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Scotland's EIA Community Conference 2018

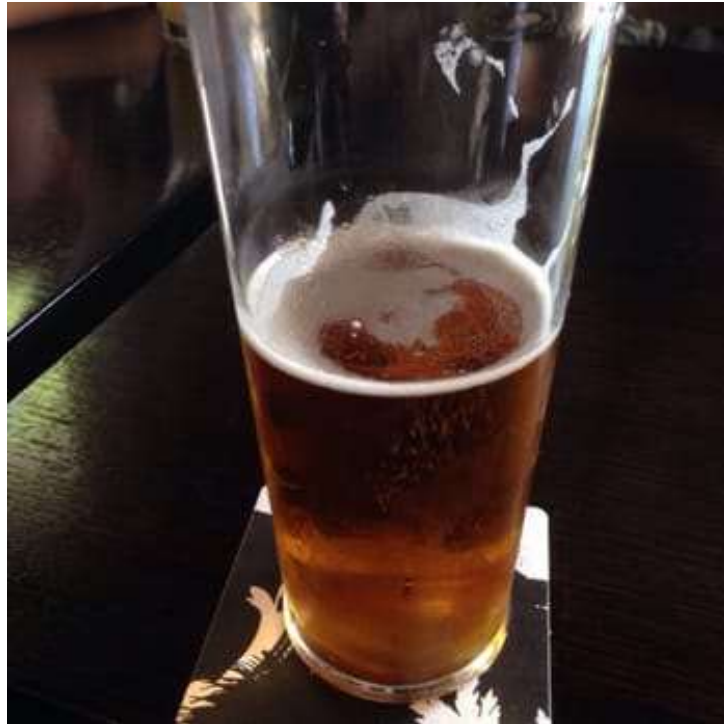
EIA Current and Future Legal Challenges



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Stages of EIA

- ES/ER
 - Screening
 - Scoping
 - Additional information
 - Content – what are we assessing?
- Consultation
- Decision making – taking into account
- Conditions – mitigation and now monitoring



Current Legal Issues

- Transitional arrangements
- Criminal offences
- Multi-stage consenting
- HRA screening

Transitional Arrangements

- Electricity Regulations, Regulation 40 tries a hotch potch of applying the new Regulations subject to modification – complex and difficult.
- Planning Regulations apply the previous Regulations. Apply in the context of where ES already submitted or Scoping Opinion/Direction requested. Planning is more in conformity with Directive.

Criminal Offences

- Enforcement Directive, Article 10a – “Members States shall lay down penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive”.
- Scotland, Regulation 54 of the Planning Regs – “Any person who for the purposes of procuring a particular decision (a) knowingly or recklessly makes a statement which is false or misleading in a material particular, (b) with intent to deceive, uses any document which is false or misleading in a material particular or with intent to deceive withholds any material information commits an offence”. Fine on summary conviction up to £10,000 and unlimited on indictment.

Criminal Offences cont'd

- Alternative in England and Wales – prohibition on grant of permission but main enforcement is in a section headed, “Unauthorised development”. In that context, “Relevant planning authorities, in the exercise of their enforcement functions, must have regard to the need to secure compliance with the requirements and objectives of the Directive”.

Multi-stage Consenting

- Why?
- ECJ decision
- Wells case C-20102, paragraph 42 – “Accordingly when national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.”
- C508/03, paragraph 105 – “In the present case, the rules at issue provide that an Environmental Impact Assessment in respect of a project may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage.”

Summary of Issues Arising from Cases

- In consenting regimes which involve more than one stage you cannot rule out the requirement for an EIA at the first stage
- In circumstances where there is a multi-stage consenting process, EIA assessment should be undertaken fully at the original decision making stage and only exceptionally should it be deferred to a later decision making process.

Scottish Response

- Regulation 4(5) of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 and Regulation 4(5) of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017
- Deferred environmental assessment only where the effects cannot be identified at the initial stage and the decision maker has to impose a suspensive condition.
- Must be stated in Decision Notice.

Multi-stage Consenting in the Scottish Context

- Regulation 25 of the Electricity Regulations and Regulation 33 of the Planning Regulations.
- Electricity Regulations – test is “significant effects on the environment which have not previously been identified”.
- Planning Regulations – “significant effects on the environment that have not previously been identified and assessed”.

Requirements for Decision Making – no new Effect

- Regulation 21 of Electricity Regs and Regulation 29 of Planning Regs.
- Provide reasoned conclusion.
- The main reasons and considerations.
- The terms of the decision.
- Review the reasoned conclusion and confirm that the reasoned conclusion is still up to date. What does this mean?
- Conditions.
- Description of mitigation measures.
- Description of monitoring measures.

Requirements for Decision Making – Environmental Report/Additional Information

- As per previous Decision Notice, plus additional requirements relating to:
 - Public participation
 - Summary of environmental information
 - Right to challenge

Habitats Regulation Screening

- People over Wind
- Irish permitted development and dealing with HRA screening
- Could practical mitigation measures be taken into account at the screening stage?
- European Court has answered the question categorically with a no
- Consequences