Independent Noise Working Group

Wind Turbine Amplitude Modulation & Planning Control Study

Work Package 6.1 – Legal Issues: the Control of Excessive Amplitude Modulation from Wind Turbines

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CONTENTS

Abbreviations

AM	Amplitude Modulation
BS4142	Methods for rating and assessing industrial and commercial sound
DBERR	Department for Business, Enterprise and Regulatory Reform
DCLG	Department of Communities and Local Government
DCO	Development Consent Order under the Planning Act 2008
DECC	Department of Energy and Climate Change
DEFRA	Department of Environment, Food and Rural Affairs
DTI	Department of Trade and Industry (now DBERR)
EAM	Excessive/Excess Amplitude Modulation
ECHR	European Convention of Human Rights
EP Act	Environmental Protection Act 1990
ETSU	ETSU-R-97 The Assessment & Rating of Noise from Wind Farms (published by the Energy Technical Support Unit)
GPG	Good Practice Guide to the Application of ETSU-R-97 for the Assessment and Rating of Wind Turbine Noise (Institute of Acoustics 2013)
HRA	Human Rights Act 1998
INWG	Independent Noise Working Group
INWG WP	INWG Working Paper
LPA	Local Planning Authority
NIP	National Infrastructure Project
NPPF	National Planning Policy Framework
P Act	Planning Act 2008
PPG	Planning Practice Guidance
RES	Renewable Energy Systems
ReUK	RenewableUK, the Wind Industry trade association formerly known as the British Wind Energy Association
SN	Statutory Nuisance
TCP Act	Town and Country Planning Act 1990

1 Executive Summary

1.1 This paper considers the legal implications of the Court of Appeal judgment[1] on the Den Brook case[2] and the way it has been implemented - or not - since that time. The lawfulness of the Condition ratified by that judgement has been challenged at a number of Public Inquiries and this paper considers whether those challenges have merit.

1.2 In addition, the paper considers the alternative solutions that have been proposed by many Planning Inspectors when considering Amplitude Modulation (AM) issues during appeals into wind farm applications. It considers whether such solutions are appropriate as remedies for foreseeable harm to amenity, and ultimately nuisance, caused by wind farm developments. In addition, other solutions are considered even if only to eliminate at least some of them.

1.3 The paper does not consider the merits of ETSU-R-97[3] (ETSU) or whether the revised standard BS4142:2014[4] provides a suitable remedy for this type of case. However, it is noted that the problem addressed in this paper of Excessive/Excess Amplitude Modulation (EAM) is not covered by ETSU but may be covered now by BS4142:2014[4]. One issue addressed is whether or not, from a legal point of view, it is appropriate to impose a condition in planning permissions to control a situation not covered by ETSU. It also briefly addresses whether or not residents can expect such a condition to be imposed to protect their enjoyment of their property under the Human Rights Act[5] (HRA) and whether or not it is reasonable to permit development without that protection. It is noted that the recently elected Government has announced an intention to repeal the HRA[5] but until any details are known it is proposed to address the law as it currently stands.

1.4 The effectiveness of these solutions is considered, including not only the speed with which a solution may be achieved but also the cost and risk that may be borne by local residents. It also considers the options open to a Local Planning Authority (LPA) if a suitably worded planning condition is imposed in the permission.

1.5 Finally, the paper concludes that the most effective way to achieve a reasonable balance between wind energy development and the protection of wind farm neighbours would be a suitably worded condition modelled on that proposed in the Den Brook[2] case or a similarly phrased standalone control. The actual drafting of that condition is considered in INWG WP5.

[1] Hulme v SoS CLG [2011] EWCA Civ 638
[2] Appeal Decision Pykett A 2009 Land to the South East of North Tawton and the south west of Bow (Den Brook) APP/Q1153/A/06/2017162
[3] ETSU-R-97 1996 The Assessment & Rating of Noise from Wind Farms
[4] BS 4142:2014 2014 Methods for Rating and Assessing Industrial and Commercial Sound
[5] Human Rights Act 1998

2 Background

2.1 Wind turbine noise has been a cause for concern for many years. In 1996 ETSU[3] was published with the stated intention to protect from excessive noise those people – to be referred to as noise sensitive receptors or receptors - living and working close to turbines. At that time, it was considered that the existing guidance for controlling noise, such as BS4142:1990[6], would inhibit wind energy development (Ch 6 ETSU[3]). Various technical arguments were advanced regarding the difficulty of applying of BS4142:1990[6] to turbine noise, but these no longer carry weight following the publication of BS4142:2014[4]. ETSU remains Government policy. Since its introduction ETSU has been criticised for not providing adequate protection for receptors with one specific issue being "blade swish" or Amplitude Modulation (AM). ETSU allows for some AM, which it identifies as having a depth (variation in amplitude) of 2-3dBA close to the turbines and includes an assumption that this will reduce with distance from turbines. Experience has shown however that there exists a form of AM – known as Excessive/Excess/Enhanced Amplitude Modulation (EAM) - at much greater distances than is catered for in ETSU and with markedly different characteristics.

2.2 It is claimed that EAM is the source of complaints for many wind farms and it has been the subject of much argument at many public inquiries. A 2013 Japanese study[7] based on 34 wind farms described EAM as a common problem causing serious annoyance to wind farm neighbours. At the second Den Brook Public Inquiry in 2009[2] – the first appeal decision was quashed by the High Court as the Secretary of State accepted there were faults in the noise data analysis - the Inspector allowed the Appeal and included an AM condition (Condition 20[2]). Now referred to as the Den Brook Condition, and designed to protect receptors from EAM, it was a modified version of that proposed by the Rule 6 party opposing the application. It should be explained that there are in fact two formal planning conditions in this case. Condition 20 contains the substance of the mitigation and is widely referred to as *the* 'Den Brook Condition', whereas Condition 21 provides a method for the developer to check they are complying with Condition 20[2]. The Inspector's decision was subsequently challenged for a number of reasons including that the EAM Condition did not now give adequate protection to receptors. The High Court[8] dismissed the challenge on all grounds but granted leave to appeal to the Court of Appeal to consider only the EAM condition.

2.3 The Court of Appeal[1] dismissed the appeal on the ground that when correctly interpreted the Decision Letter did in fact give the protection sought. The judges therefore upheld the Condition as drafted by the Inspector and it has remained a condition of this particular planning permission ever since.

2.4 Since then many attempts have been made to argue that Inspectors or LPAs should impose a similar condition on other wind farm applications. This has been resisted vigorously by wind industry representatives who have challenged the lawfulness of the Den Brook Condition[2]. They have argued that the decision of the Court of Appeal[1] did not consider the merits of the control. It is notable that at no stage, either at the High Court[8] or the Court of Appeal[1] did the developer, Renewable Energy Systems (RES) argue that the Condition was unreasonable or unenforceable. Further, at no stage did the court consider there were any difficulties with

[6] BS4142:1990 1990 Method for rating industrial noise affecting mixed residential and industrial areas

[7] Fukushima A et al 2013 Study on the amplitude modulation of wind turbine noise: Part 1 - physical investigation Internoise 2013

[8] Hulme v SoS CLG [2010] EWHC 2386

its enforcement or reasonableness. In addition, the wind industry have argued that EAM is a rare and unpredictable phenomenon and that the Condition does not allow for "false positives" i.e. the sound of a bird singing or a car passing that was argued could trigger it. They have therefore argued that it is both unlawful to impose such a condition on the basis it does not meet the requirements of a condition under the then Circular 11/95[9] and unreasonable to expect wind farm operators to comply with it.

2.5 Wind industry representatives have consistently argued that receptors can rely on the alternative remedy of Statutory Nuisance (SN) in those rare circumstances where EAM is a problem. Alternatively, receptors are able to take civil action under the tort of Nuisance.

2.6 These arguments have proved successful and Inspectors at subsequent public inquiries have refused to impose a similarly worded condition to control EAM. On more than one occasion, Inspectors have stated that SN is an alternative remedy or even that there are other available legal remedies. As evidence gathered internationally increasingly demonstrates that EAM is a greater problem than had been admitted, a wind industry acoustic specialist has been recently quoted (Lee Hoare's rebuttal[10] §8.1) as saying that they can no longer sustain the argument that "AM is rare, that there is no need for an AM condition and that it could be dealt with by statutory nuisance were it to occur".

2.7 To date however, no condition has been approved by Government that is deemed adequate to accomplish this purpose. An attempt to draft such a condition has been made by ReUK, the wind industry trade association, but it has been criticised for not protecting receptors and has not been accepted by the Government. The need for a condition however appears to be accepted by the Secretary of State for Energy and Climate Change following a question from a Member of Parliament[11].

[9] Circular 11/95 Jul 1995 Use of Conditions in Planning Permission

[10] Hoare L Nov 2013 Rebuttal to the Noise Proof of Evidence of Dr Matthew Cand, Proposed erection of two wind turbine generators, Site at land at Wood Farm, Shipdham

[11] Davey E SoS DECC Feb 2015 Letter to C Heaton Harris MP

3 Objectives and Scope

3.1 The purpose of this paper is to consider in more detail the history of the Den Brook Condition[2] since the Court of Appeal judgement[1] and to consider whether it is, as has been claimed, an "unlawful" condition. It then considers whether the alternative remedies of SN, and other forms of nuisance action since relied upon by Inspectors, are appropriate.

