

ADVICE and a WARNING - Windfarm Appeals and Hearings.

I know some of you have Appeals coming up soon , so thought it might be helpful to gain from my experience at a Public Inquiry last week.

You may know that last week (13-15th January) I was a 'lay witness' for the Private Water Supply risk assessment (PWS RA), at the Arecleoch Windfarm Extension Appeal public Inquiry (DPEA number WIN-370-2).

SAS notified people of the DPEA link to this Inquiry last week. You can see the webcast at [Webcast library - DPEA Webcasts \(public-i.tv\)](#) and choosing which day's proceedings you would like to see – assuming your internet is good enough!

This appeal is being mounted by Scotland's largest corporate Renewable energy generator, Scottish Power Renewables (SPR), (Spanish owned), after South Ayrshire Council objected to the application on the basis of visual impact and private water supplies that may be affected by this windfarm.

All SPR's applications/Appeals are handled by their well resourced and very well practiced team of lawyers at Shepherd and Wedderburn.

All public Appeal oral proceedings are currently being held virtually just now, due to Covid restrictions, although that didn't stop a team of lawyers and support staff (all off camera and apparently Covid secure) appearing from a fast internet connection in an SPR corporate office, quite obviously with help finding documents and advice being given to the solicitor conducting cross examination.

The same cannot be said for rural residents, most likely to suffer the impacts of any windfarm development. Poor internet speeds and reliance on your own IT skills and equipment is an instant disadvantage.

So I gave my evidence, sitting alone at home with my laptop, unable to either see or hear anybody else, talking to myself,(so that the limited bandwidth could cope) It was rather like 'One flew over the cuckoo's nest'!

I can't imagine anything much further from the ethos of a 'public Inquiry'!

I was stopped from saying what I wanted to say in my evidence when SPR's lawyers objected on the basis that what I was saying was 'new evidence' before the Inquiry – even though this was in regard to PWS that had been listed in their own PWS RA! Nevertheless, the Reporter's upheld the complaint on the basis that this was new evidence that the appellant's had not had time to address.

So, as DPEA have still not produced the Inquiry/Hearing advice for third parties that SAS requested last summer, **here is my advice to those who follow me.**

First, DPEA have rules for Oral proceedings: you can see these at:

<https://www.legislation.gov.uk/ssi/2013/156/schedule/2/made> and Code of Practice for Handling Inquiries under Section 62 and Schedule 8 to the Electricity Act 1989.

The latter is particularly useful at it is DPEA guidance. Copy into Google to find it!

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1. The Reporter is God. They can run a Hearing or Appeal as they wish and can stop you giving evidence or cross examining as they see fit (see rules). **Accept it and don't argue**, but if you know the rules you can ask why.

2. Remember that although this is supposed to be a public process, the public are third parties. It is not a level playing field. Regardless of rules and legislation which underscores public participation, your evidence and contributions will have less importance than that of the applicant or the Council. That's how it is.

3. The DPEA (case officer) will set dates for submission of various documents and statements – **DO NOT BE LATE.**

You will run the risk that your hard work will be rejected if you are late submitting documents.

The applicant may have more latitude to do that as they are now in control of producing all documents electronically on a hub for all parties for an Inquiry or Hearing. This means, as for this Inquiry, that a late document may be added without asking permission.

You are a third party ... you have no clout. That's how it is!

BE ORGANISED.

4. Inquiry Statement.(IS)

If appropriate, you may be asked to submit this @ 6 weeks before an Inquiry.

This sets out your case. There is no word limit.

You may be cross examined on anything you put into your IS , so be careful and truthful and know how to substantiate what you say; you may be challenged by experienced and aggressive lawyers!.

Include ALL detail

e.g. I was excluded at last week's Inquiry from discussing individual PWS which may be at risk which had been included in SPR's PWS risk assessment, even though the PWS RA formed part of the Environmental Report. This was because I had not listed individual PWS in my IS or precognition!

So, list individually each PWS, noise receptor location or view point that you may wish to discuss – even if you decide later not to do so.

Make sure that your IS is referenced to your reference documents/photos etc wherever possible.(If it's a large document it's better to give pages/chapters of that document)

5. Submission of Documents

Submit as many documents/photos etc that you can that you might refer to (even if you don't later). You will **not** have the chance to add to your documents later unless you get special dispensation from the Reporter (or you are able to control the document hub, which is very unlikely for a third party!)

