**Avoid, Reduce, Compensate? Uncertainty, Integral Design Features and Other Difficult Questions about EIA Mitigation after "People Over Wind"**

A number of planning law judgements were issued in 2018 that have changed the fundamental approach to HRA mitigation in the UK and Ireland. These provide new concepts for mitigation in impact assessment. This article reviews this caselaw and considers the immediate implications for EIA and impact assessment practice more generally.

### Protective Measures: Reducing and Avoiding

The “People Over Wind” ruling changed the way mitigation measures can be considered in screening for the need for “appropriate assessment” in HRA. It ruled that “measures to avoid or reduce effects” cannot be taken into account at screening, requiring instead full appropriate assessment. This was counter to standard HRA practice.

The proposed mitigation in People Over Wind was to be agreed in detail post-consent through a ‘Construction Management Plan’ which provided mitigation measures for the potential impact of sediment pollution from installation of a wind turbine connection cable on freshwater pearl mussels. The decision noted that there is no reference in the Habitats Directive to the concept of “mitigation measures”, and that “protective measures” must be understood as measures to avoid or reduce harmful effects. Therefore, measures to avoid or reduce harmful effects cannot now be considered at HRA screening.

### Integral Mitigation

However, there may be measures taken into account at screening which are not for avoiding or reducing effects— that is, arguably integral mitigation (embedded in a design, for example).

The Langton judgement refers to mitigation measures relied on in a badger cull which were restrictions on licenses, such as requiring vehicles to stick to access tracks. This judgement determined that these conditions were not mitigation or protective measures in the meaning of People Over Wind but were integral features of the project.

Helpfully (or perhaps not so helpfully), the Planning Inspectorate’s initial advise on People Over Wind (9/5/2018) noted that integral mitigation can include a commitment to employing standard embedded mitigation measures, such as those to prevent water pollution.

### Compensation and Certainty

The Grace and Sweetman judgement questioned if compensatory measures, particularly those which are dynamic and adaptive, satisfy appropriate assessment requirements, noting that measures in this case cannot be foreseen with the requisite degree of certainty needed to approve the development. This has the practical result of questioning the extent to which compensatory measures can be relied on, particularly with regard to uncertainty.

The Holohan et al judgement further detailed the importance of certainty at the appropriate assessment stage, ruling that future and uncertain compensatory measures cannot be relied on in an HRA. If compensatory mitigation measures cannot be taken into account at the appropriate assessment stage, there is a greater likelihood of having to address the high bar of the tests imperative reasons of overriding public interest.
Implications for EIA

The immediate implication of this 2018 HRA caselaw for EIA practice, as well as SA/SEA, is that mitigation measures should be carefully detailed. Are measures for avoidance, reduction, compensation, or integral, etc.? What is integral and what is embedded? What uncertainties are there? Are the measures standard or complex? For EIA this needs to be considered at screening and at ES stage. Uncertainty can be reduced through detailing the often-complex mitigation requirements for projects, focusing on deliverability and making mitigation integral through delaying less detail to subsequent stages.

Moreover, the 2017 EIA Regulations employ a concept of mitigation which seems at odds with the 2018 HRA caselaw in its reliance on mitigation at screening. The 2017 EIA regulations implemented UK EIA caselaw which allows for a reliance on mitigation at screening where it is straightforward, not complex, and with no significant uncertainties. The 2017 EIA Regulations require an EIA screening to state any features of the proposed development and measures envisaged to avoid, or prevent what might otherwise have been, significant adverse effects on the environment, in screening out the need for EIA Development. There are clearly grounds for a challenge on the basis of the discrepancy between the new HRA concepts for mitigation and the EIA mitigation as practiced. As a “backstop” (Brexit-pun intended!) to future challenges we advise detailed consideration of mitigation measures for EIA, which focus on integration and uncertainty.

This article was written as a contribution to the EIA Quality Mark’s commitment to improving EIA practice. Dr. Carey Doyle, Associate at Bidwells LLP, March 2019.

References

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