**Important changes in Scottish Government Energy Consents Unit procedure for advertising S 36 Electricity Act applications**

These points have arisen following the Scottish Ministers win at Appeal of the John Muir Trust's Stronelairg Judicial Review.

**SUMMARY**

In essence, the government are saying that Further Environmental Information (FEI) only requires advertised once, regardless of what subsequent information is sent through i.e. if SEPA submit FEI in 2012 and SNH submit FEI in 2013 then only the 2012 FEI is advertised. Later FEI should be searched for by interested parties on the relevant planning authority website. Clearly this shifts the responsibility for making information available to the public considerably.

Some planners in councils are concerned about this change in procedure adopted by Energy Consents Unit as to when they require advertising for a Section 36 Electricity Act application, following the Stronelairg case and their line of argument there.

The quotes below and sample adverts (see separate document) show what happened, what was argued and what was decided **ON THE SPECIFIC POINT** regarding advertising Supplementary Environmental Information (SEI) at the Stronelairg legal case.

Quotes in **BOLD or <u>underlined</u>** are my emphasis – HM

**Extract from Note of Argument for Judicial Review from Scottish Ministers (SM) 03/02/15**

"The petitioner's first strand of argument founds upon two references to "supplementary environmental information" at pages 3 and 4 of the decision letter (no. 6/1 of process). The letter does not identify what such "supplementary environmental information" was. **As explained more fully in the affidavit of Mr Coote (no. 11/13 of process), the two isolated references to "supplementary environmental information" were made in error. The respondents did not require or receive any "further information" nor did they receive "additional information**"."

This argument from SM and SSE was subsequently abandoned in the Appeal in favour of the argument that the FEI referred to in the case did not need to be advertised.

**Appeal against Outer House JR decision**

**Extract from MINUTE OF AMENDMENT from Scottish Ministers (SM) February 2016**

"Respondents' published guidance, the applicant caused advertisements to be placed in the Edinburgh Gazette, the Herald and the Inverness Courier in terms of regulation 14A on 4th

and 11th September 2012. Copies of these advertisements are produced herewith and referred to for their whole terms. The publication of these advertisements had been foreshadowed in the original advertisements placed in the same papers under regulation 9 on 3rd and 10th July 2012, which publicised the Respondents' receipt of the application for consent and the environmental statement. **The purpose of the advertisements under regulation 14A was to ensure transparency and to avoid dispute over what responses did or did not contain substantive information relating to the environmental statement.** As required by regulation 14A, the advertisements inter alia

(i) gave notice to the public that additional information had been received by the Respondents;

**(ii)** advised that the information was available for public inspection at Highland Council;

**(iii)** advised that queries be sent to either the Council or the Respondents;

**(iv) invited representations to be made to the Respondents by 24th October 2012**;

**(v) advised that any subsequent additional information received by the Respondents would similarly be forwarded to the Council for placing on its planning register and made available to the public;**

**(vi) (vi) advised that no further public notice would be issued."**

The Scottish Ministers' argument was that, although the SEI being argued over was produced in 2013, it had not needed to be advertised because there had previously been different SEI advertised in September 2012 and that that was sufficient.

**From Affidavit for John Muir Trust for the Appeal from Ian Kelly, planning consultant May 2016**

(This represents the position that the Trust believes existed before the Stronelairg legal case**. –** HM)

**"Advertised Consultation in the Usual Way**

6. The first matter in question for this affidavit relates to my own experience of the approach of Scottish Ministers **where there are rounds of what is commonly called Further Environmental Information (FEI) produced subsequent to the initial submission of a section 36 wind farm application. This is in addition to the practice of advertising the receipt of the first statutory consultee response** – a matter addressed in the material before the Court. What I set out is based on the experience of the cases on which I have worked or advised. In general, the submission of FEI often stems from alterations to the design, layout, size and number of wind turbines in a wind farm development arising from the responses/objections from consultees and other third parties. This covers the situation of the wind turbine numbers staying the same, reducing or, very occasionally, increasing. The most frequent aspects addressed in such FEI submissions are the landscape and visual impact assessment (LVIA) effects, noise assessments, ornithology and peat.

