

From: [Licensing Staff](#)
To: [Maire Buckley](#); [Sonja Smith](#);
Subject: FW: New submission entered for Reg no: P0914-01. (Reference Number: P0914-01-100803101509)
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Attachments: [WestlandIPPCFinal2.pdf](#)

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Sent: 03 August 2010 22:15
To: Licensing Staff
Subject: New submission entered for Reg no: P0914-01. (Reference Number: P0914-01-100803101509)
Importance: High

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3 August 2010

**Westland Horticulture IPPC Licence Application – P0914-01
Need for an 'appropriate assessment' - Risk of judicial review**

To Whom It May Concern:

We read with interest the supporting documentation supplied by Westland Horticulture on 16 July 2010 as part of its IPPC licence application. We are writing to concur with the Department of the Environment, Heritage and Local Government's (DoEHLG) view (in its letter of 21 June 2010) that the EPA is legally obliged to ensure, as part of this IPPC licensing procedure, that an 'appropriate assessment' is undertaken of potential impacts on the Lough Derravaragh Special Protection Area (SPA) for birds.¹ This letter is to clarify the extent of the EPA's legal obligation, and to correct one point made in the DoEHLG's letter.

Regulation 32(1) of the European Communities (Natural Habitats) Regulations 1997 (the **Habitats Regulations**),² headed 'Obligations of local authorities, An Bord Pleanála or the Environmental Protection Agency in the discharge of their powers and functions under certain enactments', provides:

"Where an operation or activity or an established activity to which an application for a licence or a revised licence or a review of a licence or revised licence, as appropriate, under any of the enactments set out in Part II of the Second Schedule [which includes the Environmental Protection Agency Act 1992, so covers IPPC licence applications] applies is neither directly connected with nor necessary to the management of a [Natura 2000] site but likely to have a significant effect thereon either individually or in a combination with other operations or activities or established activities a local authority, the Board or the **Environmental Protection Agency** shall ensure that an appropriate assessment of the environmental implications for the site in view of the site's conservation objectives is undertaken."

¹ Under the Birds Directive: Council Directive 79/409/EEC, as codified in Directive 2009/147/EC. Council Directive 92/43/EEC.

² S.I. No 94 of 1997.

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This transposes (in part) Article 6(3) of the Habitats Directive,³ which provides:

“Any plan or project not directly connected with or necessary to the management of the [Natura 2000] site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”

The Court of Justice of the European Union, in Case C-127/02 *Waddenzee*, has clarified the above obligations as follows (emphasis added):

“The first sentence of Article 6(3) of Directive 92/43 must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the [Natura 2000] site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives **if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.**

The competent national authorities, taking account of the appropriate assessment of the implications of [the activity] for the site concerned in the light of the site's conservation objectives, are to authorise such an activity **only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.**”

The Court's interpretation of Article 6(3) of the Habitats Directive, which goes to the heart of the EPA's current IPPC licensing decision, must of course be reflected in the EPA's interpretation of regulation 32(1) of the Habitats Regulations. In other words, in deciding whether or not to ensure an 'appropriate assessment' is undertaken as part of this IPPC licence application, the question for the EPA to address is not whether Westland's activity, in combination with other extraction activities in the area, is likely to have a significant effect on Lough Derravaragh SPA. Rather, the question is whether such effects can be *excluded*, on the basis of objective information. If such effects cannot be excluded, the EPA must ensure that an appropriate assessment is undertaken.

In the present case, we would submit that significant effects on Lough Derravaragh SPA cannot be excluded, particularly when Westland's activities are considered in combination with other extraction activities in the area. Indeed, Westland effectively admits as much in its supporting documentation, commenting:

“One point of reference I would like to make regards the location of Lough Derravaragh is that the Lough is located 2 – 3km downstream from our peat harvesting sites located near Coole and actually travels through a number of peat harvesting areas which are located further downstream of

³ Council Directive 92/43/EEC; Article 6(3) applies to Special Protection Areas under the Birds Directive by virtue of Article 7 of the Habitats Directive.

our site and located much closer to Lough Dergavaragh [sic], and **we are not able to verify the impact of any of these additional peat harvesting sites that are located downstream from our site.**"

In other words, Westland effectively admits that it "cannot be excluded, on the basis of objective information, that [Westland's activities] will have a significant effect on [Lough Derravaragh SPA]....in combination with other plans or projects."

