

Scottish Parliament Region: Highlands and Islands

Case 200502749: The Highland Council

Summary of Investigation

Category

Local government: Planning; Handling of application (complaints by opponents)

Overview

The complainant, Mr C, believed The Highland Council (the Council) had acted outwith procedures and in an incompetent and inconsistent way in regard to a planning application for a wind farm development (Application A). He complained that: the Council's actions had contravened Scottish Natural Heritage guidance; Environmental Impact Assessment guidance and European Union directives; the Council had approved the application on the basis of incompetent assessments; the Council had inappropriately circumvented proper procedures; and the Council had not acted consistently in comparison with the actions they had previously taken regarding other applications that were, in his view, similar.

Specific complaints and conclusions

The complaints which have been investigated are that the Council acted:

- (a) outwith procedures in regard to Application A (*not upheld*);
- (b) incompetently in regard to Application A (*not upheld*); and
- (c) inconsistently in regard to Application A (*not upheld*).

Redress and recommendations

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. On 9 January 2006 the Ombudsman received a complaint from a man, referred to in this report as Mr C. He complained about the actions of The Highland Council (the Council) in relation to a planning application for a wind farm (Application A). Mr C believed the Council had acted outwith procedures and in an incompetent and inconsistent way. He complained that: the Council's actions had contravened Scottish Natural Heritage (SNH) guidance, Environmental Impact Assessment (EIA) guidance and European Union (EU) directives; the Council had approved Application A on the basis of incompetent assessments; the Council had inappropriately circumvented proper procedures; and the Council had not acted consistently in comparison with the actions they had previously taken regarding other applications that were, in his view, similar. As a resident of the area Mr C was concerned about the effect the wind farm would have on his quality of life and the protected bird life in the area as well as what he believed were transgressions of the planning application system.

2. The complaints from Mr C which I have investigated are that the Council acted:

- (a) outwith procedures in regard to Application A;
- (b) incompetently in regard to Application A; and
- (c) inconsistently in regard to Application A.

Investigation

3. The investigation of this complaint involved obtaining and reading all the relevant documentation, including communication between Mr C, his legal representatives and the Council, the relevant documentation relating to the various planning applications referred to in Mr C's complaint, and related Scottish, United Kingdom and EU legislation and guidance. I also sought the advice of an adviser to the Ombudsman with specialist knowledge of planning matters (the Adviser). I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the Council were given an opportunity to comment on a draft of this report.

4. An application for a wind farm on the site of Application A was submitted in 2002. It was revised first in 2004 and then revised again in July 2005. The 2005 application is Application A. Application A was approved, subject to conditions set out in the report (the Report) by the Director of Planning and

Development, by the Council's Planning, Development, Europe and Tourism Committee on 2 September 2005. Following the meeting of these conditions, planning consent was issued on 7 September 2006.

5. Mr C, who had objected to Application A, complained to the Council about various aspects of the handling of Application A. Following a response from the Chief Executive of the Council on 21 December 2005, Mr C remained dissatisfied with the responses he had received and submitted his complaints to the Ombudsman.

6. Under the terms of the Environmental Impact Assessment (Scotland) Regulations 1999 (the Regulations), the application for a development, such as a wind farm, that is likely to have significant effects on the environment by virtue of its nature, size or location requires the undertaking of an EIA. An EIA includes the submission of an Environmental Statement (ES), a document containing such information as is reasonably required to assess the environmental effect of the development.

(a) The Council acted outwith procedures in regard to Application A

7. Mr C complained that the Council contravened statements laid out in SNH's document 'Environmental Impact Assessment: Questions and Answers' (the SNH Document); that the Council's action in approving Application A subject to a planning condition infringed EIA Directive 85/337/EEC (the EIA Directive) and that the Council's failure to require a cumulative impact assessment for the site in conjunction with an adjoining site for which an application for a wind farm had been considered by the Council contravened EC Birds Directive 79/409/EEC (the Birds Directive).

