

Dear Mr. Brakeland,

We were not aware that our case had not already been closed as Patrick Wegerdt informed me some time ago that it could not be kept open whilst further information was being sought.

It may be that I misunderstood. However there are now important considerations which have come to light since our initial complaint was lodged with the Commission. We have confidence that these will receive serious examination, and believe that this trust will not prove to be misguided.

1. I have alerted you to the fact that the nest sites are within 600 metres of the proposed road, not 1 kilometre as stated. I note that you mention in your letter that :-

~~deliberate disturbance~~
The Wilds Birds Directive does prohibit 'deliberate disturbance'; however, in relation to a nesting site which is 1 km away from the proposed route, with measures to avoid construction work during the birds nesting period, the question of deliberate disturbance would be extremely difficult to prove.

However, could you clarify whether you mean that it would be difficult to prove *after* the construction of both the access road and the wind farm? Surely the need is to avoid such an occurrence in the first place by strict adherence to the Directive. The refusal of our request for construction of the road during the breeding season to cease within 3 kilometres, not the 1 kilometre approved, cannot avoid what will now be guaranteed disturbance. It should be remembered that the wind farm itself is on the edge of the core area of the golden eagle pair in question. This is why an EIA to cover the environmental impact of *both projects* upon these birds was so important, and has *not* been produced.

In such fragile circumstances, extra care should be exercised not to disturb breeding pairs of golden eagles. The vulnerable GE population of Scotland is small, and *already* in demographic difficulty. Its habitat should be enhanced, as provided by the EU Birds & Habitats Directives, not the reverse. Violating the law by degrading *any* GE breeding range cannot fail to have negative consequences on the whole UK golden eagle population.' Successfully breeding pairs should have extra protection – not less.

At the last census (2003), 443 out of 716 known and potential eagle territories were occupied by pairs (1). This population failed the tests determining satisfactory conservation status, as defined by the European Habitats and Species Directive (92/43/EEC), to which the UK government is committed. It is in demographic difficulty, a condition that will lead, all things being equal, to population decline. Any additional mortality or lessening of reproductive

success will cause the decline to occur sooner or to be more severe. The decline is likely to be occurring already, as the last census dates back to 2003.

Scientific evidence:

(1) - "A CONSERVATION FRAMEWORK FOR THE GOLDEN EAGLE IN SCOTLAND - REFINING CONDITION TARGETS AND ASSESSMENT OF CONSTRAINT INFLUENCES", by Philip Whitfield, Alan H. Fielding, David R.A. McLeod, Paul F. Haworth and Jeff Watson (2006).

Published: Biological Conservation, 130 (2006) 465-480

‘The Scottish golden eagle population lacks the 'security' of a floating non-breeding adult segment of the population (Newton, 1979; Hunt et al., 1995; Hunt, 1998; Kenward et al., 2000), bringing the population closer to potential decline (Balbontin et al., 2003).

2. There appears to be an ongoing policy of destruction of documentation by Forestry Commission(Scotland), which in our case was necessary information to be used in a planning process.

Eventually, and after Consent for the timber haul and wind farm access route had been granted, some documents requested under Access to Information on the Environment rules (i.e. only the actual application forms) were only produced when FCS were asked for the dates of destruction for items at first refused due to such action. It is well understood that Access to Information on the Environment matters are not normally within your remit. However, in this case the request results merely enabled the breaches which are within your remit, to be discovered. They are therefore both relevant and important.

To explain this in more detail, recent AIE requests have revealed that there is an obligation for the FCS to record dates of destruction of documents. Initially, FCS denied that any documentation existed due to destruction of all related documentation to past EU funding applications for the West Loch Awe Timber Haul Route(prior to the involvement of a wind farm access requirement). It was further denied that any surveys or feasibility studies were ever produced to accompany the funding applications made. It is clearly not credible that an application for hundreds of thousands of pounds would not have had such evidence included. It would be tantamount to asking for funds ‘on a premise.’ No dates of destruction for any documents have been produced and these important surveys are still ‘missing’ which therefore proves the fatal flaw within the FCS recent brief statement that the alternative route they previously

presented, and we maintain must be re-assessed as a viable alternative, was merely 'indicative.' If the said documents have been destroyed, and are not still existence somewhere, hidden/lost within records, it clearly impossible to prove the unlikely event that they were not produced.