Westland states (words in square brackets added):

"I have tried to follow the appropriate assessment and screening as detailed by the EPA guidance but I just cannot understand how our operations based on the nature of the [**Special Protection Area and**] Natural Heritage Area area of Lough Derravaragh and its location processes as our main source of pollutant will be from Suspended solids in terms of discharges to water and based on our laboratory analysis on the performance of our settlement traps and the analytical data taken from the River Inny itself downstream from our Peat Harvesting operations and the fact that Lough Derravaragh is an additional 3KM further downstream of the River Inny at that point I do not believe that we will have a significant Negative Impact on Lough Derravaragh."

It is clear that a mere "belief" that Westland's activities (alone) will not have a significant negative impact on Lough Derravaragh SPA is insufficient for the purposes of Article 6(3) of the Habitats Directive, and hence insufficient for the purposes of the EPA's decision pursuant to regulation 32(1) of the Habitats Regulations. The legal test, to reiterate, is whether it can be *excluded*, on the basis of objective information, that Westland's activities will have a significant effect on Lough Derravaragh SPA, either individually or in combination with other extraction activities.

To further bolster our argument that significant effects cannot be excluded in the present case, we have included as Appendix 1 a copy of a report commissioned by the Site Protection Unit of the National Parks and Wildlife Service (**NPWS**). Note that the Site Protection Unit asked broadly the correct question for the EPA's purposes: "whether there is firm evidence that the relevant birds have **not** been adversely affected by the peat extraction and/or siltation." However, the Birds Unit went a bit astray in its report, answering what is, in effect, a different question: "In response to [your] request there is no firm evidence in the waterbird dataset that can directly link the adjacent peat extraction activities with waterbird declines. However significant declines have been identified for several of the species of special conservation interest for Lough Derravaragh [sic] SPA."

The relevant issue for the purposes of Article 6(3) of the Habitats Directive is of course not whether there is *firm evidence directly linking* peat extraction to waterbird declines. Rather, the correct questions are:

- (1) Whether, on the basis of objective information, significant effects on Lough Derravaragh SPA can be *excluded*, taking account of the cumulative effects of Westland's activities and other extraction activities in the area. If such effects cannot be excluded, an 'appropriate assessment' is required; and
- (2) In light of the 'appropriate assessment', whether reasonable scientific doubt remains as to the absence of adverse effects on the integrity of Lough Derravaragh SPA. If reasonable scientific doubt remains, an IPPC licence cannot be granted

unless Article 6(4) of the Habitats Directive applies, which would require an absence of alternatives to be demonstrated; imperative reasons of overriding public interest for granting the IPPC licence to be demonstrated; and compensatory measures to be taken. In this regard, the DoEHLG was wrong to say in its letter of 21 June 2010 that "The appropriate assessment must establish and conclude that the proposed development does not pose a significant threat to the conservation objectives of the Natura 2000 site, if the licence is to be granted." The correct legal test is not whether the extraction activities "pose a significant threat to the conservation objectives" of Lough Derravaragh SPA. Rather, the legal test is whether reasonable scientific doubt remains as to the absence of adverse effects on the integrity of Lough Derravaragh SPA (see the judgment in Case C-127/02).

In any event, at this stage point (1) is the relevant issue: whether or not an 'appropriate assessment' must be undertaken. The NPWS's report in Appendix 1 reveals:

"marked declines in the site estimates of all of the species of special conservation interest [at Lough Derravaragh]. These declines range from 22 to 77% when compared to the baseline dataset for the five year period 1995/96 - 1999/2000. These recorded declines were cross checked with trend data at the all-Ireland scale in order to see if such declines were in agreement with national population changes. Table 3 clearly shows that the recorded [sic] declines at the site level are not in agreement with the national trends.

Restricting the analysis to the data received from regional management and compiled for the four-year period (2004/05 - 2007/08) an overall assessment would be one of unfavourable conservation status for each of the species listed as special conservation interests of Lough Derravaragh [sic] SPA.

