www.oxford.gov.uk

OXFORD CITY COUNCIL

REPORT: CASTLE MILL, ROGER DUDMAN WAY: 11/02881/FUL WEST AREA PLANNING COMMITTEE TUESDAY 11 FEBRUARY 2014

Agenda No Item

3. **Castle Mill, Roger Dudman Way: 11/02881/FUL**

The Head of City Development has submitted a report which details a planning application for extension to existing student accommodation at Castle Mill to provide additional 312 postgraduate units consisting of 208 student study rooms, 90 x 1 bed graduate flats and 14 x 2 bed graduate flats, plus ancillary facilities, 360 covered cycle spaces and 3 car parking spaces.

Officer recommendation: That the Committee NOTE the progress reported.

The Page has deliberately been left blank.

West Area Planning Committee 11th February 2014

Application Number: 11/02881/FUL

Proposal:	Extension to existing student accommodation at Castle Mill to provide additional 312 postgraduate units consisting of 208 student study rooms, 90 x 1 bed graduate flats and 14 x 2 bed graduate flats, plus ancillary facilities, 360 covered cycle spaces and 3 car parking spaces.
Site Address:	Castle Mill, Roger Dudman Way.
Ward:	Jericho and Osney
Applicant:	The University of Oxford

Recommendation: Committee is asked to note the progress reported.

Purpose of the Report

1. At its meeting on 12th November 2013 the Committee resolved:

   to DEFER the report so that Officers could present afuller update which includes:
   - Detailed court transcripts of the judicial review hearing
   - Details of the proposed consultation process
   - How the voluntary Environmental Statement process will work.

   That Officers' report back to the West Area Planning Committee in February2014, the progress made from the on-going negotiations with the University ofOxford and the list of measures agreed to ameliorate the size and impact of thedevelopment given planning permission under 11/02881/FUL.

Court Transcripts

2. The City Council received a copy of the Judgment on 29 January 2014. Both that and the transcript of the hearing (not approved by the Judge) are appended.

3. At paragraph 12 of the Judgement it is stated that "it is now clear from the correspondence from the University of Oxford and from the submissions made by counsel on behalf of the City of Oxford [what is proposed]". At paragraph 13 the relevant part of the University's letter of 9 July 2013 is quoted. At

paragraph 14 Mr Maurici's skeleton argument is quoted the EIA relevant part being "The council proposed that having received…. (1) the voluntary EIA which the university has agreed to produce (see above) and, …..". There is no suggestion that either the University or the Council made commitments or undertakings as to the voluntary ES proposed over or above as set out in the University's letter of 9 July 2013.

4. At paragraphs 16 the Judge deals with and rejects the CPRE inference that it was intended to deviate from the commitment given in that letter.

5. At paragraphs 17 and 18 the Judge deals with the CPRE's criticisms of that letter deciding that "I really do think that is just criticism of the words used" (paragraph 17) and "I do not read the letter that way. The university is taking a firm stance but they know they are proposing to do an assessment of the environmental impacts, in the sense of submitting an environmental statement following the processes of the Directive and the regulations so far as is possible."

6. "In my judgment, standing back from those matters, now that one has fully understood the claimant's case, that is there are procedural deficiencies which should be rectified by use of the section 102 power and considering that those procedural deficiencies are actually in the process of being rectified so far as possible by the council and the university, replicating so far as possible the processes in the Directive in the regulation, the intervention of the court is not necessary and therefore I will refuse permission to apply for judicial review."

7. It can be noted that the language"…the processes of the Directive and the regulations so far as possible." derives from the University's letter, not some other claimed commitment or undertaking given in Court. It should also be noted that the Judge was "… proceeding, for the purposes of this afternoon on the basis that there have been those errors but I express no view as to whether or not such errors actually occurred" (Judgement paragraph 3).

Voluntary Environmental Statement and Consultation.

8. The University wrote to the City Council on 10th July explaining that while it does not accept that the development is an EIA Development requiring an Environmental Impact Assessment; nevertheless it is carrying out an assessment of the environmental impacts of the development on a voluntary basis.

9. The University is towrite further (letter will be circulated as soon as it is received) explaining that work on the Environmental Statement is progressing and the University will submit this as soon as its consultants conclude their

assessments. The University will continue to discuss progress on a regular basis with the City Council.

10. The City Council will ensure that statutory bodies and the public are consulted on this ES. Following the processes of the relevant directive and regulations some of this consultation will be instigated by the University. The consultation will include a formal notice in the local newspaper and displaying public notices around the site and beyond. The consultation period must be at least21 days but it is intended to extend this period to be 28 days or 4 weeks. A note as to the basic processes of environmental impact assessment is appended. The publicity will follow the processes of regulation 17 of the EIA regulations so far as possible.

Progress with Negotiations

11. A letter is to be sent shortly from the University providing the City Council with an update on negotiations to ameliorate the impact of the development. The letter is anticipated to provide information on Landscaping, the Roof finish and Lighting.

12. A meeting to discuss Landscaping options that was held on 31st January. This meeting involving the landscape experts of the University and the City Council was attended by representatives of the William Lucy Way Residents Association and the Cripley Meadows Allotments Association. At the meeting those present supported the University's proposed layered approach to new planting, within the site, on the north side of the allotment, and either side of Castle Mill stream. It was agreed that the species chosen for each layer was in character and appropriate for the setting.

13. It was understood that after 15 years of growth the layers of new planting would make a considerable difference and filter views of the development. However, it would not be possible to screen the 'upper reaches' of the development to views from Port Meadow even in the summer.

14. It was suggested to the University that further consideration should be given to exploring increasing the visual articulation of the elevations through the use of a combination of climbers, cladding and different render colouration. The aim would be to 'deconstruct' the current mass of the elevations and ameliorate the overall form and appearance of the development. For example the use in places of a natural timber cladding, that would weather, might be used instead of the current metal brown cladding and elsewhere. It was appreciated that this would take further consideration and consultation perhaps installing some trial panels, because the different effects would need to be considered in different day light conditions and on different elevations.

15. At the meeting reference was made to the way in which the treed edge to Port Meadow has changed over the years and will remain dynamic especially at this southern end because of the extent of crack willow as the dominant species alongside the Thames and Castle Mill steam. Crack willow needs regular pollarding at least every 5 to 10 years. Many of these willows were pollarded in 2011 and 2012 and are now the regrowth is improving their screening effect.

16. The University is also progressing its dialogue with the William Lucy Way Residents Association and in agreement with them is undertaking landscape and noise assessments and facilitating a meeting with Network Rail.

17. To date the University has agreed to provide the following mitigation:

- Landscaping between the development and Port Meadow. A layered approach of new planting in character with the location.
- Mitigation of the appearance of the building. Further consideration and consultation of a range of options involving natural wood cladding, climbing vegetation and colouration of the render.
- Light spillage amelioration. Electronically operated black out blinds for all communal areas and staircases, where feasible.

18. Further consideration is still being given to roof finish and landscaping between the development and William Lucy Way.

19. The details of proposed landscaping and other mitigation will be included in the Environmental Assessment, which will also assess the impact of such mitigation from a range of viewpoints in addition to the single viewpoint used in the Landscape Strategy.

20. The University has advised officers that it is willing to work further with the City Council to take forward the Action Plan arising from the Independent Review and that it is continuing with the Groundwater Monitoring which it committed to in the Unilateral Undertaking.

21. At the meeting in November Members were also clear that they wished to understand the progress made with negotiations to reduce the size of the development. The University wrote to the City Council on22nd March 2013 in which it stated:

> "Various suggestions have been made over recent weeks to reduce the height of some of the buildings by changing the pitched roofs to flat roofs or by removing one or two floors from the building. It is not practicable to change the roof form since the pitched roofs contain a large amount of vital services for the buildings. The removal of floors, although being

structurally possible would be extremely difficult to achieve at this stage and would involve major redesign and rebuild".

" The University is a charity, with the charitable objective of the advancement of learning by teaching and research. It would be an appropriate use of charitable funds to incur costs in relation to a scheme…… which has planning approval and which helps to address the City Council's longstanding requirement for increased student accommodation in the City. Therefore the University will not voluntarily reduce the heights of these buildings."

22. This letter was reported in full to the WAPC at its meeting on 17th April 2013. The University's position has not changed since this date.

Independent Review

23. Following the receipt of the Roger Dudman Way Review Independent report from Vincent Goodstadt an Action Plan is being developed. This will be reported to the next meeting of the Committee.

24. The University will have met Mr Goodstadt by the date of the Committee meeting and a meeting is being scheduled with the Collegiate University later in February or early March.

Contamination Monitoring

25. The City Council has agreed with the University how it will meet the obligations that it gave in the Unilateral Undertaking. This work is being undertaken in a timely manner and the results are being reported fully together with the consultant's assessment and recommendations. Where concerns are identified it has been agreed that the University or its consultants will identify proposals for mitigation and further action as required.

26. There has been a temporary disruption to the monitoring regime because of the recent flooding which has caused one cycle to be missed. However the regime is now working effectively.

27. Officers propose to report to Councillors quarterly on an exception basis if concerns are identified in any of the University's reports.

Next Report to Committee

28. In the light of these processes and to give the public an opportunity to read and comment on the University's Environmental Statement it is anticipated that it will not be possible to report to Committee until later this year. It will very much depend on the nature of the public comments on the ES and any subsequent action how soon before the next report can be put before the Committee.

29. At that meeting the first section of the report will enable Members to confirm compliance or otherwise with the outstanding planning conditions. Once these decisions have been made the second section of the report will advise Members whether there are any outstanding breaches of planning control and whether it would or would not be expedient to consider enforcement proceedings against the University.

Appendices

1. Judicial Review hearing transcript (CO/5547/2013)
2. Judicial Review approved Judgment (CO/5547/2013)
3. Note as to EIA processes
4. EIA Regulations (SI 2011/1824)
5. Letter from the University of Oxford (not yet received)

Background Papers: none

Contact Officer: Michael Crofton Briggs
Extension: 2360
Date: 3rd February 2014

CO/5547/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Priory Courts
33 Bull Street
Birmingham
West Midlands
B4 6DS

Wednesday, 23rd October 2013

B e f o r e:

MR JUSTICE LEWIS

Between:
THE QUEEN ON THE APPLICATION OF CAMPAIGN TO PROTECT RURAL ENGLAND OXFORDSHIRE

Claimant

v

OXFORD CITY COUNCIL
&
OXFORD UNIVERSITY

Defendant

Tape Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr McCraken appeared on behalf of the **Claimant**
Mr Maurici QC appeared on behalf of the **Defendant**
Mr Warren QC and Miss Blackmore appeared on behalf of the **Interested Party**

P R O C E E D I N G S

(This transcript has been prepared without the assistance of documents)

1. MR McCRACKEN: May it please your Lordship? I appear in this matter on behalf of the Oxfordshire branch of the Campaign to Protect Rural England. My learned friend, Mr Maurici, represents the City Council and my learned friends, Mr Warren and Miss Blackmore, represent the interested party.

2. Can I say right at the outset that in the entertaining sense this application concerns a building which was approximately excessive in this year's carbuncle of the year competition but I place no reliance on that.

3. MR JUSTICE LEWIS: It might still be all right.

4. MR McCRACKEN: I think it is important, right at the outset, bearing in mind the way in which this case is resisted by the defendant and interested party, to remind the court of what the authoritative work setting out the practice in these courts says, that is in the civil procedure, the White Book 2013.

5. MR JUSTICE LEWIS: I ought to declare an interest before opening because I write that section, so if it is authoritative it is not that authoritative. Just so you know. I have not updated it yet.

6. MR McCRACKEN: It had the merits of corresponding with your Lordship's thinking. 54.4.2, at page 1862.

7. MR JUSTICE LEWIS: It does not include some of the cases that are referred to in these bundles because I have not actually seen them.

8. MR McCRACKEN: Very well.

9. MR JUSTICE LEWIS: 24.2 yes?

10. MR McCRACKEN:

> "The purpose of the requirement for permission is to eliminate, at an early stage, claims which are hopeless, frivolous or vexatious and ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is case fit for further consideration. The requirement that permission is required is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints about administrative error and to remove the uncertainty in which public offices and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review are actually pending although misconceived."

The authority for this is the passage in the White Book of the highest, it is from the House of Lords.

11. The test is therefore arguability. I want, at the outset, to deal with one point raised by Mr Warren, somewhat surprising, when in his skeleton says: "If the claimant persists in an application for a stay". I shall make it absolutely clear that my client's position has always been to wish for an early hearing and my clients wrote twice to the interested party, asking for them to join in an application for expedition. My clients have not had the courtesy of a reply to that letter.

12. Our position when Hickinbottom J, having accepted that the case potentially raised an important point of law, was to co-operate when he suggested a stay. We were prepared to co-operate on the basis it seemed pointless to argue any further about whether permission should be granted and then a stay or a stay in the light of the fact that there were likely to be in the relatively near future further decisions of the Court of Appeal that would have a significant influence on the position of the English courts as to the relevant law.

13. There are four questions that need to be addressed this morning in this permission hearing. First: is it arguable that there was a judiciable error in the screening opinion of the council? That is the first point. I should right at the outset indicate that contrary to the position taken by the city, both in its response to our protocol letter and also in its skeleton argument that there is no duty to give reasons and the duty is simply that set out in the Court of Justice's decision of Mellor is, and Mr Maurici accepts this, a misconceived point in the light of the fact that the regulations which govern this application are ones that require full reasons precisely to be given whatever the screening decision that is made. This is a case where now Mr Maurici, albeit --

14. MR MAURICI: My Lord, can I clarify that? My Lord, the position is this. It is true under the domestic regulations there is now a requirement to give reasons for screening opinions. My Lord, my focus has been on whether there could be any European law requirement for that reason.

15. MR JUSTICE LEWIS: Because you say the European requirement you are not getting --

16. MR MAURICI: My Lord, that is my assertion on that.

17. MR McCRACKEN: I can deal with that point very quickly. In a case that Mr Maurici and I were both involved in, Berkley v Secretary of State for the Environment (No 1) which was heard by the Appellate Committee of the House of Lords about a decade ago, Lord Bingham of Cornhill, who delivered the leading opinion, made it absolutely clear that if the United Kingdom had transposed a European Directive by a particular mechanism, but could have transposed it by another mechanism, the obligation to, to make sure that European Union obligations were fully complied with applied to the transposed regulations and therefore the mere fact that the requirement to give reasons is the way that we have chosen to transpose the Directive is not an answer

to the point that this is both an obligation of law and one that derives from European Union law.

18. MR JUSTICE LEWIS: Your first question: is it arguable that a judicial and screening opinion, if the alleged error, the failure to give reasons or is there another error?

19. MR McCRACKEN: No, no, it goes beyond that.

20. MR JUSTICE LEWIS: It is not the first question, set out judiciable error in the screening opinion.

21. MR McCRACKEN: I want to set out the road map, as it were, first of all.

22. The second question: is it arguable that that therefore there is a duty to take discontinuance proceedings? That is a point of law that Hickinbottom J characterised as being an important one when he made his first order.

23. If I, as it were, if the application, if the answer to those two questions is in the affirmative, then the matter switches and the defendants seek to persuade you, both that the claim is premature and that the claim is too late, that it is out of time. So those are the four, as it were, matters that will need to be canvassed in front of your Lordship this morning.

24. So far as the judiciable error in the screening opinion is concerned, there are two aspects to that. First, there is of course, if your Lordship is persuaded by the response of the City Council and by Mr Maurici's skeleton argument that the city did not actually give its reasons. If your Lordship is persuaded by those submissions that have previously been made that the city did not give its reasons then of course, we have immediately established ex-hypothesis, a failure to comply with the requirements of the transposed Directive.

25. MR JUSTICE LEWIS: Does that mean that triggers discontinuance alleged duty in any event? Even if you choose to transpose it by a particular way, and if you fail to do it, if in fact there is no underlying European problem, Mr Maurici will be saying: that still does not mean you have to go over the top and over transpose and be compliant to the EU law in the way that you over transposed the first. That is what he will say.

26. MR McCRACKEN: Your Lordship is absolutely right. You do not have to over transpose, but if you choose to transpose, by over transposition then you are bound by the procedure you adopt. I will in due course, when we look at the authorities take you to what Lord Bingham of Cornhill said in that case, because he dealt expressly with that point, which was a point that had been raised by Mr Elvin, who was leading Mr Maurici in that case and said: we need not have transposed in this way, and Lord Bingham of Cornhill said: may be you did not have to transpose in that way, but you chose to. Having chosen to transpose in that way, that was, as it were, the obligation to which the European Union duty to nullify the unlawful consequences of a breach of European Union law, that derives from --

27. MR JUSTICE LEWIS: That is the first decision, the failure to give reasons.

28. MR McCRACKEN: The second aspect of this first issue is this. If your Lordship turns to the screening opinion at page 23, your Lordship will see how it was, how the matter was dealt with by the officer who dealt with it. He had a very straightforward document, which we took to be the reasons but which Mr Maurici has been at pains to submit did not set out the reasons. But there were in this, and we have set this out at paragraph 5 of our statement of facts and grounds which serves in the office of course for the skeleton for the permission hearing. We set out there the three manifest errors of this screening decision. The first is that the officer in his screening opinion completely ignored the requirements both of the Directive and the transposing 2011 regulations to have regard to and, if you turn over the page, you will see that the footnote that covers the relevant part viii "landscapes of historical, cultural or archaeological significance". He completely fails to have regard to that mandatory consideration.

29. MR JUSTICE LEWIS: Where do you get from page 23 that failure?

30. MR McCRACKEN: Twenty-three is in the bundle.

31. MR JUSTICE LEWIS: Which page shows you?

32. MR McCRACKEN: If you look through there is absolutely no reference here or discussion of the effect on the historic environment.

33. MR JUSTICE LEWIS: The absence of any reference.

34. MR McCRACKEN: Absolutely my Lord. It is very powerfully arguable that this checklist fails, manifestly fails to comply with either the requirements of the Directive or even the requirements of Circular 2 of 99, which is a document that on many occasions has been found by the Court of Justice in Luxembourg to be deficient.

35. MR JUSTICE LEWIS: That is the first point and the second point is the side threshold? They say question 5 does not mean something and you say it does.

36. MR McCRACKEN: There may be an argument about what question 5 means but the argument that they are putting forward is not a knock out blow. Question 5 says, talks about the size threshold in schedule 2 of the 1999 regulations. It may be that at the end of the day, having heard evidence at the judicial review it is conceivable they would will win on that point. It cannot seriously be suggested there is not an arguable point.

37. MR JUSTICE LEWIS: You say I can read the words for myself and "in the regulations" means in the regulations or at least it arguably means in the regulations.

38. MR McCRACKEN: Indeed.

39. MR JUSTICE LEWIS: The third error would be?

40. MR McCRACKEN: The third one is they looked at the additional consequences of the additional development which is in excess of that which has previously permitted. You can see that in the summary of comments "applications of rework of an extant permission granted in late 1990s. It gives rise to some impacts but these are not significantly addressed by appropriate mitigation."

41. I will develop that particular point by taking you to a subsequent document which clarifies, so some extent, the approach that the officer was taking. Your Lordship will appreciate that when people realised what the actual consequences of this development would be, they were horrified.

42. MR JUSTICE LEWIS: Much bigger than they thought, yes.

43. MR McCRACKEN: It is much more than that. Your Lordship will see in paragraph 3 and 4, some of the background to it and I will simply invite your Lordship to note from our paragraph 3 that the location is a sensitive one because is on the edge of Port Meadow.

44. MR JUSTICE LEWIS: Can I understand your point 3. Are you saying that they only looked at the consequences from the new additional planning permission and they should have looked at all the consequences including that in the original planning permission?

45. MR McCRACKEN: What they should have looked at is not the difference between the new and the original, what they should have looked at is the totality.

46. MR JUSTICE LEWIS: There is a Court of Appeal case on that called Snipe v Welsh Ministers(?) and that is not referred to, which addresses this question in what the Baker v Baines case actually meant.

47. MR McCRACKEN: I have to confess, none of us appear to have been aware of that decision my Lord, but if it is said that you only have to look at the difference between what had been permitted previously and what is now committed; in other words if you look at the difference between the two, then I would submit it is plainly arguable that is incompatible with the true position in European Union law having regard to cases, such Ayuntamiento de Madrid East College In Action and the other cases cited in Baker.

48. MR JUSTICE LEWIS: I do not think we need to. What it actually says if you look at the cumulative consequences but you have to bear that some of those happen any way. If you extend a runway by 30 metres, it is not the work involved in 30 metres, it is the fact it can now take 747s when it previously took small planes. If you are going to go further with this you need to draw the court's attention to relevant authority including Snout(?).

49. MR McCRACKEN: I am sure all of us, as it were, blushed if we were not aware of that decision.

50. MR JUSTICE LEWIS: It is not reported. Those are your three errors that you say create the European that requires --

51. MR McCRACKEN: I need to take your Lordship I think in this context to a document that was prepared for the West Area Planning Committee by the officers which sets out, at a later stage, this is after screening but discusses the development. I want to take you to page 136 of the bundle and this goes particularly to the first of the three criticisms. Paragraph 11:

> "Although the immediate environment of the development consists of railway sidings to the east and allotments to the west, it is also located close to Port Meadow to the north beyond the public car parks at Walterwell Road. Port Meadow is a unique and sensitive location which constitutes an important heritage asset."

The paragraph then goes on to indicate the importance which was attached in the then current PPS, Part 2 historic to heritage assets. That is the first reference. The second one is at paragraph 13:

> "Policy HE9 of PPS/5 is also relevant as Port Meadow is a designated heritage asset."

Then paragraph 14, having, as it were, dealt with the areas immediately adjoining the site, starts, in the last three words of the page, to deal with Port Meadow and it says, last three words:

> "The land at Port Meadow is more sensitive however. Indeed the very northern tip of the application site falls just within the view cone from Wilvercombe."

Then it goes on to page 15:

> "The view across Port Meadow is a low lying, distant and expansive one across the flood plain of the River Thames towards the centre of Oxford. There is virtually no topographic variation to the view except the wooded hills of east Oxfordshire which are just visible in the background to the left, east of the view. The open and historic grazed common land of Port Meadow which is publicly accessible plays an important part in the character of the view providing a historic green setting to the city. The line of trees along the railway line and the variety of more ornamental trees in the gardens of north Oxford reinforce this green setting from which the dreaming spires emerge and are seen against the open sky line. The green, fore and middle grounds contrast with the colour and texture of the buildings on the sky line, enabling the sky line buildings to stand out in silhouette. The expansiveness of the view means the spires, towers and domes appear relatively small. Close to the edge of the built-up area it is clear that trees..."

52. MR JUSTICE LEWIS: I have read to the end of that now.

53. MR McCRACKEN: I take you to paragraph 17.

54. MR JUSTICE LEWIS: Shall I read that to myself?

55. MR McCRACKEN: Yes, if you wish to (Pause).

56. MR JUSTICE LEWIS: Yes, I have read that.

57. MR McCRACKEN: Then paragraph 17, my Lord:

> "Nevertheless there can be no doubt of the significance of the Oxford sky line and its landscape setting is one of the enduring images of city, an image which in planning terms successive local plans sought to protect."

58. MR JUSTICE LEWIS: I have read all of that Mr McCracken.

59. MR McCRACKEN: The point that emerges here is that in the February 2012 report to the Committee officers are acknowledged, indeed positively asserted the considerable sensitivity of anti historic importance of Port Meadow. So there is an inconsistency between the screening opinion and what was said in the February report.

60. The next thing that one needs to look at is a report that was prepared after the public controversy had arisen which is in December 2012. This we find at page 155. By this stage, there is considerable public controversy and the offices are under some pressure as to why there was no EIA and the justification for not producing an EIA is set out at paragraphs 7 to 10 and we can pick it up at paragraph 8:

> "Although the Roger Dudland waste site exceeds that minimum size, that does not mean an EIA is necessarily required. Rather guidance on the requirement is given elsewhere in the regulations in department of community local government Circular 2/1999."

There is then set out a passage from Circular 2 of 99 which says in certain circumstances EIA is more likely if it cites more than 5 hectares and so on. If it had not been intensively developed previously and/or if it would have a significantly urbanising effect. Then paragraph 9:

> "Whilst this is a significant development that does not mean an EIA was automatically required to be submitted."

Then this is very important, in relation to the first ground:

> "Port Meadow bears designations as a site of special scientific interest and schedule ancient monument. However these designations relate to its nature conversation and below ground archaeological interest, which officers assessed as not being significant impacted by the development. In assessing that no EIA was required, regard was also had to a similar extant planning permission for student accommodation and proved in outline in 2000 and indeed 2002 of which only the first phase was constructed as existing Castle Mill development and which had a similar relationship to Port Meadow."

It goes on at paragraph 10:

> "There are no provisions within the EIA regulations to require the applicant to undertake an environmental assessment following the grant of planning permission."

61. In so far as further clarification of the thinking of the offices is given in this report, and since they are justifying their decision not to call for an EIA, it plainly is intended to clarify their thinking. They make it clear, so far as they were concerned, the sensitive of Port Meadow was confined to its status as one of a triple aside and the (inaudible). They also make it clear that in considering the impact of the proposed development, they looked at the additional impact rather than the cumulative impact of the whole thing. Those are, in my submission, very clearly justiciable errors. I do not have to persuade you at this stage they are judiciable errors.

62. MR JUSTICE LEWIS: The real issue is prematurity.

63. MR McCRACKEN: There is an argument upon that.

64. So far as prematurity is concerned, this is the point that Hickinbottom J correctly characterised as an important point in his original order which you see at page 183, where he says:

> "This claim potentially raises the important issue whether there is a duty to nullify the consequences of breach of EIA Directive."

He says "potential" because it obviously all depends on there being a justiciable error at the earlier stage. But once you cross the threshold of demonstrating that it was a justiciable error at the earlier stage, then the question arises: was there a duty to nullify the unlawful consequence of breach of European law?

65. MR JUSTICE LEWIS: Does it turn on what they actually do, now that point can be raised?

66. MR McCRACKEN: No, it does not. For this reason. I think here, I can cut to the chase, the prematurity argument is intriguingly based upon a whole series of cases dealing with immigration and asylum, where there is an obvious motive on the part of the claimants to delay as long as possible proceedings and where the motivation for asking for a stay may be rather suspect. This is a case where we said at the outset we want expedition if possible. We continue to be of that view. We want the case to be heard so soon as we can. But recognising the views of Hickinbottom J, recognising also our duty to seek to comply with the overriding objective, since the case of Evans v Vitapress(?) is going to be heard this term, we are quite happy that the substantive hearing is dealt with after that case has been determined.

67. MR JUSTICE LEWIS: What are you going to review?

68. MR McCRACKEN: We are going to review the decision, communicated by letter to us that the council does not have a duty to serve a discontinuance notice.

69. MR JUSTICE LEWIS: What do you mean by that. Do you say they have got to?

70. MR McCRACKEN: Yes, yes. We say they have to serve a discontinuance duty.

71. MR JUSTICE LEWIS: They do not have to consider what they have to do now, and what does a discontinuing notice have to include?

72. We set out the discontinuance, both in the correspondence and at paragraph 11 of the claim, so if I take your Lordship to that. I should say the discontinuance order is the appropriate method rather than the revocation under section 97 because section 97 which deals with revocation does not permit, that cannot apply to building operations that have already been carried out. So it is discontinuance where building operations have already been carried out.

73. Perhaps your Lordship ought to look at the terms of section of 102 before looking at what I have drafted there because that is important.

74. The label is rather odd because it is --

75. MR JUSTICE LEWIS: Never mind the label, look at the substance.

76. MR McCRACKEN: Indeed:

> "If having regard to the development plan and any other material considerations it appears to a local planning authority expedient addressed proper planning..."

I readily accepted in a purely domestic context of course you have regard to all these factors, such as money which Richards J (as he then was) did not think was relevant in the Anik(?) case, but which is now accepted is relevant and the development plans and so on. In the context in the EU law applying the Marleasing principle, you do not have to have to regard to those. You simply have to comply with your duty. Then the content of the order is:

> "Any buildings or works should be altered or removed."

And:

> "What they require is the discontinuance of the use and they can impose such conditions as may be specified in the order on the continuance or require such steps as may so specified to be taken to the alteration or the removal of the building or works as the case may be."

An order can require removal or alteration of buildings. It can require the taking of steps and it can impose conditions.

77. MR JUSTICE LEWIS: Do they need to know whether or not that is really necessary? The point, you say, there was an EIA which was flawed and there should not have been

EIA. You are not surely telling me, are you, they must pull it down, do the EIA, if the EIA says it is fine, they can put it back up again.

78. MR McCRACKEN: No, my Lord, I am not telling you. I appreciate....

79. MR JUSTICE LEWIS: They have to decide what to do.

80. MR McCRACKEN: I appreciate your Lordship did not have a chance to read our letter before action or to read my opinion, or to my statements of facts and grounds. I appreciate that.

81. MR JUSTICE LEWIS: Your letter before action I thought that was the one....

82. MR McCRACKEN: My Lord, if your Lordship turns to paragraph 12 of the statement of facts of grounds.

83. MR JUSTICE LEWIS: Is that not the one at 102 and in the reply, 105?

84. MR McCRACKEN: It probably is. I think your Lordship will find there is nothing inconsistent with what is set out at paragraph 12 of the statement of facts and grounds.

85. MR JUSTICE LEWIS: You carry on.

86. MR McCRACKEN: Your Lordship raised the point of what was said in my opinion.

87. MR JUSTICE LEWIS: You said I had not read it and I say I have. Let us not argue about that. Where do you want me to go next?

88. MR McCRACKEN: Paragraph 12, the statement of facts and grounds my Lord. Because it is important that one understands that when my clients wrote to the council in March 2013, they made it absolutely clear that the consequences of a proper assessment would not necessarily or even be likely to include the removal of the buildings of their entirety. It might well lead to removal of the top storey of two of the blocks *inter alia* restoring (inaudible) Mews and St Barnaby's Tower from the bins area, the cladding of the Port Meadow frontage with wood, with evergreen wall planting and green wall might be considered necessary mitigation in addition or an alternative.

89. So it is very important that I emphasise: we are not saying as Ardar(?) was saying in Ardar v Chester(?): if there has been a breach of the EIA Directive you have to demolish what has been built before you carry out a retrospective EIA. We are not saying that. We accept the decision of the Court of Appeal in Ardar v Chester that an EIA can be undertaken retrospectively.

90. What we say the council must require by way of discontinuance is set out at paragraph 11.

91. MR JUSTICE LEWIS: Yes? Can we look at 101?

92. MR McCRACKEN: That would be my Lord, for example, that would be to submit an environmental statement. That would be one of the steps that the council --

93. MR JUSTICE LEWIS: May consider necessary.

94. MR McCRACKEN: Yes.

95. MR JUSTICE LEWIS: You go to 101 and I look at your letter at 101, do I not?

96. MR McCRACKEN: I am not sure whether that is where it is set out.

97. MR JUSTICE LEWIS: That is the letter your client sent.

98. MR McCRACKEN: Very well, yes I think it was set out at 101.

99. MR JUSTICE LEWIS: Their reply and there is a pre-action protocol letter and their reply of 105.

100. MR McCRACKEN: Can I take your Lordship to page 104, where you will see that at paragraphs 10 and 11, the form of the order was set out in paragraph 10 and then the point that I have just made to your Lordship was made at paragraph 11:

> "It is important to emphasise the consequence of a proper assessment would not necessarily or even be likely to include the removal of buildings in their entirety."

101. MR JUSTICE LEWIS: What do they say in reply on the next page?

102. MR McCRACKEN: They made all sort of points. They said the notice that we had suggested was not meaningful. They said we had not particularised alleged efficiencies in the screening opinion. They said they ran a sort of general delay point.

