

## Appeal Decision Notice

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Decision by David Russell, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: P/PPA/270/544
- Site address: Wester Fearn Burn, Midfearn, Ardgay IV24 3DL
- Appeal by Charles W. Brooke against the decision by Highland Council
- Application for outline planning permission (Ref: 06/00429/FUL/SU) dated 22 October 2006, and refused by notice dated 5 February 2008
- The development proposed: installation of a small scale hydro-electric scheme (0.95MW) consisting of access tracks, overhead power line, pipeline, intake structure and turbine house with hardstanding and tailrace.
- Application drawings: the five plans stamped as refused by The Highland Council on 5 February 2008
- Dates of hearing: 2 and 3 September 2008

Date of appeal decision: 18 November 2008

### Decision

I allow the appeal and grant planning permission, subject to the nine conditions listed at the end of this notice.

### Reasoning

1. The determining issues in this appeal are whether the proposed development would accord with the relevant provisions of the development plan, and whether there are other material considerations which indicate that planning permission should be granted or refused.

2. As a renewable energy scheme on the Wester Fearn Burn, several provisions of both the Highland Structure Plan and the Ross and Cromarty East Local Plan are of potential relevance. In the structure plan, Policy E1 provides broad support for utilisation of the area's renewable energy resources, including hydro, while Policy E4 provides specific support for hydro energy developments, provided that there is satisfactory provision for the discharge and monitoring of a compensation flow. Separate provisions for granting approval for a temporary period do not appear relevant to this type of renewable energy scheme. However the support of both of these policies is dependent on the proposed



development being consistent with the general strategic policies of the plan, and specifically with Policies G2 and G4.

3. Policy G2 'Design for sustainability' requires every development, not just renewable energy schemes, to be assessed against eleven factors. It states that "developments which are judged to be significantly detrimental in terms of the above criteria shall not accord with the structure plan". Ten of the criteria appear of little or no relevance to the appeal proposal, and there is certainly no evidence on which to basis a finding that the development would be significantly detrimental in relation to any of them.

4. The other criterion requires assessment of the development's "impact on the following resources, including pollution and discharges, particularly within designated areas: habitats; species; landscape; scenery; freshwater systems; marine systems; cultural heritage; air quality." It is the potential impact on the freshwater system to which the council referred in its decision notice, stating specifically that this could, as a result, lead to the destruction of the neighbouring downstream fish farm business.

5. The fish farm business referred to is a salmon hatchery sited on land close to the Wester Fearn Burn and which utilises water extracted from the burn, and discharges directly into the Dornoch Firth. While in itself it is not part of the freshwater system, it is dependent on the burn for both the quantity and the quality of the water it requires. The extensive evidence led on the potential effects on the salmon stock within the hatchery indicates that there may be sensitivities to changes in water quality, purity, and chemical composition which could affect the health, viability and productivity of the stock, with consequential effects on the business.

6. However, there is no evidence that construction and operation of the proposed run-of-the-river hydro-electricity generating scheme would, rather than could, have any adverse effect on either the quantity or the quality of the water in the burn available for extraction for the hatchery. Still less is there any evidence on which to base a finding that, in the specific terms of the policy, the development's impact, including pollution and discharges, would be significantly detrimental in relation to the freshwater system of the Wester Fearn Burn.

7. I will turn to the potential for the salmon hatchery business to be adversely affected later, but in relation to Policy G2, I find that the required assessment of the proposed development against the specified criteria would not lead to any finding of significant detriment and, therefore, it is not to be judged contrary to the structure plan in that regard.

8. Policy G4 is to be applied to all developments. To the extent that the proposed development would support local employment, generate income locally, and contribute to national targets for renewable energy generation, I am satisfied that the proposal fulfils the stated expectation that developments should benefit the local community and contribute to the well-being of the Highlands, whilst also recognising wider national interests. As the other elements of the policy, which relate to developer contributions for community initiatives or consequential infrastructure requirements, and to financial bonds for restoration are not relevant to this proposal, I find that the proposal accords with the requirements of Policy G4 as well.

9. The key diagram of the structure plan appears to indicate that the site of the proposed development lies within a National Scenic Area and, possibly, partly within a proposed Area of Great Landscape Value. I am satisfied however that, both individually and collectively, the various elements of the proposed scheme would not have a significant adverse impact on the area's landscape characteristics which have led to these designations. I therefore conclude that, overall, the proposed development is supported by the provisions of the structure plan.

10. Turning to the local plan, the proposals map indicates that Policies BP2 and BP3 are to apply to different parts of the appeal site. Policy BP2 provides support for development, unless there would be significant adverse effects on the features for which the area has been designated. It is not clear what this is intended to refer to, although attention is directed to an appendix which contains an extensive list, of which the only relevant features again appear to be National Scenic Areas and Areas of Great Landscape Value. For the same reasons as outlined above, I find no evidence of significant adverse effects on the landscape such as would preclude support for the development under Policy BP2.

