

CNOC AN EAS WIND FARM

CLOSING SUBMISSIONS ON BEHALF OF THE HIGHLAND COUNCIL

Introduction

1. The Highland Council (“THC”) maintains its opposition to the appeal, primarily for the reasons set out in its Report on Handling (CD1.27), as supplemented by its response to the grounds of appeal and, in particular, its various hearing statements.

Cultural Heritage

2. As to Reason for refusal (“Rfr”) 4, THC makes three primary submissions.
3. First, as concerns the proper approach to and interpretation of Policy 57 of the HwLDP (CD3.1), THC rejects the Appellant’s misguided suggestions that policy advocates/supports a different approach to that contained in SPP, paragraph 145.
 - (a) The opening words of the policy indicate that the policy framework detailed in Appendix 2 will set the context for assessment. That policy framework leads straight back, inter alia, to SPP and to paragraph 145 (as well as SHEP and THC’s own strategy - which no party has put weight on). See Appendix 2, page 150. This message is reinforced by the terms of paragraph 21.1.6. The clear purpose of the policy is that it is in place to support the appropriate national policy protection that applies to each relevant policy framework. (The way it is drafted ensures that policy 57 will always be up to date with the latest relevant policy framework.)
 - (b) In so far as the second criterion is concerned, it must be noted it covers a wide number of matters and different regimes. In any particular case it must be interpreted/applied so as to accord with the relevant policy framework. In THC’s submission a proposal which conflicts with SPP paragraph 145 fails the first sentence of criterion 2 of policy 57.

- (c) Further, for the same reason, in such circumstances, there is no room in the context of ancient monuments framework for the operation of the second sentence. That may not be the case in terms of other policy frameworks covered by Appendix 2. None of these other policy frameworks include an express “exceptional circumstances” test.
 - (d) If there was the possibility of harm only to the monument’s setting but not its integrity then that harm would be dealt with in the planning balance under policy 67.
 - (e) To interpret the policy as the Appellants would have it requires a recognition of some inconsistency with or gloss upon the strict test within SPP and there is no justification for that approach – that they are attempting to do so does suggest some concern as to meeting the strict SPP test.
 - (f) Finally, in so far as the Appellants appear to seek to rely upon the second criterion they have provided no evidence to support the last sentence. This is a factor which “must be shown” if it is to be relied upon for the support in the first paragraph. If they wish to rely on precise wording and, contrary to THC’s submissions, are correct to do so then they have to have regard to it all, not just cherry pick.
4. Even if the above submission is not accepted, it is clear that the protection afforded by SPP should be given preference, which result can be achieved by treating its terms as a consideration of very significant weight.
5. Secondly, as to paragraph 145 SPP THC emphasises two matters:-
- (a) First, it is concerned with “potential” for an adverse effect on ... integrity of its setting. Actual adverse effect need not be demonstrated. If there is doubt, a precautionary approach must be adopted.
 - (b) Second, the Appellant’s case flounders when it comes to demonstrating exceptional circumstances. The anticipated contribution to energy targets and the economy are to be considered at best modest. Mr Stewart’s efforts to suggest otherwise were simply unconvincing.

6. Thirdly, it appears to be accepted that the turbines are within the setting of the Corrimony Cairn. 13 commercial scale wind turbines will undoubtedly adversely affect its setting. The sole issue appears to be *potential* for adverse impact on the *integrity* of that setting. As to that, and generally, THC adopts, supports but does not repeat the submissions of HES, including its approach to the concept of “*integrity*”. The concept of “*integrity*” may be somewhat elusive to tie down in terms of a precise definition, but at last resort it is a common English word whose application requires judgment. In that regard, it is submitted that the judgment should be that this proposal undermines the integrity of the Cairn’s setting.

Policy

7. Before dealing with the other reasons for refusal, some brief submissions on Policy to set the framework for such submissions.

Highland Council’s SG “OWESG” (CD3.5)

8. There was in the end no real dispute over the policy, its applicability or its application. It attempts to put meat on the bones of Policy 67, not create new bones. The following short points are made to reinforce (but not repeat at length) the oral submission/evidence in the policy session and, in part, to tie some of them in with the LVIA evidence:-

(a) It is up to date. It has taken account of SPP”2” (CD3.8).

(b) It is agreed that it does not proceed on the unreal basis that no significant adverse effects will occur. However, it does reinforce the point of the need for mitigation if possible – otherwise it will point to conflict (see paragraph 4.14 – use of the word “required” as well as “seek to avoid” in paragraph 4.21(b)).

