What happens when post-consent monitoring highlights that EIA mitigation is not working as expected? What does this mean for the ES and the Project assessed?

The Town and Country Planning (Environmental Impact Assessment) (EIA) Regulations 2017 (“the 2017 EIA Regulations”) introduce new requirements for monitoring likely significant effects identified in an Environmental Statement. The implications of securing monitoring are discussed in a separate Bidwells IEMA quality mark article. The 2017 EIA Regulations also require the consenting authority to consider whether to make provision for remedial action should monitoring indicate that mitigation relied on is not having the desired effect. But one detail that the 2017 EIA Regulations are light on is how and by whom this remedial action will be implemented, and what this means for a project and an EIA.

Firstly, there is now a need to consider at the consenting stage whether to make provision for potential remedial action. This may be a new practical consideration for many consenting authorities, and there are likely gaps in understanding. A first point to consider will be the arrangements for monitoring and how any possible breaches in indicators identified by monitoring will be communicated to the party responsible for remedial action.

If monitoring indicates a need for remedial action, who will be responsible for this? Local planning authorities (LPAs) could add mitigation measure remedial action to their existing planning enforcement function.

LPAs can undertake enforcement action when there is a breach of planning control, such as when there is a failure to comply with a condition or limitation subject to which planning permission has been granted, such as a mitigation or monitoring measure secured this way. There are several options available to LPAs to address breaches of planning control, and LPAs should act in a discretionary and proportionate way. An LPA may decide to take informal action or issue an enforcement, stop or breach of condition notice.

EIA and Planning are separate legislative regimes, and enforcement would require a degree of alignment. As enforcement action is discretionary and should be proportionate, what is the practical likelihood of enforcement action in relation to a monitored mitigation condition? Is a breach identified by monitoring a breach of planning or a breach of EIA? Or both? How do current time limits on enforcement apply to mitigation measures? What role could financial penalties have in remedial actions? What is the part of the LPA in enforcing mitigation relied on by other consenting authorities (a not-inconsequential question in some cases, such as with regards the proposed High Speed 2 rail line)?

Issues also arise from the nature of EIA. Many EIA impacts are short term construction impacts (such as water quality or traffic); will LPAs enforce during construction in a timely manner? During operational stages there may be lack of clarity over who is responsible for rectifying an issue, particularly in the medium to long term when project developers may have changed.
A number of other complications arise from the possibility of relying on monitoring measures being conducted by parallel consenting regimes. The 2017 EIA Regulations provide for use of existing monitoring measures to avoid duplication, but it is not clear what this will mean for enforcement. To take an example, if monitoring measures for water quality are held by an Environmental Body, these could be relied on for a project consent. But practically will there be sufficient communication between different monitoring agencies to make LPAs aware of a breach of an indicator? How will impacts from one project be differentiated from impacts from other projects? If monitoring is not appropriately related to the project, is could be difficult to pass the legal tests for a condition or planning obligation. Finally, who will implement remedial action?

Finally, what does this mean for a project and an EIA? Previously EIA legal requirements have stopped at the point of project consent and condition discharge. If there was a change in design details there may need to be a new planning applications and EIA addendum, but there was no legal obligation for monitoring that development was constructed in line with the design details and that impacts were as predicted in the ES. The new monitoring and remedial action commitments introduce the possibility of greater relevance of an ES after consent and condition discharge. For example Environmental Management Plans are commonly relied on in EIA to manage mitigation during construction and operation, but there has been no requirement grounded in the EIA legislation to monitor that these plans do what they claim to do. Now, at the very least, consenting authorities will need to evidence that they have considered future requirements for monitoring and remedial action. Where monitoring measures are imposed in the long term, the ESs may be relevant into the long term.

What type of EIA updates/ addenda could be needed if should significant impacts turn out to be not mitigated in the way expected in the ES?

If one thing is clear over the requirement to consider remedial action for monitoring, it is that this should be a fruitful area for future caselaw.

This article was written as a contribution to the EIA Quality Mark’s commitment to improving EIA practice.

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