7. **In every case that I have been involved in, where there have been new visualisations produced for a revised scheme, those new visualisations have been regarded as FEI** and have been advertised (either on a standalone basis or as part of a wider set of FEI material). In my experience it is the assessment of visual impact of wind farms that is by far of most interest to the public."

**Extract from Opinion of Court, Lord Carloway, on Appeal 22 July 2016**

**Re SM submission -**

Para 24 "…**It was only after the issue of the Lord Ordinary's opinion that the respondents had amended their pleadings to explain that, unknown to the Lord Ordinary, Regulation 14A notices had been published in September 2012.** Even if the Council report and decision had constituted "additional information", there had been no breach of Regulation 14A.

Para 26 "The obligation under Regulation 14A arose when "additional information" had been received by the respondents. The obligation was only to publish one notice on the first intimation of additional information. The notice did not require to inform the public of the nature or content of the information, but only to advise that information had been received. The purpose of Regulation 14A was to inform the public that some additional information existed and that it would be available for inspection. The construction of the terms of Regulation 14A(2) proposed by the petitioners was an ungainly and unlikely one. The term "on the first occasion" was used to make it clear that there was an obligation to publish a notice only once. The alternative would lead to a whole series of notices.

**Decision** –

Para 47 **"It is, putting matters mildly, unfortunate that the Lord Ordinary was allowed to proceed to his decision that there had been a breach of Regulation 14A of the EIA regulations in ignorance of the existence of the regulation 14A notices. The post judgment revelation of these notices must prompt a re-evaluation of the petitioners' averments of a breach of that regulation…**

Para 48 "Regulation 9 of the EIA regulations requires the publication of a notice when an application is first submitted. This provision was complied with by publication of the notice on 3 July 2012…

Para 50 "Neither the Directive, nor Regulation 14A, require there to be any more than one notice advertising the receipt of additional information. Indeed, the Regulation is clear in its terms that only one intimation of the existence of additional information need be made.

**The public are thereby put on guard that, thereafter, there may be further material on the Council's planning register. This poses no practical difficulty for the interested member of the public, since the website may be checked from time to time for any such material.**

If the petitioners' contentions were correct, there would require to be, in many cases, multiple newspaper notices advising of the receipt (but not the content) of additional information of whatever nature **in circumstances in which the public would already be aware of the potential for additional information to have been presented and which they could access on the click of a mouse.**"

Para 53 **"That having been said, it may be that, for the future, consideration should be given to amending the style of the Regulation 14A notices, so as to provide an express period, after the uploading of additional information onto a local authority's planning register, during which representations to the respondents might be made."**

**JOHN MUIR TRUST CONCLUSION**

See adverts for Stronelairg cited in the case and compare with adverts for Limekiln and Drum Hollistan post- decision to see the change in approach which is now being taken.

The Trust believes that the change in approach now being taken by Scottish Government Energy Consents Unit is significantly adverse for public access to information in S36 cases due to -

- the time that is often taken to get such information up by Councils
- the frequent problems which can arise with websites
- the impossibility of knowing whether significant SEI has been uploaded to the website
- the difficulties of accessing large documents on council websites

It is particularly concerning that so many S36 cases are in Highland Council area where broadband and adequate web access is such a major problem, denying people, even if they have computer access, the ability to consider new information and respond appropriately within the planning process.

**Council liability?**

There is a question of where liability would lie for any breach of making SEI available to the public. If a Council did not get the material on to the web immediately, or had a significant failure of IT, would they be the party liable?

**Aarhus compliance?**

There have already been considerable concerns raised about whether Scotland is "Aarhus compliant" regarding the third criteria (or pillar) "Access to justice". This change in the system raises further questions about compliance with the first criteria of "access to Information".

**NB –**
**See separate PDF for adverts for Stronelairg, Limekiln and Drum Hollistan to compare and contrast the wording used before Stronelairg legal case and after it.**