

3C East Lothian Council Response

1 Response to comments on Scoping Opinion

ELC notes the comments of your response to our Scoping Opinion.

We are of the opinion that our opinion remains valid and reasonable.

As requested, I make specific comments on the points raised. I refer the numbering in your note.

2 Procedural Matters

Paragraph 1.5 – requirement for the ER to be ‘based on’ the Scoping Opinion. You note the provisions of Regulation 5(3) for the ER to be ‘based on’ a Scoping Opinion. This is a new requirement, and interpretation of whether or not an ER is ‘based on’ a Scoping Opinion will be ultimately for the courts. Section 5.3 requires that where a Scoping Opinion is issued, the EIA report must be ‘based’ on that Scoping Opinion and include the information that may reasonably be required for reaching reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment.

The Regulations state the ER should focus on likely significant effects, and this is reflected in the Council’s Scoping Opinion. In preparing this, the Council has taken a precautionary approach; for example with marine mammals (discussed below,) it may be the case that there are no significant effects however the Council does not consider that this was clear from the Scoping Report and therefore information on marine mammals was requested. In line with the focus on significant effects, if the effects are found not to be significant a short note explaining the reasoning for this is considered sufficient for inclusion in the ER. This would satisfy the requirement for the ER to be based on the Scoping Opinion and would not remove focus from other areas.

The term ‘based on’ would appear to the Council to allow for some allowance for movement as the EIA process goes forward; the regulations do not state for example that everything in the Scoping Opinion must be included. The purpose of the process is to identify the significant impacts of the proposal; sometimes Scoping Opinions will be issued at a very early stage when these may not be at all clear, and the legislation appears to allow for this by the use of the words ‘based on’ and the provision to require information not included should it later become apparent this will be needed. The Circular states that “As these documents represent the considered view of the planning authority or Scottish Ministers, a report which does not cover all the matters specified in the scoping opinion or direction is *likely* to be subject to calls for additional information under Regulation 26 (see paragraphs 116-118)” (italics added). The Circular seems to allow for the ER not including such information (it does not say for example that this information *must* be included, only that there may be consequences if it is not). Where the impacts will not be significant and this is shown, there would be no reason for the Council to call for further information.

Where there is good reason for not including information, or for not considering it significant, if this is explained in the ER the matter has been considered, and so the ER is ‘based on’ the Scoping Opinion.

3 Scoping Direction and amending of Scoping Opinion

Paragraph 1.6 (1) and paragraph 2.1 raises the question of whether it is possible for ICOL to seek a Scoping Direction from Scottish Ministers, as advised by ELC. ICOL state that they do not consider they have the ability to seek this. The Town and Country Planning (Scotland)(Environmental Impact Assessment) Regulations 2017 (the EIA Regulations) set out provisions for Scoping.

Regulation 14.4 provides that a developer may request a Scoping Direction if Scottish Ministers have told them their development is EIA development where it has been referred to them for determination.

Regulation 15.3 provides for the same with regard to appeals determined by Scottish Ministers where the developer has been told it is EIA development.

Regulation 17.8 provides for when the planning authority fails to adopt a Scoping Opinion.

None of these situations are the case here.

However, there is also provision in 18.b for Scottish Ministers to make a Scoping Direction at their own volition. While provision for a developer to make a request (formally or informally) is not expressly included, there is nothing in the regulations specifically preventing them from doing so. The Regulations do not oblige Scottish Ministers to issue a Scoping Direction however.

Paragraph 94 of the Circular (Circular1 2017: Environmental Impact Assessment regulations 2017) notes that there is no provision to refer a disagreement between the developer and the planning authority over the content of an EIA Report to Scottish Ministers. However, Part 18.10 states that a Scoping Direction supercedes the terms of an earlier Scoping Opinion or Scoping Direction. There must therefore be circumstances where a Scoping Direction can follow a Scoping Opinion.

In Regulation 14.4, it does not appear that there would have been a previous Scoping Opinion, as in this case, it is Scottish Ministers who have told the applicant their development is EIA development. Regulation 15.3 is similar, but with regard to appeals. Regulations 17.8 provides for circumstances where the planning authority have not produced a Scoping Opinion. The only remaining circumstance therefore where Scottish Ministers could produce a Scoping Direction where there is already a Scoping Opinion appears to be where they do so under their own volition. No explanatory notes are included as to under what circumstance Scottish Ministers may do this. No restrictions on the circumstance where they may do so are given. It would seem likely that there are two main sets of circumstances where they might wish to do so.

