

ATTENDANCE NOTE

CLIENT: Welsh Government

MATTER: DNS Garn Fach

DATE: 10 January 2024

ATTENDED BY: Arwel Williams, James Cooke, Ben Standing and Rudo Mudyarabikwa

ATTENDANCE UPON: Hearing day 2 of Garn Fach DNS Application

12:30

Resume hearing session 1

2nd day

Recap

1st day dealt with all issues on item 1 of the agenda and part of item 2 in regard to peatland.

The inspector proposes to resume then hearing on hydrological and hydro geomorphology matters and then proceed to policy.

With reference to the point at which hearing session 1 was adjourned, the inspector's understanding of NRW's position on the benefits vs disbenefit of scheme in relation to peat is that NRW accept that there are concerns regarding efficacy of certain restorative/compensation measures but that it leaves it to the decision maker as to how the decision should be made. The inspector queries whether this position reflects a change in NRW'S position with reference to para 2 of its hearing statement which says enhancements cannot compensate damage to peat if the development proceeds.

Mr Pryce: – restoration cannot compensate damage to peat resource. We reiterate the we have uncertainty regarding the success of restorative measures on certain habitats on the site. The fact that the original peat will be deeply impacted and if the original peat is lost it cannot be put back as it was.

Inspector: that's not what compensation means- it means something different being offered/put in place is equal to or equates to something more than what has been removed.

Dr Pete Jones: NRW's concern focuses on the losses outlined at table 8.4 of the applicant's peatland geology, hydro geology statement (pg 13). Our position, whilst we welcome restorative measures and notwithstanding lack of certainty on what will be achievable it is difficult to measure the impact of the loss of peat and in any event it is a loss we do not want to see. It is difficult to calculate the exact overprint of development on peat. With reference to socg 5.53 ha of peat to be excavated. We appreciate applicant has gone to some extent to minimise that figure but we have not seen figure of what that has been reduced to but it must still be around the 4. 5ha figure which has to be balanced against loss of nvc features on table 8.4. Loss of habitat is not easily compensatable and amendment to PPW firmly affirms the position on loss of habitat.

inspector: I have to prepare a report on this and it will be difficult. I want NRW to clarify its position but I am not getting a clear answer. Is NRW neutral on the loss and compensation proposed by the applicant?

Dr Pete Jones: refer back to final paragraph of NRW's hearing statement. We do clearly say the proposed restoration cannot compensate for the loss of and damage to peat resource.

Mr Pryce: our role is that of statutory advisor. The status of the site is not underpinned by protection/ designation but our response has been provided and ours is a technical response. We have stirred away from policy position however, we have worked with applicant in progressing the matter from where we were at suspension and we have an agreed position in the in SOCG.

Inspector I am not sure the message from NRW is consistent. what should I take?. From yesterday I understood that NRW were unable to advise whether the compensation was a good or a bad thing.

Mr Pryce: we are unable to answer that without reference to policy position however, we are fine with our technical advice.

The Inspector's summary of the current position is not clear whether NRW are making comment on compensation. His understating is that Mr Pryce saying NRW are neutral and Dr Pete Jones is saying it is not possible to comment on the compensation.

Trinick KC: Respects NRW's position and it is understandable. It is a position he has met in other areas of the UK and similar to the position that would be taken by Nature Scotland who would be limited to giving technical response only and do not comment on policy. NRW's position is fair.

Inspector: so, on technical basis is NRW telling me this is harmful? I am not asking for acceptability of damage I am asking what is, on balance the good and/or bad to peat as a result of the development. When I write my report have to be careful on how I characterise NRW's position

Mr Pryce: can only reiterate NRW's our technical opinion in the hearing statement i.e. that restoration cannot compensate loss.

Inspector thinks this clear.

Question to Mr Standing (LQAS).

Not factoring policy, as a concept, do you agree a scheme beyond mere compensation being something to make good harm caused and to return to neutral position(net benefit).

Mr Standing: when we are reviewing a planning application there are material considerations to take into account and of course excess biodiversity net gain. Sometimes over provision can be considered a material consideration but it has to be considered in conjunction with policy. In this case peat has elevated status in policy and is irreplaceable.

