

Guidance for applicants on using the design envelope for applications under section 36 of the Electricity Act 1989

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1. Introduction

- 1.1. This guidance has been prepared by Marine Scotland (MS) and the Energy Consents Unit (ECU) and explains how the design envelope (also known as the 'Rochdale Envelope') assessment approach may be applied in the context of applications received for generating stations under section 36 of the Electricity Act 1989 (the 'Electricity Act'). This guidance also provides background to the relevant case law and environmental impact assessment (EIA) practice that has developed in this area.
- 1.2. This guidance suggests ways to address uncertainty where it exists and allow sufficient flexibility where required to enable the consideration of a proposed development, and in particular the use of a flexible approach in the EIA.
- 1.3. Section 36 applications must comply with the legislative requirements set out in: the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017; the Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (applying to inshore waters); and the Marine Works (Environmental Impact Assessment) Regulations 2007 (applying to offshore waters) (together the 'EIA Regulations'). The EIA Regulations include requirements relating to the information that must be included in an EIA where projects require EIA.
- 1.4. More general good practice guidance on onshore applications under the Electricity Act is available at the following link: [Energy consents - Energy infrastructure](#). Guidance on offshore applications under the Electricity Act is available at the following link: [Marine Scotland Consenting and Licensing Guidance](#).

2. Background and purpose

- 2.1. Applicants have approached the ECU and MS seeking discussions on the degree of flexibility that would be considered appropriate in order to address the uncertainty often inherent in the context of onshore and offshore wind applications.
- 2.2. The ECU and MS continue to expect applicants to provide full details of proposed developments in applications and to reflect those details in the EIA report submitted with the application. Applicants must demonstrate that the likely significant environmental effects of the proposal have been properly assessed, and proposals require to be clearly defined and sufficiently detailed to enable determination of an application. The design envelope assessment approach should only be used where it is necessary and should not be treated as an opportunity to provide insufficient detail in the application documentation.

- 2.3. It is also recognised that in some instances, the nature of the proposed development and evolving technology mean that some aspects of the final project are yet to be settled in precise detail at the time that the application is submitted (such as the precise location of certain types of infrastructure, the foundation type, the size of certain structures or the turbine model). Where that is the case and some details are still to be finalised, the design envelope approach can be employed for such applications to enable a degree of flexibility and address these uncertainties. Through the design envelope approach, the application can set out parameters for the proposal including the maximum extents of the proposal and can assess on that basis what the likely worst case effects of the proposal may be. The detailed design of the project can then vary within this 'envelope' to ensure that the project as-constructed has been properly assessed. The approach taken must be sufficient to enable a proper assessment of effects in the context of the receiving environment.

3. Case law and principles

- 3.1. The design envelope principle was developed from judgments in cases in the Queen's Bench Division of the High Court: *R v Rochdale MBC ex parte Tew and Others (No. 1)* [2000] Env L.R. 1; and *R v Rochdale MBC ex parte Milne (No. 2)* [2001] Env. L.R. 22. These cases dealt with challenges to decisions to grant outline planning permissions for a proposed business park in Rochdale.
- 3.2. Whilst these cases dealt with previous EIA regulations applicable at the time and related to outline planning permissions, a practice has since emerged of using the design envelope approach for developments requiring EIA where the final details of a project are unknown at the time the application is submitted.
- 3.3. The first of these cases was a challenge to the grant of outline planning permission on a number of grounds, the most relevant of which was that the information provided by the developer to describe the development failed to meet the requirements of the EIA regulations in place at that time, on the basis that the application in particular did not contain any information as to the design, size or scale of the development. The application contained an environmental statement (ES) and an ecological survey, based on an illustrative master plan and a schedule of uses. The challenge was successful and the Court's key findings relevant to this guidance can be summarised as follows:

- Whilst a “bare outline” application is permissible, an ES based on such an application could not be compliant with the EIA regulations in place at the time. In accordance with the objectives of the EIA Directive in place at the time (EC Directive 85/377 on the assessment of the effects of certain public and private projects on the environment), the information contained in the ES should have been both comprehensive and systematic, so that a decision to grant planning permission could be taken in full knowledge of the project’s likely significant effects on the environment.
- The ES did not need to contain “every conceivable scrap of environmental information” about the project, but the legislation requires likely significant effects to be addressed.
- Further, it may be appropriate to give illustrative floor space figures, and then the ES could assess the impact of a range of possible figures before describing the likely significant effects. Conditions could then be imposed to ensure that any development keeps within those ranges.

