

OUTER HOUSE, COURT OF SESSION

[2016] CSOH 167

P168/16

OPINION OF LORD KINCLAVEN

In the petition of

HELEN DOUGLAS

Petitioner

against

PERTH AND KINROSS COUNCIL

Respondent

and

RDS ELEMENT POWER LIMITED

Interested Party

Petitioner: Agnew of Lochnaw QC; Drummond Miller LLP

Respondent: JDC Findlay; Harper MacLeod LLP

Interested Party: M E McKay; Eversheds LLP

2 December 2016

Introduction and Overview

[1] This is a petition seeking Judicial Review of a decision of Perth and Kinross Council dated 18 November 2015 to grant the application by RDS Element Power Limited for planning permission for modification of permission 12/01423/FLL

(formation of wind farm with associated access track and ancillary works) change of turbines at Tullymurdoch Wind Farm, Alyth, subject to conditions.

[2] The case came before me for a substantive hearing.

[3] Sir Crispin Agnew of Lochnaw appeared for the petitioner, Ms Helen Douglas. He invited me to find that the respondent had erred in law, to sustain the petitioner's plea in law, and to reduce the decisions complained of.

[4] Mr Findlay appeared for the respondent, Perth and Kinross Council. He contended that the decisions of the respondent were not unlawful. He invited me to refuse the petition.

[5] Mr McKay appeared for the interested party, RDS Element Power Limited. He also invited me to refuse the petition.

[6] In overview, having considered the representations of all parties, and the documents produced, I have reached the conclusion (for the reasons outlined more fully below) that the submission made on behalf of the respondent and the interested party are well founded.

[7] Accordingly, in the whole circumstances, I shall sustain the first plea-in-law for the respondent; sustain the first, second, third, fourth, fifth and sixth pleas-in-law for the interested party; repel the petitioner's pleas-in-law, and refuse the orders sought in the petition.

[8] I shall reserve meantime all question of expenses.

[9] I would outline the background and my reasons as follows.

The Background

[10] This case concerns wildcat and osprey. The petitioner has satisfied section 27B(2) (requirement for permission) of the Court of Session Act 1998. She is a member of the public who claims sufficient interest to raise these proceedings under Article 11(1) of the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (as amended) ("the EIA Directive"). She objected to the grant of both the planning permissions under challenge. She raised the issue of wildcat living in the locality of the wind farm with Scottish Natural

Heritage (“SNH”). She lives opposite the osprey nest that is the subject of this petition. She was appointed spokesman by the objectors to speak at the planning meeting regarding their objections in relation to *inter alia* wildcat and osprey issues.

[11] The petitioner maintained that she has real prospects of success because her averments demonstrate that the planning authority have failed to fulfil their obligations under the EIA Directive and Regulations to require additional environmental information and to make a proper environmental impact assessment of the two applications. They are therefore in breach of their obligations in relation to European species under the Habitats and Birds Directives. This goes beyond a matter of “planning judgement” and is supported by the decisions *R v Cornwall CC* [2001] Env LR 25 and *Smith v Secretary of State for the Environment, Transport and the Regions* [2003] 2 P & CR 11.

[12] The petition is opposed by the respondent and interested party on the grounds outlined below.

The Petition

The Parties

[13] The petitioner is employed as a part time shepherd and is tenant of a farm in the locality of the Tullymurdoch Wind Farm. The petition raises issues concerning *inter alia* osprey and wildcat. The respondents are the planning authority, namely, Perth and Kinross Council (“the Council”). RDS Element Power Limited (“RDS”) have an interest in this petition as the holder of the planning permission that is the subject of challenge.

The Decisions Challenged

[14] On 18 November 2015 the Council made a decision to grant the application by RDS for planning permission for modification of permission 12/01423/FLL (formation of wind farm with associated access track and ancillary works) change of turbines at Tullymurdoch Wind Farm, Alyth subject to conditions. A copy of that Planning Permission is produced. (“the modification decision”).

[15] On 9 December 2015 the Council also granted planning permission to RDS for laying underground cable with temporary ancillary infrastructure connected with the Tullymurdoch Wind Farm (“the cable decision”).

[16] RDS holds planning permission for the construction of a seven turbine wind farm with associated tracks and ancillary works at Tullymurdoch Farm, Alyth. The grant of that initial permission is not challenged in this Judicial Review. The petitioner maintains that, at the time of that grant, the Council were not made aware of the presence of wildcat and osprey.

[17] The petitioner points out that the original planning permission contains a Condition 17 which is in similar terms to the condition in the decisions challenged. She maintains that the outcome of this Judicial Review is likely to inform how that condition is implemented if RDS decide to go ahead with the original planning consent.

The Remedies Sought by the Petitioner

[18] The petitioner seeks:

- a. reduction of the modification decision and the cable decision;
- b. an order upon the Council to require further environmental information, advertise it, and to make a full and proper environmental assessment of the impact of the application for modification of permission 12/01423/FLL, on the osprey and the wildcat that reside within the locality of the proposed wind farm and cable route including proposed measures for the protection of said species prior to any reconsideration of the two applications.

[19] The petitioner also craved the court to pronounce such further orders, decrees or orders (including an order for expenses) as may seem to the court to be just and reasonable in all the circumstances of the case. All parties reserved their position in relation to the question of a protective expenses order in terms of Chapter 58A of the Rules of the Court of Session.

The Petitioner’s Grounds of Challenge

[20] The petitioner challenged the Council's decision on the following three grounds.

[21] The first ground of challenge was that the Council did not have sufficient environmental information before it upon which to make a proper assessment of the effects of the proposed modification application or the cable application in respect of the impact upon the pair of osprey nesting within 300 metres of the wind farm and upon wildcat that live in the vicinity of the wind farm and the cable routes. Accordingly the Council was not in a position to make a proper assessment of those effects and accordingly acted unlawfully in granting those permissions. Information about the presence of the pair of osprey, and details of the wildcat living in the area, only became available after the Environmental Statement ("ES") had been presented for the original wind farm application and after the screening decision had been made that the cable application did not require an ES. The Council ought to have required additional environmental information to be provided by RDS. The petitioner accepts that the Council had made a screening decision on 17 July 2015 that an ES was not required, but maintains that when information came to hand anent the wildcat and osprey, the Council ought to have considered that further information on these species was required.

[22] The petitioner's second ground of challenge was that, in respect that the Council did not have sufficient environmental information before them upon which to make a proper assessment of the effects of the proposed modification and cable applications on the osprey and wildcat, the Council acted unlawfully in granting:

- (i) the modification permission of 18 November 2015 subject to a Condition 1 which required the preparation of a Construction and Environmental Management Plan which was to include "1) measures for the protection of or beneficial to European and other protected species, formation of any required protected species protection plans and implementation measures for any such plans" and
- (ii) the cable permission subject to Condition 7 which *inter alia* required prior to construction commencing measures for

protection of/or benefits to European and protected species including the formation of any species protection plans.

The environmental information that those plans would produce, and the assessment that would be made to produce the said plans, was environmental information that should have been obtained, and an assessment that ought to have been carried out, before consents were granted. The Council ought to have required this Supplementary Environmental Information (“SEI”) prior to granting planning permission under Regulation 23(2)(b) of the EIA Regulations 2011. Had it been required it would have had to be advertised under Regulation 24 and the members of the public, including the petitioner, could have made representations on that SEI, which ought to have included proposed mitigation measures such as would appear in species protection plans. Reference was made to paragraph 5 of Annex 4 of the EIA Regulations. By failing to require SEI and advertising it, the petitioner and members of the public were not given early and effective opportunities to participate in the environmental decision making process as required by Article 6 of Directive 2011/92/EU (the “EIA Directive”). They were thus prejudiced.

3. The petitioner’s third ground of challenge was that the Council gave inadequate reasons for its decisions.

The Factual Background Relied on by The Petitioner

[23] Wildcat (*Felis silvestris*) is listed in Annex IV of Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora (“the Habitats Directive”) and is identified as a European Protected Species in the Conservation (Natural Habitats, &c) Regulations 1994.

[24] The osprey (*Pandion haliaetus*) is protected as an Annex 1 species, subject to special conservation measures under the Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (“the Wild Birds Directive”) and protected under the Wildlife and Countryside Act 1981.

[25] RDS was granted planning permission for the Tullymurdoch Wind Farm near Alyth by the Directorate for Planning and Environmental Appeals (DPEA) on 3 September 2014 in an appeal following non determination. A copy of the Decision Letter was produced.

[26] The Environmental Statement (ES) (Production No. 20, Documents Tab 2) at paragraph 29 (of section 7.4) notes that the habitat is suitable for wildcat but that no wildcat was recorded during the watching brief for these species, notwithstanding that wildcat breed in the locality. The ES, referring to both pine marten and wildcat, goes on to note that “Given that both these species can have extensive home ranges a precautionary approach has been taken, and it is assumed that the habitat within the survey area is used to some extent by both species.”

[27] The ES at paragraph 10 (of section 6.4) notes that osprey breed within 5km of the site and that there may have been less flight activity in the survey area in recent years. The Technical Appendix (Production No. 20, Documents Tab 3) in volume 3 at A.6.2 only records that osprey is “Recorded in flight activity rarely”, when in fact a pair of osprey nests within 300 metres of the site.

[28] In these circumstances, where the ES was inaccurate in reporting about wildcat and osprey, the petitioner maintained that it was not surprising that the Decision Letter does not give proper consideration to osprey and wildcat. Copies of the relevant parts of the Environmental Statement and the Technical Appendix were produced.

[29] More detailed information about wildcat and osprey nesting nearby having come to hand *inter alia* from SNH, after the ES was prepared and before the decisions were taken, the Council ought to have required SEI and in particular details of any proposed species protections plans under Regulation 23(2)(b) of the 2011 Regulations prior to making the decision so that the petitioner and members of the public had the opportunity to make representations thereanent. Preparation of species protection plans after the consent is granted deprives members of the public, including the petitioner, of an opportunity to make representations about the effectiveness of the proposed plans in circumstances where such representations might have had an impact on the grant the of those consents.

[30] On 4 September 2015 RDS applied to the Council
“to modify the consented turbine dimensions at Tullymurdoch Wind Farm. The Application seeks to amend the candidate turbine to a Senvion MM92 which reduces the overall tip height of the turbines from 120 metres (m) to 114.75m, although the rotor diameter increases from 80-82m previously assessed to a maximum of 92.5m, equating to a 5-6m increase in blade length.”

[31] On 4 September 2015 RDS applied to the Council for planning permission for
“Installation of 19 km of underground electrical and fibre optic cables to connect the consented Tullymurdoch and Welton of Creuchies Wind Farms to the primary sub-station in Coupar Angus, including temporary ancillary infrastructure.”

[32] Those applications were applications that required an environmental assessment under the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (“the EIA Regulations”). Supplementary Environmental Information (SEI) was produced to supplement the original ES. That SEI in relation to the modification application on ecology only focused on those ecological changes that might occur as a result of the proposed amended turbine dimensions.

[33] In relation to the modification application, SNH as a statutory consultee responded by email dated 9 October 2015 16.45 stating:

“Protected Species

There are recent records of breeding wildcat among [blanked out]. We request that a species protection plan for wildcat is submitted for comment before any construction work begins and this is included within the Construction and Environmental Management Plan and required for the discharge of condition 17L of the original consent.

In addition to wildcat, there are records of protected breeding birds nesting within close proximity to the development site, notably an osprey

nest in the vicinity of [blanked out], which should also be taken into account in the discharge of condition 17.”

[34] The email from SNH went on to make recommendations. SNH’s “Wind farm impacts on birds’ guidance” on the proper assessment of the likely impact on protected birds like osprey states:

“It is widely accepted that wind farms generally present three main areas of potential risk to birds:

- displacement through indirect loss of habitat if birds avoid the wind farm and its surrounding area due to turbine operation and maintenance or visitor disturbance. Displacement can include barrier effects in which birds are deterred from using their normal routes to feeding or roosting grounds;
- death through collision or interaction with turbine blades;
- direct habitat loss through construction of wind farm infrastructure.

An assessment of a potential wind farm’s effect on the bird interest of a site should thoroughly consider each of these three potential risks for each bird species which uses the site.”

[35] In relation to the cable application SNH as a statutory consultee responded by letter dated 15 October 2015 stating:

“1.2 Ecology

We recommend measures are put in place to minimise any potential impacts on breeding wildcat. ...

2.2 Ecology

Wildcat

The development will pass through areas known to be used by breeding wildcat. As a result a species protection plan should be submitted prior to construction commencing. We recommend it includes the following; ..."

It then set out the recommendations.

[36] The petitioner accepted that the SNH's response did not refer to osprey in connection with the cable application.

[37] The petitioner objected to both the applications. It was the petitioner who drew the Council and SNH's attention to the fact that there were wildcat in the locality of the wind farm. She met with an SNH manager when the applications were being made to discuss wildcat. In these circumstances she expected SNH to raise the wildcat issue. The petitioner's house faces the osprey nest. In late summer 2015 the petitioner watched this pair of osprey taking their new-fledged offspring on practice flights over the wind farm site. Mr Stewart Miller objected on the grounds of disturbance to protected breeding mammals and that the wind farm would cause disturbance and death of protected species. Alisdair Mclean objected on grounds of noise, danger to wildlife including an osprey nest 300 metres from the site and disruption to the habitats. The petitioner was appointed spokesman by the objectors to speak at the planning meeting.