(c) This requirement for and focus on consideration of mitigation is relevant, for example, to the increase in height of some of the turbines on highest ground (T2 and T3 – the third and fourth highest turbines) as raised during the LVIA hearing session. On any reasonable interpretation of the design provisions in CD1.3 at Table 3.1 they increased from 68.5m to 85m with a 5m longer rotor radius, i.e. an increase in height by over 20m, between layout 3 and 4. This has distinct impacts, e.g. at viewpoints 10 and 13¹. Note

¹ The turbine numbers are on relevant wirelines.

in the latter VP, turbines 2 and 3 very prominent and stand apart. (They are almost on the same line but further away than the left hand turbine proposed at Druim Ba, see Fig 13a in CD1.30 – this point is relied upon below in the context of the possible in combination effect of these two proposals). Another example is the impact on the Corrimony Cairn, with the foremost turbines appearing to tower over it and to be taller than those behind (even though we know otherwise but a visitor to the site uninformed by sitting through the inquiry would not).

- (d) Mitigation is not an absolute requirement. But it is not good enough for Ms Oxley to say, as she did, just concentrate upon the current scheme. The Appellant should have but has not demonstrated appropriate mitigation. On the contrary with T2 and T3 it is exacerbation and that suggests conflict with Policy 67.
- (e) Such lingering concerns as to OWESG that the Appellant's advocate demonstrated appeared more to be born of a unwarranted underlying distrust of THC – distrust for no apparent, let alone justifiable reason - and/or a desire to argue (as he did or very nearly did on several occasions) that it does not really comply with Statute, Regulation or Policy – why else burden us with the statutory framework or refer to wording of previous versions? One is tempted to say Brexit means Brexit, but that would open up THC to an all too obvious response. Perhaps better to say, as submitted in the Policy hearing session, it is what it says on the tin – Chapter 4 supplements policy 67 and it is not lawful to go behind its terms or the value judgements it imports. Please guard against suggestions in the Appellant's closing submissions that seek to go behind the SG.
- (f) Contrary to Mr Kelly's submission the use of criterion should assist good decision making and the Reporter is respectfully requested to endorse them as an aid to sound decision making. This is the first appeal in which they have been considered. Mr Kelly is right in that they do not provide a traffic light to proposals (red, green or even amber) but neither does policy 67, nor could any policy if it properly capable of application to the particular circumstances of each proposal.
- (g) As to the criterion, the analysis of Mr Hindson is commended as more accurately reflecting reality as opposed to that advanced by Ms Oxley. See THC LVIA Hearing Statement at section 3.3.

(h) There was even agreement that Chapter 5 was a material consideration even if not directly applicable. There was dispute as to the extent of materiality. In short THC submits, particularly when considering the substance of concern as to cumulative impacts, e.g. from VP13 within the SLA and within the Study Area, the judgments formed as to the capacity of the area which the proposal lies just outside should be highly material to its impact - as it is on that area that both THC and SNH base their concerns. It is submitted that it is relevant and that in terms of its cumulative impact on the ringing of Loch Ness it makes no difference if this particular proposal is just within or just without the boundary. Its effect on the wider area of concern will be the same particularly viewed from VP11 or VP13 – the boundary does not “appear” from the viewpoints. See further THC Policy Hearing Statement 8.2(first) – 8.4.

(i) Chapter 5 is not a landscape study, although it is based on one. It is part of the development plan. There is no choice or debate as to its conclusions, any more than there is to policy 67. It cannot be equated with a Study and the comments relied upon by Mr Stewart in his Hearing Statement at 3.7 from the Larbrax appeal are inapplicable. Likewise the Kirk Hill Wind farm appeal the Appellant raised by way of late email (PPA-30-2052).

New draft energy documentation

9. There is nothing in the new material identified by Mr Stewart at paragraph 5.6.2 of his Policy Hearing Statement that purports to alter the balance between the environment and the desire for renewable power. Moreover, the attempt to pray this in aid as an additional factor is misplaced. The recognition of and support for renewable energy in the right location is a driving force behind the OWESG and Policy 67 and expressly recognised in both of them. The planning framework which they comprise already takes account of Scottish Government policy and it would be double counting to have regard to it twice.

Out of date HwLDP

10. Mr Trinick indicated he might have regard to the last sentence of paragraph 33 of SPP – and claim support of the powerful presumption in favour of sustainable development. However, that would be misguided.

- (a) There is nothing to suggest policy 67 would be significantly different in its main architecture in a plan adopted today. It is regularly applied by Reporters. (That some wording reflects the old SPP as to SG is beside the point.)
- (b) The policy is not in reality out of date.
- (c) Moreover, it clearly supports renewable energy. It would be double counting to give effect to the same presumption twice over.
- (d) It is a lawyer's point with no planning substance.

