Environmental Law Update

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Introduction

1) This paper begins by considering the relationship between environmental and planning law and aspects of the relationship including waste projects. It then provides an analysis of and update on what might be considered the classic overlap between the two bodies of law - environmental impact assessment and strategic environmental assessment.

The relationship between environmental and planning law

2) In practice, planning decisions and environmental protection can be intricately linked. A proposed motorway may cut across the habitat of a rare bird. Environmental problems can be aggravated by bad planning decisions but can often be avoided by sensitive location of new development. Planning can provide the answer to environmental problems. Despite the far reaching statutory provisions in relation to contaminated land, problems of contamination are to be tackled primarily through the planning system.

3) The law reflects these practicalities. National policy guidance indicates that the roles of environmental and planning controls are separate but complementary. However, as recent caselaw demonstrates it can be unclear where the dividing line is to be drawn.

4) Planning Policy Statement 23 Planning and Pollution Control: 

The planning and pollution control systems are separate but complementary. Pollution control is concerned with preventing pollution through the use of measures to prohibit or limit the release of substances to the environment from different sources to the lowest practicable level. It also ensures that ambient air and water quality meet standards that guard against impacts to the environment and human health. The planning system controls the development and use of land in the public interest. It plays an important role in determining the location of development which may give rise to pollution, either directly or from traffic generated, and in ensuring that other developments are, as far as possible, not affected by major existing, or potential sources of pollution. The planning system should focus on whether the development itself is an acceptable use of the land, and the impacts of those uses, rather than the control of processes or emissions themselves. Planning authorities should work on the assumption that the relevant pollution control regime will be properly applied and enforced. They should act to complement but not seek to duplicate it (para 10)

5) Gateshead MBC v Secretary of State for the Environment (1995) Env LR 37 reflects the traditional view. The extent to which emissions from a proposed plant will cause pollution is a material consideration to be taken into account in determining planning permission. Nonetheless, it can be assumed that the relevant environmental controls will be adequate to deal with the emissions.

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1 and R v Bolton MBC Ex p Kirkman (1998) Env LR 719
6) The more recent case of *Hopkins Development Limited v FSS* [2006] EWCH 2823 demonstrates a greater complexity to the relationship. The case concerned an application under section 288 of the TCPA 1990 against the decision of an Inspector to refuse planning permission for a concrete plant on the basis of significant levels of dust which would affect neighbouring properties. The Inspector took the view that, despite the existence of air pollution controls, there would be significant emissions of dust and that the amenities of the area and local residents and land users would be seriously harmed by the dust.

7) In this case the Court held that the authorities established the proposition that the impact of air emissions from a proposed development was capable of being a material planning consideration, but in considering that issue the planning authority was entitled to take into account the pollution control regime. Accordingly, in appropriate cases planning authorities could leave pollution control to pollution control authorities, but they were not obliged as a matter of law to do so. The inspector could assume, and had, that there were mitigation measures in place that would be applied under the pollution control regime. The inspector did what the relevant planning guidance clearly stated he should do, namely he focused on whether the development itself was an acceptable use of the land and the impacts that it would have, rather than on the control of the processes or emissions of the development. In approaching the matter in the way that he had, the inspector had acted in accordance with the law.

8) The complexity of the relationship between environmental and planning law can also be seen in how the Courts approach the question of the extent to which planning conditions which can be expected to mitigate environmental effects obviate the need for environmental impact assessment (see the case of *Catt* and *Gillespie* below). The case of *Edwards v Environment Agency* (currently under appeal to the House of Lords) provides a further example. This concerned the extent to which an application for a variation to a pollution control permit required an environmental impact assessment and is considered further below.

**Waste Planning**

9) Waste projects require a combination of environmental and planning controls. Before a waste management licence can be granted planning permission must be obtained.


12) In summary; the Strategy sets out national standards. Its key objectives are simple: less waste, more reuse and recycling, more energy from waste, and less landfill. New and higher national targets are set for recycling, composting and recovery of household and municipal waste.

13) Planning Policy Statement 10 Planning for Sustainable Waste Management provides detailed advice about how the land use planning system should contribute to sustainable waste management through the provision of the required waste management facilities in England and general advice on site selection and matters to be taken into account when preparing waste development plans and considering applications for waste management facilities.

14) Planning Policy Statements (PPS) set out the Government’s national policies on different aspects of land-use planning in England. The policies in the PPS should be taken into account by waste planning authorities in discharging their responsibilities; by regional planning bodies in the preparation of regional spatial strategies and, in general, by local planning authorities in the preparation of local development documents. They may also be material to decisions on individual planning applications. These policies complement other national planning policies and should be read in conjunction with Government policies for sustainable waste management, in particular those set out in the national waste strategy.

15) PPS 10 sets out the principles that the Government wishes to see underlining future waste management decisions including:
   a. Consideration of the best use for each waste stream
   b. Regional self sufficiency
   c. The proximity principle
   d. The waste hierarchy

16) Section 38 of the Town and Country Planning Act 1990 requires waste local plans or minerals and waste local plans to be prepared. The plans should address the land use implications of the authorities waste policies including the need for waste sites and suitable locations (PPS 10 provides advice on the contents of the plans and the allocation of sites). In drawing up their waste local plans, waste prevention authorities are required
to discharge their functions under the Waste Management Licencing Regulations 1994 by ensuring that waste plans encourage the prevention or reduction of waste and encourage its recovery.

17) Waste local plans must be distinguished from waste management plans drawn up by waste regulation authorities under the Environmental Protection Act 1990 and which are concerned with the types and quantities of waste in an area and waste disposal facilities.

18) Waste Local Plans are to be replaced by Minerals and Waste Development Schemes under the Planning and Compulsory Purchase Act 2004. In substance these may mean a change of structure rather than substance. The minerals and waste scheme will still contain waste policies, as with the waste local plans currently do. Its production still requires public participation although now a local authority will need to prepare statements of community involvement, which may enhance public involvement.

19) Environmental Impact Assessment has been a fertile ground for challenging the grant of planning permission for waste projects (see R(Horner) v Lancashire County Council; Hereford Waste Watchers Ltd v Herefordshire Council, R (Kent) v First Secretary of State; Blewett v Derbyshire County Council; R(PPG 11 Ltd) v Dorset County Council and Viridor Waste Management Ltd. EIA is considered further below.

20) The proper approach to waste management principles like BPEO and the proximity principle and the status of waste strategy documents have been considered in cases like R(Horner) v Lancashire County Council; R (Thornby Farms) v Daventry District Council, R (Adriano) v Surrey County Council and R (Blewett) v Derbyshire District Council.

Environmental Impact Assessment

21) Environmental impact assessment ("EIA") is an increasingly important feature of planning control. It has moved from a position of relative obscurity when introduced in 1988, to a field of law which can scupper major development projects. Planning applications and inquiries have been disrupted whilst, where it is possible to do so, EIA errors are corrected. More dramatically planning consents have been quashed by the Courts on grounds relating to EIA. In the last few years these have included a football stadium, industrial buildings, a gas-fired power station, town centre regeneration proposals, farm

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2 This section of the paper contains extracts from a paper by Richard Harwood, barrister at 39 Essex Street
buildings and several major housing projects. EIA has become a significant weapon for those seeking to challenge unwanted development and there is no reason to suppose it will become any less. The judgments of the ECJ in 2006 relation to the need for EIA for reserved matters approval opened up a new area of difficulty.

