

Renewables Update May 2011

PLANNING SCOTLAND'S RENEWABLE FUTURE

The recent elections to the Scottish Parliament delivered the first majority government in Scotland since devolution, with the SNP winning a landslide 69 seats. A key manifesto commitment of the SNP in this parliamentary term is to continue the drive to make Scotland a leader in renewable energy and combating climate change or mitigating its effects. The ambitious plans are to increase domestic energy generation from renewables to 100% and to ensure that there are 130,000 jobs in the low-carbon economy by 2020.

A fundamental review?

A majority brings control over the legislative programme, domination in parliamentary committees and certainty that legislation brought forward will be passed in the chamber.

The Scottish Parliament has full legislative competence for planning matters and, although during the last parliamentary term the SNP enacted the recent reforms to the planning system, they had actually been presented with the primary legislation from their predecessors. In the last term, the SNP were successful in bringing forward their own ideas and introduced ground breaking climate change legislation and reformed the marine consenting system for offshore projects. With determination of renewables applications still taking unacceptably long timescales, it could be expected that the SNP would want to overhaul the reformed planning system they had inherited.

However, given the recession and how recently the majority of legislation was brought into force, the SNP do not think that it is the appropriate time for a fundamental review. Instead, their manifesto commits a series of new improvements to the existing planning system, including speeding up planning decisions, avoiding unnecessary delays in new development and facilitating a boost for the construction industry. This is welcome news for all renewables developers, but the manifesto fails to indicate in any detail what the precise improvements will be.

Pre-application consultation

It is highly likely that legislation will be brought forward to amend the existing statutory pre-application consultation (PAC) requirements. This will be of particular interest to those pursuing or implementing generating stations over 20MW. Currently, in addition to applications for planning permission, PAC requirements apply to applications to change planning conditions or vary the time before the duration of a permission expires. If a condition needs changed, a developer has to carry out PAC again before applying to vary the condition, despite the principle of development remaining unchanged.

Developers and their advisors currently need to consider the position well in advance of the consent's expiry date or they could miss the "PAC window". If missed, planning permissions expire or have to be implemented – which can be costly and may not be achievable in the timeframe available. PAC in these circumstances is proving unnecessarily restrictive, disproportionate and inflexible.

In the SNP's manifesto there is a commitment to involving communities at an earlier stage and engaging them more effectively in the design of developments. It is not yet clear if this will impact on PAC or how extensive this will be. There are also plans to work with communities and developers to agree ways of ensuring an enhanced role for local people in agreeing sites for wind turbines in close proximity to them. This front-loading is welcomed, so long as it does not cause any delay.

Planning obligations

An area that has not yet been considered, but does require urgent review and improvement, is planning obligations, the provisions on which were only introduced in February. The recent reforms sought to bring the Scottish system into line with that in England, but the legislation is proving very inflexible in practice.

Unlike in England, where s106 obligations can be varied or discharged by voluntary agreement, the only way to modify or discharge an obligation in Scotland is now by formal application to the planning authority. The terms of the application can then only be approved or rejected by them – there is no scope to reach an alternative compromise.

Pre-application discussions are proving crucial, but failure to pick up differences leaves an appeal or resubmission of the application as the only options if there is a refusal. Even if the application is granted, both parties still require to draft the relevant legal agreement to formally modify or discharge the obligation. More flexibility must be introduced.

Planning appeals and "reviews"

A further area that may benefit from review is planning appeals and “reviews”. In Scotland, proposals can no longer be changed once the appeal has been submitted. This is causing a lot of frustration, especially where, for example, a relatively minor amendment to the development layout has been agreed both in principle and development terms during appeal proceedings. The appellant has no choice other than to start the entire application process afresh, but with no guarantee that the planning authority will even entertain it. Inflexible “all or nothing” appeals cause unnecessary delay.

Planning for renewables

Updated planning advice for renewable energy technologies, setting out the way SEPA and SNH will interact more proportionately as consultees in development planning and management, is promised. Before the election, the Scottish Government also launched consultations to further extend permitted development rights for renewable technologies, such as electricity charging points for cars. It is likely that these proposals will now be given effect. The creation of one or more low carbon enterprise zones will also be explored. While there is debate as to the effectiveness of enterprise zones as an urban policy, it could represent a welcome boost to those wishing to develop low carbon projects in the selected area.

