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Environmental Impact Assessment

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About this guide

Environmental Impact Assessment (EIA) is a key aspect of many large scale planning applications. It is a technique which is meant to help us understand the potential environmental impacts of major development proposals. Unfortunately both the process and the outcome of EIA can be complex and confusing, leaving local communities unsure as to how a development might affect them. This guide is intended as a broad introduction to the Environmental Impact Assessment (EIA). The material is drawn from regulations, circulars and guidance and is designed to help individuals understand what EIA is and in what circumstances it should be applied. The guide is not intended to provide guidance on how to prepare an EIA. For example it does not explain how to prepare an archaeological survey or landscape assessment. The overall theme of this guide is to encourage local communities to engage in the EIA process. Experts do not always know best and by ignoring local knowledge, their decision may have disastrous consequences for local people living near development sites.

What is environmental impact assessment?

In a nut shell EIA is just an information gathering exercise carried out by the developer which enables a Local Planning Authority to understand the environmental affects of a development before deciding whether it should go ahead. The really important thing about environmental assessments is the emphasis on using the best available sources of objective information and in carrying out a systematic and holistic process. In theory this should allow the whole community to properly understand the impact of the proposed development. Environmental assessment should lead to better standards of development and in some cases development not happening at all. Where developments do go ahead, environmental assessments should help to propose proper mitigation measures. Environmental impact assessment is meant to be a systematic process which leads to a final product, the Environmental Statement (ES).

Important jargon you will need to know:

- Environmental Impact Assessment (EIA) is a term used to describe the total process of assessing the environmental effects of a development project.
- An Environmental Statement (ES) is used to describe the written material submitted to the local planning authority in fulfilment of the EIA regulations.
- The term Environmental Assessment (EA) is no longer used, so as to avoid confusion with the Environment Agency.

So where does EIA come from?

The EIA process derives from European law. The European law basis is Directive 85/337, The Assessment of the Effects of Certain Public and Private Projects on the Environment as amended by EC Directive 97/11/EC. The Directive is mainly implemented in UK legislation through the Town and Country Planning (Assessment of Environmental Effects) (England and Wales) Regulations 1999 (SI 1999 No. 293). This is generally known as the EIA Regulations. Important guidance on the interpretation of the EIA Regulations and on the procedure to be used can be found in ODPM Circular 2/99 Environmental Impact Assessment.

The Regulations only cover decisions made under Town and Country Planning legislation. However, the Directive requires that all types of developments having significant impacts on the environment go through the EIA process. Therefore there are separate pieces of legislation (and

some non-legislative processes) covering EIA for other types of developments including highways, power stations, water resources, land drainage, forestry, pipelines, harbour works and many others. UK regulations have been criticised as not fully interpreting the spirit of the EIA directive. Individual cases over major development proposals have led to controversial debates about quality of EIA. Third parties have complained to the European Commission about the failure of the UK Government to fully implement the EC directives on EIA.

As well as the circular 2/99 there are a number of other key documents which outline the Regulations and the methodology of EIA including ODPM's Guide to Procedures: Environmental Impact Assessment. The regulations will be updated this year to take account of two judgments of the European Court of Justice in May 2006. (These will clarify and extend the application of EIA in outline and reserved matters planning applications – for more information see <http://www.communities.gov.uk/publications/planningandbuilding/towncountryplanning>)

When is an EIA required?

In a simple world EIA would apply to all forms of development ,but just to confuse everyone, EIA is required for some types of development and not others. Deciding on whether an EIA is required can be the source of major dispute between developers, communities and local authorities.

The EIA regulations define two schedules of developments. For Schedule 1 projects an EIA must always be carried out. For Schedule 2 projects an EIA must be carried out if the development is likely to have a significant impact on the environment by virtue of its nature, size or location (see selection criteria below). The definitions allow for considerable uncertainty about the need for EIA in specific circumstances.

Examples of Schedule 1 projects include:

- Major power plants
- Chemical works
- Waste disposal incineration
- Major Road Schemes

Examples of Schedule 2 Projects include:

- Quarries and opencast
- Some intensive livestock rearing
- Overhead transmission lines
- Surface storage of fossil fuel
- Foundries and forges
- Coke ovens
- Manufacture of dairy products
- Brewing
- Some textile operations
- Rubber production
- Wide range of infrastructure projects
- Waste water treatment plants

- Holiday villages
- Golf courses

All Schedule 2 developments are based on thresholds. A proposed development only becomes a Schedule 2 development where it exceeds the threshold. For example a 'shipyard' development only falls within Schedule 2 where 'the area of new floor space exceeds 1,000 square metres' (paragraph 4.g of Schedule 2).

It is important not to confuse the issue of 'thresholds' with the issue of whether a Schedule 2 development must undergo EIA because it is likely to have a significant effect on the environment. Just because a project falls within one of the categories set out in Schedule 2 and exceeds the Schedule 2 threshold, does not mean that EIA is required. The question is still whether the proposed development is likely to have a significant effect on the environment.

