
Environmental Impact Assessment and Environmental Quality Standards

By Eckard Rehbinder, Professor emeritus of economic,
environmental and comparative law, Goethe University Frankfurt,
Research Centre for Environmental Law

I. The Issue

- Core provisions: Articles 3 and 8 of the EIA Directive
- No formal requirement of taking the assessment into consideration in granting consent
- Assessment as task of the competent authority, but some elements of an assessment in the EIS and consultation of authorities and the public
- Criteria to be used for the assessment and in granting consent: almost entirely left to the member states
- Role of environmental quality objectives and environmental quality standards as issue

II. Existing Practice

1. Member State implementation of Articles 3 and 8

a) In general

- Assessment phase of the EIA process as a sort of stepchild; duty to take the EIA results into consideration has been implemented

b) Germany

- Most comprehensive regulation in Germany
The competent authority must assess the relevant environmental impacts contained in the summary description and take this assessment into consideration in deciding on the admissibility of the project with a view to effective environmental precaution pursuant to applicable laws.
- Assessment of the environmental effects is deemed to be equivalent to the interpretation and application of the statutory environmental requirements
- In granting consent, countervailing concerns may have to be taken into consideration.

II. Existing Practice

2. European jurisprudence

- The legal meaning of the assessment and the contents of the duty to consider have not played a major role
- More recent Court decisions: scope of the assessment
- Case “Commission v. Ireland” (2011): meaning of and responsibility for the assessment

III. Commission Proposal

- Clarification of the role of assessment
- Major changes in Article 8
- The consent shall contain:
 - the environmental assessment of the competent authority as piece of “information”
 - a statement summarising how environmental considerations have been integrated
- Criteria only with respect to the assessment elements of the EIS:
The developer shall take into account “the environmental protection objectives established at EU or Member State level which are relevant to the project”

IV. Discussion and recommendations

1. General Remarks

- Small step in the right direction, but need for more specific and ambitious rules
- The assessment should be formally elevated to an indispensable element of the substantive decision on the project.
- Environmental quality objectives and standards crucial for increasing the relevance of the EIA for the outcome of the consent for the project
- Numerous environmental quality objectives and standards at EU and member state levels that might be used for assessment

IV. Discussion and recommendations

1. General Remarks

- Remaining problems:
 - How close should be the link to the normative programme of the decision-making process on the project?
 - What if the existing environmental quality objectives and quality standards are deemed to be inadequate?
 - What if there are no legal environmental quality objectives and quality standards?

IV. Discussion and recommendations

2. Relevance of the prerequisites for granting consent

- a) **Anticipated effect of the environment-related consent prerequisites in the assessment phase of the EIA process?**
- b) **Applicable law provides for a broad scope of concerns to be addressed and a broad margin of planning discretion**
 - Typical: authorisation of infrastructure facilities
 - Scope of the consent not limited to pollution but also includes impacts on nature and landscape
 - Consent should also consider whether the adverse effects caused by the project can be kept well below the applicable standards; role of the precautionary principle
 - Interaction between environmental media, cumulative effects, accumulation over time, combined effects and the total pollution load should enter into the assessment

IV. Discussion and recommendations

2. Relevance of the prerequisites for granting consent

c) **The prerequisites for granting consent are more limited**

- Example: Industrial Emissions Directive (IED).
- Scope of application limited to pollution
- Some room for an assessment beyond existing environmental quality standards
- Problems: accumulation of pollutants over time, combined effects and the total pollution load

IV. Discussion and recommendations

3. Assessment and inadequate quality objectives and standards

- Question: Can the assessment be used to “correct” inadequate environmental standards?
- The meaning of Section 12 of the German EIA Act
- Fundamental question: Should the EIA have a substantive function?
Acceptable vs. optimal solution
- New Article 8(2) as a door-opener?
- Conclusion: Clarification that environmental quality objectives and standards are orientation values for assessment but do not necessarily mark the upper level of desirable environmental quality

IV. Discussion and recommendations

4. Assessment in the absence of quality objectives and standards

- Environmental quality objectives established in spatial and special environmental plans: Can be used
- Emission standards: Can be used in the absence of a high level of background pollution or cumulative effects from other facilities to be anticipated
- Role of purely scientific standards: Can be used in the assessment (value of the environmental asset, severity of the impairment, adequacy of mitigation) if the competent authority duly reflects their nature, content and limitations
- Conclusion: The Directive should explicitly recognise the relevance of these criteria