

Directorate for Planning and Environmental Appeals

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Dr S Turnbull
Highland Council
Sent By E-mail



Our ref: PPA-270-2113

19 January 2015

Dear Dr Turnbull

PLANNING PERMISSION APPEAL: SITE NORTH WEST OF SGEIR DUGHALL LOCH TORRIDON DIABAIG TORRIDON

Please find attached a copy of the decision on this appeal.

The reporter's decision is final. However you may wish to know that individuals unhappy with the decision made by the reporter may have the right to appeal to the Court of Session, Parliament House, Parliament Square, Edinburgh, EH1 1RQ. An appeal **must** be made within six weeks of the date of the appeal decision. Please note though, that an appeal to the Court of Session can only be made on a point of law and it may be useful to seek professional advice before taking this course of action.

I trust this information is clear. Please do not hesitate to contact me if you require any further information.

Yours sincerely

Christine Brown

CHRISTINE BROWN
Case Officer
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Appeal Decision Notice

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Decision by Richard Hickman, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: PPA-270-2113
- Location : Marine fish farm north west of Sgeir Dughall, near Diabaig, Loch Torridon
- Appeal by the Scottish Salmon Company against the decision by the Highland Council
- Application for planning permission 14/01868/S42 dated 10 May 2014 refused by notice dated 12 August 2014
- The development proposed: To develop the site without compliance with condition 5 of planning permission 11/04228/FUL, which limits the period of the permission to 10 years
- Date of site visit by Reporter: No site visit required

Date of appeal decision: 19 January 2015

Decision

I dismiss the appeal and refuse to grant planning permission to develop the site without compliance with condition 5 of planning permission 11/04228/FUL.

Background

1. The Highland Council granted planning permission for this marine fish farm in the outer part of Loch Torridon in March 2012. Condition 5 of the permission limited the period of the permission to 10 years from the date of the decision.
2. The application to which this appeal relates was made under section 42 of the act, to develop land without compliance with conditions previously attached. Section 42(2) states that “On such an application the planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and – (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted they shall grant planning permission accordingly.”
3. The appellant seeks the omission of the condition restricting the duration of the permission to 10 years, but has not suggested that any other conditions should be added or removed. Thus the determination of this appeal is restricted principally to whether a fresh planning permission should be granted for the fish farm that omits the condition limiting the period of the permission.



4. The main lines of argument in support of the application and appeal are that :
- It is not appropriate nor necessary to grant a temporary permission on the basis of a “trial run” where a development has been found to be acceptable following an environmental impact assessment.
 - The condition appears to seek environmental monitoring which duplicates environmental controls administered by SEPA and Marine Scotland under separate licensing and authorisation systems.
 - The condition and the reasons for imposing it do not identify fully the environmental impacts to be monitored, nor the method of monitoring, nor responsibility for monitoring.
 - The condition therefore fails at least 3 of the 6 tests for conditions set out in circular 4/1998.
5. The reason given for the imposition of this condition was “To allow alternatives to controlling sea lice to be provided within that time in recognition of the ongoing concerns with regard to the impacts on wild fisheries, whilst allowing the operator time to find alternative culture techniques for the site, for example, closed containment”.
6. The reasons given by the council for refusing the application for permission to proceed without compliance with this condition are (in summary) that :
- Policy 28 of the Highland Wide Local Development Plan requires the application of the precautionary principle when assessing development proposals where the potential impacts are uncertain, but where there are scientific grounds for believing that severe damage could occur to the environment.
 - Policy 50 of the Highland Wide Local Development Plan requires that to be supported, fin-fish farming proposals will not have a significant adverse effect on (among other things) wild fish populations.
 - Policy 59 of the Highland Wide Local Development Plan requires the council to have regard to the presence of and any adverse effects of development proposals on various specified species, including salmon.
 - The site has been in operation for an insufficient period to determine the impacts on wild salmonids.

Reasoning

7. Section 25 of the planning act requires that where, in making any determination under the planning Acts regard is to be had to the development plan, the determination is to be made in accordance with the development plan unless material considerations indicate otherwise. Section 37(2) makes it clear that in dealing with applications for planning permission, the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. Thus the determination of whether a fresh planning permission should be granted for the fish farm with amended conditions requires consideration of whether the resulting development

would be in accordance with the development plan; and if not, whether there are material considerations that indicate otherwise.

8. The development plan policies that require consideration are those cited in the reasons for refusal. The appeal submissions challenging the need for the condition and its validity in terms of the government guidance on the use of planning conditions are a material consideration that might justify a grant of planning permission without the condition.

9. Policy 50 of the Highland Wide Local Development Plan (Aquaculture – page 100) gives general support to fin-fish and shellfish farming, subject (among other things) to there being no significant adverse effect directly or indirectly or cumulatively on (among other things) wild fish populations. Thus approval of the fish farm, as a matter of principle, and subject to the specified safeguarding requirements, would be in accordance with this policy.

