THE UNITED KINGDOM'S RESPONSE TO THE EUFJE QUESTIONNAIRE ON ENVIRONMENTAL IMPACT ASSESSEMENT

Impact Assessments – Preventive Measures against Significant Environmental Impacts in the 21st Century

Legal Framework

1. How is the EIA Directive (Directive 2011/92/EU) transposed in your country? Please provide a list of your national pieces of legislation transposing the EIA Directive.

   In these answers the relevant law in England will be stated. It can be taken that this generally reflects the law in the other jurisdictions within the United Kingdom.

   The transposition of the EIA Directive into domestic law in our jurisdiction is effected by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the 2011 EIA Regulations").

   Other relevant legislation, which will be referred to below, includes the Town and Country Planning Act 1990 ("the 1990 Act") and the Town and Country (Development Management Procedure) (England) Order 2010 ("the DMPO"). The Government has also issued various policy guidance documents which bear, directly or indirectly, on the operation of the EIA regime in the making of planning decisions.

   The principal source of planning policy for England is now the National Planning Policy Framework, published on 27 March 2012 (paragraphs 165 to 168). Specific guidance on the procedures involved in EIA is to be found in Circular 02/99: Environmental Impact Assessment.

2. Are the EIA Directive and the IPPC Directive[1] transposed in your country through the same legislation?

   The IPPC Directive is transposed into UK law by The Environmental Permitting (England and Wales) Regulations 2010 (as amended).

3. What procedure is set up to determine whether a project (listed in Annex II) shall be made subject to an assessment, case by case examination, thresholds or criteria or a combination of these procedures?

   Under regulation 5(1) of the 2011 EIA Regulations a person who is minded to carry out development may request the local planning authority to adopt a screening opinion. When a local planning authority either fails to adopt a screening opinion

1 The former Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control repealed by Art 81 of the DIRECTIVE 2010/75/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Text with EEA relevance) with effect from 7 January 2014, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in 2010/75/EU Annex IX, Part B.

within three weeks of being requested to do so, or such longer period as it has agreed with the person who made the request, or adopts a screening opinion to the effect that the development is EIA development, a screening direction may be sought from the Secretary of State, under regulation 5(7) and regulation 6.

The categories of Annex II development are listed in Schedule 2 to the 2011 EIA Regulations. The schedule is divided into two columns. Column 1 contains a description of the development and column 2 sets out the applicable thresholds and criteria.

Projects are examined, case by case, by the local planning authority responsible for making the decisions on applications for planning permission. If the proposed development is found to be within one of the categories of Schedule 2 development, the relevant thresholds and criteria in column 2 are applied to it. If the development exceeds the relevant threshold and satisfies the relevant criteria, the local authority must undertake a screening process to determine whether the development is likely to have significant effects on the environment "by virtue of factors such as its nature, size or location".

Schedule 3 to the 2011 EIA Regulations, which contains the "[selection] criteria for screening Schedule 2 development", requires the authority, when carrying out that exercise, to take into account the characteristics of the development, its location and the characteristics of its potential impacts on the environment.

EIA Procedural Provisions

4. Is the environmental impact assessment procedure considered in a separate administrative procedure (e.g. - different from the development consent procedure) by the competent authority? If yes, please provide a short description of the applicable arrangements for the implementation of the Directive (including what administrative act is considered a development consent).

See the answer to question 3 above.

The EIA procedure is integrated into the statutory procedure for the making of substantive planning decisions. It is, however, governed by its own statutory regime.

Before an application for planning permission is considered the local planning authority must determine whether the proposed development is "EIA development" (as defined in regulation 2(1) of the 2011 EIA Regulations)**,** either because it is development within Schedule 1 to the 2011 EIA Regulations or because it is Schedule 2 development likely to have significant effects on the environment.

Guidance on Schedule 2 development is provided in Annex A of Circular 02/99 to assist local planning authorities when determining whether the project under consideration is EIA development. Paragraph 43 of the circular states that there is no "universal test" and the question of whether development is likely to have any significant effects on the environment must be "considered on a "case-by-case basis". This is, essentially, an exercise in judgment for the decision-making authority (see, for example, *R. (on the application of Loader) v Secretary of State for Communities and Local* Government [2013] Env. L.R. 7, at paragraph 43).