[38] The Council's Development Quality Manager's Report to Committee regarding the modification application was dated 30 October 2015. That Report referred to Policy NE3 – Biodiversity and said "Planning permission will not be granted for development likely to have an adverse effect on protected species."

[39] The ES is inaccurate and demonstrates that proper field survey work had not been carried out in relation to osprey and wildcat. The ES states (in paragraph 10 on page 6-8):

"Osprey

10. Two flights have been recorded during the period of the flight activity surveys as show in Figure 6.7 and Table A6.7 of Technical Appendix A6.2. Desk study records indicate that this species breeds within 5km. Anecdotal records indicate that there may have been less flight activity in the survey area in recent years. There is no evidence that the survey area

lies on a provisioning route between a feeding resource and a breeding location.”

However, it was clear from the SNH consultation response and the objections that there was a breeding pair of osprey nesting within 300 metres of the site.

[40] Further in relation to wildcat the ES states (in paragraph 29 on page 7-9):

“Pine Marten and Wild Cat

29. Species record provided by Perth and Kinross Council Biodiversity Officer highlighted the presence of wildcat and pine marten in the wider area. The habitat in the survey area is suitable for both these species. However no evidence of pine marten or wildcat was recorded during the watching brief for these species. The behaviour of both these species mean that absence of field signs from a watching brief does not conclusively prove absence from the Site. Given that both these species can have extensive home ranges a precautionary approach has been taken, and it is assumed that the habitat within the survey area is used to some extent by both species.”

However, SNH state that wildcat are in the vicinity.

[41] The SEI for the amendment application did not provide additional information. These discrepancies in the ES, in light of SNH’s consultation response and the objections, ought to have alerted the Council to the fact that a proper assessment was required of the issues for wildcat and osprey and that additional environmental information would be required to carry this out. The Council could not be certain that wildcat and osprey would be properly protected as European species or that the application complied with Policy NE3 – Biodiversity, without carrying out such an assessment prior to granting permission.

[42] The Council Officer reported:

“83. Letters of representation have highlighted that there are wild cat and breeding birds within the vicinity of the site. SNH have highlighted that they are aware of recent records of protected species and they recommend species

protection plans (SPP) are submitted prior to commencement of works and thereafter implemented during construction. I consider that incorporating condition 17L of the original consent will ensure compliance with Tayplan Policy 3 and Perth and Kinross Local Development Plan 2014 Policy NE3.”

[43] The Report recommended grant of the application subject to conditions including Condition 16 which provided *inter alia*:

“16. Prior to the commencement of development a Construction and Environmental Management Plan will be submitted to and be approved in writing by the planning authority, in consultation with SEPA and SNH, at least one month prior to the commencement of development. The Construction and Environmental Management Plan will identify from the environmental statement appropriate mitigation strategies and consolidate these, clearly outlining what shall be implemented, when and by whom. It will incorporate: ...

1) measures for the protection of or beneficial to European and other protected species, formation of any required protected species protection plans and implementation measures for any such plans; ”

[44] The Council’s Development Quality Manager’s Report to Committee regarding the modification application was dated 24 November 2015. The Report noted:

“69. The LDP contains a number of policies that seek to protect important species and sites designated for their natural heritage interest and to ensure that proposals that may affect them are properly assessed. NE1A relates to International Nature Conservation Sites, NE1B relates to National Designations, NE1C covers Local Designations while NE3 Bio-diversity confirms that protection should

apply to all wildlife and wildlife habitats, whether formally designated or not.

...

72. SNH also recommends measures are put in place to minimise any potential impacts on breeding wildcat through a species protection plan."

[45] There is no mention of osprey in that Report. The Report recommends the grant of permission subject to Condition 4 requiring the appointment of an Ecological Clerk of Works and Condition 7 which provides:

"7. Prior to construction commencing measures for the protection of/or benefits to European and other protected species, including the formation of any species protection plans and implementation measures for any such plans shall be submitted for the written approval of the Planning Authority in consultation with SNH. Thereafter the species protection plan shall be implemented in accordance with the approved documentation all to the satisfaction of Planning Authority."

[46] On 18 November 2015 the Council made a decision to grant the modification application. It was subject to Condition 16 which provided *inter alia*:

"16. Prior to the commencement of development a Construction and Environmental Management Plan will be submitted to and be approved in writing by the planning authority, in consultation with SEPA and SNH, at least one month prior to the commencement of the development. The Construction and Environmental Management Plan will identify from the environmental statement appropriate mitigation strategies and consolidate these, clearly outlining what shall be implemented, when and by whom ... and include ...

1) measures for the protection of or beneficial to European and other protected species, formation of any required protected

species protection plans and implementation measures for any such plans;”

[47] On 9 December 2015 the Council made the decision to grant the cable application subject to Condition 4 and Condition 7 which provides:

“7. Prior to construction commencing measures for the protection of/or benefits to European and other protected species, including the formation of any species protection plans and implementation measures for any such plans shall be submitted for the written approval of the Planning Authority in consultation with SNH. Thereafter the species protection plan shall be implemented in accordance with the approved documentation all to the satisfaction of Planning Authority.”

The Legal Arguments for the Petitioner

[48] In the petition, the first argument for the petitioner was that it should have been obvious to the Council from SNH’s consultation response and the objections that the ES and SEI were inadequate in their assessment of the potential impact of the modification and the cable applications on wildcat and osprey. Wildcat are an Annex IV species under the Habitats Directive where member states “shall take the requisite measures to establish a system of strict protection” for such species (Article 12.1) prohibiting *inter alia* deliberate killing, deliberate disturbance and deterioration or destruction of breeding sites. Osprey are an Annex 1 species subject to “special conservation measures” under Article 4 and requisite measures to establish a general system of protection prohibiting *inter alia* under Article 5 deliberate killing; deliberate destruction of, or damage to their nests and deliberate disturbance. Accordingly the Council ought to have required additional environmental information in terms of Regulation 23(2)(b) of the EIA Regulations because such further information was “reasonably required to give proper consideration to the likely significant effects of the proposed development on the environment”, which included the protection obligations set out in the Habitats and Wild Birds Directive. The Council acted unlawfully in not requiring RDS to provide

such additional information including proposed species protection plans prior to making the decisions. This failure has caused prejudice to the petitioner and to members of the public, because they have been denied the opportunity to make representations, in particular anent proposed species protection plans, which are in effect measures to prevent, reduce and where possible to offset any significant effects on the species (reference was made to para 5 of Annex 4 of the EIA Regulations) which might have influenced the decision on whether or not to grant planning permission. The failure to give the petitioner and the public an effective opportunity to participate in the decision making process was in breach of the rights given *inter alia* in Article 6(4) to (6) of the EIA Directive.

[49] The second argument for the petitioner was that the Council did not comply with its obligations under Regulation 3A of the EIA Regulations. It ought to have carried out an environmental impact assessment examining the information presented in the environmental statement and other environmental information and to have reached a reasoned conclusion on the significant effects of the proposed modification and cable applications on the environment. It did not do this because it left such an assessment over to:

- (i) Condition 16 in the modification decision requiring a Construction and Environmental Management Plan to be produced by RDS after the consent was granted, and
- (ii) Condition 7 of the cable decision which required measures to be taken to protect European species and the formation of a species protection plan.

Further the Council did not comply with SNH's "Wind farm impacts on bird's guidance" which requires "an assessment of a potential wind farm's effect on the bird interest of a site should thoroughly consider each of these three potential risks for each bird species which uses the site." Such an assessment was necessary to determine whether or not the wind farm could comply with the obligations under the Wild Birds Directive to the osprey, which used the site, and to determine what would be the significant effects of the development on the environment.

[50] The third argument for the petitioner was that the Council acted unlawfully in granting modification consent subject to a Condition 16 requiring that a Construction and Environmental Management Plan will be submitted to and be approved in writing by the planning authority and Condition 7 of the cable consent. Such assessments and management plans ought to have been carried out and produced prior to consents being granted because at the date of granting the consents it could not be known if the wildcat and the osprey could in fact be protected as required by the Habitats and Birds Directives. The Council was in effect not carrying out the assessments it was obliged to carry out, but was leaving these assessments post consent to RDS in consultation with SNH. The Council Officer could not reasonably conclude that incorporating Conditions 16 or 7 would ensure compliance with the Council's obligations under the Habitats and Birds Directive or that this would ensure compliance with Tayplan Policy 3 and/or of the Council's Policy NE3 – Biodiversity. *R v Cornwall County Council, ex p Hardy* [2001] Env LR and *Smith v Secretary of State for the Environment, Transport and the Regions* [2003] 2 P & CR 11.

[51] The fourth argument for the petitioner was that the Council had failed to give adequate reasons for their decisions. The Reports do not disclose how the Council treated the consultation responses from SNH and the objections in relation to wildcat and osprey or how the Council's obligations in relation to those species would be complied with in the granting of the planning permissions. The Council did not give any reasoned conclusion about its assessment of the significant effects of the development on the environment and in particular on the wildcat and osprey. It failed to give adequate reasons for the conclusion in the Reports that incorporating Conditions 16 and/or 7 would ensure compliance with Tayplan Policy 3 and Perth and Kinross Local Development Plan 2014 Policy NE3. *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLF 1953; *Moray Council v Scottish Ministers* 2006 SC 691.

[52] The petitioner's position, as outlined in her pleas-in-law, was essentially that:

1. The Council had acted unlawfully by failing to require additional environmental information.

2. The Council had acted unlawfully by failing to carry out a proper environmental assessment as required by Regulation 3A of the EIA Regulations.
3. The Council had acted unlawfully by granting consent subject to (i) Condition 16 requiring a Construction and Environmental Management Plan and (ii) Condition 7 requiring species protection measures and a species protection plan.
4. In any event, the Council had acted unlawfully and/or unreasonably.
5. The Council had failed to give adequate reasons.
6. In the event of the decisions being reduced, there was an obligation on the Council to obtain additional environmental information about the wildcat and the osprey in the locality, in order to be able to make an informed decision, and the Council should be ordained to obtain such information before reconsidering the applications.
7. The Council's averments in answer were irrelevant *et separatim* lacking in specification and the answers should be repelled.
8. RDS's averments in answer were irrelevant *et separatim* lacking in specification and the answers should be repelled.
9. The Council's fourth plea-in-law and RDS's ninth plea-in-law, both anent prejudice to the petitioner, were without foundation and should be repelled.

The Answers for the Respondent

[53] The respondent contends that the modification decision and the cable decision were both lawful decisions.

[54] The petition is without any merit. The respondent had sufficient environmental information before it to make the decisions.

[55] As to the modification decision, the respondent and SNH were aware of and took account of the presence of the ospreys nesting prior to making the modification decision but the specific information was redacted from SNH's email dated

9 October 2015 in order to protect the ospreys and their presence was expressly referenced in the report of handling at paragraph 83 but again in a manner designed to protect them.

[56] As to the cable decision, neither the petitioner nor any other person or body including SNH raised the issue of impact on ospreys of it and nobody attended before the respondent to oppose the making of the cable decision. The presence of wildcat was expressly considered and taken into account in both of the decisions. In so far as the cable decision is challenged on the basis of any deficiency under the EIA Regulations this ground is irrelevant as the cable decision is not EIA development in terms of those Regulations the respondent having issued a screening decision to that effect dated 17 July 2015. A copy of the screening decision was produced.

[57] The respondent had sufficient environmental information provided *inter alia* by RDS and SNH upon which to make the decisions that it did. It was a matter for the respondent to determine whether it had sufficient information, subject only to challenge on a *Wednesbury* basis. It was entitled to and did place considerable weight on the consultation responses and advice of SNH. The respondent was entitled to have regard to mitigation provided for by Condition 18 of the modification permission and Condition 7 of the cable permission in reaching its decision. There was no requirement for the decision maker to know the specific details of the plans prior to making the decisions.

[58] The respondent's reasons are adequately set out in the respective Reports and the decisions.

[59] Reference was made to the full terms of the Decision Letter dated 3 September 2014 including Condition 17 thereof which is in similar terms to that of Condition 16 of the modification decision. That permission has not been challenged.

[60] Reference was also made to the full terms of the ES including paragraphs 7.5.23-24 and 7.6.6 and 14.4. As at or about the dates of the decisions under challenge a pair of ospreys nested within about 340 metres of the site of the wind farm. That was known to and taken account of by the respondent in making the modification decision.

[61] The ES was dated July 2012. Neither the petitioner nor any other person made representations or objections concerning the issue of ospreys or wildcat to the respondent in respect of the initial application.

[62] By the time of the modification decision, which is the relevant time for the purpose of the EIA Regulations, the respondent was aware of and had regard to impact on osprey and wildcat.

[63] It was reasonable for the respondent to have regard to the original ES and the SEA together when considering the adequacy of environmental information pursuant to the EIA Regulations. Reference was made to the full terms of the ES and SEI. The cable permission was not an EIA application and no environmental statement was required.

[64] Reference was also made to the full terms of the unredacted SNH response (with redactions shown in italics) a copy whereof was produced. It stated:

“Protected Species

There are recent records of breeding wildcat among [*location redacted*]. We request that a species protection plan for wildcat is submitted for comment before any construction work begins and this is included within the Construction and Environmental Management Plan and required for the discharge of condition 17L of the original consent.