Bearing in mind that the Forestry Commission, north and south of the border in the UK is the largest landowner in the British Isles, their movement away from being primarily, custodians of the nations' forests, sensitive habitats and wildlife into that of renewable energy developer, is a major cause for concern.

For the past few years, our Community Council and individuals have sought to ensure that this much needed route is the best that it can be, whilst also ensuring the Annex 1 golden eagle pair threatened by the development are undisturbed.

In respect of the Consolidated EIA Directive in the initial phases of the decision making, such as the planning approval, it is clear that not sufficient consideration was given to alternatives and due recognition of the public participation exercise.

The requirement for the competent authority to produce its own EA as part of the EIA procedure and is part of EU legislation, Directive 85/337/EEC as amended. It is believed that in this instance, this has not been produced for the wind farm access & Timber Haul Route. A further request is currently lodged with the FCS to establish this fact beyond doubt, but may not be provided within the month that this reply must be returned.

However, Environmental Impact Assessment is also a fundamental requirement of Article 6 paragraph 6 of the Aarhus Convention and Article 6 paragraph 8 requires that this documentation be taken into account in the decision reached by the competent authority. It is worth pointing out that this European Court of Justice Decision of 3rd March 2011, had its origins in November 1988, which demonstrates how long and quite ineffective the EU Commission's enforcement measures are. Essentially In case C-50/09 of the European Court of Justice, the Court found that Ireland had failed to transpose Article 3 of Directive 85/337/EC, in that.

"The competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case".

"Indeed, that assessment, which must be carried out before the decision-making process, involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must

thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors[1]”.

Being an Annex 1 protected species there are no derogations existing under Article 9 (Directive 2009/147/EC) as an alternative route exists.

3. Obviously the way these decisions go can have massive financial and other repercussions, this was clearly recognised by the UN in the Aarhus Convention, which relates to transparency in Governance and Citizens rights in planning decisions, etc. Our case may be seen as one of a failure of a system of administration, in which the habitats, wildlife and unspoilt Scottish countryside is the victim, all too often - without a voice. There is an ‘overlap’ in our case which should be addressed by both the EU Directives and the Aarhus Convention regulations for which it will be highly beneficial for Member States if EU Commissioners were to seek the evidently missing parity on important aspects.

To clarify:-

- *The UNECE Aarhus Convention provides for Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters. The Convention was adopted in June 1998 is unique in many ways. The Aarhus Convention is the first international treaty with the purpose of granting rights directly to the public with regard to protection of the environment. Its focus is not the protection of the environment per se but the procedural rights of civil society to participate in decision-making that relates to environmental matters. The Convention links environmental rights and human rights and also recognises the right to a healthy environment for every individual.*
- *There are failures in Scotland with regard to adoption of National Renewable Energy Action Plan by the UK, without completion of the necessary strategic environmental impact assessment and public participation. In July 2010 the UK adopted a National Renewable Energy Action Plan (NREAP) which involves by 2020; 14,890 MW of onshore wind and 12,990 MW of offshore wind energy. Under Articles 3 (2) (a) and 4(1) of Directive 2001/42/EC such a plan has to be subject to strategic environmental assessment before its adoption. In Scotland it appears that this strategic environmental assessment is only at a scoping stage (Renewable Energy Roadmap and Electricity Generation Policy Statement).*

Hence there is no knowledge of what tonnes of greenhouse gases are to be saved, what alternatives could achieve those reductions, what the environmental impacts are going to be, what the financial costs are going to be, what the state of the environment would be without implementation of the plan.

