

## **EIA: nuts and bolts**

**James Maurici Q.C.**  
**Landmark Chambers**

# Scope



Post screening, stages where ES to be submitted:

- (1) Scoping;
- (2) Judging the adequacy of the ES;
- (3) Reg. 22 requests for further information; and “*any other information*”;
- (4) Leaving matters over to later consideration;
- (5) Grants of planning permission for EIA development and reasons.

Other EIA issues:

- EIA and enforcement/retrospective planning permission;
- EIA and permitted development;
- EIA and “subsequent applications”.

# Scoping (1)



- Scoping: the process of determining the content and extent of the matters which should be covered in an ES;
- No legal requirement for scoping;
- See regs 13 and 14 of the EIA Regs 2011
  - Reg. 13(1): “*may*” ask for a “*scoping opinion*”;
  - Reg. 13(2): prescribes what must submit with request;
  - Reg.13(3): LPA can seek further information;
  - Reg. 13(4): must consult “*the person who made the request*” and the “*consultation bodies*” as defined in reg. 2(1) and must issue opinion in 5 weeks unless agreed longer in writing

## Scoping (2)



- Reg. 13(5) prescribes what LPA must have regard to: “*the specific characteristics of the particular development*”; “*the specific characteristics of development of the type concerned*”; and “*the environmental features likely to be affected by the development*”
- Reg. 13(7) if not adopted in time can see scoping direction from S/S, see reg. 14
- Reg. 13(9): adopting scoping opinion does not prevent requesting additional information (see reg. 22 below);
- Reg. 23: scoping opinions must be made publicly available, and where an application is later made put on the Planning Register
- There is Commission guidance on scoping: *Guidance on EIA: Scoping (June 2011)*

# Adequacy of the ES (1)



- **R. (Blewett) v Derbyshire CC** [2004] Env. L.R. 29 per Sullivan J.

*“36 ... can it be said that that document falls outside the definition of environmental statement in reg.2 (so that the local planning authority is unable to grant planning permission ...) because it has failed to describe a likely significant effect on the environment subsequently identified by the local planning authority, or a particular mitigation measure thought necessary by the local planning authority? The omission might have been due to an oversight on the part of those preparing the environmental statement, or to a deliberate decision because it was not considered by the author of the environmental statement that a particular environmental effect was likely, or, if likely, that it was likely to be significant, or because the author of the environmental statement was unfamiliar with the particular mitigation technique, or because he considered that mitigation was unnecessary.*

*37 In my judgment, the fact that the local planning authority's consideration of the application leads it to conclude that there has been such an omission does not mean that the document is not capable of being regarded by the local planning authority as an environmental statement for the purposes of the Regulations.*

# Adequacy of the ES (2)



- Also said:

*38 The Regulations envisage that the applicant for planning permission will produce the environmental statement. It follows that the document will contain the applicant's own assessment of the environmental impact of his proposal and the necessary mitigation measures. The Regulations recognise that the applicant's assessment of these issues may well be inaccurate, inadequate or incomplete ...”*

*41 ... In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the ‘full information’ about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting ‘environmental information’ provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations ... but they are likely to be few and far between.”*

- Approved by HL in **R. (Edwards) v Environment Agency** [2008] Env. L.R. 34.

## Adequacy of the ES (3)



- ES does not need to include “every conceivable scrap of environmental information about a particular project” per Harrison J. in ***R v Cornwall County Council ex p Hardy*** [2001] Env LR 26;
- if the ES did contain everything it would be voluminous and there would be a real danger of the public/local planning authority “losing the wood for the trees”: Sullivan J in ***R v. Rochdale Metropolitan Borough Council, ex p. Milne*** (2000) 81 P & CR 365;
- See also ***Davies v Secretary of State for Communities and Local Government*** [2008] EWHC 2223 (Admin) per Sullivan J. again “ ... *In an ideal world the applicant's Environmental Statement would be the last word on the environmental impact of a proposal because it would contain the ‘full information’ ... However, the Regulations are not premised upon such a counsel of perfection ...*”

