacted us, and we responded to that approach. We also attended the one or two public meetings that happened subsequently. That takes us back to 2005. In May last year, we met Forth Ports to discuss ship-to-ship transfer and exchanged views on measures that might be needed to ease the way forward and to reach a conclusion on how an assessment should be carried out. However, we are not terribly clear what has happened since then, what is going on, what stage things are at or what account has been taken of the suggestions that we made.

Dr McLellan: Although the documentation refers to the consultation process being initiated in April 2004, the first indication that Fife Council had of any proposal was when Captain Taylor from Melbourne Marine Services came to see us in December 2004. Until then, we had no idea that any proposals were in the pipeline. I think that Captain Taylor also met some of the elected members of the council, so there were perhaps two meetings. That is all that took place.

We were of the firm opinion that there would be no consultation until noises were made about the proposals. I think the 12-week consultation took place in February 2005 after quite a bit of representation from Fife Council and other bodies. There was no further consultation after that, and we heard nothing until July 2006, when the Maritime and Coastguard Agency intimated a number of amendments that would have to be made, and thereafter on 25 August 2006, when it gave approval. There were two meetings of a couple of hours each, the 12-week consultation was carried out and a decision was made on 25 August.

Stephen Walker: I echo what Dr McLellan said. Like Fife Council, the City of Edinburgh Council learned second or third hand about the

consultation and we have had little consultation time.

Another issue is that it appears that none of our recommendations to Forth Ports has been adopted in any of its plans. A prime example, about which the committee heard earlier, is the need for an immediate response at the anchorage site should there be an oil spill. We are still waiting for a firm commitment that Forth Ports will have a tug presence throughout the transfer, a counter-pollution vessel on site and that it will even consider booming around the daughter ship. We and other local authorities have made those recommendations, but it appears that Forth Ports has ignored them.

Mr Ruskell: Have you been involved in the further revisions of the appropriate assessment that are taking place at the moment?

Richard Evans: If you mean the environmental impact assessment, we have not been involved.

The Convener: Nora Radcliffe wants to ask a short question. I hope that the answers will also be short.

Nora Radcliffe: I do not know whether this is a fair question to ask because it is about legal competence. Would it be competent to include in the oil spill contingency plan a clean-up duty? I was rather surprised to hear that local authorities do not have a statutory responsibility in that regard. Would it be competent to specify—either in the oil spill contingency plan or in a licence condition—that the developer would have to pick up any reparation costs?

Stephen Walker: You have heard from Dr McLellan that throughout the UK it has been assumed that local authorities will prepare for and co-ordinate such activity, even though we have no resources, equipment or materials in reserve with which to do so. We must face the risk and deal with the clean-up—should it be necessary—at huge expense. The committee has heard how long it might take for local authorities to get compensation.

Nora Radcliffe: The fact that you will have done any clean-up voluntarily may make your grounds for recovering compensation rather shaky.

The MCA is considering secondary legislation on non-emergency ship-to-ship transfers within the 12 nautical mile zone, but outwith harbour authority areas. Is there any reason why that legislation could not include harbour areas? That is quite a technical question, the answer to which we might need to look for elsewhere.

Dr McLellan: Again, I cannot answer that from a legal perspective but, as I have said, it might help the transparency of the decision-making process if the port authority was not the body that was responsible for the approval of operations.

Richard Evans: Nora Radcliffe asked about the proposed UK regulations. I think that their purpose is to ensure that transfers do not take place on the high seas, which is a good thing. The question whether they should extend in detail to harbour authority areas is probably better addressed to Forth Ports. We have indicated to the Department for Transport that we think that clear guidance should be provided on how to apply the habitats directive regulations within harbour authority areas, when that is relevant.

The Convener: Thank you very much indeed. That was excellent evidence and it has given us a great deal of food for thought.

We will have a five-minute comfort break before we hear from the next panel. We will reconvene just after half past 11.

11:27

Meeting suspended.

11:33

On resuming—

The Convener: I welcome our third panel of witnesses, who represent Forth Ports plc. Charles Hammond is the group chief executive, Captain Bob Baker is asset manager marine and chief harbour master, Dr Derek McGlashan is ports security and environment manager for the Scottish operation and Morag McNeill is the group company secretary. Thank you for providing us with written material in advance, which has been circulated to members and which we have found helpful.

Before we begin questions, I point out that Forth Ports plc would rightly be reluctant to give too much detail when discussing its work on a particular application before it has made its decision because to do so would be regarded as fettering its discretion. However, the approach of committees that consider petitions is generally to seek to identify any generic lessons that arise from the particular cases with which the petitions deal. It is appropriate for members to find out what a particular case, and the processes that are required to come to a decision on it, illustrate about the current state of the law or the regulatory framework and its application in practice, and to identify whether the case highlights a need for legislative reform.

The committee's role is to consider the environmental issues that the subject raises. I see that Ted Brocklebank wishes to ask questions. He will be followed by Mark Ruskell, Helen Eadie, Christine May and everybody, in fact.

Mr Brocklebank: Good morning, lady and gentlemen. You have listened to the evidence and

heard that the Fife and Lothians coastlines could experience tremendous devastation if an oil spill ever occurred as a result of the oil transfers. We have also heard about the amount of money that such transfers might be worth to Forth Ports—about £9 million annually. What would the communities around the Forth get out of transfers? What would be the economic benefit to them in jobs and money?

Charles Hammond (Forth Ports plc): Good morning, convener and ladies and gentlemen. It may be unusual to have four representatives of one organisation here to give evidence, but I felt that, given the range of issues that had been raised, it was only fair to show our seriousness in addressing the issues when we came here today, to try to help the committee.

I am not sure where the figure of £9 million has come from, but I fear that it is grossly exaggerated. At the current point in the process, we are concentrating on making the right regulatory decision under existing legislation and our interpretation of it.

Mr Brocklebank asked about the benefits to communities. Forth Ports does several tasks that benefit communities generally, including regeneration in Fife, the creation of jobs at Rosyth, the safeguarding of the estuary for navigation and benefits to Grangemouth and to Dundee.

We look at the project as a whole. One point that we are clear about is that we do not wish to proceed with anything that is not inherently safe, because our reputation matters to us. Shareholders, other members of the community and people who are interested in our business generally believe that when we say that we will do something, we will do it and see it through properly. We take seriously our role as guardians of the estuary, which is why no final decision has been made on the project that the committee has heard about.

Mr Brocklebank: Your response suggests that communities would experience no direct economic benefits from the activity.

Charles Hammond: The project would create some jobs. I hope and expect that several jobs might be created locally. I would love to have locally based training in the Methil area, for example, to help to alleviate some of the problems there. One local company—Briggs Marine—has been involved in arrangements that might be used for the oil pollution response plan.

If the project proceeds, investment will be made in new towage, in new craft and in training people to handle pollution incidents. I would expect the number of jobs that was created to be less than 40; it might be between 20 and 40. However, I would hope and expect that the project would be

of benefit to the local community. Any revenues from the project would benefit communities, because we see our Scottish operation as an integrated whole.

Mr Brocklebank: So for the communities that will be forced to accept the project—if it is approved—you believe that 20 to 40 jobs would be a fair trade-off for the risk in an area that has an important ecology.

We heard that Forth Ports has connections with Scapa Flow and that there is no particular reason why such operations should not be conducted there. It is difficult to understand why, for 20 to 40 jobs, we are being asked even to consider the possibility of transfers, when they could go somewhere else where you have a presence.

Charles Hammond: We do not consider the proposal as a trade-off. We are considering whether such transfers could be undertaken safely in the Forth. If the answer is that they cannot, jobs and benefits will not even be considered. We must answer that first question before we ask ourselves what we will do. I do not see the proposal as being a trade-off, because we must fulfil our regulatory functions before we go into such questions.

Mr Ruskell: You are a statutory environmental regulator with statutory functions. My first question is on those functions. What is your understanding of the application of the precautionary principle to European wildlife sites?

Charles Hammond: I hand over to Derek McGlashan, who is our environmental manager.

