

TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997
TOWN AND COUNTRY PLANNING (INQUIRIES PROCEDURE) (SCOTLAND)
RULES 1997

**APPEAL BY NPOWER RENEWABLES LIMITED REGARDING A WINDFARM
AND ASSOCIATED INFRASTRUCTURE AT STROUPSTER, CAITHNESS**

CLOSING SUBMISSION

on behalf of

SCOTTISH NATURAL HERITAGE

(DPEA REFERENCE P\PPA\270\431)



23 November 2009

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1. Introduction

- 1.1 This Inquiry follows an appeal lodged by Npower Renewables Limited ("the Appellant") into the refusal by The Highland Council ("the Council") of its planning application for a wind farm and associated infrastructure at Stroupster, Caithness ("the Proposal"). An identical application ("the Second Application") submitted on 11 May 2007 is yet to be determined by the Council.
- 1.2 The Proposal comprises 12 wind turbines measuring 113m to blade tip with a hub height of 70m. The associated infrastructure includes 2 permanent anemometer masts of 70m in height, 7km of new on-site access tracks, 2 temporary construction compounds, a control and electrical sub-station, a site office and store and a borrow pit of approximately 105,400 cubic metres.
- 1.3 The Proposal lies within the Caithness and Sutherland Peatlands Special Area of Conservation ("the SAC"), the Caithness and Sutherland Peatlands Special Protection Area ("the SPA"), the Caithness and Sutherland Peatlands Ramsar Site ("the Ramsar Site") and the Stroupster Peatlands Site of Special Scientific Interest ("the SSSI"). Given that the interests of the Ramsar Site and the SSSI are encompassed within the advice for the SAC and the SPA, neither of these is considered further.
- 1.4 SNH objected to the Proposal in its Consultative Reply of 15 November 2005¹ because of:
- (i) insufficient information regarding the impacts on the SAC;
 - (ii) the effects of the Proposal upon the hen harrier qualifying interest of the SPA unless the Proposal was made subject to a specified planning condition, and;
 - (iii) insufficient information to enable SNH to assess if the Proposal would be detrimental to the maintenance of populations of otter, a European Protected Species, at a favourable conservation status.
- 1.5 Although SNH was concerned at the landscape and visual impacts of the Proposal, SNH recommended that the Council determine the application in line with the Council's

¹ SNH Written Submission, Appendix B

Renewable Energy Strategy CD022 which had not, at that time, been issued. SNH also recommended that a precautionary approach be adopted in relation to the impacts of the Proposal upon water vole by ensuring that the measures outlined in the Environmental Statement ("ES") were implemented.

- 1.6 At the pre-Inquiry meeting on 28 May 2009 the Appellant advised that Further Environmental Information ("FEI") would be submitted. It was agreed that SNH's up-to-date advice to you, Sir, would be provided in a written submission upon consideration of the FEI which was received by SNH on 10 July for all matters excepting landscape and visual impact. The landscape and visual impact section was received on 24 August 2009.
- 1.7 On 17 September 2009, SNH lodged their "Written Submission in relation to Natura, European Protected Species, UKBAP and Peatland" interests (the "Written Submission"). Therein, SNH explained the legislative and regulatory frameworks relating to SACs and SPAs² and the legal position for European Protected Species ("EPS")³. SNH also explained the legal protection afforded to water vole, a species listed in the UK Biodiversity Action Plan ("UKBAP")⁴. No party to the Inquiry has challenged that evidence and I commend it to you, Sir.

The SAC

- 1.8 The SAC was designated by Scottish Ministers on 17 March 2005⁵. The qualifying habitats are listed in paragraph 3.2 of the Written Submission. As noted in the Written Submission⁶ and explained to you, Sir, by Dr Coupar, the proposed access track lies within the SAC. SNH has assessed the proposal as having a likely significant effect upon the blanket bog, wet heath and otter qualifying interests of the SAC⁷ in terms of respectively the repair and maintenance of the access track, the felling of the commercial forestry, the maintenance of the clear-felled area, noise and sedimentation and/or pollution of watercourses.
- 1.9 Having considered in detail the FEI, guidance from both the Scottish Government and SNH, advice from specialists and experts within SNH and the invaluable evidence

² Section 2

³ Appendix C

⁴ Section 9

⁵ Written Submission para 3.1

⁶ For example, para 4.4

⁷ Written Submission paras 3.4 – 3.11 and 4.3 – 4.7

obtained from site visits, SNH's up-to-date advice to you, Sir, is that the Proposal will not have an adverse effect upon the integrity of the SAC if, and only if, the conditions as amended by SNH are applied to any consent that may be granted.