When the scope of the data analysis was expanded it appears that the declines of Coot are not as severe as initially calculated. More targeted survey work would be needed in order to further assess the status for Whooper Swan at this site. Despite the fact that both Pochard and Tufted Duck have declined at the national scale the magnitude of the declines reported for Lough Derravaragh [sic] SPA is of notable concern."

The NPWS report therefore clearly supports the conclusion that, on the basis of objective information, significant effects on Lough Derravaragh SPA cannot be excluded, taking account of the cumulative effects of Westland's activities and other peat extraction activities in the area. An 'appropriate assessment' is therefore legally required. Please note that this obligation is separate from the obligation to carry out an environmental impact assessment pursuant to the EIA Directive (Directive 85/337/EEC).

In light of all of the above, we assume the EPA will be ensuring that an 'appropriate assessment' is undertaken via regulation 32(1) of the Habitats Regulations as part of Westland Horticulture's IPPC application. We note that Westland appears more than willing to provide an EIS, stating in its supporting documentation that "To date we have not received any confirmation or request to complete an Environmental Impact Statement but if we are requested to do so we will complete with immediate effect."

We would be grateful for confirmation in writing that the EPA will be ensuring that an 'appropriate assessment' is undertaken. If the EPA will not be ensuring that an

'appropriate assessment' is undertaken, we would be grateful for its full reasons in writing.

Please note that any failure to ensure that an 'appropriate assessment' of cumulative impacts is undertaken as part of this IPPC licence application will put the EPA's decision at risk of a judicial review.

Yours faithfully,

Andrew Jackson
Friends of the Irish Environment

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APPENDIX 1

To: James O'Connell
Cc: Conor O'Ragallaigh, Judit Keleman, Padraig O'Donnell
From: David Tierney
Date: 18/December/2009
Subject: **Peat extraction works and Lough Derravaragh SPA
4043**

Background:

Site Protection Unit requested that Birds Unit examine available bird data for Lough Derravaragh Special Protection Area (SPA) to verify whether there is firm evidence that the relevant birds have not been adversely affected by the peat extraction and/or siltation. The following is Birds Unit's response to the request.

Introduction:

Lough Derravaragh was designated as an SPA under the EU Wild Birds Directive (79/409/EEC) in 1995 (as per SI 284 of 1995). As part of the SPA review Birds Unit has examined suitability of the boundary of this SPA as well identifying the special conservation interests of the site. This work will inform the re-classification of this site which is due to happen in 2010.

Lough Derravaragh has been selected for SPA designation as it is one of the most suitable sites in the country for the following species: Pochard (*Aythya ferina*), Tufted Duck (*Aythya fuligula*) and Coot (*Fulica atra*). In addition to the aforementioned species Whooper Swan (*Cygnus cygnus*) is also considered to be of special conservation interest for this site as they have been recorded at this site in nationally important numbers.

In establishing their SPA network, Member States are explicitly required under Article 4 of the Birds Directive to pay attention to the protection of wetlands. To this end the wetland habitat that is contained within Lough Derravaragh SPA, and the waterbirds that utilises this resource, are therefore listed as a special conservation interest for the site.

Those birds specifically listed as special conservation interests for this site were identified using waterbird data collected during the five years of 1995/96 - 1999/2000. This is the baseline period, which is used for the majority of the wintering waterbird sites of the SPA network. The waterbird data that the baseline refers to was collected at a range of wetland sites around the country by NPWS staff and BirdWatch Ireland as part of the Irish Wetland Birds Survey (I-WeBS) which is an ongoing programme¹. Table 1 presents the

¹ I-WeBS

(<http://www.birdwatchireland.ie/Ourwork/SurveysProjects/IrishWetlandBirdSurvey/tabid/111/Default.aspx>)

baseline population estimates for those species that are specifically listed as special conservation interests for this site namely Whooper Swan, Pochard, Tufted Duck and Coot.