Dr Derek McGlashan (Forth Ports plc): We have sought advice on the project from various bodies. The committee heard earlier about SNH's and other people's thoughts on the environmental work that the developer undertook. We cross-checked three versions of the environmental impact assessment against advice from various organisations—we have relied particularly on an organisation called BMT Cordah Limited to give us independent advice beyond the advice that SNH provided. On the basis of SNH's comments on Aquatera Limited's interpretation of the precautionary principle and the perceptions of some individuals, we felt that we had to take the process a step further.

You heard earlier from Iain Rennick that it is the developer's responsibility to provide us with information to allow us to make a judgment. We felt that it was important that we had independent advice beyond the advice that Aquatera supplied. That was for a variety of reasons, but generally that is good practice. That is why we called on BMT, which is an expert in facilitation, to pull together an independent panel of experts to examine risk and to apply the precautionary principle to the operations from a risk perspective.

That panel has assisted BMT Cordah—particularly its Aberdeen office, which specialises in oil—to produce, independently and at arm's length, an appropriate assessment. The brief was clear that BMT Cordah had to make judgments on our behalf, within our statutory remit. Clearly, we did not want a perceived conflict of interests, such as has been suggested in the press, to cloud any judgments. That emphasises the fact that we take our statutory responsibilities seriously.

One piece of advice that came out of that was that it was unclear how a vetting process, which we had informed MMS we would like to be in place if the transfers went ahead, would work. We felt that the independent panel did not have enough guidance on that, so we asked another independent shipping organisation for advice on how the vetting process would work and how it could be applied, not just generally, but specifically in the Forth for ship-to-ship oil transfers. All that information has been pulled into the appropriate assessment that BMT Cordah is undertaking on our behalf.

Mr Ruskell: The Scottish Executive's interpretation of the precautionary principle was laid out in a refusal for a licence to release beavers in Argyll a year or two ago, which states:

"the test for considering the effects on the integrity of a European site requires there to be no reasonable scientific doubt as to the absence of adverse effects."

What specific work has been done to assess whether there is

"no reasonable ... doubt as to the absence of adverse effects"?

Dr McGlashan: That strays into the outcome of the appropriate assessment, which is on-going, and links to the points that the convener made in introducing us. However, the interpretation of the principle that you have given is broadly the one to which we are working. A little over a week ago, SNH gave us further advice on a draft of the appropriate assessment, which it saw in January. The advice was constructive and useful, particularly in relation to the wording of the test, which was subtly different from the wording that the consultants had applied on the basis of up-to-date guidance that they found on various websites. The consultants have been asked to re-examine the appropriate assessment using the wording of the test that SNH has supplied. The issue comes back to ensuring that we apply all the best practices.

11:45

Mr Ruskell: You mentioned an independent panel carrying out work to interpret the precautionary principle. Who is on that independent panel and what is their expertise? For

example, do they have expertise in cetaceans or birds?

Dr McGlashan: The independent panel was set up to examine the risks that are associated with the transfer process, not to examine the point of the precautionary principle. Various guidance documents have been used to apply that. The independent panel consisted of—

Mr Ruskell: I am sorry—are you saying that the panel considered the risks but not their impacts on wildlife?

Dr McGlashan: There are two separate issues. There is a panel to inform us of risk, the findings of which are then integrated into the appropriate assessment. The precautionary principle is implicit in the appropriate assessment process. The documents that have been referred to are various Government documents, including the European Commission's own guidance on the precautionary principle.

Mr Ruskell: Okay. Who is on the independent panel? Who is able to sit on that panel and decide whether there will be an absence of risk, especially with regard to birds and cetaceans, which are offered European protection?

Dr McGlashan: There is no such thing as an absence of risk. If you pick up your pen, there is a chance that it could impale you—to take the principle to a peculiar level.

Mr Ruskell: Okay then, what about the “absence of adverse effects”?

Dr McGlashan: The judgment about the absence of adverse effects is made on the basis of scientific information. The test of which SNH has helpfully advised us is that, if we were to approve the transfers, there would have to be scientific evidence that there would not be an adverse impact.

Mr Ruskell: Who, on the independent panel, is offering scientific advice with specific reference to cetaceans and birds, which are protected under EU law?

Dr McGlashan: I return to what I said: the panel was set up to assess the risk, not the precautionary principle. The appropriate assessment is being carried out by an independent consultant—a large international firm that has expertise across a range of areas and which has undertaken appropriate assessments for all sorts of activities.

Charles Hammond: Perhaps I can add to that in order to help members of the committee to understand the process. It is difficult to talk about an on-going process. As was mentioned earlier, when the appropriate assessment is finalised and we have received advice from SNH about it, that

appropriate assessment will be released not only to stakeholders, but on the Forth Ports website so that we can take any final comments on it from interested parties. If there are comments such as those that Mr Ruskell has made, we will be more than happy to take them into account before any final decision is arrived at.

Christine May: Good morning, lady and gentlemen. Thank you for coming and giving us this opportunity to question you. I want to return to perceptions because they are important. I hope that you will agree that they are important for all of us, including for Forth Ports as a company. How conscious are you of the degree of concern that is being expressed locally about the proposal? What do you believe the proposal has done for the perception of Forth Ports as an ethical and environmentally conscious organisation?

Charles Hammond: We are conscious of the concerns that have been expressed. Over the past two and a half years of consultation and engagement, we have been at pains to listen to factual concerns—not expressions of opinion about whether the transfers will almost certainly cause devastation—that we must, before the process goes ahead, have examined it carefully to ensure that it is inherently safe.

We take our ethical and social responsibilities seriously. We are on the Kempen SNS smaller Europe social responsibility index of socially responsible firms. We have had several meetings with institutions—Mr Jarvis referred to this in his earlier evidence—at which we have met not only the fund-management side of the institution that holds the shareholding in Forth Ports, but the social responsibility side, as well, to ensure that the two things are integrated. That aspect is important to us.

We have started a series of visits to the Forth and Tay navigation service, to try better to inform people about the systems that are used to manage traffic in the estuary. Some of the questions that are being raised apply not only to ship-to-ship transfer, which will be only a few hundred shipping movements out of 8,000 or 9,000 shipping movements. It is important for people to have that information. I again extend an open invitation to the committee to visit the Forth and Tay navigation service to see for yourselves how we control navigation in the estuary.

We are a member of various bodies, including the Forth estuary forum and the Tay estuary forum, and we like to think that we engage with stakeholders as much as possible. However, we could always do more, so we have taken on board some of the comments that have been made in this process. We want to ensure that people are better informed about management of the estuary, and we will continue to take that seriously. We will

listen to anybody's comments, take them on board and give them careful consideration.

Christine May: Thank you. How successful do you think you have been in allaying the concerns that have been raised, especially among the coastal communities of Fife and the Lothians?

Charles Hammond: It is difficult. We have found that when people who have expressed concerns have seen how we manage the estuary, those concerns have diminished substantially. I ask Bob Baker to comment on that, as he has been co-ordinating the visits and he is the chief harbourmaster.

The difficulty comes from the fact that a number of views were expressed early in the project, before information was gathered. Those views appear to have been arrived at before the facts were available. When we have been able to engage with people and explain not just what we are doing in this process, but how we safeguard navigation in the estuary, that has helped the perception. Nevertheless, I accept that a number of people around the estuary are concerned about the proposal.

Captain Bob Baker (Forth Ports plc): We have had several visits to the Forth and Tay navigation service to allow people to see how we manage the river with regard to navigational movements and shipping control. During those visits, the visitors have been surprised by the facilities that we have and the systems and processes that are in place to control the river. In fact, on a recent visit someone said that it was just like air traffic control. That is the sort of system that we have. We have an operations room that is manned 24 hours a day by experienced mariners who control all the shipping and plan all the shipping movements on the river. They also monitor the weather forecasts and the prevailing weather conditions.

