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| **Application Decision** |
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| **by Harry Wood** |
| **Appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 6 June 2024** |
| **Application Ref: COM/3303800**  **Brackenthwaite and Buttermere Commons, Cumbria**  Register Unit No: CL74 and CL480  Commons Registration Authority: Cumberland Council   * The application, dated 21 July 2022, is made under Section 38 of the Commons Act 2006 (the 2006 Act) for consent to carry out restricted works on common land. * The application is made by Melbreak Renewable Energy Community Interest Company. * The works of approximately 4 months duration to install a hydro-power generating system comprise:  1. turbine shed (3.5m x 4m and approx. 4m high) clad in local stone with pitched slate roof housing a hydro-electric turbine with generator and control panel; 2. 570m long underground polyethylene water pipeline; 3. concrete intake structure (6m wide x 1.1m high) to divert water flow into the pipeline from Mill Beck; and 4. 250m long temporary hardcore access track (3.5m wide) to facilitate machinery access to the intake and top section of pipeline during the period of works. | |

**Decision**

1. Consent is granted for the works in accordance with the application dated 21 July 2022 and the plans submitted with it subject to the following conditions:
2. The works shall begin no later than 3 years from the date of this decision.

REASON: To provide certainty to users of Brackenthwaite and Buttermere Commons.

1. The temporary track shall be removed and the land shall be fully reinstated within one month from the completion of the works.

REASON: To retain access for Commoners, public and livestock across Brackenthwaite and Buttermere Commons.

1. For the purposes of identification only, the location of the proposed works is shown on the attached plan.

**Preliminary Matters**

1. I have had regard to Defra’s Common Land consents policy of November 2015 in determining this application under section 38, which has been published for the guidance of both the Planning Inspectorate and applicants. However, every application will be considered on its merits and a determination will depart from the policy if it appears appropriate to do so. In such cases, the decision will explain why it has departed from the policy.
2. The full name for CL74, as given in the register of common land, is Brackenthwaite Common, Buttermere Common and Hobcarton Crags and the full name for CL480 is given as Buttermere Common Land. In the interests of clarity, I will use the CL numbers when referring to them separately.
3. Cumbria County Council was the commons registration authority at the time the application was made.
4. The original application plan showed an underground power supply cable to the proposed turbine shed, which was not included in the works applied for. The applicant subsequently confirmed that they did not wish the cable to be considered as part of the application and submitted an updated plan with the cable detail removed. This is the plan referred to in paragraph 2 above and attached below.
5. Planning permission had not been granted at the time the application was made but was subsequently granted by Lake District National Park Authority (LDNPA) for construction of a 45kW micro-hydroelectric scheme utilising the waters of Mill Beck (Decision 7/2022/2234 of 8 March 2023).
6. This application has been determined solely on the basis of written evidence. I have taken account of the representations made by Natural England (NE), Friends of the Lake District (FLD) and Open Spaces Society (OSS).
7. I am required by section 39 of the 2006 Act to have regard to the following in determining this application:-
8. the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);
9. the interests of the neighbourhood;
10. the public interest. (Section 39(2) of the 2006 Act provides that the public interest includes the public interest in; nature conservation; the conservation of the landscape; the protection of public rights of access to any area of land; and the protection of archaeological remains and features of historic interest); and
11. any other matter considered to be relevant.

**Reasons**

1. The works are proposed to generate renewable energy, which in conjunction with installation of air or ground source heat pumps, will be sufficient to provide the complete electrical and heating needs of all the domestic properties in the village of Buttermere and the future demands of domestic electric vehicle charging. The applicant explains that the works are essential for the transition of Buttermere, which is currently dependent on oil, to a zero-carbon community.

***The interests of those occupying or having rights over the land***

1. The land to be occupied by the intake structure, temporary track and most of the underground pipeline route is owned by Mr Les Kyle of Syke Farm. Much of the remaining pipeline route land is owned by Mr Mark Richardson. The above lands lie within CL74. The land to be occupied by the turbine shed and final short section of pipeline is owned by Mrs Sally Lewis, the Title being confirmed during the s38 application process, and lies within CL480.
2. The applicant advises that all three landowners support the scheme and have agreed access arrangements. There is no evidence before me to suggest otherwise and I am satisfied that the interests of those occupying the land will not be harmed.
3. The common land register for CL74 records numerous rights of grazing, turbary, estovers and common in the soil over various parcels. The applicant advises that there are 16 active rights holders but none of them exercise rights over the application land parcel. The common land register for CL480 records no rights of common, although it is open to a parcel of CL74 over which grazing rights are exercised and, as such, is subject to *vicinage* grazing by straying animals*.*
4. All active rights holders were consulted about the proposals via the Buttermere and Brackenthwaite Commoners Association but none of them commented. There is no evidence before me to suggest that the works will harm the interests of those having rights over the land.

