

# **Regulating public participation: Is the answer blowin' in the wind?**

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## Key regulatory dilemmas:

- Conceptual nature of participation: how does law and regulation deal with it?
- Weight of public rationalities in decision-making

## Conceptual Nature

- Unsettled in the legal literature and difficult in practice



- Models of ‘participation’ as deliberative dialogue + influence (procedural+substantive)

vs

- Models of ‘acceptance’ as validation of decisions already made (instrumental/bureaucratic/legalistic)

# Participation in Planning for Nationally Significant Wind Projects in England and Wales (>50MW onshore and >100 MW offshore)

Planning Act 2008 and National Policy Statements: Development Consent by SoS, based on Planning Inspectorate Recommendations

Pre-examination:

- Applicant **must consult** a number of statutory consultees, including local authorities, any relevant person with a right or interest in the land, and the local community
- Produce draft Statement Of Community Consultation (SOCC) to determine the way they will consult with the local community prior to application

## Cont'd

Examination phase:

- Interested Parties/Local Authorities can make **representations**/  
local authority can submit Local Impact Report
- Planning Inspectorate will take into account....

**but Examining Authority must 'give substantial weight to the contribution of the project to achieving the NPS objectives (eg. increase in renewable energy output)**

NPSs on Energy contain a 'presumption in favour of development' limiting opportunities for the public to influence the decision/alternatives (Lee et al, 2013, Rydin et al 2015)

# Participation in EIA for Nationally Significant Wind Projects in England and Wales

EIA screening request to SoS, before carrying out the pre-application consultation

If 'EIA development' (= 'likely to have significant impact'),

- Stakeholders will have the **opportunity to comment** on Preliminary Environmental Information (PEI) at the pre-application stage;
- make relevant and written representations to the Examining Authority on the Environmental Statement (ES) at the pre-examination and examination stages.
- A developer **may** decide to share relevant chapters of the draft ES with stakeholders prior to submission to obtain comments and address any issues prior to submission.

# Clocaenog Forest Wind Farm (Wales) and Burbo Bank Extension Offshore Wind Farm (England)



## What do these cases tell us?

- Examples of Models of Acceptance
- Planning Law as ‘Persuasion’ (Barry and Ellis, 2011) of decisions already made + significant impact outweighed by other considerations (eg. reduced sensitivity of the community, maximise energy output,)
- Little opportunities for public participation on how the project is going to be implemented
- Consultation requirements are fulfilled, but don’t engage with difficult issues on the nature of participation

## Expected Policy & Regulatory Changes:

- ‘give local communities the final say on windfarm applications’ (conservative party manifesto, 2015)
  - Onshore NSIPs to be decided by local planning authority decision-making (new Energy Bill)
  - Local planning authorities should only grant planning permission if:
    1. the development site is in an area identified as suitable for wind energy development in a Local or Neighbourhood Plan; and
    2. following consultation, it can be demonstrated that the planning impacts identified by affected local communities have been fully addressed and therefore the proposal has **their backing**.
- (National Planning Policy Framework)

# What will this change mean for public participation?

- From a regulatory perspective:
  - Inversion of presumption towards development?
  - Consultation vs Backing? Local Authority Discretion
  - Impact on nature of participation and model of decision-making?
- From a policy perspective
  - Using participation argument to move away from wind
  - Change in level of decision-making without actual change in nature of engagement model

## So, the regulatory dilemmas remain

Regulatory requirements for participation are often 'marginalised' by the wider policy context (e.g. NPS)

Routine consultation in planning and EIA provisions reflect law's generally limited engagement with the practices of participation (Lee, 2015)

*'Law is more concerned with individual rights than with 'collective will formation', and provides at best imperfect opportunities to shape an agenda. But publics are entitled to have a say on the legal governance of technological development. And it is possible that something more ambitious could be developed within the bare legal requirements'.*

(Lee, 2015)



**THANK YOU!**

## References

- Yvonne Rydin, Maria Lee and Simon Lock, 'Public Engagement in Decision-Making on Major Wind Energy Projects' (2015) 27 (1) *Journal of Environmental Law* 139.
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- Maria Lee, 'The Legal Institutionalisation of Public Participation in the EU Governance of Technology' in Richard Brownsword, Eloise Scotford and Karen Yeung (eds), *Oxford Handbook of Law and Regulation of Technology* (forthcoming)