

EVALUATION OF ENGLISH HERITAGE INVOLVEMENT IN ENVIRONMENTAL IMPACT ASSESSMENTS (EIAs)

English Heritage Research Project 6455

by *Green Balance*



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SUMMARY

S1 Development projects likely to have a significant effect on the environment are required by European law passed in 1985 to engage in a process of Environmental Impact Assessment (EIA). This helps to shape the development proposals to respond to environmental interests. It also informs the decision on whether or not to proceed with such a development and, if so, on what terms. In England the requirements were given legal effect through a series of different laws tailored to the pre-existing practices for authorising each type of development. Some decision-making functions have been reallocated over the years and the EIA requirements with them.

S2 EIA procedures primarily involve a 'screening' stage at which a decision is taken on whether an EIA is necessary, a 'scoping' stage at which the range of environmental issues to be studied is decided, and a 'submission' stage when the final 'environmental statement' is completed. The requirements at each stage vary between the laws for different types of development. This study set out initially to identify how many environmental statements were submitted in 2010-11 under each law, and on how many of these English Heritage was consulted at each of the main stages.

S3 The research established that there were at least 300 EIA projects registered in the land use planning system that year, far more than the EIA cases under all other laws combined. The overall aim was to identify whether projects likely to have a significant impact on heritage interests were satisfactorily being brought to English Heritage's attention and were then being addressed properly. Investigations were made under all laws into whether English Heritage was consulted when this was a legal requirement (as the rules vary), or even if this was not statutorily required, and whether English Heritage responded.

S4 The primary focus of the research was on the land use planning system. Here the screening and scoping stages are optional and there are no statutory consultation requirements at the screening stage. The consultation requirements with English Heritage are the same at scoping and submission stages, but some discretion lies with the local planning authority to decide whether English Heritage is 'likely to have an interest' in a project. All local planning authorities thought to have received EIAs (county councils and the 125 other authorities identified by the Department for Communities and Local Government) were contacted by telephone and questionnaires circulated for completion by case officers. Full information was received on 232 cases which had passed the screening stage. Of the 150 cases subject to scoping, English Heritage was consulted on 80 and responded to at least 59. The missed opportunities included two major schemes on which English Heritage was not subsequently consulted at submission stage. Of the 230 cases accompanied by an environmental statement, English Heritage was consulted on 119: in only about 7 cases were no responses made, of which one was handled informally, and there were mitigating circumstances for non-response in three more. The information supplied was cross-checked through a validation exercise with English Heritage.

S5 The research pursued the 132 EIA projects of the 232 on the database on which English Heritage was not consulted (after allowing for overlap) to identify if heritage interests might have been affected in these cases. A questionnaire to local authority

conservation staff was completed in respect of 45 cases. Only one non-consultation was questionable out of 45 cases and two others marginal. Additional discussions with case officers by telephone on many other cases identified two more cases in one authority where non-consultation had been of concern to English Heritage (where the authority reviewed its procedures as a result). Discussions with heritage officers identified a few more where, with hindsight, consultations with English Heritage should probably have taken place. The overwhelming evidence from local authority heritage staff is that in cases where English Heritage was not consulted at the scoping or submission stages of EIAs: (a) there have not been significant effects of proposed EIA developments on the historic environment, and (b) planning case officers have been making defensible judgements about consultation.

S6 Only four substantive cases could be identified in 2010-11 in which English Heritage had heard about major projects with impacts on the environment but on which it was not consulted through the EIA procedures. The experience shows that the vast majority of projects of potential interest are coming to the attention of English Heritage through formal EIA consultation routes. Such alternative routes that English Heritage may have for finding out about schemes in preparation are identifying very few and may therefore be deemed not reliable. Overall, the most probable position is that almost all cases of potential interest to English Heritage are already being drawn to its attention through the planning system. There were plenty of cases where there was some heritage interest in an application but officers considered that this was insufficient to merit a consultation with English Heritage: local government continues to address heritage interests at the local scale, below the level of engagement of English Heritage.

S7 The number of EIA cases outside the planning system were few in 2010-11 other than 58 in the marine environment (though data were not collected on highways or land drainage cases). Since then, decisions in the marine environment have largely passed to the Marine Management Organisation which has a policy of always consulting English Heritage on EIAs at the scoping and submission stages. The other authorities deciding EIA cases appear to follow consultation procedures accurately, with a small amount of additional non-statutory consultation in some cases. Projects which would be likely to have a significant effect on the historic environment are therefore highly likely to be drawn to English Heritage's attention. However, the legal definition of relevant EIA cases meriting consultation is tightly constrained in the case of forestry projects. English Heritage almost always responds to the consultations it receives on non-planning EIAs. No problems became apparent regarding heritage issues being: omitted from consideration by non-planning EIA projects, poorly handled or misunderstood. However, the sample interrogated was either somewhat out of date (in the marine environment) or otherwise modest in size.

S8 Four recommendations are made which in summary are:

- to regulators to obtain professional heritage advice at screening and scoping stages;
- to English Heritage to clarify to local planning authorities those impacts which would make projects 'likely to be of interest' to it and therefore merit consultation;
- to English Heritage to aim to respond formally to all consultations on scoping opinions in the planning system;
- to local planning authorities to give reasons if they change their decision on whether to consult English Heritage between the scoping and submission stages.

1 INTRODUCTION

Aims and objectives

- 1.1 To establish how many decisions involving an EIA were determined in England in a one year period.
- 1.2 To evaluate these to determine in how many cases:
 - English Heritage would have been a statutory consultee and of those how many English Heritage responded to;
 - where English Heritage was not a consultee there was any impact on the historic environment.
- 1.3 To evaluate in addition:
 - where English Heritage should have been a consultee but was not consulted;
 - cumulative impacts of development on the historic environment;
 - the stage in the EIA process at which English Heritage can participate; and
 - varying levels of importance which EIA developments will have for English Heritage.

Background: the law on EIA in England

1.4 In cases when a project is likely to have significant effects on the environment there is a legal requirement that the project is subject to an Environmental Impact Assessment which the decision maker must take into account in the decision on the proposal. This requirement is established in European law through Council Directive 85/337/EEC. Member States of the European Union must give effect to this legislation, which in England has been by transposing the requirements into a series of domestic laws. The original 1985 Directive has been amended periodically, and those amendments too have been introduced into English law by suitable amendments to the English laws passed after 1985.

1.5 The approach taken in England was to graft the EIA requirements onto pre-existing decision-making structures. As a result, EIA legislation needed to be applied to each main category of development and decision-maker. Most of this was achieved through Statutory Instruments (secondary legislation), though a few requirements were more conveniently enshrined in Acts of Parliament (primary legislation). The result has been a plethora of different laws, often with quite substantial differences between them in detailed application (usually to reflect the underlying procedures they were intended to complement).

1.6 In recent years there has been some redistribution of powers, notably affecting the marine environment by the consolidation of much decision-making into the hands of the Marine Management Organisation. In addition, major new legislation over the years affecting development, such as the Transport and Works Act 1992 and the Planning Act 2008 (which created the Infrastructure Planning Commission to deal with nationally significant infrastructure projects) have generated new EIA legislation and further redistributed powers for applying the European requirements.

1.7 The number of EIAs carried out under each law varies enormously. At one extreme, there has not been a single EIA required under the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003 in its nine years of existence. On the other hand, the number of EIAs carried out under the planning system (The Town and Country Planning (Environmental Impact Assessment) Regulations 2010 and its predecessors) – over 300 in 2010-11 – has far eclipsed EIAs under all the other laws put together.

1.8 The process of tying-in EIA to pre-existing decision-making practice has ensured that EIA assists in the making of decisions under other laws, and is not for the most part a matter on which a submitted environmental statement (the principal output of the EIA process) is assessed for a decision in itself. Only in one unusual instance, marine works, is an ‘EIA decision’ required before a proposed project is transferred for final decision by the established body. This means that for the most part the adequacy of conformity of an EIA process with the statutory provisions under which it is drawn up is rarely evaluated formally. The decision-maker must therefore do the best it can with the intelligence it derives from the EIA process to take reasonable decisions. It may be possible for decisions on the projects themselves to rectify to some extent certain shortcomings in the quality of the EIA process.

Screening, scoping and submission

1.9 The principal stages of the EIA process are screening, scoping and submission (though screening and scoping are not essential in all legislation). Screening is the process by which a decision can be taken at an early stage in the life of an emerging project to establish whether or not it will need to be accompanied by an EIA. Scoping is the process for establishing the topics which an EIA should address. Submission of the outcome of the process, in the form of an ‘environmental statement’, is common to all EIA processes. Each of these stages offers an opportunity for heritage issues to be addressed so that, if significant effects of a project on the historic environment would be likely, they can be addressed in the EIA to assist the decision on the project proposal.

1.10 The effectiveness of this arrangement depends on decision-makers having sufficient appreciation of heritage issues, or access to knowledge about it, so that heritage issues are not inadvertently overlooked. In some cases there are arrangements to obtain advice by means of consultation with English Heritage: these can vary from stage to stage in the process and may be either compulsory or optional (i.e. if the decision-maker considers that English Heritage’s interests would be affected). This research has aimed to evaluate the adequacy of the arrangements both when English Heritage is consulted and when it is not.

1.11 Screening allows applicants to avoid the risk of significant delay that would affect their project if they found out only at the point of decision on the project that an EIA was in fact required though none had been prepared. Under most legislation the process of requesting an ‘opinion’ on whether an EIA is required is optional: the applicant can ignore screening and either carry out an EIA or take a chance on one not being needed. In a few cases screening is compulsory (land drainage, the introduction of agriculture, offshore oil and petroleum production and associated pipelines, harbour works, and highways). There is

no screening in the case of nuclear reactor decommissioning because EIA is mandatory for these projects.

1.12 Screening provides early warning to English Heritage and other parties that projects are under consideration which may affect their interests. The statutory position under the various screening laws is as follows:

- consultation with English Heritage is mandatory for land drainage projects;
- there is no statutory consultation facility at all at screening stage in the case of planning, forestry, water resources, highways, nationally significant infrastructure, or offshore oil and petroleum production and associated pipelines projects;
- there is no statutory facility for consultation with English Heritage (but there is with local authorities) for electricity works, gas transporter pipeline works, and onshore oil and gas pipeline works;
- in all other cases there is a statutory facility for consultation with parties which the decision-maker considers likely to be interested.

1.13 Once a decision has been taken that an EIA is required, scoping is the means by which promoters of a project can ensure that the EIA addresses the appropriate issues in the appropriate depth. Like screening, the process of requesting a scoping 'opinion' is optional under most legislation: the applicant has the option of guessing what topics will be of concern to decision-makers. The power is usually available for decision-makers to require a supplementary environmental statement (or more simply additional information to enable them to reach a decision on the project proposal) if they consider the information contained in a submitted environmental statement to be inadequate.

1.14 The statutory position regarding consultation with English Heritage at scoping stage under the various laws is as follows:

- consultation with English Heritage is mandatory for land drainage, nationally important infrastructure and water resources projects, and planning projects which affect specific heritage assets;
- there is no provision for a scoping stage in highways projects, and therefore no consultation facility;
- in all other cases (including planning projects) there is a statutory facility for consultation with parties which the decision-maker considers likely to be interested.

1.15 This project aimed to establish the sufficiency of engagement of heritage concerns at the scoping stage:

- whether statutory consultations are carried out;
- whether decision makers have access to sufficient expertise in heritage or other means of reaching a sound judgement either on whether consultation with English Heritage is appropriate or on the scope of any heritage issues to be considered in an EIA; and
- whether non-statutory consultations or other arrangements are a satisfactory substitute.

1.16 The statutory position regarding consultation with English Heritage on submitted environmental statements under the various laws is as follows:

- consultation with English Heritage is mandatory for land drainage, nationally important infrastructure, highways and water resources projects, and for planning and transport & works projects which affect specific heritage assets;
- in all other cases (including planning projects not covered by the above) there is a statutory facility for consultation with parties which the decision-maker considers likely to be interested.

1.17 It is clear from the legal provisions that in many cases, at each stage in the EIA process, there is reliance on the judgement of the decision-making body about the 'interest' which English Heritage might have in a case sufficient to merit consultation. The legal requirement to consult in these cases is in effect a duty to consult if English Heritage would be likely to be interested. The terminology in the legislation, which varies from law to law, gives some flexibility in interpretation to the decision-maker but appears to offer legal redress if a consultation does not take place in a case where the decision-maker ought to have realised that this was merited. Legal advice would be needed on the interpretation of the obligation in any particular project, but the overall approach aims for a balance between consulting English Heritage when it is likely to be interested and avoiding an unnecessary burden on the parties when it would be unlikely to be interested.

Research method

1.18 Initial information was sought from all targeted decision-makers by telephone. This was in order to identify the correct individuals with responsibility for the issues being researched, to ensure as rapid progress as possible in the obtaining of information, and to facilitate the expression of views and an understanding of how procedures function in practice. Once contact had been made, detailed requests for information were sent by email (and on a few occasions where the appropriate respondent could not readily be contacted by telephone).

(a) *Local Planning Authorities*

1.19 Four main steps were required to obtain the information needed for this project:

- identify EIAs received by the authority;
- identify the case officers who handled the planning applications and accompanying EIAs;
- circulate a questionnaire for each EIA and seek its completion by the case officer;
- in cases where English Heritage was not consulted, identify the conservation officer(s) responsible for the heritage interest in the project, circulate to them a second questionnaire on this topic, and seek their completion of it.

1.20 Cutbacks in local government have caused officers to focus on statutorily required work and to minimise their exposure to spending time on research projects and outside callers. The large majority of officers were helpful once they had been contacted, though a few development control managers promised half-heartedly to assist the project but continually failed to do so. More time-consuming to overcome (and thereby diverting of the resources for the research) were those many authorities which have adopted procedures which frustrate reaching a point of contact with officers. Furthermore, many experienced

planning staff have retired or lost their jobs in recent years, leaving behind others who are often unfamiliar with major decisions taken as recently as 2010-11. We were fortunate in a number of cases to obtain information days before individuals retired. A note on this practical experience from the researcher of the district, unitary and national park authorities is given in Box 1. This is similar to the experience when contacting County Councils.

Box 1 Obtaining information from lower tier local authorities

1. Phone contact was initially made with the Head of Development Management, (or if he/she was not available, a senior officer in the Development Management Team), the project was explained and a request was made for the EIAs listed in CLG Live Table P134¹ to be identified. In a few cases, this information was forwarded promptly. In most cases, the request was ignored and repeated calls had to be made until somebody in the organisation agreed to help, often a member of the team responsible for registering applications.

2. When the EIAs had been identified, together with the names of the Case Officers, attempts were made to contact Case Officers by phone. In most cases, this proved virtually impossible. Case Officers were usually on site, on leave or sick. When they were in the office, their phones were often switched to voicemail. Many local authority switchboards refused to divulge direct dial numbers for individual officers. In many cases, it took several weeks to make initial contact with Case Officers. Once contact had been established and the project explained, questionnaires were emailed to individual Case Officers. While a minority returned these promptly, most did not and follow up calls had to be made and emails re-sent.

3. In all cases where English Heritage was not consulted at any stage (i.e. screening, scoping or submission of environmental statement), the identity of any local specialist Conservation/Historic Buildings Officer/s was established.

4. Attempts were made to speak to these officers so that their contribution could be explained. This also proved problematical. A significant number of authorities no longer have access to these specialist services, employ specialist staff part time or share staff between authorities.

5. In all cases where contact was made successfully, a questionnaire was forwarded to the appropriate member of staff. As with the Case Officer questionnaires, some were returned promptly, while others had to be chased up.

1.21 The questionnaires circulated to case officers and to conservation officers are in Appendices 1 and 2 respectively.

(b) *Other decision-makers*

1.22 All up-to-date legislation on EIA was identified, followed by the decision-making body with practical responsibility for implementing it. Individuals in these bodies with day-to-day responsibility were then identified so far as possible, though one Government Department chose to erect a rigidly effective barrier between this research and their own responsible staff, with an information officer acting as conduit. That still produced satisfactory answers to questions but the prospect of insight from discussion was lost.

¹ www.communities.gov.uk/documents/statistics/xls/1929730.xls

1.23 The individuals responsible were asked to identify EIA cases in the year 2010-11. When this had been done, further questions were sent where appropriate asking detailed questions regarding the engagement of English Heritage. As with local authorities, some of these bodies had better monitoring systems than others. The effort applied to obtaining details was proportionate to the circumstances: for example, there was less need to pursue those bodies which indicated that they consulted English Heritage more extensively than the statutory minimum requirements. Conversely there was more opportunity to obtain information from those who clearly had readily accessible records, and they were sent short 'personalised' questionnaires comparable to those sent to local authorities. Unfortunately there was little purpose in pursuing full details where bodies struggled to identify cases in the first instance. Some chose to treat initial or subsequent requests for information as formal requests under the Environmental Information Regulations.

Structure of the report

1.24 Section 2 of the report establishes how many decisions involving EIA were determined in England in 2010-11. Sections 3 and 4 provide a detailed review of EIA in practice under planning law, and English Heritage's engagement in the process, as these are by far the most numerous cases. Section 3 describes the collection and analysis of data on individual EIAs, with particular reference to those cases on which English Heritage was consulted. Section 4 focuses on those EIAs on which English Heritage was not consulted, to establish whether it is missing out on engagement in major projects which could have a significant effect on the historic environment. Section 5 describes the overall arrangements for EIA under legislation other than planning and reports on individual cases and the engagement of English Heritage with them. It also introduces a series of appendices which outline the legal provisions for carrying out EIA for a wide range of development types.

1.25 Conclusions are provided at the end of each section. Recommendations are grouped at the end of the report.

2 THE NUMBER OF EIA DECISIONS IN ENGLAND

2.1 There is no central record of EIA decisions in England. The research for this report has shown that some bodies charged with taking decisions on projects accompanied by EIA do not keep records in an easily retrievable form. This even extended to some records being kept in paper form only and not electronically as recently as 2010-11. In contrast, other bodies have ready access to computerised historic information.

2.2 The research focused on EIAs in the financial year 2010-11. This was the most recent full year prior to the research period and was also the only year for which information on EIAs in most of the planning system has been published by the Department for Communities and Local Government. Where legislation and practice have changed since then, emphasis in the research moved to the new arrangements (with notes on the 2010-11 experience for completeness). For the most part, cases were logged for this research if project proposals accompanied by EIA were registered within that 12 month period. In these cases, any screening and scoping may have taken place in an earlier year. In a few cases (other than planning), all 'decisions' that year were included (i.e. including decisions on screening opinion requests and scoping opinion requests). In each legislative category the numbers of EIA cases was small, and the greater merit appeared to lie in obtaining additional information from just outside the target period to give a better insight into practices.

2.3 Most decisions on projects accompanied by EIAs are made by a single organisation. They hold the monitoring records on EIA cases and were approached for this research. Appeal against their decisions can only be by way of the High Court on legal grounds. This typically applies to bodies who act in the name of the Secretary of State, such as Government Departments. Where decisions are taken by lower-tier bodies, such as local authorities and some government agencies, there is generally an appeal process to the Secretary of State available on merits to aggrieved applicants and, occasionally, to other interested parties. In those cases, records of all EIAs received are kept by the lower level body, not by the Secretary of State.

2.4 In only two cases are decisions devolved to very numerous lower tier bodies: to 365 local planning authorities for planning applications and to each local drainage body for land drainage proposals. In both cases it was beyond the capacity of this project to enquire of each possible body whether they had received applications accompanied by EIA procedures: such a 'fishing trip' would have been a poor use of resources. In the case of land drainage, Defra was approached as the ultimate decision-making body (on behalf of the Secretary of State) to whom cases in dispute come for resolution.

EIAs with planning projects

2.5 There is indicative information on the number of EIAs accompanying planning applications submitted to local planning authorities in the Department for Communities and Local Government's Live Table P134, which is the only central database available. This lists the number of environmental statements received by district, unitary and national park authorities (but not county councils) by financial year: for the period 2010-11 see www.communities.gov.uk/documents/statistics/xls/1929730.xls. 355 applications

accompanied by EIAs are recorded as having been received by 125 authorities, with very few authorities failing to make a return for the CLG database. All 125 authorities were approached for more detailed information. This database was found to be not totally reliable: at least three authorities turned out not to have received any applications that year with EIAs (and two more had 'screened out' the need for one EIA each), whereas the research discovered by alternative means that at least three other authorities which claimed in Table P134 to have received none had in fact received one or more.

2.6 Live Table P134 covers applications received with EIAs. It does not address requests for screening opinions which resulted in decisions that EIA was not necessary: that was outside the agreed scope of the research, though five authorities reported such cases to us. Included in the research (though not sought) are a very few cases drawn to our attention by local planning authorities where an EIA was agreed through screening as required but the project was either withdrawn or thereafter did not reach the planning application stage (or at least not within the study year of 2010-11). These cases are of interest in respect of any consultation with English Heritage at the scoping stage.

2.7 In addition to the authorities covered by Live Table P134, all 27 county councils are local planning authorities and were also approached directly. County councils determine strategically important applications such as for minerals and waste, many of which attract EIA, and also their own proposals such as for new schools. As a result, only one county council is known to have received no applications accompanied by an EIA in 2010-11.