The SNP’s manifesto considers that Scotland is on a journey and the path ahead is a bright one. The re-elected Scottish Government must continue open dialogue with renewables developers who directly engage in the planning system, in order for their renewables’ ambition to be realised, to keep Scotland moving forward and to kick start development and the economy.

BAN ON COMMERCIAL WIND FARM DEVELOPMENT CAN BE JUSTIFIED BY HABITATS AND BIRDS DIRECTIVES

The Advocate General to the European Court of Justice (ECJ) has opined that a national ban on the construction of commercial wind farms within the Natura 2000 network is not inconsistent with EU law and policy on renewable energy.

The case related to an application for a commercial wind farm in the Alta Murgia National Park in Italy, which is classified as a site of Community importance and a special protection area under the European Habitats and Birds Directives. Italian law entirely prohibits the construction of new wind turbines within all special protection areas and sites of Community

importance, with the exception of turbines for self-production up to 20kW in capacity. The application was therefore turned down.

The companies applying to locate the wind farm within the National Park went to court to seek annulment of the legislation prohibiting such developments in the Natura 2000 network.

The Italian court sought guidance from the ECJ as to whether the national provisions were compatible with EC law, and in particular with the Renewable Energy Directives and the Birds and Habitats Directive, insofar as it completely prohibited such developments instead of requiring an appropriate environmental impact assessment to be carried out analysing the impact of the individual project on the particular site.

The Advocate General noted that there was no outright ban on construction within sites of Community importance or special protection areas. The Habitats Directive requires in respect of such sites for appropriate steps to be taken to avoid the deterioration of habitats and significant disturbance of relevant species. It also provides that projects not directly connected with or necessary to the management of the site, but which are likely to have a significant effect on the site, may be authorised only if it has been ascertained by means of an appropriate assessment that it will not adversely affect the integrity of the site.

The question was therefore whether more stringent national measures could be adopted, so as to completely ban certain types of development within these types of site. The Advocate General noted that the Birds Directive expressly allowed this, and while the Habitats Directive contained no such express provision, its legal basis permitted more stringent measures to be adopted, as long as the measures adopted also conformed to European environmental and energy policies and Community law.

The Advocate General determined that the measures were consistent with environmental policy, on the basis that it sought to implement and pursue the objectives of the Habitats and Birds Directives. It was also consistent with the European Commission's 2010 Guidance for wind energy development in the Natura 2000 network, which highlighted the risks presented by wind turbines to nature and wildlife, including collisions, disturbance and displacement, barrier effects and habitat loss or degradation.

He also determined that the measures were consistent with energy policy, insofar as there was no priority in terms of renewable energy policy over environmental protection more generally, noting that the Treaty for European Union provided that energy policy would have regard to the need to preserve and improve the environment. In this context, he also noted that there was no evidence that the measures had jeopardised the production of renewable energy at a national or regional level, nor that it hindered Italy's ability to meet its renewable energy targets.

The applicants had also claimed that the measure was discriminatory, in that other forms of industrial development were not subject to a similar prohibition in such areas, and would instead be assessed under the Habitats Directive on a case by case basis. However, the Advocate General stated that there was no evidence that other industrial developments had the same potential detrimental effects on Natura 2000 sites as the construction and operation of wind farms, and that there was therefore no discrimination.

While he noted that the question of whether national law conformed with Community law was a matter for the referring court to determine, it was clear that the Advocate General considered the measures in question to be consistent with EC law and policy on environment and energy. In this context he also suggested that the court should take into account the limited scope of the provision, applying only to wind turbines, and to a limited geographical area. The ECJ itself tends to follow the opinion of its Advocate General, and it will be interesting to see if they do so in this case.

While there is no suggestion that the UK has any intention of adopting a blanket ban on wind farm developments in sensitive sites, the Advocate General's opinion makes clear that it is not inconsistent with renewable energy legislation and policy to implement such bans, and that the implementation of renewable energy developments do not in principle take precedence over other environmental protection issues.

CLIMATE CHANGE DUTIES OF PLANNING AUTHORITIES

Planning authorities are considered to be major players in contributing to tackling climate change, as their functions can shape new and existing land use and development, thus influencing greenhouse gas emissions. In Scotland, planning authorities must exercise their development plan functions with the objective of contributing to sustainable development, and it is also a policy objective of the Scottish planning system to contribute to the reduction of greenhouse gas emissions and sustainable economic development. However, on 1 January 2011, The Climate Change (Scotland) Act 2009 introduced new "climate change" statutory duties for all public bodies in the exercise of their functions, resulting in major implications for planning authorities.

