Compliance with Environmental Impact Assessment Regulations and Directive: London Ashford Airport, Lydd, Romney Marsh, Kent, TN29 9QL, Planning Appeals, APP/L2250/V/10/2131934, APP/L2250/V/10/2131936

Report by Mark Watts BSc (Econ), MSc, FRSA

For Lydd Airport Action Group (LAAG)

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Compliance with Environmental Impact Assessment Regulations and Directive

1. My name is Mark Watts BSc (Econ), MSc, FRSA.

2. I am Director of Luther Pendragon Brussels.

3. I am a consultant specialising in transport, planning, economic development and European Union (EU) regulation.

4. I have a degree in economics, BSc (Econ) and a Master of Science degree in Urban & Regional Planning (MSc), both from the London School of Economics and Political Science (LSE).

5. I was a UK Member of the European Parliament (MEP) for ten years, where I specialised in transport and EU regulation.

6. I was MEP for Kent East, which included Lydd, and therefore I am very familiar with the area and the planning issues surrounding London Ashford Airport (LAA).

7. I was appointed by the Prime Minster to advise the Cabinet Office on EU regulation between 1999-2004.

8. I followed and advised on the amendments to the Environmental Impact Assessment Directive on behalf of the Government.

9. I was a planning officer for a London Borough for six years. I was involved in strategic, local and development control matters. I was a member of a local authority Planning Committee in Kent for ten years.

10. Luther Pendragon Brussels specialises in EU regulation, law and policy making.

11. I have advised clients on EU regulations for several years. My recent clients include the Civil Aviation Authority, the Port of Tilbury London Limited, UPS, IKEA, Maersk, European Commission and the Joint Parishes Group (JPG). I recently gave advice to the JPG in relation to the appeal by KIG in Maidstone.

12. I was elected a fellow of the Royal Society of Arts in 2009.

13. The evidence which I have prepared and provide for this appeal in this report is true and I confirm that the opinions expressed are my true and professional opinions.

Conclusion

14. All the evidence demonstrates that the current applications are an integral part of an inevitably more substantial development. The environmental impact was assessed assuming 500,000 passengers per year, despite the clear intention, as set out in the latest Scoping Report, Scoping Opinion, and Master Plan, to reach the figure of 2 million ppa. Phase 2 is certainly likely, if not inevitable. Therefore the more substantial 2 million ppa figure should have been assessed and consequently the Statement does not contain all the information required by the Regulations and the Directive

15. In light of the sensitive nature of the location, the public consultation on the Scoping Opinion that has taken place that assumed 2 million ppa, UK Government guidance and EJC Case Law that seeks to prevent developers seeking to circumvent the regulations and Directive by submitting multiple applications, and the aim to ensure the legislation is interpreted with wide scope and broad purpose, I must conclude the current Statement is not substantially compliant with the Regulations and the Directive.

16. The uncertainly created as a result of the failure to produce a substantially compliant Statement is clearly undesirable for all concerned. It is therefore imperative that the Secretary of State or Inspector formally makes a request under Article 19 of the Regulations for the information contained in the Statement to include an assessment at 2 million ppa prior to the commencement of the Inquiry.

17. In accordance with the Regulations and the Directive if an applicant fails to provide enough information to complete the Statement, the application can be determined only by refusal.

18. In accordance with the Regulations and the Directive if the Secretary of State or Inspector refuse to require the applicant to undertake an assessment at 2 million ppa and subsequently grants planning permission, the objectors have the right to ask the UK Courts or the European Commission to quash any decision to grant permission. According to Government guidance the Courts has very limited discretion in cases involving environmental impact assessments because of the duty to comply with EC legislation. If the statement does not comply with EU law the permission should be quashed.

Background

19. I have been asked by Lydd Airport Action Group (LAAG) to advise on whether the Environmental Impact Statement (the Statement) produced by London Ashford Airport Limited (the applicant) complies with The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999 No 293 (The Regulations) and the Environmental Impact Assessment Directive 85/337EEC, as amended by 97/11/EC and 2003/35/EC (The Directive). I have also been asked to advise on the consequence for the validity of the applications, or any decision to grant permission, if the Statement is not compliant. Finally, I have also been asked to advise in the case of non compliance what action should be taken to taken to regularise the situation.

20. The applications are for the construction of a 249 metre runway together with an additional 150 metre starter extension (Y06/1648/SH), and the erection of a terminal building capable of processing 500,000 passengers per annum and 637 car parking spaces (Y06/1647/SH), at London Ashford Airport, Lydd, Romney Marsh, Kent TN29 9QL.

