

**Private Water Supplies , Windfarm Developments and the  
Failure to uphold National, International and Aarhus Regulations by the Scottish Government**

Points arising from the Sneddons Law Appeal Hearing.2017 (DPEA PPA -190-2054)

Decision Notice issued 23/02/17

Local Authorities (LA) usually have the best understanding of the constraints which should apply to either consenting a planning application or to applying planning conditions to that consent, in order to protect the immediate environment and residential amenity related to that development. As a competent authority, the LA is subsequently responsible for enforcing that consent.

However, conflicts arise when planning permissions or planning conditions are approved by the Scottish Government which may be contrary to the decisions made at a more local level. This can be no more significant than when this power affects the rights of human beings to the provision of safe and adequate water supplies; a basic need for life.

For some planning applications e.g. S36 planning applications, decisions by a competent Local Authority to refuse planning Conditions, which are designed to protect essential Private Water Supplies (PWS ) can be and are overturned by The Scottish Government(SG) . In doing so, it is not clear whether as the 'new' Competent Authority, the SG then assumes the mantle of responsibility for enforcing the consent and conditions that it has awarded or discharged. The public has been given conflicting information as to whether the SG assumes any responsibility for enforcing the decisions it makes and yet the SG has no mechanism for enforcement.

It seems that LA's must frequently be left to fund and enforce decisions made by the SG which are contrary to local decision making. Worse still occurs when the SG overturns decision making at a local level and then excludes the LA from conducting its statutory obligations to protect the environment and PWS and adequately enforce both planning conditions and statute, as has happened recently with Sneddon Law windfarm, in East Ayrshire, Scotland.

Some developers regard that it is not the developers' duty to adhere to planning conditions, rather that it is the duty of competent authorities to enforce them. This has been stated publicly by Eversheds LLP on 24/09/14, acting for CWP Ltd for Sneddon Law windfarm in a successful Appeal PPA-190-2040, *"With regard to the issue of compliance, firstly there is no requirement in planning terms for there to be confidence that the wind farm company will strive to comply with the condition, since that is the purpose of the enforcement jurisdiction."*

This is a situation which is untenable and provides no reassurance to the public that planning conditions can ameliorate or prevent adverse environmental effects from major developments.

There is a perceived failure by the public of the Scottish Government to uphold both existing statute and the Human Rights of its citizens.

Public authorities are obliged to uphold the European Convention on Human Rights in terms of s.6 of the Human Rights Act 1988. The Scottish Government does not have authority to sanction any act which is incompatible with ECHR in terms of s.57(2) of the Scotland Act 1988.

Article 8 of the ECHR provides:

ARTICLE 8

## Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The above can apply to the provision of safe water and there have been several successful cases against States for contamination of PWS and violating Human Rights, Article 8 in relation to PWS. (the European Court of Human Rights : CASE OF DZEMYUK v. UKRAINE (Application no. 42488/02), Case of TĂTAR v. ROMANIA (application no. 67021/01), Case of Dubetska and Others v. Ukraine (application no. 30499/03).

An example of how centralized Government decision making is perceived to flout Human Rights, National and Aarhus Regulations is provided in the recent case of Sneddon Law windfarm, a 15 turbine 35MW windfarm, consented in 2012 by elected Members of the Local Authority against the advice of its own planning department and against the wishes of three local Community Councils and local residents.

In the case of Sneddon Law windfarm, 22 PWS are deemed under EIA Regulations to be at significant risk from the development (as stated by the Developers' own consultants). Planning condition 36 was written by the competent Local Authority, East Ayrshire Council (EAC), to protect those PWS which 'may be affected by the development'.

The developer, Community Windpower Ltd, submitted a plan to support discharge of this Condition 36, which in the view of EAC, which has the statutory responsibility for monitoring PWS quality and enforcing compliance, was inadequate to provide the required protection, monitoring or mitigation for those PWS which might be affected and the application to discharge the condition was therefore refused by EAC in January 2016.

The Developer then appealed to the Scottish Government. The appeal was determined by a Public Hearing (January 10<sup>th</sup> 2017), after a new PWS risk assessment was submitted by the appellant in November 2016 (updating a new PWS RA of August 2016), to the Scottish Government (DPEA). The Appeal by the developer for Condition 36 was upheld and in doing so, the Reporter added four new subclauses to the original condition, which required to be fulfilled before windfarm development could commence.

All planning Conditions are required to comply with Scottish Planning Circular 4/1998 : *'The Use of Conditions in Planning Permissions'*.

Condition 36 required a monitoring and mitigation plan for PWS to be submitted, which was to extend throughout the operational life of the windfarm.

