EUFJE WARSAW CONFERENCE 2011

ENVIRONMENTAL PROTECTION IN URBAN PLANNING AND LAND DEVELOPMENT IN THE LAW OF ENGLAND AND WALES

PART A: THE SEA DIRECTIVE: DIRECTIVE 2001/42/EC

Part A

Question 1

The SEA Directive has been implemented by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633). The Regulations apply to plans and programmes relating solely to any part of England, or to England and any other part of the United Kingdom. They do not apply to plans and programmes relating exclusively to Northern Ireland or Wales, for which separate, similar Regulations have been made, or to Scotland. In Scotland implementation was initially by Regulations, but these have been superseded by an Act of the Scottish Parliament, the Environmental Assessment (Scotland) Act 2005. This expands the requirement for SEA beyond the scope of the Directive.

For this purpose, England is treated as including any territorial waters of the United Kingdom that are not within Northern Ireland, Scotland or Wales, and waters in areas for the time being designated under the Continental Shelf Act 1964.

Question 2

The Directive and, accordingly, the Regulations, do not apply to plans and programmes whose sole purpose is to serve National Defence or Civil emergency, or to financial or budget plans and programmes. Neither do they apply to a plan or programme co-financed by the European Community under various Council Regulations.

The Regulations apply to certain plans and programmes, including those co-financed by the European Community, and any modifications to them which are required by legislative, regulatory of administrative provisions and are either-

a) Subject to preparation or adoption by an authority at National, Regional or local level; or
b) Prepared by an authority by adoption, through a legislative procedure by Parliament or Government.

Subject to certain exceptions, where the first formal preparatory act in relation to a plan or programme to which the Regulations apply is on or after the 21 July 2004, the plan or programme cannot be adopted, or submitted for adoption, unless it has been subjected to environmental assessment under the Regulations.

The requirement for environmental assessment applies, in particular, to any plan or programme prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, which sets the framework for future development consent of projects listed in Annex 1 or to Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC; and to any plan or programme which, in view of the likely effect on sites, has been determined to require an assessment

pursuant to Article 6 or 7 of Council Directive 92/43/EEC on the conservation of natural habitats and wild flora and fauna, as amended.

There are exceptions for plans and programmes that determine the use of a small area at local level, and for minor modifications, if the authority responsible for preparing the plan or programme (referred to in the Regulations as the “Responsible Authority”) has been determined under Regulation 9(1) that the plan or programme is unlikely to have significant environmental effects (Regulation 5(6); Article 3.3 of the Directive). The responsible Authority’s determination may, however, cease to have effect if the Secretary of State gives a Direction under Regulation 10(3).

The requirement for Environmental assessment also applies to other plans and programmes which determine the framework for future development consent of projects if they are the subject of a determination under Regulation 9(1) that the plan or programme is likely to have significant environmental effects (Regulation 5(4); Article 3.3 of the Directive). The responsible authority’s determination may, however, cease to have effect if the Secretary of State gives a Direction under Regulation 10(3).

Regulation 7 makes provision for environmental assessment of plans and programmes co-financed by the European Community (other than those excepted by Article 3.9 of the Directive) to be carried out in conformity of the specific provisions in relevant community legislation (Article 11.3 of the Directive).

Question 3

Regulation 9 deals with the making of determinations by the responsible Authority as to whether a plan or programme is likely to have significant environmental effect. The criteria to be applied are set out in Schedule 1 to the Regulations (Article 3.5 of, and Annex 2 to, the Directive). Determinations cannot be made unless the responsible authority has consulted designated environmental authorities (“the Consultation Bodies”). The authorities can be local, regional or central.

Question 4

Regulation 4 deals with the designation of the consultation bodies (Article 6.3 of the Directive). In the case of every plan and programme to which the Regulations apply, the consultation bodies will consist of, or include, the Countryside Agency, English Heritage, English Nature and the Environment Agency. In respect of the part of a plan or programme to which the regulations apply that relates to any part of Northern Ireland, the Department of the Environment for Northern Ireland will also be a consultation body. In respect of the part of a plan or programme to which the regulations apply that relates to any part of Scotland, the Scottish Ministers, the Scottish Environment Protection Agency and Scottish Natural Heritage would also be consultation bodies. In respect of the part of a plan or programme to which the regulations apply that relates to any part of Wales, the National Assembly for Wales and the Countryside Council for Wales will also be consultation bodies.

