**TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997**

**THE TOWN AND COUNTRY PLANNING (APPEALS) (SCOTLAND) REGULATIONS 2013**

**PROPOSED OVERHILL WIND FARM, B741 FROM ARMOUR WYND TO U720 DALRICKET, DALMELLINGTON, EAST AYRSHIRE**
**PPA-190-2093**

# WRITTEN RESPONSE TO PROCEDURE NOTICE DATED 29 JANUARY 2026 AND APPELLANT'S WRITTEN SUBMISSION OF 20 FEBRUARY 2026 ON BEHALF OF EAST AYRSHIRE COUNCIL

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## 1. Introduction

1.1 The Reporter dealing with appeal PPA-190-2093 issued a procedure notice dated 29 January 2026 requesting responses from various parties. Initially a response from Anderson Strathearn LLP on behalf of North Kyle Wind Farm Limited regarding matter 6 was requested and, subsequently, a response from the Appellant to the various submissions by parties from December 2025 by 19 February 2026. The Appellant's response was submitted on 20 February 2026 after which all parties have a further two weeks to provide any final comments they wish to make.

1.2 This submission represents the Council's response to the Appellant's submission of 20 February 2026 and the matters set out in the Reporter's procedure notice, and additional correspondence from the DPEA dated 23 February 2026.

## 2 and 3. Response to Appellant's 20 February 2026 Submission and Procedure Notice Matters

Section 75

2.1 The Council would reiterate the points it has made in respect of Section 75 and the various documents and policies which supports the Council's position. The Council notes the Appellant has largely restated their previous comments. The Appellant again places weight on the Scottish Government's Standard Onshore Wind Conditions (APP231) which the Council will address later in this response.

2.2 The Appellant claims that if a planning condition is used to secure a financial guarantee then a planning obligation should not be used. The Appellant will be aware that a condition was not used to secure a financial guarantee in the existing consent and the two reporters handling that appeal were clearly content that a legal agreement be used to secure a financial guarantee. As such, the Council considers that consistent approach remains applicable and that a planning obligation remains the most appropriate means of securing a financial guarantee, as supported by national planning policy and the other documentation previously noted by the Council in its written submissions.

Noise

2.3 The Appellant used the following quotes from APP121 in support of their previous position:-

"*3.7.1 'The Assessment and Rating of Noise from Wind Farms'…(ETSU-R-97) provides the framework for the measurement of* ***wind turbine noise****, and all applicants are required to follow the framework and use it to assess and rate noise from wind energy developments*."

"*3.7.4 Until such time as new guidance is produced, ETSU-R-97 should continue to be followed by applicants and used to assess and rate noise from wind energy developments*."

2.4 It is established that ETSU-R-97 provides the framework for the measurement of wind turbine noise (emphasis added in the quote above). The latter quote evidences that the assessment of noise from wind energy developments follows ETSU-R-97, the former quote confirming that that document provides the framework for assessing wind turbine noise. Any suggestion by the Appellant that such guidance relieves them, or indeed decision makers, from considering and assessing other noise generating infrastructure from being assessed is an entirely unreasonable position. It does not reflect the fact that planning applications require to accord with the Development Plan, the Development Plan itself (NPF4 and EALDP2) containing policies requiring the assessment of noise impacts associated with applications.

2.5 The Appellant's assertions are unconstructive and undermined by their own application submission which assesses noise impacts associated with construction noise – which is not considered under the remit of ETSU-R-97 (nor is it specifically mentioned in APP121 as requiring assessment). British Standard BS 5228 is used by the Appellant as the basis to assess construction noise associated with the wind farm. Therefore, it is evident that noise associated with wind energy developments is not limited to that which can be assessed under ETSU-R-97, but appropriate guidance documents be used to assess noise depending on the nature of the noise source.

2.6 The Appellant goes further to note that a substation noise assessment has been submitted in respect of other applications. Crucially, these are separate, different applications and do not form part of the appeal application for which no noise assessment for the substation had been submitted until 15 July 2025 – and even then, did not reflect the appeal application. The failings of that report (APP222) to assess the specific impacts of the substation forming part of the appeal application have already been highlighted by the Council previously and nothing submitted by the Appellant on 20 February 2026 has addressed the fundamental errors and inconsistencies in the information presented in that document (APP222). The Appellant's submission actually confirms APP222 was prepared for other applications and not the development subject of this appeal, "….*because the noise assessment was prepared for those other applications rather than the Proposed Development*…."