The three stage process is therefore as follows:

1. Is the proposed development within a category set out in Schedule 2?

If so, either:

2. a. does it exceed the threshold set out for that category in Schedule 2?

or b. is it in a 'sensitive area' such as a SSSI, SPA, national park, AONB etc?

3. If so, is it likely to have a significant effect on the environment by virtue of its nature, size or location?

If the answer to all three of those questions is 'yes' then an EIA is required.

If the answer to any of those questions is 'no' then an EIA is not required.

Questions 1 and 2 are objective questions of fact. However, question 3 is a matter of opinion and different authorities may reach different views on that question. A decision on question 3 is therefore much harder to challenge in Court.

Alright, so how do local authorities reach a decision on all of these tests?

The overall test for whether EIA is required for a Schedule 2 description of development is whether the proposed development would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

Government guidance states that EIA will be needed for Schedule 2 projects in three main types of cases:

- for major projects which are of more than local importance;
- occasionally for projects on a smaller scale which are proposed for particularly sensitive or vulnerable locations;
- in a small number of cases, for projects with unusually complex and potentially adverse environmental effects; where expert and detailed analysis of those effects would be desirable and would be relevant to the issue of principle as to whether or not the development should be permitted.

The decision should be taken by the local planning authority or the Secretary of State on a case-by-case basis taking into account the criteria set out in the new Regulations. The criteria which must be taken into account when screening a Schedule 2 development are set out in Schedule 3 to the Regulations which are as follows:

Schedule 3 selection criteria for screening schedule 2 development:

1 Characteristics of development

The characteristics of development must be considered having regard in particular to:

- the size of the development;
- the accumulation with other development;
- the use of natural resources;
- the production of waste;
- pollution and nuisances;
- the risk of accidents, having regard in particular to substances or technologies used.

2 Location of development

The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard in particular to:

- the existing land use;
- the relative abundance, quality and regenerative capacity of natural resources in the area;
- the absorption capacity of the natural environment, paying particular attention to:
 - i. wetlands;
 - ii. coastal zones;
 - iii. mountain and forest areas;
 - iv. nature reserves and parks;
 - v. areas classified or protected under Member States' legislation; areas designated by Member States pursuant to Council Directive 79/409/EEC on the conservation of wild birds[41] and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora[42];
 - vi. areas in which the environmental quality standards laid down in Community legislation have already been exceeded;
 - vii. densely populated areas;
 - viii. landscapes of historical, cultural or archaeological significance.

3 Characteristics of the potential impact

The potential significant effects of development must be considered in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to:

- the extent of the impact (geographical area and size of the affected population);
- the transfrontier nature of the impact;
- the magnitude and complexity of the impact;
- the probability of the impact;
- the duration, frequency and reversibility of the impact.

The 1999 regulations and circular 02/99 make clear that the usual indicative criteria for requiring EIA in schedule 2 cases may not apply when the development is likely to impact on environmentally sensitive locations.

Paragraph 36 of the circular makes clear that an EIA will normally be required for any development likely to have significant impacts on SSSIs and that in areas such as National Parks and areas of Outstanding Natural Beauty, the probability of requiring environmental impact assessment for particular development is increased.

There are a number of complex ideas bound up in the assessment of the likely impact of the development and its consequent need for environmental impact assessment. The sensitivity of particular receptors to environmental impact may, for example, include both social and ecological impacts. Likewise there is an emerging trend to see the environmental carrying capacity of an area in terms, not just of wildlife, but as a measure of for example air pollution and its impact on human health. This has led to an extremely important and contentious area of environmental impact assessment and planning regulation which is the assessment of health impacts and their materiality to planning decisions. For major developments, Local Planning Authorities have required health impact studies to be prepared.

What about extensions to existing developments?

Extensions or changes to existing development will only require environmental impact assessment if they are likely to have significant negative environmental impact. Such impact should be measured against the indicative thresholds set out in column 2 of schedule 2.

Who decides if an EIA is required?

A developer can decide to submit an EIA voluntarily for a large scale development. Normally, however, it is the local planning authority who decides if an EIA is required in consultation with the applicant.

The local planning authority

The local planning authority may be asked informally by the applicant whether EIA is necessary for schedule 2 projects. The 1999 regulations now require a local planning authority to provide on request a formal opinion as to whether EIA should be carried out, and this is termed a screening opinion. The local planning authority must be satisfied that it has received sufficient information to give a safe opinion, bearing in mind that the failure to require an EIA for a project subsequently found to have significant environmental impacts, could be subject to costly legal challenge. The 1999 regulations require that such opinions be made public by formally recording them on the planning register.

Where an application is submitted for a development falling within any of the Schedule 2 descriptions without an ES, the local planning authority may determine that EIA is required and refuse to consider the application until an ES is submitted. Such determination should be made within three weeks, beginning with the date of receipt of the application.

The Secretary of state

The Secretary of State has reserved powers to intervene in cases where the local planning authority have failed to give an opinion on whether an EIA is needed within the prescribed period, or where the applicant disagrees with the opinion given by the local planning authority.