103. MR JUSTICE LEWIS: All of which is irrelevant.

104. MR McCRACKEN: They said at page 106, if you look at the (inaudible) pre-penultimate paragraph:

> "It would therefore appear to be clear that there is no continuing duty and that if there is some legitimate criticism of the screening or any criticism of the process leading to grant of permission, the correct manner in which to challenge that decision would seek the quashing of the grant of the permission within 3 months of the ground."

This is the delay point. Then in the pre-penultimate paragraph they say:

> "However, it has been set out about your argument relies on emitting an integral part of the judgment relied up and clearly and repeatedly been shown to be wholly misconceived. It follows that the council denies that it is under a mandatory obligation to make a discontinuance order."

There is the heart of the dispute: "We submit there is a mandatory obligation to serve a discontinuance order", which will enable the requirements of the EIA Directive to be complied with retrospectively and that would be screening and that if it is screened to require EIA then the submission of an environmental statement by the university.

105. MR JUSTICE LEWIS: I am just wondering whether we are at cross purposes. At some stage they may have to require something to be done to the building. It may to clear the top storey, it may be mitigation, it may be something else. But they have to decide whether to do that or not.

106. MR McCRACKEN: Yes. But they have to decide whether to do that, after complying with the requirements of the EIA Directive which they have not at the moment.

107. MR JUSTICE LEWIS: They are doing that, because they have asked for voluntarily EIA.

108. MR McCRACKEN: That, with respect my Lord, is very far from compliance with the requirements of the EIA Directive. There are two reasons for that. The first reason for that is that the EIA Directive requires an assessment by the competent authority not by the developer. What the city have agreed to is that the developer should carry out an assessment. That simply does not begin to comply with the requirements of the Directive. Second reason is that the process of EU compliant environmental assessment requires participation by those who are interested. What is proposed by the university and been accepted by the City Council does not involve participation.

109. MR JUSTICE LEWIS: Does that not mean that if they tell you in 2 months' time: we have had something in from the developer, he says everything is hunky dory, and we are not going to issue an order under section 102. You will say that is not good enough and you will challenge the decision. At the moment we do not know whether or not there is going to be continuance, do we? We do know whether it is lawful or unlawful.

110. MR McCRACKEN: We can be very sure that the city will not actually serve a discontinuance order.

111. MR JUSTICE LEWIS: How do you know that?

112. MR McCRAKEN: They have been manifestly adopting the Charizard approach to this case, whereby they are reluctant to concede that they made their decision. Whether you do or do not accept the view that I suggest to the court that their approach is a Charizard one. Whether or not you accept that, if you look at the cases that are relied upon by particularly Mr Warren but also Mr Maurici about prematurity, the real point in the cases that where permission has been granted notwithstanding potential prematurity, is there, as it were, a real point of law in issue that is in issue now and will be in issue later and with the discontinuance order undoubtedly is. We submit there is a duty to serve a discontinuance order.

113. MR JUSTICE LEWIS: I think you could only actually be submitting there is a duty potentially to submit a discontinuance order, but whether or not that treaty will come into effect, whether or not the one they served is lawful, it seems to depend at moment what are the factors, the factors 426 of the Stadlen J judgment.

114. MR McCRACKEN: No, with respect my Lord. I am undoubtedly submitting that there is a duty to serve a discontinuance order, whether that submission is sound or not is a matter that will --

115. MR JUSTICE LEWIS: How can they serve a discontinuance order until they need to know (a) they do actually need to do something substantively to address issues here and (b) until they know what is going to be?

116. MR McCRACKEN: The beauty of the way in which I have crafted the discontinuance order that I invite them to serve is that it does not actually require the university physically to do anything unless and until the council have (a) decided that environmental impact assessment must be undertaken retrospectively and (b) having undertaken that environmental assessment retrospectively they consider that some further steps need to be taken. The discontinuance order, as crafted by me, would not require the university to do anything other than initially to wait for the new screening opinion and then when the new screening opinion had been issued, if required to serve an environmental statement, followed by the usual procedure of consultation and so on. A discontinuance order is very carefully drafted to go as far as but no further than that which European Union law requires the emanations of the United Kingdom to do.

117. MR JUSTICE LEWIS: There should have been, on your case, a proper EIA and there was not.

118. MR McCRACKEN: Yes.

119. MR JUSTICE LEWIS: The purpose of an EIA is to make sure that assessments are made of the likely significant effects on the environment you described.

120. MR McCRACKEN: Yes.

121. MR JUSTICE LEWIS: There are likely significant effects to refuse it, to have mitigation and so on and they have not done that.

122. MR McCRACKEN: Yes.

123. MR JUSTICE LEWIS: The thing that has permission, it has been build. It may be that substantively had they done an EIA it would not have been built at all; it may be that it would have been one storey lower. It may be that it would have had more trees in front of it or setback 20 yards. All of those things are substantive things that make flow, if the substantive process involved in the EIA has been done. But the purpose of the discontinuance order is to require the steps that need to be taken now, to address the underlying substantive error. You should have a discontinuance order, should you, just to require them retrospectively to do the EIA? The question now is at some stage, if they decide not to do something, you have to look at whether or not their decision not

to do anything is lawful, or if they only decide to do some things, whether that is lawful. Until we know what they are doing and why they are doing it, it is artificial, is it not?

124. MR McCRACKEN: It is not at all artificial my Lord. I mean first of all the EIA is not undertaken by the developer, it is undertaken by the --

125. MR JUSTICE LEWIS: I understand that and you may come back in 6 months' time and say: it was never good enough.

126. MR McCRACKEN: It is quite important that I make that clear because the second thing is that the first thing that has to be done is a lawful screening decision has to be made. It might be the City Council will lawfully decide that no EIA was required and then, in those circumstances, the discontinuance order would end up with being a requirement for the university to do nothing.

127. MR JUSTICE LEWIS: You are not actually seeking a discontinuance order, you are seeking a *mandamus* to comply with the EIA Directive as far as I see at the moment then.

128. MR McCRACKEN: No, with respect, it has to be by way of discontinuance order because --

129. MR JUSTICE LEWIS: And *mandamus*, yes.

130. MR McCRACKEN: It is not that, but you --

131. MR JUSTICE LEWIS: Let me have a look at the words.

132. MR McCRACKEN: I think it is very important that your Lordship reads very carefully and thinks about the wording of A and B, because it is carefully drafted to encompass the fact that the first thing that has to happen is that the City Council has to carry out a screening opinion. Then, if it thinks that there should be EIA, it requires the developer to submit an environmental statement. Then, after that environmental statement has been submitted and a consultation process has been undertaken by the council, if the council thinks it is appropriate it can require various things to happen as a result of that.

133. MR JUSTICE LEWIS: So one was the need to carry out an EIA and what was the second and third?

134. MR McCRACKEN: No, my Lord. The first was that the council, after it served its discontinuance order will decide, would go through a lawful screening process. Okay? Then if it decides that EIA is required, then it will require the discontinuance order. It would impose, communicate in writing to the university of the step of submitting an environmental statement. Then, after the city has carried out the necessary consultations and made a decision on the basis of this retrospective EIA as to whether the buildings can continue and with or without additional or different mitigation, the university will

be required to carry out those additional or different mitigation measures or removal measures, depending on what conclusion is reached.

135. MR JUSTICE LEWIS: You say there is no way in which an obligation to do the screening process and, if required, an EIA can be avoided and the continuance powers must be used for steps 1 and 2, to achieve the screening and the EIA before you get to 3?

136. MR McCRACKEN: The point is the university has, in terms of domestic law, a planning permission. Therefore that has got to be something has to be done to oblige the university to comply with the requirements that are imposed upon the United Kingdom. I should emphasise the university entitles compensation from the city, in so far as it suffers any financial loss as a result of what is required. That is just one of those consequences that flows where a competent authority fails to comply with its duties.

137. MR JUSTICE LEWIS: But 102 is not a power in 1 and 2 of your list, 102--

138. MR McCRACKEN: Yes, it is.

139. MR JUSTICE LEWIS: I understand your argument if you have a power you use it to EU law:

> "If having regard to the development plan and to any other material consideration it appears it is expedient that any use of land should be discontinued or any condition should be imposed on continuance on the use of land, or that any buildings or works should be altered or removed then they may-
>
> (a) require the discontinuance of that use, impose such conditions as may by specified in the order on the continuation of the use or require such steps as may be specified to be taken for the alteration of removal of the works."

I read that as applying the stage 3 of your process. What you are doing is trying to use a power which does not exist for the purpose to enforce the obligations in the Directive in the EIA regulation.

140. MR McCRACKEN: I think what your Lordship is perhaps not appreciating is that absent a discontinuance order, there is absolutely no point in the City Council recognising that it made an error at the early stage. It is not in a position to require an environmental statement to be submitted at this stage. It is not in a position at this stage to require works to be removed. It is not in a position at this stage, to require mitigation measures to be taken. The only mechanism available to it is that under section 102.

141. MR JUSTICE LEWIS: Yes. If they look at all these matters and if they decide a storey must come off or a couple more trees go in, they require that. They have not got to that stage yet.

142. MR McCRACKEN: They will never be in a position to make a lawful decision, they either require or they do not require that. The only way they can make a lawful decision about that is after the requirements of the EIA Directive have been complied with. They cannot be complied with whilst this concern permission stands.

143. MR JUSTICE LEWIS: The EIA was required before the grant of planning consent and that has been granted. The situation we are in now is whether it was granted you say unlawfully and you cannot chance that as too late and you are saying there is an obligation under EU law to take all necessary steps to remedy the substantive breach of EU law.

144. MR McCRACKEN: I think one needs to qualify that. The development consent has not, so far as I am aware, yet actually been issued as a whole and certainly at the time this challenge was launched there was no, for the purpose of EU law, there was no grant of development consent because there were a number of conditions that required further material to be submitted and that further material was never submitted. In the context of the European Union concept of a development consent, that had not been issued at the time that the challenge was launched. In terms of the time the challenge launched there had been a development consent.

145. MR JUSTICE LEWIS: I am having real trouble in understanding what you are trying to do. You seem to me to be seeking to get an order enforcing the requirement on the council to comply with the EIA regulations and because you say they should have done it and they have not done it, they have been very naughty and what you will do is you will make them do it under 102. It may never be necessary to do it in order to get a requirement, because even if they did, it may say they do not need to make any alterations. Nonetheless you are saying they must because it is the only mechanism you can find. Use the 102 to get an EIA. That seems to be what you are saying.

146. MR McCRACKEN: Yes, you will not have an EIA while you have a valid planning permission. You cannot have any EIA while there is a valid planning permission. The case of Carlton-Conway makes it absolutely clear that when authorities are making decisions such that of screening, they need to do so without any desire to avoid, as it were, losing mitigation that they are already engaged in it.

147. MR JUSTICE LEWIS: Your case is that it is arguable that given the absence of an EIA, you should use a power, which can require conditions of discontinuance of use or removal or alteration of building to require an EIA.

148. MR McCRACKEN: I think to require the developer to co-operate in the process of carrying out a retrospective EIA and thereafter to comply with any requirements which the planning authority consider are necessary in the light of the information that has been supplied to them and the comments that have been made to them in the process of the EIA.

149. MR JUSTICE LEWIS: It says: "To require the developer to co-operate and thereafter to carry out any necessary works."

150. MR McCRACKEN: Yes, whether those works be by way of removing a storey or by putting in wooden --

151. MR JUSTICE LEWIS: It is not enough for the authority to say: we are looking at this. We have taken various steps and we can work out whether substantively the thing that an EIA would have shown up would have been addressed. It has to go through the formalities. Section 102 must be used to achieve that.

152. MR McCRACKEN: Yes. Absent any alternative, section 102 must be used to achieve that end. So far as substantial compliance is concerned, that was actually another of the matters discussed in the Berkley case and the argument of substantial compliance was rejected there by the House of Lords and indeed the doctrine of substantial compliance only really applies in circumstance where a Directive has not been transposed, where you can say: the Directive was not transposed but there was substantial compliance with its requirements so therefore, we --

153. MR JUSTICE LEWIS: My questions are not directed to that. We are on a different waive length Mr McCracken. You are saying there has been a breach of EU law.

154. MR McCRACKEN: Yes.

155. MR JUSTICE LEWIS: Domestic powers must be used to remedy a breach of EU law.

156. MR McCRACKEN: Yes.

157. MR JUSTICE LEWIS: I am saying the breach of EU law is they should have considered an EIA (inaudible) required they should have it. The purpose of having an EIA was to see what significant environmental effect there were and require conditions to deal with it.

158. MR McCRACKEN: Yes.

159. MR JUSTICE LEWIS: The end result of EU law was not to have a piece of paper with an EIA stamped on the front but to have a proper assessment of whether or not steps needed to be taken to address significant environmental effect. That is what EU law aimed to achieve. If there has been a failure to do that, then the section 102 order would be made. If they built a ginormous extension on the side of St Paul's and it is obvious that should not have happened, then they can require the ginormous extension to be removed. But, at the moment, I am having huge trouble in seeing how it is not premature to start deciding whether or not they are going do something, or require something to be done, when they have even finished the consideration of what should happen. If they come back and say: there are no significant environmental effects. We have looked at it, there is not any. You would say that is still not good enough. They can only do that, if there EIA process.

160. MR McCRACKEN: Let me take you to Carlton-Conway.

161. MR JUSTICE LEWIS: It is 1 o'clock, do you want to do that after?

162. MR McCRACKEN: I should say that I think this hearing is going to take some considerable time.

163. MR JUSTICE LEWIS: No, it is not. You may like it to, but it is not going to. It is a 20-minute application at the moment but we have already had 45 minutes. You can....

164. MR McCRACKEN: I mean.

165. MR JUSTICE LEWIS: Did you request a particular time?

166. MR McCRACKEN: We are in your Lordship's hands. The issue is arguability and perhaps one needs to bear in mind the issue is arguability.

167. MR JUSTICE LEWIS: I understand that, and I am not bothered, I assuming at the moment what who you say (inaudible). My one concern at the moment, and you can come back and address me on, that is prematurity. The concern I have about it is not so much Evans, although you can tell me why Evans is going to deal with it. I have 46 in front of me. The problem I have is that the aim of EU law would be to rectify any breach, any substantive breach, not just they have not got the document. What I see in Mr Maurici's defence is that they are still at the stage where they are addressing whether or not the need to do it to the end of the discontinuance order. If they are considering that, I cannot quite see how it is not premature.

168. MR McCRACKEN: By the way my Lord, it was a three-and-a-half hearing slot not a 20 minute. This is not a case where we were refused on the paper, we were down for three-and-a-half.

169. MR JUSTICE LEWIS: I was not told it was down for three-and-half hours, there is another litigant as well. Okay. You have had 45 minutes, you say you are entitled, taking into account Mr Maurici, to the balance of three-and-a-half hours. We have to carry on after lunch then. That is where I am at the moment. A lot of the submissions you make are all very interesting but they are not assisting me at the moment. What I see is the key issue is whether there is a situation now, where we have to wait to see what the council does and then you decide to bring proceedings or whether it is clear, now, what they must do and therefore this is arguable.

170. MR McCRACKEN: I will deal with it after lunch. That is very helpful my Lord.

171. MR JUSTICE LEWIS: That is where I am coming from at the moment. Is it arguable they have got to do this now and there is no other way round it, is it they can wait and see what they have done and decide whether or not it is something that is lawful. So it will be 2 o' clock.

(Luncheon Adjournment)

172. MR JUSTICE LEWIS: Mr McCracken, I have double checked, Hickinbottom J ordered half a day, so I have cleared the diary for this afternoon, so you will end up having more than half a day. So we have had the morning and we carry on to 4.00. So (inaudible) 20 minute time estimate. We were dealing with questions 2 on 3.

173. MR McCRACKEN: I posed the question of prematurity, so I deal with in response to your Lordship's question, if your Lordship having given an indication as far as question 1 and 2 were concerned there was an arguable case.

174. MR JUSTICE LEWIS: So there is no confusion, I am proceeding on the assumption that 1 is arguable. Two, I think it is a question of wording. I am not even remotely persuaded that it is arguable, you can use the discontinuance procedure to require an EIA. It may be arguable in due course (inaudible) decision is something that can be rectified, used to rectify EU law.

175. MR McCRACKEN: If your Lordship is not remotely persuaded that discontinuance ... I need to take you to the European authorities then before I do that. Let me take your Lordship to the European authorities on that point.

176. I think we start then, I think I need to take you to the skeleton to paragraph 10.

177. MR JUSTICE LEWIS: Whose skeleton?

178. MR McCRACKEN: My skeleton my Lord.

179. MR JUSTICE LEWIS: I thought there was not one from you.

180. MR McCRACKEN: The statement of facts of grounds. It may not be labelled as "skeleton" but it is in reality a skeleton.

181. MR JUSTICE LEWIS: I do not care what it is called, as long as I am looking at it. Paragraph 8.

182. MR McCRACKEN: We can start with some general principles of EU law which made good the claim that a discontinuance order is a means of achieving the result required by the Directive. First of all, your Lordship notes that the EU constitution requires for a high level of protection and enhancement to the environment and the application of preventive, precautionary case principles.

183. MR JUSTICE LEWIS: Yes.

184. MR McCRACKEN: Secondly, these principles are critical to interpretation and application of EU legislation and the first case I ought to take you to is (Inaudible) which is dealing with the Halifax Directive but also applied expressly to the EIA Directive. This was a case where these principles caused the Court of Justice to interpret the words "likely to have significant effects" as effectively meaning "possibly having significant effects". This case was a case dealing with, it is tab I think 28 of the bundle I think. Does your Lordship have it?

185. MR JUSTICE LEWIS: I have it here.

186. MR McCRACKEN: A case dealing with mechanical cockle fishing and the question was whether this was a project that required appropriate assessment under the Habitats Directive, but the test for that was "likely to have significant effect". The court when it

was dealing with what that meant expressly associated the wording of the Habitats Directive, the wording of the Environmental Directive. So paragraph 42 of the judgment.

187. Your Lordship will see there that the court expressly equates the wording, the test and the trigger for an environmental impact assessment with the test and the trigger for an appropriate assessment.

188. MR JUSTICE LEWIS: Yes.

189. MR McCRACKEN: Then 43, having quoted the test, that is, that there is likely to be significant effects on the environment, the court says:

> "It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.
>
> 44 In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned."

In other words "likely" does not mean what we would think "likely" means, it means "impossible". So there I make good the submission in paragraph 9.

190. Then I go on to look at Article 4(3) of the Treaty on the European Union and which used to be Article 10 and before that it was Article 5 and then Article 288 of the Treaty on the function of the European Union which used to be 249, that is on Directives. The first thing is national legislation must be so far as possible interpreted as to be consistent with it. You will remember the facts in the Marleasing case were very striking. It was a case where a company had been formed in Spain, with a fraudulent intention, and this was accepted by everybody but because there was a Directive that limited the circumstances in which companies could be, as it were, nullified, even though it was accepted that the company had been formed for fraudulent purposes, the domestic legislation had to be interpreted to be consistent with the Directive:

> "In so far as domestic legislation cannot be so interpreted it must be disapplied [that is the Symmental case]. All emanations of the State have a duty to use their power to secure the implementation of EU law."

That is the Milan football case, Fratelli Costanzo v Milano. In that case, your Lordship will remember, the tendering process for the Milan football club had not complied with the relevant Directive. We have not set that case out because it is so common place. The tendering process had not been complied with and the unsuccessful tenderer was

able to persuade the Court of Justice that Italy and the local authority in Italy had to, as it were, to renegotiate and the mere fact that the successful tenderer lost his contract was nothing to the point. That is sometimes referred to as "the triangular effect situation". That includes of course refraining from action which makes it more difficult the achievement for the purpose of EU legislation, that is the Kraaijeveld case and looking at the last sentence of Article 4(3).

191. The next proposition is very important in this case. "Domestic courts must enforce the obligations of Member States deriving from Directives." I am going together Kraaijeveld. That is the case known as the Dutch dykes case generally speaking. That is in the bundle at tab 6.

192. MR JUSTICE LEWIS: Middle of tab 6.

193. MR McCRACKEN: 26, I am sorry.

194. MR JUSTICE LEWIS: Got it.

195. MR McCRACKEN: That was a case relating to dykes in the Netherlands and a question arose in the case of whether or not even if a party did not raise a point, the court had a duty, of its own volition, to take a point. It also raised the question of whether or not the Directive was one that was capable, that is the EIA Directive was capable of being directly effectively.

196. MR JUSTICE LEWIS: Yes.

197. MR McCRACKEN: We pick it up at 54 first of all:

> "... it appears from the order for reference that in its action Kraaijeveld did not raise the question whether an environmental impact assessment ought to have been made."

Then 55:

> "First of all it should be recalled that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189."

That has obviously been replaced by (inaudible):

> "That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts."

There is then a discussion of whether or not that means individual can rely upon inadequately transposed Directives and the answer was yes, they can in paragraph 56. In 57, this is the bit very important to us:

> "Secondly, where, by virtue of national law, courts or tribunals must, of their own motion, raise points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned."

That is dealing with the situation, if there is a duty on a court to take a domestic rule, you have the same duty to take a European rule. This is what is important:

> "The position is the same if national law confers on courts and tribunals a discretion to apply of their own motion binding rules of law. Indeed, pursuant to the principle of cooperation laid down in Article 5 of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law."

What is significant there is the court is saying is that there is a duty to take European Community law points even if in terms of national law all you have is a discretion.

So paragraph 60:

> "Consequently where, pursuant to national law, a court must or may raise of its own motion pleas in law based on a binding national rule which were not put forward by the parties, it must, for matters within its jurisdiction..."

Then paragraph 61:

> "If that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment..."

That in a sense, that paragraph 51 goes to the heart of this case, because we have here two competent authorities. We have the city of Oxford and we have the court. Both of them have to exercise their powers so as to ensure that this project is examined to determine whether it is likely to have significant effects on the environment. If so, to ensure they are subject to an impact assessment. You have to ask yourself, the question you are going to have to ask yourself is: would a discontinuance order enable that result be achieved? If it would, the power has to be exercised.

198. It does not end there, because we also need to look at the Wells case and than the Berkley case. The Wells case is No 21. That was an old mining permission case. In 1997, the (inaudible) planning authority imposed a new set of conditions and amongst the conditions was one that required further matters to be the subject of submission and approval later on. Nearly 2 years passed and just before the approval of the deferred conditions in 1999, a challenge was launched by Delena Wells. That challenge went both to the originally set of conditions that had been imposed in 1997, so on a

conventional domestic view, well out of time, but also to the new conditions that were imposed, the deferred conditions in respect of which a decision was made later on.

199. It is important to bear in mind the challenge was based both on a challenge to the lawfulness of the original set of conditions in 1997 and the later ones. We need to pick it up in the judgment I think. That at paragraph 47, the court holds, says this:

> "Accordingly, decisions such as the decision determining new conditions [that was the 1997 one that was not challenged for nearly 2 years] and the decision approving matters reserved by the new conditions [that is the later one] for the working of Conygar Quarry must be considered to constitute, as a whole, a new consent within the meaning of Article 2(1) of Directive 85/337, read in conjunction with Article 1(2) thereof."

That is why I say in this case, we did not have a development consent, when the permission was first granted, we do not have the development consent (we do have one now) when the matters that had to be submitted for approval before development could begin have been proved.

200. MR JUSTICE LEWIS: When did that happen?

201. MR McCRACKEN: I do not think it has happened yet, because there was a "condition 16" that said in relation to contamination, matters had to be submitted to the council. If I can pick that up in the bundle.

202. MR JUSTICE LEWIS: If you are right and it is development consent and collectively constitute new consent, challenging or EIA before they approved the other matters?

203. MR McCRACKEN: We are doing what we can, as and when we can, my Lord. As yet, we have no concession, by the ... I think the answer to your question is that the domestic procedure to deal with this situation is the discontinuance order, I think that is the point. The reason why we are doing this that is the domestic procedure that is the procedure to deal with the situation in domestic law.

204. MR JUSTICE LEWIS: It would not be appropriate to challenge the new combined consent.

205. MR McCRACKEN: Not in the domestic law, domestic law, you need to do the discontinuance, I think that is the answer to your Lordship's question. The appropriate domestic procedure, having regard to the system of law that we have is a discontinuance order.

206. MR JUSTICE LEWIS: I thought we had to use it to ensure EU law. I would have thought the best way to insist on getting an EIA assessment is to make sure they do not grant a new consent or what would be a new consent without (inaudible) EIA. If they use discontinuance I am finding it puzzling that you cannot use the new consent.

207. MR McCRACKEN: There is a very good reason why you can only use discontinuance and cannot do the other one. Discontinuance will give the university

the compensation to which it is entitled and the city is punished for its failure to comply with EU law originally. If one sought to do something else, one would be depriving the university of the compensation to which it is entitled from the city.

208. MR JUSTICE LEWIS: You tell me you cannot use the new consent procedures as a vehicle for your EIA and discontinuance is the proper procedure.

209. MR McCRACKEN: Yes, yes.

210. MR JUSTICE LEWIS: Okay. I took you away from the cases.

211. MR McCRACKEN: Yes, okay. Going back to Wells, at paragraph 49, this becomes quite important under the heading:

> "The time at which the environmental impact assessment must be carried out
>
> 49 Given that, in the context of a consent procedure comprising several stages, merely establishing that there is a development consent within the meaning of Directive 85/337 cannot provide the referring court with a complete answer as regards the obligation on Member States to carry out an assessment of the environmental effects of the project at issue, it is necessary to consider the question as to when such an assessment must be carried out.
>
> 50 As provided in Article 2(1) of Directive 85/337, the environmental impact assessment must be carried out before consent is given."

I have already indicated we accept it can be retrospective if necessary:

> "According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question at the earliest possible stage in the decision-making process."

That is quite important. That is one of the reasons why we cannot wait and see what emerges from the university's voluntary so-called environmental impact assessment because that would not be at the earliest possible stage.

212. MR JUSTICE LEWIS: I do not follow that.

213. MR McCRACKEN: The environmental assessment has to take place at the earlier possible stage so the consultation process can be effective as possible. If we sit back and wait until the university have put in their voluntary so-called environmental assessment and see whether the council do anything about it, we will not be participating as at early a stage as we can, because the stage at which we wish to participate is as soon as it has been decided that there should be an environmental assessment, and we want to be able to do so in accordance with the procedures which have been laid down. I come to ask you (inaudible) about that in a little while. The

longer you leave it the more entrenched positions will be and the less likely it will be there is any effective opportunity for participation:

> "Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure."

We will seek what the court is said by the court later by Barker. But, this is a case where the city, on any view, have not appreciated there are likely to be significant environmental effects until after the consent, the planning permission has been issued. Then, there is a reference again to the fact that the original set of conditions and subsequent deferred matters as a whole constitute development consent and then there is further discussion which is important. Paragraph 58:

> "The fact that mining operations must be halted to await the results of the assessment is admittedly the consequence of the belated performance of that State's obligations. Such a consequence cannot, however, as the United Kingdom claims, be described as inverse direct effect of the provisions of that directive in relation to the quarry owners."

Then the court goes on to discuss the period that had elapsed between the decision determining new conditions and Mrs Wells' request for the situation to be remedied:

> "The United Kingdom Government further submits that the considerable period which has elapsed since the decision determining new conditions in 1997 renders revocation of that decision contrary to the principle of legal certainty. The claimant in the main proceedings should have challenged the decision in due time before the competent court.
>
> 60 As to that submission, the final stage of the planning consent procedure was not completed when the claimant in the main proceedings submitted her request to the Secretary of State. It cannot therefore be contended that revocation of the consent would have been contrary to the principle of legal certainty."

Then 63:

> "The United Kingdom Government contends that, in the circumstances of the main proceedings, there is no obligation on the competent authority to revoke or modify the permission issued for the working of Conygar Quarry or to order discontinuance of the working.
>
> 64 As to that submission, it is clear from settled case-law that under the

> principle of cooperation in good faith laid down in Article 10 EC [now Article 4(3)] the Member States are required to nullify the unlawful consequences of a breach of Community law..."

That is a very important passage that was initially set out in paragraph 36 of the Francovich case:

> "Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned."

I emphasise that includes this court and Oxford City Council:

> "Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment... Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.
>
> 66 The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.
>
> 67 The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)...
>
> 68 So far as the main proceedings are concerned, if the working of Conygar Quarry should have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 85/337, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment.
>
> 69 In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered."

So what we have to do is to ask: is it possible under domestic law to achieve a result

in which an environmental assessment pursuant to the Directive is actually carried out? Our submission is that section 102 makes that possible but section 102 is the only mechanism whereby that is possible. There has been no suggestion by either of my learned friends that there was another mechanism which is possible which could have achieved that result.

214. I will deal in reply with any suggestion they put forward there is another mechanism that can deal with that.

215. MR JUSTICE LEWIS: Looking at 69 for a moment, there has to be an assessment of its environmental effects. Does that have to be a screening opinion and the full EIA, or is it sufficient for authority to look at now and say: in retrospect, yes, is this is hideous and should not have been granted and must be revoked? As I understand your case at the moment, you seem to be saying: they should have done certain things prior to the grant of consent, they have not done it, therefore we have a continuation order to require them to do now what they should have done now, if I understand your case.

216. MR McCRACKEN: That is right, yes.

217. MR JUSTICE LEWIS: I am wondering out loud: having seen 62 to 70 whether that is what it is saying, or whether it is saying you have to look at the environmental effects and form a view on (whether you are talking about revocation or suspension) another alternative would be discontinuance although a fourth one they say would be compensation. It has to be within the sphere of the competence of the body concerned. There are two questions really. Does this help in insisting that there be a screening opinion and an EIA in the way it would normally be carried out prior to consent if things had gone, I think they should have gone properly. Alternatively, if I consider that 102 just does not cover the kind of order you are dealing with and it is dealing with the end result, ie do you take the storey off the building, not carrying out procedural assessments, does that affect matters? Those two questions.

218. MR McCRACKEN: As to the latter point, Marleasing principle makes it clear you have to interpret section 102 to achieve the result required. Your Lordship will recollect the Litster v Forth Engineering case where --

219. MR JUSTICE LEWIS: I have got to 102, yes.

220. MR McCRACKEN: You have to adopt a flexible approach to you. If you remember the Litster v Forth Engineering case the House of Lords actually read words in to achieve the legislation. So I do not think that is a problem.

221. MR JUSTICE LEWIS: What about the first question?

222. MR McCRACKEN: Answer to the first question. Revocation under section 97 cannot apply where the building has already been carried out so it is discontinuance or nothing. That is why it is discontinuance.

223. MR JUSTICE LEWIS: That is not my question.

224. MR McCRACKEN: I thought it was. I thought you had two questions my Lord. One was: why not revocation or suspension?

225. MR JUSTICE LEWIS: My first question is, I understand you to be wanting the following. If this case had started before they got planning permission there would have been a document called "screening opinion" filled out by the officer in one box. That would have been handed to another officer and you would assess the need to be an EIA and if there was the people concerned, the planners, would have to do it. It seems to me that what you are saying is that we have got to replicate that exact same documentary procedure now. As I say, is that what it is saying or is it saying no more than the purpose underlying the EIA was to see if there were environmental effects and provided they do that, by whatever machinery they do it, not having two boxes and two pieces of paper and so as they write: goodness me, looking back now we should not have two storeys we should have one storey, take a storey off. That is my question.

226. MR McCRACKEN: I follow. I will deal with that when I deal with the Berkley case because that makes it clear, the essence of the Directive, the substance of Directive is procedural and therefore it is no good saying the result would have been the same.