8. The SNH Document was originally issued as part of a letter from the Scottish Executive¹ Development Department Planning Division to local authorities' Heads of Planning in the light of contemporary court cases in England that had a bearing on the EIA Directive. It provides guidance on the Regulations, the domestic legislation into which the EIA Directive was transposed. Mr C complained that the Council's actions contravened sections

¹ On 3 September 2007 Scottish Ministers formally adopted the title Scottish Government to replace the term Scottish Executive. The latter term is used in this report as it applied at the time of the events to which the report relates.

14.2, 14.3, 17.1, 18.2 and 19.1 of the document. These sections are discussed in more detail below.

9. It is important to note that section 1.1 of the SNH Document stated that it '... does not offer definitive guidance and is not a substitute for the Regulations or for guidance provided ...' in Scottish Executive Circulars or Planning Advice Notes.

10. Section 14.2 of the SNH Document stated that a planning authority '... must obtain all the information it needs to assess and evaluate the likely significant environmental effects of the proposal before it reaches its decision. It cannot adopt a 'wait and see' approach or impose a condition requesting further work to identify the likely environmental effects after permission has been granted'. Section 14.3 referred to an English court case where a planning application was approved for development on a site whose conditions were those favoured by bats, a protected species. The SNH Document explained that in that case the planning authority had approved the planning application but imposed a condition requiring the applicant to carry out a survey to establish whether bats were present prior to commencing the development but that the Court had ruled that information about the presence of a protected species should have been included in the ES accompanying the application. Similar points and information on what procedures must be followed in the event of an authority requesting further information or an applicant submitting a revised ES are made in sections 17.1, 18.2 and 19.1. Mr C believed the Council's actions had contravened these sections.

11. I sought the opinion of the Adviser on this point. He gave his opinion that the key phrase in all the legislative documents and guidance related to this point was 'significant environmental effects'. What constituted 'significant environmental effects' was a judgement for the planning authority alone to make. The Adviser's view is that the Council did assess the significance of the environmental effect of Application A.

12. Condition 15 of the planning approval stated: 'Prior to the commencement of development, a Peat Slide Assessment and Mitigation Statement shall be prepared and submitted to the Planning Authority for prior written approval in consultation with SNH, Scottish Environmental Protection Agency and the Health and Safety Executive. This should include a detailed survey of peat depths and slopes and the presence of any sub-peat water flows, reservoirs of

wet peat and water, evidence of past slips, sink holes, peat channels and drainage features. Based on this, best practice and any mitigation measures, including any micro-siting amendments to the location of turbine bases and access tracks ... shall be set out in the Statement for approval'.

13. Mr C complained that the requirement of condition 15 infringed the EIA Directive because he believed that this constituted the Council approving the application without prior assessment of ground stability.

14. The Council told me that condition 15 sought to control a specific element of the development; to ensure that peat and construction mitigation regarding peat were fully considered at the individual turbine sites. They pointed out that the ES had included an assessment of peat stability and mitigation but that, as adjustments of the individual turbine sites was allowed under the planning permission, the condition was inserted to cover these.

15. I sought the opinion of the Adviser on this point. He told me that, in his view, the Council's decision to control the siting of the individual turbines by condition 15 did not contravene the EIA Directive.

16. Mr C complained that Article 4(4) of the Birds Directive had been breached by the Council. Article 4(4) of the Birds Directive stated that EU member states 'shall take appropriate steps to avoid pollution or deterioration of habitats or disturbances affecting ... birds' that are the subject of special conservation measures. The area of Application A is designated as a natural habitat of several species of such birds. Mr C's complaint specified that the Council had not required a cumulative impact assessment relating to both the area of Application A and an adjoining area that was the subject of a separate planning application (Application B) for a wind farm.

17. The Council told Mr C that the statutory consultee on such matters, SNH, had admitted that the cumulative impact of the proposed wind farms dealt with in Application A and Application B was difficult to assess but had advised the Council that they had no objection to the proposals as they would not have a significant impact on the Cuillins Special Protection Area.