Earlier, a comment was made about who would be in charge of stopping an STS operation. We do that already for operations at Braefoot and Hound point. All our ports have weather criteria, and the duty officers at the Forth and Tay navigation service have the authority to stop any operation once the weather reaches the criteria that have been laid down in the agreed procedures for that particular operation.

I was surprised by how surprised people were when they came to visit us and saw the systems that we have in place. They made comments such as, "We didn't realise all this existed. We thought ships just turned up at the river." I think that it has been beneficial to offer people the opportunity to visit our operation.

Christine May: Thank you. I am grateful for that. Nevertheless, there are people in my community whose lives have been blighted by the

loss of coal mining and engineering activity who have seen considerable investment in cleaning up and new businesses coming in. Because you appear unable to convince them, they are not convinced that the proposal is as risk free as they would like it to be. From what you and others have said this morning, it is impossible to give that guarantee. Given that the proposal will create virtually no jobs and provide no financial benefit to the community, why do you want to proceed with it?

Charles Hammond: Obviously, as the competent authority, we have not yet taken the decision to proceed with it. If we were to take that decision, it would be because we were happy not only that we could comply with all relevant regulations, including the habitats directive, but that we could ensure that the operation was carried out in an inherently safe manner, as are other operations in the Forth.

Helen Eadie: Good morning, lady and gentlemen. I represent the area that stretches from the two Forth bridges all the way up to just short of Burntisland and I live by the shore in Dalgety Bay. In the time that I have been the member of the Scottish Parliament for Dunfermline East, I do not recall receiving any correspondence or communication from Forth Ports inviting me to engage with this process. That causes me major concern. In my opinion, any company of size and worth would seek to engage the key stakeholders in the decision-making process. It concerns me that you have not done that.

Setting that aside, can I ask you again to take up Mark Ruskell's point? He has asked you four times in four different ways whether you can state clearly who was on the panel that considered the situation and took account of the precautionary principle. That is one question.

My only other question is to ask you about the perception of conflict of interest. Bruce Crawford and I have raised the point that, under the Harbours Act 1964, Forth Ports was a public authority but it is now a commercial company. I am not aware of many commercial companies that are allowed to act as if they are a state body; in other words, to make a regulatory decision with regard to a planning or development application, which this is. There is a clear problem with public perception.

I hope that you are aware that we raised this issue with the President of the European Parliament and we submitted a public petition to the European Parliament on the issue on behalf of Christine May, Marilyn Livingstone, Scott Barrie and myself. The perceived conflict of interest—that Forth Ports, as a commercial operator, is about to profit from something it regulates—will be considered in due course.

Charles Hammond: I will start off and I might ask my colleague, Morag McNeill, to elaborate on the framework in which we operate.

We operate in a framework that is no different from that in which any other harbour authority, whether it be a private company, a plc, or owned by the local authority, operates. A harbour authority has certain statutory duties to safeguard navigation, and they have to be complied with. That is our starting point. I can remember the days before Forth Ports was privatised. Even in those days, the systems that we used and tests that we applied for navigation were never compromised by commercial considerations. We consider the safety of any system to be paramount because of the overall effect that systems not being safe could have on our reputation. That is also what our shareholders would expect of us.

As a necessary consequence of the framework, any harbour authority, including Forth Ports, will stand to receive revenue from any activity that happens in its estuary. It is no different in Scapa Flow, where it just happens to be the local authority that gets the revenue, and it is no different down south. That is how we apply what Parliament gave us and we continued to apply that after 1991.

It is also worth saying that any ship that can comply with the law has a right to navigate in an estuary. We have to get to the bottom of that issue. We cannot deny people rights of navigation, but we have to establish whether any ship that is looking to carry out activities in our estuary complies with the law, which includes any environmental regulations. I note the petition and thank Helen Eadie for making us aware of it; obviously, we were not aware of it before.

Morag McNeill (Forth Ports plc): I just want to add to what Charles Hammond said about our statutory duty, which is to keep harbours open for lawful trade. We are not in a position to differentiate or discriminate between lawful trades because as well as giving us powers, the legislation gives us duties.

A number of regulatory organisations are also privately owned, or public limited companies. Scottish Power, for example, has the right to act as a planning authority on its own operational land, as do a number of previously publicly owned organisations. We are not alone in that. However, to add to what Charles Hammond said, the regulations and regulatory framework apply to all harbour authorities, whether they are in public or private ownership.

Helen Eadie: You have still not answered the question about the panel.

The Convener: You will have to resubmit it, Helen.

Dr McGlashan: I thought that I had made it fairly clear. The panel considered the risk assessment of the operational process—

Helen Eadie: That was not the question. Mark Ruskell asked it four times and this will be the sixth time this morning that it has been asked. Who were the members of the panel and what expertise did they bring to that area of work?

Dr McGlashan: Correct. Mark Ruskell asked who were the members of the panel that examined the precautionary principle. The members of the panel examined the risk assessment. The precautionary principle was examined using Government documents and other guidance from the European Commission.

Helen Eadie: You have still not said who the members of the panel were.

12:00

Dr McGlashan: Sorry. The risk assessment panel consisted of a tanker master mariner, who had understanding of how oil tankers work, but did not necessarily have ship-to-ship experience; an individual from a marine consulting company that undertakes ship-to-ship activities, who could provide information on how the ship-to-ship process works and whether proposed operations were safe; an environmental expert from a consultancy company, who could advise whether the measures being put in place were likely to safeguard the environment—although, ultimately the key issue was navigational safety—and a facilitator.

Captain Baker: There was also an expert on oil spill and oil spill prevention and clear-up and one of the experienced senior pilots on the Forth.

Helen Eadie: Thank you, but that still does not answer the question who had the expertise to examine the precautionary principle, which Mark Ruskell asked. However, we will let it lie.

The Convener: I do not think that that panel examined the precautionary principle; that was done in another way.

Nora Radcliffe: You have done a great deal on the precautionary principle and risk assessment. How good are your data on what is at risk, such as migratory species, winter visitors, summer visitors, birds and cetaceans? You have done a good risk analysis, but for it to be relevant you have to know what is at risk. The evidence from SNH was that it was not terribly convinced that the environmental impact assessment was as good as it might be.

Charles Hammond: SNH was talking about the environmental impact assessment that was prepared some time ago by Aquatera. Recently, in the appropriate assessment, we have sought to

identify any gaps in any document. That involves consulting SNH and asking it whether our data are adequate. We have looked at any data that it has asked us to look at as part of the process of finalising the appropriate assessment.

Nora Radcliffe: Right. That is good. I will ask you a question that I asked an earlier panel. If the transfer went ahead, would it be competent to include in the oil spill contingency plan a requirement to foot the bill for any consequences of an oil spill?

Charles Hammond: It might help if we outline the arrangements that are in place at the moment. Some of the comments have provided only a glimpse of what is in place for oil spill clean-up.

Captain Baker: The process for dealing with an oil spill, not just in the Forth, but at all UK ports, is divided into three tiers. A tier 1 spill is a small spill—there are no defined limits on a small spill, but it is basically a spill that can be cleared up by the local, immediately available resources that are on site. A larger spill, which local resources cannot deal with, is a tier 2 spill, for which there are back-up measures with contractors, such as Briggs Marine and Oil Spill Response Ltd, which is based in Southampton. Tier 3 spills are more major incidents. The national contingency plan is activated, the MCA gets involved and all the resources of the UK are brought to bear to tackle them.

On costs, for a small, tier 1, spill, the resources are what is on site at the time. If those resources are not available, the spill immediately becomes a tier 2 spill, and contractors are brought in. The cost of those contractors is, as always in these situations, borne by the polluter. All tankers have membership of the International Tanker Owners Pollution Federation. That is where the recompense for the cost goes. It is the tanker operator's insurance company.

Nora Radcliffe: So the polluters are legally responsible for all the costs that can be traced back to their negligence—or back to anything they have done?

Captain Baker: Yes.

Nora Radcliffe: So why is Shetland Islands Council still trying to recover costs from 1973?

Captain Baker: I cannot comment on that, because I do not know what the claims were.