EIA and Case Law

In recent years, there have been a large number of cases in the UK courts and the European Court of Justice that have looked at questions surrounding environmental impact assessments. One important case illustrates the range of EIA questions which the courts have dealt with:

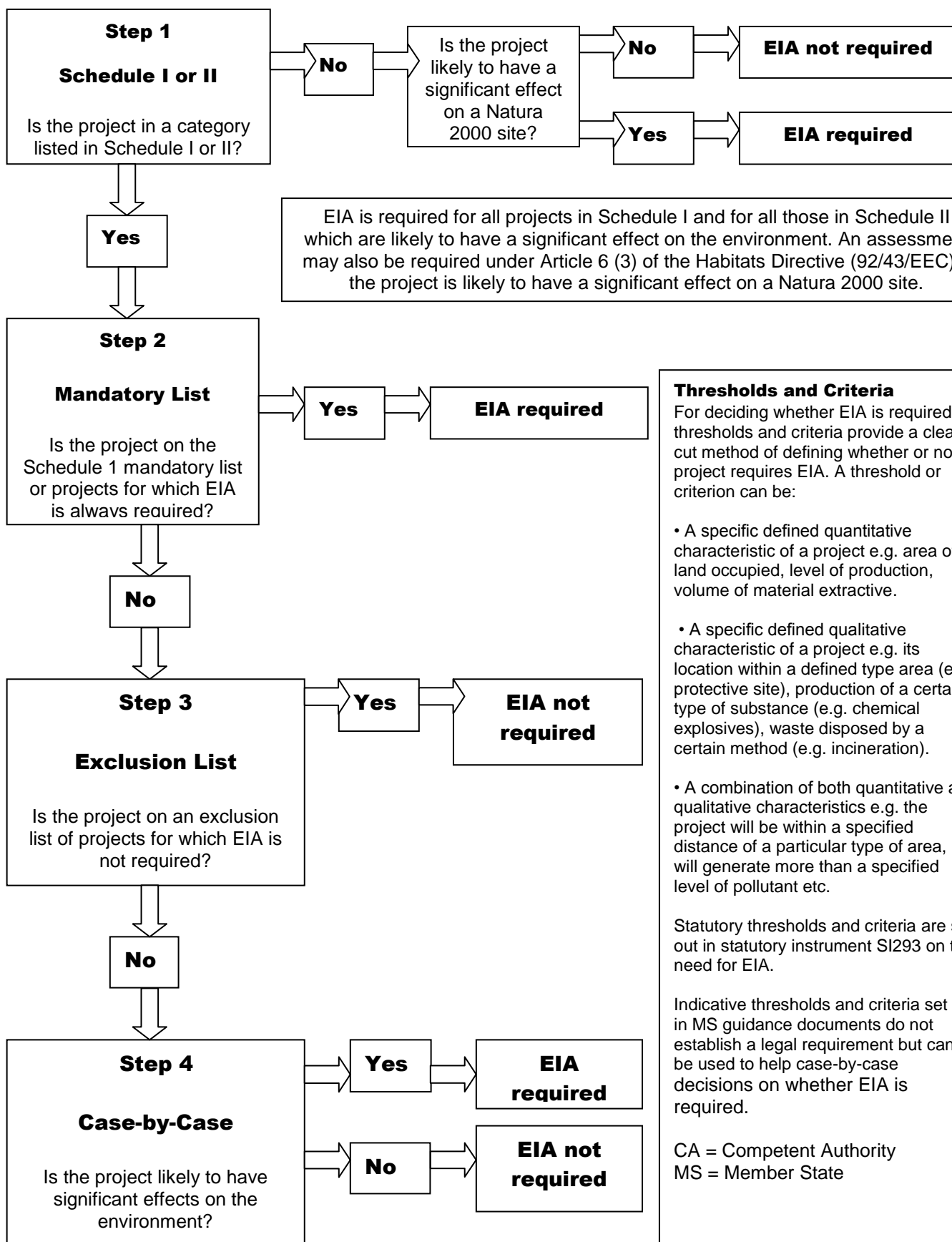
In *Berkeley v Secretary of State for the Environment* 2000, the House of Lords ruled that EIA could no longer be inferred. In short, this means that planning authorities can no longer say that while they have not carried out an explicit EIA, their determination process amounts to an EIA by addressing key environmental impacts. This was often used as a defence by local authorities who had not required EIA. The Lords ruled that EIA was a distinct set of methods which must be applied coherently and in their entirety. In effect, local authorities are now under more pressure to get their decisions about whether to require an EIA right in the first instance. The Government has published a guidance note for local authorities on the key case law and an edit version, for those finding it hard to sleep at nights, is attached at Annex 1

Stop Press! New case on Schedule 2 projects

The European Court of Justice recently gave judgment in the case of *Paul Abraham and others v Region Wallone and others* (2008), a case about modifications to an airport in Belgium. The European Court referred to the original European law (the Directive) which requires that projects which are likely, by virtue of their nature, size or location, to have significant effects on the environment, are to be subject to an EIA. The Court then issued a warning that *“a Member State which establishes criteria and/or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion”* under the Directive.

