

GS/439/IK

Electricity Act 1989

Town and Country Planning (Scotland) Acts 1997 and 2006

Electricity Works (Environmental Impact Assessment) (Scotland) Regulations
2000

Viking Wind Farm

Objection on behalf of Sustainable Shetland

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Background

The Objectors

This objection to the proposed Viking wind farm has been lodged on behalf of Sustainable Shetland. The objection is being submitted to both the Scottish Ministers (via the ECU/RED) and to the Shetland Islands Council (via the Head of Planning).

The Sustainable Shetland group was set up in February 2008 with the following aims and objectives: -

1. The aims of the group are:
 - a) To oppose plans for very large wind farms in Shetland, such as the Viking Energy wind farm development.
 - b) To support renewable energy projects, including wind, which are fit for scale and fit for purpose.
 - c) To support social, environmental and economic sustainability in Shetland

2. To fulfil these aims:
 - a) The group will undertake research, publicity, lobbying and general campaigning activities.
 - b) Other activities, in furtherance of the aims or for the benefit of the group, shall also be undertaken from time to time as the members see fit.
 - c) Money shall be raised when necessary for carrying out the aims of the group.

3. As members of the group the membership believes:
 - a) That the proposed Viking Energy project would be damaging to the Shetland environment.
 - b) That the proposed Viking Energy project exposes our community funds to unacceptable financial risk.
 - c) That at present we are concerned that a direct electrical connection from Shetland to the UK mainland would result in the wind farm industrialisation of hilltops throughout mainland Shetland.
 - d) That the integrity of Shetlands environment, landscape, archaeology and society are important, and should not be treated as mere commodities.
 - e) That man-made pollution and man-made climate change pose serious risks to the environment and the population.

- f) That Shetland should promote and support efforts at reducing energy consumption, and support economic and environmental sustainability.

The group now has 624 members and consists almost entirely of Shetland residents. With an island population of 22,000 Sustainable Shetland believes that this constitutes a significant voice in the community. Indeed it is understood that there is no other voluntary organisation in Shetland that can claim such a high membership. The broad spectrum of the group ranges across professional and business people, to crofters and members of the general public. The full spectrum of the membership all has very real concerns regarding a sustainable environmental and financial future for their islands.

Additionally, Sustainable Shetland has just presented a petition of 3,474 signatures to the Shetland Islands Convener opposing the wind farm. This petition was targeted locally and directed towards the local councillors. Approximately 95% of the signatories were Shetland residents underlining the level of concern within the community. Many of the limited number of signatories from out with Shetland were students and family members temporarily living outside the islands.

The basis of the Objection

Sustainable Shetland, in opposing the Viking Energy Partnership proposal, has contributed to local debate not least in highlighting the conflict of interests that the Island Councillors face. With Councillors holding positions as Trustees on the Shetland Charitable Trust (of the 24 Trustees, 22 are Councillors), who own 45% of the proposed project, they face an almost impossible dilemma.

To carry out and properly discharge their responsibilities as councillors and trustees whilst SIC acts as a statutory consultee in the consent and planning process has two principal consequences. The first is that SIC cannot be an effective consultee, since it is the collective view of members of the Council which must be conveyed to Scottish Ministers by the terms of the 1989 Act. Secondly, the effect of Councillors being Trustees of a part owner of the project is to create an almost complete void in local democracy, and to deny the population of Shetland the right of effective representation which is the duty of every elected Councillor.

In addition there are three elected Councillors who are directors of Viking Energy Ltd. Indeed one Councillor sits both as chair of the Shetland Charitable Trust and Viking Energy Ltd as well as being on the SIC Planning Board.

The remainder of this objection statement considers landscape and visual effects, planning policy and related issues and matters of procedure and process before reaching conclusions. As is stated in the main text of the objection, Sustainable Shetland has seen the detailed objections from the Shetland Amenity Trust and the John Muir Trust. These are fully supported, endorsed and incorporated by Sustainable Shetland and, thus, are not repeated within this document but they should be taken as also reflecting the views of Sustainable Shetland.