3.2 It does not however consider the actual actions taken by Mr Hulme, who challenged the appeal decisions in that case – these are dealt with in INWG WP 4. Nor does it consider the actions taken by any group to obtain evidence in wind farm noise cases or the frustrations such people say they have faced when they have complained about wind farm noise – these issues are addressed in INWG WPs 6.2 and 9.

3.3 This paper does not attempt to address the science of EAM or the adequacy of ETSU[3], be it in the way it addresses AM, EAM or any other aspect of noise. Nor does it seek to consider BS4142:2014[4] and whether or not that document as now revised provides greater protection for receptors.

3.4 Finally, it does not seek to evaluate the actual Den Brook Condition[2] or any proposed condition to replace it. Science and practice will determine whether any condition proposed is appropriate – it is not a legal issue.

3.5 The Objectives of this Work Package are:

> Objective 1 – To assess the legality of the Den Brook Condition[2] relating to EAM following the judgement of the Court of Appeal[1];
>
> Objective 2 – To assess the legal appropriateness of other remedies such as Statutory and Private Nuisance that have been recommended since that judgement or may be available to persons affected by EAM;
>
> Objective 3 – To recommend the most appropriate course of action that will provide legal protection to residents hosting wind farms should EAM occur.

3.6 Bearing these objectives in mind the history of the Den Brook Condition[2] and Inspectors' reliance on other remedies such as SN, will also be considered.

4 Legal Issues: the Control of EAM from wind turbines

4.1 This section of the paper falls into two parts. First we review, in §5, the legal implications of the Den Brook Court of Appeal judgement[1] and how it reviewed the EAM Condition imposed by the Planning Inspector[2] ; and secondly, in §6, the various reactions of the wind industry, planning inspectors (§6.2 below) and LPAs, and the actions they have recommended in lieu of a planning condition.

4.2 This somewhat detailed approach may now be deemed unnecessary as representatives of the wind industry admitted in 2013 that EAM is a problem that is more common than they had previously acknowledged. In particular, it is reported[10] that Dr Jeremy Bass of RES stated at a meeting to discuss the Den Brook Condition[2] that the developer had abandoned the "industry line" that AM is rare and can be dealt with by SN and that he was "drawing up an AM condition on behalf of the wind industry trade organisation". There is, however, still no satisfactory control of, or remedy for, this problem and no condition has yet been agreed. The Secretary of State for Energy and Climate Change has however now acknowledged the need for such a condition[11].

4.3 This paper does not discuss the science of EAM or the frequency of its occurrence. These are dealt with in other INWG WPs. For the purposes of this paper, it is assumed that the problem exists and is sufficiently widespread such that it should be subject to control. However, as there still appears to be no consensus as to how this problem should be tackled, it is proposed to consider the history of the events subsequent to the Den Brook judgement[1] and the alternative remedies that have been proposed in some detail. In the absence of suitable protection it is recognised as a planning principle that development should be refused. There is also a duty to protect citizens' private and family life under Article 8 of the European Convention on Human Rights (ECHR)[12] which is brought into effect in this country by the HRA[5].

[12] European Convention of Human Rights Article 8

5 Background and history of the Den Brook Case

5.1 As soon as industrialised modern wind turbines appeared in our landscape, it was known there were issues relating to noise from them. This resulted in the publication of ETSU[3] in 1996. ETSU does not seek to render wind farms inaudible to so-called noise sensitive receptors (ETSU p63) but to assess the noise levels that should be acceptable to them (Common Barn[13] §58) attempting to balance needs for renewable energy with noise impact, ETSU has ever since been rigorously applied by LPAs and Planning Inspectors (for example at Starbold [14] §5.136) and is now generally applied even to smaller turbines outside of its original research range. Recently, however, some Inspectors appear to have accepted that there are issues with ETSU (see §76 and §77 of the Planning Inspector's report on the Allerdale Local Plan Part One[15] and on occasions a condition to control EAM has been imposed (as at Dunsland Cross §59[16],and Turncole Farm §18[17]).

5.2 It is noteworthy that the ETSU Guidelines allow more noise for wind turbines than may be permitted for any other industrial site under noise standards such as BS4142:1990[6] - because it was considered primarily that these standards would impose too rigid a restriction on wind turbine developers (ETSU p54). Additionally, on the basis that people are likely to be indoors, ETSU permits higher noise levels at night than would be permitted under BS4142:1990[6]. This disregarded the fact BS4142:1990[6] similarly recognised people would be indoors at night.

5.3 ETSU allows for a certain amount of "blade swish" or AM (ETSU p68), stating that it will be experienced at its severest close to the turbine, that even close up there will only be limited modulation, and that it will diminish with distance. It does recognise that in some exceptional cases such as courtyards modulation can be greater when further away. As far as is known, there is no case law on the ETSU provisions regarding AM and it is not considered further in this paper.

5.4 Since its publication in 1996, and especially recently, there have been numerous criticisms of ETSU (Northern Ireland Assembly Inquiry into Wind Energy[18], Executive Summary §28), but it remains the Government's accepted guidance on wind farm noise. It has been endorsed by Planning Inspectors at most public inquiries, many of whom have declared it "fit for purpose" (see Saxby Wolds[19] §78).

5.5 Concern has been growing for some time among residents affected by existing or proposed wind farms and those who represent them that the problems experienced by noise sensitive receptors from EAM may be much greater and with different characteristics to those anticipated by ETSU (ETSU[3] p68). Inspector Holland said in her report[15] (§68): "*ETSU-R-973*

[13] Appeal Decision Major P Jul 2013 Land at Church Farm, Rectory Lane, Southoe, Cambridgeshire (Common Barn) APP/H0520/A/12/2188648

[14] Appeal Decision SoS CLG (PINs Baird S) Oct 2014 Land Between Bishops Itchington, Gaydon and Knightcote (Starbold) APP/J3720/A/13/2193579

[15] Holland S (Planning Inspector) Jul 2014 Report to Allerdale Borough Council on the Examination into the Allerdale Local Plan Part One

[16] Appeal Decision Pope N Jan 2014 Land at Dunsland Cross APP/W1145/A/13/2194484

[17] Appeal Decision SoS CLG (PINs Woolcock J) Turncole Farm etc APP/X1545/12/2174982, 2179484 and 2179225

[18] Committee for the Environment Jan 2015 Report to the Northern Ireland Assembly on the Committee's Inquiry into Wind Energy

[19] Appeal Decision SoS CLG (PINs Robinson A) Jul 2014 Saxby Wolds APP/Y2003/A/12/2180725

recommends a minimum separation distance of 350m for a 'typical' wind turbine in relation to residential development. This, based upon the industry in 1997, is widely regarded as inadequate and out-of-date in application to present-day turbines which are commonly much larger and of greater overall impact than those of 1997."

5.6 In the Den Brook Case, the Court of Appeal[1] - §8 noting the Inspector's reasoning[2] and §17 noting the reasoning of the Judge in the High Court[8] - adjudicated that a condition to control EAM imposed by the Inspector[2] did fulfil the requirements of protecting nearby residents from EAM for the duration of the planning permission. The judges (particularly Elias LJ) noted that the Inspector considered (§6 - §8) the issues surrounding EAM. Elias LJ noted that it had been claimed that this was a rare phenomenon (§7, §8) and that the Inspector had imposed the condition on a precautionary basis (§8). Indeed, the Inspector had commented in the Decision Letter (§121[2]) "*It is in the light of these inherent uncertainties that I conclude the living conditions of local residents would not be unreasonably affected provided the necessary and appropriately worded conditions were imposed. If the appellant's predictions are correct there would be no need for the conditions to be enforced, but it is important that the council is able to take the necessary action if it became expedient to do so*". When considering the condition he intended to impose, the Inspector commented that rarity of a phenomenon was not in itself a reason for failing to impose a condition, specifically mentioned his approach being "precautionary" but considered the imposition of such a condition to be both reasonable and necessary (§183[2]). As discussed, evidence now confirms it is far more common than originally thought.

5.7 **Developments since the Den Brook Judgement**

Almost immediately after the Court of Appeal judgement in 2011[1], but at no stage before, representatives for the wind industry claimed that there was a problem with the Condition as drafted. They said that it would be impossible to implement this Condition as it stood because extraneous noise such as birdsong or a passing car could have the effect of causing "false positives". As a result, it was claimed that it would be impossible to say whether peaks were caused by turbine EAM or some other source. It is not within the remit of this paper to determine whether or not this is correct, merely to note that this has been an argument for not imposing a similar condition in other applications or appeals, that much contrary evidence has been presented to show the ease with which extraneous noise is excluded, and that such exclusion procedures are a normal and integral part of noise level condition compliance checks.

5.8 Advocates for the wind industry referred to Circular 11/95[9] (now revoked and superseded by NPPF[20] §206 and PPG[21]) which set the parameters to be followed by an LPA in determining whether or not to include conditions in a planning permission. Circular 11/95[9] was published following a number of judgements about the validity of planning conditions and when it was appropriate to impose them. In particular, it sets six tests which must be satisfied for any planning condition to be lawful. In short, planning conditions should be:

1 necessary;
2 relevant to planning;
3 relevant to the development to be permitted;

[20] National Planning Policy Framework 2012 DCLG
[21] Planning Practice Guidance 2014 Renewable and low carbon energy

4 enforceable;
5 precise; and
6 reasonable in all other respects.

