

PHILIP^{LEE}

LICENCE CHANGE

CONSTRAINTS

AND

SOLUTIONS

Rachel Minch

2 6 F e b r u a r y 2 0 1 5

CURRENT FRAMEWORK

Licence Change: 3 Options

1. Letter of agreement
2. Technical amendment
3. Full review/new licence

Condition 1: Request for Approval to OEE

Prior consent of EPA required for alteration/ reconstruction of licensed activity (or part of activity) which would/would be likely to result in:

(a) **a material change or increase** in the:

- nature or quantity of any emission
- abatement/treatment or recovery systems
- range of process to be carried out
- fuels, raw materials, intermediates, products or wastes generated, or

(b) any changes in site management, infrastructure or control with **adverse environmental significance**

Technical/Clerical Amendment: S.96

The EPA can amend a licence to:

(a) correct any clerical error in it,

(b) facilitate things that could reasonably be regarded as having been contemplated by the terms of the licence but weren't expressly provided for, or

(c) otherwise facilitate the *operation of the licence* and the **requirements of section 83(5)** remain complied with i.e. no significant environmental effects

- No public consultation
- No prescribed application process or fees
- BUT limited in scope: *Hunter v EPA (High Court, 2013)*

Licence Review .. and the curious nature of Section 98

- Only other option
 - full review/new licence application
 - two stages (PD and FD) with public participation at both stages
- Question: when is licence review required as a matter of law?
- S.98 IPC licences – S. 98:
 - Notice to EPA of alteration/reconstruction which would/is likely to change or increase emissions or cause new emissions
 - New/revised licence if EPA considers it would **substantially change or increase emissions...or cause significant new emissions**

(and Section 98A for IED)

- Must give notice of alteration/reconstruction/extension which:
 - would or is likely to change or increase emissions or cause new emissions in a manner which would have consequences for the environment
- New or revised licence required if it would:
 - (substantially?) increase or change emissions or cause **significant new emissions** or otherwise constitute **a substantial change**
- Substantial change: “a change in the nature or functioning or, an extension of ... a plant which **may** have **significant adverse effects** on human health or the environment”
 - Article 20 IED Directive
 - Rely on S. 98 and 98A as a form of protection

A FOURTH (OR THIRD) WAY?

Identifying the Legal Constraints
and
Finding Solutions

PHILIPLEE

DUBLIN | BRUSSELS | SAN FRANCISCO

Identifying the Legal Constraints

- *WFD*: silent on licence change
- *IED*: application for permit required for a substantial change
- *EIA Directive*: EIA required for certain changes
 - Annex II Class 13(a) any change or extension to a project listed in Annex I or II which **may have significant adverse effects** on the environment
 - through works or interventions involving alterations to its physical aspect

C-121/11, Pro-Braine and Others

- *Habitats Directive*: screening/AA required if change is **likely to have a significant effect** on a European Site
- *EPA Act/WMA*: pre-conditions for licence grant - S.83(5), S.40(4)

Identifying the Legal Constraints

Is Public Participation required for licence change?

- EIA: Yes if EIA required but probably not at screening stage
- IED: Yes if new permit or substantial change to one
- AA: Not compulsory under Habitats Directive but...
- Aarhus? Maybe if likely to have a significant environmental effect
 - *McCoy v Shillelagh Quarries* (Court of Appeal, February 2015)
 - *Case C-240/09 Brown Bear Case*
- Otherwise under national law/the Constitution?
 - *Harrington v EPA (2014)*

Finding Solutions

1. Overhaul of primary legislation
 - too many terms, triggers and procedures!
2. Simplification of terms
3. New procedures to accommodate partial licence review
4. Letters of agreement under licence within jurisdiction
5. Widen circumstances in which “technical” amendment process can be used to facilitate operation of facility as well as licence
 - where no likely significant (adverse) effect (with screening for EIA/AA for matters within EPA competence)

Finding Solutions

6. Partial review with one stage only with application information, public participation and assessment limited to change
 - Have to use this if EIA/AA required and/or substantial change
 - Consider SID Planning analogy - S.146B Planning Act
 - Look into UK Model: variations and limited reviews
7. With 5 and 6 in place - consider if full review process still required
8. New licence application - consider whether to retain PD stage
9. Introduce mandatory deadlines or objectives for decisions
10. Distinguish IPC activities? not covered by IED constraints

Solutions – no legislation required

- EPA Guidance for Requests for Alterations: assess effectiveness and keep under review
- Early decision on appropriate application type
- Effective, early pre-application consultation on information required
- Make provision for future/phases development in applications
- Forms for TA applications?
- (And fees?)
- EU Guidance

Thank you



RACHEL MINCH
PARTNER



+353 (0) 1 237 3700



rminch@philiplee.ie



[@Rachel_Minch](https://twitter.com/Rachel_Minch)

PHILIPLEE

DUBLIN | BRUSSELS | SAN FRANCISCO

Licence Change: **Constraints and Solutions**

DUBLIN | BRUSSELS | SAN FRANCISCO



2012 IRISH
LAW AWARDS

EXCELLENCE IN BUSINESS AWARD 2011
OUTSIGHT WINNER
LEGAL LAW SERVICES AND SOLUTIONS

PHILIPLEE

philiplee.ie
info@philiplee.ie



DUBLIN

7/8 Wilton Terrace
Dublin 2
Ireland

T: +353 (0)1 237 3700

F: +353 (0)1 678 7794

BRUSSELS

39 Rue des Deux Eglises
1000 Brussels
Belgium

T: +32 (0) 2 640 3890

F: +32 (0) 2 640 3944

SAN FRANCISCO

201 Spear St.
Suite 1100
San Francisco
CA 94105

T: +1 415 213 2836