

IN THE HIGH COURT OF JUSTICE

CO/9686/07

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:;

THE QUEEN

on the application of RENEWABLE ENERGY FORUM LIMITED

Claimant

-and

SECRETARY OF STATE FOR BUSINESS ENTERPRISE AND  
REGULATORY REFORM

Defendant

SUMMARY GROUNDS OF RESISTANCE

## INTRODUCTION

1. The Claimant seeks an order quashing part of a statement, issued on 1st August 2007 ("**the 2007 Statement**") relating to the approach to be taken to the assessment of noise when determining applications for permission to develop wind farms [14]. In particular, the Claimant challenges the final paragraph of the 2007 Statement, by which the Defendant announced the Government's continued support for the approach to noise levels first set out in Planning Policy Statement 22: Renewable Energy ("PPS 22"), which advises that:

"Local planning authorities should ensure that renewable energy developments have been located and designed in such a way to minimise increases in ambient noise levels ... The 1997 report by ETSU for the Department of Trade and Industry should be used to assess and rate noise from wind energy development"

2. The application for judicial review is misconceived and permission should be refused. In particular:
  - (1) the 2007 statement merely reaffirms the Secretary of State's policy on the assessment and rating of noise from wind energy development, as set out in PP522 and an earlier Government statement made in November 2006. The expression of continuing support for an existing policy is not a "decision" which is meaningfully amenable to judicial

review. Quashing the August 2007 statement will have no effect on the previous statements, which will continue to apply. The application is therefore pointless;

(2) in any event, the Claimant's Grounds disclose no arguable case.

3. If, contrary to these submissions, permission is granted, the Defendant reserves the right to argue that the claim is not justiciable in any event.

## **FACTUAL AND POLICY BACKGROUND**

4. In August 1993, the Working Group on Noise from Wind Turbines was established by the Energy and Technology Support Unit ("ETSU") of the former Department for Trade and Industry in order to address the dearth of experience in the environmental assessment of noise from wind turbines, and the lack of an agreed procedure for determining acceptable noise levels. One of the objectives of the Working Group was to define a framework which could be used to measure and rate the noise from wind turbines, including parameters to be measured, measurement methods, units and periods.

5. In 1997, the Working Group produced the report entitled *The Assessment and Rating of Noise from Wind Farms* ("ETSU-R-97", at [16-39]), which recommended different noise limits for day-time and night-time [21-22]. The noise levels recommended in ETSU-R-97 expressly took account of the phenomenon known as "blade swish" but the Report commented [39] that:

"[T]here is insufficient data available at this time to formulate an accurate measurement methodology for blade swish where it occurs. It is envisaged that further research will be required to enable proper measurement and assessment to be devised, if in the future this is felt to be necessary "

6. ETSU-R-97 is referred to in PPS 22 Renewable Energy (2004), which contains the national policy for England concerning renewable energy and sets out locational and other considerations relevant to planning permission for renewable energy developments. Paragraph 22 of the PPS provides:

**Noise**

Renewable technologies may generate small increases in noise levels (whether from machinery such as aerodynamic noise from wind turbines, or from associated sources - for example, traffic). Local planning authorities should ensure that renewable energy developments have been located and designed in such a way to minimise increases in ambient noise levels. Plans may include criteria that set out the minimum separation distances between different types of renewable energy projects and existing developments. The 1997 report by ETSU for the Department of Trade and Industry should be used to assess and rate noise from wind energy development

7. In January 2004, an article in the national press alleged that low frequency noise emitted by wind farms had adversely affected the health of residents near three wind

farms in Cumbria, North Wales and Cornwall. As a result, the DTI commissioned Hayes McKenzie, an independent consultant on acoustics, noise and vibration, to investigate the levels and effects of infrasound and low frequency noise in dwellings neighbouring those three wind farms (11 November 2004).

