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Environmental challenges to major projects

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## Environmental challenges to major projects



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MAJOR PROJECTS, SUCH AS ENERGY generation stations or waste treatment plants, can meet with fierce opposition, often on environmental grounds. Sometimes the opposition is led by non-governmental organisations (NGOs) voicing concerns over climate change or habitat destruction, sometimes the campaign is driven by local residents anxious about amenity issues, such as noise or odour pollution, and in many cases it is a combination of the two. As the public's interest in environmental protection has risen, so too has the influence and power of the environmental NGOs and the number of claimant litigators specialising in environmental challenges. As such, in-house lawyers for companies involved in major projects need to be alert to the myriad ways in which projects can be delayed or even brought to a halt by well-organised opposition.

This article looks at objections to the project on environmental grounds at the consenting stage and, in particular, it focuses on legal challenges to the environmental permit, rather than challenges to planning permissions, section 36 Electricity Act 1989 consents or the new development consent orders under the Planning Act 2008. This article seeks to provide some practical advice on the steps that can be taken to minimise the risks and protect against challenges based on the experience of the authors.

### COMMUNICATION AND PUBLIC PARTICIPATION

As this article has a legal focus it is not intended to go into any detail on practical issues of public relations, but it is important to mention at the outset that at least some of the risk can be reduced by actively engaging with the community at the start of a project and ensuring that the community feels that it has participated in the decision making. An interesting recent example is the agreement reached between the community of Fintry in Stirlingshire and the developers of the adjacent Earlsburn wind farm to build an additional turbine to supply the village and to sell the surplus for the benefit of the community. The consenting passed with only a single objection from the local community.

### ENVIRONMENTAL OBJECTIONS TO MAJOR PROJECTS

Of course, not all developers find themselves with communities as open

mindful as Fintry and it may be that, despite faultless community engagement, there are nevertheless objectors to a development. The objections could be for several reasons falling under the umbrella of environmental concerns but which can be very different in scope.

At a local level, concerns about the affects on the amenity can range from nimbysism (impact on land values, loss of a view) to concerns about noise and dust nuisance (from the construction phase but also sometimes from the operational phase). Concerns over odours may also be a big issue for certain projects, especially those in the waste sector.

Concerns may also be global. Objections to fossil fuel generation stations on the grounds that development will contribute to man-made climate change are commonplace. There may be fears that certain developments will affect important habitats (and this is a developing area of law worthy of an article in its own right). The concerns of NGOs can even stretch to habitats many thousands of miles away, as is demonstrated by the ongoing fight over the proposed W4B biofuels power station at Avonmouth. In that case local campaigners and NGOs, including the Bristol branch of Friends of the Earth, were extremely vocal in their opposition to a proposed power station to burn palm oil and jatropha oil on the grounds that growing the fuel would lead to deforestation of ecologically important rainforests in the tropics. Bristol City Council agreed and refused the application on the grounds that the sustainability of bioliquids was a material consideration for local planning even though the concerns related to deforestation in another continent. On appeal, the Secretary of State granted planning permission but on the condition that all fuel burnt in the plant had to be certified as sustainable under the EU Renewable Energy Directive criteria. This has not satisfied the objectors, however, and, at the time of writing, the Friends of the Earth Bristol website states that the campaigners 'are determined that this plant will not operate'.<sup>1</sup>

### LEGAL CHALLENGES AT THE ENVIRONMENTAL PERMITTING STAGE

For many years, the focus of environmental campaigners and objectors has been to

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commence judicial review proceedings against planning consents. Claimant litigators and NGOs are well versed in the potential arguments that can be raised to quash planning consents, and some claimant lawyers have made a career out of challenges on the grounds of absent or inadequate environmental impact assessments (EIAs) under the EU Environmental Impact Assessments Directive.

However, in recent years, a second front has opened up in the battle against major infrastructure projects. This second front involves challenging the environmental permit under which many sites must operate.<sup>2</sup> The benefits to those opposed to a development are clear: it allows two bites of the cherry in the attempt to stop the project. Objectors understand that timing is crucial to the success of a development and that there is a chance that, even if their legal challenges are unsuccessful, the simple fact that the project is delayed may have major effects on the financial viability of the project as investment is made elsewhere, or investors decide that the project is too risky or simply get cold feet.

The effect of such challenges is that the Environment Agency (EA) has become increasingly nervous and this fear of subsequent challenges can manifest itself in considerable delay to the grant of a permit or the imposition of conditions that are tighter than it would otherwise have been reasonable to grant. Of course, the EA is right to be cautious and a carefully reasoned grant of a permit, which is robust and therefore deters challenge, benefits the developer as well. However, developers must be careful that the pendulum is not allowed to swing too far because delays at the permitting stage do themselves have considerable effects on the timing and costs of major projects.