Nora Radcliffe: We are getting the impression that regulations on the application of the habitats directive, for example, are not terribly clear. From your experience, would it have been helpful to have clearer guidance on such matters?

Charles Hammond: We would welcome any objective guidance on something that has

obviously been drafted as a European directive. To clarify matters for us, we have engaged a senior Queen's counsel to ensure that the wording in the directive is complied with in any assessment that is made by our consultants. We therefore have not just the interpretation of the consultants but the interpretation of a senior QC. To the extent that SNH has a view, that view is taken into account as well. In any assessment, it is helpful to have a set of clear criteria.

We have also considered other appropriate assessments of major projects in Scotland, to ensure that our approach is consistent. People reading about what we have done should be able to see that consistency.

Mr Arbuckle: I want to ask a question of Captain Baker, with his seafaring experience. Which would be the better environment for this kind of ship-to-ship operation—the Forth estuary or Scapa Flow?

Captain Baker: I would suggest that both have their pluses and their downsides. Both areas are sheltered and both have the required depth of water. Much is said about the shelter offered to vessels at Scapa Flow, but because of ballasting issues the vessels have to go out to sea to de-ballast before coming back alongside. You could argue that that increases the risk; vessels have to unberth and reberth, unberth and reberth, on numerous occasions. However, history shows that operations at Scapa Flow have been safely and successfully carried out for 20-odd years. The statistics for STS are similar around the world.

I see no difference between the two areas: both have the required depth of water; both have sheltered water; and, most important, both have the experience. Much has been made of the experience of Scapa Flow, but the Forth has many years of experience of handling oil traffic too. Hound point has been around since the 1970s and Grangemouth has been around a lot longer. We have the experience, we have the equipment, and we have the experts on site.

Mr Arbuckle: Do you discount arguments about the risk of the open sea and the weather?

Captain Baker: I am sorry—when you say “open sea”, do you mean outside port authority waters?

Mr Arbuckle: Yes.

Captain Baker: The MCA has discouraged STS taking place outside national limits. Out there, operations are uncontrolled. Earlier on, someone asked why the MCA is not looking into extending regulations so that they cover port authorities. The MCA is trying to stop operations taking place offshore. The MCA argues that operations taking place inside a port authority's waters will be

regulated and properly controlled because legislation puts obligations on the port authority. Operations offshore—out at sea—are not regulated; you do not know who is watching over it, what preparations have been made or what precautions are in place.

Mr Arbuckle: I do not have any further questions, but I suggest to the committee that it might ask Forth Ports whether it can supply the names of the people who were on the panel, to assure us of their experience and background and to assure us that surveys were carried out properly. We were given a response, but there were no names.

The Convener: Would it be possible for the witnesses to give us that information in writing?

Charles Hammond: If it is all right with the committee, we would prefer to finalise the appropriate assessment and then release information about the panel as part of a finalised package, rather than release information piecemeal.

The Convener: That seems to be acceptable to some members but not to others.

Nora Radcliffe: What will be the gap between releasing that information and coming to your decision?

Charles Hammond: I have just been told that the names of the panel members are on the MCA website.

The Convener: That solves a problem for us.

Nora Radcliffe: But it does not answer my question. How long after all your information and the assessments that are acceptable to you have been released will you make your decision? As part of your decision-making process, is there an opportunity for people to comment on what is acceptable to you before you make your decision?

Charles Hammond: That is the commitment that we have given.

Margaret Smith: Nora Radcliffe has just asked my substantive question, so I will ask a small supplementary.

What is the timetable that you are working to for the appropriate assessment to be made and for decisions to be taken?

Charles Hammond: I hesitate to give a timetable because this process has now been going on for two and a half years. I am sure that any date I give will be wrong.

The next step in the process—if I can approach it that way—is for us to address the current SNH comments on the draft appropriate assessment. We have given a commitment to the Minister for

Environment and Rural Development that, once we have done that, we will hold a meeting with SNH—with some ministerial presence—to get to the heart of any outstanding issues before the assessment can be finalised. The next step would be—assuming the assessment is finalised—to release it on our website. We would also seek to engage with certain key stakeholders, particularly the councils, in order to present the information, which will be contained in what will no doubt be a weighty document. At that point, we will look for final comments.

I hesitate to give a timescale for that, but I hope that, one way or another, the position will be finalised in the course of this year.

Margaret Smith: That is helpful.

I would like to return to a point that I discussed with Richard Evans. The habitats directive says that such a plan or project should go ahead only if no other alternative is available or if there are imperative reasons for overriding the public interest. What is your understanding of the scope of those alternatives? Would the alternatives only be in the area that is controlled by Forth Ports, or would, for example, Scapa Flow be acceptable? That is the point that Mr Evans made in response to my question.

Dr McGlashan: A flow chart is provided in the guidance that supports the UK regulation. We are at the stage in the flow chart at which we can assess—based on the appropriate assessment—whether it is likely that there will be a significant impact beyond reasonable scientific doubt. It is only if that test is failed that we move to an examination of other appropriate locations. We must wait and see what the outcome of the appropriate assessment is before we start going down the next route.

As a footnote to that, I should say that the environmental impact assessment examined other locations around Europe in which there would be the potential to undertake ship-to-ship transfers. Scapa Flow was one of the areas that was looked at in that regard, but the developers perceived the Forth to be the safest place to do it.

Margaret Smith: Presumably there is a possibility that the Executive might say that there needs to be a licence in terms of—

Dr McGlashan: The licence is the next step after the identification of alternative sites. Obviously, however, it would not be required if a decision were made immediately either way, pending the appropriate assessment.

Rob Gibson: What would the size of the mother ships be?

Captain Baker: The size of ship is variable. The process need not necessarily involve one large

ship and lots of small ships. There could be two ships of a similar size if, for example, the process involved shuttle tankers from the North sea.

The larger ships that would be involved would be around 250,000 to 300,000 tonnes.

Rob Gibson: What size are the largest tankers that come into Hound point?

12:15

Captain Baker: They are of a similar size—about 300,000 tonnes. A few months ago, we had one of around that size at Hound point.

Rob Gibson: Earlier, we heard evidence that neither the Netherlands nor Norway wishes to have ship-to-ship transfers near its coastline. What knowledge do you have of that?

Captain Baker: I am not aware of the stance of the Netherlands or Norway, but the developer of the scheme already carries out the operation off the coast of Denmark, so it is taking place off the European coast, in Danish waters.

Rob Gibson: Fife Council suggested earlier that the Netherlands and Norway have declined to allow ship-to-ship transfers to take place in their waters.

Charles Hammond: We are not aware of that. The question is probably one for Fife Council.

Rob Gibson: Why might those countries not want ship-to-ship transfers in their waters?

Charles Hammond: I am sorry, but I cannot answer that because we are not aware of the concerns.

Rob Gibson: It is surprising that, from whatever kind of assessment you have made of the impact, you have not learned about the potential impact in other countries.

Charles Hammond: We are focusing on any potential impact in the Firth of Forth.

Eleanor Scott: I am not clear about something Captain Baker said in response to Andrew Arbuckle. He seemed to suggest that the Scapa Flow and Firth of Forth model of ship-to-ship transfer is safe and desirable, but that when the procedure takes place outside the 12-mile limit it is not. To some of us, Scapa Flow is a different situation from the open Firth of Forth. Do you think the two are similar?

Captain Baker: The Firth of Forth is a sheltered area. The anchorages inside the Forth are sheltered from the main prevailing winds and weather, which in this country come from the west and south-west. There is substantial shelter. Criteria are built into the operations plan under which operations would have to be suspended and

precautions taken when there are certain wind speeds and sea states—I assume that that is the case in Scapa Flow, too. I am more than confident that the procedure in the Forth would be just as safe as the procedure in Scapa Flow, where there is sheltered water. Obviously, that would not be the case out in the open sea outside the 12-mile limit, where there is not only the weather element, but a lack of control, because no one regulates the procedure or carries out risk assessments and no expertise is on hand if issues arise. Those are the main issues about the two types of locations.