227. MR JUSTICE LEWIS: I do think we are at cross purposes about this. I fully understand. I really do understand that Mr McCracken but this is not that case. This is not whether or not you can remedy a breach of the Directive at a time it applied by saying: has there been any substantial compliance. This is a separate question. We are working on the assumption there has been a failure to comply. We have a new duty, the old Article 10 duty to do all that is necessary to comply. I say does that point to substantial compliance, in a very different use of the words, ie the purpose of the procedure was to subject it to an assessment. So provided it is subjected to an assessment and they then take the substantive steps required that is enough.

228. MR McCRACKEN: No. First of all that would be to give me more than I am asking, more than I am entitled to. What I am entitled to is that the unlawful consequences of breach of community law are nullified. The starting point for that is to carry out a proper screening exercise. So the outcome of the screening exercise cannot be known in advance. I mean one can make certain submissions about that, but the screening exercise is an exercise of judgment.

229. MR JUSTICE LEWIS: Could the university do the following: this is a mess. We do not care about screening. We do not care about sitting down and considering whether or not we could require an EIA. We want one. If you do not do it we are going to take steps. Could they have done that?

230. MR McCRACKEN: Your Lordship's question is: could the city have done that?

231. MR JUSTICE LEWIS: Yes.

232. MR McCRACKEN: The city could have served a discontinuance placement.

(At this point in the proceedings the recording was corrupted)

233. MR JUSTICE LEWIS: They say: we are not even worried about that. We are not worried about screening opinions, we are not worried about EIA. We want to be provided with the information that we have been provided with, prior to deciding whether or not to grant permission. How does that stand?

234. MR McCRACKEN: The city has no power to require the university to co-operate in that process.

235. MR JUSTICE LEWIS: I understand that. If they say: if you do not co-operate we are going to grant a discontinuance order.

236. MR McCRACKEN: They have not done that.

237. MR JUSTICE LEWIS: Hypothesis.

238. MR McCRACKEN: With respect my Lord, they have had 6 months to do that if that is what they wanted to do and they have not done it.

239. MR JUSTICE LEWIS: You say they have to have a screening opinion and a decision on whether or not they assess significance and if they need an EIA they have got ... there is no other way they can go about it.

240. MR McCRACKEN: They have not suggested it my Lord.

241. MR JUSTICE LEWIS: Okay.

242. MR McCRACKEN: I want to take your Lordship in a little while to Carlton-Conway and Berkley.

243. MR JUSTICE LEWIS: Keep an eye on the time.

244. MR McCRACKEN: Just before I do I want to take your Lordship to Wells.

245. MR JUSTICE LEWIS: We are in Wells.

246. MR McCRACKEN: Sorry, to Berkley.

247. MR JUSTICE LEWIS: Which tab?

248. MR McCRACKEN: It is at tab 4. This was a case that was decided after the authorities such as Noble v Thannet, that tab 24 yes, that my learned friend rely on. Back to Jones v Mansfield and Noble v Thannet.

249. MR JUSTICE LEWIS: What do you want to look at in here?

250. MR McCRACKEN: This was the Crystal Palace development and relationship between reserved matters and planning permission of development consent. English doctrine was: you get your planning permission in outline stage and reserve matters. Not part of that. The Court of Justice said: it is the combination of reserved matters

and planning permission that outline planning permission constituted development consent. It is important to note what the court said. Paragraph 46:

> "Having regard to those points, it is therefore the task of the national court to verify whether the outline planning permission and decision approving reserved matters which are at issue in the main proceedings constitute, as a whole, a 'development consent' for the purposes of Directive 85/337 (see, in this connection, the judgment delivered today in Case C-508/03 Commission v United Kingdom."

Then we go on and paragraph 48 is perhaps is important here:

> "If the national court therefore concludes that the procedure laid down by the rules at issue in the main proceedings is a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, it follows that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved (see, in this regard, Commission v United Kingdom, paragraphs 103 to 106). This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment."

251. That is the, as it were, European position and the Wells case posed the question: is there a mechanism available in the English courts to nullify the consequent breach of community law? There are two things that need to be done there. One needs to carry out the assessment but also one needs to have the ability at the end of that assessment to say: take the building down. So it not just a matter doing it.

252. I then turn to the Berkley point and I do think it is important to look at the Berkley point, because ... That is at tab 10 I think of the authorities.

253. MR JUSTICE LEWIS: I am familiar with it but.

254. MR McCRACKEN: My Lord, the first point is to note in the opinion of Lord Bingham of Cornhill at H.

255. MR JUSTICE LEWIS: Which page?

256. MR McCRACKEN: Page 607:

> "It is common ground that the Secretary of State's failure to consider the question cannot in law be justified or excused on the ground that the outcome (namely the grant of planning permission on the terms of the actual grant) would have been the same even if he had considered it. The parties agree that the Secretary of State's failure can in law be excused, if at all, only on the ground that there was, on the special and perhaps

> unusual facts of this particular case, substantial compliance with the requirements of the Directive and the Regulations."

This was a case where there had been a six-day inquiry including two leading practitioners at the planning Bar. So there had been rather more consideration of environmental matters in the Berkley case than there have been in this case.

257. Lord Bingham then discusses the question of whether or not there would have been, the Secretary of State would have waived the procedure or and he came to the conclusion that the Secretary of State could not lawfully achieve by inadvertence your Lordship which he could not have achieved deliberately.

258. MR JUSTICE LEWIS: Yes.

259. MR McCRACKEN: Then there is the celebrated passage where Lord Bingham says at D:

> "Even in a purely domestic context, the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow."

260. MR JUSTICE LEWIS: Yes.

261. MR McCRACKEN: And then at F and G:

> "But the cornerstone of the régime established by the Regulations is provision by the developer of an environmental statement as described in Schedule 3 to the Regulations, setting out (among other things) the data necessary to identify and assess the main effects which the development was likely to have on the environment. The developer provided no document which, in my view, met that requirement."

Then Lord Hoffman delivered the most lengthy opinion at page 613G to H.

262. MR JUSTICE LEWIS: Yes.

263. MR McCRACKEN:

> "Before your Lordships, Mr. Elvin has not attempted to support this reasoning. He accepts that the fact that a court is satisfied that an EIA would have made no difference to the outcome is not a sufficient reason for deciding, as a matter of discretion, not to quash the decision. The argument which he submitted to your Lordships was a different one, namely that there had on the facts been substantial compliance with the requirements of the Directive. So the narrow issue argued before your Lordships was whether the objectives of the Directive as transposed into domestic law by the Regulations had been substantially satisfied."

Here it is very important to look at the discussion which - I will not read you the

whole of it but section 7 as Lord Hoffmann opinion is very important.

264. MR JUSTICE LEWIS: I am very familiar with this.

265. MR McCRACKEN: Yes. I think what one needs to bear in mind, in particular, is what he then says in paragraph 8 on page 615D to G. I will read out what he says at G because it goes to answer some of the questions your Lordship has asked:

> "The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue."

I think that answers one of the questions that your Lordship raised:

> "It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues."

I will not read out the remainder of that section.

266. Section 9 he deals with substantial compliance and at D to F he says:

> "My Lords, I do not accept that this paper chase can be treated as the equivalent of an environmental statement. In the first place, I do not think it complies with the terms of the Directive. 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. It is true that article 6.3 gives Member States a discretion as to the places where the information can be consulted, the way in which the public may be informed and the manner in which the public is to be consulted. But I do not think it allows 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 Annex III information which should have been provided by the developer."

Then, here is a very important, in light of some of the points that are made at G:

> "Secondly, the Regulations represent the way in which the United Kingdom has chosen to implement the Directive. This is not a case like Commission v. Germany (Case C-431/92) [1995] E.C.R. I-2189, in which the Directive had not been implemented and the court had to consider whether its terms had nevertheless been satisfied. In the present case the Directive had been transposed into domestic legislation and there was a failure to comply with the terms of that legislation. In my view, a court should not ordinarily be willing to validate such an act on the ground that

> a different form of transposing legislation (e.g. by allowing an environmental statement to take the composite form put forward in this case) might possibly have also satisfied the terms of the Directive."

So here is a case where we are, for example, in relation to duty to give reasons, we are transposed and there is a duty to give reasons and therefore the fact that we might have chosen not to require reasons is no answer.

267. I want to take your Lordship the case of Carlton-Conway, a decision of the Court of Appeal and it is, in my submission, very, very important to this suggestion and actually one does not seem to....

268. MR JUSTICE LEWIS: You have not understood my question. Never mind. Plough on.

269. MR McCRAKEN: Your question again my Lord.

270. MR JUSTICE LEWIS: Best if I just hear your submissions. Where are we?

271. MR McCRACKEN: I am anxious to deal with the point that your Lordship has and your Lordship appreciates if in a permission hearing such as this, one comes along and one does not know whether the attack is to be delay or prematurity, arguability, this or that. So that I would appreciate your Lord put the question again.

272. MR JUSTICE LEWIS: The questions that I have been trying to get to the bottom of this. I am working on the assumption for present purposes there was a failure to comply with the Directive in the sense they did not do the EIA that they should do. I have your submission that you have to the three stages they should have required a screening opinion. They should then decided whether or not to require an EIA and if they did require an EIA, they should have done all the consultation that you normally have. I understand that. You are saying that duty in EU law is the duty to use the powers available to you to nullify the consequences of (inaudible).

273. The question that I have been trying to explore is this. Is that really a question of substance? What the authority has to do now is to consider whether or not there is significant effects on the environment, including if necessary procedures for consultation and involvement. That is one thing they have got to and they are say they are doing, or is it is the case that they must go through each of the steps you outlined, with the same heading and same piece of paper: stage 1, screening; stage 2, doing assessments; stage 3, we therefore follow step by step the regulations now, as it was the situation before. So the question is if the underlying aims procedurally and substantively of the Directive that must now be achieved, or are you saying each and every step must be followed through as if this was a situation where you are working through the regulations and the Directive prior of the planning permission.

274. MR McCRACKEN: The answer is yes, because that is the only way you can achieve the underlying aims and objectives.

275. MR JUSTICE LEWIS: You have to go through each and every step in the Directive or the regulations.

276. MR McCRACKEN: Yes. Otherwise you would not be achieving underlying aims of the Directive.

277. MR JUSTICE LEWIS: The underlying are procedural and not just substantive, and therefore you must comply step by step with the procedural obligations in the regulations.

278. MR McCRACKEN: Yes, you must do, because that was in a sense, the heart of the Berkley case. Could you simply say: we have achieved substantial compliance and the answer was: you cannot just say that. The essence of the Directive requires certain procedures to be followed and --

279. MR JUSTICE LEWIS: The only way you can rectify the consequence of it not being followed is by replicating each and every step of the Directive.

280. MR McCRACKEN: So far as you can retrospectively. Obviously *mutatis mutandis*.

281. MR JUSTICE LEWIS: Procedure obligation, each and every step must be replicated.

282. MR McCRACKEN: Yes. But each and every is a rather pejorative way of describing the relatively limited.

283. MR JUSTICE LEWIS: I do not mean to be pejorative in the sense I understand the submissions but each and every step must be replicated if possible.

284. MR McCRACKEN: Yes with that *mutatis mutandis* qualification.

285. MR JUSTICE LEWIS: That is why I put in English if possible, yes. But I understand the submission. Yes. I thought the case was quite different, but it is not.

286. MR McCRACKEN: I do not think what I have said is inconsistent with what is in the statement of facts.

287. MR JUSTICE LEWIS: I understand it now, it is my fault not yours. Do you want me to look at another cases.

288. MR McCRACKEN: I want you to look at Carlton-Conway because that a very important decision.

289. MR JUSTICE LEWIS: Tab?

290. MR McCRACKEN: It is tab 19 I think.

291. MR JUSTICE LEWIS: Where do you want me to look at?

292. MR McCRACKEN: Tab 19, look at the back of the case first of all. It was a case where there had been an error of law in the approach of a local planning authority to a planning application that was in front of them.

293. During the course of the proceedings the local planning authority purported, as it were, to put things right, in other words to adopt the approach that your Lordship in a sense has characterised as dealing with the underlining aims and objectives as it were. The question before the Court of Appeal was whether that was whether that was acceptable, whether that would actually achieve the right result. It is discussed in the judgment of Pill LJ in paragraph 27 to 30, and Walker LJ, as he then was agreed, as did Sir Martin interveners:

> "I reject the argument on discretion. In my judgment, the appellant is entitled to a fresh consideration of the application by the planning committee. There is a real risk that in taking the decisions they did in October 2001 there was a potential motivation, as would be perceived by a fair-minded member of the public, that a wish to support their chief planning officer and to avoid the possibility of judicial review were factors which led to the relevant decisions. I stress that it is a potential risk. There is no evidence that there was improper motivation.
>
> 28. In my judgment, an appellant who has established what this appellant has established is entitled to a fresh consideration by a committee which is not burdened by the possibility of the extraneous factors to which I have referred. Upon a fresh application the procedures of the respondent permit the appellant to address them orally for a period of up to three minutes. That is a right which he should have the opportunity to exercise. Wisely, in my view, the appellant was advised to have nothing to do with the procedures which the council proposed to follow on 6 October 2001.
>
> 29. I only add that I regard it as unfortunate in this case that the planning officer did not set out in writing the factors which led him to the decision he took which has led to the quashing of the planning permission."

If Mr Maurici is right on might the same observation in this case:

> "Anyone who has been involved in decision making knows that it is a valuable guide to clarity to set out the factors which are relevant before taking the decision.
>
> 30. I do not consider a procedure satisfactory whereby, after the event, considerable resources have been expended by the respondent in preparing the long reports to which I have referred."

This in a sense is a classic instance where the defendants are putting forward the same argument. They are saying: wait until the voluntary environmental assessment has been submitted. Wait and see whether we do decide to make distance infarction but the reality is that these proceedings have been launched and they have a very powerful

motivation for trying to reach a decision that simply, as it were, justifies what they have done in the past. Like now, I would like to, unless I can help you further on that aspect of the case.

294. MR JUSTICE LEWIS: I understand the submissions now.

295. MR McCRACKEN: I want to now deal with the point of prematurity, which your Lordship raised before the midday adjournment.

296. MR JUSTICE LEWIS: Rather choose together. If you are right there is a duty to take all the steps to nullify referring to the Directive, and it is not premature you would say. If it does not go to that and it is a substantive thing, then the argument is that premature they are trying to do it. You say the procedural sense.

297. MR McCRACKEN: I say that. I want to pose this question my Lord. Suppose when we received the council's letter in Easter last year, suppose we said: oh, we will not do it. Then, they have made a decision in December that they were not actually going to serve a discontinuance order and we then launch the proceedings saying it was duty, would it be met with the argument: you are out of time? You were told we did not recognise there was a duty more than 3 months ago and you should have launched the proceedings then.

298. The second point is this. The letter from the council said: you are too late. We did not accept that we were. Just suppose we were, as it were, guilty of some form of delay, then the sooner we moved the more likely we would have been to be given an extension of time. So those are powerful arguments, in my submission, for saying that we are not premature.

299. Likewise, the fact, and I drew attention to that in Wells that the obligation is to, as it were, to carry as early possible applies to us.

300. MR JUSTICE LEWIS: I have that.

301. MR McCRACKEN: I raised the Carlton-Conway point and of course, the Berkley point. I suppose the other point is quite simply this. This is a situation where one needs to think about the overriding objective. What is the sensible thing to do in these circumstances. Is it to say: you are premature, come back again if things do not pan out right in a few months' time. Or is it simply to say: we grant permission and then we either stay it depending the outcome of evidence or not. In my submission, the overriding objective leads only one way.

302. MR JUSTICE LEWIS: Which is what?

303. MR McCRACKEN: Which is what Hickinbottom J --

304. MR JUSTICE LEWIS: Granted the stay.

305. MR McCRACKEN: I say grant and stay. We are very happy for it to be expedited but I would say, practically speaking, having regard to the overriding objective, the sensible thing is to grant and then to stay.

306. MR JUSTICE LEWIS: You say the sensible outcome is to grant permission but to stay it.

307. MR McCRACKEN: I emphasis, we are very happy for an early hearing date but I can see the sense of saying: grant and then stay. But we prefer to have an early hearing date. So I think ultimately I put it this way. We would like permission and we would like to go ahead as soon as we can.

308. MR JUSTICE LEWIS: You want to go ahead but you see the force of stay.

309. MR McCRACKEN: If your Lordship, as it were, is attracted to prematurity then the correct answer of overriding objective is to grant permission and to stay. Unless I can be of further assistance. I hope I have at last made my position clear.

310. MR JUSTICE LEWIS: I understand the point and it is going to be the very first question that I put. I had understood, Mr Maurici, that the argument was that you were going to look at these things, take a view as to whether or not it was too big, too wide, not straighted enough and do the discontinuance. What Mr McCracken is saying, as I now understand, is quite different. You have only got choice which is to replicate the EIA Directive now, so far as you can and we must interpret section 102 (inaudible) to allow that. The answer is?

311. MR MAURICI: My Lord, the first answer is my learned friend is wrong to say that one has to effectively undertake a process of replicating identically the procedural steps. My Lord, the best place to see that my Lord, you have been already been to the Wells case at tab 21. If you go to one paragraph it is a very short paragraph, 66 on page 610, tab 21, page 1057 paragraph 66:

> "The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment."

My Lord the focus there is clearly on the underlying substance rather than on the procedure. My Lord, we will come back to this in a bit more detail. But the second point is this. My learned friend accepts, it is paragraph 12 of his claim form, that one can do a retrospective exercise. My Lord he accepts that and want to touch a bit more detail in a moment, but he accepts you can do respectively exercise. He also accepted, although he said to your Lordship one has to go through all the procedures he said by qualification: "so far as it is possible to do so". My Lord, recognition is once one gets into the retrospective process there are going to be differences.

312. My Lord, can I deal with this in way --

313. MR JUSTICE LEWIS: What he is saying you should decide to have a screening opinion, then you should decide whether you require one and if you do require one

there should be consultation, and there should not be this broad overall: is it okay? He says that misses asserted environment procedure protection.

314. MR MAURICI: My Lord, in my submission it is a completely different position to that my Lord. But the starting point, you will see in paragraph 11 of my skeleton argument what I say it is the council propose to do. I would like to summarise. I have given you the detailed chronology and I have given you the reports. I have tried to summarise it at paragraph 11. We say what we are proposing to do is having received voluntary EIA which is the university has agreed to produce. Secondly, having received detailed proposals for university mitigating impact on views from Port Meadows. That is what the university also agreed to look at. Also having looked at how these would be secured:

> "Following [this is a consultation with all interested parties] we will ask the Planning Committee to determine..."

My Lord, there are three questions and I need to deal with these. On the first two relate to a point that Mr McCracken has touched on but really shied away from, and my Lord that is this point about the contamination condition, condition 16. That was a pre-commencement condition which was not complied pre-commencement. We had all the details now, but they were not provided pre-commencement as they should have.

315. The first question we have to ask ourselves is whether those conditions should be discharged retrospectively, as the case law tells us they can be. If not, whether the development that proceeded was unlawful. My Lord, if it was unlawful that options that opens up to us are completely different from discontinuance. They include for example enforcement.

316. My Lord, can I ask you to note Mr McCracken in the Evans case, at paragraph 337 accepted that in some cases where it is argued about the failure to do an EIA, in some cases one way forward could even be enforcement. It depends on the facts of the case. Here that is another possibility.

317. MR JUSTICE LEWIS: If that worked. You would say: the land is contaminated and you must take the building down.

318. MR MAURICI: Not so much --

319. MR JUSTICE LEWIS: Notice directed by the breach, would you not?

320. MR MAURICI: The question is we have had all the reports now. We need to decide whether we discharge those conditions retrospectively. My Lord, there is another element to that. Under the 2011 regulations where you are dealing with the discharge of a subsequent condition that is a pre-commencement condition, you are required to screen those conditions. We withdrew a report that was going to Committee quite recently on the basis that we are going to screen the submission of details under that condition, to see whether there is a need for an EIA in respect of that subsequent discharge of conditions.

321. So my Lord, my learned friend touched on this but shied away from it. There are these other procedures which are going on, which if they were going to come to a certain result would actually mean we never got near discontinuance.

322. But my Lord --

323. MR JUSTICE LEWIS: This is where I think there has been crossed wires. I understand, I read "continuance" in the Act as meaning you require a building to be removed or altered or your require a land use to stop or to have conditions. What Mr McCracken actually is saying is community law requires something quite different. Take any power you have and use it to insist on an EIA.

324. MR MAURICI: He has two problems with that my Lord. Two problems with that. The first problem is that Wells actually says: one has to take steps to remedy it in so far as national procedure autonomy allowance. It is not you can make up any procedure you want. My Lord, if we go back to Wells again in tab 21.

325. My Lord it is the end of 65:

> "Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337."

326. MR JUSTICE LEWIS: Could I not just fiddle with the wording of 102?

327. MR MAURICI: It is not about fiddling with the wording of 102. The order that Mr McCracken suggested we should make is plainly ultra vires, the section 102. What section 102 allows us to do is to deal with the substance. It allows us to require the use to be discontinued. It allows my Lord, for us to impose conditions specified in the order which must be complied with to allow the use to continue. It requires us to require the alteration or removal of the building.

328. MR JUSTICE LEWIS: Mr McCracken would say that is what you do, you either impose such conditions as may be specified in the order and the continuance of it. You can only continue the use if you now take all the steps that you would have required prior.

329. MR MAURICI: His suggestion goes even further than that. His is paragraph 11, which is his claim, the discontinuance order. What he is actually suggesting here is a discontinuance order that requires a university to do anything that we require in writing. That is what he is actually asking.

330. MR JUSTICE LEWIS: "...necessary to ensure compliance with. Or as a result of compliance with." In a sense, or I certainly got confused by the word "discontinuance". If we forgot the word "discontinuance" and said "discontinuance (or used to achieve EU law)" and you use it to achieve an EIA, is it arguable? Standing back first, is it arguable that the underlying objective of EU law in this area is not simply the

substantive assessment of effect but the procedural, everybody has to be involved, got to be these steps? If it is the latter arguably - as Mr McCracken says it is - should you then, can you then arguably interpret 102 as covering that? If it is arguable Mr McCracken wins on the permission.

331. MR MAURICI: Look at 67 in Wells:

> "The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order."

332. My Lord, this is not the ECJ telling us we must completely avert the legislative regime. It is telling us we must decide and 69 is even clearer:

> "In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment."

Not that it must be. It is a question for the national court, not something required by EU law, whether it is even possible under domestic law to go so far as to revoke or to suspend in order to allow assessment process to go ahead.

333. My Lord, my first point is simply that my learned friend is trying to get something out of Wells that is just not there. He is trying to take the obligation far further than the ECJ itself took it.

334. MR JUSTICE LEWIS: I understand that. But is not the real problem the Dutch dykes case - I have lost it now - where is that?

335. MR MAURICI: My Lord, which case.

336. MR JUSTICE LEWIS: Dutch dykes .

337. MR MAURICI: In other words that 26 I think. It is really the.... No, it is might be... There is one case where there is a distinct section on, and it seemed to be the only section which bit on the question: as to what are the obligations to nullify. It is not that case.

338. MR MAURICI: My Lord it is back in Wells I think, in the early part of Wells. (Pause).

339. MR JUSTICE LEWIS: Yes, paragraph 62 and onwards of Wells that is the relevant section.

340. MR MAURICI: Yes. My Lord, that section. The key to that section my Lord, is both in 65 my Lord, also in 67, but perhaps more importantly in 69, it makes clear that ultimately this is a matter for national law to decide what can be done. You are required to do only what it is possible to do as a matter of national law subject to normal principles of equivalence and effectiveness.

341. MR JUSTICE LEWIS: Is it not arguable that (i) there are procedural steps to the Directive that are reported, so decisions are properly thought about, information provided, the public consulted. Two, it is arguable that you could use section 102 to achieve that first stage, get that procedural (inaudible) in place and then depending on what comes out of it you decide whether to take the top off.

342. MR MAURICI: My Lord, I say not my Lord. But suppose you are against me on that. My Lord, can we step back and look at the procedure that is actually proposed to be followed here as counsel. Because, my Lord what my learned friend says we must do a screening opinion, he says another screening opinion, we have already done a screening opinion, his complaint is he says the reasoning is defective.

343. MR JUSTICE LEWIS: I am assuming for the moment the screening opinion is flawed.

344. MR MAURICI: The first step is a screening opinion. My Lord, secondly, if we then conclude that the proposal was one that was likely to have significant effects on the environment, what we are supposed to do then is effectively to require an environmental impact assessment from the developer. We do not take into account and decide what it is that we can do at this retrospective stage, my Lord. But my Lord, what is happening, what is actually happening on the ground, is that the university have determined they are going to put in a voluntary environmental statement.

345. We are already going to get exactly what we would get if we went through all these procedural steps. We are going to this voluntary statement. Yes, it is retrospective but my learned friend accepts that.

346. MR JUSTICE LEWIS: The voluntary EIA would have been exactly the same in procedural terms as what you would have got had you had a screening opinion saying: yes, one is required.

347. MR MAURICI: I repeat what Mr McCracken says. It will do as much as it can given that it is, everybody acknowledges now, must be retrospective.

348. MR JUSTICE LEWIS: The building is there for a start, yes. The tree has been cut down and that is the end of it. In substantive terms you have skipped the screening opinion which would have resulted in the EIA. You are having an EIA which you say is in substance the same thing. What about Mr McCracken's about the rights of consultation.

349. MR MAURICI: He makes two complaints about that. One he said: no consultation. As I recalled in paragraph 11 of my skeleton argument before we take any decision we have said we will consult all interested parties. There will be effectively compliance

with the regulations in spirit. So, whereas the regulations would have required the environmental statement to be advertised, to allow people to have a chance to have their say, this environmental statement we will ensure will be advertised and people will have their say.

350. MR JUSTICE LEWIS: You would do everything you would have done, had you been doing it before the Planning Committee.

351. MR MAURICI: So far as we can my Lord. The first complaint was no consultation my Lord. That is simply wrong; there will be consultation of this environmental statement.

352. MR JUSTICE LEWIS: In the same way as it would have occurred as it happened before the planning.

353. MR MAURICI: That is the aim of this whole process is to try to mirror, as closely as we can, albeit it is retrospective the process under the regulations. My Lord, everyone recognises there are limitations on that because it is retrospective but in terms of consultation, we are going to do, as close as we can, as to what would have been required if this was a planning application.

354. MR JUSTICE LEWIS: So the EIA, the same content.

355. MR MAURICI: Same content, same consultation.

356. MR JUSTICE LEWIS: Consultation, the same as if it was preplanning so far as you can.

357. MR MAURICI: My Lord, the other complaint that Mr McCracken made about it was that he said: it is no good because the developers is doing it and this should be done by the city. My Lord, I simply do not understand that submission. As we saw when we looked at Berkley the cornerstone of the EIA regime is that it is a developer who is invited to produce the statement. That is what is happening here, albeit it has been produced as a voluntary ES.

358. MR WARREN: Forgive me for rising. Very clearly what it is said is going to happen is that the university will be putting in a voluntary environmental assessment, not a voluntary environmental statement pursuant to the regulations and Directives so far as possible.

359. MR JUSTICE LEWIS: This is what I am trying to understand.

360. MR MAURICI: The court is being inadvertently misled here.

361. MR JUSTICE LEWIS: Just pause. Do not have a fight. I just need to know the plan. I have understood your case Mr McCracken, I had not understood it before. Your argument is there should be a replication in effect - I am using that word - a replication of the process. I have never been bothered about a screening opinion because if they are going to require the same as an EIA, it does not matter you have an

SO or not. Mr Maurici tells me that the EIA would have the same content as what would have been required had there been a positive screening opinion.

362. MR McCRACKEN: We have absolutely no basis.

363. MR MAURICI: There was attached documents to my skeleton argument. Did you get those attachments? There is a letter from the university, my Lord, at page 14 it starts. The 9th July, from the director of the states. My Lord this is where we learned the university would do this. It is page 16 "environmental information." "The university does not accept the development is ... required assessment. It will nevertheless carry out an assessment..."

364. MR JUSTICE LEWIS: I have not found that yet.

365. MR McCRACKEN: Can you take the judge to the first case of that letter.

366. MR JUSTICE LEWIS: I have not read anything yet. Just be quiet a moment Mr McCracken. It is Mr Maurici's turn. Where are you reading from?

367. MR MAURICI: Page 16, at the very end of the letter my Lord, there is a heading "Environmental information".

368. MR JUSTICE LEWIS: Okay. The university does not accept that it is required. "It will carry out an assessment on a voluntary basis following the processes of the Director and the regulations so far as possible."

369. MR MAURICI: That is what they have undertaken to do and that is what we are expecting them to do. My Lord, again, and my learned friend, Mr McCracken ... perhaps I should go to Mr Warren's skeleton argument. He does also say - I am not sure I have the right part of it - at paragraph 3, he again talks about what the university is doing, and my Lord, it is four lines:

> "The interested party has been preparing voluntary environmental to enable that full consideration and review. The voluntary environmental statement ... not finales, expect will be. Traffic and noise assessments need to be carried out further consideration referred to take place within the next few months."

370. My Lord, again we are expecting the university to produce an environment statement which in their own words will follow the processes in the Directive and regulations so far as possible.

371. MR JUSTICE LEWIS: So it is not then a situation of something you "as good as" or nearly good as, it is going to be as far as feasible will replicate what I call the preplanning EIA.

372. MR MAURICI: My Lord, it is when we have received that we will then look at the options, all the options, that are open to us. One possible option is the enforcement route, one possible option is discontinuance order, and my Lord, we have made very

clear, as I said in my skeleton argument in a number of places, that we have been considering and accept that we have the power to discontinue. But my Lord, what the university's proposal to produce the environmental statement in accordance with, so far as possible, the regulations and Directive has done, is effectively allow us to engage in a process which involves my Lord, at the very least substantial compliance with the Directive.

373. My Lord, although my learned friend took you to Berkley and said: substantial compliance is not permissible, that is in fact the exact opposite of what Berkley says. Berkley says: substantive compliance with the Directive is acceptable what is not acceptable is to say the EIA make a difference. That is a different point. Substantial compliance is allowed and my Lord, the House of Lords simply referred to EU authorities, Commission of Germany, which established that that was the position.

374. MR JUSTICE LEWIS: Show me that in Berkley again.

375. MR MAURICI: My Lord, yes.

376. MR JUSTICE LEWIS: You cannot have a paper chase here.

377. MR MAURICI: You cannot have a paper chase but that is not... It is really page 617, in the speech of Lord Hoffmann at B:

> "Commission v. Germany in my opinion establishes that an EIA by any other name will do as well. But it must in substance be an EIA. Can this be said of the procedure followed in the present case?"

On the facts of that case - no.

378. My Lord, here - yes, because that is what the university has promised us they are going to do.

379. MR JUSTICE LEWIS: Standing back from that your powers for a discontinuance order, even I assume against you that they could be used arguably to require an EIA in the form and with the procedures of the Directive, you are saying they are going to do that any way. You do not need to have a discontinuance order, everybody is doing it. Then when you get on to the next take, do you take the top off - shall we put it? That is another decision and you may have to take a lot off if there had been a breach of the condition.

380. MR MAURICI: My Lord, all options are open to us. One of my learned friend's submissions to you, as you may recall was that we are not genuinely considering all these options. Obviously, I would completely refute that my Lord. One can see, my Lord, again in a bundle of documents attached to my skeleton argument.

381. MR JUSTICE LEWIS: I have been slow, it took me a while to get to grips with what Mr McCracken's case was. I have it now and I see what the answer to that case is now. It is my fault nobody elses.

382. MR MAURICI: You see at page 1213, is a relatively ... the 22nd April 2013, a letter to the Vice-Chancellor of the university from the Chair of the West Area Planning Committee. It is page 13, the very last paragraph:

> "In this context I am writing as instructed by the Planning Committee urging us to take all steps available to ensure ... progress promptly and openly, so you must be clear as possible about your proposals to ameliorate the impact of the development. The Planning Committee also instructed to draw to your attention the existence of further compulsory remedial steps which it may recommend to the City Council in due course, including discontinuance in respect of the whole development."