Overall, Sustainable Shetland submits that this application for s. 36 consent and deemed planning permission cannot be the subject of a fair and balance recommendation by the Shetland Islands Council, since the Members of the SIC are irrevocably compromised by a conflict of interest with their position as Trustees of the Shetland Charitable Trust.

It is the considered view of Sustainable Shetland that, in view of the Councillors' and Trustees' apparent, direct and irreconcilable conflict of interest, the Members of the Council should recommend that Ministers direct that a Public Inquiry should be held into the application.

Landscape and Visual

Sustainable Shetland has commissioned a review of the landscape and visual material lodged in support of the application. That review is enclosed with this objection and should be referred to for its terms. Those terms need not be repeated in full here, rather the review is summarised below.

An initial review of the Environmental Statement methodology against current guidance has revealed a number of deficiencies that call into question the conclusions of the ES landscape and visual impact assessment.

These deficiencies relate to the design process, the selection of viewpoints, the visualisations, the assessment of visual impact and the assessment of landscape impact (with particular reference to the ‘Landscape Sensitivity and Capacity Study for Wind Farm Development on the Shetland Islands’).

Issues arising from the Environmental Statement can be summarised as follows;

- An overriding concern is that the number of turbines proposed has been dictated by the minimum required for the viability of an interconnector cable rather than landscape and visual capacity.
- The design process has led to the creation of six distinct and geographically separate groups of turbines that should be assessed as separate wind farms. Also, the design process has not led to a reduction in the significance of impacts (particularly for the turbines on the Mid Kame Ridge).
- The impact of access track construction (and associated peat displacement) is not adequately addressed either in the ES assessment or the visualisations.
- The viewpoints selected do not adequately represent key receptors of impact including users of promoted walks, users of ferry routes and viewers at promoted viewpoints.
- The visualisations understate the impact of the proposed wind farm as many do not include the full field of view affected and others understate the impact of the turbines (particularly those on the Mid Kame Ridge).
- The ES assessment of visual impact significance cannot be relied upon as the methodology for assessing sensitivity is flawed. The ES methodology understates the level of sensitivity and the consequential impact significance.
- The ES overstates the benefits of mitigation arising from the reconfiguration of turbines and potential woodland screen planting.

Issues arising from the Environmental Statement with particular regard to the landscape capacity study can be summarised as follows;

- The proposed wind farm is contrary to the study recommendation regarding turbine intervisibility.
- The ES understates the sensitivity of Landscape Character Area 4 (when compared to the capacity study assessment) and the consequential landscape impact significance.
- The wind farm proposes more turbines than the maximum number recommended by the study for all five of the relevant visual compartments.
- The proposed wind farm is in conflict with landscape guidance notes.
- The proposed wind farm is incompatible with some of the capacity study design principles.
- The ES does not consider the cumulative impact of the distinct groups of turbines within the proposed wind farm.

In conclusion, the premise that a minimum number of turbines are required to make the project viable undermines the site selection and design process. Furthermore, the inadequacy of the viewpoints and visualisations as well as an understatement of both landscape and visual sensitivity means that the Environmental Statement assessments fail a basic objectivity test.

The deficiencies of the landscape and visual impact section of the Environmental Statement are such that the ES conclusions cannot be relied upon.

For these reasons alone the proposal should be rejected.

Planning

Introduction

This section of the objection on behalf of Sustainable Shetland addresses land use planning and related considerations. Although the application is a s36 application to the Scottish Ministers there is a deemed planning permission aspect and therefore this objection addresses the Development Plan and then considers other material considerations including SPP6, SPG and prematurity. The objection will be directed to the RED/ECU and to the Council as Planning Authority.

