

Paul Cackette, Esq, Chief Reporter

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Directorate of Planning and Environmental Appeals

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14/03/2017

Dear Mr Cackette

Appeal No PPA-190-2054

I write with serious concerns about the Decision Notice issued by Mr Michael Cunliffe, a Reporter, in the Appeal by Community Windpower Ltd (CWL) against East Ayrshire Council for failing to discharge Planning Condition 36 relating to Private Water Supplies. The Notice was issued on 23 February 2017.

Our concerns are both logical (how can it work?) and legal (is it ultra vires?)

Background information

The decision to grant planning permission for the Sneddon Law windfarm followed a non-determination Appeal (reference PPA-190-2040), itself determined without any Hearing or Inquiry (save as to Noise Conditions) by Mr Michael Shiel, a DPEA Reporter, on 24 October 2014. Attached to his decision were a number of Conditions. Condition 36, as it appears in the Decision Notice, reads:

*“Prior to commencement of development, the Operator shall submit a water risk assessment of the effects of the development on the quantity and quality of water supplied to all properties with a private water supply that may be affected by the development for the written approval of the Planning Authority in consultation with SEPA. 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. Thereafter any mitigation measures identified in the approved Water Risk Assessment shall be implemented and maintained by the Operator.”*

*The reason for this condition is to ensure the protection of the quantity and quality of PWS (Private Water Supplies).*

So operation of the Condition depended, at that stage, on details of mitigation and monitoring being brought forward and approved before the commencement of development.

The applicants produced and submitted a so-called Private Water Supply Risk Assessment) (hereafter “PWS RA”) to the Local Planning Authority (“LPA”), who refused their application on 14 January 2016, broadly on grounds of inadequate information having been supplied. The applicants then appealed to Scottish Ministers (TCPSA97, s. 47), and in due course their appeal was heard in a three day Hearing before Mr Cunliffe, on 11 and 12 January 2017.

### Versions of the PWS RA

By the time of the Appeal Hearing, three rewritten “improved versions” of the PWS RA, containing previously unidentified PWS at major and moderate risk from the development, had been brought forward. These “iterations” culminated in a “final” version submitted in November 2016. Despite some disquiet that the appellants were being allowed to introduce completely new material (TCPSA, s.47A(1) refers), the Examination by way of a Hearing was allowed to proceed on that basis.

### Protection of the PWS RA.

You will readily understand that the protection of PWS is a vital matter for those whose homes, farms and businesses depend on potable water of a suitable quality and quantity. In this case, there are 22 such recipients of private water supplies, ranging from a Trout Fishery, a Country sports establishment providing corporate entertainment, a Dairy Farm and seven other stock farms and a number of private homes. A number of householders and businesses have taken part in the Public Examination. They are identified in paragraphs 5-9 of Mr Cunliffe’s decision letter, and in the submissions of Moscow and Waterside CC to the Examination. Despite the resources available to them, the appellants never accurately identified and assessed them all.

### Decision

The Reporter upheld the appeal to discharge condition 36 by CWL and reissued Condition 36 on 23 February 2017, with additional clauses.

The Decision Notice read:

## Decision

*I allow the appeal and discharge Condition 36 of Planning Consent 13/0198/PP on the basis of the Technical Report on Private Water Supplies: Consolidated Water Risk Assessment dated 15 November 2016, as read with the Response for the Appellant to Procedure Notice dated 20 January 2017, which I hereby approve subject to the four conditions listed at the end of this decision notice.*

So, understanding the content of the Decision depends on knowing what is in the PWS RA of November, plus knowing what is in the Response of the Appellants to the PN of 20 January 2017, and is also subject to further conditions. You might think that that lexicon of material tests the ability of even informed laymen and women such as ourselves to see where the core of the regulation lies. You might also think that it stretches credulity to the limit to think that comprehension and enforcement of this vital condition will actually be possible, down the line, as memories fade, if a pollution event occurs. Crisp and precise, it is not.

## Amended condition 36

The new subclause 3 to condition 36 (3) reads:

*36 (3). Within one month of the date of discharge of Condition 36, the Operator shall submit to the planning authority for their information, and to SEPA for their agreement, a Scheme of Monitoring which shall set out details of arrangements for water sampling, analysis and the interpretation of results, prior to commencement of development, during construction and upon completion of construction. The scheme shall include details of the locations for sampling both at the sources of private water supplies and at the points of consumption, the frequency of sampling, methods of sampling and the transport of samples for analysis, the determinands against which samples will be tested, and the arrangements for notification of results, including notification to the users of the private water supplies being monitored. The scheme shall be deemed to form part of the Consolidated Water Risk Assessment and shall supersede Annexes 3 and 4 of that document for the purposes of Condition 36 of the planning permission. (underlining added)*

*Reason: to ensure that there is a detailed and up-to-date scheme of monitoring in place so as to measure the effects of development on private water supplies and the need for, and effectiveness of, mitigation measures.*

So we now have to wait for a Scheme of Monitoring, to be available by 23 March 2017. The Scheme has to have certain contents, which are listed in the Condition.

