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Appraisals of Sustainability and the New National Policy Statements: Opportunities Missed and Challenges to Come?



Final Report to RSPB and WWF

by

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Executive Summary

This report was requested by RSPB and WWF and sought to review the current state of play of Strategic Environmental Assessment (SEA) in the UK and the EU and particularly to review the Appraisals of Sustainability (AoSs) being undertaken for the recent draft National Policy Statements (NPSs) for their effectiveness in delivering the requirements and objectives of the SEA Directive. SEA has an important role to play in helping to deliver sustainable development, through both its advocative role, where its primary purpose is to raise the profile of the environment, and its integrative role where environment, social and economic considerations are brought together through the SEA process, particularly where used in the context of sustainability appraisals. Since the new AoSs are supposed to meet the requirements of the SEA Directive it was appropriate to review these against key compliance criteria. In all seven NPS AoSs were reviewed (as well as the Scottish National Planning Framework 2 SEA report for comparison). Overall, the quality of the AoS reports was variable, but unfortunately often poor and in some cases with critical failings.

The most problematic areas stem from the overall approach adopted to the AoSs and the context in which they are being used. The context of speeding up the planning process does not facilitate better appraisal of sustainability or SEA, since such assessments takes time to undertake properly and to engage effectively with stakeholders and the public. This results in the SEA Directive appearing to be a hurdle to jump over rather than used as a tool that can bring real benefits for better strategic planning. The way in which sustainability is conceived by Government in the AoSs also militates against an effective assessment of the likely significant environmental effects of the NPSs. Sustainability is generally conceived of in the AoSs as 'weak' sustainability where environmental, economic and social factors are 'balanced' and therefore capable of being traded-off against each other. This runs counter to the tenets of the Bruntland definition of sustainability which recognises the imperatives of environmental limits and social needs. In many cases, especially true in the context of the energy sector NPSs, there also appears an assumption that low carbon can be equated with sustainability when the two may not inherently be compatible.

Fundamentally, the way the NPS objectives have been defined is highly variable; there is a surprisingly large variation in the purposes ascribed to NPSs when under the Planning Act 2008 a key intention is that are to establish criteria for decision-making by the Infrastructure Planning Commission. Only the Nuclear NPS makes this explicit as its primary objective, others proffer a range of additional and multiple objectives at the same time as Government claims the NPSs are intended only to further clarify policy and not to develop policy. The way in which the NPS objectives have been framed has been such that Government has then sought to justify a seemingly deliberately narrow interpretation when it comes to defining the nature of the alternatives studied. It is highly questionable whether the alternatives studied in the AoSs for the Overarching Energy NPS and Ports NPS can be considered 'reasonable' (in the context of the SEA Directive) and the alternatives studied for the Nuclear NPS are constrained by the fact that the policy decision to promote nuclear power has not been subject to any environmental assessment of the role nuclear should play in the wider energy mix. The alternatives considered are often those considered reasonable for Government rather than reasonable from the point of view of being possible and plausible alternatives to the objectives of the plan in question, as required by the Directive.

This *de minimis* approach to the implementation of SEA through the NPS AoSs extends further to the often poor quality of the assessments actually undertaken. In the Ports AoS the baseline information provided about the current state of the environment is quite inadequate, and again in the case of the Ports AoS and the overarching Energy AoS the way in which the assessment against the appraisal objectives has been undertaken has failed to assess the real impact of an NPS on the environment. The very existence of an NPS, for example, has the potential to encourage larger, more centralised approaches to energy generation because the Nationally Significant Infrastructure Projects (NSIPs) process applies only over a certain threshold and could be perceived as a faster route to approval. Consequently, it is questionable whether many of the AoSs are actually assessing the true consequences of the NPSs and therefore meeting the requirements of the SEA Directive. It is difficult to see from the evidence of the AoSs reviewed that they are meeting the purposes of influencing the planning process.

The report concludes that there are a significant number of failings across the AoSs, which make them potentially challengeable in the courts, most notably:-

1. That the very nature of the planning process in these cases is that they, in a variety of ways, seek to circumvent the purposes of the SEA Directive, particularly with respect to the evaluation of reasonable alternatives. In some cases it is because they purport to be strategic planning documents, but are in fact being determined by projects that have already been identified, e.g. Nuclear NPS. In that way the projects are setting the strategic framework for the plan and not the plan for the projects. In other cases the objectives of the plan are defined and/or interpreted in such narrow terms as to exclude proper consideration and evaluation of 'reasonable alternatives'.
2. Potential for judicial review over the **Ports NPS**, which is consistently inadequate in its approach to the AoS and would appear to substantially fail to meet the requirements of the SEA Directive.
3. **Overarching Energy AoS** (and technology specific AoSs) raise some similar issues to those for Ports. The issue of alternatives in particular is highly debateable and so it is questionable whether the alternatives considered can be considered 'reasonable'.
4. For the **Nuclear AoS**, the main failing relates to the inappropriate appraisal objectives against which the appraisal is undertaken and that there are no proposals for monitoring, proposing instead to outline those in the AoS Statement. This would appear to be non-compliant with the SEA Directive since the monitoring is therefore excluded from the consultation process on the AoS report and draft NPS.

The report outlines a number of recommendations for amending the SEA Directive and the way in which it is implemented in the UK which arise from the findings of the review.

1. Introduction

The publication by Government in 2009 of a number of draft National Policy Statements (NPSs) provides an important opportunity to reflect on how Strategic Environmental Assessment (SEA) is being implemented in the UK, particularly with respect to strategic plans and strategies. An important question to ask is whether the desire to speed up the decision-making process may compromise the environmental assessments or Appraisals of Sustainability being undertaken and particularly whether they may fail to comply with the requirements of the European SEA Directive 2001/42/EC.

This report has been produced by Collingwood Environmental Planning (CEP) in response to a request from RSPB and WWF to review the current state of play of SEA in the UK and the EU and particularly to review the Appraisals of Sustainability (AoS) being undertaken for the recent draft NPSs for their effectiveness in delivering the requirements and objectives of the SEA Directive.

2. SEA and its Potential Role in Delivering More Sustainable Development

What role does SEA play in helping to deliver more sustainable development?

There is considerable debate about how SEA contributes to sustainability¹, though the SEA Directive has this as a key objective: “to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development...” (Article 1). Common conceptions of sustainable development talk of balancing environmental, social and economic factors, accepting trade-offs between these factors in the process – this is often referred to as ‘weak’ sustainability. Other conceptions recognise that ultimately all economic and social activity is dependent on the natural environment, its resources and ecosystem services that it provides – sometimes referred to as ‘strong’ sustainability. The most commonly used definition of sustainable development is that from the Brundtland report², but usually only the first part of the definition is quoted, forgetting the important second part:-

“Sustainable Development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- *the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and*
- *the idea of limitations imposed by the state of technology and social organisation on the environment’s ability to meet present and future needs.” (WCED,1987:43)*

¹ For example: Dalal-Clayton, B. and Sadler, B. (2005), *Sustainability Appraisal - A Review of International Experience and Practice*, Earthscan Publications, London; Kørnøv L. and Thissen W. A. H. (2000), Rationality in decision and policy-making: implications for strategic environmental assessment, *Impact Assessment and Project Appraisal*, 18(3): 191-200; Sheate, W.R., Dagg, S., Richardson, J., Aschemann, R., Palerm, J. and Steen, U. (2003), Integrating the Environment into Strategic Decision-Making: Conceptualizing Policy SEA, *European Environment*, 13 (1): 1-18; Partidario, M. R. (2000), Elements of an SEA framework - improving the added-value of SEA, *Environmental Impact Assessment Review*, 20:647-663; Pope, J. and Grace, W. (2006), Sustainability Assessment in Context: Issues of Process, Policy and Governance, *Journal of Environmental Assessment Policy and Management*, 8 (3): 373-398; Morrison-Saunders A and T Fischer (2006) What is wrong with EIA and SEA anyway? - A Sceptic’s Perspective on Sustainability Assessment, *Journal of Environmental Assessment Policy and Management*, 8(1): 1-21; Owens, S., Rayner, T. and Bina, O. (2004), New agendas for appraisal: reflections on theory, practice and research, *Environment and Planning A*, 36: 1943-59; Wallington T, Bina O, Thissen W, Theorising strategic environmental assessment: fresh perspectives and future challenges, *Environ Impact Assess Rev* 2007;27:569–84; Gibson, R B., Hassan, S., Holtz, S., Tansey, J. and Whitelaw, G. (2005), *Sustainability Assessment: Criteria, Processes and Applications*, 240pp, Earthscan Publications, London; Gibson, RB. (2006), Beyond the Pillars: Sustainability Assessment as a Framework for Effective Integration of Social, Economic and Ecological Consideration in Significant Decision-Making, *Journal of Environmental Assessment Policy and Management*, 8 (3): 259-280.