8. The study, *The measurement of Low Frequency Noise at three UK wind farms* (May 2006) ("The Hayes McKenzie Report", at [44-60]) concluded that of the 126 wind farms operating within the UK at the time, only a total of 5 had reported low frequency noise problems. Accordingly, this was the exception rather than the rule. The principal findings of the Hayes McKenzie Report were:

- Infrasound associated with modern wind turbines is not a source that will result in noise levels which may be injurious to health;
- low frequency noise was measurable on a few occasions but below the existing permitted Night Time Noise Criterion;
- A common cause of complaint at all three farms investigated was not associated with low frequency noise, but with the audible modulation of aerodynamic noise ["AM"]\_

9. On the last of these issues, the Report observed that:

"it may be appropriate to re-visit the issue of aerodynamic modulation and the means by which it should be assessed. In the presence of high levels of aerodynamic modulation a

correction for the presence of the acoustic feature should be considered. However, it is beyond the scope of this report to consider the issue of appropriate assessment and acoustic feature correction methodologies for this character within the noise"

10. Following publication of the Hayes McKenzie Report, there was speculation about the possible review of ETSU-R-97, which led to suggestions being made at planning inquiries that the guidance in PPS 22 relating to the use of ETSU-97 for the assessment of noise and rating should no longer be followed. In response, in November 2006 the DTI (after consultation with DEFRA and DCLG) issued a government statement that:

"The Hayes McKenzie work has mistakenly been reported as recommending a total review of ETSU-R-47. The purpose of this statement is to clarify the Government's position with regard to the LFN report and the action being taken by the Noise Working Group.

**The Department for Communities and Local Government (DCLG) has written to all Local Planning Authorities and the Planning Inspectorate to confirm that the advice in PPS22 and its Companion Guide that ETSU-R-97 should be used for assessment and rating of noise from wind farms should continue to be followed.**

The Hayes McKenzie report noted that a phenomenon known as Aerodynamic Modulation (AM) was in some isolated circumstances occurring in ways not anticipated by ETSU-R-97. The report stated that concerns apparently relating to this phenomenon have been expressed in relation to only 5 out of 126 wind farms in the UK.

Government has taken the view that more work is required to determine whether or not AM is an issue which may require attention in the context of the rating advice in ETSU.

To assist with this work Government has brought together an advisory group (the NWG) drawn from acoustic experts, including former members of the Noise Working Group, to provide a peer review and guidance in the issue of AM. It is not within the terms of reference of NWG to examine the assessment and rating advice in ETSU-R-97 beyond the issue of Aerodynamic Modulation. If in time it is felt appropriate to reflect AM in the context of the ETSU rating advice further information will be issued"

11. As announced in this statement, the Working Group on Noise from Wind Turbines ["NWG"] was re-constituted as a peer review to consider the main conclusions of the Hayes, McKenzie report. The NWG group met on three occasions: August 2006, October 2006 and April 2007. At its first meeting, the NWG agreed to commission a study to gather empirical data from existing operational wind farm sites to better understand the extent and causes of Aerodynamic Modulation. Salford University was contracted to carry out that research.
12. Salford University's final report *Research into Aerodynamic Modulation of Wind Turbine Noise (July 2007)* ("The Salford Report" at [63-115]) concluded that the causes of AM are not fully understood, and that AM cannot be fully predicted given the current state of technology. However, it found that the incidence of AM was low: it was

considered to be a factor in four of the 133 wind farm sites examined, and a possible factor in a further eight sites. Of the four sites where AM was positively identified, complaints about noise had subsided at three of them, in one case as a result of treatment in the form of a wind turbine control system.

13. The Salford Report concluded that [109]

"Considering the need for further research, the incidence of AM and the number of people affected is probably too small at present to make a compelling case for further research funding in preference to other types of noise which affect many more people. On the other hand, since AM cannot be fully predicted at present, and its causes are not fully understood we consider that it might be prudent to carry out further research to improve understanding in this area."

14. On consideration of the Salford Report the Defendant decided that there was not a compelling case for further work into AM, and that it would not carry out further research; although it would continue to keep the issue under review. It should be noted that the Claimant does not challenge this aspect of the 2007 Statement.

#### THE GROUNDS OF CHALLENGE

15. The Claimant challenges the decision on five grounds:

- (1) The decision was taken without regard to material considerations, contained in the Hayes McKenzie Report [CG para 21];
- (2) The decision was perverse [CG para 21] in that:
  - (a) It was made without properly understanding the Salford Report [CG para 22];and
  - (b) It was made without properly revising the ETSU approach in light of more recent data in the Hayes Report [CG para 23];
- (3) The decision was made without appropriate consultation [CG para 24];
- (4) The decision frustrates the Claimant's legitimate expectation that there would be further scientific work following the publication of the Hayes McKenzie Report [CG para 25];
- (5) the decision attempts to fetter discretion or impermissibly direct decision makers in that it attempts to erase from planning decisions certain circumstances that are highly material [CG para 26].