2.8 From the responses received by mid-June 2012, 300 EIAs were identified as passing through the screening process, almost all to the planning application stage:

- 237 EIAs from 118 out of 125 district, unitary and national park authorities;
- 63 EIAs from 23 out of 27 county councils.

Missing information was mostly due to a small number of non-responding authorities. The more significant shortfall between the 355 EIA cases recorded in CLG Table P134 and the 237 identified by local planning authorities is accounted for principally by many other authorities in practice identifying fewer EIAs than recorded by CLG (eclipsing those who recorded more EIAs). In particular County Durham was able to identify just 3 EIAs rather than the remarkable 51 recorded by CLG. In addition the CLG database apparently included 5 cases which had been 'screened out'. With responses from the large majority of authorities anticipated to have registered EIAs in 2010-11, the overall total of 300 EIAs with planning projects that year is likely to underestimate the true figure by only a modest amount.

EIAs with projects other than planning

2.9 Appendices 3 to 18 set out the legal provisions applying in the study year of 2010-11 for carrying out EIA for each type of project other than planning. Decision-making bodies were approached for information on the number of EIA projects arising that year, other than local land drainage bodies (see paragraph 2.4 above). The number of EIA projects reported by them is listed in Table 1 in each legislative category.

Table 1 EIA projects other than planning registered in England in 2010-11

Development type	Decision-maker	No. of EIAs
Nationally Significant Infrastructure	Infrastructure Planning Commission	1
Intensive agriculture	Natural England	3*
Water Resources	Environment Agency	0
Forestry	Forestry Commission	2**
Land Drainage (initial decisions)	Local Drainage Bodies	N/A
Land Drainage (final decisions)	Department of Environment Food and Rural Affairs	0
Gas Transporter Pipelines (onshore)	Department of Energy and Climate Change	4***
Offshore Petroleum Production and Pipelines	Department of Energy and Climate Change	0
Onshore pipelines (until April 2010)	Department of Energy and Climate Change	0
Electricity Works including offshore windfarms	Department of Energy and Climate Change	0
Marine Works, Harbour Works, and Marine Dredging, including some offshore electricity works	Predecessors to the Marine Management Organisation	58
Fish Farming in Marine Waters	Crown Estate Commissioners	0
Highways	Highways Agency	N/A
Transport and Works	Department of Transport Department of Energy and Climate Change	2 0
Nuclear reactor decommissioning	Health and Safety Executive	0

* EIA procedures begun on three projects resulted in one being amended so that it fell outside the Regulations; the other two did not proceed to submission of an environmental statement.

** For three sites

*** Where an EIA is not automatically required, DECC is jointly responsible with the IPC for screening decisions only under this legislation (as indicated); project decisions are then taken by the IPC.

2.10 The figures show that there are clearly far more projects in the marine environment requiring EIA than in all the other categories other than planning together. The Marine Management Organisation (MMO) commenced its work in April 2011 after a reorganisation of responsibilities and powers in the Marine and Coastal Access Act 2009. EIA powers were transferred from bodies such as CEFAS (the Centre for Environment, Fisheries and Aquaculture Science, at Defra) and the Department for Business Innovation and Skills to the MMO, while the Marine and Fisheries Agency was disbanded. Records from that earlier period may not be entirely reliable. General information has been obtained from the Highways Agency. This is the one body with whom English Heritage has a protocol on consultation arrangements which affects projects accompanied by EIA, and therefore a high chance of reliability in this respect, though detailed information on cases has not been pursued in the time available.

3 CONSULTATIONS WITH ENGLISH HERITAGE IN PLANNING CASES

3.1 This section of the report presents the principal findings from the questionnaires circulated to case officers in local planning authorities, describes and evaluates the consultations which local authorities carry out with English Heritage, and reports on the response rate to these. Section 3 addresses the circumstances in which consultation was not carried out, the implications of those, and the monitoring and improvement of practice.

Local authority responses

3.2 Detailed information was obtained by questionnaire from case officers and others knowledgeable about 232 EIA projects. Reasons for the shortfall from the 300 EIA cases known to exist included the following as a minimum:

- case officers failed to respond in 41 cases across 21 authorities: this included one overseeing team leader and one consultant contracted to administer an application;
- case officers were no longer in post for 8 cases across 6 authorities;
- one case officer was on long-term sick leave; and
- one authority wanted payment to respond.

The 232 cases provided the database used for all subsequent assessment.

Screening

3.3 In 133 of the 232 cases the applicant decided to carry out an EIA as part of the planning application process without formally requesting a screening opinion beforehand. A modest number of projects required an EIA mandatorily as they were 'Annex 1' projects under the European Directive (details were not requested on this, but the position is often clear from the project descriptions and certain comments offered by local authorities). The large number of EIAs in other cases in which the screening stage was omitted should not be interpreted to mean that applicants for planning permission are simply unilaterally deciding to carry out an EIA voluntarily. Indications provided by local planning authorities suggested that pre-application discussions on these usually substantial projects were resulting in a clear understanding that an EIA would be required, and it was often for this reason that formal requests were not being submitted.

3.4 Screening opinions were requested in 96 cases (and there were three more where information could not be obtained, e.g. because the case officer at the time had retired). There is no statutory requirement for consultation at the screening stage so there should be no surprise that English Heritage was not consulted in 84 of these 96 cases (and information was not provided on 2 more). Nonetheless, non-statutory consultations with English Heritage took place in 10 cases by 8 authorities. Separate reports from English Heritage showed that consultations at the screening stage had become more frequent in South West England, mainly on renewable energy projects (especially photo-voltaic arrays), probably as authorities feel their way with this relatively novel type of development. Non-statutory consultation arose in two cases because the screening stage was combined with the scoping stage, whilst in the other cases specific issues of heritage interest had usually been identified (and there was one case where it is not known if there was a response). English

Heritage replied to all the consultations which were exclusive to the screening stage (and to one of the joint screening/scoping cases).

Scoping

3.5 Prospective applicants submitted requests for scoping opinions in 150 of the 232 cases. They did not do so in 80 other cases, and information is missing in two further cases. In some of the 80 cases without a scoping opinion, it is clear from case officers' comments that informal discussions addressed the matter, avoiding the need for a formal request.

3.6 The legal requirements for consultation with English Heritage are set out in Box 2. The provisions are comparable at the scoping and submission stages. There are two principal parts to the requirements:

- Development proposals which fall into the categories in Article 16 of the Order require consultation with English Heritage: these consultations would be required in any event under planning law at the planning application stage, but the Regulations have the effect of requiring another round of consultations at the earlier EIA scoping stage as well as at the submission stage. (Consultation on the submitted environmental statement and on the planning application would normally be at the same time through one consultation covering both requirements).
- An additional requirement to consult organisation such as English Heritage when the local planning authority considers it "likely to have an interest in the application".

3.7 Conspicuous by their absence from these requirements are clear obligations to consult English Heritage on development proposals affecting Grade I or II* listed buildings or their settings. This is because there are other mechanisms for consulting English Heritage in such cases under separate legislation. Nonetheless, those other provisions only apply to submitted planning applications, not explicitly at an early stage in the planning process when an EIA is being carried out prior to an application being submitted. Those would clearly be prime candidates for impacts on the heritage in which English Heritage would be 'likely to have an interest', and therefore English Heritage should then be consulted under this criterion specified in the EIA Regulations.

3.8 English Heritage was consulted in 80 of the 150 cases attracting a scoping opinion (it was not consulted on 69 cases and no information was provided on one more). One objective of the research is to identify when English Heritage would have been a statutory consultee. The phraseology of the legislation is remarkably loose in this respect in that, aside from the reasonably clear requirements under the Development Management Procedure Order (DMPO), a consultation becomes statutory when the local planning authority considers that English Heritage would be 'likely to have an interest'. It is difficult to understand when a consultation might be 'non-statutory'²: this would only arise if the

² To some extent this can be a problem of labelling rather than substance. For example, Cumbria County Council reported that it did not have a policy on consulting English Heritage "beyond implementing the EIA Regulations – i.e. where non-statutory we consider whether English Heritage would have an interest". It clearly appreciates the two criteria, but has called only the requirements of Article 16 of the DMPO 'statutory' whereas the Regulation 2(1)(c)(iv) requirements are of course also statutory. Other authorities may also be doing this in questionnaire returns for this research.

Box 2 Legal requirements to consult English Heritage on planning projects with EIA

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

(i) *In respect of requests for scoping opinions:*

Regulation 13(4) “An authority shall not adopt a scoping opinion in response to a request under paragraph (1) until they have consulted the person who made the request and the consultation bodies, but shall..... within 5 weeks beginning with the date of receipt of that request or such longer period as may be agreed in writing with the person making the request, adopt a scoping opinion and send a copy to the person who made the request”.

(ii) *In respect of submitted environmental statements:*

Regulation 16(2) “16(2) When a Local Planning Authority receives an Environmental Statement, it shall:

...(c) “forward to any consultation body which has not received a copy direct from the applicant a copy of the statement and inform any such consultation body that they may make representations.”

The ‘consultation bodies’ for both purposes are defined in the Regulation 2(1):

(a) “Any body which the relevant LPA is required to consult, or would, if an application for planning permission for the development in question were before them, be required to consult, by virtue of Article 16 of the [Town and Country Planning (Development Management Procedures) (England)] Order [2010], or of any direction under that article.

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

- (i) any principal council for the area where the land is situated, if not the relevant planning authority;
- (ii) Natural England;
- (iii) the Environment Agency;
- (iv) other bodies designated by statutory provision as having specific environmental responsibilities and which the relevant planning authority or the Secretary of State, as the case may be, considers are likely to have an interest in the application.”

Article 16 of the Town and Country Planning (Development Management Procedures) (England) Order 2010 begins by requiring consultations according to categories set out in its Schedule 5. The categories of development which require consultation with English Heritage are:

“(m) development within 3km of Windsor Castle, Windsor Great Park or Windsor Home Park, or within 800m of any other royal palace or park, which might affect the amenities (including security) of that palace or park;

(n) development of land in Greater London involving the demolition, in whole or part, or the material alteration of a Listed Building;

(o) development likely to affect the site of a scheduled monument;

(p) development likely to affect any garden or park of special historic interest which is registered in accordance with section 8C of the Historic Buildings and Ancient Monuments Act 1953 (register of gardens) and which is classified as Grade I or Grade II*”.

authority did not consider that English Heritage would have an interest in the case (in which case it would hardly be likely to consult), or that the nature of any interest was somewhat conjectural. Nonetheless, the research aimed to establish the occasions on which local

planning authorities considered their consultations to be statutory. This would give an indication of how the law was being interpreted and how reliable such consultations could be expected to be.

3.9 Of the 80 cases on which English Heritage was consulted, 53 were reported as statutory consultations, 22 as non-statutory, and the status was not known in 5 cases (3 being Urban Development Corporation sites where the local planning authority carried out the consultations). Case officers generally indicated during brief telephone discussions that they did not have difficulty deciding whether or not English Heritage should be consulted. Whether this indicates a complete understanding of the EIA regulations, or is more a case of 'if in any doubt, consult', is debatable. The results in practice indicate some confusion amongst local authorities, particularly from the written responses to the questionnaires. The issues seemed to be as follows:

- (i) Some authorities had difficulty in interpreting the legal requirements of the DMPO, such as two authorities which consulted because of potential impact on a World Heritage Site, but considered these non-statutory consultations. That could arise either through ignorance of the law or because of a belief that the development might be too far removed from the heritage asset to be sure that the DMPO applied. In another case the officer thought a consultation was statutory but was 'not too sure: no direct impact on heritage assets'. Generally, there is an issue of proximity (in relation to size of scheme) to be resolved in deciding whether a likely impact on a heritage asset crosses a threshold to merit a statutory consultation.
- (ii) Some authorities seemed to be unfamiliar with the second, EIA-specific, obligation to consult (when English Heritage would be likely to be interested), and may have acted as though only the requirements of the DMPO applied. This was indicated in various ways. One authority commented "The Council consults EH when EH would be requested to comment on applications anyway. The same applies at scoping stage". This suggests that statutory consultations may not be taking place, but there is no indication of how many schemes, if any, were adversely affected by this approach. The majority of those authorities carrying out what they believed to be non-statutory consultations may have made the same assumption: some referred to consulting on significant heritage assets outside the scope of the DMPO – such as a large scheme within an archaeological priority zone and various developments affecting the setting of Grade I and II* listed buildings. Impacts on such assets would clearly have been likely to be of interest to English Heritage, and therefore statutory consultations, and other local planning authorities had indeed treated comparable effects as meriting statutory consultation.
- (iii) A few authorities clearly took a precautionary approach to consultation, stating that they consulted on all EIAs, or all with a heritage interest, or certain kinds of EIA such as large mineral workings (but contrast this with other practice, see paragraph 4.23). This could result in weak reasons for specific consultations, such as that non-statutory consultations had been carried out 'to provide an opportunity for EH to comment on the scoping submission and to request any specific investigations' or because of a 'possible impact on' a named town. Two authorities had even proposed such a generalised precautionary approach as a reason for a statutory consultation.

(iv) Authorities would respond to specific requests. In one case a non-statutory consultation was carried out by North Yorkshire CC “at the request of English Heritage in connection with PPS5 and the location of the site relative to Starr Carr” (a designated site from which the proposed development was more than 2km distant).

- 3.10 The broad conclusions from this assessment are that at the scoping stage:
- there may be some projects ‘likely to be of interest’ to English Heritage which are not being brought to its attention, and to that extent statutory consultations may not be happening, but it is not possible to put a number on these without detailed investigations of the case files or advice from heritage experts;
 - some consultations which ought to be statutory are treated as non-statutory, though the fact that the consultations take place makes this finding a distinction without a legal difference;
 - some genuinely non-statutory consultations are taking place.

3.11 Case officers reported that English Heritage replied to 59 of the 80 consultations. There were no replies to 18 consultations and 3 cases where it was not known whether there was a reply. One of the non-responses was to a combined screening and scoping opinion request where the authority was consulting on a precautionary basis (which contributed to the commentary in paragraph 3.9(iii) above). However, 11 of the 18 consultations were said by the local planning authority to be statutory. There were concentrations of non-response to significant project proposals in Arun (2), Cambridge (3) (major proposals for new communities of 600, 1,600 and 2,300 dwellings) and Westminster (5), though in one of the latter a telephone response was made rather than a formal written one. 8 of the 18 non-responses were in London.

3.12 The possibility was investigated that English Heritage remedied its shortcomings in responses at the scoping stage by responding at the next stage when the environmental statement was submitted. Of the 18 cases, 17 have so far proceeded to planning applications with environmental statements. In two of them the local planning authorities did not consult English Heritage despite having done so at scoping stage, including a large new community in Cambridge. In a further case a response was made later to a consultation on an amendment but not to the original proposal. Four of the cases where no responses were provided to scoping opinion requests were all for alternative developments on the same site: English Heritage became involved in pre-application discussions after the scoping stage and did respond to the consultations on the four submitted environmental statements. English Heritage responded to the consultation at submission stage in most the other cases too.

3.13 Numerically, therefore, English Heritage’s response rate at scoping stage was initially 77% (59 out of 77) but ultimately 94% of the cases (72 out of 77). It ultimately missed out on responding to just 5 of the cases on which it was originally consulted at scoping stage. In one of them, English Heritage is reported as having been sufficiently concerned to take the unusual step of commenting on the submitted scheme even though it had not been formally consulted, suggesting greater interest in the case than non-response at the scoping stage may have indicated to the local planning authority. Overall, the evidence therefore suggests

that to a very large degree English Heritage was able to express its views on heritage interests in the EIA process at scoping stage to the extent that its resources allowed.

3.14 It is important to appreciate that non-responses at the scoping stage may have been a factor in the absence of consultation at the submission stage by two local planning authorities, meaning that English Heritage lost a formal chance to make comments on those schemes. There seems no reason why a local planning authority is not legally entitled to consider that English Heritage might be “likely to have an interest in the application” at scoping stage, but in the light of no response decide at submission stage that English Heritage would not be likely to have an interest – and so not be consulted. Therefore, to the extent that consultation relies on Regulation 2(1)(c)(iv) rather than Regulation 2(1)(a) of the EIA Regulations, English Heritage could lose the opportunity to be consulted at submission stage if it fails to respond at scoping stage. Further illustrations of the consequences are given in paragraph 3.18 below.

Submission

3.15 The legal requirements for consultation on EIA are comparable at submission stage to the scoping stage (see Box 2 above). The cases on which English Heritage was consulted were not identical, however. The database is reduced from 232 cases to 230 because schemes in Leeds and Bath & North East Somerset have not yet progressed beyond the scoping stage to a full planning application accompanied by an environmental statement. English Heritage had been consulted on the Leeds case but not the Bath case at scoping stage. Furthermore, both the development proposals to West Sussex County Council were withdrawn after the completion of all stages of the EIA process: these have been retained in the database.

3.16 Consultations were carried out with English Heritage in 119 cases. There were no consultations in 109 cases and 2 cases where it was unclear whether consultations had taken place. Of the additional consultations over the 80 at scoping stage, 24 arose because there had been no request for a scoping opinion, and the procedure moved directly to submission of an environmental statement. Also one each arose on cases where it had not been clear if there had previously been either a scoping request or a consultation at scoping stage with English Heritage.

3.17 There were 19 projects where English Heritage was consulted at the environmental statement submission stage even though it had not been consulted at the scoping stage. 14 of these were said by local planning authorities to be statutory consultations: if that is correct, then it is likely that at least some of these should have been circulated to English Heritage for comment at the scoping stage too (that would depend on whether the consultation was on the basis of Regulation 2(1)(c)(iv) or Regulation 2(1)(a)). In contrast, there were 6 projects on which English Heritage was consulted at the scoping stage but not at the submission stage (two of which were included in the data in paragraph 3.13 above). Two of the six were said by local planning authorities to be statutory consultations. There were therefore 16 cases on which English Heritage was consulted at one stage only. Unless all of these were attributable to a formal change of mind on the part of the local authorities concerned – about whether English Heritage would be ‘likely to be interested’ under

Regulation 2(1)(c)(iv), which seems improbable – there was a failure to apply the consultation legislation correctly. To try to find out, these cases of ‘changed approach to consultation’ were followed up with authorities’ Heritage Officers (see section 4).

3.18 There were tensions in local planning authorities between pressures to consult English Heritage extensively on EIA and pressure to consult only when required. There were certainly over-consultations on the precautionary principle (see paragraph 3.9(iii)). This may have been to ensure that heritage issues were certainly not overlooked, or because an authority may have been short of its own access to heritage expertise. However, the tendency to exercise caution in deciding when to consult is entirely to be expected: the risks of ‘over-consultation’ are minor compared with the risks of ‘under-consultation’ – which could lead to Judicial Review challenges in the High Court, delayed projects and possibly compensation claims. Alternatively, there were pressures to consult much less than this. That would keep down costs and staff time requirements, avoid duplication with the authority’s own heritage staff, and also save time for English Heritage itself. Key determinants limiting consultations were authorities’ knowledge that there was little or no heritage interest in a site and the lessons of past experience on a site. Local matters could be handled entirely adequately by the authority’s staff. Examples of the issues raised are:

- One authority, North Somerset, reported that “EH had previously been asked twice as whether a former airport control tower should be listed. On both occasions EH did not consider it worthy and therefore it was unnecessary to consult on an EIA”.
- Similarly, resubmissions where views had previously been expressed, and mineral workings where any heritage interest had been erased beforehand, often resulted in a disinclination to consult English Heritage.
- Consultation where it is not required – one authority said “we have had too many “Why did you consult us?” responses”, a point which was by no means unique.
- One authority, Harborough, referred to the merit of indications from English Heritage of the matters on which it did or did not wish to be consulted: “decision to consult usually taken on a case by case basis, having regard to EH’s direction on the types of applications for notification to EH”. Gateshead said that it “would only consult on obligations at the request of English Heritage”, while Brighton & Hove commented “The new requirements list of English Heritage is quite restrictive and does not pick up all applications which they should potentially be consulted on”.

3.19 The views expressed by case officers reported above and elsewhere in this report must be approached with some caution, though, as views can differ between officers of the same authority on the procedures they are expected to follow. For example one case officer reported that it was their Council’s policy to consult English Heritage on all EIAs, not just on minimum obligations, but the other two case officers returning questionnaires did not mention that and one of them had not consulted English Heritage on an EIA. Another case officer reported that it was not the Council’s policy to consult on all EIAs: “It is our impression that English Heritage only wants us to consult them where it is a statutory requirement to do so, so this is what we do.” However, a colleague told us independently that the Council erred on the side of caution and they would consult English Heritage “if there were any matters of interest shown on the Historic Environment Record on or adjacent to the site...”. The degree of enthusiasm for encouraging applicants to engage with English Heritage also varied, and many other detailed discrepancies emerged.

3.20 In only one authority had the balance between the pressures to consult and not consult English Heritage caused difficulties, on two occasions. These had involved chalk extraction close to a scheduled ancient monument and an energy from waste scheme also close to a scheduled ancient monument. English Heritage had been concerned about these non-consultations and as a result the authority had reviewed its procedures. These are the only occasions of this type identified by this research.

