ENVIRONMENTAL IMPACT ASSESSMENT: AVOIDING THE ELEPHANT-TRAPS

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Environmental impact assessment (or EIA as it is normally known) easily outpaces any other area of environmental or planning law in the number of new cases it generates. It has moved from a position of relative obscurity when introduced in 1988, to a field of law which can scupper huge and high-profile projects, such as football stadiums, business parks and new rail facilities. It chimes in with the mood of the times, stressing the importance of environmental protection and of public participation in decision-making. The importance of the EIA process, and of the public’s role in it, was confirmed by the House of Lords in the landmark decision, Berkeley No. 1, in July 2000. Since then there has been a string of EIA cases. This article aims to provide an overview of these developments, and indicate the key areas where care is needed if the developer is not to blunder into an elephant-trap.

The following abbreviations are used in this article:


1 Stephen Tromans is co-author of Tromans and Fuller, Environmental Impact Assessment – Law and Practice (LexisNexis Butterworths, 2003).
2 As was stated by the Court of Appeal in Goodman, the whole aim and object of the system is that there should be “sequential and transparent consideration of the environmental implications of a project”, and that such a process provides a local authority with “assistance in the proper form” (para 14, per Buxton LJ)


Gillespie: Gillespie v. First Secretary of State [2003] EWCA Civ 400; [2003] JPL 1287


**Prokopp:** R (Prokopp) v London Underground Limited [2003] EWCA Civ 961


**Wells:** C-201/02 R (Wells) v. Secretary of State for Transport, Local Government and the Regions

**Screening**

The screening process is the means by which it is determined whether or not a project requires EIA. It is therefore fundamental to the safeguards which the Directive is intended to afford. Essentially it involves first considering whether a project falls within one of the categories of development in Schedules 1 or 2 of the Regulations, and if within Schedule 2 (as will most often be the case) whether the project is likely to have significant effects on the environment. The question of significance is, as the courts have repeated affirmed, one of judgment for the planning authority, not one of law or precedent fact for the courts. Decisions – if soundly based – will therefore be reviewed only on a basis of *Wednesbury* unreasonableness. It is however important to stress the caveat “if soundly based”, as there are numerous examples of planning authorities which have gone wrong in the process. The following examples highlight the manifold ways in which errors can occur:

- Lack of formality in the procedures, so that no formal screening opinion exists: *Lebus*. 
• Decisions taken by an officer lacking formal delegated authority: *Walton*.

• Failure to consider the aggregated effects of separate applications which are in substance a single project: *BAA*.

• Taking a “global” view that overall the project is likely to have net beneficial effects and so discounting negative effects: *BT*.

• Taking into account possible measures to mitigate environmental effects where those measures are uncertain in their efficacy or may themselves have significant effects: *Gillespie*.

• Misconstruing the descriptions of development in Schedules 1 and 2 of the Regulations: *Goodman*.

This last point is particularly significant, given the potential breadth of some of the descriptions in Schedule 2: in *Goodman* the Court of Appeal held it was an error of law (as opposed to an irrationality test) to conclude that a self-storage warehouse could not be an “urban development project”. In construing the words used, which mirror those of the Directive, planning authorities will need to bear in mind the need to construe terms used in a purposive way, in accordance with EC principles of legislative interpretation. However, as indicated above, provided the developer and planning authority do not fall into these or other traps, the courts will allow considerable latitude to the authority in deciding first whether it has sufficient information on which to base a screening decision and, secondly, the decision itself as to whether significant effects are likely.

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3 A good example might be the use in Schedule 2 of the words “including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas”. A black-letter approach which argued that the linkage of “car parks” with shopping centres means that car parks cannot be relevant urban development projects in any other circumstances would plainly be contrary to that approach. In *Goodman*, Morland J emphasised that the words following “including” were in any event words of description emphasising the wide ambit of “urban development projects”, and not words of limitation.

4 See *Jones*.

5 As Sullivan J put it in *Malster*, “A detailed knowledge of the locality and expertise in assessing the environmental effects of different kinds of development are both essential in answering that question,
**Environmental statements**

Whilst the screening process has proved a major focus for legal challenges to development, in many cases developers are choosing to submit an environmental statement in preference to running the risk of a legal challenge for the absence of one. Similarly there are signs that the Planning Inspectorate is becoming more active in requiring environmental statements at an early stage in the appeal process, so as to avoid the difficulties which have arisen in some cases through the need for EIA only being identified at or after the opening of the inquiry. Thus there are many cases where the challenge is to the sufficiency of the environmental statement. The information required to be included in an environmental statement is set out in Schedule 4 to the Regulations. It must include such of the information referred to in Part I of the Schedule as it reasonably required to assess the environmental effects of the development and which the applicant can reasonably be required to compile; in any event it must include at least the information referred to in Part II of the Schedule.

As with screening, the decision as to whether the information is adequate to meet these requirements is pre-eminently one for the planning authority and the courts will only interfere where something has gone wrong with that process. There may well be gaps in the information available, but provided these are not such as to affect the ability of the authority to determine that any effects are not likely to be significant, they will not vitiate the decision: see **PPG 11**. Nonetheless, as with screening, the cases show that there are plenty of ways in which it is possible to go wrong:

- A bare outline planning application, with no details of the final form of the development (or illustrative details only) is unlikely to provide an adequate basis for an environmental statement: **Tew**. The way to avoid this difficulty is to provide appropriate details of the development and to ensure that these are given force by way of planning condition or section 106 obligation: **Milne** and **Portland Port**.

which is pre-eminently a matter of judgment and degree rather than a question of fact. Unlike the planning authority, the court does not possess such knowledge and expertise” (para 61).