² World Commission on Environment and Development (1987), *Our Common Future*, Report of the Brundtland Commission, Oxford University Press; and see Scrase, I and MacKerron, O (2009), *Energy for the Future: A New Agenda*, Palgrave Macmillan, 304 pp, in the context of the energy sector.

Brundtland therefore recognises the strong social and environmental imperatives underlying sustainable development (as does the SEA Directive in Article 1) and that this is not therefore simply a matter of balancing environmental, social and economic factors, which is otherwise effectively business-as-usual. That does not mean that economic factors are not important since they contribute to human wellbeing, and the SEA Directive, in requiring assessment of population, human health, material assets and cultural heritage, for example, already defines the environment broadly. But the purpose of SEA is very much to ensure that environmental considerations are integrated into strategic decision-making, in recognition that traditionally that has not been done sufficiently. Many plans and programmes will have a strong economic rationale to their promotion, so in the absence of SEA that is likely to be the most determining factor. This dual purpose of SEA - having an advocative role, where its primary purpose is to raise the profile of the environment, or an integrative role where environment, social and economic considerations are combined in a more 'objective' way is widely recognised³. In an integrative role SEA requires decision-making to recognise a strong conception of sustainability, since otherwise the economic benefits are likely to be double counted both in the rationale for the plan or programme and in the SEA. This is particularly pertinent in the context of sustainability appraisal (SA) of spatial plans, which seeks to assess environmental, social and economic factors together.

The SEA Directive follows the same broad principles as the Environmental Impact Assessment (EIA) Directive, not necessarily changing the decision on whether the plan or programme should go ahead, but ensuring that it is more informed so significant adverse effects can be avoided and positive benefits enhanced. This reflects the more traditional rationalist perspective on decision-making inherited from EIA. In reality most strategic decision-making is recognised as being characterised by 'bounded rationality' because of the more iterative, political and dynamic nature of such decision-making and greater uncertainty at strategic levels⁴.

Key principles underpinning the review

1. Sustainability

Can be conceived of as

- a) 'strong' - economic and social activity is dependent on the natural environment, its resources and ecosystem services that it provides
- b) 'weak' - balancing of environmental, social and economic factors, accepting trade-offs between these factors

2. Strategic environmental assessment

a) 'advocative role' – where SEA is used to raise the profile of the environment in decision-making; or

b) 'integrative role' - where environment, social and economic considerations are combined in SEA a more 'objective' way

3. Purpose of the SEA Directive

"to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development..." (Article 1).

4. Alternatives required by the SEA Directive

Article 5 (1). *"Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I."*

5. Participation

"The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure." (Article 6 (2) SEA Directive)

"Each Party shall provide for early public participation, when all options are open and effective public participation can take place." (Article 6 (4) Aarhus Convention)

³ Kornov and Thissen, 2000, op. cit note 1.

⁴ Nilsson M. and Dalkman H. (2001), Decision making and strategic environmental assessment. *Journal of Environmental Assessment Policy and Management* 3(3): 305-327.

Consequently SEA can also bring a range of other benefits to strategic decision-making, not just informing the *decision*, but improving the whole planning process and strategic thinking. One of the key ways in which SEA can do this is that it should provide a framework within which more strategic participation of the public and stakeholders can take place. The stages of SEA provide excellent opportunities for the inclusion of participation, in order to better inform options (e.g. at scoping stage) and the assessment of options and around the draft plan or programme. SEA can also therefore provide opportunity for social and institutional learning by those undertaking and using SEA⁵ and exchange of knowledge among stakeholders and participants⁶. Effective SEA, therefore, can present a much wider range of potential and more long-term benefits than simply informing the decision-making process.

What do we mean by effectiveness with respect to SEA/SA?

Evaluating effectiveness of tools like SEA is notoriously difficult; the tool will have been just one factor exerting some degree of influence⁷. But a simple understanding of effectiveness may be that for a tool to be effective it needs to be able at least to achieve its own purposes. In the case of SEA this will be to ensure that environmental considerations influence the decision-making process and, given the underlying spirit of the SEA Directive, this is likely to entail a change in the mindset of the actors involved⁸. This influence may occur at various stages throughout the planning process: early on in influencing the options considered, and at later stages to inform mitigation and monitoring. Arguably it is at the earliest stages where SEA can be most effective in influencing the overall direction and objectives of the plan, programme or strategy under consideration. A truly strategic consideration of alternatives requires the assessment of alternative options⁹, i.e. alternatives for meeting the objectives set, such as alternative modes of transport for a transport strategy. This is in contrast to a consideration of option alternatives, e.g. alternative locations or routes that might occur in an EIA of a road scheme where the option of a road has already been decided.

In the EU, the SEA Directive 2001/42/EC requires the evaluation of 'reasonable alternatives' (Article 5 (1)), which includes (through the reference in Article 5 (1) to Annex I), the "*measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme*" (para (g), Annex I) and reasons for selecting the alternatives dealt with (para (h), Annex I). That sequence of **prevent, reduce or offset**, reflects an important principle of the SEA Directive, that it seeks to **avoid** impacts from occurring rather than merely their mitigation. This is reflected in the preamble to the Directive (Recital 1, invoking the precautionary principle, and Recital 5 that SEA procedures "*should contribute to more sustainable and effective*

⁵ Fischer, TB (2010) Reviewing the quality of strategic environmental assessment reports for English spatial plan core strategies, *Environmental Impact Assessment Review* 30 (2010) 62–69; Runhaar H. (2009) Putting SEA in context: a discourse perspective on how SEA contributes to decision-making. *Environ Impact Assess Rev*,29:200–9; Hertin J, Turnpenny J, Jordan A, Nilsson M, Russel D, Nykvist B. Rationalising the policy mess? Ex ante policy assessment and the utilisation of knowledge in the policy process. *Environ Plann A* 2009;41(5):1185–2000; Wallington et al, (2007), op.cit note 1.

⁶ Sheate, WR and Partidario,MR (2009), Strategic approaches and assessment techniques—Potential for knowledge brokerage towards sustainability, *Environmental Impact Assessment Review*, available online November 2009.

⁷ There have, however, been plenty of attempts at evaluating or promoting effectiveness see for example Sadler. B. and Yerheem. R. (1996) *Strategic Environmental Assessment: Status, Challenges and Future Directions*. Ministry of Housing, Spatial Planning and the Environment of the Netherlands; Sheate, W.R., Dagg, S., Richardson, J., Aschemann, R., Palerm, J. and Steen, U. (2001), *SEA and Integration off the Environment into Strategic Decision-Making (3 Volumes)*, Final Report to the European Comm.ission, DO XI, Contract No. B4-3040/99/1 36634/MAR/B4 available at <http://ec.europa.eu/environment/eia/sea-support.htm>, Office for Official Publications of the European Communities, Luxembourg, 438pp, 2003; Fischer, T. and Gazzola, P. (2006), SEA effectiveness criteria--equally valid in all countries? The case of Italy, *Environmental Impact Assessment Review* 26, 396-409.

⁸ Fischer, T.B. (2005), Having an Impact? Context Elements for Effective SEA Application in Transport Policy, Plan and Programme Making, *Journal of Environmental Assessment Policy and Management*, 7 (3): 407-432.

⁹ Noble, B. (2000), Strategic Environmental Assessment: What Is It and What Makes It Strategic? *Journal of Environmental Assessment Policy and Management*, Vol. 2 (2), 203-224; Noble, B. (2002), The Canadian experience with SEA and sustainability, *Environmental Impact Assessment Review*, 22: 3-16.

solutions”). This creates an important lever in ensuring that alternatives are properly considered and a potential focus for legal challenge if they are not¹⁰.