3.21 A number of authorities, such as those noted in paragraph 3.18 above, referred to advice they had received from English Heritage on the scope of consultations expected from them. This is a potentially effective means of focusing on priority consultations under Regulation 2(1)(c)(iv), but caution does need to be exercised in the use of memoranda of understanding because any agreement not to carry out a consultation on EIA cannot override a statutory obligation³.

3.22 Of the 119 cases on which English Heritage was consulted at submission stage, 85 were reported as statutory consultations, 31 as non-statutory, and the status was not known in 3 cases (all Urban Development Corporation sites where the local planning authority carried out the consultations). The proportion of consultations said to be statutory rose slightly from 66% at scoping stage to 71% at submission stage. Most of the reasons for suggesting that consultations were non-statutory were matters of judgement on heritage significance. However, occasionally authorities claimed procedural reasons for consultations being non-statutory. These included that the project was essentially a resubmission of an EIA on which English Heritage had been consulted before; the applicant had already contacted English Heritage; or that English Heritage had been involved at pre-submission in the preparation of the scheme. In law, none of these issues should affect whether or not English Heritage is statutorily consulted. In cases like this pragmatism is the key consideration, though the fact that the consultations are still taking place does suggest that consultation procedures are not being compromised (even if labelled dubiously).

3.23 English Heritage responded to 108 of the 119 consultations on submitted environmental statements, and there were 4 more cases where it was unclear whether a response had been made. In only 7 cases were no responses made. One consultation at least was precautionary only, and in another English Heritage had responded to an original proposal for which this was largely a resubmission. Another was for a variation of a condition but with a fresh EIA. The final case was for a large urban redevelopment: despite clear evidence of substantive engagement, the absence of written responses to consultations by English Heritage resulted in no official record of this effort.

3.24 This evidence suggests that English Heritage is generally performing very well in responding to EIA consultations at the critical stage of environmental statement submission, at a formal rate of 94% (108 out of 115 cases with known outcomes) and slightly higher with

³ The Development Management Procedure Order 2010 at paragraphs 16(1)-(3) allows that a local authority shall carry out a consultation before reaching a decision in accordance with its Table in Schedule 5 except where “the development is subject to any standing advice provided by the authority or person so mentioned to the local planning authority in relation to the category of development” (16(1)(d)); however, “the exception in paragraph (1)(d) shall not apply where— (a) the development is an EIA development...” (16(3)).

informal engagement. There were mitigating circumstances in three of the few cases of non-response, though a very few major schemes do appear to have passed through both scoping and submission without any substantive response.

3.25 Case officers also drew attention to the nature of some responses, indicating that about a dozen offered little or no comment at all. In one case a short response said that English Heritage did not consider it necessary to be consulted, on the grounds of the nature of the proposal: this had been for a 240-berth marina with earthworks.

Effective use of the EIA process

3.26 The scope of this research does not extend to examining whether English Heritage secured its objectives in relation to development proposals. However, two issues were addressed about the engagement of English Heritage in ways which improved the effectiveness of the EIA process.

3.27 First, the research enquired into the possibility that English Heritage was hearing about proposals from applicants carrying out non-statutory consultations during the preparation of EIAs, in parallel with or instead of formal LPA consultations. This would be the main means by which English Heritage could hear about projects and contribute to their formulation prior to the submission of an environmental statement if there was no scoping stage. Case officers were asked if they had encouraged applicants to consult English Heritage during EIA preparation. 152 respondents to this question said that they had (even if qualified with limitations such as 'where we know a heritage asset would be affected' or 'where appropriate'). Points were made that this was more likely to be proposed if there were pre-application discussions, with the London Borough of Camden commenting "We would encourage involvement of EH on all relevant pre-application discussion, this way they inform preparation of the EIA rather than just commenting once it has been submitted". Applicant consultations were more likely to be advocated when there were heritage topics outside the formal remit of consultation through the Development Management Procedure Order (e.g. Grade I and II* listed buildings and conservation areas). One authority, Lichfield, reported that it had drawn applicants' attention to English Heritage publications.

3.28 These findings suggest that there is a good level of support amongst planning authorities for informal consultations by prospective developers, and that this is sensitively handled so that English Heritage is not overwhelmed by consultation requests in cases where heritage interests are modest or absent (recognising the limited staff available). Almost all those authorities giving unqualified support to applicants' consultations also consulted English Heritage at EIA submission stage (the remainder usually having good reasons not to): this suggests that informal consultations can improve the quality of the EIA process but are not being used as a substitute for formal consultation procedures.

3.29 Second, we asked case officers if, where English Heritage did comment on the EIA, one consequence had been that the applicant had prepared a Supplementary Environmental Statement to address the comments made. 12 local planning authorities reported that they had 13 cases in which such a Supplementary ES had been prepared arising from proposals in 2010-11. In addition, other steps taken as a result of comments by

English Heritage to improve the development proposals placed before the planning authority included:

- sufficient further work on heritage issues to merit a re-consultation (i.e. comparable to a Supplementary ES) in Norwich;
- likewise the preparation of a heritage statement to accompany the application and EIA in Gateshead;
- assessment of the impact of the scheme from additional viewpoints and other additional assessment work, in South Staffordshire, Lichfield, Central Bedfordshire, LB Camden and Suffolk CC;
- alterations to the project proposals, in Waverley, Hammersmith & Fulham, Manchester and Norwich (four cases); and
- further information was requested from and provided by the applicant, notably in West Somerset.

3.30 This evidence suggests that English Heritage's participation in EIA has helped to raise the standard of development proposals affecting the historic environment, both in their preparation and at the point of local planning authority decision after the completion of the main EIA procedures.

Validation and development of the findings

3.31 The basic information obtained from local authority case officers was presented to English Heritage staff to establish if there was agreement between the parties on the basic data on each EIA case and its interpretation. English Heritage staff were invited particularly to identify any missing cases (other EIAs on which it was consulted or cases where it would have liked to have been consulted) and to grade the relevance to English Heritage of the EIA projects on which it was consulted.

3.32 At the time of the research, English Heritage staff were under enormous time pressure arising from the cutbacks in the public sector and also a reorganisation of responsibilities taking place at the same time. As a result responses were incomplete, but the research project is nonetheless grateful for those received.

3.33 English Heritage staff were able to assess briefly the fifteen EIAs received in the North East Region and one of those received in the North West. These did not question any of the information provided by the questionnaire responses from local authority case officers. English Heritage had been consulted on scoping opinions in all the five cases which it was able to validate, considering that three of these were appropriate, one not needed, and was unsure about the other. At submission stage English Heritage was consulted on the case in the North West and on seven of the fifteen submitted EIAs in the North East (and was not sure if it should have been consulted on the other eight). English Heritage responded to all the consultations, categorising these as six projects not being relevant to English Heritage and two having some relevance.

3.34 English Heritage was also able to provide complete tabular information on four more cases in the North East and three in the North West on which it had been consulted on scoping opinions (reviewed in paragraphs 3.36-37 below). English Heritage considered it

should have been consulted in six of the cases and was unsure in the other. Just one case appeared to have reached the stage of consultation on submission, to which English Heritage had responded. English Heritage considered there was a statutory requirement to consult it in at least five of the seven cases. Response categories were: one non-response, one project not relevant to English Heritage and five projects having some relevance.

3.35 These findings together suggest that consultations with English Heritage are erring on the side of caution, given how little substantive heritage interest they generated. It seems to us, however, that there is no inherent harm in a system which includes consultation on cases which turn out to be of little interest to English Heritage, as this system is more likely to be capable of ensuring consultation on all cases which do turn out to be of considerable importance. However, no wider comment was provided by English Heritage on whether it was receiving too many or too few consultations, or the right amount, or on whether there were weaknesses in the current arrangements.

3.36 Notes on additional EIAs submitted for consultation, outside the scope of the database of 232 cases provided, were offered by English Heritage from some of its regions, as follows:

- South West region: 23 cases
- South Yorkshire: 17 cases
- North Yorkshire: 11 cases
- North East: 9 cases
- North West: 4 cases

3.37 The large majority of these cases seemed more recent than those in the research database, (certainly those given registration dates), which explains their omission. Those few cases which appeared to fall within the study period of the financial year 2010-11 were consultations on scoping opinions (or even screening opinions in eight cases – see paragraph 3.4 above), where the registration of submitted EIAs would be at future dates. It was also clear that almost all the cases submitted were either from authorities which this research considered had already provided full information, or from authorities which, according to CLG Live Table P134, had not received any EIAs in the study year. This again suggests that they fell outside the study period and we cannot be sure that any can reliably be added to the list of 300 known cases in the year.

Conclusions

3.38 Of the 300 EIAs known to accompany planning projects in 2010-11, detailed information was obtained from local planning authorities on 232 which had passed beyond the screening stage.

3.39 The option of requesting a screening opinion was taken up in 96 cases, and English Heritage was a non-statutory consultee in 10 of these cases (with the consultation outcome not known in one of them). English Heritage replied to all 8 of the consultations which were exclusive to the screening stage (and to one of the two joint screening/scoping cases). There are no statutory consultations at screening stage.

3.40 Proposals for 150 EIA developments were submitted for a scoping opinion in 2010-11. English Heritage was consulted in 80 of these cases, of which 53 were reported as statutory consultations, 22 as non-statutory, and the status was not known in 5 cases. English Heritage replied formally to 59 of these consultations (42 of which were said to be statutory). In 3 cases it is not known whether there was a reply. 11 of the 18 consultations to which English Heritage did not respond were said to be statutory. However, English Heritage responded at the pre-application or submission stage to all but five of these 18 cases.

3.41 Environmental statements were submitted for 230 of the 232 EIA projects in the database, and English Heritage was consulted on 119 of these (including 24 which had not been subject to a scoping opinion). 85 were reported as statutory consultations, 31 as non-statutory, and the status was not known in 3 cases. English Heritage responded to 108 of the 119 consultations, and there were 4 more cases where it was unclear whether a response had been made. In only 7 cases were no responses made, of which one was handled informally, and there were mitigating circumstances for non-response in three more.

3.42 Overall, the effective response rate by English Heritage to consultations was very high, especially at the key stage of the submission of the environmental statement. There were a few missed opportunities at the scoping stage, including two major schemes on which English Heritage was not subsequently consulted at submission stage.

3.43 There are competing pressures on local planning authorities to consult and to not consult English Heritage on EIA projects, though the balance of advantage lies in a precautionary approach consulting more often than may strictly be necessary. As a result only two cases, in one authority, have been reported to this research in which English Heritage was concerned that it had not been consulted. The authority reviewed its procedures.

3.44 There is substantial encouragement in local planning authorities for developers to engage informally with English Heritage during the EIA preparation process. This allows English Heritage to influence proposals at an early stage and is particularly valuable when no scoping opinion is requested. Local authorities sensibly encourage such consultation broadly in line with the likely level of heritage interest in schemes, to allow effective engagement without unduly burdening the parties. Informal consultations between English Heritage and developers did not appear to be at the expense of formal consultations by local authorities with English Heritage. Evidence also suggests that English Heritage's participation in EIA has helped to raise the standard of development proposals affecting the historic environment, both in their preparation and at the point of local planning authority decision after the completion of the main EIA procedures.

3.45 The principal area of uncertainty in the process is in the distinction between statutory and non-statutory consultations. Some authorities had difficulty in interpreting the legal requirements of the Development Management Procedure Order and the EIA Regulations. This included deciding how large or near to a heritage asset a development needed to be to merit consultation, and some confusion on the extent of cases which

English Heritage wished to hear about. As a result, some consultations labelled non-statutory should have been described as statutory, and more importantly some projects 'likely to be of interest' to English Heritage might possibly have been omitted from consultation.

3.46 There has been some limited validation of the questionnaire survey results by English Heritage at the local level. None of the findings has been called into question. From the small sample, the responses provided by English Heritage to consultations have tended to fall into the categories of 'not relevant' to English Heritage or having 'some relevance'. This suggests that the number of consultations being sent to English Heritage is erring on the side of caution, and indeed English Heritage felt that specific consultations may not have been necessary. Numerous additional EIA cases were identified, but these appear to be outside the scope of the study period in the financial year 2010-11 rather than additional to the 300 known to have been registered that year.

4 IDENTIFICATION OF PROJECTS FOR CONSULTATION WITH ENGLISH HERITAGE

Introduction

4.1 This section analyses the consultations which did not take place with English Heritage during the EIA process, in order to assess the possible impact on the historic environment resulting from that non-engagement. Local planning authorities must make judgements on whether to consult English Heritage at the scoping stage and at the environmental statement submission stage, and these are the focus of this section.

4.2 Authorities must also decide whether or not an EIA is required at all, if asked to provide a screening opinion and before deciding a planning application, but as there is no requirement for formal consultation at that screening stage it has fallen outside the scope of this project. We note in any event that no problem has become obvious during this research at the screening stage, to the extent that neither English Heritage nor anyone else has drawn to our attention any case in which an EIA should in their view have been carried out alongside a planning application, despite a screening opinion that one was unnecessary.

4.3 The research has not sought to investigate individual cases and substitute its own judgements on the merits of consultation for those made by planning authorities. In preference it has aimed to establish the procedures used by the authorities and the expertise applied to make them work effectively. A clear explanation and method for the decision reached in each case is evidence of a reliable process. Local decision-making structures are reviewed.

4.4 The research aimed to identify cases of 'greater relevance' to the historic environment on which English Heritage was not consulted, in order to establish the scale of any shortcomings in EIA consultation procedures. English Heritage would be the best judge of the effect of development proposals on the historic environment, if it was consulted on them. Where that consultation did not take place, the research aimed to obtain the view – as the next-best judge – of the relevant Conservation Officer in the local authority where the proposal was submitted.

Local planning authority procedures for deciding on consultation with English Heritage

4.5 During the course of telephone calls to planning authorities, the research identified that decisions about which agencies should be consulted on planning applications are proposed in the main by the staff who validate and register the applications. Ideally they utilise the Historic Environment Record or their authority's Geographical Information System (GIS) to identify any designations and to prepare lists of suggested consultees, internal and external, which are passed with the application documentation to the case officers. The case officers check the lists and may add consultees as they see fit. The onus is therefore on non-specialist staff to make a judgement about consultations on heritage.

4.6 To obtain some tangible support for an understanding of this process, case officers were asked a single question in the questionnaire⁴: if they had consulted the Historic Environment Record to help in deciding whether or not to consult English Heritage, (in order to gauge the likely heritage interest in a site). The Historic Environment Record, which is typically held by County Councils, is an up-to-date mapped information base on all known matters of heritage interest. This is now GIS-based for ready access electronically. The sources of information available vary from authority to authority (some have their own GIS-based data, for instance), but the principle of having a single resource containing all heritage information relevant to planning is well-understood. If an authority did not use the Historic Environment Record, the hope was that the question would prompt a brief comment explaining what information source they did use instead. The Historic Environment Record should be comprehensible to any planning officer, though in one case the case officer advised that it could not be directly accessed by themselves and that the data required interpretation by the Historic Environment Manager.

4.7 The responses covered a range of methods for being informed on the heritage interest in sites. Although some of them are not mutually exclusive, and questions were not asked systematically about the options, responses were allocated to one category. The results should be treated with great caution, however, as different case officers in the same authority sometime reported incompatible responses (with the overall effect being that some engagement with the Historic Environment Record or local equivalent may be overstated). The results show (excluding 'not known' and blank returns):

- (i) The Historic Environment Record was said to have been accessed directly by case officers to help decide whether English Heritage should be consulted in 38 cases.
- (ii) Local authorities had consulted their own GIS databases or comparable sources, equivalent to or not far short of an Historic Environment Record for this purpose in 19 cases.
- (iii) Accessing the Historic Environment Record had not been necessary in 5 cases because the available information made it clear that a consultation with English Heritage would be necessary.
- (iv) The decision on whether or not to consult English Heritage had been advised by the Conservation Officer on two occasions, one instead of using the Historic Environment Record and another where the conservation team was 'normally' consulted, but see also paragraphs 4.13 and 4.24 below. In addition, in another authority which has its own database, the conservation officer was involved in the decision on consulting English Heritage probably because he was also the case officer for the EIA application.

⁴ There were significant self-imposed limitations on the length of the questionnaire to case officers, and this was a topic where questions had to be constrained. Other items had to take priority, and the view was taken that a short questionnaire achieving a good rate of response was more useful than a longer one that was unduly awkward or time-consuming for hard-pressed development management staff to complete.

- (v) The Historic Environment Record had specifically not assisted the decision whether to consult English Heritage in 65 cases (including suggestions that it was not applicable or relevant) – and a similar number of blank responses suggest the same. In 16 more cases the response was negative but with a mention of an alternative step taken.

4.8 The Conservation Officer/Historic Buildings Officer will often be an internal consultee, (or an external consultee if the heritage service is provided externally, e.g. by a County Council or consultants). On 19 occasions (additional to those noted above) case officers responded in the questionnaires that the Historic Environment Record had been examined by the authority's heritage conservation staff when they had been consulted, though this was not part of the process of deciding whether or not to carry out a consultation with English Heritage on the EIA. It is likely that such consultations happen more frequently than the occasions mentioned. These results confirm overwhelmingly the importance of the case officer rather than heritage staff in deciding whether English Heritage should be consulted on EIA projects.

4.9 Taken together, the results show that decisions on whether or not to consult English Heritage were infrequently based on thorough assessment. Historic environment databases had been (or would have been) interrogated, or experts consulted, on at most 64 out of 232 occasions (categories (i) to (iv) above), just 28% of cases. Decisions must therefore be relying to a substantial extent on the experience and judgement of case officers and their immediate colleagues and managers. It is difficult to say how reliable, transparent and reproducible such decisions are, but the limited scale of expert heritage input clearly leaves open the possibility that there is a somewhat random element in consultation decisions. The claim from case officers that they did not have difficulty deciding whether or not English Heritage should be consulted (paragraph 3.9 above) should be viewed in this light. The next subsection describes the research used to obtain expert opinion on the heritage impacts of the EIA projects on which English Heritage was not consulted.

Local expert advice on the heritage impacts of EIA projects

4.10 English Heritage had the opportunity to comment on EIA projects when it was consulted. Here we consider the likely heritage impact of projects on which it was not consulted. The intention was that this would indicate the quality of the judgements by the case officers and establish whether English Heritage was not being advised of significant cases. The research did not evaluate consultations which had taken place with English Heritage but were not justified. The objective was therefore to review the 69 cases in which a decision had been taken not to consult English Heritage at the scoping stage (paragraph 3.8 above) and the 109 cases at the environmental statement submission stage (paragraph 3.16 above). There were 46 cases where there were no such consultations at either stage, so the total number of non-consultation projects avoiding double-counting is 132.

4.11 A similar procedure was used to identify and contact conservation staff as had been used for case officers, and again a short questionnaire was prepared for them (see Box 1 above and Appendix 2). Particularly in the case of minerals and waste schemes covering substantial areas of land, contact was often attempted with both building conservation and

archaeology experts, and in some cases also with those holding the Historic Environment Records, all appropriate to the circumstances of each case.

4.12 This part of the research did not achieve such high rates of response as approaches to case officers. Whereas a case officer for an EIA project is obviously essential, the same is less true of the employment of heritage staff. Where the heritage role is not left to non-specialist staff, such heritage staff as are still employed are under enormous pressure to fulfil statutory requirements such as in processing applications and can be even more difficult to talk to than case officers. Though they wished to be helpful, obtaining responses was often a struggle. When it appeared that a telephone conversation would be the only time devoted to this research – and that questionnaires would be unlikely to be returned – an effort was made to obtain key information at that time from heritage staff.

(i) *Questionnaire responses*

4.13 A total of 45 Conservation Officer questionnaires were returned. These confirmed the dearth of engagement by heritage staff in decisions on whether English Heritage should be consulted. That had happened in only three cases, of which one was included in paragraph 4.7(iv) above). In another case the archaeologist explained “I decided that the existing permission with conditions for mitigating impacts to heritage assets was appropriate and there were no designated assets which would be significantly affected. I provided advice to the planning team confirming the appropriate condition. I did not recommend that English Heritage should be consulted” (but see paragraph 4.19 below). This brings to five the number of authorities reporting this arrangement.

4.14 The effects on the historic environment which the 45 projects might have had as estimated by heritage expert respondents are given in Table 2, by number of instances.

Table 2 Significance of effects of EIA planning projects on the historic environment

<i>Type of heritage asset</i>	<i>Effects were significant</i>	<i>Effects might be significant</i>	<i>Effects were discernible</i>
One or more listed buildings	0	0	4
One or more scheduled ancient monuments	0	1	0
One or more registered park or garden	0	0	1
One or more conservation areas	0	2*	3
A World Heritage Site	0	0	0
An area of known archaeology or archaeological potential	1	7	3
An historic landscape	1	2	3
One or more historic views	0	1	3
The setting of a heritage asset	0	3	5

* The heritage adviser considered in one case that there were no significant effects, but reported that the Planning officer considered that some of the works would be detrimental to the setting of a conservation area and required changes to the proposals to mitigate this. This has been conjecturally recorded as a case where the ‘effects might be significant’.