No monitoring plan for the 22 identified at risk PWS was submitted prior to the decision to uphold the Appeal and the discharge of the condition by the SG.

The new discharged Condition 36 is therefore required to meet the six criteria of the Circular below:

- Need for a Condition,
- Relevance to Planning,
- Relevance to the Development to be Permitted,
- Ability to Enforce,
- Precision and
- Reasonableness.

There seems no doubt that the first three criteria are met. However, in this instance the last three criteria have not been met, rendering the discharged condition ineffective for reasons following:

Firstly, the people affected need to be able to clarify and understand how the Condition can possibly work and therefore be enforced. That cannot be done.

Secondly, contrary to the terms of Condition 36, which have been added to with additional wording, the Reporter allowed the appeal and discharged the condition without the required Private Water Supply (PWS) Monitoring Plan being in place.

The appellant submitted Appendices 3 and 4 to their November PWS Risk Assessment as a “PWS Water Monitoring Plan”, and were referred to as such by the Appellants’ consultants, in support of the November PWS RA. However, Appendices 3 and 4 belonged to the supporting documents of Condition 22, not Condition 36. Appendices 3 and 4 are a Surface Water Monitoring and Pollution Prevention Plan written in September 2015, before the 22 “at significant risk” supplies PWS were even identified, listed and charted by CWP Ltd .

They did not relate to a PWS monitoring plan which was required to be a constituent part of the PWS RA and in particular, a document to support discharge of Condition 36.

So the DPEA Reporter had in front of him a “Monitoring Plan” which was prepared for another purpose **before** the supplies which now require to be monitored were even identified. Appendices 3 and 4 are therefore not a PWS Monitoring Plan, as was required to be submitted under the plain terms of the original Condition 36, yet they were adopted, as a substitute, *verbatim*, into the new Condition 36 as a substitute for a PWS monitoring plan.

Condition 22, the Surface Water Monitoring plan (appendices 3 and 4) for Sneddon Law windfarm has not yet been discharged by EAC for Permission No 13/0198/PP. There is currently a Court Action in the Court of Session about it, which it makes it even more inappropriate that these monitoring plans for surface water could be considered to be acceptable as a substitute for PWS monitoring to allow the condition to be discharged.

Condition 36 expressly states:

*The Water Risk Assessment shall include, but not exclusively, details of any necessary mitigation measures **and monitoring arrangements prior to commencement of development, during construction and upon completion of construction.***

There **were no PWS monitoring arrangements in place, which could be subject to public comment and scrutiny**, before the SG discharged the condition to protect PWS, contrary to the terms of **condition 36.**

In respect of legal responsibility for the future, through his actions, **the Reporter has excluded the LPA, which has statutory responsibility for testing and monitoring PWS, from contributing to any new PWS Water Monitoring Plan, as set out in the new Condition 36 (3). Instead, he has delegated this role and authority to the Scottish Environment Protection Agency (SEPA) for approving what will be an unseen PWS monitoring plan, which is to be devised by the appellant's Agent, AA Enviro, within one month following discharge of the condition.**

**SEPA has no statutory or other responsibility for PWS.**

So, the Local Authority, which **does** have responsibilities and powers with regard to PWS, has now been **excluded** from approving any PWS monitoring plan, with those responsibilities for this condition 36 transferred to SEPA, which **does not** have statutory responsibility for PWS.

**With no further reference to affected members of the public, or to the Local Authority, SEPA have now (as of 30/03/17) discharged a still unseen PWS monitoring plan, even though they have no authority or responsibility for PWS.**

SEPA's remit for drinking water supplies is evidenced in a letter from one of its Officers in 2014:

*"SEPA can comment on the water environment issue from wind farm construction but the drinking water quality issues are not within our remit and should be directed to Scottish Water for public supplies or the local authority for private water supplies."*

Simon Kirk SEPA 08/09/14, SEPA Environment Protection Officer, Ayr Office.

Furthermore, in a letter to the Reporter during the Appeal proceedings (14/02/17 PCS 151253) SEPA made it clear that not only is it an obligation that the developer identify PWS water sources (which has still not happened) but that they will have nothing to do with alternative private water supplies. SEPA said :

*"Thank you for your consultation email which SEPA received on 1 February 2017.*

*As outlined within SEPA Guidance on Assessing the Impacts of Development Proposals on Groundwater Abstractions and Groundwater Dependent Terrestrial Ecosystems (LUPS-GU-31) when assessing the risk it is the developer's responsibility to identify all public and private water supply groundwater abstractions, both within and outwith the site boundary. It is critical that it is the actual source of the abstraction and not the property that it supplies that is identified. The commitment from the developer to provide alternative water supplies is noted. SEPA are not able to comment on the alteration or the provision of alternative supplies, the acceptance of which can only be agreed between the applicant and the supply owner." (underlining added)*