5.9 **The industry's argument**

On behalf of the industry, it has been argued that

1 As EAM is "very rare" the Den Brook Condition[2] is precautionary and so does not meet the test of necessity (Alaska[22] §53 and Common Barn[13] §59);
2 In view of the difficulty with "false positives" (and indeed "false negatives") the Condition is unenforceable;
3 As a result of this, it is not precise;
4 It seriously affects the operation of a wind farm and so is not reasonable.

Indeed, it is clear from the Den Brook appeal[2] decision letter (§182) that these arguments were used by the appellant in that inquiry but notably not pursued at the High Court hearing[8].

5.10 As a result, it is argued (Alaska[22] §53 and Common Barn[13] §59) that this type of condition does not meet the six tests of the (now) NPPF[20] and so is not lawful. Further it has been alleged by the industry that the Court of Appeal judgement[1] is not applicable in this type of case as the judges did not consider the (then) Circular 11/95[9] to determine whether the Condition was necessary, reasonable and enforceable (although there had been considerable consideration of this point in the High Court[8] and the Court of Appeal[1] endorsed that judgment – see further §5.17 below). In determining planning appeals, Inspectors frequently appear to have fully accepted the arguments of the wind industry without any reference to the issues mentioned by the Judges in their judgments, both in the High Court[8] and the Court of Appeal[1].

5.11 So far as can be assessed, there has been no attempt by Inspectors to distinguish legally the facts of an appeal site from the facts in the Judgement[1]. This appears to be nothing short of an argument that the Court of Appeal[1] judgement is wrong because the Condition in that case did not meet the provisions of the (then) Circular 11/95[9] or comparable tests as effectively defined by it. It is claimed that Inspectors do not have the power to decide that a Court of Appeal judgement is wrong in law whereas they may decide that the circumstances are different.

5.12 It has been argued on behalf of appellants at many public inquiries that if there is in fact a problem, the provisions relating to SN will protect nearby residents, even in the absence of expert evidence on SN. On occasions it has also been said that local residents have a remedy in taking a civil case of nuisance. These arguments are discussed further below (§6) but the result has been that in the vast majority of cases, no condition has been imposed to protect residents from EAM and instead decisions have been made in the belief adequate protection is provided through the SN regime and therefore control is not necessary. It is understood planning controls do not need to replicate other controls and it can only be assumed it was believed the SN regime effectively replicates the planning controls and councils can utilise

[22] Appeal Decision Jackson P Jul 2012 Land at Masters Pit, Puddletown Road, near Wareham, Dorset (Alaska) APP/B1225/A/11/2161905

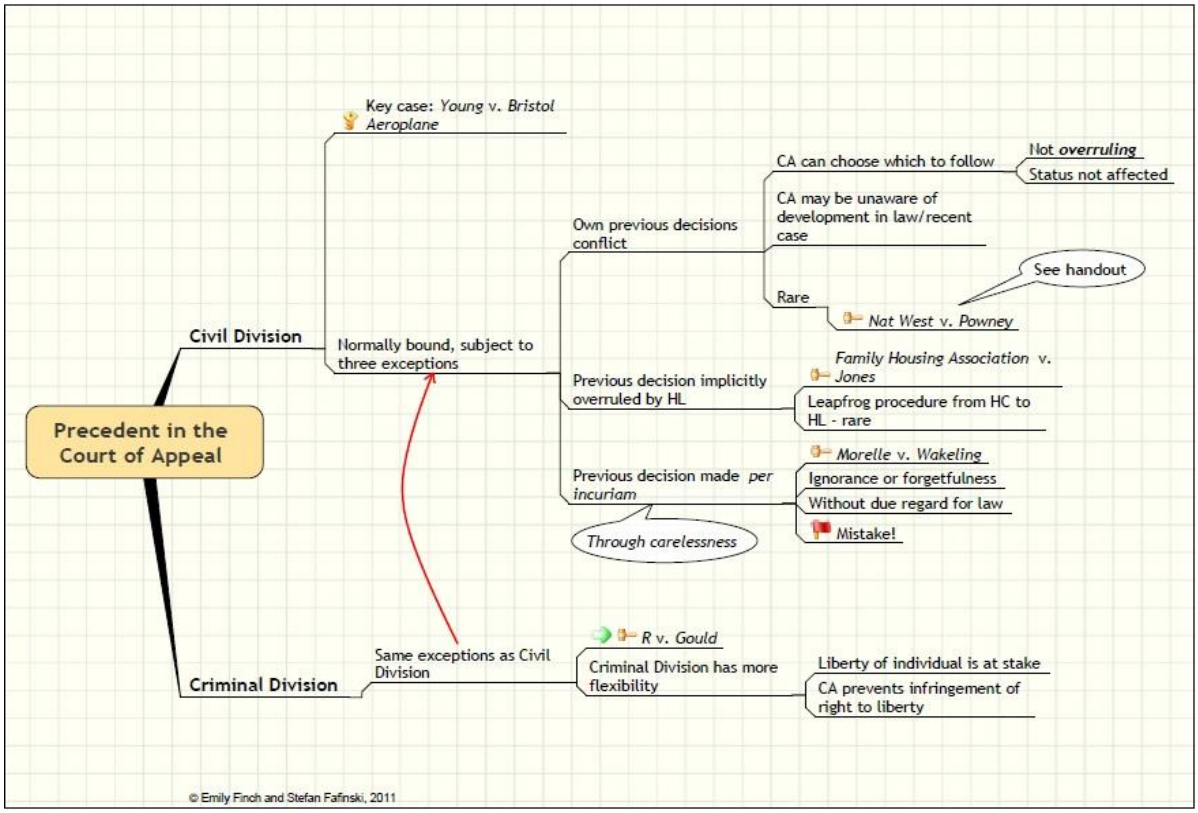
the SN procedure if there is a problem.

5.13 **Is this a correct approach?**

The Court of Appeal is the second highest court in the land. Its judgments represent the law until and unless they are overturned. The only ways in which a Court of Appeal judgment can be overturned are:

1 The judgment is reversed on appeal to the Supreme Court ;
2 The judgment is overturned by an Act of Parliament;
3 The Court of Appeal itself subsequently determines that it was wrong. However, as a rule, the Court of Appeal is bound by its previous decisions and this option only applies in particular circumstances such as it is satisfied it made an earlier judgment when an important fact was not considered.

This is known as the Doctrine of Precedent and is demonstrated by the following diagram prepared by Emily Finch and Stephan Fafinski in 2011.



5.14 On the face of it therefore, the judgement in the Den Brook case[1] binds all subsequent decision makers apart from the Supreme Court or Parliament. Yet the Condition approved in this judgement has systematically not been followed by Inspectors, indeed has actively been ignored.

5.15 The reason for this has not, apparently, been because subsequent cases have been distinguished from the situation in Den Brook. It appears to have been that the wind industry has itself decided that the Condition is wrong in law for the above reasons (§5.9). However, it is represented that, even if the Court of Appeal[1] did make a mistake in the Den Brook case, it is not for lower decision makers such as LPAs or planning inspectors to determine this without at least distinguishing the case. Yet that is what they appear to have done ever since the Den Brook judgment[1].

5.16 The reason why they have taken this route appears to be because of the claimed need for renewable energy and the assertion that a Den Brook Condition[2] would effectively stop wind energy in its tracks. This paper does not determine the merits or otherwise of renewable energy in general and wind energy in particular but it does consider whether or not this approach is correct in law. The industry's argument is that the Court of Appeal did not consider the technical merits of the Condition[2]. However, the reasons given for discounting the Den Brook Condition[2] go to the heart of the validity of the Condition which the court did consider. Thus it follows there is no basis in law for decision makers to dismiss the Den Brook Condition[2] on the basis of unlawfulness on the basis that the Condition is unnecessary, unreasonable and unenforceable.

5.17 **Are there reasons to criticise the Court of Appeal judgment?**

In the written judgement[1], the judges in the Court of Appeal did not dwell on Circular 11/95[9], which was then in force. However they did note it during the course of the judgment and it seems inconceivable that they did not take this into account in giving the judgement.

5.18 They did however fully consider the "precautionary" nature of the application and noted (§13, §14, §32 and §38[1]) that the Inspector had fully addressed this in the Decision Letter. There appears to be no doubt that they considered that this was an appropriate way to deal with this issue (§8 and §17[1]).

5.19 They did not however consider issues such as "false positives". The industry representatives now clearly consider this to be very important and a point that calls into question the validity of the judgement, but they did not argue this point before the judges.

5.20 If this point ever comes back before the Court of Appeal, it is impossible to say how they would deal with it. In the Den Brook judgement[1] , Elias LJ (§15) noted it was claimed that the Inspector may have dismissed the appeal if he had determined he could not impose such a condition. However, what the position would be if the judges now accepted an argument that such a condition is unlawful in accordance with the NPPF[20] (§206) is far from clear (PPG[21] §005) . However, it is of note that the courts have held that difficulty in enforcing a condition has not been a reason to consider it fails the tests. Any argument of "false positives" must relate to the difficulty in eliminating them. All noise conditions face "false positive" scenarios but the Den Brook Condition[2] faces less difficulty than most as few other sounds have both the regularity and spectral energy content of wind turbines.