4.15 The returns show a low level of impact of the schemes not drawn to English Heritage's attention. An EIA is required only if a project is likely to have significant effects on the environment. Only where the 'effects were significant' could a strong case be made for an EIA on heritage grounds, and where these effects were anticipated there would be a strong case for consulting English Heritage. Where effects 'might be significant' there could be an argument for an EIA, and consultation with English Heritage, just in case the effects were significant. What is 'likely' to be significant, to justify an EIA, is of course a matter of judgement. Consultation with English Heritage would be especially helpful in these marginal cases at scoping stage, to obtain a view on whether detailed further study of heritage assets was necessary. Where effects on the heritage would only have been 'discernible' there is no case for an EIA: these can be dealt with as part of the normal planning process when evaluating a planning application. Furthermore, there would be no case for consulting English Heritage on these matters: these would be matters of distinctly less than national significance, which should be evaluated at the local level.

4.16 In the 'effects were significant' category there were no impacts on nationally designated heritage assets, but impacts in just two other respects. These were both from the same flood alleviation scheme. The proposal was also expected to have a significant effect on an historic landscape: "The HER [Historic Environment Record] contained reference to a series of WWII structures related to invasion defence and to an air to ground attack training range. I recommended that these be properly recorded prior to their being made inaccessible as a result of the proposed works." It was also located in an area of known archaeological potential: "Although our HER had no relevant records of specific buried archaeological assets that might cause concern, the coastal plain in general (and specifically the coast) is considered to have a high archaeological potential. For this reason archaeological evaluation of significant ground-works was recommended." The latter entry appears to overstate the position in that it was not known that the effects 'were' significant, but there was a concern that they 'might' be.

4.17 From the information available, consultation with English Heritage in that case does not appear to have been required by Regulation 2(1)(a) of the EIA Regulations, but the local planning authority might arguably have considered that English Heritage would have been likely to be interested with the terms of Regulation 2(1)(c)(iv) on historic landscape grounds (at least). Nonetheless, English Heritage was not consulted at either scoping or submission stages. This is the only questionable decision to emerge from responses to 45 questionnaires.

4.18 Cases where the 'effects might be significant' comprised:

- a quarry in respect of (a) an ancient monument, (b) the monument's setting and impact on undesignated archaeological assets (mainly WWII buildings and structures), (c) an historic landscape of unaltered open heathland with Bronze Age barrows, and (d) the setting of the WWII buildings and structures;
- a quarry in respect of (a) an area of known archaeological interest and (b) an historic landscape;
- a retail scheme in respect of (a) a conservation area and (b) the setting of a heritage asset;

- the flood alleviation scheme above in respect of a conservation area (see table footnote);
- five other projects where the effects on wider archaeological interests were in due course dealt with by conditions on the permissions;
- a golf course development in respect of historic views to a church and a mill;
- a time extension to a sand and gravel permission in respect of the setting of listed buildings; and
- an auction mart in respect of the setting of two listed buildings.

4.19 In the case which attracted the most heritage interest where the ‘effect might be significant’, the first in the list above, English Heritage was consulted at the submission stage even though it was not consulted at the scoping stage. That reconsideration appears to be warranted. There has been an interesting outcome from the second case in the list above, discussed by the archaeologist in paragraph 4.13 above. Despite not recommending at the time that English Heritage be consulted, the archaeologist reported: “Having reviewed this proposal as a result of your survey, I have concluded that I would in future make the recommendation that English Heritage is consulted. I have discussed this with my planning colleagues and they, subject to the normal procedure of treating each application on its own merits, will as a default position ask me if I think English Heritage should be consulted.”

4.20 English Heritage was not consulted at all in any of the cases in paragraph 4.18 above, though in six of the twelve cases there were no requests for scoping opinions. From the information available, consultation with English Heritage does not appear to have been required by Regulation 2(1)(a) of the EIA Regulations in any of these cases, and the local planning authority could reasonably have argued that English Heritage would not have been likely to be interested in any of them within the terms of Regulation 2(1)(c)(iv) – except perhaps in the first quarry case, which was rectified, and the second quarry case, where local archaeological advice had been followed.

4.21 Finally in the questionnaire, the local authority heritage experts were asked whether the individual EIA projects, with others, would have a cumulative impact on heritage assets. The historic environment can be adversely affected by numerous smaller scale developments as well as by fewer larger ones. A requirement of the EIA legislation is that consideration is given to the cumulative effects of a project, with others, on the environment. Four projects were identified as contributing to impacts in this way, all noted in paragraph 4.18:

- the flood alleviation proposal;
- the second quarry proposal;
- the retail proposal (which had caused the displacing of on-site activities and the demolition of unlisted heritage assets); and
- the redevelopment of a golf course (which had heritage interest in its own right).

It is far from certain that these cumulative impacts on the local heritage amount to significant environmental effects which would of themselves merit EIA or consultation with English Heritage.

4.22 The overwhelming evidence from the questionnaires returned by local authority heritage staff is that in cases where English Heritage was not consulted at the scoping or

submission stages of EIAs: (a) there have not been significant effects of proposed EIA developments on the historic environment, and (b) planning case officers have been making defensible judgements about consultation. Only one decision was questionable out of 45 cases and two others marginal. These are additional to the cases noted in paragraph 3.20.

(ii) *Telephone interview responses*

4.23 Telephone interviews with conservation staff revealed that consultation by case officers with heritage staff was far from universal on EIA projects. A number indicated that they had not been consulted and did not know about the projects. When asked about schemes with which they were familiar, and on which English Heritage had not been consulted, the great majority indicated that there were no impacts whatsoever, or only minor ones. There were nonetheless a small number of cases where, with hindsight, they would have preferred English Heritage to have been consulted (cf. the second quarry example noted in paragraph 4.19, from a questionnaire response). For example, one archaeologist took this view on two cases on which English Heritage had not been consulted at either scoping or submission stages:

- at a site proposed for a pig-breeding unit for 2,500 sows there was considerable archaeological interest and the environmental statement was submitted with an archaeological report;
- at a large extension to an opencast coal mine the archaeological interest was modest but English Heritage should have been consulted because of the scheme's size.

4.24 Conservation Officers often confirmed that they had no formal role in deciding whether English Heritage should be consulted. However, it became apparent, particularly in County Councils, that heritage staff were often consultees of their planning colleagues on EIAs and that, in response, they might recommend consulting English Heritage if this had not already been done. When that happened it did appear to have the desired result:

- (a) when consulted at the scoping stage, a recommendation to consult English Heritage could result in a subsequent consultation at submission stage;
- (b) in another case, the Conservation Officer said that he was aware that a further application for the site was expected and he would ensure that English Heritage was consulted.

A number of case officers and conservation officers referred to the potential for conservation staff to recommend consultation with English Heritage, e.g. South Staffordshire, Lichfield, Purbeck, Cumbria CC. In cases where this advice is given on submitted EIAs when there was no scoping stage on which to comment, the likelihood is that consultation with English Heritage will be delayed until after receipt of the conservation officers' recommendation.

4.25 The telephone interviews also confirmed that local heritage and case officer staff can be substantially engaged in heritage issues without any engagement by English Heritage. For example, we identified a case in Essex County Council where the case officer had not consulted English Heritage on an EIA for a project to redevelop a recycling and recovery centre to provide a new waste management facility. The accompanying planning application had been refused on a number of grounds, including local heritage issues (the effect on a listed building on an undesignated moated site). An appeal had been lodged and

an inquiry was being held at the time of the research, at which the case officer was making a strong heritage case for refusal. This all happened without any engagement from English Heritage and quite possibly without its knowledge, suggesting what appears to be a sensible division of interest between national and local responsibilities.

4.26 The analysis of consultations with English Heritage showed that the decision to consult changed in 25 cases between scoping and submission stages (paragraph 3.17). Enquiries were made into the reasons for this, principally from local authority heritage staff (as the opportunity to raise it with case officers rarely arose, as this information appeared in questionnaire returns at the end of that consultation process). Unfortunately, as heritage staff were largely outside the decision-making process on consultations, they had very little insight to offer. The reasons for change in so many cases are therefore unresolved, though a few cases may be explained by English Heritage non-responses to consultations (paragraphs 3.13-14) and others by heritage officer comments (perhaps the case in paragraph 4.24(a)). This is a matter which Recommendation 4 would be able to address.

Alternative means by which English Heritage hears about EIA projects

4.27 English Heritage relies for the most part on consultations by local planning authorities for it to be alerted to development proposals which would affect the nation's heritage, and in the case of EIA developments this may allow early intelligence of emerging schemes if it is consulted on any scoping opinion or if the applicant makes informal enquiries. If, however, this process were to be shown to be unreliable, then alternative means by which English Heritage may be able to be alerted to such major projects would take on significance. The research aimed briefly to establish to what extent these alternative mechanisms were in use.

4.28 The approach used was to ask case officers if English Heritage had commented on EIA projects even though they had not been consulted. Just three cases were reported through questionnaire returns⁵ in respect of the 132 known projects on which there was no consultation. However, in one case the case officer advised that a comment had been submitted due to a misunderstanding about the location of the proposed EIA development. In addition there were the two cases noted which were reported by telephone where English Heritage is likely to have commented (paragraph 3.20). The research has therefore identified only four substantive cases where English Heritage commented on EIA developments on which it had not been consulted at all. The means by which English Heritage heard about projects is not known.

4.29 The following conclusions can be drawn on the means by which English Heritage is informed about proposed developments likely to have a significant effect on the historic environment:

- the vast majority of projects of potential interest are coming to the attention of English Heritage through formal EIA consultation routes; and/or

⁵ Another case was reported where this was claimed, even though consultations were reported as having taken place.

- such alternative routes that English Heritage may have for finding out about schemes in preparation are identifying very few and may therefore be deemed not reliable. Taken with the absence of any advice that screening is omitting worthwhile projects from EIA (paragraph 4.2), and that local authority heritage staff report that the vast majority of EIAs on which English Heritage is not consulted involve little or no impact on the heritage (paragraph 4.23), the tempting conclusion to draw is that almost all cases of potential interest to English Heritage are already being drawn to its attention through the planning system. Fresh evidence could challenge this, but on the basis of the information available to this research, this does seem the most probable position.

Conclusions

4.30 Decisions in local authorities on whether to consult English Heritage on EIA projects are overwhelmingly taken by non-specialist planners rather than heritage experts. Evidence to inform their decisions is available from GIS-based databases and expert internal consultees, but the use of these sources is modest. Decisions must therefore be relying to a substantial extent on the experience and judgement of case officers and their immediate colleagues and managers. It is difficult to say how reliable, transparent and reproducible such decisions are, but the limited scale of expert heritage input clearly leaves open the possibility that there is a somewhat random element in consultation decisions.

4.31 English Heritage was not consulted on 132 out of 232 EIAs in the database. Heritage staff in local authorities were approached to establish the scale of heritage interest in the sites affected, to gain an insight into the reliability of case officers' decisions on consultation with English Heritage. Questionnaire returns were received in respect of 45 cases, and issues were also discussed with heritage staff by telephone on many other cases. The overwhelming evidence from local authority heritage staff is that in cases where English Heritage was not consulted at the scoping or submission stages of EIAs: (a) there have not been significant effects of proposed EIA developments on the historic environment, and (b) planning case officers have been making defensible judgements about consultation. Only one decision was questionable out of 45 cases and two others marginal. Discussions with case officers identified two more where non-consultation had been of concern to English Heritage, and discussions with heritage officers a few more where, with hindsight, consultations with English Heritage should probably have taken place. These shortcomings appear minor in the overall picture of consultations, which in any event tends towards a precautionary approach with possibly excess consultations.

4.32 Local authorities changed their minds on 25 occasions between the scoping and submission stages of EIA, consulting English Heritage on one occasion but not the other even though the legislation is the same for both occasions. Contributors to this change are probably non-responses by English Heritage at scoping stage, discouraging local authority consultations later, and internal advice from heritage staff on the need to consult English Heritage, which is implemented at the later stage. However, the reasons for change in so many cases remain partially unresolved.

4.33 Only four substantive cases could be identified in 2010-11 in which English Heritage had heard about major projects with impacts on the environment but on which it was not

consulted through the EIA procedures. How it heard about these is not clear. However, the experience shows that the vast majority of projects of potential interest are coming to the attention of English Heritage through formal EIA consultation routes. Such alternative routes that English Heritage may have for finding out about schemes in preparation are identifying very few other cases, and may therefore be deemed not reliable. Overall, the most probable position is that almost all cases of potential interest to English Heritage are already being drawn to its attention through the planning system. There were plenty of cases where there was some heritage interest in an application but officers considered that this was insufficient to merit a consultation with English Heritage: local government continues to address heritage interests at the local scale, below the level of engagement of English Heritage.

5 ENGLISH HERITAGE ENGAGEMENT IN EIA PROJECTS OTHER THAN PLANNING

5.1 This section of the report outlines the means by which EIA applies to projects regulated through legislation other than the land use planning system. Reflecting the range of development types, there are up to sixteen separate legislative packages. Each has its own characteristics within an overall framework established by the European Directive from 1985. This information is provided in Appendices 3-18, noting in each case the background development of the law in recent years and outlining the allocation of functions.

5.2 Different bodies are charged with applying the EIA legislation. The consultation requirements in detail vary from law to law (outlined in paragraphs 1.12, 1.14 and 1.16 above). Table 1 above identifies the cases registered under each law in the financial year 2010-11.

5.3 As the responsibilities for taking decisions on major projects changes from time to time, so too do the responsibilities for applying EIA legislation. Sometimes the new body simply applies the previous EIA legislation, but sometimes new EIA laws are created and the reallocation of functions becomes more complex. There have been two main revisions affecting the period covered by this research:

- (a) The creation of the Infrastructure Planning Commission (IPC) to decide nationally important infrastructure projects was accompanied by new EIA legislation for the purpose, effective from April 2010. Numerous major projects were transferred to the IPC for decision. One casualty was the EIA law on onshore pipelines, for example: pipelines less than 10 miles had always been the responsibility of local planning authorities under planning law, but projects over 10 miles were transferred to the IPC from the Department of Energy and Climate Change (DECC), to be decided instead under the new Infrastructure Planning EIA legislation. This left the Pipelines EIA law no longer relevant to anyone. (The Infrastructure Planning Commission was itself abolished from 1 April 2012, with responsibility for examining national infrastructure projects passing to the Planning Inspectorate.)
- (b) The Marine Management Organisation (MMO) came into effect in April 2011, drawing powers over a range of marine functions from previous bodies including the Marine and Fisheries Agency (which ceased to exist) and the Centre for Environment, Fisheries and Aquaculture Science (at Defra). In this case most of the earlier legislation continued to apply, but different bodies took on responsibilities for EIA for projects above and below various threshold scales. The MMO took on responsibility for some offshore electricity projects, though many remained with DECC.

5.4 As a result of these changes, analysis of experience as recently as the study period of 2010-11 in the marine environment has become partially impractical as one of the main decision-makers no longer exists and another may not have retained its records. In any event experience from that time is no longer especially relevant, as it is the performance of the MMO which now matters, not its predecessors. An outline of all legislation relevant in 2010 has been retained for completeness in the appendices.

Consultations with English Heritage on non-planning EIA projects

(i) *Nationally important infrastructure*

5.5 The Infrastructure Planning Commission dealt with only one project relevant to the study year for this research. This concerned an Energy from Waste Generating Station at Rookery South Pit, Near Stewartby, Bedfordshire. The IPC has provided a timeline for the procedures in this case (note that only the stages 1, 2, 3, 6 and 7 below are specific to EIA alone):

1. Applicant makes non-statutory scoping request to English Heritage January 2010
2. IPC consults English Heritage at the Scoping Stage 10.2.10
3. English Heritage responds 16.2.10
4. Applicant consults English Heritage on proposed application (s42) 18.2.10
5. English Heritage responds 12.4.10
6. Applicant provides English Heritage with a copy of the Environmental Statement at Submission Stage
7. English Heritage makes initial response to the EIA 18.11.10
8. English Heritage makes full written representation on the application 28.2.11
9. IPC circulates additional questions 11.4.11
10. English Heritage responds to further questions 28.4.11
11. English Heritage appears at Examination (with advocate and witness) 22.6.11
12. A Statement Of Common Ground was agreed between the applicant and English Heritage at the Examination stage of the development proposal.

5.6 The evidence shows that English Heritage was correctly consulted in line with statutory requirements at all stages. English Heritage responded to all consultation opportunities offered (and also made further submissions on the application as a whole as well as on the EIA at each opportunity). The procedures operated as intended. English Heritage was not in any way disadvantaged by the current procedures or the way in which they were applied. In particular, the Rules require that English Heritage is consulted on “all proposed applications likely to affect land in England”, so that consultation should be comprehensive in respect of development proposals decided by this mechanism.

(ii) *Intensive agriculture*

5.7 The circumstances in which Natural England must consult English Heritage are imprecise in law (see Appendix 8). Natural England has explained to this research project its approach to consultations with English Heritage as follows: “In line with our Standard Operating Procedures our consultee on the historic environment is the relevant County Archaeologist (CA). However, whenever the CA is consulted the consultation letter is copied to English Heritage (EH) and the CA is requested to copy their response to EH. Natural England would normally consult the CA on all screening applications where the regulations apply. There may be exceptions such as when the project only involves chemical applications and the soil is unlikely to be disturbed.... In all cases a GIS is used to obtain information about scheduled monuments along with an inventory which details other areas of archaeology that may be of importance that show on Entry Level Stewardship/Higher

Level Stewardship environmental information reports. The environmental information record is also consulted if the land is [in] an ELS or HLS agreement. Aerial photographs are normally examined too as not all ridge and furrow is registered with the local archaeologist. The CA would be consulted on all full EIA applications with EH being copied in.”

5.8 Three proposals for intensive agriculture were registered in the study period, with the following engagement of English Heritage by Natural England:

- For a project to reseed grassland at Melbury in Dorset, the Dorset CC archaeologist was consulted with English Heritage copied in. Neither responded. The project changed significantly between the screening stage and the Environmental Statement. The final project, as described in the environmental statement, was below the 2ha threshold and was therefore considered to be outside the scope of the Regulations. There was no cumulative impact as there was no indication of heritage assets on this land.
- A scoping stage application was submitted for the cultivation of grassland at Bakewell in the Peak District National Park. English Heritage was consulted because there was a Scheduled Monument within the application area, and replied.
- A screening proposal for the cultivation of grassland near Aylesbury prompted consultation with the county archaeologist, with English Heritage being copied in. This was an area of known archaeology: aerial photographs, and information from NE staff who knew the land, indicated the presence of ridge and furrow. However, the CA initially responded to say there were no known archaeological features. When the R&F was pointed out to them they said it wasn’t significant. English Heritage did not respond.

The evidence shows that English Heritage was consulted in accordance with expectations and replied in one case but not in another. Natural England obtained heritage advice from sources with heritage expertise.

(iii) *Forestry*

5.9 The Forestry Commission has advised this research that, “If our Opinion is that an EIA consent is required we notify the relevant bodies of this decision. This would include English Heritage (EH) where the proposals may affect a scheduled ancient monument.” To obtain heritage advice, “Where EH are not involved FC would rely on the County Archaeologist; where further views on the impacts on Cultural Heritage are required FC would take advice from their own Cultural Heritage Advisor and potentially EH.” The approach to consultation is described as follows:

“FC do not consult EH as a matter of course. Forestry Commission would always consult EH on the proposals that are likely to affect Scheduled Ancient Monuments. This could be because the monument is within the proposal’s footprint or is close by. In case of doubt FC would seek EH’s views. This approach is consistent a Ministerial Statement on consultation on planting and felling proposals given in May 1996.”

5.10 There were three project proposals on which a final determination was issued in the study year. Screening decisions were provided on a further eight projects, all of which were ‘screened out’. The Forestry Commission advises that it has no rigid rules about when to involve English Heritage at screening stage, but the arrangements are comparable to

submitted schemes: English Heritage would be consulted where a designated site such as a SAM or registered park would be affected. Otherwise reliance would be on the Commission's own Cultural Heritage advisor and the County Archaeologist.

5.11 Two of the three cases determined, at Foulshaw Moss and Meathop Moss in Cumbria, were essentially one project and a single environmental statement was prepared for them. The engagement with English Heritage in these schemes was as follows:

- Deforestation at Foulshaw and Meathop Mosses: There are no known archaeological features of significance recorded in the mosses (established by a previous survey) and no scheduled/listed sites. Consequently archaeology was not considered to be affected significantly at the screening opinion stage, and at scoping opinion stage was assessed as not within the scope of the EIA. English Heritage was therefore not consulted.
- Deforestation at Gib Tor, Staffordshire in the Peak District National Park: This was considered at the screening opinion stage to be likely to have discernible effects on an area of archaeological potential: "The true impact on the cultural heritage was unknown. While there were relic drystone walls, gate posts and buildings features within the woodland [their significance] were unknown and a survey of the Nature Reserve in 2002 had found little evidence of pre-historic settlement." Because the proposals would have no effect on a scheduled or listed site or monument over which English Heritage has a statutory duty, English Heritage was not consulted. There was a possibility of cumulative impacts on heritage assets, so conditions were imposed on the authorisation to safeguard the cultural heritage as follows:
 - “(u) The following archaeological features will be identified and marked appropriately prior to any potentially damaging operations taking place and all operatives made aware of their existence and the mitigation measures required for each feature listed:
 - relic drystone walls.
 - gateposts.
 - buildings.
 - “(v) The *proposer* will inform and allow the Peak District National Park Authority or local archaeological interest groups to access the site immediately after clearance for field walking in case there are any features of interest that can be located and recorded before vegetation establishes. If any evidence of archaeological interest is found during operations expertise will be sought on the features' importance any mitigation to prevent damage.”