21. The applicant and Shepway District Council (the local planning authority) both acknowledge that the applications require an environmental impact assessment and Statement in compliance with the Regulations and the Directive. [1]

22. Given the environmental importance of the site and adjoining land a very high standard of compliance would normally be expected.

> "An important aspect of the site and its surroundings is that it is part of the Dungeness area, the largest shingle foreland in Europe, and a number of other sites in the area support a range of high value and important ecological and nature conservation features of international and national interest. Part of LAA is located in the Dungeness Special Area of Conservation (SAC) and Dungeness, Romney Marsh and Rye Bay Site of Special Scientific Interest (SSSI). The Dungeness to Pett Level Special Protection Area (SPA), designated for certain species of birds under European Directive. It is located approximately 30m to the south and 495m to the east. An RSPB Nature Reserve at Dungeness is also to the east and south, falling within the boundary of the SPA."[2]

23. This need for additional rigour is acknowledged by the local planning authority.

> "These (the 1999 Regulations) require more rigorous assessment of a wide range of environmental effects for certain major developments, especially in sensitive locations such as Dungeness and Romney Marsh."[3]

[1] Shepway District Council, Appropriate Assessment and Planning Applications Summary, March 2010

[2] Ibid
[3] Ibid

Will the planning application for London Ashford Airport be invalid if it does not comply with EU legislation?

24. The primacy of EU law is well established, and Government guidance stresses that EIA "is not discretionary". [4] Compliance with the Directive is a legal requirement. The Directive has been transposed into domestic legislation by the Regulations. The Directive has been further amended and the Regulations are in the process of being updated.

25. The Directive is one of the cornerstones of European Community law concerned with protecting the environment. It has proven to be problematic to implement in most Member States. In the UK it has generated more case law than any other area of EC or domestic environmental law.

26. The European Court has stated on numerous occasions that the Directive is not just a technical means of assisting expert decision-making but as an important guarantee of the democratic right of the public to be informed about the potential environmental consequences of proposed development and to participate in the planning process by expressing their views. In the words of Advocate General Elmer of the European Court of Justice (ECJ):

> "...however misguided and wrongheaded the public's views may be, they must be given an opportunity to express their opinions on the environmental issues arising from a project".[5]

27. The Government has acknowledged that this is a complex area and that many local authorities have limited experience in handling applications which are subject to the Directive.[6] Moreover, in legal proceedings, domestic courts must take account of judgments of the ECJ. So far as the Directive is concerned the ECJ has consistently held that its application is to be interpreted as having "wide scope and broad purpose". [7]

28. It is my contention that the Statement has been produced on too limited a basis, failing the "wide scope and broad purpose" test. It is the clear that the current applications are an integral part of an inevitably more substantial development. I shall return to this point, but it is no secret that the aim of the applicant is to develop an airport with capacity for 2 million passengers per annum (ppa), yet their assessment assumes only 500,000 ppa. The runway application will already facilitate this, and the applicant themselves refer to the extension to the terminal as 'Phase 1'. Phase 2 has been, at least for now, withdrawn, but is clearly the next inevitable stage.

29. In accordance with the Regulations:

> "The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission 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".[8]

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[4] Circular 02/ 99, Environmental impact assessment, Para 12, Department of Communities and Local Government (DCLG)
[5] Advocate-General Elmer in Commission of the EC v Federal Republic of Germany (Case C-431/92)
[6] Note on Environmental Impact Assessment Directive for Local Planning Authorities, Department for Communities and Local Government, Page 1
[7] Kraaijveld - Dutch Dykes Case (C-72/95)
[8] The Regulations, 3(2)

30. Consequently if it can be demonstrated that the planning application for London Ashford Airport does not comply with EU legislation it will be invalid and planning permission may not be granted.

What number of passengers should the Statement use - 500,000 ppa or 2 million ppa?

31. LAA have an aspiration outlined in their Master Plan to cater for 2 million ppa.

> "The background to the submission is the aspiration by LAA for the airport to gradually expand to cater for two million passengers by 2014. In December 2003, in accordance with the recommendation of the Aviation White Paper, LAA produced an initial Master Plan study, which was updated in December 2005."[9]

32. I understand the Master Plan has never been made publicly available and the local planning authority has acknowledged the difficulty this has created in assessing the proposal. [10]

33. However, the applicant freely admits that 2 million ppa is the aim of the Master Plan, and goes on to accept that even the current design of the terminal building could be adapted over time to accommodate 2 million ppa.