The SPA

1.10 The SPA was classified by Scottish Ministers on 2 February 1999⁸. It qualifies under Article 4.1 of the Council Directive 79/409/EEC ("the Birds Directive") by supporting populations of European importance of species listed in Annex I of the Directive namely:

- black-throated diver
- golden eagle;
- golden plover;
- hen harrier;
- merlin;
- red-throated diver;
- short-eared owl, and;
- wood sandpiper.⁹

1.11 The SPA also qualifies under Article 4.2 of the Birds Directive by supporting populations of European importance of the following migratory species:

- common scoter;
- dunlin;
- greenshank, and;
- wigeon.¹⁰

1.12 SNH assessed the Proposal as having a likely significant effect upon the following species:

- hen harrier;
- dunlin, and;
- golden plover¹¹

because foraging and nesting birds could be disturbed both during construction and operation of the Proposal. Furthermore, the requisite tree felling within the turbine envelope may create nesting and foraging habitats which are more attractive to these

⁸ Written Submission para 5.1

⁹ Written Submission para 5.2 and ES Appendix 6.3

¹⁰ Written Submission para 5.2 and ES Appendix 6.3

¹¹ Written Submission paras 5.4 – 5.12 and 6.4 – 6.5

species than the existing commercial forestry. Although not employing the precise terminology of the Birds Directive, the Habitats Directive¹² and the Conservation (Natural Habitats, &c.) Regulations 1994 (as amended) ("the Habitats Regulations")¹³, it appears that Dr Percival agrees with SNH's assessment.

- 1.13 Thus, SNH's advice is that the Proposal will not adversely affect the integrity of the SPA if, and only if, the conditions that are applied to any consent reflect the terms of the draft conditions debated at the Conditions Session and incorporate measures to address the SNH's specific concerns. I consider the draft planning conditions below.¹⁴

EPS

- 1.14 The legislative requirements for EPS are set out in Appendix C of the Written Submission. Given that otter are also a qualifying interest of the SAC, SNH advises that if, and only if, the specific conditions are attached to any consent, will the requirements of Regulations 39 and 43 of the Habitats Regulations be met.

UKBAP

- 1.15 The Appellant's water vole survey indicated that there were signs of water vole in several locations. There exist no legal means of damaging a burrow for the purposes of development and there exists no licensing regime.¹⁵ It is therefore imperative that the Proposal does not damage the shelters and/or resting places of water voles.
- 1.16 Having visited the site and considered all of the environmental information, SNH recommends that a precautionary approach is adopted. SNH therefore recommends that the draft conditions incorporating SNH's comments should be applied to any consent that is granted.

¹² 92/43/EEC

¹³ See, for example, Prec. paras 4.2 and 4.3

¹⁴ Section 3

¹⁵ Written Submission, Appendix B, page 31

Landscape and Visual Impact

1.17 In line with the undertaking given at the pre-Inquiry meeting ("PIM") and having assessed the FEI, SNH provided a Written Submission in relation to Landscape and Visual Impacts ("Landscape and Visual Impacts Submission") on 25 September 2009. As with SNH's consultative reply to the Second Application, SNH objects to the Proposal because of its significant and adverse cumulative landscape and visual impacts in combination with existing and consented wind farms. SNH does not consider that these impacts can be overcome by the application of planning conditions.¹⁶ Specifically, SNH considers that the Proposal would:

- reduce the distinctiveness of the landscape and visual resource and its experience within the north-east corner of Caithness;
- detract from the underlying characteristics of the landscape and visual resource along the A99 particularly the distinct composition in views of the seam, coastal settlements and the open moorland backdrop;
- increase the spread of wind farms within key views of Caithness, and;
- contrast with the pattern of existing and consented wind farms in the area so that it would appear discordant and create a confusing visual composition from some key views.¹⁷

Thus, SNH advises that this appeal should be refused planning consent because of its significant and adverse landscape and visual impacts.