Inspector: in terms of peat (setting aside policy). Where there is expected small harm and extreme high benefit. Do you accept there can be scheme which produces a net benefit to peat resource?

Mr Standing: Policy position is absolute. It would be difficult if there is small amount of loss stopping a big developer from bringing forward development.

Inspector: considering LQAS position in its Nov 2023 consultation response. Does that mean there cannot be improvement of peat in this case?

Mr Standing: LQAS has no problem with restoration but it is weight of those measures that are proposed. We are not looking at this saying this amount of improvement done so this compensate. They way we look at the proposal is that any loss of irreplaceable habitat cannot be compensated.

Mr Pryce : no issues with hydrological issues per hearing statement and suggested condition. The (updated?) condition on hydrological information is being submitted as agreed between the applicant and NRW. A copy of this information has been sent to Mr Pudsley

Inspector: one question on hydrology and maybe one for Dr Jones, the Applicant's argument on geomorphology is that the peat is not good at retaining water and it is affected by manmade attempts to drain water (maybe for farming). Do you say in its state, the site is vulnerable to further damage or, are the characteristics typical to other areas that receive a similar rainfall amount?

Dr Pete Jones: accept there are drainage issues with the site but the fact there are these peat habitats in place suggests there is some drainage in place on the site albeit not in optimal condition.

Inspector: few question on peat and soli. The site does not sequester carbon ... (as best as it could?). Is there a way of measuring sequestration?

Dr Pete Jones: there are no way of directly measuring of greenhouse. Part of the peat habitat sufficiently damaged that they are net emitters but, whether it applies to all of the peat I cannot say.

Mr Mills: with regard m19 and 17 as being active sequestration. Our character is it does not characterise ... those communities are not in optimal condition. In sense the vegetation is a proxy that is the way we can measure the direct sequestration.

Inspector: in summary, there is no empirical measurement.

Dr Pete Jones: There is nothing exceptional about the site – the majority of the welsh peat exists in a degraded state. The fact that the peat is in modified condition is not a matter that should be given considerable weight by the inspector. This is an issue recognised by Gov hence the national peatland programme

Insp: _____

Mills: The applicant's Carbon calculation assessment gives a range of value regarding carbon payback in various scenarios. It gives maximum range that is why there are different values at different times. It is based on maximum and minimum ranges.

Inspector: he has read it somewhere in the documents that when looking at energy generation of a scheme it is a nuanced prediction based on wind speed rather than capacity of machinery on the site i.e. turbines. he has the figure for annual yield but wants to confirm if that is based on annual yield of each wind turbine on site ...

Trinick KC: the applicant does not have this information to hand and will review documents and provide the required information before the end of the session.

Inspector: in regard to carbon footprint benefit, , the inspector queries whether the additional rock on site was factored in the carbon footprint of the scheme? (Vehicles transporting the rock...)

Trinick KC: will come back to Inspector on that point

Inspector: queries whether would it be fair to say if this site is funded is it fair to say others will not be funded due to finite financial resource?

Mr Standing: it is very early to make such an assessment. the national peatland action programme is running for 4 yrs and then second round of the programme will be commencing soon so we would expect money to be prioritised but it is hard to say. Just because a site did not get in the first tranche of funding. Does not mean it will not get in the next tranche..

James Cooke: Welsh government cannot commit to funding out of spending review .. the upscale programme which was put to ministers and approved subject to budget process seeks public funding to meet 45,000 ha over half or resource by 2050. That is for national peatland program alone and it does not take account of sustainable farming and does not account of peatland code or money under that or other water ...

Inspector: on decommissioning issue and systems used, the applicant's statement on peat refers to 40yr timescale whereas scheme itself runs for 30yrs. Is that typo?

Mills : 40yrs time to build grid securing and time to operate. The applicant is aiming for 2032 grid connection.

Inspector: That assumes 10yr implementation condition.