Firstly, where the planning authority has failed to include in the Scoping Opinion matters of environmental protection which Scottish Ministers consider to be in the national interest. Secondly, where, as you argue may be the case here, the planning authority has incorrectly included in the Scoping Opinion matters which they consider may impact on the delivery of a national development. ICOL's proposal is part of National Development 4 of the National Planning Framework, so there is a national interest in it. Even if Scottish Ministers generally prefer to leave Scoping Opinions to be determined by the planning authority they may take an interest in this one.

As far as ELC is aware there is no legislation explicitly preventing ICOL from making a request that Scottish Ministers do issue a Scoping Direction of their own volition.

4 Onshore/Offshore interaction

Paragraph 1.6 (2): *is there an approach to EIA of the OnTW and the offshore Works that would satisfy the requirements of the EIA Regulations and ensure the Council's process is robust?*

ELC consider that the PPP for the previous onshore works took account of the offshore works by reference to the EIA for that part of the project, which was at the time of determination current and complete. A suspensive condition was put in place requiring that the works did not commence until it could be demonstrated that consent was in place for the offshore works.

The Council wishes to avoid the situation where associated works that are integral to the project, as these are considered to be, are initiated prior to the EIA of the main project being complete, as it considers this would be in breach of the Directive.

In order for the Council to make a 'whole project' determination for the OnTW it would require either:

- (a) The assessment of the revised proposal for the offshore works to be complete; or
- (b) The assessment of the existing offshore works to be confirmed as remaining valid i.e. that there have been no relevant changes to the baseline, methods of assessment, or cumulative impact with other schemes &c.

We agree with ICOL in paragraph 3.4 that if planning permission is granted for the OnTW, ICOL would be able and entitled to implement that planning permission with the existing consents as a 'whole project' - provided EIA is up to date. Arguably that this should include discharge of suspensive conditions on consent for the offshore works where that discharge has the potential to require further EIA work (as a multi-stage consent). However, if ICOL does not build the original offshore scheme, and does intend to build the revised scheme, approval of the works and their physical execution before the EIA for the revised scheme is complete would be a breach of the Directive. To avoid this situation arising, consent for the onshore works would have to contain a condition that they can only connect to either the original offshore works, or that EIA is completed for the revised works (which may have to include the discharge of any suspensive conditions on the offshore consent as this could give rise to further EIA work) before the onshore works commence as outlined in paragraph 3.7.

5 Updating Scoping Opinion

Paragraph 1.6 (3) *Is it possible for the Council to update the Scoping Opinion following discussions with ICOL and potential resolution of issues.*

ICOL do not set out where in the legislation it is stated that the Council may replace one Scoping Opinion with another, so the Council is unsure of the basis for your view that is possible.

The legislation sets out procedures which the Council must follow before issuing a Scoping Opinion in response to a request. This includes in Section 17.4 that the planning authority may not adopt a Scoping Opinion in response to a request before carrying out certain consultations, and that in Section 17.5 states that it must take into account the information provided by the developer. Section 17.6 provides for the planning authority to adopt a Scoping Opinion within a certain time period of receiving a request. This does not suggest the planning authority could issue a Scoping Opinion without such a request. If such a request is made, consultations would have to be carried out again. Section 17.10 provides for the planning authority to adopt a Scoping Opinion where a Screening Opinion has been issued but the developer has not requested a Scoping Opinion. This is not the case here.

It is unclear as to whether the planning authority can amend a Scoping Opinion. The legislation (17.2) states that a later Scoping Opinion supercedes an earlier one which does allow for there being more than one Scoping Opinion issued. This may be intended to cover where the baseline has changed between the Scoping of the proposal and application, or for changes to the proposal, and for this to follow a further request. ICOL suggest that we could issue a supplementary report or letter which states that it is supplementary to the Scoping Opinion and that the Scoping Opinion as supplemented supercedes the original. There is no provision in the legislation for this and the Council is not convinced that it would be legally sound. The Council does not therefore intend to amend the Scoping Opinion.

