



Law Society
of Scotland

Consultation Response

Assessing the impact of repowered wind farms on
nature

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Introduction

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We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the United Kingdom and Scottish Governments, Parliaments, wider stakeholders and our membership.

Our Planning Law sub-committee welcomes the opportunity to consider and respond to Scottish Natural Heritage's consultation paper: *Assessing the impact of repowered wind farms on nature*¹. We have the following comments to put forward for consideration.

Consultation Response

1. We advise that the formal baseline for EIA should be the expected restored state of the site, excluding the existing turbines. We set out our reasoning at Annex A of this draft guidance.

Do you agree with this approach? If not, why not?

We have concerns regarding the approach taken in the consultation paper. We consider that the law in this area is complex and uncertain and we cannot be satisfied as to whether the proposed approach complies fully with the EIA Regulations.

Due to the legal uncertainty in respect of the Regulations and the potential for the legal position to vary depending on the circumstances of the case, it is difficult to produce guidance which covers all possible circumstances in the same manner.

The consultation appears to blur the distinction between the requirements of the EIA Regulations and wider planning issues. The consultation title and document itself does not specifically mention EIA, yet Annex A is clearly restricted to the EIA baseline. EIA is part of the consenting process – the environmental

¹ <https://www.nature.scot/sites/default/files/2018-06/Guidance%20-%20Assessing%20the%20impact%20of%20repowered%20wind%20farms%20on%20nature%20-%20consultation%20draft%20-%20June%202018.pdf>

information contained in the EIA Report is taken into account when determining a consent application. The expected restored state of the site would also be a consideration in such a process.

The Regulations require: “A description of the relevant aspects of the current state of the environment (baseline scenario) **and** an outline of the likely evolution thereof without implementation of the development as far as natural changes from the baseline scenario”² (our emphasis).

The Regulations therefore indicate that the baseline scenario is “the current state of the environment”. There are differing views as to the meaning of this. We note that the Regulations require an outline of the evolution “as far as natural changes ...”. It is questionable as to whether restoration of a wind farm site in compliance with the terms of a planning permission is a “natural change”. We note that Annex A of the consultation paper omits to mention of “natural change”.

We note the decision of the High Court of Justice in *William Bosson v Derbyshire County Council and others*³. The development in this case was of a different nature to that dealt with in this consultation, but it involved a new development on a site where the permission for the existing development had come to an end without the conditions requiring restoration having been complied with. It was agreed between the parties that the EIA ought to have proceeded on a baseline in which the development was actually restored in accordance with the conditions even though at the time of the application having been made, it had not been so restored.

We consider that the correct approach to be taken will depend on the circumstances of each case. For example, we do not agree that the same approach should be adopted whether the repowering proposal comes forward at the end of the existing permission or at a much earlier stage. It may be that significant changes have been made to the site as a result of a previous wind farm having been built and then subsequently decommissioned and it is potentially artificial and unrealistic to ignore those changes and assume no wind farm had ever been built on the site. Having said that, there will require to be sufficient clarity in guidance to allow individuals and businesses to take the appropriate approach to the circumstances of their case.

The consultation raises concerns about reduced potential for identifying significant effects. We note that statutory consultees, such as SNH, have the opportunity to raise such matters in responses to the planning authority on consent applications. Such actions could result in additional information being required from the applicant if not already provided within the application. The consultation notes “there would be a high risk of underestimating the effects of successive incremental changes”. It is not clear if there is an evidential basis for the assessment of this as a “high risk” nor is “successive incremental changes” defined. In practice, repowering is likely to be a single change.

There may be merit in considering the approach taken to mineral permissions, which are also time-limited with restoration requirements and subject to EIA. Mineral permissions are not repowered but it is possible

² The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, Schedule 4, part 3

³ [2011] EWHC 2566 (Admin).

that an application for an extension to the existing mineral workings could involve postponing some or all of the restoration requirements, which would raise broadly similar issues regarding the EIA baseline.

2. We think it could also be helpful for decision-makers to see information comparing the full likely significant effects of the new proposal with the effects of the existing scheme. For example, we suggest that the application information should include a table comparing likely significant effects, a comparative ZTV, and comparative visualisations based on the 'baseline panorama and wireline' type format (see Section 2).

Do you agree with the proposed approach to comparing effects? Can you suggest a better alternative on how to present comparative visualisations?

We have no comments to make. The matters arising are best addressed by EIA professionals.

3. Because of the existing wind farm, standard bird surveys will give a skewed picture of the restored site's likely bird activity and the related impacts of the new proposal. This is largely due to displacement effects. We therefore advise that there should normally only be a new desk-based assessment drawing upon a range of information (see Section 3).

Do you agree with this approach? If not, why not?

We have no comments to make. The matters arising are best addressed by EIA professionals.

4. We advise that new terrestrial species and bat surveys should typically be undertaken. New habitat survey is also likely to be required and new peat survey may be necessary to comply with the latest peat survey guidance. Developers should review the success of any implemented restoration/ management associated with the original scheme, and look for opportunities to improve upon this.

Do you agree with this approach? If not, why not?

We have no comments to make. The matters arising are best addressed by EIA professionals.



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