10. Policy 59 of the Highland Wide Local Development Plan (Other Important Species – page 114) states that the council will have regard to the presence of and any adverse effects of development proposals on the other important species specified in the policy. Wild salmon are among those species. The text also states that the council will use conditions and agreements to ensure that detrimental effects on these species is avoided. Thus the development plan recognises that it may be necessary to use conditions to safeguard other important species from the potential impact of development.

11. Finally, policy 28 of the Highland Wide Local Development Plan (Sustainable Design) includes (on page 78) the adoption of the precautionary principle where the potential impacts of a proposal are uncertain but where there are scientific grounds for believing that severe damage could occur to the environment or the wellbeing of communities. The definition of this term in the glossary (page 145) confirms that the principle is intended to avoid damage to the environment in situations where the scientific evidence is not proven but the possible damage could be significant.

12. It is clear from the large volume of submissions and supporting documents relating to sea lice infestation at fish farms and the potential impact on wild salmonids that this is a subject where the potential impacts are uncertain; where there is an evolving understanding of the problems caused by sea lice infestation and how to control them; and that the scientific evidence to give assurance that there will be no significant adverse impacts on wild fish populations is not proven but the possible damage could be significant.

13. On this basis, I am satisfied that a grant of planning permission for this fish farm would be in accordance with the council's general policy 50 on aquaculture, subject to the requirements set out in that policy, and complemented by the other two policies that seek to safeguard the wellbeing of the wild fish population in the area. The reason for imposing condition 5 makes it clear that these concerns were the basis for the council wishing to review the situation at a later date, to take account of improved knowledge and best practice.

14. Turning to consideration of the submissions about the legitimacy of imposing a time limit in this situation by means of a planning condition, I have had regard to the guidance on planning conditions in circular 4/1998, the further guidance on planning conditions in relation to fish farming set out in paragraphs 33-36 of circular 1/2007 (Planning Controls for Marine Fish Farming), and the statement in paragraph 253 of Scottish Planning Policy (relating to aquaculture) that “The planning system should not duplicate other control regimes such as sea lice and containment regulation by Marine Scotland”.

15. The appellant contends that it was and is inappropriate to use a planning condition for the purpose stated by the council; and that the condition is unacceptable because it would fail to comply with the government guidance on the use of planning conditions (circular 4/1998), and in particular, the 6 tests specified in paragraph 12 of the annex to the circular and explained more fully in succeeding paragraphs.

16. The first of the 6 tests described in paragraphs 12-39 of the annex to circular 4/1998 is that of necessity. The key issue here is whether the intended purpose of the condition (to safeguard wild salmonids from sea lice) is unnecessary as it would duplicate more specific controls, contrary to the stated national policy noted in paragraph 14 above.

17. There are extensive submissions on this matter, including a detailed contribution from the Wester Ross Area Salmon Fishery Board, and other appeal decisions have been cited. However I note that the assertion of the salmon fishery board (on page 5 of their objection to the planning application) that the Aquaculture and Freshwater Fisheries (Scotland) Act 2007 cannot be used to control sea lice on fish farms for the benefit of wild fish or to reduce emissions of sea lice into the wider sea loch environment appears to be accepted by the appellant, as paragraph 4.25 of the appeal statement states that “it is correct to say that the regulatory responsibility of Marine Scotland with regard to sea lice relates to fish health on fish farms themselves and not to sea lice on wild fish”. This is further confirmed in the consultation response from Marine Science Scotland dated 3 June 2014, and in the submitted Marine Scotland publication “A Fresh Start”, which states on page 9 that the provisions of the Aquaculture and Fisheries (Scotland) Act 2007 for sea lice control and containment relate to fish farms.

18. On this basis, and in the apparent absence of any other source of regulation of this particular matter, I accept the position of the salmon fishery board that the use of the planning development management regime to seek to safeguard wild salmonids from sea lice infestation from the fish farm would not duplicate a more specific control available under other legislation.

19. I also note from the extensive submissions and the published scientific papers that have been lodged that sea lice infestation is a very important ongoing issue in salmon farming and the safeguarding of wild salmonid stocks. This appears to be a dynamic issue where new information, research results, and management practices are in a state of ongoing development and improvement. Accordingly I conclude that, if the matter is to be kept under review so that these changes can be taken into account, it is necessary for the planning permission to provide an opportunity for alternative forms of sea lice control and

culture techniques to be introduced if appropriate, as stated in the reason for imposing the condition.

