Senior Investigations Officer
Environmental Standards Scotland
Ìrean Àrainneachdail na h-Alba

ENVIRONMENTAL
Standards Scotland
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By e-mail:

23 May 2024

Case Reference IESS.24.002 – Energy Consents Unit Approach – Decision Letter

Dear ,

Thank you for submitting your representation to Environmental Standards Scotland (ESS), regarding the Energy Consents Unit (ECU)'s handling of windfarm planning applications, and for your patience as I have considered your case. I have now decided that ESS will not take any further action on this case, and I explain why in this letter.

The representation

You raised concerns that local authorities were unable to respond to planning application consultation requests made under section 36 of the Electricity Act 1989 within the consultation timeframe, or in some cases were unclear as to whether and when extensions would be provided to those timeframes, and therefore were missing the consultation deadline. You said that, as a result, there is no automatic Public Local Inquiry (PLI) and this was preventing significant environmental concerns from being formally discussed and debated. You suggested this could be a contravention of the Aarhus Convention ('the Convention') in relation to public participation rights.

The outcome you sought was for ESS to require the ECU to be transparent in the processing of applications for extensions and decision making, allowing local authorities to prioritise consultation responses so that environmental concerns raised by the public can be assessed

and debated at PLIs and ensure determining authorities are in receipt of the full facts relating to potential environmental impacts.

Assessment of ESS' remit, and significance of the issue
When we receive a representation, our first steps are to confirm that it is within ESS' remit, and to consider whether the case raises significant issues that could be appropriate for investigation. ESS can investigate:

- Whether a public authority is failing (or has failed) to comply with environmental law (section 20(1)(b)(i))
- The effectiveness of environmental law or of how it is (or has been) implemented or applied (Section 20(1)(b)(ii))

I determined that the representation fell within ESS' remit in that it:

- Relates to a public authority – Scottish Government
- Relates to environmental law – the Electricity Act 1989 and associated regulations such as the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017
- Could relate to the effectiveness or otherwise of environmental law
- Could relate to the way effective implementation or application of environmental law
- Did not pertain to any legislative provisions excluded from ESS' remit.

I went on to assess whether the representation met our significance criteria (if a case does not meet these criteria, we would normally not take it forward). The criteria considers whether the matter arises from a significant incident concerning the environment; raises public health concerns; is something that could seriously affect the welfare of a member of the public; concerns significant alleged neglect or systemic non-compliance; could undermine public confidence; or concerns a failure to meet international obligations.

I concluded that what you told us could undermine public confidence and that further enquiries were required in this regard. We therefore took the case forward to 'pre-investigation' stage. This stage involves ESS making enquiries with the public body to understand more fully the issues raised. Based on the outcome of these enquiries, the case may move to investigation or be closed.

Consideration

Compliance with the Aarhus Convention
The Aarhus Convention came into force on 30 October 2001 with UK ratification on 23 February 2005. Scotland, as a signatory through the UK, is obliged to implement the Convention. The Convention contains three "pillars": (1) access to information, (2) public participation, and (3) access to justice.

Your representation relates to the second pillar of the Convention, specifically that if PLIs are not being held as a consequence of the legislative timescales for objection, the public is being denied the right to participate in the decision-making process.

It is important to note that the public can comment on and participate in the planning process, even where a PLI is not held. Public consultation is part of the EIA procedure,[1] and the public can comment on the planning application once it has been made to the ECU (similarly to planning applications that are considered under the Town and Country Planning (Scotland) Act 1997).[2] Furthermore, whilst every party who has commented on the application is invited to participate in any PLI, the PLI is held as a consequence of the objection of the relevant planning authority and public participation is not the main purpose of this process.

Finally, I would highlight that if not holding a PLI was a failure to comply with Aarhus, the logical extension of this would be that every planning case that does not result in a PLI would be contravening Aarhus. As PLIs are the exception in planning cases, this would mean most planning applications and decisions would be contravening Aarhus. To my mind, this is unlikely, particularly given the other mechanisms in place for public participation.

Effectiveness of the law

I also considered whether the legislation is effective in protecting the environment, and whether it is being applied effectively.

I carried out a review of recently determined Section 36 applications. This showed that whilst the ECU can, according to the law, disregard objections by local authorities submitted outwith the four-month deadline, they do not in practice appear to do this. For example, in the case of Faw Side Community Windfarm, the planning authority objected outwith the agreed timescale.