> "The current design of the terminal building provides an adaptable design solution which is able to change over time, notably to accommodate 2 million passengers per annum to reflect phase II of the airport expansion. Therefore the sub structure and superstructure is designed to accommodate internal and departure re-configurations. With the proposed design scheme, the airport will match anticipated future standards for growth, security, sustainability, and design." [11]

34. So it would be reasonable to deduce that not only is the likely aim to accommodate 2 million ppa but that the sub structure and superstructure planned for Phase 1 will enable the airport to accommodate 2 million ppa, making it an integral part of Phase 2.

35. The application to expand the runway by 444m has been made to allow the airport to handle fully loaded Boeing 737s and Airbus 320s. The extended runway will enable London Ashford Airport to achieve this 2 million ppa objective, using this type of aircraft.

36. The Statement has to address the direct and indirect effects of the development on a number of factors including the population, fauna, flora, soil, air, water, climatic factors, material assets including architectural and archaeology heritage, landscape and the inter-relationship between these factors. The Directive also requires a description of the likely significant affects of the proposed project on the environment resulting from:

- the existence of the project,
- the use of natural resources,

[9] Shepway District Council, March 2010 Planning Committee Report
[10] Ibid
[11] LAA, Revised design and access statement (Terminal Building), Chapters 5-9, August 2008

- the emissions of pollutants, the creation of nuisances and the elimination of waste, and the description by the developer of the forecasting methods used to assess the effects on the environment. [12]

37. In a footnote the Directive requires that this description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term and temporary, positive and negative effects of the project. [13]

38. Clearly the ultimate Phase 2 aim of 2 million ppa must be a direct (or indirect) medium term effect. In the applicant's Planning Statement for the Phase 1 terminal the medium term aspiration is clearly set out.

> "...it is LAA's medium term aspiration to achieve 2 million passengers per annum (mppa). "[14]

39. Government guidance on this matter is clear. A planning application should not be considered in isolation if, in reality, it is properly to be regarded as "an integral part of a more substantial development". It is important to establish whether "the aims of the Regulations and Directive are being frustrated by the submission of multiple planning applications". [15]

40. The proposition that developers should not be allowed to split-up projects in order to circumvent the requirements of the Directive is now well-established in European case-law.

41. **R v Swale BC ex p RSPB (1991)** is the case that is the basis for the statement in Circular 2/99 para 46. Mr Justice Simon Brown said:

> "...the question of whether 'it would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location' should, in my judgement, be answered rather differently. The proposals should not be considered in isolation if, in reality it is properly to be regarded as an integral part of an inevitably more substantial development. This approach appears to me appropriate to the language of the Regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter. In common-sense moreover, developers could otherwise defeat the objective of the Regulations by piecemeal development proposals."

42. The Swale test of inevitability remains relevant but appears to have been reinforced by more recent case law like Ecologistas[16].

43. Swale was decided before the meaning of "likely" in European law had been elucidated by the European court. The meaning of "likely" in European law does not equate to the "balance of probabilities" standard usually applied in domestic law, rather it requires the consideration of the "risk" of significant environmental effect occurring. Therefore even if a more substantial development cannot be said to be inevitable, but merely likely, it arguably ought to be assessed as part of the project. [17]

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[12] The Directive - Article 3, European Commission
[13] The Directive – Annex IV, European Commission
[14] Terminal Building Planning Statement, LAA, December 2006
[15] Circular 02/99, Para 46, DCLG
[16] Case C- 142/07 Ecologistas en Accion CODA v Ayuntanamiento de Madrid, 2009
[17] Paul and Sackman, Francis Taylor Building, 2009

44. The purpose of the Directive cannot be circumvented by the splitting up of projects and since Phase 2 is certainly likely, if not inevitable, the more substantial 2 million ppa figure should have been used.

Was the need to assess at 2 million ppa set out in the applicant's Scoping Report and the local authority's Scoping Opinion?

45. The Scoping Report produced by Parsons Brinkerhoff Ltd (PB) on behalf of the applicant acknowledges the plans are to introduce a phased development to allow up to 2 million passengers p.a. by 2014".[18] This specifically relates to the proposals as put forward within paragraphs 3.1.7 and 3.1.8 of the Scoping Report, namely a detailed application for a runway extension and Phase 1 terminal meeting, and an outline application for Phase 2 of the terminal building. [19]

46. The Scoping Opinion produced by CEAM on behalf of the local planning authority specifically relates to the proposals as put forward within paragraphs 3.1.7 and 3.1.8 of the PB Scoping Report, namely a detailed application for a runway extension and Phase 1 terminal meeting, and an outline application for Phase 2 of the terminal building.[20]

47. It acknowledges that the applicant may submit proposals which may differ or feature only certain elements of those described in PB's report, and therefore consulted on.