6 Marine Mammals

The Scoping Opinion for the offshore windfarm element states that Scottish Ministers agree that bottlenose dolphin, harbour seal, grey seal, harbour porpoise, humpback whale and white beaked dolphin should be included in the EIA. The Offshore Scoping Opinion Mammal Appendix also notes on page 10 that the meeting on 26 May 2017 between Marine Scotland, SNH and Whale and Dolphin Conservation considered that the baseline of the original ES is likely to prove conservative. Scottish Ministers agree that the existing baseline *and proposed updates* are appropriate. Bottlenose dolphin management unit information has also been updated. Until the results of the proposed updates are applied it cannot be certain that the effects will remain insignificant. Updated information/management units is also available on seals.

Scottish Ministers agree that cumulative impacts on marine mammals can be scoped out other than impacts from disturbance from increased noise. Impact on marine mammals from disturbance from noise on marine mammals included in a list of possible ecological pathways for impact on Natura 2000 sites in the Forth previously supplied to the Council by SNH.

The location of the substation itself could be anywhere within the red line boundary (the setting out diagram is indicative). Regardless of where it is within the site, the substation itself is considerably closer to the coast than previously. The method of construction or decommissioning is not specified. The levels of noise from construction, operation or decommissioning that might disturb marine mammals are not specified in terms of those impacts. No information was provided in the Scoping Opinion on the evolution of the baseline since the previous application.

Taking the precautionary approach, the Council included impact on marine mammals as with the information available it did not consider an impact could be ruled out. It may be that due to construction methods, there is no possible scope for an impact. If so the Council considers it would be sufficient to address the Scoping Opinion requirement by stating how this conclusion was reached. However, if there is a low impact this should be considered as part of the overall impact of the scheme (onshore and offshore).

SNH did not initially comment on marine mammals. The Council attempted to contact the SNH officer who had provided the response to clarify their position however he was unfortunately on leave at that time. On his return the Council had a phone call with him and the Council's understanding of the call was that he agreed that what had been included was acceptable.

In addition to EIA, the Council must also undertake assessment under the Habitats Regulations. Regulation 53 of the EIA Regulations requires that EIA and HRA are coordinated where appropriate. Provision of this information will aid the process of coordination of assessment.

Marine mammals are a qualifying interest of the Isle of May SAC and Moray Firth SAC. The Council must determine whether or not there will be a likely significant effect on any Natura 2000 site, and if so it must carry out Appropriate Assessment to determine whether or not there will be an adverse impact on the integrity of any Natura 2000 site. Information is needed to support any conclusion reached.

7 Landscape and visual

The proposal overall is part of a National Development, representing millions of pounds of investment. The proposal overall, including the onshore works in particular the substation, is likely to be visible across a wide area of East Lothian, and is in a location formerly occupied by the iconic Cockenzie Power Station, and in which there is considerable community interest. The level of survey effort therefore is not considered disproportionate. Detailed response on landscape and visual matters is set out below, following your Table 1.

LANDSCAPE AND VISUAL

Table 1 below details ICOL's position on the Council's Scoping Opinion with regards to landscape and visual. Whilst ICOL does not consider all the requests to be proportionate to the development, where possible, the Council's requests have been met.

