

Gortnakesh,
Cavan,
County Cavan.
23rs March, 2017.

**Regarding: National Planning Framework - Cavan County Council, Submission by Val Martin,
Irish Spokesperson for the European Platform Against Wind Farms.**

I welcome the opportunity to participate and the extension of time allowed. I base my submission on the feature article in the Anglo Celt of the 23rd March, 2017.

A few years ago I called to the planning office in Cavan and staff admitted that they were not familiar with UN and EU planning laws on the environment. I am available to clarify the law or to address your staff on this law. In the area of wind farms and pylons, it appears many provisions were being by-passed and those affected by these structures were forced to insist on these rules being complied with. In the case of Raragh wind farm 09/270, I took a Judicial Review on the EIA Directive and won. It is not meant to be like this, the public authority should be to the forefront in administrating the legal framework and not trying to dodge legal requirements.

Legal Framework.

The Aarhus Convention requires access to information which is largely in place, but the Ombudsman does not deal adequately with appeals. It requires public participation when all options are open, which is covered in Article 6 of the SEA Directive and Article 6 and 11 of the EIA Directive. It requires access to the courts which is in most part denied because Irish courts will not give protective costs orders under Section 50 (B) of the Planning and Development Act 2000 in advance of the pleadings.

The SEA Directive is transposed into Irish Law by statutory instrument 435/2004 and 436/2004 for town and country planning. Article 3 (2) of the Directive sets out the industries and activities for

which an assessment is mandatory or where an assessment is required because of the environmental impact determined by a screening.,

What requires an SEA.

All public plans or programmes listed in Article 3 (2) which are above threshold require an SEA automatically. If they are below threshold but where they are likely to have significant impact on the environment, they require such assessment. A draft environmental report is prepared, public consultation carried out. A final environmental report with copies of all submissions is forwarded to the competent authority which in this case is Cavan County Council. The environmental report is adopted.

If the plan's components form part of a National Plan or programme there must be in existence a draft Environmental Report , details of submissions received leading to a final environmental report where due account is taken of all submissions. I presume a notice under the regulations was published in the local newspaper in this case, if it was not, this process must be stopped and a notice published. To do it correctly, a few radio notices would need to be broadcast.

Who must do it?

Responsibility for carrying out the assessment rests with the higher of public authorities concerned. The National Authority, the regional authority and the administrative District. In the case of energy, agriculture, river management and Fisheries the Irish government is responsible. Cavan Co. Co. cannot do it for energy. The SEA environmental report sets the legal framework for future planning consent for projects under the EIA Directive. A project listed cannot be considered for planning consent until an SEA is completed for the public plan or programme of which it forms part. It is not sufficient to just publish a notice, the public concerned must be identified and given an opportunity to participate. Inadequate notification will invalidate the entire process.

Cavan Co. Co. can carry out a County Development Plan and this can include various regulations and plans for wind energy and cabling but only as a tiered part of the National SEA for the particular plan or programme. All authorities may delegate to a particular competent authority, such as Eirgrid Plc.

Who must enforce it?

The planning authorities must ensure compliance and mark as void any planning application project where there is no SEA. The public are given an enforcement roll through Judicial Review.

I have been accepted by the courts as an environmental campaigner and I specialise in energy plans or programmes. Energy is listed in Article 3 (2) of the SEA Directive together with fisheries, agriculture, forestry, and town and country planning. All of these industries require an SEA. Note the Planning and Development Act 2000 has been amended several times to take account of the SEA Directive per S.I. 436/2004.

SEA for energy.

The EU Directive 2009/28/EC directed 11 forms of renewable energy be identified and gave member states authority to develop one or more sources. In Ireland wind energy was chosen as the principle source. The Directive was not complied with.

Non-compliance on energy.

The National Renewable Energy Action Plan of 2010 allowed two weeks for public participation. No notices were published and I never knew it was being conducted. There were 58 submissions of which only 3 were from members of the public. The compliance Committee of the United Nations Aarhus Convention later ruled that the time allowed was inadequate. In 2012, Grid 25 was carried out by Eirgrid as the competent authority. No notice was published and there were only 24 submissions of which only 3 were from members of the public.

In 2014, Eirgrid carried out an assessment on Grid Link in the South East. The same notification was posted to inform the public as was given for Grid 25. I and a few other campaigners set about notifying those affected and raised public awareness. There were 35,000 submissions to that consultation. This proved that there was no opportunity for public participation earlier.

The Banteer court case.

In this case, seven members of the Shivers family lived in the local Banteer area of County Cork. A wind farm was proposed with all the hype and they did not object. When the wind farm was

commissioned it soon became clear they could not sleep with the noise, which was much worse than expected. The Project passed the EIA process. Finally some residents were forced to leave their homes and rent accommodation. They sued for nuisance and the wind farm company, Enercon Ltd accepted liability. The case is adjourned until April to measure the damages to be paid. This was reported in the National newspapers.