If the development is found to be EIA development, the developer must prepare an environmental statement which contains an assessment of any likely significant effects on the environment. The environmental statement must contain all of the information described in Part 2 of Schedule 4 to the 2011 EIA Regulations. Developers may request from the local planning authority further guidance on the information required, in the form of a "scoping opinion", under regulation 13. Once complete the environmental statement is submitted to the local planning authority under regulation 16.

Regulation 3(4) provides that the local planning authority or the Secretary of State shall not grant planning permission or "subsequent consent" for EIA development without first taking into consideration the "environmental information", stating in the decision that this has been done. The definition of a "subsequent consent", in regulation 2(1), is a consent granted on a "subsequent application". That is an application for the approval of a matter whose approval is required by a condition on a grant of a planning permission and which must be obtained before the development, or any part of it, is begun.

In regulation 2(1) the "environmental information" is defined as meaning "the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development".

5. Is the EIA process part of a permitting procedure in your legal system? How are the results of the consultations with environmental authorities and the public and environmental information taken into consideration in the development consent procedure? To what extent does an EIA influence the final decision, i.e. its approval or refusal and attached conditions?

The EIA process is an integral part of the procedures for the granting or refusing of devleopment consent.

If the project is EIA development the developer must prepare and submit an environmental statement (see the answer to question 4 above).

After the relevant period of consultation (see the answer to question 19 below), the local planning authority must consider the application for planning permission. It must ensure that all of the relevent information listed in Parts 1 and 2 of Schedule 4 to the 2011 EIA Regulations has been provided. If any of the required information has not been provided the authority can request further information from the applicant, under regulation 22 of the 2011 EIA Regulations. Under regulation 8(3) where it appears to the authority that the environmental information already before it is not adequate to enable it to assess the environmenatl effects of the development, it is required to serve a notice seeking further information in accordance with regulation 22(1).

Because the local planning authority may not grant planning permission for EIA development without first taking into account the environmental information (see the answer to question 4 above), the results of consultation with the public and with consultee bodies will be taken into consideration in the development consent process. The EIA will thus influence the outcome of the whole process, and may make a difference, perhaps a crucial difference, in the decision whether to approve or refuse the proposal. If the development is found to be acceptable, the content of the environmental statement may influence the controls or restrictions imposed on the planning permission in conditions or through planning obligations. The same may be said of decisions taken on appeal or after an application has been called-in by the

Secretary of State for his own determination. Conditions or obligations may commit the developer to putting into effect mitigation measures identified as necessary in the environmental statement. And the performance of such commitments will thus be enforceable (see the answer to question 29 below).

Section 70 of the 1990 Act enables local planning authorities to grant planning permission either conditionally or unconditionally, at their discretion. The Secretary of State has the same power on appeal (under section 78 of the 1990 Act), or after he has called-in an application (under section 77 of the 1990 Act). Generally, an application will only be called in if the planning issues involved are of more than local importance. The Secretary of State will determine an appeal or a called-in application after a "de novo" consideration of the planning and environmental issues, and, in the case of EIA development, in the light of environmental information.

6. In case of a multi-stage development consent procedure (e.g. combination of several distinct decisions), at what stage does the environmental impact assessment procedure take place during the development consent procedure in your country?

See the answer to question 5 above.

In a case where a development is, or may be, part of a larger development, the local planning authority must determine the full extent of the project so that it can assess the likely environmental effects of the project. In *R. (on the application of John Catt) v Brighton & Hove City* Council [2013] EWHC 977 (Admin) (at paragraph 68) the court held that the decision-maker in the screening process "must consider nothing less – and nothing more – than the development in its entirety".

When a project involves several sections or stages the likely significant environmental effects of the development should be identified and assessed when the principal decision is being made. But if the effects have not been identified at the time of the principal decision, they must be assessed at a later stage. It is open to an authority to revisit the environmental effects of a development when a subsequent proposal for an additional part or phase of the development is being considered, or when the approval is sought for reserved matters after outline planning permission has been granted. If, in the case of a grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its size, nature or location (see *Wells v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] ECR I-723, and *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [2006] Q.B. 764, at p.773. If sufficient information is provided to the authority at the outset it ought to be able to determine whether the EIA undertaken at that stage will take account of all the potential environmental effects likely to follow as consideration of the application proceeds through the multi-stage process. Conditions designed to ensure that the project remains within the scope of that assessment will minimize the risk that those effects will not be identifiable until the stage when approval is sought for reserved matters. In such cases it will normally be possible for the authority to treat the EIA at the outline stage as sufficient for the purposes of granting a multi-stage consent for the development (see R. v Rochdale Metropolitan Borough Council, ex parte Milne (2001) 81 P. & C.R. 27, at paragraph 114). However, there will be cases in which the need for an EIA becomes clear only after planning permission has already been granted for the initial or main part of a composite development (see *R. v London Borough of Bromley Council, ex parte Barker* [2006] UKHL 52, at paragraphs 16 to 25).