1.18 Following your email, Sir, of 24 September 2009, SNH attended the Hearing Session to consider the following specific issues:

- The impact of the development on the SAC/SPA/SSSI;
- The habitat management proposals for the cleared site;
- The impact of the development on hen harriers or other birds;
- The impact of the development on otters;
- Peat stability, and;
- SNH's recommended conditions.

It is to the Hearing Session that I now turn.

¹⁶ Landscape and Visual Impacts Submission para 1.3

¹⁷ Landscape and Visual Impacts Submission para 5.1

2. The Hearing Session

- 2.1 You divided the Hearing Session into various topics and I retain these here for ease of reference.

Peat Stability and the Proposed Borrow Pit

- 2.2 Mr Young for CWIF-W explained his concerns relating to the proposed borrow pit and, particularly the temporary stacking on either side thereof. For SNH Dr Coupar expressed some agreement with Mr Young but noted that the proposed borrow pit is approximately 1km distant from the SAC so that even if small slides did occur, the integrity of the SAC would not be adversely affected. Dr Coupar also referred to the description in the Peat Stability Addendum as “provisional” observing that he therefore expected that the Appellant would undertake more detailed analysis before finalising the precise location of the proposed borrow pit. This was confirmed by Mr Uglow for the Appellant who also agreed with Dr Coupar and you, Sir, that in the event that the proposed borrow pit is to be located “significantly closer” to the SAC that SNH would require to be consulted since this would constitute a material variation to the consented development. In any event, the agreed draft planning condition that deals with micrositing¹⁸ excludes therefrom the proposed borrow pit. Thus, the borrow pit must be constructed in its present location to ensure that the Proposal will not result in an adverse effect upon the SAC.

Blanket Bog

- 2.3 Mrs Leat (CWIF-W) explained that she considers it “ironic” that wind farms are constructed on peatlands since they are “the best ecosystem that we have.” Mrs Leat added that the afforestation had resulted in surface cracking, dehydration and root penetration. Dr Dargie for the Appellant accepted that constructing wind farms on blanket bog was a “topic of debate” within the environmental arena but noted that the footprint of wind farms, including the Proposal, is “quite small”. He agreed with Mrs Leat that wind farms can affect the drainage around the sides of the infrastructure but referred to a “very active debate” about the size of the areas around turbines are affected.
- 2.4 Confirming the Appellant’s agreement with SNH that blanket bog should be created upon the clear-felled area to ensure that the integrity of the SPA will not be adversely affected, Dr Dargie explained that he hoped to have active blanket bog on the clear-felled area in

¹⁸ Condition 7

10 years. In support of this timescale Dr Dargie referred to the wind farm at Spadeadam in Northumberland. However, Dr Coupar disputed this timescale, noting that it would be more helpful to consider the blanket bog restoration works carried out at Forsinard given its close geographical proximity and therefore similar climatic conditions to the Proposal. Dr Coupar advised that a period of 30 years to achieve active blanket bog is more realistic.

The Access Track

- 2.4 Dr Coupar confirmed, in answer to you, Sir, that the proposed access track lies within the SAC and that the qualifying habitats for which there is a likely significant effect, namely blanket bog and wet heath would be affected only by the access track. Dr Coupar explained that the effect on adjacent areas is more likely to occur when working on undisturbed blanket bog hence requiring that there must be a condition attached to any consent preventing work outwith the existing ditches and machinery outwith the limits of the ditches. Dr Dargie confirmed the Appellant's agreement to incorporate all of these measures in planning conditions. Dr Coupar, in answer to you, Sir, confirmed that if and only if these protective measures were included as planning conditions to any consent that the integrity of the SAC would not be adversely affected by the Proposal.

Otter

- 2.5 Mr Cohen, whilst very fairly acknowledging that he is not an otter specialist within SNH, stated that 2 spraints had been observed within the site during the Appellant's survey which indicates that otters use the site, albeit at low levels. He explained that as is normal practice, there must be attached to any planning consent a planning condition requiring a pre-construction survey to enable SNH to remove its objection to the Proposal.

Habitat Management

- 2.6 Mr Cohen explained that, subject to there being attached a condition limiting the construction works to the period outwith the breeding season, the crossbills that are on the site would not be affected by the Proposal.

The SPA

2.7 Dr Percival agreed with you, Sir, that only golden plover, dunlin and hen harrier would be affected by the Proposal. SNH agrees with that assessment.