3.4. In the second of these cases, the same developer revised its planning application, including a new ES, and planning permission was again granted – this case was a challenge to that decision, on the basis that a sufficient description of the development had not been provided. Although a description of the scale and size of the proposed development had been provided, the design of the scheme was not provided at that time. The challenge was unsuccessful and the Court’s key findings relevant to this guidance can be summarised as follows:

- The requirement in the EU Directive to provide information on the site, design and size of the project was, and was intended to be, sufficiently flexible to accommodate the specific characteristics of different types of project and accordingly, it was possible to provide more or less information on site, design and size, depending on the nature of the project to be assessed.
- Where a project was, by its very nature, not fixed at the outset, but is expected to evolve over a number of years, there was no reason why a “description of a project” should not recognise that reality. What was important was that the EIA should then take full account at the outset of the implications for the environment of this need for an element of flexibility.

- For some projects, it will be possible to obtain a much fuller knowledge of the likely significant effects on the environment. The aim is that as much knowledge as can reasonably be obtained, given the nature of the project, about its likely significant effects is available to the decision-maker. However, it also made clear that: “This does not give developers an excuse to provide inadequate descriptions of their projects. It will be for the authority responsible for issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that it has ‘full knowledge’ of its likely significant effects on the environment. If it considers that an unnecessary degree of flexibility, and hence uncertainty as to the likely significant environmental effects, has been incorporated into the description of the development, then it can require more detail, or refuse consent” (paragraph 95).
- In assessing likely significant effects, it is possible to adopt a “cautious worst case” approach. Such an approach will then feed into the mitigation measures, which must be adequate to deal with the worst case.

3.5. This second case was then appealed to the Court of Appeal in *R v Rochdale MBC* [2000] 12 WLUK 678. The Court refused the application for permission to appeal and reaffirmed the findings in *R v Rochdale MBC ex parte Milne (No. 2)*. The Court also confirmed the following in relation to the adequacy of descriptions of development:

- What is sufficient in terms of the description of development “...is a matter of fact and degree. There is no blueprint which requires a particular amount of information to be supplied. What is necessary depends on the nature of the project and whether... enough information is supplied to enable the decision-making body to assess the effect of the particular project upon the environment.” (paragraph 33)
- It is for the decision-maker to decide if the information is sufficient, but there may be cases where the court can and should intervene where it finds that no reasonable authority could have been satisfied with the amount of information it was supplied with in the particular circumstances of the case.

3.6. Certain key principles have emerged from these and subsequent cases, as well as the practical application of them. ECU and MS consider the following points as the key principles for applicants to consider when using the design envelope approach:

- Application documents should explain the need for and the timescales associated with the flexibility sought for the proposed development and this should be established within clearly defined project parameters;

- The parameters established for the proposed development must be sufficiently defined to enable a proper assessment of the likely significant environmental effects and to allow for the identification of mitigation, if necessary, within a range of possibilities;
- The assessments in the EIA report should be consistent with the clearly defined parameters and ensure a robust assessment of the likely significant effects;
- The EIA report assessment may include a “cautious worst case” approach, but that must then feed through into the mitigation measures which should be adequate to deal with the worst case; and
- Any consent given by Scottish Ministers must not permit the proposed development to extend beyond the clearly defined parameters which have been requested and assessed. Scottish Ministers may choose to impose conditions to ensure that the proposed development is constrained in this way.

3.7. It is for the applicant to be satisfied that it has provided an appropriate degree of specification in the application documentation, having regard to the receiving environment and the specific facts of an application. The EIA scoping process is beneficial to allow matters of specification and the degree of flexibility incorporated to be canvassed before an application is submitted.

4. Scoping and consultation at the pre-application stage

- 4.1. Where flexibility is sought, there are clear benefits in formally seeking a scoping opinion from the Scottish Ministers under the EIA Regulations to inform the scope and level of detail to be provided in the EIA report – this will include consultation with relevant statutory consultees.
- 4.2. For both offshore and onshore applications, the carrying out of pre-application consultation with the public is considered good practice and applicants are encouraged to have meaningful engagement at the earliest possible stage with any communities or groups who would be affected by development proposals. Guidance for onshore projects is included in the ECU’s good practice guidance on onshore applications, which can be found at the following link [Energy consents - Energy infrastructure](#). For offshore applications, the Marine Licensing (Pre-application Consultation) (Scotland) Regulations 2013 apply out to 12 nautical miles and contain legislative requirements on pre-application consultation. Further guidance can be found in MS’s [Guidance on Marine Licensable Activities subject to Pre-Application Consultation](#).