The relevant procedure for the consideration of proposals after an earlier application for EIA development is provided in regulation 8 of the 2011 EIA Regulations (see the answer to question 5 above). If environmental information relating to the development has not previously been provided, the relevant procedure is that provided for by regulation 9.

If a project is modified it is necessary for the authority to take into account the environmental effects of the whole development, and not merely the environmental effects of the modification, when assessing the proposal for the modification (see *R. (on the application of Baker) v Bath and North East Somerset Council* [2009] Env. L.R. 27, at paragraph 45).

7. What kind of authority (local, regional, central) is responsible for making decisions on EIA and/or to grant/refuse development consent?

The local planning authority responsible for the administrative area in which development is proposed, or, on appeal, the Secretary of State, is responsible for making decisions on applications for planning permission in that area. Applications for development consent for nationally significant infrastructure and other major development within the scope of section 62A of the 1990 Act (introduced by section 1 of the Growth and Infrastructure Act 2013) may be made directly to the Secretary of State.

If the application is being determined by the local planning authority, that authority may, in accordance with section 101 of the Local Government Act 1972, delegate that function to a committee or sub-committee, or, in appropriate cases, to an officer.

8. Is the decision resulting from the environmental impact assessment a pre-condition to grant development consent? In case of a multi-stage development consent procedure, at what stage are the results of the consultations with environmental authorities and the public and environmental information taken into consideration?

If a development is EIA development the application may be granted by the local planning authority or the Secretary of State conditionally or unconditionally (see the answer to question 5 above).

In a multi-stage procedure the likely significant effects of the project are identified and assessed at the time of the principal decision (see the answer to question 6 above).

When the local planning authority is making the principal decision it must take account of all potential environmental effects of the project as a whole (see *R. v Rochdale Metropolitan Borough Council, ex parte Milne* [2001] 81 P.& C.R. 27).

9. In case of projects for which the obligation to carry out environmental impact assessment arises simultaneously from the EIA Directive and other Union legislation, does your country ensure a coordinated or joint (e.g. single) procedure ("one stop shop")? If yes, please provide a list of the Directives covered.

Under article 11 of Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes on the environment" ("the SEA Directive"), which are transposed into domestic law by the Environment Assessment of Plans and Programmes Regulations 2004 ("the SEA regulations"), an environmental assessment carried out under the SEA Directive "shall be without prejudice to any requirements under [the EIA Directive] and to any other Community law requirements". In *Genovaite Valciukiene and others v Pekruojo rajono savivaldyve*

and others (Case C-295/10) [2012] Env. L.R. 283 the European Court of Justice was able to infer from article 11(2) of the SEA Directive that if an EIA has been carried out under a coordinated or joint procedure it may satisfy all of the requirements of the SEA Directive, and that, if this is so, there is no obligation to undertake a further assessment under the SEA Directive (paragraph 62 and 63). However, as Lord Reed said in his judgment in *Walton v Scottish Ministers* [2013] P.T.S.R. 51 (at paragraph 28), if the two assessments differ in their scope or content a second assessment will be appropriate.

10. Is it possible to carry out joint or coordinated environmental assessments, fulfilling the requirements of the EIA Directive, and Directive 92/32/EEC and/or Directive 2009/147/EC? Is there a legal basis for carrying out such assessments?

    See the answer to question 9 above.

11. What arrangements are established with neighboring Member States for exchange of information and consultation?

    Regulation 53 of the 2011 EIA Regulations sets out the requirements with which the Secretary of State must comply if a proposed development in England is likely to have significant environmental effects in another Member State. Regulation 54 sets out the corresponding requirements which apply where a proposed development in another Member State is likely to have significant transboundary effects on the environment in England. These provisions reflect those of article 7 of the EIA Directive.