In exercising their functions, planning authorities now have the following duties:

Mitigation – reducing greenhouse gas emissions

They must act in the way best calculated to contribute to delivery of the Act's greenhouse gas emissions reduction targets (referred to as mitigation). The Act has set an interim target of a 42% reduction in greenhouse gas emissions by 2020 and an 80% reduction by 2050.

Adaptation – adapting to the changing climate

They must act in the way best calculated to deliver any statutory adaptation programme. Although the first statutory adaptation programme is not expected until 2013, public bodies are advised to consider their approach to adaptation now.

Acting sustainably – sustainable development as a core value

They must act in the way they consider most sustainable. This is about ensuring that in reaching properly balanced decisions, the full range of social, economic and environmental issues are fully taken into account alongside the impact on greenhouse gas emissions, and that these aspects are viewed over the short and long term.

Whilst the interpretation of the duties is for public bodies themselves and ultimately for the courts to decide, should a challenge that a public body is not compliant be brought before them, the Scottish Government suggests that when it comes to considering what "exercising functions" covers, public bodies should take a broad approach and not restrict this to simply their direct impact.

On this basis, planning authorities could play a key role in supporting the transition to a low carbon economy, through the way they exercise their development plan and decision making functions. For example, spatial planning policies can impact on greenhouse gas emissions associated with energy, waste and transport in a particular local area. They can also affect the resilience of natural systems to the changing climate and the vital resources they provide, such as food and water. Planning authorities can also clearly make a significant contribution to both mitigating and adapting to climate change, through decision-making on the location, scale, mix and character of development.

We may expect to see development plans adopting more explicit policies supporting and not unreasonably restricting renewable and low carbon energy developments. Low carbon

policies may be at the forefront of development management criteria, for example, in assessing sites in the first instance the following factors may be considered:

- the service to a development by a decentralised energy supply;
- the potential of the development to contribute to heat demand;
- the scope for sustainable and low carbon transport; and
- whether the development of the site is appropriate, having regard to increases in risk resulting from climate change such as sea level rises, flooding and extreme weather.

If a development or site performs badly against the foregoing, planning permission may be refused or the site may not be allocated. Planning authorities may also need to equip themselves to demonstrate how sustainability has been fully integrated into their decision-making processes, for example by devising procedures for sustainability-proofing or assessing the sustainability of policy decisions and strategies.

The level of response needed to comply with the Act is a matter for each public body to consider and justify for themselves. In their capacity as a planning authority, it is clear that Councils are particularly well placed to make use of the planning system to contribute to their indirect targets. However, it may be that if strict low carbon policies are implemented in one local authority area but are not mirrored in neighbouring areas, inward investment or traditional property development may gravitate to the more relaxed low carbon policy area to try to maximise gross development value. On the other hand, renewable and green development will clearly flourish in “low carbon policy” areas.

A green property investment in the traditional sense may not make more profit than a non-green investment at present, but any government is bound to continue to penalise investors through taxes or legislation in the future for investing in or owning a property that is not contributing to the ideals of a low carbon economy. Financial incentives, which are now clearly backed by the new climate change statutory framework in Scotland, represent a coherent move to try to ensure that any new and existing land use and development is future-proofed and fully contributes to tackling climate change.

FUTURE SKILLS SHORTAGE IN THE ENERGY SECTOR

Last month, ScottishPower announced that the energy sector in Scotland will face a major skills shortage in the future. The company revealed that 80% of its engineers are due to retire within the next 20 years, and they have therefore had to start thinking about succession planning.

To combat this potentially major problem, ScottishPower are aiming to attract a large proportion of graduates into their organisation, to address the issue at an early stage.

In a report to the BBC, ScottishPower suggested that more children in Scotland should be encouraged to study subjects such as maths and science which could lead them into professions in the energy sector.

So far as renewables growth is concerned, some commentators have suggested that engineers and others currently engaged in the oil and gas sector may be tempted across to the renewables sector. However, as matters currently stand, the renewables sector cannot compete in terms of salaries and profitability. As a result, those workers who do possess directly transferable skills but are engaged in oil and gas are unlikely to move across. A failure to grow the skilled workforce capable of supporting the developing renewables sector will likely lead to a fall off in the attractiveness of the UK for renewables investment.

In terms of natural resources, Scotland is ideally placed for the growth in the renewables sector, but without the skilled labour to back this up projects will inevitably stall.