Two critical issues for sustainable development (and a focus for the Earth Summit in Rio de Janeiro in 1992), are also recognised in the SEA Directive:

- i) climate change (included as ‘climatic factors’ in para (f) Annex I of the SEA Directive); and
- ii) biodiversity loss (also reflected in para (f) of Annex 1, and para (d) in relation to Natura 2000 sites, and reference to the Habitats Directive 92/43/EC in Article 3. Recital 3 of the preamble to the Directive further emphasises the requirement of the Convention on Biological Diversity (CBD) for Parties to integrate “the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans and programmes”. SEA therefore needs to ensure that these issues, among others, are properly considered in the assessment process.

3. The European Experience – Five Years of Practice

The SEA Directive 2001/42/EC came into force in the European Union in July 2004. During 2009 the European Commission published two reports on the application and effectiveness of the SEA Directive. The first was a report¹¹ by COWI/Milieu based on a survey of Member States on how they had transposed the Directive and their experience of implementation and the relationship with other key environmental Directives, such as the EIA and Habitats Directives. The second report¹², drawing on the first and other reports, was the Commission’s formal report to the Council and the European Parliament. Both reports recognised the wide variation in experiences with implementing the SEA Directive, but concluded that most Member States believed that SEA has had a positive effect on the organisation and structure of the planning process, and that the formal requirements for consultation with environmental authorities and the public have led to increased transparency. They also reported that in many cases, SEA changed the content of the plan or programme. Some experiences also showed that, at the level of the largest national plans, a significant number of the SEA findings had a strong influence on the substance of the plans, including in the selection of the alternatives or by incorporating important suggestions from the SEA. Examples quoted¹³ include a National Programme for Ports Development in Bulgaria where two of the proposed terminals were rejected because of conflicts with protected areas for biodiversity; a regional waste management plan in Romania where the best environmental alternative was selected because of the SEA analysis; in Hungary a water management programme where the SEA helped to prevent a very expensive project; and in Ireland the importance of alternatives having to be considered by law had resulted in a number of plans being changed in favour of an alternative action because of the SEA, whereas previously that would not have happened.

The Commission concluded: “Overall,...the SEA Directive contributes to the systematic and structured consideration of environmental concerns in planning processes and better integration of environmental considerations upstream. In addition, by means of its requirements (environmental report, consultation and information of the authorities and public concerned etc.) it ensures better and harmonized planning procedures, and contributes to transparent and participatory decision making processes.”

¹⁰ Recent UK case law on SEA, e.g. *Seaport* case in Northern Ireland: No. [2007] NIQB 62; *East of England Plan* case (St. Albans City and District Council and Hertfordshire County Council v Secretary of State for Communities and Local Government, May 2009); and critique of Eco-towns SA (Sheate, 2008) at http://www.bardcampaign.com/press/pressreleases/198064/the_sheate_report.html.

¹¹ COWI/Milieu (2009), Study concerning the report on the application and effectiveness of the SEA Directive (2001/42/EC), Final Report. European Commission DG-ENV; 2009.

¹² CEC (2009), Report from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions On the application and effectiveness of the Directive on Strategic Environmental Assessment (Directive 2001/42/EC);

¹³ COWI report (2009) op. cit note 11.

The Commission reports draw heavily upon the views and reporting of Member States themselves so caution is needed in the interpretation, especially given the focus on implementing the Directive and SEA procedures rather than the quality of assessments, changes to plans and wider benefits, and the experience of applying the SEA Directive is still in its infancy. This also means that there is not yet a large body of more academic literature evaluating the experience of SEA under the SEA Directive. There is some¹⁴, but it can only be a snapshot at this stage. Biodiversity and climate change are both areas relatively poorly addressed to date, the former still too focused on species and/or habitats and not yet much on ecosystem services and functions, and the latter needing to address the issues of uncertainty, particularly in the way in which climate change might impact on different groups in society¹⁵. Some other European experience¹⁶ suggests there are real benefits that can accrue which may include less tangible benefits than just changes to actual plans, e.g. in the relationships created with stakeholders, the opportunities created for better long-term thinking about plans and strategies, and knowledge brokerage.

In the UK three recent studies¹⁷ have also identified some strengths and weaknesses in SEA implementation in the UK. All found similar weaknesses and a need to strengthen the evidence base, better consideration of alternatives, better focusing of the assessment through scoping and better integration with the plan making process. In addition, the quality of SEA was often compromised by misplaced effort and a lack of capacity and skills in SEA.

'Could do better' sums up much of the experience to date, both in terms of the way in which SEA/SA is undertaken – the techniques and methodologies used - and the way in which it is integrated with or influences the plan making processes. In Scotland, where SEA is more widely applied than in England, following the SEA (Scotland) Act 2005, the early years saw a tendency to try to minimise workload through scoping out of some key environmental issues and a rigid adherence to detailed guidance and templates under the (false) impression that was the only way to do SEA. In England however, the Department for Communities and Local Government (CLG) research, focused on SA, suggested that practitioners should be bolder at scoping out issues, and that SEA should follow an approach that concentrates more on evaluating plans and programmes against baseline information rather than aspirational objectives. An important lesson from these studies should actually be that over-prescription through guidance can suffocate innovation and work against delivering what might be most effective in any particular circumstance. The more strategic the assessment, the more flexibility that is needed to tailor the techniques and methodologies adopted to be fit for purpose. What is required is greater capacity and knowledge of SEA within responsible authorities, so that those undertaking SEA/SA, or commissioning it, understand better how and why they are doing it.

¹⁴ For example, Theophilou, V., Bod, A. and Cashmore, M. (2009), Application of the SEA Directive to EU structural funds: Perspectives on effectiveness, *Environ Impact Asses Rev* (2009) online at doi:10.1016/j.eiar.2009.08.001; Weiland, U., (2009) Strategic Environmental Assessment in Germany — Practice and open questions, *Environ Impact Asses Rev* (2009), online at doi:10.1016/j.eiar.2009.08.010; Therivel, R., Christian, G., Craig, C., Grinham, R., Mackins, D., Smith, J., Sneller, T., Turner, R., Walker, D., and Yamane, M. (in press), Sustainability-focused impact assessment: English experiences, *Impact Assessment and Project Appraisal*; and Fischer (2010), op.cit note 5.

¹⁵ Weiland, U., (2009) Strategic Environmental Assessment in Germany — Practice and open questions, *Environ Impact Asses Rev* (2009), online at doi:10.1016/j.eiar.2009.08.010.

¹⁶ e.g. Partidário, M.R., Sheate, W.R., Bina, O., Byron, H., Augusto, B. (2009), Sustainability assessment for agriculture scenarios in Europe's mountain areas: lessons from six study areas, *Environmental Management*, 2009, 43: 144 – 165; Sheate and Partidario (2009), op. cit. note 6.

¹⁷ EnviroCentre/CEP (2009), *SEA Pathfinder Project Stage 1: Research*, Final Report to the Scottish Government, April 2009; Scott Wilson (2009) *Towards a more efficient and effective use of Strategic Environmental Assessment and Sustainability Appraisal in spatial planning*. Draft Final Report. Prepared for the Department of Communities and Local Government; Sustainable Development Research Network (2008) *Issues for the practice of sustainability appraisal in spatial planning - a review*. Final Workstream Report. Prepared by Land Use Consultants and the Royal Town Planning Institute (RTPI).

4. Current Challenges in the UK Energy and National Planning Arenas

The European experience shows that some Member States see SEA as having had a very positive effect on national level strategic plans, e.g. through the proper consideration of alternatives. The question arises therefore: is the same true for national level plans in the UK?