Eleanor Scott: You mentioned deballasting in connection with Scapa Flow. What would be the arrangements for deballasting in the Firth of Forth?

Captain Baker: Under the procedures for STS operations that we have written, all vessels that came to the Forth would be required to follow the International Maritime Organization's recommendations and guidelines on deballasting. The procedure is in place to ensure that vessels that could have alien species in their ballast water exchange it en route. The easiest way in which to describe that is that, when they arrive at the next port, they have flushed out the water in their ballast tanks and replaced it with water from a deep sea area.

Eleanor Scott: How far out would that happen?

Captain Baker: It would happen en route. It depends where the ship comes from. If it comes from somewhere local, such as another United Kingdom port or somewhere on the continent—which is possible—there will probably be no need, but if it comes from a tropical area or some other area where there are such species, the procedure would happen when the ship was en route to the port.

Eleanor Scott: What monitoring arrangements would there be?

Captain Baker: The procedure sets out that there would be testing of ballast water in ships to check for alien species.

Eleanor Scott: We have focused on the role of Forth Ports in the run-up to ship-to-ship transfers possibly happening, but I am also interested in your role as a competent authority should the transfers happen and something goes wrong. We have heard that the clean-up of any onshore oil would fall to the local authority and that the Scottish Executive would be in breach of the habitats directive. You have told us that the commercial tanker firms would be obliged to pay to clean up any pollution. What responsibilities would Forth Ports have?

Captain Baker: First, we have the statutory responsibility for ensuring that everything is done

safely on the river. As for pollution, we would be in a similar position to the councils, because we have an obligation to respond to a pollution incident on the river. We would have to use our own resources and contract in other resources to clear up oil while it was on the water. Like the councils to an extent, we would have to approach the polluter to seek compensation payment for the costs that we had incurred to clear up oil on the water.

The Convener: The petitioners have told us that the decision to stop pumping because of weather conditions, for example, would be in the hands of the master of the ship. You have said that that is not the case. Will you clarify that?

Captain Baker: In the procedures guide, we have a set of weather criteria. At different wind speeds, different actions require to be taken. The first stage is to stop pumping operations, the next stage is to disconnect hoses and a further stage is to separate the ships. That is all in the procedures guide.

The captain of a ship, who will know the procedures, and the STS adviser on board a ship, would be expected to act on those procedures, but we would monitor that from the Forth and Tay navigation service, too, where we have all the weather monitoring equipment. All the anemometers are fed into the FTNS, so my duty officers have all that information to hand and would at any point be able to stop an operation if they thought the weather was unacceptable.

A further step, which we apply to the Braefoot and Hound point operations, is that if the wind speed limit is set at 27 knots, for example, and people have any concerns when the wind speed is only 25 knots, they have the authority to stop the operation. We do not have a committee meeting or a decision between various people; if any person, such as a duty officer at FTNS, has a concern, he has the authority to stop an operation.

The Convener: That is helpful.

Bruce Crawford: I have found some of the information exchange useful. I want to clear up a couple of matters. The Maritime and Coastguard Agency submission says:

"Forth Ports ... expressed an interest in allowing ship-to-ship transfers of oil carried as cargo to take place within its harbour ... area."

Your submission says that Melbourne Marine Services made an approach. I am a bit confused about what came first—the expression of interest from Forth Ports or the application.

Charles Hammond: The statement in our submission is accurate. Melbourne Marine Services approached us.

Bruce Crawford: That is fine. Before that approach, did you make any general expression of interest to whatever industry is out there that you might want such activity to take place on the Forth?

Captain Baker: The first indication was when Melbourne Marine Services approached us back whenever it was in 2004.

Bruce Crawford: That nails that issue.

I guess that you are now racking up substantial costs from the process. I do not expect you to go into specifics, because contractual confidentiality applies, but if you are racking up substantial costs, I guess that substantial benefits would ensue if the process were given the go-ahead.

Charles Hammond: I have said that quantifying the benefits is difficult. It is presumed that Forth Ports would receive revenue—that is for sure—from the activity. If the proposal went ahead, additional cost would be incurred and additional investment would be required—that would depend on the number of ship movements. At this stage, we must incur costs, because we have a duty to consider the matter properly. Those costs are unavoidable.

Bruce Crawford: I will ask my final question, because most of the other issues that I wanted to talk about have been covered. The appropriate assessment process continues and I understand why you cannot give us a timescale for that. As if anyone did not know, we are about to have an election. My concern is that the appropriate assessment might become available in the campaigning season or immediately after it, when we might be in a season of negotiation.

Would you be prepared to give a commitment, if the committee asked, that the appropriate assessment could be brought back for another evidence session of the Environment and Rural Development Committee so that, as part of the stakeholder process, the committee could, if it wished, have the opportunity to examine the appropriate assessment in detail?

The Convener: I think that that is not a question for Forth Ports to answer. If we want to get that evidence—

Bruce Crawford: I am asking a hypothetical question.

The Convener: I think that it is too hypothetical. If the committee wants to speak to Forth Ports at a later date, we will ask for that. I do not want the committee's wishes to be pre-empted on that.

Bruce Crawford: Okay. Let me rephrase the question. If I wrote to you, asking whether you were prepared to return to the committee at a certain stage—although I am not a member of the

committee—to give further evidence based on the appropriate assessment so that the detail of it could be gone into, what would your response be?

Charles Hammond: If individual committee members have comments to make on the appropriate assessment, we will be happy to deal with those. I am unsure of my response to the committee as a whole, as I am not quite sure of my constitutional ground. All I can say is that, if individual members, constituency MSPs or other interested parties have comments to make on the appropriate assessment, we will try to deal with those as efficiently as possible.

Bruce Crawford: In that case, I have one final question on the appropriate assessment. Who will be the stakeholders in the process? Obviously, you will receive some advice from Scottish Natural Heritage. Are you able to state publicly who those stakeholders might be prior to the appropriate assessment process being completed?

Charles Hammond: As I have said, the appropriate assessment will be released on our website. That will give those who are interested in the proposal an opportunity to make comments on it. For the stakeholders who were involved in the earlier consultation process, such as the councils, we will try to do something more than that. We will seek to have meetings and present the guts of the appropriate assessment to them before they have otherwise had a chance to look at it.

The Convener: That is a fair offer. Thank you very much for your evidence. I invite you to stand down. If you wish to wait and listen to what the deputy minister has to say, you are welcome to stay.

12:27

Meeting suspended.

12:30

On resuming—

The Convener: To conclude our evidence on the petitions, I welcome Sarah Boyack, the Deputy Minister for Environment and Rural Development, and her officials. I apologise for the lengthy wait that you have had, minister. As you can imagine, the evidence that we have taken so far has been lengthy and detailed. Thank you for waiting and appearing now. I invite you to make an opening statement.

The Deputy Minister for Environment and Rural Development (Sarah Boyack): I am conscious that this morning's meeting has not been short, but I think that that is appropriate in the context of the committee's marine environment inquiry and the petitions that are before it. I am

grateful for the opportunity to put a few words on the record before members ask questions. Colleagues will know that, prior to taking up my present ministerial appointment, I was interested in this subject and had been involved in correspondence with Rhona Brankin on it.

Last year, in the members' business debate on ship-to-ship oil transfers, Rhona Brankin—the then deputy minister—acknowledged that the issue straddles devolved and reserved boundaries. Since that debate, the Executive has supported SNH in its considerable efforts to assess the potential environmental impact of the proposals. It might be helpful if I say how the Executive perceives the process and the respective responsibilities of the Executive, the UK Government and the statutory harbour authority, Forth Ports, in respect of the proposed transfers.