Insp: next consideration is on policy but – short break – 20mins 14:05pm

Trinick KC: – The applicant has Jack Pudsley to deal with policy and retained Dr Mills and Medcalf to address technical points which inform policy

Mr Standing: has clients in attendance. Mr Williams and Mr Cooke

Inspector: with reference to the applicant's national policy statement he asks Trinick KC whether policy EN3 applies.

Trinick KC: confirming EN3 does not apply to this application.

Inspector: TAN1 which has been referred by LQAS is a policy for aggregate extraction applied by mineral-de authorities and the aggregate industry – is this policy directly relevant in today's context?

Mr Standing: para 5.14.34 PPW 11 and in that it states borrow pits must be restored to high stand expected of other forms of mineral extraction. Borrow pit are devised used to take out aggregates...

Insp – (interject) requesting specific focus on MTAN only (no ref to PPW?)

Mr Standing: submitting it is PPW that brings in MTAN in the same way that PPW brings in future Wales however when we progress further in the proceedings and go through other bits of policy we are less concerned about MTAN. The scheme consists of aggregate extraction even on a small scale.

Mr Pudsley: MTAN not relevant but it is complied with as advice ...

Mr Standing : with reference to para 7 of mtan. The policy... obviously targets large scale mineral extraction but there is no reason why this is not relevant. We are concerned with the way in which aggregates are taken out of the ground.

Inspector: if the scheme was to proceed would LQAS be satisfied with the measures to restore borrow pits and that the whole development can be adequately controlled and info today will give you some confidence as to the scheme

Mr Standing: LQAS rely on the evidence of Dr Jones. Nothing fundamentally wrong with the restorative measures proposed but LQAS' concern is we are taking an area of land peat, digging hole for aggregate and then hoping a peatland will develop on restoration. There must be an acknowledgment that there is risk with borrow pits.

Insp: So LQAS' is concerned with the decision to allow the scheme rather than details of carrying out the scheme.

Mr Standing: yes

Moving on to PPW and future Wales

The applicant's statement provided table of changes introduced in chapter 6. The issue is that it stopped short and did not address para 6.4....The Inspector asks whether LQAS or council want to comment on the table or whether the parties think it is a fair summary of the changes to PPW

Mr Standing: LQAS have no concern with table but he is going to be referring to the annex (paragraph 6.4.20 and the paragraph 1b under the stepwise diagram figure 1x)

Inspector: with reference to 1b now – (reading step 1b and footnote 8 which identifies peatland as one of features mentioned). Looking at wording of provisions before the practical implications which applicant refers to. The peat interest will not have boundaries in terms of deciding what the site is

Mr Standing: when we opened yesterday we started with NVC definitions. Some NVC features can occur on peat some do not. There will be a boundary where peat finishes/ends.

Inspector: in step1b when we talk about sites designated there is clear line – with peatland on application site there is no hard-line so there is an element of judgement whether the site has peatland .

Mr Standing: Yes there is no standard designation document which sets out a location on a map but there will be investigations on site locating where peat is

Inspector: If a site is designated we can compare site with designation. If not designation. We have to look if there are features which fall in footnote 8 and then apply 1b and then decide that no development should take place in the area.

Mr Standing: in the policy, reference to site is not to a redline site – it is the ecological interest site.

Inspector: so how do we draw a line on pockets of peat? applying the policy and disallowing development to site with firm boundaries is one thing but in situation with no such boundaries this seems more difficult

Mr Standing: yes, it is more difficult when there is a mosaic habitat – the principle that is engaged in 1b is to stop at avoid but, consideration had to case by case basis. Cannot hypothesise what to do but starting point is avoid. Just under half of the development is in northern side where peat is and also just outside PAA. It is possible that the applicant could run a cable from one point to the other and avoid the peat deposits. Whereas I don't think we have evidence the peat has been avoided at all. The applicant has reverted to restoration, mitigation and compensation in the first instance

Inspector: the position of an in principle objection is an issue to the application it is seen as (too blunt an instrument?) – you mention consideration on a case by case basis _____

Mr Standing: the qualifying words in policy are “wholly exceptional” but, I think it needs to be given its usual meaning – something almost unique to the site. It is a planning judgment of what is wholly exceptional on a case by case basis.