11. In any case in paragraph 28 of SPP, the aim is to *achieve the right development in the right place; it is not to allow development at any cost*. THC contends that this development will have a significant cost in terms of impacts on landscape, visual and cultural heritage and so, in any event is not sustainable development capable of taking advantage of the presumption.

Landscape and Visual Impact

12. THC does not intend to rehearse its evidence. It would wish, though, to highlight the following points in respect of three matters – visual impact, LCA and cumulative.

13. First, visual impact, and Rfr 1.

- (a) There is agreement that there are significant effects at VPs 1, 2, 5, 11 and 12 (and not at VPs 16-19).
- (b) There is agreement by SNH, THC and STAG but not Ms Oxley that there are significant impacts at viewpoints 9, 10, 13 and 14. As to VP15, whilst SNH do not agree in respect of the road, they do as to people picnicking on the shore (see page 3, last bullet point, of their consultation response CD2.1s). The cleared forestry and tables provide an ideal spot to take in the view and, no doubt, look for monsters. It will now include the turbines with moving blades to distract attention which will intrude into the scenic views.

- (c) The Reporter is entitled to give great weight to the views of SNH when calibrating impacts in his own mind on the site visits, and seeking to determine the disputes between rival parties. (That SNH have not objected simply means their concerns did not reach national interest level but concerns below that level can more than justify refusal of a planning application as many appeals have shown.) They are the government's advisers on landscape. They have a wealth of experience in assessment of windfarms. They are clearly of the view that the ES (and hence Ms Oxley) underestimate impacts. (It is acknowledged that in one respect only she takes a more realistic view at VP2 than the ES.) Their view as to underestimation extends to cumulative impacts and to impacts on the SLA as well as visual impacts – see CD2.1s.
- (d) The under-estimation does not arise from methodology as such, but apparently from inclination. The only instance of methodology contributing to this is Ms Oxley's determined attempt to classify all car drivers as low sensitivity, cf GLVIA CD4.1, even in a tourist hotspot. As to VP10, in her unreal world people are always looking/walking towards Loch Ness, but never away from it. Exaggeration perhaps, but she appeared determined to downplay impacts at VP10 and the natural draw of the eye to the skyline, and in the face of local evidence of the popularity of the footpath in question. Urquhart Castle is an iconic location within Loch Ness. Drumnadrochit hums in the summer.
- (e) The Great Glen way and the Kintail/Affric trail are very well used. The felling plans indicate that over the expected lifespan of the windfarm there will be clearances and greater visibility at present. Of course there will be replanting too but the overall impact will be opening of more views including those of the proposal if built.

14. Rfr 1 is thoroughly borne out by the evidence.

15. Second, as to Rfr 3, this concerns the SLA, see CD4.12 at page 117 onwards. THC's application of SLA policy is guided by Appendix 2 to the HwLDP, page 152 CD3.1. It is clear it considers that there can be adverse effects on *integrity* by development which would interrupt important views out of the SLA. VPs 10, 11, 14 and 15 exemplify such viewpoints where views out of the SLA will be adversely impacted, significantly so in each case. It is the impact on all these viewpoints that has to be considered when regard is had to integrity. Impact on integrity involves an overall judgement based on individual impacts, not just those impacts considered in isolation.

16. Put another way, in this sense it is the impact on an individual who climbs Meall Fuar 'mhonaidh in the morning to take in the panoramic views, who returns by road to Drumnadrochit (passing VP 10) and who takes a boat across the loch to have a picnic on the far side looking back at Urquhart Castle – which as the name suggests is sited so as to command the confluence of loch Ness and Glenurquhart. And not just one individual but many.
17. It cannot be the case that an SLA must be affected overall to affect its integrity, otherwise large SLAs would offer less protection than small ones. That cannot be the case. Conversely, it is also accepted that a simple adverse impact on one particular area of the SLA will not give rise to an impact on its overall integrity. It is a question of consideration quality as well as quantity as to the SLA and the severity of impact.. Adverse impact at a vital point can impinge on integrity. The part of the SLA in the vicinity of Drumnadrochit and Urquhart Castle are central. Mr Hindson distinguished this case from Bhlaraidh windfarm as giving rise to significantly more of an impact. (One has to be very wary that just because a ZTV shows potential influence on the loch from that windfarm – a point the Appellant relies upon, that could just be one blade in fact obscured by forestry.)
18. Rfr 3 should be upheld. This proposal would undermine the integrity of the SLA.
19. Lastly, Cumulative impact. There will be a real sense of encirclement if this proposal is permitted from both VP 11 and VP 13, see THC LVIA hearing statement at paragraph 4.3 as well as Report on Handling. The point is stated succinctly because it is best demonstrated on site and/or with the aid of the visualisations. The succinctness of the submission should not be equated with lack of emphasis.
20. It is as appears from closing submissions of other parties, e.g. MScot and Scotways, a point worthy of considerable weight. (Their submissions are also endorsed in so far as they support THC's case – i.e. there is no attempt by THC to expand its case to include Wild land or Tourism.)
21. From these well used vantage points, it is not a map based perception of a ring of windfarms, but the visual reality. See further the SG.