In the UK, national planning processes in England and Wales (National Policy Statements, NPSs) and in Scotland (National Planning Framework, NPF2) present new challenges for SEA and SA as they reflect new levels of decision-making. The Government has accepted that the SEA Directive applies, i.e. that they are plans or programmes for the purposes of applying the SEA Directive and therefore that they set the framework for projects likely to be subject to EIA. While much of the experience of SEA/SA in the UK has been through local authority spatial planning, experience of applying SEA/SA at national and/or high level strategy level is more limited, although it is increasing. In Scotland, with the SEA Act 2005 applying SEA to a wider range of plans, programmes and strategies than the SEA Directive, SEA is now being applied to high level strategies developed by Government authorities and agencies and the Scottish Government itself¹⁸. The devolved administrations undertook SEA of their respective Rural Development Plans/Programmes under the EC Rural Development Council Regulation (EC) No. 1698/2005 in 2006-8, which were very strategic documents relating to funding programmes e.g. for agri-environment schemes. In England, Regional Spatial Strategies have been undergoing SA though a number are now faced with re-visiting issues around the consideration of reasonable alternatives following the judicial review of the East of England Plan¹⁹, which found the last minute addition of extra housing figures without proper evaluation of alternatives was not in compliance with the SEA Directive. Other case law, such as *Seaport*²⁰ in Northern Ireland, has raised the bar in terms of the need for substantial compliance with the requirements of Article 5 and Annex 1 of the Directive relating to the contents of the environmental report.

5. National Policy Statement (NPSs)

Seven NPS AoS reports were reviewed: for the energy sector an overarching NPS AoS (EN 1), which included technical annexes (EN 2-5 for fossil fuel electricity infrastructure, renewables (onshore and offshore wind, energy from waste), gas and oil infrastructure, and electricity networks respectively). EN 6 is a separate NPS for new nuclear power stations with a separate AoS. All of these were produced by the Department of Energy and Climate Change (DECC) with the AoSs undertaken by a number of consultants. The Ports NPS and AoS were produced by the Department for Transport (DfT), supported by consultants. For comparative purposes the SEA of the NPF2 in Scotland was also reviewed

Table 1 below summarises the comparative review²¹ undertaken of the reports of the AoSs of the five energy NPSs for England and Wales, the Nuclear NPS and the Ports NPS, and in addition the environmental report of the SEA for NPF2 in Scotland to provide a national level SEA comparator to the Appraisals of Sustainability (and see Appendix 2 for further details). The term “Appraisals of Sustainability” refers solely to those assessments undertaken for NPSs, though in all other respects are the same as sustainability appraisals undertaken for spatial plans and need to be screened for applicability of the SEA Directive. In this case all the AoS reports reviewed seek to be in compliance with the SEA Directive. The most important issues, particularly where the assessments raise potential concerns about compliance with the Directive, are discussed below in more detail.

¹⁸ E.g. Scottish Forestry Strategy, Deer Commission Strategy for Wild Deer.

¹⁹ *East of England Plan*: Hertfordshire County and St. Albans District Councils v Secretary of State for Communities and Local Government, May 2009.

²⁰ *Seaport* case in Northern Ireland: No. 120071 NIQB 62.

²¹ The review was undertaken by Collingwood Environmental Planning and evaluated the SEA/AoS reports against a broad set of review criteria (summarised in Table 1), drawing on those developed by the Institute of Environmental Management and Assessment (IEMA), but particularly focusing on those aspects required by the SEA Directive.

Table 1: Summary of comparative review of national planning and policy documents

	Scotland SEA	National Policy Statements Appraisals of Sustainability							Key	
	NPF2 National Planning	NPS 1 Over- arching	NPS 2 Fossil fuel	NPS 3 Renewabl es	NPS 4 Gas & Oil	NPS 5 Elect Networks	NPS 6 Nuclear	Ports NPS		
AoS/SEA objectives										<p>Key</p> <ul style="list-style-type: none"> Overall good coverage/quality Overall poor coverage/quality because of significant omissions or inadequacies Overall satisfactory coverage/quality despite some omissions or inadequacies <p style="text-align: center;">Commentary</p> <p>NPF2 SEA objectives: all SEA topics + more detailed sub-criteria, designed to protect and enhance the current state of the environment. Energy AoSs objectives seek to promote sustainable development and cover all SEA topics. Nuclear AoS objectives seek <i>only</i> to avoid potential adverse impacts without any aspiration to enhance the current state of the environment or promote sustainable development. Ports' AoS objectives, though suggested to be 'aspirational', most are aimed at 'preserving', 'protecting' or 'avoiding' negative impacts rather than enhancing and/or improving.</p>
Scoping										<p>NPF2 assessment – no environmental topics scoped out. Energy AoSs excluded noise and landscape features for not being relevant to a high level appraisal, but scoped back in following the consultation. Nuclear topics identified in the scoping report apparently were kept, but some of the AoS objectives have been excluded with no justification. Ports AoS - None of the key sustainability topics have been scoped out from the assessment. General public has only been involved in the consultation on the scope of the NPF2. Only statutory consultees have been consulted on the NPSs.</p>
Baseline										<p>NPF2 - overall, good coverage of baseline information. Energy AoS baseline data is satisfactory, although at times superficial and not focused. Nuclear AoS - description of baseline is clear, providing quantitative information where appropriate for each sustainability topic, but usually very brief and therefore does not seem to provide sufficient information for defining potential impacts. Ports AoS, an <i>inadequate</i> description of the current state has been given with most of the sustainability topics being described within a single sentence and generic and/or irrelevant to the coast/ports, and no evolution of the baseline evaluation.</p>
Alternatives										<p>NPF2 SEA considered two types of alternatives: high level alternatives representing a selection of policies and the project-level alternatives, the number of which has increased throughout the assessment period. While the former alternatives might be considered reasonable (although not entirely logical), <i>the project-level alternatives are quite inadequate</i> – they are not alternatives to each other, more a wish list of possible developments by interested parties. Energy NPS objectives have been defined so narrowly as to exclude possibility for reasonable competing alternatives (contrary to consultants' recommendations). No alternatives have been put forward for the technology-specific NPSs. Nuclear NPS - the 'hierarchy' approach for considering alternatives is welcomed yet the 'location' aspect, under which alternative options have been narrowed to 'suitable' sites for nuclear power stations highlights that in fact this NPS is operating more at the programme not plan level and in the absence of higher policy level environmental assessment Ports AoS alternatives are alternative options to selected policies of the NPS not to the plan itself. Ports AoS <i>does not consider BAU scenario</i>.</p>

	Scotland SEA	National Policy Statements Appraisals of Sustainability							Key
	NPF2 National Planning	NPS 1 Over- arching	NPS 2 Fossil fuel	NPS 3 Renewabl es	NPS 4 Gas & Oil	NPS 5 Elect Networks	NPS 6 Nuclear	Ports NPS	
									<p>Key</p> <p> Overall good coverage/quality</p> <p> Overall poor coverage/quality because of significant omissions or inadequacies</p> <p> Overall satisfactory coverage/quality despite some omissions or inadequacies</p> <p style="text-align: center;">Commentary</p>
Impact identification and assessment									<p>NPF2 - relatively good assessment of high level impacts taking into account their potential significance and duration, although rather superficial assessment at project level.</p> <p>Energy AoSs - very brief and somewhat opaque description of potential impacts has been provided often concluding that there is no effect for the issue concerned. Moreover, a very <i>superficial assessment of cumulative effects</i> has been undertaken for the NPS 1 AoS, whereas technology-specific NPSs AoSs have <i>not assessed cumulative effects</i> at all.</p> <p>Ports AoS is confused, failing to assess significant effects arising from the implementation of Ports NPS; inadequate cumulative effects assessment.</p> <p>Poor assessment of Energy and Ports NPSs also linked to sometimes inadequate baseline information.</p>
Mitigation									<p>NPF2 - reasonable outline of mitigation measures, although somewhat general and not clear how successful these measures are likely to be. No mitigation measures provided for additional national developments.</p> <p>Energy AoSs <i>emphasise the importance of mitigation</i> rather than suggesting measures to avoid the potential impacts. Only the NPS 4 provides any concrete mitigation measures.</p> <p>Nuclear AoS proposes some mitigation measures for topics likely to be significantly affected.</p> <p>Ports AoS makes a number of recommendations throughout, <i>not targeted mitigation measures</i>.</p>
Consultation/participation									<p>NPF2 - consultation took place early and all responses have been documented and indications given as to how they have been taken into account.</p> <p>Energy and Nuclear NPSs consulted statutory authorities early, but no early public or non-statutory consultation.</p> <p>Ports NPS - consulted statutory authorities early, but no early public or non-statutory consultation.</p>
Monitoring									<p>NPF2 - ER provides quite a comprehensive table with the proposed monitoring data, but the data do not specifically refer to the significant environmental effects of the NPF2.</p> <p>Energy AoS identifies the effects that need to be monitored yet the proposed measures are not clearly defined and explained.</p> <p>Nuclear AoS does not consider monitoring at this stage, rather it proposes the monitoring strategy to be outlined in the AoS Statement, to be published at the same time as the Nuclear NPS, thereby <i>excluding monitoring from consultation</i> and the requirement in Annex I.</p> <p>Ports AoS - monitoring is proposed for sustainability as a whole <i>rather than for the potential effects</i>.</p>
Reporting									<p>NPF2 - ER is easily readable, systematic, largely transparent and covers key issues required.</p> <p>Energy AoSs and Ports AoS, cover key factors required under Annex I, but generally superficial.</p> <p>Nuclear AoS has a good structure to the report yet some key issues like baseline information or mitigation measures are not included in the main report and outlined only in annexes.</p> <p>Ports AoS - not easy to follow; lacks clarity in the approach adopted.</p>
Non-technical summary (NTS)									<p>NPF2 NTS well structured and produced as a stand-alone document written in non-technical language, providing a clear summary of the ER.</p> <p>Nuclear AoS NTS - a good summary except <i>no outline of the baseline information or mitigation measures</i> (only in annexes of the report), therefore not compliant with Annex I.</p> <p>Energy AoS NTSs simply cut and pasted from the main report, and <i>NTS is longer than the report itself for most of the technology-specific energy NPSs</i>. Questionable whether compliant with Annex I.</p> <p>Ports' NTS does not fully summarise the content of the AoS Report, and it <i>fails to summarise the environmental effects</i>, therefore not compliant with Annex I.</p>

