EIA and Infrastructure Projects: Potential Pitfalls

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1. It is inevitable that when dealing with applications for development consent for nationally significant infrastructure projects,[1] the Infrastructure Planning Commission (IPC) will have to engage in detail with the environmental effects of the proposal. To that end, the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ("the EIA Regulations 2009") make provision for environmental information to be taken into account in the IPC process, thereby discharging the duty under Directive 85/337/EEC ("the EIA Directive").

2. This paper examines the operation of the EIA Regulations 2009 and attempts to identify some potential pitfalls for applications to the IPC in respect of the assessment of environmental effects.

The EIA Regulations 2009

3. To a large extent, the EIA Regulations 2009 mirror the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 ("the 1999 Regulations"). In summary, they provide as follows:

    a. The regulations are engaged by an application for "EIA development" or a "subsequent application for EIA development" (reg 3(1)). EIA development is defined as being Schedule 1 development, or Schedule 2 development which is likely to have significant effects on the environment;

    b. Schedule 1 is in identical terms to the 1999 Regulations. Schedule 2 contains the same descriptions of developments as the 1999 Regulations, but does not have the indicative thresholds for each form of development which form "column 2" of Schedule 2 to the 1999 Regulations. This may reflect a concern as to the appropriateness of indicative thresholds in, for example, case C-427/07 *Commission*

[1] As defined in s 14 Planning Act 2008

v Ireland [2010] Env LR 8 ([41] – [42]). In any case, nationally significant infrastructure projects would be likely to exceed those indicative thresholds;

c. "Subsequent applications" refer generally to reserved matters applications under a development consent order, and reflect the changes made to the 1999 Regulations in 2008;[2]

d. There is a general prohibition on granting development consent for EIA development without having first taken into account environmental information (reg 3(2));

e. The question of whether a development is EIA development is resolved by notification that the developer proposes to submit an environmental statement ("ES") (reg 6(1)(b)), the adoption by the IPC of a screening opinion (reg 6(1)(a)) or the making of a screening direction by the Secretary of State (reg 5);

f. The developer may request a scoping opinion from the IPC (reg 8). Such a request must at a minimum include a plan of the land concerned and a "brief description of the nature and purpose of the development and of its possible effects on the environment" but may also include "such other information or representations as the person making the request may wish to provide or make". In practice, the request for a scoping opinion is likely to include a detailed scoping report including baseline environmental information. The IPC may in any event require further information to be provided before giving a scoping opinion (reg 8(5));

g. The consultation and publicity requirements are designed to link to the pre-application consultation procedure in Part 5, Chapter 2, Planning Act 2008. In consulting the local community under s 47 PA 2008, the developer must state whether the proposal is EIA development and how it intends to publicise and consult on the preliminary environmental information (reg 10). At the same time as publicising the proposed development in accordance with s 48 PA 2008, notice of

[2] Town and Country Planning (Environmental Impact Assessment) (Amendment) (England) Regulations 2008/2093. Those changes gave effect to the decisions in Case C-290/03 *Barker* [2006] QB 764 and *R v Bromley LBC ex p Barker* [2006] 3 WLR 1209 and [2007] 1 AC 470. See also Case C-201/02 *Wells* [2004] 1 CMLR 31, and Case C-508/03 *Commission v UK* [2007] Env LR 1.

the proposal must be sent to the consultation bodies identified by the IPC and to any person identified by the IPC as being likely to be affected by, or having an interest in, the proposed development but unlikely to become aware of the proposed development through the Part 5 pre-application procedure (reg 11);

h. When an application for development consent is accepted by the IPC, the notice to be given under s 56 PA 2008 must also be given to the consultation bodies and other persons affected as identified by the IPC before the application can proceed (regs 13 and 15). The developer must certify that that requirement has been complied with, and a false statement in this regard carries a criminal penalty (reg 14);

i. If the IPC (or the Secretary of State) has adopted a screening opinion to the effect that the proposal is not EIA development but forms the view that the screening opinion did not take account of information that is material to the decision as to whether the proposal is EIA development, the consideration of the application should be suspended and a further screening opinion adopted (reg 16). If a screening opinion is then adopted to the effect that the proposal is EIA development, fresh publicity and consultation requirements are engaged. This is a shift from the position under the 1999 Regulations, where there has been held to be no duty to review a negative screening opinion: see *R (Fernback) v Harrow [2002] Env LR 10* and *R (Friends of Basildon Golf Course) v Basildon DC* [2009] EWHC 66 (Admin);

j. Regulation 17 provides for requests for further information by the IPC (reflecting reg 19 of the 1999 Regulations). The provision of further information triggers fresh publicity requirements[3];

k. Regulations 18 and 19 provide procedures for subsequent applications in respect of EIA development. Regulations 20 to 22 provide for documents, including the ES, to be made available to the public. Regulation 23 provides for notification of the final decision by the IPC;