This judgment may mean that even if the project does not exceed the threshold set out for its category in Schedule 2, and is not actually in one of the ‘sensitive areas’, an EIA could still be required if the nature and location of the project mean that the project is still likely to have a significant effect on the environment. If you think this applies to a development in your area, get in touch with the Rights & Justice Centre.

Environmental impact assessment criteria



Step 5 - Recording the Screening Decision

When a formal screening decision is made whether to require or not to require EIA, the competent authority must keep a record of the decision and the reasons for it, and make this available to the public.

So what stages of the EIA should we look out for?

Identifying Alternatives

Part II of Schedule 4 of the regulations requires the applicant to provide a reasoned decision of the main alternatives to development. These requirements raise a number of important new issues about planning decision making. It suggests for example that a developer would honestly seek to examine other development sites which may not be in their control. It also suggests that, in the case of waste disposal, consideration should be given to more sustainable solutions in sectors outside the operational range of the company. In practice therefore, the assessment of alternatives is at present fairly meaningless, since developers will not identify an option likely to make profits for a competitor.

Scoping

Scoping is simply the part of the process when the applicant and the LPA decided what issues the EIA will investigate. The emphasis should be on the 'main' or 'significant' effects. Other issues may be of little or no significance for the particular development and will need only brief treatment to indicate that their relevance has been considered. Regulation 10 of the Regulations allows developers to obtain a formal scoping opinion from an LPA on what should be included in an ES. This is a controversial move because it throws a considerable administrative burden on planning officers. It also means that responsibility for failing to include an important issue rests as much with planning officers as it does with the applicant.

Baseline

The scoping exercise enables the applicant to establish the existing conditions or standards referred to as the baseline against which the effects of the proposed development may be judged. This can be crucial stage for communities who may have local knowledge which is highly relevant to understanding the baseline conditions.

Consultation

As well as consulting the local authority, anyone conducting an EIA is obliged to consult a set of statutory consultees. These names, which include government agencies, are laid down in regulation and are obliged to provide information which they hold and which might be relevant to the EIA. In practice, there are some key consultees, such as the Environment Agency who deal with a whole range of pollution issues and flood defence and, English Nature and English Heritage who deal with biodiversity and archaeology respectively. The consultation bodies are only required to provide information already in their possession usually held on public registers. They are not required to carry out any research on behalf of the applicant. A reasonable charge may be made to cover the cost of making the information available to the applicant.

In addition to the statutory consultation, many of those working with third parties have taken the directive requirement for consultation as applying to the whole community, placing a burden on the developers negotiating with local communities. In reality, while this may be best practice, UK EIA regulations do not require any additional level of public consultation. The applicant may however choose to consult other local organisations with a specific interest, particularly where local groups or societies may have prepared species schedules and carry out regular monitoring.

Publicity

For an ES accompanying a planning application, the publicity by the local planning authority consists of the following:

- a copy of the ES is put on Part I of the Register of Planning Applications available for inspection by members of the public;
- a site notice in the prescribed form is displayed on or near the application site for not less than 21 days;
- an advertisement is put in a newspaper circulating in the locality of the application site.

Where the development involved is likely to be controversial, the planning authority may provide copies of the ES in local public libraries or at local authority offices or other convenient locations.

If an ES is submitted after the Planning Application, it is the applicant's responsibility to organise publicity by:

- a notice that should be put in a newspaper circulating in the locality of the application site;
- a site notice on the application site containing the same information as the newspaper advertisement, in a position where it is visible to members of the public without trespassing. The site notice should remain in position for not less than seven days in the month immediately preceding the submission of the ES.

A certificate that the site notice has been posted, together with a copy of the newspaper advertisement, should be supplied to the local planning authority with the ES.

What's the format of an environmental statement?

Once the EIA has been carried out, the information should be systematically presented in the environmental statement. The Regulations specify in Schedule 4, the information to be included in the ES is as follows:

Description of the development, including in particular:

- description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;
- a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;
- an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development.

A description of the aspects of the environment likely to be significantly affected by the proposed development, including in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

A description of the likely significant effects of the proposed development on the environment should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:

- the existence of the development;
- the use of the natural resources;
- the emission of pollutants, the creation of nuisances and the elimination of waste and the description by the applicant of the forecasting methods used to assess the effects on the environment.

A description of the measures envisaged to prevent, reduce and where possible, offset any significant adverse effects on the environment. A non-technical summary, of the information provided above.

An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant in compiling the required information. There is no statutory or prescribed format for the arrangement of this information. This will depend upon the scale of the development project, and the complexity of the Issues that have been investigated. The ES can be a lengthy document with separate technical annexes.

At present, for an environmental statement of any significance, it would be usual to provide the information on a CD-Rom.