In addition to wildcat, there are records of protected breeding birds nesting within close proximity to the development site, notably an osprey nest in the vicinity of [*location redacted*], which should also be taken into account in the discharge of condition 17.”

[65] Reference was also made to the full terms of SNH’s “Wind farm impacts on birds’ guidance”.

[66] In relation to the cable application, reference was made to the full terms of the SNH response dated 15 October 2015. SNH made no reference to the presence of ospreys in connection with this application nor did the petitioner.

[67] The petitioner spoke as a representative at the planning meeting dealing with the modification application only and solely on the issue of noise. It was accepted that SNH and other objectors did raise the presence of wildcat and the breeding osprey in respect of the modification application but only wildcat in respect of the cable application.

[68] It was explained and averred that the Council was aware of the presence of the osprey when it approved the modification decision and took into account the possible presence of wildcat in respect of both decisions. No further assessment was needed in respect of either before the grant of permission.

[69] Reference was made to the full terms of the Report on Handling for the cable application. No party raised the issue of impact on osprey.

[70] The petitioner's legal arguments were said to be without merit.

[71] The respondent had adequate environmental information upon which to make its decision. SNH in particular were aware of the potential impact on osprey in respect of the modification application and wildcat in respect of both applications and had advised that conditions be imposed as a consequence. There was no need for further information and it was not necessary that the detail of the precise measures to be taken should be identified prior to the decisions being made. Such measures are in any event designed to ensure safeguards are put in place not to provide information as to likely significant effects. Further there is no basis for any suggestion that the cabling permission will have any material impact on the osprey in addition to that of the existing or the modification permission. Whether or not a respondent has sufficient information and whether or not any environmental information provided is sufficient in terms of the EIA Regulations are planning judgments for the respondent and subject only to review on *Wednesbury* grounds. Reference was made to *The Cairngorms Campaign v Cairngorm National Park Authority and Ors* [2013] CSIH 65 and *R (Blewett) v Derbyshire CC* [2004] Env LR 29.

[72] There was no need for a further environmental impact assessment and Regulation 3A of the EIA Regulations did not require the respondent to undertake one. The respondent had appropriate information and advice before it. The petitioner misunderstands the purpose of the conditions. It was not to require

further information as to impact but in short to provide for the detail of the measures to be taken in respect of the potential impacts that had been identified. The respondent was entitled to have regard and to follow the site specific advice of SNH, who can be taken to be aware of their own generic guidance on Windfarm impacts on birds. Reference was made to paragraphs 77-80 and 83 of the Report on the modification application.

[73] The respondent's approach and decisions were reasonable and were open to it in the circumstances of this matter. Wind turbine and related permissions are regularly granted with management plans akin to the decisions in this case. There was nothing unusual about the circumstances of this case which required a different approach. The Council was entitled to place significant weight on the advice of SNH, being Scottish Ministers' advisers. Reference was made to *R v Cornwall CC ex parte Hardy* [2001] Env LR 25 and *Smith v SOSETR* [2003] EWCA Civ 262 but both cases concerned circumstances different from those the subject of the current petition.

[74] The Reports deal with the matter adequately. In effect the respondent followed the advice of SNH and that is apparent from the Reports.

[75] The petitioner addressed the planning meeting in respect of the modification application only and her oral remarks concerned noise.

[76] The respondent had the relevant information before it and followed the advice of SNH. It was clear that the respondent had specific regard to the osprey and wildcat and made informed decisions based on SNH's guidance.

[77] The pleas-in-law for the respondent were as follows:

1. The Council having acted lawfully and *intra vires* the prayer of the petition should be refused.
2. The petitioner's averments being irrelevant, *et separatim* lacking in specification the petition should be dismissed.
3. The petitioner's averments, so far as material, being unfounded in fact, the order sought should be refused.

4. *Esto* the respondent's decisions or either of them were *ultra vires* (which is denied) the petitioner not having suffered substantial prejudice as a result of the decision the prayer of the petition should be refused.
5. *Separatim esto* the respondent's decisions or either of them were *ultra vires* (which is denied) there being no real possibility that a different decision would be reached, the Court should exercise its discretion not to grant the orders sought.

The Answers for the Interested Party

[78] The Answers for the interested party shared many similarities with those of the respondent. Reference was made to the whole terms of the modification decision and the cable decision.

[79] It was pointed out that the interested party already holds planning permission for the construction of a 7 turbine wind farm, Alyth, in terms of planning permission 12/01423/FLL. The decision to grant that planning permission is not challenged in this application for Judicial Review.

[80] According to the interested party, the petitioner had no legal entitlement to the orders sought. The petitioner has no real prospect of success. The grounds of challenge rely upon alleged breaches of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 ("the EIA Regulations"). Those Regulations provide for the environmental impact assessment of "EIA development" (see the definition provided at Regulation 2 and the obligation upon the planning authority at Regulation 3).

[81] The development authorised by the cable decision is not "EIA development", a negative screening opinion having been issued by the respondent on 17 July 2015. The petitioner does not challenge the legality of the screening decision, a copy of which was produced. The EIA Regulations have no application to the cable decision. The grounds of challenge set forth in the petition are irrelevant so far as the cable decision is concerned.

[82] As regards the modification decision, the development authorised by that decision is EIA development. For the reasons advanced in the answers, there is no

basis to suggest that there has been a breach of the EIA Regulations. In particular, the impacts upon osprey and wildcat were assessed in the environmental information taken into account by the respondent.

[83] The assessment of likely significant effects was not held over to the Construction and Environmental Management Plan required through Condition 16 attached to the modification decision. Rather, that was a lawful condition, imposed at the recommendation of Scottish Natural Heritage (SNH), the effect of which was to ensure that the mitigated project did not give rise to environmental effects beyond those that had been assessed and reported upon in the Environmental Statement in accordance with the EIA Regulations. The adequacy of the environmental information was a matter for the respondent to determine subject only to challenge on the ground of *Wednesbury* unreasonableness. The respondent was entitled to place weight on the advice of SNH.

[84] Adequate reasons were provided for the decisions.

[85] The ES was prepared following standard methodology and in accordance with the expectation of SNH. The ES reported upon the presence of species detected during the relevant survey periods but also made reasonable assumptions on the basis of available evidence. Reference was made to the ES and Technical Appendices.

[86] As regards the impact on wildcat, paragraph 7.4.27 of Chapter 7 (Ecology) of the ES reports that:

“Pine Marten and Wildcat

29. species records provided by Perth and Kinross Council Biodiversity Officer highlighted the presence of wildcat and pine marten in the wider area. The habitat in the survey area is suitable for both these species. However no evidence of pine marten or wildcat was recorded during the watching brief for these species. The behaviour of both these species mean that absence of field signs from a watching brief does not conclusively prove absence from the Site. Given that both these species can have extensive home ranges a precautionary approach has been taken, and

it is assumed that the habitat within the survey area is used to some extent by both species.”

[87] Paragraph 7.5.23 of the ES states that there is at present, as far as the author of the ES is aware, no evidence of effects on these species in relation to displacement from foraging resources as a result of construction or operational disturbance from wind farms or other similar developments.

[88] Paragraph 7.5.24 then states that:

“24. The primary concern in relation to these species would therefore be in relation to direct damage and disturbance to dens. Wildcat will use dens amongst rocky boulders, tree roots and old fox earths and badger setts... There is no evidence that pine marten or wildcat dens are present within the survey area or that they would be affected by the proposed development. No potentially suitable den sites have been noted within the footprint of the development. However, these species could move into the area prior to construction and are difficult to detect. There is therefore a very small residual risk of direct harm to these species as a result of damage to undetected dens. The potential effect on these regional value receptors is therefore a negative, short term, reversible effect of moderate magnitude, which is very unlikely to occur.”

[89] Paragraph 7.6.6 of the ES reports upon mitigation measures designed to address the very unlikely risk identified. It is stated that:

“Prior to construction, checks will be undertaken to identify any potential den sites for wildcat or pine marten. Should any sites be identified as being potentially suitable and within 50m of the construction footprint, further survey will be undertaken to confirm if any dens are present. Should any dens be identified appropriate mitigation will be agreed in accordance with Scottish Natural Heritage.”

[90] Table 7.6 Summary of Effects records that, with mitigation in place, the residual effect is “negligible and not significant”.

[91] As regards the impact on osprey, paragraph 6.1.2 of Chapter 6 (Ornithology) of the ES explains that:

“... The assessment focuses on potential effects on black grouse (there is a lek on site), hen harrier and merlin (both of which use the site for foraging occasionally) and an assemblage of upland waders (which breed on site). In addition, potential effects on geese/waterfowl and skylark are considered.”

[92] It is apparent from the section of the ES in which Birds of Prey are considered that notwithstanding the survey efforts carried out over three years (paragraph 6.3.7) there was little evidence of use by raptors.

[93] In relation to osprey it is recorded at paragraph 6.4.10 that:

“Osprey

Two flights have been recorded during the period of the flight activity surveys as shown in Figure 6.7 and Table A6.7 of Technical Appendix A6.2. Desk study records indicate that this species breeds within 5km. Anecdotal records indicate that there may have been less flight activity in the survey area in recent years. There is no evidence that the survey area lies on a provisioning route between a feeding resource and a breeding location.”

[94] In these circumstances it was reasonable for the ES to concentrate on the two raptor species for which there was evidence of occasional foraging (namely hen harrier and merlin). The assessment went on to report that no likely significant effects were predicted for these species. Accordingly, the ES was not “inaccurate” in reporting about the presence of wildcat and osprey. The ES accurately reflected the survey work and assessment that had been carried out.

[95] In their consultation response of 9 October 2015 SNH noted recent records of breeding wildcat in the vicinity of the site and also records of protected breeding

birds nesting within close proximity to the site, notably an osprey nest. SNH recommended that species protection plans be submitted before construction work begins and included within the Construction and Environmental Management Plan. No objection was raised by SNH, nor was it suggested that additional environmental information was required.

[96] The Report of Handling by the Development Quality Manager states:

“83. Letters of representation have highlighted that there are wildcat and breeding birds in the vicinity of the site. SNH have highlighted that they are aware of recent records of protected species and they recommend species protection plans (SPP) are submitted prior to commencement of works and thereafter implemented during construction.”

The report recommends that a condition be imposed to take account of this.

[97] Condition 16 attached to the modification decision is in the following terms:

“16. Prior to the commencement of development a Construction and Environmental Management Plan will be submitted to and be approved in writing by the planning authority, in consultation with SEPA and SNH, at least one month prior to the commencement of development. The Construction and Environmental Management Plan will identify from the environmental statement appropriate mitigation strategies and consolidate these, clearly outlining what shall be implemented, when and by whom.”

[98] To be included with the Construction and Environmental Management Plan are (amongst other matters):

“j) details of bird surveys to be carried out before the commencement of development; and ...

l) measures for the protection of or beneficial to European and other protected species, formation of any required protected species protection plans and implementation measures for any such plans.”

[99] The condition concludes by requiring that:

“All work shall be carried out in accordance with the approved Construction Environmental Management Plan and all mitigation measures proposed within the environmental statement shall be undertaken within the approved timescales, unless as otherwise agreed in writing with the planning authority.”

[100] Accordingly, in accordance with standard practice, Condition 16 attached to the modification permission ensures that committed pre-construction mitigation measures and necessary species protection plans are delivered through the mechanism of the Construction and Environmental Management Plan.

[101] Condition 7 attached to the cable permission similarly requires the approval of species protection plans by the planning authority prior to construction commencing.

[102] The underground electrical cable application was not the EIA development and the EIA Regulations do not apply.

[103] The respondent took into account the advice of SNH when imposing conditions on the modification and cable permissions. Further, the ES included an assessment of the three main areas of potential risk to birds for those species for which there was the potential for likely significant effects. For the reasons set out in Chapter 6, for the raptor species, only hen harrier and merlin were assessed as having the potential for experiencing significant effects. In their consultation response of 9 October 2015 SNH do not advise the respondent that the ES is deficient in any respect. In particular, it is not suggested that records of an osprey nest close to the site necessitated a fresh assessment of the impact on osprey. As authors of the Guidance referred to by the petitioner, had SNH been of the view that additional environmental information was required before planning permission could be granted, they could reasonably have been expected to advise the respondent

accordingly. Instead, SNH recommended mitigation measures which have been incorporated by way of the condition referred to above.

[104] In accordance with the advice of SNH, Condition 7 of the cable permission requires species protection plans to be approved by the planning authority prior to construction commencing. SNH's advice related to wildcat. SNH did not raise any concerns as regards osprey, nor did the petitioner.

[105] It was accepted by the interested party that the petitioner had objected to both applications but under the explanation that in relation to the modification application her objection related to the issue of noise and in relation to the cable application her application related to the issue of wildcat.

[106] The interested party believed that respondent took into account the representations that were made, including those provided by SNH. The respondent was entitled to hold the view that the ES was adequate. The ES included consideration of potential impacts upon both wildcat and osprey. That SNH brought to the attention of the respondent, prior to the decision to grant planning permission, records relating to wildcat and osprey does not mean that there were inaccuracies or discrepancies in the ES. Standard EIA practice was followed and SNH did not raise any concerns over survey effort or methodology in relation to either wildcat or osprey. The assessment of impacts on these species was not left over to the conditions stage. An assessment was carried out in accordance with the EIA Regulations before the decision was reached by the respondent to grant planning permission, subject to conditions.