Regulation 10 enables the Secretary of State to require responsible authority to provide him with relevant documents. It also enables him to direct that a particular plan or programme is likely to have significant environmental effects. In the latter case, any determination to the contrary made under Regulation 9(1) by a responsible authority ceases to have effect. If the responsible authority has not made any determination under that provision, the Secretary of State’s Direction relieves it of the duty to do so.

Question 5

Environmental assessment under the Regulations includes the preparation of an environmental report (Regulation 12; Article 5 of the Directive). The matters to be included in the environmental report are specified in Schedule 2 to the Regulations (Article 5.1 of, and Annex 1 to the Directive).

Question 6

Regulation 13 specifies the consultation procedures that must be undertaken in relation to a draft plan or programme for which an environmental report has been prepared under these Regulations (Articles 5.4 and 6 of the Directive). Once the information is provided in an environmental report, there must be consultation with — the Consultation Bodies and with the public, including relevant environmental non-Government organisations, in a similar way to EIA. Unlike EIA, however, authorities responsible for preparing a plan or programme have to consult the consultation bodies at an earlier stage on the scope and level of detail of information to be included in the report, effectively providing for mandatory scoping. A further noticeable difference is that environmental information be taken into consideration during the plan-making process, rather than simply before adoption; the public must be given an "early and effective opportunity within appropriate time frames" to comment. Precisely what this means is left to the member state.

Question 7

There must be measures for monitoring the implementation of the plan or programme. However, the 2004 Regulation provide only for publicity (Regulation 11) and consultation with the consultation bodies described above as well as "public consultees", i.e. the public likely to be affected or having an interest (Regulation 13). The right is for the consultation bodies and public consultees to express their opinion on the relevant documents to the responsible authority: Regulation 13(2)(d). Once the plan or programme is adopted then it must be publicised: Regulation 16. Legal challenge at any stage would be by way of judicial review through the Administrative Court.

Question 8

The SEA and EIA procedures are not integrated in the United Kingdom. The SEA operates in a similar way to project-based assessment under EIA. Not all aspects of development plans or waste plans will relate to matters governed by EIA. In practice, it must be assumed that the EIA-related aspects of plans and programmes will not be looked at in isolation, and that, for convenience (and regulatory coherence), all aspects of these types of plans – for example, the whole of the National Waste Strategy under the Environment Act 1995 and perhaps also the Air quality strategy under the same Act would be subject to SEA.

PART B: EIA DIRECTIVE 85/337/EEC AMENDED BY DIRECTIVE 97/11/EC, DIRECTIVE 2003/35/EC, AND DIRECTIVE 2009/31/EC

Questions 1 and 2

The Directives have been implemented into the town and country planning system of England by the Town and Country Planning (Environmental Impact Assessment)

(England and Wales) Regulations 1999 (SI 1999/293), as amended[1]. These Regulations cover about 80% of the projects listed in the Directive with the remainder covered by Regulations under other consent systems and the answers given below relate to these Regulations unless specific reference is made to other Regulations. Equivalent provisions exist for the Devolved Administrations of Northern Ireland , Scotland and Wales.

Question 2

These separate regulations all follow the framework of the general planning regulations.

Question 3

In the EIA Directive, the term "project" is defined as the execution of construction works, or of other installations or schemes. This equates roughly with the concept "development" in English planning laws. However, many activities listed in the EIA Directive fall outside the range of activities classed as "development" in planning law and hence the specific regulations referred to above have been enacted. Whether something is a "project" is a secondary consideration. Thus in R. (Edwards) v Environment Agency (No.2) [2007] Env LR9, a case about changing the fuel source at a cement works to waste tyres, the Court of Appeal could not find a category listed in the Directive into which this fell, so whether it was a "project" was irrelevant. The Court of Appeal did stress that operations, as well as constructions, could be "projects" which is line with the interpretation given to "projects" under EC Nature Conservation Law. Two further issues can arise. EIA might be avoided by breaking up a development project into several small projects, none of which individually require EIA. The second issue is the cumulative impacts of development projects. In National Guidance (DOEC Circular 2/99 paragraph 46) local planning authorities are advised to have regard to possible cumulative effects and where appropriate to consider together more than one application for development to determine whether or not EIA is required.

The selection criteria set out in Annex III of the Directive are copied out in all UK Regulations. Specific Regulations refer to the selection criteria when considering general provisions relating to screening development.

Question 4

In the first instance it falls to the Local Planning Authorities in England to consider the need for EIA under the Regulations referred to in the answer to question 1. Developers can appeal to the Secretary of State where the LPA has required EIA or where it has failed to issue a screening opinion within the statutory time limit.

Under other Regulations other statutory bodies may be the main competent authority and in some cases this is the Secretary of State.