## The Examination

The Examination disclosed the course of events. The Reporter made it clear during the Hearing on 11 January 2017, that the so-called Water Quality Monitoring Plan, written in September 2015 by the Ecological Clerk of Works, but submitted as an Appendix to the November 2017 PWS RA, was part of Condition 22. That condition deals with the Water Quality Monitoring Plan (WQMP) and Water Pollution Prevention Plan (WPPP) for surface water, not PWS, which are all groundwater dependent on this site. Condition 22 was not before the Reporter to decide. It deals with Surface Water, not with PWSs. Most significantly, it did not comprise part of the updated November PWS RA, written by consultant Hydrologists MacArthur Green which was under consideration. The Reporter said in relation to the 2015 Water Pollution Prevention Plan , which contains the WQMP (Annex 3), submitted to support the November PWS RA by MacArthur Green,

*“The reporter has noted the exchange of e-mails below from Moscow and Waterside C.C. and MacRoberts LLP. [NB MacRoberts acted for the appellants)*

*He considers that while the water quality monitoring plan as such is not before him for a decision, it does form part of the essential underpinning of the water risk assessment for private water supplies, and has been presented as an annex to the PWS report. It is essential, in deciding whether to approve the report\* as a basis for discharging Condition 36, that the reporter can have confidence in the monitoring regime. He takes seriously the concerns raised by local residents and would welcome both the appellant and the council's comments by 23 January 2017”. – DPEA 17/01/17*

*\* i.e. the PWS RA*

and

*“While the enforcement of Condition 22 is not a matter for the reporter, he takes comfort from the appointment of a fellow member of the Chartered Institution of Water and Environmental Management to complete all further water monitoring and sampling”. – DPEA 31/01/17*

*(underlining added)*

So, now we have a condition, the enforcement of which depends on another document written for a different purpose (Surface Water Management) and for a different condition (No 22), which has not been discharged, applying to the application to discharge Condition 36. At best, this is logically inconsistent and confused. At worst, it is completely unworkable and, regrettably, incoherent.

### Submission

With respect, this revised Condition 36(3) does not meet the requirements set out in Planning Circular 4/1998 : *'The Use of Conditions in Planning Permissions'*.

For the new discharged Condition 36 to meet the required (and very familiar) six criteria of the Circular, namely

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

certain, far more robust hurdles must be crossed.

### Does the condition comply with the Circular?

There seems no doubt that the first three criteria are met. However, the last three criteria have emphatically NOT been met, in our submission, unfortunately rendering the condition wholly inept, and, to be frank, ineffective.

Why is that? The following circumstances apply.

Firstly, the people affected submit that we 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 has allowed this appeal and discharged the condition without the required PWS Monitoring Plan being in place.

As we have said, Appendices 3 and 4 were submitted by the appellant as a "PWS Water Monitoring Plan", and were referred to as such by the Appellants' consultants, in support of the November PWS RA.

BUT..... Appendices 3 and 4 belong to the supporting documents of Condition 22, not Condition 36. They are a Surface Water Monitoring and Pollution Prevention Plan written in September 2015, before

the 22 “at significant risk” supplies PWS were even identified by the MWCC and copied by the Appellant into the November PWS RA. They do not relate to a PWS monitoring plan required to be a constituent part of the PWS RA and in particular, a document to support discharge of Condition 36.

So the 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. These Appendices are not, and cannot be relevant to the discharge of Condition 36 (the subject of this appeal).

Yet they have been adopted, *verbatim*, into the new Condition 36.

Condition 22 has not yet been discharged by the LPA for Permission No 13/0198/PP. There is currently a Court Action in the Court of Session about it.

In the amended clause/condition 36(3), above, the Reporter relies on the November PWS RA. It has adopted/transposed Appendices 3 and 4 into its text. Yet these do not provide a Water Monitoring Plan for the 22, “at significant risk” PWSs. They are devised and were written for Surface Water.