[107] Reference was made to the whole terms of the Report on Handling for the cable application. The impact on osprey was not one of the determining issues. The Environmental Appraisal submitted in support of the application had not identified any specific concerns relating to osprey, and no such concerns had been raised by either SNH or by the petitioner. Dr Alisdair McLean raised a concern relating to the disruption of wildcat habitat. His objection relating to osprey was made in relation to the modification application, not the cable application.

[108] In relation to the petitioner's legal arguments, the interested party maintained that the petitioner has no real prospect of success. Reference was made to the terms of the Habitats Directive and the EIA Regulations.

[109] The petitioner relied on Regulation 23(2)(b) of the EIA Regulations which provides that:

“where in the opinion of the Scottish Ministers or the planning authority –

(a) the applicant or appellant could (having regard in particular to current knowledge and methods of assessment) provide further information about any matter mentioned in Schedule 4; and

(b) that further information is reasonably required to give proper consideration to the likely significant effects of the proposed development on the environment,

they must notify the applicant or appellant in writing and the applicant must provide that information.”

[110] An environmental statement does not have to describe every environmental effect, however minor, but only the “main effects” or “likely significant effects”. Where a planning authority has a discretion to require further environmental information of an applicant so as to supplement an environmental statement, this involves the exercise of planning judgement and the Courts will intervene only where the exercise of discretion is *Wednesbury* unreasonable. The interested party referred to the recent discussion of authority by Lord Jones culminating at paragraphs 96 and 97 of his Opinion in the petition of *John Muir Trust* [2015] CSOH 163. In paragraph [97] Lord Jones said *inter alia*:

“I respectfully agree with the English judges that whether or not information is to be regarded as sufficient or adequate is a matter of judgment, and the person best able to exercise that judgment is the decision-maker, unless, as observed by Sullivan J in *Blewett* [*R (Blewett) v Derbyshire CC* [2004] Env LR 29

per Sullivan J at paragraphs 41 and 42], an environmental statement is so inadequate that it cannot be called an environmental statement at all.”

The interested party also pointed out that his Lordship’s decision had been reclaimed on the separate legal question of whether certain information supplied to Scottish Ministers bore the character of “additional information” under the relevant EIA Regulations applying to decisions under the Electricity Act 1989). Now see also [2016] CSIH 61 (Authorities Tab 14).

[111] In the circumstances of the present case it was not *Wednesbury* unreasonable for the respondent not to exercise its discretion to require further information under Regulation 23. The respondent was entitled to take the view that it had adequate environmental information as to the impact on wildcat and osprey, including the representations from SNH (see the definition of “environmental information” at Regulation 2 of the EIA Regulations).

[112] The respondent was entitled to conclude that, in accordance with standard practice, conditions could be imposed on the grant of consent to further regulate the manner in which the development was carried out as to avoid any additional impact upon wildcat or osprey. [113] The species protection plans, brought forward by Condition 16 of the modification permission and Condition 7 of the cable application, are designed to put in place mitigation measures and safeguards, not to report upon likely significant effects.

[114] The respondent was entitled to form the view that the ES was adequate. SNH did not raise any concerns as regards the adequacy of the ES. The assessment of likely significant effects was not left over to the conditions stage. There had already been a proper and adequate assessment of the effects on protected species, including wildcat and osprey. The effect of the conditions is to require mitigation measures to be put in place in respect of the potential impacts that were identified.

[115] The conditions imposed by the respondent are of a standard nature. In the circumstances before this Court, the authorities referred to by the petitioner do not assist the petitioner’s argument. In *R v Cornwall County Council, ex p Hardy* [2001] Env LR 25 it was held unlawful to require further bat surveys post-consent in order

to determine whether the level of effect was significant (see also *Smith v Secretary of State for the Environment, Transport and Regions* [2003] 2 P & CR 11 at paragraphs 27 to 33). By contrast, in the present circumstances, an assessment of likely significant effects had been carried out. The respondent did not act unreasonably in forming the view that the ES was adequate. It was entitled to rely on the advice of SNH that the imposition of conditions would be appropriate. The effect of the conditions is to put in place measures which were, in any event, contemplated in the ES. The assessment of likely significant effects has not been held over to the documents generated at the conditions stage. Species protection plans are designed to put in place mitigation measures and safeguards, not to report upon likely significant effects.

[116] The respondent's reasons are intelligible to an informed reader and are adequate.

[117] The petition is wholly misconceived insofar as reliance is placed upon the EIA Regulations in respect of the cable permission (the cable application not being EIA Development).

[118] The legal authorities support the proposition that the respondent was entitled to rely upon the adequacy of the ES and the advice of SNH.

[119] The petitioner cannot satisfy the Court that the respondent's exercise of discretion not to request further information was *Wednesbury* unreasonable. It is clear that the respondent was aware of the potential impacts upon wildcat and osprey and put in place appropriate conditions, in accordance with the advice of SNH. The petition is, in effect, a challenge to the planning judgement of the respondent.

[120] In any event, even if the petitioner is able to establish that there has been a breach of the EIA Regulations in relation to the modification permission, these proceedings are of no practical import. The interested party holds planning permission for a wind farm at Tullymurdoch (ref: 12/01423/FLL), as granted by a reporter on appeal. That planning permission is not challenged by the petitioner as unlawful, nor could it be given the date upon which planning permission was granted. On the hypothesis that the modification permission came to be reduced by

this court, the interested party would be entitled to proceed to construct the wind farm development in accordance with the permission granted on appeal. That permission includes Condition 17 which is in materially the same terms as Condition 16 to the modification permission. The only substantive difference between the wind farms authorised by the two permissions relates to the turbine dimensions. It is not suggested in the petition that the proposed design changes which brought about the modification application, make any difference to the suggested impact on wildcat or osprey. Accordingly, reduction of the modification permission would make no substantive difference to the impact upon species which the petition is, according to the petitioner, designed to protect. The lack of any practical effect of these proceedings would be a factor of some considerable weight in the exercise of the court's discretion when determining whether to reduce the modification permission. The petition is wholly irrelevant as regards the cable application.

[121] Accordingly, so submitted the interested party, the petition should be refused.

[122] The pleas-in-law for the interested party were in the following terms:

1. The respondent not having acted unlawfully in deciding not to require additional environmental information, the decisions should not be reduced.
2. The respondent not having acted unlawfully, in the circumstances condended upon, and not having failed to carry out a proper environmental assessment as required by Regulation 3A of the EIA Regulations, the decision should not be reduced.
3. The respondent not having acted unlawfully, in the circumstances condended upon, by granting consent subject to conditions, the decisions should not be reduced.
4. The respondent not, in any event, having acted unlawfully and/or unreasonably, the decisions should not be reduced.
5. The respondent not having failed to give adequate reasons, the decisions should not be refused.

6. There being no obligation on the respondent to obtain additional environmental information about wildcat and osprey in order to make an informed decision, the respondent should not be ordained to obtain such information before reconsidering the applications.

7. The petition having no real prospect of success, permission to proceed should be refused.

8. The petitioner's averments, so far as material, being unfounded in fact, the orders sought should be refused.

9. *Esto* the respondent ought to have required additional information before proceeding to grant the permissions (which is denied) the petitioner not having suffered substantial prejudice as a result, the orders sought should be refused.

The Productions

[123] Helpfully parties provided me with a "joint inventory of productions for the parties" (No 20 of Process) containing copies of the following (referred to below as "Documents Tab 1" to "Documents Tab 33"):

20/1 Excerpt from the Strategic Development TayPlan – Policy TayPlan 3 approved on 8 June 2012.

20/2 The Environmental Statement Volume 1 dated July 2012.

20/3 The Technical Appendix to the Environmental Statement dated July 2012.

20/4 Appeal Form and Appeal Statement by RDS to DPEA dated 13 March 2013.

20/5 Policy NE3: Biodiversity approved as part of the Perth and Kinross Local Development Plan on 3 February 2014.

20/6 DPEA Decision letter dated 3 September 2014 granting planning permission to Tullymurdoch Wind Farm.

20/7 Respondent's Screening Opinion 15/01080/SCRN dated 17 July 2015.

20/8 Application by RDS for planning permission to modify DPEA planning permission dated 3 September 2014 dated 4 September 2015.

20/9 Application by RDS for planning permission for underground cabling etc dated 4 September 2015.

20/10 Appendix 3: Ecological Appraisal dated September 2015.

20/11 The Supplementary Environmental Information produced by RDS for the applications to modify the planning consent for the wind farm dated September 2015.

20/12 Objection by petitioner submitted 9 October 2015.

20/13 SNH's Consultation Response (modification application) email dated 9 October 2015.

20/14 SNH's Consultation Response (cable application) dated 15 October 2015.

20/15 Objection by Stewart Miller submitted 19 October 2015.

20/16 Objection by Dr AF McLean submitted 20 October 2015.

20/17 Development Quality Manager's Report to Committee dated 30 October 2015 (modification application).

20/18 Perth and Kinross Council's decision dated 18 November 2015 granting the application by RDS for planning permission for modification of permission 12/01423/FLL.

20/19 Development Quality Manager's Report to Committee dated 24 November 2015 (cable application).

20/20 The Cable Decision dated 9 December 2015.

20/21 Arcus Construction Environmental Management Plan dated June 2016.

20/22 Appendix A of Arcus Construction Environmental Management Plan dated June 2016 – Drawings.

20/23 Appendix B of Arcus Construction Environmental Management Plan dated June 2016 – Turbine Specification.

20/24 Appendix C of Arcus Construction Environmental Management Plan dated June 2016 – Ecological Protection and Management Plan (including Annex A and Annex D).

20/25 Annex B of Arcus Ecological Protection and Management Plan dated June 2016 – Scottish Wildcat Protection Plan.

20/26 Annex C of Arcus Ecological Protection and Management Plan dated June 2016 – Osprey Survey Report (redacted version).

20/27 Windfarm impacts on bird's guidance – Scottish Natural Heritage.

20/28 Consultation Response dated 31 October 2012.

20/29 Scottish Natural Heritage Letter dated 26 January 2009.

20/30 Scottish Natural Heritage letter dated 23 April 2012.

20/31 Draft CMS for cable application.

20/32 Email from John Russell dated 22 July 2016.

20/33 Email from Ms Douglas to Perth and Kinross Council dated 20 October 2015.

Authorities

[124] I was also provided with a “joint inventory of authorities for the parties” (No 19 of Process) containing copies of the following (referred to below as “Authorities Tab 1” to “Authorities Tab 25”):

1. *R v Secretary of State for Environment ex p RSPB* [1996] ECR 1-3805.
2. *R v Cornwall County Council, ex p Hardy* [2001] Env LR 25.
3. *Smith v Secretary of State for the Environment, Transport and Regions and Ors* [2003] 2 P & CR 11.
4. *R (Blewett) v Derbyshire CC* [2003] EWHC 2775 (Admin).
5. *R (Jones) v Mansfield DC* [2003] EWCA Civ 1408.
6. *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953.
7. *Moray Council v Scottish Ministers* 2006 SC 691.
8. *R (Edwards) v Environment Agency* [2008] UKHL 22.
9. *Skye Windfarm Action Group Ltd v The Highland Council* 2008 CSOH 19.

10. *Jenkins v Gloucestershire County Council* [2012] EWHC 292 (Admin).
11. *C-260/11 R (Edwards) v Environment Agency (No 2)* [2013] 1 WLR 2914.
12. *John Muir Trust v Scottish Ministers* [2015] CSOH 163 – see also Tab 14.
13. *R (on app Devon Wildlife Trust) v Teignbridge District Council* [2015] EWHC 2159 (Admin).
14. *John Muir Trust v Scottish Ministers* [2016] CSIH 61.
15. *Smyth v SOSCLG* [2015] EWCA Civ 174.
16. *R (Champion) v North Norfolk District Council* [2015] UKSC 52.
17. *Co-Operative Group Ltd v Glasgow City Council* [2016] CSOH 88.
18. Town and Country Planning (Scotland) Act 1997, sections 25, 37 and 41.
19. Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 SI 2011/139.
20. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.
21. Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora.
22. Conservation (Natural Habitats etc) Regulations 1994 – Regs 38, 39 & Sched 2.
23. Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.
24. Wildlife and Countryside Act 1981 – section 1.
25. *Sustainable Shetland v Scottish Ministers* [2015] UKSC 4.

The Petitioner's Position

The Motion for the Petitioner

[125] The petitioner's motion was that the court should:

- (a) sustain the petitioner's pleas-in-law 7, 8 and 9 and repel the Answers;
- (b) sustain one or more of the petitioner's pleas-in-law 1, 2, 3, 4 and 5 and reduce the modification decision and the cable decision; and

- (c) following reduction of said decisions, sustain plea-in-law 6 and pronounce the order sought by the petitioner.

Summary of the Petitioner's Submissions

[126] The modification decision was an “EIA application”. However, the cable decision was screened not to require an EIA and so was not an “EIA application”. While the same issues apply to each decision there are differences. Authorities Tab 19 – Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 SI 2011/139 (“EIA Regulations”) Regulation 2 – EIA Development.