(i) Golden Plover

Mr Cohen asserted that there would be a likely significant effect upon golden plover as a result of the Proposal but given the low density of golden plover the integrity of the SPA would not be adversely affected.

(ii) Dunlin

Mr Cohen explained that given the SPA population of over 18,000 pairs, the loss of a single pair would not adversely affect the integrity of the SPA.

(iii) Hen Harrier

Mr Cohen agreed with Dr Percival's assessment that since there had been no successful breeding attempts recorded within 1 km of the site, there was only a negligible risk of collision with the turbines. However, Mr Cohen pointed out that the existing forestry would be felled were the Proposal to be consented and hen harriers are known to be attracted into such areas to feed and nest. Mr Cohen also noted that grass is particularly attractive habitat for field voles, a key prey species of hen harrier. Dr Dargie explained that the Appellant had "taken on board" SNH's comments and would create blanket bog to reduce the attractiveness to field voles of the clear-felled area. Mr Cohen agreed with Dr Dargie that blanket bog would be less attractive to field voles, and therefore hen harriers, than grassland provided that the vegetation is maintained at a short height of 10-15cm. This important matter is part of the agreed elements within Condition 10. Dr Coupar advised that whilst he was, in general terms, content with the proposed management, he was concerned that the measures appeared to focus upon the SPA. However, Dr Coupar explained that since the Outline Habitat Management Plan was an evolving document, he was happy to provide further comment on it to ensure that the SAC was also sufficiently protected.

3. Conditions

At the end of the Hearing Session, you held a session on Conditions. Mr Trinick circulated a text edited version of the proposed conditions which formed the basis of the

discussion. Of those conditions only Conditions 4 and 10 require comment from SNH. The remainder is either agreed or outwith the scope of SNH's involvement.

(i) Condition 4

Both Mr Findlay for the Council and Mr Trinick addressed you in detail referring variously to the Development Plan and to Scottish Government policies. It is SNH's view that there requires to be a restoration bond to ensure that there is, at the end of the operation of the wind farm, sufficient funds to enable all of the agreed restoration work to be completed. That restoration work is itself the subject of planning conditions and, in the circumstances, it is appropriate that there exists a mechanism to ensure that, in practical terms, the planning conditions can be implemented in full. Given that the site lies within the SAC, there is in my submission, a particular requirement to ensure that there exists the financial certainty to ensure full compliance with the requirements of decommissioning and restoration. I leave it to you, Sir, to determine whether that be by way of a planning condition or a legal agreement.

(ii) Condition 10

As stated during the conditions session, the level of detail that is required is a matter of debate. In my submission, in order to pass Regulation 48(5) i.e. to ensure that the integrity of both the SAC and the SPA are not adversely affected by the Proposal, enforceable planning conditions must ensure:

- (i) that blanket bog will be created on all of the clear-felled areas as soon as reasonably practicable;
- (ii) the blanket bog restoration area will be maintained to ensure the maximum vegetation height does not exceed 10-15cm, using either stock grazing or mechanical means;
- (iii) construction within the SAC will be restricted to the existing track corridor i.e. the existing track and side drains, with no vehicle movements or construction works taking place outwith the outer boundary of the existing track ditches;
- (iv) that there be specified areas for the washing of machinery;
- (v) construction works cease when there is a significantly increased risk of siltation and additional disturbance of soft ground, and;

- (vi) SNH must be consulted about and agree with the terms of the habitat management prior to its implementation and any variation thereto must also be the subject of SNH consultation and agreement.

Similarly a condition such as that proposed by the Council that the Construction and Environmental Management Plan includes provision for concrete batching and dewatering arrangements seems entirely appropriate given the location of the site within the SAC. It is submitted that leaving the detail of such measures to be agreed amongst the parties at a later stage runs the risk of such conditions failing one or more of the relevant tests and, in this case, a failure to pass Regulation 48(5).

4. Conclusion

In light of the foregoing, I respectfully invite you Sir, to agree with the evidence of Dr Coupar and Mr Cohen by concluding that the integrity of both the SAC and the SPA will not be adversely affected by the Proposal if, and only if, the conditions that are applied to any consent reflect the terms of the draft conditions debated at the Conditions Session and incorporate measures to address the SNH's specific concerns.

Louise Cockburn
23 November 2009