An Environmental Statement (ES) is often packaged in three parts

Part I: The planning application

- Planning application form
- Certificate
- Schedule of plans and drawings

Part II: The environmental statement

Non-technical summary:

This is the summary of the contents and conclusions of the EIA. It is the part of the ES which may be published separately for circulation on a non-statutory basis to local residents or interested parties. Beware of the often generalised nature of non-technical summaries. If you really want to get to grips with an application, you need the full ES.

Environmental statement:

This sets out the information about the development in more detail than the non-technical summary. The ES draws together the threads which have been explored through the technical reports. These issues can be summarised under various headings, depending upon the nature of the development proposed, and having regard to the various items identified in the Regulations (see 6(1) Appointment of environmental consultants). It is necessary to define the 'baseline' that has been adopted in order to demonstrate the effects, if any, of the development upon each key issue that has been identified by the scoping exercise. Also, where an issue has not been investigated in detail, this should be clearly explained in order to avoid any third party questioning the adequacy of the EIA.

The mitigation measures should be described either in relation to each item or collated in a separate section of the ES, which may also constitute the suggested environmental management and monitoring scheme to be followed during and after the development has been completed and is operational.

The ES should set out an outline of the main alternatives studied by the applicant and an indication of the main reasons for his/her choice, taking into account the environmental effects.

Main alternatives may include:

- physical location of sites;
- type of processes (where relevant);
- physical appearance, design of buildings and site layout, including materials to be used;
- means of access, including principal mode of transport to be used to gain access to the development.

This component of an ES is often dealt with in a very summary way. It should not be ignored as it could give rise to third-party objections about the adequacy of the ES.

Part III: Technical reports

The individual technical reports prepared for the various effects on the environment, together with the data supporting the conclusions, should be included in Part III. This enables the local planning authority to verify the contents of the ES by reference to the source material, and also be satisfied that the EIA has been sufficiently rigorous and in accordance with the methodology agreed as part of the scoping exercise.

When is an Environmental Statement not an Environmental Statement?

The format and contents of an ES can often be inadequate either in terms of the quality of the assessment or because key parts of the assessment are missing. Frequent defects include, the failure to produce a non-technical summary, the failure to adequately consider human health and the failure to include proper consideration of alternatives. The discussion above has outlined some of the issues which the regulations require EIA to consider. It is also worthwhile making reference to the original EU directive 97/11/EC which sometimes contains more useful indications of the scope of EIA.

The legal principle of direct effect, in which EU directives can have a direct effect in UK law, regardless of whether they have been transposed by UK regulations, means that local communities can mount challenges based on original directives.

Are the public entitled to see the ES and how much should it cost?

The public are entitled to see both the non technical summary and the full ES. The local planning authority is obliged to provide this information. The problem is that they are also entitled to make charges to copy material, which for a full ES might run into hundreds of pounds.

The EIA regulations require that the developer must make available copies of the ES at a reasonable cost. This cost is nowhere defined but the average price for ES is between £60.00 and £120.00. This cost is a major barrier to public participation in the process. It is worth remembering that Parish Councils and elected members can often get free copies of ES.

In the past some local groups have also obtained copies free through appealing to MPs or MEPs. Members of the public can rely on their rights under the Environmental Information Regulations 2004 to obtain copies of the document at no more than the cost of photocopying (see www.RightToKnowOnline.org). One way of saving costs is to ask for a copy of the EIA on a CD-Rom. Where the council has a copy in CD Rom format, then this should cost no more than £1.00 - £2.00 to obtain.

What about assessing the quality of EIA?

Information in planning cannot be seen as always providing a clear technical and objective statement of environmental circumstances. In practice, the ES is often a sales document for the applicant and there have been increasing calls for an independent commission of EIAs to take them out of the hands of those with a vested interest in seeing schemes approved. This realisation is vitally important for the evaluation of EIA since it requires planners and the public to apply a critical assessment of both baseline data and measures designed to secure mitigation.

Beyond this critical mind set, a number of formalised mechanisms have been developed with which to assess the quality of EIA. These methods are summarised in Appendix 7 of the DoE publication 'Good Practice on the Evaluation of environmental Information for Planning Projects (HMSO 1994)'. The most often used system is known as the Lee Colley review Package. This system attempts to divide an ES into its constituent areas and review categories and sub categories in line with an A to F scale. The review process is usually conducted by consultants with experience in each field but in fact any local community group could apply a technique, particularly where they have local knowledge not possessed by the developer.

The major problem with the system is that it's essentially subjective and certainly time consuming. It is therefore unlikely that a decision to reject the contents of ES could be justified solely on such an assessment. In practice the evaluation of ES is based on professional experience and on good knowledge of the application area and its environmental context.

Conclusion

The legal and procedural background to EIA is complex but members of the public can be surprisingly effective in participating in the process if they ignore the jargon, have a basic understanding of the process and apply their local knowledge effectively. Things to look out for are phrases such as "desk top survey" which is short hand for nobody had time to look at the site. The quality of ES can be surprisingly poor, with developers often keen to do the least possible to get the application through, so it is vital local people go on asking critical questions of the applicant and local authority planners. In the future EIA is likely to be applied to ever more forms of development. New measures will soon ensure the Strategic Environmental Assessment of planning policy and investment programmes. EIA can be made into a useful tool to defend the environmental quality of localities but only if local people feel able to engage with the process effectively.

