
Environmental Impact Assessment : Role of Ae and French administrative court decisions regarding EIA

Ressources, territoires et habitats
Énergie et climat
Prévention des risques
Développement durable
Infrastructures, transports et mer

Présent
pour
l'avenir



Forum of judges for the environment – Helsinki, September 14th

General legal context

- **According to EIA Directive, each Member State shall design an « objective competent authority » in charge of EIA quality control.**
- **Unusual for a very centralized country**
- **French historic specificity**
 - Numerous preexisting authorization procedures
 - Positive lists, with low thresholds
 - Numerous public enquiriesresulting in numerous procedures with public participation
⇒ **Important delay to transpose EIA and ESE directives correctly**



- **2007 - Dramatic institutional evolution : a same minister is in charge of environment, energy and transport. Urgence to create a new « objective competent authority » for all files in which he may have an interest**
 - **Creation of a new structure *sui generis* (2009)**
 - Independent of all ministerial structures, including inspection
 - 2/3 of the members « insiders » from the inspection, 1/3 of membres « outsiders » renowned for their competence in various fields / environmental issues
 - Reporting by its own staff
 - All opinions after collegial debates, always agreed by consensus since 2009 (but dissensus theoretically possible)
 - Publication immediately following deliberation
- ⇒ **No way possible to « influence » the content of the opinions (but a few attempts nevertheless)**



Regulatory process

Once the opinion is published :

- **Opinion joined to authorization file presented to public. Following a 2018 law, answers of the developers are required (for projects)**

but no opportunity appreciation (« neither favourable nor unfavorable ») and no recommandation compulsory. Just quality control of the documents and about the way environment is taken into account

- **For each public enquiry, an « investigating commissioner » is responsible for emitting a balanced opinion, taking into account all information and public advice.**

« favourable », with ou without « reservations » or « recommendations » or « unfavorable ».

- **The authorization decision « *takes this opinion into consideration* »**

but there is no formal obligation to « satisfy » each recommendation



Case by case decisions

- **Decisions taken by Ae : requires EIA in case of potentiel significant impacts**
Reasoning exclusively based on environmental ground, according to criteria of the directive
- **According to french case law**
Anybody can make discretionary remedies but only the developer may attack a case-by-case decision
A case-by-case decision which does not require an EIA may be contested once the authorization of the projet has been granted, on the basis that the public may not have been correctly informed in spite of significant impacts. It then may occur at the end of the procedure, many years after the decision



Some feedbacks 10 years later

- **An average of 100-110 opinions per year**
 - 50 % transport infrastructures
 - 20 % land use management
 - 10 % « energy » or « industry » projects, including nuclear plants
 - a growing number of ESE (2018 : 25 %)
- + **Decisions to submit or not to EE projects, plans and programs**
 - A few discretionary remedies, but no case law for Ae
- **Numerous cases regarding the « objective competent authorities » for other projects. Still pending. Some authorizations and plans cancelled for this reason**



What is the scope of Ae opinions and decisions ?

From Ae point of view : who are the « customers » ?

- . The « prime » customer : the developer

Ae takes part to an continuous improvement process.

- . The « following one » : the public

Because all this (Aarhus convention) is about democracy and about the capacity of the public to contribute to environmental public decisions

- . The third one : the authority in charge of authorizing the project

This approach is based on the premise of a normal democratic functioning, according to Aarhus convention.

- . The judge is a « default costumer », when this process fails.



Ae opinions

Two parts :

- Synthesis : summary for everybody, at first for the public
- Detailed opinion : at first, for the developer. But self-supporting reasoning that may be used by anybody
- Rapporteurs always go on-site :
 - Helps resolve misunderstandings
 - but also informs about the context and the good will of the developer
 - Useful to adjust the content and the tone of the opinion, according to the way all the customers may be concerned

For some projets, European commission may be a potential customer....

Ae opinions

Content is, above all, about environment

An Ae opinion is not about « legality control »

When necessary, Ae « recalls » the law, but makes no recommendation to respect the law...

Ae opinions must fully take into account french law, which is very developed and complex (as regards historic context)

Generally, Ae opinions brings a further technical interpretation, within the room left by law, as an expert valuation, according to state-of-the-art

Helps to hierarchize stakes and impacts

Brings methodological support and criticisms

Also helps to detect main risks

⇒ The tone is mainly critical + everybody has access to it



What about case laws ?

Since 2010, few case laws use Ae opinions

New process in french procedures and french culture

Initially, opinions not public

A majority of opinions, if not « positive », includes minor remarks and recommandations developed during the public enquiry : they don't change the general orientation of the public decision.

Sometimes, opinions may even confirm the good quality of the EIA : this reduces the risk of case laws for the developer.

Used for two types of cases

Procedural error, when opinion or answer missing, or more often when environmental authority is not « objective »

Emblematic projects, with high political support :

- generally reflects a dysfunction of the democratic process ;
- high environmental and often societal stakes ;
- NGOs and judges use only the main points.

⇒ **Few invalidations by first and second trials. Almost none by Conseil d'État + almost no prejudicial experience**