5.12 The absence of consultation with English Heritage in these cases was in accordance with the legal obligation to consult only with bodies “designated by statutory provision as having specific environmental responsibilities”. This is a more limiting requirement than the duty in planning law to consult when the body would be ‘likely to have an interest’ in the project.

(iv) *Gas transporter pipelines*

5.13 The Department of Energy and Climate Change (in parallel with the Infrastructure Planning Commission) takes screening decisions where EIA is not automatically required. If an EIA is then required, the IPC becomes the regulator (following the transfer of powers from April 2010). DECC provided screening opinions on four gas transporter pipeline EIAs in study period 2010-11:

- Rowhook to Horsham, West Sussex: 3.2km replacement; County Archaeologist consulted;
- Warmington to Wheelock, Cheshire: 3.25km new connection between two above-ground installations. No archaeological or historic environment interest;
- Kirkby Pool, Kirkby-in-Furness, Cumbria: 65 metre river crossing, no archaeological or historic environment interest;
- Shawell Quarry, Leicestershire: 2km diversion, no archaeological or historic environment interest.

In these screening cases there is a statutory duty to consult the local planning authority but no provision to consult anyone else: English Heritage was therefore not consulted.

(v) *Transport and Works*

5.14 Two Transport and Works proposals were registered and decided by the Department of Transport during the period 2010-11. In neither case were scoping opinions sought by the promoters, so the option for consultation with English Heritage did not arise at this stage. At the submission stage, the applicants (not the regulator) must serve the relevant documents to consultees under Schedule 5 of the Procedure Rules. The cases were:

- (a) The proposed Chiltern Railways (Bicester to Oxford Improvements) Order:
- English Heritage was statutorily consulted by the applicant on the basis of categories 14 and 15 of Schedule 5, though category 16 (registered parks and gardens) was not applicable.
 - English Heritage objected on 16 February 2010.
 - A Supplementary ES was prepared as a second addendum in September 2010 which dealt specifically with one of English Heritage's concerns.
 - English Heritage was consulted on this SES and withdrew its objections in November 2010 following modifications made to the proposed Order.
- (b) The proposed Ashton Vale to Temple Meads and Bristol City Centre Rapid Transit Order.
- English Heritage was consulted on a scoping report in September 2008.
 - Regular meetings were held with English Heritage officers in 2009 and additional information was provided.
 - English Heritage was statutorily consulted by the applicant on the basis of categories 14 and 15 of Schedule 5.
 - A representation was made to the Secretary of State on 22 July 2010.
 - There was no Supplementary Environmental Statement for this project.

5.15 The statutory requirements for consultation, which are comparable to those under the Development Manager Procedure Order in planning law, appear to have been applied correctly, together with a non-statutory consultation on scoping in the Bristol Rapid Transit

scheme. English Heritage had one of its clearest impacts on EIA procedures in the Chilterns Railway case, where its concerns merited the preparation of a Supplementary Environmental Statement and modifications to the proposals.

(vi) *Marine works, marine dredging and harbours*

5.16 The Marine Management Organisation (MMO) has advised this research that they adopt the same approach to consulting English Heritage across all three sets of legislation dealing with marine issues for which they are responsible. At screening stage English Heritage is not consulted, but advice is obtained from the Centre for Environment, Fisheries and Aquaculture Science, Natural England and the Environment Agency. At scoping and submission stages English Heritage is always consulted. In our view the consultation at scoping and submission exceeds the statutory minimum, whilst the absence of consultation at screening stage risks falling below it (see the outline of screening procedures in Appendix 4). See also Recommendation 1.

5.17 The MMO instituted a new casework monitoring system from the outset of its activities in April 2011. The study period for this research covered the preceding period when other organisations had their own responsibilities. Most or all of these should have been covered by a Marine Consent Management System in place at the time, but there may be gaps in the data. The available information on 58 cases is presented in Table 3. This has been pieced together from different sources, which explains some gaps in the information on consultations with English Heritage. It is difficult to say in the circumstances whether statutory consultation procedures were properly followed at the time. More importantly, the MMO's procedures at present are as indicated in the previous paragraph. It is clear from the table, however, that in all but one case (where information is available) English Heritage did respond to the consultations on EIA it received.

(vii) *Land drainage*

5.18 There were no land drainage EIA projects considered by Defra during the study period, but Defra report that one case has since been referred to it in November 2011, relating to works proposed to be undertaken at Hatfield Colliery, in the Fishlake area of Doncaster by the Dun Drainage Commissioners. English Heritage was consulted at the scoping stage. It is not clear whether English Heritage was consulted at the screening or submission stages in this case. (Consultation is a statutory requirement at all three stages.)

(viii) *Highways*

5.19 The Highways Agency is, so far as we understand, the only EIA regulatory body with whom English Heritage has a Memorandum of Understanding on the case on which consultations on highways proposals will take place. (We suspect that most of this applies to smaller schemes below the threshold for EIA). EIA is a major activity within the Highways Agency (in part as promoter as well as regulator of schemes). A designated officer has regular meetings with the lead officer for transport at English Heritage, we are advised, which ensures that procedures are fulfilled. This liaison provides advance intelligence in addition to the statutory consultations which are carried out. This is especially important in

Table 3 EIA projects in the marine environment in 2010-11

Case Reference	Submitted Date	Pre-Application Type	Applicant Name	EH Consulted (Y/N)	EH Response (Y/N)
20102206	22/04/2010	Scoping Request	Mott MacDonald	N	n/a
20102220	07/05/2010	Scoping Request	Environment Agency	Y	Y
20102223	07/05/2010	Scoping Request	Environment Agency		
20102235	20/05/2010	Scoping Request	Southend-on-Sea BC	N	n/a
20102247	08/06/2010	Scoping Request	Premier Marinas (Falmouth) Ltd	Not sent yet	
20102248	08/06/2010	Scoping Request	Premier Marinas (Falmouth) Ltd	N	n/a
20102252	08/06/2010	Scoping Request	E.ON UK	Not sent yet	
20102260	11/06/2010	Scoping Request	Environment Agency	Y	Y
20102268	17/06/2010	Scoping Request	Magnox South	Y	Y
20102267	18/06/2010	Scoping Request	E.ON UK	Y	Y
20102277	24/06/2010	Scoping Request	Wightlink Ltd	N	n/a
20102280	24/06/2010	Scoping Request	AECOM	Y	Y
20102285	24/06/2010	Scoping Request	Environmental Resources Mgt	Not sent yet	
20102286	24/06/2010	ES Review	Centrica Resources Ltd	N	n/a
20102329	29/06/2010	Scoping Request	RWE DEA UK	Not sent yet	
20102290	02/07/2010	Scoping Request	Wightlink Ltd	N	n/a
20102290	02/07/2010	Scoping Request	Wightlink Ltd	N	n/a
20102294	05/07/2010	Scoping Request	Renewable Energy Systems Ltd.	N	n/a
20102295	07/07/2010	Scoping Request	Environment Agency		
20102296	05/07/2010	Scoping Request	IPC	N	n/a
20102302	09/07/2010	Scoping Request	Cleveland Potash Ltd.	Y	N
20102301	12/07/2010	Scoping Request	Environment Agency	Y	Y
20102320	19/07/2010	Scoping Request	Peel Energy	Not sent yet	
20102321	20/07/2010	Screen&Scoping	CPR Regeneration	Y	n/a
20102323	21/07/2010	Scoping Request	Hartlepool Borough Council		
20102327	21/07/2010	Scoping Request	Hartlepool Borough Council	Y	Y
20102341	06/08/2010	Scoping Request	IPC	Not sent yet	
20102361	06/09/2010	Screening Request	Cory Environmental	N	n/a
20102372	20/09/2010	Scoping Request	Able UK Ltd	N	n/a
20102377	27/09/2010	Scoping Request	Helius Energy Plc	N	n/a
20102389	05/10/2010	Scoping Request	Northumberland County Council	Y	Y
20102394	08/10/2010	Scoping Request	Portsmouth Commercial Port	N	n/a
20102396	13/10/2010	Scoping Request	Environment Agency	Y	Y
20102399	19/10/2010	Scoping Request	Halite Energy Group	N	n/a
20102400	19/10/2010	Scoping Request	Environment Agency	Y	Y
20102401	19/10/2010	Scoping Request	National Grid c/o PMSS	Y	Y
20102408	25/10/2010	Scoping Request	Centrica Energy	N	n/a
20102412	01/11/2010	Scoping Request	METOC Plc	N	n/a
20102439	18/11/2010	Scoping Request	Centrica Energy c/o RPS Energy	Not sent yet	
20102430	22/11/2010	Scoping Request	Thames Water Utilities	N	n/a
20102434	26/11/2010	Scoping Request	Environment Agency	Not sent yet	
20102456	14/12/2010	Scoping Request	Torbay Development Agency	Not sent yet	
20102461	16/12/2010	Scoping Request	Joseph Strong Frazer Trust	N	n/a
20102465	17/12/2010	Scoping Request	Torbay Development Agency	Not sent yet	
20102481	30/12/2010	Scoping Request	Environment Agency	Y	Y
20112495	18/01/2011	Scoping Request	Environment Agency	N	n/a
20112501	20/01/2011	Scoping Request	United Utilities Water PLC	Not sent yet	
20112518	03/02/2011	Scoping Request	METOC Plc	N	
20112536	23/02/2011	Scoping Request	Royal Haskoning	N	
20112551	24/02/2011	Scoping Request	Marina Projects Ltd	N	
20112543	28/02/2011	Scoping Request	University of Exeter	N	
20112565	15/03/2011	Screen&Scoping	Marina Developments Ltd	N	
20112566	16/03/2011	Scoping Request	Centrica Energy c/o RPS Energy	N	
20112569	15/03/2011	Screen&Scoping	Marina Developments Ltd		
20112571	21/03/2011	Scoping Request	CdMR Purfleet Ltd	Y	
20112573	22/03/2011	Screen&Scoping	Environment Agency	Not sent yet	
20112577	25/03/2011	Scoping Request	ABP Hull	N	
20112579	28/03/2011	Scoping Request	Environment Agency	Not sent yet	

the highways context as the screening process for EIA is essentially internal and without consultation, and there is no provision in the legislation for scoping (the Highways Agency would often be asking the question of itself). We are advised that about four fifths of local highway schemes are screened out without the need to carry out an EIA. English Heritage is a statutory consultee at submission stage. Obtaining and reviewing cases appeared disproportionate to the parties in view of the limited resources of the research and the existence of the Memorandum of Understanding backed by face-to-face meetings.

Conclusions

5.20 The number of EIAs outside the planning system were few in 2010-11 other than in the marine environment (though data were not collected on highways or land drainage cases). Since then, decisions in the marine environment have largely passed to the Marine Management Organisation which has a policy of always consulting English Heritage on EIAs at the scoping and submission stages. Although this goes beyond the statutory minimum requirement, it does appear to offer comprehensive consultation across the heritage resource which we are advised by English Heritage is most needed (i.e. outside the scope of the land use planning system). The other authorities deciding EIA cases appear to follow consultation procedures accurately, with a small amount of additional non-statutory consultation in some cases. Projects accompanied by EIAs which would be likely to have a significant effect on the historic environment are therefore highly likely to be drawn to English Heritage's attention. However, the legal definition of relevant cases meriting consultation is tightly constrained in the case of forestry projects.

5.21 There is a statutory requirement to consult English Heritage in some of the categories of project in which EIA cases were identified in 2010-11, either on all cases or at least in defined circumstances. In these cases relatively little discretion – and therefore expertise – in heritage issues is required to decide whether a consultation is merited. On those occasions where expertise is required, the regulating authorities had taken steps to obtain it, either in-house or from other statutory bodies. These appear satisfactory except in the case of the Marine Management Organisation, which takes advice from bodies for whom heritage issues are a peripheral concern only.

5.22 The evidence from non-planning regulators of EIA projects is that English Heritage almost always responds to the consultations it receives on EIAs.

5.23 No problems have been drawn to our attention by any party regarding heritage issues being: omitted from consideration by non-planning EIA projects, poorly handled or misunderstood. However, the sample interrogated has been either somewhat out of date (in the marine environment) or otherwise modest in size. There are also greater risks to special interests, like heritage, in circumstances where regulators deal with EIAs infrequently and therefore may not accumulate as much practical experience and insight as might be hoped. In this context we cannot of course comment on practices in those regulatory bodies which handled no EIAs in 2010-11. While all functions appear to be proceeding fairly smoothly, for these reasons we caution against relying too heavily on the findings presented.

RECOMMENDATIONS

1. We recommend that all EIA regulators should obtain early professional advice on heritage issues: at screening stage before deciding whether or not an EIA is required and at scoping stage before deciding whether (and which) heritage issues should be included in the EIA.
2. We recommend that English Heritage makes clearer to local planning authorities – by way of a publication, or memorandum of understanding with representative bodies – those impacts which would make projects ‘likely to be of interest’ to it and therefore merit consultation. This would provide a practical interpretation of the legal consultation requirements in the EIA Regulations. This should also indicate how precautionary an approach by local authorities would be acceptable, balancing the aim of not missing projects likely to have significant effects with the aim of not over-burdening the parties with surplus consultations. Advice should also be given on English Heritage’s interpretation of the requirements of the Table in Schedule 5 of the Development Management Procedure Order (though bearing in mind this is ultimately a matter for the Courts to decide).
3. We recommend that English Heritage should aim to respond formally to all consultations on scoping opinions in the planning system, not least as in some cases it may otherwise lose the legal right to be consulted at the environmental statement submission stage as well.
4. We recommend that local authorities should be asked to give reasons if they change their decision on whether to consult English Heritage on EIA projects between the scoping and submission stages.

APPENDIX 1 CASE OFFICER QUESTIONNAIREEvaluation of English Heritage Involvement in Environmental Impact Assessments**Background:**

English Heritage (EH) has appointed planning consultancy Green Balance to research and evaluate EH's involvement in Environmental Impact Assessments (EIAs). This includes establishing if there have been development proposals likely to have a significant effect on the historic environment of which EH was unaware.

In order to prepare a report for EH, we need to obtain information about all EIAs submitted to English LPAs in the period April 2010-March 2011. **Please note that this is about consultations on EIAs (though at times these may be the same as consultations on planning applications).**

CLG Live Table P134 indicates that a total of *[insert no.]* EIAs were submitted to *[specify local authority name]* in this period. We should be very grateful if you could provide information for each EIA on a separate questionnaire.

1. Respondent

Name of respondent	
Job title	
Date of contact	
Telephone number	
Email address	

2. Proposed development

a) Proposal name and location	
b) Description of proposed development (summarise)	
c) LPA reference number	

3. EIA Screening

a) Was a formal request for a screening opinion sought?	
b) If 'Yes', was EH consulted at screening stage?	
c) If 'Yes', why did you carry out this non-statutory consultation with EH?	
d) If consulted at screening stage, did EH respond?	

4. EIA Scoping

a) Was a formal request for a scoping opinion sought?	
b) Was EH consulted at the scoping stage?	
[continued]	

c) If 'Yes', was this a statutory or non-statutory consultation?	
d) EITHER: If statutory, what was considered to be the need for the consultation? OR: If non-statutory, why did you consult EH?	
e) If consulted at scoping stage, did EH respond?	

5. Submission of Environmental Statement

a) Was EH consulted after the Environmental Statement had been submitted?	
b) If 'Yes', was this a statutory or non-statutory consultation?	
c) EITHER: If statutory, what was considered to be the need for the consultation? OR: If non-statutory, why did you consult EH?	
d) If consulted at submission stage, did EH respond?	

6. General

a) Have you encouraged applicants to consult EH during EIA preparation?	
b) Did EH comment on the EIA, even though you did not consult them?	
c) If EH did comment on the EIA, did the applicant prepare a Supplementary Environmental Statement addressing the comments?	
d) In deciding whether or not to consult EH, did you consult the Historic Environment Record (normally held by County Councils)?	
e) Please add any further comment you feel may be relevant, e.g. if it is your Council's policy to consult EH on all EIAs, not just on minimum obligations,	

Thank you for your assistance.

Please return this questionnaire to Dick Lankester at lankesters@hotmail.com

Tel: 01737 225814

Research for English Heritage by
Green Balance, 9 West End, Kemsing, Kent TN15 6PX

APPENDIX 2 HISTORIC BUILDINGS/ARCHAEOLOGICAL OFFICER QUESTIONNAIRE

Evaluation of English Heritage Involvement in Environmental Impact Assessments

Background:

English Heritage (EH) has appointed planning consultancy Green Balance to research and evaluate EH's involvement in Environmental Impact Assessments (EIAs). This includes establishing if there have been development proposals likely to have a significant effect on the historic environment of which EH was unaware.

In order to prepare a report for EH, we need to obtain information about all EIAs submitted to English LPAs in the period April 2010-March 2011. **Please note that this is about consultations on EIAs (though at times these may be the same as consultations on planning applications).** The research has already been assisted by planning staff familiar with the EIAs in your authority in that period.

We have some additional questions for Historic Buildings/Archaeological Officers in **cases where English Heritage is known not to have been consulted on the EIA.** We would be grateful if a separate questionnaire could be completed for each EIA if there was more than one in your authority: we have completed section 2 below and are sending you as many forms as appropriate.

1. Respondent

Name of respondent	
Job title	
Date of contact	
Telephone number	
Email address	

2. Proposed development

a) Proposal name and location	<i>To be filled in by Green Balance before issuing, using info from Case Officer questionnaire</i>
b) Description of proposed development (summarise)	<i>To be filled in by Green Balance before issuing, using info from Case Officer questionnaire</i>
c) LPA reference number	<i>To be filled in by Green Balance before issuing, using info from Case Officer questionnaire</i>

3. Consultation

Were you involved in the decision making process on whether or not English Heritage should be consulted on this EIA?	
--	--

[continued]

4. Did you consider the proposal likely to have effects on the following types of heritage assets which were significant, might be significant or were discernible (please indicate 'yes' in any relevant column)?

<i>Type of heritage asset</i>	<i>Effects were significant</i>	<i>Effects might be significant</i>	<i>Effects were discernible</i>
One or more listed buildings			
One or more scheduled ancient monuments			
One or more registered park or garden			
One or more conservation areas			
A World Heritage Site			
*An area of known archaeology or archaeological potential			
*An historic landscape			
*One or more historic views			
*The setting of a heritage asset			

*A short note with some details would be especially helpful in these cases

5. Did you consider that this proposal, with others, would have a cumulative impact on heritage assets? If so, please give brief details below:

--

6. If English Heritage submitted comments on the EIA (despite not being consulted by the LPA):

Do you know how they heard about the case?	
On what issue/s did they respond?	

Thank you for your assistance.

Please return this questionnaire to Richard Bate at bateeh@greenbalance.co.uk

Tel: 01732 763591

Research for English Heritage by
Green Balance, 9 West End, Kemsing, Kent TN15 6PX

APPENDIX 3 NATIONALLY SIGNIFICANT INFRASTRUCTURE

Principal decision maker: Infrastructure Planning Commission

The legislative requirements in summary

Legal basis:

- Planning Act 2008
- The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI No. 2263)
- The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (SI No. 2264)
- The Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2011 (SI No. 2741)

1. Screening

Requesting a screening opinion is optional, but Regulations prescribe the procedure if a request is submitted. The Infrastructure Planning Commission must provide a Screening Opinion within 21 days of being asked. There is no statutory consultation at this stage.

2. Scoping

Requesting a scoping opinion is optional, but Regulations prescribe the procedure if a request is submitted. The Infrastructure Planning Commission must provide a Scoping Opinion within 42 days of being asked. Within that period the IPC must consult 'consultation bodies' (amongst others), who have 28 days to respond. The Regulations (SI 2264) specify that English Heritage is such a body in respect of "all proposed applications likely to affect land in England" (see Schedule 1). The IPC has also committed as a matter of policy to undertake non-statutory consultations with English Heritage in the case of "all proposed applications where there is an off-shore element". This will therefore enable English Heritage not least to fulfil its duties as the relevant body for designated wrecks and as the relevant body in relation to underwater sites that are scheduled under the Ancient Monuments and Archaeological Areas Act 1979⁶.

There is a duty on consultation bodies to provide information relevant to the preparation of the environmental statement: consultation bodies are notified of this by the IPC and must enter into consultations with the applicant (if requested by the applicant). Before issuing a scoping opinion, the IPC must take into account a range of matters specified in the Regulations (8(9)), but these do not explicitly include the advice provided by consultation bodies – though this advice might be covered by other requirements, such as an obligation to take into account 'the environmental features likely to be affected by the development'.