Table 1 Baseline data for species that are of special conservation interest for Lough Derravaragh SPA

Name	Amount (individuals)	Reference
Whooper Swan	102	Robinson et al ² (1995/96 - 1999/2000)
Pochard	3,129	I-WeBS (1995/96 - 1999/2000)
Tufted Duck	1,073	I-WeBS (1995/96 - 1999/2000)
Coot	1,358	I-WeBS (1995/96 - 1999/2000)

Data analysis:

Data on the bird counts undertaken by the relevant Conservation Ranger (CR) for the site in question for four winter seasons were given to Birds Unit for analysis (Table 2). For the aforementioned species the data were compared against the baseline (Table 3).

Table 2 CR bird count data for Lough Derravaragh SPA

Period	Number of counts	Notes
2004/05	5	Good coverage spanning peak months (November, December, January)
2005/06	3	Coverage spanning peak months (November, December, January)
2006/07	2	Coverage spanning peak months (January, February)
2007/08	3	Coverage spanning peak months (November, December, February)

Using this data set four-year mean peak values were calculated for all species recorded. Table 3 lists the various count data for the relevant species. The percentage change of these values from the baseline data are also presented alongside the all-Ireland change in the relevant population estimates during the period from 1994/95 - 1998/99 to 1999/2000-2003/04³. Note that these time periods do not precisely coincide with the baseline and more recent data but it does give an overall indication of population changes at the all-Ireland scale.

² Robinson J.A., Colhoun K., McElwaine J.G. and Rees E.C. 2004. *Whooper Swan Cygnus cygnus (Iceland population) in Britain and Ireland 1960/61 - 1999/2000*. Waterbird Review Series, The Wildfowl and Wetlands Trust/Joint Nature Conservation Committee, Slimbridge.

³ Crowe et al (2008) Estimates and trends of waterbird numbers wintering in Ireland, 1994/95 to 2003/04. *Bird Study* 55, 66-77.

Table 3 Analysis of CR data

Name	4 year mean peak 2004/05 2007/08	5 year mean peak 1995/96 - 1999/2000	Percentage change +/- from baseline	All-Ireland population estimates percentage change 1994/95- 1998/99 to 1999/200 2003/04
Whooper Swan	49	102	-52%	29%
Pochard	914	3,129	-71%	-23%
Tufted Duck	250	1,073	-77%	-12%
Coot	1066	1,358	-22%	17%

The above analysis show marked declines in the site estimates of all of the species of special conservation interest. These declines range from 22 to 77% when compared to the baseline dataset for the five year period 1995/96 - 1999/2000. These recorded declines were cross checked with trend data at the all-Ireland scale in order to see if such declines were in agreement with national population changes. Table 3 clearly shows that the recorded declines at the site level are not in agreement with the national trends. This indicates possible pressure from one or more source impacting the waterbirds of the site, an insufficiency of bird data to accurately quantify the waterbird populations of the site or a combination of both.

To further contextualise the four-year data set used in this analysis of Table 3 all waterbird data relevant to Lough Derravargh compiled by the I-WeBS office were downloaded. The four species were re-analysed for this site using the latest five-year mean peak values.

Examining the five-year mean peak values from the I-WeBS dataset, the recorded declines are in strong agreement except for Coot counts (Table 4). The full dataset indicate that Coot numbers have not dropped as severely as initially estimated. However the strong recorded declines in Pochard and Tufted Duck, and to a lesser degree Whooper Swan, remain.

Table 4 Analysis of I-WeBS data

Name	5 year mean peak 2003/04 - 2007/08	5 year mean peak 1995/96 - 1999/2000	Percentage change +/- from baseline
Whooper Swan	47	102	-54%
Pochard	931	3,129	-70%
Tufted Duck	207	1,073	-81%
Coot	1277	1,358	-6%

Figure 1 shows the annual 'sum of peaks' (i.e. the sum of recorded individuals from each species annual peak count) since regular waterbird monitoring

began in 1995. A steep recorded decline starting at the 2001/02 winter period is evident. This recorded decline continued until the 2003/04 season. The overall trend since then has been one of an overall increase. The decline in overall numbers coincided with a severe drop in the number of species using the site, which in parallel with the total amount of individuals using the site has increased in recent years.