20. The second test is whether the condition is relevant to planning. There is a degree of overlap with the necessity test, as paragraphs 20-22 of the annex explain the relationship between planning conditions and other non-planning controls. However there appears to be no doubt on this point, as Scottish Planning Policy (2014) states at paragraph 251, fifth bullet point, that the effects of aquaculture developments “on coastal and marine species (including wild salmonids)” should be taken into account in development planning. The position is accepted by the appellant, who “agrees that the potential impact of fish farms on wild fish is a material planning consideration” (paragraph 3.2 of the appellant’s response to the planning authority appeal statement).

21. The third test is that a condition is relevant to the development to be permitted. Again, there appears to be no doubt on this point, as it is accepted that sea lice infestation is an ongoing issue at many fish farms, and the appellant has stated that the company has adopted enhanced measures and procedures at all of its fish farm sites to address the problem (appeal response paragraph 3.12).

22. The fourth and fifth tests are respectively that a condition should be enforceable and precise. Although the appellant contends that the condition fails to specify what matters are to be monitored, how, and by whom, I agree with the council and the salmon fishery board that the intention of the condition is clear – that the permission that has been granted should terminate after a 10 year period. It will be very evident whether the fish farm continues in use after the expiry of this period, opening the way for the issue of an enforcement notice if appropriate.

23. The final test relates to reasonableness. The main thrust of the appellant’s criticisms of the condition in this regard are that it is unreasonable to seek to restrict the period of a permission where an environmental impact assessment has shown the proposal to be acceptable; that a “trial run” is also inappropriate in this situation; and, for the same reason, that this is a misuse of the precautionary principle adopted by the council in policy 28 of the Highland Wide Local Development Plan.

24. Circular 4/1998 provides guidance on the circumstances where a temporary planning permission might be appropriate, while paragraphs 33-36 of circular 1/2007 (Planning Controls for Marine Fish Farming) discourage the use of temporary permissions. The guidance recognises the role of a “trial run” where the impact of a development is uncertain, and (in paragraph 33 of circular 1/2007) the responsibility of the decision maker to consider what planning conditions are required.

25. I accept the appellant’s contention that where an environmental impact assessment has resulted in a grant of planning permission, it should not normally be necessary to restrict the period of the permission. However, as noted above, the issue of sea lice management and control is not in a static situation but is a dynamic matter where increases in knowledge and improvements in good practice are evidently taking place. In the present case, the council has made it clear in the reason for imposing the time restriction that this is

to allow for new and improved techniques for sea lice control to be implemented, in the interests of wild salmonid stocks. Given the ongoing dynamic nature of sea lice infestation issues arising at fish farms, and the particular concerns in the Loch Torridon area expressed by the salmon fishery board and other bodies, I agree that it was reasonable and prudent to restrict the permission to a 10 year period. I also agree with the submissions that this is a reasonable and sufficient period to support the investment (as has been borne out by implementation of the permission), in contrast with another appeal that has been cited where a limited period of 4 years was found to be unreasonably short in relation to the necessary investment.

26. Towards the end of the 10 year period, and in the context of the then state of knowledge and best practice in sea lice control and the wellbeing of wild salmonid stocks, it would be open to an applicant to seek to extend the period of the permission, on the basis of an updated review of the continuing potential environmental impact of the fish farm. This is not on the basis that the present permission should be treated as a trial run, but that the dynamic and changing characteristics of sea lice infestation and how to cope with the effects on wild salmonids requires ongoing review from time to time to ensure that the fish farm site continues to be suitably located for the purpose and subject to appropriate development management regimes.

27. I acknowledge that this finding does not accord with the policy set out in paragraph 33 of circular 1/2007 and the principles applying to temporary permissions described in paragraphs 105-109 of the annex to circular 4/1998. However I am satisfied that, on the basis of the submissions before me, and in the context of the 3 development plan policies cited in the reasons for refusal, the imposition of a time limit on the duration of this permission cannot be regarded as unreasonable.

28. Drawing these matters together, for the reasons set out above, I conclude that the grant of a fresh planning permission for the fish farm would be in accordance with the provisions of the development plan, subject to the various requirements and safeguards set out in the relevant policies. However I also conclude that the imposition of a 10 year limit on the duration of the fish farm permission is necessary, and that it would satisfy the 6 tests set out in the guidance on the use of planning conditions.

29. I have given careful consideration to the other aspects of the guidance relating to the use of temporary permissions, and to other decisions cited where this has been an issue. On balance, given the explicit central and local government planning policies that seek to safeguard wild salmonids, the concerns about the potential effects on them in this area expressed by the responsible bodies, and the ongoing dynamic nature of knowledge and good practice in sea lice control for the benefit of wild fish stocks, I agree with the council and others that it would not be appropriate to grant planning permission without compliance with the limit on the duration this fish farm permission. Accordingly I conclude that the appeal should be dismissed.

Richard Hickman

R M HICKMAN
Reporter