2.7 The Appellant then makes reference to the wind farm's 100m micrositing tolerance, however their application sought only a 50m micrositing allowance which is also reflected in the existing consent at Condition 11 which provides for a 50m micrositing tolerance. The Appellant appears to be unaware of these facts.

2.8 The Appellant proceeds to make a false claim regarding the Council's comments at paragraph 2.9 of its written response of 5 December 2025. The Appellant states, "*As the Council correctly identifies at paragraph 2.9, as the substation for the Proposed Development is located further west than assessed in the noise assessment, the noise levels at Upper Beoch would be less than suggested in the noise assessment*." The Council only noted that it may be reasonable to assume the noise levels would be less, it did not say the noise levels 'would be less'. The inherent issues regarding the noise assessment previously highlighted by the Council and confirmed on 20 February 2026 by the Appellant as being due to APP222 not assessing the noise impacts of the

Proposed Development (but instead other different development applications) remain unaddressed. The lack of a cumulative noise assessment to consider what contribution the proposed substation would make to such a cumulative baseline (when other, more distant substations would be audible at Upper Beoch and other properties in the area) remains an omission. The Council as it previously noted, would call into question the reliability of APP222 as a document upon which to assess with confidence the noise impacts of the proposed substation.

2.9 The Council disagrees with the Appellant's suggestion that the detail being sought by the Council is disproportionate to what is reasonably required. On the contrary, the Council considers it is perfectly reasonable to expect as a minimum that an applicant (or Appellant) undertakes an assessment of impacts of their proposed development. Given the Appellant has confirmed that APP222 does not assess the Proposed Development, then this proportionate minimum expectation has not been achieved by the Appellant.

Conditions

Condition 29 MOD Details

2.10 In response to the Appellant's comments relating to separate applications the Council would simply refer to the consents of the Scottish Ministers which it highlighted in its previous response of 5 December 2025. The same issue persists if the wording advanced by the Appellant is used. If the Appellant only requires to submit information to satisfy the requirements of the condition, regardless of whether said information is acceptable to the relevant consultees, there is no recourse to address that later. The submission of information is meaningless if it is not acceptable to the relevant parties. If they do not accept the information, there is no means through the condition wording as proposed by the Appellant to compel the Appellant to resubmit information which would be satisfactory to the relevant parties. More suitably, the Council's proposed wording would require the Appellant to submit not only the information specified but also evidence that the information is acceptable to the relevant parties. This ensures the submitted information is effective.

Condition 30 Aviation Lighting

2.11 The Appellant continues to make reference to the aviation lighting condition set out in APP231 and argues this should be preferred over the Council's proposed wording. The Council would reiterate its previous response in that regard that the conditions set out in document APP231 should not be considered as some sort of definitive wording to be applied to wind energy developments. The wording changes once expert consultees have given their advice and feedback to the Energy Consents Unit of the Scottish Government.

2.12 To demonstrate this fact, the Council advised the Energy Consents Unit in relation to Sclenteuch S36 wind farm that the aviation lighting condition of APP231 did not meet the tests for the same reasons as previously highlighted by the Council in its written response to this appeal of 5 December 2025. As evidenced in Appendix 2 of the decision notice issued by the Scottish Ministers on 16 December 2025 in respect of Sclenteuch wind farm (EAC34), Condition 43 (Aviation and Other Lighting) has removed all reference to taking account of costs. The evidence would indicate that the advice of the Planning Authority was accepted by the Scottish Ministers and they removed the wording relating to costs from the condition to ensure it could then meet the tests.