22) EIA is designed to ensure firstly that planning decisions involving significant effects on the environment are taken by bodies with full information as to the relevant factors. A further purpose is to ensure public scrutiny of major schemes and democratic participation in decisions about such schemes. In the words of Advocate General Elmer of the European Court of Justice; “however misguided and wrongheaded the public’s views may be, they must be given an opportunity to express their opinions on the environmental issues arising from a project". The UK Government has put it more eloquently

“The general public’s interest in a major project is often expressed as concern about the possibility of unknown or unforeseen effects. By providing a full analysis of the project’s effects, an environmental statement can help to allay fears created by lack of information….One of the aims of a good environmental statement should be to enable readers to understand for themselves how its conclusions have been reached and to form their own judgment on the significance of the environmental issues raised by the project”.

23) The remit of the relevant EC Directive and the UK implementing regulations is intended to be wide in their scope. The Courts have responded accordingly. Since the House of Lords decided the landmark decision, Berkeley No. 1, in 2000, the Courts have taken an increasingly inventive and rigorous approach to the Regulations. EIA generates more new cases than other areas of environmental or planning law. 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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4 Environmental assessment; a guide to the procedures HMSO 1989
24) The main principles of the EIA regime are set out below, together with a reference to the relevant case law. The most recent developments are covered in more detail.

**Screening**

25) The screening process is aimed at determining whether or not a project requires EIA. It is therefore fundamental to the safeguards which the Directive is intended to afford. The two issues that the local planning authority must address at the screening stage are;

a. whether a project falls within one of the categories of development in Schedules 1 or 2 of the Regulations; and

b. if within Schedule 2 (as will most often be the case) to decide whether the project is likely to have significant effects on the environment by virtue of its nature, size and location.

26) Whether a development falls within the classes in Schedules 1 or 2 is regarded by the Courts as a question of law and not one of judgement for the reasonable assessment of the local planning authority. The Courts will therefore intervene more easily; *Goodman*.

27) Minor environmental effects do not bring a development within the scope of the EIA regime. The question of whether environmental effects are significant is, as the courts have repeatedly affirmed one of judgment for the planning authority and the Courts tend to adopt a "hands off" approach to decisions taken. This is on the basis that it involves an exercise of judgment or opinion, a detailed knowledge of the locality and an expertise which planning authorities but not the courts possess.

28) Decisions – if soundly based – will therefore be successfully reviewed only if the planning authority has gone beyond what constitutes reasonable judgment into the realm of absurd, irrational behaviour. This is a high hurdle for those seeking to get the courts to intervene in the decisions of local authorities.

29) Nonetheless there are numerous examples of planning authorities which have gone wrong in the process. The following cases highlight the traps developers and authorities can fall into.

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7 See R(Goodman) v Lewisham LBC [2003] EWCA Civ 140. See also R(Horner) v Lancashire County Council and Castle Cement Ltd [2005] EWHC 2273 where Ouseley J considered the interpretation of the threshold in Schedule 2 of 1,000 m³ of new floorspace (in relation to a change or extension to an existing cement works).

a. Lack of formality in the procedures, so that no formal screening opinion exists: 
*Lebus*\(^9\). The Regulations require a written statement of the local planning authority’s decision that an EIA is not required which must be placed on the planning register. In *Lebus* this was not done.

b. Decisions taken by a local authority planning officer lacking formal delegated authority: *Walton*\(^10\). The Regulations require ‘the local planning authority’ to decide whether an application requires an EIA. The decision in *Walton* was taken by the Council’s planning officer without any formal delegation of authority.

c. Failure of the local planning authority to ask itself whether it has enough information to make a proper decision as to whether an EIA is necessary - *BT*\(^11\) - In *BT* the court noted that it is quite easy for officers to slip into the trap of focusing on particular areas suggested to them by the developers rather than making an independent assessment.

d. Asking whether the proposed development had significant adverse effects on the environment instead of whether it had significant effects. *BT*.

e. Taking a ‘global’ view that overall the project is likely to have net beneficial effects and so discounting negative effects: *BT*. There is no principle in the legislation that justifies significant adverse effects being ignored or treated as nullified in some way on the grounds that they are outweighed by the environmental benefits of the project.

f. Failure to consider the aggregated effects of separate applications which are in substance a single project: *BAA* \(^12\). It is now clear that the cumulative effect of separate projects must in any event be specifically considered\(^13\). However the Courts will not insist on aggregation of phased schemes where there is no question of the developer seeking to avoid or circumvent EIA by splitting up a project *Candlish*\(^14\). Where an application relates to a small project below the thresholds in Schedule 2 of the Regulations, the fact that some time in the future the small project will form part of a larger project does not mean that the cumulative effects of the larger project has to be considered in the current application. The assessment of whether an application relates to a Schedule 2 application or not is to be decided by reference to the


\(^12\) *BAA*: *BAA plc v. Secretary of State for Local Government, Transport and the Regions* [2002] EWHC 1920 (Admin); [2003] JPL 610

\(^13\) Annex III screening criteria in the Directive.

\(^14\) *R(Candlish) v Hastings Borough Council* [2005] All ER (DO 178 (Jul)
application for development consent applied for and not any development contemplated beyond that. See also the recent case of *R (Trees and wildlife Action Committee) v Forestry Commissioners* 2007 EWHC 1623 Collins June 29 2007 (see Annex for commentary)

g. Misconstruing the descriptions of development in Schedules 1 and 2 of the Regulations: *Goodman* 15. This is particular problem given the potential breadth of some of the descriptions in Schedule 2. The Courts regard getting this wrong as an error of law which they will intervene more readily to correct. One issue presently before the courts is whether a cemetery is capable of falling within the EIA Directive.

h. In deciding that EIA is not necessary, taking into account possible measures to mitigate environmental effects where those measures are uncertain in their efficacy or may themselves have significant effects: *Gillespie* 16. A local planning authority is entitled to envisage the operation of standard conditions and a reasonably managed development so not all remedial or mitigating measures need to be ignored. In some cases the remedial measures will be modest in scope or so plainly and easily achievable that it would be proper to hold that the project could not have significant effects on the environment. However if prospective remedial measures are not plainly established and not plainly uncontroversial, the case calls for an EIA.

*R(Catt) v Brighton and Hove City Council* 17 concerned a temporary planning permission for the use of an athletics stadium for Brighton and Hove Albion Football Club and related temporary seating. This raised the change or extension element of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. As there was an existing stadium, used for athletics, the change was the temporary use of land for football matches and the additional seating and works. The area covered by the change was over the 0.5 hectare threshold so a screening opinion had to be adopted. Mr Justice Collins considered that the Council should then ask itself whether the environmental effects of the whole project, including that which had already been approved, were likely to be significant [17]. He considered that the Council had done so.

The second EIA issue was whether the mitigation measures proposed, in particular traffic management, could legitimately be taken into account in deciding whether there were likely to be significant effects. This is a difficult issue, not, unfortunately, made any easier by the decision of the Court of Appeal in *Gillespie* which avoided

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any neat distinction between routine measures (such as approval of materials to prevent the building being too lurid) and project specific provisions. Mitigation measures may themselves be contentious as Gillespie and the present case illustrated. A Road Traffic Regulation Order for a park and ride scheme was proposed at Carden Avenue, Brighton to serve the stadium. The scheme involved closing a road into Brighton and using it for parking, with the diverted traffic passing through a retail park. One of the park operators, Asda, brought High Court proceedings against the order under the Road Traffic Regulation Act 1984. After two days’ operation, and the threat of an injunction, the park and ride scheme was suspended. The Council ultimately agreed to revoke the order and the proceedings were settled.