22. Finally, Druim Ba. As mentioned in paragraph 4.3, if both Druim Ba and Cnoc an Eas were to be permitted the cumulative impact would be exacerbated. It is THC's submission that should be avoided even if its primary submissions are not affected. Assuming Cnoc an Eas will be determined first, the Druim Ba Reporter will have to grapple with the consequences of both an approval or a rejection at Cnoc an Eas. Should however Druim Ba be approved first, THC would reserve its position as to whether further submissions and input would be required. Only limited information is available as to Druim Ba, see CD1.30 and no photomontages which include both it and Cnoc an Eas albeit there are wirelines.
23. Finally, the Applicants and Ms Oxley under estimate the impacts by only considering the additional impact and not the overall impact as well, as required by SNH's guidance Assessing Cumulative Impact (CD4.8) at paragraph 7 (combined effects ... taken together) and GLVIA 3 (CD4.1) at 7.16 and 7.18 – reference to totality of the cumulative effects. Only to consider one aspect is to lead to underestimation of impact. A concentration on the former leads to an under-estimation of impact.
24. Rfr 2 should be upheld as there is a serious cumulative impact.

Policy balance

25. In THC's submission this has been carried out in the Report of Handling and it not necessary to repeat it. It is accepted that Rfr1-4 can only be upheld, as requested above, having carried out the appropriate balance. However, given the many significant adverse impacts of this windfarm that balance points firmly to refusal.
26. The adverse impacts include the numerous residential properties significantly affected, in respect of which THC commends and relies upon the evidence and submissions of Dr Gold, STAG and Glenurqhart CC (with similar caveat as above respecting MScot and Scotways).
27. Overall, the result should be a clear refusal of the appeal.

Conditions

28. Lest the appeal succeeds, conditions will be relevant. Only one needs to be the subject of further detailed submission (although THC seeks that all of its points of dispute are upheld).

29. The Appellant makes an in-principle objection to the condition requiring a Planning Monitoring Officer. Its opposition is without foundation.

(a) It was accepted by the Appellant that it has been imposed elsewhere - an example on a deemed planning permission is Millenium South (WIN-210-4, c17) – a Minister’s decision. There are no particular circumstances here which would render such a condition unlawful or unnecessary, quite the contrary.

(b) That it requires expenditure is no different from c14 and c16 which require an ECOW.

(c) Indeed, there is much overlap between a PMO and an ECOW in role, one is just more tied to ecology as the title suggests.

(d) It is quite reasonable and necessary when a large industrial complex is being erected in the deep countryside where the importance of compliance with conditions is vital for the environment and local residents for there to be an PMO. Enforcement from an officer based in Inverness is the only alternative. The number of windfarms being constructed in THC area is clearly significant.

(e) In the context of a 13 turbines windfarm with the benefits this one is claimed to bring, complaints of this requirement being onerous are surprising.

30. Further the Reporter asked the Planning Authority to approach a suitable worded condition in relation to micro-siting. This is now included below:

“The wind turbines and anemometer mast hereby permitted shall be erected at the following grid co-ordinates:

Turbine	Easting	Northing
1	241802	833775
2	242225	834092
3	242599	834173
4	241518	833276
5	242012	833507
6	242470	833681

7	242849	833865
8	241543	832648
9	241928	833058
10	242568	833213
11	242153	832789
12	242225	823455
13	241811	832380
Anemometer mast	241530	832978

Notwithstanding the terms of this condition the wind turbines and other infrastructure hereby permitted may be micro-sited no more than 50 metres from the above mentioned co-ordinates with the details of the proposed micro-siting having first been provided to the Ecological Clerk of Works who shall be given an opportunity to comment.

However, unless otherwise approved in advance in writing by the Planning Authority, micro-siting is subject to the following restrictions;

- i. no wind turbines or other infrastructure may be micro-sited to within 50 metres of the top of the bank of any watercourse;
- ii. *No wind turbine foundation shall be positioned higher, when measured in metres Above Ordinance Datum (AOD) at the above co-ordinates.*

The consequential realignment of access tracks following the micro-siting of turbines is permitted within the micro-siting permitted by this condition, save for the access track between turbine 3 and turbine 7 (wind turbine numbering shown on Figure 4.1a of the Environmental Statement) detailed alignment of which is covered by Condition 10.

James Findlay QC

03/4/2017