There are steps that developers can take to minimise the risk of subsequent challenges, such as a careful and thorough application with the potentially contentious issues addressed in detail, and resolved, in the supporting papers. Detailed responses to issues raised by the EA or by objectors during the consultation will also assist. Good communication to encourage public participation can play a role to avoid objectors feeling shut out of the process (which itself is often a reason, if not always a ground, for judicial review).

However, it is inevitable that in some cases judicial review proceedings will nevertheless be launched against the EA following the grant of the environmental permit and, in such cases, the biggest problem to the developer is often the resulting delay.

*R (on the application of) Edwards & ors v Environment Agency & ors* [2008] reached the House of Lords in 2008, almost five years after the EA had issued a permit to Rugby Cement Ltd to allow the combustion of shredded and chipped tyres as a partial substitute fuel in its cement kilns. In fact,

the original application by the cement works was made on 21 August 2001 and, although the substantive issues were resolved in the 2008 House of Lords decision, the litigation is continuing on the issue of costs (on 15 December 2010 the Supreme Court made a reference to the European Court of Justice (ECJ) and, with its backlog, the ECJ is not likely to hand down its judgment for another couple of years).<sup>3</sup> It is no wonder that the EA is anxious to avoid challenges to its permits in the future.

In *Edwards* the precise grounds of the judicial review evolved as the challenge moved through the courts and the issues addressed by the House of Lords were in many ways different to those addressed in the lower courts. One ground was that the grant of the permit was vitiated by procedural irregularity because (it was alleged) the EA had not properly discharged its statutory obligation of public consultation before concluding whether the proposal to substitute the fuel would cause significant pollution. The appellants also alleged that an EIA was a mandatory requirement for the project. The House of Lords unanimously dismissed the appeal and the grant of the permit was upheld. For the purposes of this article, there are three key observations. The first, as already mentioned, is the length of time it took for the substantive issues to be resolved through the court. The second is that the grounds for judicial review evolved over the years as the lawyers for the claimants sought to advance novel arguments as to why the permit should not be granted. The third is that *Edwards*

## NOTES

- 1) See <http://www.bristolfoe.org.uk/?Content=Campaign=Biofuels> (5 April 2011).
- 2) Since the introduction of the Environmental Permitting (England and Wales) Regulations 2007, pollution prevention and control permits and waste management licences (and indeed other environmental consents) have been rebranded as ‘environmental permits’. To avoid confusion, this article uses the new terminology throughout.
- 3) This article does not address the issue of costs in environmental claims but the subject is topical: on 6 April 2011 the European Commission announced that it was taking the UK to the European Court of Justice for breaching its obligation under EU law to ensure that environmental challenges are fair, equitable, timely and not prohibitively expensive, and this follows similar criticism from the Aarhus Compliance Committee in 2010. It is likely that the government will be required to make it easier and less costly for the type of challenges discussed in this article to be brought in the future. The government’s current proposals to alter costs of UK litigation, published on 29 March 2011, do not address environmental judicial review challenges.

is in the vanguard and, although ultimately unsuccessful on its particular facts, it is expected that there will be more challenges to environmental permits on environmental grounds in the future.

Another recent example, with a novel angle, is the High Court decision in *Yates-Taylor v Environment Agency & ors* [2010]. *Yates-Taylor* concerned a proposed incinerator at Queen Elizabeth Dock in Hull. Two planning permissions were granted:

- the first by East Riding of Yorkshire Council in December 2006; and
- the second by Hull City Council in January 2007.

The operator applied for an environmental permit in October 2007 but, although the permit was granted, there was a challenge, and the EA agreed to revoke the permit and the operator made a fresh application in December 2008. The EA granted the permit on 24 June 2009, with a decision document of some 123 pages in length. The objectors (a single issue environmental group, Hull and Holderness Opposing the Incinerator (HOTI), of which Mr Yates-Taylor was a member) launched an application for judicial review on four grounds, the most novel of which was that, although the EA had undertaken its own consultation process, it had failed to take into account the opinions of the public that were voiced during the consultation run by the planning authority and, as such, the EA had failed to take into account 'information' as required by the Integrated Pollution Prevention and Control Directive (the IPPC Directive). Judgment was handed down on 8 June 2010 and, again, the EA, assisted by the developer as an interested party, was ultimately successful, but yet again *Yates-Taylor* shows that significant time and costs were required to defeat the challenge. As a postscript, the plans for the incinerator were scrapped in January 2011.

**INTERACTION BETWEEN PLANNING AND ENVIRONMENTAL PERMITTING**

The interaction between the planning and environmental permitting regimes is well illustrated in *R (on the application of) Lewes District Friends of the Earth Ltd & ors v East Sussex County Council & anor* [2008]. *Lewes* concerned proposals for a waste incinerator

at Newhaven. As is the current trend, those opposed to the incinerator launched their challenge on two fronts:

- 1) judicial review of the grant of the environmental permit; and
- 2) judicial review of the grant of planning consent.