The council's Scoping Opinion	ICOL's Position	
There is a request for a full topographic analysis with spot heights at no less than 0.5m intervals.	There is no access available to the Application Site which is subject to ongoing demolition works. The LVIA can be completed based on available OS 5m Terrain data (OS Terrain-5).	There are office blocks on the eastern half of the site, which are not part of the demolition works, where access may be possible. Failing this the applicant could carry out a laser survey.
It is requested that cross sections through the site are provided.	Indicative cross sections showing the proposals and included mitigation will be provided.	The cross sections must be based on accurate levels
Under Zone of Theoretic Visibility Influence (ZTVI), it is stated that a "full level survey and proposed finished level plan must be carried out" to enable accurate modelling.	The modelling will be carried out in relation to the currently proposed design parameters and OS 5m Terrain data.	In the absence of a full level survey results of the ZTVI will not accurately reflect the likely visibility of the proposed development. We require that the proposed finished floor level and roof ridge height of the highest building is included in the legend.
It is requested that the latest version of OS Terrain-5 is used.	A current version of OS Terrain-5 will be used.	No comment.
It is requested that tree belts, woodland and buildings be built into the ZTV model.	An overlay of the ZTV for the proposed development on aerial photography for the study area will be provided which will show these features.	The screening ZTV plan shall include a colour coded legend.
It is requested that a ZTV is provided for the existing site.	It is not clear what purpose a ZTV of the existing site would serve in the context of the LVIA.	We want to be able to compare the ZTV for the existing site with the ZTV for the proposed development.
It is requested that the ZTV reflect finished floor levels and proposed roof ridge heights.	This will be done on the basis of the available design information and bearing in mind that the application is for Planning Permission in Principle.	The level at which the FFL is set will impact on how the proposed development will relate to the surrounding existing levels. We therefore require that the FFL is clearly stated and that it is based on an accurate level survey.
It is requested that the ZTV information is provided in raw GIS format.	Raster data for the ZTV can be provided if required.	We require the GIS data to be submitted in shapefile format
Under View Points (VP), certain requirements are laid out in the first paragraph.	The Viewpoint visualisation requirements are acceptable.	No Comment
Various locations, receptor types and display methods are requested.	The LVIA viewpoints have been chosen to be representative of the range of landscape and visual receptors identified within the LVIA study area, in line with GLVIA3 likely to be affected by the proposed development. Further response in the context of each of the locations identified by ELC's Landscape Advisor is provided at the end of this table.	The proposed VP were published in the scoping report, prior to any consultation with ELC. Our response was that we do not require proposed VP 1, 2 and 8. We asked for an additional 6 VP, of which the applicant agreed to provide VP 2 from the top of the grass mound to the west, VP 4 from Cockenzie Harbour and VP 6 from JMW in Cockenzie CA

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The council's Scoping Opinion	ICOL's Position	ELC comment 7/12/17
Under Viewpoint Analysis, cross-reference is made to an assessment matrix set out in ELC's L + V response.	The assessment will be carried out with reference to the matrix set out in the Scoping Report which is based on SLR's tried and tested methodology. This is considered in line with GLVIA3.	Due to the headings layout and lack of colour, SLR's matrix is not as clear and easy to interpret as a summary of the written analysis as the matrix that ELC propose.
Under Night Lighting, a request is made of assessment of lighting.	Night time lighting will be considered in the LVIA.	No comment.
Under Cumulative Landscape and Visual Impact (CLVIA), it is suggested that effects in combination with the adjacent substation be considered.	The presence of the substation will be reflected in the baseline.	No comment.
Under Tree Survey and Arboricultural Constraints Plan, a lot of statements are made about the need to develop a plan and working methodology.	It is considered that this would be better suited as part of any planning conditions rather than determination of effects and consideration of PPP.	No comment.

8 Decommissioning

ELC recognises that best practice on decommissioning is likely to change, along with timescales. However, in order to cost a financial guarantee, there must be some basis for how it envisaged that the decommissioning will occur. It is also possible (though unlikely) that the scheme will be decommissioned before it is currently expected to be so for currently unforeseen reasons. It is therefore expected that sufficient detail of the decommissioning is shown to enable costing to be carried out. Also, attention given to the decommissioning now may help avoid impacts on the environment through for example choice of methods or materials of construction of the proposal.

Where decommissioning will have specific impacts, this should be described in the ER, which is difficult to do if there is no firm plan given on how decommissioning will be carried out.

Sufficient detail should be given to allow this to be done. It is agreed that the final details of decommissioning statement would be more appropriately supplied closer to the time of decommissioning.

9 Embedded mitigation

The Council is aware of previous aspirations to remove the dust attenuation bund from residents (which may or may not be the case currently) some of which may have been told when buying their homes that it would be removed when Cockenzie Power Station closed. Regardless of the owners aspirations for the bund, and how bedded in it looks, nonetheless if it is not under the control of the applicants it cannot be relied on to stay in position. Noise and visual assessment may include 'with' the bund if the applicant chooses, but it must also include 'without'.

10 Cumulative impact

Sites included in the LDP represent the Councils settled view on the future development of the area, and are considered to be effective. If there are cumulative impacts which arise from this proposal which could prejudice the development of these sites, this information is significant and should be known at the time of decision. The allocation of these sites is in the public domain, and it is considered reasonable for sites within the LDP to be taken into account.

11 Noise

The Council would accept the use of the guidance as ICOL have indicated.