

National Taskforce for Human Rights Leadership

Human Right to a Healthy Environment and Planning Decisions – Case Studies

Background

RSPB Scotland and the Environmental Rights Centre for Scotland (ERCS) offered to provide case studies to emphasise the value of incorporating the human right to a healthy environment, to inform the work of the Scottish National Taskforce for Human Rights Leadership.

The state of Scotland's environment – what are the issues and problems?

Scotland's environment is far from being in a healthy state. In April 2019, the First Minister declared a climate emergency and the Scottish Parliament responded with the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019¹ setting targets of “net-zero” emissions by 2045 and a 75% reduction by 2030. It is increasingly clear that a similar effort is needed to restore nature. The First Minister has acknowledged that the global nature crisis is as significant as the climate emergency and said she wants Scotland to lead the way on this vital issue.² The UN's Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) highlighted in May 2019³ how global nature was declining at “rates unprecedented in human history” and that “transformative changes” were needed. Additionally, the 2019 State of Nature report⁴ showed that on average, we are still losing wildlife in terms of both species' abundance and occupied range across Scotland.

In August 2020, the Edinburgh Declaration⁵ set out the aspirations and commitments of the Scottish Government, and others, in delivering for nature over the coming decade. It outlines deep concerns about the significant implications that the loss of biodiversity and climate change has on our livelihood and communities and acknowledges that healthy biodiversity and the ecosystem services that it provides are key for human well-being. Furthermore, a recent report by the European Environment Agency⁶ has outlined the strong links between the environment and human health. Most recently, in September 2020 the final “stocktaking” report on the world's progress against the Aichi targets was published. This report (Global Biodiversity Outlook 5)⁷ shows that we have failed to take enough action to turn the tide of biodiversity loss. Things continue to get worse.

Scottish planning system – what are the current provisions?

There are well-established processes for environmental assessment in Scotland, which originate in EU Directives. Strategic Environmental Assessment (SEA)⁸ is required under the Environmental

¹ <https://www.legislation.gov.uk/asp/2019/15/enacted>

² https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12083&mode=html#iob_109348

³ <https://www.ipbes.net/news/Media-Release-Global-Assessment>

⁴ <https://nbn.org.uk/stateofnature2019/reports/>

⁵ <https://www.gov.scot/publications/edinburgh-declaration-on-post-2020-biodiversity-framework/>

⁶ <https://www.eea.europa.eu/publications/healthy-environment-healthy-lives>

⁷ <https://www.unenvironment.org/resources/report/global-biodiversity-outlook-5-gbo-5>

⁸ <https://www.legislation.gov.uk/asp/2005/15/contents>

Assessment (Scotland) Act 2005 and is a systematic process for evaluating the environmental implications of a proposed policy, plan or programme. It provides means to look at cumulative effects and appropriately address them at the earliest stage of decision making alongside economic and social considerations.

Environmental Impact Assessment (EIA) required under The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017⁹ is an exercise carried out by the developer which enables a Local Planning Authority (or Scottish Ministers) to understand the environmental effects of a development before making a decision. There is an emphasis on using the best available sources of objective information and in carrying out a systematic and holistic process which should lead to better standards of development with appropriate mitigation, or development not happening at all.

Habitats Regulations Appraisal (HRA)¹⁰ is required under the Habitats Regulations in order to assess adverse effects on the integrity of European sites and is applied at both the plan and project level.

Planning legislation is extensive and deals primarily with the processes leading to a planning decision, to ensure that the decision is an informed one and taken legally, rather than the decision itself which is a matter of judgement of the planning authority. Planning law requires that decisions are made in accordance with the development plan unless material considerations indicate otherwise (applications under Section 36 of the Electricity Act are not subject to this requirement). A material consideration should serve or be related to the purpose of planning and to the development and use of land; and it should fairly and reasonably relate to the particular application in question. It is for the decision maker to assess both the weight to be attached to each material consideration and also whether individually, or together, they are sufficient to outweigh the provisions of the development plan. This gives a degree of discretion to planning authorities including when weighting economic interests against environmental and other concerns. Environmental information should have been taken into account in the production of the relevant development plan through SEA and both EIA and HRA provide the decision-maker with environmental information for the project.

