

Environmental Impact Assessment: where are we now?



Martin Edwards

The Starting Point

- Directive 85/337/EEC
- Directive 97/11/EC
- Directive 2001/42/EC – the “SEA Directive”
- Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999: but be warned
- ODPM Circular 02/99

The Broad Structure of EIA

- The European Dimension
- The Guiding Principles
- Is EIA required?
- Is the environmental information accurate?
- What about reserved matters?
- The timing of EIA challenges

The Guiding Principles

- Schedule 1 projects – EIA is mandatory
- Schedule 2 projects – EIA only required if the development “would be likely to have significant effects on the environment”.
- If EIA is required the developer must produce an Environmental Statement & non-technical summary

The fundamentals

- Regulation 3 – if EIA required the decision maker cannot grant planning permission without first having taken into account the environmental information
- EIA Directive is to be interpreted as having a “wide scope and broad purpose” – *Kraaijveld (Dutch Dykes) Case C- 72/95*
- See Lord Hoffman in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603

Is EIA required?

- The Screening Opinion: written statement of the opinion of the LPA as to whether EIA is required to be sent to applicant and a copy placed on the planning register
- Failure to adopt a screening opinion in accordance with the statutory procedure will render a decision unlawful – *R (Lebus) v South Cambridgeshire District Council* [2002] EWHC 2009 Sullivan J.

The rule of thumb

- Schedule 1 – is the project within the description in the Schedule? If so EIA is required.
- Potential Schedule 2 projects:
 - Is the project of a type that falls within the first column of Schedule 2?
 - If so, does it require screening by reason of thresholds or criteria?
 - Is it likely to have significant effects on the environment by virtue of factors such as its nature, size or location?

Types of Project in Schedule 2

- Many types of development project very broadly defined e.g. category 10(b) “Urban Development Projects”
- *Berkeley No. 1* – accepted that a football stadium and housing arguably an Urban Development Project under the 1988 Regulations
- *Berkeley No. 2* – appeal inspector accepted that a block of flats could be an Urban Development Project

Problematic cases

- *R (Roplas) v Kingston upon Hull City Council* – LPA submitted to judgment for failing to screen an urban development project on just over 0.5 ha site
- *R (Goodman) v Lewisham LBC & Big Yellow Warehouse Co* – CoA held LPA had wrongly categorised the development as an “infrastructure project”

Applying Thresholds & Criteria

- Purpose of thresholds and criteria is to render it unnecessary to assess each project individually
- The setting of criteria and thresholds must be such that the excluded projects as a whole would not have significant likely effects
- The setting of criteria and thresholds is a matter for the discretion of Member States
- The purported exercise of the discretion can be reviewed by the ECJ on normal principles

Are significant effects likely?

- Delegated authority – *R v St Edmundsbury BC ex p. Walton* – failure to delegate properly
- Do not rely too heavily on the indicative criteria in Annex A of circular 02/99
- The need to consider any effects and not just **adverse** effects – *British Telecommunications plc v Gloucester City Council*

- Remedial measures – *Bellway Urban Renewal Southern v Gillespie* – SoS’s view that significant effects were unlikely must have been based in part of an assessment that the proposed remediation measures would be effective to prevent the significant effects was wrong but note comments of Pill LJ and Laws LJ. In this case the degree of contamination was such that SoS had deployed the contamination condition as a surrogate for EIA

- The need for further survey work – *R (Jones) v Mansfield DC* – Richards J dismissed JR claim:
 - A lesser degree of information needed at the screening stage than at the ES stage
 - Whether information is sufficient to enable a judgment to be made as to the likelihood of significant effects is a matter for the LPA reviewable only on *Wednesbury* principles
 - *Hardy* distinguished

Revisiting the issues: new information

- *Fernback v Harrow* – Richards J: can the LPA revisit a negative screening opinion?
- A negative screening opinion by LPA is determinative but not a positive one
- SoS's screening opinion is determinative either way
- LPA could therefore ask SoS to make a screening opinion

Reasons?

- Reasons required for a positive screening opinion
- *R v Secretary of State and Parforce. Ex p Marson* – CoA refused to find any general duty to give express reasons for a negative opinion given under the 1988 Regs but now in question following the reference to the ECJ in *Mellor* in January 2008

Is the environmental information adequate?

- Outline applications – *R v Rochdale MBC ex p Tew* – Sullivan J: a bare outline application could not give adequate description of the development and could not be cured by the reserved matters procedure
- Decision followed by Richards J in *Elmbridge BC v Secretary of State*

- *R v Rochdale MBC ex p Milne* – Sullivan J: fresh applications submitted with a masterplan, schedule of development and development framework with the masterplan being fixed by conditions
- *R (Portland Port Limited) v Weymouth and Portland Borough Council* – Harrison J: section 106 agreement could also tie in the masterplan and the ES thereby limiting the parameters of the development to those considered as part of the EIA

- *R (Bedford) v Islington LBC and Arsenal FC* – Ouseley J: emphasised that it is for the LPA to judge the adequacy of the ES
- Cumulative effects - *R v Swale BC ex p RSPB* – necessary to consider the project as whole to avoid any potential piecemeal development
- Note: fresh information – LPA, SoS or inspector can require additional information (Reg 19(1)) but no provision for developer volunteering further information

EIA and reserved matters

- *R (Barker) v Bromley LBC* – House of Lords adopted ECJ ruling that, where outline planning permission has been granted without EIA, EIA may now be required at the reserved matters stage
- 1999 Regs therefore about to be revised

The timing of EIA challenges

- *Burkett* – House of Lords held that time begins to run from the date of the grant of planning permission (ending the 6 week fallacy) but “promptness” left open
- *R (Lynes) v West Berkshire DC* – Harrison J: endorsed the approach in *R (Young) v Oxford City Council* that promptness remained a live issue and claimants should not assume that they can defer filing their claim form until the near end of the 3 month time limit

Wells : re-inforcing the importance of the European dimension

- New conditions imposed without EIA on a review of an old mining permission in 1997 before decision of House of Lords in *R v North Yorkshire County Council ex p Brown*
- Reserved matters approved in 1999
- Mrs Wells asked SoS to revoke the permission who refused. In subsequent proceedings the matters was referred to the ECJ

ECJ decision

- The review of conditions on an old mining permission was a development consent thereby confirming *Brown*
- The imposition of new conditions and the approval of details under those conditions was a single, composite development consent – possible implications for *Barker*?

- Member States are required to nullify the consequences of breaches of Community law. Thus:

It is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.....

The sting in the tail

...Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.