The Court of Appeal upheld the decision in Catt. The Court of Appeal entered into the vexed question of the extent to which mitigation measures could be taken into account in deciding whether a project was likely to have significant effects on the environment for the purposes of Environmental Impact Assessment screening. Giving the only reasoned judgment, Pill LJ sought to interpret the judgments in Gillespie. In Gillespie, the Court of Appeal had agreed that the Secretary of State had erred in relying on a proposed contamination condition as a reason for not requiring EIA. The most extensive judgment was by Pill LJ but Laws LJ set out different reasons. Arden LJ agreed with both judgments but then provided her own reason. Divining the ratio of Gillespie is not therefore straightforward.

In Catt Pill LJ emphasised his own reasoning in Gillespie. The carrying out of an Environmental Impact Assessment involves an identification of the likely significant effects of a project and the measures proposed to mitigate them. On that basis, Richards J considered in the High Court in Gillespie ‘in deciding whether an EIA is required, the focus should be on likely significant environmental effects rather than on remediation or mitigation measures; and if a decision runs the two issues together and rests on the view that remediation measures will be effective to prevent otherwise significant effects, it deprives the public of the opportunity to make informed representations in accordance with the EIA procedures about the adequacy of such measures’ [2003] EWHC 8 (Admin) at para 74. But what is considered in deciding whether the project is likely to have significant effects? Part of the answer is provided by the concept of ‘likely significant effects’: it can be assumed that the project will be subject to detailed design and operation in a typical fashion and a normal range of planning and other controls. Richards J in Gillespie and Sullivan J in Lebus identified that point. For a football stadium, a typical level of league, cup and
B team home games can be assumed, rather than having crowds arriving every day. The other aspect is the project for which consent is sought, as World Wildlife Fund put it, the actual characteristics of any given project.

However they strongly disagreed with Mr Justice Collins’ view that time for bringing proceedings ran from the date of the screening opinion. Following the House of Lords in R(Burkett) v London Borough of Hammersmith and Fulham and the approach of Ouseley J in Younger Homes (Northern) Limited v First Secretary of State, judicial review proceedings could be brought against the grant of planning permission with time running from that point, even if the error complained about was made earlier in the process, including in a screening opinion.

**Environmental statements**

30) 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. 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.

31) 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.

32) The ES does not have to contain every scrap of environmental information. The Courts have recognized that 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.” It only need cover the “main effects” or “likely significant effects.”

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33) Determining what effects are significant has to be considered in the context of the kinds of development that are included in Schedules 1 and 2 of the Regulations. Although each application will turn on its facts, examples taken from the case law as to what will be significant include demolishing or other changes to listed buildings and 46 deliveries of waste to a site every day 23. On the other hand details of landscaping in an application for outline planning permission may be “significant” from the point of view of neighbouring house holders and thus subject to reserved matters approval but they are not likely to have a significant effect on the environment in the context of the Regulations.

34) 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 24. 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 following cases show that there are plenty of ways in which it is possible to go wrong:

a. A bare outline planning application, with no description at all as to what the development comprised or its final form is unlikely to provide an adequate basis for an environmental statement: Tew 25. This is likely to still be the case even though the European Court of Justice has ruled that EIA can be required at the reserved matters stage of an application (see below). The way to avoid this difficulty is for the developer to provide appropriate details of the development and for the local planning authority to ensure that these are given force by way of planning condition or section 106 obligations. The effect is that the proposed development stays within the parameters of development assessed in the environmental assessment: Milne and Portland Port 26. This may also be a way, should the developer/local planning authority wish to, to avoid the need for another EIA at a later stage in the project (see further below).

b. If the authority lacks a vital piece of information to assess whether significant effects are likely, it has been thought that it cannot leave that matter to be ascertained under a condition after planning permission has been granted:

22 See Humber Sea Terminal Limited –v – Secretary of State for Transport [2005] EWHC 1289 (Admin); [2006] Env LR 86. Compensatory measures omitted from an EIA (recharge and flooding schemes to create new mud flat habitat) would not be main or likely significant effects of the project so it was acceptable to omit them from the EIA. See Annex 1 for more detail.
23 PPG 11
24 For recent confirmation of this proposition see R(on the application of Kent) v First Secretary of State [2004] EWHC 2953
Hardy. Where preliminary surveys had identified the possible presence of bats (a European protected species) and nature conservation authorities had recommended further surveys, the local planning authority could not conclude there were no environmental effects until further surveys had been done. (See also Hereford Waste Watchers). However this position may need reassessing in light of the recent ECJ judgments which allow an EIA to be carried out at reserved matters stage of the planning process. Part of the Court’s reasoning in Hardy was that protecting the bats could not be left to the reserved matters stage because no EIA would be possible.

c. 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. 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.

d. Provided the EIA sets out the parameters within which the likely significant effects of the development can be assessed, the detail can be left for subsequent consideration, whether by way of a planning condition or as part of an environmental pollution permit process.

e. A failure to comply with the procedural requirements for consultation may not be fatal to the decision. Wembley Fields Ltd. In Wembley Fields the decision to grant planning permission was taken a few hours before the consultation period closed. However there had been substantial compliance with the provision and no prejudice had been suffered as no representations had been received after the decision. Oddly, the case was argued as if the committee resolution was the determination in the period, when the actual determination, by issuing a planning permission, was almost certainly outside the period.


29 paras 69 – 72
30 Berkeley v. Secretary of State for the Environment [2001] 2 AC 603; [2000] 3 All ER 897; [2000] 3 WLR 420; (2000) 81 P 7 CR 492; [2000] 3 PLR 111; [2001] JPL 58. Counsel sought to argue in a case where no EIA had been prepared that the equivalent of the applicant’s environmental statement can be found in its statement of case, the planning authority’s statement of case, the Planning officer’s report, background papers and proofs of evidence.
31 R(on the application of Kent v First Secretary of State [2004] EWHC 2953. Concerned a proposed waste disposal development. The generic waste types were set out in the EIA. Detailed consideration of the waste types was left to be dealt with by way of planning condition and the environmental permit (PPC) process. See Annex 1 for more detail.


14) The Town and Country Planning (Environmental Impact Assessment) (England) Regulations 2006 amend the 1999 EIA Regulations to implement the 2003 Directive and to require publicity for further information voluntarily submitted by a developer. The 2003 Directive implemented the Aarhus Convention on public participation and the changes seek to improve public involvement. The amendments are modest in substance, but it is important to ensure that they are complied with. The provisions apply to planning applications submitted on or after 15th January 2007.

The amendments do not address the reserved matters issue.

