

ADVICE ON ENVIRONMENTAL IMPACT ASSESSMENT

1. The issue is whether this NoPD requires EIA.
2. Although the proposal is principally for national defence purposes (and thus formally exempt from the EIA regulations), the Secretary of State for Defence has publicly committed the MOD not to rely on that exemption unless it is essential to do so. That commitment has legal effect.
3. Accordingly, if the proposal is a Schedule 1 or Schedule 2 application within the meaning of the EIA regulations, then EIA is required.
4. It is well-established that the wording of the schedules must be construed widely to give effect to the “wide scope and broad purpose” of the EIA directive (namely to ensure that projects which might have significant environmental effects) are subject to EIA. See thus, the decision of the European Court of Justice in *Kraaijeveld v Gedeputeerde Staten van Zuid-Holland* ECR [1996] I-5403, Case C-72/95 para 50.
5. With that in mind, it appears to me that the proposal may well fall within para 3g of Schedule 2 of the regulations, namely “Installations for the processing and storage of radioactive waste ...” where the area of new floor space exceeds 1,000 square metres.
6. It is not clear to me what is going to take place within the new building including, most particularly, whether it involves any radioactive materials. But the substantial shielding which has been specified suggests that radioactive materials may well be involved. Any radioactive material which was to be subsequently disposed of would plainly be “nuclear waste”.
7. In that event, and bearing in mind the obligation (as above) to give a broad meaning to the terms involved, it seems highly likely that the materials involved would include “radioactive waste” which would be being processed and/or stored (even if only temporarily).
8. This is a matter which the planning authority needs to clarify before proceeding.
9. If radioactive waste is being processed or stored, then the question is whether the new floor space exceeds 1,000 square metres.
10. The NoPD is in outline form only. Although the officer report says that the building will be 110m x 60m, I understand this to be approximate only and that size remains a reserved matter. If outline approval were given, it would be possible for AWE then to set a larger size and the planning authority would be powerless to resist the principle of the development.
11. Given that EIA must be undertaken at the outline stage if EIA is required at all (i.e. it cannot be left to be considered when reserved matters are being considered), I thus proceed on the basis that size is an open question and that the building could exceed 1,000 square metres.
12. Accordingly, the proposal could well fall within Schedule 2. In that event, EIA is required if the proposal is “likely to have significant effects on the environment”.
13. In considering that question, the planning authority needs to distinguish between (1) the environmental effects of the proposal and (2) the measures which AWE proposes to employ to mitigate those effects. The mitigation measures include the thick shielding around the building. In the light of the Court of Appeal’s decision in *R (Gillespie) v Secretary of State for Environment*

[2003] EWCA Civ 400, when considering whether the environmental effects of the proposal are “significant” (thus triggering EIA), the planning authority is allowed to take into account the effect of the mitigation measures, but only if the measures are straightforward and uncontroversial. In the present case, the mitigation measures (such as the substantial shielding) are plainly not going to be uncontroversial. In particular, the public and other consultees (and indeed the planning authority itself) may well want to suggest that different screening is employed and/or that other precautions are also taken. And the EIA regime requires that they be allowed to do that, and do so following the publication of a proper Environmental Statement. In my opinion, in the present case, the planning authority could not legitimately take into account the shielding (etc) in deciding whether significant environmental effects were likely. And plainly, without the screening, significant environmental effects would be inevitable (which is the whole justification for the screening).

14. Accordingly, if - as above - the proposal falls within Schedule 2 para 3g (or indeed any other paragraph of the Schedule), then, in my opinion, EIA is essential; and, further, the planning authority could not lawfully approve the NoPD without requiring EIA and thus requiring the preparation and publication of an Environmental Statement.

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