383. MR JUSTICE LEWIS: This is the early procedure stages.

384. MR MAURICI: True my Lord. What that letter then my Lord, what happens of course next in stage is one gets the letter from the university. So my Lord, your Lordship postulates the question: could the council say to the university: unless you go through all these steps and do what should be done. We actually say it was not required to be done. Leave that aside for now, do all the things that would have been done had an EIA be required. One option open to us, we have been saying to them is: we will simply discontinue the whole thing. That is what the Chair of the Planning Committee say of the matter. What the university's response was, in due course, was a number of points. My Lord you have seen the 9th July letter. They talk about landscaping proposals, additional things they could do to ameliorate it but my Lord, the key one for us, because of my learned friend's procedural complaint is the very last page, page 16, which we have looked at. So, my Lord, effectively, in my submission, what my learned friend really wants in paragraph 11, my Lord, has already been achieved.

385. MR JUSTICE LEWIS: It is not prematurity, it is lack of necessity for a court order.

386. MR MAURICI: Lack of necessity for a court order. It is premature my Lord, so far as my Lord is seeking to go any further down the line. My Lord, that I have to say, my Lord, it is not just your Lordship who has not appreciated it was simply the procedural point which was of such concern to Mr McCracken until today. My Lord if that is his concern it is met.

387. My Lord, if we can step back from it. What are the other complaints that my learned friend could have about this? My Lord, he seems to go to the Carlton-Conway case to say: it is not acceptable to be doing these kind of exercises in the shadow of judicial review proceedings. My Lord, I do not understand where Carlton-Conway fits into my learned friend's case.

388. MR JUSTICE LEWIS: The real issue is Wells and that section that says what we must do when there has been a breach. You say you are doing what Mr McCracken says you need to do and therefore I need not lie awake at night.

389. MR MAURICI: My Lord, all you can say is that that there is some advantage in having a formal discontinuance order rather --

390. MR JUSTICE LEWIS: A matter for you actually. Achieving it that is far and it is not achieved.

391. MR MAURICI: In essence that is my case. My Lord, the reason we get into prematurity is if my learned friend was, and I do not think it is his case now my Lord. If he was saying: keep these proceedings on hold, so they could be used going forward to challenge the next stage of the decision making - actually the only stage of decision making my Lord. You have seen our response, the letter before court, which is the decision identified in the challenge. My Lord, we say it is premature because we have not actually decided.

392. MR JUSTICE LEWIS: It could be two section 102 decisions. There could be the 102 decision on procedure and that arguably is not premature because it needs to get on with that now. There will be a section 102 decision on "take the top off" as I call it pejoratively, ie the substance. I had understood this case was all about: what do you do because it is too big? But it is not. Mr McCracken is making it absolutely clear there are European Union principles and objectives on a procedural level and that decision is the one at issue. He has managed to get into my head what is I am doing but you say I need not have worried because you are doing it.

393. MR MAURICI: We are doing it. In my submission, everything that could possibly be required in terms of the procedural side is going to be achieved through the process.

394. MR JUSTICE LEWIS: We are not having a screening opinion because there is no point, you are going to have the EIA.

395. MR MAURICI: Exactly what is the point of having a screening opinion if you are going to get the voluntary EIAs?

396. MR JUSTICE LEWIS: The screening opinion you would either say you do not need one, or I would say you would need one. You are working on the assumption that one is needed.

397. MR MAURICI: Yes my Lord. I think the university and the City Council are both agreed one was not needed but the university had decided nonetheless to produce one, and therefore to effectively avoid having to have that sterile debate, as I think Lord Carnwath called it in the Berkley case, but we are going straight to the nub of it: there will be an environment statement.

398. MR JUSTICE LEWIS: In accordance with the procedures of the Directive as far as you can.

399. MR MAURICI: My Lord, yes.

400. MR JUSTICE LEWIS: That is very helpful. That changes the complexion of the case. Anything else Mr Maurici? That is very helpful.

401. MR MAURICI: Unless I can assist you further that is the answer.

402. MR JUSTICE LEWIS: I will let Mr McCracken reply.

403. Mr Warren, does the interested party have anything to add?

404. MR WARREN: One observation to my Lord.

405. MR JUSTICE LEWIS: Is Mr Maurici correct that you are intending to do what that letter says which is to carry out what I called a replication of the EIA process of the Directive of the regulations as far as possible, skipping the screening opinion.

406. MR WARREN: He is, he is entirely correct about that matter of fact and I adopt, obviously with gratitude, with what he says on the law.

407. My Lord the point that I would add which ties in with the point you were discussing with Mr Maurici is if you go to Wells and focus on the paragraph which deals with the procedural aspects of where there has been default, which is paragraph 65 because 66 and 67 talk about the harm, dealing with the harm of the substance. Sixty-five is the one that deals with examining the projects; in other words doing, you know, having the ES and consulting of it. You will see there that the Court of Justice identifies that it is all the general or particular measures necessary to ensure that projects are examined. Obviously that depends on a fact specific assessment of the case.

408. MR JUSTICE LEWIS: Hold on. There is a pre-assumption in the EIA Directive that in order to get the right answer on that there are procedural things like consultation.

409. MR WARREN: Absolutely. That is right. In order to understand whether there is a duty to make an order here as a domestic Court, one has to understand that the Court of Justice is saying one has to take the measures that were necessary to ensure that they are identified. Here of course the facts are that the voluntary environmental statement plus consultation etc will take place.

410. MR JUSTICE LEWIS: In order for there to be any room for slippage or misunderstanding I had thought and I had a discussion with Mr McCracken, we are talking about broadly, getting in an assessment is it too big and too small. Mr McCracken was saying: no, no, there were procedural issues and that is a value. That may lead to a substantive decision which is a separate value. I hope you are not slipping back from 1 into 2.

411. MR WARREN: Not at all. The reason why I am focussing on 65 is because it deals with whether it is necessary to do anything, to ensure (inaudible) there are examined. That is the procedural paragraph and you go on at 66 likewise, "required to make good any harm caused" and that is whether it is a discontinuance order in due course take your top off etc.

412. MR JUSTICE LEWIS: You are not diluting the procedures by reference to overall it looks --

413. MR WARREN: Not at all. Forgive me. I did not mean to say that at all. I was merely drawing the distinction one finds in Wells between what is necessary for the procedural side, 65, and what is necessary to make good the harm in substance 66, and what Mr McCracken seems to be basing his case on is more at 65. Here the facts are that all of those matters are going to be dealt with. That is all, my Lord, unless I can assist you further than that.

414. MR JUSTICE LEWIS: Mr McCracken things have changed and I have caught up with everybody. I understand what you want. You want, as I have said throughout, broadly a replication of the procedures skipping the screening opinion. Now they say that is what they are going to do.

415. MR McCRACKEN: First of all, so far as Mr Warren's last point, that he suggested we are only concerned about the paragraph 65 elements of Wells, we are concerned about the paragraph 66 element of Wells as well. The discontinuance order that we want is directed towards both of those. That is the first point.

416. The second point, Mr Maurici said that the screening that he is envisaging will only be in relation to whether or not in respect of contamination condition, we go way beyond --

417. MR JUSTICE LEWIS: That is a red-herring entirely, there is nothing to do with what has go on here.

418. MR McCRACKEN: It is interesting he said that, bearing in mind what he also said. It is lightly odd. On the one hand he says: we do not need our order because it is going to happen any way. On the other hand, he is proposing to carry out screening.

419. MR JUSTICE LEWIS: For one condition.

420. MR McCRACKEN: Exactly. But the point is he is only proposing to carry out screening for one condition and if it really were the case the city genuinely believed they were going to get an environmental statement of the kind you would normally get, then there would not to be screening in respect of one condition.

421. MR JUSTICE LEWIS: As I understood Mr Maurici they think there might be a big problem with contamination. They are going to make sure they have crossed all the Ts before they act.

422. MR McCRACKEN: But if they genuinely believed that the voluntary environmental assessment that the university are going to submit would do everything that the regulations and Directive required then it would be covering contamination and all the matters that in respect of which they are going to have their limited screening exercise. It is very, very strange. There is an inconsistency on the one hand saying: we are going to carry out a limited screening exercise and on the other hand, saying: we are doing a full environmental statement.

423. MR JUSTICE LEWIS: What I had understood, I mean I am not obviously planning lawyer in the way you three are. There is potentially a big problem with the condition

of contamination and the council want to make sure they have crossed every T and dotted every I in case they are going to say this is an unlawful development. They are treading very carefully there. But at the same time, irrespective of that, on the general issues, not the contamination issue, they are going to have, so far as you reasonably can, a replication of the EIA. I do not at the moment --

424. MR McCRACKEN: I follow that my Lord. But a general environmental statement - I want to use the correct term - I do attach significance to the fact that the university have talked about "them" carrying out an environmental assessment. That is exactly what they proposed to do. They propose to give the city, not their first pitch, as it were, they propose to give the city their conclusions. If they genuinely were going to submit an environmental statement of the kind that you would get if the discontinuance order we seek were to lead to a screening upon that says: you need to carry out an environmental assessment, then contamination would be covered by that. Contamination is one of the obvious things that would be covered that would be within the ambit of an environmental statement.

425. MR JUSTICE LEWIS: Can I go behind 16 of the court. This man, whoever is, the Secretary of State served the University of Oxford, tells me that they are going to carry out an assessment of environmental impact "following the process of the directive regulations as far as possible".

426. MR McCRACKEN: Can we have a look at the context of letter of my Lord. I mean in a sense I am a little bit surprised at the way this has formulated.

427. MR JUSTICE LEWIS: They seem to have won.

428. MR McCRACKEN: Well...

429. MR JUSTICE LEWIS: Unless I have missed something.

430. MR McCRAKEN: I think you have missed something, with greatest of respect. What the university is promising to do is that it will carry out an assessment. It is not suggesting for a moment that the city will be carrying out the assessment or there be consultation. It is saying it will be carry out the assessment. The fact that any developer can say: he is going to carry out an assessment, indicates that he does not understand one of the fundamentals of the process which is the assessment is carried out by the competent authority not by the developer.

431. MR JUSTICE LEWIS: What he means is he is going to do it with a piece of paper which has all the information.

432. MR McCRACKEN: I do not think we can draw that conclusion, my Lord, at all.

433. MR JUSTICE LEWIS: I have two counsel telling me that, and I have the submission and you have the letter.

434. MR McCRACKEN: This is exactly the sort of situation when permission should be granted, so the matter could be investigated. Can I take you to the start of the letter my

Lord. I quite simply have the greatest of respect for both Mr Maurici and Mr Warren, but I really do not think they have got a window into the mind of Mr Gottling any more than Queen's Elizabeth had a window into the mind of her subjects. This is a letter written in July. We do not have Mr Gottling here - we do but we do not have him on the witness stand. I would be very happy to cross-examine him when permission is --

435. MR JUSTICE LEWIS: In a judicial review it is virtually unheard of in a permission application.

436. MR McCRACKEN: It is unusual but he says at the outset:

> "I thought it might be helpful to update you on the university's process with providing options to amelioration of the impact of the development at Castle Mill."

Then he sets out, he says in relation to landscaping that effectively they are proposing to plant some more trees, in so far as there are opportunities there are opportunities to carry out screening planting within the elopements. That falls very far short of what we would envisage is an effective environmental assessment process requiring by way of mitigation measures and he then says under William Lucy Way:

> "The university therefore does not propose any further landscaping for the elevation of buildings opposite William Lucy Way."

So nothing proposed there. "Roof":

> "The university does not consider the reduction in the roof line will have any benefit.
>
> Light spillage. University have spoken to glass manufacture. They have confirmed that when it is dark outside there is no film which will completely prevent light from transmitting through our glass."

They do not deal with the question of whether or not there should be a requirement that at night blinds should be drawn or some other measure would be relatively straightforward to prevent light spillage.

437. That is the context in which they offered to carry out a voluntary assessment of the environmental effects, not at all on an open basis. It is on a basis that has already ruled out a very substantial number of the matters that my clients think would be obvious candidates for consideration.

438. MR JUSTICE LEWIS: What is the correct word to describe what the developer does in a normal EIA assessment?

439. MR McCRACKEN: He submits an environmental statement but that is not what they said they are going to do.

440. MR MAURICI: My Lord, it is often referred to an environmental impact assessment. It is an environmental statement. It is often referred to as an environmental impact assessment. My Lord, I am just concerned there is a bit of an attempt to confuse the issue here.

441. The only thing the university can do is produce environmental statement and our obligation is to consider it. My Lord, I do not really know where the argument goes beyond that. The university has made very clear what they are producing. That is all they can produce. They cannot carry out the assessment for us.

442. MR McCRACKEN: It is more than English, it is more the attitude that is being demonstrated there but never mind.

443. My learned friend, Mr Maurici, says: oh well section 102 will not do what we want. Section 102 is certainly capable of requiring the removal of the buildings. We do not go so far as to say section 102 must be operated in such a way that in this case the building should be removed before the environmental assessment takes place. But, if it were the case that you could not interpret section 102 in the convergently constructed way that Marleasing requires. If it were the case that you could not do that - fine. The simply discontinuance order would require the removable of the buildings.

444. MR JUSTICE LEWIS: You say you can do it. Can I not do it under 102 by such conditions as may be specified?

445. MR McCRACKEN: My Lord, you can say.

446. MR JUSTICE LEWIS: You can say you can continue to use it if you have done an EIA.

447. MR McCRACKEN: Absolutely my Lord. Yes, I say that this criticism that 102 is not flexible enough to cover is manifestly false.

448. The important thing about Carlton-Conway is it makes it clear that during ... it is not desirable for authorities that have.

449. MR JUSTICE LEWIS: This is your reply, do not forget. We have gone through Carlton. What you are saying they are going to do one and you set out three reasons why it is wrong. One if that is the case is it not jolly odd they are doing the contamination screening opinion. Two, it is wrong to say the developer assesses, I can read the letter and understands the obligation and three, if I read the letter as a whole you prejudge the outcome.

450. MR McCRACKEN: Yes, it is certainly --

451. MR JUSTICE LEWIS: No, no need to hear the whole case again, I need to hear your reply and what date is set.

452. MR McCRACKEN: I was dealing what was said. I think they were saying that it does not matter whether this is done. It does not matter if everything is done on a

voluntary basis. I say: no, the answer to that is Carlton-Conway. That makes it absolutely clear. That was a case where the public authorities purporting to put things right on a voluntary basis and Pill LJ, with then Walker LJ and with Sir Martin Nourse rejected that argument and said, if your Lordship looks at the last page: that will not do.

453. MR JUSTICE LEWIS: I have not got to that. I have lost the tab now.

454. MR McCRACKEN: It 19 is I think.

455. MR JUSTICE LEWIS: I thought that was paragraph...

456. MR McCRACKEN: It is tab 19 I think, Carlton-Conway.

457. MR JUSTICE LEWIS: I have it now.

458. MR McCRACKEN: He says at paragraph 27:

> "...the appellant is entitled to a fresh consideration of the application by the planning committee. There is a real risk that in taking the decisions they did in October 2001 there was a potential motivation, as would be perceived by a fair-minded member of the public, that a wish to support their chief planning officer and to avoid the possibility of judicial review were factors which led to the relevant decisions."

That would be a problem we face if this is dealt with on the voluntary basis.

459. So far as Mr Maurici's point that Berkley accepts substantial compliance, the point about Berkley is it says very clearly: that since the essence of the Directive is procedural you do not achieve substantial compliance unless you follow the procedures of the Directive as transposed, as it were.

460. MR JUSTICE LEWIS: They are going to do that in their case.

461. MR McCRACKEN: That is what they say but I, with greatest respect, do not accept that. Also point this out in relation to prematurity point, my Lord. Our challenge was launched in May. The offer that is said to be the offer gives us what we want was made in a letter of 9th July; it was after the challenge had been launched. That being so, there are very powerful reasons for granting permission and staying rather than refusing permission on the ground of prematurity. If the offer had been made before we launched proceedings well, there would be something to be said for that argument but it was not. This was an offer that was made in the face of these proceedings as an attempt to defeat them. What we are being asked to do is to take on faith that everything will work out fine. In my submission, we are well justified in not taking that on faith in adopting the same approach as Pill LJ commended in Carlton-Conway, and the proper course of action is to grant permission because our points are all arguable and then if your Lordship is persuaded by the prematurity argument, to stay the proceedings. Unless I can be of any further assistance to your Lordship.

462. One final point I should make is this. This is a case which we say needs to be referred to the Court of Justice. That is an important --

463. MR JUSTICE LEWIS: I am not surely doing that this afternoon, am I. Do I need to worry about it today?

464. MR McCRACKEN: We do have to worry about it today, because you should not refuse permission if there is a case which might call for a reference to the Court of Justice. I think a lot of the points that have been raised against us are points that need to be examined by the Court of Justice.

465. MR JUSTICE LEWIS: If they are fundamental to my decision, yes.

466. MR McCRACKEN: I am not suggesting that you refer at this stage, I am saying that would be a reason for granting permission. My point is --

467. MR JUSTICE LEWIS: I understand that if what they say does not influence me at all and I am making my decision on other grounds then so be it.

468. MR McCRACKEN: Yes. I do not have a window into your Lordship's mind, I might have a sense of some features of it but I do think I ought to draw that to your Lordship's attention because it is quite important. What Wolfe J (as he then was) says. If the case raises something where there is a possibility of a reference might be appropriate, then permission should be granted.

469. What we ask for is permission and I hesitate but in a sense I do need to end by saying the vast amount of material that has been presented, the fact that ultimately the key point upon which the defendant and interested party seek to rely is a letter that came in after these proceedings were launched. If ever there was a case that indicated this is one that does call for further consideration permission should be granted, this is that case.

470. MR JUSTICE LEWIS: You have been extremely helpful and very patient with me as I have caught up with. I am very, very grateful to you Mr McCracken.

(Judgment Followed)

CO/5547/2013

Neutral Citation Number: [2013] EWHC 4376 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Priory Courts
33 Bull Street
Birmingham
West Midlands
B4 6DS

Wednesday, 23rd October 2013

B e f o r e:

MR JUSTICE LEWIS

Between:
THE QUEEN ON THE APPLICATION OF CAMPAIGN TO PROTECT RURAL ENGLAND OXFORDSHIRE

Claimant

v

OXFORD CITY COUNCIL
&
OXFORD UNIVERSITY

Defendant

Tape Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr McCraken appeared on behalf of the **Claimant**
Mr Maurici QC appeared on behalf of the **Defendant**
Mr Warren QC and Miss Blackmore appeared on behalf of the **Interested Party**

J U D G M E N T
(Approved)

1. MR JUSTICE LEWIS:

2. This is an application for permission to apply for judicial review of what is said to be the decision of Oxford City Council contained in a letter of 28th March 2013, refusing to make a discontinuance order under section 102 of the Town and Country Planning Act 1990.

3. The position is this. Planning permission was granted to the University of Oxford to build student accommodation in a particular area of Oxford which has very attractive views and historic and cultural significance or might have such attractive views and historic cultural significance. Mr McCracken, who appears on behalf of the claimant today, contends that it is arguable that there were errors committed prior to the granting of that planning permission, in connection with the way in which the assessment of likely significant environmental effects was considered. I am proceeding, for the purposes of this afternoon on the basis that there have been those errors but I express no view as to whether or not such errors actually occurred.

4. Given that position Mr McCracken's submission is this. There is a duty or an obligation on both this court and indeed the local authority, to take all the general or particular measures necessary to nullify the consequences of that failure and to remedy, so far as possible, the breaches that have occurred.

5. Mr McCracken says that the way to do that is to make an order under section 102 of the Town and Country Planning Act. There are two aspects to what broadly could be the subject of the discontinuation or discontinuance order. The first aspect deals with the procedural obligations underlying the environmental impact assessment Directive and the domestic implementing regulation, that is ensuring developers, if it is necessary to do so, produce environmental statements. There is then consultation on those and a considered decision which is reached by the planning authorities.

6. The second area of concern is substantive. If at the end of the day it turns out that steps need to be taken to address any substantive deficiencies in the way that this building interacts with its environment, section 102 provides powers to require the discontinuance of use of land or impose such conditions as may be specified in an order, on the continuation of the use of land, or indeed to require that such steps as may be specified be taken for the alteration or removal of the buildings or works.

7. Initially I had understood the claimant's concern was with the substantive consideration of these matters. The question, putting it crudely, is whether the building was too big and should be reduced in size, whether additional screening should be erected and so on. I suspect that Hickinbottom J also considered it in that way because the council had indicated they were considering whether or not things needed to be done in relation to the building because of its potential or actual environmental effects. Given that the council were considering those issues, Hickinbottom J raised the question of whether this claim was premature and whether the matter should be stayed. In fact, Mr McCracken's submissions are different. They are these. Firstly, he submits there is an

EU obligation to nullify the consequences of action that involves a breach of an EU regulation or Directive. Secondly, the relevant EU Directive here has procedural obligations which are important. There would be three stages normally. Firstly, the authority would carry out a screening process to see if an EIA was required. Secondly if an EIA was required the university would have to prepare an impact statement and thirdly, there would be consultation in prescribed ways prior to a decision on the substance by the university.

8. Mr McCracken says that a local authority can nullify the consequences of not having followed that procedural process properly prior to grant of planning permission by use of section 102. In a very carefully drafted proposed order, he submitted that it is arguable that under section 102 the council must make a first stage discontinuance order in the following terms:

"(a) the taking of such steps communicated in writing as the council considers necessary to ensure compliance with, or as a result of compliance with the requirements of EIA Directive 2011/11/EU including the supply of information such as an environmental statement and/or cessation of use and/or removal or whole or part of the buildings and/or be compliant with conditions communicated in writing other than thereafter judged necessary by the council."

9. Mr McCracken submits that it is possible and indeed obligatory relying on the European Court decision in Marleasing to interpret 102 as permitting the imposition of conditions on the continuation of the use of the site which would require the university, by way of example, to provide an environmental statement.

10. 9. Consideration of the second stage of the exercise, that is what substantive steps if any need to be taken in relation to the development, would, in my judgment, be premature. The council has not decided yet what steps to take. That would be a difficult discretionary decision and would involve a number of considerations as is clear from a reading of paragraph 426 of the decision of Stadlen J in the case of R (on the application of) Evans v Basingstoke and Deane Borough Council.

11. Dealing with the first stage of the exercise however, the argument about prematurity has less force because Mr McCracken says that involves a procedural obligation or a procedural step that should be taken now and the council should be using section 102 to remedy the procedural failures that he says occurred prior to the grant of planning permission. Viewed in that light I well understand the prematurity may not be a reason for refusing permission.

12. But however, viewed in that light, it is now clear from the correspondence from the University of Oxford and from the submissions made by counsel on behalf of the City Council and University of Oxford that is what is proposed.

13. In a letter of 9th July 2013 Mr Paul Goffing, the Director of the States at the University of Oxford said this under the heading "Environmental Information":

"The university does not accept the development is an EIA development

requiring an environmental impact assessment. It will nevertheless carry out an assessment of the environmental impact of the development on a voluntary basis following the processes of the Directive and the regulations so far as possible."

14. Mr Maurici, counsel for the City Council, says at paragraph 11 of his skeleton argument, on instructions, the following:

> "The council proposed that having received
>
> (1) the voluntary EIA which the university has agreed to produce (see above) and.
>
> (2) detailed proposals from the university for mitigating the impact on Port Meadow and how these are to be secured (see again above)and following consultation with all interested parties it will ask the Area West Planning Committee to determine whether
>
> (i) the Castle Mill development was constructed in accordance with the permission and if it is not whether it is expedient that any enforcement action should be taken
>
> (ii) whether the university's applications to discharge both conditions under the permission should be granted and.
>
> (iii) whether the council should make a discontinuance order."

Pausing there, by "discontinuance order" what is meant in that context is an order dealing with the second stage matters going to the substance.

15. So standing back from matters Mr McCracken says it is arguable that a local authority must use its powers to remedy any defect that occurred in relation to the environmental impact assessment process prior to the grant of planning permission. He says that there should be a screening process and if that said an EIA was required, then there would have to be an environmental statement prepared by the university, then consultation and then a decision on what steps, if any, are required to be taken in relation to the building. That, according to what the council in the correspondence say, is effectively what is going to happen. In those circumstances, the intervention of the court and the grant of permission to apply for judicial review is not necessary. The situation is being rectified and addressed by the council and the university realises that they would have to co-operate with that process.

16. Mr McCracken expresses a number of concerns. He points out the university are preparing a screening opinion on a condition relation to contamination. He says: why are they bothering to do that if what was proposed was a full environmental statement as such a statement would deal with that in any event? As I understand it, the council have very particular concerns about the contamination condition, and are being absolutely careful to make sure they follow the process to the letter in relation to that.

But I do not infer from that any indication that they do not intend to do what they say in their letter they intend to do.

17. Secondly, Mr McCracken says that the letter itself clearly does not understand what the law requires because the developer at the university does not carry out an assessment of the environmental impact of the development, the council does that. I really do think that is just criticism of the words used. In the vernacular everyone talks these days about the developer carrying out the assessment, when what one actually means in strict terms is that the developer is going to submit an environmental statement. It is clear the council is going to have to consider and assess the statement and it is quite clear from the skeleton arguments put in by Mr Maurici that the council is contemplating doing that in due course.

18. Thirdly, Mr McCracken says that the rest of the letter of 12th July indicates that the university has prejudged the outcome. I do not read the letter in that way. The university is taking a firm stance but they know they are proposing to do an assessment of the environmental impacts, in the sense of submitting an environmental statement following the processes of the Directive and the regulations so far as is possible. If they do not, they may well face problems with the council or problems with the claimant. So, I do not consider that that is a reason to doubt the accuracy of what Mr Goffing said in his letter of 12th July 2013.

19. There is also a suggestion that the Court of Appeal decision in the case of R (on the application of) Carlton-Conway v Harrow London Borough Council means that it is inappropriate to refuse permission on a discretionary basis. I do not read the judgment of the Court of Appeal in that way. Furthermore, the facts of the case here are very different from the facts of the case in the Carlton-Conway case.

20. In my judgment, standing back from those matters, now that one has fully understood the claimant's case, that is there are procedural deficiencies which should be rectified by use of the section 102 power and considering that those procedural deficiencies are actually in the process of being rectified so far as possible by the council and the university, replicating so far as possible the processes in the Directive in the regulation, the intervention of the court is not necessary and therefore I will refuse permission to apply for judicial review.

Environmental Impact Assessment (EIA)

1. EIA is a European concept. It dates back to the 1985 Directive and the requirements are now found in Directive 2011/92/EU which came into force in February 2012 – it was a codifying Directive intended to make it more legally clear, accessible and easier to enforce.
2. The transposing regulations are the T&CP (EIA) Regs 2011.
3. The core obligation is not to grant permission (or a subsequent consent) for EIA Development without first considering the environmental information and stating in the decision that this has been done. A subsequent consent is an approval required by a planning condition that is to be obtained before all or any part of the permitted development may be begun. The obvious example is reserved matters approval but it is not limited to those.
4. Environmental information is the environmental statement (ES), including any other substantive information formally required by the local planning authority or voluntarily provided by the applicant in connection with the ES. It also includes any representations made as part of the EIA process.
5. An ES is a statement that includes a range of information as to the proposed development and its likely environmental effects. The requirements are set out in Schedule 4 to the EIA Regs.
6. What the actual decision is – whether or not planning permission or subsequent consent should be granted - is not determined by the EIA process.
7. EIA Development is either
    1 Schedule 1 Development, or
    2 Schedule 2 Development likely to have significant effects on the environment by virtue of factors such as its nature, size of location.
8. Schedule 1 Development is simply development of a type described in the first schedule to the EIA Regs. It includes, by way of example, thermal power stations with a heat output of 300 megawatts or more, waste disposal installations for the incineration of hazardous waste and, installations for storage and distribution of petroleum, petrochemical or chemical products with a capacity of 200,000 tonnes or more.
9. Schedule 2 Development is development of a type

1 described in the second schedule to the EIA Regs, AND

2 to be carried out in whole or in part in a sensitive area OR is in excess of any applicable threshold or criterion in that second schedule

10. Schedule 2 includes, again by way of examples, intensive livestock installations with an area of new floorspace over 500 square metres, installations for hydroelectric energy production designed to produce more than 0.5 megawatts and, urban development projects with a development area exceeding 0.5 hectare
11. Sensitive area is also a defined term meaning a SSSI, a National Park, the Broads, a World Heritage Site, a Scheduled Ancient Monument, an AoNB or, a European Site.
12. Screening is the process of determining whether development is EIA Development. When screening there isa set of selection criteria listed in the EIA Regs (Schedule 3)and those that are relevant must be taken into account. There is also significant non-statutory guidance from the Secretary of State and the EU.
13. If, in relation to a development, an applicant submits a statement referring to it as an ES for the purposes of the EIA Regs, the development is EIA Development. This applies regardless of whether or not the criteria already mentioned are met.
14. The other events that would determine that development is EIA Development is the adoption by a local planning authority of a screening opinion to that effect or a direction to that effect by the Secretary of State. (The Secretary of State may also direct that development is not EIA Development even where is is Schedule 1 Development in limited circumstances.)
15. An intending applicant may ask a local planning authority to adopt a screening opinion. The request must include a plan identifying the land, a brief description of the nature and purpose of the development and, of its possible effects on the environment. If the request relates to a subsequent consent the original planning permission must also be identified. The local planning authority may request additional information but is required to adopt a screening opinion within three weeks of receiving the request (a longer period may be agreed with the requestor).

16. If the local planning authority does not adopt a screening opinion within that time or determines that the development is EIA Development the requestor may request the Secretary of State to make a screening direction which would be determinative.
17. If a local planning authority receives an application for planning permission which appears to be for Schedule 1 or Schedule 2 development which is not accompanied by an ES and is not the subject of a screening opinion or direction, it must screen it as if a screening request had been made.
18. In connection with applications for subsequent consent, if the application appears to relate to Schedule 1 or Schedule 2 development, is not accompanied by an ES and, is not the subject of a screening opinion or direction, the local planning authority must also screen it as if a screening request had been made. This does not apply if the original application for planning permission was accompanied by an ES. In that circumstance the local planning authority must consider whether or not the environmental information it has is adequate to assess the environmental effects. If inadequate the local planning authority must formally require the provision of further information.
19. If an application for planning permission or subsequent consent in relation to EIA Development is made without an ES the local planning authority is required to inform the applicant of this. The applicant then has three weeks to inform the local planning authority that it will either agree to provide an ES or seek a screening direction from the Secretary of State. If neither option is taken the application is deemed to be refused without a right of appeal. If the local planning authority is aware of any person who is or is likely to be affected by (or has an interest in) the application and is unlikely to be made aware of it by site notice or local newspaper advertisement it is also required to notify the applicant of that person.
20. Scoping is an optional process allowing an intending applicant to ask (a scoping request) a local planning authority to state in writing its opinion as to information to be provided in the ES (a scoping opinion). An intending applicant is under no obligation to make a scoping request and, unlike screening, there is no deemed scoping request if an application for EIA Development is make without having sought a scoping opinion. A scoping

opinion does also not definitively determine what should be included in an ES. The local planning authority may formally require further information on a particular possible environmental impact even if it has been “scoped out” via a scoping opinion.