In preparing this objection we have had full sight of the objections lodged on behalf of the Shetland Amenity Trust and also the John Muir Trust. The contents of these objections have been reviewed and they are fully endorsed on behalf of Sustainable Shetland. Both objections have been incorporated into the planning assessment that informs this part of the objection.

We have also seen a copy of an assessment of the likely effects on the fresh water aquatic systems by Paul Featherstone of Kergord Hatchery and again this is endorsed.

Sustainable Shetland has commissioned a review of the Landscape and Visual assessment material in the submitted ES. That review is enclosed with this objection and the conclusions of the review have been adopted for the purposes of the planning section of the objection.

Given the time and resource constraints on Sustainable Shetland and given that the current consultation process is just the first stage in considering the s36 application, this planning section of the objection does not seek to set out the full planning assessment. Rather it concentrates on the key aspects of policy assessment. The planning objections have been informed by a two day site visit, a meeting with the Council's Head of Planning, and a review of the submitted ES as well as a review of the relevant sections of the Development Plan. It is intended that, in terms of the assessment of the proposal, this initial objection should be supported by a presentation to the Council at the time that it determines its position and a subsequent submission to the RED/ECU based on that Council position. Finally, it would be intended to present a full case at any future Public Local Inquiry in relation to the proposal.

The planning position in relation to this proposal is so unusual, in terms of conflict with the Development Plan combined with prematurity and a fundamental conflict of interest on the part of the Planning Authority, that it is clear that, in order not to undermine the public trust in the planning system in Scotland, Ministers should either refuse the application as it stands or invoke their powers to call a Public Inquiry without any further delay.

This is because the SIC can never act as an effective consultee, and that is because, as stated, Trustees of the Shetland Charitable Trust are also elected Councillors. The Shetland Charitable Trust is a part owner of the project. As Trustees, they have a duty to act in the interest of the Trust. The ambit of that duty may vary with circumstances, but it never ceases to be anything but a fiduciary duty. That it is a duty to act in the utmost good faith and only in the interest of the Trust. As Members of the Council, they also have a duty, to act in accordance with the law, *irrespective* of the interests of the Trust or applicant. These duties are plainly irreconcilable.

Further, as the project is being promoted by means of a large sum of money that is public money that should be spent for the benefit of Shetland people, then Ministers should also consider how best to ensure that objectors are adequately funded in relation to the objections at any such Inquiry.

The s36 Tests

This proposal is in the form of an application under the Electricity Act 1989 to Scottish Ministers. Paragraph 3 of Schedule 9 of the 1989 Act provides a specific requirement on the Scottish Ministers to have regard to:

- The desirability of preserving natural beauty, of conserving natural beauty, of conserving flora and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeology interest: and
- The extent to which the developer has complied with its duty to do what it reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or any such flora, fauna, features, sites buildings or objects”

These requirements do not give a specific set of criteria or thresholds against which to assess a project, but at their simplest, they do clearly indicate that there is a balance to be struck between the policy, technical and economic justification for any project and its environmental and other impacts. The tests set a very low bar for passing the requirements as has been shown in various Ministerial decisions and Public Inquiry reports. However, as there is also a deemed planning permission aspect to the s36 consent process it is, therefore, considered that the more informative approach, as to the acceptability or otherwise of the proposal, is to examine the extent of compliance of the proposed development with the Development Plan.

The Structure Plan

The relevant Structure Plan is the Shetland Structure Plan 2001 – 2016. That Plan, approved by Ministers in 2001, makes no provision at all for a project of this scale.

Chapter 2 of the Structure Plan sets out the general development strategy which focuses on sustainable development. General Development Policy 1 sets out the key requirements. It is considered that the proposed Viking scheme does not comply with GDS1 on account of it not being planned to meet the economic and social needs of Shetland and on account of its failure to protect environmental assets and minimise environmental impacts. Within the sustainable vision for 2016, para 2.13, it is clear that the focus on renewable energy is to meet local needs.