# Adequacy of the ES – specific issues (1)



- (1) Alternatives:
  - “an outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account environmental effects” (see schedule 4);
  - Does not require alternatives not considered to be covered: see ***R (Bedford) v LB of Islington*** [2002] EWHC 20444 (Admin);
  - Does not requires as does SEA Directive, and Regulations, consideration of all “reasonable alternatives”: see ***R. (Buckinghamshire CC) v Secretary of State for Transport*** [2014] 1 W.L.R. 324:
    - Para. 45: the “*treatment of alternatives required under the SEA Directive is more detailed than under the EIA ...*”;



## Adequacy of the ES – specific issues (2)



- Para. 44: *“The reasons for this difference are not obvious. It may simply reflect the different stages at which the two exercises are carried out. At the earlier stage of strategic assessment neither the proposed plan nor the alternatives will need to have been worked up to the same degree of detail as will be appropriate at the EIA stage. At the latter stage to require an equivalent degree of detail for the rejected alternatives may be seen as unduly burdensome.”*;
- See also new EIA Directive 2014/52/EU (April 2014, not yet in force, must be transposed by 16 May 2017) requires *“a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment”* – watered down ...

# Adequacy of the ES – specific issues (4)



- (2) Socio-economic considerations:
  - *R(Portland Port) v Portland Harbour* [2002] JPL 1099, did not resolve this;
  - Very commonly included (brave/stupid developer leave out).
- (3) Climate change: 2 cases where failure to assess in ES not fatal:
  - *R (Littlewood) v Bassetlaw DC* [2008] EWHC 1812 (Admin): PP for a pre-cast concrete manufacturing facility: silent on CC: Harrison J. rejects challenge “*counsel of perfection*” point, and no one include EA raised: see paras. 66 – 67;
  - *Barbone v SST* [2009] EWHC 463 (Admin): common ground that no CC effect directly linked to the proposed additional use of the runway could be demonstrated.

# Adequacy of the ES – specific issues (5)



- (4) cumulative effects:
  - See para.4 of Pt 1 of Sch.4 of the 2011 EIA Reg
  - See: *R (Larkfleet Ltd) v South Kesteven DC* [2015] Env. L.R. 16
  - Argued content of ES on cumulative effects not sufficiently detailed
  - Court held:
    - The extent of the assessment of cumulative effects was a matter of fact and judgment for the decision-makers
    - This applies to the content of an environmental statement's assessment of cumulative effect as well as the question whether or not any cumulative effect with other developments ought to be assessed at all.
  - Appeal to CA pending.

# The importance of the ES (1)



- (1) *Berkeley v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 603: “*The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues*” (emphasis added);
- (2) NPG ID4-002-20140306: “*The aim of Environmental Impact Assessment is to protect the environment by ensuring that a local planning authority when deciding whether to grant planning permission for a project, which is likely to have significant effects on the environment, does so in the full knowledge of the likely significant effects, and takes this into account in the decision making process*”

## The importance of the ES (2)



- (3) Avoid paper chase: See the NPG at ID 4-033-20140306: *“It may consist of one or more documents, but it must constitute a “single and accessible compilation of the relevant environmental information and the summary in non-technical language” (Berkeley v SSETR [2000] 3 All ER 897, 908).”*
- (4) NTS: esp. important in this regard;
- (5) Jones v Mansfield District Council [2003] EWCA 1408: per Carnwath LJ (as he then was) - the environmental assessment process was not intended to be an obstacle course that a developer had to overcome. The purpose of the Regulations was to allow an opportunity to debate the environmental impact of a proposal so that full account of both the impact and the proposed mitigation could be taken into account in the eventual decision.