2.13 The Appellant makes the following statement, "*It should be preferred over the Council's wording, which could present problems at the financing stage if there is no cap on what is considered to be a reasonable cost*." This is irrelevant as the wording they seek to advance from APP231 does not include a cap on costs, so does not address the Appellant's stated concern. The point made by the Council previously is more relevant, in that many conditions require developers to implement mitigation measures and no such conditions include a requirement to consider or cap costs associated with the delivery of such mitigation in their wording. Such conditions have not proven to be problematic at the financing stage for all other developers of wind farms throughout the country and nor should the Council's aviation lighting condition either.

2.14 The Appellant continues to advocate for condition wording which fails to meet the tests. Given the comments above, and previously submitted by the Council on this matter, should the Reporter intend to grant consent the Council's wording should be preferred in relation to aviation lighting as it meets the tests and is reflected in a recent wind farm consent by the Scottish Ministers as evidenced by EAC34.

3. Material Errors

3.1 In their written submission of 20 February 2025 the Appellant states, "*At paragraphs 2.10 - 2.11 the Council makes various comments in relation to Section 32A of the 1997 Act. The Council made similar comments in its written submissions of 12 and 26 August 2025, all of which were considered by the Reporter prior to her decision on 2 September 2025 to continue with the appeal*."

3.2 The Council would note that the Reporter's correspondence of 2 September 2025 did not actually address the issue of Section 32A of the 1997 Act. It simply noted, "*The reporter has now considered the respective submissions in relation to the procedure notice dated 29 July 2025*."

3.3 Section 32A was initially raised by the Reporter herself in the procedure notice dated 29 July 2025 where she raised three matters:- (1) Section 32A of the 1997 Act, (2) Collision risk assessment and (3) Scope of Section 42. The procedure notice sought views from the Council and the Appellant on these matters raised by the Reporter.

3.4 Both parties responded to the Reporter's procedure notice and the only response issued by the Reporter in relation to that was in her correspondence of 2 September 2025. It should be noted in that correspondence that the Reporter failed to detail or explain her findings or conclusions in respect of the three matters she raised with the Council and Appellant, simply noting the quote set out above at paragraph 3.2. So neither the Appellant nor the Council are aware, despite having responded to the Reporter's request for comments, what the Reporter's views or conclusions are in respect of the three matters she herself raised on 29 July 2025. The Reporter then goes on to state, "*Even if some doubt remains as to the scope of the Section 42 in this case, she considers the adverts and publicity to date combined with the intention to advertise the proposed FEI are sufficient in the context of avoiding any potential prejudice to parties*."

3.5 The Reporter's correspondence of 2 September 2025 is entirely inadequate and unsatisfactory in addressing the very three matters which she herself raised on 29 July 2025. Her statement appears to relate to two of the three matters she raised, scope of Section 42 and Section 32A of the 1997 Act (given the reference to the FEI). Of most concern is the fact that the Reporter as decision maker appears to raise doubt as to the scope of Section 42. Given the Reporter is

considering a Section 42 application appeal it is essential that the Reporter provides clarity as to whether what is proposed by the Appellant actually falls within the scope of Section 42.

3.6 The Reporter seems to suggest the advertisement of the appeal up to 2 September 2025 and the Reporter's intention to advertise the FEI were sufficient to avoid any potential prejudice to parties. This fundamentally fails to address the questions she raised on 29 July 2025, or the fact that as the Council has previously pointed out, the FEI introduces new aspects of the development and changes the application, something which Section 32A of the 1997 Act does not permit. As such the lawfulness of accepting the submission of FEI and progressing an appeal on the basis of said FEI and seeking consideration of that FEI from all parties, including the wider public and consultees, has not been addressed by the Reporter.

3.7 In fact, it appears the Reporter relied upon advertising the FEI as avoiding prejudice to parties to address two of the three matters she raised on 29 July 2025. This is, in the Council's opinion, a material error in her handling of the appeal as the decision to progress the appeal appears to be based on an irrational conclusion that as long as the FEI is publicised no party is prejudiced – which fails to address the legality of accepting the FEI in the first place when it changes the application, nor whether what is proposed by the Appellant falls within the scope of Section 42 of the 1997 Act. It is irrational to progress an appeal when one, and possibly two, sections of the 1997 Act are contravened simply on the basis that provided the information is publicised, no one is prejudiced. It is considered the Reporter has failed to adequately explain why she can continue with the appeal. The Council is not satisfied these matters have been properly addressed and the lack of explanation by the Reporter provides no compelling evidence as to why she considers she can progress the appeal.