Question 5

Applicants can, at any time prior to making a planning application, seek a screening opinion from the local planning authority as to whether a proposed development falls within Schedules 1 or 2, and requires EIA (Regulation 5(1) of the 1999 Regulations).

[1] The Town and Country (Environmental Impact Assessment) Regulations 2011 (SI No. 1824) will replace these Regulations when it comes into force on 24 August 2011.

If the local planning authority either fails to give an opinion within the statutory period (3 weeks), or finds that the project is subject to EIA, the developer may request the Secretary of State to issue a “screening direction” (in effect, an appeal of the screening opinion: Regulation 5(6)). The Secretary of State can also make a screening direction without a request from the developer, in line with his power to require an environmental statement after an application has been called in or has gone to appeal (Regulations 4(7) and 9). What is clear is that the question of whether environmental impact assessment should take place is best taken as early as possible and before the making of a planning application.

Question 6

The environmental impact assessment does not determine the grant of development consent. The role of the environmental impact assessment is to inform the planning application process, and the LPA must take into account the information provided in the environmental statement (which reports on the findings of the assessment) and representations made by third parties before determining whether to grant development consent.

Question 7

Regulations require the publicity of an EIA application and the publication and advertising of the availability of environmental information (referred to as an *environmental statement*).

Regulations also require the applicant to certify that the availability of the environmental statement has been advertised by notice and in the local press and that sufficient copies are provided to do this and be purchased. A non-technical summary also has to be made available and guidance encourages this to be made freely available.

The LPA are required to inform other persons (including non-Government environmental organisations) of the environmental statement who would not be made aware by site notices and local advertising

Question 8

A developer can ask for a scoping opinion prior to the submission of a planning application about the information that should be made available in the environmental statement. On receipt of such a request the LPA must consult statutory consultees and the developer about the content of the scoping opinion.

Once the environmental statement has been published third parties, NGOs and other authorities can submit representations on the environmental information in the environmental statement. The same are able at any time during the EIA process to make representations to the Secretary of State about any decision regarding the need for EIA, although there is no formal requirement for the Secretary of State to issue a screening direction in response to such representations.

Question 9

Questions concerning eg why a local planning authority decides that no EIA is required or if environmental effects have been considered without an EIA when an

EIA was required or a failure to consult are dealt with by an application for judicial review to the Administrative Court.

The best example we can give involves the issue of whether a planning permission was lawful given that there was a failure to undertake an EIA. The case is Berkley v Secretary of State for the Environment, Transport and the Regions [2001] ENV LR16. The brief facts were that planning permission had been granted, without environmental impact assessment, for redevelopment of the ground of Fulham Football Club. As well as the ground redevelopment, the proposal involved the building of flats above a riverside walk and some encroachment onto the River Thames. Mitigation measures were proposed to compensate for potential damage due to aquatic habitat caused by the walkway. These satisfied the (then) national rivers authority, not the London Ecology Unit. The Secretary of State called in the application, but did not require an EIA and granted the planning permission, albeit subject to various conditions aimed at mitigating the environmental impact. The proposed redevelopment was opposed by a group of local residents.

The House of Lords emphasised the extent to which EIA is a procedural mechanism involving the opportunity for informed public participation: it is not simply an information gathering exercise. Lord Hoffman, in the leading judgment, held that the available documents provided a mere “paper chase” which fell short of what was required of a proper environmental statement. It was not sufficient, for example, that interested parties had the opportunity to trace all of the relevant documents, if this would require “a good deal of energy and persistence” on their part. Here, the developer had not provided an environmental statement in a single source and there was no non-technical summary, meaning that the rights of the public to be involved in the decision making process were inevitably hindered. This was regardless of how much information was made available for the planning enquiry, of the objector’s chance to comment on this and present her own information, and even, it seems, of whether the objector could point to any particular prejudice that she had suffered. The House of Lords stressed that, when it came to errors of law – especially in cases related to EC law – the Courts had little room for discretion. There is now a considerable body of English case law about this issue and we will be happy to discuss it at the conference.

Question 10

The UK Regulations transpose the requirements of the directive on transboundary consultation more or less in copy out format. The process is dealt with on an initially state to state basis, and to date we have not been informed of projects that would have significant effects on the UK. This is in the main due to the UK being separated geographically from other member states.

Northern Ireland and the Irish Republic have an informal understanding for dealing with cross border projects that would be analogous to consultation between two planning authorities in England.

Lord Justice Robert Carnwath
Judge William Birtles
5 August 2011