Further amending legislation

35) A raft of amendments and replacements of EIA regimes have been produced in 2007. These essentially seek to implement the Public Participation Directive. The latest changes are:

- Environmental Impact Assessment (Uncultivated Land and Semi-natural Areas) (Wales) (Amendment) Regulations 2007
- Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007
- Gas Transporter Pipe-line Works (Environmental Impact Assessment) (Amendment) Regulations 2007
- Highways (Environmental Impact Assessment) Regulations 2007
- Marine Works (Environmental Impact Assessment) Regulations 2007
- Pipe-line Works (Environmental Impact Assessment) (Amendment) Regulations 2007
- Electricity Works (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2007

16) The government does however intend to fill one lacuna in the regime. The underground storage of gas in natural strata under the Gas Act 1965 is not subject to any EIA regulations, despite falling under the Directive. Whilst there is a consultation on Gas Act procedures, the government intend to deal with EIA by requiring information under its existing statutory powers.
Other aspects of planning

17) The Regulations were framed with applications for planning permission in mind but EIA requirements can and have been applied to other aspects of the planning system.

18) 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 European Court of Justice has made clear that “development consent” is to be determined according to EC law. The following areas have given rise to difficulty:

a. The approval of conditions on old mining permissions is a grant of development consent, as further mining would be a breach of planning control if new conditions were not applied for and approved. Brown and Wells33

b. 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.34 Care is still needed however in establishing what exactly is being authorised and hence what its environmental effects are.

c. Applications for planning permission for development carried out previously, under section 73A of the 1990 Act.

d. Crown land. The European Court of Justice found the UK in breach of its obligations under Directive 85/337/EEC in Case C-37/05 Commission v. United Kingdom (January 12, 2006). The Commission had alleged that the UK had incorrectly transposed Articles 2(1) and 4 of the Directive in failing to provide that Crown Land was subject to the Directive’s requirements. The UK accepted that it was necessary to transpose those measures by way of binding legislation, and not by an administrative practice, and committed itself to taking the necessary legislative action.

e. Applications for approval of reserved matters pursuant to outline planning permission (dealt with below)

33 C-201/02 R(on the application of Wells) v Secretary of State for Transport, Local Government and the Regions
34 R (Prokopp) v London Underground Limited [2003] EWCA Civ 961
The Court of Appeal held that a section 73 application involves the grant of planning permission and is a development consent. In R (Hautol) v London Borough of Wandsworth [2003] EWHC 905, comment at [2003] J.P.L. 935 contrary to the first instance finding, it was accepted on appeal that section 73 applications engaged EIA.
Outline planning applications and reserved matters – Barker and the new style “Multi-stage” Environmental Impact Assessment

19) Cases C-508/03, Commission v United Kingdom and C-290-03 R(Barker) v London Borough of Bromley arose out of proposed substantial developments at White City and Crystal Palace in London. In both cases the developers applied for outline planning permission, which was granted without an EIA being considered necessary. In both cases the developers subsequently applied, successfully, for reserved matters approval. The issue in both cases turned on the domestic law which provides that an EIA could only be carried out at outline stage and not at reserved matters stage and turned on the central obligation in the EIA Directive that projects likely to have significant environmental effects must be assessed before development consent is given. This in turn depends on how ‘development consent’ is to be interpreted.

23) The ECJ held that, in providing that an environmental impact assessment in respect of a project may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage, the UK is in breach of Articles 2(1) and 4(2) of Directive 85/337, as amended. The European Court rejected arguments that ‘development consent’ is to be interpreted according to national law. It repeated the principle, laid down in the earlier case of Wells (C-201/02) that its meaning and scope are normally to be given throughout the Community an autonomous and uniform interpretation.

24) ‘Development consent’ is defined for the purposes of the directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project. Under domestic law, a developer cannot commence works in implementation of a project until reserved matters approval has been obtained. Until such approval has been granted, the development in question is still not entirely authorised.

25) This then gives rise to what the ECJ termed ‘multi-stage’ development consent. Outline planning permission and the decision approving reserved matter together constitute ‘multi stage’ development consent. As a result, the competent authority is, in some circumstances, obliged to carry out an EIA in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved if it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.
This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.

28) The ECJ set out the general position to be adopted in a consent procedure comprising several stages. EIA must, in principle, be carried out as soon as it is possible to identify and assess all the environmental effects of a project. Where the consent procedure consists of a principal decision and a second stage involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision (the current position under UK law). However the Court went on to say that “It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure”.

The House of Lords decision

30) These cases were considered by the House of Lords in Barker. Lord Hope of Craighead, with whom the other Law Lords agreed, was clear that any grant of planning permission which contains a condition requiring details of siting, design, appearance, etc, to be submitted and approved before development is commenced must be regarded as a multi-stage development consent for the purposes of the Directive (para. 21). Lord Hope went on to make the following points:

(i) It does not follow, however, that consideration must be given to the need for an EIA at each stage (para 22). The decision should be made at the outset – an application for outline planning permission should be accompanied by sufficient information to enable that question to enable the question of whether EIA is required to be answered. The authority must refuse permission if it is of the opinion that it does not have sufficient information to come to a decision at that stage (para. 11).

(ii) If sufficient information is given at the outset it ought to be possible to determine whether the EIA which is obtained at that stage will take account of all the potential effects likely to follow as the multi-stage process progresses (para. 23). Appropriate conditions to ensure the project remains strictly within the scope of the original assessment will normally make it possible for the authority to treat the EIA at outline stage as sufficient.
(iii) However, there may be cases where the authority is required to carry out an EIA after outline permission has been granted (para. 24). Examples are where the need for an EIA was overlooked at the outline stage, or where the increased level of detail at reserved matters stage reveals that the development may have significant effects that were not anticipated earlier.

(iv) In that event account will have to be taken of “all the aspects of the project that which have not yet been assessed or which have been identified for the first time as requiring assessment” (para. 24).

(v) The observation of Sullivan J in *R v. Rochdale MBC, ex p Tew* [1999] 3 PLR 74, 97, that if significant adverse impacts on the environment are identified at the reserved matters stage and it is then realised that mitigation measures will be inadequate, the local authority is powerless to prevent the development proceeding must now be regarded as unsound. If it is likely that there will be significant effects on the environment which have not previously been identified, an EIA must be carried out at the reserved matters stage before consent is given for the development (para. 29). Thus the council misdirected itself when it decided it had no power to require an EIA to be carried out in accordance with the requirements of the Directive at that stage (para. 30).

31) Amending regulations are required, though have yet to appear. It is hard to see how the House of Lords view that EIA need not be considered in all cases can be applied as the regulations must ensure that EIA is not missed by the need for it not being considered.

**Implications**

**Effects on reserved matters applications:** Developers and local planning authorities will need to prepare for the possibility that a ‘second stage’ EIA will be required at the reserved matters stage. Local planning authorities will have to screen reserved matters applications for likely significant effects, as an obligation to carry out EIA cannot be avoided by failing to consider whether EIA is necessary: *R(Goodman) v London Borough of Lewisham*. Although unpalatable, this may extent to a review of any initial screening decision that EIA is not required.

**Scope of reserved matters EIA** The scope of the second stage assessment is not clear. It will need to cover all aspects of the project which require a fresh assessment due to changes in circumstances during the lifetime of the project. The circumstances need not arise however from the project itself. It may be for example that a nearby
piece of land is designated as a Special Protection Area after the outline planning application or a housing development creates cumulative impacts which need to be assessed. More controversially, the assessment may also need to cover aspects of the project which have not yet been assessed. In cases where no EIA was carried out at the outline stage, this could in effect seek to reopen earlier decisions that no EIA was necessary.