Planning is, by its nature, often a contentious process. The need to apply for planning permission exists because property development by individuals to meet their own desires and needs inevitably affects the interests, to a greater or lesser extent, of neighbours or the wider community, sometimes adversely. In terms of the ability of individuals to challenge planning decisions, there are currently no third or equal party rights of appeal in Scotland although applicants can appeal refusals of consent, which creates an imbalance. Scotland however, as part of the UK, is bound by the 1998 UN Aarhus Convention¹¹ on access to environmental justice. Groups have been critical of the Scottish Government for breaching commitment and a report produced by the UN convention's compliance committee concluded that Scotland "has not yet fulfilled" key requirements of the convention.¹² Human rights are sometimes invoked by third parties in the planning system but there are few examples in this regard of them being upheld in court.¹³

⁹ <https://www.legislation.gov.uk/ssi/2017/102/contents/made>

¹⁰ <https://www.legislation.gov.uk/uksi/1994/2716/contents/made>

¹¹ <https://www.unece.org/env/pp/treatytext.html>

¹² http://www.unece.org/fileadmin/DAM/env/pp/mop6/Documents_aec/ECE.MP.PP.2017.46_as_submitted_advance.pdf

¹³ <https://www.pas.org.uk/wp-content/uploads/2019/09/7-Rights-Challenges.pdf>

Case study - What does the Menie Estate (Trump) golf course application tell us about the ability of the current provisions to secure a healthy environment?

Development controlled by the planning system is of course not the only driver of change in the environment however it is a vital tool in reducing carbon emissions, adapting to climate change and ensuring that biodiversity is protected, enhanced and restored as well as helping to protect communities from adverse impacts. As set out in the previous section, on the face of it, Scotland has a range of provisions in place to prevent damage to the environment through the planning process so why are we now facing twin biodiversity and climate crises and issues with health and wellbeing?

Unfortunately, environmental considerations are often not given sufficient weight in the decision-making process. One example where a favourable environmental outcome has not been achieved is the Trump International Golf Links Scotland (TIGLS) case where an application was lodged in 2006 to build a golf course and resort development at Menie Estate in Aberdeenshire. Aberdeenshire Council's Infrastructure Services Committee voted to refuse the development after the application was referred to them following a "minded to approve" decision from the local area planning committee. Following the refusal, the Scottish Government 'called-in' the application for their own determination (this led to a Parliamentary inquiry over the circumstances¹⁴) and a Public Local Inquiry was held in mid-2008 involving a number of parties, including environmental NGOs and members of the public. There were more than 4,000 written representations concerning the development from concerned individuals and bodies made initially to Aberdeenshire Council and subsequently to Scottish Ministers. Statutory consultees including SNH and SEPA were amongst the objectors¹⁵

There was a significant amount of environmental information concerning the proposal and its likely effects contained in the Environmental Statement (ES) and the supporting documentation. The key issues considered by the inquiry included the likely impact on sites designated for nature conservation and also the economic benefits of the development, although a number of other issues were also considered.

The case against - impacts on the SSSI

Part of the golf course is on Foveran Links Sites of Special Scientific Interest (SSSI) and many objections related to the fact that the application would involve the destruction of a third of the SSSI and other biodiversity and habitats. A strong case was made by the objectors in evidence given at the inquiry that this is a unique and exceptional natural heritage site and should be protected for future generations. This is one of the very best examples of a mobile dune system in the country and SSSI designation should offer such a site a very high level of protection. The UK's network of SSSIs are designated for good reason, to prevent the piecemeal but cumulative loss of our biodiversity. The Nature Conservation (Scotland) Act 2004 sets out the legal mechanism for protecting Scotland's SSSIs which are of special interest since they are "representative of the diversity and geographic range of Scotland's natural features."¹⁶

The developer's own ES acknowledged that there would be significant adverse effects on habitats and biodiversity. Much of the qualifying features of the Foveran Links SSSI were predicted to be destroyed – specifically the area of natural, mobile sand dunes that would be irreparably damaged by "stabilisation" to provide the back nine of one of the two courses. It also promised various