48. It recommended that if proposals to be applied for do **substantially change** then a new Scoping Report should be submitted and a new Scoping Opinion sought.

49. No new Scoping Report was submitted and no new Scoping Opinion was sought or produced.

50. The applicant acknowledges that the Scoping Opinion of 19 December 2005 is the relevant Scoping Opinion and that the issues in the Scoping Opinion have been addressed in the Statement wherever practical.

> "Scoping is a process used to identify at an early stage, from all the project's possible impacts, those that are the significant issues requiring greatest attention in the further assessment. For the proposed runway extension, the project scoping has involved both a review of previous studies in the area and consultation with key organisations. A detailed Scoping Report was produced (see Appendix 1.1) and submitted to SDC on 26th August 2005. A formal scoping opinion was received from SDC on the 19th December 2005 and the issues raised have been addressed in this ES wherever practical." [21]

51. The public consultation on scoping was conducted on the basis of 2 million ppa and it would seem to be a breach of the Aarhus Convention if this Scoping Opinion is no longer valid. [22]

52. This Convention has now been transposed into EU and UK law and seeks to ensure the public are consulted on the facts early in the decision making process. Failure to comply can invalidate a decision to grant permission.

[18] Parsons Brinkerhoff Scoping Report, Para 3.1.7, August 2005
[19] Parsons Brinkerhoff Scoping Report, Para 3.1.8, August 2005
[20] Scoping Opinion, CEAM, Paras 2.1, 2.2, 3.1, 3.4, 4.7 and 4.10, December 2005
[21] Environmental Statement, Para 1.2.7 , LAA, December 2006
[22] Aarhus Convention, Fourth Ministerial Conference, 1998

53. Given the above it would be reasonable to conclude that the Scoping Opinion stands because the proposals did not substantially change.

54. Consequently, there is a need to assess at 2 million ppa in accordance with the Scoping Opinion.

Does the Statement comply with the Scoping Opinion in relation to passenger numbers?

55. The Statement acknowledges the Master Plan allows for the expansion of the airport to 2 million ppa, but the Statement only conducts an assessment at 500,000 ppa.

> "To ensure a sustainable future for the airport, and in accordance with National Government Requirements, LAA has developed a masterplan to cover proposed developments at the airport up to an including the year 2014. This masterplan, which has been lodged with the Department of Transport, the CAA and Shepway District Council, allows the expansion of the airport to up to 2,000,000 passengers per annum (2) in accordance with both national objectives and local planning policies." [23]

56. The Statement ignores the Scoping Opinion in relation to passenger numbers and throughout the document assumes passenger numbers would increase to 500,000 ppa. For example:

> "The current proposal to construct a new terminal building would increase passenger numbers to 500,000 ppa…" [24]

57. The Statement does not comply with the Scoping Opinion in relation to passenger numbers.

If issues are not addressed, or not fully addressed, is the local authority required to request further information?

58. Although a Statement is not necessarily invalid if it does not fully comply with a Scoping Opinion, given the document represents the considered view of the local planning authority there is an expectation in the Regulations that where a Statement does not comply with the Scoping Opinion, the planning authority will call for further information under Regulation 19 of the Regulations.

> "An ES is not necessarily invalid if it does not ***fully comply*** (my emphasis) with the scoping opinion or direction. However, as the documents represent the considered view of the local planning authority or the Secretary of State, a statement that does not cover all the matters specified in the scoping opinion or direction will probably be subject to calls for further information under regulation 19."[25]

[23] LAA, NTS Environmental Statement, December 2006
[24] LAA, NTS Environmental Statement, December 2006
[25] Circular 02/99, Para 95, DCLG

59. In this case we are dealing with a Statement that omits a key issue. An assessment at 2 million ppa is not addressed at all, and therefore it does not "not fully comply" with the Scoping Opinion.

60. In such cases there is an obligation on the local planning authority to make a Regulation 19 request (to secure the necessary assessment at 2 million ppa). Government guidance makes it clear that the local planning authority must request further information.