11. I interpret the appendix as indicating that the designation of the remainder of the appeal site under Policy BP3 is justified by its local landscape significance and its views over the Dornoch Firth. However the policy indicates only that the council will approve developments if there are no significant adverse effects on heritage, amenity, public health and safety interests. In the case of this development, no evidence of any such effects have been drawn to my attention.

12. As I have not found the proposal to be inconsistent with either Policy BP2 or Policy BP3 of the local plan, it is my conclusion in relation to the first determining issue that the proposed development is supported by the relevant provisions of the development plan.

13. It is therefore necessary for me to assess whether the other material considerations also support approval, or are of sufficient weight to justify refusal as an exception, contrary to the presumption in favour of the development plan.

14. National planning policy in relation to renewable energy is set out in Scottish Planning Policy 6. Dated March 2007, it sets out the Scottish Ministers' target for increasing electricity generation in Scotland from renewable sources, which has since been strengthened further. Paragraph 28 confirms the Scottish Ministers' support for run of the river small-scale hydro schemes such as this, to ensure that hydro continues to play an important part in Scotland's renewable energy mix.

15. It also advises that development plans should confirm that issues such as impacts on the natural and cultural heritage, water regimes, fisheries, aquatic habitats and species and cumulative impacts must be adequately addressed by applicants. I am satisfied that the policy framework which is applied through the Highland Structure Plan reflects this approach.

16. The council has subsequently published a specific 'Renewable strategy and planning guidelines'. This is supplementary planning guidance to which regard should be had, but is of less weight than the provisions of the current development plan as it has not been subject to independent scrutiny or ministerial approval. I have not identified anything in this strategy which changes the basic policy position of support for small-scale hydro-electric schemes, subject to their impacts being acceptable.

17. However, specific mention is made of impacts on other commercial users, and the relevant policy states that: "Renewable energy developments should not interfere with existing commercial activities. However, where there are clear advantages and the scale of benefits from renewable developments outweighs existing levels of activity, then a suitable compromise/transition between the two commercial activities may be sought."

18. Here, there remains a possibility that the construction or operation of the hydro-electric scheme could cause an impact on the quality or quantity of the water in the Wester Fearn Burn which would have a significant effect on the neighbouring salmon hatchery business. The potential destruction of this business was the reason given by the council for its decision to refuse planning permission.

19. The perception of risk here is perhaps heightened by the geographical proximity of the hatchery, which is situated on the western bank of the burn, directly opposite the proposed site of the turbine house and associated tailrace. As the intake for the hatchery is upstream of the proposed tailrace, the potential for pollution or discharges to affect the hatchery is restricted to possible effects associated with the operation or construction of the weir, some three kilometres upstream, or a landslide along the pipeline route or failure of the pipe itself.

20. However, as already referred to above, no evidence has led me to conclude that there would be an adverse effect on the hatchery, either from the construction or the operation of the scheme. The Scottish Environment Protection Agency is the relevant regulatory authority in relation to the protection of the water quality of the burn. Under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 it has already issued a "CAR" licence for the scheme. It was confirmed in evidence that the agency had taken into account the presence of the hatchery in assessing the potential impacts.

21. While some details of the scheme have been modified since the licence was issued, and further licences will be required in relation to specific aspects, I am satisfied that, applying the test of "the balance of probabilities", the evidence before the hearing would lead me to conclude that it is unlikely that the construction and operation of the proposed scheme would have an adverse impact on the neighbouring salmon hatchery business. In the terms of the wording of the council's renewable energy policy, I consider that it equates to a conclusion that the development "should not interfere with existing commercial activities".

22. However, I also recognise that, despite the safeguards which may be built in through planning conditions or the licensing requirements, there would remain a possibility of an incident associated with the construction or operation of the scheme occurring through natural events, human error, or undetected design fault which could have an adverse

impact on the operation of the hatchery. Few developments can be undertaken without some risk to neighbouring users, notably through additional traffic movements, although I accept that the potential sensitivity of fish stock to unexpected discharges could lead to a significant effect. In these circumstances, the appellant's proposed provision of insurance cover appears to offer a very significant safeguard, and to constitute the type of compromise between the two activities which the council's non-statutory policy suggests could be sought.

23. In these circumstances, while an incident could conceivably result in the destruction of the fish stock, it is even less likely to result in the destruction of the business, which was the reason given by the council for its decision to refuse planning permission.