Shipping-related activity and activity that is covered primarily by merchant shipping legislation is fully reserved. The process is as follows. The specific regulatory regime surrounding the proposed oil spill contingency plan is a matter for the UK Government. The consultation that was undertaken by the MCA considered the environmental implications of the oil spill contingency plan. It is for the harbour authority—in this case, Forth Ports—to regulate any specific oil transfer operation in its area. In order to do that—and as a first step in the process—an appropriate oil spill contingency plan had to be approved by the MCA. That process was completed in August. However, it should be noted that the MCA's statement of approval to Forth Ports stated that its decision did not discharge Forth Ports from its duties, under regulation 3 of the Conservation (Natural Habitats, &c) Regulations 1994, as the competent authority for the purposes of the habitats directive in respect of ship-to-ship oil transfers in the Firth of Forth.

The Executive's interest in ship-to-ship oil transfer relates to our responsibilities for environmental protection in Scotland, especially in respect of fisheries management and our responsibility for the application of the EC birds and habitats directives. Because of our environmental responsibilities, the Executive is one of the named consultees in the UK-led statutory process of approving oil spill contingency plans, and we responded to that consultation. SNH and the Scottish Environment Protection Agency are separately named consultees in their own right.

In commenting on such plans, the Executive takes into account the potential impacts on Scottish fishing activity and the sites that we have designated in Scotland for special protection under the EC directives. The Executive also has responsibilities under the habitats directive to

ensure the protection of European protected species such as cetaceans. To meet those responsibilities, we take advice from the Fisheries Research Services and SNH.

Under the terms of the habitats directive, Forth Ports is regarded as the competent authority for ship-to-ship oil transfer operations in the Firth of Forth. It has acknowledged its responsibilities, and—as you heard—SNH has been advising Forth Ports on the appropriate assessment of the implications of the proposal for Natura 2000 sites that are designated under the habitats directive.

In addition, under the habitats regulations, the Executive may grant licences in respect of activities that are likely to disturb a European protected species or damage or destroy its breeding sites or resting places. We take advice from SNH, which has advised Forth Ports to review the available scientific data on cetacean sightings in the Firth of Forth.

The Scottish Executive acknowledges that there are sensitive and potentially vulnerable environmental sites along the firth; we are concerned about potential oil spills and the pollution risks associated with them; and we acknowledge the concerns that have been raised by local authorities and others, including colleagues in the committee today. The Scottish Executive is committed to ensuring that the habitats directive is fully implemented. That is why the Scottish Executive keeps under continuous review the relevant legislative provisions to take into account relevant case law or court judgments.

As I said to the committee in January, in view of concerns that had been raised about the potential impact of the proposals on Natura sites in the Firth of Forth, the Executive will examine whether there is a need to make improvements to legislation under the habitats directive in relation to ship-to-ship operations.

I turn to the petitions. I understand the concern that is raised in PE956 that the regulations that implement the habitats directive should be applied in this instance. I have to say that there is no clear evidence that they are not being applied or that the current legislative provisions do not ensure compliance with the directive, although, as I said, the Executive is considering that issue.

I also appreciate the concern that is raised in PE982 that the proposals are scrutinised carefully. The Parliament debated the proposals in March 2006. The committee's current inquiry is evidence of an interest in marine management more generally. As you will have heard, considerable effort has been invested by the various parties that have an interest in this issue—not least the MCA and Forth Ports as the regulators—to ensure that the environmental implications of the proposals are assessed properly.

It is absolutely right that environmental impacts should be an important consideration for the committee and I hope that this meeting has reinforced that point. I reassure members of the committee and visiting members that I take my role in that very seriously indeed.

The Convener: What is the Executive's view on the conflict of interest—real or perceived—in the commercial operator deciding on such a major strategic matter, which many people think ought to be decided at Government level?

Sarah Boyack: The decision is for Forth Ports to make, as the competent authority, as outlined by the legislation. It is for Forth Ports to ensure that it adheres to the terms to which it is required to adhere under the habitats directive. It is taking that seriously—it has to be seen to do so.

It is not for me to comment on the appropriateness of the legislation. It is entirely a matter for Forth Ports to ensure that it is carrying out its functions as a public authority properly and effectively. The Executive's job is to ensure that we support SNH in its discussions with Forth Ports, which we have done over the months. The dialogue that there has been between Forth Ports and the Executive—and more directly between Forth Ports and SNH—has reinforced that point. We have responsibilities under the habitats directive, but so does Forth Ports, in acting as a public authority.

Bruce Crawford: Thank you for coming along and being prepared to give evidence to the committee, which I am visiting today.

You said that you do not think that it is appropriate for you to comment on the legislation. The Harbours Act 1964 created the general rules under which harbours operate and there has been further legislation since. Do you not think that, following the privatisation of Forth Ports, it would have been appropriate to re-examine the regulatory framework to check whether the current legislation best suited its purpose, given the type of activity that we are thinking about undertaking now?

Sarah Boyack: The situation is not unique, in that other privatised utilities have public authority requirements. They have to exercise their consideration under the legislation, so they have to be able to convince the public, the regulators and us that they take their responsibilities seriously. The Executive has been keen, over the months, to send letters to Forth Ports and to work with SNH to ensure that they are aware of our interest in the matter.

You asked whether the legislation should be reviewed. The committee's inquiry is timely, in that marine legislation is being considered actively. If the general issue demonstrates one thing, it is the

need for more straightforward legislation on marine issues—even though achieving that might not be straightforward. Given the complexity of the matter and issues about transparency, I suspect that modernisation would have helped the decision-making process. However, there has been no modernisation and everybody who is involved in the process must take seriously their responsibilities under different legislation, whether that is legislation on habitats or on the marine environment.

Bruce Crawford: I want to burrow down into the habitats directive. In a letter to the Public Petitions Committee dated 28 August 2006, David Mallon, of the marine management division in the Scottish Executive Environment and Rural Affairs Department, referred to the Executive's intention to make regulations to improve the transposition of the directive into domestic legislation, in response to European Court of Justice ruling C-6/04.

The regulations, depending on how quickly they can be made, might provide a significant opportunity to make the law much clearer, particularly given that I think that the law talks about deliberate and reckless damage but does not mention accidental damage. An incident in the Forth might be the result of an accident rather than deliberate and reckless damage.

How long will it be before regulations are made that improve the transposition of the habitats directive into Scots law? Accidents happen, so can the process be accelerated, to ensure that the legislative framework provides that accidents, as well as deliberate and reckless action, must be taken into account in an examination of the impact of operations on areas in which cetaceans are present and on important bird sites and European protected areas?

Sarah Boyack: I appeared before the committee in January to discuss the draft regulations that were developed in response to ECJ judgments. On such urgent matters the Executive must respond as quickly as possible. I said at the time that we are also considering other issues in relation to the potential ship-to-ship oil transfers. That work is on-going, but it is a separate issue.

Judith Morrison might comment on the law on accidental damage and negligence.

Judith Morrison (Scottish Executive Legal and Parliamentary Services): Mr Crawford might not be aware that, as the minister said, draft regulations were considered by the Environment and Rural Development Committee in January and have since been approved by the Parliament. The regulations will be made shortly. The Scottish Executive considers that the regulations answer the complaints that were made in the infraction

cases that went to the ECJ. We have gone as far as is required to deliver the habitats directive's intentions on species protection. There continues to be provision on deliberate and reckless conduct in that regard.

Bruce Crawford: David Mallon said in his letter:

"Though the recent consultation on potential improvements to the Conservation (Natural Habitats, &c) Regulations 1994 in Scotland did not propose amendments in relation to Ship to Ship transfers, the Scottish Executive will assess responses prior to laying draft amendments before Parliament".

That was not possible, given the timescale involved. However, given that the minister has said that she is considering the matter, will she consider making further regulations on the matter, over and above the regulations that were considered in January?

Sarah Boyack: As I said in January, we are considering the issue and we are working with the United Kingdom Government on the matter.

Bruce Crawford: Are you specifically considering accidental damage as opposed to reckless or deliberate damage?

Sarah Boyack: No.

Bruce Crawford: In that case, there is still a hole and we need to think how we can fill it.

Sarah Boyack: It is for Executive lawyers, in conjunction with the UK Government, to consider whether there are gaps. The most recent regulations were drafted because the ECJ judged there to be gaps. We will keep the regulations and their implementation under active review.