[127] The factual background is that the developer prepared an ES for the original wind farm decision which noted limited presence of osprey and wildcat near to the wind farm site. Both species are protected European Species. The same ES was used for the modification application. There was no ES for the cable application. During the consultation response to both applications, SNH and objectors drew the Council’s attention to the fact that an osprey was nesting within about 300 metres of the wind farm site and that wildcat were active in the area of the wind farm site and cable route. In consequence the Council included a condition in both consents, which required *inter alia* a Construction and Environmental Management Plan to include ecology protection measures and details of bird surveys and measures for the protection of, or beneficial to, European species.

The Modification Application

[128] In relation to the modification application the petitioner submitted that standing SNH’s consultation response and the information from objectors about osprey nesting and wildcat breeding in the area, it should have been obvious to the Council that the ES was inadequate and accordingly the Council ought to have required the developer to produce additional information under Regulation 23 of the EIA Regulations (Authorities Tab 19) about these species before making a decision to grant planning permission. Failure to do was unlawful and/or unreasonable in the whole circumstances.

[129] In the above circumstances the Council acted unlawfully in granting permission subject to the foregoing conditions, because the council could not be reasonably satisfied, without the additional information, that the permission could be granted without adverse effects on the protected species. It was therefore unlawful to grant the permission subject to the condition.

The Cable Decision

[130] In relation to the cable decision, the issues are within the same compass (except that as the cable decision was not an EIA development Regulation 23 does not apply), but it was submitted that in context of the EIA Regulations and the EIA Directive (Authorities Tab 20) that on receiving the information about wildcat breeding in the area from SNH and objectors the Council should have required additional information either by way of changing their screening decision and requiring an ES or just requiring information on the wildcat in the area and proposed mitigation.

Legal Background: Osprey and Wildcat

[131] Osprey and wildcat are European protected species under the Wild Birds Directive (Authorities Tab 23) and section 1 of the Wildlife and Countryside Act 1981 (Authorities Tab 24) and the Habitats Directive (Authorities Tab 21).

[132] Osprey (*Pandion haliaetus*) is an “Annex 1 species” that under Article 4 “shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution” and is under a “general system of protection” prohibiting killing, destruction of or damage to nests and eggs and disturbance of during the breeding season under Article 5. Wild Birds Directive (Authorities Tab 23), Annex 1, *Pandion haliaetus*, Article 4(1), and Article 5, given effect by section 1 of the Wildlife and Countryside Act 1981 (Authorities Tab 24). SPAs are the most prominent special conservation measure so that absent an SPA member states and the Council will have to take other “special conservation measures” to comply with Article 4 “to ensure the very

survival of the species concerned, and to facilitate their reproduction". *R v Secretary of State for Environment ex p RSPB* [1996] ECR 1-3805 AG 66 (Authorities Tab 1).

[133] Importantly, therefore, the osprey is a highly protected species under the Wild Birds Directive.

[134] Wildcat (*Felis silvestris*) is a "species of Community interest" which is endangered or vulnerable or rare and is listed in Annex IV(a) of the Habitat's Directive (Authorities Tab 21) and has to be subject to "a system of strict protection" under Article 12. Habitats Directive (Authorities Tab 21), Annex IV(a) *Felis silvestris*, Article 12 brought into effect by Conservation (Natural Habitats etc) Regulations 1994 (Authorities Tab 22), Regulations 38 and 39 and Schedule 2.

[135] Importantly, therefore, the wildcat is also a highly protected species under the Habitats Directive.

Public Participation in Environmental Decision Making

[136] In relation to both osprey and wildcat, the petitioner stressed the importance of public participation in environmental decision making.

[137] One of the purposes of the EIA Directive (Authorities Tab 20), giving effect of the Aarhus convention, is to ensure that there is "effective public participation" in environmental decision making procedures, so that the public are "given early and effective opportunities to participate in the environmental decision-making procedures ... when all options are open". The EIA Directive requires an ES to include "A description of the measures envisaged to prevent, reduce, and where possible offset any significant adverse effects on the environment." i.e. mitigation measures such as the Construction and Environmental Management Plan and the species protection plans.

[138] This is of importance in relation to the argument that the Council ought to have required additional information about osprey and wildcat and any proposed species protection plans so that this information could be advertised and commented on by the public concerned, including the petitioner. By granting planning permission subject to a condition that requires the mitigation measures to be approved by the Council, the public have been denied the opportunity of

commenting on the mitigation measures. EIA Directive (Authorities Tab 20), Preambles (16) to (20), Articles 6(2), (4) and (6); *C-260/11 R (Edwards) v Environment Agency (No 2)* [2013] 1 WLR 2914 (Authorities Tab 11) AG at paragraphs 40 to 42, and CJEU at paragraphs 31 and 32. These passages, in addition to the EIA Directive itself, demonstrate the importance that the EU places on public participation in the protection of the environment.

[139] The EIA Regulations (Authorities Tab 19) brings the EIA Directive into effect in UK. The petitioner highlighted the importance of public participation. Regulations 2, 3, 3A, 4(3), 17 to 22, 23, 24, 26 and Schedule 4 paragraphs 3 and 4.

Factual Background and Timeline

[140] The factual background and relevant quotes from the documentation have been set out in the petition (already outlined above). Essentially the ES for the original planning application, and the supplementary environmental information for the modification decision, and for the application for a screening decision in respect of the cable decision, only dealt with the issue of osprey and wildcat in the area broadly and had not picked up that there was a breeding pair of osprey within 300 metres of the wind farm site and that breeding wildcat were active in the area of the wind farm and cable route. The information only came to the attention of the Council from SNH's consultation responses (Documents Tabs 10 & 11) (SNH having been given the information by the petitioner and other objectors) and from objectors thereafter and prior to the Council's Reports to Committee being prepared.

[141] The Council then proceeded to grant the modification and the cable decisions with conditions requiring *inter alia* Construction and Environmental Management Plans for both developments and details of bird species surveys and details of measures for the protection of or beneficial to European species within the modification decision only: (Documents Tab 18) Modification decision dated 18 November 2015, Condition 16; (Documents Tab 20) Cable decision dated 9 December 2015, Conditions 2 and 7.

Grounds of Challenge: Failure to Request Additional Information

The Modification Decision

[142] In relation to the modification decision there was a failure to request additional information. The petitioner contended that the Council:

- (1) acted unlawfully in granting planning permission for the modification decision with Condition 16; and
- (2) ought to have required additional information to be provided; i.e. an updated draft Construction and Environmental Management Plan (“CEMP”) for the site, details of updated bird species surveys, particularly in relation to the osprey and details of measures for the protection of or beneficial to European species, namely the osprey and wildcat.

[143] This could have been required under Regulation 23(2)(b) of the EIA Regulations (Authorities Tab 19) as:

“information reasonably required to give proper consideration to the likely significant effects of the proposed development on the environment”.

[144] It is clear that this should have been required because under paragraph 5 of Schedule 4 of the EIA Regulations the ES ought to have contained information which included:

“5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.”

[i.e. the CEMP and the measures for protecting the osprey and wildcat]

[145] Because the ES did not have the detailed information on osprey and wildcat that became available later there were no detailed mitigation measures.

[146] The additional information would then have had to be published under Regulation 24 and the public, including the petitioner, would be given an opportunity to comment on that information and in particular on whether or not

the CEMP, bird surveys and measures for the protection of the osprey and wildcat were accurate, adequate and effective.

[147] The Council did not have sufficient information before it on which it could reasonably have made its decision.

[148] The petitioner contended that the Council acted unlawfully by failing to require additional information and publishing it so that the petitioner and members of the public could comment on that information. The Council was in breach of the obligations under Article 6(4) of the EIA Directive [Authorities Tab 20] to give the public:

“early and effective opportunities to participate in environmental decisions making procedures ... when all options are open ... before the decision on the request for development consent is taken”

As the CEMP has to be agreed by the Council in conjunction with SNH the public are excluded from commenting on that information and so do not have an effective opportunity to participate and the Council’s decision on the effectiveness of the CEMP is taken after the decision on the application has been taken contrary to Article 6(4).

[149] The Council also acted unreasonably because, without seeing the CEMP, the bird surveys and the proposals for the protection of the osprey and the otter, the Council could not reasonably be certain that there would be no adverse impacts on those species. This was in effect, or should have been, “environmental information” which they required and under Regulation 3 of the EIA Regulations the Council could not lawfully grant planning permission without taking environmental information into account.

[150] Further, the Council acted unreasonably because the modification decision is incompatible with LDP Policy NE3 Biodiversity (Documents Tab 5) because that policy says that “Proposals ... will not be supported unless clear evidence can be provided that ecological impacts can be satisfactorily mitigated”. There was no clear evidence at the time of the decision. Such evidence will only become available after the decision. Further “Planning permission will not be granted for development that

would ... be likely to have an adverse effect on" Annex IV species. The Council could not know if there was likely to be an adverse effect until the information required by the conditions was produced.

[151] SNH's Guidance on wind farm impacts on birds (Documents Tab 27) suggests three bullet points that have to be assessed: (1) displacement, (2) collision risk and (3) habitat loss. With an osprey breeding within 300 metres of the site, that assessment should have been done before any decision was made, because there will be at least two adult and then young ospreys flying in the area or they are likely to be displaced from that nesting site.

[152] In relation to The Report to Council (Documents Tab 17) the petitioner highlighted *inter alia* the following paragraphs:

- Paragraph 21 – Policy NE3 – Biodiversity.
- Paragraph 42 – SNH "Provide updated comments on pre-construction survey" – the petitioner contended that that was not an accurate representation of SNH's response which refers to an osprey nesting nearby and breeding wildcat activity.
- Paragraph 62 – Concerns that there could be impact on protected species.
- Paragraphs 77 – 80 – "Ornithology" – the petitioner contended that there was no mention of osprey nesting nearby which might affect collision risk and/or risk of displacement, so the Council was unaware of these issues raised by SNH.
- Paragraphs 81 – 83 – "Ecology" - the petitioner contended that this refers to wildcat in the area, but not that there are breeding wildcat at a nearby location, and only mention breeding birds in vicinity of the site – not that the birds are osprey which are highly protected.

The Council would therefore have been misinformed by the Report and might not have realised the important issues about osprey and breeding wildcat which could have affected their decision.

[153] The petitioner also highlighted the following authorities:

- *R (app Devon Wildlife Trust) v Teignbridge DC* [2015] EWHC 2159 (Admin) at paragraph 75 (Authorities Tab 13) in relation to the proper approach to Officer's Report.
- *R v Cornwall County Council, ex p Hardy* [2001] Env LR 25 (Authorities Tab 2) at paragraphs 56, 61, 63, and 64. The fact that surveys were required indicated that there was the likelihood of significant adverse effects and thus was a main reason for overturning the decision. This is similar to the present position where bird surveys were required, no doubt to include osprey, and species protection plans which indicate that it was accepted there could be adverse effects unless there were good plans in place. The fact that it was suggested that surveys be carried out after permission was granted did not weigh with the judge. Without the surveys one could not rationally conclude there would be no significant nature conservation effects – similarly in the present case without the CEMP, bird surveys and species protection plans, the Council could not rationally conclude there would be no significant nature conservation effects.
- *Smith v Secretary of State for the Environment etc* [2003] 2 P & CR 11 (Authorities Tab 3) at paragraphs 22, 25-27, 30, 33, 54, 55 and 58 in relation to the unlawfulness of "leaving over" decisions and circumstances where decisions cannot be left over.
- *R (app Devon Wildlife Trust) v Teignbridge DC* [2015] EWHC 2159 (Admin) (Authorities Tab 13) at paragraphs 20, 104 - 114 and 119 in relation to the purpose of EIA Directive, cutting the public out of the process, the prejudice this causes and the propositions drawn from the cases. *Hardy* demonstrates that in circumstances like this the present decision could not reasonably have been held.
- *R (Jones) v Mansfield DC* [2003] EWCA Civ 1408 (Authorities Tab 5) at paragraphs 38, 39, 54 and 58. A planning authority cannot rely on conditions as a surrogate for the EIA process. An authority must have sufficient information on which to make a decision. In this case SNH required a condition that required further investigations; i.e. a CEMP, bird surveys and species protection plans. A

planning authority's duty is to inform itself of all relevant matters in deciding the case. In this case the Council had not informed itself before taking the decision, but left this over to after the decision.

The Cable Decision

[154] The petitioner contended that the Council acted unlawfully in granting planning permission for the cable decision with Conditions 2 and 7 for all the reasons given in relation to the modification decision. However, because a screening decision (Documents Tab 24) had been issued that an ES was not required and so this was not an "EIA development" Regulation 23(2)(b) of the EIA Regulations (Authorities Tab 19) does not apply.

[155] It was to be noted that this was not a challenge to the original screening decision not to require an ES, but it was a challenge to the response by the Council to the new information provided by SNH and the objectors about wildcat, i.e. the failure then to require additional information.

[156] It was of note:

- That SNH is a consultation response, although if this was not an EIA decision then there was no need to consult SNH; and
- That the decision (Documents Tab 26) Condition 2 refers to the CMS contained within the environmental statement, so it is odd (submitted the petitioner) that the development is not an EIA development and so no ES should have been prepared for it.

[157] The Report to Council (Documents Tab 19) at paragraph 72 merely refers to SNH recommending that measures are put in place to minimise any potential impacts on breeding wildcat through a species protection plan.

