Llywodraeth Cynulliad Cymru
Welsh Assembly Government

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1 July 2002

Dear Colleague,

Environmental Impact Assessment Directive

Over the past few years, an increasing number of planning decisions have been challenged on grounds that the local planning authority has not, or has not properly, complied with the requirements of the European Community Directive on the assessment of the effects of certain public and private projects on the environment (the EIA Directive). Local authorities need to ensure compliance with the Directive so that environmental impacts can be properly considered. For all concerned, challenges are costly and time consuming. They delay and frustrate the planning system and do little to encourage belief in its efficiency.

We cannot prevent such challenges. But careful application of the Regulations that implement the Directive will help minimise them and should also limit the likelihood of a successful challenge.

Attached to this letter is a note in the form of a Q/A brief that sets out minimum requirements of the EIA Regulations that transpose the Directive. It also highlights some EIA related issues that have arisen in recent Court cases and indicates actions that your planning staff can take to avoid similar difficulties. I would be grateful if you could arrange to disseminate it to **all** of your development control staff and the Chairman and Members of the Planning Committee. I am arranging for a copy to be placed on the Assembly's Internet site.

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If you think development control staff within you authority would find it helpful to meet my staff for informal training/discussion on EIA issues, please get in touch with Jean Parry by telephone on 029 20 823882 or e-mail Jean.Parry@Wales.gsi.gov.uk We hope to be able to tailor the discussions to your specific needs. Due to the pressure on my staff as a result of current staff vacancies, it may take a while to meet the demand for training. In the meantime, Jean or Dave Miles (029 20 823474) will be happy to discuss any issues of concern.

We will discuss your individual needs for training and organise sessions as soon as we know the level of demand.

Yours sincerely

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Environmental Impact Assessment

Background

In the UK, environmental issues have long been taken into account during the planning process. But practice varied throughout the European Community. Member States agreed in 1985 that procedures should be harmonised so that environmental issues were addressed in a more rigorous, scientific and transparent manner. In 1988 the European Directive on the effects of certain public and private projects on the environment came into effect. The Directive, referred to as the EIA Directive, was amended in 1997. The consolidated text of the directive is reproduced at Appendix 1 of the publication "Environmental Impact Assessment; a guide to procedures". An electronic copy is available at www.planning.dtlr.gov.uk/eia/guide/index.htm

For projects that are subject to approval through the planning system the requirements of the Directive have been transposed into domestic legislation by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999 No 293). A copy of these Regulations is available at www.legislation.hmso.gov.uk/si/si1999/19990293.htm

Although the Directive has now been in force for many years some planning authorities will have had limited experience of it. This note, in the form of answers to frequently asked questions, offers a brief guide to the Directive, the Regulations and planning authority responsibilities. The guide does not offer definitive guidance and is not a substitute for the Regulations or for guidance provided in the official Departmental Circular (Welsh Office Circular 11/99, Environmental Impact Assessment). You need to be familiar with these documents and refer to them when dealing with applications where EIA is involved. But it may provide a useful aide-memoire to remind you of some the potential pitfalls in cases involving EIA and offer some advice on how you can avoid them. And it refers to some important judgments involving EIA that you should be aware of and take note of.

What do the Regulations require?

For qualifying projects they require a planning authority to consider, first, whether a proposed project is likely to have a significant effect on the environment. If so, the authority must ensure that the applicant carries out an assessment and prepares and submits to the planning authority a report that identifies, describes and assesses the effects that the project is likely to have on the environment. The process is referred to as Environmental Impact Assessment (EIA), the report as the Environmental Statement (ES).

The ES has to address the direct and indirect effects of the development on a number of factors including the population, fauna, flora, soil, air, water, climatic factors, landscape and archaeology. Full detail of the information that has to be included is listed in

Schedule 4 of the Regulations. The ES must also contain a non-technical summary so that lay persons can understand what is being proposed and its likely effects.

Members of the public, and statutory consultees, must be given the opportunity to comment on the ES. Before any decision to approve the application may be taken, the planning authority must take into account the ES and any representations made about the environmental effects by the public or consultees. And they must state in their decision that they have done so.

Is there a standard format for an ES?

There is no prescribed format. But in the **case of Berkeley v SSETR (2000)**, 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."

Do the Regulations apply to all applications for planning permission?

There are two classes of project. Schedule 1 of the EIA Regulations lists those for which EIA is mandatory. Schedule 2 lists those where the planning authority is required to consider whether the project is likely to have a significant effect on the environment. Where this is the case, EIA must also be carried out. There is no discretion not to require EIA simply because other information about the project is available.

What action does the planning authority have to take?