5.21 It is not accepted that a Den Brook type condition makes the permission unviable or undeliverable but if that argument should be successful, does this mean that the permission must be granted without the Condition? Or does it mean that permission is refused as it was

not possible to impose a necessary condition (NPPF[20] §176 and §203)?

5.22 However, the industry has now accepted that there has been a problem with EAM and a condition needs to be prepared to protect residents from it[10]. Indeed, it is reported that DECC are commissioning a study into this problem[11]. The issue now appears to be the wording of any condition. It should also be noted that the developer in the Den Brook case made an application under §73 of the Town and Country Planning Act 1990[23] ('TCP Act') for a new permission that omitted this Condition. However, following analytical reports from objectors and the LPA on the detail of the application, the developer withdrew it and proceeded to prepare a scheme under Condition 21[2] to apply Condition 20[2]. The developer has developed a scheme to check compliance with the Condition and therefore is tacitly accepting that the Condition is lawful and capable of being enforced.

5.23 **The Current Situation**

To date, the ETSU[3] guidelines have not been changed since being drafted in 1996 but turbines have changed almost out of recognition. In 2013, the *Good Practice Guide* [24] (GPG) to interpret ETSU was issued that barely mentioned EAM and in effect stated that on present evidence no condition should be imposed (§7.2.1) . Although this predates the wind industry's announcement admitting that there was a problem[10], ETSU[3] and the GPG[24] remain intact.

5.24 However, there remains inconsistency in planning permissions and appeals as to whether a condition in respect of EAM is imposed or not. So in the Clocaenog Forest wind farm Development Consent Order (DCO)[25], no conditions regarding EAM were imposed even though the Examining Authority[26] (§4.237) considered that some properties could suffer from EAM and be made "*unattractive places in which to live*" which "*has been found to be against the public interest*". The Order acknowledged that EAM is unpredictable and therefore recommended a precautionary approach with the imposition of an EAM condition. However, the Secretary of State at DECC determined (§4.14) that the right of residents to enjoy their property granted by Article 8 of the ECHR[12] was superseded by the country's need for renewable energy. This is discussed further below (§6.20, §6.44, §6.46, §6.51).

5.25 In the Turncole[17] (§18) and Dunsland[16] (§ 59) decisions, however, provision was made for EAM, the question being whether the wording in each case is satisfactory. It was also considered necessary to control EAM in the case of Bryn Llewelyn[27] (proposed Condition 19) but that appeal was dismissed.

5.26 Consequently, the Den Brook Condition[2] remains controversial. Despite the comments attributed to Dr Bass[10] (§4.2 above) and the decisions mentioned in §5.25 above, no alternative condition has yet been drafted and approved by the Government. Consequently, it is suggested that under the doctrine of precedent described in §5.13, the Den Brook

[23] Town and Country Planning Act 1990
[24] Institute of Acoustics 2013 A Good Practice Guide to the application of ETSU-R-97 for the Assessment and Rating of Wind Turbine Noise
[25] Statutory Instruments 2014 No 2441 Infrastructure Planning The Clocaenog Forest Wind Farm Order 2014
[26] Examining Authority's Report Burden W Jun 2014 Clocaenog Forest EN010013I
[27] Inspector's Report to Welsh Government Jones E Bryn Jan 2014 Land surrounding Bryn Llewelyn PP/M6825/A/12/2189697

Condition[2] officially remains intact and that the Court of Appeal decision remains binding. It is of note the Secretary of State defended the Den Brook Condition[2] at the Court of Appeal[1] hearing.

5.27 So far as the Den Brook case itself is concerned, since the developers withdrew their application to vary Condition 20[2], they have submitted a scheme under Condition 21[2] of the planning permission. This scheme has been legally challenged in *Hulme v West Devon Borough Council*[28] on the ground that it does not provide the protection required. The case did not consider the actual scheme itself, just whether or not the LPA was justified in accepting it. The judge[28] (§56 and §57) has held that it was, or at least that the local authority had not erred in law in agreeing to approve it. This does not mean that the scheme will provide the protection that is supposed to be given by the Condition, just that the LPA was, under current information, justified in agreeing it.

5.28 Notwithstanding any scheme accepted under Condition 21[2], which is devised to provide a method for the developer to check they are complying with Condition 20[2] but which provides a different method to that in Condition 20[2], that Condition does not remove the requirement to continue to comply with Condition 20[2]. Condition 20[2] is a standalone requirement and therefore if any scheme under Condition 21[2] fails to show up breaches of Condition 20[2] it does not prevent enforcement of the requirements of Condition 20[2].

5.29 Surely now the industry should accept the legality of the Den Brook Condition[2] – the issue is whether or not a scheme such as that currently approved at Den Brook does or does not provide the protection expected.

5.30 **Available options if there is a planning condition imposed**

If a valid planning condition is imposed in a planning certificate, any breach of the condition can be controlled by the LPA serving an Enforcement Notice (TCP Act §172[23]). There is an appeal procedure that can be followed by the recipient of an enforcement notice that can take time to resolve. However, if the Enforcement Notice is upheld, it is then an offence for the provisions of that notice to be breached.

5.31 This can clearly take time and there are commercial interests at stake. It is therefore distinctly possible that the recipient of an Enforcement Notice will make an appeal against it. In this respect therefore, a planning condition is not a "silver bullet" to resolve an EAM complaint, but it does attempt to address directly the problem.

5.32 When an Enforcement Notice is served, it is also possible for the LPA to serve a Stop Notice (TCP Act §183[23]) requiring the developer to immediately cease operations. The problem with this is that if there is a successful appeal against the Enforcement Notice, there is a risk that compensation is payable in respect of the Stop Notice (TCP Act §186[23]). In respect of a commercial wind farm, any compensation that may become payable is likely to be substantial.

5.33 There are, however, two other steps that can be taken if there is a planning condition. First, the LPA may serve a "Breach of Condition" notice (TCP Act §187A[23]). This appears to be a relatively straightforward process that goes to the heart of the matter and there is no

[28] R (Hulme) v West Devon Borough Council [2014] EWHC 3937 (Admin)

provision for appeal. If the notice is not complied with, an offence is committed. There is, however, a defence for the recipient that they took all "reasonable steps to secure compliance". However, even if convicted, the only penalty is a relatively small fine. One negative element is that following case law[29] the validity of the condition can be challenged at the time of prosecution for a breach and this is a potential risk. The judgement in *Dilieto v Ealing LBC*[29] establishes that in breach of condition cases, a defendant is entitled to challenge the validity of the planning condition and to challenge whether or not the notice was served in the 10 year period specified in the TCP Act 1990[24].

5.34 The second step is to seek an injunction, which can be done irrespective of any other action taken or proposed under the TCP Act (§187 B[23]). This does not create an offence and only the High Court or a County Court can do it but obtaining an injunction is a powerful tool.

[29] Dilieto v Ealing LBC [1998] 2 All ER 885

6 Is Statutory Nuisance a suitable alternative to a planning condition?

6.1 We have addressed the conditions that were imposed in the Den Brook Appeal[2] and the judgement of the Court of Appeal[1] in respect of them. We have suggested that as a result of this judgment the basic condition is valid until and unless that Court in a future case adjudicates that it has made a mistake or the Supreme Court overrules it.

6.2 However, since that judgement, whatever the true legal position regarding the Court's judgment, developers have constantly argued to Local Planning Authorities and Planning Inspectors that the Condition is not in fact valid. They have argued that the phenomenon known as EAM is rare and no condition should be made in respect of it as it cannot comply with the provisions of Circular 11/95[9]. Decision makers have been persuaded to determine that, if a problem should in fact occur, the appropriate remedy would be under the relevant provisions of the Environmental Protection Act[30] (EP Act), in particular those relating to Statutory Nuisance contained in Part III of the Act, or alternatively residents should rely on the civil remedy of nuisance (Cotton Farm[31] §90 (albeit with "misgivings") or Common Barn[13] §59).

6.3 This approach has been criticised by practitioners on the ground experienced in nuisance that neither SN nor private nuisance are appropriate alternatives to a planning condition. This part of the paper attempts to determine whether or not that is in fact the case. In doing so, it also addresses whether SN can fill any gap if no condition is imposed and also other remedies that may be available for persons affected by AM, namely nuisance (private and public) and strict liability as in *Rylands v Fletcher*[32] – discussed further in §6.21 below. It is perhaps necessary first to consider the necessary ingredients of each of these concepts.

6.4 Additionally, we shall consider whether or not Compulsory Purchase is appropriate in these circumstances, discussed in detail in §6 g) below.

6.5 Definitions

a) Planning Condition

A planning condition is clearly something contained in a planning permission. While that is straightforward, it must now comply with the NPPF[20] §206. The history of the law relating to planning conditions has been considered in §5.8 above. Under the NPPF[20], now replacing Circular 11/95[9], a planning condition must be:

1 Necessary;
2 Relevant to planning;
3 Relevant to the development to be permitted;
4 Enforceable;
5 Precise; and
6 Reasonable in all other respects.