The challenge against the permit by way of judicial review was successful and the permit was quashed with the consent of the EA shortly after the local authority had granted planning permission. The objectors then challenged the planning permission on several grounds, one of which was that the local authority had been wrong to assume that environmental issues would be adequately regulated by the (now quashed) environmental permit. Sullivan J held that, because the planning and pollution prevention and control regimes were complimentary but separate, and because a permit was not a legal requirement for the grant of planning permission, the local authority had not erred in granting planning consent on the basis that the environmental permit would adequately regulate effects on the environment. Sullivan J was no doubt mindful of the EA's submissions that, while it had consented to judgment on technical grounds, it was still minded to grant the permit and had even issued a revised draft for consultation.

**STRATEGIES AND TACTICS IN ENVIRONMENTAL JUDICIAL REVIEW**

Judicial review can be frustrating for developers and operators because the claim is against the EA, and the developer or operator is relegated to the role of an 'interested party'. However, that is not to say it must sit on the sidelines. The developer can play a valuable role at all stages of the judicial review.

First, the developer can and often should produce evidence to convince the court that the judicial review must be dealt with on an expedited basis. In many cases, the claimants are in no rush for the litigation to be resolved because they perceive (often quite correctly) that delay itself may have the consequence of precipitating the downfall of the project. The evidence produced in an application for expedition must explain why the usual timescales for

judicial review will cause substantial prejudice and it must explain that the prejudice is not just to the developer's commercial interests but also to the public interest. The evidence will need to be drafted carefully, especially when addressing why the public interest argument favours expedition.

Recent cases in which interested parties have been successful in convincing the court that the case must be dealt with on an expedited basis so as not to jeopardise the project include:

- *R (on the application of) Bailey & ors v Secretary of State for Business, Enterprise & Regulatory Reform & ors* [2008] (judicial review of a section 36 consent for a 350MW biomass plant in Wales);
- *R (on the application of) North Devon District Council v Secretary of State for Business, Enterprise & Regulatory Reform & anor* [2008] (judicial review of a section 36 consent for an onshore wind development);
- *Finn-Kelcey v Milton Keynes Council & anor* [2008] (judicial review of planning permission for an onshore wind farm); and
- *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change*

*Bailey & ors, R (on the application of) v Secretary of State for Business, Enterprise & Regulatory Reform & ors* [2008] EWHC 1257 (Admin)

*Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change* [2010] EWHC 2312 (Admin)

*Edwards & ors R (on the application of) v Environment Agency & ors* [2008] UKHL 22

*Finn-Kelcey v Milton Keynes Council & anor* [2008] EWCA Civ 1067

*Lewes District Friends of the Earth Ltd & ors, R (on the application of) v East Sussex County Council & anor* [2008] EWHC 1981 (Admin)

*North Devon District Council, R (on the application of) v Secretary of State for Business, Enterprise & Regulatory Reform & anor* [2008] EWHC 1700 (Admin)

*Yates-Taylor v Environment Agency & ors* [2010] EWHC 3038 (Admin)

***‘Developers and operators in sectors such as energy and waste are finding that their projects are under increasing scrutiny and legal challenges have the potential to disrupt or even derail a project.’***

[2010] (judicial review of a section 36 consent for a biomass plant in Avonmouth).

Burges Salmon acted for the interested party in each of these cases. As well as succeeding in the application for expedition, in every case the interested party was able to support the public body in the successful defence of its decision and all four applications were ultimately dismissed, allowing the projects to progress.

Secondly, an interested party can put forward submissions and arguments at both the permission stage and at the substantive hearing. Getting the matter dismissed at the permission stage on the papers is obviously a great strategic advantage because, although (as in *Yates-Taylor*) the application can be renewed at an open hearing, the claimants will be very much

on the back foot if a High Court judge has already rejected the claim as having no reasonable prospect of success.

There is no doubt that the interested party can provide valuable assistance to the defence of the EA's decision by bringing a further set of legal minds to bear on the task. However, the developer and the EA must be careful as to the extent of the co-operation, because the EA must (and moreover must be seen to) maintain an appropriate degree of independence from both parties. Overstepping the mark could lead to embarrassment for the EA and difficulties for the developer. The flip side of the coin is that, in the absence of any co-operation, there is clearly a risk that the EA and the interested party could adopt inconsistent positions or undermined each other's arguments, and therefore a careful balance must be struck.

## CONCLUSION

Environmental issues now have a high profile with the public and environmental NGOs, and local pressure groups are often well organised and well funded. Developers and operators in sectors such as energy and waste are finding that their projects are under increasing scrutiny and legal challenges have the potential to disrupt or even derail a project. Even in cases where the merits favour the operator, the delay and the negative publicity from sustained challenges can themselves be fatal to the project's success. Judicial review challenges are extending beyond the realm of planning and are increasingly being used to test the grant of environmental permits by the EA, with a subsequent increase in nervousness by the EA in its determination of applications. In-house lawyers with responsibility for such projects need to be alert to the strategies and tactics of seasoned objectors if they are to play their role in facilitating the successful completion of the project and its ongoing success in the operational phase.

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