I wrote to SEPA (Ms MacLean , SW Area Manager) asking how they could discharge their concerns for groundwater and PWS when water sources had still not been identified:

15.03.17

Dear Ms MacLean,

*I am aware from repeated submissions from East Ayrshire Council (EAC) to SEPA regarding this windfarm and its potential impacts on Private Water Supplies (PWS) in the vicinity of this windfarm, that SEPA have repeatedly stated that SEPA has no concerns with regard to its interests from the construction and operation of this windfarm.*

*In the recent Appeal Hearing (PPA-190-2054), which was submitted by Community Windpower Ltd against EAC, due to the failure of that Local Authority to discharge Condition 36, which was designed to protect the quality and quantity of PWS, that the Reporter assigned to the case, Mr Cunliffe, contacted SEPA for advice. Your response to the Reporter, in a letter of 14th February 2017, is posted on the DPEA website.*

*In that letter, you have said,*

*"As outlined within SEPA Guidance on Assessing the Impacts of Development Proposals on Groundwater Abstractions and Groundwater Dependent Terrestrial Ecosystems (LUPS-GU-31) when assessing the risk it is the developer's responsibility to identify all public and private water supply groundwater abstractions, both within and outwith the site boundary. It is critical that it is the actual source of the abstraction and not the property that it supplies that is identified".*

*As the developer has provided no evidence either to the Council, PWS owners or to SEPA of the location and required grid reference of the sources for the two large multiple PWS (Airtnoch spring supply to nine properties, including one Dairy and two stock Farms) and Blackshill spring supply (To a trout fishery, five stock farms and one domestic dwelling), could you please explain how SEPA is able to state that it has discharged its concerns and has no objection to this development.*

*The PWS owners/consumers have no knowledge of the whereabouts of the sources of these two large spring supplies, only the intermediate holding tanks. Despite attempts by local residents to reiterate to all parties that these holding tanks are not the location of the water sources, these holding tanks have been submitted/charted by the developer in PWS risk assessments submitted to DPEA as 'points of abstraction'. Clearly this cannot meet the terms of LUPS-GU-31.*

*Our Community Council has great concern for the large number of households and PWS in our CC area deemed to be at major risk (9) and at moderate risk (13), both in the short and long term- from this development. These PWS are all reliant on the groundwater from this windfarm site and the zones of contribution to those supplies have been clearly charted by the Developer's hydrologists as being within the windfarm site.*

*As I am one of those consumers and the Responsible person for the Airtnoch spring supply, as well as being Chair of our Community Council, I would very much appreciate a prompt reply and explanation of SEPA's position.*

This is the response from SEPA, which ignores repeated letters to EAC over 3 years stating that SEPA had no concerns:

28.03.17

*Thank you for your consultation email of 15 March 2017.*

*In response to the specific question within the email 'could you please explain how SEPA is able to state that it has discharged its concerns and has no objection to this development'; it is the developer's responsibility to identify all public and private water supply (PWS) groundwater abstractions, both within and outwith the site boundary. SEPA received a copy of a Response to the Procedure Notice [Ref.4] which indicates that alternative supply will be provided for the PWS. SEPA responded as per guidance (LUPS-GU-31); 'SEPA are not able to comment on the alteration or the provision of alternative supplies, the acceptance of which can only be agreed between the applicant and the supply owner.' Section 3.5 of the guidance (LUPS-GU-31) notes: 'In this situation we will respond with no objection in relation to groundwater abstractions'.*

*If you have any queries relating to this letter, please contact me by telephone on 01698 839 339 or e-*

mail at [planning.sw@sepa.org.uk](mailto:planning.sw@sepa.org.uk).

**It is clear from this response that the public can have no confidence in an environmental agency which relies solely on the moral competence of a developer to submit whatever information they wish in order to be able to discharge statutory responsibilities for a planning application.**

To be clear, all the 22 at risk PWS are groundwater(GW) dependent supplies. Should any of these PWS be affected, it will be because of adverse GW effects caused by construction. SEPA have responsibility under the Water Framework Directive to monitor GW and enforce compliance with legislation to protect GW.

They have abrogated this responsibility, by considering that unproven alternative mitigation water supplies (from the same GW), for which they have no responsibility – as stated above-, relieves them of their responsibilities to protect GW.