The authority's roles involve "screening" to determine whether a project requires EIA; "scoping" to advise the applicant of the likely, significant effects on the environment that it wants to see addressed in the ES; consultation with statutory consultees, members of the public and others who may have views on the proposal and the ES; and evaluation of the environmental information presented in the ES and any representations made on it prior to making its decision.

Screening

An applicant for planning permission may ask the planning authority for a "screening opinion" before submitting the application. If it receives such a request, the authority has to issue an opinion within 3 weeks of the date of receipt. A copy of the opinion has to be made available for public inspection where the planning register is kept.

Where a planning application is submitted without an ES, and a screening opinion has not previously been issued, the authority must determine whether the application falls within a class of development listed in either Schedule 1 or 2 of the Regulations and, for any that fall within Schedule 2, whether the project will have a significant effect on the

environment. The authority will then issue a "screening opinion" to the applicant and place a copy on the planning register. Again a period of 3 weeks is allowed from the date the application is received.

Who has to carry out the screening opinion?

It is the responsibility of the local planning authority to ensure that planning applications are "screened" to establish whether an EIA is required. Normally this will be carried out by the officer dealing with the planning application. But the decision is taken on behalf of the planning authority. **If the decision is to be made by officers, it is important to ensure that they have delegated authority to do so.**

In **R v St Edmundsbury Borough Council, ex parte Walton (1999)** a decision of the planning authority to grant planning permission was overturned because a decision not to require EIA was taken by an officer who had no formal delegation.

What factors are taken into consideration when reaching a screening opinion?

Given their scale and nature, Schedule 1 projects should be easily identified and it is expected the applicant would not submit such a proposal without an EIA. But if not, it should be a fairly straightforward matter to decide that EIA is required.

For projects within a category of development listed in Schedule 2, a screening opinion has to be made if the project meets or exceeds the thresholds and criteria listed in column 2 of the Table at Schedule 2.

Schedule 3 of the Regulations gives some guidance on how to decide whether these projects are likely to have significant environmental effects. Further indicative guidance is provided in Annex A of Welsh Office Circular 11/99 on Environmental Impact Assessment (reproduced in column 3 of the Table at Appendix 3 of the guide to procedures). Decisions need to be taken on a case-by-case basis. Thresholds shown within the indicative guidance are not determinative. Individual projects that fall below the indicative thresholds and criteria may require EIA. The important thing is to consider whether the proposed development is likely to have significant environmental effects and to be clear of the reasons for the decision.

Projects that fall below the thresholds and criteria in Column 2 of the Table at Schedule 2 do not generally require EIA and the authority need not adopt a screening opinion. In effect, the Regulations have already provided a negative screening opinion. The exceptions to this are where the proposed project falls in or partly within a sensitive area as defined in Regulation 2(1), or where the National Assembly for Wales has exercised powers under Regulation 4(8) to direct that EIA is required even though it does not meet these thresholds ands criteria. Such a direction will usually be in response to a request by the planning authority.

Does the screening opinion have to give reasons for the decision?

Where an EIA is required, the authority must provide a written statement giving full reasons for its decision. There is no similar requirement where the authority decides that EIA is not required. However, it would be prudent for the authority to make and retain for its own use a clear record of the issues considered and the reason for its decision. This would be very useful in the event of any challenge to the planning decision based on EIA grounds.

Can screening opinion still be issued outside of the 3-week timescale?

To avoid unnecessary delays it's important that every attempt should be made to issue screening opinions within the statutory 3-week period. The regulations do, however, allow for the authority and the applicant to agree a longer period. Unless there is such agreement, the authority has no legal authority to request an EIA beyond the 3-week period.

But, if it had not issued a screening opinion, and it considered that EIA was required, the authority could seek to persuade the applicant voluntarily to carry out an assessment and provide an ES which would be submitted in accordance with the Regulations. It can also request the Assembly to issue a screening direction to determine whether EIA is required.

Can the authority change its screening opinion?

Yes. But this should done within the statutory period unless there is prior agreement of the applicant to extend the period.

It's possible that additional information about the effects of the project not known to the authority when its screening opinion was given will come to light before a decision is taken on the application. If that information indicates that EIA is required the authority must not ignore it simply because it has already issued an opinion that EIA is not required. If the authority itself is unable to change its opinion, it should request a screening direction from the Assembly before any decision is taken on the application.

This case of **Fernback and Others v Harrow LBC (2000)** addressed this issue. In this case the Court held that a "negative" screening opinion issued by an LPA did not determine whether an application for planning permission was "EIA Development" and a "positive" one by the LPA was determinative only in the absence of one by the Secretary of State. On the other hand, an opinion by the Secretary of State, either way, is determinative.