The approaches adopted for the AoSs varies across the sectors and NPSs and Table 1 highlights some interesting inconsistencies in the way in which even the AoS frameworks i.e. assessment objectives have been developed. The AoSs are, however, consistent in that it appears clear that they have been restricted in terms of their consideration of alternatives, based on the objectives set for the NPSs; these objectives are summarised in Appendix 1.

NPS Objectives

The NPS objectives indicate the constraints under which the consultants undertaking the AoSs had to work. The most clearly defined objectives are for the **Nuclear NPS** (EN 6), simply because it is operating more at the programme level than plan level, i.e. it has clear and specific locations identified and makes clear that the NPS provides the policy framework and therefore the basis for the Infrastructure Planning Commission (IPC) to make decisions on projects (which is after all what the NPSs are supposed to do). The objectives for the **Overarching Energy NPS** (EN1-5), on the other hand, are much less focused on providing the framework for the IPC and far more explicit about its wider objectives which, surprisingly, do not include any reference to sustainable development. While Objective 1 seeks to promote a low carbon economy, that is not the same as sustainable development – low carbon should not be assumed to be a proxy for sustainability, it is but one (albeit important) element of it. But you could have a low carbon economy that had scant regard for any other aspects of the environment or society. The other objectives are fundamentally economic – competitiveness and energy security. These objectives set the basis for consideration of alternatives (reflected explicitly in Article 5 (1) of the SEA Directive) and it is no surprise therefore that the consultants (Entec) working on the Overarching Energy AoSs (EN 1-5) recommended a wide range of possible alternatives that should be considered, including different mixes of technologies. There are, for example, numerous ways²² in which one could meet Objective 2: “*Contribute positively towards improving the vitality and competitiveness of the UK energy market*”, yet these alternatives were roundly dismissed by DECC. The reasons given were that it is not the purpose of the NPS to consider different technology mixes, that it did not direct the market in this area, and that it sought to clarify existing policy not to change significantly the underlying policies against which applications are assessed²³. However, DECC has explicitly intervened in the market with the Nuclear NPS in actively promoting new nuclear power stations and particular locations.

The Ports NPS takes this approach of going beyond providing a framework for the IPC much further by being absolutely explicit about its intention to “*cater for long-term forecast growth in volumes of imports and exports by sea for all commodities.*” Consequently it is not surprising that the Ports NPS is largely devoid of any real spatial considerations. Indeed, it is not even possible to find the locations of the ports the NPS might be relating to in the draft NPS and AoS documents. The objectives of the NPS themselves (see Appendix 1) are multiple objectives even with the sub-objectives and therefore quite incapable of being evaluated.

The concept of meeting forecast demand has been recognised by Government as unsustainable for road transport for more than a decade. While the Government still attempts to meet demand for airport capacity there is increasing recognition that in practice this will be extremely difficult and gradually there is recognition that modal alternatives such as rail for short haul flights have an important role to play. But there is no recognition in the Ports NPS that there may be alternative approaches to simply trying to meet the market’s demands. So the statement (para 1.1.3, draft NPS) that “*The planning system is a key to the future sustainable development of ports*” is quite incompatible with the objectives of the NPS itself; as long as there is not even any consideration of demand management there can be no sustainable development of ports. Objective 3, which lumps

²² See for example: Vaizgelaite, I (2009), *Assessing the Potential Environmental Implications from Renewable Electricity Generation Expansion in the UK – Applying SEA as a Tool*, Unpublished MSc Thesis, Imperial College London, Centre for Environmental Policy.

²³ Pages vii-viii of overarching Energy NPS AoS Non-technical Summary.

together a number of separate sustainability objectives (modal transfer, renewable energy etc) presumably is meant to reflect sustainability aspirations, but is entirely dependent on modal shifts in other transport modes and energy, with no objectives explicitly to avoid, reduce or minimise environmental impacts of ports themselves (Objective NPS1c – to meet legal requirements - is a *de minimis* requirement and should not even need to be stated).

The objectives of the NPSs are critical because of the constraints they impose on the nature of what might be considered 'reasonable alternatives' under the SEA Directive.

Alternatives and Mitigation

The **NPS** objectives set the basis for the consideration of alternatives. Other than the Nuclear AoS none of the other AoSs provide satisfactory consideration to the issue of alternatives. The Nuclear AoS can only be considered satisfactory on the basis that it is effectively a programme level assessment where Government has already decided to promote new nuclear power, notwithstanding the fact that that decision i.e. the role nuclear should play within wider energy policy, has not been subject to proper environmental or sustainability assessment. The Nuclear AoS did consider alternatives through a hierarchy approach of need, process and location.

In the **Overarching Energy AoS** on the other hand, DECC dismisses eight alternative options proposed by the consultants Entec, effectively because they consider them to be incompatible with the objectives of the NPS. The only alternatives considered (four) were variations on no NPS or NPS with increasing specification. The opportunity to engage in a real debate and *further specify* existing policy about energy technologies was completely lost, because the overriding imperative behind the NPS was to speed up decision-making. The term 'reasonable' has been interpreted as whether an alternative is considered convenient for Government rather than whether it is a 'reasonable alternative' to meet the objectives set by the NPS. These would appear to be quite different things. The nod to the environment is in the form of seeking to minimise or avoid impacts through mitigation, but this misses the opportunity to avoid impacts through the appropriate selection of the most environmentally favourable options in the first place (e.g. a mix of technologies that would have the least adverse impact upon the environment), an essential tenet of the SEA Directive²⁴.

The Ports AoS consideration of alternatives is peculiar. It considers seven alternatives, but most are alternatives for selected policies, rather than strategic options for the plan itself, and there is little spatial reference, the NPS seemingly intent on expanding capacity wherever it might be demanded. In fact a locationally specific NPS was explicitly rejected by DfT (unlike DECC for Nuclear NPS) on the grounds that it would make little difference to the environmental impacts if these were assessed in EIAs at project level:-

"A locational policy (B) may allow environmental and social constraints on location to be considered at a strategic level, but this is unlikely to result in differing environmental and social impacts as compared to such constraints being considered at the specific proposal assessment level, which would happen under a non-locational policy (A)." (Section 6.4.3, page 91, Ports NPS AoS)

This suggests a complete misunderstanding of the fundamental purposes of SEA with which the AoS is supposed to comply. A spatially-relevant NPS and AoS would allow a much better assessment of the strategic and cumulative effects of different levels of development of ports at different locations and so enable a strategy/policy that might actually help to maximise environmental benefits and avoid adverse environmental and social impacts as much as possible. By the time projects come forward there is far less scope for avoidance and mitigation becomes the main focus of the EIA.

²⁴ Recital 5 of the SEA Directive Preamble states that SEA procedures "should contribute to more sustainable and effective solutions".