    If a development proposed in England is likely to have a transboundary effect on another Member State, the National Planning Casework Unit, on behalf of the Secretary of State, must, in accordance with the Espoo (EIA) Convention, send information about the development to the relevant government department of the affected Member State and invite it to participate in the consultation procedure.

EIA Content

12. Is the developer obliged by national legislation to consider specified alternatives to the proposed project?

    There is no requirement for the developer to identify alternatives to his development or the site on which it is proposed, but, if alternatives have been identified, an outline of those alternatives must be included in the environmental statement (see paragraph 4 in Part 2 of Schedule 4 to the 2011 EIA Regulations). This reflects the distinction between article 5 of the EIA Directive and article 5 of the SEA Directive. Article 5 of the EIA Directive requires an environmental statement to include the information specified in Annex IV, which includes merely “an outline” of the main alternative studied by the developer and an indication of the “main reasons for his choice, taking into account the environmental effects”. Article 5 of the SEA Directive requires an environmental report to [identify], [describe] and [evaluate]” the likely significant effects on the environment of implementing both the plan or programme itself, and “reasonable alternatives” (see Lord Carnwath’s judgment in *R. (on the application of Buckinghamshire County Council and others) v Secretary of State for Transport* [2014] 1 W.L.R. 324, at paragraphs 44 to 49). Annex I specifies the information to be provided, which includes “an outline of the reasons for selecting the alternatives dealt with” and a description of how the assessment was undertaken.

13. Is scoping (e.g. scope of information to be provided by the developer) a mandatory step in the EIA procedure?

See the answers to questions 4 and 6 above.

A scoping opinion under regulation 13 will serve to determine the extent and nature of the matters which are to be dealt with in the environmental statement. Regulation 13(1) provides that the intending developer "may" ask the local planning authority to adopt a scoping opinion.

Paragraph 193 of the NPPF states that a local planning authority should publish a list of their information requirements for planning applications, including developments which need an environmental statement. It goes on to say that the information requested by the local planning authority must be "proportionate to the nature and scale of development proposals".

The request for a scoping opinion must include details of the location of the proposed development, its nature and purpose and its possible environmental effects (regulation 13(2)). Regulation 13(4) states that the local planning authority, before it issues a scoping opinion, must discuss the proposal with the developer and the relevant consultation bodies (as listed in regulation 2(1)(a) to (c) of the 2011 EIA Regulations). The local planning authority may also consult any other designated bodies which could have an interest in the development (for example, Natural England and the Environment Agency). The scoping opinion must be provided within five weeks of the request being made, or such longer period as the developer and the authority may agree.

Regulation 23 requires the scoping opinion to be placed on the appropriate register and made available for public inspection. It must remain on the register for a period of two years.

14. Are there any provisions to ensure the quality of the EIA report prepared by the developer?

There are no statutory provisions specifying criteria for the quality of the environmental statement, or the format in which it must be presented. However, it must include information specified in Schedule 4 of the 2011 EIA Regulations relevant to the assessment the project's environmental effects. It may consist of more than one document. But it must constitute a "single and accessible compilation … of the relevant environmental information" (see Lord Hoffmann's speech in *Berkeley v Secretary of State for the Environment* [2000] 3 All E.R. 897).

15. How is the cumulation with other existing and/or approved/already proposed projects considered? Please illustrate your answer by referring to examples of national case law!

See the answers to questions 5 and 6 above.

Whilst every application for planning permission must be considered on its own merits, it is acknowledged in paragraph 46 of Circular 02/99 that local planning authorities must have regard to the possibility of cumulative effects of a proposed development with "any existing or approved development".

If it is necessary to consider other developments in an EIA process, the totality of the development should be comprehensively assessed for its likely significant effects on the environment so that a clear picture emerges of the combined environmental impact (see, for example, *Brown v Carlisle City Airport* [2010] EWCA Civ 523, a case

concerning developers at a regional airport comprising both airport infrastructure and associated commercial development).

16. How is it ensured that the purpose of the EIA Directive is not circumvented by splitting of projects – e.g. 'salami slicing' of projects (i.e. the assessment and permitting of large-scale, usually linear infrastructure projects by pieces)? Please illustrate your answer by referring to examples of national case law!

When an EIA is undertaken for a proposed development the local planning authority must consider the potential environmental impacts of the development as a whole, taking into account the full extent of the project (see the answers to questions 6 and 8 above).