21. Where a scoping request is made (with similar information being provided as for a screening request) the local planning authority is obliged to adopt a scoping opinion within 5 weeks of receiving the request. It may not adopt a scoping opinion without consulting the requester and statutory consultation bodies. The local planning authority must take into account the specific characteristics of the particular development, the specific characteristics of that type of development and the environmental features likely to be affected by that development.
22. If the local planning authority does not adopt a scoping opinion within the given time the requester may seek a scoping direction from the Secretary of State. As with a scoping opinion, the “scoping out” of an issue by a scoping direction does not prevent the local planning authority requiring further information upon that issue.
23. A person intending to submit an ES may also inform the local planning authority of that intent giving details of the land affected, the development and the main intended contents of the ES. The local planning authority is then required to inform the statutory consultation bodies reminding them of their duty to provide information relevant to the ES preparation.
24. Where an applicant for EIA Development (or subsequent consent) submits an ES additional copies of the ES must be provided for forwarding on to the Secretary of State and statutory consultation bodies. The applicant may send the copies direct. In addition to forwarding the ES copies the local planning authority is required to give notice to any person it is aware of that is likely to be affected by (or have an interest in) the application and is unlikely to become aware of it via site notice or local advertisement.
25. The Development Management Procedure Order publicity requirements for such an application are similar to those applying to departure applications and applications affecting public rights of way. The prescribed notice is different drawing attention to the fact that the development is EIA Development and the existence of and opportunity to inspect (and obtain copies of) the ES. In

addition to the publication of information on the local planning authority's website, the notice must be publicised by at least one site notice on or near the subject land and a newspaper notice.

26. If an ES is to be submitted after the application to which it relates then prior to submitting the ES the applicant is required to:

    1 Effect a local newspaper notice giving specified details including as to the application, how to inspect documents, how to make representations and availability of the ES.

    2 Give similar notice to any person notified to the applicant by the local planning authority as affected by or interested in the application but unlikely to be made aware of it via site notice or local newspaper advertisement.

    3 Post a site noticegiving specified details including as to the application, how to inspect documents, how to make representations and availability of the ES.

27. An applicant who submits an ES (whether with or after the application) is required to ensure that a "reasonable" number of copies are available in accordance with the details publicised by either the local planning authority or the applicant. A "reasonable charge reflecting printing and distribution costs" made by imposed.

28. If a local planning authority in receipt of an ES if of the opinion that further information is required then it may require the applicant to provide that information.

29. Further information and any other substantive information provided by the applicant relating to the ES is also required to be publicised by local newspaper advertisement by the local planning authority and copied to persons to whom the ES was sent. As with the ES this information is to be made available (details to be provided by the publicity) for the public. A reasonable number of copies are to be made available and a reasonable charge may be made.

30. A range of EIA relevant documentation is required to be included in the planning register when the application is registered. These include screening and scoping opinions and directions, ESs and further information and any other substantive information provided by the applicant relating to it and, any

statements of reasons relating to these. If there has not been an application (and accordingly no registration), then for a period of two years the local planning authority is required to keep copies of screening and scoping opinion and directions and requests for scoping opinions (and any related statement of reasons) available for public inspection at the same place at which the planning register is made available for inspection.

31. Once an application for EIA Development (or subsequent consent relating to it) has been determined the local planning authority is required to inform the Secretary of State. It is required to inform the public of the decision by local advertisement or by such other means as is reasonable in the circumstances. It is also required to make a statement available (in the same place as the planning register is kept) containing the content of the decision and any conditions, the main reasons and considerations on which the decision was based including (if relevant) information about public participation, a description (where necessary) of the main measure to avoid reduce and (if possible) offset the major adverse effects and, information concerning the right to challenge the decision and the procedures for doing so.

.

2011 No. 1824

TOWN AND COUNTRY PLANNING

The Town and Country Planning (Environmental Impact Assessment) Regulations 2011

Made - - - -	*19th July 2011*
Laid before Parliament	*26th July 2011*
Coming into force - -	*24th August 2011*

CONTENTS

PART 1
General

1. Citation, commencement and application 4
2. Interpretation 4
3. Prohibition on granting planning permission or subsequent consent without consideration of environmental information 8

PART 2
Screening

4. General provisions relating to screening 9
5. Requests for screening opinions of the local planning authority 10
6. Requests for screening directions of the Secretary of State 10

PART 3
Procedures Concerning Applications for Planning Permission

7. Applications which appear to require screening opinion 11
8. Subsequent applications where environmental information previously provided 11
9. Subsequent applications where environmental information not previously provided 12
10. Application made to a local planning authority without an environmental statement 12
11. Application referred to the Secretary of State without an environmental statement 13
12. Appeal to the Secretary of State without an environmental statement 14

PART 4
Preparation of Environmental Statements

13. Scoping opinions of the local planning authority 15

14. Scoping directions of the Secretary of State 16
15. Procedure to facilitate preparation of environmental statements 16

PART 5
Publicity and Procedures on Submission of Environmental Statements

16. Procedure where an environmental statement is submitted to a local planning authority 17
17. Publicity where an environmental statement is submitted after the planning application 18
18. Provision of copies of environmental statements and further information for the Secretary of State on referral or appeal 19
19. Procedure where an environmental statement is submitted to the Secretary of State 20
20. Availability of copies of environmental statements 20
21. Charges for copies of environmental statements 20
22. Further information and evidence respecting environmental statements 20

PART 6
Availability of Directions etc and Notification of Decisions

23. Availability of opinions, directions etc for inspection 22
24. Duties to inform the public and the Secretary of State of final decisions 22

PART 7
Development By a Local Planning Authority

25. Modifications where application by a local planning authority 23
26. Screening opinions and directions 23

PART 8
Restrictions of Grants of Permission

27. Old simplified planning zone schemes or enterprise orders 24
28. New simplified planning zone schemes or enterprise zone orders 24
29. Local development orders 25

PART 9
Unauthorised Development

30. Interpretation 28
31. Prohibition on the grant of planning permission for unauthorised EIA development 28
32. Screening opinions of the local planning authority 28
33. Screening directions of the Secretary of State 29
34. Provision of information 29
35. Appeal to the Secretary of State without a screening opinion or screening direction 30
36. Appeal to the Secretary of State without an environmental statement 30
37. Procedure where an environmental statement is submitted to the Secretary of State 31
38. Further information and evidence respecting environmental statements 31
39. Publicity for environmental statements or further information 31
40. Public inspection of documents 32

41. Significant transboundary effects 32

PART 10
ROMP Applications

42. General application of the Regulations to ROMP applications 33
43. Modification of provisions on prohibition of granting planning permission or subsequent consent 33
44. Modification of provisions on application to local planning authority without an environmental statement 33
45. Disapplication of Regulations and modifications of provisions on application referred to or appealed to the Secretary of State without an environmental statement 34
46. Substitution of references to section 78 right of appeal and modification of provisions on appeal to the Secretary of State without an environmental statement 34
47. Modification of provisions on preparation, publicity and procedures on submission of environmental statements 34
48. Modification of provisions on application to the High Court and giving of directions 35
49. Suspension of minerals development 35
50. Determination of conditions and right of appeal on non-determination 36
51. ROMP application by a mineral planning authority 37
52. ROMP applications: duty to make a prohibition order after two years suspension of permission 38

PART 11
Development with Significant Transboundary Effects

53. Development in England likely to have significant effects in another EEA State 39
54. Projects in another EEA State likely to have significant transboundary effects 40

PART 12
Projects serving national defence purposes

55. Projects serving national defence purposes in Scotland 41
56. Projects serving national defence purposes in Wales 41
57. Projects serving national defence purposes in Northern Ireland 41

PART 13
Miscellaneous

58. Service of notices etc 42
59. Application to the High Court 42
60. Hazardous waste and material change of use 42
61. Extension of the period for an authority's decision on a planning application 42
62. Extension of the power to provide in a development order for the giving of directions as respects the manner in which planning applications are dealt with 42
63. Application to the Crown 42
64. Review 43
65. Revocation of statutory instruments and transitional provisions 43
66. Consequential amendments 44

SCHEDULE 1 — Descriptions of development for the purposes of the definition of "Schedule 1 development" 45
SCHEDULE 2 — Descriptions of development and applicable thresholds and criteria for the purposes of the definition of "Schedule 2 development" 48
SCHEDULE 3 — Selection criteria for screening Schedule 2 development 55
SCHEDULE 4 — Information for inclusion in environmental statements 56
PART 1 56
PART 2 56
SCHEDULE 5 — Statutory instruments revoked 57
SCHEDULE 6 — Consequential amendments 58

The Secretary of State being designated(**a**) for the purposes of section 2(2) of the European Communities Act 1972(**b**) in relation to measures relating to the environment, in exercise of the powers conferred by that section, section 71A of the Town and Country Planning Act 1990(**c**), and having taken into account the selection criteria in Annex III to Council Directive 85/337/EEC(**d**) as amended by Council Directive 97/11/EC(**e**), makes the following Regulations:

PART 1

General

Citation, commencement and application

1.—(1) These Regulations may be cited as the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 and shall come into force on 24 August 2011.

(2) Subject to paragraph (4), these Regulations shall apply in relation to England only.

(3) Paragraphs (2) and (6)(a) of regulation 17 shall not apply to the Isles of Scilly and, in relation to the Isles of Scilly, the reference in paragraph (7) of that regulation to paragraph (6) of that regulation shall be construed as a reference to paragraph (6)(b).

(4) Regulations 55 to 57 shall apply in relation to Scotland, Wales and Northern Ireland respectively(**f**).

Interpretation

2.—(1) In these Regulations—

"the Act" means the Town and Country Planning Act 1990 and references to sections are references to sections of that Act;

(**a**) S.I. 2008/301.
(**b**) 1972 c. 68.
(**c**) 1990 c. 8. Section 71A was inserted by section 15 of the Planning and Compensation Act 1991 (c. 34).
(**d**) O.J. No. L 175, 5.7.1985, p. 40. Council Directive 85/337/EEC was amended by Council Directive 97/11/EC, O.J. No. L 73, 14.3.1997, p. 5; Directive 2003/35/EC of the European Parliament and of the Council, O.J. No. L 156, 25.6.2003, p. 17; and Directive 2009/31/EC of the European Parliament and of the Council, O.J. No. L. 140, 5.6.2009, p. 114.
(**e**) O.J. No. L 73, 14.3.1997, p. 5.
(**f**) Regulations 55 to 57 relate to the Secretary of State's power to direct that the Regulations shall not apply to development that constitutes or forms part of a project serving national defence purposes. The decision as to whether a direction should be made in respect of projects situated in the devolved administrations will be taken by the Secretary of State. National defence is a reserved matter for Scotland (*see* paragraph 9 of Schedule 5 to the Scotland Act 1998 (c. 46)), an excepted matter for Northern Ireland (*see* paragraph 4 of Schedule 2 to the Northern Ireland Act 1998 (c.47)), and a matter not devolved to Wales.

"the 1991 Act" means the Planning and Compensation Act 1991(**a**);

"the 1995 Act" means the Environment Act 1995(**b**);

"any other information" means any other substantive information relating to the environmental statement and provided by the applicant or the appellant as the case may be;

"any particular person" includes any non-governmental organisation promoting environmental protection;

"the consultation bodies" means—

(a) any body which the relevant planning authority is required to consult, or would, if an application for planning permission for the development in question were before them, be required to consult by virtue of article 16 (consultations before the grant of permission) of the Order or of any direction under that article;

(b) the Marine Management Organisation(**c**), in any case where the proposed development would affect, or would be likely to affect, any of the following areas—

(i) waters in or adjacent to England up to the seaward limits of the territorial sea;

(ii) an exclusive economic zone(**d**), except any part of an exclusive economic zone in relation to which the Scottish Ministers have functions;

(iii) a Renewable Energy Zone(**e**), except any part of a Renewable Energy Zone in relation to which the Scottish Ministers have functions;

(iv) an area designated under section 1(7) of the Continental Shelf Act 1964(**f**), except any part of that area which is within a part of an exclusive economic zone or Renewable Energy Zone in relation to which the Scottish Ministers have functions; and

(c) the following bodies if not referred to in sub-paragraph (a) or (b)—

(i) any principal council for the area where the land is situated, if not the relevant planning authority;

(ii) Natural England(**g**);

(iii) the Environment Agency(**h**);

(iv) other bodies designated by statutory provision as having specific environmental responsibilities and which the relevant planning authority or the Secretary of State, as the case may be, considers are likely to have an interest in the application;

"the Directive" means Council Directive 85/337/EEC;

"EIA application" means—

(a) an application for planning permission for EIA development; or

(b) a subsequent application in respect of EIA development;

"EIA development" means development which is either—

(a) Schedule 1 development; or

(b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location;

"environmental information" means the environmental statement, including any further information and any other information, any representations made by any body required by

---

(**a**) 1991 c. 34.
(**b**) 1995 c. 25.
(**c**) See section 1 of the Marine and Coastal Access Act 2009 (c. 23).
(**d**) See section 41 of the Marine and Coastal Access Act 2009.
(**e**) See section 84(4) of the Energy Act 2004 (c. 20), substituted by the Marine and Coastal Access Act 2009.
(**f**) 1964 c. 29.
(**g**) See section 1(1) and 1(2) of the Natural Environment and Rural Communities Act 2006 (c.16).
(**h**) See section 1(1) of the Environment Act 1995 (c. 25).

these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development;

"environmental statement" means a statement—

(a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but

(b) that includes at least the information referred to in Part 2 of Schedule 4;

"exempt development" means development in respect of which the Secretary of State has made a direction under regulation 4(4);

"further information" has the meaning given in regulation 22(1);

"General Regulations" means the Town and Country Planning General Regulations 1992(**a**);

"inspector" means a person appointed by the Secretary of State pursuant to Schedule 6(1) to the Act(**b**) to determine an appeal;

"the land" means the land on which the development would be carried out or, in relation to development already carried out, has been carried out;

"by local advertisement", in relation to a notice, means—

(a) by publication of the notice in a newspaper circulating in the locality in which the land to which the application or appeal relates is situated; and

(b) where the relevant planning authority maintains a website for the purpose of advertisement of applications, by publication of the notice on the website;

"local development order" means a local development order made pursuant to section 61A(**c**);

"the Order" means the Town and Country Planning (Development Management Procedure) (England) Order 2010(**d**);

"principal council" has the meaning given by section 270(1) (general provisions as to interpretation) of the Local Government Act 1972(**e**);

"register" means a register kept pursuant to section 69 (registers of applications etc) and "appropriate register" means the register on which particulars of an application for planning permission for the relevant development have been placed or would fall to be placed if such an application were made;

"relevant mineral planning authority" means the body to whom it falls, fell, or would, but for a direction under paragraph—

(a) 7 of Schedule 2 to the 1991 Act;

(b) 13 of Schedule 13 to the 1995 Act; or

(c) 8 of Schedule 14 to the 1995 Act,

fall to determine the ROMP application in question;

"relevant planning authority" means the body to whom it falls, fell, or would, but for a direction under section 77(**f**) (reference of applications to Secretary of State), fall to determine an application for planning permission for the development in question;

"ROMP application" means an application to a relevant mineral planning authority to determine the conditions to which a planning permission is to be subject under paragraph—

(a) 2(2) of Schedule 2 to the 1991 Act (registration of old mining permissions);

(**a**) S.I. 1992/1492. Relevant amending instruments are S.I. 1992/1982 and S.I. 1997/3006.
(**b**) Schedule 6 was amended by the Environment Act 1995 (c. 25), Schedule 22, paragraph 44.
(**c**) Section 61A of the Town and Country Planning Act 1990 was inserted by section 40 of the Planning and Compulsory Purchase Act 2004 (c.5).
(**d**) S.I. 2010/2184.
(**e**) 1972 c. 70.
(**f**) Section 77 was amended by the Planning and Compensation Act 1991, Schedule 7, paragraph 18.

(b) 9(1) of Schedule 13 to the 1995 Act (review of old mineral planning permissions); or

(c) 6(1) of Schedule 14 to the 1995 Act (periodic review of mineral planning permissions);

"ROMP development" means development which has yet to be carried out and which is authorised by a planning permission in respect of which a ROMP application has been or is to be made;

"ROMP subsequent application" means an application for approval of a matter where the approval—

(a) is required by or under a condition to which a planning permission is subject following determination of a ROMP application; and

(b) must be obtained before all or part of the minerals development permitted by the planning permission may be begun or continued;

"ROMP subsequent consent" means consent granted pursuant to a ROMP subsequent application;

"Schedule 1 application" and "Schedule 2 application" mean an application for planning permission for Schedule 1 development and Schedule 2 development respectively;

"Schedule 1 development" means development, other than exempt development, of a description mentioned in Schedule 1;

"Schedule 2 development" means development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where—

(a) any part of that development is to be carried out in a sensitive area; or

(b) any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development;

"scoping direction" and "scoping opinion" have the meanings given in regulation 13;

"screening direction" means a direction made by the Secretary of State as to whether development is EIA development;

"screening opinion" means a written statement of the opinion of the relevant planning authority as to whether development is EIA development;

"sensitive area" means any of the following—

(a) land notified under section 28(1) (sites of special scientific interest) of the Wildlife and Countryside Act 1981(**a**);

(b) a National Park within the meaning of the National Parks and Access to the Countryside Act 1949(**b**);

(c) the Broads(**c**);

(d) a property appearing on the World Heritage List kept under article 11(2) of the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage(**d**);

(e) a scheduled monument within the meaning of the Ancient Monuments and Archaeological Areas Act 1979(**e**);

(f) an area of outstanding natural beauty designated as such by an order made by Natural England under section 82(1) (areas of outstanding natural beauty) of the Countryside and Rights of Way Act 2000(**f**);

(**a**) 1981 c. 69, substituted by the Countryside and Rights of Way Act 2001 (c. 37) section 75(1) and Schedule 9, paragraph 1, and amended by the Natural Environment and Rural Communities Act 2006 (c. 16) section 105(1), Schedule 11, Part 1, paragraph 79, and by the Marine and Coastal Access Act 2009 (c. 23) section 148, schedule 13, Part 2, paragraph 2(1).
(**b**) 1949 (c. 97), s section 5(3).
(**c**) See the Norfolk and Suffolk Broads Act 1988 (c. 4).
(**d**) See Command Paper 9424.
(**e**) 1979 c. 46. See the definition in section 1(11).
(**f**) 2000 c. 37.

(g) a European site within the meaning of regulation 8 of the Conservation of Habitats and Species Regulations 2010(**a**);

"subsequent application" means an application for approval of a matter where the approval—

(a) is required by or under a condition to which a planning permission is subject; and

(b) must be obtained before all or part of the development permitted by the planning permission may be begun;

"subsequent consent" means consent granted pursuant to a subsequent application.

(2) Subject to paragraph (3), expressions used both in these Regulations and in the Act have the same meaning for the purposes of these Regulations as they have for the purposes of the Act.

(3) Expressions used both in these Regulations and in the Directive (whether or not also used in the Act) have the same meaning for the purposes of these Regulations as they have for the purposes of the Directive.

(4) In these Regulations any reference to a Council Directive is a reference to that Directive as amended at the date these Regulations were made.

(5) In these Regulations references to the Secretary of State shall not be construed as references to an inspector.

Prohibition on granting planning permission or subsequent consent without consideration of environmental information

3.—(1) This regulation applies—

(a) to every application for planning permission for EIA development received by the authority with whom it is lodged on or after the commencement of these Regulations;

(b) to every application for planning permission for EIA development lodged by an authority pursuant to regulation 3 or 4 (applications for planning permission) of the General Regulations on or after that date;

(c) to every subsequent application in respect of EIA development received by the authority with whom it is lodged on or after the commencement of these Regulations; and

(d) to every subsequent application in respect of EIA development lodged by an authority pursuant to regulation 11 of the General Regulations on or after the commencement of these Regulations;

(2) For the purposes of paragraph (1)(a) and (b), the date of receipt of an application by an authority shall be determined in accordance with article 29(3) (time periods for decision) of the Order.

(3) For the purpose of paragraph (1)(c) and (d), the date of receipt of an application by an authority shall be determined in accordance with article 30 (applications made under planning condition) of the Order.

(4) The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so.

(**a**) S.I. 2010/490.

PART 2

Screening

General provisions relating to screening

4.—(1) Subject to paragraphs (3) and (4), the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development.

(2) The events referred to in paragraph (1) are—

(a) the submission by the applicant or appellant in relation to that development of a statement referred to by the applicant or appellant as an environmental statement for the purposes of these Regulations; or

(b) the adoption by the relevant planning authority of a screening opinion to the effect that the development is EIA development.

(3) A direction of the Secretary of State shall determine for the purpose of these Regulations whether development is or is not EIA development.

(4) (a) The Secretary of State may direct that these Regulations shall not apply in relation to a particular proposed development specified in the direction either—

(i) in accordance with Article 2(3) of the Directive (but without prejudice to Article 7 of the Directive), or

(ii) if the development comprises or forms part of a project serving national defence purposes and in the opinion of the Secretary of State compliance with these Regulations would have an adverse effect on those purposes;

(b) Where a direction is given under paragraph (4)(a) the Secretary of State must send a copy of any such direction to the relevant planning authority.

(5) Where a direction is given under paragraph (4)(a)(i) the Secretary of State must—

(a) make available to the public the information considered in making the direction and the reasons for making the direction;

(b) consider whether another form of assessment would be appropriate; and

(c) take such steps as are considered appropriate to bring the information obtained under the other form of assessment to the attention of the public.

(6) Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development.

(7) Where a local planning authority adopts a screening opinion under regulation 5(5), or the Secretary of State makes a screening direction under paragraph (3)—

(a) that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion; and

(b) the authority or the Secretary of State, as the case may be, shall send a copy of the opinion or direction and a copy of the written statement required by sub-paragraph (a) to the person who proposes to carry out, or who has carried out, the development in question.

(8) The Secretary of State may make a screening direction either—

(a) of the Secretary of State's own volition; or

(b) if requested to do so in writing by any person.

(9) The Secretary of State may direct that particular development of a description mentioned in Column 1 of the table in Schedule 2 is EIA development in spite of the fact that none of the conditions contained in sub-paragraphs (a) and (b) of the definition of "Schedule 2 development" is satisfied in relation to that development.

(10) The Secretary of State shall send a copy of any screening direction and a copy of the written statement required by paragraph (7)(a) to the relevant planning authority.

Requests for screening opinions of the local planning authority

5.—(1) A person who is minded to carry out development may request the relevant planning authority to adopt a screening opinion.

(2) A request for a screening opinion in relation to an application for planning permission shall be accompanied by—

(a) a plan sufficient to identify the land;

(b) a brief description of the nature and purpose of the development and of its possible effects on the environment; and

(c) such other information or representations as the person making the request may wish to provide or make.

(3) A request for a screening opinion in relation to a subsequent application shall be accompanied by—

(a) a plan sufficient to identify the land;

(b) sufficient information to enable the relevant planning authority to identify any planning permission granted for the development in respect of which a subsequent application has been made;

(c) an explanation of the likely effects on the environment which were not identified at the time that the planning permission was granted; and

(d) such other information or representations as the person making the request may wish to provide or make.

(4) An authority receiving a request for a screening opinion shall, if they consider that they have not been provided with sufficient information to adopt an opinion, notify in writing the person making the request of the points on which they require additional information.

(5) An authority shall adopt a screening opinion within 3 weeks beginning with the date of receipt of a request made pursuant to paragraph (1) or such longer period as may be agreed in writing with the person making the request.

(6) An authority which adopts a screening opinion pursuant to paragraph (5) shall send a copy to the person who made the request.

(7) Where an authority—

(a) fails to adopt a screening opinion within the relevant period mentioned in paragraph (5); or

(b) adopts an opinion to the effect that the development is EIA development;

the person who requested the opinion may request the Secretary of State to make a screening direction.

(8) The person may make a request pursuant to paragraph (7) even if the authority have not received additional information which they have sought under paragraph (4).

Requests for screening directions of the Secretary of State

6.—(1) A person who pursuant to regulation 5(7) requests the Secretary of State to make a screening direction shall submit with the request—

(a) a copy of the request to the relevant planning authority under regulation 5(1) and the documents which accompanied it;

(b) a copy of any notification received under regulation 5(4) and of any response sent;

(c) a copy of any screening opinion received from the authority and of any accompanying statement of reasons; and

(d) any representations that the person wishes to make.

(2) A person making a request pursuant to regulation 5(7) shall send to the relevant planning authority a copy of that request and of any representations that person makes to the Secretary of State.

(3) If the Secretary of State considers that sufficient information to make a screening direction has not been provided, the Secretary of State shall give notice in writing to the person making the request pursuant to regulation 5(7) of the points on which additional information is required, and may request the relevant planning authority to provide such information as they can on any of those points.

(4) The Secretary of State shall make a screening direction within 3 weeks beginning with the date of receipt of a request pursuant to regulation 5(7) or such longer period as may be reasonably required.

(5) The Secretary of State shall send a copy of any screening direction made pursuant to paragraph (4) to the person who made the request.

PART 3

Procedures Concerning Applications for Planning Permission

Applications which appear to require screening opinion

7. Where it appears to the relevant planning authority that—

(a) an application which is before them for determination is a Schedule 1 application or a Schedule 2 application; and

(b) the development in question has not been the subject of a screening opinion or screening direction; and

(c) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,

paragraphs (4) and (5) of regulation 5 shall apply as if the receipt or lodging of the application were a request made under regulation 5(1).

Subsequent applications where environmental information previously provided

8.—(1) This regulation applies where it appears to the relevant planning authority that—

(a) an application which is before them for determination—

(i) is a subsequent application in relation to Schedule 1 or Schedule 2 development;

(ii) has not itself been the subject of a screening opinion or screening direction; and

(iii) is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations; and

(b) either—

(i) the original application was accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations; or

(ii) the application is for the approval of a matter where the approval is required by or under a condition to which planning permission deemed by section 10(1) of the Crossrail Act 2008(**a**) is subject.

(2) Where it appears to the relevant planning authority that the environmental information already before them is adequate to assess the environmental effects of the development, they shall take that information into consideration in their decision for subsequent consent.

(**a**) 2008 c. 18.

(3) Where it appears to the relevant planning authority that the environmental information already before them is not adequate to assess the environmental effects of the development, they shall serve a notice seeking further information in accordance with regulation 22(1).

Subsequent applications where environmental information not previously provided

9. Where it appears to the relevant planning authority that—

(a) an application which is before them for determination—

(i) is a subsequent application in relation to Schedule 1 or Schedule 2 development;

(ii) has not itself been the subject of a screening opinion or screening direction; and

(iii) is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these regulations; and

(b) the original application was not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,

paragraphs (4) and (5) of regulation 5 shall apply as if the receipt or lodging of the application were a request made under regulation 5(1).

Application made to a local planning authority without an environmental statement

10.—(1) Where an EIA application which is before a local planning authority for determination is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations, the authority shall notify the applicant in writing that the submission of an environmental statement is required.

(2) Where the relevant planning authority is aware that any particular person is or is likely to be affected by, or has an interest in, the application, who is unlikely to become aware of it by means of a site notice or by local advertisement, the relevant planning authority shall notify the applicant of any such person.

(3) An authority shall notify the applicant in accordance with paragraph (1) within 3 weeks beginning with the date of receipt of the application or such longer period as may be agreed in writing with the applicant; but where the Secretary of State, after the expiry of that period of 3 weeks or of any longer period so agreed, makes a screening direction to the effect that the development is EIA development, the authority shall so notify the applicant within 7 days beginning with the date the authority received a copy of that screening direction.

(4) An applicant receiving a notification pursuant to paragraph (1) may, within 3 weeks beginning with the date of the notification, write to the authority stating—

(a) that the applicant accepts their view and is providing an environmental statement; or

(b) unless the condition referred to in paragraph (5) is satisfied, that the applicant is writing to the Secretary of State to request a screening direction.

(5) For the purpose of paragraph (4)(b) the condition is—

(a) if the application referred to in paragraph (1) is an application for planning permission, that the Secretary of State has made a screening direction in respect of the development;

(b) if the application referred to in paragraph (1) is a subsequent application, that the Secretary of State has made a screening direction subsequent to that application in respect of the development.

(6) If the applicant does not write to the authority in accordance with paragraph (4), the permission or subsequent consent sought shall, unless the condition referred to in paragraph (7) is satisfied, be deemed to be refused at the end of the relevant 3 week period, and the deemed refusal—

(a) shall be treated as a decision of the authority for the purposes of article 36(4)(c) (register of applications) of the Order; but

(b) shall not give rise to an appeal to the Secretary of State by virtue of section 78 (right to appeal against planning decisions and failure to take such decisions).

(7) For the purpose of paragraph (6) the condition is—

(a) if the application referred to in paragraph (1) is an application for planning permission, that the Secretary of State has made a screening direction to the effect that the development is not EIA development;

(b) if the application referred to in paragraph (1) is a subsequent application, that the Secretary of State has made a screening direction subsequent to that application, to the effect that the development is not EIA development.

(8) An authority which has given a notification in accordance with paragraph (1) shall, unless the Secretary of State makes a screening direction to the effect that the development is not EIA development, determine the relevant application only by refusing planning permission or subsequent consent if the applicant does not submit an environmental statement and comply with regulation 17(6).

(9) A person who requests a screening direction pursuant to paragraph (4)(b) shall send to the Secretary of State with the request copies of—

(a) the application;

(b) all documents sent to the authority as part of the application;

(c) all correspondence between the applicant and the authority relating to the proposed development;

(d) a copy of any planning permission granted for the development; and

(e) in the case of a subsequent application, documents or information relating to the planning permission granted for the development that are relevant to the application,

and paragraphs (2) to (5) of regulation 6 shall apply to a request under this regulation as they apply to a request made pursuant to regulation 5(7).

Application referred to the Secretary of State without an environmental statement

11.—(1) Where an application has been referred to the Secretary of State for determination, and it appears to the Secretary of State that—

(a) it is an EIA application; and

(b) the development in question—

(i) has not been the subject of a screening opinion or screening direction; or

(ii) in the case of a subsequent application, was the subject of a screening opinion or direction before planning permission was granted to the effect that it is not EIA development; and

(c) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,

paragraphs (3) and (4) of regulation 6 shall apply as if the referral of the application were a request made by the applicant pursuant to regulation 5(7).

(2) Where an application has been referred to the Secretary of State for determination, and it appears to the Secretary of State that—

(a) it is an EIA application, and

(b) it is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,

the Secretary of State shall notify the applicant in writing that the submission of an environmental statement is required and shall send a copy of that notification to the relevant planning authority.

(3) The Secretary of State shall notify the applicant in accordance with paragraph (2) within 3 weeks beginning with the date the application was received or such longer period as may be reasonably required.

(4) Where the Secretary of State is aware that any particular person is or is likely to be affected by, or has an interest in, the application, who is unlikely to become aware of it by means of a site notice or by local advertisement, the Secretary of State shall notify the applicant of any such person.

(5) An applicant who receives a notification under paragraph (2) may, within 3 weeks beginning with the date of the notification, confirm in writing to the Secretary of State that an environmental statement will be provided.

(6) If the applicant does not write in accordance with paragraph (5), the Secretary of State shall be under no duty to deal with the application; and at the end of the 3 week period shall inform the applicant in writing that no further action is being taken on the application.

(7) Where—

(a) a notification has been given under paragraph (2), and

(b) the applicant does not submit an environmental statement and comply with regulation 17(6),

the Secretary of State shall determine the relevant application only by refusing planning permission or subsequent consent.

Appeal to the Secretary of State without an environmental statement

12.—(1) Where on consideration of an appeal under section 78 (right to appeal against planning decisions and failure to take such decisions) it appears to the Secretary of State that—

(a) the relevant application is an EIA application; and

(b) the development in question —

(i) has not been the subject of a screening opinion or screening direction; or

(ii) in the case of a subsequent application, was the subject of a screening opinion or direction before planning permission was granted to the effect that it is not EIA development; and

(c) the relevant application is not accompanied by a statement referred to by the appellant as an environmental statement for the purposes of these Regulations,

paragraphs (3) and (4) of regulation 6 shall apply as if the appeal were a request made by the appellant pursuant to regulation 5(7).