¹⁴ <https://archive.parliament.scot/s3/committees/lgc/reports-08/lgr08-05.htm>

¹⁵ <https://www2.gov.scot/Resource/Doc/212607/0067709.pdf>

¹⁶ <https://www.legislation.gov.uk/asp/2004/6/contents>

‘mitigation measures’ to ‘maintain and enhance as much natural interest as possible.’ It became apparent during the inquiry that the application could be easily modified to deliver a world-class golf course which avoids the SSSI. RSPB Scotland, who had objected to the application, together with the Scottish Wildlife Trust, tried to engage constructively from an early stage with the developer about possible design solutions that would avoid the destruction of a nationally important wildlife site but regrettably attempts failed.¹⁷ The idea was that, if Ministers decided to let the development go ahead, they could do so in a manner that would be less damaging, avoiding the SSSI and the mobile sand dome in the southern part of the application site. Aside from the SSSI impacts, the application was also contrary to development plan policies on housing, development on the coast and others.

The case for – economic benefits

The applicant estimated that the development would bring major benefits for the local and Scottish economy, with an estimated 4,694 net full-time equivalent construction jobs (on a one-year basis) and 1,237 net full-time equivalent jobs from ongoing operations, both at the Scotland level.

Aberdeenshire Council’s independent economic study broadly confirmed the benefits cited by the applicant. Once completed, the development would generate 1,400 net additional jobs locally with £64 million spent each year in Aberdeenshire. The Council (at the local area planning committee) supported the proposed development because of the economic benefits through growing and diversifying the economy were sufficient to outweigh the conflict with development plan policies relating to the environment, protected landscapes and new house building.¹⁸

The decision – balancing interests

At the inquiry, the Scottish Government reporters outlined that the assessment of both the development plan and material considerations would be critical to the recommendation and the decision on the application. The reporters concluded that their findings “show that the proposal amounts to a significant departure in respect of environmental impact, landscape impact and as the consequence of the proposed residential development.”¹⁹ Despite this, and the fact that there were alternative ways to develop a golf course whilst avoiding the SSSI, the recommendation was for approval subject to conditions on the basis that ***“economic and social advantages of this prospective development at national, regional and local level are such as to justify, uniquely, the adverse environmental consequences caused by a development on this scale and in this location.”***²⁰

The impact on the SSSI was clearly set out, with the recommendation stating that the objectives of both designation and overall integrity would be compromised and the loss of 10% of the Annex 1 habitat within the development site was a “a major adverse effect”. It was further acknowledged that these habitats support birds, animals, invertebrates and plants of high nature conservation importance and these would be likely to be affected to the extents indicated in our findings. Ministers were asked to set the significance of these conclusions against the commitment within the UK Biodiversity Action Plan to halt the loss of biodiversity by 2010.

Following the reporter’s recommendation, the application was approved late 2008 by Scottish Ministers. Finance Secretary John Swinney said that the significant economic and social benefit of the project was a major consideration in his decision²¹ and that the Trump Organisation would need

¹⁷ <https://ww2.rspb.org.uk/our-work/rspb-news/news/details.aspx?id=tcn:9-189755>

¹⁸ <https://committees.aberdeenshire.gov.uk/committees.aspx?commid=5&meetid=10507>

¹⁹ <https://www2.gov.scot/Resource/Doc/212607/0067709.pdf> (Page 8)

²⁰ <https://www2.gov.scot/Resource/Doc/212607/0067709.pdf> (Page 9)

²¹ <https://www.scotsman.com/news/donald-trump-time-right-i-want-get-started-2507815>

to make sure sand dunes and wildlife on the estate at Menie were properly protected (there were planning conditions attached to the consent but there were issues with implementation of these, see below). First Minister Alex Salmond made reference to the 6,000 possible jobs and Aberdeenshire Council Leader welcomed the decision also citing the positive benefits to jobs and tourism.²²

The current situation

Over 10 years after the decision was made, SNH announced that the Foveran Links SSSI is set to suffer “partial denotification” because of destruction caused to it by the golf course at Menie.²³ Its inspectors had decided that the damage to the site through loss of its most important geomorphological features is now so great that it should be officially described as “partially destroyed”. Information on the implementation of planning conditions designed to minimise damage to the site was either unpublished or heavily redacted.