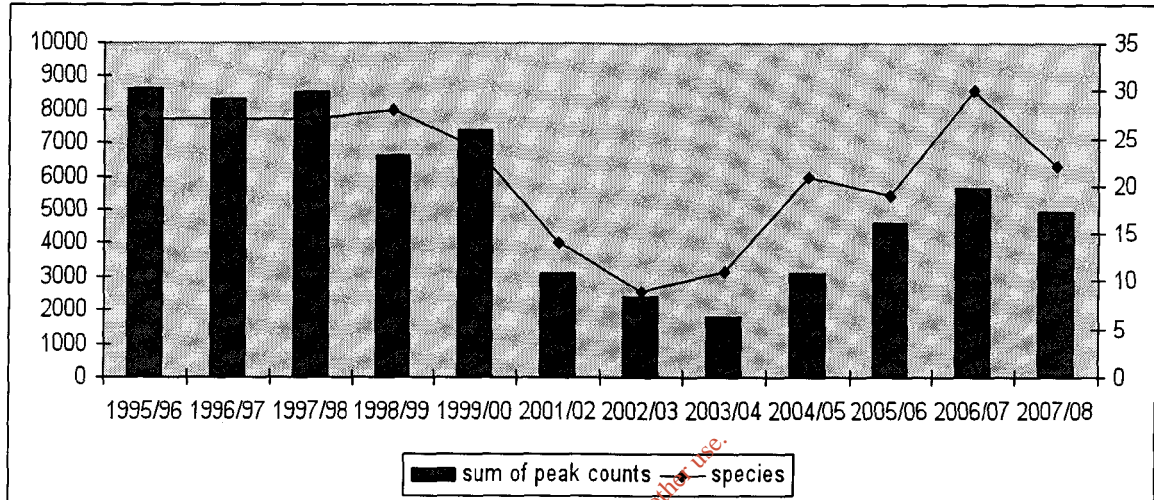


Figure 1 A comparison of the yearly sum of peak totals of waterbirds recorded and the amount of species recorded

The data set can be further analysed by categorising the waterbird species into groups and by splitting the time series into four three-year blocks. Figure 2 relates the pattern of Mute Swan (*Cygnus olor*) recorded abundances on Lough Derravagh, which mirrors that of the overall waterbird trend for the site of stable high numbers in the late 1990s then a decline followed by a recovery.

Unlike the Mute Swan pattern there has been no recorded increase in Whooper Swan numbers at this site. Whooper Swan could well use parts of this lough for feeding purposes but it is possible the main use of this site would be as a roosting site at night with the swans departing the lough in the morning to feed on nearby agricultural land.

It is possible that the recent waterbird counts may have been conducted when the majority of the Whooper Swans are away from the site thus the reported decline may not reflect the true site use by Whooper Swan. Robinson et al (2004) noted that the northern basin is the most frequently used area and that adjacent feeding areas remain largely unknown but birds have been observed feeding at the northern end at Donore (N4065) and on grassland in the estate near Williamstown.