12:45

Mr Ruskell: We have heard this morning about the licensing of activities that disturb European protected species. I am trying to get clarity about the exact process and the involvement and responsibility of the Scottish Executive in it. As you said, Forth Ports is the competent authority. Is it correct to say that, if Forth Ports makes an appropriate assessment and determines that the activity will not have a significant impact on protected species, it does not have to ask you to decide whether a licence is required?

Sarah Boyack: I understand that that is correct. Forth Ports may have to defend the decision, should someone not agree with it.

Mr Ruskell: Thank you for that clarification. If appropriate assessment has been concluded and there are differences of opinion between SNH and Forth Ports, at the end of the day Forth Ports will make the final decision on the assessment. If you and your advisers shared SNH's view that there would be damage and that a licence should be

applied for, but Forth Ports, which is the competent authority, said that there was no problem, what legal responsibility would you have?

Sarah Boyack: That is a theoretical question, because we are not at that point.

Mr Ruskell: Yes, but it may become a real question.

Sarah Boyack: Let us go back to just before that point. Currently SNH and Forth Ports are in dialogue. SNH wants certain issues to be considered completely by Forth Ports and is giving nature conservation advice to it. When we reach the end of that process, it will be for Forth Ports to decide whether it needs to apply to the Scottish Executive for a licence. It will have to do that in light of the comments that are made to it by SNH about whether it has all the available information and the right research and evidence on which to base its decision. It is for Forth Ports to come to a judgment in the light of advice from SNH. Should SNH not be satisfied, it will be for Forth Ports, as the competent authority, to justify its decision not to accept SNH's advice. As I am not a lawyer, but a minister, I invite my legal adviser to clarify the issue on the record.

Judith Morrison: The minister is correct. The function of a licence is to exempt a licensee from prosecution in respect of conduct that may give rise to criminal liability. It is for the operator to decide whether it wishes to conduct an activity in the absence of a licence.

Mr Ruskell: Minister, you are saying that you have no powers in this matter. If SNH expresses the view to you that the activity will have damaging impacts, there is nothing that you can do. You cannot put pressure on Forth Ports legally or use your authority as minister. Despite knowing the information that has been passed to you and to Forth Ports, there is no mechanism for you to advise Forth Ports to apply for a licence.

Sarah Boyack: It is a matter of interpretation. I would not say that the Executive has absolutely no power in the matter. The process that is under way is quite rigorous. SNH is having a dialogue with Forth Ports on the work that it is doing, so I would not characterise it as having no influence or power. Although we may not be the last port of call on the issue, the Executive is clearly involved in the process. We have encouraged SNH, as our nature conservation adviser, to work closely with Forth Ports to ensure that issues on which it is not content or on which it wants further work to be done are brought to the authority's attention. SNH is acting as our nature conservation adviser, under the habitats directive, and its advice will be submitted to Forth Ports. It is not fair to characterise us as having no power or influence.

Mr Ruskell: You have provided useful clarification and have indicated that you have some power and influence. I return to the issue of the habitats regulations, which could give the Executive considerably more power—not just influence—over the issue. As you rightly said, on 17 January you attended a meeting of the committee during which you reaffirmed the commitment that David Mallon gave to consult on introducing new regulations. However, you could not give us a timescale for that work then. Can you give us a timescale now?

Sarah Boyack: No, but my officials have started the process and they are actively considering the issues. As I said at the time, it is not up to the Scottish Executive alone to consider the issues—we must debate them with our United Kingdom colleagues. That said, the process has started.

Mr Ruskell: Given the public interest in the matter and that you have a public petition in front of you that asks for the regulations to be applied, it would be useful for the Parliament to have more information on the consultation and the progress of negotiations with Westminster. Forth Ports could decide in the near future to go ahead with the operations in question, and we would still have no indication of whether the law could be tightened up to fill in gaps, including the lack of provision for ship-to-ship transfers. More detail about the steps that the Executive is apparently taking would be useful.

Sarah Boyack: I am not sure that I want to go much further than the commitment that I gave to members in January. We are actively considering the issues, and we must discuss them with the UK Government. I would be in a happier position if I could give an end date for the process, but it would be inappropriate for me to do so now. At the previous meeting, I gave a commitment to members that we would come back to the committee when we had reached a conclusion on whether further regulations would need to be introduced. I am happy to give the committee such a commitment, but I do not have a date by which consideration of the matter and discussions will be completed. However, I assure members that work is on-going.

Margaret Smith: I would like to clarify matters. You are saying that Forth Ports can ultimately take a decision that is based on appropriate assessment and takes into account everything that we have heard about today to go ahead with ship-to-ship oil transfers, whether or not you think that it should have a licence to do so. As an Executive minister, you have direct influence and indirect influence through SNH, but the ultimate power over all the key decision-making processes rests with Forth Ports, which could stand to make money from the decisions that it takes.

Sarah Boyack: Forth Ports is the competent authority. Therefore, it is required to implement the directive in a way that it can defend, as any authority must do under Government legislation. It is well aware of that and it has given reassurances to previous ministers that it takes its obligations under the habitats directive seriously. It is well aware of the need for a rigorous process.

Margaret Smith: Ms Morrison intimated that a licence would exempt Forth Ports from the consequences of legal action. The Executive would have responsibility for actions that had been taken because it had given Forth Ports a licence. What would the legal position be if Forth Ports went ahead with ship-to-ship oil transfers without a licence? Would it be open to legal challenges from councils? This morning and previously, we have heard that councils and others are contemplating a legal challenge. Is legal action the end game?

Sarah Boyack: There is a step before that. Forth Ports must consider information that it receives from SNH and ensure that its position is robust with respect to the habitats directive. It must consider the conditions for granting a licence and the need to apply for a licence. It must judge whether a licence is required on the basis of the available evidence. It is for Forth Ports to take a decision. Does that answer your question?

Margaret Smith: Yes.

Sarah Boyack: It is not for the Scottish Executive to tell Forth Ports that it needs a licence. SNH has given information to Forth Ports, which now has to consider the available evidence. It will then be for Forth Ports, as the competent authority, to come to a decision—and it will have to be able to defend its position.

Margaret Smith: I have some questions on the habitats directive. I asked a couple of the previous witnesses about this, so you will be well aware of what is coming. The directive will allow a plan to go ahead if no alternative is available or if there are imperative reasons for overriding the public interest. How do you interpret the scope of the directive? What would be an acceptable alternative? Would an acceptable alternative be one that happened to be within the close confines of the Firth of Forth area? Or could it be at Scapa Flow?

Sarah Boyack: I invite Judith Morrison to comment on that.

Judith Morrison: It has already been pointed out that the decision rests with Forth Ports, as the competent authority. It would be for Forth Ports to decide on its next steps if an appropriate assessment suggested a negative impact on the site.

Margaret Smith: As a taxpayer and a member of the Scottish Parliament, I am asking for your

opinion on what scope the directive offers on alternative sites. I am not saying that it is for you to take the decisions; all I am doing is asking for your views on alternatives. Under the directive, does an alternative have to be in a certain area, or would Scapa Flow be suitable? What scope is offered by the directive?

Sarah Boyack: Again, that would be a judgment for Forth Ports. It is not a judgment for the Scottish Executive.

Margaret Smith: So the Scottish Executive does not have a view on what a suitable alternative might be.

Judith Morrison: Not in relation to this particular case, no.

Margaret Smith: I want to return to a point that the minister made at the beginning, which colleagues have picked up on. You are investigating possible changes to legislation relating to the habitats directive and ship-to-ship transfer. Can you tell us about discussions that you might be having with the United Kingdom Government? Some witnesses have said that it would have been helpful had the current review at Westminster included ship-to-ship transfer in harbours.

Sarah Boyack: The last set of changes, which have just been put in place, came about as a result of the Executive's urgent need to demonstrate that we had transposed the EU directive as a result of ECJ decisions that had gone against the UK Government. We had to demonstrate to Europe that we had actively considered those decisions and taken them on board.