[158] The petitioner contended that, having regard to the obligations in the EIA Directive and the Wild Birds and Habitats Directions, EU law would oblige the Council to seek the further information set out above before it could rationally be certain that the cable decision would not have an adverse impact on the protected

species. It was of note that Condition 1 of the cable decision (Documents Tab 20) requires the development to be carried out in accordance with the approved plans, so there is little room for deviation of the cable route if it was found to run through a wildcat den – a point made in *Smith* (Authorities Tab 3).

[159] While the Council originally determined that an ES was not required in the screening decision it was submitted that the moment the additional information became available anent the wildcat it should have been obvious that the decision was potentially liable to have significant effects on the environment and so became an EIA Development – see Regulation 2(1) definition.

[160] In these circumstances, it was submitted that it was open to the Council (and they should have done so) to recall their screening decision as it was based on wrong information and to require an ES (scoped to deal with the wildcat issue) which would have included mitigation measures as required by paragraph 5 of Annex IV. Such an ES would then have had to be advertised and the petitioner and others would have had an opportunity to comment on the ES and the proposed mitigation measures.

[161] When one has regard to the strictures of the EIA Directive and Regulations (that where a development is likely to have significant effects on the environment an EIA procedure has to be followed) it was submitted that if it becomes clear during the course of a permission process that an assumption that it would not have significant effects on the environment is overtaken by information, then the development becomes one which should then require an EIA then it must be put on that course. See Regulation 3 - permission must not be granted if it is an EIA development without considering environmental information which includes an ES. See also EIA Directive Regulation 2(1) “Member States shall adopt all measures necessary ...” (*c.f.* Duty, in cases cited above, re obligation to inform themselves.)

[162] For these reasons the Council has acted unlawfully in the cable decision.

Ground of Challenge – Inadequate Reasons

[163] The Council has issued the planning permissions (Documents Tab 18 (modification); Documents Tab 20 (cable)) and the planning permissions do not

contain any particular reasons beyond those for each condition. Therefore the “reasons” for the decision have to be discerned from the Council Officer’s Reports.

[164] The approach to the Report is set out in *Devon Wildlife Trust* (Authorities Tab 13 at paragraph 75). Reference was made to the criticisms already made (above). The Report does not properly address the issue arising in particular from SNH’s consultation response about osprey and breeding wildcat in the locality.

[165] The law on adequacy of reasons is in *South Buckinghamshire DC v Porter (No 2)* [2004] 1 WLR 1953 (Authorities Tab 6) at paragraphs 35 and 36. The reasons given should:

1. enable the reader to understand why the matter was decided as it was;
2. enable the reader to understand what were the conclusions on the principal controversial issues;
3. not give rise to a substantial doubt that the decision maker misunderstood some important matter;
4. refer to main issues and not every material consideration; and
5. not give rise to prejudice.

[166] Looking at those headings in the context of the Officer’s Report (Documents Tab 17 (modification) and Documents Tab 19 (cable)) the petitioner submitted that there was no clear reference dealing with those important issues. The petitioner contended that one cannot understand how the main issue which related to the protection of the European species was decided. Why did the council not require additional information? Why was the information from SNH sufficient to make a decision that there would be no significant impact on the species and therefore that a condition for the future would be sufficient? There is no clear understanding of the conclusions on the issues. The Report does not clearly highlight osprey in the vicinity of the wind farm or breeding wildcat or the fact that these are European protected species. It is not clear if the Council had regard to these very important matters.

[167] For these reasons, the petitioner submitted that the reasons provided in both decisions are inadequate.

[168] With regard to prejudice, the petitioner submitted that as the position was not clearly explained (as set out above) this amounts to prejudice to the petitioner. *John Muir Trust v Scottish Ministers* [2015] CSOH 163 Lord Jones at paragraphs [259] to [262] and [266] (Authorities Tab 12) appealed to the Inner House – now see [2016] CSIH 61 (Authorities Tab 14).

The Petitioner's Response to the Submission that Court Should Not Exercise its Discretion

[169] In response to the defence that the court should exercise its discretion to refuse the application, the legal position, which now has to take account of the EU law, is set out in: *R (Champion) v North Norfolk District Council* [2015] UKSC 52 Lord Carnwath JSC at paragraphs 54 to 58 (Authorities Tab 16). The petitioner highlighted:

“the seriousness of the defect invoked’ and the extent to which is has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive.”

So the court is concerned not just with whether or not the petitioner has been prejudiced but whether the public concerned has been deprived of the rights under the EIA Directive. It is “prejudice” to both that is in issue.

[170] It is for the respondent/interested party to demonstrate that the decision would not have been different but for the defect in procedure. The petitioner submits that this cannot be demonstrated, because if there had been public consultation members of the public including the petitioner could have provided information that might have led to changes in the CMEP and the species protection plan.

[171] It was of note, in looking at the draft plans now produced, that the interested party has not taken information from the petitioner who has seen the osprey flying in the area and who knows where some of the wildcat dens are located.

[172] The petitioner has been prejudiced because she has not been able to exercise her right to make representations; the public has likewise been prejudiced. See *John Muir Trust* (Authorities Tab 12) Lord Jones at paragraph [105]:

“The question, therefore, is not whether the trust was prejudiced, but whether members of the public were prejudiced.”

Now see also [2016] CSIH 61 (Authorities Tab 14)

[173] The onus is on the Council/interested party to satisfy the court. This defence should be rejected and plea-in-law number 9 for petitioners should be sustained.

The Respondent’s Position – Perth and Kinross Council

Introduction

[174] The petitioner seeks to challenge the grant of two planning permissions by Perth & Kinross Council (“the respondent”) on the basis of the inadequate and flawed treatment of impacts on ospreys and wildcat:

(i) On 18 November 2015 planning permission (Documents Tab 18) was granted for the modification of the approved Tullymurdoch Wind Farm, so as to permit changes to the dimensions of the 7 turbines permitted on appeal 3 September 2014 (“the original permission”), (“the modification decision/permission”) and

(ii) On 9 December 2015 planning permission (Documents Tab 20) was granted for the laying of an underground cable with temporary ancillary infrastructure connected with the Tullymurdoch Wind Farm (“the cable decision/permission”).

[175] It was noted that:

(a) The original permission is not challenged, and is now incapable of challenge. The modification permission is for development within the parameters of the design assessed for the original permission.

(b) Only the application for the modification permission engaged the provisions of EIA Regulations 2011, the respondent having “screened out” the cable permission by a decision made on 17 July 2015 (Documents

Tab 7), which decision is also not challenged. The petitioner's grounds of challenge in respect of cable decision based on the EIA Regulations 2011 (petition, statements 5(a)-(b) and 7(a)-(c)) are therefore irrelevant.

[176] Whilst much of the petitioner's criticism is directed at the original Environmental Statement ("ES") (Documents Tab 2) and the Supplementary Environmental Information ("SEI") (Documents Tab 3), as a matter of basic administrative law the decisions fall to be considered upon the information known to the respondent at the time they were made.

[177] It is also relevant to note that planning permissions under challenge were granted subject to planning conditions that provided for a Construction and Environmental Management Plan and any required species protection plans to be approved by the respondent in consultation with SNH prior to construction commencing. In particular, the relevant conditions attached to the modification permission are in terms identical to those attached to the original planning permission.

Background

[178] The original permission required an ES, and one was produced in 2012 (Documents Tab 2). It considered the potential impact on both osprey and wildcat (in respect of both of which is recorded *inter alia* that they bred in the locality), but did not record/note the particular presence of either. Likewise in terms of the modification application and the SEI supplied in respect of it.

[179] However, in their response to the modification application dated 9 October 2015 (Documents Tab 13) SNH drew attention to the possible presence of both and the substance of that response was considered and dealt with within the officer's report.

[180] Further in their response dated 15 October 2015 (Documents Tab 14) to the cable application SNH drew attention to breeding wildcat, which response was considered and duly dealt with within the officer's report.

[181] It is a matter of common knowledge that SNH have significant expertise as to the potential impact of wind turbines on a wide variety of species, including wildcat and osprey.

Legal Submissions

[182] Decisions as to whether further information is required in respect of environmental information under the EIA Regulations are planning decisions within the exclusive province of the planning authority, subject to challenge on *Wednesbury* grounds only. Further, just because information becomes available after the production of an ES which supplements it does not necessitate that a request for further environmental information (“FEI”) needs to be made, nor does it mean that the original ES (or SEI) are deficient and cannot reasonably be described as an ES. See *R (Blewett) v Derbyshire CC* [2003] EWHC 2775 (Admin) at paragraphs [31] to [42] (Authority Tab 4), in particular at paragraphs [41] and [68] (upheld on appeal). Paragraph [41] was specifically approved in *R(Edwards) v Environment Agency* [2008] UKHL 22 at paragraph [38] (Authorities Tab 8)). See also *Skye Windfarm Action Group Ltd v The Highland Council* 2008 CSOH 19 Lord Hodge at paragraphs [41] and [42] (Authorities Tab 9).

[183] In taking any decisions in respect of planning applications which engage the EIA Regulations planning authorities are entitled to have regard to reasonable mitigation proposals. See *Smith v SOSETR* [2003] EWCA Civ 262 at paragraphs [22] to [33] (Authorities Tab 3).

[184] In particular, it is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case, see *R (Jones) v Mansfield DC* [2003] EWCA Civ 1408 at paragraph [39] (Authorities Tab 5).

[185] In taking any such decisions referred to above, a planning authority is entitled to place considerable weight upon the advice of a body such as SNH. See *Smyth v SOSCLG* [2015] EWCA Civ 174 at paragraph [85] (Authorities Tab 15).

[186] In considering the adequacy of reasons for planning decision in respect of which there is an officer's report, and particularly when the decision accords with the recommendation of the report, regard should be had to the terms of the report. See Lord Turnbull in *Co-Operative Group Limited v Glasgow City Council* [2016] CSOH 88 at paragraphs [21], [33], [38] and [39] to [52] (Authorities Tab 17) and the cases cited therein.

Submissions on the Merits

[187] In this case, standing the terms of the SNH consultation responses (Documents Tab 13 and Tab 14) the respondent acted both lawfully and reasonably in determining to grant planning permission subject to the conditions that it did. Further, its reasons for so doing are adequately conveyed to the informed reader.

[188] In terms of the modification permission:

(a) SNH did not suggest that there would be any significant environmental impact arising in respect of either wildcat or osprey and made it clear that the issue, such as it was, could be dealt with by condition, in respect of which it provided draft terms.

(b) There was no basis upon which the respondent might reasonably require SEI from the applicant to in effect replicate the information supplied by SNH, which was within the environmental information it could consider.

(c) There is no evidence to justify any assertion that the mitigation measures were unusual and/or justified being treated themselves as SEI.

[189] In terms of the cable permission:

(a) SNH did not suggest that there would be any significant environmental impact arising in respect of wildcat and made it clear that the issue, such as it was, could be dealt with by condition, in respect of which it provided draft terms.

(b) There is no evidence or other basis to justify any assertion to the contrary or that any, let alone any significant, impact might be suggested

to arise in respect of osprey. Neither the petitioner nor any other person suggested the same in writing or orally notwithstanding their knowledge of the presence of osprey.

(c) There was therefore no basis upon which the respondent could have been required to reconsider its screening decision.

[190] In neither case was there any reason to suggest they should request more information. They had information as to the presence of both species and there were uncontentious steps that could be taken to manage them appropriately. That the information became available after the ES and/or the SEI matters not. The purpose of the conditions was not to provide more information as to whether impacts might be significant but to inform the precise details of the mitigation of the impacts identified.

[191] Such conclusion is reinforced by consideration of the two relevant reports (Documents Tab 17 and Tab 19), which had due regard both to the local residents' letters of representation as well as the SNH consultation responses noted above. (Such letters did not add to SNH's response in any significant degree.) Specific consideration was given to such matters in the report on the modification application (see paragraph 83) and in the report on the cable application (at paragraph 72). There is no basis for suggesting what was proposed in either case was unusual or uncertain.

[192] In any event, *esto* either decision was *ultra vires* which is denied, the petitioner has not suffered substantial prejudice and there is no real possibility that a different decision would be reached, particularly given the existence of the original permission, see paragraph 2(a) above. Reference was also made to *R (Champion) v North Norfolk District Council* [2015] UKSC 52 (Authorities Tab 16) per Lord Carnwath at paragraphs [54] to [60].

Other Matters

[193] The respondent reserved its position in respect of orders relating to expenses.

The Position of the Interested Party – RDS Element Power Limited

Relevancy of the Cable Permission Challenge

[194] The cable application was not for EIA Development (there having been a negative screening opinion issued by the respondent which was not the subject of challenge). Accordingly, the Town and County Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (“the EIA Regulations”) (Authorities Tab 19) have no application to the cable permission.

[195] Should the petitioner continue to assert that, in breach of the respondent’s obligations under the EIA Regulations, the cable permission was unlawful by virtue of a failure to require additional information, or the assessment of effects having been “left over” to discharge of conditions, those grounds of challenge are irrelevant.

Response to Ground of Challenge 1 (i.e. that the Council did not have Sufficient Environmental Information Before it and Ought to Have Required Additional Information)

[196] The obligation upon the respondent was not to grant planning permission unless it had first taken the environmental information into consideration (Regulation 3 of the EIA Regulations).