A challenge to a grant of planning permission may be brought before the court by way of a claim for judicial review on the grounds that the local planning authority failed to consider that the proposed development was, or could be, part of a larger, even much larger project (see, for example, *Bowen-West v Secretary of State* [2012] EWCA Civ 321 and *John and Sandra Hockley v Essex County Council* [2013] EWHC 4051 (Admin). If such a claim is brought the court may have to consider whether, on the evidence before it, the local planning authority's EIA screening process was sound and that it did take account of the project as a whole.

In several cases the court has considered the approach to be adopted by an authority when addressing the issue of cumulative impact. When identifying the project it has to screen an authority does not have to resurrect the past or speculate about proposals the future may bring" (see *R. (on the application of Catt) v Brighton & Hove City Council* [2013] EWHC (Admin) 977 at paragraph 69). In *Hockley* (at paragraphs 102 and 103) the court said that conjecture about future development on other sites that might or might not act with the development in question to produce indirect, secondary or cumulative effects is not in the screening decision-maker's remit. The precautionary approach did not extend that far. When it is suggested in a claim for judicial review that a screening decision was deficient because some potential cumulative effect was left out, it is not enough for a claimant simply to point to other developments in the locality that have been or might be approved, and to leave it to the court to work out whether any aggregate effects were unlikely to be significant. Objective evidence to support that contention is required.

In *R. (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 (at paragraph 20 of his judgment) the Court of Appeal emphsaized that it was important to bear in mind the nature of what is involved in giving a screening opinion. A screening opinion is not intended to involve a detailed assessment of factors relevant to the grant of planning permission. Nor does it require a full assessment of any identifiable environmental effects. What is involved in a screening process is only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. The court should not, therefore, impose too high a burden on planning authorities in what is simply a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment.

If the Secretary of State or the local planning authority is found to have failed to consider the whole project the court may quash the planning permission (see, for example, *Burridge v Breckland District Council* [2013] EWCA Civ 228 (at paragraph 69).

17. Can the screening decision be appealed? If yes, who can lodge an appeal?

See the answer to questions 3 and 16 above and question 26 below.

If a development is of a type listed in Schedule 2 to the 2011 EIA Regulations the developer can request a screening opinion from the local planning authority to ascertain whether EIA is required. Regulation 5(2) of the 2011 EIA Regulations lists the information required to be submitted with the request for a screening opinion.

If the local planning authority does not make a decision on the screening request within three weeks or decides that an EIA is required, the developer may make an application to the Secretary of State for a screening decision under regulation 5(7). Any other person may also make an application to the Secretary of State for a screening decision if he considers that the proposed development requires EIA. The criteria for requesting a screening decision from the Secretary of State are in regulation 6 of the 2011 EIA Regulations.

Any screening decision made by the Secretary of State may only be challenged by a claim for judicial review (see Renfree v Mageean [2011] EWCA Civ 863). The application for judicial review can be lodged by any person with standing to do so. In practice, this means that anyone who is likely to be affected by the development – such as an owner of neighbouring land – or any body – such as a local or national association with a sufficient interest in the outcome – will be able to bring proceedings before the court. The decision whether to grant a remedy in a successful claim for judicial review and the nature of any remedy that is granted lie in the court's discretion (see the judgment of Lord Carnwath in *Walton*, at paragraphs 102 to 140). As Lord Carnwath said in *Walton* (at paragraph 139), where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, there is nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source.

18. Is there a time limit for the validity of the EIA-decision and the development consent? Is the permit holder obliged to apply for a new permit after a certain period of time?

A screening decision will subsist while the application for planning permission is live and after planning permission is granted, unless that permission is successfully challenged in proceedings before the court. A planning permission granted by a local planning authority may be challenged by a claim for judicial review within six weeks of the grant. The same time limit applies to decisions of the Secretary of State allowing an appeal against refusal of planning permission. See the answers to questions 22 and 23 below.

Planning permission, once granted, runs with the land (see section 75(1) of the 1990 Act). It can therefore be acted upon by the owner of the land, in accordance with any controls imposed on it by way or condition or planning obligation. Planning permissions are granted subject to time limits on their implementation, which is normally three years from the date of the grant (see section 91 of the 1990 Act). Conditions may require the submission of further material for consideration and approval by the local planning authority, and, in doing so, may restrict or prevent the implementation of the permission until any requisite further approval has been granted.