In the case that we are discussing, we are not under the same sort of pressure. At the moment, I just want to be sure that we have fully considered all the issues in the light of points raised over the past few months. I do not think that I need to say any more today, other than to reassure members that the process is under way.

Margaret Smith: I—

The Convener: Margaret, I am concerned about the time.

Bruce Crawford: I have a supplementary question on that issue.

I understand the minister's interpretation: discussions are continuing with Westminster, and Forth Ports is to decide whether it is required to apply for a licence. However, I have with me a piece of evidence from which I have quoted before and which seems to conflict with the Scottish Executive's view. In a written answer at the House of Commons, Dr Ladyman said:

"As this is for a devolved purpose, it is the responsibility of the Scottish Executive to determine whether a licence

would be required for ship-to-ship transfers in the Firth of Forth.”—[*Official Report, House of Commons*, 25 July 2006; Vol 449, c 1308W.]

Either the Scottish Executive’s interpretation is right or that written answer from Westminster is right—or perhaps there is something in between and you are both right. However, there has to be clarity in what Westminster is saying and what the Scottish Executive believes. The issue has been clouded.

Sarah Boyack: There is a distinction to be made. It is up to the Executive to grant a licence, or to decide not to, but it is up to Forth Ports to decide whether to apply for a licence. That is the distinction.

Bruce Crawford: The written answer says that it is for

“the Scottish Executive to determine whether a licence would be required”.

That is a statement by Dr Ladyman, on 25 July 2006, in a House of Commons written answer, in response to a question from Mike Weir. The minister has to decide what she will do, but her legal advisers need to consider the matter to clarify who is right. Is the view that was expressed at Westminster right, or is the advice that is being given to the minister right?

13:00

Sarah Boyack: I have asked about the matter. The answer that I gave you is the Scottish Executive’s view: in this case, it is for the competent authority to decide whether it needs to apply for a licence. It needs to consider the evidence. It has been given information by SNH about evidence that it needs to examine and, should an application be raised with the Scottish Executive, it would be for Scottish ministers to decide whether to grant a licence. The decision on whether to apply for a licence is for the competent authority. Under the habitats directive, the competent authority would have to be able to defend that decision.

I do not think that there is anything else that our lawyer, Judith Morrison, would like to add.

Bruce Crawford: I think you are confirming that, in your view, the answer that was given by Dr Ladyman was inaccurate.

Sarah Boyack: I have Dr Ladyman’s answer in front of me. I can see what he said on the record and I do not think that there is a huge difference between us. He has given a very short answer. I will rest with the answer that I have given you.

The Convener: I will stop the discussion there. I thank the minister for her attendance.

To finish our business, we must decide what to do with the petition. Although visiting members

may contribute to the discussion, any voting on how we will proceed will be done by committee members only. I should say that Trish Godman is at the committee as a substitute for Elaine Smith.

We agreed previously that we would consider the petitions as part of our marine environment inquiry. We have done that through our questioning of witnesses during the inquiry and our inquiry report can draw out any generic issues that arise. However, separately from the report, we must decide how to proceed with the petitions and it is appropriate that we do that at today’s meeting.

How do members think that we should proceed with the petition?

Eleanor Scott: There has been a lot to take in, particularly for those of us who are not from Fife and who have not been heavily involved in the issue. I would like to have a bit of time to reflect on what we have heard today. We might well want to ask several follow-up questions, perhaps of the minister and perhaps of other witnesses, in writing. What is the timescale for us to decide what we will do and how we will do it?

The Convener: That is a matter for the committee. The petitioners are here today and they would probably like us to reach some conclusion today. On the other hand, I realise that we have spent a lot of time discussing the matter today and that it is now after 1 o’clock.

Nora Radcliffe: Having read the petitions, I think that we have discharged what we were petitioned to do. The other issue is what we do with what we have learned from our consideration of the petitions. How do we take forward the evidence in drawing out what we might want to put forward as recommendations in our marine inquiry?

PE956 calls on the Scottish Parliament to urge the Scottish Executive

“to ensure the Conservation (Natural Habitats, &c.) Regulations 1994, as amended, are applied in relation to ship to ship oil transfers in Scotland.”

I think that we have done that, or that we can write to the Executive and do that. PE982 calls on the Scottish Parliament

“to consider and debate the implications”.

At a technical level, I think that we have discharged the petitions and that we can now take forward what we have learned from our consideration of them. Is that a fair comment?

The Convener: Indeed.

Margaret Smith: I am well aware of the fact that I am a visitor to the committee, and I thank committee members for putting up with me this morning.

One of the key things that will happen now is the appropriate assessment; that point was raised earlier. Having heard the minister's evidence, I think that the matter of appropriate assessment is now even more important. Some of us were probably under the impression that, following the publication of the appropriate assessment, the minister would at least be able to decide whether a licence was required. We now find that that is not the case. It would be beneficial to have as much publicity around and scrutiny of the appropriate assessment as possible. Given the concerns that the issue has generated—in Fife, Lothian and across the country and both inside and outside Parliament—it would be helpful if the committee could take evidence again on the completion and publication of the appropriate assessment, so that some of the matters that we have heard about today may be examined fully.

SNH has raised questions about a lack of data on the very species that we know the Executive has powers to deal with, should a licence be required. That is a key point. Sitting here today, we do not know what those data will say with regard to whales, dolphins, porpoises and so on. It would be useful to return to the matter once the appropriate assessment has been published so as to allow proper parliamentary scrutiny of the matter. That would be beneficial all round, even bearing in mind the comments that were made by Forth Ports that it will highlight the issue on its website and that it wants input from stakeholders and others. I am sure that the committee could encourage that by examining the matter again.

Bruce Crawford: First, I thank the committee for hearing from me. On the points that Nora Radcliffe made, I think that the committee has discharged what it was asked to do with respect to the first petition, PE956. The second petition, PE982, asks the Parliament to debate the implications. Patently, and following on from what Margaret Smith said, without the appropriate assessment in front of us—that will be the key document—it is difficult to debate the implications without having all the facts. I thought that I raised that point in a constructive way earlier. I was not meaning to be mischievous; I was just trying to find a means to get to Margaret Smith's position on the issue.

If the committee was prepared to hold another evidence-taking session on the matter, that would be constructive for the petitioners, the councils involved and the people of Fife, who have been discussing the issue. Depending on the timing, it might be necessary to leave the matter as some sort of legacy for the successor committee, but it would at least be a recommendation for it to pick up. If we had another evidence session, we could get into more of the nitty-gritty that we will be required to deal with, particularly regarding the

impact on the protected area status and so on. If we did that, it would do a significant service to the process and make it a lot more transparent. I also think that it would help Forth Ports.

Mr Ruskell: As a visiting member, albeit a regular one, I agree with all those sentiments. I would also like the committee to consider some conclusions based on what we have heard today, and I would like those conclusions to be brought into the wider report that I am sure the committee is constructing on its marine environment inquiry.

Ship-to-ship oil transfer has provided an excellent case study of some of the wider issues around regulation. There are questions around the habitats regulations, and there are various other issues that the committee needs to consider. I would certainly like to see a written report on those matters, which I think would satisfy the petitioners and many constituents. That would show that the matter has been aired and that some conclusions and recommendations have been made. I appreciate, however, that that would have to slot into the committee's timetable if it wishes to pursue the issue as part of its marine environment inquiry and other on-going work.

The Convener: Thank you very much for that input. I am hearing that we should not close the petition at this point, but that we should keep it open and ask for ministerial updates from time to time, as well as ask Forth Ports to send us the appropriate assessment when it is ready. We will feel free to ask various parties to return and report to the committee.

We do not have much time between now and dissolution, so we will include something about this subject in our legacy paper, highlighting the need to keep an eye on developments. I am sure that our report on the marine environment will contain quite a large section dealing with the issues of governance and transparency that have been raised at today's meeting.

Do members agree with that?

Members indicated agreement.

Meeting closed at 13:10.

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