## Further information (1)

- A planning authority dealing with an application in relation to which the applicant has submitted an environmental statement: “...if of the opinion that the statement should contain additional information in order to be an environmental statement, shall notify the applicant ... in writing accordingly, and the applicant ... shall provide that additional information ... ” (see the Town and Country Planning (Environmental Impact Assessment) Regulations 2011/1824, reg. 22);
- Previously reg. 19 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293), which is very similar to reg. 22;
- Various procedural requirements apply to further information provided following a request and also (see reg. 22(2)) to “any other information” except in so far as the further information and any other information is provided for the purposes of an inquiry or hearing held under the Act.

## Further Information (2)



- *What is “any other information” for these purposes:*
  - Reg 2(1) *“any other information” means any other substantive information relating to the environmental statement and provided by the applicant or the appellant as the case may be”*
  - ***R (Corbett) v Cornwall Council*** [2014] P.T.S.R. 727:
  - *“the developer entered into correspondence with bodies such as Natural England and English Heritage, individuals (or their representatives), and individual officers of the council such as the conservation officer and the archaeological officer. The developer carried out further studies on certain matters, such as, for example, an archaeological trial trench. In essence, the developer sought to respond to the concerns that had been raised”. C. argued that = “any other information“ and procedural requirements not complied with*

## Further Information (3)

- Court held that it means “*substantive information provided by the applicant to ensure that the council is provided with the information required for inclusion in an environmental statement as required by Schedule 4 to the EIA Regulations*”
- If requested by planning authority = “*further information*”
- if such information were provided voluntarily it would be “*any other information*”
- “*any other information*” did not include
  - comments or responses made by the applicant in response to the concerns of, or points raised by, third parties or local authority officers,
  - documents submitted by third parties or generated by the local authority, and such information was not subject to the notification requirements of the EIA Regulations



## Further Information (4)

- But contra ***Jenkins v Gloucestershire CC*** [2012] EWHC 292 (Admin)
  - Advisory Note on flood risk;
  - Not been requested by it, so that it was not "further information";  
*"But it was substantive information relating to the relevant environmental statement and provided by the applicants for planning permission. It sought to address objectors' concerns on a significant issue, namely flood risk, by giving "a description of the measures envisaged in order to avoid, reduce, and if possible remedy significant adverse effects". It was therefore "any other information" within the reg.2(1) definition"*;
  - Not cited in **Corbett**.

## Further information (5)

- If within reg. 22(1) and not excluded by reg. 22(2) then:
  - Publish a notice in local newspaper re the information: reg 22(3)
  - Send it to those ES sent to, and to S/S: reg. 22(4) and (5);
  - LPA can require copies: reg. 22(6);
  - Suspend determination of application/appeal for a period (14 days from sending to persons under reg. 22(4), 21 days from newspaper notice – whichever later: reg. 22(7);
  - Can require submission of evidence to verify the information: see reg. 22(10).
- A failure to comply with the letter of procedures in reg. 22 not necessarily fatal: ***R (Wembley Field Ltd) v Chancerygate Group Ltd*** [2006] Env. L.R. 34

# Further Information (6)



- LIMITS ON POWERS TO REQUEST:
  1. “the further information that is required by regulation 22 is additional information “in order to be an environmental statement””: **Sharp v Chelmsford City Council** [2013] EWHC 4180 (Admin), para. 48;
  2. Cannot use reg. 22 to require information on something that Regulations does not require an ES to provide (e.g. reasons for rejecting the alternatives it did consider; a full EIA of alternatives; “analysis of the environmental effects which did not form part of the reasons which led to the choice”): **Sharp**, para. 55;
  3. But it is “open to the Council to refuse planning permission or to defer consideration of the further information outside the scope of regulation 22 if it thought that that was necessary and justified”: **Sharp**, para 58;
  4. Note lapse of Reg. 4 of Town and Country Planning (Applications) Regulations 1988, allowed LPA to direct applicant to “supply any further information ...plans and drawings necessary to enable them to determine the application” or “provide ... any evidence in respect of the application as is reasonable”. Still in force in Wales ...