Scoping

Applicants for planning permission may request the planning authority to provide a "scoping opinion" on the impacts and issues that the EIA should address - i.e. those impacts that are likely to be significant. The statutory process requires discussion between the authority, applicant and statutory bodies and a scoping opinion to be issued within 5 weeks of the request or such longer period as may be agreed.

The Regulations require the authority to issue a scoping opinion only in cases where the application has not yet been submitted. But authorities are encouraged to respond favourably to any request from the applicant for a scoping opinion. They may also wish to consider whether they should extend consultations to involve the public and other interested bodies.

Once a scoping opinion is issued can I request further information?

A scoping opinion agreed by all interested parties at the outset should ensure that the relevant issues and potential impacts are identified and reported in the ES. Provided the EIA is properly carried out this should minimise the need to request further information. However, if it believes that further information is necessary it is able to request it under Regulation 19.

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) 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. 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.

Consultation

Who has to be consulted, and when?

The Regulations require a planning authority to consult with specified statutory consultees prior to issuing any scoping opinion. It must also give statutory consultees and members of the public an opportunity to comment on any ES and its associated planning

application and it must take any relevant views expressed by them into account in reaching its decisions.

There is no requirement to consult either statutory consultees or the public about screening opinions.

Do special provisions apply in advertising development subject to EIA?

Where the ES is submitted with the planning application the authority has to advertise the fact and specify where the application and ES may be inspected at a place on or near the site to which the application relates for a minimum period of 21 days before it may determine the application and must also publicise it in a local newspaper. There is also a specific form of Notice for EIA applications. See Article 8 and Schedule 3 of the General Development Procedure Order 1995.
www.legislation.hmso.gov.uk/si/si1995/Uksi_19950419_en_1.htm

Where the ES is submitted after the planning application the applicant is responsible for publicity.

Does further information requested under Regulation 19 also have to be advertised?

Yes. The authority will have to advertise in the manner set out in Regulation 19.

What if the applicant changes the ES rather than simply provides further information?

There is no specific provision dealing with amendments or additions to an ES that has already been submitted. Such information would not be regarded as "further information" as this is very specifically defined in the EIA Regulations.

The safest approach is to treat any addition or amendment as an ES submitted during the course of a planning application and to advise the applicant to advertise the whole of the ES, with the amendment/addition, in compliance with regulation 14. This will ensure compliance with the general intent of the EIA Directive to notify and inform people of the possible environmental effects of a proposed development.

Evaluating the Environmental Statement

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. It should be prepared to challenge the findings of the ES if it believes they are not adequately supported by scientific evidence. If it believes that key issues are not fully addressed, or not addressed at all, it must request further information. 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 (2001)**.

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) and R v Rochdale MBC ex parte Milne (2000)** 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.

He also commented that the ES need not contain information about every single environmental effect. The Directive refers only to those that are likely and significant. To ensure it complied with the Directive the authority would have to ensure that these were identified and assessed before it could grant planning permission.

The Court of Appeal in **ex parte Diane Barker** (2001) confirmed this approach.

What are the lessons of these cases?

You will want to read these judgments carefully, but there are some general points about applications for outline planning permission:

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. Usually, this can be 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 (2000).** "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.

What if I fail to comply with the Regulations?

It's possible that proceedings will be initiated by an aggrieved party either through the domestic Courts or by reference to the European Commission.

Domestic challenges

It should be evident from the Court cases referred to that failing to comply with the Regulations may make a decision to grant planning permission unlawful and lead to it being quashed by the Court. Although the Court has the power not to quash planning decisions where there has been procedural impropriety, this discretion is very limited in cases involving EIA because of the duty to comply with EC legislation. It can only be exercised where there had been "substantial compliance" with the Directive.

If the project is one to which the 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 (2000),** 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".

Complaints to the European Commission

Individuals may, and frequently do, complain to the European Commission that planning applications should have been subject to EIA, or that where an EIA was undertaken the procedures were not followed correctly or the information in the Environmental Statement was inadequate. This can lead to formal legal proceedings between the Commission and the United Kingdom. This can be lengthy and prolonged and can increase uncertainty for developers and planning authorities.

How can I avoid legal challenge?

Nothing can guarantee there will be no legal challenge. But you can minimise the risk of such challenge being successful by ensuring compliance with all of the Regulations. In particular you should ensure that:

- Planning applications are properly screened and copies of screening opinions placed on the planning register;
- Environmental Statements contain all of the information required by Schedule 4 of the Regulations;
- All of the likely significant effects that the project will have on the environment have been identified and taken into account prior to a decision to allow the project to go ahead;
- The permission that is granted relates only to the project whose environmental effects have been described, assessed and mitigated in the ES. If the ES describes and assesses the effects of burning a single specific type of fuel in a manufacturing process, the consent for the project should be limited to its operation only with the fuel that has been assessed.
- Keep a record of your decisions and why you have reached them