Inspector: so the development is what needs to be “wholly exceptional” – any development on peat has to fall in stage 1b avoidance

Trinick KC: looking at the words irreplaceable – I note in passing the LQAS case is the peat and peatland. We must focus on the habitat supported by the peat. Habitats underpinning etc are qualifying words. the inspector has clear evidence that peatland will not be lost. The peat will be stored and replaced in borrow pits and tracks. There is evidence that restoration and enhancement can be achieved and in terms of habitats affected by development these are not the s7 protected habitats but only those on modified areas. On this site, the habitat can be restored and can and will be improved in reasonable timescale. In summary there is nothing irreplaceable impacted by development. Looking at step 1 b the word irreplaceable is not engaged so far as this scheme is involved.

Inspector: semantics – the word irreplaceable in normal meaning seems to rule out something technically difficult to restore or replace. Irreplaceable means it is impossible to restore or replace. The footnote does not seem to align with the dictionary definition. The footnote pulls back from the absolute nature of the word irreplaceable.

Mr Standing: it is not uncommon in legislation or planning to use one word and then having that word defined more broadly than the dictionary term. For example, and the EIA (Wales) refer to uncultivated land projects and then has this term defined further. In conclusion, although there is an English definition we need to focus on the definition in policy or legislation.

Insp: (noted)

Standing: LQAS focus is once peat is taken from where it is and placed somewhere else i.e. along track or borrow pit there is concern the storage is not going to be effective and there will be loss. If I can take you to soc – the applicant refers to “direct habitat loss” table 8.4– this sets out the 5 columns. The first is nvc classification and the second is direct loss in heater fig – the total area potentially affected (ref SEI pg24 chapter 8 ecology). The view of the applicant is that NVC classes m20 m25 and m3 are peat habitat affected – we think this is broader. We will take a narrow view first. There is 1.42 ha of habitat loss and total area affected is_____

Trinick – (interference) we are going into tech evidence. LQAS have not submitted technical evidence and these issues being raised were explored yesterday. LQAS case is drifting – there is nothing irreplaceable on this site. The application does not fall in scope of step 1b and with reference to footnote 8 we have confirmed that the habitat is going to be restored, enhanced and mitigation measures implemented.

Mr Standing: strongly submits that LQAS case is drifting. We are applying information to policy – the applicant's own evidence demonstrates there is direct loss of habitat. The wording in step 1 b is what we are relying on and it describes peatland as being difficult to restore. It grows 1m every thousand yrs. ____

Inspector: (interference) when we look at the resource itself and measures proposed by the applicant to restore and mitigate, that has to be the benchmark

Mr Standing: we should not be looking at mitigation and restore we should be looking at step 1 first.

In his view, the Inspector suggests there is a danger of cherry picking the policy. He requests an explanation of how habitat cannot be restored or recreated. Within confines of footnote 8- how is this offended?

Mr Standing: benefits of linkages have been addressed in these proceedings. Enhancements are positive. LQAS are not against restoration of habitats they can be restored ____

Inspector: (interference) – (drawing Mr Standing back) ...

Trinick KC: drawing attention to footnote 8, step 1 b is not engaged. the applicant maintains it is not destroying the habitat.

Mr Standing: footnote 8 defines irreplaceable habitat for the purpose of reading step 1b and gives a bit of an example/narrative of what is irreplaceable habitat. Paragraph 1b does not give any option ...

Inspector: summarises what he considers Trinick KC's case is – that, if peat was of a good quality then it would fall in definition of footnote 8 because it is to the high standard.

Mr Standing: the biodiversity deep dive talks about peat restoration. Peat is peat whether in degraded or in an immaculate state . This is the correct way to interpret policy. There will be loss of peat as a result of the development. There will be acceleration and restoration ...LQAS has understood what the Applicant's submission is and acknowledges there were degree of benefit to peat as a result of the proposed restoration etc.

Inspector: (in regard to the priority of restoration of peat). what would the implication be if the site is taken out of the national peatland programme because it is to be restored using private money

Mr Standing : despite that, it is the direct habitat loss that is of concern to LQAS. I understand there are other works that will be carried out on the site that are restorative but, in those areas were infrastructure there will be loss and those areas will be take out of use as beneficial peatland. It is those areas that will be lost.