What must be done?

Cavan County Council must examine all topics covered, to see if any part of it is an industry for which the National Competent Authority is obliged to carry out an SEA. Energy is one, forestry is an obvious one in County Cavan as is forestry and river management also comes to mind. There is one for River Basin Management. Once it is known that the process involves the SEA Directive, the local authority must ask the National authority for an Environmental report in compliance with SEA Directive. If there is none, any further assessment or decision by Cavan Council will be beyond the powers of the council and ultra vires. Any planning permission granted may be quashed by the High Court on Judicial review.

Energy planning.

The European Court of justice ruled in case 290/15, that no laws or guidelines can be introduced for wind energy without a full SEA having been carried out. There was no SEA carried out in any EU country on renewable energy as far as I am aware. In relation to wind and solar energy projects there can be no plans or guidelines at regional or administrations level without an SEA. The same applies for town and country planning. There must be an SEA on it at National level before any local arrangements can be put in place to regulate it for planning purposes. This would include recent government announcements for the renovation of rural towns if any of these is a project under the EIA Directive.

In this case Patrice D'Oultremont and Others –v- Regeon Wallonne (Belgium) the court ruled that “Articles 2(a) and 3(2)(a) of Directive 2001/42/EC of the European Parliament and the Council of the 27th June 2001, on the assessment of certain plans and programmes on the environment must be interpreted as meaning that a regulatory order, such as that at issue in the main proceedings, contained various provisions on the installation of wind turbines which must be complied with when administrative consent is granted for the installation and operation of such installations comes within the notion of plans and programmes within the meaning of that directive. The Advocate General stated that the circumvention of the SEA Directive must not be allowed.

Public participation.

The SEA Directive and the EIA Directive both contain provisions for the public to participate when all options are open. Therefore public participation must happen before the final decision is made.

Set back distances for wind turbines.

In recent years a number of rural local authorities on the recommendations of elected representatives introduced set back distances for wind turbines. These were much longer than those in the 2006 guidelines for wind farms. Minister Alan Kelly countermanded the actions issuing a directive to return to the 2006 guidelines. This was replicated in County Donegal last when the set back distance was increased to 10 times the turbine height. Councillor John Campbell took a high court challenge by way of Judicial review and the judge quashed the direction of the Minister. Minister Simon Covney then reinstated the earlier directive in defiance of the High Court. Mr Campbell took a second judicial review and the court ruled again in his favour. The Minister did not interfere again.

In accrual fact, the court was correct in ruling that the Minister does not have jurisdiction to issue such a directive, but no executive action can be taken outside the SEA Directive. It is a tiered process.

Connection between the SEA and EIA Directives.

On reading the EIA Directive 2011/92/EC one will find a connection between the SEA Directive where it sets the framework between it and future planning consent for projects, but not visa – versa. There is no reference to the SEA in the EIA Directive. This might be seen as some sort of get out clause.

However, it must be borne in mind that there are three categories of planning application from the top down. There are applications which is a project which is part of a public plan or programme, there is a project and there is a development. It is a tiered process.

Many proposed works may be projects which are not part of a public plan of programme. A quarry might an example. A private water scheme, a horse training facility or indeed an hotel. A

development which is not listed in the Annexes to the EUA Directive can become a project after screening for its likely environmental effects. There, the SEA Directive would not apply.

Town and Country Planning.

There is a lot of case law on Town and Country planning in the UK and this is published in the book by Gregory Jones QC on the SEA Directive available on-line. Mr Jones was the one who did the examination into An Bord Pleanala. Of course Town and Country planning is listed as requiring an SEA.

Summary.

I have avoided being too technical or legal here. I can advise on such matters if requested as I have assistance from colleagues who are experts in the legal issues. However, the local authority has a responsibility to safeguard the health of its people. If the County development plan is finally compiled without proper public consultation, without compliance with the SEA Directive or in a way to deny me my rights under the law, I may take a judicial review to quash such a plan. I hope that will not be necessary.

I would like to see the present "us and them" way of running environmental matters ended and replaced by partnership. The day of building wind farms with 126 meter high wind turbines in the midst of family homes will either end now or will end with courts with Judicial Reviews or claims for damages. Failure to comply with the law could make Cavan County Council liable for claims for such damages because they have a duty of care to citizens.

The Kingscourt Residents against the Raragh wind farm and the Lough An Leagh Heritage Group have asked to be associated with this submission. At the planning level the council should adopt a more stringent approach to protect citizens. The 2006 guidelines are inadequate.

A full SEA must be carried out by government on Ireland's renewable energy plans before any more wind farms can be installed.

<http://ec.europa.eu/environment/eia/sea-support.htm>

Yours faithfully,

Val Martin