If you submit your own photo's , make sure they are clear and labelled with key reference points e.g. a house, a water source or holding tank and preferably with a grid reference and

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compass orientation (e.g. north/south etc) so that it's easier for others to understand. Make a numbered document list that hopefully that you should refer to in your IS if possible.

The appellant may tell you what number prefix you should use for your documents.

6. Precognition

This is requested @ 2 weeks before the Inquiry/Hearing. It is supposed to be a brief summary of what you will say in evidence. It is limited to 2000 words. The Reporter may allow slightly more at their discretion.

The precognition is supposed to set out what you intend to bring up in oral evidence.

Traditionally, the witness read it out, but most of the time it's now just taken as read.

HERE IS THE WARNING!

If you do not list what you are to talk about – you may be barred from giving evidence on those matters – as I was, even if it is material evidence to the Inquiry.

Make every word count. Say who you are and what your experience/qualifications are - if that is relevant to the Inquiry or matter in hand.

Refer specifically to the list of PWS/noise receptors/view points included in your IS and say that the content of your IS must be taken into account for the Inquiry. If you do not actually say that, you may be excluded from discussing those matters which are important to you and your case.

7. Closing Statement

This sets out your final arguments, as modified by evidence given at the Inquiry/Hearing.

The Reporter will give a date when this must be submitted – usually after all oral proceedings have finished.

Third parties/Councils will get one date and the appellant usually gets a date 2 weeks after that, so that they have the advantage of addressing points that you've raised in your closing statement. You do not have a right to answer or correct anything the appellant writes. It's not fair, but that's how it is.

Don't be late with your closing statement.

The appellant seems to get away with submitting such documents when it suits them – even three months late- and still get closing submissions accepted by Reporters. That's how it is.

The closing statement should not include new evidence, even though the appellants did this for the Whitelee Extension 3 windfarm Inquiry in 2015 and that unsubstantiated, unchallenged evidence (a collapsed water supply pipe) formed the reasoning the Reporter decided 3 PWS lost their water during windfarm construction. (ie. Not due to sediment which was confirmed in water monitoring for other PWS)

Your closing statement can refer to anything discussed at the Inquiry or raised in cross exam and refer to any documents submitted to the Inquiry, including the applicant's

Environmental Report. You cannot submit new reference documents, which it is why you need to be over inclusive in submitting documents earlier on.

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Understanding the rules helps, but in practice it's a confusing situation which can be changed by Reporters as they see fit. Remember that public participation may be enshrined in law – but corporate concerns will try and shut you down and out. It's not fair, but that's how it is.

I hope to give further advice for lay third parties later on the actual Inquiry proceedings as appellant's lawyers use cross examination techniques which are designed to intimidate third parties. – It's best to be prepared, most of us have never been in a Court of Law!

I know my appraisal of the inquiry process was useful to many people who will be involved in a windfarm inquiry in the near future. It's a daunting and potentially demoralising experience as the opposition, – the very well funded legal teams of the developer, have experience in law, court procedure and of techniques to undermine your evidence and belittle you as a lay witness, even if you know what you're talking about or have local knowledge which is critical to understanding the particular environmental impacts of a development.

There are many people who, without funding, have to do their own research, be their own 'expert' as best they can, and be their own advocate.

In the Inquiry, you may have to cross examine the developer's expert witnesses who will have years of experience and the support of a large commercial organisation and a legal team. So how do you phrase your questions. Understanding how to ask leading questions is crucial in cross examination.

Understanding that the opposition may not ask leading questions of their own witness in 'evidence in chief' and re-examination (even though they do) is also important so that you may consider objecting.

So, in addition to understanding the 'rules' of the Inquiry or Hearing process in an Appeal (which I attached with my last update) it's a good idea to know how the other side will work and how they will attack you and your evidence.

Below are useful websites on the strategy that will be used against you and how you can prepare. It's not an alternative for law school, but at least it slightly levels the playing field! There are also many YouTube videos on cross examination techniques, how to defend yourself etc. which are worth watching

[How to Cross Examine: 14 Steps \(with Pictures\) – wikiHow](#)

[How to Question Witnesses when Representing Yourself \(wikihow.com\)](#)

[How to Become an Expert Witness \(with Pictures\) – wikiHow](#)

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