***The interests of the neighbourhood and the protection of public rights of access***

1. The interests of the neighbourhood test relates to whether the works will unacceptably interfere with the way the common land is used by local people and is closely linked with the protection of public rights of access.
2. The applicant advises that the land housing the turbine shed is accessible to the public, although the turbine shed will be securely locked. Its footprint will be 14m², which I consider constitutes only a small impediment to public access.
3. Whilst all the application land is registered common land, the applicant advises that the intake and pipeline land is accepted locally as having been registered in error and has always been fenced as private land. This being the case, it would seem that in practice there is little or no local or public access over the land to be affected by the proposed intake and pipeline works. Nevertheless, the land remains subject to public rights of access and I must consider the impact of the works on those rights.

1. The turbine shed (described as a Powerhouse on the application plan) and intake structure will be permanent features. The underground pipeline and access track works will be temporary. No associated permanent or temporary fencing is proposed. NE advises that there are no recorded Public Rights of Way that appear to be affected by the proposals.
2. The intake structure will take up a small footprint on each side of Mill Beck. However, much of it will lie across the 6m width of the beck, which will make crossing it on foot easier.
3. The underground pipeline will extend north eastwards for approximately 570m from the turbine shed to the intake structure. The required 700mm wide pipe trench will be backfilled immediately. The 3.5m wide access track will extend for approximately 250m from a farm gateway off Newlands Road to the intake to facilitate machinery access to the intake and top section of pipeline. It will be in place for approximately 4 months, during which time it could be walked along or across when not in use.
4. I am satisfied that the permanent and temporary works will not seriously harm the interests of the neighbourhood and rights of public access.

***The public interest***

*Nature conservation*

1. NE advises that the works have the potential to affect two statutory sites designated for their nature conservation value. These are River Derwent and Tributaries Site of Special Scientific Interest (SSSI), which is part of the River Derwent and Bassenthwaite Lake Special Area of Conservation (SAC), and Buttermere Fells SSSI, which is part of the Lake District High Fells SAC.
2. The granting of planning permission followed LDNPA’s Planning Report of 6 March 2023. The Planning Report advises that Mill Beck is not a designated site, though it flows into Crummock Water, which is part of the River Derwent SSSI and River Derwent and Bassenthwaite SAC. The fells above Mill Beck form part of the Lake District High Fells SAC. It follows that the proposed works will not directly affect the designated sites but could have indirect impacts.
3. The Planning Report includes a Habitats Regulations Assessment (HRA) of the likely significant effects of the proposals on designated nature conservation sites; specifically in relation to the River Derwent SSSI and SAC. The HRA concluded that, subject to the mitigation proposed, there would be no likely significant effects. NE confirms that theconclusions drawn by the HRA, and the mitigations suggested, are sufficient to accept an outcome of no likely significant effect on River Derwent and Bassenthwaite Lake SAC*.*
4. NE further advises that the HRA would ideally have also considered the Lake District High Fells SAC, given its proximity to the site. However, NE understands that the elevation between Mill Beck and the High Fells SAC may have influenced the decision not to include it and advises that the information included in the HRA is satisfactory.NE also advises that if there are no activities within the boundary of the High Fells SAC, such as access for machinery or any storage or dumping of materials, then it is highly unlikely that that the proposed works would have a significant effect on the SAC. The applicant has confirmed that there will be no such activities.
5. The applicant advises that this is a heavily regulated project. The scheme was not only the subject of a full planning application, but also required two licenses from the Environment Agency following a pre-application process with site visits. The applicant further advises that LDNPA has accepted the Construction Environment Management Plan (Mill Beck Community Hydropower Scheme Construction Environment Management Plan 2023), which summarises the management and mitigation of identified environmental risks.
6. I am satisfied that the potential for nature conservation harm has been fully explored and that adherence to the Construction Environment Management Plan and the mitigations set out in the HRA will allow the works to be carried out without significant harm to nature conservation interests.