General Development Policy GDS4 sets out policy in relation to the natural and built environment. It is considered that the proposed Viking development is contrary to criterion (a) on account of its significant adverse impacts.

Policy SP NE2 sets out a general landscape and design policy. It is considered that the proposed development is in breach of this policy in that it does not form a high standard of design that is sympathetic to the landscape. The enclosed landscape and visual review demonstrates precisely the reverse.

Having regard to the other objections before Ministers and the Council, it is considered that the proposal is in breach of Policy SP NE7 in that it does not protect locally important habitats and species.

Policy SP BE2 sets out the Council's policy in relation to important archaeological remains. The proposal fails this policy as it has not established that preservation in situ of the remains is impossible and that no alternative site is available.

Policy SP ENG3 expresses general, conditioned support for renewable energy projects, but the wording is so generalised as to render the policy meaningless in terms of testing proposals.

Policy SP ENG4 is again expressed in very generic terms. However, in that the proposal fails other relevant policies on both the Structure Plan and the Local Plan it follows that it fails this policy also.

Policy SP IND1 sets out that the Council, with partners, will promote an integrated and sustainable approach to the development of the Shetland economy. It is considered that the Viking proposal, by virtue of its scale, location and adverse impacts, does not comply with criteria (a), (c), (e) or (f) in this policy.

Having regard to the above initial assessment the proposed Viking Wind Farm is not in accord with the Structure Plan.

The Local Plan

The Shetland Local Plan dates from 2004 and, as with the Structure Plan, it does not make any specific positive provision for a project of this nature and scale. This initial assessment

concentrates on the sustainable development chapter, Policy LP NE10 on development and the environment and on Chapter 7 (Energy) in the Local Plan.

Chapter 2 on sustainable development does not contain any policies. However, taking into account the text of paragraph 2.4 it is clear that the proposed Viking development, on account of its various adverse effects, would be in breach of many of the principles set out in the bullet points within paragraph 2.4.

The text at the start of Chapter 3 on the natural and built environment stresses the value of the landscape heritage of Shetland. Policy LP NE10 sets out the Plan policy on the assessment of developments for, inter alia, the exploitation of natural resources. The proposed Viking development is considered to be contrary to the policy test on account of the adverse impacts on the interests listed in considerations (a) to (f) in the policy. It is therefore in breach of this key Local Plan policy on account of these impacts and on account of its location, scale and duration of operation.

It is noted that paragraph 7.3 recognises the essential role of a sub-sea interconnector cable. Given that this is recognised as essential it is considered unusual that there is no such proposal before Ministers and the Council at the same time as the s36 application. As is well known and understood by now, European Law forbids “salami slicing” of major infrastructure projects. What that means is that the actual or potential significant environmental effects of all of the component parts of such a proposal cannot be “sliced” or considered one apart from the other, but must rather be considered as a whole. That has not been done in this case.

Paragraphs 7.4, 7.5 and 7.6 refer to a number of energy related initiatives. There is no mention of a major on shore wind farm. Policy LP ENG6 relates to Energy proposals but mainly defers to Policy LP NE10 (above). There are requirements for suitable site restoration proposals which include enhanced biodiversity (which the Viking proposal does not provide) and for compliance with other Structure and Local Plan policies (which the Viking proposal does not achieve).

Having regard to the above, the proposal is therefore contrary to the Local Plan.

Development Plan Conclusions

As set out above the proposed development is contrary to both the Structure Plan and Local Plan and is therefore contrary to the Development Plan. The presumption is therefore for a refusal of deemed planning permission in this case.

Other Material Considerations

There is a range of Scottish Government Planning Guidance which is in the process of being consolidated. Much of that will have been incorporated into the Local Plan policies and need not be reviewed here. However, regard needs to be given to the terms of SPP6 which is

considered below. General Government Energy policy support for renewable energy is already built into the text of SPP6 and therefore there is no need to undertake a separate assessment of that policy. However, it is worth noting that, in terms of that policy approach, there is nothing that says that on shore wind turbines should be built anywhere irrespective of their adverse impacts.