Further information and guidance:

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26 – 28 Underwood Street, London, N1 7JQ
Website: www.foe.co.uk

Planning

Email: planning@foe.co.uk
Website: www.YourPlanningRights.co.uk

Right to Know

Email: right2know@foe.co.uk
Website: www.RightToKnowOnline.org

Rights and Justice Centre

Email: legal@foe.co.uk

Useful web sites

Government

Audit Commission
www.audit-commission.gov.uk

Department for Communities and Local Government
<http://www.communities.gov.uk/>

The Planning Inspectorate
<http://www.planning-inspectorate.gov.uk/>

Environment Agency
www.environment-agency.gov.uk/

Information Commissioners Office
www.ico.gov.uk

Neighbourhood Statistics
www.neighbourhood.statistics.gov.uk

Environment Agency Public Registers
<http://www2.environment-agency.gov.uk/epr/>

Planning Portal
www.planningportal.gov.uk

Non Governmental Organisations (NGO)

Air Quality – UK National Air Quality site
www.airquality.co.uk

Campaign to Protect Rural England planning site
www.planninghelp.org.uk

Environmental Law Foundation
www.elflaw.org/

Liberty
www.liberty-human-rights.org.uk/

Neighbourhood Initiatives Foundation
www.nif.co.uk/

Planning Aid
www.planningaid.rtpi.org.uk

Wildlife and Countryside Link.
www.wcl.org.uk

Specific reading

Community Rights Resource Pack:
<http://www.foe.co.uk/resource/local/planning/resource/index.html>

Department for Communities and Local Government – Environmental Assessment
<http://www.communities.gov.uk/index.asp?id=1143275>

The Planning and Compulsory Purchase Act 2004
www.legislation.hms.gov.uk/acts/acts2004/20040005.htm

Royal Town Planning Institute:
<http://www.rtpi.org.uk/resources/publications/environment/eia/>

ANNEX 1 EIA AND CASE LAW

This is an edited version of longer document you can find on the CLG web site. Its pretty dense but gives a flavor of some the legal challenges made around EIA.

Note on environmental impact assessment directive for local planning authorities

Case Law on whether an ES is required?

In legal proceedings, domestic Courts must take account of judgments of the European Court of Justice (ECJ). So far as the EIA Directive is concerned the ECJ has consistently held that in its application it is to be interpreted as having a "wide scope and broad purpose" (**Kraaijveld (Dutch Dykes) Case C-72/95**). This has implications for Local Planning Authorities (LPAs) when they are screening for EIA.

A recent example of how the 'wide scope and broad purpose' applies to England and Wales is found in the Court of Appeal judgment relating to a planning proposal by the Big Yellow Property Company Ltd to construct a storage and distribution **facility (Goodman and another v Lewisham London Borough Council [TLR 21/2/03])** The planning authority took the view that as such development was not specifically described in either the Directive or Regulations, there was no need to consider EIA. Following legal challenge, the Court of Appeal decided that *"in this instance "infrastructure" goes wider, indeed far wider, than the normal understanding, as quoted from the Shorter English Dictionary, of "the installations and services (power stations, sewers, roads, housing etc) regarded as the economic foundations of a country"*. It held that the decision that the development was outside the reach of Schedule 2.10(b) of the EIA Regulations was outside the range of reasonableness that was open to the planing authority. The planning permission was quashed and the application remitted to the planning authority for reconsideration.

What are the lessons of these cases?

First, the Directive is **not** open to narrow interpretation. The UK Courts will interpret the Directive in the European sense - i.e. as having wide scope and broad purpose. Second, **do not** assume a project is excluded simply because it is not expressly mentioned in either the Directive or the Regulations. For example, neither the Directive nor the EIA Regulations refer to specifically "housing development". But it would be a mistake to consider that housing development does not fall within the ambit of "urban development projects".

Case Law on the format for an ES.

There is no prescribed format or recommended length. The key issue is that it contains the relevant environmental information specified in Schedule 4 of the EIA Regulations. It may comprise more than one document but in this case it will be helpful if the status of each and its relationship to the others is clearly explained.

In the case of **Berkeley v SSETR (2000) [WLR21/7/2000 p420]**, the House of Lords commented that an ES must not be a "paper chase". Lord Hoffman said, "the point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language."

Is it necessary to have full knowledge of the environmental effects before making a screening decision on whether EIA is needed?

The EIA Directive requires that decisions on whether to grant development consent for specific projects are taken in the full knowledge of the project's likely significant impact on the environment. It also requires a determination to be made of which projects should be made subject to assessment. There is a two stage process - first, deciding whether EIA is required; and second, where it is required, of providing the environmental information.