Currently only one of the two consented 18-hole golf courses are open and an application has since been approved for housing, with the hotel element of the original proposal not being developed with as it is “no longer economically viable”. Aberdeenshire Council described the alternative proposals as “a weak substitute”.²⁴

Many local residents and councillors believe that the development did not justify damaging the delicate ecosystem at Foveran. The applicant had claimed that, when completed, the land there would be “environmentally enhanced and better than it was before”, however it appears that this is not the case and a healthy environment has not been secured and raises the question of how to secure ecological justice.

Conclusion - what added value would a human right to a healthy environment bring?

Whilst some of the difficulties with the Menie case were as result of the failure of the developer to engage constructively with the planning system, it also points to wider problems. It is one of many examples where a healthy environmental outcome has not been secured after the balance of interests have been weighed up and extra legal provisions would be beneficial in such cases. It highlights that although there are processes in place to consider the environmental impacts of a development, these interests can still be overridden. In the Menie case, a nationally important wildlife site was partially destroyed for the promise of economic benefits, many of which have not materialised.

If relevant authorities had an obligation to protect everyone from current and emerging environmental degradation, which has or is likely to have an impact on human life and well-being, this would strengthen existing provisions and help ensure decisions are made with the best interests of Scotland’s environment and population as a whole in mind. There needs to be measures in place to ensure that economic growth and development cannot be at any cost and that adverse environmental impacts, affecting climate, biodiversity and health and well-being are given sufficient weight in decision making.

An integrated approach to environmental and human rights law would be welcome and key will be finding a way to implement provisions to ensure that change is effective, and the balance is shifted

²² <https://www.heraldsotland.com/news/12372990.jobs-prove-trump-card-as-pound1bn-golf-plan-goes-ahead/>

²³ <https://www.nature.scot/reasons-proposed-partial-denotification-foveran-links-sssi>

²⁴ <https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-46399752>

towards achieving a healthy environment, to halt degradation and achieve restoration and to ensure the health and well-being of the population. Any new obligations should be integrated into the planning system at all stages to influence decisions, with judicial address being a last resort only, to ensure business as usual is properly challenged.

Case studies - What do on- and offshore renewables applications tell us about the ability of the current provisions to secure a healthy environment?

Scotland needs to move rapidly to low carbon energy to tackle climate change however we must achieve this in harmony with nature. This means putting renewables in the right places, and rigorously assessing impacts. Whilst windfarms have obvious benefits in terms of their carbon saving potential, there are several instances of wind energy developments in Scotland which have been granted permission despite clear adverse impacts on the environment being predicted and with outstanding objections from statutory and non-statutory consultees on these impacts.

Forth and Tay offshore wind farms

In 2014, the Scottish Ministers granted consent for four offshore wind farms (with up to 335 turbines) located in the Firths of Forth and Tay off the east coast of Scotland. This was despite objections from various consultees due to the cumulative risks posed by the four wind farms for seabirds, cetaceans and salmon populations in the internationally designated Special Protection Areas (SPAs) and Special Areas of Conservation (SACs) of this region – risks considered by statutory advisors SNH and JNCC to be too great for public interests to override. The assessments estimated over a thousand gannets and hundreds of kittiwake could be killed each year during the summer months alone and many hundreds of puffin could die as a result of losing important feeding areas. Objections also outlined that a precautionary approach had been largely overlooked throughout the entire assessment process, evident from gaps in assessment findings, coupled with lack of mitigation measures to offset negative impacts on nature and marine life over the operational life of the wind farms.

However, despite this advice, Marine Scotland Licensing Operations Team (MS-LOT), on behalf of Scottish Ministers, concluded that the four proposed wind farms would not adversely affect the integrity of the SPAs and SACs in the region. MS-LOT were satisfied that although the developments would have an impact on the environment, environmental issues would be appropriately addressed by way of mitigation and monitoring and that any impacts which remained were outweighed by the benefits the developments would bring.^{25,26} The 2014 consented offshore wind farms were predicted to generate a combined gross value between £314m and £1.2bn in their lifetime, generate up to 13,000 jobs within Scotland and power up to 1.4 million homes, as well as delivering renewable energy to the national grid.