If a planning permission expires because it has not been implemented within the specified time, a landowner or developer intending to carry out the development will need to apply again for planning permission, and a further permission will have to have been granted before he can proceed with his project. A further application for the same development will have to be considered on its merits by the local planning authority. The authority is not bound to grant planning permission on a second or subsequent application.

Access to Information Provisions

19. How is the public informed about the project and the EIA? When is the public informed about a project requiring an EIA and about a pertaining administrative procedure? Where can the information be accessed? What does the information contain? Who gets access to this information?

An application for planning application must be given appropriate publicity by the local planning authority to which the application was made.

Regulation 24 of the 2011 EIA Regulations provides the specific duties of the local planning authority in giving publicity to decisions on EIA development.

Article 13 of the DMPO specifies the requirements for the publication of applications for planning permission. Articles 13(2) and 13(3) specify the information which must be provided when proposals for EIA development are publicized. Article 13(7) states what information must be published on the local planning authority's website.
Notices must be published in the local press and placed on local planning authority's website. Schedule 3 to the DMPO contains the appropriate form for those notices. The local planning authority's website will provide instructions on what needs to be done by somebody who wishes to make representations about the proposal. Article 29 of the DMPO states that no decision will be made by the local planning authority within 21 days for notices displayed at the site or 14 days for notices placed on the website or in newspapers.

If a decision on EIA development has been issued by the Secretary of State, the requirements for giving publicity to that decision are set out in regulation 39 of the 2011 EIA Regulations.

20. How does the authority ensure public access to environmental information in the procedures based on the EIA Directive? To what extent is this provision of information user-friendly (easy to find, free of charge, searchable, online, downloadable, etc.)?

See the answer to question 21 below.

Local planning authorities will ensure public access to environmental information, in accordance with the requirements of the EIA Directive and the 2011 EIA Regulations, on their planning websites. Thus the information ought always to be easy to find and available free of charge. The relevant documents will be provided to members of the public on request, or, at least, made available for viewing by them. The UK Government runs a website called the Planning Portal. The section headed "Planning" includes, but is not limited to, information on planning applications, planning policy and legislation. Each section has links to other areas of the website and other sites relevant to the enquiry. The website is accessible free of charge and it contains documents that can be downloaded for public use.

Public Participation Provisions

21. What are the criteria for taking part in an environmental impact assessment procedure, besides the project developer and the competent authority? What rights can people living in the neighborhood, NGOs, authorities invoke in the procedure? What legal rights do participants of the proceeding have? What happens if the competent authority denies someone's legal standing? Please illustrate your answer by referring to examples of national case law!

    See the answers to questions 19 and 20 above.

    After a planning application has been received there is a statutory period of consultation. Section 54 of the Planning and Compulsory Purchase Act 2004 sets out what the local planning authority is required to do to facilitate that consultation. Article 20 of the DMPO gives details of the length of the consultation period, the information that is to be provided by the local planning authority. Article 16 identifies what a local planning authority must do if the development falls within the cateogories listed in Schedule 5.

    Regulation 40 of the 2011 EIA Regulations provides that the local planning authority must make all documents relevant to the planning application available for public inspection. Anyone, including individuals who will be affected by the development, community groups and specific interest groups, may expect to be included in the consultation process.

    Regulation 61(2) of the 2011 EIA Regulations states that a local planning authority must determine the application within 16 weeks of receipt of the application and environmental statement. When determining the application it must take into account the information in the environmental statement and any responses to the consultation.

Administrative and Judicial Review & Enforcement Provisions

22. Can the decisions of the authority (local, regional, central) responsible for making decisions on EIA be appealed? Who is the superior authority deciding over the appeal?

    See the answers to questions 15, 16 and 17 above.

    If an application for planning permission is refused by a local planning authority or is granted subject to conditions an appeal may be made to the Secretary of State under section 78 of the 1990 Act. The right of appeal is limited to the person who made the original planning application. Most appeals against refusals of planning permission or in cases where the local planning authority has failed to make a decision are determined by an inspector appointed to make the decision on behalf of the Secretary of State. In some cases, usually those concerning larger proposals or proposals likely to have a widespread impact or which affect some sensitive or novel aspect of national planning policy, the decision will be made by the Secretary of State himself.