24. Photographs produced for the hearing demonstrated the existing susceptibility of the Wester Fearn Burn to "flashy" flood events and gave clear evidence of recent landslips along its banks, both of which would have given rise to significant increases in suspended solids within the water. While this suggests that similar events can be expected in future, to date they appear to have had no adverse effect on fish stock health within the hatchery, or on its business. The absence to date of regular monitoring of the quality of intake water at the hatchery is surprising in view of the company's expressed concerns about the potential impact of small changes in water quality on its business in the context of the potential effects of the proposed hydro electricity scheme.

25. I have considered all the evidence given at the hearing and contained within the written submissions, but nothing has led me to alter my conclusion that there are no material considerations which indicate that planning permission should be refused for this development which I have found to be consistent with the relevant provisions of the development plan.

26. Turning now to the planning conditions to be imposed, I have considered those suggested by the parties and have adjusted them in the light of the discussion at the hearing and of the requirements of Circular No. 4/1998: 'The use of conditions in planning permissions'. I have included a condition imposing an obligation on the developer in relation to insurance protection for the neighbouring hatchery business, as this appears also to meet the tests of the circular. In these circumstances, and as the consent is not temporary in nature, I do not consider that it is necessary to require the prior completion of an agreement under Section 75 in respect of insurance, restoration, or any other matter.

***This is the version issued to parties on 18 November 2008***

DAVID A. RUSSELL  
Principal Inquiry Reporter

## LIST OF CONDITIONS

1. The development hereby permitted shall be begun within five years of the date of this notice.

*Reason: To limit the duration of the consent, as required by Section 58 of the Town and Country Planning (Scotland) Act 1997.*

2. The development shall be undertaken in accordance with the application, except insofar as amended by the terms of this permission or as subsequently agreed in writing by the planning authority. Construction of the permitted development shall be undertaken in one continuous phase, and shall be completed within a six month period.

*Reason: To minimise potential disruption to the neighbouring salmon hatchery business.*

3. Before the development starts, a construction method statement shall be submitted to and be approved in writing by the planning authority. The development is to be carried out in accordance with the approved statement, which shall include:

- a) a detailed construction programme and timetable;
- b) a code of construction practice incorporating the Scottish Environment Protection Agency's Pollution Prevention Guidelines;
- c) pollution prevention measures including contingency plans;
- d) provision for waste management and waste minimisation;
- e) a landscape and habitat restoration plan;
- f) provision for ongoing management and maintenance of the scheme, including arrangements for the timing of maintenance works to be agreed in advance with the operator of the adjacent salmon hatchery.

*Reason: To minimise the likelihood of pollution of the Wester Fearn Burn, or of any adverse impact on the operation of the neighbouring hatchery.*

4. At least one month before work starts, details of all access arrangements, both permanent and temporary, shall be submitted to and be agreed in writing by the planning authority. The submission shall include an assessment of construction traffic generation and management insofar as public roads are affected, and details of any new access points and of extended passing places.

*Reason: To safeguard road safety.*

5. Before the development starts, the written approval of the planning authority shall be obtained for the detailed design relating to the siting and visual appearance of the intake weir, including the compensation flow notch, gabions and any other bank protection measures, the pipeline route, and the tailrace.

*Reason: To safeguard visual amenity and to minimise the impact on the landscape.*

6. Before the development starts, a scheme for monitoring water quality in the Wester Fearn Burn shall be submitted to, and be approved by, the planning authority. The scheme shall include details of the testing points, the methodology and equipment to be used, the means of analysis, the timetable for monitoring, the reporting procedures, and the emergency procedures for alerting the neighbouring hatchery business.

*Reason: To protect the fish stock in the neighbouring salmon hatchery.*

7. Before the development starts, a scheme for monitoring of fish health at the neighbouring salmon hatchery shall be submitted to, and be approved by, the planning authority. Monitoring shall commence at least three months prior to the start of construction of the development and not cease until three months after the development has been commissioned.

*Reason: To enable any effects of the construction of the development on the fish stock in the neighbouring salmon hatchery to be identified.*

8. In the event of no electricity being generated by the development over a period of 12 months, the sluice gate at the intake weir shall be closed.

*Reason: To remove the potential effect of the development on water quality and quantity, in the event that the approved scheme ceases to generate electricity over a whole year.*

9. The development shall not start before the owner has provided to the planning authority and the neighbouring hatchery business a copy of an insurance policy, or the relevant extract from an insurance policy, currently in force and detailing the protection provided for the neighbouring hatchery business in the event of the construction or operation of the development affecting the quantity or quality of the water in the Wester Fearn Burn. Thereafter, the insurance policy or relevant extract from the insurance policy currently in force shall be provided to the planning authority and the neighbouring hatchery business annually. The policy shall be in the terms specified in submissions lodged on behalf of the developer on 18 September 2008.

*Reason: To ensure financial protection for the company operating the neighbouring hatchery in the event of the development affecting its business.*