*Conservation of the landscape*

1. The works are all proposed within the boundary of the Lake District National Park and the Lake District UNESCO World Heritage site.
2. NE advises that the turbine shed will be visible from several surrounding viewpoints, including the B5289 road bridge crossing Mill Beck and the path running alongside the beck. Well established tree and shrub planting will provide some screening during the summer months when in full leaf but less so in the winter months as it is mostly deciduous. The applicant advises that some trees will need to be removed from the turbine shed site; most likely a mature larch, two ash and a sycamore. This will make the turbine shed more visible than it would otherwise be, and the applicant is proposing only partial screening of it with new native trees such as oak, rowan, hawthorn and Scots pine.
3. Water passing through the turbine will be returned to the beck through a 700mm diameter outlet pipe set into the cliff face below the turbine shed. Filtered water will drop from the pipe at low velocity and cascade approx. 2.5m down the steep bedrock riverbank to the beck below. FLD raises concerns about the pipe’s visual impact on the attractiveness of the nearby waterfalls which they say are enjoyed and photographed by many visitors. The applicant advises that the pipe will be cut as flush as possible to the cliff face and I am satisfied that the flow of water, rather than the pipe, will be the prominent feature.
4. The turbine shed will not be fully shielded from public view, but neither will it be placed in an otherwise undisturbed location as it will be adjacent to an existing electricity sub-station. Furthermore, the applicant advises that it will appear as a small traditional farm shed constructed in local stone and slate and will be set approximately 1 metre below current ground level to reduce its visible height. I am satisfied that neither the shed nor the necessary outflow pipe will cause significant visual harm to the landscape.
5. The intake structure will also be a long-term feature in the landscape, although the applicant advises that the location is set down within a steep-sided valley which cannot be seen from any public roads or footpaths. The applicant also advises that the concrete used will be of a dark shade to reduce any visual impact there may be. I am satisfied that it will not cause significant visual harm to the landscape.
6. The underground pipeline will not be visible and the topsoil will be restored and re-seeded. The temporary track will be removed and the ground re-seeded on completion of the works, which are expected to take around 4 months. I am satisfied that the land will be restored on completion of the works, which can be ensured by attaching a suitable condition to the consent.
7. The applicant advises that approximately sixty two trees will require removal for the scheme. The submitted Tree Report (BS5837 Arboricultural Report For Buttermere Hydro Scheme dated 25 June 2022) recommends that the woodland to the north could be left to allow natural regeneration to take effect or planted with native broadleaved trees. Some of the areas near the beck could be left open to allow light penetration and improve biodiversity. The applicant confirms that the recommendations of the Tree Report will be implemented.
8. I am satisfied that there will be no significant long term landscape impact from the removal of trees necessary to the carrying out of the works and that the natural beauty of the Lake District National Park and the Lake District UNESCO World Heritage site will be conserved.

*Archaeological remains and features of historic interest*

1. Historic England and LDNP Archaeology Service were consulted about the application but did not comment. There is no evidence before me to suggest that the above interests will be harmed by the proposed works.

***Other relevant matters***

1. FLD notes that the consent applied for is permanent and requests that any consent given is conditional to any above ground or in-stream infrastructure being removed if the scheme fails or no longer operates. The applicant advises that the scheme structures and pipeline are designed to last 100 years and that the turbine and generator may be replaced every 30 years or so. If the scheme becomes unviable as a community project it is more likely to be sold to be run as a private operation than to be discontinued.
2. The applicant further advises that in the unlikely event that the scheme has to be abandoned, the machinery would be removed from the turbine shed but the power supply would remain and it would be offered to the village hall as an electric bike charging facility for the local community. The intake structure would be breached and nature would be allowed to take its course to grow over and erode the structure over time.
3. The application is for permanent works. Where consent is given that is not time-limited there is no mechanism to require removal of the consented works when or if they are no longer needed unless a suitable condition is attached to the consent. It is not guaranteed that the hydro-power scheme will operate successfully and I am satisfied that there is a suitable plan to decommission the works if the operators conclude that it cannot succeed. However, if the scheme fails it is possible that it could be re-introduced at some future point and I do not consider it prudent to prevent its re-introduction by requiring removal of the works to an arbitrary time frame.

**Conclusion**

1. Defra’s Common Land Consents Policy advises that

works may be proposed in relation to common landwhich do not benefit the common, but confer some wider benefit on the local community, such as minor works undertaken by a statutory undertaker (e.g. a water utility) to provide or improve the public service to local residents and businesses […] consent under section 38 may be appropriate where the works are of temporary duration (such as a worksite), where the works will be installed underground (such as a pipeline or pumping station) or where their physical presence would be so slight as to cause negligible impact on the land in question (such as a control booth or manhole) […] and the proposals ensure the full restoration of the land affected and confer a public benefit.

1. I conclude that the proposed works will not seriously harm the interests set out in paragraph 9 above. I am satisfied that whilst the turbine shed is somewhat larger than a control booth, the works generally accord with Defra’s policy and confer a public benefit by facilitating a hydro-power scheme to supply carbon neutral electricity to the local community. Consent is therefore granted for the works subject to the conditions set out in paragraph 1.

**Harry Wood**

**Plan referred to in Paragraph 2
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