    The appeal decision itself can be challenged, but only by a “person aggrieved” by the decision, and only on a point of law, by an application to the court under section 288 of the 1990 Act. The concept of a “person aggrieved” has been considered in a number of cases. A relatively liberal approach is normally taken (see, for example, *The Attorney General of the Gambia v N'Jie* [1961] A.C. 617 (at p.634), and the answer to question 24 below). There is a statutory time limit of six weeks for the making of such an application.

Regulation 59 of the 2011 EIA Regulations provides, in effect, that an application under section 288 of the 1990 Act may be brought to challenge any grant of planning permission or subsequent consent by the Secretary of State in contravention of regulations 3 or 31 (see the answers to question 4 above and to question 30 below).

Decisions on such applications are made in the first instance in the High Court – now in the Planning Court. Appeals from the High Court go to the Court of Appeal, and appeals from the Court of Appeal go to the Supreme Court.

As has been explained above, decisions of local planning authorities granting planning permission may be challenged by a claim for judicial review, but only on points of law. Such claims are heard in the High Court and the route for appeal against the decision made in the High Court is, again, to the Court of Appeal, and the Supreme Court.

23. Is there a judicial review against decisions made in EIA procedures? If yes, what matters can be challenged and what decisions can the court take?

See the answers to question 22 above.

A claim for judicial review can be made by a public body with a sufficient interest in the decision in question. The court can only review the decision on the basis that it is procedurally unsound or unlawful. It cannot review the decision on the merits and substitute its own opinion for the planning judgment of the local planning authority (see *R. (on the application of Jones) v Mansfield District Council* [2003] EWCA Civ 1408, at paragraph 17).

The basis for such a challenge must be some arguable error of law in the authority's decision – a decision which was irrational or perverse and thus one which no reasonable authority could have made (*Wednesbury* unreasonbleness), an error involving a failure to take into account considerations relevant to the decision, a taking into account of irrelevant considerations, a significant deficiency in the reasons given for the decision, a breach of natural justice, or a failure to comply with relevant statutory requirements, including requirements relating to the procedure involved in the making of the decision. A claim cannot be brought merely because a person disagrees with the decision.

The relevant procedural rules for claims for judicial review are in Part 54 of the Civil Procedure Rules and associated Practice Directions. The court's permission must be obtained before the substantive claim may proceed (see Rule 54.4). There is no such filter for applications brought under section 288 of the 1990 Act against decisions made by the Secretary of State on appeal. Rule 54.5(1)(a) of the Civil Procedure Rules states that the claim must be brought "promptly" and, in any event, the claim must be brought within six weeks after the grounds to make the claim first arose. Permission to apply for judicial review may be refused if a claim is lodged out of time (see *Finn-Kelcey v Milton Keynes Borough Council* [2009] Env. L.R. 17, at paragraphs 20 to 22). Ignorance of the time limit is no excuse for a failure to lodge a claim promptly and within time (see, for example, *R. (on the application of Kenneth Kolb) v Buckinghamshire County Council* [2013] EWHC 1055 (Admin), at paragraph 65).

24. What are the criteria of legal standing against decisions based on EIA? Who (individuals, NGOs, others) is entitled to challenge the EIA decision at the court? Do individuals need to be

affected? If yes, in what way do individuals need to be affected by the decisions in order to have standing?

The requisite standing for those challenging planning decisions on the grounds of some alleged flaw in the decision-maker's performance of its duties under the EIA regime is no different from that in challenges brought on other grounds. A person bringing a claim for judicial review must show that he has either a personal interest in the development or that he represents some body or group with a relevant public concern and in that sense an interest in the authority's decision (see *Walton v Scottish Ministers* [2013] P.T.S.R. 51). Challenges may be brought by societies or associations which can demonstrate a sufficient interest in the outcome. The question of standing is then approached in a similar way to the standing of an individual, but the organization must show that it is acting upon a relevant issue of public concern (see, for example, *R. v H.M. Inspectorate of Pollution and Ministry of Agriculture, Fisheries and Food, ex parte Greenpeace Ltd* [1994] All E.R. 329).

25. Does an administrative appeal or an application for judicial review have suspensive effect on the decision? Under which conditions can the EIA decision be suspended by the court?

The making of an application under section 288 or a claim for judicial review does not automatically result in the decision under challenge being suspended until the outcome of the proceedings has emerged. If a claimant wishes to achieve that he must seek an injunction requiring the developer to desist or refrain from implementing the planning permission. The fact that the challenge is, or includes, allegations of errors in the procedure for EIA makes no difference. Of course, the developer himself may decide not to proceed until the proceedings have run their course, because he may not wish to take the risk of the planning permission for his development being quashed if the claim succeeds.