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 simply are no monitoring arrangements in place.*

### Question

The question thus comes to be - **How can the whole of Condition 36 therefore be discharged, when the terms of the Condition itself now incorporate irrelevant material, written for a different purpose, and without any reference to an approved Monitoring arrangement.**

Who is legally responsible for PWSs in this location, looking forward?

In acting as he has done, 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.

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)*

We submit that in particular, if the Council is unable to enforce the lasting provision of safe and adequate quantities of either existing or replacement private water supplies, this will have serious implications for public health, animal welfare, the viability of several rural businesses and the viability of

properties and homes for owners of 22 private water supplies deemed to be at significant risk from this development.

The new 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.

It cannot be right, we submit, that the responsibility for assessing the future suitability of a **Private Water Supply** Monitoring Plan has been delegated to SEPA. The PWS Monitoring Plan – which should have been available for public inspection and comment and submitted as part of the documents to enable discharge of Condition 36 -- has now not only been excluded from scrutiny and comment by the LPA and other interested parties, but has been delegated to SEPA, an organisation that has no responsibility for PWS and no responsibility for future alternative water supplies that may be required as a consequence of disruption or pollution of existing groundwater supplies during the development phase or later. Put as simply as possible, SEPA has no responsibility for PWS and cannot assume that role.

**We ask, therefore, by what authority can the Reporter delegate such decision making to an unqualified statutory organisation?**

The Drinking Water Quality Regulator (DWQR), on the other hand, does have a statutory role in ensuring the potable quality of both public and private water supplies, and potentially would have been a more appropriate authority, but it has not been consulted by the Reporter. MWCC understands that within its remit, that DWQR has not been directly involved with small (Type B) PWS, apart from data collection at a National level. So we can discount any reference to the DWQR.

#### 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 power nor the knowledge to influence the outcome. For obvious reasons, from the point of view of the affected public and users of the PWS, this is completely unacceptable.

#### Consequences for PWS users



This decision to bypass the need for submission of a 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, (by the appellants own consultants) with no input into the monitoring of their own PWS.

Aside from contravention of both the Åarhus Convention and the EIA Regulations, which allow for public scrutiny and public participation, we are driven to conclude 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 DWQR has no place. 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 no doubt substantial legal costs of the necessary alteration to title deeds for water rights that such agreements will inevitably require.

#### Water quality and quantity issues

No required PWS Monitoring Plan has been devised or included prior to discharge of Condition 36. There is 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 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. This developer has shown itself to be spectacularly inept, not to say dismissive of community interests to date. The consequences of pollution thus fall back on the PWS user; a complete nullification of Condition 36 and a wholly unacceptable outcome, leaving the words as an empty shell.

**Who will now determine the 'need' for implementing the mitigation measures set out in clause 1 of condition 36'?** 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 it has 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. Can that really be the intended outcome?

It follows that we are able to say that condition 36(1) is not specific, is unenforceable and does not and cannot protect the health of existing PWS consumers.

### Specific users issues

We turn now to the question of the issues which have arisen for specific users. The “new” Condition 36(1) requires new, alternative borehole supplies for Blackhill/Cowans Law, Alton Muirhouse/Alton Lodge and Tayburn/Muirburn which are to be ‘fully operational’ before Ground Investigations for, or construction of the windfarm commences.

### **What does ‘fully operational’ mean?**

There is no definition stated in the new 36(1).

Does this mean all wayleaves agreed, supply pipes and holding tanks in place and 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, does this mean 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). 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.

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.

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.

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”*

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

This would require a crystal ball.

We therefore have to conclude that the condition, as framed, is *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 would then be left to negotiate directly with the developer from a position of disadvantage; a completely unsatisfactory situation.

#### OVERALL CONCLUSION

On the positive side, the mechanism of a Hearing for examination of the appeal issues was welcome and was successful, in that it allowed these concerns to be ventilated, and it forced the appellant to bring forward a PWS RA which had some of the hallmarks of reliability. But in the end it fails to do what it is meant to, because it relied on out-of-date Appendices which relate to Surface Water management, rather than groundwater, which feed Private Water Supplies. 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.

In addition, acting *ultra vires*, the Reporter has bestowed upon SEPA a supervisory role which it cannot 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. For those reasons, it fails to fulfil the criteria in the Circular, and should be revoked.

We are unclear what powers are available to you to put this matter right, in such obviously imperfect conditions. We hope you will be able to reassure us that something can be done to bring this matter to the attention of the decisionmakers - the Scottish Ministers – without delay.

Yours sincerely,

Dr Rachel Connor

(Chair Moscow and Waterside Community Council)