18. I sought the opinion of the Adviser on this point and he told me that the evidence showed that the Council had given due consideration to the cumulative effect of the proposed wind farms in line with the Birds Directive.

(a) Conclusion

19. With regard to Mr C's complaint that the Council had contravened statements laid out in the SNH Document, the fact that this document was for advice only, and states in its introduction that it 'does not offer definite guidance' means that the Council's contravention of it would not constitute maladministration. Notwithstanding this, however, the decision on whether any environmental effect of Application A was significant, was one that the Council were entitled to make and the evidence indicates that they did assess this when considering Application A.

20. The Council clearly stated that condition 15 was attached to the approval of Application A for the purpose of ensuring that peat and construction mitigation regarding peat were fully considered at the sites of individual turbines. It is also true that a general assessment of peat stability and mitigation had been included in the ES. While the wording of condition 15 could be interpreted to be wider than the Council's intentions, I do not consider that condition 15 infringes the EIA Directive.

21. A cumulative impact assessment was carried out with regard to the areas of Application A and Application B and, therefore, I do not consider that the Council contravened the Birds Directive as Mr C believed. Given all of the above, I do not uphold the complaint.

(b) The Council acted incompetently in regard to Application A

22. Mr C complained that the Council accepted an incompetent and plagiarised Peat Slide Assessment as part of the EIA for Application A; an incompetent assessment of the collision risk to protected bird species and incompetently used planning conditions as a substitute for an EIA.

23. Mr C believed that the Peat Slide Assessment for Application A was incompetent because it did not include any measurement of peat-shear strength, did not contain any mitigation proposals, included conclusions plagiarised from a peat-slide appraisal prepared for another wind farm development and did not competently meet the terms of condition 15 of the planning approval (see paragraph 12).

24. The Council told Mr C that they had been satisfied by the Peat Slide Assessment as it had been carried out by a qualified engineer and, as no main

or significant issues had been identified, there was no requirement for mitigation proposals. Mr C believed that the Council themselves should have produced the Peat Slide Assessment.

25. Schedule 4 of the Regulations outlines what information must be included in an ES, which forms part of the EIA. Guidance on this is given in Planning Advice Note 58 (PAN 58). Annex 5 of PAN 58 gives a checklist of possible effects to be assessed. These include the 'effect of earth-moving on stability, soil erosion etc'. Paragraph 7(2) of the Regulations make clear that the responsibility for submitting an ES lies with the applicant.

26. I sought the opinion of the Adviser on these points and he commented that, although Mr C believed that the peat-shear strength had not been adequately considered, the Report had concluded that the general vulnerability of the site to peat-slide was low in view of the peat depth and slope characteristics.

27. The checklist of possible effects to be assessed given in Annex 5 of PAN 58 includes the loss of, and damage and disruption to, habitats and species. Included in the EIA on Application A is an assessment of the collision risk to protected bird species. Section 14 of the Regulations require that the planning authority consult certain bodies regarding any ES that they receive: these bodies include SNH.

28. Mr C believed this assessment was incompetent for a number of reasons, and he complained of these to the Council. The Council advised Mr C that SNH had been consulted as required by the Regulations and had advised the Council that they had no objections to the proposals (see paragraph 17). The Council attached a condition to the planning permission that monitoring of bird species would be undertaken at the site and, if required, proposals for mitigation measures would be submitted.

29. Mr C believed that the Council's attaching of condition 15 (see paragraph 12) to the planning permission for Application A had the effect of removing the need for further public consultation which would have been required had the Council requested further information be added to the EIA by the applicant.

30. The Council told me that they had considered all the main or significant effects of the proposal and had satisfied themselves that, as the ES included an assessment of peat stability and mitigation, condition 15 was considered necessary to safeguard that peat stability and mitigation were fully considered at the individual turbine sites.