26. Does the court have the competence to change/amend an EIA decision? Can it decide on a new condition or change the conditions of the EIA decision?

The court can only review the decision on the grounds that it is unlawful or procedurally unsound (see the answer to question 23 above). It cannot change the conditions or substitute its own opinion for that of the local planning authority or the Secretary of State on any of the planning issues which arise, in the making of any judgment in the screening process, or in its conclusions on the merits of the project in the light of the environmental information.

27. In general, is it required to include monitoring of environmental impacts in the EIA? How is compliance with the monitoring conditions being checked? Is the public informed about the results of monitoring and if yes, how?

There are no statutory requirements, either in the 2011 EIA Regulations or elsewhere, for the monitoring of the environmental effects of a development to be undertaken after it has been subjected to an EIA and planning permission for it has been granted. However, it would be open to a local planning authority to impose a condition on a grant of planning permission or to seek a planning obligation under section 106 of the 1990 Act, to require the monitoring of the environmental performance of the development and specific measures to be taken if, for example, a particular noise level is exceeded, or a particular criterion of air quality is not met (see *R. (on the application of Kent v First Secretary of State* [2004] EWHC 2953 (Admin).

28. Who controls compliance with EIA decisions in your country? Are there specialized inspectorates checking compliance? How often do inspections take place? What enforcement

policy do the authorities have (warnings, injunctions, sanctions and so on) in case of detected non-compliance? Has information on the results of inspections and related enforcement actions been disseminated to the wider public, and if yes, how?

There is no government department charged specifically with a duty to secure compliance with the EIA regime in the United Kingdom. The government department responsible for planning is the Department for Communities and Local Government. The department responsible for policy and regulations on the environment is the Department for Environment, Food and Rural Affairs. There are bodies with specific responsibilities for protecting the environment, including the Environment Agency, Natural England and English Heritage.

The enforcement of planning control is the responsibility of local planning authorities (see the answer to question 29 below).

29. If EIA decisions are infringed, what types of sanctions can be imposed by whom? Are these sanctions administrative, criminal or civil in nature? What is the level of sanctions? Are those sanctions often applied and are they considered to be effective? Can those sanctions be applied on legal persons? Please illustrate your answer by referring to examples of national case law!

See the answers to questions 5 and 28 above.

Part VII of the 1990 Act contains a range of step which a local planning authority may take to remove or prevent breaches of planning control. Section 171C provides that the local planning authority, where it believes there has been a breach of planning control, may serve an enforcement notice. Section 172 provides the circumstances in which a local planning authority can issue an enforcement notice, on whom the notice must be served and when the service of the notice should take place. The authority may serve a breach of condition notice under section 187A. Section 171D provides that it is an offence to fail to comply with the notice within 21 days. An appeal against an enforcement notice may be made under section 174 of the 1990 Act, on one or more of the grounds set out in that section. Section 179 lists the type of offences with which the person receiving the notice may be charged. The Secretary of State has reserve powers under section 182 of the 1990 Act.

Paragraph 207 of the NPPF points out that enforcement action by local planning authorities is “discretionary” and that authorities should act proportionately when responding to breaches of planning control.

If an enforcement notice issued by a local planning authority in accordance with Part VII of the 1990 Act has not been complied with in the time specified in the notice, the owner of the land will be exposed to criminal liability and the prospect of a fine, or an application being to made to the court for an injunction to secure compliance with conditions or the removal of the offending development and the reinstatement of the site.

30. If a given activity falls under the provisions of the EIA legislation, but the developer started the activity without the required authorization, what kind of measures can be taken by the competent authority?

See the answer to question 29 above.

Part 9 of the 2011 EIA Regulations provides the steps which the Secretary of State may take when dealing with “unauthorised EIA development”, which is EIA development that is the subject of an enforcement notice issued under section 172 of

the 1990 Act. Regulation 31 of the 2011 EIA Regulations states that the Secretary of State may not grant planning permission or subsequent consent for an unauthorised EIA development unless he has first taken the environmental information into consideration.

31. Are there any penalties applicable to infringements of the national provisions adopted pursuant to the EIA Directive?

See the answers to questions 26 to 30 above.