The Local Authority, in their Appeal Hearing Document to DPEA (21/12/16), have also made it clear that they will have no responsibility in future for any arrangements for alternative PWS

*“3.3 It is the Council’s position that any person who takes their water from a PWS should ensure that the supply is maintained and remains wholesome and sufficient. Further, any requirement for the maintenance of the quality and quantity of private water supplies throughout the construction, operation and decommissioning of the development, and the provision of a bond or financial guarantee for the replacement of a private water supply to individual properties lies with the property owners, Relevant Person(s), landowners and the Appellants directly, rather than with the Council”.*

The new subclause in condition 36(3) only requires that there is a plan and that SEPA approves this, not that this plan is compliant with or specific **to statutory or other requirements** for monitoring of various types of PWS, or allows for statutory rights of the local authority to request additional test parameters according to concerns, as specified under the Private Water Supplies (Scotland) Regulations 2006.

Therefore, how can it be correct for the responsibility for assessing the future suitability of a **Private Water Supply** Monitoring Plan to be delegated to SEPA, a Scottish Government organization which has no responsibility for PWS as the Reporter, on behalf of the Scottish Government, has decreed?

The PWS Monitoring Plan which should have constituted part of the Environmental Impact Assessment and which should have been available for public inspection and comment was not submitted as part of the documents to enable discharge of Condition 36 . An unseen plan has now been **excluded from scrutiny** and comment by the Local Planning Authority and other interested parties and approved by SEPA. **The affected public has no right to question or appeal this decision.**

### Conclusion on legal responsibility

It can be seen therefore that the terms of the new Condition 36 **excludes** the Local Authority from its statutory role and responsibilities in advising on and monitoring PWS. It **substitutes** a body with neither the statutory power, responsibilities, nor the knowledge to influence the outcome. This action by the Scottish Government is completely unacceptable for obvious reasons, from the point

of view of the affected public and users of the PWS.

### Consequences for PWS users

This decision to bypass the need for submission of a required Monitoring Plan before discharge of the Condition by the Reporter leaves the consumers of the 22 PWS, deemed as being at *significant* risk from this windfarm, with no input into the monitoring of their own PWS, for which they have ultimate responsibility and ownership.

**Aside from contravention of both the Aarhus Convention and the EIA Regulations, which allow for public scrutiny and public participation,** it becomes clear that because such detail has been omitted from the ES or documents submitted to secure discharge of Condition 36, the purpose of the Condition can never be achieved.

SEPA has absolved itself of any responsibility for alternative potable water supplies. The LPA is out of the picture, as explained.

The Drinking Water Quality Regulator ( DWQR) has no place and has not been consulted by the DPEA. Scottish Water has no concern with private supplies.

This leaves the PWS owners themselves responsible for negotiating for any required alternative water supplies directly with a hostile Developer and having to bear not only the physical consequences, but also the unavoidable and substantial legal costs of the necessary alteration to title deeds for water rights that such agreements will inevitably require.

We are already experiencing a situation where the developer is coercing individual PWS owners to agree alternative water supplies not specified in planning conditions , which cannot be enforced by the LA, in order that construction can commence without adequate protection of GW in place.

### Water quality and quantity issues

No required PWS Monitoring Plan was devised or included prior to discharge of Condition 36. There was no agreed written definition of what would be deemed to be a definition of deterioration of either water quality or quantity that would trigger the provision of any mitigation, by activating the alternative contingency plans either in the short term, or the implementation of alternative intermediate and long term water supplies.

That question and definition of ‘deterioration’ in water quality or quantity has now been left to the developer alone, **without any statutory body being involved**. The consequences of pollution thus fall back on the PWS user; a complete nullification of Condition 36 and a wholly unacceptable outcome, and **breach of both Human Rights legislation and Articles of the Aarhus Convention.**

**Who will now determine the ‘need’ for implementing the mitigation measures set out in clause 1 of condition 36 is unknown.**

It will not be SEPA or DPEA (Scottish Government), and cannot be the Council, since no terms have been set out in the Condition.

It should not be the developer, because there is an obvious conflict of interest. That leaves the users. The unresourced, unskilled, uninformed users have to define the need for contingency supplies of water at their own expense and argue that need with the developer. Hardly an outcome to be applauded or permitted and yet this is what the SG have decreed and we, the public have no right of appeal, save for prohibitively expensive judicial review, which cannot be funded.

It follows therefore that condition 36(1) is not specific, is unenforceable and does not and cannot

protect the health of existing PWS consumers.

### Specific users issues

In new subclauses added to Condition 36 (1) the Reporter has required the developer to provide new, alternative borehole supplies for 9 PWS deemed to be at major risk both in the short term and long term. These new supplies are to be 'fully operational' before Ground Investigations for, or construction of the windfarm commences, but there is no definition of 'fully operational' stated in the new 36(1).