(2) Where an inspector is dealing with an appeal and a question arises as to whether the relevant application is an EIA application and it appears to the inspector that it may be such an application, the inspector shall refer that question to the Secretary of State and shall not determine the appeal, except by refusing planning permission or subsequent consent, before a screening direction is made.

(3) Paragraphs (3) and (4) of regulation 6 shall apply to a question referred under paragraph (2) as if the referral of that question were a request made by the appellant pursuant to regulation 5(7).

(4) Where it appears to the Secretary of State that the relevant application is an EIA application and is not accompanied by a statement referred to by the appellant as an environmental statement for the purposes of these Regulations, the Secretary of State shall notify the appellant in writing that the submission of an environmental statement is required and shall send a copy of that notification to the relevant planning authority.

(5) Where the Secretary of State is aware that any particular person is or is likely to be affected by, or has an interest in, the application, who is unlikely to become aware of it by means of a site notice or by local advertisement, the Secretary of State shall notify the appellant of any such person.

(6) An appellant who receives a notification under paragraph (4), may within 3 weeks beginning with the date of the notification, confirm in writing to the Secretary of State that an environmental statement will be provided.

(7) If the appellant does not write in accordance with paragraph (6), the Secretary of State or, where relevant, the inspector, shall be under no duty to deal with the appeal; and at the end of the 3 week period shall inform the appellant that no further action is being taken on the appeal.

(8) Where—

(a) a notification has been given under paragraph (4), and

(b) the appellant does not submit an environmental statement and comply with regulation 17(6),

the Secretary of State or, where relevant, the inspector shall determine the appeal only by refusing planning permission or subsequent consent.

PART 4

Preparation of Environmental Statements

Scoping opinions of the local planning authority

13.—(1) A person who is minded to make an EIA application may ask the relevant planning authority to state in writing their opinion as to the information to be provided in the environmental statement (a "scoping opinion").

(2) A request under paragraph (1) shall include—

(a) in relation to an application for planning permission—

(i) a plan sufficient to identify the land;

(ii) a brief description of the nature and purpose of the development and of its possible effects on the environment; and

(iii) such other information or representations as the person making the request may wish to provide or make;

(b) in relation to a subsequent application—

(i) a plan sufficient to identify the land;

(ii) sufficient information to enable the relevant planning authority to identify any planning permission granted for the development in respect of which a subsequent application has been made;

(iii) an explanation of the possible effects on the environment which were not identified at the time planning permission was granted; and

(iv) such other information or representations as the person making the request may wish to provide or make.

(3) An authority receiving a request under paragraph (1) shall, if they consider that they have not been provided with sufficient information to adopt a scoping opinion, notify the person making the request of the points on which they require additional information.

(4) An authority shall not adopt a scoping opinion in response to a request under paragraph (1) until they have consulted the person who made the request and the consultation bodies, but shall, subject to paragraph (5), within 5 weeks beginning with the date of receipt of that request or such longer period as may be agreed in writing with the person making the request, adopt a scoping opinion and send a copy to the person who made the request.

(5) Where a person has, at the same time as making a request for a screening opinion under regulation 5(1), asked the authority for an opinion under paragraph (1) above, and the authority have adopted a screening opinion to the effect that the development is EIA development, the authority shall, within 5 weeks beginning with the date on which that screening opinion was adopted or such longer period as may be agreed in writing with the person making the request, adopt a scoping opinion and send a copy to the person who made the request.

(6) Before adopting a scoping opinion the authority shall take into account—

(a) the specific characteristics of the particular development;

(b) the specific characteristics of development of the type concerned; and

(c) the environmental features likely to be affected by the development.

(7) Where an authority fail to adopt a scoping opinion within the relevant period mentioned in paragraph (4) or (5), the person who requested the opinion may under regulation 14(1) ask the Secretary of State to make a direction as to the information to be provided in the environmental statement (a "scoping direction").

(8) Paragraph (7) applies notwithstanding that the authority may not have received additional information which they have sought under paragraph (3).

(9) An authority which have adopted a scoping opinion in response to a request under paragraph (1) shall not be precluded from requiring of the person who made the request additional information in connection with any statement that may be submitted by that person as an environmental statement in connection with an application for planning permission or a subsequent application for the same development as was referred to in the request.

Scoping directions of the Secretary of State

14.—(1) A request made under this paragraph pursuant to regulation 13(7) shall include—

(a) a copy of the request to the relevant planning authority under regulation 13(1);

(b) a copy of any relevant notification under regulation 13(3) and of any response;

(c) a copy of any relevant screening opinion received by the person making the request and of any accompanying statement of reasons; and

(d) any representations that the person making the request wishes to make.

(2) A person making a request under paragraph (1) shall send to the relevant planning authority a copy of that request, but that copy need not include the matters mentioned in sub-paragraphs (a) to (c) of that paragraph.

(3) If the Secretary of State considers that the information provided pursuant to paragraph (1) is insufficient to make a scoping direction, the Secretary of State shall give notice in writing to the person making the request of any points on which additional information is required; and may request the relevant planning authority to provide such information as they can on any of those points.

(4) The Secretary of State—

(a) shall consult the person making the request and the consultation bodies before making a scoping direction in response to a request under paragraph (1), and

(b) within 5 weeks beginning with the date of receipt of that request or such longer period as may be reasonably required, make a direction and send a copy to the person who made the request and to the relevant planning authority.

(5) Before making a scoping direction the Secretary of State shall take into account the matters specified in regulation 13(6).

(6) Neither the Secretary of State who has made a scoping direction in response to a request under paragraph (1) nor the relevant planning authority shall be precluded from requiring of the person who made the request additional information in connection with any statement that may be submitted by that person as an environmental statement in connection with an application for planning permission or a subsequent application for the same development as was referred to in the request.

Procedure to facilitate preparation of environmental statements

15.—(1) Any person who intends to submit an environmental statement to the relevant planning authority or the Secretary of State under these Regulations may give notice in writing to that authority or the Secretary of State under this paragraph.

(2) A notice under paragraph (1) shall include the information necessary to identify the land and the nature and purpose of the development, and shall indicate the main environmental consequences to which the person giving the notice proposes to refer in his environmental statement.

(3) The recipient of—

(a) such notice as is mentioned in paragraph (1); or

(b) a written statement made pursuant to regulation 10(4)(a), or 11(5) or 12(6)

shall—

(i) notify the consultation bodies in writing of the name and address of the person who intends to submit an environmental statement and of the duty imposed on the consultation bodies by paragraph (4) to make information available to that person; and

(ii) inform in writing the person who intends to submit an environmental statement of the names and addresses of the bodies so notified.

(4) Subject to paragraph (5), the relevant planning authority and any body notified in accordance with paragraph (3) shall, if requested by the person who intends to submit an environmental statement, enter into consultation with that person to determine whether the authority or body has in its possession any information which that person or they consider relevant to the preparation of the environmental statement and, if they have, the authority or body shall make that information available to that person.

(5) A planning authority or other body which receives a request for information under paragraph (4) shall treat it as a request for information under regulation 5(1) of the Environmental Information Regulations 2004(**a**).

PART 5

Publicity and Procedures on Submission of Environmental Statements

Procedure where an environmental statement is submitted to a local planning authority

16.—(1) An applicant who makes an EIA application shall submit to the relevant planning authority a statement, referred to as an "environmental statement" for the purposes of these Regulations, and shall provide the authority with 1 additional copy of the statement for transmission to the Secretary of State. If at the same time the applicant serves a copy of the statement to any other body, the applicant shall—

(a) serve with it a copy of the application and any plan submitted with the application (unless these have already been provided to the body in question);

(b) inform the body that representations may be made to the relevant planning authority; and

(c) inform the authority of the name of every body so served and of the date of service.

(2) When a relevant planning authority receive in connection with an EIA application a statement as described in paragraph (1) the authority shall—

(a) send to the Secretary of State, within 14 days of receipt of the statement, 1 copy of the statement and a copy of the relevant application and of any documents submitted with the application;

(b) inform the applicant of the number of copies required to enable the authority to comply with sub-paragraph (c) below;

(**a**) S.I. 2004/3391.

(c) forward to any consultation body which has not received a copy direct from the applicant a copy of the statement and inform any such consultation body that they may make representations;

(d) where the relevant planning authority are aware of any particular person who is or is likely to be affected by, or has an interest in, the application, who is unlikely to become aware of it by means of a site notice or by local advertisement, send a notice to such person containing the details set out in regulation 17(2)(b) to (j) and the name and address of the relevant planning authority.

(3) The applicant shall send the copies required for the purposes of paragraph (2)(c) to the relevant planning authority.

(4) Where an applicant submits an environmental statement to the authority in accordance with paragraph (1), the provisions of article 13 of and Schedule 3 to the Order (publicity for applications for planning permission) shall apply to a subsequent application as they apply to a planning application falling within paragraph 13(2) of the Order except that for the reference in the notice in Schedule 3 to the Order to "planning permission to" there shall be substituted "subsequent application in respect of".

(5) The relevant planning authority shall not determine the application until the expiry of 14 days from the last date on which a copy of the statement was served in accordance with this regulation.

Publicity where an environmental statement is submitted after the planning application

17.—(1) Where an application for planning permission or a subsequent application has been made without an environmental statement and the applicant proposes to submit such a statement, the applicant shall, before submitting it, comply with paragraphs (2) to (5).

(2) The applicant shall publish in a local newspaper circulating in the locality in which the land is situated a notice stating—

(a) the applicant's name, that an application is being made for planning permission or subsequent consent, and the name and address of the relevant planning authority;

(b) the date on which the application was made and, if it be the case, that it has been referred to the Secretary of State for determination or is the subject of an appeal to the Secretary of State;

(c) the address or location and the nature of the proposed development;

(d) that—

(i) a copy of the application, any accompanying plan and other documents, and a copy of the environmental statement, and

(ii) in the case of a subsequent application, a copy of the planning permission in respect of which that application has been made and supporting documents,

may be inspected by members of the public at all reasonable hours;

(e) an address in the locality in which the land is situated at which those documents may be inspected, and the latest date on which they will be available for inspection (being a date not less than 21 days later than the date on which the notice is published);

(f) an address (whether or not the same as that given under sub-paragraph (e)) in the locality in which the land is situated at which copies of the statement may be obtained;

(g) that copies may be obtained there so long as stocks last;

(h) if a charge is to be made for a copy, the amount of the charge;

(i) that any person wishing to make representations about the application should make them in writing, before the date named in accordance with sub-paragraph (e), to the relevant planning authority or (in the case of an application referred to the Secretary of State or an appeal) to the Secretary of State; and

(j) in the case of an application referred to the Secretary of State or an appeal, the address to which representations should be sent.

(3) An applicant who is notified under regulation 10(2), 11(4) or 12(5) of such a person as mentioned in any of those paragraphs shall serve a notice on every such person; and the notice shall contain the information specified in paragraph (2), except that the date specified as the latest date on which the documents will be available for inspection shall not be less than 21 days later than the date on which the notice is first served.

(4) The applicant shall post on the land a notice containing the information specified in paragraph (2), except that the date named as the latest date on which the documents will be available for inspection shall be not less than 21 days later than the date on which the notice is first posted. This provision shall not apply if the applicant has not, and is not reasonably able to acquire, such rights as would enable the applicant to comply.

(5) The notice mentioned in paragraph (4) must—

(a) be left in position for not less than 7 days in the 28 days immediately preceding the date of the submission of the statement; and

(b) be affixed firmly to some object on the land and sited and displayed in such a way as to be easily visible to, and readable by, members of the public without going on to the land.

(6) The statement, when submitted, shall be accompanied by—

(a) a copy of the notice mentioned in paragraph (2) certified by or on behalf of the applicant as having been published in a named newspaper on a date specified in the certificate; and

(b) a certificate by or on behalf of the applicant which states either—

(i) that a notice was posted on the land in compliance with this regulation and when this was done, and that the notice was left in position for not less than 7 days in the 28 days immediately preceding the date of the submission of the statement, or that, without any fault or intention on the applicant's part, it was removed, obscured or defaced before 7 days had elapsed and the applicant took reasonable steps for its protection or replacement, specifying the steps taken; or

(ii) that the applicant was unable to comply with paragraphs (4) and (5) because the applicant did not have the necessary rights to do so; that any reasonable steps available to acquire those rights have been taken but unsuccessfully, specifying the steps taken.

(7) Where an applicant indicates that it is proposed to provide a statement in the circumstances mentioned in paragraph (1), the relevant planning authority, the Secretary of State or the inspector, as the case may be, shall (unless disposed to refuse the permission or subsequent consent sought) suspend consideration of the application or appeal until receipt of the statement and the other documents mentioned in paragraph (6); and shall not determine it during the period of 21 days beginning with the date of receipt of the statement and the other documents so mentioned.

(8) Where it is proposed to submit an environmental statement in connection with an appeal, this regulation applies with the substitution of references to the appellant for references to the applicant.

Provision of copies of environmental statements and further information for the Secretary of State on referral or appeal

18. Where an applicant for planning permission or subsequent consent has submitted to the relevant planning authority in connection with that application an environmental statement, or further information, and—

(a) the application is referred to the Secretary of State under section 77 (reference of applications to Secretary of State); or

(b) the applicant appeals under section 78 (right to appeal against planning decisions and failure to take such decisions),

the applicant shall supply the Secretary of State with 1 copy of the statement and, where relevant, the further information unless, in the case of a referred application, the relevant planning authority have already done so.

Procedure where an environmental statement is submitted to the Secretary of State

19.—(1) This regulation applies where an applicant submits an environmental statement to the Secretary of State, in relation to an EIA application which is before the Secretary of State or an inspector for determination or is the subject of an appeal to the Secretary of State.

(2) The applicant or appellant shall submit 2 copies of the statement to the Secretary of State who shall send 1 copy to the relevant planning authority.

(3) An applicant or appellant who submits an environmental statement to the Secretary of State may provide a copy of it to any other body, and if so shall comply with regulations 16(1)(a) and (b) as if the reference in regulation 16(1)(b) to the relevant planning authority were a reference to the Secretary of State, and inform the Secretary of State of the matters mentioned in regulation 16(1)(c).

(4) The Secretary of State shall comply with regulation 16(2) (except sub-paragraph (a) of that regulation) and the applicant or appellant with regulation 16(3) as if—

(a) references in those provisions to the relevant planning authority were references to the Secretary of State; and,

(b) in the case of an appeal, references to the applicant were references to the appellant,

and the Secretary of State or the inspector shall comply with regulation 16(5) as if it referred to the Secretary of State or the inspector instead of to the relevant planning authority.

Availability of copies of environmental statements

20. An applicant for planning permission or subsequent consent, or an appellant, who submits an environmental statement in connection with an application or appeal, shall ensure that a reasonable number of copies of the statement are available at the address named in the notices published or posted pursuant to article 13 of the Order or regulation 17 as the address at which such copies may be obtained.

Charges for copies of environmental statements

21. A reasonable charge reflecting printing and distribution costs may be made to a member of the public for a copy of a statement made available in accordance with regulation 20.

Further information and evidence respecting environmental statements

22.—(1) A relevant planning authority, Secretary of State or inspector dealing with an application or appeal in relation to which the applicant or appellant has submitted an environmental statement, if of the opinion that the statement should contain additional information in order to be an environmental statement, shall notify the applicant or appellant in writing accordingly, and the applicant or appellant shall provide that additional information; and such information provided by the applicant or appellant is referred to in these Regulations as "further information".

(2) Paragraphs (3) to (9) shall apply in relation to further information and any other information except in so far as the further information and any other information is provided for the purposes of an inquiry or hearing held under the Act and the request for the further information made pursuant to paragraph (1) stated that it was to be provided for such purposes.

(3) The recipient of further information pursuant to paragraph (1) or any other information shall publish in a local newspaper circulating in the locality in which the land is situated a notice stating—

(a) the name of the applicant for planning permission or subsequent consent or the appellant (as the case may be) and the name and address of the relevant planning authority;

(b) the date on which the application was made and, if it be the case, that it has been referred to the Secretary of State for determination or is the subject of an appeal to the Secretary of State;

(c) in the case of a subsequent application, sufficient information to enable the planning permission for the development to be identified;

(d) the address or location and the nature of the proposed development;

(e) that further information or any other information is available in relation to an environmental statement which has already been provided;

(f) that a copy of the further information or any other information and of any environmental statement which relates to any planning permission or subsequent application may be inspected by members of the public at all reasonable hours;

(g) an address in the locality in which the land is situated at which the further information or any other information may be inspected and the latest date on which it will be available for inspection (being a date not less than 21 days later than the date on which the notice is published);

(h) an address (whether or not the same as that given pursuant to sub-paragraph (g)) in the locality in which the land is situated at which copies of the further information or any other information may be obtained;

(i) that copies may be obtained there so long as stocks last;

(j) if a charge is to be made for a copy, the amount of the charge;

(k) that any person wishing to make representations about the further information or any other information should make them in writing, before the date specified in accordance with sub-paragraph (g), to the relevant planning authority, the Secretary of State or the inspector (as the case may be); and

(l) the address to which representations should be sent.

(4) The recipient of the further information or any other information shall send a copy of it to each person to whom, in accordance with these Regulations, the statement to which it relates was sent.

(5) Where the recipient of the further information or any other information is the relevant planning authority they shall send to the Secretary of State 1 copy of the further information.

(6) The recipient of the further information may by notice in writing require the applicant or appellant to provide such number of copies of the further information or any other information as is specified in the notice (being the number required for the purposes of paragraph (4) or (5)).

(7) Where information is requested under paragraph (1) or any other information is provided, the relevant planning authority, the Secretary of State or the inspector, as the case may be, shall suspend determination of the application or appeal, and shall not determine it before the expiry of 14 days after the date on which the further information or any other information was sent to all persons to whom the statement to which it relates was sent or the expiry of 21 days after the date that notice of it was published in a local newspaper, whichever is the later.

(8) The applicant or appellant who provides further information or any other information, in accordance with paragraph (1) shall ensure that a reasonable number of copies of the information are available at the address named in the notice published pursuant to paragraph (3) as the address at which such copies may be obtained.

(9) A reasonable charge reflecting printing and distribution costs may be made to a member of the public for a copy of the further information or any other information, made available in accordance with paragraph (8).

(10) The relevant planning authority or the Secretary of State or an inspector may in writing require an applicant or appellant to produce such evidence as they may reasonably call for to verify any information in the environmental statement.

PART 6

Availability of Directions etc and Notification of Decisions

Availability of opinions, directions etc for inspection

23.—(1) Where particulars of a planning application or of a subsequent application are placed on Part 1 of the register, the relevant planning authority shall take steps to secure that there is also placed on that Part a copy of any relevant—

(a) screening opinion;

(b) screening direction;

(c) scoping opinion;

(d) scoping direction;

(e) notification given under regulation 10(1), 11(2) or 12(4);

(f) direction under regulation 4(4);

(g) environmental statement, including any further information and any other information;

(h) statement of reasons accompanying any of the above.

(2) Where the relevant planning authority adopt a screening opinion or scoping opinion, or receive a request under regulation 13(1) or 14(1), a copy of a screening direction, scoping direction, or direction under regulation 4(4) before an application is made for planning permission or subsequent consent for the development in question, the authority shall take steps to secure that a copy of the opinion, request, or direction and any accompanying statement of reasons is made available for public inspection at all reasonable hours at the place where the appropriate register (or relevant section of that register) is kept. Copies of those documents shall remain so available for a period of 2 years.

Duties to inform the public and the Secretary of State of final decisions

24.—(1) Where an EIA application is determined by a local planning authority, the authority shall—

(a) in writing, inform the Secretary of State of the decision;

(b) inform the public of the decision, by local advertisement, or by such other means as are reasonable in the circumstances; and

(c) make available for public inspection at the place where the appropriate register (or relevant section of that register) is kept a statement containing—

(i) the content of the decision and any conditions attached to it;

(ii) the main reasons and considerations on which the decision is based including, if relevant, information about the participation of the public;

(iii) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development; and

(iv) information regarding the right to challenge the validity of the decision and the procedures for doing so.

(2) Where an EIA application is determined by the Secretary of State or an inspector, the Secretary of State shall—

(a) notify the relevant planning authority of the decision; and

(b) provide the authority with such a statement as is mentioned in sub-paragraph (1)(c).

(3) The relevant planning authority shall, as soon as reasonably practicable after receipt of a notification under paragraph (2)(a), comply with sub-paragraphs (b) and (c) of paragraph (1) in relation to the decision so notified as if it were a decision of the authority.

PART 7

Development By a Local Planning Authority

Modifications where application by a local planning authority

25. Where the relevant planning authority is also (or would be) the applicant (whether alone or jointly with any other person), these Regulations shall apply to an EIA application (or proposed application) subject to the following modifications—

(a) subject to regulations 26(1) and (2), regulations 5 and 6 shall not apply;

(b) regulations 7 and 8 shall apply as if the reference to paragraph (4) of regulation 5 were omitted;

(c) regulation 10 shall not apply;

(d) regulations 13 and 14 shall not apply;

(e) paragraphs (1) to (3) of regulation 15 shall not apply, and regulation 15(4) shall apply to any consultation body from whom the relevant planning authority requests assistance as it applies to a body notified in accordance with regulation 15(3);

(f) save for the purposes of regulations 19(3) and (4), regulation 16 shall apply as if—

(i) for paragraph (1), there were substituted—

"(1) When a relevant planning authority making an EIA application lodge a statement, referred to as an "environmental statement" for the purposes of these Regulations, they shall—

(a) provide a copy of—

(i) that statement;

(ii) the relevant application and any plan submitted with it; and

(iii) in the case of a subsequent application, the planning permission granted for the development in respect of which the subsequent application has been made and any documents or information relating to the application,

to each consultation body;

(b) inform each consultation body that representations may be made to the relevant planning authority; and

(c) send to the Secretary of State within 14 days of lodging the statement—

(i) 1 copy of the statement;

(ii) a copy of the relevant application and of any documents submitted with the application; and

(iii) in the case of a subsequent application, the planning permission granted for the development in respect of which the subsequent application has been made and any documents or information relating to the application.";

(ii) paragraphs (2) and (3) were omitted;

(g) regulation 19 shall apply as if paragraph (2) were omitted.

Screening opinions and directions

26.—(1) An authority which is minded to make a planning application or a subsequent application in relation to which it would be the relevant planning authority may adopt a screening opinion or request the Secretary of State in writing to make a screening direction, and paragraphs

(3) and (4) of regulation 6 shall apply to such a request as they apply to a request made pursuant to regulation 5(7).

(2) A relevant planning authority which proposes to carry out development which they consider may be—

(a) development of a description specified in Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995(**a**) other than development of a description specified in article 3(12) of that Order; or

(b) development for which permission would be granted but for regulation 27(1),

may adopt a screening opinion or request the Secretary of State to make a screening direction, and paragraphs (3) and (4) of regulation 6 shall apply to such a request as they apply to a request made pursuant to regulation 5(7).

(3) A request under paragraph (1) or (2) shall be accompanied by—

(a) in the case of a planning application, the documents described in regulation 5(2);

(b) in the case of a subsequent application, the documents described in regulation 5(3).

(4) An authority making a request under paragraph (1) or (2) shall send to the Secretary of State any additional information which is requested in writing to enable the Secretary of State to make a direction.

PART 8

Restrictions of Grants of Permission

Old simplified planning zone schemes or enterprise orders

27.—(1) Any—

(a) adoption or approval of a simplified planning zone scheme(**b**);

(b) order designating an enterprise zone(**c**); or

(c) approval of a modified scheme in relation to an enterprise zone,

which has effect immediately before the commencement of these Regulations to grant planning permission shall, on and after that date, cease to have effect to grant planning permission for Schedule 1 development, and cease to have effect to grant planning permission for Schedule 2 development unless either:

(i) the relevant planning authority has adopted a screening opinion; or

(ii) the Secretary of State has made a screening direction,

to the effect that the particular proposed development is not EIA development.

(2) Paragraph (1) shall not affect the completion of any development begun before the commencement of these Regulations.

New simplified planning zone schemes or enterprise zone orders

28. No—

(a) adoption or approval of a simplified planning zone scheme;

(b) order designating an enterprise zone made; or

(c) modified scheme in relation to an enterprise zone approved,

---

(**a**) S.I. 1995/418, to which there are amendments not relevant to these Regulations.
(**b**) See section 83 and Schedule 7 to the Town and Country Planning Act 1990 (c. 8).
(**c**) See sections 88 and 89 of the Town and Country Planning Act 1990 (c. 8) and Schedule 32 to the Local Government, Planning and Land Act 1980 (c. 65).

after the commencement of these Regulations shall:

(i) grant planning permission for EIA development; or

(ii) grant planning permission for Schedule 2 development unless that grant is made subject to the prior adoption of a screening opinion or prior making of a screening direction that the particular proposed development is not EIA development.

Local development orders

29.—(1) This regulation applies in relation to Schedule 2 development for which a local planning authority propose to grant planning permission by local development order.

(2) Where this regulation applies, the local planning authority shall not make a local development order unless they have adopted a screening opinion or the Secretary of State has made a screening direction.

(3) Paragraphs (4) to (6) apply where—

(a) the local planning authority adopts a screening opinion; or

(b) the Secretary of State makes a screening direction under these Regulations,

to the effect that the development is EIA development.

(4) The local planning authority shall not make a local development order which would grant planning permission for EIA development unless—

(a) an environmental statement has been prepared in relation to that development; and

(b) the authority has first taken the environmental information into consideration, and they state in their decision that they have done so.

(5) In a case to which this regulation shall have effect these Regulations shall apply subject to the following modifications—

(a) regulations 3, 5 to 12, 15, 18 and 19 shall not apply;

(b) in regulation 4—

(i) paragraph (2)(a) shall not apply;

(ii) in paragraph (2)(b) for "relevant" substitute "local";

(iii) in paragraph (4)(b) for "relevant" substitute "local"; and

(iv) in paragraph (10) for "relevant" substitute "local";

(c) for regulation 13(1) substitute—

"(1) Where a proposed local development order is EIA development, the local planning authority shall state in writing its opinion as to the information to be provided in the environmental statement ("a scoping opinion")."

(d) in regulation 14(1)(a) and (3) for "relevant" substitute "local";

(e) for regulation 16 substitute—

"**Procedure where an environmental statement is prepared in relation to a local development order**

16.—(1) Where a statement, referred to as an "environmental statement" for the purposes of these Regulations, has been prepared in relation to EIA development for which a local planning authority proposes to grant planning permission by a local development order, the local planning authority shall—

(a) send to the Secretary of State 1 copy of the statement;

(b) send a copy of the statement to the consultation bodies and inform them that they may make representations; and

(c) notify any particular person of whom the authority are aware, who is likely to be affected by, or has an interest in, the application, who is unlikely to become aware

of it by means of a site notice or by local advertisement, of an address in the locality in which the land is situated where a copy of the statement may be obtained and the address to which representations may be sent.

(2) The local planning authority shall not make the local development order until the expiry of 14 days from the last date on which a copy of the statement was served in accordance with this regulation.";

(f) in regulation 17—

(i) omit paragraph (1);

(ii) for paragraph (2) substitute—

"(2) The local planning authority shall publish in a local newspaper circulating in the locality in which the land is situated a notice stating—

(a) the name and address of the local planning authority;

(b) the address or location and the nature of the development referred to in the proposed local development order;

(c) that a copy of the draft local development order and of any plan or other documents accompanying it together with a copy of the environmental statement may be inspected by members of the public at all reasonable hours;

(d) an address in the locality in which the land is situated at which those documents may be inspected, and the latest date on which they will be available for inspection (being a date not less than 21 days later than the date on which the notice is published);

(e) an address (whether or not the same as that given under sub-paragraph (d)) in the locality in which the land is situated at which copies of the statement may be obtained;

(f) that copies may be obtained there so long as stocks last;

(g) if a charge is to be made for a copy, the amount of the charge; and

(h) that any person wishing to make representations about the local development order should make them in writing, before the date specified in accordance with sub-paragraph (d), to the local planning authority.";

(iii) in paragraph (4), for "applicant" substitute "local planning authority".

(iv) omit paragraphs (6) to (9);

(g) for regulation 20 substitute—

"Availability of copies of environmental statements

20. The local planning authority shall ensure that a reasonable number of copies of the statement referred to as the environmental statement prepared in relation to EIA development for which the authority propose to grant planning permission by a local development order are available at—

(a) their principal office during normal office hours; and

(b) at such other places within their area as they consider appropriate.";

(h) in regulation 22—

(i) for paragraph (1) substitute—

"(1) Where an environmental statement has been submitted and the local planning authority is of the opinion that the statement should contain additional information in order to be an environmental statement, the local planning authority shall ensure that additional information is provided and such information provided is referred to in these Regulations as "further information"";

(ii) for paragraph (3) substitute—

"(3) The local planning authority shall publish in a local newspaper circulating in the locality in which the land is situated a notice stating—

(a) the name and address of the local planning authority;

(b) the address or location and the nature of the development referred to in the proposed local development order;

(c) that further information is available in relation to an environmental statement which has already been provided;

(d) that a copy of the further information may be inspected by members of the public at all reasonable hours;

(e) an address in the locality in which the land is situated at which the further information may be inspected, and the latest date on which it will be available for inspection (being a date not less than 21 days later than the date on which the notice is published);

(f) an address (whether or not the same as that given under sub-paragraph (e)) in the locality in which the land is situated at which copies of the further information may be obtained;

(g) that copies may be obtained there so long as stocks last;

(h) if a charge is to be made for a copy, the amount of the charge;

(i) that any person wishing to make representations about the further information should make them in writing, before the date specified in accordance with sub-paragraph (e), to the local planning authority;

(j) the address to which representations should be sent.";

(iii) for paragraph (4) substitute—

"(4) The local planning authority shall send a copy of the further information to each person to whom, in accordance with the Regulations, the statement to which it relates was sent and to the Secretary of State.";

(iv) omit paragraphs (5) and (6);

(v) for paragraph (7) substitute—

"(7) Where information is provided under paragraph (1) the local planning authority shall not make the local development order before the expiry of 14 days after the date on which the further information was sent to all persons to whom the statement which it relates was sent or the expiry of 21 days after the date that notice of it was published in a local newspaper, whichever is the later.";

(vi) in paragraph (8)—

(aa) for "The applicant or appellant who provides further information or any other information in accordance with paragraph (1)" substitute "The local planning authority"; and

(bb) after "number of copies of the" insert "further or other";

(vii) for paragraph (10) substitute—

"(10) The local planning authority may in writing require the applicant or appellant to provide such evidence as they may reasonably call for to verify any information in the environmental statement.";

(i) in regulation 23—

(i) for paragraph (1) substitute—

"(1) Where particulars of a draft local development order are placed on Part 3 of the register, the local planning authority shall take steps to secure that there is also placed on that Part a copy of any relevant—

(a) scoping opinion;

(b) screening opinion;

(c) screening direction;

(d) direction under regulation 4(4);

(e) the statement referred to as the environmental statement including any further information;

(f) statement of reasons accompanying any of the above.";

(ii) omit paragraph (2);

(j) in regulation 24—

(i) in paragraph (1) for "Where an EIA application is determined by a local planning authority" substitute "Where a local planning authority make a local development order granting permission for development which constitutes EIA development"; and

(ii) omit paragraphs (2) and (3); and

(k) in regulation 53—

(i) in paragraph (1) for sub-paragraph (a) substitute—

"(a) it comes to the attention of the Secretary of State that EIA development proposed to be carried out in England for which a local planning authority propose to grant planning permission by a local development order is likely to have significant effects on the environment in another EEA state; or"; and

(ii) in paragraphs (3) and (6) for "application" substitute "proposed local development order".