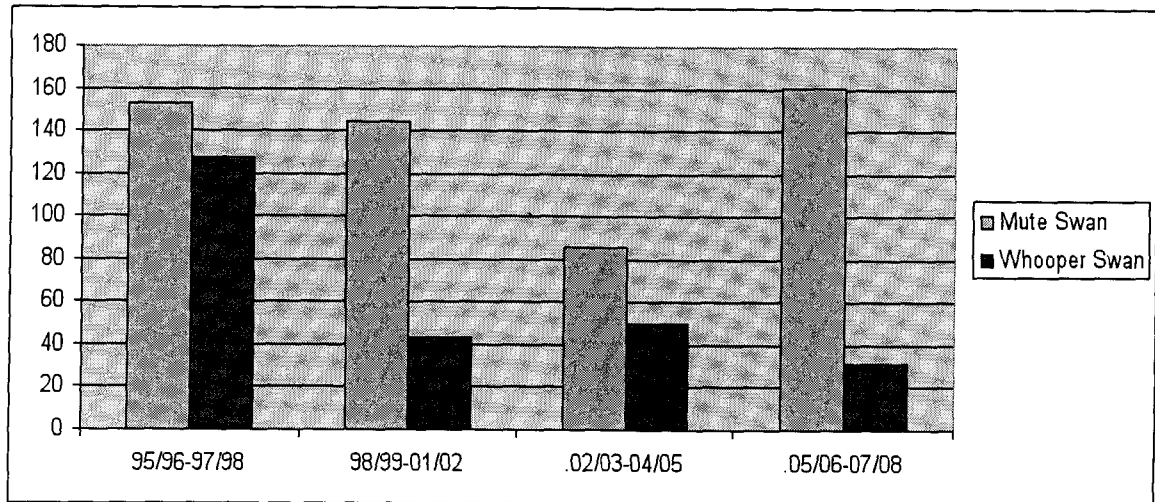


Figure 2 Whooper Swan and Mute Swan abundances on Lough Derravaragh 1995 - 2008

Figure 3 relates the changing recorded abundances of the main duck species occurring on the lough. It shows an overall trend of decreasing numbers of ducks using Lough Derravaragh. This trend is in contrast to the overall waterbird trend as shown in Figure 1. It is obvious from Figure 3 that the duck cohort is dominated by Pochard and to a lesser degree Tufted Duck. Both of these duck species are listed as being of special conservation for the SPA. Because of their numerical dominance on the total waterbird population of Lough Derravaragh the significant declines of these species strongly influenced the recorded total waterbird decline at the turn of the century. The recent increase in the total waterbird numbers at this site is not primarily driven by increasing duck abundances - ducks as a percentage of the total waterbird population has steadily declined from a starting point of 70% to 24% (1995/96 and 2007/08 respectively).

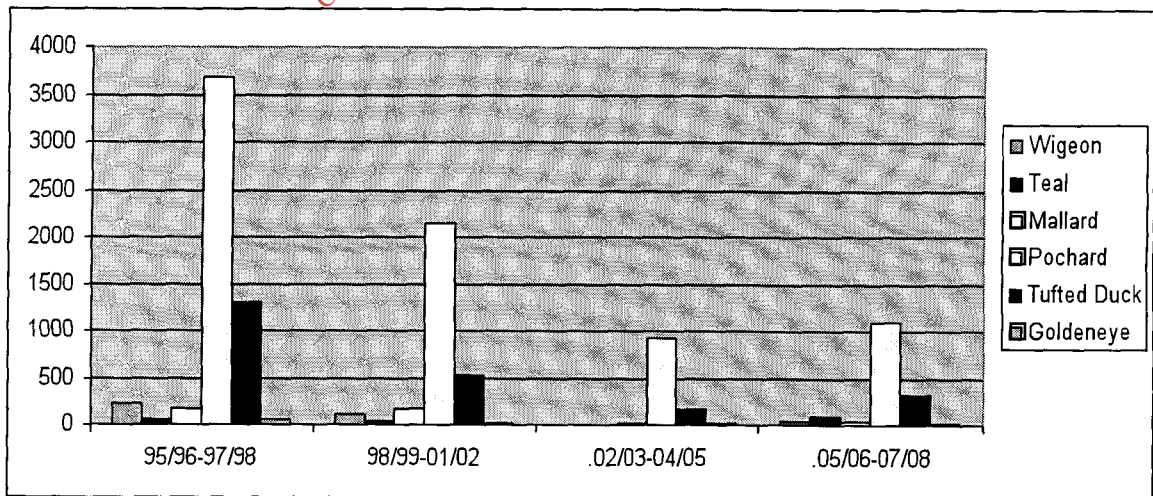


Figure 3 Selected duck species abundances on Lough Derravaragh 1995 - 2008

At Lough Derravaragh Pochard and Tufted Duck are the two main representatives of the feeding guild known as diving ducks which primarily

forage in open water by diving to the lake bottom in search of their prey. Waterbird diet at any particular site is a function of prey availability and hence is site specific. However it is understood that vegetative matter (e.g. *Chara*, *Nitella*, *Potamogeton*) forms part of both species' diet and chironomid larvae can often be favoured by Pochard in contrast to Tufted Duck that frequently show a preference for molluscs.