Following the decision, the RSPB raised a legal challenge against Ministers in 2015 on several grounds including the lack of consultation, flaws in the appropriate assessment process and failure to take into

²⁵ http://marine.gov.scot/sites/default/files/submission_to_ministers_0.pdf

²⁶ http://marine.gov.scot/sites/default/files/submission_to_minister_redacted.pdf

account impacts on a proposed SPA. The final claim was that Ministers failed to give sufficient weight and merit to the advice of its statutory conservation advisers, or alternatively, in failing this, give an adequate justification for doing so. The Outer House of the Court of Session were in favour of the pleas made by the RSPB however this ruling was overturned on appeal by the Scottish Ministers in the Inner House where the Lord President was dismissive of the scientific evidence provided by the consultees regarding the impact the four wind farms would cause to the integrity of the SPAs and SACs²⁷. The different rulings in the offshore wind case highlights the degree of subjectivity applied when interpreting the law and that the weight given to a right to a healthy environment would have to be significant to be meaningful in cases such as this. Following the court proceedings, applications for new designs to replace the 2014 consents were submitted and subsequently approved. RSPB Scotland have focussed on securing national scale opportunities for seabird conservation, including monitoring, research and focussed site-based measures.

Strathy South

SSE applied to build a 39-turbine windfarm at Strathy South, in the middle of the Flow Country in the north of Scotland. This is an area home to many threatened species such as red-throated divers, hen harriers, greenshanks and the rare wood sandpiper. The natural beauty of the Flow Country and its importance for wildlife has been recognised in its consideration for UNESCO World Heritage Status. The site was forested in the 1980s, under a long-abandoned policy of planting on peat bog. Today, much of the once forested land around Strathy has been returned to its former glory and all the areas surrounding the proposed development are designated as a Special Protection Area (SPA), Special Area of Conservation (SAC) and Ramsar site.

Objectors considered the site was unsuitable for development due to the risk to the surrounding species and habitats. SNH maintained their objection throughout the application process in relation to impacts on both red-throated divers and greenshank.²⁸ There were concerns about impacts to a range of species through collision and the prevention of full re-colonisation by open-space birds once trees were removed and bog habitat restored. Restoration of the internationally important blanket bog habitat was possible and wind farm development on the site would prevent this happening fully. Objectors made the case national targets for renewable energy development could be easily by met without the need for such damaging and inappropriately sited proposal. As well as the objections by statutory and non-statutory consultees, the Scottish Government received several hundred representations from members of the public the majority of which were objections regarding the wildlife and habitat impacts.

The Highland Council had also objected but Scottish Ministers granted consent for the windfarm in April 2018, following a public inquiry. The decision stated “Ministers are satisfied that many of the environmental issues have been appropriately addressed by way of the design of the proposal and mitigation, and that the issues which remain are, on balance, outweighed by the benefits of the proposal”.²⁹ Following the original decision, a Section 36 application to vary the terms of the consent has been submitted and we await the new decision.

²⁷ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=116833a7-8980-69d2-b500-ff0000d74aa7>,
<https://www.scotcourts.gov.uk/search-judgments/judgment?id=d69419a7-8980-69d2-b500-ff0000d74aa7>

²⁸ <http://dpea.scotland.gov.uk/CaseDetails.aspx?id=115293>

²⁹ <http://dpea.scotland.gov.uk/CaseDetails.aspx?id=115293>

Conclusion - what added value would a human right to a healthy environment bring?

These projects present significant risks to some of our most important biodiversity. Although we need to urgently increase efforts in order to reach net zero by 2045 at the latest, action taken to address climate change must avoid creating new, or exacerbate existing, environmental problems. Despite having processes in place to prevent environmental damage and having targets and objectives to the halt loss of and restore nature, Scotland's nature is in decline. It can no longer be acceptable to continually make 'exceptions', with other factors outweighing environmental impacts, and allow development to go ahead despite leaving nature in a worse state for future generations. Otherwise, our biodiversity objectives are ultimately meaningless.

Environmental interests should not have to be pitted against each other – decision makers must ensure that developments protect, enhance and restore biodiversity as well as delivering climate benefits. A right to a healthy environment could help deliver these goals by giving the environment higher status in decision making and ensuring that decision makers can be held accountable.