3.8 The determination/decision (the Appellant taking the Reporter's correspondence of 2 September 2025 as her decision to continue with the appeal) by the Reporter is bereft of reasoning directed at the points she herself raised on 29 July 2025 and does not tackle the live issues – those being the scope of Section 42 of the 1997 Act or the implications for accepting further environmental information which changes the application despite Section 32A of the 1997 Act not permitting applications to be changed at the appeal stage.

3.9 This is not the first material error in the Reporter's handling of this appeal. There was a material error at the outset when considering the preliminary matters raised by the Council when the appeal was first submitted. The Council raised the validity of the appeal when the application submitted to the Council was not valid due to the lack of an EIA Report for an EIA development application. The Council's position was set out to the Reporter, who issued a decision on the validity of the appeal on 20 August 2024. She addressed this issue in three paragraphs, as set out below:

"*3. It is clear to me that a comparative EIAR was submitted as part of this application in December 2023. This was accompanied by the relatively recent 2020 EIAR. I accept there is remaining ambiguity as to whether the earlier report dated 2017, as prepared for the original scheme, was submitted in full. I have considered the submitted information in the context of this proposal which seeks variation of the conditions applied to the previous planning permission. The success of such an application or appeal would lead to the issue of a new planning permission with a revised set of conditions.*"

"*4. The EIAR report for such an application should be sufficient to enable assessment of the effects of such changes and clear enough to enable an understanding of any new or updated assessment*

*and/or where previous assessment is to be relied upon. However, the decision maker can still request further environmental information post validation. In that context, I consider the submitted EIAR documentation was sufficient to fulfil the requirements of the regulations and enable validation of the application.*"

"*6. The application included an EIAR that I consider was suitable to enable validation in this case*."

3.10 The Council has added emphases to various text in the quotes by the Reporter above. Regulation 5 of the EIA Regulations 2017 sets out the definition of an EIA Report and the matters to be included necessary to meet that definition, which also includes the information specified in schedule 4 of the EIA Regulations 2017.

3.11 The Reporter acknowledges what the Appellant calls a comparative EIA Report was submitted. Any form of comparison of environmental impacts only makes sense to an assessor, or indeed anyone reading the document, if the baseline environmental impacts the proposed changes are being compared to is known otherwise such a document on its own does not satisfy the EIA Regulations 2017. The Reporter also notes the submission of the 2020 EIAR, though tellingly accepts there is ambiguity as to whether the 2017 Environmental Statement was submitted in full. The Council contends there was no ambiguity. A simple reading of the submitted supporting documentation which accompanied the planning application to the Council and subsequently the appeal to the DPEA evidenced the 2017 Environmental Statement had not been submitted in full. The fact was it had not been submitted at all. This despite the 2020 EIAR making countless references to considerable environmental information contained within that document which was necessary to enable an assessment of environmental impacts to take place.

3.12 It appears from the wording of the Reporter's decision on the validity of the application that as far as the assessment of environmental impacts is concerned she is making some sort of exception because it was a Section 42 application – "*in the context of this proposal*…." and, "*The EIA Report for such an application*…." There is nothing within the EIA Regulations 2017 which suggest the requirements of the EIA Regulations 2017 change depending on the section of the 1997 Act under which an application is made. An EIA Report, regardless of whether it accompanies a Section 42 application or otherwise, must consider the whole development in the context of assessing the environmental impacts.

3.13 The supporting documentation accompanying the planning application to the Council and subsequent appeal to the DPEA was so substantially deficient that it was not possible for an assessment of the environmental impacts of the whole development to take place. As such information is necessary to enable an informed assessment of the environmental impacts to take place and yet did not form part of the submission, the limited documentation as submitted could not be relied upon to assess the environmental impacts of the development and did not satisfy the requirements of the EIA Regulations 2017 – and fell far short of meeting the definition of an EIA Report.