[3] See *R (Finn-Kelcey) v Milton Keynes Council* [2009] Env LR 17 on the publicity requirements under regulation 19

l. Regulation 24 concerns applications for developments with significant transboundary effects. Provision is made for EEA States likely to be significantly affected by the proposal to be notified of the application and, if that state requests, provided with a copy of the application and the ES.

4. Given the nature of nationally significant infrastructure projects, this paper will not examine in detail in the thresholds for EIA development. Of the applications notified to the IPC thus far, it seems likely that all the proposals, with the possible exception of the road schemes,[4] would be considered to be EIA development.

5. Instead, the following potential pitfalls will be examined:

    a. How is the scheme defined for the purposes of assessing its environmental effects?

    b. How should the cumulative effects of the development be addressed?

    c. To what extent is it necessary for the ES to consider alternatives?

    d. How are matters which are governed by other regulatory regimes dealt with?

Defining the scheme

6. The case law on EIA strongly suggests that developers (and the IPC in issuing scoping opinions) should adopt a broad view of what constitutes the scheme for which development consent is sought. The European Court of Justice has taken the view that projects cannot be "salami sliced" for the purposes of deciding whether significant environmental effects will arise: Case C-227/01 *Commission of the European Communities v Spain* [2005] Env LR 20. The assessment should plainly include an assessment of the effects of "associated development" for which consent is also granted on the application: s 115 PA 2008. It should also take a broad view of how environmental effects may arise. For example, the effects of a new nuclear power station would also be likely to include the effects of generating a thousand new jobs in a remote rural location.

[4] But see Case C-142/07 *Ecologistas en Accion-CODA v Ayuntamiento de Madrid* [2009] Env LR D4 - a failed attempt to argue that a road improvement scheme was not EIA development.

7. In practice, there is likely to be a stronger incentive for a developer to define its scheme widely for the purposes of comprehensive environmental assessment, than to seek to limit the assessment and run the risk of undermining the EIA process.

Cumulative effects

8. The EIA Regulations 2009 require information to be provided as to the likely significant effects of the development including any cumulative effects (Schedule 4, para 20). That raises the question of what "cumulative effects" are in this context.

9. The question of what amounts to cumulation most commonly arises in the context of the screening of development. *R (Tree and Wildlife Action Committee Ltd) v Forestry Commissioners* [2008] Env LR 5 concerned the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI 1999/2218), which implement Council Directive 85/337/EEC in respect of forests and which mirror the EIA Regulations on this point. The development proposed was deforestation and development of around 5ha of a 19ha area of woodland for football pitches and car-parking. Collins J held that the deforestation must be analysed in cumulation with the future use of the football pitches:[5]

> it will be a question of fact in an individual case whether it can properly be said that there is a cumulation, whatever that means in the context. Clearly it would not be possible to say merely because there were developments proposed which were nothing to do directly with the one in question but happened to be nearby, that that would bring this into play. It is a question of fact: proximity, combined effect and so on, are all factors which would have to be taken into account. However this is an exercise which any planning authority has to carry out, because there are similar provisions under the [EIA Regulations].

10. Cumulation is not, of course, simply adding together the effects of the separate proposals. In *R (Mortell) v Olham MBC* [2007] JPL 1679, Sir Michael Harrison quashed three outline planning permissions where negative screening opinions had been produced. The Council had granted three separate planning permissions for urban redevelopments at sites all governed by the same Masterplan. Each screening opinion simply referred (in identical terms in each case) to the fact that the proposal formed part of a wider redevelopment. It then concluded that, in comparison to the existing use of the sites, the proposal would have no greater impacts on the environment. The judge accepted the claimant's argument that

[5] [36], emphasis added

the point about cumulative effects is that they may have a magnitude and significance which the individual components do not have. Merely simultaneously assessing the effects of three developments is simply not grappling with cumulative effects of the development. In the context of NSIPs this is of particular importance, because it cannot be assumed, for example, that the assessment of environmental effects of nuclear power station A, or windfarm B, will mean that it is unnecessary to address any cumulative effects with those developments when carrying out an assessment of power station C.