31. I sought the opinion of the Adviser on this point. He told me that, in his view, the use of the terms 'main' and 'significant' in relation to environmental effects reflected the intention of the legislation to give scope for effects considered to be below the level of 'main' or 'significant' to be dealt with by the attachment of planning conditions.

(b) Conclusion

32. The Council told Mr C that they believed the peat-slide appraisal contained sufficient and competent information for them to reach a view that slope stability was not a 'main' or 'significant' issue and, therefore, no mitigation proposals were required. The Council were entitled to reach such a decision regardless of Mr C's disagreement with this or his opinion on the competency, origin or potential effect of the appraisal.

33. It was reasonable for the Council to seek the views of SNH as the statutory consultee on the question of the collision risk to protected bird species. Given that SNH did not object to Application A the Council's subsequent actions were, in my view, reasonable.

34. While the Council's decision to attach condition 15 to the planning approval for Application A meant that further public consultation was not required, in my view, the evidence does not suggest that this was the Council's aim in doing so, as Mr C believed. I agree with the Adviser that the inclusion of the terms 'main' or 'significant' in the legislation and guidance indicate that there is scope for effects considered by the Council not to fall into these categories to be dealt with via planning conditions. Given all of the above, I do not uphold the complaint.

(c) The Council acted inconsistently with regard to Application A

35. Mr C complained that the Council did not deal with Application A in the same way as they had dealt with two previous wind farm applications (Application C and Application D) that he believed were similar.

36. Mr C believed that a peat-slide assessment for Application C contained similar conclusions to the peat-slide assessment for Application A. In the case of Application C the Council had deferred the hearing on the application, but the hearing for Application A was not deferred.

37. The Council told Mr C that they did not believe that the conclusions in the peat-slide assessments for Applications A and C were similar.

38. Mr C believed that the peat-slide appraisal for Application A included conclusions plagiarised from a peat-slide appraisal prepared for another wind farm development, referred to in this report as Application D. The Council had made representations to the Scottish Executive following the submission of Application D, and Mr C believed that the Council should, therefore, have made a similar submission in respect of Application A.

39. The Council told Mr C that the representations they had made to the Scottish Executive in respect of Application D had been related to the terms of section 36 of the Electricity Act 1989. This section relates to developments generating more than 50 megawatts of electricity. The development applied for by Application A does not fall into this category.

(c) Conclusion

40. The Council did not believe that the conclusions of the peat-slide assessments for Application A and Application C were similar. As the planning authority, the Council has discretion to decide what is required to determine a planning authority beyond the information and procedures demanded by statute.

41. Similarly, the Council advised Mr C why the reasons the representations made to the Scottish Executive with regard to Application D did not apply to Application A.

42. In my view the Council have adequately explained why there were differences in their handling of Application A, Application C and Application D. Having considered these, I do not believe the Council's actions in regard to the points raised by Mr C meant that Application A was not properly considered and, therefore, I do not uphold the complaint.

Explanation of abbreviations used

Mr C	The complainant
The Council	The Highland Council
Application A	The application for a wind farm development whose handling Mr C complained about
EU	European Union
The Adviser	An adviser to the Ombudsman with specialist knowledge of planning matters
The Report	The report by the Director Planning and Development concerning Application A
The Regulations	The Environmental Impact Assessment (Scotland) Regulations 1999
SNH	Scottish Natural Heritage
EIA	Environmental Impact Assessment
ES	Environmental Statement
The SNH Document	Scottish National Heritage's document 'Environmental Impact Assessment : Questions and Answers'
The EIA Directive	EU Directive 85/337/EEC

The Birds Directive

EU Directive 79/409/EEC

Application B

An application for a wind farm development in an area neighbouring that of Application A

PAN 58

Scottish Executive Planning Advice Note 58

Application C

An application for a wind farm development

Application D

An application for a wind farm development

List of legislation and policies considered

The Environmental Impact Assessment (Scotland) Regulations 1999

The Electricity Act 1989

EU Directive 85/337/EEC

EU Directive 79/409/EEC