There is a possible pattern emerging here, given the NPF2 SEA in Scotland (Appendix 2), and the previous experience of the SAs of the Eco-towns draft Planning Policy Statement and Eco-towns programme, where the inadequate consideration of alternatives and the over reliance on mitigation were seen as raising serious issues of potential non-compliance with the SEA Directive²⁵.

Baseline and impact identification and assessment

The other critical areas to emerge from the review in Table 1 above are the evidence base on which the assessment is made and the quality of the assessment itself. The Directive is clear that sufficient information on the state of the environment and an assessment of the likely evolution of the environment without the plan, are required. Good baseline information at the appropriate level of detail for the plan concerned is essential to be able to understand what the impacts might be of the proposed plan. In the case of the **Ports AoS** the baseline information provided is *quite inadequate* since it is entirely generic with little focus or emphasis on the environment in relation to ports, and in many cases is no more than a single sentence, e.g. with respect to flooding. Bizarrely some locational data are provided but often where completely irrelevant to ports e.g. the area covered by limestone pavement orders. Consequently, in this case, there is no *evaluation of the evolution of the environment* in the absence of the proposed NPS. Other AoSs and the NPF2 SEA are generally more satisfactory in their use of baseline data.

The quality of the assessment is an essential requirement of the SEA Directive and specific provision is made in Article 12 to ensure that quality is sufficient to meet the requirements of the Directive. The clear intention here is that poor quality in the assessment would be unable to meet the substantial requirements of the Directive. A key issue in the context of the NPSs is what is actually being assessed? Are the AoSs assessing the likely significant effects on the environment of the proposed NPSs? To understand this it is important to reflect back on the objectives of each NPS itself and to understand the full range of possible effects recognised by the SEA Directive. In many cases a criticism of the assessment is that it is not actually assessing the impact on the environment of the NPS, more the impact of the NPS on the consenting process for projects, which is not the same. The fact, for example, that the **Ports NPS** may recognise a potential environmental impact on biodiversity from increased shipping or dredging, should not result in a positive appraisal score – the actual impacts, even with mitigation measures are still likely to be negative or at best uncertain. One consequence of an NPS is that development may be speeded up and the impacts of projects so consented may be greater and occur sooner and possibly at a larger scale than they would otherwise. Those will have real physical effects on the ground, but these aspects have not been adequately assessed. In other cases (e.g. in **Overarching Energy AoS**) the appraisal results in a positive score for economic development (on the assumption that the NPS will speed up planning²⁶), but neutral for most other appraisal objectives, even though there are likely to be adverse consequences for many environmental components. Two examples illustrate this point.

The first is from the **Overarching Energy AoS**. The very existence of NPSs and the NSIPs consenting process by the IPC risks greater centralisation of the energy sector and poor technology choice, which challenges the notion of sustainability head on. Because the Planning Act 2008 sets a certain threshold for the nationally significant infrastructure projects in the energy sector, it is very likely that NPSs will encourage the development of larger-scale energy infrastructure in order to avoid what might be perceived as a more time-consuming consenting process with local authorities. Major developments are likely to have more significant local impact on both the environment and communities. In addition, Energy from Waste (EfW) is most likely to benefit from the new planning regime because such schemes are more likely to exceed the threshold. However, EfW is the least

²⁵ Sheate (2008) op.cit. note 10.

²⁶ This in itself may be a false assumption, even though it is the intention of the NPS; if NPSs and NSIPs end up being challenged in the courts, as they no doubt will, there can be no assumption that the planning process itself and delivery of infrastructure will necessarily be any quicker in the long run.

preferred renewable technology in terms of its overall environmental effects (e.g. an order of magnitude higher in terms of lifecycle CO₂ emissions compared to wind, tidal, wave and energy crops, and significantly higher SO₂ and NO_x emissions²⁷). So a consequence of the Energy NPSs will be to encourage particular types of technologies and larger scale developments without having assessed the relative environmental impacts of those technologies or mixes of generating capacities beforehand.

The second example is from the **Renewables AoS** (for NPS EN 3), in para 2.5.31 on page 12 in its guidance to the IPC it states:-

“In sites with nationally recognised designations (Sites of Special Scientific Interest, National Nature Reserves, National Parks, Areas of Outstanding Natural Beauty, Heritage Coasts, Scheduled Monuments, Conservation Areas, Listed Buildings, Registered Historic Battlefields and Registered Parks and Gardens) consent for renewable energy projects should only be granted where it can be demonstrated that the objectives of designation of the area will not be compromised by the development, and any significant adverse effects on the qualities for which the area has been designated are clearly outweighed by the environmental, social and economic benefits.”
(emphasis added)

This appears to be a weakening of national park policy (PPS 7, para 22) which requires that consent should only be granted if there is an overriding public interest, that there has been an assessment of need, and that suitable alternative locations outside of the National Park (or AONB) area – or other forms of alternatives - have been considered. This has not been assessed in the AoS²⁸.

Central to the quality of assessment is the selection of SEA or AoS objectives against which the plans are assessed. Again these vary considerably. The Overarching Energy AoSs and the NPF2 generally draw on an appropriate range of AoS/SEA objectives that are suitably aspirational (which is essential if you take an objectives-led approach – the assessment is meant to be against a desired future environment). The Nuclear AoS adopted a peculiar set of objectives against which to assess the NPS which are almost entirely unambitious – they seek only to avoid potential adverse impacts not to protect or enhance the environment. Cumulative effects are generally poorly addressed, often superficial where they are considered or not at all in the case of the energy technology-specific AoSs.

6. Why Compliance Matters - Making SEA Count

If Government is to meet the objectives of the SEA Directive (Article 1) its application to NPSs/NPF2 needs to ensure it is delivering substantial compliance with the specific requirements for an environmental report laid out in Article 5 and Annex 1. In our view the AoSs for the NPSs (and the SEA for the NPF2) show considerable variability in quality, even among those coming out of the same department - DECC (EN1-5 and EN6). This variability stems partly from variability in the objectives set for the NPSs themselves which had consequences for the nature of the alternatives considered. The variability in the assessment objectives between the NPSs gave rise to further variability in the quality of the assessment undertaken, as did the quality of baseline data description and evaluation. Almost across the board the issue of alternatives has been a problem and it is highly questionable whether the alternatives in many cases can be considered to have been ‘reasonable’ as required by the Directive. The constraint on alternatives has been imposed because of the overriding intention of the NPSs to speed up decision-making and the framing and interpretation of the NPS objectives to ensure alternatives are constrained. If we consider therefore the extent to which the AoS process (and SEA

²⁷ Vaizgelaite (2009), op. cit note 22, based on Defra, House of Commons, Veolia figures.

²⁸ See page xiv of the renewables AoS annex summary table, and pages xxiv-v and page xviii of the NTS.

process in NPF2) has influenced the planning process it is difficult to conclude that it has been effective. Only if real alternatives, such as technology mixes (or sector specific programmes for NPF2), for example, had been considered might the SEA/AoS process have been able to influence the direction of the NPS process itself. It is not as though an assessment could not be undertaken of energy technology mixes; such an assessment would be perfectly possible and more importantly would have been highly beneficial to create the opportunity to further specify existing energy policy and to help provide a strategic policy framework for lower level plans and programmes²⁹.

What does this say about the application of the SEA Directive in the UK to national level planning processes? The review suggests that either the NPS and AoS approach has been poorly conceived by Government in terms of applying the SEA Directive, or that it has been well conceived in order to circumvent the purposes of the Directive. Either way the application of AoS/SEA by Government appears disingenuous since there seems to be little real intention that the assessments should influence the planning process. The very purpose of speeding up the planning process serves to militate against effective environmental assessment since the assessment process needs to influence the planning process from the earliest possible opportunity and should seek to ensure public participation during that process. Is this a peculiar feature of AoSs and/or SAs (given the experience with Eco-towns PPS at the national planning level and current concerns over SAs of RSSs) rather than SEA, or a wider pattern of the approach by Government in the UK to the implementation of the SEA Directive? Is there a potential for a return to a *de minimis* approach³⁰ similar to that seen in the 1980s on EIA and the early developments of a draft SEA Directive?