At the 1st stage, the responsibility is to consider whether the project is likely to have a significant effect on the environment. This calls for the exercise of professional judgment taking into account factors such as nature, scale and location of the project (see Schedule 3 of the EIA Regulations), knowledge of the local area and its environment and evaluation of such information as it is reasonable to expect the applicant to provide at this stage. But the amount of information necessary at this stage does not mean you need to have "full knowledge" of every environmental effect. Only if it is decided that EIA is required, will full and detailed knowledge of the project's likely significant effects be required. A helpful judgment in this respect is that of **Regina oao Jones v Mansfield DC (January 20, 2003)** where **Richards J** held that in general a lesser degree of information is needed at the 1st stage of deciding whether EIA is required at all than at the 2nd stage where it necessary to provide the information. He commented that

"it is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available and to any gaps in that information and to any uncertainties that that may exist, as to the likelihood of significant effects. The gaps and uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effects. Everything depends upon the circumstances of the individual case." The judgment also noted that:

"Whether sufficient information is available to enable a judgment to be made as to the likelihood of significant environmental effects is a matter for the authority, subject to review by the court on Wednesbury principles".

Case Law on what should be in the ES

Once a scoping opinion is issued can the Council request further information?

It is important to stress that the authority must obtain all the information it needs to assess and evaluate the likely significant environmental effects of the proposal before it reaches its decision. It cannot adopt a "wait and see" approach or impose a condition requesting further work to identify the likely environmental effects after permission has been granted. It must be sure that all of these have been identified and taken into account before granting planning permission.

R v Cornwall County Council ex parte Jill Hardy [2001 JPL 786] refers to a case in which the applicant carried out an EIA and provided an ES. Although it was known that the conditions at the site were those favoured by a protected species, bats, the applicant did not investigate for their presence as a part of the EIA. The planning authority, advised by English Nature, imposed a condition requiring the applicant to carry out a survey to establish whether bats were present prior to commencing the development. The Court held that this information should have been included in the ES, otherwise the authority could not comply with the EIA Regulations (Regulation 3(2)). The planning permission was quashed.

Does this now mean that conditions cannot be used in cases where the proposed development fall within the scope of the EIA Regulations?

No. They can still be used in the case of EIA development. But planning authorities need to exercise care and judgment to ensure that conditions designed to mitigate the likely effects of a proposed development are not used as a substitute for environmental impact assessment or to circumvent the requirements of the EIA Directive.

It may be useful to refer to relevant recent case law.

Regina oao Lebus v South Cambridgeshire DC [2003 2PLR5] involved development for an egg production unit to house 12,000 free range chickens. A local resident had written to the planning authority in 2000 suggesting that EIA was required for this development. After a meeting and discussion with the applicant, the planning officers dealing with the case took the view that this was not EIA development and the applicant was told informally that EIA was not required. The planning officer dealing with the case made no written record of his conclusions. At the meeting the officers concluded that the potential adverse impacts of the development would be insignificant with proper conditions and management under enforceable under section 106 planning obligations. Planning permission was granted subject to conditions in 2002. The resident challenged the decision by judicial review.

The Court allowed the appeal and quashed the planning permission. So far as planning conditions and EIA are concerned it held that *"it is not appropriate for a person charged with making a screening decision to start from the premise that although there may be significant impacts, these can be reduced to insignificance by the application of conditions of various kinds. The appropriate course in such a case is to require an environmental statement and the measures which it is said will reduce their significance"*.

The message from Lebus is that where proposed development is EIA development the use of conditions cannot be used to substitute for the proper assessment procedure. To do so would simply negate the purposes of the Directive. It is also clear from this case that planning authority staff need to make formal screening opinions on Schedule 2 applications.

The question of planning conditions was also considered in **Gillespie v First Secretary of State and Bellway Urban Renewal (TLR 7/4/2003)** In this case the First Secretary of State granted planning permission for a housing development on the site of a former gas works. One of the former gasholders was still in situ. Soil surveys on the site had been carried out and revealed contamination but the type and extent was not fully known, particularly of that below the gasholder. The First

Secretary of State, however, considered that there was no need for an EIA. He approved the development subject to conditions to carry out a detailed site examination to establish the nature, extent and degree of the site contamination and to remediate it prior to commencement of the development. The remediation strategy would rely upon tried and tested methods so there was no reasons to assume they would be unsuccessful in removing the contamination.

The Court of Appeal held that on considering whether an environmental impact assessment was required before planning permission could be granted the Secretary of State did not have to ignore proposed remediation measures but could not assume that in a case of any complexity they would be successfully implemented.

Lessons from Gillespie

Remediation measures need not be ignored when making decisions about the likely significant effects of proposed development. But care and judgment has to be exercised. Remedial measures that are well-established and uncontroversial, eg cleaning wheels of trucks and covering load in lorries to minimise dust etc. may well be taken into account. In more complex development it may be less appropriate to take the proposed measures into account. It is important that the offer of remediation measures is not used to frustrate the purpose of the EIA directive or serve as surrogate for it.

Case Law on Evaluating the Environmental Statement for full and outline applications

The planning authority is responsible for evaluating the ES to ensure it addresses all of the relevant environmental issues and that the information is presented accurately, clearly and systematically..