3.14 The Reporter went further to claim that the decision maker can still request further environmental information post validation. This is in respect of an EIA Report, however what accompanied the planning application to the Council and appeal to the DPEA was so substantially deficient that it could not meet the definition of an EIA Report. As such further environmental information could not have been requested as what was originally submitted was not an EIA Report.

3.15 Correspondence and evidence subsequent to the Reporter's 20 August 2024 decision on the validity of the application only further evidenced how deficient the supporting documentation was, with the Reporter asking the Appellant whether the submitted documentation was capable of standing sufficiently on its own. The Appellant's tacit admission through their subsequent submission of all the substantial missing environmental information which the Council had requested in order to validate the application in the first place, only proving their supporting documentation was not capable of standing on its own.

3.16 Despite the clear evidence before the Reporter from the outset when the appeal was submitted she concluded, based on an apparent divergence from the requirements of the EIA Regulations 2017 for the purposes of assessing the environmental impacts of the whole development on the basis the application was submitted under Section 42 of the 1997 Act, that the application was valid. The Council considers this to be a material error by the Reporter. By apparently accepting a lower threshold for the requirements of an EIA Report in respect of a Section 42 application with no evidence or regulatory support for these actions, she has failed to address the requirements of the EIA Regulations 2017 and the matters necessary to include an assessment of the environmental impacts of the whole development in the documentation necessary to meet the definition of an EIA Report. It was irrational for the Reporter to conclude supporting documentation so substantially deficient that it was not capable of standing on its own, satisfied the EIA Regulations 2017 and met the definition of an EIA Report.

3.17 Her confirmation on 5 December 2024, relating to the press adverts and publication referencing the EIA Report, that the EIA Report for the proposed development comprised a series of documents which included the 2017 Environmental Statement, which had never formed part of the planning application submission and subsequent appeal only proving that the substantial missing environmental information was necessary to constitute the EIA Report for the proposed development.

3.18 The Reporter's decisions, both on the validity of the appeal and on the matters raised by her procedure notice of 29 July 2025, failed to adequately explain what considerations had been taken into account or the reasons for reaching the decisions she reached. Particularly so when the Reporter herself on both occasions acknowledged some degree of uncertainty relating to aspects in both instances but failed to provide a definitive position in respect of these, leaving these questions unanswered. Her decisions in both situations (validity of the appeal, scope of Section 42 and the implications for accepting further environmental information which changes the application in contravention of Section 32A of the 1997 Act) were not adequately reasoned and, in light of the evidence, appear to be irrational and therefore potentially unlawful.

3.19 The Council recognises that it has raised these matters previously throughout the appeal, though it remains dissatisfied with the explanations and reasoning, or lack thereof, from the Reporter on these, particularly given such matters are of significant consequence to the validity of the appeal and the veracity of any decision.

## 4. Peat Information in Relation to SEPA objection

4.1 The Appellant has submitted Appendix A on 20 February 2026 to address the holding objection from SEPA. Within this document, paragraph 2.2.8. states, "*As part of the 2023 Comparative EIAR for the Application the on-site Substation was relocated from south of T1 to the south of the development boundary near the on-site borrow pit. Whilst the substation size has increased and the reason for relocation was due to a change in grid connection location, the revised location is within an area historically disturbed through mining and does not contain any peat or carbon-rich soils and therefore minimises the disturbance of peat compared with the Consented Development*."

4.2 This is a contrast to APP050 which noted the variation proposed in regard to the relocation and enlargement of the substation would result in peat loss increasing to 1,040m$^3$ compared to 214m$^3$ for the consented development. Appendix A submitted by the Appellant appears to confirm their previous information was incorrect in this regard.

4.3 Appendix A goes on to state, "*The 2023 Comparative EIAR did not introduce any other changes to the layout of infrastructure compared to the Consented Development and apart from the relocation of the substation, is only associated with a slight increase in cranepad footprint at established turbine locations*." The Council has added the emphasis in the above quote and would disagree with the Appellant that more than doubling the footprint of the cranepads could be described as a 'slight' increase. As the Council has already previously noted, the proposed changes to the cranepads represent an over 200% increase in peat loss compared to the consented development, though this appears to be based on incorrect information submitted by the Appellant in their supporting documentation.