[30] Environmental Protection Act 1990
[31] Appeal Decision Pike M Dec 2010 Land at Cotton Farm, Offord Road, Graveley App/H0520/A/09/2119385
[32] Rylands v Fletcher [1868] UKHL 1

6.6 In addition, the PPG[21] (issued March 2014) now gives guidance on interpreting or implementing many issues contained in the NPPF[20] and does contain paragraphs relevant to the implementation of planning conditions. While these provisions are important, it is not considered that it is necessary to consider the impact of the PPG[21] on planning conditions in this paper.

6.7 A planning condition cannot be implied. If it is not expressly stated in the planning permission, there is no scope to include any restriction on the way the proposal is implemented by implication (*Hulme v SoS*[1] §13d).

6.8 Further, in wind farm cases a planning condition cannot seek to eliminate noise altogether from neighbouring residences. The British Standard method BS4142:1990[6] for rating industrial noise does not apply to wind farm cases where DECC has determined that the ETSU guidelines should prevail. ETSU does not say that neighbours should hear no noise, only that noise restrictions should give a reasonable degree of protection to residents while not putting too much of a burden on developers (ETSU[3] Executive Summary §1 and §11) .

6.9 ETSU allows a small amount of AM (referring to it as Blade Swish) that exists close to wind farms and makes some provision for this (ETSU[3] p68 and Ch3). This AM is less than 3dB peak to trough and centred on the frequency range 800-1000Hz. It is unlike the AM mainly experienced from modern large wind farms. It does not cover "other", "excessive" or "enhanced" AM that has been found to exist further away from turbines. This EAM is what the Den Brook Condition[2] sought to address. As discussed in §5 above, it is this Condition that developers have sought to avoid ever since the Court of Appeal judgment[1] and have encouraged decision makers to determine not to make such a condition. Instead, they have referred to the powers of the LPA to rely on SN. This is also the effect of the GPG[24] (§7.2.1), although no reference was made to the Den Brook judgment[1]. ETSU (p8) does mention how operators might rely on defences against SN action including "best practical means" discussed further below S6.28 onwards.

6.10 Some Inspectors have also stated that residents can rely on other remedies such as the private law of nuisance (Common Barn[13] §59). As SN includes "nuisance" as part of its definition, it is proposed to consider these provisions first.

6.11 b) Nuisance

At common law, in England and Wales there are broadly two forms of nuisance, private nuisance and public nuisance. The law recognises that there has to be an element of "give and take" in nuisance cases (*Coventry v Lawrence*[33], discussed §6.18 below) although this is judged from the position of the party exposed to the noise. In addition, it is necessary to consider the character of the area within which something that constitutes a nuisance arises and nuisance in one place may not be nuisance in another. So it is necessary to consider what happens when one party exceeds what is reasonable after considering "give and take". In short, an oversensitive person cannot necessarily make a successful claim in nuisance and a ruthless industrialist cannot rely on his neighbour being expected to tolerate his excessive

[33] Coventry & Ors v Lawrence & Anor [2014] UKSC 13

behaviour. There will be an element of fact and degree in every nuisance case. The test is an objective test of the "reasonable person".

6.12 The Table below is intended to give a brief guide to the relationships between private and public nuisance:

Private nuisance	**Public nuisance**
Is Civil only	Can be both Civil and Criminal
Burden of proof is "balance of probabilities"	If Civil, as for Private nuisance If Criminal, burden is "beyond reasonable doubt"
Court action can only be taken by an individual or individuals	If Civil, as for Private nuisance If Criminal, can be prosecuted by Police or Local Authority
Usually, only one or a few people affected but a public nuisance can still be a private nuisance	Must affect a number of people (no precise number but more than a few). It is something that is widespread and indiscriminate and typically affects a community
Remedies are damages or an injunction	If Civil, as for private If Criminal, penalties are fine, injunction or even prison

6.13 These should now be examined in a little more detail:

Public nuisance

As outlined in the table, before any action can be taken for public nuisance, it must affect a number of people, i.e. "the public", or at least a reasonable section of them. Broadly, it is believed that the following can be said:

1 If a suitable number of people are affected, there appears to be no reason why they cannot take an action in public nuisance instead of private nuisance, provided there is widespread indiscriminate impact. However, in this case, the actions may well constitute the offence of "public nuisance";

2 There are two broad categories of the offence of public nuisance. One covers what we may usually consider to be criminal activity (e.g. placing a rope across a highway). This type of public nuisance will be prosecuted by the Police and/or the Attorney General.

3 The other category generally covers environmental nuisance. This is what we are most likely to be interested in. This will most probably be prosecuted by the LPA (Law Commission Consultation Paper [34] §2.47) but could be prosecuted by the Police or the Attorney General.

6.14 On balance, it is doubted whether this is ever likely to happen in practice and so it is not proposed to consider public nuisance further in this paper. Indeed the Law Commission

[34] The Law Commission April 2010 Consultation Paper No 193 – Simplification of Criminal Law: public nuisance and outraging public decency

Consultation Paper[34] (eg §2.50) suggests an LPA is likely to use other powers such as SN unless there is a persistent problem.

6.15 Private nuisance

An action for private nuisance can only be taken by an individual or individuals. Perhaps the first comment to make in wind farm cases is that if this action is taken, it must mean that the planning permission has failed to address a particular issue. Individuals are less likely to risk taking this action through the Courts if they could have relied on the LPA to enforce a planning condition.

6.16 It is important however to recognise that whilst traditionally planning provisions were seeking to avoid nuisances, this does not now seem to be an objective and there is increasing recognition LPAs can permit activities that could amount to a nuisance. The issue is whether or not the nuisance can be made acceptable by the imposition of conditions – but see comments on *Coventry v Lawrence*[33] §6.18 below.

6.17 Nuisance has been developed over the years by the Common Law and in some limited ways by statute. However, it has undergone a radical overhaul in 2014 by the Supreme Court in the case of *Coventry v Lawrence*[33] where it was effectively concluded any planning consent is of extremely limited relevance to whether there is a nuisance. So what constitutes a nuisance and can it cover any issue not covered in the planning permission that causes a problem? In wind farm cases, this is most likely to be problems caused by EAM.

6.18 Coventry v Lawrence[33]

This case involved nuisance arising from a stock car circuit and adjacent motocross track. It reviews and to some extent changes the law relating to private nuisance. Given the importance of this case, it is not proposed to review the earlier law. Although the five Justices in the Supreme Court did make some different points, they all agreed that a nuisance had in fact been caused in this case. The principal points made by Lord Neuberger, who gave the lead judgement, that now appear to be relevant for nuisance are:

6.18.1 Prescription

The Justices determined that a person can acquire the right to cause a neighbour a nuisance. It takes 20 years to acquire this right[35] (§2) without complaint or objection but, once acquired, it means that a nuisance can be caused with impunity. However, acquiring the right to pollute would only extend as far as that continuously polluted over the period.

6.18.2 "Coming to the nuisance"

If a nuisance exists and you move next to it, you can still successfully sue for nuisance. This is old law, but in Coventry the Justices have put forward a qualification. If you built a house on land otherwise not used for pollution sensitive activity next to a problem that would be a nuisance, you may not be able to sue for

[35] Prescription Act 1832

nuisance. The land would be assessed on the basis of its use at the time the impact arose.

6.18.3 So if you buy a house next to a wind farm, you may still be able to sue for nuisance unless the wind farm has acquired the right to cause it. But if you build a house next to a wind farm, you may not be able to claim. This may not apply to the prejudicial-to-health limb of SN discussed below (§6.23, §6.24).

6.18.4 **Is the defendant's own activity a good defence?**

In other words, if a person moves next door to an industrial estate, can they claim nuisance for the noise it causes? The answer appears to depend on the general character of the area. In the case of, say, an established industrial estate, they almost certainly cannot. But in *Coventry v Lawrence*[33] the nuisance was in a rural area coming from stock car racing and an adjacent motocross track. There was a nearby military airfield. The character there was still rural so it was ruled that a nuisance did exist. It is a question of fact and degree in every case. In summary, impact is considered in the context of where it occurs.

6.18.5 **What if the defendant has planning permission for the activities?**

This is very relevant in wind farm cases which are usually in rural areas and require planning permission. Does the granting of planning permission somehow authorise a nuisance by henceforth ensuring the area has a "wind farm" characteristic? Although there was no judgement in *Davis v Tinsley*[36] (settled out of court), it is understood that this was an issue. However, Jacqueline Cook wrote[37] about the issues at stake in this case before it was settled, commenting that the outcome of the case was eagerly awaited and could "*impact on other wind farm developments and open the judicial floodgates for other cases on similar grounds*". She noted that planning permission "*does not provide a defendant in a nuisance claim with immunity from action*" although it is something that may "*be taken into account*" when determining whether any nuisance was objectively substantial.

6.18.6 She does outline how a defendant could refer to a planning permission to justify his actions and it is probably true to say that there was some confusion as to whether a planning permission may "authorise" a nuisance. The Justices in *Coventry v Lawrence*[33] may not have fully resolved the point but it now seems clear that a planning permission does not authorise a person to commit a nuisance. Nor, subject to §6.18.7 below, does it change the character of the land although non-nuisance activities introduced by a development would become part of the character of an area. But planning permission may still be relevant if, say, it limits activities to certain hours or noise to certain limits. This could be relevant in wind farm cases.