## Leaving matters over (1)

1. So long as parameters of environmental effects established nothing to prevent leaving details to a subsequent condition or permit: see ***R (Kent) v FSS*** [2004] EWHC 2953 (Admin) at para. 78 and ***Atkinson v SST*** [2006] EWHC 995 (Admin) at para. 29
2. However, if information absent on whether a LSE or not and cannot even know what is worst case, *may* be unlawful to leave over: ***R v Cornwall CC, ex p Hardy*** [2001] JPL 786;
  - planning permission was sought for the extension of a landfill site.
  - Application accompanied by an ES
  - The ecological part of the Statement identified the possibility of bats and other important creatures indicating that further surveys were required.

## Leaving matters over (2)



- The planning committee decided that further surveys should be carried out.
- The planning permission granted prohibited the commencement of development until additional surveys were carried out.
- Harrison J held unlawful
- Why?
- Total absence of information on bats
- An unusual case, nothing in principle to prevent a condition requiring further surveys. Distinguished since.
- See ***R (Jones) v Mansfield DC*** [2004] Env. L.R. 21
  - “Without the results of the surveys, they were not in a position to know whether they had the full environmental information”
  - “The **Hardy** case was a fairly unusual one as there was an acceptance by the decision-maker that the surveys of bat populations could provide evidence that these would be significantly affected by the project”

## Leaving matters over (3)



- NPG - ID: 4-052-20140306 How should mitigation measures proposed in a planning application be secured? (emphasis added)
- *“Mitigation measures proposed in an Environmental Statement are designed to limit or remove any significant adverse environmental effects of a development. Local planning authorities will need to consider carefully how mitigation measures proposed in an Environmental Statement are secured”.*
- *“Conditions attached to a planning permission or subsequent consent may include mitigation measures. However, a condition requiring the development to be “in accordance with the Environmental Statement” is unlikely to be sufficient unless the Environmental Statement was exceptionally precise in specifying the mitigation measures to be undertaken, and the condition referred to the specific part of the Environmental Statement, rather than the whole document.”*

# Grants of planning permission for EIA development and reasons



- Reg. 24 duties to inform the public of decisions on EIA applications:
  - Inform the public of the decision;
  - Make available for public inspection a statement of content of decision, conditions, “*the main reasons and considerations on which the decision is based*”; the main mitigation measures and the right to challenge the decision
- A failure to comply will not always, or even usually, be fatal: **R. (Richardson) v North Yorkshire CC** [2004] 1 W.L.R. 1920. Simon Brown LJ said failure to give reasons a “*venial error*”. Can give/be directed to give reasons subsequently in this context.
- See the NPG at ID: 4-053-20140306

# EIA and retrospective development (1)



- (1) ***R. (Padden) v Maidstone BC*** [2014] EWHC 51 (Admin)
  - Vast unauthorised dumping of waste in order to construct raised fishing lakes;
  - “*The unauthorised works took place between 2003 and 2008 and involved the importation of very large amounts of construction waste material including glass, plastic and asbestos. The Environment Agency has estimated that about 650,000 cubic metres of waste material were deposited on the land between March 2003 and January 2008 with even more since. The material was formed into, amongst other things, massive 8 metre high retaining bunds close to neighbouring residential properties including [the listed] Hertsfield Barn.*”
  - Council having served an EN, grant application for retrospective PP



## EIA and retrospective development (2)



- Important reminder that grant of PP for retrospective EIA development “exceptional”, applying ***Commission v Ireland*** [2008] E.C.R. I-4911 and ***Ardagh Glass Ltd v Chester City Council*** [2011] 1 All E.R. 476
  - “57. While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception”
- In ***Padden*** the ES took a baseline post the unauthorised development;
- The OR never once cited or dealt with test of “exceptionality”;
- What was exceptional?
- Quashed grant of PP, yet to be re-determined

# EIA and retrospective development (3)



- *Ellaway v Cardiff County Council* [2014] EWHC 836 (Admin)
  - PP granted subject to certain pre-commencement and other conditions.
  - The developer applied for the conditions to be discharged but works commenced before the application had been determined. Subsequently, the LPA resolved to discharge the conditions and declined to take enforcement action against the developer, relying on the **Whitley** principle.
  - The claimant challenged those decisions, inter alia, on grounds that (i) the authority had in effect granted retrospective planning permission which had been unlawful on domestic common law grounds; and (ii) that European Union law relating to EIA development required that any retrospective planning permission be granted only in accordance with section 73A of the Town and Country Planning Act 1990 , and the permission in issue had not been so granted. Rejected.
- Original application and discharge of conditions accompanied by ES.