## **GROUNDS OF RESISTANCE**

1. There is no "Decision" which is Meaningfully Amenable to Judicial Review/ the Application is Pointless

16. Although the Claimant characterises the paragraph of the 2007 Statement which it seeks to quash as a "decision", it is clear on its face that the paragraph in question is not a "decision" but simply a general statement of continuing approach. In particular, it has been government policy since PPS22 that the potential impact of noise from wind farms should be assessed in accordance with ETSU-R-97, a position which was restated in November 2006.
  
17. In this respect, it is noteworthy that a large part of the Claimant's argument is directed at the suggestion that the 2007 Statement prevents reference at planning inquiries to findings of the Hayes McKenzie Report. For the reasons set out under Ground 5 below, that argument is misconceived, but if it were correct, the same would also be true of the statement made in November 2006, which has never been the subject of challenge..
  
18. In consequence, quashing the final paragraph of the 2007 Statement would be an entirely futile exercise:
  - (1) if the paragraph is quashed, government policy will continue to be as set out in PPS22 and the November 2006 statement, namely that noise should be assessed in accordance with ETSU-R-97;
  
  - (2) the Claimant does not challenge the Government's decision that there is no compelling case for further work into AM, and that it will not carry out any further research at this time (nor, given the conclusions of the Salford Report, would there be any prospect of such a challenge succeeding);

- (3) the Hayes McKenzie Report provides no alternative methodology to that set out in ETS-R-97. The authors expressly state that it is

"beyond the scope of this report to consider the appropriate assessment and acoustic feature correction methodologies for this character within the noise."

A new methodology was also patently also beyond the scope of the Salford Report;

- (4) in circumstances where it is accepted that there will, for the time being, be no further work on AM; where there is no new methodology to replace that in ETSUR-97; and where the number of cases in which AM is likely to be an issue is low in any event, it is difficult to see on what basis (other than ETSU-R-97) the effects of noise from wind farms could be assessed.

19. In the circumstances this application for judicial review, even if it were to succeed, could fulfil no useful purpose. Permission should be refused for this reason alone.

## 2. No Arguable Case, in Any Event

20. Irrespective of the Court's conclusion on the futility of these proceedings, none of the Claimant's grounds bear scrutiny, and permission, should be refused on the grounds that there is no arguable case.

***Ground 1 - Failure to Take Material Considerations into Account***

21. The suggestion that the Secretary of State failed to have regard to "the highly material consideration in the Hayes report" is demonstrably wrong. The 2007 Statement specifically recites the fact that

"The [Hayes McKenzie] Report went on to note that a phenomenon known as Aerodynamic Modulation ... was in some isolated circumstances occurring in ways not anticipated by ETSU-R-97"

22. The 2007 Statement therefore refers to the very conclusions of the Hayes McKenzie Report which the Claimant accuses the Defendant of disregarding.

***Ground 2 - Perversity***

23. The Claimant asserts that the Secretary of State misunderstood the Salford Report, and that the Salford Report "was not, as the Secretary of State has understood it, stating that AM was not an issue in the UK, but that there were limited complaints on it and that it was not possible to identify the precise quantum of AM". [CG para 22]. This argument flies in the face of the 2007 Statement, which specifically records that (emphasis added):

"The [Salford] study concluded that, although AM cannot be fully predicted, the incidence of AM resulting from wind farms in the UK is low. Out of the 133 wind farms in operation at the time of the study, there were four cases where AM appeared to be a factor. Complaints have subsided for three out of these four sites ,,

24. Nowhere in the 2007 Statement does the government statement suggests that AM is not an issue in the UK, nor does it suggest that AM will not and cannot be an issue in the case of future applications for wind farms close to residences in low background noise areas. Contrary to the assertion in [CG para 22] it is clear beyond argument that the Secretary of State was aware that AM was an issue in the UK, albeit that the number of complaints was limited.
25. Further (and contrary to [CG para 23]) the 2007 Statement does not ignore the fact that ETSU-R-97 had itself called for further scientific work, and that further work had been done by Hayes McKenzie. The 2007 Statement expressly refers to the Hayes McKenzie Report.
26. Nor, in the light of the terms in which Hayes McKenzie reported, can it be described as "perverse" to reaffirm the ETSU-R-97 methodology:
  - (1) although the Hayes McKenzie report identified the fact that AM was an issue, it is clear from both the Hayes McKenzie Report and the Salford Report that the incidence of problems associated with AM is low;
  - (2) although the Hayes McKenzie Report recorded certain readings taken at the 3 sites surveyed, the Report did not suggest (or even purport to suggest) any alternative

methodology which should be applied instead of that set out in ETSU-97. Indeed, it expressly stated that any such recommendation was beyond its scope.