The determination letter notes:

Notification of Scottish Borders Council's objection was not received within the agreed time and the Scottish Ministers were therefore not required by virtue of paragraph 2(2) to cause a public inquiry to be held.
As required by Paragraph 3(2) the Scottish Ministers considered Scottish Borders Council's objection together with all other material considerations, with a view to determining whether a public inquiry should be held …

[1] Part 5 of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 sets out that the developer must publish notice of the application in local and national newspapers, and online, with details of how and when to make representations, and details of arrangements for public participation in the decision-making procedure,

[2] ECU Website - Submitting a Representation April 2020.pdf

The Scottish Ministers did not consider it possible to overcome the objection, by way of application conditions to give effect to Scottish Borders Council's objection, and therefore caused a public enquiry to be held.

Following a PLI, the application was ultimately refused permission by Scottish Ministers.

In none of the recently determined section 36 applications did the local authority appear to respond within the four-month timescale. The Scottish Government guidance on section 36 and 37 applications notes that, on agreement of the planning authority, applicant, and Ministers, an extension to the consultation period can be given – in other words, there is discretion as to when and how extensions are agreed. In some cases, extensions were requested and agreed, in others no extension appears to have been requested. However, it does not appear the potential inconsistency is resulting in any negative impact, as in cases where the local authority has missed the deadline, their objections have still been accepted and considered. The legislation gives Ministers discretion to disregard late objections, but in practice it appears this is generally not applied and late objections are taken into account. Whilst I accept that this raises questions about the way the law is being applied (in that if the deadline is *never* met, then what is the purpose of the deadline), it does not appear to be applied in a way that is detrimental to local authorities.

Though I did not see any cases like this in my review, I considered the possibility that there may have been, or may be, cases in which the local authority submits their objection outwith the deadline and the ECU decides (as they have discretion to) to disregard the objection and not hold a PLI. I considered whether this would result in the environment not being protected sufficiently. Relevant to my consideration was that there are other ways for environmental issues to be raised and discussed: the EIA (which includes public consultation and consultation with other bodies such as NatureScot, SEPA etc); the planning application process (which allows for public comments and consultation with relevant bodies); and Scottish Ministers can choose to hold a PLI even if no objection from the local authority is forthcoming. The PLI in itself is not the only way for environmental matters to be raised and discussed, and indeed the PLI is not specifically a process for environmental matters – whilst these may form part of the subject of the inquiry, it is for any areas of objection to the application, which may not be environmental.

For all of those reasons, I did not consider there is evidence that the current system is being applied in a way which has been, or could be, failing to protect the environment.

Finally, I wish to highlight the Onshore Wind Sector Deal, published in September 2023. The plan committed the Scottish Government and the onshore wind sector to a number of actions, including:

- establishing a collaborative working group to develop a standard scope and format for EIARs, to reduce the burden on consultees and other stakeholders

- holding meetings between the sector, government and statutory consultees at least annually to examine data on consenting timelines and agreeing on actions needed to achieve targets
- working with statutory consultees, the ECU and DPEA to determine resourcing and training requirements to process expected project pipeline, and publish proposals for additional resources and training to be available for statutory consultees when responding to onshore wind applications
- the sector will provide an analysis of the expected pipeline of onshore windfarms including geographic distribution and timelines, to enable SG and statutory consultees to plan ahead for resources required to process applications
- the sector will ensure that in planning for developments close to other projects, due attention is given to cooperation on interconnected planning and environmental considerations for the area, through joint working regardless of owners/developers involved.

I consider this good evidence that Scottish Government and the sector are aware of the pressures on statutory consultees (such as local authorities) and difficulties in responding to consultations within the legislative timeframe, and are putting in place actions to alleviate those pressures and difficulties.

Conclusion
I have considered the issues raised in the representation relating to the Aarhus Convention and the effectiveness of the law in protecting the environment. My review has concluded that other methods exist outwith the PLI process for the public to participate in the planning process. In considering effectiveness of the law in protecting the environment, it appears that the PLI process is not designed specifically to protect the environment and there are other mechanisms in place for that purpose. The issues highlighted in relation to local authorities' ability to object within the legislative timescale do not appear to be causing any environmental harm, and are being addressed through actions in the Onshore Wind Sector Deal for Scotland.

On the basis of the above, no further action will be taken by ESS in respect of your representation.

I appreciate you may find this response disappointing, but I hope my explanation reassures you that we have fully considered whether there are any potential systemic issues raised by your representation. If there is anything in this letter you would like to discuss, please do not hesitate to contact me.

Yours sincerely,

Senior Investigations Officer

Environmental Standards Scotland Enquiries
enquiries@environmentalstandards.scot
Thistle House, 91 Haymarket Terrace, Edinburgh, EH12 5HD
0808 1964000