- 4.3. It will be important for consultation bodies and communities to understand what flexibilities will be sought within the range of parameters and what the 'worst case' impact would be for their interests. Applicants should seek to ensure that additional complexities are fully explained at the pre-application stage in order for interested parties to be able to usefully comment.

5. Assessment and the EIA report

- 5.1. Applicants should carefully consider the approach to assessing uncertainty and understand how this will influence the complexity of their assessment in the EIA report. If in the course of preparing the EIA report, it becomes clear that it is not possible to specify all the final details of the proposed development, the EIA report must explain how this has been addressed. The EIA report will need to establish the parameters of the proposed development for the purpose of the assessment. Relevant parameters enabling flexibility within an application will be project-specific. Examples include: maximum and minimum number of turbines and blade tip heights associated with wind farms; and maximum and minimum heights or widths of buildings associated with electricity generating development and associated infrastructure.
- 5.2. Where this approach is adopted, assessments should:
- be undertaken on the basis of the relevant design parameters applicable to the characteristics of the proposed development included in the application documents; and
 - for each of the different receptors, establish those parameters likely to result in the maximum adverse effect (the worst case scenario) and be undertaken accordingly to determine significance.
- 5.3. Where flexibility is being sought, the EIA report should:
- clearly identify the characteristics of the proposed development that are yet to be finalised in the description of the development - the description of the development in the EIA report must not be so wide that it is insufficiently complete to comply with requirements of the EIA Regulations;
 - include information relating to where flexibility is sought, taking into account the variations applicable to the proposed development;
 - explain the reasons as to why characteristics of the proposed development remain uncertain in order to justify the flexibility sought; and

- ensure that the approach taken in the assessment is not overly complex, as this may impede the understanding of the assessment and the finding of likely significant effects - fewer options and variations make the EIA report easier to understand.

5.4. Where the applicant chooses to use a design envelope approach using a parameters-led assessment to establish the worst case scenario for the EIA report, the applicant should ensure that the applicable parameters are explained and clearly set out in order to:

- ensure that interactions between assessments of the relevant descriptions of the environment (identified in accordance with the EIA Regulations) are taken into account relevant to the worst case scenario(s) established and that careful consideration is given to how these are assessed;
- ensure that the assessment of the worst case scenario(s) addresses impacts which may not be significant on their own but could become significant when they inter-relate with other impacts alone or cumulatively with impacts from other developments (including those identified in other assessments of the relevant descriptions of the environment (identified in accordance with the EIA Regulations)); and
- ensure that the potential cumulative impacts with other developments are carefully identified such that the likely significant effects can be shown to have been identified and assessed against the appropriate baseline.

6. Consistency across documentation

- 6.1. Ensuring consistency of approach to flexibility across application documents is essential. As such, applicants should make every effort to finalise details applicable to the project prior to submission of the application. The applicant should also provide as much information as possible to inform pre-application consultation.
- 6.2. The applicant is encouraged to make every effort to limit the variations and parameters applicable to the proposed development across all documentation in order to simplify the assessment and provide assurance that the proposed development (as built) would not result in significant environmental effects beyond those identified and assessed in the EIA report.
- 6.3. The EIA Regulations set out the requirements for information that must be included in the EIA report. This requires the applicant to demonstrate through the EIA report that the likely significant environmental effects have been identified and assessed. Any limitations of the assessment should be clearly set out in the EIA report.

- 6.4. The applicant should also ensure consistency across other application documentation beyond the EIA report. For example, a consistent approach would be required for any Habitats Regulations Assessment under the Conservation of Habitats and Species Regulations 2017.

7. Conclusions

- 7.1. The design envelope approach is a way of assessing a proposed development that requires an EIA, where flexibility is sought by the applicant due to reasonable uncertainty associated with certain details of the proposed development. Where relevant, applicants can consider whether there is a need to use the design envelope approach to incorporate flexibility into their application for consent.
- 7.2. In doing this, it is expected that applicants ensure that:
- their approach is explained clearly for the purpose of consultation and publicity, including pre-application consultation;
 - the application documentation clearly defines the proposal and is sufficiently detailed to enable proper consideration and comment by stakeholders, and determination of the application;
 - the EIA report explains fully how the flexibility sought has been taken into account in the assessments and why it is required; and
 - there is consistency across all the application documents including any other relevant environmental assessments.



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