[197] “Environmental information” means the environmental statement, any additional information and any representations made by any body required to make representations and any representations duly made by any other persons about the environmental effects of the development (Regulation 2 of the EIA Regulations). The environmental information available to the respondent in respect of the modification application therefore included the Environmental Statement (ES) (Documents Tab 2), Technical Appendix (Documents Tab 3), the Supporting Environmental Information (SEI) (Documents Tab 11) and the consultation representations from SNH, the petitioner and other members of the public (Documents Tabs 13, 14, 15, 16 and 28).

[198] An environmental statement must include at least the information referred to in Part 2 of Schedule 4 including a “description of the measures envisaged in order

to avoid, reduce and, if possible, remedy *significant* adverse effects” (para 2). It must also include such of the information referred to in Part 1 of Schedule 4 as is “*reasonably required*” to assess the environmental effects of the development (including “a description of the aspects of the environment *likely to be significantly affected*”). See Regulation 2 and Schedule 4, Part 1, paragraph 3.

[199] Therefore, the focus of an environmental statement is properly upon the identification of “likely significant effects” and the mitigation of those effects.

[200] Similarly, there is a discretion afforded to the planning authority to request additional environmental information where, in their opinion, that further information is reasonably required to “give proper consideration to the *likely significant effects* of the proposed development on the environment.” (Regulation 23(2)(b).)

[201] Rarely will an environmental statement be so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations. Further, the EIA Regulations require the taking into account of the environmental information (not simply the environmental statement), and therefore the Regulations include a mechanism for any deficiencies to be identified and addressed (*R (Blewett) v Derbyshire County Council* [2003] EWHC 2775

(Admin); [2004] Env LR 29 per Sullivan J at paragraphs [32] to [42]) (Authorities Tab 4, upheld on appeal and paragraph [41] cited with approval by Lord Hoffman in *R (Edwards) v Environment Agency* [2008] UKHL 22; [2008] Env LR 34 at paragraph 38).

[202] The EIA Regulations do not require the planning authority to have available to it information on every detailed environmental effect. What is required from the planning authority is that it makes its planning decision only after a proper assessment of what the significant environmental effects are likely to be. The judgment of whether the environmental information is sufficient for that assessment will be one of fact and degree in each case, subject to review by the courts on the normal grounds of Judicial Review (*Skye Windfarm Action Group Ltd v The Highland Council* 2008 CSOH 19 per Lord Hodge at paragraph 41) (Authorities Tab 9).

[203] In this instance, an ES was prepared according to agreed methodologies and submitted in support of the original planning application for which permission was granted. There was no challenge to that decision by the petitioner or any other party on the basis that the ES was deficient such that the grant of planning permission for a 7 turbine wind farm was unlawful.

[204] Neither the ES nor the subsequent SEI prepared for the modification application identified a likely significant effect upon either osprey or wildcat. Nevertheless, the potential for such effects was considered. For osprey, the survey effort reported in the ES detected limited flight activity. Desk studies indicated breeding within 5km. However, the survey effort did not establish a breeding attempt during the survey period (see Chapter 6 of the ES at paragraph 6.3.7 (page 6-3) and paragraph 6.4.10 (page 6-8)). For wildcat, species records provided by the respondent's Biodiversity Officer highlighted the presence of wildcat in the wider area. No evidence of wildcat was recorded during the surveys; however a precautionary approach was taken and it was assumed that the habitat within the survey area was used to some extent by that species (see Chapter 7 of the ES at paragraph 7.4.29 (page 7-9) and paragraphs 7.5.23-24 (page 7-14)).

[205] A commitment was made to carry out pre-construction checks for potential wildcat dens, and if any dens were identified, to agree appropriate mitigation with SNH (see ES Chapter 7, paragraphs 7.6.5 and 6 (page 7-16)) (Documents Tab 2). Taking account of this proposed mitigation, there was no residual significant effect (table 7.6 on page 7-16). Although no significant effect on osprey was predicted a commitment was also made to include breeding bird nest checks, overseen by an Ecological Clerk of Works, as part of the Construction Environment Management Plan (See Chapter 6, Section 6.6 (Mitigation Measures), page 6-19) (Documents Tab 21 and Appendices at Tabs 22, 23, 24).

[206] Both the SNH consultation response dated 9 October 2015 (Documents Tab 13) and Dr A F McLean's letter of objection dated 30 October 2015 (Documents Tab 16) made reference to recent records of breeding osprey and wildcat. SNH gave advice as regards the content of species protection plans (using wildcat as an

example) and the discharge of Condition 17 for the original planning permission. The report of handling for the modification application refers expressly to the advice of SNH (paragraph 83 of the report) (Documents Tab 17).

[207] It was not suggested by SNH that the potential presence of osprey and wildcat in the vicinity of the development site gave rise to likely significant environmental effects. SNH did not advise the respondent that additional surveys were required. Nor did they advise that the ES and SEI were deficient such that additional information should be sought in relation to osprey or wildcat. The recommendations of SNH reflected the mitigation measures identified in the ES and Condition 17 attached to the grant of the original planning permission. Conditions to like effect were attached to the grant of the modification permission (see Conditions 16 and 17).

[208] Accordingly, the interested party submitted:

(1) that the respondent was entitled to form the view that the “likely significant effects”, and the mitigation of those effects, had been identified in the ES;

(2) that the environmental information provided by SNH and by an objector as regards the potential presence of osprey and wildcat was taken into account by the respondent; and

(3) that the respondent was entitled not to exercise its discretion to require additional information from the interested party and its decision to proceed to grant planning permission without first requesting such information cannot be described as *Wednesbury* unreasonable.

Response to Ground of Challenge 2 (i.e. that it was Unlawful to Leave Over the Assessment of Effects to the Discharge of Conditions)

[209] As occurred on the particular facts in *R (Hardy) v Cornwall County* [2001] Env LR 25 (Authorities Tab 2), in the legal context of the EIA Regulations, it would be unlawful to leave over the assessment of likely significant effects on protected species, and the mitigation of those effects, to the discharge of conditions stage – but

that is not what occurred here. Full ornithological surveys had been carried out of osprey and a watching brief for wildcat was implemented during the ecological and ornithological survey efforts. Although no evidence was detected of wildcat presence within the site, a precautionary approach was taken, and mitigation measures committed to in the ES. The residual (post-mitigation) effect was assessed as not significant. The respondent was therefore in a position to determine that there would be no likely significant effect on these species. Contrast the position in *Hardy* relating to bats for which only preliminary surveys had been carried out resulting in a recommendation by English Nature and Cornish Wildlife Trust that further surveys of the mine shafts were necessary to ensure that bats would not be adversely affected by the excavation or capping of mine shafts. It was held that without such underground surveys having been carried out, the Council could not rationally conclude that there would not be “significant adverse effects” which the equivalent EIA Regulations required the Council to take into account.

[210] Nevertheless, because of the potential for osprey and wildcat (and other protected species) to change location, Condition 16 requires pre-construction breeding bird surveys and other measures for the protection of protected species to form part of the Construction and Environmental Management Plan (“CEMP”). SNH offered guidance on the content of species protection plans, using wildcat as an example. It is lawful for the detailed implementation of mitigation measures to be left over to management plans required by condition (*Smith v Secretary of State for the Environment, Transport and the Regions* [2003] EWCA Civ 262; [2003] Env LR 32 per Waller L J at paragraphs 27 and 28, 48 and 49) (Authorities Tab 3).

[211] Further, the planning Authority is entitled to rely on advice of a statutory advisory body when deciding whether detailed mitigation measures can be adequately addressed through the imposition of conditions (*Jenkins v Gloucestershire County council* [2012] EWHC 292 (Admin) per Bean J at paragraphs 79 to 83 and 89) (Authorities Tab 10).

[212] The failure of the petitioner to raise a concern about the impact on osprey or wildcat in her consultation response lends support to the proposition that the

planning authority was entitled to rely on the advice of a statutory consultee. See *Blewett* [2003] EWHC 2775 (Admin) per Sullivan J at paragraphs 33, 57 to 63, 66 and 68 (Authorities Tab 4). There is even greater weight to this proposition where there has been a prior planning permission with identical conditions, the legality of which has not been challenged.

[213] Condition 16 is of a standard nature, and meets the requirements of SNH. In accordance with the expectations of SNH, species protection plans will be prepared as part of the CEMP to reflect the findings of pre-construction surveys. Written approval of the CEMP by the planning authority (in consultation with SNH and SEPA) is required before the development can be commenced. Once written approval is obtained, implementation of the ecology related conditions, including mitigation delivered through the CEMP, will be overseen by an Ecological Clerk of Works who has the power to suspend works if necessary until a species protection plan is implemented (Condition 17).

[214] The CEMP includes a draft Ecological Protection and Management Plan ("EPMP") (Documents Tab 24) that incorporates a Method Statement for Osprey and other Breeding Birds (section 5.6), a Protection Plan for wildcat (Annex B) (Documents Tab 25), and a Survey Report for Osprey (Annex C) (Documents Tab 26). As an illustration, the current draft of the CEMP has been produced. The Osprey Survey Report confirms the presence, in June 2016, of an off-site osprey nest in a different location to that suggested by the SNH 2015 record. The CEMP and EPMP identify appropriate mitigation measures, including the need for pre-construction surveys and, where necessary, the use of species protection plans and the imposition of construction buffer areas. Therefore, should pre-construction surveys confirm, at the relevant time, the presence of osprey, wildcat or any other protected species there is a defined mitigation strategy in place to ensure that there is no disturbance to these species.

[215] The CEMP, EPMP and any required species protection plans concern the practical implementation of mitigation measures in accordance with the conditions attached to the grant of planning permission. They do not "leave over" the assessment of likely significant effects. Nor do they amount to "additional

information.” Necessarily, and by design, the detail of any species protection plans will reflect the findings of surveys carried out after the grant of planning permission but prior to the commencement of construction.

[216] Accordingly, the respondent has not “left over” the assessment of likely significant effects on protected species in breach of its obligations under the EIA Regulations.

Response to the Ground of Challenge 3 (Inadequate Reasons)

[217] The reasons for the decisions are intelligible and adequate (*South Buckinghamshire District Council v Porter (No 2)* [2004] UKHL 33; [2004] 1 WLR 1953 per Lord Brown of Eaton-Under-Heywood at paragraphs 35 and 36) (Authorities Tab 6).

[218] An informed reader would understand that the modification permission was granted in the context of advice from SNH in respect of the modification and cable applications recommending the imposition of conditions. Reference is made in particular to paragraph 83 of the report of handling for the modification application (Documents Tab 17) and paragraphs 35 and 72 of the report of handling for the cable application (Documents Tab 19).

[219] Further, and in any event, the petitioner’s own consultation responses did not express any concerns in relation to osprey or wildcat. She has not been substantially prejudiced.

The Exercise of the Court’s Discretion

[220] The obligations under the EIA Regulations are of a procedural nature. Even where a breach of the Regulations is established, the Court retains a discretion to refuse relief (*R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2016] Env LR 5 per Lord Carnwath at paragraphs 54 to 60) (Authorities Tab 16).

[221] The petitioner had the opportunity to participate in the EIA consultation for the original planning application, but did not do so. In particular, she did not submit a consultation response to the effect that Condition 17 was unlawful or that detailed species protection plans must be consulted upon. The petitioner did not

herself raise a concern relating to osprey or wildcat in her consultation responses for the modification application. The conditions now attacked by the petitioner are of a standard nature and, even if additional information had been required of the interested party, in light of SNH's advice there is nothing to suggest that the decisions would have been any different.

[222] Further, consistent with the findings of the SEI for the modification application (see section 4.2.5 at page 9) (Documents Tab 11), it is not suggested in the petition that the proposed turbine design changes make any difference to the reported impact on wildcat or osprey. Accordingly, reduction of the modification permission would make no substantive difference to the impact upon species which the petition is, according to the petitioner, designed to protect.

[223] The lack of any practical effect of these proceedings is a factor of some considerable weight in the exercise of the court's discretion when determining whether to reduce the modification permission.

[224] Accordingly it was submitted that *esto* there has been any procedural defect in the handling of the applications (which is denied), the court should exercise its discretion to refuse to reduce the decisions challenged by the petitioner.

Motion for the Interested Party

[225] The interested party invited me to sustain the first to sixth, eighth and ninth pleas-in-law for the interested party, and to refuse the petition.

Discussion of the Issues

[226] As can be seen from the above, Perth & Kinross Council ("the respondent") granted (i) planning permission for the modification of the approved Tullymurdoch Wind Farm, so as to permit a change to the dimensions of the turbines (the "modification decision"), and (ii) planning permission for the laying of an underground cable with temporary ancillary infrastructure connected with the Tullymurdoch Wind Farm (the "cable decision").

[227] The assessment presented in the Environmental Statement ("ES") for the original wind farm application, which was also used together with further

Supplementary Environmental Information (“SEI”) for the modification decision, included survey and desk based information for osprey and wildcat. The Environmental Statement contains the details of consideration given to osprey and wildcat. In respect of the application for the cable decision a screening decision, which has not been challenged, determined that an EIA was not required. Prior to the grant of the two planning permissions and preparation of the relevant reports by the respondent, SNH and an objector (Dr A F McLean) brought to the respondent’s attention records of a breeding pair of osprey near to the wind farm site and to wildcat near to both the wind farm site and the underground cable route. The species are protected under the Wild Birds and Habitats Directives.