With the exception of Goldeneye (*Bucephala clangula*) the other species in Figure 3 primarily feed by upending for in shallow waters or by surface feeding.

Although not as numerous as Pochard and Tufted Duck, the recorded populations of Mallard (*Anas platyrhynchos*), Teal (*Anas crecca*), Wigeon (*Anas penelope*) and Goldeneye do not follow a similar pattern of steady decline. In contrast to the diving ducks Teal, Wigeon and Mallard would occur less in the open waters areas of the lake and favour the more littoral parts. No real abundance patterns emerges for these duck species except for the recent spike in numbers of Teal (247) which constitute an overall increase of over 300% from the baseline 5-year period.

The waterbirds that are classed as allies of the wildfowl contain such species as Little Grebe (*Tachybaptus ruficollis*), Great Crested Grebe (*Podiceps cristatus*) and Coot. The latter being one of the listed special conservation interests for this SPA. The proportion of these species of the total recorded waterbird population of the lough has, in direct contrast to the ducks, steadily increased from 9% in 1995/96 to 50% in 2007/08.

Overall Coot numbers have fluctuated (Figure 4). Comparing the latest five-year mean with that of the baseline a relatively small decline of 6% is noted (see Table 4). In recent years Little Grebe numbers have reflected those of Teal by dramatically increasing from its baseline level.

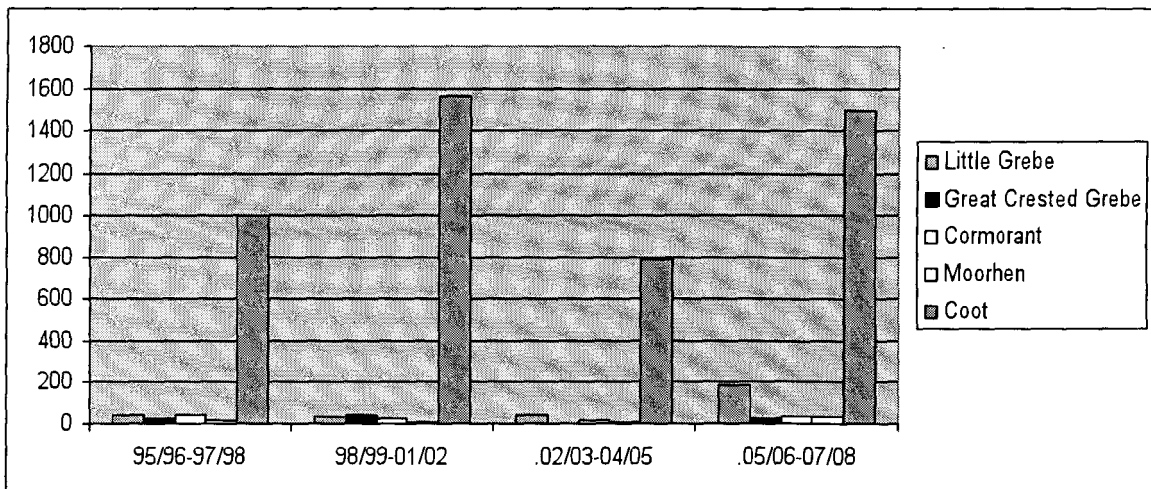


Figure 4 Selected allies of wildfowl species abundances on Lough Derravaragh 1995 - 2008

The general diet of the Coot consists of aquatic plants (and their seeds) and invertebrates. It is interesting to note that the diet and diving behaviour of Coot overlaps to some degree with those of Pochard and Tufted Duck. Cormorant (*Phalacrocorax carbo*) is a primarily a fish eating species. Fish can contribute significantly to the overall diet of the grebes but aquatic invertebrates would also be an important food resource.

The remaining waterbirds of note for this site are Black-headed Gull (*Larus ridibundus*) and three wader species (Golden Plover *Pluvialis apricaria*, Lapwing *Vanellus vanellus* and Curlew *Numenius arquata*). These waders usually feed by probing for surface or submerged invertebrates in suitable areas of wet and improved grassland within and without of the SPA. The undisturbed areas of the lakeside edge or islands may well provide a roosting resource for all of these birds.