Inspector: Trinick KC you refer to 1b as ambiguous

Trinick KC consider that step1b is difficult to interpret. The parties have considered in this hearing, the word irreplaceable and then considered footnote 8 which departs from the meaning of the word irreplaceable. To the point that Peat is peat point, the Applicant's answer is no (referring to the carbon storage capacity of the peat on site)

The Inspector asks Mr Standing regarding the point of safeguarding peat from development, how 1b can be united with the new peatlands paragraph in PPW chapter 6

Mr Standing: the point is we cannot maintain and protect other parts where there is a loss of peat on another part. Allowing a small amount of loss in order to accelerate improvement is contrary to policy

Inspector: as a step further from this case – how is the “wholly exceptional” test applied?

Mr Standing: the term “wholly exceptional” is not defined in policy – the obvious intent is that it is not hard and fast rule – wholly exceptional is the only basis on which the Inspector can allow the development – the inspector is invited to look at all the details in consideration of what is “wholly exceptional” and consider PPW and Future Wales policy. It is not for LQAS to tell the Inspector how to decide. “wholly exceptional” is a step-up from suggesting that something needs considerable weight. Peat soils are given considerable weight and peatland on “wholly exceptional”. I had hoped the app will be something re what is meant by “wholly exceptional”

Trinick KC: paragraph 7 of the skeleton sets out the applicant’s consideration of “wholly exceptional”. Reference is also made to - DNS decisions 3251545 dated 19 December 2023 – solar farm para 26 of the decision.

Mr Standing: with reference to greenbelt policy as an aide in assessing the terms “wholly exceptional” it is submitted that greenbelt is replaceable, but peat is not. We are not comparing like for like.

Inspector: the implications of strict interpretation of the policy and its impact on other scheme in the pipeline and government proposals regarding climate change – (with reference to the table at the end of the applicant’s skeleton argument listing the applications in the pipeline).

15:40 – 15:55

Inspector now turns to the new document received by email xls sheet (list of onshore wind DNS applications that are undetermined). - considering the spread of green on the xls sheet, how does the PPW affect the delivery of renewable energy in particular wind farms. Given government policy on renewable energy changed at the same time as PPW chapter 6 – what are practical implications to delivery with ref to “wholly exceptional” test

Mr Standing: – policy has not changed Future Wales 17 and 18 has not changed. with reference to the DCPO letter on DNS – if these applications are taken on face value and the application goes ahead then the implication is there will be significant loss of peat and, if the application is not allowed then there will be a reduction in the number of schemes that can be delivered. We would argue that policy requires the peat resource to be “d” I do not think this has been demonstrated.

Inspector: would there be ground to argue that “wholly exceptional” in relation to this case or cases so far advanced in process might justify departure from the recent policy updates.

Mr Standing: the cover letter to PPW says the policy comes in with immediate effect. It does not give any exemption in planning regarding how far advanced an application is in the planning in process. Policy could have been staged but it is not ...

Trinick KC: from the Applicant’s perspective, policy has been applied. The Inspector must address implication of application of the policy in his report. The implication is that if Garn Fach is allowed then there will be a loss of peat is not correct if care and attention is taken then there will be no loss of peat

Inspector: noting Trinick KC's submission in skeleton argument that PPW update is challengeable – because its interpretation is irrational and cannot be correct

Trinick KC: the approach of LQAS leads to an irrational unreasonable outcome and Garn Fach being rejected on step 1 b.

there is also nothing in step 1 b addressed repowering ... that is an implication of policy application that should be borne in mind

Mr Standing: the point about re-repowering supports LQAS case –the policy aims to stop disturbance of peat. In regard interpretation, to make a decision that the policy is irrational when it has not been challenged in court is not correct...

