

SEAS Response to the submission of SPR at Deadline 8 on SEAS's complaint about gagging and non-opposition clauses

A. Introduction

1. Suffolk Energy Actions Solutions (“SEAS”) submits this in response to the short submission of ScottishPower Renewables (“SPR”) at Deadline 8 on issues relating to gagging and non-opposition clauses in its agreements with landowners.
2. SEAS suspects that SPR will seek, at the very last moment, to introduce new evidence. As SEAS made clear in its response submitted at Deadline 8, if SPR seeks to game the system and introduce new evidence that it hopes cannot be responded to, SEAS will respond.

B. The basic position

3. An increasing number of landowners have now provided their agreements with SPR to SEAS. These, with minor variations, contain the same gagging and non-participation clauses.
4. In the Telegraph on 28 February 2021, SPR denied that they had entered into *any* clauses of this sort.
5. In oral submissions on 19 March SPR said that there were “*many*” such agreements.
6. Now they admit that “*the majority of landowners have signed them*”.
7. The truth is that the Heads of Terms entered into between SPR and landowners are ubiquitous.
8. The position is thus that SPR has concluded a network of agreements which both gag landowners and which have prevented them from participating in the examination.
9. The fact that virtually no landowner – with honourable exceptions – has participated or given evidence is proof of the effectiveness of SPR’s strategy. This has been procured through misuse of compulsory purchase powers and through the offering of so-called “Incentive Payments”.
10. As is set out fully in SEAS’s earlier submissions, under the law:
 - (i) it is the duty of the examining authority (the “ExA”) to ensure a fair procedure;
 - (ii) a procedure is unfair if affected persons are not able to give evidence;
 - (iii) the test is objective, and it is irrelevant whether the decision maker is at fault or not;
 - (iv) if a procedure is unfair, it will be set aside;
 - (v) once the procedure has been established as unfair there is no possibility for that to be remedied; and

(vi) it is irrelevant whether the final decision would have been the same or not but for the unfair procedure.

11. In this case, SPR has neutralised an entire class or category of participant. They are amongst the most directly affected of all affected persons. They have not given evidence. This renders the procedure unfair.

12. Any recommendation or decision in favour of SPR will be unlawful.

C. Recent events

13. SPR says that it has not pursued an aggressive campaign to sign up affected persons. SEAS's submission at Deadline 8 demonstrates otherwise. Landowners who are talking to SEAS speak of being intimidated, bullied and threatened. SPR uses the threat of the exercise of draconian statutory purchase powers to force landowners into agreements they would rather not conclude.

14. By way of update, a growing number of landowners have now supplied their agreement to SEAS. SPR has been taking steps to identify the anonymous landowners who have assisted SEAS.

15. In relation to one landowner, who we refer to as "X", SPR contacted X's agent and, to use X's language, "*hit the roof*". SPR was furious that X had disclosed the Heads of Terms to SEAS. SPR threatened X that there could be financial repercussions. X was left very shaken by the experience.

16. In relation to ██████████, SPR have at no point indicated that he could: (i) retain his past evidence; or (ii) be permitted to continue to make submissions and serve evidence in opposition to the applications. Moreover, even though SPR has no right to be on ██████████ land, by chance, a team of SPR employees were found on his land preparing to dig a bore hole on 8 April 2021. ██████████ required them to leave. Had he not done so they would, without consent, have started excavations on this land. SPR has not said it made a mistake in encroaching on his land nor given any explanation.

D. SPR's arguments about legal effect

17. SPR now pins its argument upon the Heads of Terms not being legally binding. There are three points to make.

18. **First**, this is a red herring. The issue concerns effect. The Heads of Terms contain, in unequivocal terms, an express articulation of SPR's intention to gag and silence opposition. SPR included these restrictions in their Heads of Terms to bend the entire planning inquiry in its favour. SPR cannot deny this because that intent is set out in black and white clauses in the Heads of Terms itself.

19. SPR has carried out this intention vigorously and has allocated a very substantial sum of money to achieving its ends. To the law, it is irrelevant whether the Heads of Terms are legally binding or not.

20. Landowners have sought legal advice and have been told that their obligations under the Heads of Terms are binding. They have complied. Why else would SPR include

such provisions in the Heads of Terms if they did not intend and expect them to be complied with?

21. **Secondly**, in any event SPR's analysis is wrong and simplistic.
22. The Heads of Terms contain two parts, both relating to different points in time. The first relates to what will happen in the future if consent is given and SPR can then acquire the land in issue. The Heads of Terms address many such issues which arise upon that contingent event. SEAS expresses no view as to whether these clauses are legally binding.
23. However, the Heads of Terms also relate to a second and quite different matter, namely the current, real time, planning process. The gagging and non-opposition and participation clauses all relate to the present day. They are not contingent or conditional. As a matter of elementary contract law as to restrictions which apply in real time, they are intended to be binding. Indeed, it is for this reason that SPR has imposed a dispute resolution mechanism for "claims" pursuant to the Heads of Terms. There can be no claim to resolve if there is no breach of contract, and there can be no breach of contract if the contract in question is not legally binding.
24. **Thirdly**, SPR has asserted that the Heads of Terms contain language stating that they are not legally binding. In their submission, SPR state the following:

"At the back above the signature section the following is stated:

"None of the contents of this document are intended to form any part of any contract that is binding on any Scottish Power group Company.

The above Heads of Terms represent the main terms for the Option/Deeds of Grant of Easement, but are not supposed to be fully inclusive and are subject to additions to or amendments by the Grantor, the Grantee and their respective solicitors."

This statement is made without qualification. SEAS is in possession of a growing number of Heads of Terms, only one of which contains the emboldened text above. This includes the copy of the Heads of Terms submitted to the ExA by SEAS on 25 March 2021 which, as the ExA will have seen, does not contain the emboldened text. SPR must have been aware of the terms of its own documents when it made this misleading submission to the ExA. SEAS notes that the language cited by SPR states that the Heads of Terms are not "binding on any Scottish Power group Company". It does not say that the Heads of Terms do not bind the landowner. At base however this is immaterial since, as already explained, what matters is effect, not legal status.

E. Conclusion

25. SPR has brought about an unlawful unfair procedure. SEAS reserves all rights.