SPP6 sets out national planning policies for renewable energy developments including schemes under s36 of the Electricity Act. The SPP principles are set out in paragraphs 16 and 17 which should be referred to for its terms noting that the role of fully engaging with local communities is recognised. It is also necessary to ensure that impacts on local communities are satisfactorily addressed.

Policies for wind farms specifically are set out in paragraphs 23 to 25. For large scale wind farms, over 20 MW, reference is made to the guidance in annex A in the SPP. The material in Annex A is primarily directed at Councils preparing spatial frameworks for large scale wind farms. However, the principles can be applied to the consideration of individual proposals.

In this case the submitted ES addresses many of the listed issues but with a tendency to understate the adverse impacts and overstate the benefits. The aspect of the grid connection is not properly assessed in the case of the Viking proposal as no details are before Ministers at this stage despite the clear interrelationship between the scale of the wind farm and the justification for an interconnector.

The Council has sought, in the past, to prepare Supplementary Planning Guidance on renewable energy. However, none of that work has ever been taken to the stage of being finalised, adopted SPG that could be used in the determination of applications or in the formation of a consultation response on a s36 consultation.

The Council has more recently begun to prepare new spatial planning guidance for renewable energy in line with the guidance in [PAN 45 Annex 2](#). A Landscape Capacity Study has been commissioned in that regard and it has been published (the landscape and visual review commissioned by the objectors has had regard to that published document). However, no new SPG is available even in draft form and we have been advised that publication of the same is unlikely in the short term. Therefore, there is no new SPG to set against the Development Plan assessment.

The Council has embarked on preparing a new Local Development Plan under the new Development Planning procedures but, at present, there are no new draft policy documents available.

Benefits of the Project

In carrying out the balanced assessment of a wind farm proposal it is necessary to look at the potential range of benefits of the scheme. The claimed benefits would be analysed in much more detail in any Public Inquiry evidence. In this regard the claimed benefits of the project are overstated. The environmental claims of the Government's Energy policy are based on generic claims and are not, in fact, attributable to any individual project especially one located on an island.

However, what can be clearly stated is that the construction of the Viking wind farm would not make any measurable impact of any scale on the future climate indicators indeed Government policy does not claim such an effect) and furthermore, it would not have any verifiable and attributable effect on the emission levels of greenhouse gasses. Much more work is required to calculate, as accurately as possible, the nature and extent of any savings.

The project would have some local economic development benefits although the bulk of the benefit would be to others outwith Shetland whilst no convincing evidence has been set out that this is the only way to generate sustainable economic development activity on Shetland. In short, the benefits to the extent that there are any, do not offset the adverse impacts and they do not form a sustainable future for Shetland. This is not an occasion for a repeat of the effect of the Zetland County Council Act 1974.

Therefore, having regard to the other material considerations there is nothing that would lead to a justification for consent or deemed planning permission contrary to the provisions of the Development Plan.

Prematurity

This is a massive project by any normal standards. Having regard to the scale of the project in relation to the land mass of Shetland, and considering that it is designed as a purely export driven project rather than as one designed to serve Shetland's needs, one might consider it to be premature in the absence of any supportive policy, plan or project for a development on this scale. Given that there are no details of the necessary interconnector cables, there is a strong argument that the proposal is premature pending a proper updating of the Development Plan to address the major policy issues raised by the proposal. Finally, this proposal is premature pending the publication of all of the details of the related cable links and on shore structures (along with the assessment of the environmental effects of these). Indeed, there is not even up to date Supplementary Planning Guidance against which to assess the proposal.

To proceed to give any positive consideration to the project in the short term would involve making one of the most significant planning decisions ever for Shetland in a complete planning policy vacuum.