> "The planning authority is responsible for evaluating the ES to ensure it addresses all the relevant environmental issues and that the information is presented accurately, clearly and systematically. It should be prepared to challenge the findings of the ES if it believes they are not adequately supported by scientific evidence. If it believes that key issues are not fully addressed, or not addressed at all, it **must** (Government emphasis) request further information. The authority has to ensure it has in its possession **all** relevant environmental information about the likely significant environmental effects **before it** makes a decision whether to grant planning permission. It is too late to address the issues after planning has been granted." [26]

Must the Secretary of State or Inspector ask the applicant to supply further information?

61. A Statement must address all the relevant environmental issues. The obligation of the local planning authority to ask the applicant to supply further information applies equally to the Secretary of State or Inspector. Under the Regulations they have no discretion.

62. Where a statement does not contain all the relevant or "required" information, the Secretary of State or Inspector must ask the applicant to supply further information.

> "Where a statement has been submitted which does not contain all the required information, the local planning authority, Secretary of State or Inspector must ask the applicant to supply further information (regulation 19)." [27]

If an applicant fails to provide enough information to complete the ES, what discretion does the decision maker have?

63. It is clear that the environmental information in relation to the impact of the development, assuming 2 million ppa, should be taken into consideration in the Statement. The local planning authority, Secretary of State or Inspector have no discretion if the necessary information is not taken into consideration, they shall **not** grant planning permission.[28]

> "The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission 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."

[26] Note on Environmental Impact Assessment Directive for Local Planning Authorities, Page 12, DCLG
[27] Circular 02/99, Para 24, DCLG
[28] Regulations (3(2))

If the local authority, Secretary of State or Inspector refuse to require the applicant to undertake an assessment at 2 million ppa has the objector the right to ask the UK Courts or the European Commission to quash any decision to grant permission?

64. Failure to comply with the Directive may make a decision to grant planning permission unlawful and lead to it being quashed by the UK Courts. Although the Court has the power not to quash planning decisions where there has been procedural impropriety, this discretion is **very limited** in cases involving EIA because of the duty to comply with European law. The Court can only allow a permission to stand if there has been "substantial compliance" with the Directive.[29]

65. Given the failure to assess the effects of 2 million ppa there has not been "substantial compliance" in this case. Individual citizens may, and frequently do, complain directly to the European Commission that information in the Statement was inadequate. This can lead to formal legal proceeding between the Commission and the United Kingdom.

66. This can be lengthy and prolonged and can create uncertainty for developers, planning authorities and citizens.

67. In this case an objector has the right to ask for any decision to grant planning permission to be quashed and given the serious lack of compliance the UK Court or the European Commission would have a clear obligation to do so.

Conclusion

68. All the evidence demonstrates that the current applications are an integral part of an inevitably more substantial development. The environmental impact was assessed assuming 500,000 passengers per year, despite the clear intention, as set out in the latest Scoping Report, Scoping Opinion, and Master Plan, to reach the figure of 2 million ppa. Phase 2 is certainly likely, if not inevitable. Therefore the more substantial 2 million ppa figure should have been assessed and consequently the Statement does not contain all the information required by the Regulations and the Directive

69. In light of the sensitive nature of the location, the public consultation that has taken place on the Scoping Opinion that assumed 2 million ppa, UK Government guidance and EJC Case Law that seeks to prevent developers seeking to circumvent the regulations and Directive by submitting multiple applications, and the aim to ensure the legislation is interpreted with wide scope and broad purpose, I must conclude the current Statement is not substantially compliant with the Regulations and the Directive.

70. The uncertainly created as a result of the failure to produce a substantially compliant Statement is clearly undesirable for all concerned. It is therefore imperative that the Secretary of State or Inspector formally makes a request under Article 19 of the Regulations for the information contained in the Statement to include an assessment at 2 million ppa prior to the commencement of the Inquiry.

[29] Note on Environmental Impact Assessment Directive for Local Planning Authorities, Page 15, DCLG

71. In accordance with the Regulations and the Directive if an applicant fails to provide enough information to complete the Statement, the application can be determined only by refusal.

72. In accordance with the Regulations and the Directive if the Secretary of State or Inspector refuse to require the applicant to undertake an assessment at 2 million ppa and subsequently grants planning permission, the objectors have the right to ask the UK Courts or the European Commission to quash any decision to grant permission. According to Government guidance the Courts has very limited discretion in cases involving environmental impact assessments because of the duty to comply with EC legislation. If the statement does not comply with EU law the permission should be quashed.

Mark Watts BSc (Econ), MSc, FRSA
Brussels, 23 September 2010