Many energy companies are considering how best to encourage fresh talent to join their organisations. It might be an idea to put in place a graduate scheme in your company, if one does not already exist. You might also take the opportunity to attend recruitment events to encourage people to join your organisation.

Internships are also a good opportunity for those interested in the renewables sector, enabling people to get a flavour of what life may be like working for a renewable energy organisation. Organisations should however be wary of offering unpaid internships. If the intern is carrying out any work for the organisation then they are likely to qualify for national minimum wage. It is also important to ensure that internships and other opportunities are offered on a basis which is non discriminatory on grounds of age and other protected characteristics such as race and sex.

Whilst some organisations are focusing on recruiting recent graduates, ultimately the real ability to make change in terms of growth of skilled graduates coming into industry, may lie with the Government and its ability to put in place initiatives to encourage students to take up science, maths and engineering subjects at university. Companies themselves may decide to partner with universities to see if they can tackle the root cause of the skills shortage in terms of a recruitment drive across relevant degree subjects and course provision.

Some commentators have suggested that the focus on new graduates neglects a potential skills pool in terms of the many qualified individuals who have been made redundant within the current economic climate, who possess basic skills and who, with some retraining, could potentially plug the skills gap that has been identified.

Reports suggest that thus far energy companies have been slow to offer retraining programs for people who have already built up a level of related experience within other sectors. It may become a business imperative to take steps to pro-actively plan for the future and consider all realistic ways of plugging the skills gap. If companies are to be able to recruit the necessary human resources needed to ensure that they can actually implement renewables strategy and remain competitive then they need to look at all options that may be available.

The important thing for businesses to do is to plan ahead and prepare for their future. This industry will continue to grow, however if the UK cannot provide home grown talent then inevitably we will lose the competitive edge.

WIND FARM DEVELOPMENT – USE OF PHOTOMONTAGES

Photomontages are often used by wind farm developers to show the extent of visual intrusion of wind turbines in the landscape.

On 13 April 2011, the Advertising Standards Authority (ASA) upheld a complaint by Ecotricity against a leaflet and photomontage created by Save Berkeley Vale (SBV), an environmental campaign group objecting to the Ecotricity proposal. The decision will be welcomed by wind farm and other renewables developers, since it makes clear that literature produced by opponents of schemes must comply with rules designed to prevent misleading communications, in the same way that literature produced by a developer must.

The ASA administers the codes prepared by the Committee of Advertising Practice (CAP), which is the body responsible for creating, revising and enforcing various advertising codes in the UK. One of those codes applies to non-broadcast marketing communications in the UK, and includes provisions relating to:

1. **Misleading advertising.** Marketing communications must not materially mislead the reader, or be likely to do so; and

- 2. Substantiation.** Before distributing or submitting a marketing communication for publication, the authors must hold documentary evidence to prove any claims that consumers are likely to regard as objective and which are capable of objective substantiation. Where there is no adequate substantiation, the ASA may regard claims as misleading.

In this case, SBV objected to a proposal by Ecotricity to develop four wind turbines in a rural location in England. SBV used technical information relating to existing Ecotricity wind farm developments, as well as information in their proposal for the new development, to create a photomontage of what it thought the turbines would look like in the proposed location. SBV then went on to use the photomontage both on its website and in its campaign leaflet.

Ecotricity complained to the ASA on the basis that the photomontage breached the CAP Code by deceptively exaggerating the visual impact on the landscape resulting from the proposed development.

The expert involved in helping the ASA was of the view that the positioning of the turbines, the extent of the turbines across the view, the depth of turbine colour, the unbalanced turbines, and the perceived overall height of the turbines above the ground exaggerated the impact of the proposed wind farm from the viewpoint used in the photomontage.

The ASA did note that SBV had gone to some lengths to produce a photomontage that they believed was an accurate representation of how the turbines would look. It was understood that they had double checked their methodology, calculated the positioning of the camera and lenses based on information provided by Ecotricity, and considered issues such as sunlight.

However, the ASA noted that their expert's photomontage had highlighted a number of discrepancies in the SBV photomontage, namely exaggeration on the impact to the landscape. The image placed three of the four turbines in the wrong location, exaggerated the spread of the proposed wind farm on the landscape, overstated the extent of blade sweep and gave the impression that the turbines were taller. SBV were told to ensure that future photomontages more accurately reflect the impact the wind farm turbines would have and it was made clear that the leaflet could not be used in its current form. The decision came only a day after councillors rejected the plan because of visual impact concerns, despite a recommendation from council planning officials to progress with the project.