11. However, as *R (Littlewood) v Bassetlaw District Council* [2009] Env LR 21 demonstrates, cumulation is not a question to be answered in the abstract. In that case planning permission had been granted for part of a site which was likely to be subject to extensive redevelopment. No Masterplan had been brought forward to lay out what was to follow. It was argued that the application should be considered in light of the further development proposed. Sir Michael Harrison held:[6]

> … at that time no proposals had yet been formulated by Laing for the rest of the site for the reasons that I have mentioned. I simply do not see how there could be a cumulative assessment of the proposed development and the development of the rest of the site pursuant to the EIA Regulations when there was no way of knowing what development was proposed or was reasonably foreseeable on the rest of the site. The site was not allocated for development in the local plan. No planning application had been made and no planning permission given in respect of the rest of the site, and no proposals had yet been formulated for that part of the site. There was not any, or any adequate, information upon which a cumulative assessment could be based. In my judgment, there was not a legal requirement for a cumulative assessment under the EIA Regulations involving the rest of the Steetley site in those circumstances.

12. It is therefore necessary to consider whether actual proposals which have some realistic prospect of coming forward are likely to have cumulative effects on the environment when considered with the development for which consent is sought.

Alternatives

13. The role for the consideration of alternatives presents, it is submitted, a real problem in the new world of national policy statements. This paper does not attempt to consider the

[6] At [32]. Permission to appeal was refused.

potential vulnerability of the NPS system in respect of the strategic environmental assessment. The key question for the purposes of developers and others working with the IPC is what assessment of alternatives must be carried out within the context of EIA. The EIA Regulations 2009 require the ES to contain (Schedule 4, para 18):

> An outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental effects.

14. The wording suggests that it is only those alternatives which have actually been considered by the applicant that need to be taken into account. If the applicant has not studied alternatives, there will be no need to consider the environmental effects of those alternatives or the reasons for the choices made. The question of alternatives is also addressed in the NPSs themselves. The draft Overarching National Policy Statement for Energy (EN-1) states (p 14):

> ...the IPC should start its assessment of applications for infrastructure covered by the energy NPSs on the basis that need has been demonstrated. The IPC does not need to consider the relative advantages of one technology over another given the Government's view that companies should be permitted to determine the individual projects to bring forward within the strategic framework set by the Government, taking account of the clear benefits of a diverse energy mix.

15. The NPS therefore seems to suggest, for example, that it is unnecessary for an applicant for a windfarm to consider whether tidal power would have been a better alternative. Detailed consideration of the approach to alternatives is found at paragraph 4.4:

> 4.4.2 There are also legal requirements to consider alternatives in some circumstances (for example, under the Habitats Directive). These should normally have been identified in the ES. The ES should in any case include an outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant's choice, taking into account the environmental, social and economic effects, and including, where relevant, technical and commercial feasibility.
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> 4.4.3 When such a policy or legal requirement to consider alternatives does arise the IPC should frame any consideration of alternatives as follows (subject to any specific legal requirements such as under the Habitats and Water Framework Directives):

• given the urgency of the need for energy infrastructure as set out in this NPS, the consideration of alternatives should be carried out in a proportionate manner;

• in view of the level of need for energy infrastructure set out in this NPS, the IPC should be guided in considering alternative proposals by whether there is a realistic prospect of the alternative delivering the necessary infrastructure in line with the urgency of the need;

• given the level of need for energy infrastructure as set out in this NPS, the IPC should have regard to the possibility that all suitable sites may be needed;

• alternatives not among the main alternatives studied by the applicant (as reflected in the ES) should only be considered to the extent that the IPC thinks they are both important and relevant to its decision;

• as the IPC must decide an application in accordance with the relevant NPS (subject to the exceptions set out in the Planning Act), it should be reasonable for the IPC to conclude that alternative proposals which are not in accordance with the relevant NPS cannot be important and relevant to its decision. In particular where, as is the case with the nuclear NPS, locations have been identified which are potentially suitable for the infrastructure, the IPC should be guided in considering alternative sites by whether they are in the locations identified in the NPS;

• in view of the level of need for energy infrastructure set out in this NPS, it should be reasonable for the IPC to conclude that alternative proposals which mean the necessary development could not proceed, for example because the alternative proposals are not commercially viable or physically suitable, may be excluded on the grounds that they are not important and relevant to its decision;

• it should be reasonable for the IPC to conclude that alternative proposals which are vague or inchoate may be excluded on the grounds that they are not important and relevant to its decision; and

• where an alternative is put forward by a third party it may be reasonable for the IPC to place the onus on the person proposing the alternative to provide the evidence for it and the IPC should not necessarily expect the applicant to have assessed it.