**Effect on outline planning applications:** Following the *Tew* and *Milne* decisions a fair degree of detail has had to be fixed in outline planning permissions to enable EIA to be carried out and to prevent the final development departing from the significant effects assessed in the EIA. Some of the rigour has been imposed because it has not been possible to carry out EIA at a later stage. As that is no longer the case, some reassessment of the English caselaw is required. The ECJ does require effects to be assessed at the outline application stage, where possible, although the ability to identify effects depends, in part, on the detail of the scheme which has been provided. It is uncertain whether outline planning permissions will in practice be able to be less detailed than they are at present. A clear explanation will need to be provided to show why issues can be deferred to a reserved matters EIA. It may now be the case that, unlike in *R –v- Cornwall County Council ex p Hardy* and *Hereford Waste Watchers v Herefordshire County Council*, where an authority lacks a vital piece of information to assess whether significant effects are likely, it can leave the matter to be dealt with under a condition after planning permission has been granted, with the option of an EIA if the new information indicates the effects will be significant.

**Conditions/section 106 agreements** Approval of details under conditions might require EIA where those details are likely to have significant effects. The conditions will need to prevent the carrying out of all or part of the development if details are not approved. There may be circumstances in which a planning obligation becomes part of the development consent, requiring EIA of variations or approvals under it. In *R(Anderson) v Bradford City Council*35 the High Court considered whether a further EIA was required on the approval of details under conditions on a landfill planning permission which had been subject to EIA when originally granted. This case was decided in the light of the ECJ judgment in *Barker* but before the House of Lords decision. Mr Justice Crane held:

“65. In my judgment, applying the principles of Barker, I cannot rule out the possibility that a further assessment might be required in such a situation as this. I

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do not decide the case on the basis that that requirement could never arise, but it would be necessary for there to be truly a two stage process, involving real importance at the second stage, and then, only if a decision at the second stage would have the result that the project was likely to have significant effects on the environment from that envisaged. It would not necessarily require even then a new environmental impact assessment on all aspects of the matter. Paragraph 48 in Barker makes it clear that there may be just some aspects that require attention.

66. The approvals required here related to existing trees and tree replanting, to drainage and to noise abatement measures. They were, in my view, genuinely matters of detail, and in my judgment they cannot, in terms of the decision in Barker, be described as the second part of a two stage process.

67. I proceed on the basis, therefore, that a further assessment could sometimes, although perhaps rarely, be applied in a situation where approval of conditions is said to amount to a second stage, but I conclude that it was not in the particular circumstances necessary for this defendant to consider whether a further assessment was required. Even if I am wrong in that conclusion, I am satisfied that if they had answered that question they would, applying correct principles, have reached the only possible answer that no further assessment was required."

32) The Government has recently issued a consultation on legislative changes to give effect to the judgments.


33) The consultation paper sets out proposals for amending the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) in England. A draft of the amending regulations is attached to the consultation document. As well as enabling EIA to be carried out at reserved matters stage for outline planning applications, the draft regulations enable EIA to be applied to conditions attached to full planning permissions for all types of development, including minerals development, which require the submission of certain detailed matters and their approval by the planning authority before the development may proceed. It is intended that the final regulations will also provide for EIA to be applied to conditions determined following the review of minerals permissions under Schedule 2 to the Planning and Compensation Act 1991 and Schedules 13 and 14 to the Environment Act 1995. These conditions may
similarly require the submission of certain detailed matters and their approval by the
mineral planning authority before all or part of the development may proceed.

Future Elephant Traps

34) Future elephant traps for developers and local planning authorities could include;

a. **Outline applications and reserved matters EIA.** The nature of the EIA required at outline and reserved matters stage could cause some initial difficulties as developers and local planning authorities grapple with the implications of the recent ECJ judgments.

b. **Alternatives** The information that must be included in an EIA includes an outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects. It is not clear whether the requirement to consider alternatives is mandatory or not. There has been little judicial scrutiny of the issue. In particular there has been no scrutiny of the issue of whether developers have to give adequate consideration to alternatives.

c. **Lawful development certificates and local authority enforcement** The ECJ has recently dismissed another EIA case taken by the Commission against the UK. The case concerned whether the UK was, in effect, by passing the requirements for EIA and development consent by virtue of its rules on; issuing lawful development certificates; time-limits for the taking of enforcement action against development; the failure of local planning authorities to take enforcement action in relation to illegal development. The ECJ dismissed the action on the basis the Commission had not put forward a coherent and detailed case. The issue has therefore gone away for the moment. Nonetheless the UK government had accepted in 2003 that a lacuna existed and undertook to adopt the measures necessary to remedy it. In the earlier domestic case of [Prokopp](#) Schiemann

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36 Department of the Environment Circular 2/99 on Environmental Impact Assessment suggests it is not whereas the leading commentators on EIA - Tromans and Fuller in *Environmental Impact Assessment Law and Practice*, characterise the requirement as mandatory.

37 The issue of alternatives in an environmental statement appears to have been the subject of detailed judicial ruling in only one reported case, *R –v- Secretary of State for the Environment Transport and the Regions ex parte Challenger* and the Court did not interpret the requirement over-onerously. However the project in question was a transport project (Thameslink) and the obligation to include the information on alternatives is contained in the Transport and Works (Applications and Procedures) Rules 1992. The obligation on alternatives is arguably different and less onerous than under the EIA Regulations.

38 Case C-98/04, Commission v United Kingdom. Case report available on the website of the European Court of Justice.

39 Prokopp concerned the proposed East London Extension and the demolition of the Bishopsgate Goods Yard.
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 development consent. Kennedy LJ agreed with them both, rendering it rather difficult to ascertain the ratio on this point.

d. **EIA for pollution control consents where planning permission has already been granted**. In Edwards, the High Court rejected the argument that an EIA was required on the particular circumstances of the application for pollution consent. The Courts have yet to consider the point of principle as to whether an EIA can be required on the grant of a pollution control consent after planning permission has been granted. (Edwards involved EIA arguments in relation to the use of substitute fuels at cement kilns, as did another case in 2005, Horner. In issue was the use of waste chipped tyres, which was the subject of a PPC permit. Lindsay J held that the use of tyres in this way could not be regarded as a “project”, and further the references to waste “disposal” in the Annexes to the Directive were to be read as meaning disposal in the technical sense of the Waste Framework Directive, whereas the use of tyres for fuel was “recovery”. This approach was followed in Horner. The appeal was dismissed. (See Annex for a commentary on the Court of Appeal decision in Horner)

35) The case of R (Horner) v Lancashire CC also raised the tricky issue of thresholds. In that case the challenge was to the grant of planning permission for the equipment (a silo, tanker off-loading area and pipework) to feed “animal waste derived fuel” into a calciner. The relevant threshold in Schedule 2 was 1,000 m$^3$ of new floorspace (in relation to a change or extension to an existing cement works). The planning application stated the area of the site to be 1,000 m$^3$, but the structures did not occupy the whole area. Ouseley J held first that the silo had “floorspace”, albeit not in normal sense, and was below 1000 m$^2$, and alternatively it did not have any “floorspace” so could not be above the threshold. The Court of Appeal

36) There could be potential problems with this approach in relation to “changes” as opposed to “extensions”, given the fact that the ECJ has stressed that Member States are not entirely free agents in setting thresholds, but must act in accordance with the purpose of

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40 Pollution control consents include pollution prevention and control authorisations, waste management licences or radioactive substances discharge authorisations

41 R (Edwards) v. Environment Agency [2005] EWCA 657; [2006] Env LR 56 involved the use of chipped tyres as substitute fuel in a cement kiln. The Court held that a change in the fuel of the kiln did not amount to a project within the meaning of the EIA Directive or a change to the existing project so as to require a fresh EIA.