[36] Davis & Davis v Tinsley & Ors 2011 Settled out of court

[37] Cook J & Mill S Oct 2011 Wind Farms and Noise Nuisance – Another Chink in the Armour

6.18.7 Lord Neuberger commented[33] (§82) that the implementation of a planning permission did not change the character of the area unless:

1 It did not cause a nuisance;

2 The right to commit the nuisance had been acquired by prescription (see §6.18.1 above); or

3 A court had awarded damages instead of an injunction.

6.18.8 **Damages or Injunction**

This issue deals with the solution assuming a nuisance is found. It does not as such deal with liability. A judge may find that the nuisance has been caused but it can be resolved by the defendant paying damages rather than the court issuing an injunction to prevent them from doing it again.

6.18.9 It appears that the Justices in *Coventry v Lawrence*[33] have left open whether or not it should ever be appropriate to award damages instead of an injunction in say a wind farm case where problems such as EAM may well recur many times rather than being a "one off". They identified that the first principle remains the issuing of an injunction (§121) but recognised there may be circumstances where damages can be awarded as a suitable remedy. But, if a Court ever did award damages in such a case rather than order the defendant not to cause a nuisance through EAM, it would in effect be permitting them to commit nuisance through EAM in the future with impunity.

6.19 c) Related Remedies Similar to Nuisance

There are some other potential issues relating to nuisance which need to be mentioned briefly as follows:

6.20 National Infrastructure Projects (NIP)

It should be noted that §158 of the Planning Act 2008[38] ('P Act') effectively removes the right to take any action for nuisance emanating from a NIP, unless the Development Consent Order (DCO) states otherwise. It is understood the courts have limited statutory authority on the basis of reasonable development but action for nuisance where exemption is provided is likely to prove a high risk strategy. However, §152 of the P Act[38] does provide a scheme to enable anyone affected by nuisance to claim. Lord Neuberger did refer to this in *Coventry v Lawrence*[33] (§28) noting in particular that there was a statutory scheme under this Act. For NIP cases therefore, there is no right of action for nuisance or SN unless the DCO states otherwise. This may be relevant in the case of the Clocaenog Forest DCO[25], where the Secretary of State (§4.10 - §4.14 of his Decision Letter[50]), discounted the AM problems that were admitted to be likely to be suffered by some residents on the basis that the project was needed in the public interest. This decision is discussed further below in §6.44 and §6.51).

[38] Planning Act 2008

6.21 **Strict Liability**

Generally, a plaintiff saying they have been "injured" by a defendant must prove that the defendant has acted negligently or otherwise wrongly. There is however a limited number of cases where the plaintiff does not have to prove negligence or wrongful act. This is the law of strict liability devised in the 19th century in the case of *Rylands v Fletcher*[32]. In that case, the defendant dammed a watercourse, the dam breached and the plaintiff's land was flooded. The plaintiff could not prove that the defendant built or maintained the dam negligently. It was held that as creating a reservoir was a hazardous business, he did not have to prove negligence and the defendant was liable for any damage that resulted from the flood.

6.22 Since *Rylands v Fletcher*[32], there have been cases which have restricted the scope of the law of Strict Liability[39]. The following issues may be relevant to wind farm cases:

1 The rule does not apply to "natural uses" of land, such as mining, so therefore negligence must be proved. There is no case law relating to farming the wind but whether or not this would also be a "natural use" is critical;

2 Where *Rylands v Fletcher*[32] does apply, there must be an "escape" which, it now appears, must damage property. So if a turbine blade flew off and crashed through a neighbour's roof, a claim could be made. Whether or not a person could claim for nuisance from EAM causing, say, loss of sleep is another matter – does EAM "escape"?

3 The rule does not cover "economic loss", so a person could not claim damages for, say, the loss of value of his house resulting from the nuisance under this rule.

Strict Liability needs to be mentioned here but it is highly unlikely to be the basis of a case for nuisance arising from EAM.

6.23 **d) Statutory Nuisance**

SN was first created by the Public Health Acts and is now embodied in the EP Act[30]. §79 states, as far as is relevant for this purpose, that a "statutory nuisance" is "noise emitted from premises so as to be prejudicial to health or a nuisance"

6.24 "Premises" includes "land" so SN is applicable in wind farm cases. "Nuisance" is not defined other than including two categories, "nuisance" and "prejudicial to health". In case law on nuisance it generally defines it as the same test as found in common law (*Godfrey v Conwy*[40] §27). It will be necessary to refer to *Coventry v Lawrence*[33] for guidance on common law nuisance. "Prejudicial to health" means "injurious, or likely to cause injury, to health".

6.25 As far as is known, no case has been successfully brought in respect of wind farm noise under either of these provisions. While health is fully considered in INWG WP3.2, this is an extremely controversial issue and is likely to be much more difficult to prove than a claim alleging the "nuisance" limb.

[39] §3.5.1 Significance/England and Wales/Developments https://en.wikipedia.org/wiki/Rylands_v_Fletcher
[40] Godfrey v Conwy CBC [2000] All ER (D) 1809

6.26 If a Local Authority is satisfied that SN exists or has occurred and is likely to recur, they must serve an "Abatement Notice". However, if the problem is noise as defined above (§6.23), they may first take other steps to try to abate the problem (EP Act [30] §80(2A)) provided this arises within 7 days.

6.27 If an Abatement Notice is served, the recipient can appeal to the Magistrates Court within 21 days (EP Act[30] §80(3A)). The EP Act[30] does not specify which factors the Magistrates must consider in determining whether to uphold or revoke the notice which is addressed in separate appeal regulations of 1995. This includes a defence that the best practicable means of counteracting the nuisance were already implemented.

6.28 Assuming that the Abatement Notice does take effect, it is only then that an offence is committed if the recipient does not abide by it (EP Act[30] §80(4)). However, if they are prosecuted, they may still have a defence "*to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance*" (EP Act[30] §80(7)). In the circumstances of this type of nuisance, the defence is available to commercial enterprises but not to private persons (EP Act[30] §80(8)a). There is also a "reasonable excuse" defence.

6.29 A private individual also has power to commence proceedings for an Abatement Notice if they believe that they are suffering from SN (EP Act[30] §82). Of course, they then take the risk of pursuing this matter themselves. In the case of §82 (EP Act[30]) the law differs, and if on the date of making a complaint alleging nuisance the court find nuisance did exist, the right to costs is confirmed by the statute. If at the date of the hearing the nuisance was found to exist then a criminal offence is also committed. Where nuisance exists, the court is bound to make an order at the hearing. Strictly the defence of "best practicable means" does not apply as a defence in this situation as it does under §80 (EP Act[30] §82(8)-(10)). However, at any future attempt to enforce the court order it can be relied upon as a defence. In the event of an appeal the Abatement Notice can be quashed, amended in favour of the recipient, or left as it was.

6.30 In the event an appeal against an Abatement Notice fails, the recipient can further appeal (*de-novo*) to the Crown Court. This is an appeal which starts afresh disregarding the decision at the Magistrates Court. It is not uncommon that such appeals could take up to 2 years at each stage. Further appeal on points of law are then available to the High Court and from there the Supreme Court. In the case of *Elvington Estates v City of York Council* [41] a case about motor sport, this process ensued. The Council successfully defended the appeals in the Magistrates and Crown Court but the notice was quashed in the High Court and the procedure had to start again. Over six years later this case is continuing. There were eventually successful prosecutions but it did not bring the matter to an end.

6.31 If following this potentially lengthy process nuisance is not abated, the local authority can then seek an injunction in the High Court but the court have been reluctant to consider this until the process of prosecution *etcetera* has been exhausted. At any stage if the wind farm is sold, even to a subsidiary company then a new notice would have to be served and the process started again. Even with the most diligent of action by a local authority, statutory nuisance provisions could fail to control a wind farm nuisance for many years if at all.

[41] Elvington Park Ltd & Elvington Events Ltd v York City Council [2009] EWHC 1805 (Admin)

6.32 From this, it should be noted that causing a SN is not in itself a criminal offence, except when a private action is taken and it continues to exist at the hearing. In the main it is breach of any enforceable Abatement Notice that constitutes the offence – and as identified it may take some considerable time before an Abatement Notice becomes enforceable. As breach of such a notice is criminal, the Local Authority must prove its case "beyond reasonable doubt". The defendant (if a commercial enterprise) will have a defence which it needs to prove "on the balance of probabilities", a much lower standard. Potentially §80(9) EP Act[30] provides a defence under the Control of Pollution Act 1974 but these generally only relate to construction works.

6.33 The offence is summary only so can only be tried in the Magistrates' Courts. In the case of noise from industrial premises the maximum penalty is a fine of £20,000 but, as identified, an injunction does not appear to be available (§80(6) EP Act[30]) until the prosecution of breaches process has been exhausted. In theory, a summary offence should be completed quickly but the nature of SN makes this unlikely, especially if the operator appeals against the service of an Abatement Notice and subsequently against any conviction made by a Magistrates' Court.

6.34 It can be seen that the statutory nuisance procedure is cumbersome and slow compared to other pollution controls such as licensing by the Environment Agency. SN is liable to be lengthy and with a high costs risks for local authorities only to face a risk a new operator could take over and the need to start the process again. This is, in effect unending.