Planning Conflict of Interest

Based on experience throughout Scotland it is generally the case that s36 applications are not made the subject of a Public Local Inquiry unless the Planning Authority exercises its right to object (EA 1989 Schedule 8). A Planning Authority is therefore in a unique position in this regard in that it is only a Planning Authority's formal objection that can automatically trigger an Inquiry. It follows that other objectors often rely on or are dependent on the Planning Authority's objection, in order to ensure that their objections are considered at Inquiry. Indeed, Councils have a clear and direct interest in seeing their policies upheld (if there are any), and it is well understood that other objectors positively look to Councils to defend their Development Plan policies in this regard.

However, as has already been made plain, in this case, all of the Members of SIC sitting on the SIC Planning Committee are also Trustees of the Shetland Charitable Trust, which, by direction of the SIC, holds the Council's substantial financial interest in the Viking project. This creates, in Sustainable Shetland's submission, a conflict of interest which is particularly acute, for two reasons. Firstly, it is insoluble. These joint offices are held at the date of the application, and even resignation as Trustees of all Councillors would not negate the conflict of interest which now exists. In the second place, where the development is clearly contrary to the Development Plan and where it is only the Council that can automatically trigger a Public Inquiry, Members considering any report will be faced with a dilemma; do they act as Trustees, seeking to maximise the interests of the Trust?, or do they act as Councillors, and follow the law, as they must, in relation to the use of the Development Plan? Each course of action would be likely to produce a different result.

Overall Planning Conclusions

The proposal is considered to be premature pending the preparation of new policy guidance which is unlikely to be available in the short term. The proposed development is contrary to the Development Plan and there are no material considerations that would lead to a change in the presumption of refusal that follows from the Development Plan test. In addition, the Council is in a unique conflict of interest position whereby they should not look, themselves, to enable the granting of consent and deemed planning permission for the project.

Conflict of Interest and Related Procedural Issues

The factual position has been stated here with sufficient clarity not to need further elaboration.

The legal position is just as clear; a Trustee may not act for gain, and may not act other than in a fiduciary capacity in the best interests of the Trust for which he is a Trustee. Yet any Councillor considering an application should, in general, disregard the personal circumstances of any applicant, and simply apply the law. In so doing, Councillors will therefore be asked to disregard their interests and fiduciary duties as Trustees.

The law has provided since time immemorial that any person taking a decision which affects any rights held in trust should not act, nor be a judge in his or her own cause. To pretend that the Trustee/Councillor roles can both be discharged effectively, properly and legally by the same people is to invite judicial review and reduction(nullification) of any decision which flows from such a process. In addition, it is submitted that that such a burden poses an impossible feat of mental gymnastics which it would be unfair to impose on any elected members.

The only fair way to ensure that the proposal receives the attention it deserves is for it to be considered in a Public Local Inquiry, and SIC is accordingly recommended to advise Ministers that that is their wish and decision, and to act as they may to procure a Public Local Inquiry to consider all details of the case. At that inquiry Trustees and Council alike may present their individual points of view, and have their interests independently evaluated.

Conclusions

Sustainable Shetland objects to this proposed development on the undernoted grounds:

- The objections by the Shetland Amenity Trust and the John Muir Trust are fully supported by the Sustainable Shetland group and are incorporated within this objection
- In terms of visual and landscape impacts, the ES methodology is flawed and the assessment of visual impact and cumulative impact cannot be relied upon. The ES also contradicts the recommendations of the Council's recent landscape capacity study
- The proposed development is premature pending the preparation of up to policy guidance
- The proposed development is contrary to the Development Plan and therefore there should be a presumption for the refusal of consent and deemed planning permission. There are no material considerations that would change this conclusion
- The Council Members, and therefore the Council itself, have a profound and irreconcilable conflict of interest in relation to the proposed development

Therefore, Ministers are requested to either reject this proposal now or, if they are not minded to do so, to immediately refer the proposal to a Public Local Inquiry, convened in terms of the Electricity Act 1989 Schedules 8 and 9.

Submitted for Sustainable Shetland

24th July 2009