42 Ouseley J in R (Horner) v. Lancashire CC [2005] EWHC 2273). The Court of Appeal subsequently dismissed an appeal against the decision

43 [2007] EWCA Civ 784.
the Directive. Setting a threshold based on an area of new floorspace may be an acceptable approach to extensions to plants, on the basis that the government can be satisfied that an extension below that size could not individually or cumulatively have significant effects. However, a new floorspace threshold is not necessarily relevant to the likely impact of changes to an existing facility – an obvious example would be a new stack at a cement works or power station, which would not involve any new floorspace, but obviously might have significant environmental effects, whether visually or in terms of emissions. The case is currently the subject of a petition to the House of Lords.

STRATEGIC ENVIRONMENTAL ASSESSMENT

Background

36) EIA is concerned with specific projects, in the form of actual development or other human physical intervention in the environment. Strategic environmental assessment is the term used to assess the effects of plans and programmes on the environment. SEA is a relatively new innovation in EC environmental law.

37) SEA is viewed as an important tool of environmental protection. Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment provides in its preamble as follows:

38) “Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

39) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions”

40) In the UK the focus on SEA began in the early 1990s with recognition of the importance of embedding the principle of sustainable development within government policy making and ensuring that the development plan system took environmental considerations comprehensively and consistently into account.
41) At EU level, a report by the European Commission in 1993 on the effectiveness of the Environmental Impact Assessment Directive led to the conclusion that the evaluation of some projects was taking place too late in the development planning process, thus hindering proper consideration of alternative proposals and the location of projects. After a lengthy gestation period, Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive) was agreed in 2001.  

42) Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive) was agreed in 2001. Its objective is;

“...to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.”

43) European Commission guidance provides useful commentary

“The Strategic Environmental Assessment (SEA) Directive is an important step forward in European environmental law. At the moment, major projects likely to have an impact on the environment must be assessed under Directive 85/337/EEC. However this assessment takes place at a stage when options for significant stage are often limited. Decisions on the site of a project, or on the choice of alternatives, may already have been taken in the context of plans for a whole sector or geographical area. The SEA Directive...plugs this gap by requiring the environmental effects of a broad range of plans and programmes to be assessed, so that they can be taken in account while plans are actually being developed, and in due course, adopted. The public must also be consulted on the draft plans and on the environmental assessment and their views must be taken into account.

Whilst the concept of strategic environmental assessment is relatively straightforward, implementation of the Directive sets Member States a considerable challenge. In many cases it will require more structured planning and consultation procedures. Proposals will have to be more systematically assessed against environmental criteria to determine their likely effects and

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46 Article 1
those of viable alternatives. There will be difficult questions of interpretation, but when properly applied, these assessments will help produce decisions that are better informed. This in turn will result in a better quality of life and a more sustainable environment now and for generations to come” (Foreward to the EC Commission’s Guidance on the SEA Directive by the Director General of the Environment Directorate)

44) Under Article 4(1) of the Directive, where an environmental assessment is required, it must be carried out during the preparation of the plan or programme and before its adoption or submission to the legislative process. The requirements for assessment follow the components of those required for the EIA of projects and include the preparation of an environmental report containing requisite information, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and geographical scope of the plan or programme (article 5), consultation with relevant authorities and the public (article 6), and information on the plan/programme adopted (article 9). The assessment of the plan or programme is without prejudice to the later requirements of EIA for any project subject to the plan (see article 11(1))

45) The European Commission has published useful guidance on interpreting the requirements of the Directive including guidance on when an assessment is required (“EC guidance”)

The SEA Regulations

46) The UK implemented the Directive into UK law by the Environmental Assessment of Plans and Programmes Regulations 2004 (the SEA Regulations)

47) Regulation 3(2) provides that the Regulations apply to a plan or programme relating a) solely to the whole of any part of England or b) to England (whether as to the whole of part) and any other part of the United Kingdom.


When is an SEA required?

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48 SI 1633/2004
49) Regulations 5 and 6 of the SEA Regulations set out the scope of the requirement for a strategic environmental assessment. In doing so, they repeat in substance the wording of the SEA Directive\textsuperscript{49}.

50) An SEA is required if the first formal preparatory act of a plan or programme is on or after 21/07/04 and:

51) the plan/programme is prepared for is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and sets the framework for future development consent of Annex I/II projects or:

52) plan or programme which has been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive, in view of the likely effect on Special Protection Areas and Special Areas of Conservation or

53) the plan/programme sets the framework for future development consent of projects and it is determined (by the authority on behalf of whom the plan/programme is being prepared or the Secretary of State) that it is likely to have significant environmental effects

**SEA NOT required**

54) An SEA not required\textsuperscript{50} for:

   i. a plan or programme whose sole purpose is national defence or civil emergency
   
   ii. A Financial or budget plan or programme
   
   iii. plan or programme which determines the use of a small area at local level, unless it is determined that the plan or programme is likely to have significant environmental effects
   
   iv. or for a minor modification to a plan or programme which does require an SEA unless it is determined that the modification is likely to have significant environmental effects.

**Pipeline plans or programmes - first formal preparatory act before 21st July 2004**

2. For plan or programmes which had their first formal preparatory act before 21st July 2004, an SEA must be undertaken if the plan/programme has not been adopted or submitted to the legislative procedure for adoption before 22nd July 2006; and it is such that, it would have required an environmental assessment if its first formal act had been


\textsuperscript{50} Regs 5 (5) & (6)
after 21 July 2004 or the responsible authority is of the opinion that, the plan or programme was likely to have significant environmental effects.

3. An SEA will not however be required in these circumstances if the responsible authority decides that an assessment is not feasible and informs the public of its decision.

**Plans and Programmes**

4. Regulation 2 defines a plan/programme as “plans/programmes….which are
   a. subject to preparation or adoption by an authority at national, regional or local level; or
   b. are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and in either case,
   c. are required by legislative, regulatory or administrative provisions

5. ‘Plan/programme’ is not defined further in the Regulations/Directive but is to be interpreted broadly.

6. **Authority** is not further defined but is also intended to be broadly defined. The EC Guidance adopts the approach laid down in European Court of Justice caselaw which treats the concept of authority as including bodies made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and having for that purpose special powers beyond those which result from the normal rules. The guidance specifically refers to the activities of privatised utilities which in non privatised regimes would be carried out by public authorities. In the domestic context, the concept of “authority” in human rights law extends to hybrid authorities with a mix of public and private functions including privatised utility companies. Privatised utilities are considered subject to the requirements of Environmental Information Regulations.

7. **Subject to preparation and/or adoption.** The EC Guidance suggests that this refers to the plan/programme needing to fulfil certain formal conditions.

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51 Also repeats in substance the wording of the Strategic Assessment Directive.
52 EC Guidance paras 3.3 – 3.10. It may be that the terms should be taken to cover any formal statement which goes beyond aspiration and sets out an intended course of future action (para 3.4)
53 See Case C-188/89 Foster and others v British Gas ECR 1990 I-03313.
54 So called ‘hybrid’ authorities with a mix of public and private functions including the privatised water companies are subject to the obligations in the Human Rights Act in respect of their public functions (see Section 6(1) HRA and also Marcic v Thames Water [2002] QB 929 at paragraphs 61 - 65 (the Court of Appeal and House of Lords did not depart from the High Court on this aspect).
8. **Required by legislative, regulatory or administrative provision.** ODPM guidance on the SEA Regulations sets out the characteristics of 'administrative provisions' as likely to include provisions that are "publicly available, prepared in a formal way and probably involving consultation with interested parties. The administrative provision must have sufficient formality such that it counts as a "provision" and it must also use language that plainly requires rather than just encourages a plan or programme to be prepared"\(^{55}\).