(6) In paragraphs (6)(a), (6)(b)(i), and (c)(i) and paragraph (10) of article 34 of the Order after "local development order" insert ", the environmental statement" in each place where the words occur.

PART 9

Unauthorised Development

Interpretation

30. In this Part, "unauthorised EIA development" means EIA development which is the subject of an enforcement notice under section 172(**a**).

Prohibition on the grant of planning permission for unauthorised EIA development

31. The Secretary of State or an inspector shall not grant planning permission or subsequent consent under section 177(1)(**b**) (grant or modification of planning permission on appeals against enforcement notices) in respect of unauthorised EIA development unless the Secretary of State or inspector has first taken the environmental information into consideration, and shall state in the decision that they have done so.

Screening opinions of the local planning authority

32.—(1) Where it appears to the local planning authority by whom or on whose behalf an enforcement notice is to be issued that the matters constituting the breach of planning control comprise or include Schedule 1 development or Schedule 2 development they shall, before the enforcement notice is issued, adopt a screening opinion.

(2) Where it appears to the local planning authority by whom or on whose behalf an enforcement notice is to be issued that the matters constituting the breach of planning control

(**a**) Section 172 was substituted by the Planning and Compensation Act 1991 (c. 34), section 5.
(**b**) Section 177 was amended by the Planning and Compensation Act 1991 (c. 34), sections 6(3) and 32, and Schedule 7 paragraph 24.

comprise or include EIA development they shall serve with a copy of the enforcement notice a notice ("regulation 32 notice") which shall—

(a) include the screening opinion required by paragraph (1) and the written statement required by regulation 4(7); and

(b) require a person who gives notice of an appeal under section 174(**a**) to submit to the Secretary of State with the notice 2 copies of an environmental statement relating to that EIA development.

(3) The authority by whom a regulation 32 notice has been served shall send a copy of it to—

(a) the Secretary of State;

(b) the consultation bodies; and

(c) any particular person of whom the authority is aware, who is likely to be affected by, or has an interest in, the regulation 32 notice.

(4) Where an authority provide the Secretary of State with a copy of a regulation 32 notice they shall include with it a list of the other persons to whom a copy of the notice has been or is to be sent.

Screening directions of the Secretary of State

33. Any person on whom a regulation 32 notice is served may, within 3 weeks beginning with the date the notice is served, apply to the Secretary of State for a screening direction and the following shall apply—

(a) an application under this regulation shall be accompanied by—

(i) a copy of the regulation 32 notice;

(ii) a copy of the enforcement notice which accompanied it; and

(iii) such other information or representations as the applicant may wish to provide or make;

(b) at the same time as applying to the Secretary of State, the applicant shall send to the authority by whom the regulation 32 notice was served, a copy of the application under this regulation and of any information or representations provided or made in accordance with sub-paragraph (a)(iii);

(c) if the Secretary of State considers that the information provided in accordance with sub-paragraph (a) is insufficient to make a direction, the Secretary of State shall notify the applicant and the authority of the matters in respect of which additional information is required; and the information so requested shall be provided by the applicant within such reasonable period as may be specified in the notice;

(d) the Secretary of State shall send a copy of the direction to the applicant;

(e) without prejudice to sub-paragraph (d), where the Secretary of State directs that the matters which are alleged to constitute the breach of planning control do not comprise or include EIA development, the Secretary of State shall send a copy of the direction to every person to whom a copy of the regulation 32 notice was sent.

Provision of information

34.—(1) The relevant planning authority and any person, other than the Secretary of State, to whom a copy of the regulation 32 notice has been sent ("the consultee") shall, if requested by the person on whom the regulation 32 notice was served, enter into consultation with that person to determine whether the consultee has in their possession any information which that person or the

(**a**) Section 174 was amended by the Planning and Compensation Act 1991 (c. 34), section 6(1) and Schedule 7, paragraph 22, and by S.I 2003/956. See also section 177(5) which was amended by the Planning and Compensation Act 1991, Schedule 7, paragraph 24.

consultee consider relevant to the preparation of an environmental statement and, if they have, the consultee shall make any such information available to that person.

(2) Regulation 15(5) shall apply to information under paragraph (1) as it applies to any information falling within regulation 15(4).

Appeal to the Secretary of State without a screening opinion or screening direction

35.—(1) Where on consideration of an appeal under section 174 it appears to the Secretary of State that the matters which are alleged to constitute the breach of planning control comprise or include Schedule 1 development or Schedule 2 development, the Secretary of State shall, before any notice is served pursuant to regulation 36, make a screening direction.

(2) Where an inspector is dealing with an appeal under section 174 and a question arises as to whether the matters which are alleged to constitute the breach of planning control comprise or include Schedule 1 development or Schedule 2 development, the inspector shall refer that question to the Secretary of State.

(3) Before receiving a screening direction the inspector shall not determine the application which is deemed to have been made by virtue of the appeal under section 174 ("the deemed application") except to refuse that application.

(4) Where a question is referred under paragraph (2), the Secretary of State shall make a screening direction within 3 weeks beginning with the date on which the question was referred or such longer period as may be reasonably required.

(5) The Secretary of State shall send a copy of any screening direction made pursuant to paragraph (4) to the inspector.

(6) If the Secretary of State considers that sufficient information to make a screening direction has not been provided, the Secretary of State shall give notice in writing to the applicant and the authority by whom the regulation 32 notice was served of the matters in respect of which additional information is required; and the information so requested shall be provided by the applicant within such reasonable period as may be specified in the notice.

(7) If an appellant to whom notice has been given under paragraph (6) fails to comply with the requirements of that notice—

(a) the application which is deemed to have been made by virtue of the appeal made under section 174; and

(b) the appeal in so far as it is brought under the ground mentioned in section 174(2)(a) ("the ground (a) appeal"),

shall lapse at the end of the period specified in the notice.

Appeal to the Secretary of State without an environmental statement

36. Where the Secretary of State or an inspector is considering an appeal under section 174 and the matters which are alleged to constitute the breach of planning control comprise or include unauthorised EIA development, and the documents submitted for the purposes of the appeal do not include a statement referred to by the appellant as an environmental statement for the purposes of these Regulations, the following procedure shall apply—

(a) the Secretary of State shall, subject to sub-paragraph (b), within the period of 3 weeks beginning with the day on which the appeal is received, or such longer period as may be reasonably required, notify the appellant in writing of the requirements of sub-paragraph (c) below;

(b) notice need not be given under sub-paragraph (a) where the appellant has submitted an environmental statement to the Secretary of State for the purposes of an appeal under section 78 (right to appeal against planning decisions and failure to take such decisions) which—

(i) relates to the development to which the appeal under section 174 relates; and

(ii) is to be determined at the same time as that appeal under section 174;

and that statement, any further information, any other information and the representations (if any) made in relation to it shall be treated as the environmental information for the purpose of paragraph (2) of this regulation;

(c) the appellant shall, within the period specified in the notice or such longer period as the Secretary of State may allow, submit to the Secretary of State 2 copies of an environmental statement relating to the unauthorised EIA development in question;

(d) the Secretary of State shall send to the relevant planning authority a copy of any notice sent to the appellant under sub-paragraph (a);

(e) if an appellant to whom notice has been given under sub-paragraph (a) fails to comply with the requirements of sub-paragraph (c), the deemed application and the ground (a) appeal (if any) shall lapse at the end of the period specified or allowed (as the case may be);

(f) as soon as reasonably practicable after the occurrence of the event mentioned in sub-paragraph (e), the Secretary of State shall notify the appellant and the local planning authority in writing that the deemed application and the ground (a) appeal (if any) have lapsed.

Procedure where an environmental statement is submitted to the Secretary of State

37. Where the Secretary of State receives (otherwise than as mentioned in regulation 36(b)) an environmental statement in connection with an enforcement appeal, the Secretary of State shall—

(a) send a copy of that statement to the relevant planning authority, advise the authority that the statement will be taken into consideration in determining the deemed application and the ground (a) appeal (if any), and inform them that they may make representations; and

(b) notify the persons to whom a copy of the relevant regulation 32 notice was sent that the statement will be taken into consideration in determining the deemed application and the ground (a) appeal (if any), and inform them that they may make representations and that, if they wish to receive a copy of the statement or any part of it, they must notify the Secretary of State of their requirements within 7 days of the receipt of the Secretary of State's notice; and

(c) respond to requirements notified in accordance with sub-paragraph (b) by providing a copy of the statement or of the part requested (as the case may be).

Further information and evidence respecting environmental statements

38. Regulations 22(1) and 22(10) shall apply to statements provided in accordance with this regulation with the following modifications—

(a) where the Secretary of State or an inspector notifies the appellant under regulation 22(1), the appellant shall provide the further information within such period as the Secretary of State or the inspector may specify in the notice or such longer period as the Secretary of State or the inspector may allow;

(b) if an appellant to whom a notice has been given under sub-paragraph (a) fails to provide the further information within the period specified or allowed (as the case may be), the deemed application and the ground (a) appeal (if any) shall lapse at the end of that period.

Publicity for environmental statements or further information

39.—(1) Where an authority receive a copy of a statement or further information by virtue of regulation 37(a) or any other information they shall publish by local advertisement a notice stating—

(a) the name of the appellant and that the enforcement notice has been appealed to the Secretary of State;

(b) the address or location of the land to which the notice relates and the nature of the development;

(c) sufficient information to enable any planning permission for the development to be identified;

(d) that a copy of the statement, further information or any other information and of any planning permission may be inspected by members of the public at all reasonable hours;

(e) an address in the locality in which the land is situated at which the statement or further information or any other information may be inspected, and the latest date on which it will be available for inspection (being a date not less than 21 days later than the date on which the notice is published);

(f) that any person wishing to make representations about any matter dealt with in the statement or further information or any other information should make them in writing, no later than 14 days after the date named in accordance with sub-paragraph (e), to the Secretary of State; and

(g) the address to which any such representations should be sent.

(2) The authority shall as soon as practicable after publication of a notice in accordance with paragraph (1) send to the Secretary of State a copy of the notice certified by or on behalf of the authority as having been published by local advertisement on a date specified in the certificate.

(3) Neither the Secretary of State receiving a certificate under paragraph (2) nor an inspector shall determine the deemed application or the ground (a) appeal in respect of the development to which the certificate relates until the expiry of 14 days from the date stated in the published notice as the last date on which the statement or further information was available for inspection.

Public inspection of documents

40.—(1) The relevant planning authority shall make available for public inspection at all reasonable hours at the place where the appropriate register (or relevant part of that register) is kept a copy of—

(a) every regulation 32 notice given by the authority;

(b) every notice received by the authority under regulation 36(d); and

(c) every statement and all further information received by the authority under regulation 37(a);

and copies of those documents shall remain so available for a period of 2 years or until they are entered in Part 2 of the register in accordance with paragraph (2), whichever is the sooner.

(2) Where particulars of any planning permission granted by the Secretary of State or an inspector under section 177 are entered in Part 2 of the register(**a**), the relevant planning authority shall take steps to secure that that Part also contains a copy of any of the documents referred to in paragraph (1) as are relevant to the development for which planning permission has been granted.

(3) The provisions of regulations 24(2) and 24(3) apply to a deemed application and a grant of planning permission under section 177 as they apply to an application for and grant of planning permission under Part 3 of the Act.

Significant transboundary effects

41. Regulation 53 shall apply to unauthorised EIA development as if—

(a) for regulation 53(1)(a) there were substituted—

"(a) on consideration of an appeal under section 174 the Secretary of State is of the opinion that the matters which are alleged to constitute the breach of planning

(**a**) See section 177(8) Town and Country Planning Act 1990.

control comprise or include EIA development and that the development has or is likely to have significant effects on the environment in another EEA State; or"

(b) in regulation 53(3)(a) the words "a copy of the application concerned" were replaced by the words "a description of the development concerned";

(c) in regulation 53(3)(c) the words "to which that application relates" were omitted; and

(d) in regulation 53(6) the word "application" was replaced by the word "appeal".

PART 10

ROMP Applications

General application of the Regulations to ROMP applications

42. These Regulations shall apply to—

(a) a ROMP application as they apply to an application for planning permission;

(b) a ROMP subsequent application as they apply to a subsequent application;

(c) ROMP development as they apply to development in respect of which an application for planning permission is, has been, or is to be made;

(d) a relevant mineral planning authority as they apply to a relevant planning authority;

(e) a person making a ROMP application as they apply to an applicant for planning permission;

(f) a person making a ROMP subsequent application as they apply to a person making a subsequent application;

(g) the determination of a ROMP application as they apply to the granting of a planning permission; and

(h) the granting of ROMP subsequent consent as they apply to the granting of subsequent consent,

subject to the modifications and additions set out in this Part.

Modification of provisions on prohibition of granting planning permission or subsequent consent

43. In regulation 3(1) (prohibition on granting planning permission or subsequent consent without consideration of environmental information)—

(a) in sub-paragraph (1)(b) for "3 or 4 (applications for planning permission)" substitute "11 (other consents)";

(b) in paragraph (2), in the case of a ROMP application, for the words "determined in accordance with article 29(2) (time periods for decision) of the Order", substitute " the date on which a ROMP application has been made which complies with the provisions of paragraphs 2(3) to (5) and 4(1) of Schedule 2 to the 1991 Act, 9(2) of Schedule 13 to the 1995 Act, or 6(2) of Schedule 14 to the 1995 Act".

Modification of provisions on application to local planning authority without an environmental statement

44. In the case of a ROMP application, in regulation 10(4) (application made to a local planning authority without an environmental statement)—

(a) for "3" substitute "6"; and

(b) after "the notification" insert ", or within such other period as may be agreed with the authority in writing".

Disapplication of Regulations and modifications of provisions on application referred to or appealed to the Secretary of State without an environmental statement

45.—(1) In the case of a ROMP application, regulations 10(6) and (8), 11(6) and (7), 12(7) and (8), 25 and 61 shall not apply.

(2) In the case of a ROMP application, in regulation 11(5) (application referred to the Secretary of State without an environmental statement) and in regulation 12(6) (appeal to the Secretary of State without an environmental statement)—

(a) for "3" substitute "6";

(b) after "the notification" insert ", or within such other period as may be agreed with the Secretary of State in writing,".

Substitution of references to section 78 right of appeal and modification of provisions on appeal to the Secretary of State without an environmental statement

46.—(1) In the case of a ROMP application, in regulations 12(1) and 18(b), for the references to "section 78 (right to appeal against planning decisions and failure to take such decisions)" substitute—

"paragraph 5(2) of Schedule 2 to the 1991 Act, paragraph 11(1) of Schedule 13 to the 1995 Act or paragraph 9(1) of Schedule 14 to the 1995 Act (right of appeal)".

(2) In the case of a ROMP application, in regulation 12(2) (appeal to the Secretary of State without an environmental statement) omit the words ", except by refusing planning permission or subsequent consent,".

Modification of provisions on preparation, publicity and procedures on submission of environmental statements

47.—(1) In the case of a ROMP application, in regulations 13(9) and 14(6) for the words "an application for planning permission or a subsequent application for" substitute "a ROMP application which relates to another planning permission which authorises".

(2) In the case of a ROMP application, in regulation 16 (procedure where an environmental statement is submitted to a local planning authority) for paragraph (4) substitute—

"(3A) Where an applicant submits an environmental statement to the authority in accordance with paragraph (1), the provisions of article 13 of and Schedule 3 to the Order (publicity for applications for planning permission) shall apply to a ROMP application under paragraph—

(a) 2(2) of Schedule 2 to the 1991 Act, and

(b) 6(1) of Schedule 14 to the 1995 Act(**a**),

as they apply to a planning application falling within paragraph 13(2) of the Order except that for the references in the notice in Schedule 3 to the Order to "planning permission" there shall be substituted "determination of the conditions to which a planning permission is to be subject" and that notice shall refer to the relevant provisions of the 1991 or 1995 Act pursuant to which the application is made."

(3) In the case of a ROMP application, in regulation 17 (publicity where an environmental statement is submitted after the planning application)—

(a) in paragraph (2)(a) for the words "that an application is being made for planning permission or subsequent consent" substitute—

"that an application is being made for determination of the conditions to which a planning permission is to be subject, the relevant provisions of the 1991 or 1995 Act pursuant to which the application is made";

(**a**) The provisions of the Order are not applied to applications under paragraph 9(1) of Schedule 13 to the 1995 Act as they are applied by paragraph 9(5) of Schedule 13 to the 1995 Act.

(b) for paragraph (7) substitute—

"(7) Where an applicant indicates that it is proposed to provide such a statement and in such circumstances as are mentioned in paragraph (1), the relevant planning authority, the Secretary of State or the inspector, as the case may be, shall suspend consideration of the application or appeal until the date specified by the authority or the Secretary of State for submission of the environmental statement and compliance with paragraph (6); and shall not determine it during the period of 21 days beginning with the date of receipt of the statement and the other documents mentioned in paragraph (6)."

(4) In the case of a ROMP application, in regulation 18 (provision of copies of environmental statements and further information for the Secretary of State on referral or appeal), in paragraph (a) for "section 77" substitute "paragraph 7(1) of Schedule 2 to the 1991 Act, paragraph 13(1) of Schedule 13 to the 1995 Act or paragraph 8(1) of Schedule 14 to the 1995 Act".

(5) In the case of a ROMP application, in regulation 20 (availability of copies of environmental statements) after "the Order" insert "(as applied by regulation 16(4) or by paragraph 9(5) of Schedule 13 to the 1995 Act),".

(6) In the case of a ROMP application, in regulation 22 (further information and evidence respecting environmental statements)—

(a) in paragraph (3)(a) for the words "applicant for planning permission or subsequent consent or the appellant (as the case may be)" substitute—

"person who has applied for or who has appealed in relation to the determination of the conditions to which the planning permission is to be subject, the relevant provisions of the 1991 or 1995 Act pursuant to which the application is made";

(b) in paragraph (7) after the words "application or appeal" insert "until the date they specify for submission of the further information".

Modification of provisions on application to the High Court and giving of directions

48.—(1) In the case of a ROMP application, for regulation 59 (application to the High Court) substitute—

"Application to the High Court

59. For the purposes of Part 12 of the Act (validity of certain decisions), the reference in section 288, as applied by paragraph 9(3) of Schedule 2 to the 1991 Act, paragraph 16(4) of Schedule 13 to the 1995 Act or paragraph 9(4) of Schedule 14 to the 1995 Act, to action of the Secretary of State which is not within the powers of the Act shall be taken to extend to the determination of a ROMP application by the Secretary of State in contravention of regulation 3."

(2) The direction making power in article 25(2) of the Order shall apply to ROMP development as it applies to development in respect of which a planning application is made.

Suspension of minerals development

49.—(1) Where the authority, the Secretary of State or an inspector is dealing with a ROMP application or an appeal arising from a ROMP application and notifies the applicant or appellant, as the case may be, that—

(a) the submission of an environmental statement is required under regulation 10(1), 11(2) or 12(4) then such notification shall specify the period within which the environmental statement and compliance with regulation 17(6) is required; or

(b) a statement should contain additional information under regulation 22(1) then such notification shall specify the period within which that information is provided.

(2) Subject to paragraph (3), the planning permission to which the ROMP application relates shall not authorise any minerals development (unless the Secretary of State has made a screening direction to the effect that ROMP development is not EIA development) if the applicant or the appellant does not—

(a) write to the authority or Secretary of State within the 6 week or other period agreed pursuant to regulation 10(4), 11(5) or 12(6);

(b) submit an environmental statement and comply with regulation 17(6) within the period specified by the authority or the Secretary of State in accordance with paragraph (16) or within such extended period as is agreed in writing;

(c) provide additional information within the period specified by the authority, the Secretary of State or an inspector in accordance with paragraph (16) or within such extended period as is agreed in writing; or

(d) where a notification under regulation 5(4), 6(3), 13(3) or 14(3) has been received, provide the additional information requested within 3 weeks beginning with the date of the notification, or within such extended period as may be agreed in writing with the authority or Secretary of State, as the case may be.

(3) Where paragraph (2) applies, the planning permission shall not authorise any minerals development from the end of—

(a) the relevant 6 week or other period agreed in writing as referred to in sub-paragraph (2)(a); and

(b) the period specified or agreed in writing as referred to in sub-paragraphs (2)(b), (c), and (d),

until the applicant has complied with all of the provisions referred to in paragraph (2) which are relevant to the application or appeal in question.

(4) Particulars of the suspension of minerals development and the date when that suspension ends must be entered in the appropriate part of the register as soon as reasonably practicable.

(5) Paragraph (2) shall not affect any minerals development carried out under the planning permission before the date of suspension of minerals development.

(6) For the purposes of paragraphs (2) to (5) "minerals development" means development consisting of the winning and working of minerals, or involving the depositing of mineral waste.

Determination of conditions and right of appeal on non-determination

50.—(1) Where it falls to—

(a) a mineral planning authority to determine a Schedule 1 or a Schedule 2 application, paragraph 2(6)(b) of Schedule 2 to the 1991 Act, paragraph 9(9) of Schedule 13 to the 1995 Act or paragraph 6(8) of Schedule 14 to the 1995 Act shall not have effect to treat the authority as having determined the conditions to which any relevant planning permission is to be subject unless either the mineral planning authority has adopted a screening opinion or the Secretary of State has made a screening direction to the effect that the ROMP development in question is not EIA development;

(b) a mineral planning authority or the Secretary of State to determine a Schedule 1 or a Schedule 2 application—

(i) section 69 (register of applications, etc), and any provisions of the Order made by virtue of that section, shall have effect with any necessary amendments as if references to applications for planning permission included ROMP applications under paragraph 9(1) of Schedule 13 to the 1995 Act and paragraph 6(1) of Schedule 14 to the 1995 Act(**a**); and

(**a**) These provisions are not applied to applications under paragraph 2(2) of Schedule 2 to the 1991 Act as they are applied by paragraph 9 of Schedule 2 to the 1991 Act.

(ii) where the relevant mineral planning authority is not the authority required to keep the register, the relevant mineral planning authority must provide the authority required to keep it with such information and documents as that authority requires to comply with section 69 as applied by sub-paragraph (i), with regulation 23 as applied by regulation 42, and with regulation 49(4).

(2) Where it falls to the mineral planning authority or the Secretary of State to determine an EIA application which is made under paragraph 2(2) of Schedule 2 to the 1991 Act, paragraph 4(4) of that Schedule shall not apply.

(3) Where it falls to the mineral planning authority to determine an EIA application, the authority shall give written notice of their determination of the ROMP application within 16 weeks beginning with the date of receipt by the authority of the ROMP application or such extended period as may be agreed in writing between the applicant and the authority.

(4) For the purposes of paragraph (3) a ROMP application is received by the authority when it receives—

(a) a document referred to by the applicant as an environmental statement for the purposes of these Regulations;

(b) any documents required to accompany that statement; and

(c) any additional information which the authority has notified the applicant that the environmental statement should contain.

(5) Where paragraph (1)(a) applies—

(a) paragraph 5(2) of Schedule 2 to the 1991 Act, paragraph 11(1) of Schedule 13 to the 1995 Act and paragraph 9(1) of Schedule 14 to the 1995 Act (right of appeal) shall have effect as if there were also a right of appeal to the Secretary of State where the mineral planning authority have not given written notice of their determination of the ROMP application in accordance with paragraph (3); and

(b) paragraph 5(5) of Schedule 2 to the 1991 Act, paragraph 11(2) of Schedule 13 to the 1995 Act and paragraph 9(2) of Schedule 14 to the 1995 Act (right of appeal) shall have effect as if they also provided for notice of appeal to be made within 6 months from the expiry of the 16 week or other period agreed pursuant to paragraph (3).

(6) In determining for the purposes of paragraphs—

(a) 2(6)(b) of Schedule 2 to the 1991 Act, 9(9) of Schedule 13 to the 1995 Act and 6(8) of Schedule 14 to the 1995 Act (determination of conditions); or

(b) paragraph 5(5) of Schedule 2 to the 1991 Act, paragraph 11(2) of Schedule 13 to the 1995 Act and paragraph 9(2) of Schedule 14 to the 1995 Act (right of appeal) as applied by paragraph (26)(b),

the time which has elapsed without the mineral planning authority giving the applicant written notice of their determination in a case where the authority have notified an applicant in accordance with regulation 10(1) that the submission of an environmental statement is required and the Secretary of State has given a screening direction in relation to the ROMP development in question no account shall be taken of any period before the issue of the direction.

ROMP application by a mineral planning authority

51.—(1) Where a mineral planning authority proposes to make or makes a ROMP application to the Secretary of State under regulation 11 (other consents) of the General Regulations which is a Schedule 1 or a Schedule 2 application (or proposed application), these Regulations shall apply to that application or proposed application as they apply to a ROMP application referred to the Secretary of State under paragraph 7(1) of Schedule 2 to the 1991 Act, paragraph 13(1) of Schedule 13 to the 1995 Act or paragraph 8(1) of Schedule 14 to the 1995 Act (reference of applications to the Secretary of State) subject to the following modifications—

(a) subject to paragraph (2) below, regulations 5 to 10, 12, 13, 14, 16 (save for the purposes of regulations 19(3) and (4)), 18 and 24(1) shall not apply;

(b) in regulation 4 (general provisions relating to screening), paragraphs (4)(b) and (10) shall not apply;

(c) in regulation 11(2) (application referred to the Secretary of State without an environmental statement), omit the words "and shall send a copy of that notification to the relevant planning authority";

(d) in regulation 15 (procedure to facilitate preparation of environmental statements)—

(i) in sub-paragraph (3)(b) for the words "10(4)(a), or 11(5) or 12(6)" substitute "11(5)";

(ii) in paragraph (4) omit the words "the relevant planning authority and" and "authority or";

(e) in regulation 17(2) (publicity where an environmental statement is submitted after the planning application)—

(i) in sub-paragraph (a) omit the words "and the name and address of the relevant planning authority";

(ii) for sub-paragraph (b) substitute—

"(b) the date on which the application was made and that it has been made to the Secretary of State under regulation 11 of the General Regulations;";

(f) in regulation 19 (procedure where an environmental statement is submitted to the Secretary of State), in paragraph (2) omit the words "who shall send 1 copy to the relevant planning authority";

(g) in regulation 22(3) (further information and evidence respecting environmental statements)—

(i) in sub-paragraph (a) omit the words "and the name and address of the relevant planning authority";

(ii) for sub-paragraph (b) substitute—

"(b) the date on which the application was made and that it has been made to the Secretary of State under regulation 11 of the General Regulations;";

(h) regulations 23 (availability of opinions, directions etc for inspection) and 24(2) (duties to inform the public and the Secretary of State of final decisions) shall apply as if the references to a "relevant planning authority" were references to a mineral planning authority.

(2) A mineral planning authority which is minded to make a ROMP application to the Secretary of State under regulation 11 of the General Regulations may request the Secretary of State in writing to make a screening direction, and paragraphs (3) and (4) of regulation 6 shall apply to such a request as they apply to a request made pursuant to regulation 5(7) except that in paragraph (3) the words ", and may request the relevant planning authority to provide such information as they can on any of those points" shall be omitted.

(3) A request under paragraph (2) shall be accompanied by—

(a) a plan sufficient to identify the land;

(b) a brief description of the nature and purpose of the ROMP development and of its possible effects on the environment; and

(c) such other information as the authority may wish to provide or make.

(4) An authority making a request under paragraph (2) shall send to the Secretary of State any additional information he may request in writing to enable him to make a direction.

ROMP applications: duty to make a prohibition order after two years suspension of permission

52.—(1) This regulation applies if, in relation to a minerals development—

(a) a period of 2 years beginning with the suspension date has expired, and

(b) the steps specified in regulation 49(2) have yet to be taken.

(2) The "suspension date" is the date on which the suspension of minerals development (within the meaning of regulation 49(3)) begins.

(3) Paragraph 3 of Schedule 9 to the Act(**a**) (prohibition of resumption of mineral working) has effect in relation to any part of a site as it has effect in relation to the whole site.

(4) Sub-paragraph (1) of that paragraph has effect as if for the words from "the mineral planning authority may by order" to the end there were substituted—

"the mineral planning authority—

(i) must by order prohibit the resumption of the winning and working or the depositing; and

(ii) may in the order impose, in relation to the site, any such requirement as is specified in sub-paragraph (3)."

(5) In sub-paragraphs (2)(a) and (b) of that paragraph, references to winning and working or depositing are to be read as references to winning and working or depositing for which permission is not suspended by virtue of regulation 49(3).

(6) Paragraph 4(7) of Schedule 9 to the Act has effect as if for "have effect" there were substituted "authorise that development".

PART 11

Development with Significant Transboundary Effects

Development in England likely to have significant effects in another EEA State

53.—(1) Where—

(a) it comes to the attention of the Secretary of State that development proposed to be carried out in England is the subject of an EIA application and is likely to have significant effects on the environment in another EEA State; or

(b) another EEA State likely to be significantly affected by such development so requests,

the Secretary of State shall—

(i) send to the EEA State as soon as possible and no later than their date of publication in The London Gazette referred to in sub-paragraph (ii) below, the particulars mentioned in paragraph (2) and, if relevant, the information referred to in paragraph (3); and

(ii) publish the information in sub-paragraph (i) above in a notice placed in The London Gazette indicating the address where additional information is available; and

(iii) give the EEA State a reasonable time in which to indicate whether it wishes to participate in the procedure for which these Regulations provide.

(2) The particulars referred to in paragraph (1)(b)(i) are—

(a) a description of the development, together with any available information on its possible significant effect on the environment in another Member State; and

(b) information on the nature of the decision which may be taken.

(3) Where a EEA State indicates, in accordance with paragraph (1)(b)(iii), that it wishes to participate in the procedure for which these Regulations provide, the Secretary of State shall as soon as possible send to that EEA State the following information—

(a) a copy of the application concerned;

(b) a copy of any planning permission relating to the development;

(**a**) Paragraph 3 was amended by the Planning and Compensation Act 1991 (c. 34), Schedule 1, paragraph 15(6).

(c) a copy of any environmental statement in respect of the development to which that application relates; and

(d) relevant information regarding the procedure under these Regulations,

but only to the extent that such information has not been provided to the EEA State earlier in accordance with paragraph (1)(b)(i).

(4) The Secretary of State shall also—

(a) arrange for the particulars and information referred to in paragraphs (2) and (3) and any further information and any other information to be made available, within a reasonable time, to the authorities referred to in Article 6(1) of the Directive and the public concerned in the territory of the EEA State likely to be significantly affected; and

(b) ensure that those authorities and the public concerned are given an opportunity, before planning permission for the development is granted, to forward to the Secretary of State, within a reasonable time, their opinion on the information supplied.

(5) The Secretary of State shall in accordance with Article 7(4) of the Directive—

(a) enter into consultations with the EEA State concerned regarding, inter alia, the potential significant effects of the development on the environment of that EEA State and the measures envisaged to reduce or eliminate such effects; and

(b) determine in agreement with the other EEA State a reasonable period of time for the duration of the consultation period.

(6) Where a EEA State has been consulted in accordance with paragraph (5), on the determination of the application concerned the Secretary of State shall inform the EEA State of the decision and shall forward to it a statement of—

(a) the content of the decision and any conditions attached to it;

(b) the main reasons and considerations on which the decision is based including, if relevant, information about the participation of the public; and

(c) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development.

Projects in another EEA State likely to have significant transboundary effects

54.—(1) Where the Secretary of State receives from another EEA State, pursuant to Article 7(1) or 7(2) of the Directive, information which that EEA State has gathered from the developer of a proposed project in that EEA State which is likely to have significant effects on the environment in England, the Secretary of State shall, in accordance with Article 7(4) of the Directive—

(a) enter into consultations with that EEA State regarding the potential significant effects of the proposed project on the environment in England and the measures envisaged to reduce or eliminate such effects; and

(b) determine in agreement with that EEA State a reasonable period, before development consent for the project is granted, during which members of the public in England may submit to the competent authority in that EEA State representations pursuant to Article 7(3)(b) of the Directive.

