## The Use of Mitigation in EIA – Implications of Case Law

The IEMA Impact Assessment Steering Group has discussed the implications of a number of legal cases on EIA practice, specifically the use of mitigation in EIA. We therefore wanted to share with the network, a view on the importance of IEMA guidance in avoiding legal challenge.

The current EIA Regulations and national guidance support the role of mitigation in determining whether a project comprises EIA development; and defines the need for mitigation to be adequately described. IEMA have a very clear position on this and produced guidance on the use of mitigation and necessary control mechanisms in their ‘EIA Guide to: Delivering Quality Development in EIA’, which still remains very valid to ensure the delivery of quality EIA.

If mitigation is identified (at any stage of the EIA process), it must be specific and fully evaluated to ensure there is confidence in its effectiveness. There is also a need for clear control measures to ensure that mitigation identified (in some cases at the EIA Screening stage only) are successfully implemented to avoid, reduce or offset an environmental impact.

| The importance of the need for mitigation to be specific and effective was considered in Kenyon R v Wakefield Council & Ors, 18 December 2018. In this case, a decision had been made that the redevelopment of a disused sports complex was not EIA development, and this was in part due to the reliance on future ground investigations and remediation (secured by condition). Whilst the case was dismissed, the case (a) strengthened the role of mitigation in determining whether a project comprises EIA development; (b) confirmed the importance of developing evidence (both specific and implementable) to allow a reasoned conclusion on the need for EIA; and (c) that without specific, effective mitigation, there could be ‘material doubt’ and in this scenario any decision should be ‘in favour of EIA’. |
| Squire R v Shropshire Council, 24 May 2019 further considered the application of mitigation. The challenge made was that effects of odour and dust, associated with the proposed disposal of manure from a chicken farming facility, had failed to be sufficiently considered and assessed. The Environmental Statement (ES) which supported the planning application relied on the application of the Environmental Permitting (England and Wales) Regulations 2016 to adequately control and manage environmental impact from the disposal of manure. |
It was concluded that the ES was legally deficient and planning permission was quashed.

However, the failure of the ES in this case was that the ‘expected residues’, i.e. the manure and its disposal off-site had not been defined as part of the description of development as required under Schedule 4 of the EIA Regulations. If this had been completed, the ES would have duly considered the indirect effects of the project as a whole. This case has brought into question the use of other existing legislative requirements as mitigation, which is promoted by IEMA guidance. They should still be used; however, their application to avoid, reduce or offset environmental impacts requires careful evaluation and the role and function of the legislation (and regulators) needs to be clearly defined alongside the control mechanisms for its effective implementation.

The application of mitigation in EIA is likely to continue to be a topic for legal debate, however, the pitfalls and associated delays and costs to projects can be avoided through the application of IEMA guidance. The careful and considered application of the guidance can also assist with robustly reducing the scope or need for EIA.

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