Framework for future development consent

9. The EC Guidance refers to the requirement that the plan/programme sets the framework for future development consents of projects listed in Annexes I/II to the EIA Directive as being 'crucial to the interpretation of the [SEA] Directive'. It goes on to say that the words would normally mean that the plan or programme contains criteria or conditions which guide the way the consenting authority decides an application for development consent \(^{56}\).

10. Appendix 1 of the ODPM guidance sets out an indicative list of plans and programmes in the UK subject to the SEA Directive. The examples given include:

   d. Land use and spatial planning documents which form part of the regional spatial strategy or local development plan framework.

   e. Other plans produced by local or regional authorities (e.g. local air quality action plans, local transport plans).

   f. Environmental protection and management plans including Areas of Outstanding Natural Beauty Management Plans and salmon plans.

   g. Miscellaneous plans including oil and gas licensing, nuclear decommissioning strategies.

11. The common thread running through the list is that the plans tend to be produced, or subsequently adopted, by what may be termed loosely the principal regulatory, consenting or strategic authority for areas covered by the plan, including local authorities, the DTI, the Environment Agency, and the Nuclear Decommissioning Authority.

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\(^{55}\) See paragraph 2.6.

\(^{56}\) Para 3.23 See also para 3.28 "The phrase could also include sectoral plans and programmes which in broad terms identify the location of subsequent development within that sector. It would be necessary in each case to consider the extent to which future decisions on projects were conditioned by the plan or programme."
The mechanics of producing an environmental assessment

12. If an SEA is required, the responsible authority must produce an environmental report and consult on it. It then has various obligations in relation to taking account of the report, the opinions expressed in consultation and to explaining its decision.

The environmental report

13. Regulation 12 provides for the provision of an environmental report and its content:
   (1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of an environmental report in accordance with paragraphs (2) and (3) of this regulation
   (2) The report shall identify, describe and evaluate the likely significant effects on the environment of-
       a) Implementing the plan or programme: and
       b) Reasonable alternatives taking into account the objectives and geographical scope of the plan or programme
   (3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required taking account of-
       a) Current knowledge and methods of assessment;
       b) The contents and level of detail in the plan or programme;
       c) The stage of the plan or programme in the decision making process: and
       d) The extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment

27. Schedule 2 lays down the information for environmental reports required under Regulation 12(3):
   (1) An outline of the contents and main objectives of the plan or programme and of its relationship with other relevant plans and programmes
   (2) The relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme.
   (3) The environmental characteristics of areas likely to be significantly affected.
(4) Any existing environmental problems which are relevant to the plan or programme including in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Council Directive 79/409/EEC on the conservation of wild birds and the Habitats Directive

(5) The environmental protection objectives established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation.

(6) The likely significant effects on the environment, including short, medium and long-term effects, permanent and temporary effects, positive and negative effects, and secondary, cumulative and synergistic effects, on issues such as Biodiversity; Population; Human health; Fauna; Flora; Soil; Water; Air; Climatic factors; Material assets; Cultural heritage, including architectural and archaeological heritage Landscape and The inter-relationship between the issues referred to in sub-paragraphs (a) – (l)

(7) The measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme

(8) An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical difficulties or lack of know-how) encountered in compiling the required information

(9) A description of the measures envisaged concerning monitoring in accordance with regulation 17.

(10) A non technical summary of the information provided under paragraphs 1 - 9

Consultation

28. Regulation 13 provides for consultation on the plan or programme and the environmental report:

(1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report (“the relevant documents”) shall be made available for consultation in accordance with the following provisions of this regulation

(2) As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall-

a) Send a copy of those documents to each consultation body;
b) Take such steps as it considers appropriate to bring the preparation of the relevant documents to the attention of the persons who, in the authority’s opinion, are affected or likely to be affected by, or have an interest in the decisions involved in the assessment and adoption of the plan or programme concerned, required under the Environmental Assessment of Plans and Programmes Directive (“the public consultees”);

c) Inform the public consultees of the address (which may include a website) at which a copy of the relevant documents may be viewed or from which a copy may be obtained; and

d) Invite the consultation bodies and the public consultees to express their opinion on the relevant documents, specifying the address to which, and the period within which, opinions must be sent

(3) The period referred to in paragraph (2)(d) must be of such length as will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents

(4) The responsible authority shall keep a copy of the relevant documents available at its principal office for inspection by the public at all reasonable times and free of charge

Obligations to take into account and explain its decision

29. Regulation 16 provides, in part, that the responsible authority shall on adoption of the plan and programme provide a statement containing the following particulars:

   (4) a) how environmental considerations have been integrated into the plan or programme:

b) how the environmental report has been taken into account

c) how opinions expressed in response to –

   i) the invitation referred to in regulation 13(2)(d):

   ii) action taken by the responsible authority in accordance with regulation 13(4)

   have been taken into account

d) how the results of any consultations entered into under regulation 14(4) have been taken into account:

e) the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with; and

f) the measures that are to be taken to monitor the significant environmental effects of the implementation of the plan or programme
55) Recent cases include *R(on the application of Seaport Investments Limited and others) [2007 NIQB 7 Sep 2007* - a Northern Ireland decision and is the first decision to consider the SEA Directive and the Northern Ireland SEA Regulations. The first English case is currently making its way through the Courts.
ANNEX

Commentary of R(Trees and Wildlife) v Forestry Commissioners and the Court of Appeal decision in R(Horner) v Lancashire County Council

The Administrative Court has provided a significant interpretation of the extent of impacts required to be considered under the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (S.I. 1999/2228). In ‘R. (on the application of Tree and Wildlife Action Committee Ltd) v Forestry Commissioners’ ([2007] EWHC 1623 (Admin)) the Forestry Commissioners gave an opinion pursuant to the Regulations that a project comprising deforestation and development of around 5 hectares of a 19 hectare area of woodland for football pitches and car-parking was not a “relevant project”, so that an EIA was not required. “Deforestation” was defined in Regulation 2 as “deforestation for the purposes of conversion to another type of land use (which terms have the same meaning as in paragraph 1(d) of Annex II to … Directive [85/337/EEC])”. The area of deforestation was well above the threshold of 1 hectare set in Schedule 2 to the Regulations, but the Commissioners decided that the project was not likely to have significant effects upon the environment, stating that they had only been concerned with the environmental impacts associated with the proposed deforestation, and not any associated with the subsequent development The claimant brought judicial review proceedings on the basis that the Commissioners had failed consider the full scope of the project. The claimant argued its case on two grounds: (1) that the Regulations and Directive required the effects of the land use conversion to be considered as well as the preceding deforestation; and (2) that the football pitch development was a project linked to the deforestation project so that both aspects had to be considered together under Schedule 3 of the Regulations, which listed “cumulation” with other projects as a characteristic which had to be considered. Collins J quashed the grant of planning permission, finding that deforestation on its own was not covered by any requirement for an EIA and only had to be considered if there was a change of use proposed as a result of the deforestation. He thought that it would be somewhat strange if the requirement for an EIA consideration in those circumstances was limited merely to the deforestation aspect. Whilst there may be situations where deforestation itself might have such an adverse effect upon the environment as to make an EIA desirable, that would rarely be the case, and even in such cases it would be the project as a whole that was relevant with the deforestation and resulting development considered to see whether cumulatively they required an EIA. Collins J considered that this approach furthered the purpose of the Directive of ensuring that no development project took place which might have an adverse effect on the environment unless that possibility was properly investigated and taken into consideration in deciding whether the development should go ahead. It followed that in any case which fell within the ambit of the Regulations, but in particular if it was deforestation for the purposes of conversion to another type of land use, then the whole project, including that proposed use, had to be taken into account in deciding whether an EIA was required. The definition of “project” was wide and the proposals in the present case amounted to “cumulation” in that the two projects went together in reaching the final result, namely the change from forest to football pitches, and it was clear that this change of use should be taken into account. It would be a question of fact in an individual case whether it could properly be said that there was a “cumulation”, with proximity, combined effect and other factors would have to be taken into account.

