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Renewal of permission requires habitats assessment

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Published in:
Scottish Planning and Environmental Law

Publication date:
2021

Document Version
Peer reviewed version

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):
Reid, C. (2021). Renewal of permission requires habitats assessment. *Scottish Planning and Environmental Law*, (204), 39-40.

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Renewal of permission requires assessment

Friends of the Irish Environment Ltd v An Bord Pleanála

C-254/19, Court of Justice of the European Union, 9 September, 2020

Extending the duration of a permission granted for construction work may require the authorising body to undertake an appropriate assessment under the Habitats Directive. That was the conclusion of the Court of Justice of the European Union in a case from Ireland which was influenced by the particular circumstances there but contains useful statements of wider application.

Background and Decision

In 2008 an application was granted for permission to build a natural gas terminal close to two Natura 2000 sites on the River Shannon. This was done in accordance with Irish law at the time which did not comply with EU law on the assessment of projects under the Habitats Directive. The permission required work to start within 10 years but after the expiry of that period it was decided to allow an additional five years for the work to commence. The question was whether the Habitats Directive required this decision to be taken only after a full assessment of the likely effects of the project on the protected sites.

The Court held that the new decision did amount to approval of a “project” within the terms of the Directive and therefore an appropriate assessment was required before the extension decision could lawfully be made. That conclusion was, however, influenced by two factors which will not apply in all cases where an initial permission is extended.

The first was that no work had been begun and that the original permission had expired and ceased to have any legal effect before the new decision was made; the Court was therefore not called on to consider the position where the validity of a current permission is being extended. The second was that the process by which the initial permission was granted did not comply with EU law, so that there had never been a proper consideration of the likely impact on the protected sites. These factors mean that the decision may be of limited direct application elsewhere.

Wider observations

The Court’s consideration does, however, include a number of points of wider relevance. Firstly there is a reminder that the rules under the Habitats Directive apply not only to projects that are located in Natura 2000 sites, but also to those that may have a significant effect on them. Especially where rivers, lochs and estuaries are concerned, impacts may be felt well beyond the boundaries of a project site.

Secondly, in relation to determining what counts as a “project”, the Court noted earlier case-law on the relationship between the Habitats and Environmental Impact Assessment Directives. The definition of “project” under the latter is narrower than under the former so that any proposal which requires an environmental impact assessment will *a fortiori* be a “project” under the Habitats Directive if it is in a relevant location.

Thirdly, where there is more than one consideration of a project, the Court noted that the decision-making authority can take previous assessments into account, but the precautionary principle requires that a full assessment is required for a new decision unless it is shown beyond all reasonable scientific doubt that a project will not have a significant effect on the protected site.

Therefore any earlier assessments can be relied on only if they offer complete and definitive conclusions removing any doubt as to the effect of the works and also that there have been no changes to the relevant environmental and scientific data, no amendments to the project and no other plans or projects that must be taken into account in terms of possible cumulative effects. When several years have passed since the original assessment, there will have to be a very thorough review before that can safely be relied on without further consideration of how a project might affect protected sites.

Comment

As noted above, the particular decision here may be of limited direct application, but it highlights the complexities when a project's approval rests on a series of decisions, and the need to take a precautionary approach. Problems have previously arisen in fitting environmental impact and habitats assessments into a situation where decisions come in several stages (*R(Barker) v London Borough of Bromley*, C-290/03) or are amended (*Wells v Secretary of State for Transport, Local Government and the Regions*, C-201/02) and the famous *Waddenzee* case on the Habitats Directive (C-127/02) itself involved the renewal of annual permits. This decision reminds authorities that once initial permission for a project has been granted, any subsequent decision to renew, alter or extend it may again trigger the requirement for careful consideration, and possibly a full assessment, of likely impacts under the Habitats Directive.

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