

Delivering NPF4 Exploring the role of EIA

Scotland's EIA Conference 2023 - Session 3

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Legal perspective: The EIA Regs and Outcome Approaches



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1. The Legal Framework for Onshore Wind Development Decision Making in Scotland

1.1 The legal framework is covered by two legislative pathways :-

EIA

- The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017
- The Electricity Works (Environmental Impact Assessment) Regulations 2017

DEVELOPMENT CONSENTING

- The Town and Country Planning (Scotland) Act 1997; The Planning (Scotland) Act 2019; The Statutory Development Plan:
- The Electricity Act 1989, s36 and Schedule 9.

2. The EIA Regs; A decision maker cannot issue a consent for an EIA development unless an EIA has been carried out (Reg3)

2.1 What is EIA Development?

- Schedule 1 Development
- Schedule 2 Development. Screening?

2.2 What is an environmental impact assessment?

- the preparation of the EIAR by the developer;
- publication, notification and consultation;

2.3 What is an Environmental Impact Assessment Report (“EIAR”)?

- The criteria is set out in Regulation 5;
- to be prepared by the developer and include at least the descriptions specified;
- the mitigation hierarchy;
- A non technical summary;
- must be based on the Scoping Opinion where one is adopted.

3. Robustness of EIARs

- **Procedural** : (2017 CSIH 31 Royal Society for the Protection of Birds v Scottish Ministers)
- **Deficiency** : (2019 EWCA 888 R. (on the application of Squire) v Shropshire Council)
- **Direct/indirect effects**: (2022 EWCA 187 R.(on the application of Finch) v Surry CC)
- **Salami slicing**: (2019 EWHC 1975 R. (on the application of Wingfield) v Canterbury CC)
- **AI** : (2021 CSOH 87 Wildland)
- **Additional Environmental Information**

4. Does NPF4 change the approach to EIA and the preparation of an EIAR

4.1. The Status of NPF4

- TCPA Applications – it has primacy (unless material considerations indicate otherwise) (s25 TCPA1997);
- Electricity Act 1989 Applications - it is a material consideration (Wm Grant (2012 CSOH 98))
- There is no provision that NPF4 has precedence over the EIA Regs.

4.2 NPF4 – Part 2 – National Planning Policies; Achieving Policy Outcomes

4.2.1 Policies 3 (Biodiversity) and 11 c and e (Energy).

4.2.2 Guidance :-

- The Chief Planners Letters of 8 February and 30 June 2023
- SG Delivery Program September 2023.
- Policy 3c guidance has been issued by NS; “Research into Approaches to Measuring Biodiversity in Scotland” in respect of Policy 3b published.
- The Sector Deal for Onshore Wind (September 2023)

4.2.4 No change to the EIA Regs.

Concluding Remarks: Matters for Further Discussion

- NPF4 does not change the EIA legal framework;
- Are changes to the EIA Regs required to enable better implementation of NPF4?
- Or, is there flexibility within the EIA Regs already (noting amendment by s40 TCPA)?
- Is the EIAR the appropriate vehicle for describing how the proposed development addresses the policy requirements of NPF4? Is the Planning Statement the means to do this?
- What would a revision to the structure and overall content of an EIAR look like?

Thank You