

ARTHUR COX

7th Ocean Energy  
Industry Forum 2016  
Ocean Energy:  
Developments & Plans  
Consenting issues

Friday, 12 February 2016

# No. 1 Consenting Issue: Appropriate Assessment

- What are the legal tests?
- What level of scientific knowledge is required?
- What level of scientific certainty is legally required before a project consent can be granted?
- 5 Key 'De-Risking' Considerations

# What are the legal tests?

(1)

A screening for Appropriate Assessment of a project shall be carried out by the public authority to assess,

- in view of best scientific knowledge and
- in view of the conservation objectives of the site,
- if that project, individually or
- in combination with other plans or projects
- is likely to have a significant effect on the European site.

(Article 42 (1), Habitats Regulations 2011 (as amended))

The public authority “shall” determine that an Appropriate Assessment is required

- if it cannot be excluded, on the basis of objective scientific information
- that the project, individually or
- in combination with other plans or projects,
- will have a significant effect on a European site.

(Article 42(6), Habitats Regulations 2011 (as amended))

# What are the legal tests?

(3)

- A public authority “shall” give consent for a project
- only **after** having determined that
  - the project shall not adversely affect the integrity of a European site.

(Article 42 (16), Habitats Regulations 2011 (as amended))

# What level of scientific knowledge is required? (1)

*“the best scientific knowledge in the field”*

*(Case C-127/02 Waddenzee [2004] ECR I-7448)*

*(Kelly v An Bord Pleanála [2014] IEHC 400)*

*“obligation on the decision maker to consider the best available scientific knowledge at the date of the decision”*

*“the best scientific knowledge which is reasonably available”*

*(People over Wind v. An Bord Pleanála [2015] IECA*

# What level of scientific certainty is legally required? (1)

**Where doubt remains as to the absence of adverse effects on the integrity of the site** linked to the project being considered, the competent authority will have to refuse authorisation.

*(Case C-127/02 Waddenzee [2004] ECR I-7448)*

Must contain complete, precise and definitive findings and conclusions

**- capable of removing all reasonable scientific doubt** as to the effects of the works proposed on the protected site concerned.

*(Case C-258/11 Peter Sweetman v An Bord Pleanála and Others)*

# What level of scientific certainty is legally required? (2)

- Must contain complete, precise and definitive findings and conclusions
- May not have lacunae or gaps.
- The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions.
- **The reference to findings and conclusions in a scientific context requires both**
  - **findings following analysis and**
  - **conclusions following an evaluation**
  - **each in the light of the best scientific knowledge in the field.**

*(Kelly v An Bord Pleanála [2014] IEHC 400)*

# What level of scientific certainty is legally required? (3)

A decision-maker may only include a determination that the proposed development will not adversely affect the integrity of any relevant European site

- where upon the basis of complete, precise and definitive findings and conclusions made
- it decides that **no reasonable scientific doubt remains as to the absence of the identified potential effects.**

*(Kelly v An Bord Pleanála [2014] IEHC 400)*

## 5 Key 'De-Risking' Considerations

(1)

1. Engage a species-specific ecologist
2. Ensure that technical experts are using the best science available in the field when compiling Natura Impact Screening Statement / Natura Impact Statement
3. Ensure that the correct legal tests are used in the Natura Impact Screening Statement/Natura Impact Statement

## 5 Key 'De-Risking' Considerations

(2)

4. Recommend that an NIS is prepared if there is any possibility that the proposed development could have significant effects on a European site, in light of its site conservation objectives
5. Determine whether a development would bring about a permanent and irreparable loss of a European site / protected habitat. If so, prepare an 'IROPI' application, as opposed to a 'standard' application

Thank you for your  
time today.

Danielle Conaghan

Senior Associate

Arthur Cox

Tel.: + 353 (0)1 618 1197

E-mail: [Danielle.Conaghan@arthurcox.com](mailto:Danielle.Conaghan@arthurcox.com)