Inspector: new peatland paragraph mentions that peat is fragile and talks about % cover and considerable weight should be given to its protection because of its special importance in underpinning and supporting national natural resources and unless other significant material considerations indicate otherwise it will be necessary to refuse permission. In terms of biodiversity, the scheme will provide carbon benefit in its life. Is that a relevant weight that can be given

Mr Standing: taking back to step 1 b – all 4 need to be satisfied (protect, maintain and enhanced and safeguarding from development) plus paragraph 6.4.21 also applied so that enhancement of green infrastructure is not exceptional. Those enhancements are required and so is safeguarding of the peat resource.

But, this creates a contradiction for the Inspector and according to Trinick KC, the submission by Mr Standing is illogical. The submission that if all 4 requirements if satisfied amount to safeguarding the peat is illogical...

With regard to Green infrastructure, the Inspector notes the applicant has provided a green infrastructure statement and asks if LQAS accept that the applicant has addressed the principles of biodiversity

Mr Standing: LQAS submits there is no evidence of peat and more could be done.

Insp : with reference to s38(6)Planning and Compulsory Act 2004, Policy 17 Future Wales gives strong presumption of renewable energy. It was written before PPW so, to what extent should I interpret Future Wales in light of the recent change in PPW?

Standing: obviously substantial weight should be given to PPW and this is stated in future Wales. All planning policy should be read together. Because you are the Inspector and you are responsible for considering this application I cannot say where you should put more weight. This is a duty for you as the Inspector

Inspector: In regard to Pre-Assessed Areas in Future Wales, LQAS mention that the presumption is for landscape only. Can we agree PAA took into account peat as a constraint?

Mr Standing: The purpose of policy only applies to landscape. The applicant has probably tried to avoid peat areas by the fact that the construction of turbines in the northern areas been avoided but policy only applies to landscape and that doesn't impact on peat policies.

Inspector: The policy says there is a presumption in favour of wind farm development - subject to policy 18. It seems to me the confines of landscape are loosed by the second line in the relevant paragraph of policy 17 that introduces Pre-Assessed Areas i.e. In Pre-Assessed Areas for Wind Energy the Welsh Government has already modelled the likely impact on the landscape and has found them to be capable of accommodating development in an acceptable way. There is a presumption in favour of large-scale wind energy development (including repowering) in these areas subject to the criteria in policy 18.

Mr Standing: (disagreeing with the inspector's interpretation). The first bit refers to landscape and as a drafter (lawyer) he would have also referred to the word "landscape" too because when you refer to policy 18 it refers to landscape and explains the provision of policy 17 first paragraph.

Trinick KC: In accordance with s38(5) Planning and Compulsory Act 2004, the development plan has to be considered first however, one cannot apply policy 18(4) without knowing what the protected habitats are unless one refers to ppw. Having said that, on consideration of the October update of the PPW and footnote 8 one has to come to the view that any adverse effect is prohibited.

The change of the PPW is so dramatic to trump the presumption for development of wind energy.

Mr Standing: The assessment on behalf of LQAS is similar to that advanced by Trinick KC. Where we differ is on the analysis of PPW and whether there are wholly exceptional reasons for the development. Where there is direct conflict between PPW and Future Wales the Future Wales takes preference however, there is not such conflict between the two policies in this instance. We do not think one could decide not to apply the wholly exceptional test in policy.

Inspector: with reference to policy 18(11), is it fair to say the provisions are not in dispute with reference to this scheme?

Mr Standing: yes the provision in reference to this scheme is not disputed. Harm and loss is at construction stage

Inspector: moving on to policy 9 Future Wales. It is not disputed that this policy applies. If I find the scheme contrary to policy for reasons set out today and influenced by avoidance measures which are not demonstrated by the applicant, what will be the implications of not allowing scheme and the implications to the potential to develop site in the future

Trinick KC: the applicant has to have an alternative scheme to give a view on the potential to develop the site in the future. The applicant cannot answer that question. If the scheme is against PPW and Future Wales then the Inspector has to consider the legal obligation to net zero and the 2035 targets. There is great deal to balance between policy and the net zero and 2035 targets. .

Mr Pryce for NRW states that draft conditions have been sent to Mr Pudsley and the parties are consolidating what has been agreed. The conditions will be sent to the infrastructure email.

17:07 conclusion