(2) The Secretary of State shall also—

(a) arrange for the information referred to in paragraph (1) to be made available, within a reasonable time, both to the authorities in England which are likely to be concerned by the project by reason of their specific environmental responsibilities, and to the public concerned in England;

(b) ensure that those authorities and the public concerned in England are given an opportunity, before development consent for the project is granted, to forward to the competent authority in the relevant EEA State, within a reasonable time, their opinion on the information supplied; and

(c) so far as such information has been received by the Secretary of State, notify those authorities and the public concerned of the content of any decision of the competent authority of the relevant EEA State; and in particular—

(i) any conditions attached to it;

(ii) the main reasons and considerations on which the decision was based including, if relevant, information about the participation of the public; and

(iii) a description of the main measures to avoid, reduce and, if possible, offset any major adverse effects that have been identified.

PART 12

Projects serving national defence purposes

Projects serving national defence purposes in Scotland

55.—(1) If a development comprises or forms part of a project serving national defence purposes and in the opinion of the Secretary of State compliance with the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011(**a**) would have an adverse effect on those purposes the Secretary of State may direct that those Regulations shall not apply to a project specified in the direction.

(2) The Secretary of State shall notify the Scottish Ministers prior to making a direction.

(3) The Secretary of State shall send a copy of the direction to the Scottish Ministers and the relevant planning authority.

Projects serving national defence purposes in Wales

56.—(1) If a development comprises or forms part of a project serving national defence purposes and in the opinion of the Secretary of State compliance with the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999(**b**) would have an adverse effect on those purposes the Secretary of State may direct that these Regulations as amended for Wales shall not apply to a project specified in the direction.

(2) The Secretary of State shall notify the Welsh Ministers prior to making a direction.

(3) The Secretary of State shall send a copy of the direction to the Welsh Ministers and the relevant planning authority.

Projects serving national defence purposes in Northern Ireland

57.—(1) If a development comprises or forms part of a project serving national defence purposes and in the opinion of the Secretary of State compliance with the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999(**c**) would have an adverse effect on those purposes the Secretary of State may direct that those Regulations shall not apply to a project specified in the direction.

(2) The Secretary of State shall notify the Department of the Environment prior to making a direction.

(3) The Secretary of State shall send a copy of the direction to the relevant planning authority.

(**a**) S.S.I. 2011/139.
(**b**) S.I. 1999/293, which were amended for Wales by S.I. 2000/2867, S.I. 2006/3295, S.I. 2006/3099 and SI 2008/2335.
(**c**) SR 1999 No 73.

PART 13

Miscellaneous

Service of notices etc

58. Any notice or other document to be sent, served or given under these Regulations may be served or given in a manner specified in section 329(**a**) (service of notices).

Application to the High Court

59. For the purposes of Part 12 of the Act (validity of certain decisions), the reference in section 288 to action of the Secretary of State which is not within the powers of the Act shall be taken to extend to a grant of planning permission or subsequent consent by the Secretary of State in contravention of regulations 3 or 31.

Hazardous waste and material change of use

60. A change in the use of land or buildings to a use for a purpose mentioned in paragraph 9 of Schedule 1 involves a material change in the use of that land or those buildings for the purposes of section 55(1) (meaning of "development" and "new development").

Extension of the period for an authority's decision on a planning application

61.—(1) In determining for the purposes of section 78 (right to appeal against planning decisions and failure to take such decisions) the time which has elapsed without the relevant planning authority giving notice to the applicant of their decision in a case where—

(a) the authority have notified an applicant in accordance with regulation 10(1) that the submission of an environmental statement is required; and

(b) the Secretary of State has given a screening direction in relation to the development in question,

no account shall be taken of any period before the issue of the direction.

(2) Where it falls to an authority to determine an EIA application, articles 29 (time periods for decision) and 30 (applications made under planning condition) of the Order shall have effect as if for each of the references in article 29(2)(a) and (b) and 30 to a period of 13 and 8 weeks respectively there were substituted a reference to a period of 16 weeks.

Extension of the power to provide in a development order for the giving of directions as respects the manner in which planning applications are dealt with

62. The provisions enabling the Secretary of State to give directions which may be included in a development order by virtue of section 60 (permission granted by development order) shall include provisions enabling him to direct that development which is both of a description mentioned in Column 1 of the table in Schedule 2, and of a class described in the direction is EIA development for the purposes of these Regulations.

Application to the Crown

63.—(1) These regulations shall apply to the Crown with the following modifications.

(**a**) Section 329 was amended by the Town and Country Planning (Electronic Communications) (England) Order 2003 (S.I. 2003/956).

(2) In regulation 11 (application referred to the Secretary of State without an environmental statement)—

(a) in paragraph (1)—

(i) before "referred" insert "made or"; and

(ii) before "referral" insert "making or the"; and

(b) in paragraph (2), before "referred" insert "made or".

Review

64.—(1) Before the end of each review period, the Secretary of State must—

(a) carry out a review of these Regulations,

(b) set out the conclusions of the review in a report, and

(c) publish the report.

(2) In carrying out the review the Secretary of State must, so far as is reasonable, have regard to how the Directive is implemented in other Member States.

(3) The report must in particular—

(a) set out the objectives intended to be achieved by the regulatory system established by these Regulations,

(b) assess the extent to which those objectives are achieved, and

(c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(4) "Review period" means—

(a) the period of 5 years beginning with the day on which these Regulations came into force, and

(b) subject to paragraph (5), each successive period of 5 years.

(5) If a report under this regulation is laid published before the last day of the review period to which it relates, the following review period is to begin with the day on which that report is published.

Revocation of statutory instruments and transitional provisions

65.—(1) The statutory instruments in Schedule 5 are revoked, to the extent shown in that Schedule.

(2) Nothing in paragraph (1) shall affect the continued application of the instruments revoked by that paragraph in relation to—

(a) any application lodged or received by an authority before the commencement of these Regulations,

(b) any undetermined ROMP application to which those instruments apply in accordance with the Town and Country Planning (Environmental Impact Assessment) (Mineral Permissions and Amendment) (England) Regulations 2008(**a**),

(c) any appeal in relation to an application under paragraph (a) or (b), or

(d) any matter in relation to which a local planning authority has before that date issued an enforcement notice under section 172,

and these Regulations shall not apply in relation to any such application, appeal, or matter.

(**a**) S.I. 2008/1556.

Consequential amendments

66. The instruments in Schedule 6 are amended to the extent shown in that Schedule.

Signed by authority of the Secretary of State for Communities and Local Government

Bob Neill
Parliamentary Under Secretary of State
19th July 2011 Department for Communities and Local Government

SCHEDULE 1

Regulation 2(1)

Descriptions of development for the purposes of the definition of "Schedule 1 development"

Interpretation

In this Schedule—

"airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organisation (Annex 14)(**a**);

"express road" means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975(**b**);

"nuclear power station" and "other nuclear reactor" do not include an installation from the site of which all nuclear fuel and other radioactive contaminated materials have been permanently removed; and development for the purpose of dismantling or decommissioning a nuclear power station or other nuclear reactor shall not be treated as development of the description mentioned in paragraph 2(b) of this Schedule.

Descriptions of development

The carrying out of development to provide any of the following—

1. Crude-oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.

2.

(a) Thermal power stations and other combustion installations with a heat output of 300 megawatts or more; and

(b) Nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).

3.

(a) Installations for the reprocessing of irradiated nuclear fuel;

(b) Installations designed—

(i) for the production or enrichment of nuclear fuel,

(ii) for the processing of irradiated nuclear fuel or high-level radioactive waste,

(iii) for the final disposal of irradiated nuclear fuel,

(iv) solely for the final disposal of radioactive waste,

(v) solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

4.

(a) Integrated works for the initial smelting of cast-iron and steel;

(b) Installations for the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes.

(**a**) *See* Command Paper 6614.
(**b**) *See* Command Paper 6993.

5. Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos—

(a) for asbestos-cement products, with an annual production of more than 20,000 tonnes of finished products;

(b) for friction material, with an annual production of more than 50 tonnes of finished products; and

(c) for other uses of asbestos, utilisation of more than 200 tonnes per year.

6. Integrated chemical installations, that is to say, installations for the manufacture on an industrial scale of substances using chemical conversion processes, in which several units are juxtaposed and are functionally linked to one another and which are—

(a) for the production of basic organic chemicals;

(b) for the production of basic inorganic chemicals;

(c) for the production of phosphorous-, nitrogen- or potassium-based fertilisers (simple or compound fertilisers);

(d) for the production of basic plant health products and of biocides;

(e) for the production of basic pharmaceutical products using a chemical or biological process;

(f) for the production of explosives.

7.

(a) Construction of lines for long-distance railway traffic and of airports with a basic runway length of 2,100 metres or more;

(b) Construction of motorways and express roads;

(c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 kilometres or more in a continuous length.

8.

(a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tonnes;

(b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1,350 tonnes.

9. Waste disposal installations for the incineration, chemical treatment (as defined in Annex IIA to Council Directive 75/442/EEC(**a**) under heading D9), or landfill of hazardous waste as defined in regulation 6 of the Hazardous Waste (England and Wales) Regulations 2005(**b**).

10. Waste disposal installations for the incineration or chemical treatment (as defined in Annex IIA to Council Directive 75/442/EEC under heading D9) of non-hazardous waste with a capacity exceeding 100 tonnes per day.

11. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

12.

(a) Works for the transfer of water resources, other than piped drinking water, between river basins where the transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres per year;

(**a**) O.J. No. L 194, 25.7.1975, p. 39. Council Directive 75/442/EEC was amended by Council Directive 91/156/EEC (O.J. No. L 78, 26.3.1991, p. 32) and by Commission Decision 94/3/EC (O.J. No. L 5, 7.1.1994, p. 15).

(**b**) S.I. 2005/1806.

(b) In all other cases, works for the transfer of water resources, other than piped drinking water, between river basins where the multi-annual average flow of the basin of abstraction exceeds 2,000 million cubic metres per year and where the amount of water transferred exceeds 5% of this flow.

13. Waste water treatment plants with a capacity exceeding 150,000 population equivalent as defined in Article 2 point (6) of Council Directive 91/271/EEC(**a**).

14. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes per day in the case of petroleum and 500,000 cubic metres per day in the case of gas.

15. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

16. Pipelines with a diameter of more than 800 millimetres and a length of more than 40 kilometres:

– for the transport of gas, oil, chemicals, or

– for the transport of carbon dioxide streams for the purposes of geological storage, including associated booster stations.

17. Installations for the intensive rearing of poultry or pigs with more than—

(a) 85,000 places for broilers or 60,000 places for hens;

(b) 3,000 places for production pigs (over 30 kg); or

(c) 900 places for sows.

18. Industrial plants for—

(a) the production of pulp from timber or similar fibrous materials;

(b) the production of paper and board with a production capacity exceeding 200 tonnes per day.

19. Quarries and open-cast mining where the surface of the site exceeds 25 hectares, or peat extraction where the surface of the site exceeds 150 hectares.

20. Installations for storage of petroleum, petrochemical or chemical products with a capacity of 200,000 tonnes or more.

21. Any change to or extension of development listed in this Schedule where such a change or extension in itself meets the thresholds, if any, or description of development set out in this Schedule.

22. Storage sites pursuant to Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide.(**b**)

23. Installations for the capture of carbon dioxide streams for the purposes of geological storage pursuant to Directive 2009/31/EC from installations covered by this Schedule, or where the total yearly capture of carbon dioxide is 1.5 megatonnes or more.

(**a**) O.J. No. L 135, 30.5.1991, p. 40.
(**b**) O. J. No L 140, 5.6.2009, p. 114.

SCHEDULE 2

Regulation 2(1)

Descriptions of development and applicable thresholds and criteria for the purposes of the definition of "Schedule 2 development"

1. In the table below—

"area of the works" includes any area occupied by apparatus, equipment, machinery, materials, plant, spoil heaps or other facilities or stores required for construction or installation;

"controlled waters" has the same meaning as in the Water Resources Act 1991(**a**);

"floorspace" means the floorspace in a building or buildings.

2. The table below sets out the descriptions of development and applicable thresholds and criteria for the purpose of classifying development as Schedule 2 development.

Column 1 *Description of development*	*Column 2* *Applicable thresholds and criteria*
The carrying out of development to provide any of the following—	
1 *Agriculture and aquaculture*	
(a) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes;	The area of the development exceeds 0.5 hectare.
(b) Water management projects for agriculture, including irrigation and land drainage projects;	The area of the works exceeds 1 hectare.
(c) Intensive livestock installations (unless included in Schedule 1);	The area of new floorspace exceeds 500 square metres.
(d) Intensive fish farming;	The installation resulting from the development is designed to produce more than 10 tonnes of dead weight fish per year.
(e) Reclamation of land from the sea.	All development.
2 *Extractive industry*	
(a) Quarries, open cast mining and peat extraction (unless included in Schedule 1); (b) Underground mining;	All development except the construction of buildings or other ancillary structures where the new floorspace does not exceed 1,000 square metres.
(c) Extraction of minerals by fluvial or marine dredging;	All development.
(d) Deep drillings, in particular— (i) geothermal drilling; (ii) drilling for the storage of nuclear waste material; (iii) drilling for water supplies; with the exception of drillings for investigating the stability of the soil.	(i) In relation to any type of drilling, the area of the works exceeds 1 hectare; or (ii) in relation to geothermal drilling and drilling for the storage of nuclear waste material, the drilling is within 100 metres of any controlled waters
(e) Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale.	The area of the development exceeds 0.5 hectare.

(**a**) 1991 c. 57. See section 104.

3 *Energy industry*	
(a) Industrial installations for the production of electricity, steam and hot water (unless included in Schedule 1);	The area of the development exceeds 0.5 hectare.
(b) Industrial installations for carrying gas, steam and hot water;	The area of the works exceeds 1 hectare.
(c) Surface storage of natural gas; (d) Underground storage of combustible gases; (e) Surface storage of fossil fuels;	(i) The area of any new building, deposit or structure exceeds 500 square metres; or (ii) a new building, deposit or structure is to be sited within 100 metres of any controlled waters.
(f) Industrial briquetting of coal and lignite;	The area of new floorspace exceeds 1,000 square metres.
(g) Installations for the processing and storage of radioactive waste (unless included in Schedule 1);	(i)The area of new floorspace exceeds 1,000 square metres; or (ii) the installation resulting from the development will require the grant of an environmental permit under the Environmental Permitting (England and Wales) Regulations 2010(**a**) in relation to a radioactive substances activity described in paragraphs 5(2)(b), (2)(c) or (4) of Part 2 of Schedule 23 to those Regulations, or the variation of such a permit.
(h) Installations for hydroelectric energy production;	The installation is designed to produce more than 0.5 megawatts.
(i) Installations for the harnessing of wind power for energy production (wind farms).	(i) The development involves the installation of more than 2 turbines; or (ii) the hub height of any turbine or height of any other structure exceeds 15 metres.
(j) Installations for the capture of carbon dioxide streams for the purposes of geological storage pursuant to Directive 2009/31/EC from installations not included in Schedule 1.	All development.

(**a**) S.I. 2010/675.

4 Production and processing of metals	
(a) Installations for the production of pig iron or steel (primary or secondary fusion) including continuous casting; (b) Installations for the processing of ferrous metals— (i)hot-rolling mills; (ii)smitheries with hammers; (iii)application of protective fused metal coats. (c) Ferrous metal foundries; (d) Installations for the smelting, including the alloyage, of non-ferrous metals, excluding precious metals, including recovered products (refining, foundry casting, etc); (e) Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process; (f) Manufacture and assembly of motor vehicles and manufacture of motor-vehicle engines; (g) Shipyards; (h) Installations for the construction and repair of aircraft; (i) Manufacture of railway equipment; (j) Swaging by explosives; (k) Installations for the roasting and sintering of metallic ores.	The area of new floorspace exceeds 1,000 square metres.

5 Mineral industry	
(a) Coke ovens (dry coal distillation); (b) Installations for the manufacture of cement; (c) Installations for the production of asbestos and the manufacture of asbestos-based products (unless included in Schedule 1); (d) Installations for the manufacture of glass including glass fibre; (e) Installations for smelting mineral substances including the production of mineral fibres; (f) Manufacture of ceramic products by burning, in particular roofing tiles, bricks, refractory bricks, tiles, stonewear or porcelain.	The area of new floorspace exceeds 1,000 square metres.

6 *Chemical industry (unless included in Schedule 1)*	
(a) Treatment of intermediate products and production of chemicals; (b) Production of pesticides and pharmaceutical products, paint and varnishes, elastomers and peroxides;	The area of new floorspace exceeds 1,000 square metres.
(c) Storage facilities for petroleum, petrochemical and chemical products.	(i) The area of any new building or structure exceeds 0.05 hectare; or (ii) more than 200 tonnes of petroleum, petrochemical or chemical products is to be stored at any one time.

7 *Food industry*	
(a) Manufacture of vegetable and animal oils and fats; (b) Packing and canning of animal and vegetable products; (c) Manufacture of dairy products; (d) Brewing and malting; (e) Confectionery and syrup manufacture; (f) Installations for the slaughter of animals; (g) Industrial starch manufacturing installations; (h) Fish-meal and fish-oil factories; (i) Sugar factories.	The area of new floorspace exceeds 1,000 square metres.

8 *Textile, leather, wood and paper industries*	
(a) Industrial plants for the production of paper and board (unless included in Schedule 1); (b) Plants for the pre-treatment (operations such as washing, bleaching, mercerisation) or dyeing of fibres or textiles; (c) Plants for the tanning of hides and skins; (d) Cellulose-processing and production installations.	The area of new floorspace exceeds 1,000 square metres.

9. *Rubber industry*	
Manufacture and treatment of elastomer-based products.	The area of new floorspace exceeds 1,000 square metres.

10. *Infrastructure projects*	
(a) Industrial estate development projects; (b) Urban development projects, including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas; (c) Construction of intermodal transshipment facilities and of intermodal terminals (unless included in Schedule 1);	The area of the development exceeds 0.5 hectare.
(d) Construction of railways (unless included in Schedule 1);	The area of the works exceeds 1 hectare.
(e) Construction of airfields (unless included in Schedule 1);	(i) The development involves an extension to a runway; or (ii) the area of the works exceeds 1 hectare.
(f) Construction of roads (unless included in Schedule 1);	The area of the works exceeds 1 hectare.
(g) Construction of harbours and port installations including fishing harbours (unless included in Schedule 1);	The area of the works exceeds 1 hectare.
(h) Inland-waterway construction not included in Schedule 1, canalisation and flood-relief works; (i) Dams and other installations designed to hold water or store it on a long-term basis (unless included in Schedule 1); (j)Tramways, elevated and underground railways, suspended lines or similar lines of a particular type, used exclusively or mainly for passenger transport;	The area of the works exceeds 1 hectare.
(k) Oil and gas pipeline installations and pipelines for the transport of carbon dioxide streams for the purposes of geological storage (unless included in Schedule 1); (l) Installations of long-distance aqueducts;	(i) The area of the works exceeds 1 hectare; or, (ii) in the case of a gas pipeline, the installation has a design operating pressure exceeding 7 bar gauge.
(m) Coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dykes, moles, jetties and other sea defence works, excluding the maintenance and reconstruction of such works;	All development.
(n) Groundwater abstraction and artificial groundwater recharge schemes not included in Schedule 1; (o) Works for the transfer of water resources between river basins not included in Schedule 1;	The area of the works exceeds 1 hectare.
(p) Motorway service areas.	The area of the development exceeds 0.5 hectare.

11 *Other projects*	
(a) Permanent racing and test tracks for motorised vehicles;	The area of the development exceeds 1 hectare.
(b) Installations for the disposal of waste (unless included in Schedule 1);	(i) The disposal is by incineration; or (ii) the area of the development exceeds 0.5 hectare; or (iii) the installation is to be sited within 100 metres of any controlled waters.
(c) Waste-water treatment plants (unless included in Schedule 1);	The area of the development exceeds 1,000 square metres.
(d) Sludge-deposition sites; (e) Storage of scrap iron, including scrap vehicles;	(i) The area of deposit or storage exceeds 0.5 hectare; or (ii) a deposit is to be made or scrap stored within 100 metres of any controlled waters
(f) Test benches for engines, turbines or reactors; (g) Installations for the manufacture of artificial mineral fibres; (h) Installations for the recovery or destruction of explosive substances; (i) Knackers' yards.	The area of new floorspace exceeds 1,000 square metres.

12 *Tourism and leisure*	
(a) Ski-runs, ski-lifts and cable-cars and associated developments;	(i) The area of the works exceeds 1 hectare; or (ii) the height of any building or other structure exceeds 15 metres.
(b) Marinas;	The area of the enclosed water surface exceeds 1,000 square metres.
(c) Holiday villages and hotel complexes outside urban areas and associated developments; (d) Theme parks;	The area of the development exceeds 0.5 hectare.
(e) Permanent camp sites and caravan sites;	The area of the development exceeds 1 hectare.
(f) Golf courses and associated developments.	The area of the development exceeds 1 hectare.

13 *Changes and extensions*	
(a) Any change to or extension of development of a description listed in Schedule 1 (other than a change or extension falling within paragraph 21 of that Schedule) where that development is already authorised, executed or in the process of being executed.	Either— (i) The development as changed or extended may have significant adverse effects on the environment; or (ii) in relation to development of a description mentioned in a paragraph in Schedule 1 indicated below, the thresholds and criteria in column 2 of the paragraph of this table indicated below applied to the change or extension are met or exceeded. *Paragraph in Schedule 1* — *Paragraph of this table* 1 — 6(a) 2(a) — 3(a) 2(b) — 3(g) 3 — 3(g) 4 — 4 5 — 5 6 — 6(a) 7(a) — 10(d) (in relation to railways) or 10(e) (in relation to airports) 7(b) and (c) — 10(f) 8(a) — 10(h) 8(b) — 10(g) 9 — 11(b) 10 — 11(b) 11 — 10(n) 12 — 10(o) 13 — 11(c) 14 — 2(e) 15 — 10(i) 16 — 10(k) 17 — 1(c) 18 — 8(a) 19 — 2(a) 20 — 6(c)
(b) Any change to or extension of development of a description listed in paragraphs 1 to 12 of column 1 of this table, where that development is already authorised, executed or in the process of being executed.	Either— (i) The development as changed or extended may have significant adverse effects on the environment; or (ii) in relation to development of a description mentioned in column 1 of this table, the thresholds and criteria in the corresponding part of column 2 of this table applied to the change or extension are met or exceeded.
(c) Development of a description mentioned in Schedule 1 undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years.	All development.

SCHEDULE 3

Regulation 4(6)

Selection criteria for screening Schedule 2 development

Characteristics of development

1. The characteristics of development must be considered having regard, in particular, to—

(a) the size of the development;

(b) the cumulation with other development;

(c) the use of natural resources;

(d) the production of waste;

(e) pollution and nuisances;

(f) the risk of accidents, having regard in particular to substances or technologies used.

Location of development

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

(a) the existing land use;

(b) the relative abundance, quality and regenerative capacity of natural resources in the area;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas—

(i) wetlands;

(ii) coastal zones;

(iii) mountain and forest areas;

(iv) nature reserves and parks;

(v) areas designated by Member States pursuant to Council Directive 2009/147/EC on the conservation of wild birds(**a**) and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora(**b**);

(vi) areas in which the environmental quality standards laid down in EU legislation have already been exceeded;

(vii) densely populated areas;

(viii) landscapes of historical, cultural or archaeological significance.

Characteristics of the potential impact

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

(a) the extent of the impact (geographical area and size of the affected population);

(b) the transfrontier nature of the impact;

(c) the magnitude and complexity of the impact;

(d) the probability of the impact;

(e) the duration, frequency and reversibility of the impact.

(**a**) O.J. No. L 20, 26.1.2010, p. 7.
(**b**) O.J. No. L 206, 22.7.1992, p. 7.

SCHEDULE 4

Regulation 2(1)

Information for inclusion in environmental statements

PART 1

1. Description of the development, including in particular—

(a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;

(b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;

(c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development.

2. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects.

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

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

(a) the existence of the development;

(b) the use of natural resources;

(c) the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the applicant or appellant of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

6. A non-technical summary of the information provided under paragraphs 1 to 5 of this Part.

7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant or appellant in compiling the required information.

PART 2

1. A description of the development comprising information on the site, design and size of the development.

2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.

3. The data required to identify and assess the main effects which the development is likely to have on the environment.

4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects.

5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part.

SCHEDULE 5

Regulation 65(1)

Statutory instruments revoked

Title of instrument	*Reference*	*Extent of revocation*
The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999	S.I. 1999/293	The whole of the Regulations in so far as they apply to England.
The Town and Country Planning (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2000	S.I 2000/2867	The whole of the Regulations in so far as they apply to England.
The Town and Country Planning (Application of Subordinate Legislation to the Crown) Order 2006	S.I. 2006/1282	Article 22 so far as it applies to England.
The Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006	S.I. 2006/3295	Regulations 1-21, 23 and 24 so far as they apply to England, and regulation 22.
The Town and Country Planning (Environmental Impact Assessment) (Mineral Permissions and Amendment) (England) Regulations 2008	S.I. 2008/1556	Regulations 3 and 4.
The Town and Country Planning (Environmental Impact Assessment) (Amendment) (England) Regulations 2008	S.I.2008/2093	The whole of the Regulations.

SCHEDULE 6

Regulation 66

Consequential amendments

The Town and Country Planning (General Permitted Development) Order 1995

1. The Town and Country Planning (General Permitted Development) Order 1995(**a**) is amended as follows.

2. In article 3(10), for "the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999", substitute "the Town and Country Planning (Environmental Impact Assessment) Regulations 2011".

3. In article 3(11) for "regulation 4(7)" substitute "regulation 4(8)".

The Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999

4. The Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999(**b**) are amended as follows.

5. In regulation 2(1), for the definition of "the 1999 EIA Regulations" substitute ""the 2011 EIA Regulations" means the Town and Country Planning (Environmental Impact Assessment) Regulations 2011;".

6. In regulation 4(3), for "the 1999 EIA Regulations" (at both places where those words occur) substitute "the 2011 EIA Regulations".

The Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999

7. The Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999(**c**) are amended as follows.

8. In regulation 3(1)(c)(ii), for "the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999;" substitute "the Town and Country Planning (Environmental Impact Assessment) Regulations 2011;".

The Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005

9. The Town and Country Planning (Major Infrastructure Project Inquiries Procedure) (England) Rules 2005(**d**) are amended as follows.

10. In regulation 2(1), for the definition of "environmental statement", substitute ""environmental statement" has the same meaning as in regulation 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011;".

(**a**) S.I. 1995/418.
(**b**) S.I. 1999/1672.
(**c**) S.I. 1999/2228.
(**d**) S.I. 2005/2115.

The Planning (National Security Directions and Appointed Representatives) (England) Rules 2006

11. The Planning (National Security Directions and Appointed Representatives) (England) Rules 2006(**a**) are amended as follows.

12. In regulation 6(8), for the definition of "EIA application", substitute ""EIA application" has the same meaning as in regulation 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 and "environmental statement" means a statement which the applicant refers to as an environmental statement for the purposes of those regulations".

Environmental Impact Assessment (Agriculture) (England) (No 2) Regulations 2006

13. The Environmental Impact Assessment (Agriculture) (England) (No 2) Regulations 2006(**b**) are amended as follows.

14. In regulation 3(2)(b), for "the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 apply;" substitute "the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 apply;".

The Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007

15. The Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007(**c**) are amended as follows.

16. In regulation 2(1), in the definition of "dredging", for "the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999;" substitute "the Town and Country Planning (Environmental Impact Assessment) Regulations 2011;".

The Town and Country Planning (Development Management Procedure) (England) Order 2010

17. The Town and Country Planning (Development Management Procedure) (England) Order 2010(**d**) is amended as follows.

18. In regulation 2(1), in the definition of "EIA development", "environmental information" and "environmental statement", for "the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999" substitute "the Town and Country Planning (Environmental Impact Assessment) Regulations 2011".

19. For regulation 25(2), substitute—

> "(2) The Secretary of State may give directions that development which is both of a description set out in column 1 of the table to Schedule 2 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (descriptions of development and applicable thresholds and criteria for the purposes of the definition of "Schedule 2 development" and of a class described in the direction is EIA development for the purposes of those Regulations."

20. In regulation 34(13), for "the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 " substitute "the Town and Country Planning (Environmental Impact Assessment) Regulations 2011".

(**a**) S.I. 2006/1284.
(**b**) S.I. 2006/2522.
(**c**) S.I. 2007/1067.
(**d**) S.I. 2010/2184.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations consolidate with amendments the provisions of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 Regulations") and subsequent amending instruments. The 1999 Regulations consolidated and updated earlier instruments which implemented the Council Directive on the assessment of the effects of certain public and private projects on the environment(**a**)

These Regulations include provisions in relation to projects serving national defence purposes in Scotland, Wales and Northern Ireland, but apart from those provisions these Regulations apply in relation to England only. They also include provisions regarding the application of these Regulations to the Crown, which are similar to the provisions in article 22 of the Town and Country Planning (Application of Subordinate Legislation to the Crown) Order 2006 ("the 2006 Order"), which modified the 1999 Regulations. Article 22 of the 2006 Order is consequently revoked.

The main changes to the 1999 Regulations are:

— a limitation to the requirement for subsequent applications to be subject to the screening process to those cases where the development in question is likely to have significant effects on the environment which were not identified at the time that the initial planning permission was granted (regulation 8).

— a requirement for the reasons for negative screening decisions to be provided in writing and placed on Part 1 of the Register, to be available for public inspection (regulation 4(5) and (7)).

— an amendment to clarify that any person may ask the Secretary of State to exercise the power of direction (regulation 4(8)).

— the inclusion of sites for the geological storage of carbon dioxide in Schedule 1(22) and installations for the capture of carbon dioxide streams for the purposes of geological storage in Schedule 2(3)(j). These amendments are required by the Directive on the Geological Storage of Carbon Dioxide (Directive 2009/31/EC).

— an amendment to the provisions relating to changes or extensions to existing development, so that the effects of the development as a whole once modified are considered (Schedule 2(13)).

Regulation 64 requires the Secretary of State to review the operation and effect of these Regulations and lay a report before Parliament within 5 years after they come into force and within every 5 years after that. Following a review it will fall to the Secretary of state to consider whether the Regulations should remain as they are, or be revoked or amended. A further instrument would be needed to revoke the Regulations or to amend them.

There are transitional provisions (regulation 65) and consequential amendments to a number of instruments (regulation 66 and Schedule 6).

A full impact assessment of the effect that this instrument will have on the costs of business, charities and the voluntary sector has been placed in the Library of each House of Parliament and copies may be obtained from the Planning Directorate, the Department for Communities and Local Government, Eland House, Bressenden Place, London SW1E 5DU or http://www.communities.gsi.gov.uk.

Printed and published in the UK by The Stationery Office Limited under the authority and superintendence of Carol Tullo, Controller of Her Majesty's Stationery Office and Queen's Printer of Acts of Parliament.

(**a**) O.J. No. L 175, 5.7.1985, p. 40. Council Directive 85/337/EEC was amended by Council Directive 97/11/EC, O.J. No. L 73, 14.3.1997, p.5; Directive 2003/35/EC of the European Parliament and of the Council, O.J. No. L 156, 25.6.2003, p.17; and Directive 2009/31/EC of the European Parliament and of the Council, O.J. No. L 140, 5.6.2009, p. 114.