⁶ *Meeting the IPC's obligations – Advice note 3: Consultation and notification undertaken by the IPC*, July 2011, IPC, p11.

3. Submission

The applicant must provide consultation bodies, i.e. including English Heritage, with a copy of the submitted environmental statement once an order for development consent under section 56 of the Planning Act 2008 has been accepted by the IPC. This is not a formal consultation, as the emphasis moves to addressing the submitted proposal as a whole, including its environmental statement.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	No	N/A
Scoping	Yes	Yes
Submission	Yes	Yes

Commentary

The procedures for handling EIA are closely integrated with the wider procedures for deciding the schemes themselves. For example, the requirements for consultation on the application itself under s42 of the Planning Act 2008 are exactly the same as for consultation at the scoping stage of the EIA. (This ensures that, in the unlikely event of a nationally significant infrastructure project not requiring an EIA, all the appropriate consultations still take place, including with English Heritage.) Although not part of the EIA requirements, The Infrastructure Planning (Decisions) Regulations 2010 (SI No. 305) require that decisions made by the IPC pay proper attention to listed buildings, conservation areas and scheduled monuments. Regulation 3 imposes a 'duty of regard' in respect of these, in effect meaning that the IPC cannot ignore them. The consequence of this is likely to be that the IPC will err on the side of caution on these matters, notably by requiring them to be taken into account in the EIA process where possibly relevant (e.g. by requiring their study in each Scoping Opinion and by devoting space to them in each Decision and Statement of Reasons).

APPENDIX 4 MARINE WORKS

Principal decision maker: Marine Management Organisation

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Marine Works (Environmental Impact Assessment) Regulations 2007 (SI No. 1518)
- The Marine Works (Environmental Impact Assessment) (Amendment) (England and Wales) Regulations 2009 (SI No. 2258)
- The Marine Works (Environmental Impact Assessment) (Amendment) Regulations 2011 (SI No. 735)

The 2007 Regulations apply to activities which include:

- licences for the depositing of articles or substances in the sea or under the sea-bed and licenses for incineration at sea (under the Food and Environment Protection Act 1985);
- consents for construction, alteration or improvement works, or depositing or removing materials, on the seashore detrimental to navigation (under the Coast Protection Act 1949); and
- harbour works (previously covered by the Harbour Works (Environmental Impact Assessment) Regulations 1999, as amended).

The 2011 Amendment Regulations came into effect on 6th April 2012. This is after the financial year 2010-11 and therefore would not have applied to cases in the sample period for this research. The 2011 Amendment Regulations are partly consequential on the enactment of the Marine and Coastal Access Act 2009, which largely replaced (a) the marine licensing and (b) the consent controls previously exercised over marine dredging under the Food and Environment Act 1985 and the Coast Protection Act 1949 respectively. One of the main effects of the change is to transfer certain functions to the Marine Maritime Organisation. The 2009 Amendment Regulations were very minor and were in any event revoked by the 2011 Amendment Regulations.

The other main part of the 2011 Amendment Regulations provides transitional arrangements to these new 2011 rules for marine dredging, following the revocation of The Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007 (in Reg. 14). This ensures continuity of permissions granted under the 2007 Regulations and provides for continuity of handling of applications in progress in their earlier stages.

1. Screening

A prospective developer may submit an application for regulatory approval with or without an EIA in the usual way, but the legislation presents the following specific options at this stage:

- an EIA is required... “if the applicant so agrees with the appropriate authority” (Reg. 5);
- “An applicant may request a screening opinion from the appropriate authority” (Reg. 11(1));
- if the regulator of the development type (rather than the appropriate authority for EIA purposes) considers that an application for a regulated activity requires EIA, the regulator “must direct the applicant to request a screening opinion from the appropriate authority” (Reg. 11(3)).

The appropriate authority for evaluating EIA proposals – the Secretary of State – must issue a screening opinion if requested. It must also consult such of the consultation bodies as it considers appropriate before giving a screening opinion. Consultation bodies include the local planning authority, Natural England (or other equivalent national bodies), relevant Ministers (according to country of the UK) and “such other bodies as the appropriate authority considers likely to have an interest in the regulated activity (whether by virtue of their having specific environmental responsibilities under an enactment or otherwise)”. English Heritage could be a consultee under the last criterion. Consultation bodies must be given a reasonable period to respond, of not less than 28 days from the date of the letter or such other period as may be agreed.

2. Scoping

The applicant may request a scoping opinion. The appropriate authority must consult such of the consultation bodies as it considers appropriate before giving a scoping opinion. Consultation bodies must be given a reasonable period to respond, of not less than 28 days from the date of the letter or such other period as may be agreed. Schedule 4 paragraph 5 requires the appropriate authority when reaching its scoping opinion to consider specified characteristics of the project, the environment and information that may reasonably be required, though not specifically consultees’ responses.

3. Submission

The regulator and the appropriate authority ‘may’ make available to the applicant information relevant to the preparation of the environmental statement, and ‘must’ do so if requested by the applicant. There is no statutory obligation on consultees to do the same. Either the appropriate authority or the applicant must supply the environmental statement, application and any further submitted information to such of the consultation bodies as the appropriate authority considers appropriate. Consultees then have 42 days from the date of the letter in which to make representations, or such longer period as a consultee may agree with the appropriate authority. In addition to consultation, the publicity requirements also allow that anyone wishing to make representations may do so within 42 days of the date of the notice. The regulator may not reach a decision on the application until after the expiry of the consultation and publicity periods.

A lengthy Schedule 5 sets out the procedures to be followed where a response to the publicity material (though not to consultations) could be relevant to the EIA consent. It sets

out a series of alternative procedures for handling representations which are relevant and increasingly difficult to resolve:

- to be addressed separately by the regulator rather than by the appropriate authority in the context of EIA;
- for resolution by negotiation between the parties;
- appointing an expert on the subject-matter to report on questions of fact where there is a dispute between the parties;
- holding a local inquiry, which all persons interested are permitted to attend.

In reaching its EIA consent decision, the appropriate authority must also take into account a range of matters including not only the legislation and the direct and indirect effects of the project but also the environmental statement and any further information, the outcome of the Schedule 5 processes, and any representations by the consultation bodies. The regulator may proceed to deal with the application only when the appropriate authority has given an EIA consent to the regulated activity. The regulator must have regard to the EIA consent, particularly in a number of specified details. If EIA consent has been refused, the regulator must treat the application as having been withdrawn.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	Yes	Yes if “likely to have an interest”
Scoping	Yes	Yes if “likely to have an interest”
Submission	Yes	Yes if “likely to have an interest”

Commentary

Most legislation on Environmental Impact Assessment is phrased in terms of a decision being made on a proposed development informed by the findings of an Environmental Impact Assessment which has followed correct procedures. This Regulation uses the concept of an ‘EIA consent’ as a parallel requirement to the authorisation of the development itself. The regulator of a development must not approve a development subject to EIA unless the appropriate authority (the Secretary of State) has first given such a scheme its EIA consent. This arrangement avoids interfering with the procedures for taking decisions on development proposals under the various laws for each type of development covered by these Regulations, while ensuring a consistent approach to EIA.

It is for the appropriate authority to decide whether an EIA is required for a development type covered by these Regulations. The appropriate authority may or may not be the same body as the regulator of the development type (as the Regulations draw a procedural distinction between the two).

Although there is no formal obligation on an applicant to request a screening opinion or a scoping opinion, there is some incentive to request both. This is because neither the regulator nor the appropriate authority may deal with an application requiring EIA until specified information, including the environmental statement, have been provided (Reg. 12), and also crucially because the appropriate authority may specify “the format in which

the applicant must provide the material referred to” (Reg. 12(3)). Without this information within a reasonable period, the appropriate authority can direct the regulator to treat the application as having been withdrawn.

These Regulations are also unusual in specifically enabling the decision-making authority on the EIA to charge a fee to cover its costs of giving screening and scoping opinions. The 2011 Amendment Regulations added a requirement that before determining the amount of a fee, the appropriate authority must consult those representing “persons who are likely to apply for regulatory approval”. They also added the power to charge a fee for assessing and interpreting the results of any monitoring condition attached to the grant of a regulatory approval.

APPENDIX 5 EXTRACTION OF MINERALS BY MARINE DREDGING

Principal decision maker: Marine Management Organisation

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007 (SI No. 1067)

These Regulations were revoked by The Marine Works (Environmental Impact Assessment) (Amendment) Regulations 2011, which came into effect on 6th April 2011. This is after the financial year 2010-11 and therefore would not have applied to cases in the sample period for this research. This summary of the principal features relevant to the research are included for completeness.

1. Screening

Obtaining a screening opinion is optional. If a request is submitted, then before making what is called under these Regulations a ‘preliminary determination’, the regulator must consult the owner and the appropriate ‘consultation bodies’. The consultation bodies are defined primarily as Natural England (in England) plus other parties if the proposed dredging could affect the environment beyond England, and “such other bodies as the regulator considers, by reason of their specific environmental responsibilities, to have an interest”. English Heritage could be covered by that last obligation. No periods are specified within which consultees must respond or the regulator must make a determination, nor is there a requirement to await consultees comments or take them into account; however, the person making the request and consultees must be informed of the decision as soon as reasonably practicable afterwards. A decision that a proposal does not require EIA in effect lasts for 12 months only (Reg. 10(3)).

2. Scoping

The prospective applicant may ask for a scoping opinion. In that event the regulator, before giving an opinion, must again consult the appropriate consultation bodies as to the information to be provided in the environmental statement. The selection criteria when deciding the scope of an EIA, set out in Schedule 2, are transposed from Annex III of the Directive. These include “the environmental sensitivity of geographical areas likely to be affected by projects... having regard, in particular, to... landscapes of historical, cultural or archaeological significance”. The regulator will therefore need some familiarity with the interests of English Heritage in these respects. No periods are specified within which consultees must respond or the regulator must make a determination, nor is there a requirement to await consultees comments or take them into account. Consultees must be informed of the decision (though at this stage not ‘as soon as reasonably practicable’ afterwards).

Consultees, government departments and the regulator must provide relevant information to the prospective applicant if requested to do so (subject to limitations), and they may charge for this.

3. Submission

After submission of an environmental statement, the regulator may require the provision of additional information to enable the environmental effects of the dredging to be fully considered and that may reasonably be required “having regard in particular to current knowledge and methods of assessment” (Reg. 11(1)(b)).

On receipt of an environmental statement, the regulator must send the application (including the environmental statement) and any further supporting documents to the owner and appropriate consultation bodies. Consultees must respond with representations within eight weeks.

There is also provision (Reg. 12(5)) that “Where the regulator is aware of any other person (including any non-governmental organisation promoting environmental protection in marine waters) who is likely to have an interest in the application, but is unlikely to become aware of it by means of the public advertisement”, then the regulator shall send a notice so such person containing the publicity details (not the full consultation documents package). There seems no reason why English Heritage should not be covered by this definition, though the provision does not apply at scoping stage; however, the more likely route to the engagement of English Heritage is through consultation as a ‘consultation body’.

The regulator may cause an independent investigation to be held (“may give the opportunity of making representations (whether in person or in writing) to a person appointed by the regulator for that purpose”) to give an opportunity to be heard to the owner, applicant “and any other person whom the regulator considers should be given such an opportunity”. After that, the regulator makes the decision on whether to grant or refuse permission. In doing so the regulator must take into account the information provided in the application, the EIA, any further information supplied, any representations made (not only by consultees), and the report of the person holding the investigation.

Notice of the decision must be sent to the applicant, the owner, anyone who made representations, and consultees. This must state the reasons for the decision, the main considerations on which the decision is made, and, if granted, any conditions and if applicable the main measures taken to avoid, reduce and if possible offset any major adverse effects. Under Reg. 26 there are extensive requirements for the regulator to hold a register of information relating to EIA under the provisions of this legislation.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	Yes	Yes if considered “to have an interest”
Scoping	Yes	Yes if considered “to have an interest”
Submission	Yes	Yes if considered “to have an interest”

APPENDIX 6 HARBOUR WORKS

Principal decision maker: Marine Management Organisation

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Harbours Act 1964
- The Harbour Works (Environmental Impact Assessment) Regulations 1999 (SI No. 3445)
- The Harbour Works (Environmental Impact Assessment) (Amendment) Regulations 2000 (SI No. 2391)
- The Harbour Works (Environmental Impact Assessment) (Amendment) (England and Wales) Regulations 2009 (SI No. 269)

The 1999 Regulations originally applied to harbour works proposals under specific sections of a range of Acts, including the Coast Protection Act 1949, Merchant Shipping Act 1988, Harbours Act 1964 and local Acts. They also applied to harbour works below low water mark of medium tides outside the scope of a number of other laws (including planning law) (Reg. 3). However, most of the Regulations were revoked by Regulation 29 of the Marine Works (Environmental Impact Assessment) Regulations 2007, leaving only their application to Harbour Revision and Empowerment Orders under the Harbour Works Act 1964. The 1999 Regulations had through their Regulation 15 and Schedule 3 replaced the EIA requirements by direct amendment of the primary legislation in the Harbours Act 1964 (cf. Highways Act 1980 and Transport and Works Act 1992). The outline below applies only to those remaining provisions.

Harbour works projects still covered by these Regulations will be considered for possible EIA if the area of the harbour works exceeds 1 hectare, any part of the harbour works is to be carried out in a sensitive area (defined to include World Heritage Sites and scheduled ancient monuments), or the Secretary of State determines that they shall be treated as requiring EIA.

1. Screening

A prospective applicant for consent must ask the Secretary of State for a screening opinion and may not make an application until this has been done. The Secretary of State must give an opinion on (a) whether the application falls within Annex 1 or Annex 2 of the Directive; (b) whether the project is relevant project, requiring an EIA (if it is within Annex 2), and if so (c) the information to be supplied in the environmental statement (regarding the extent of the information referred to in Annex IV of the Directive) – in such form as he may specify.

2. Scoping

Scoping takes place at the same time as screening insofar as the prospective applicant does not need to request a separate opinion (see item (c) in 'Screening' above). There is

consultation at the scoping stage, in which the Secretary of State must not give an opinion “until he has consulted the proposed applicant and such bodies with environmental responsibilities as he thinks appropriate” (inserted Schedule 3 paragraph 6(4)). This could include English Heritage. There is also publicity for the information provided (and for any further information), with a period of 42 days available in which representations may be made. The Secretary of State must provide written reasons for his decision. Where EIA is not required the development proposal is determined under the Harbours Act procedures.

3. Submission

The Secretary of State must consult, and send the environmental statement, to “such bodies likely to have an interest in the project by reason of their environmental responsibilities as he thinks appropriate”. This could include English Heritage. There is no time period specified for this consultation, but the decision cannot be made until “every period for the making of objections or representations to the Secretary of State in respect of the application has expired”.

The requirements for publicity for an environmental statement are blended in to the requirements for publicising a harbour revision order. Notices must publicise in specified ways the existence of the application and environmental statement, giving 42 days for representations to be made to the Secretary of State. If there is an outstanding objection arising from publicity, the Secretary of State must (other than in closely defined circumstances) cause an inquiry to be held at which the objector, the applicant and “such other persons as he thinks appropriate” have the opportunity to be heard.

The decision on the application is then taken by the Secretary of State, after having received the report of any inquiry, and taking into account:

- the environmental statement;
- representations arising from the publicity;
- consultees views;
- objections made and not withdrawn; and
- the report of any inquiry.

There are procedures whereby the Secretary of State can make Orders of his own motion, though these are considerably truncated compared with those described above.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	No	N/A
Scoping	Yes	Yes if the SoS “thinks appropriate”
Submission	Yes	Yes if “likely to have an interest”

Commentary

The running together of the screening and scoping stages is unusual, as is specifying the EIA requirements in the primary legislation of the Harbours Act rather than in Regulations.

APPENDIX 7 FISH FARMING IN MARINE WATERS

Principal decision maker: Crown Estate Commissioners

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Marine and Coastal Access Act 2009
- The Environmental Impact Assessment (Fish Farming in Marine Waters) Regulations 1999 (SI No. 367)

These regulations repeal, and re-enact with amendments, the Environmental Assessment (Salmon Farming in Marine Waters) Regulations 1988 (SI No. 1218). Under the Regulations, EIA may be required when a proposal is larger than a specified minimum size by biomass or area, or when any part is to be carried out in a 'sensitive area'. The definition of 'sensitive area' is dominated by landscape and wildlife criteria but includes World Heritage Sites and Scheduled Ancient Monuments.

The principal decision maker on fish farming proposals is the Crown Estate Commissioners, and the Regulations are drafted on that basis (as set out below). Fish farming is concentrated in Scotland and is rarely proposed in England.

1. Screening

A person minded to apply for consent for fish farming in marine waters may ask the Crown Estate Commissioners for a screening opinion. (When an application for consent is submitted without an EIA, and no screening opinion has previously been sought, the application shall be treated as a request for a screening opinion.) The Regulations specify a range of information to accompany the request (Reg. 4(2)). In coming to a view on whether EIA is required, the Commissioners must consult such of the authorities, bodies or persons listed in Schedule 3 as they consider appropriate. Schedule 3 lists: any adjacent planning authority, the Secretary of State at (what is now) Defra, (what is now) Natural England, the Environment Agency, and any district salmon fishery board within whose area the development is proposed, but not English Heritage.

In giving a screening opinion, the Commissioners must take into account such of the selection criteria, listed in Schedule 1 (transposed from Annex III of the Directive), as are relevant to the proposed development. This includes "the absorption capacity of the natural environment, paying particular attention to... landscapes of historical, cultural or archaeological significance". The Commissioners will therefore need some familiarity with the interests of English Heritage in these respects.

The Commissioners have six weeks in which to give an opinion, including the period for consultations, or such longer period as may be agreed. If they decide an EIA is required, they must "provide with the screening opinion a written statement giving clearly and precisely the reasons for their conclusion".

2. Scoping

The procedures at scoping stage are very similar to those at screening stage. A person minded to apply for consent for fish farming in marine waters may ask the Commissioners for a scoping opinion. The Regulations specify the same range of information to accompany the request as for a screening opinion. In coming to a view on the information to be provided in an EIA, the Commissioners shall consult such Schedule 3 authorities, bodies or persons as they consider appropriate. The Commissioners have six weeks in which to give an opinion, including the period for consultations, or such longer period as may be agreed. (The six weeks runs from the date a screening opinion was given if both screening and scoping opinions were requested at the same time.) The giving of a scoping opinion does not preclude the Commissioners from requiring further information after the submission of an environmental statement.

Those notified of a development requiring EIA shall, if requested by the applicant, establish with the applicant whether they have any relevant information for the preparation of an environmental statement and make it available (and may do so without any such request).

3. Submission

Consultation on the submitted environmental statement can be more extensive than at the screening and scoping stages. In addition to consulting appropriate bodies listed in Schedule 3, the Commissioners must also consult “such other persons, groups or bodies as they consider appropriate” (Reg. 9(1)), which could include English Heritage. Consultees must be given not less than 28 days to provide environmental information to be taken into account, and the Commissioners cannot grant a consent for fish farming in marine waters in that period. There is provision for consultees to advise the Commissioners that they do not wish to be consulted on any case or class of case or in any specified area (Reg. 9(4)).

There is a specific requirement that the authority deciding the application for fish farming in marine waters cannot grant consent where the proposed development will be likely to have significant effects on the environment “unless they have taken into consideration the environmental information in respect of the proposed development and state in their decision that they have done so” (Reg. 3(1)).

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	Yes	No
Scoping	Yes	No
Submission	Yes	Yes if “consider[ed] appropriate”

Commentary

The provision for prospective consultees to indicate to the Commissioners that they do not wish to be consulted on certain classes of application is unusual and the reverse of the requirement under Planning law, which precludes consultees from doing precisely this.

APPENDIX 8 INTENSIVE AGRICULTURE

Principal decision maker: Natural England

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Environmental Impact Assessment (Agriculture) (England) (No.2) Regulations 2006 (SI No. 2522)

Intensive agriculture refers to the restructuring of rural land holdings, and to the use of cultivated land and semi-natural areas for intensive agriculture.

1. Screening

A person may not begin or carry out either type of project above the specified threshold sizes unless he has first obtained a screening decision permitting the project to proceed. The threshold size of development affected is reduced for proposals wholly or partly within sensitive areas, which are defined to include a scheduled monument. Natural England “may” consult any of the ‘consultation bodies’ before making a screening decision. These are specifically English Heritage and the Environment Agency, plus “any other public authority, statutory body or other organisation which Natural England or the Secretary of State considers has any interest in or holds any information which might be relevant to the project”. Natural England must provide a Screening Opinion within 35 days of an application for a screening decision, but if a decision is not forthcoming within that period, the default option is for the applicant to assume that the scheme is a significant project requiring EIA. Natural England may also notify any of the consultation bodies of its decision where it considers they might wish to be informed of it.