4.4 Appendix A confirms only 5 turbine foundations are proposed to be piled, which addresses the inconsistency in APP050 which stated both 5 turbine foundations and also six turbines and associated foundations would be piled.

4.5 Paragraph 4.1.1. of Appendix A states, "*The 2023 DPMP provides details of the total anticipated peat demand for the Application of 40,113m$^3$, which would be re-used in infrastructure reinstatement*…." If the Appellant is correct that the peat losses associated with the substation are now zero (compared to 1,040m$^3$ previously reported) then this should affect the peat supply figure previously reported in APP050. Subtracting 1,040m$^3$ from the peat supply figure of 40,704m$^3$ would mean there is less peat supply than required to satisfy the peat demand to be used in infrastructure reinstatement. From where will the shortfall be sourced?

4.6 Ultimately Appendix A has been submitted to address the objection of SEPA and it will be for SEPA to advise the Reporter as to whether they consider the further written submission by the Appellant on 20 February 2026 to be sufficient to address their objection. At the time of writing, the Council is not aware of any response from SEPA so currently there remains an outstanding objection from SEPA in relation to the appeal.

## 5. Appendix C Glasgow Prestwick Airport

5.1 The Council has no comment in respect of Appendix C other than to note it has implications for the set of condition wording previously submitted by the Council which the Reporter will have to consider in her assessment of the appeal.

## 6. Matter 6 – Anderson Strathearn LLP / Turbine Separation

6.1 The Appellant infers simply on the basis that no further comments have been made by the Council in respect of the turbine separation distances that their comments have addressed the Council's concerns in this regard. It will be the Reporter, however, as decision maker who must address this matter in their assessment of the appeal. The Council would simply note the Appellant's position previously raised by them that turbine manufacturers generally stipulate spacing between individual turbines should be no less than ~3x rotor diameters' distance in their objections to other applications were taken into account by the Scottish Ministers in the process of assessing other applications. In those cases Scottish Ministers have consistently ensured no less than 3x rotor diameters' distance is maintained between turbines of neighbouring schemes. As such it will be for the Reporter to consider whether to deviate from the consistent approach of Scottish Ministers in allowing for separation distances less than what has so far been maintained.

## 7. Information from Mr Mulders

7.1 The DPEA advised of a further submission from Mr Mulders of 18 February 2026 and sought the parties' comments on this submission.

7.2 Regarding the comments on residential visual amenity raised in Mr Mulders' submission and any supporting documentation to inform such impacts, it will be for the Reporter as decision maker to determine whether she is satisfied that the environmental information upon which she will ultimately make her decision remains up to date at that time, including cumulative environmental impacts.

7.3 A further point is raised in connection to the environmental impacts associated with the grid connection raised in relation to the recent court decision on Wull Muir wind farm (EAC35). The Council notes correspondence from the DPEA of 23 February 2026 mentions this court decision and notes the DPEA is currently considering its content before inviting comment or instigating any next steps. On that basis, the Council does not intent to comment on EAC35 at this time and will await further direction from the Reporter on this matter.

## 8. Conclusion

8.1 The Reporter's procedure notice of 29 January 2026 set out a final opportunity for all parties to make any final comments this wish to make before the procedure is drawn to a close for now.

8.2 The Council's response to the Appellant's submission of 20 February 2026 is set out above, supported by the various submissions the Council has made previously. Issues remain in terms of the adequacy of certain information submitted to assess the environmental impacts of the proposed development.

8.3 The Council further contends, consistent with the Council's position throughout the duration of this appeal regarding the validity issue, that the Reporter has made material errors in her handling of this appeal and in her decisions issued in respect of key matters to date. The adequacy of the Reporter's reasoning in her decisions on these matters: the validity of the application; the scope of Section 42 of the 1997 Act, and the implications for accepting further environmental information which changes the application in contravention of Section 32A of the 1997 Act have been insufficiently set out or explained and leave the Council entirely unclear on how such findings can be lawful.

8.4 On the basis of the submissions previously made by the Council in respect of this appeal, and the matters set out above, including the range of procedural concerns, the Council invites the Reporter to reject the appeal.