The authority has to ensure that it has in its possession **all** relevant environmental information about the likely significant environmental effects of the project **before it** makes its decision whether to grant planning permission. It is too late to address the issues after planning permission has been granted.

Does this also apply to applications for outline planning permission where some matters may be reserved for later determination?

Yes. Where it applies, the Directive requires EIA to be carried out prior to the grant of "development consent". Development consent is defined as "the decision of the competent authority or authorities which entitled the developer to proceed with the development". Under the UK planning system, it is the planning permission that enables the applicant to proceed with the development. Therefore, in the case of outline applications, an EIA application must be properly assessed for possible environmental effects prior to the grant of outline permission.

It will not be possible to carry out an EIA at the reserved matters stage. The planning permission and the conditions attached to it must be designed to prevent the development from taking a form - and having effects - different from what was considered during the EIA.

This was confirmed in the case of **R V SSTLR ex parte Diane Barker [2002 EnvLR 631]**.

For outline planning applications, how should an EIA be carried out so as to comply with the Directive and Regulations?

The cases of **R v Rochdale MBC ex parte Tew [1999 3PLR74]** and **R v Rochdale MBC ex parte Milne [2001 81PCR27]** set out the approach that planning authorities need to take when considering EIA in the context of an application for outline planning permission if they are to comply with the Directive and the Regulations.

Both cases dealt with a legal challenge to a decision of the authority to grant outline planning permission for a business park. In both cases an ES was provided. In **ex parte Tew** the Court upheld a challenge to the decision and quashed the planning permission. In **ex parte Milne**, the Court rejected the challenge and upheld the authority's decision to grant planning permission.

In **ex parte Tew**, the authority authorised a scheme based on an illustrative masterplan showing how the development might be developed, but with all details left to reserved matters. The ES assessed the likely environmental effects of the scheme by reference to the illustrative masterplan. However, there was no requirement for the scheme to be developed in accordance with the masterplan and in fact a very different scheme could have been built, the environmental effects of which would not have been properly assessed. The Court held that description of the scheme was not sufficient to enable the main effects of the scheme to be properly assessed, in breach of Schedule 4 of the EIA Regulations.

In **ex parte Milne**, the ES was more detailed; a Schedule of Development set out the details of the buildings and likely environmental effects, and the masterplan was no longer merely illustrative. Conditions were attached to the permission "to tie the outline permission for the business park to the documents which comprise the application". The outline permission was restricted so that the development that could take place would have to be within the parameters of the matters assessed in the ES. Reserved matters would be restricted to matters that had previously been assessed in the ES. Any application for approval of reserved matters that went beyond the parameters of the ES would be unlawful, as the possible environmental effects would not have been assessed prior to approval.

The Judge emphasised that the Directive and Regulations required the permission to be granted in the full knowledge of the likely significant effects on the environment. This did not mean that developers would have no flexibility in developing a scheme. But such flexibility would have to be properly assessed and taken into account prior to granting outline planning permission.

What are the lessons of the Tew and Milne and Barker cases?

- i). An application for a "bare" outline permission with all matters reserved for later approval is extremely unlikely to comply with the requirement of the EIA Regulations;
- ii). When granting outline consent, the permission must be "tied" to the environmental information provided in the ES, and considered and assessed by the authority prior to approval. This can be usually done by conditions although it would also be possible to achieve this by a section 106 agreement. An example of a condition was referred to in **ex parte Milne**. "The development on this site shall be carried out in substantial accordance with the layout included within the Development Framework document submitted as part of the application and shown on (a) drawing entitled 'Master Plan with Building Layouts'." The reason for this condition was given as "The layout of the proposed Business Park is the subject of an Environmental Impact Assessment and any material alteration to the layout may have an impact which has not been assessed by that process." (see paras 28 and 131 of the judgment);

iii). Developers are not precluded from having a degree of flexibility in how a scheme may be developed. But each option will need to have been properly assessed and be within the remit of the outline permission

iv). Development carried out pursuant to a reserved matters consent granted for a matter that does not fall within the remit of the outline consent will be unlawful.

Domestic challenges

If the project is one to which the EIA Regulations apply it is essential to comply fully with them. It is not sufficient to argue that EIA was not necessary because all of the information that could have been in the ES was available elsewhere and was taken into account before the decision was taken; or that had an ES been available the decision would have been the same.

In **Berkeley v SSETR**, the House of Lords unanimously emphasised the need to comply with the Regulations. It took the view that when considering compliance with the Regulations it was necessary to consider the EIA Directive. The Lords stressed that the importance of the EIA process extended beyond the decision on the application. Its purpose is to provide individual citizens with sufficient information about the possible effects and give them the opportunity to make representations. The Court was not entitled to decide after the decision had been made that the requirement of an EIA could be dispensed with on the ground that the outcome would have been the same even if these procedures had been followed. In his leading judgment, Lord Hoffman noted that the Directive did not allow Member States to treat "a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the information which should have been provided by the developer".