16. It is submitted that this is a bold approach, which runs the risk of coming back to haunt the drafters of the NPS. The requirement to assess alternatives is found in the EIA Directive, and it is not within the power of the framers of the NPS to state how that obligation is to be discharged. Ultimately, that is a question for the domestic courts and the ECJ.

17. In any event, in many applications it will have been incumbent upon the applicant to have properly considered alternatives, and therefore they will inevitably be “on the table” before the IPC. For example, alternatives will have to be considered in an appropriate assessment

of the impact on a protected habitat[7] and in particular where it is to be argued that "imperative reasons of overriding public interest" justify a project being permitted which would result in adverse effects on a protected habitat (reg 49, Conservation (Natural Habitats, &c.) Regulations 1994/2716). Similarly, if the IPC is invited to exercise compulsory acquisition powers as part of a development consent order (ss 120 and 122-134 PA 2008), alternative means of achieving the objectives behind the acquisition will have to be considered (see Circular 06/2004: *Compulsory Purchase and the Crichel Down Rules* and Article 8(1) and Article 1P ECHR).

18. The fundamental question here is the appropriate scale of any search for alternatives. The starting point might be alternative physical arrangements on a single site, or the use of an alternative technology or process in the same project (such as the choice of a particular type of turbine). The next level of focus might be the choice of alternative sites for the same development in the vicinity, and then in a wider area. The final level of focus would be alternative means of achieving the same overall result, such as using gas power as an alternative to nuclear. It is probably easiest to discount that final level of abstraction from the assessment in an ES: the concern is with alternatives to this project. That level of assessment properly falls to be considered at the strategic policy level. However, it will be less easy to dismiss alternative sites for the same development, especially where alternatives have been identified (and then dismissed) through compliance with the Habitats Regulations or compulsory purchase considerations.

19. The consideration of alternatives in respect of nuclear sites is a special case. The draft NPS for Nuclear Power Generation (EN-6) relies on the assessment of alternative sites carried out by Atkins Ltd to inform the strategic siting assessment. The NPS's conclusion is that (a) all of the sites identified in the NPS are required and (b) no other sites are "credible sites for the deployment of new nuclear power stations by the end of 2025" (paragraph 3.3). So long as the NPS survives, the consideration of alternatives for nuclear sites will therefore be limited to alternative arrangements and technologies at the identified sites.

<u>Other regimes</u>

20. The NPSs anticipate that the IPC will have to be satisfied that appropriate consents from other regulatory regimes will be provided. However, as is generally the case in planning law,

[7] See Managing Natura 2000 Sites, European Commission, para 5.3.1

the IPC is entitled to assume that other consent regimes will be properly applied: see for example EN-1, para 4.10.3 and EN-6, para 3.4.2. However, that assumption may not result material planning considerations being disregarded, and it would be wrong to say that the IPC should completely defer to other regulatory regimes: see for example *Hopkins Developments Ltd v First Secretary of State* [2007] Env LR 14 and *Harrison v Secretary of State for Communities and Local Government* [2009] EWHC 3382 (Admin).[8]

21. How does the relationship with other regulatory regimes feed into the scope of the EIA? It has already been suggested that a developer's best interests may be served by drawing the scope of the ES widely. In any event, the technical work required to satisfy other consent regimes (e.g. the Generic Design Assessment for nuclear) is likely to be sufficient to deal with the particular issues arising under those regimes for the purposes of the ES. Developers are likely to be guided by the IPC's scoping opinions in this regard, although it should be remembered that a deficiency in the assessment of the environmental effects of a proposal will not be saved by the fact that the deficiency arose by virtue of the IPC's own scoping opinion.

Conclusion

22. Given the fact that most NSIPs are likely to be EIA development, a successful application will depend on early engagement with the EIA process. In particular, careful regard should be had to the scoping opinion of the IPC and the developer's own frank assessment of the potential scope of the environmental effects of a project. Given the scale and nature of the projects concerned, the ES is likely to be closely scrutinised. To that end, drawing the ES widely would seem to have clear advantages. It is also clear that the developer must satisfy itself of the adequacy of the environmental information to ensure that any development consent order which is made will be robust in the face of legal challenge.

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22 February 2010

[8] But see the earlier case of *R v Bolton MBC ex p Kirkham* [1998] Env LR 560, upheld CA [1998] Env LR 719, which suggests that a planning authority should defer to the Environment Agency's licensing regime unless the discharges are likely to be unacceptable to the EA.