In view of the limited number of cases affected by AM and the absence of any other methodology to replace EWTSU-R-97, the continued support for ETSU-R-97 was entirely reasonable.

***Ground 3 - The Decision was Made Without Consultation***

27. Although the Claimant's third ground complains that there was a lack of consultation, the Claimant:

(1) is almost completely non-specific as to the identity of the parties who (it is said) should have been consulted;

(2) fails to identify any legal basis for the assertion that consultation should have taken place.

28. As a matter of principle, the Defendant submits that that there can be no obligation to consult on a statement which simply reaffirms support for an existing policy.

29. In any event, the Claimant's supposition that the government statement was drafted by the Defendant without reference to any other departments or interested parties is simply wrong. The Salford Report was a joint DEFRA / DTI project, commissioned through DEFRA's Research Programme, funded by DTI, and published on the DTI website with a link to it from DEFRA's website. DEFRA was a member of the NWG and with BERR jointly led on the work undertaken leading up to the statement of 1 August and the statement itself. With their responsibilities for the planning system and because they are the issuing department for PPS22, CLG also attended the NWG in April 2007 and were consulted on the November 2006 and August 2007 statements. Both through the commissioning of the Salford Report and through the NWG, there was consultation with the appropriate stakeholders in this area.

***Ground 4 - Legitimate Expectation***

30. In order to found a legitimate expectation, the Claimant needs to be able to identify a clear and unambiguous promise or an established practice/course of conduct by the Defendant. The Claimant's Grounds conspicuously fail to do this.
31. If and so far as the Claimant relies on the recommendation in the Hayes McKenzie Report, it will be noted:
- (1) that the Hayes McKenzie Report was an independent report. The recommendations of the authors do not and cannot constitute a representation by the Defendant;

(2) in any event, the Defendant/NWG did commission further work in the light of the Hayes McKenzie Report. The conclusions of the Salford Report provide no basis for any expectation (legitimate or otherwise) that there would be still further work done.

32. This ground is accordingly without foundation.

***Ground 5 - Fettering of Discretion/Impermissible Direction***

33. This ground is completely misconceived, for two reasons.

34. First, it is the legitimate function of government to steer the consideration of issues at planning inquiries through the provision of guidance. That is what Planning Policy Guidance Notes (PPGs) and Planning Policy Statements (PPSs) do. No-one would suggest that PPS 22 was unlawful because it indicates that noise should be assessed by reference to the methodology in ETSU-R-97. If PPS 22 is not unlawful, then it is impossible to see how restating Government support for it can be so.

35. Second, it is in any event patent nonsense to suggest either (as the Claimant does at CG para 18) that the Secretary of State has "decided that it is appropriate to determine applications to him under s36 of the Electricity Act 1989 without reference to e.g. the Hayes study or the site specific circumstances which may make AM a significant issue", or (per CG para 26) that the Secretary of State has "attempted to erase from decision-making what can be in certain circumstances a highly material consideration. The 2007 Statement says nothing of the sort. Ground 5 attempts to give the final paragraph of the 2007 Statement a meaning it

simply cannot bear. Nothing in the statement can be construed as preventing any material from being considered in the context of a section 36 application.

## CONCLUSIONS

36. This claim is misconceived. Permission should be refused.

## COSTS

37. In the event. that permission is refused, the Defendant, in accordance with the principles in R (*Mt Cook Land Ltd*) v. *Westminster City Council* [2003] EWCA Civ 1346 seeks an order that the Claimant pay the Defendant's costs in the total sum of £4,800. The breakdown for this is as follows: £2,480 (12. 4 hours @ £200) attendance on clients; £840 (4.2 hours @ £200) attending counsel; £760 (3.8 @ £200) work done on documents; and £720 counsel's fees.

PAUL BROWN