6.35 **Is it appropriate to avoid drafting a planning condition and rely instead on nuisance, private or statutory?**

Since the Den Brook judgment[1], many Inspectors have been persuaded not to impose a condition to seek to control EAM and instead have said that, if there is a problem, reliance should be placed on SN (see for example §59 Common Barn[13)] where the Inspector referred to "other legal procedures" existing to deal with such a problem and the Inspector's recommendation in the recovered appeal relating to Bishop Itchington [42] (§10.30)). However, on occasions a condition has been imposed (§59 Dunsland Cross[16]).

6.36 It is to be recognised that SN is a separate legislative regime with different aims and objectives from the Town and Country Planning Acts. They are not parallel and no case law precedent has been found to suggest one case can be relied upon to avoid controls under the other. On the contrary, the courts have pointed out they are separate[43]. It must be emphasised that planning inspectors do not have expertise in nuisance, on which ultimately only a court of competent jurisdiction can decide.

6.37 There has been inconsistency in decisions recovered by the Secretary of State for Communities and Local Government. In the Turncole decision [17] (§18), he determined a condition was necessary and as a result that a scheme should be devised before electricity

[42] Appeal Decision SoS CLG (PINs Baird S) Oct 2014 Land Between Bishops Itchington, Gaydon and Knightcote (Starbold) APP/J3720/A/13/2193579

[43] R v Kennet District Council, ex p Somerfield Property Co Ltd [1999] JPL 361

could be generated to the grid (Condition 25). However, the Shipdham decision letter[44] (§17) states

> *"The Secretary of State has taken account of the Inspector's remarks at IR365-367 and agrees that the matter of noise-related amenity is addressed through the use of ETSU-R-97. He further agreed with the Inspector's conclusions at IR373 that if excess amplitude modulation were to arise, that statutory nuisance procedure as a means of dealing with excess amplitude modulation is preferable to assigning a planning condition."*

6.38 If a condition is not imposed, then there are only two realistic alternatives. One is for the individual to sue for nuisance, the other is for action to be taken in SN. If a person sues for nuisance, this is a civil case and so the burden is for them to prove the case "on the balance of probabilities". However for anybody to undertake such action remains a massive risk with enormous costs consequences. Even if it were successful, there is always an unrecoverable costs burden and the need to embark on a highly intrusive process including analysis of your reasonableness as a person – a potentially distressing and stressful experience as was seen during the five day cross examination of the Davis family[36]. It will be necessary for the affected individual to take into account all the issues arising from the Coventry case [33], not all of which are settled or clear cut. While this may be necessary if the permission is lacking a suitable condition, it is surely not recommended as an approved alternative to the enforcement of a planning condition.

6.39 So far as SN is concerned, this can be commenced by either the LPA or an affected resident but there are clearly large financial risks for a resident similar to those in a case for private nuisance. There is, however, the added risk that, should the operator change, the process would have to start afresh. As discussed, it is necessary to prove that there has been a nuisance or alternatively that there has been an action that is prejudicial to health. Then there are the inbuilt delays resulting from the Abatement Notice (or indeed other action) procedure. If it does come to criminal proceedings for breach of the notice, the prosecution must prove the breach "beyond reasonable doubt" while a commercial defendant can prove "best practicable means" only on "the balance of probabilities". Altogether, this can take years before a case is finalised with no guarantee as to the result and resulting in long term property blight with little prospect of selling or moving house in the interim (at least at the full market value). Furthermore any individual complaining to the local authority is obliged in law to inform potential future purchasers of their complaint and even if resolved the evidence shows a serious devaluation risk continues. This alone acts as a major disincentive to seek any redress by way of a complaint of nuisance.

6.40 As far as is known, the SN procedure has not been used to remedy any reported problem arising from a commercial wind farm and it was not an issue considered by Jacqueline Cook in her article[37].

[44] Appeal Decision SoS CLG (PINs Watson J) Sep 2014 Land at Wood Farm, Church Lane, Shipdham APP/F2605/A/12/2185306

6.41 Perhaps it is worth noting the following passage in a letter[45] from Richard Perkins of Parsons Brinkerhoff (formerly an advisor to DEFRA and currently DECC):

> *"The applicant has also noted in their submissions that Statutory Nuisance provisions will still be available to deal with EAM in the event that it were to occur, and they reference the DEFRA report produced by AECOM. As a matter of principle, the Statutory Nuisance regime is not there to pick up problems that should be dealt with by the Planning system, and as the DEFRA report notes, whilst it is theoretically possible to take nuisance action, it would be a significant "challenge" for a Local Authority to take this action due to the technical and legal challenges it would present. For that reason, local residents may not feel that there were sufficient safeguards in place if EAM were to occur in the absence of a planning condition."*

Although he then goes on to say

> *"On the basis of the current evidence, and the above discussion, I would be of the opinion that it is not currently possible to construct a suitable condition for EAM that would meet the six tests of Circular 11/95, but hope that current research will lead to a solution in the future. Environmental Health Officers should be encouraged to take swift action to invoke their powers under the Statutory Nuisance regime if EAM should occur."*

6.42 During the Brechfa Forest Examination[46], the barrister for a residents' action group, Peter Jennings[47], took a similar line when making final submissions (§38) to the Examining Authority. While this argument was not accepted by the Examining Authority[46] (§4.119) when the DCO[48] was made, it is believed that this submission more accurately reflects the true position regarding SN.

6.43 In addition, a DEFRA publication[49] appears to accept the limitations of the SN procedure although it does not completely rule out the use of the procedure. At §4.27, it states

> *"The provisions in the EP Act concerning Statutory Nuisance can be used to control and manage noise arising from wind farm development. However, the scope of noise problems that can be addressed using Statutory Nuisance methods can be limited and the standard of relief that can be achieved restricted by the statutory and legal precedents and conventions that apply. Ideally local authorities should utilise planning controls to manage noise from proposed wind farms as a first line of defence."*

6.44 In the Clocaenog Forest Decision Letter[50], in effect the Secretary of State dismissed these concerns completely. He noted (§4.10 - §4.14) that certain properties were likely to be severely affected by the proposal and it might affect their rights under Article 8 of the European Convention of Human Rights (ECHR)[12] and that there was no proposal to mitigate

[45] Perkins R Jan 2013 Letter of Advice to Darlington Borough Council re Moor House Wind Farm - Use of SN in lieu of a planning condition
[46] NIP Examining Authority's Report Macey B Dec 2012 Brechfa Forest EN010008
[47] NIP Closing Remarks Jennings P Sep 2012 Brechfa Forest Examination – Barrister for opposition group Grwp Blaengwen
[48] NIP Statutory Instruments 2013 No 586 Infrastructure Planning Brechfa Forest Wind Farm Order 2013
[49] Fiumicelli D & Triner N (AECOM) Apr 2011 Wind Farm Noise Statutory Noise Complaint Methodology
[50] Decision Letter Davey E SoS DECC Sep 2014 Clocaenog Forest EN010013

this. Nevertheless, he concluded that the need for the wind farm outweighed the rights of the residents and it was proportionate for him to make the DCO[25] without any condition to help mitigate the problems that it was anticipated these residents would suffer (§4.14[25]). Whether or not this is an appropriate way to deal with Article 8 is perhaps a matter for conjecture.

6.45 e) Human Rights Act 1998[5] (HRA)

The ECHR[12] was incorporated into English Law by §1 of the Human Right Act 1998[5] (HRA). Whilst it is acknowledged that this Act is controversial, it is law until and unless it is repealed - and the Queen's Speech (2015) has not contained a provision for its repeal during the 2015/6 session of Parliament.

6.46 As far as Article 8[12] is concerned, there are certain limitations on the right to enjoy a property but the issue in the Clocaenog decision[50] is whether or not these limitations have been properly addressed. As far as is known, there has been no legal challenge to the decision. At present, it is argued that the way Article 8 of the ECHR[12] has been addressed by the Secretary of State is flawed but until and unless there is a court decision on the issue, the outcome will not be known. It is also to be remembered that in this case the development is exempt from statutory nuisance controls and in any event these could not therefore be relied upon.

6.47 The limitations to the right to privacy in Article 8[12]are contained in §2 of that article. It is perhaps worth quoting here Article 8[12] in full which says:

> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

6.48 The issue is whether the decision maker acted "in accordance with the law". This has most recently been considered by the Supreme Court where Lord Sumption[51] (§11) said:

> *"The requirement of Article 8(2) that any interference with a person's right to respect for private life should be "in accordance with the law" is a precondition of any attempt to justify it. "*

6.49 That case dealt with the power of the police to hold information in respect of an individual's activities and considered the provisions of Article 8[12]. There is a clear provision in Article 8[12] to enable privacy to be invaded when law enforcement is concerned and this was upheld in the Catt case[51]. The issue is whether the limitations to an individual's right to privacy extends to the generation of renewable electricity – on the face of it, none of the limitations in Article 8(2)[12] appear to extend to this.