# EIA and subsequent applications (1)



- (1) The history: long-established position no EIA required at reserved matters stage or on discharge of conditions
- (2) Case C-290/03 *R (Barker) v Bromley LBC* [2006] Q.B. 764 and *R. (Barker) v Bromley LBC* [2007] 1 A.C. 470;
- (3) the 2011 EIA regs:
  - “*subsequent application*” an application for approval of a reserved matter where the approval is: (i) required by or under a condition to which the PP is subject; and (ii) must be obtained before all or part of the development permitted by the PP may be begun
  - “*subsequent consent*” – grant of consent pursuant to a subsequent application.

## EIA and subsequent applications (2)



- (4) reg. 3 prohibits grant of subsequent consent for EIA development unless considered environmental information;
- (5) reg. 5 deals with screening requests re subsequent applications
- (6) reg. 8: where a subsequent application that is in relation to Sch 1 or 2 development, and no screening decision and not accompanied by ES and original application was accompanied by an ES then: (i) if considers environmental information it already has adequate, take that into account; (ii) if it considers it is not issue a reg. 22(1) request.

## EIA and subsequent applications (3)



- (7) reg. 9: where a subsequent application that is in relation to Sch. 1 or 2 development, and no screening decision and not accompanied by ES and original application was not accompanied by an ES then there is deemed to be a request under reg. 5 for a screening opinion re: subsequent application.
- NPG: ID: 4-056-20140306
  - *“the likely significant effects of a project on the environment should be identified and assessed at the time of the procedure relating to the principal decision ... However, if those effects are not identified or identifiable at the time of the principle decision, an assessment must be undertaken at the subsequent stage”*

## EIA and subsequent applications (4)



- NPG also advises:
- *“To minimise the possibility that further environmental information is required at a later stage of a multi-stage consent procedure, it is considered that (**R v Rochdale MBC ex parte Tew** [1999] 3 PLR 74 and **R v Rochdale MBC ex parte Milne** [2001 81 PCR 27]):*
  - *where an application is made for an outline permission with all matters reserved for later approval, the permission should be subject to conditions or other parameters (such as a section 106 agreement) which ‘tie’ the scheme to what has been assessed; and*
  - *while applicants are not precluded from having a degree of flexibility in how a scheme may be developed, each option will need to have been properly assessed and be within the remit of the outline permission”.*

# EIA and enforcement



- See regs 30 – 41 of the 2001 EIA regs on “*unauthorised EIA development*”
- Prohibit grant of PP on enforcement notice appeal in respect of EIA development; and deals with screening by LPA and S/S;
- NB PINS can also require an ES where no ground (a) appeal or deemed application, but a ground (g) appeal – but what scope for alternative schemes under (g) post- *Ioannou v SSCLG* [2015] 1 P. & C.R. 10?
- No requirement where ground (d) appeal/ LDC application: see *R (Evans) v Basingstoke and Deane BC* [2014] 1 W.L.R. 2034; and time limits for enforcement not a breach of EIA Directive

# EIA and permitted development



- Town and Country Planning (General Permitted Development) (England) Order 2015/596
  - Art. 3(10) Subject to paragraph (12), Sch 1 or Sch 2 development under the EIA regs 2011 is not permitted by this Order unless a screening decision that the development is not EIA development;
  - Art 3(11) Where screened as EIA development “*that development is treated, for the purposes of paragraph (10), as development which is not permitted by this Order.*”
  - Art 3(12) a number of exceptions to this.
- See the NPG at ID:13-020-20140306.