6 In **Tew**, Sullivan J stated that the effect of the Directive and Regulations on outline applications was to impose a “legal straitjacket”; in **Milne** however the same judge held that the intention was not to draw that straitjacket so tight as to suffocate projects.
• If the authority lacks a vital piece of information to assess whether significant
effects are likely, it cannot leave that matter to be ascertained under a
condition after planning permission has been granted: *Hardy*. 7

• Whilst it is not necessarily the case that an environmental statement must be a
single document (indeed they often comprise many thick volumes), the public
may not be expected to engage in a “paper chase” to piece an environmental
statement together: *Berkeley 1*. Thus for example, if a developer chooses to
submit further information having put in an environmental statement, it will be
important to ensure that it is properly integrated with the previous information
and that the non-technical summary reflects this.

Other aspects of planning

The Regulations were framed with applications for planning permission in mind, but
controversy continues as to the application of EIA requirements to other aspects of
the planning system. The key issue is whether the approval in question constitutes a
“development consent” in terms of the Directive; that is to say “the decision of the
competent authority or authorities which entitles the developer to proceed with the
project.” The issue arose originally in the case of procedures for setting conditions on
old mining permissions. In *Brown* the House of Lords held that the approval of such
conditions was a grant of development consent, as further mining would be a breach
of planning control if new conditions were not applied for and approved. Lord
Hoffmann sought to deduce a distinction between the development consent on the one
hand and “decisions which merely involve the detailed regulation of activities for
which the principal consent, raising the substantial environmental issues has already
been given”. However, a purposive approach might require even consents of the
latter type to be subject to EIA, as appears from the case of *Wells*, currently before
the European Court. Advocate General Léger gave his Opinion in this case on
September 25, 2003. The first issue was whether the setting of conditions on an old
mining permission was a “development consent” for the purposes of the Directive.
The Advocate General held that the term was to be given an “autonomous

7 In that case the possible presence of colonies of lesser horseshoe bats (a European protected species)
within mine workings which were on the site of a proposed landfill.
dimension”, in that although national law defined exactly when and on what terms a project could begin, the Directive was an harmonising measure intended to remove disparities between member states; the definition could not therefore be left purely to national law. The conditions had been set in stages; first by the Secretary of State in 1997, and then detailed conditions approved by the local authority in 1999. The Advocate General held that where the consent procedure was in two stages, EIA was to take place at the first stage. However, where there was no EIA that stage, it was the decision settling the detailed conditions that would have to be regarded as the development consent. It would be for the national courts to decide whether EIA had been achieved at the earlier stage. In this case clearly it had not. Hence if the conditions determined at the later stage were likely to have significant environmental effects, then EIA would be required at that stage.

The following areas have given rise to difficulty:

- Applications for the modification of planning conditions under section 73 of the Town and Country Planning Act 1990. These applications are now regarded as being for development consent: see Prokopp and Hautot. Care is still needed however in establishing what exactly is being authorised and hence what its environmental effects are.

- Applications for planning permission for development carried out previously, under section 73A of the 1990 Act. As for section 73 applications, these applications must now be regarded as development consent.

- Decisions not to take enforcement action against unauthorised development. The position is not entirely clear, but the safer view is that development consent may be involved: see Prokopp.

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8 In Prokopp the Court of Appeal held that a section 73 application involves the grant of planning permission and is a development consent. In Hautot, contrary to the first instance finding, it was accepted on appeal that section 73 applications engaged EIA.

9 Prokopp concerned the proposed East London Extension and the demolition of the Bishopsgate Goods Yard. Schiemann LJ held that a decision not to take enforcement action where EIA development was concerned was capable of amounting to a development consent. Buxton LJ held to the contrary that a failure to take or decision not to take enforcement proceedings was not a
• Applications for approval of reserved matters pursuant to outline planning permission. This issue is currently subject to a reference to the European Court in *Barker*.

• Pollution control consents, such as pollution prevention and control authorisations, waste management licences or radioactive substances discharge authorisations, where planning permission has already been granted. This issue was subject to a reference to Europe in *Horner* (which it is understood has now been abandoned) and is the subject of a current challenge in the domestic courts in *Edwards*.10

**Summary**

In this short article it has been possible only to sketch out the main areas of potential difficulty and continuing uncertainty. There are other important related issues, such as time limits for challenge on EIA grounds and the discretion of the courts as to whether to quash permissions, which it has not been possible to include. Looking back, EIA has been an amazingly fruitful area for challengers to unwanted development, and there is no reason to suppose it will become any less so. The key aspect is perhaps that of discerning where the role of the courts in supervising the exercise of the planning authority’s discretion begins and ends in each case.

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10 *Horner* involved authorisation to burn substitute liquid (waste derived) fuel at cement kilns; *Edwards* involves the use of chipped tyres as substitute fuel in a cement kiln.