A trend of decreasing Lapwing numbers in contrast to increasing Golden Plover is difficult to explain using available data. These species would spend a large proportion of their time feeding away from the site.

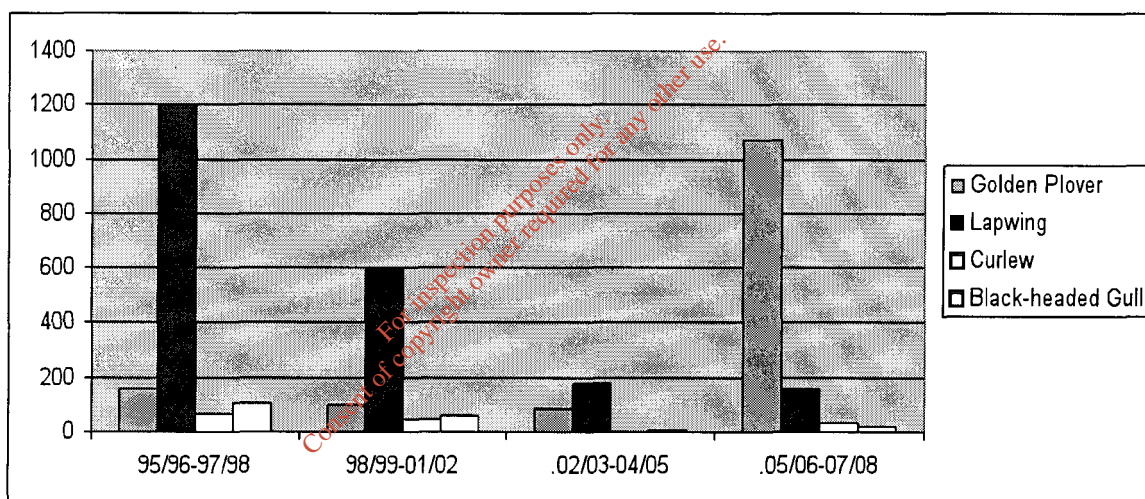


Figure 5 Selected wader and gull species abundances on Lough Derravargh 1995 - 2008

Conclusion:

Restricting the analysis to the data received from regional management and compiled for the four-year period (2004/05 - 2007/08) an overall assessment would be one of unfavourable conservation status for each of the species listed as special conservation interests of Lough Derravargh SPA.

When the scope of the data analysis was expanded it appears that the declines of Coot are not as severe as initially calculated. More targeted survey work would be needed in order to further assess the status for Whooper Swan at this site. Despite the fact that both Pochard and Tufted Duck have declined at the national scale the magnitude of the declines reported for Lough Derravargh SPA is of notable concern.

Using available waterbird data alone it is impossible to reliably attribute such declines in recorded numbers to a single causal factor. The declines of the diving ducks are contrasted with significant increases in the recorded abundances of Teal and Little Grebe. It is noteworthy that even though a theoretical overlap in habitat use of Pochard and Tufted Duck with Coot exists, they display very different patterns of recorded abundance at this site.

Changes in recorded waterbird abundances can often be multifactorial. Potential factors include: a change in the overall ecology of the wetland system due to natural succession, eutrophication or other forms of pollution; recreational disturbance impacting on a broad scale or targeted to specific areas of the lake; hunting pressure on game species; or even changes in waterbird survey emphasis and/or effort.

In response to Species Protection Unit's request there is no firm evidence in the waterbird dataset that can directly link the adjacent peat extraction activities with waterbird declines. However significant declines have been identified for several of the species of special conservation interest for Lough Derravagh SPA.

Further work on this issue is needed to better explain the population trends at this site. Such work should include initiatives (1) to increase in waterbird survey effort and targeted surveys for those birds that may only use this SPA for roosting purposes; (2) to examine the population changes at this site in relation to waterbird data collected at adjacent wetland sites; (3) to compile available data on the current ecology of wetland habitat of Lough Derravagh SPA including EPA and fisheries monitoring data; and (4) to identify the sources and intensity of disturbance that the waterbirds of this site are exposed to.

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