There are a number of important considerations to take into account in seeking to answer these questions. The sustainability appraisal/appraisal of sustainability approach is one rather peculiar to England and Wales, and has not been pursued in Scotland where SEA has been further enshrined in primary legislation. The principle of assessing all aspects of sustainability together is an attractive one, but depends very much upon the perspective of sustainability being adopted by policy makers. An approach that adopted the full Brundtland definition would include a clear recognition in decision-making of the environmental and social imperatives that underpin the whole concept. That would also be consistent with seeing SEA as a means of ensuring the environment (and many social aspects such as populations and human health) are fully integrated into decision-making. But if your view is a more equivocal one, which sees sustainability as a balance between economic, social and environmental factors, then trade-offs between those factors become more acceptable. In practice, SA and AoS can appear to reinforce that, claiming sustainability while accepting loss in one or more factors even though there could be alternative ways of enhancing economic growth that would also enhance other factors.

The experience to date before the UK courts reinforces the perception that the Government is somewhat ambivalent about the purpose of the SEA Directive; otherwise it could, for example, have avoided judicial review over the East of England Regional Spatial Strategy³¹. There would seem, therefore, to be a number of issues of non-compliance on which you may wish to seek legal advice:-

²⁹ A previous overview appraisal of technologies was undertaken by the Chief Scientific Adviser's Energy Research Review Group (2002) Recommendations to Inform the Performance and Innovation Unit Energy Policy Review, Office of Science and Technology, available at <http://www.dius.gov.uk/~media/publications/F/file25485>. Also the Carbon Trust now promotes an appraisal-based approach to selecting and commercialising low carbon energy technologies in its report 'Focus for Success' (2009). See also Vaizgelaite (2009), op. cit. note 22.

³⁰ See for example: Council for the Protection of Rural England (1991), *Submission by the Council for the Protection of Rural England (CPRE) to the European Commission's five-year review of EC directive 85/337/EEC on environmental assessment: the environmental assessment directive-five years on*; Sheate, W.R. (1994), *Making an Impact: A Guide to EIA Law and Policy*, Cameron May; Wood, C. (1995), *Environmental Impact Assessment: A Comparative Review*, Longman 1st edition.

³¹ Judgment, City and District Council of St Albans and Hertfordshire County Council v Secretary of State for Communities and Local Government [2009] EWHC 1280 (Admin), 20 May 2009.

1. **Formal complaint to the European Commission** over the poor application of the SEA Directive to national level planning processes, as illustrated by the NPS processes to date (and the Eco-towns PPS earlier). The basis for this complaint would be that the very nature of the planning process in these cases is that they, in a variety of ways, seek to circumvent the purposes of the SEA Directive, particularly with respect to the evaluation of reasonable alternatives. In some cases it is because they purport to be strategic planning documents, but are in fact being determined by projects that have already been identified, i.e. NPF2 and NPS EN 6. In that way the projects are setting the strategic framework for the plan and not the plan for the projects. In other cases the objectives of the plan are defined and interpreted in such narrow terms as to exclude proper consideration and evaluation of 'reasonable alternatives'.
2. **Potential for judicial review** over the **Ports NPS**, which is consistently inadequate in its approach to the AoS and would appear to substantially fail to meet the requirements of the SEA Directive. Key areas where there is potential for substantial non-compliance are:-
 - i) Non-technical summary is inadequate since it provides no summary of the likely effects of the plan on the environment;
 - ii) The baseline information is inadequate as it does not describe the existing state of the environment;
 - iii) Failure to provide any evaluation of the likely evolution of the environment without the plan. The only reference to this issue, in section 3.2.4 in the Ports AoS, begs the question of what is the point of the NPS if it will have no effect on the environmental, economic and social baseline:-

“Due to the nature of the policy statement being considered – the Ports NPS, it is not anticipated that the environmental, economic and social baseline will be affected as a result of its direct implementation. The NPS sets out existing policy, but only aims to affect the process of consenting port-related development projects (including time taken through making it clear what may be consented), rather than the outcome of decisions. Therefore any trends identified in the baseline are likely to be the same with and without the NPS.”

This statement in any case runs counter to some of the AoS findings itself, which does identify effects;
 - iii) Inadequate assessment of alternatives – it is questionable whether the alternatives considered are reasonable since they are based on alternative options for policies within the plan and not strategic options overall. No assessment of business as usual and no combinations of these alternative policy options are considered.
 - iv) The lack of any spatial reference precludes any effective evaluation of strategic and/or cumulative and secondary environmental effects;
 - v) Poor quality of assessment of environmental effects – the AoS fails to assess the full range of impacts of the NPS, including the likelihood it will speed up and bring about major port development that will have impacts on the environment, which may be different to what would happen otherwise. Many of the assessments against the AoS objectives are scored positively even where the NPS simply reiterates existing policy, which means that the NPS actually will at best have a neutral effect on such criteria and effectively be the same as business-as-usual. Had a no-NPS option (as required by the SEA Directive Annex 1 (b)) been assessed this would have highlighted to DfT the fundamental failure in the approach taken to the assessment.
 - vi) There are no proposals to monitor the environmental effects of implementing the plan as required by the Directive, only general sustainability monitoring.

3. **Overarching Energy AoS** (and technology specific AoSs) raise some similar issues to those above for Ports. The issue of alternatives in particular is highly debateable and so it is questionable whether the alternatives considered (no NPS or NPS with varying degrees of specificity) can be considered 'reasonable'. The arguments employed in the AoS are similar to those employed for the Eco-towns PPS and hold little water since there are a number of ways of seeking to promote a low carbon economy (Objective 1 of the NPS EN1), including a variety of different mixes of energy technologies which would be reasonable alternatives to consider as part of the NPS and AoS process.
4. For the **Nuclear AoS**, the main failings are sometimes superficial baseline and more significantly no proposals for monitoring, proposing instead to outline those in the AoS Statement. This would appear to be non-compliant with the SEA Directive since the monitoring is therefore excluded from the consultation process on the AoS and draft NPS.

7. Conclusions

The analysis above suggests that the current performance by the UK Government in implementing the SEA Directive for national level planning decisions is far from exemplary. In this case it is not failure to transpose the Directive for these classes of decisions, but poor application. A serious question is raised as to whether this is simply symptomatic of the early learning phase of SEA in Europe or whether it is symptomatic of an approach to SEA implementation in the UK at national level. The former argument is a weak one, given the UK, and England and Wales in particular, has a long history prior to the SEA Directive being introduced of undertaking forms of environmental appraisal for a range of land use planning documents. SEA as such was not introduced for the first time with the SEA Directive, only the formal requirements of the Directive.

Undertaking SEA effectively – i.e. to deliver the objectives of the SEA Directive - requires time and resources invested early in the planning process, and a 'receptive' planning process, to avoid the unnecessary expenditure and delay in the process later on. It is inevitable that the more consultation and assessment is squeezed in the planning process the more recourse will be sought through the courts in the form of judicial review. Delays in past infrastructure planning because of long public inquiries were not caused by sheer bloody-mindedness, but because they were controversial proposals that would have significant impacts on the environment and local communities. The Aarhus Convention³² is clear in promoting access to information, public participation and access to justice that if the first two are not forthcoming the last has to be available as a measure of last resort. Where time is curtailed, options severely constrained or SEA/AoS is only introduced late in the process, the SEA/AoS inevitably becomes a bolt-on exercise with little real influence on the plan making process. The ability of SEA to influence the planning process or the mindset of the plan makers or stakeholders is severely constrained in such circumstances, and there is little real opportunity for exchange of knowledge or understanding. The core objective of the SEA Directive, contained in Article 1 – *“to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development”* - clearly is not achievable under these circumstances.

Considerable time and effort has been put into undertaking the assessments, but if there is little integration with the actual planning process then it is hard to see how the AoSs (or SEA for NPF2) are significantly influencing decision-making. This is particularly true if reasonable alternatives are not being properly addressed, since this is the main way in which changes to a plan might actually be

³² UNECE (1998), *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, available at <http://www.unece.org/env/pp/>

brought about to avoid adverse environmental impact, enhance environmental benefits and deliver more sustainable solutions.