The ASA therefore found that SBV had breached aspects of the CAP Code relating to misleading advertising claims and requiring substantiation of claims.

This case highlights that, when creating photomontages, both developers and campaign groups alike have to be careful to ensure that no misleading impression is created. Environmental campaigners have in the past used complaints to the ASA as a means of objecting and putting pressure on renewables developers. However, it is clear that the damage associated with misleading marketing information disseminated by campaign groups is no less than that associated with communications from developers, and it is therefore only correct that they should have to abide by the same rules.

THE MARINE PLANNING REGIME IN SCOTLAND MOVES A KEY STEP FORWARD

The Marine (Scotland) Act 2010 and The Marine and Coastal Access Act 2009 marked a historical step in creating a statutory marine planning framework, with distinct national and regional structures, as well as a more streamlined planning and licensing system for the marine environment.

Scotland's National Marine Plan (SNMP) must now be formulated to identify national strategic objectives and priorities for the marine environment, following adoption of the UK

Marine Policy Statement in March which provides a high level policy context for its creation. The first formal step in creating the National Marine Plan commenced with a pre-consultation draft of Scotland's National Marine Plan (CDNMP) being published by the Scottish Government on 21 March 2011, with the consultation period closing on 7 June.

As the SNMP will be part of the statutory framework for marine licensing and other decision-making functions by bodies such as the Crown Estate Commissioners, it is vital for stakeholders interested in development in the marine environment to respond to the consultation.

Marine spatial planning is a new concept, based on the notion that sustainable development of our marine environment needs to be holistically managed in a similar way to land use planning. Much like land use development plans, the full suite of National and Regional Marine Plans will be the spatial framework that the Scottish Government hopes will give greater clarity and certainty to decision-making in the marine environment, as well as reducing potential conflicts between maritime interests.

The CDNMP commences the statutory process and debate towards agreeing the policies and objectives covering Scotland's inshore and offshore waters, which will be contained in the SNMP. The policies and objectives will essentially form the strategic framework for eventually managing and allocating areas for renewable energy development through Regional Marine Plans, which will be delivered on a local planning level within Scottish Marine Regions by Marine Planning Partnerships.

Part 3 of the Marine (Scotland) Act 2010 places a duty on the Scottish Ministers to prepare and adopt a National Marine Plan. The SNMP must set out policies for and in connection with:

- the sustainable development of Scotland's seas and on Nature Conservation Marine Protected Areas (MPAs) and other relevant conservation sites;
- economic, social and marine ecosystem objectives and further objectives for the mitigation and adaptation of climate change; and
- the condition of the Scottish Marine Area as a region including a summary of the significant pressures and human impacts on the relevant area.

The CDNMP goes into the detail of this, and also the Scottish Government's approach to development in the marine environment. The content is likely to change and evolve during the consultation process but the renewables sector, amongst others, has been set with key challenges, policies and the following key objectives:

- provide 10GW generation capacity by 2020 in place and under construction;
- prioritise the rapid development of demonstration facilities for fixed and floating offshore wind and wave and tidal marine energy;
- where spatial conflicts between marine renewable and other sectors occur, resolution should initially be sought through discussion and agreement;
- facilitate the development of an offshore grid system including links to Europe, capable of bringing Scotland's wave, tidal and offshore wind energy potential to market;
- projects should be sited, constructed and operated to minimise noise and collision risk to Best Available Technology Not Entailing Excessive Costs (BATNEEC) standards;
- ensure the availability of port facilities capable of supporting the offshore renewables industry; and
- ensure that decision making on renewables issues is timely.

It has been estimated that a total offshore energy resource of 46.5GW exists around the Scottish coastline and, most importantly, it is considered to be a predictable and plentiful resource. If this significant green energy potential is to be captured and utilised, a strategic

and pragmatic, rather than ad hoc, approach to marine development needs to be adopted now. The importance of getting strategic planning policy and objectives correct from the outset is vital for marine development to move forward. It is therefore crucial for future marine developers to engage in the strategic planning process, especially given the level of competition for exclusivity agreements which existed for Round 3.

Consultation responses to the CDNMP must be received by the Scottish Government by 7 June 2011.

The matters covered in this ebulletin are intended as a general overview and discussion of the subjects dealt with. They are not intended, and should not be used, as a substitute for taking legal advice in any specific situation. Semple Fraser LLP will accept no responsibility for any actions taken or not taken on the basis of this publication.

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