Either this means that all wayleaves agreed, supply pipes and holding tanks in place are plumbed into existing supplies and the new water source proven to have the required quantity and quality of water for all potential users over all seasons of the projected 18 months construction period - OR that the borehole itself is fully operational and sufficient water is available at the wellhead (but not supplied to, or plumbed into potentially affected properties). Because 'fully operational' is not defined, it is by definition not specific, not enforceable and gives no protection to PWS consumers who may need alternative water supplies either during construction or during the operational phase of the windfarm.

To these important questions there is no ready answer. **Now that the Appeal has been allowed, neither is there a forum in which these concerns can be ventilated.**

Condition 36 (1.1) reads in part,

*"In each case the replacement supply shall either be from the public mains or be derived from a source shown to be at low or negligible risk of contamination or disruption, and which does not prejudice the quantity or quality of water delivered by other existing private water supplies, delivering sufficient quantity and quality of water for the relevant uses (as determined following consultation with the users), and details shall be provided of how the supply will be managed and maintained"*

For example, one of the proposed replacement boreholes will be almost 1km nearer windfarm construction activity than two existing boreholes *already* deemed to be at major risk and yet the Reporter was content with this proposal.

How can future water quantity and /or quality be guaranteed to be low or negligible risk, unless this is a public water provision?

The condition, as framed, is therefore *unreasonable*. This condition simply makes no provision for any obligation upon the developer should the new borehole alternative water supply that was satisfactory at the start of construction, fail during construction or operation of the windfarm. PWS owners will then be left to negotiate directly with the developer, as they are now, from a position of disadvantage; a completely unsatisfactory situation. This approach is inherently flawed, and cannot work in the event that the PWS are polluted either by construction works or pollution incidents during the operational phase.

**So the mechanism of a Public Hearing failed to do what it is meant to, because it did not examine the required pertinent Environmental Impact information, it relied on out-of-date Appendices which relate to Surface Water management, rather than critical groundwater and it did not consider the available facts which would impact on alternative provision of safe and adequate quantities of alternative water supplies to dependent consumers.**



In addition, acting *ultra vires*, the Reporter has bestowed upon SEPA a supervisory role which it cannot competently fulfil. It has neither the legal power, nor the knowledge and capability to approve any Monitoring Plan, far less to supervise its operation and to ensure its success.

These two glaring *lacunae* in the Condition mean that it cannot be enforced, is intrinsically imprecise, and in almost every respect is unreasonable. The Reporter has removed the LA from being able to enforce the discharged condition. For those reasons, it fails to fulfil the criteria in the Circular, and should be revoked.

In Summary, the owners and consumers of 22 PWS deemed to be at significant short and long term risk from Sneddon Law Windfarm for both pollution and loss of their water supplies are left with:

1. A discharged Planning Condition which does not meet statutory requirements and which therefore cannot be enforced.
2. No clear responsibility of whether the enforcement to provide short and long term provision of adequate quantities of potable water to PWS consumers lies with the Local Authority or the Scottish Government, with rights of enforcement being removed from the LA.
3. All statutory authorities abrogating any responsibility for involvement in ensuring suitability of long term provision of alternative water supplies should these be needed, with that responsibility left with individual PWS owners/consumers which have been adversely affected.
4. No financial provision or bond to compensate local residents should they require to make their own arrangements for sustainable alternative water supplies in the short or long term resulting from the effects of this development.

The Scottish Government have to date, made clear that if local residents and PWS owners are unsatisfied with the Appeal decision, then their only recourse is to obtain (at their own expense) judicial review. DPEA have said,

*“The reporter’s decisions are final. However you may wish to know that individuals unhappy with the decisions made by the reporter may have the right to appeal to the Court of Session, Parliament House, Parliament Square, Edinburgh, EH1 1RQ. An appeal must be made within six weeks of the date of the appeal decision. Please note though, that an appeal to the Court of Session can only be made on a point of law and it may be useful to seek professional advice before taking this course of action.”*

It is unclear what powers are available to the DPEA or Scottish Government to put this matter right as is urgently required for the affected community and certainly in respect of patent breaches of Articles of the **Åarhus Convention and the EIA Regulations** .

It is hoped that the Committee will take due note of this situation which may well affect communities with related issues throughout Scotland/the U.K. and provide clarification of responsibilities for Environmental issues raised in this and other cases which impact on crucial water supplies.

Dr. Rachel Connor.

Responsible person for the Airtnoch spring supply providing water to nine homes , including a dairy farm and two working stock farms. (Address and contact details available upon request).