There is a risk that where environmental or sustainability benefits are identified as part of the objectives of the plan that the plan is automatically seen as somehow a sustainable plan. Promoting a low carbon economy, for example, does not equate to promoting a fully sustainable energy policy – there are other important considerations as well as carbon. What is revealed very clearly by the evidence of the NPS AoSs is the yawning gap above the NPSs where there is no formal SEA undertaken. The problems surrounding the alternatives, for example, at the Overarching Energy NPS level, stem directly from the lack of any meaningful environmental assessment of options and mix of options of energy technologies at the policy level and the apparent view of Government that it will intervene in some markets but not others. There has always been a need for policy level SEA, but that becomes ever more clear when high level decisions about energy mixes are being made without being properly informed by environmental assessment of their consequences. At the root of the problems with these AoSs is the fundamentally weak conception of sustainability adopted by Government and the apparent perception that having to undertake an Appraisal of Sustainability and comply with the SEA Directive is a hurdle to be seen to have jumped rather than a useful mechanism for helping to deliver better and more sustainable evidence-based policy making. SEA, in these cases, is therefore being allowed to perform neither an effective advocative nor an integrative role.

8. Recommendations

A number of recommendations flow from the analysis and discussion above, which RSPB and WWF may wish to consider:-

- i. Given the potential identified for non-compliance with the SEA Directive of a number of the AoSs, it would be appropriate to seek further legal advice on the potential for legal challenge, through complaints to the European Commission and through applications for leave for judicial review.
- ii. The issue of 'reasonable alternatives' will be only be clarified following interpretation through the courts and therefore there are wider benefits in the long term to be gained from RSPB and WWF pursuing clarification of such issues through recourse to the law.
- iii. RSPB and WWF may wish to seek to amend the SEA Directive at the earliest opportunity to extend its scope to policy, as has been considered before in the past;
- iv. RSPB and WWF may wish to urge the UK Government (and devolved administrations) unilaterally to apply SEA to policy level decisions, following the Scottish lead;
- v. RSPB and WWF should urge the UK Government to amend the SEA Regulations (2004) to extend scoping consultation to include non-statutory consultees and the public. This front loading of consultation in SEA would help to ensure the objective of the Aarhus Convention for early and effective consultation is met and should also be followed through to the EU level in amending the SEA Directive.
- vi. RSPB and WWF should urge the Government to amend Planning Policy Statement (PPS) 1 on *Sustainable Development* to emphasise how SEA is to be used to enhance early and effective public participation and help deliver better and more sustainable plans and programmes.
- vii. RSPB and WWF should urge the Government to develop and apply a consistent approach to the NPS process, which would:

- a. Clarify the different types of NPSs and a more consistent approach to the appraisal of the different types, e.g. whether at broad strategic plan level or programme level, e.g. Ports NPS could easily have been as locational as the Nuclear NPS;
 - b. Incorporate a tiered approach to assessment where high level policy is also subject to SEA/AoS. In this way NPSs could be used for constructive dialogue and further specification of higher level policy and open up the process to seeking genuinely more sustainable options for essential infrastructure.
- viii. The emphasis in the NPS/NSIPs process of speeding up the planning process may in practice cause more conflict rather than less, and so more likely to result in recourse to the courts, thereby creating delay later in the process. RSPB and WWF may therefore wish to encourage the Government to embrace the SEA process more positively as providing a mechanism for active engagement and better strategic planning, rather than the *de minimis* approach which is now emerging through the AoSs.
- ix. RSPB and WWF should continue to learn from the experience of SEA and promote its use as a constructive tool for strategic engagement and planning, and continue to support further capacity building and development of appropriate SEA skills among practitioners and authorities.

Appendix 1: NPS Objectives

Overarching Energy NPS	Nuclear NPS objectives:	Ports NPS objectives
<p>1. Speed up the transition to low carbon economy</p> <p>2. Contribute positively towards improving the vitality and competitiveness of the UK energy market</p> <p>3. Deliver faster and more transparent decisions on energy infrastructure which should improve the UK's security of supply</p>	<p>1. Provide the primary basis for planning decisions by IPC on applications for development consent for a new nuclear power station.</p> <p>2. Set out the role of nuclear power and the key features of relevant planning policy in which applications of new nuclear power stations should be considered.</p>	<p><u>Objective 1:</u></p> <ul style="list-style-type: none"> • encourage sustainable port development to cater for long-term forecast growth in volumes of imports and exports by sea with a competitive and efficient port industry capable of meeting the needs of importers and exports cost effectively and in a timely manner (NPS1a) • allow judgments about when and where new developments might be proposed to be made on the basis of commercial factors by the port industry or port developers operating within a free market environment (NPS1b) • ensure all proposed developments satisfy the relevant legal, environmental and social constraints and objectives, including those in the relevant European Directives and corresponding national regulations (NPS1c). <p><u>Objective 2:</u></p> <ul style="list-style-type: none"> • cater for long-term forecast growth in volumes of imports and exports by sea for all commodities indicated by the demand forecast figures set out in the MDS Transmodal report, taking into account capacity already consented. The Government expects that all of the demand forecast in the 2006 ports policy review is likely to arise, though in the light of the 2008-09 recession, not necessarily by 2030 (NPS4a) • support the development of offshore sources of renewable energy (NPS4b) • offer a sufficiently wide range of facilities at a variety of locations to match existing and expected trade, ship call and inland distribution patterns (NPS4c) • ensure effective competition between ports and provide resilience in the national infrastructure (NPS4d) • take full account of both the potential contribution port developments might make to regional and local economies (NPS4e). <p><u>Objective 3</u></p> <ul style="list-style-type: none"> • support sustainable transport by offering more efficient transport links with lower environmental disbenefits • provide a basis for trans-modal shifts from road transport to shipping and rail, which are generally more sustainable • support sustainable development by providing additional capacity for the development of renewable energy • support economic and social cohesion

Appendix 2: SEA of the Scotland National Planning Framework (NPF) 2

SEA of the Scotland NPF2

The NPF2 sets out the strategy for Scotland's spatial development to 2030 and seeks:

- to contribute to a wealthier and fairer Scotland by supporting sustainable economic growth and improved competitiveness and connectivity;
- to promote a greener Scotland by contributing to the achievement of climate change targets and protecting and enhancing the quality of the natural and built environments;
- to help build safer, stronger and healthier communities, by promoting improved opportunities and a better quality of life; and
- to contribute to a smarter Scotland by supporting the development of the knowledge economy.

The focus is on promoting “sustainable *economic growth*” while also having clear environmental objectives. It set out a broad vision for planning in Scotland and created a class of priority national development projects (NDPs), the inclusion of which in the NPF2 signals the desire to see those projects delivered. The process of arriving at those NDPs however appears far from logical, given that the list started out with only nine projects, and then became a ‘wish-list of some 52 projects before finalising at 14.

The key area of conflict was in trying to reconcile climate change and economic growth aspirations due to the large number of proposed major energy and transport projects. Many developments would inevitably have significant negative effects on biodiversity particularly on coastal and marine habitats and species. There are therefore inherent conflicts even within the NPF2 objectives themselves, given a greener Scotland is a high level aim.

A number of problems with the SEA stem directly from the split nature of the plan process itself, which while national, was not particularly spatial in its approach to alternatives, and in the creation of NDPs, which had the effect of turning strategic thinking on its head. Consequently, NDPs have been created by the NPF2 without adequate assessment of whether they are the most appropriate or environmentally acceptable projects to take forward.

Two types or levels of alternatives were considered for NPF2: i) **High-level ‘alternatives’** representing four thematic scenarios: economy, sustainability, communities and connectivity, each of which represents a selection of policy options, but little in the way of spatial resolution, plus business as usual; and ii) **National Development ‘alternatives’**, representing a number of energy, transport or environmental infrastructure projects, although it is hard to see how these projects might have been considered ‘reasonable alternatives’. Fundamentally, there is a gap between the ‘strategic scenarios’ and ‘national development projects’, i.e. there was no sectoral or programme level of assessment, nor assessment of spatial alternatives. The NPF2 SEA therefore attempted to do both high level policy assessment and low level (but superficial) project assessment – it is not surprising that it does not really accomplish either entirely satisfactorily¹. The reality here is that the strategic planning process was being driven by the projects, rather than the other way around, constraining the nature of what might be considered to be ‘reasonable’ alternatives and potentially raising a question of whether the SEA Directive is being circumvented by such an approach.