EIA and animal waste-derived fuel

An appeal against the Administrative Court decision in ‘R (Horner) v Lancashire CC’ has been dismissed by the Court of Appeal ([2007] EWCA Civ 784). The case concerned an application for judicial review of the grant of planning permission for the erection at a cement works of machinery to handle animal waste derived fuel. The claimant was a local farmer who argued that the grant should not have been made without the undertaking of an Environmental Impact Assessment.
The claimant’s challenge was based upon three grounds. First, she submitted that the development was of a nature which required EIA, arguably falling within a number of “projects” under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. These were submitted to be either a “waste incineration installation” under Schedule 1, Classes 9 and 10 or Schedule 2, Class 11(b), or an “extension to an existing installation” under Schedule 2, Classes 13(a) and 5(b) of the 1999 Regulations. Secondly, the claimant argued that one of the permission conditions was irrational in that it did not tie in the burning of the fuel to the manufacture of cement. Thirdly, it was submitted that the defendant had failed to consider the waste management objectives found in the Waste Management Licensing Regulations 1991, Schedule 2 para. 4, and the fulfilment of those objectives found in policies contained in the Waste Local Plan and the National Waste Strategy 2000, and had failed to consider the Best Practicable Environmental Option for the disposal of waste as required by those policies. Ouseley J dismissed the application, finding that the meaning of the various classes in the 1999 Regulations was a matter of law, so that the meaning could be ascertained by reference to the defining characteristics of the relevant class, but that the application of the phrase, adopting the correct approach in law, to the particular facts of an individual case, was a matter of fact and degree, subject to challenge only on conventional public law grounds. The language of the application itself and the surrounding facts had demonstrated that the proposal or project was integral to the manufacture of cement. It was also clear that the proposed development could not possibly have exceeded the relevant threshold of 1000 square metres for Schedule 2 Class 13(a) and 5(b) of the 1999 Regulations. Nor had the development fallen within the class of a “waste incineration project” as the machinery involved no burning but it merely stored and fed the waste before it was burnt elsewhere, and where a new installation formed an integral part of a larger works, the relevant class for the purposes of the EIA regulations was that which dealt with extensions to whatever class of works those larger works fell into, unless the new works had changed the character of those larger works. The defendant had determined that no material change of use had occurred, and so the proposal had been for the extension of a cement production process. Ouseley J considered that in determining the correct class of installation what mattered was the purpose or the function of the installation, rather than the environmental effects of the process, so that, although it was an effect of the operation as a whole that the fuel was burned, it was as a whole or in isolation, an installation for the manufacture of cement, and not for waste disposal. If the operation could be said to be a waste related activity at all it was for the recovery of waste rather than its disposal, and there was no reason for not treating the 1999 Regulations as distinguishing between disposal and recovery installations. As to the condition challenged as irrational, Ouseley J found that this would procure the removal of the equipment at the same time as the rest of the equipment and structures became redundant on the site, and was lawful. The waste management objectives and policies had not applied because although the project for which planning permission was sought was related to the use of waste as an energy source, i.e. to its recovery, it was not a proposal “for the incineration” of animal waste. Finally, in considering the BPEO for waste disposal there was a limit to the extent to which a waste planning authority had to consider alternatives before it reached a conclusion on what it was satisfied was an environmentally acceptable application which related to the recovery of waste. The defendant had considered the relevant objectives and policies and any specific consideration of BPEO would inevitably have led to the same conclusions. In any event, BPEO was not the ruling consideration but one of a number of objectives which had to be balanced in the context of each case.

The claimant’s appeal was on the grounds (1) that Ouseley J had erred in holding that the proposed development could not possibly have exceeded the relevant threshold of 1000 square metres for Schedule 2 Class 13(a) and 5(b) of the 1999 Regulations – there being no “new floorspace” so that the threshold was not an appropriate criterion to apply, and there should instead have been consideration of the individual circumstances of whether an EIA was required; and (2) that if, contrary to Ouseley J’s ruling, the defendant had erred in law in failing to give proper consideration to the principles of BPEO, it was relevant to his decision to refuse relief that the defendant would have made the same decision whether or not it had given proper consideration to those principles. Auld LJ found that the meaning of “floorspace” should be
interpreted widely to achieve the Directive’s objectives and the definitions in the 1999 Regulations and the Town and Country Planning Act 1990 s.336(1) of “floorspace” and “building” indicated that the range of meaning of floorspace was wide enough to be a marker of scale in any structure or erection. Given the wide variety of developments to which class 13(a) change or extension of development provisions applied, the threshold as applied by class 13(a) was equally not confined to conventional floorspace. Ouseley J’s application of that broader meaning to the measurable base or floor area of the silo had been well within the range of reasonable decisions open to him. Replacement of the “floorspace” criterion, as a default mechanism, in the context of class 13(a) with a requirement to consider the individual circumstances of projects would be to require a screening opinion in almost every case, which would fundamentally undermine the structure of the 1999 Regulations. There was no basis for introducing a wider case-by-case approach than already provided to meet any perceived lack of appropriateness or adequacy of the class 13(a) size threshold. The defendant had effectively considered all the relevant objectives under the Waste Management Regulations, but the issue raised necessarily involved consideration of the impact of BPEO principles on the planning process, in particular, their role as compared with that of EIA requirements. There was an important distinction to be drawn between an environmental impact assessment and consideration of the principles of the policy where either or both were required. An EIA had a two-fold purpose: first to produce an assessment that could be weighed in the planning balance and second to help to inform the public of the substantive issues in the case. The BPEO principles did not have that dual role; they were relevant, albeit importantly, to the balance of planning considerations in the decision-making process, namely as to whether the grant of permission would be in line with the relevant waste objectives. A judge, when considering the lawfulness of a planning permission against the exercise of the local authority’s balance of material planning considerations was entitled, subject to Wednesbury constraints, to form a view as to whether in the circumstances the omission or inadequate consideration of BPEO as one of the material considerations would have made any difference. If, as in the present case, a judge held that it would not, given the paucity of practicable lines of enquiry open to it, that was a relevant consideration to his decision that the permission was legally valid. Whilst those findings made consideration of the question of discretion unnecessary, Ouseley J’s contingent view on the issue could not possibly be considered as Wednesbury irrational.