[51] R (Catt) v Commissioner of Police for the Metropolis and anor [2015] UKSC 9

6.50 Even if Article 8(2)[12] does allow this in law, the issue is whether a decision to create a potential nuisance with no mitigation for the sufferer is "proportionate". Lord Sumption[51] (§17) said

> *"The real question on these appeals is whether the interference with the respondents' Article 8 rights was proportionate to the objective of maintaining public order and preventing or detecting crime"*

6.51 Clearly, the Secretary of State in the Clocaenog case[50] was not dealing with maintaining public order or preventing or detecting crime. But if any of the other exceptions in Article 8(2)[12] to the right to privacy do extend to this purpose, is it proportionate to remove the rights of the individual, especially in the absence of any compensation? Where it is appropriate to deal with the public interest in this way and the loss can in some way be addressed, then necessity may well carry weight. It is noted that in certain cases, conditions are imposed to protect the interests of say, air traffic control, by requiring the developer to reach a solution with the air traffic controller before the development can commence (known as a Grampian Condition) or by entering into a separate agreement with the council to ensure that this is done (§ TCP Act[23]). Lord Sumption (§ 11[51]) quoted the following from an earlier judgment of Lord Bingham

> *"The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality."*

6.52 f) Applications to "vary" existing planning permissions

In law, there is no such thing as an application to vary a planning permission[52]. Instead, the LPA considers issuing a new planning certificate alongside the existing one. If they do this, they are not restricted to considering only the "variation" requested by the applicant and can review all conditions, whether on different topics from the application or not.

6.53 As a result, should an applicant apply to "vary" a planning permission, the opportunity arises to review the planning conditions for omissions, particularly if the existing permission does not address EAM.

6.54 g) Compulsory Purchase or Blight

Although this topic is not related to nuisance in any form, there have been questions as to whether it is a possible remedy in wind farm cases where there is an EAM problem. Under the TCP Act[23], an LPA can compulsorily purchase property that may be required for a development if it has economic, social or environmental well-being potential (TCP Act[23] §226). This however is likely to mean land directly required for such development, not land

[52] R (Wilkinson) v Rossendale BC [2002] EWHC 1204 (Admin)

that may be adversely affected by it. There is a similar power to compulsorily acquire property under the P Act[38] (§92) if it is required to enable the development to take place.

6.55 There is also a power under the TCP Act[23] whereby a person can require a public body to purchase their property if it is adversely affected by the proposal - a "blight notice"(TCP Act [23] Ch II). This power however only applies when a public body is carrying out the development (e.g. a motorway), not a private developer such as a wind farm operator.

6.56 There is therefore no power for an individual detrimentally affected by, say, wind farm noise to compel the developer to purchase his property. The only known instance of a wind farm operator purchasing an affected property is in the case of *Davis v Tinsley*[36], where the developer purchased the Davis's home after the court case was settled (although it is not known whether this was one of the settlement terms).

6.57 h) Monitoring

This Work Package does not consider the number of complaints made or where issues relating to EAM may arise but those issues are addressed in INWG WP 3.1. It is also believed that many people living close to wind farms "suffer in silence" for any number of reasons, not least being the discussion above (§6.39) that if they complain they will have to disclose that if they come to sell their house. It is therefore believed that the extent of the problem may well be under-reported.

6.58 INWG therefore questions whether or not it is appropriate to include a condition to ensure that there is monitoring of new wind farms or single turbines to determine whether or not acceptable noise limits (including EAM) are breached. While there may be a requirement for a wind farm operator to undertake certain monitoring work in the event of a complaint, this would refer to a standard condition to ensure that there is not a problem. Residents should not have to blight their own property by complaining to ensure unlawful activities were addressed.

6.59 In certain cases, for example to determine the actual impact on birds, monitoring can already take place. In the application by Banks Renewables for a wind farm at Windy Bank in County Durham (which has now been refused permission), the operators themselves suggested (§6[53]) that monitoring of bird collisions should take place after the turbines are operational. The issue therefore is whether monitoring should take place to establish actual noise levels and, if so, whether this should be a standard condition or only in specified circumstances. It need not relate to complaints but alternatively a reasoned concern of the LPA there is excess noise. This could then arise from direct complaints or indirect evidence.

6.60 INWG notes the recent Report to the Northern Ireland Assembly[18] - a comprehensive assessment of all aspects of wind farm development and including noise issues (Vol 7). Ursula Walsh's report (Vol 7 p2386) critiqued ETSU[3]. The Committee has made a number of recommendations in relation to future wind farm development in Northern Ireland including:

1 A review of the use of ETSU (Executive Summary[18] §28);

[53] AESL Aug 2011 Windy Bank Ornithology Report Part 2 Windy Bank Wind Farm 8/CMA/6/48

2 Long term monitoring of wind farm noise (Executive Summary[18] §29);

3 Specification of minimum distances between wind turbines and residences (Executive Summary [18] §32).

6.61 Of course monitoring on its own does not resolve a problem, but if there is an appropriate condition to control a phenomenon such as EAM, it can help assess whether the phenomenon is in fact occurring. The situation can therefore be assessed whether complaints regarding noise are or are not in fact made to the LPA. In addition, it may be appropriate to consider the steps to be taken to remedy a problem which is identified as a result of monitoring, especially if no solution to the problem can be found.

7 Conclusion

7.1 The Objectives of this Work Package were listed as:

> Objective 1 – To assess the legality of the Den Brook Conditions[2] relating to EAM following the judgement of the Court of Appeal[1];
>
> Objective 2 – To assess the legal appropriateness of other remedies such as Statutory and Private Nuisance that have been recommended since that judgement or may be available to persons affected by EAM;
>
> Objective 3 - To recommend the most appropriate course of action that will provide legal protection to residents hosting wind farms should EAM occur.

7.2 Objective 1 has been met by a complete review of the situation regarding a planning condition to control EAM since the judgment of the Court of Appeal[1] in the Den Brook case. The advantage of this procedure is that a suitably worded condition strikes at the heart of this problem. However, it also has to be acknowledged that there are procedures to be followed and these can take time. The question is whether this is the most effective way of addressing the problem

7.3 Objective 2 has been addressed through discussion of other remedies available under the TCP Act[23] if a planning condition is in place, namely the power to serve a stop notice, to serve a breach of condition notice or to seek an injunction. Of these, a Stop Notice runs the risk of substantial compensation being paid and a Breach of Condition notice does not have real "teeth". However, if an injunction can be obtained, this is likely to be a powerful tool. It may be expensive and perhaps risky to obtain, but if the Court should grant one, it should quickly resolve the problem. It cannot be considered costlier or more protracted that alternative approaches such as SN.

7.4 In answering Objectives 2 and 3, other potential remedies have been considered. Some of these such as SN have been actively advocated by the Wind Industry and supported by Planning Inspectors. Evidence however suggests that an Abatement Notice is not an effective control to protect nearby residents from EAM. Others such as private nuisance and similar legal actions have been considered but these place too much risk and burden on residents for a problem not of their making with likely long term adverse financial implications. They may however be the only remedies available if a suitably worded condition is not imposed in the Planning Certificate. The inability of the alternative procedures to bring about effective control and exemption from those procedures in some cases may indicate action under the EHRC[12] is the only realistic option. This is also a complex, potentially lengthy and dauntingly uncertain process.

7.5 Consideration has also been given to Blight action. This could provide a speedy remedy if there were power to enforce it but, under the current law, this is not an option that is open to residents.

7.6 This Work Package has not considered the practical effects of the current version of BS4142[4]. This is considered in INWG WP5 and the conclusion may be that this does provide better protection for residents than ETSU while not imposing undue restrictions on

developers. However, present policy is that ETSU should be used and BS4142:2014[4] is not relevant for wind farm cases in relation to planning controls. There is therefore an option to recommend a change of policy to effect the use of BS4142:2014[4] in future cases rather than ETSU if it is considered elsewhere that BS4142:2014[4] does now address the situation satisfactorily.

7.7 A final purpose of this paper is to recommend the most effective course of action to protect residents if there is a potential problem caused by EAM from a wind farm or turbine. While no course of action may provide the speedy remedy that is sought, it is firmly recommended that the adoption of a modified Den Brook[2] type condition (§20) is appropriate, as the available actions that can be taken if there is such a condition are the most direct and reliable, and go to the heart of the issue. It is considered that this course of action is available now, has been endorsed by the Courts and is fully justified under the provisions of the NPPF relating to planning conditions. As a result of the doctrine of judicial precedent mentioned above (§5.13), it is suggested that decision makers are not justified in ignoring and saying it has no effect. There is also no basis to conclude the Den Brook Condition[2] fails planning condition tests and cannot be suitably enforced as it presents no more hurdles than any other noise level condition which warrants removal / exclusion of extraneous noise producing activity.

7.8 All other forms of action, including those adopted by Planning Inspectors in the past, do not address this problem directly and can be subject to considerable periods of delay and likely lack any protection.

7.9 It is accepted that in future a suitably worded alternative condition may need to be drafted. While the Den Brook Condition[2] has been accepted, with the passage of time this may need to be adapted. However, once such a condition is agreed, it is recommended that it is imposed in every planning permission for a wind turbine unless there are clear reasons to show that it is unnecessary.

7.10 This form of action would help to provide reasonable protection for affected residents. It would in turn comply with their Human Rights provisions particularly under Article 8 of the ECHR[12]. Even if the HRA[5] is repealed by this government, consideration will still have to be given to protecting citizens in these circumstances and it is represented that such a condition would still be relevant even if the law is changed.

7.11 It is further suggested that such a condition should be strengthened by the imposition of a monitoring condition such as that recommended by the Northern Ireland Assembly Report[18]. Consideration also needs to be given to what happens if such monitoring does find a problem

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Organised in sections as follows:

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Legislation, Guidance and Standards
Legal Cases
Other

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