4. As the approval of the Carraig Gheal wind farm was part of our original 2010 complaint:-

- There is a lack of transparency with regard to CO₂ emissions and there are failings to assess them at a policy level (Strategic Environmental Assessment) and at a project level (Environmental Impact Assessment).
- The environmental objectives of the UK and Scottish renewable energy programmes, which are heavily biased towards wind energy, have never been established:
- Under the EU's 20% renewable energy by 2020 policy, Member States were required under Directive 2009/28/EC to draw up a National Renewable Energy Action Plan (NREAP) by mid 2010. This was then adopted by both the UK authorities and the EU Commission.
- The consultations on the UK's Strategic Environmental Assessments for its new energy policies only began four months after this NREAP had already been formally adopted.
- These assessments failed to quantify the greenhouse savings of the renewable energy policies. For instance AoS EN-1, which on page 33 on Climate Change (Section 3.3.1) states; "The contributions to climate change objectives whilst potentially positive are consequently also uncertain, given the range of economic and technological factors that may influence the successful implementation of low carbon energy sources".
- The Scottish Authorities are in autumn 2011 completing a scoping exercise for a new Strategic Environmental Assessment for their renewable energy programme. The 2009 Strategic Environmental Assessment was limited to the heat component of the renewable energy programme. While the 2006 Strategic Environmental Assessment completed by the Scottish Authorities (SPP6) did include wind energy, with regard to environmental objectives it stated that:
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 - Climate factors
 - Reduces emissions of greenhouse gases, including CO₂?
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- In conclusion there therefore has been a complete failure to complete the necessary Strategic Environmental Assessments of the current renewable energy programmes before they were adopted and quantify the emissions reductions and fuel savings of the enormous roll out of wind energy.

Furthermore Table 7.2 of the post adoption report of the 2009 Scottish Strategic Environmental Assessment in relation to consultation comments included:

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- 1 Consultation Comment: "Must ensure carbon impacts are taken into consideration to ensure that wind farms make a positive contribution to green targets". To which the Response was "Noted: Further assessment of carbon impacts of specific developments is likely to be undertaken at the project level as an integral part of the project's feasibility and environmental impact assessments".
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5. It is believed that FCS did not comply with http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf , which was also reaffirmed in the decision of C-50/09 of the 3rd March 2011. It is maintained that FCS did not properly assess the direct and indirect effects, such as the interaction between the wind farm and WALTHR (salami slicing).

From

- European Commission, DG ENV
- Study concerning the
- report on the application
- and effectiveness of the
- EIA Directive
- Final report
- June 2009
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- **UK Circular 02/99 on Environmental Impact Assessment** makes
- clear to competent authorities that they should always have
- *regard to possible cumulative with existing or approved*
- *development*. It also reminds them that **applications**
- **should not be considered in isolation** if they are in reality
- part of a larger project. Provided they heed, and act upon,
- this advice they should be able to prevent attempts to circumvent
- the requirements of the Directive by this means.

In conclusion.

An upholding of the complaint lodged on this case provides an opportunity for the Commission to legitimately restrict the ability of the Scottish Government to:-

- a. continue to by-pass the Commission's recommendations in place regarding 'salami slicing' of consents for wind power applications which separate the need for access to be part of the original consent process.
- b. ignore the necessity to ensure, where not undertaken, that all competent authorities, such as the FCS, produce their own Environmental Impact Assessment rather than rely on those produced by developers, which is a direct breach of regulations.
- c. Mitigation conditions can only ever be an experiment in the hope that they may be sufficient to avoid that which is forbidden in Directives. In this case, where an alternative exists and has not been allowed to be discussed or considered, such conditions as are imposed also ignore the need for the 'precautionary principle' to be invoked. If the Commissioners consistently allow this to continue by dismissing examples brought to their attention, their 'raison d'etre' will be brought into question.

With the greatest respect, we have sought to provide ample evidence for this request to be granted, and your decision here could have far-reaching and beneficial effects for the birds and habitats that we are both trying so hard to protect. It is clear that you are 'minded' to refuse the request, but there are now sufficient grounds to re-consider such a decision.

Yours sincerely,

Christine Metcalfe. Community Councillor. Avich & Kilchrenan
Community Council.