2. Scoping

Requesting a scoping opinion is optional, but Regulations prescribe the procedure if a request is submitted. Natural England must provide a Scoping Opinion within 35 days of being asked. Within that period Natural England “must consult the applicant and such of the consultation bodies as it thinks fit”, who have 28 days to respond. Consultation bodies must make available information relevant to the preparation of the environmental statement, if requested by the applicant or Natural England.

3. Submission

Natural England must send a copy of the application (including the environmental statement) “to any of the consultation bodies it considers appropriate”, i.e. potentially English Heritage. This is a formal consultation with a six week period for response from the date of receipt. When deciding whether to grant consent for a significant project, Natural England is required by the Regulations to consider various matters, including any representations it receives from consultation bodies.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	Yes (power not duty)	Identified as “may” be consulted
Scoping	Yes	Yes if Natural England “thinks fit”
Submission	Yes	Yes if NE “considers [it] appropriate”

Commentary

The legislation not only makes an application for a screening decision compulsory for projects above threshold sizes, but gives Natural England considerable powers to remedy any breaches of control where development proceeds without authorisation. The public register of cases held by Natural England shows that the effect has been for the large majority of applications to be found not to require EIA. This is either because they are not considered likely to have significant effects on the environment, or (in response to prospective developers who understandably take a cautious approach) because they are found not to fall within the scope of the regulations.

The procedures are unusual in having three rounds of formal consultation, at each of the screening, scoping and submission stages. However, whether such consultation actually takes place is left as a matter for the discretion of Natural England. These arrangements are imprecise in law, with no indication of the circumstances in which consultation might be appropriate. There appears to be no formal means of resolving differences of opinion on whether consultation is or is not appropriate.

APPENDIX 9 FORESTRY

Principal decision maker: Forestry Commissioners

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI No. 2228)
- The Environmental Impact Assessment (Forestry) (England and Wales) (Amendment) Regulations 2006 (SI No. 3106)

The types of development covered by these Regulations are afforestation, deforestation, forest road works and forest quarry works, but do not apply where planning permission would be required for the project. These development types are relevant if they are likely by virtue of factors such as their nature, size or location to have a significant effect on the environment, with minimum thresholds set out in Schedule 2 of the Regulations. If any part of a project is within a World Heritage Site or a scheduled ancient monument (or in a variety of other 'sensitive areas') it is within the scope of these Regulations.

1. Screening

Applicants may seek a screening opinion. The opinion must be provided within 28 days of receipt of the application (or of the further information) or such other longer period as the parties may agree. This opinion must take into account the selection criteria, given in Schedule 3 (transposed from Annex III of the Directive). There is no provision for consultation before the Commissioners give their opinion.

The proposer may appeal to the appropriate authority (the Secretary of State at Defra) if the Commissioners fail to give an opinion within the prescribed period or give an opinion that an EIA is required. The appropriate authority shall make a decision within 28 days "or such longer period as the appropriate authority may reasonably require" from the date of receipt of the appeal or of the further information. Reasons must be given where the decision is that an EIA is required. A decision that an EIA is not required has a time limit of 5 years or such shorter period as may be specified in the decision (if the project has not been completed within that period).

2. Scoping

A proposer may request a scoping opinion from the Commissioners. Before giving an opinion, the Commissioners must (under Regulation 9(3)) statutorily consult the proposer, Natural England, the Environment Agency, any local authority for the area and (since 2006) "any other body designated by statutory provision as having specific environmental responsibilities" (interpreted by the Forestry Commissioners as meaning 'at the application site' – contrast with the scoping regulations for Electricity Works noted in Appendix 11), which could include English Heritage. The scoping opinion must be provided within 5 weeks

from receipt of the request (or such longer period as may be agreed with the proposer). Where the Commissioners fail to give an opinion with the prescribed period, the proposer may request the appropriate authority to make a direction as to the information required. The appropriate authority must consult the same statutory consultees as the Commissioners did, and similarly has 5 weeks (or such longer period as may be agreed) to make a direction.

3. Submission

The environmental statement and other prescribed information must be supplied at the application stage. The Commissioners and the statutory consultees must, if requested by the applicant, enter into consultation with the applicant to establish if they have any information relevant to the preparation of the environmental statement, and then provide it.

On receipt of the application, the Commissioners must consult the same parties as at the scoping stage plus any other public authority which appears to them to have an interest in the application, giving them 28 days to make representations (on the application, accompanying documents, environmental statement and any further information). Publicity is also prescribed, giving 28 days for the inspection of documents and the making of representations. No decision can be made until these periods have expired.

“In determining an application, the Commissioners shall take into consideration the environmental information, any representations received by them in relation to the application and any other material consideration, including in particular their assessment of the direct and indirect effects of the relevant project on the environmental factors specified in Schedule 4 [taken from Article 5(1) of the Directive].”

The Commissioners may refuse consent or grant consent. If granted, this must be subject to conditions that the project is begun within 5 years of the consent and that no work is carried out beyond 10 years of the consent. Other conditions, including stricter time limits, may also be added. The applicant may appeal to the appropriate authority within 28 days against a refusal or the other conditions. The appropriate authority must determine the appeal within 28 days or such longer period as it reasonably may require, and must take into account equivalent considerations as those applicable to the Commissioners, quoted above. The appropriate authority must publicise its decision and any conditions, along with its reasons and a description where necessary of the main measures to avoid reduce and, if possible, offset the major adverse effects of the project. The Regulations set out the scope for persons aggrieved by a consent to appeal to the High Court (Reg. 19).

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	No	N/A
Scoping	Yes	Yes
Submission	Yes	Yes

Commentary

These Regulations are comparable to those for EIA accompanying developments regulated by the land use planning system. They have options of screening and scoping available to proposers, statutory consultation at the scoping stage but not the screening stage, a right of appeal at the screening, scoping and decision stages, and a right of appeal to the High Court. However, there is no formal scope for a public inquiry into an appeal challenging the decision. Also the degree of interest which English Heritage must have in the application to warrant consultation site is slightly less in forestry cases than in planning cases (see paragraph 5.12).

APPENDIX 10 WATER RESOURCES

Principal decision maker: Environment Agency

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003 (SI No. 164)
- The Water Resources (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2006 (SI No. 3124)

The types of project covered by these Regulations concern water management for agriculture, including irrigation projects. These cover (a) those proposals requiring an abstraction or impounding licence under Part II of the Water Resources Act 1991 and (b) other proposals for abstracting or impounding water which require consent under the Regulations themselves (in Part III). These development types are relevant if they are likely by virtue of factors such as their nature, size or location to have a significant effect on the environment.

1. Screening

Applicants may seek a screening opinion. The opinion must be provided within three weeks of receipt of the application (or of such further information as the Environment Agency may require) or such other longer period as the parties may agree. This opinion must take into account the selection criteria, given in Schedule 1 (transposed from Annex III of Directive). There is no provision for consultation before the Agency gives its opinion.

The proposer may appeal to the appropriate Minister (the Secretary of State at Defra) if the Agency fails to give an opinion within the prescribed period or gives an opinion that an EIA is required. Such an appeal must be lodged within 28 days of the expiry of the prescribed period, but there is no time limit within which the Minister must reach a decision.

2. Scoping

A prospective applicant may request a scoping opinion from the Agency. Before giving an opinion, the Agency must statutorily consult the 'consultation bodies', which include English Heritage. There are no time limits within which consultees must respond to such consultations or within which the scoping opinion must be provided, nor is there any provision for appeal to the appropriate Minister.

3. Submission

The environmental statement must be supplied in relation to an application for the authorisation of a project, and its content must meet minimum prescribed requirements set out in Schedule 2 (transposed from Annex IV of the Directive). The Agency and the statutory

consultees must, if requested by the applicant, enter into consultation with the applicant to establish if they have any information relevant to the preparation of the environmental statement and then provide it.

On receipt of the application, the Agency must consult the statutory consultees and any other persons the Minister may direct, giving them 28 days to make representations on the application and environmental statement. Publicity is also prescribed, giving 28 days for the inspection of documents and the making of representations. No decision can be made until these periods have expired. In determining an application, the Agency must take into consideration the environmental information, any further information provided, and any representations relating to the environmental effects of the project.

The applicant may appeal to the Minister against the Agency's decision. For projects consented under Part III of the Regulations, an appeal may be lodged against the decision or if the application has not been determined within three months from the date of its receipt (or such other period as may be agreed). The appeal period is 28 days. Both for projects consented under these Regulations and for projects licensed under section 43 of the Water Resources Act 1991, an appeal cannot be made until four months after the environmental statement (or any further information) was supplied: in effect this prescribes the period within which the Agency should reach a decision on the project proposals.

Part III of the Regulations provides that the appropriate Minister may cause a local inquiry or hearing to be called before making a final decision. In any event, anyone who made representations to the Agency is given the opportunity to make further representations to the Minister. Formally, where the Minister's decision differs from the Agency's, the Minister directs the Agency to issue the Minister's decision. Although the Minister's decision is final on substance, there is provision for appeal to the High Court by the Agency or applicant within six weeks, on the grounds that the Regulations have not been complied with or the decision was not within the Regulation's powers.

Comparable Regulations apply where a proposal is made to vary an existing abstraction or impounding licence at the instance of the Agency or Secretary of State.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	No	N/A
Scoping	Yes	Yes
Submission	Yes	Yes

APPENDIX 11 ELECTRICITY WORKS

Principal decision maker: Secretary of State for Energy and Climate Change

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2000 (SI No. 1927)
- The Electricity Works (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2007 (SI No. 1977)

The types of development covered by these Regulations are to construct or extend generating stations and to install electric lines above ground, under sections 36 and 37 of the Electricity Act 1989 (which are outside the scope of planning control and determined instead by the Secretary of State at the Department of Energy and Climate Change). However, the Planning Act 2008 passed responsibility for determining larger projects to the Infrastructure Planning Commission (IPC), with its own Regulations on EIA: the IPC now decides on all onshore generating stations with a capacity over 50 MW (all cases previously under s36 of the Electricity Act 1989) and electric lines over 132 kV.

An EIA is required to accompany development proposals of the types listed in Schedule 1 to the 2000 Regulations, and may be required with those listed in Schedule 2 if they are likely by virtue of factors such as their nature, size or location to have significant effects on the environment. Schedule 2 requires (inter alia) that if any part of an electric line is within a World Heritage Site or a scheduled ancient monument (or in a variety of other 'sensitive areas') it is within the scope of these Regulations. As a result of the transfer of powers to the IPC, this just leaves the Secretary of State at DECC with decisions on proposals under 132 kV in sensitive areas. The Secretary of State also has the power to decide that a proposal not listed in Schedule 2 may also require to be accompanied by an EIA (for the same reasons): the transfer of powers to the IPC again leaves the SoS at DECC deciding this for electric lines outside sensitive areas in the range 20-132 kV.

1. Screening

Applicants may seek a screening opinion. There is some incentive to do so, in that the Secretary of State may decide that even a project outside the scope of Schedule 2 requires an EIA, and also because the first task of the Secretary of State on receipt of an application not accompanied by an environmental statement is to establish if one should have been prepared.

When he has full information, the Secretary of State must consult the local planning authority for the area on whether or not EIA is needed before issuing a screening opinion, giving the authority three weeks (or such longer period as the SoS may determine) to respond. The Secretary of State must issue a screening opinion within three weeks of the date by which the local authority is required to give its views.

2. Scoping

A proposer may request a scoping opinion from the Secretary of State. When he has sufficient information, and before giving an opinion, the Secretary of State must statutorily consult the consultative bodies – the proposer, Natural England, the Environment Agency (for any s36 consent), any local authority for the area and (since 2007) such “other bodies designated by statutory provision as having specific environmental responsibilities whom the Secretary of State considers likely to have an interest in the application...”, which could include English Heritage. The Secretary of State must consider any consultation responses and provide a scoping opinion within 3 weeks from receipt of the request (or of further information or of the date for consultation responses) or such longer period as may be agreed with the proposer.

3. Submission

The consultative bodies must provide information relevant to the environmental statement if requested by applicant (or may do so without such a request). If a prospective applicant informs the Secretary of State of an intention to carry out an EIA, and submits sufficient information about it (including the main environmental consequences to which he proposes to refer in his environmental statement), the consultative bodies must be informed, triggering the requirement to make information available to the applicant.

The applicant for a s36 or s37 consent who submits an environmental statement to the Secretary of State is expected to serve a copy of it and other documents on “any of the consultative bodies”, though the Secretary of State has a further two weeks to decide if additional consultative bodies should be informed, inviting them to make representations.

Where an application for s36 or s37 consent is accompanied by an environmental statement, the applicant must advertise this in one or more local newspapers, giving at least four weeks for anyone to make representations. The local authority is also required to place all the documentation on its register alongside planning applications and make it available for inspection.

The Secretary of State may not determine the application until at least two weeks from the date for representations to be received from the public or the date on which the last consultee was served with the environmental statement (or further information). Publicity for the determination of the application for consent is the responsibility of the local planning authority (including a summary of representations and the reasons for the Secretary of State’s determination).

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	Yes (LPA only)	No
Scoping	Yes	Yes if “likely to have an interest”
Submission	Yes	Yes if “likely to have an interest”

Commentary

The procedures for consultation at the submitted environment statement stage are cumbersome (deciding who should be consulted, and then doing so), being split between the applicant and the Secretary of State. Some delay is also built into the arrangements by virtue of the Secretary of State engaging the services of the local planning authority to undertake all the necessary publicity for the application and its determination.

There is no time limit within which the Secretary of State must determine an application. However, a guidance note issued in 2000 (by the Department of Trade and Industry, which was the decision-making Department at the time) states that the local planning authority has the power to object to an application for a generating station within four months and an overhead line within two months, effectively precluding a decision by the Secretary of State within that time. A guidance note to the 2007 Amendment Regulations (issued by the Department for Business, Enterprise and Regulatory Reform, which was the decision-making Department at the time) additionally notes that the Secretary of State must hold a public inquiry if the local planning authority maintains an objection to an onshore proposal, and he may do this in any event. These appear to be powers under the legislation for deciding electricity works projects rather than required specifically by the EIA Regulations.

APPENDIX 12 GAS TRANSPORTER PIPELINE WORKS

Principal decision maker: Secretary of State for Energy and Climate Change

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- Gas Act 1986
- The Public Gas Transporter Pipeline Works (Environmental Impact Assessment) Regulations 1999 (SI No. 1672)
- The Gas Transporter Pipeline Works (Environmental Impact Assessment) (Amendment) Regulations 2007 (SI No. 1996)

These Regulations apply to ‘public gas transporters’ who hold licences to convey gas through pipes under the Gas Act 1986. The power to authorise public gas transporter pipeline works on land in England is divided between those subject to planning control and cross-country pipelines subject to Ministerial control under the Pipe-lines Act 1962. Nonetheless, the power to decide whether EIA is required for any pipeline works under these Regulations rests entirely with the Secretary of State – i.e. at the Department for Energy and Climate Change – and not with the local planning authority.

There are three categories of project under which an EIA may be required under these Regulations. First, EIA is mandatory in respect of a pipeline (or an extension to a pipeline) with a diameter of more than 800mm and a length greater than 40km. Second, EIA ‘may’ be required in respect of a pipeline either with a design operating pressure exceeding 7 bar gauge or whose working width would in whole or part be within a ‘sensitive area’ (specified inter alia to include World Heritage Sites and scheduled monuments). Third, and unusually, EIA may be required in any other case.

The Planning Act 2008 gave the power to decide major projects to the Infrastructure Planning Commission under its own EIA Regulations from April 2010 onwards. This covered all cases in the first category, all cases with a design operating pressure exceeding 7 bar gauge, and all cases likely to have a significant effect on the environment. In effect, all cases requiring EIA would be decided by the Infrastructure Planning Commission. However, the arrangements left the parties in an awkward position in respect of schemes with lesser capacity and schemes in sensitive areas: for these, a ruling is required from both the Secretary of State at DECC and the IPC that an EIA is NOT required (so that each can satisfy the legislation which it applies). Therefore, only the screening arrangements described below still apply to the Secretary of State at DECC, and the remainder is for background information on the 1999 Regulations.

1. Screening

The Regulations specifically provide that smaller pipeline schemes which might otherwise be automatically ‘permitted development’ (under planning control) can in principle still be required to be accompanied by an EIA if that criterion is met.

The distinction between the three categories of project noted above have different effects at the screening stage. A gas transporter is required in the first case (mandatory EIA) to give notice to the Secretary of State of an intention to submit an EIA. In the second case the gas transporter cannot proceed with a scheme until EIA procedures have been complied with, while in the third case, the gas transporter might have no idea that an EIA will be required. The Regulations allow the Secretary of State to require an EIA “where it appears... that a public gas transporter proposes to carry out or is carrying out any pipe-line works which are EIA development”. It is unclear how the Secretary of State might find out about such schemes. However, as the Secretary of State has the power to halt any works which he considers needs an EIA, the provider does have an incentive to enquire first if one is required. In this legislation a request for a screening opinion is called a ‘request for an environmental determination’.

The Secretary of State has discretion whether to require an EIA in the second and third cases noted above. In both cases he is required to consult the local planning authority. If the gas transporter submitted a request for an environmental determination, there are no other statutory consultees. However, if any other case he is also required to consult the public gas transporter “and such other persons as he thinks fit”. There is an obligation on the local planning authority to respond within four weeks of date of receipt of notification, but there is no time limit on ‘other persons’ to respond to any such a consultation. The Secretary of State has a further four week maximum period in which to issue a screening decision, but is under no formal obligation to take into account any submissions made.

In deciding whether an EIA is required, the Secretary of State is required to take into account the ‘selection criteria’ in Schedule 2 (transposed from Annex III of the Directive). These include the absorption capacity of the natural environment paying particular attention (inter alia) to landscapes of historical, cultural or archaeological significance. This is the principal formal safeguard for heritage interests.

2. Scoping

The Secretary of State is required to give a scoping opinion only if the public gas transporter ‘makes a request’ for one. Before giving his opinion, the Secretary of State must (inter alia) consult the ‘consultation bodies’. These are defined in England as the relevant planning authority, Natural England, the Environment Agency and (since the 2007 Amendment Regulations) any other statutory body with environmental responsibilities “which the Secretary of State considers likely to have an interest in the pipe-line works in question”. English Heritage is therefore capable of being included within the formal consultations. Consultees have four weeks to comment (and also on any further information required to be provided by the gas transporter) and the Secretary of State a further four weeks to issue a scoping opinion. He is under no formal obligation to take consultation responses into account in his scoping decision.

3. Submission

Consultation bodies are formally obliged to make relevant information available for the preparation of the EIA. When a public gas transporter applies to the Secretary of State for

consent for pipeline works, accompanied by an environmental statement, it must also consult the consultation bodies on the application and environmental statement. Representations are required within four weeks from the date each of these documents (and any other information subsequently required) are served. There is a legal duty on the Secretary of State to take into account any representations received from consultation bodies and “any opinions expressed by the public”. The environmental statement must include all the matters identified in a list in Schedule 1. These include a description of aspects of the environment likely to be significantly affected by the pipeline, including the architectural and archaeological heritage and the landscape.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	Yes (LPA only on applicant request)	On applicant request: No On SoS request: if SoS “thinks fit”
Scoping	Yes	Yes if “likely to have an interest”
Submission	Yes	Yes if “likely to have an interest”

Commentary

The screening arrangements offer considerable discretion in law, but it is likely that in practice gas providers will normally seek a screening opinion. The Secretary of State is required to take into account heritage issues in his decision, but the Regulations provide no formal and reliable means by which he may be advised on such matters other than by the local planning authority. English Heritage may not be consulted at the screening stage even if a pipeline scheme falls within a World Heritage Site or a scheduled monument. Where projects are below the threshold sizes and not in a sensitive area, an EIA may still be necessary, and on these occasions the Secretary of State can consult “such other persons as he thinks fit”. That could include English Heritage, but DECC has decided as a matter of general practice not to do so. Instead, DECC advise that they expect the Local Planning Authority to highlight any significant potential effects on archaeology or the historic environment, for instance via the County Archaeologist.

There is no obligation for the environmental statement to describe the measures envisaged to avoid, reduce and if possible remedy any significant adverse effect on the environment, nor any obligation to explain the main alternatives considered (e.g. routes) or the reason for the choice, taking into account the environmental effects. There is, however, an obligation on the Secretary of State to explain in his final decision how these matters were taken into account. In these respects it is not entirely clear whether the Regulations have adequately transposed the European legislation into UK law. There would be merit in clarifying through good practice guidance the occasions on which ‘other bodies’ like English Heritage should be consulted at screening stage and on how the Secretary of State can transparently provide reassurance that he is fulfilling his obligations to take into account heritage interests in the EIA screening process.