[228] Both planning permissions were granted subject to planning conditions that provided for a Construction and Environmental Management Plan (“CEMP”) and any required species protection plans to be approved by the respondent in consultation with SNH prior to construction commencing. The relevant conditions attached to the modification permission are in terms identical to those attached to the original planning permission. The condition in the cable decision was in similar terms.

[229] I take as my starting point, as the petitioner rightly points out, that osprey and wildcat are both *highly* protected species (*emphasis added*).

[230] However, before turning to the particular issues arising, it may be noted:

- that each case depends on its own particular facts and circumstances;
- that in the present case the original permission for the wind farm is not challenged, and is now incapable of challenge;
- that the modification permission is for development which falls within the parameters of the design assessed for the original permission;
- that as a matter of general administrative law the decisions fall to be considered upon the information known to the respondent at the time they were made; and

- that relevant conditions attached to the modification permission are in terms identical to those attached to the original planning permission.

The Issues Relating to the Modification Decision

[231] There are four principal issues in relation to the modification decision.

Modification Issue 1

[232] The first issue is whether it was lawful for the respondent to grant the modification permission without first exercising its discretion to require additional information under Regulation 23(2)(b) of the EIA Regulations, including proposed measures for the protection of osprey and wildcat.

[233] In short, I agree with the respondent/interested party on this issue. Decisions as to whether further information is required in respect of environmental information under the EIA Regulations are planning decisions within the exclusive province of the planning authority, subject to challenge on *Wednesbury* grounds only.

[234] In general terms, just because information becomes available after the production of an ES does not necessarily mean that a request for further environmental information (“FEI”) needs to be made, nor does it mean that the original ES (or SEI) are deficient and cannot reasonably be described as an ES: *R (Blewett) v Derbyshire CC* (Authorities Tab 4), *R(Edwards) v Environment Agency* (Authorities Tab 8) and *Skye Windfarm Action Group Ltd v The Highland Council* (Authorities Tab 9). Planning authorities are also entitled to have regard to reasonable mitigation proposals: *Smith v SOSETR* (Authorities Tab 3). Everything depends on the circumstances of the individual case: *R (Jones) v Mansfield DC* (Authorities Tab 5). A planning authority is entitled to place considerable weight upon the advice of a body such as SNH: *Smyth v SOSCLG* (Authorities Tab 15).

[235] I also agree with the interested party that the focus of an environmental statement is properly upon the identification of “likely significant effects” and the mitigation of those effects. There is a discretion afforded to the planning authority to

request additional environmental information where, in their opinion, that further information is reasonably required to “give proper consideration to the *likely significant effects* of the proposed development on the environment.” (Regulation 23(2)(b).) The EIA Regulations require the taking into account of the environmental information (not simply the environmental statement) and the Regulations include a mechanism for deficiencies to be identified and addressed (Authorities Tab 4 and Tab 8). The EIA Regulations do not require the planning authority to have available to it information on every detailed environmental effect. What is required is that the authority makes its planning decision only after a proper assessment of what the significant environmental effects are likely to be. The judgment of whether the environmental information is sufficient for that assessment is one of fact and degree in each case, subject to review by the courts on the normal grounds of Judicial Review: *Skye Windfarm Action Group Ltd v The Highland Council* (Authorities Tab 9).

[236] In this case, the environmental information available to the respondent in respect of the modification application included *inter alia* the information contained in Documents Tab 2, 3, 11, 13, 14, 15, 16 and 28. An ES was prepared according to agreed methodologies and submitted in support of the original planning application for which permission was granted.

[237] Neither the ES, nor the subsequent SEI prepared for the modification application, identified a likely significant effect upon either osprey or wildcat. Nevertheless, the potential for such effects was considered, a precautionary approach was taken and a commitment was made to carry out pre-construction checks and agree appropriate mitigation with SNH. A commitment was also made to include breeding bird nest checks, overseen by an Ecological Clerk of Works, as part of the Construction Environment Management Plan.

[238] It was not suggested by SNH that the potential presence of osprey and wildcat in the vicinity of the development site gave rise to likely significant environmental effects. SNH did not advise the respondent that additional surveys were required. Nor did they advise that the ES and SEI were deficient such that additional information should be sought in relation to osprey or wildcat. The

recommendations of SNH reflected the mitigation measures identified in the ES and Condition 17 attached to the grant of the original planning permission. Conditions to like effect were attached to the grant of the modification permission (Conditions 16 and 17).

[239] In the whole circumstances, of this particular case, I am satisfied:

(1) that the planning authority was entitled to form the view that the “likely significant effects”, and the mitigation of those effects, had been identified in the ES;

(2) that the environmental information provided by SNH and by an objector as regards the potential presence of osprey and wildcat was taken into account by the authority;

(3) that the authority was entitled not to exercise its discretion to require additional information from the interested party; and

(4) that its decision to proceed to grant planning permission without first requesting such information cannot be described as *Wednesbury* unreasonable.

Modification Issue 2

[240] The second issue is whether by attaching the conditions to the grant of the modification permission, the respondent “left over” the assessment of likely significant effects on protected species and thereby failed to comply its obligations under the EIA Regulations.

[241] I also agree with the respondent/interested party on this issue.

[242] The present case can be distinguished from the particular facts in *R (Hardy) v Cornwall County* (Authorities Tab 2). In *Hardy* only preliminary surveys had been carried out resulting in a recommendation by English Nature and Cornish Wildlife Trust that further surveys of the mine shafts were necessary to ensure that bats would not be adversely affected.

[243] In the present case, full ornithological surveys had been carried out for osprey and a watching brief for wildcat was implemented during the ecological and ornithological survey efforts. A precautionary approach was taken, and mitigation

measures committed to in the ES and the residual (post-mitigation) effect was assessed as not significant. The respondent in the present case was in a position to determine that there would be no likely significant effect on these species.

[244] Nevertheless, because of the potential for osprey and wildcat (and other protected species) to change location, Condition 16 requires pre-construction breeding bird surveys and other measures for the protection of protected species to form part of the Construction and Environmental Management Plan (“CEMP”). SNH offered guidance on the content of species protection plans, using wildcat as an example. It is lawful for the detailed implementation of mitigation measures to be left over to management plans required by condition: *Smith v Secretary of State for the Environment, Transport and the Regions* (Authorities Tab 3).

[245] I agree that the Planning Authority is entitled to rely on advice of a statutory advisor body when deciding whether detailed mitigation measures can be adequately addressed through the imposition of conditions: *Jenkins v Gloucestershire County Council* (Authorities Tab 10). There is even greater weight to this proposition where there has been a prior planning permission with identical conditions, the legality of which has not been challenged.

[246] Condition 16 is of a standard nature, and meets the requirements of SNH. In accordance with the expectations of SNH, species protection plans will be prepared as part of the CEMP to reflect the findings of pre-construction surveys. Written approval of the CEMP by the planning authority (in consultation with SNH and SEPA) is required before the development can be commenced. Once written approval is obtained, implementation of the ecology related conditions, including mitigation delivered through the CEMP, will be overseen by an Ecological Clerk of Works who has the power to suspend works if necessary until a species protection plan is implemented (Condition 17).

[247] The CEMP and EPMP identify appropriate mitigation measures, including the need for pre-construction surveys and, where necessary, the use of species protection plans and the imposition of construction buffer areas. Therefore, should pre-construction surveys confirm, at the relevant time, the presence of osprey,

wildcat, or any other protected species there is a defined mitigation strategy in place to make sure that there is no disturbance to these species.

[248] The CEMP, EPMP and any required species protection plans concern the practical implementation of mitigation measures in accordance with the conditions attached to the grant of planning permission. I agree with the interested party that they do not “leave over” the assessment of likely significant effects. Nor do they amount to “additional information.” Necessarily, and by design, the detail of any species protection plans will reflect the findings of surveys carried out after the grant of planning permission but prior to the commencement of construction.

[249] Accordingly, the respondent has not “left over” the assessment of likely significant effects on protected species in breach of its obligations under the EIA Regulations.

Modification Issue 3

[250] The third issue is whether the respondent gave adequate reasons for its decision.

[251] All thing considered, I am satisfied that the reasons given by the respondent were adequate in this case.

[252] In considering the adequacy of reasons for planning decision in respect of which there is an officer’s report, and particularly when the decision accords with the recommendation of the report, regard can and should be had to the terms of the report: *Co-Operative Group Limited v Glasgow City Council* (Authorities Tab 17). In this case, standing the terms of the SNH consultation responses (Documents Tab 13 and Tab 14), I agree that the respondent acted both lawfully and reasonably in determining to grant planning permission subject to the conditions that it did. Its reasons for so doing are adequately conveyed to the informed reader. The reasons for the decisions are intelligible and adequate: *South Buckinghamshire District Council v Porter (No 2)* (Authorities Tab 6). An informed reader would understand that permission was granted in the context of advice from SNH recommending the imposition of conditions. (Document Tab 17 and 19). In any event, the petitioner’s own consultation responses did not express any concerns in relation to osprey or

wildcat. She has not been substantially prejudiced. Nor have members of the public.

[253] In short, the reasons given by the respondent were adequate.

[254] I can detect no material defect in the decision under challenge.

Modification Issue 4

[255] The fourth issue is, *esto* there is any legal defect in the decision reached (which the respondent and interested party deny), whether in the circumstances the court should exercise its discretion to reduce the decision.

[256] Accordingly, I should add that (if it had been necessary for me to consider the question) I would have refused the remedies sought by the petitioner in the exercise of my discretion.

[257] I have reached that conclusion essentially for the reasons outlined by the respondent/interested party. I agree that the petitioner has not suffered substantial prejudice. The same applies to members of the public. There is no real possibility that a different decision would be reached, particularly given the existence of the original permission. The conditions now attacked by the petitioner are of a standard nature. Even if additional information had been required of the interested party, in light of SNH's advice there is nothing to suggest that the decisions would have been any different. It is not suggested in the petition that the proposed turbine design changes make any difference to the reported impact on wildcat or osprey. Reduction of the modification permission would make no substantive difference to the impact upon the species concerned.

[258] In other words, I would have exercised my discretion to refuse to reduce the modification decision.

The Issues Relating to the Cable Decision

[259] There are also four principal issues raised by the petitioner in relation to the cable decision – although the respondent and interested party do not accept that the first two are relevant issues.

Cable Issue 1

[260] The first issue is whether, in the circumstances where a screening decision had determined that an Environmental Statement was not required, it was lawful for the respondent to grant the cable permission without first requiring additional information about wildcat including the proposed measures for the protection of wildcat.

[261] I agree with the respondent/interested party that only the application for the modification permission engaged the provisions of EIA Regulations 2011. The respondent had “screened out” the cable permission by a decision made on 17 July 2015 (Documents Tab 7) and that decision is not challenged. The petitioner’s grounds of challenge in respect of the cable decision based on the EIA Regulations 2011 are therefore irrelevant. The EIA Regulations (Authorities Tab 19) have no application to the cable permission.

[262] In any event, I would have decided this issue against the petitioner – for similar reasons to those given in relation to “Modification Issue 1” (detailed above).

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Cable Issue 2

[263] The second issue is whether, by attaching the condition to the grant of the cable permission, the respondent “left over” the assessment of the assessment of likely significant effects on wildcat and thereby failed to comply with its obligations under the EIA Directive.

[264] This ground of challenge is also irrelevant – for the reasons given in relation to “Cable Issue 1” (detailed above).

[265] In any event, I would have decided this issue against the petitioner – for similar reasons to those given in relation to “Modification Issue 2” (detailed above).

Cable Issue 3

[266] The third issue is whether the respondent gave adequate reasons for its cable decision.

[267] All thing considered, I am satisfied that the reasons given by the respondent were adequate in relation to the cable decision. The considerations are similar to those already referred to (above) in relation to the modification decision.

[268] In short, the reasons given by the respondent were adequate.

[269] I can detect no material defect in the decision under challenge.

Cable Issue 4

[270] *Esto* there was any legal defect in the decision reached (which the respondent and the interested party deny), the fourth issue is whether in the circumstances the court should exercise its discretion to reduce the decision.

[271] Accordingly, I should add that (if it had been necessary for me to consider the question) I would have refused the remedies sought by the petitioner in the exercise of my discretion. The considerations are similar to those already referred to (above) in relation to the modification decision.

[272] In other words, I would have exercised my discretion to refuse to reduce the cable decision.

Conclusions in Relation to the Modification and Cable Decisions

[273] In the whole circumstances, having regard to all the submissions of counsel, the documents before me, and the authorities produced, I have reached the conclusion that the submission made on behalf of the respondent and the interested party are well founded.

[274] In short, the Council have acted lawfully and *intra vires* in relation to both the modification decision and the cable decision. Accordingly the petition must be refused.

[275] Those findings are sufficient to dispose of the petition. However, as mentioned above, I would also have refused the orders sought on the basis of the “*esto*” cases encapsulated in the fourth and fifth pleas-in-law for the respondents and in the ninth plea-in-law for the interested party. Those pleas relate to the petitioner not having suffered substantial prejudice and there being no real possibility that a different decision would be reached.

Decision

[276] In the whole circumstances, for the reasons outlined above, I shall sustain the first plea-in-law for the respondent; sustain the first, second, third, fourth, fifth and sixth pleas-in-law for the interested party; repel the petitioner's pleas-in-law, and refuse the orders sought in the petition.

[277] I shall reserve meantime all question of expenses.