APPENDIX 13 ONSHORE PIPE-LINE WORKS

Principal decision maker: Secretary of State for Energy and Climate Change

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- Pipe-lines Act 1962
- The Pipe-line Works (Environmental Impact Assessment) Regulations 2000 (SI No. 1928)
- The Pipe-line Works (Environmental Impact Assessment) (Amendment) Regulations 2007 (SI No. 1992)

The provisions under these Regulations are broadly similar to those under The Public Gas Transporter Pipeline Works (Environmental Impact Assessment) Regulations 1999 (as amended): see Appendix 12. However, whereas those Regulations applied to public gas transporters under the Gas Act 1986, these apply to authorisations for the construction of oil, gas and chemical pipelines on land under the Pipe-lines Act 1962. The 1962 Act regulates ‘cross-country pipelines’ of at least 10 miles (16.093km) length, with authorisations provided by the Secretary of State (at DECC) rather than under the Planning Acts. The Planning Act 2008 transferred the power to decide pipeline projects of over 10 miles length to the Infrastructure Planning Commission, from April 2010, applying the EIA Regulations set out in Appendix 3, so this Appendix is for information only.

Proposals used to come before the Secretary of State in any event, allowing him more easily to address any need for EIA than was reliable under the gas transporter pipelines Regulations. Furthermore, if an applicant did not consider an EIA necessary, there was a formal requirement for a screening opinion to be given by the Secretary of State (a process which again included consultation with the local planning authority).

The information requirements and consultation arrangements are substantively the same as in respect of The Public Gas Transporter Pipeline Works (Environmental Impact Assessment) Regulations 1999 (see Appendix 12), and so are not repeated here. Only the main differences from those provisions are set out below.

1. Screening

The Regulations provided that EIA is mandatory in respect of a pipeline (or an extension to a pipeline) with a diameter of more than 800mm and a length greater than 40km. Second, EIA ‘may’ be required in respect of other pipelines (there is no reference to ‘sensitive areas’). The Secretary of State is required in non-mandatory cases to consult the relevant planning authority at screening stage. There is no statutory time limit for a response or obligation on the Secretary of State to take any response into account. There is no consultation at screening stage with “such other persons as he thinks fit”. The Secretary of State must, however, take into account in his decision the selection criteria listed in Schedule 2 (transposed from Article III of the Directive), which include the environmental

sensitivity of geographical areas likely to be affected by proposed pipe-line works, having regard in particular (inter alia) to landscapes of historical, cultural or archaeological significance. This is the principal safeguard for heritage interests, though there is a lack of clarity as to where advice on this might be obtained and there is no specific obligation to have regard to World Heritage Sites or scheduled monuments. There is no time period within which the Secretary of State must issue a screening opinion.

2. Scoping

There are no significant differences at the scoping stage from the provisions under The Public Gas Transporter Pipeline Works (Environmental Impact Assessment) Regulations 1999 (as amended).

3. Submission

Consultation by the applicant at submission stage must be with not only the consultation bodies (including those “likely to have an interest”) but also “any other persons on whom environmental responsibilities are conferred... who in the opinion of the Secretary of State are likely to be interested in the particular relevant pipe-line works”. Both of these could include English Heritage.

The environmental statement must again include all the matters identified in a list in Schedule 1. These have the same features and deficiencies as in The Public Gas Transporter Pipeline Works (Environmental Impact Assessment) Regulations 1999 (as amended).

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	Yes (LPA only)	No
Scoping	Yes	Yes if “likely to have an interest”
Submission	Yes	As scoping/if “likely to be interested”

Commentary

There are no requirements on the Secretary of State to consult at the screening stage beyond the local planning authority, and less precise obligations than for Gas Transporter Pipeline Works about the heritage interests he must take into account.

The legislation on the submitted environmental statement has similarly limitations to The Public Gas Transporter Pipeline Works (Environmental Impact Assessment) Regulations 1999 (as amended), see Appendix 12.

APPENDIX 14 OFFSHORE PETROLEUM PRODUCTION AND PIPE-LINES

Principal decision maker: Secretary of State for Energy and Climate Change

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (SI No. 306)
- The Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) (Amendment) Regulations 2007 (SI No. 933)

These Regulations apply to licences required for the offshore production and transport by pipeline of petroleum (mineral oil or relative hydrocarbons and natural gas) under the Petroleum Act 1998.

1. Screening

There is an in-built mandatory screening mechanism for EIA under this legislation. The Secretary of State licenses all offshore petroleum production and pipeline schemes, so all applications come before him. The Secretary of State must decide whether the proposals warrant an EIA. This will be determined by their features (some schemes always trigger an EIA if above threshold sizes or likely to affect significantly the environment of another State in the European Economic Area) or as a matter of judgement by the Secretary of State. There is no consultation on this, though the Secretary of State can require additional information from the applicant. There are two main checks on the exercise of this discretion. First, the matters which the Secretary of State must take into account at this stage include those set out in Schedule 1 (transposed from Annex III of the Directive), which include the absorption capacity of the natural environment paying particular attention (inter alia) to landscapes of historical, cultural or archaeological significance. Second, the decision is phrased in precautionary terms in that the Secretary of State can only decide not to require an EIA if satisfied that the proposal is not likely to have a significant effect on the environment. A screening decision remains in force for two years only.

2. Scoping

The Secretary of State is required to give a scoping opinion only 'on the application of the undertaker' of the project. Before giving his opinion, the Secretary of State must (inter alia) consult (technically "serve notice on") any environmental authority which the Secretary of State considers would be interested in the project by reason of its particular environmental responsibilities, which clearly could include English Heritage. Unusually, instead of being an open-ended consultation, the Secretary of State is required to "serve a notice setting out the opinion he is minded to give". He has a legal obligation to take into account any representation made regarding the proposed opinion. There are no specific time limits within which consultees must respond (they need simply be given a 'reasonable opportunity') or within which the Secretary of State must reach a scoping opinion. Any

environmental authority which the Secretary of State considers might have information relevant to the preparation of the environmental statement is notified of the project and required to provide information, but the list of such authorities need not necessarily be the same as the environmental authorities consulted on the draft scoping opinion.

3. Submission

When the Secretary of State receives an application accompanied by an environmental statement, he serves a notice on the undertaker requiring the undertaker to send copies of both of these to environmental authorities he names. Representations are required within a period which shall be at least four weeks from the application date. There is a legal duty on the Secretary of State to take into account any representations received from an environmental authority supplied with the documentation. The environmental statement must include all the matters identified in a comprehensive list in Schedule 2 (derived from the Directive), with the clear implication that this should encompass the scope of issues in Schedule 1, so that the interests of English Heritage ought to be covered.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	No	N/A
Scoping	Yes	Yes if “likely to be interested”
Submission	Yes	Yes if “likely to be interested”

Commentary

The legislation gives apparently considerable discretion to the Secretary of State on who to consult in the circumstances of any particular application for an offshore pipeline licence requiring an EIA, but there are reasonably clear obligations in respect of the issues to be taken into account and therefore who to consult about them. There are formal rounds of consultation (though not called that) at the scoping and submission stages, both of them with formal obligations on the Secretary of State to take into account environmental authorities’ views.

Limitations in the procedures (particularly on how to decide whether an EIA is required at screening stage, when to involve each environmental authority as a prospective consultee at scoping and submission stages, and how to resolve differences of view on these points) could be addressed by best practice guidance to which the Secretary of State committed himself, rather than by legislation. This would reinforce the precautionary basis for decisions in order to minimise the risk that English Heritage’s interests were overlooked.

APPENDIX 15 HIGHWAYS

Principal decision maker: Highways Agency

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- Highways Act 1980
- The Highways (Assessment of Environmental Effects) Regulations 1999 (SI No. 369)
- The Highways (Environmental Impact Assessment) Regulations 2007 (SI No. 1062)

EIA of highways proposals is unusual in that the legislation is set out in the primary Act rather than in a Statutory Instrument (but see also the Transport and Works Act 1992 and Harbours Act 1964). Nonetheless, the provisions of section 105A of the Highways Act 1980 dealing with EIA were inserted originally by Regulations in 1988. These were then amended by Regulations in 1994, replaced completely by the 1999 Regulations with the addition of sections 105B and 105C, and further amended (including with the addition of section 105D) by the 2007 Regulations.

EIA is required by Annex 1 of the European Directive if the highway project comprises:

- the construction of motorways or express roads; or
- the construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 km or more in a continuous length.

A highways project may also require EIA in accordance with Annex 2 of the Directive. The Regulations establish that the minimum requirements for a relevant project under Annex 2, for consideration for EIA, are: “a project for constructing or improving a highway where the area of the completed works together with any area occupied during the period of construction or improvement by requisite apparatus, equipment, machinery, materials, plant, spoil heaps or other such facilities exceeds 1 hectare or where any such area is situated in whole or in part in a sensitive area.” ‘Sensitive areas’ are specified to include World Heritage Sites and Scheduled Ancient Monuments. The 2007 Regulations downgraded proposals for ‘special roads’ (defined in section 16 of the Highways Act 1980 – essentially those reserved for particular classes of traffic, mostly motorways) from being required to have an EIA to being assessed for the need for one on a case by case basis.

1. Screening

The 1999 Regulations required the screening of highway project proposals on a case by case basis to decide whether they must be accompanied by an EIA, but this process took place wholly within the Department of Transport. The only indication that it had happened, other than the decision itself on the need or otherwise for EIA, was a requirement that this determination be published (section 105B(1)), the implication being that this would be in advance of the publication of the environmental statement itself (as noted in the accompanying ‘Explanatory Note’ but not specified in law). The 2007 Regulations

attempted to clarify that giving this ‘notice of’ an environmental statement was intended to provide a reasonable opportunity for the expression of views. (The subsection is, however, expressed not in terms of whether or not an EIA should be required, but in terms of “before the Secretary of State decides whether or not to proceed with the construction or improvement to which the assessment relates” – which is more appropriately a matter after submission of the environmental statement.)

2. Scoping

There is no provision for scoping the issues which should be studied in the EIA other than through the internal decision-making process of the Department of Transport.

3. Submission

Consultation bodies must be given an opportunity to express an opinion on the details of the project and the environmental statement before the Secretary of State decides whether or not to proceed with the project. The ‘consultation bodies’ specifically include English Heritage, along with the principal local authority, the Environment Agency, (what is now) Natural England, and (since the 2007 Regulations) “any other public authority which has environmental responsibilities”. No period of time for comment is stated, but before making a decision the Secretary of State must take into account the environmental statement and any opinion expressed by any consultee and by any other person. The 2007 Regulations added a requirement that the Secretary of State publishes “information about the consultation carried out in compliance with this section and section 105C, the representations received on consultation, and any changes made as a result of those consultations” (new subsection 105B(6)(d)).

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	No	N/A
Scoping	No	N/A
Submission	Yes	Yes

Commentary

The legislation makes no reference to the promoter of highways projects, or even to the ‘receipt’ of documents. In practice, most highways projects requiring EIA are likely to be promoted by the Department of Transport or funded by it, and the Secretary of State is the decision-maker on his own projects. There is some phraseology in the legislation which hints at this lack of distinction between developer, decision-maker on proposals and assessor of environmental statements. These features go some way to explaining the lack of transparent screening and scoping procedures (certainly without formal consultations).

APPENDIX 16 TRANSPORT AND WORKS

Principal decision maker: Secretary of State for Transport

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- Transport and Works Act 1992
- The Transport and Works (Assessment of Environmental Effects) Regulations 1995 (SI No. 1541)
- The Transport and Works (Assessment of Environmental Effects) Regulations 1998 (SI No. 2226)
- The Transport and Works (Assessment of Environmental Effects) Regulations 2000 (SI No. 3199)
- The Transport and Works (Assessment of Environmental Effects) Regulations 2006 (SI No. 958)
- Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (SI No. 1466)

EIA of transport and works proposals is unusual in that the legislation is set out partly in the primary Act and partly in a Statutory Instrument (but see also the Highways Act 1980 and Harbours Act 1964). EIA provisions were first established in Procedure Rules for the Act in 1992, and then two Articles of the Directive were implemented by insertions into the Transport and Works Act by Regulations in 1995. Further provisions were made by Regulations in 1998 and 2006, both amending the Act. The Procedure Rules were replaced in 2000 and again in 2006.

EIA under this Act affects projects for the construction or operation of railways, tramways and other guided transport systems, inland waterways and works interfering with navigation. A variety of these projects is covered by Annex 1 and Annex 2 to the Directive (making EIA respectively either compulsory or a matter of judgement according to its likely effects on the environment). In addition, EIA for offshore generating stations of under 100 MW capacity is decided under these Regulations, but by the Department for Energy and Climate Change rather than the Department for Transport; larger offshore energy generating projects are regulated by the Infrastructure Planning Commission.

1. Screening

Applicants for a Transport and Works Order may submit a request to the Secretary of State for a screening opinion on whether the proposed application need be accompanied by an environmental statement. The Secretary of State has 28 days in which to request from the applicant further information to enable him to determine this. He also has 42 days from the date of request (or of the supply of the further information) to determine the request. There are statutory provisions for consultation by the Secretary of State before reaching his decision, with the local planning authority and Environment Agency in all cases, with Defra and Natural England in defined circumstances, and with “any other body which is

designated by statutory provision as having specific environmental responsibilities and which the Secretary of State considers is likely to have an interest in the application.” This could include English Heritage. Consultees must respond within 28 days. He must take into account the selection criteria for EIAs in Annex 3 to the EIA Directive, and give his reasons if requiring one.

2. Scoping

Before submitting an application when an EIA is required, the applicant may request a scoping opinion from the Secretary of State. Information must be provided in support of this, but the Secretary of State has 28 days in which to request from the applicant further information to enable him to determine this. The same consultation obligations apply at the scoping stage as at the screening stage. He again has 42 days from the date of request (or of the supply of the further information) to determine the request.

3. Submission

The Secretary of State can require the applicant to serve the application, applicant’s ‘statement of environmental information’ (see commentary below) and accompanying documents on consultees on the same basis as at screening and scoping stages (though anyone can indicate that they do not wish to be so served). The full environmental statement is not provided as of right to consultees, unless the proposal is made by the Secretary of State himself. Furthermore, applicants must serve the relevant documents on specific parties whose specific interests are identified in Schedule 5 of the Rules. English Heritage is a statutory consultee (categories 14-16), regardless of whether an EIA is required, when works would affect:

- a listed building;
- a scheduled ancient monument;
- any archaeological site;
- a conservation area;
- a designated area of archaeological importance; or
- a registered park or garden;

The legislation defines ‘works affecting’ as including ‘adjacent’ as well as ‘in, on, over’ the land. The application must also be publicised giving anyone the opportunity to make representations for at least 42 days.

The Act includes provisions on the handling of objections to applications for Orders. Broadly, the Secretary of State can decide the application himself, but where there are outstanding objections he must engage in a written representations procedure, with (at least) the applicant responding to objections, rejoinders from objectors, and further responses from the applicant (Rule 24). Alternatively, the Secretary of State may cause an inquiry or hearing to be held for the consideration of objections. In addition to those affected by compulsory acquisition of property, statutory objectors can insist on a public inquiry for evaluating objections instead of the written representations procedure.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	Yes	Yes if “likely to have an interest”
Scoping	Yes	Yes if “likely to have an interest”
Submission	Yes	Yes (in most cases)

Commentary

As part of the process of applying for authorisation under the 1992 Act, an applicant must prepare a ‘book of reference’ which contains considerable information (Rule 12(8)). This must include identification of any World Heritage Site and scheduled ancient monument. There is therefore a basic level of attention to heritage issues irrespective of whether an EIA accompanies the application. Once an application has been submitted, English Heritage is a statutory consultee if any of a range of designated heritage assets would be affected (irrespective of whether an environmental statement has been required).

For the purposes of the Act, the applicant must for certain purposes provide a ‘statement of environmental information’. Confusingly, this is not the ‘environmental statement’, but it forms part of that environmental statement when the latter has been prepared. The Rules try to mix the two, enabling the Secretary of State to require the applicant to upgrade a statement of environmental information to an environmental statement (Rule 17). If done, this triggers consultation and publicity requirements to comply with the EIA Directive.

APPENDIX 17 LAND DRAINAGE IMPROVEMENT

Principal decision maker: Drainage Bodies

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999 (SI No. 1783)
- The Environmental Impact Assessment (Land Drainage Improvement Works) (Amendment) Regulations 2005 (SI No. 1399)
- The Environmental Impact Assessment (Land Drainage Improvement Works) (Amendment) Regulations 2006 (SI No. 618)

Drainage bodies are public authorities which initiate improvement works, namely the Environment Agency, internal drainage boards, county councils, unitary authorities, district councils, London Boroughs and the Council of the Isles of Scilly. The Regulation applies to drainage “improvement works” which are automatically ‘permitted development’ under the Town and Country Planning (General Permitted Development) Order 1995 (Parts 14 and 15 of Schedule 2).

1. Screening

It is the duty of the drainage body to determine whether its proposed improvement works are likely to have significant effects on the environment and therefore whether or not an EIA is required. This must take into account the selection criteria in Schedule 2 of the Regulations (transposed from Annex III of the Directive). (This requires particular attention to the absorption capacity of landscapes of historical, cultural or archaeological significance.) The view it comes to is then publicised. If it concludes that an EIA is not required, the published notice must give any person 28 days’ opportunity to make representations on the environmental effects and must also be sent to consultation bodies. These are Natural England, English Heritage (since the 2005 Amendment Regulations), and “any other public authority, statutory body or organisation which, in the opinion of the drainage body proposing any improvement works, has an interest in those improvement works”. Consultation bodies have an opportunity to make comments on the environmental effects before the expiry of the period specified in the notice.

If there are no representations, the drainage body does not need to carry out an EIA and can proceed with the improvement works (Reg. 5(3)). If there are representations, then the drainage body can decide either that an EIA is, after all, necessary, or maintain its earlier view that it isn’t. In the latter case, the decision passes to the appropriate authority (the Secretary of State at Defra). The appropriate authority can require further information from the drainage body to enable it to make a determination.

2. Scoping

The drainage body undertakes any necessary EIA, including if this was required by the appropriate authority contrary to the view of the drainage body. The drainage body may request the appropriate authority to give a scoping opinion. Before giving that opinion, the appropriate authority must consult the drainage body and the consultation bodies. It may also require further information from the drainage body to assist this determination.

3. Submission

Any authority must make information relevant to the preparation of an environmental statement available to the drainage body if consulted on this by the drainage body. Once prepared, the environmental statement must be publicised by a notice, again giving 28 days for any person to make representations on the likely environmental effects, "in order to give the public concerned the opportunity to express an opinion before a determination is made as to whether the improvement works should proceed". On or before the date of that notice, the drainage body must supply a copy of the environmental statement and the notice to all consultation bodies. They must have an opportunity to make representations on the environmental effects before expiry of the period specified in the notice.

Where no objections in relation to the environmental effects of the works are made and the consultation period has expired, the drainage body may determine that the improvement works should proceed. They may also determine the conditions attached to their own proposal (Reg. 12(2)). This determination is subject only to a requirement to take into account:

- the environmental statement;
- representations made by consultees;
- information from other EEA States; and
- the direct and indirect effects of the improvement works on the main 'Environmental Factors' specified in Schedule 4 (from Article 3 of the Directive).

The decision must then be publicised, including the conditions attached, the reasons for the determination, and where necessary a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the improvement works.

Where there are objections to the proposed works, the matter is referred to the appropriate authority for determination, who may again request further information from the drainage body. In that event, this further information too must be publicised and sent to the consultation bodies with a further 28 day opportunity to make representations. The appropriate authority then decides whether to consent to the drainage improvement works (absolutely or with conditions) or to refuse consent. The drainage body must publicise this decision.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	Yes	Yes
Scoping	Yes	Yes
Submission	Yes	Yes

Commentary

This legislation provides an element of self-regulation by drainage bodies in the application of EIA, but with checks in the procedures through the Secretary of State at the Department of Environment Food and Rural Affairs where there are disputes. Not only does the drainage body come to an initial view on the need for an EIA of its own scheme, but also unusually it does so in advance of receiving any representations. Furthermore, the process of deciding the need for an EIA is also the process for deciding whether or not the development can proceed without the need for any other authorisation (Regs. 5(3), 12(2) and 12(7)).

There is no provision under these Regulations for the holding of an inquiry into schemes.

APPENDIX 18 NUCLEAR REACTOR DECOMMISSIONING

Principal decision maker: Health and Safety Executive

The legislative requirements in summary

Legal basis:

- Council Directive 85/337/EEC (as amended)
- The Nuclear Reactors (Environmental Impact Assessment for Decommissioning) Regulations 1999 (SI No. 2892)
- The Nuclear Reactors (Environmental Impact Assessment for Decommissioning) (Amendment) Regulations 2006 (SI No. 657)

1. Screening

Only the holder of a licence under the Nuclear Installations Act 1965 can apply for a consent for decommissioning work. EIA is mandatory for nuclear reactor decommissioning, so there is no screening stage. However, in circumstances where there is proposed to be a change or extension to an established decommissioning project, which may have significant effects on the environment, the licensee is required (Reg. 13(1)) to apply to the HSE for a determination of whether an EIA is required.

2. Scoping

The scoping opinion stage is called a pre-application opinion under these Regulations. Information must be supplied with a request for an opinion, and the HSE can require the supply of additional information from the licensee to enable that decision to be made.

Before the HSE gives its opinion it must consult the licensee, the consultation bodies “and such other bodies as appear to the Executive to be appropriate having regard to the circumstances of the case” (Reg. 6(3)). Consultation bodies are defined (in England) as including the local planning authority (and county council if appropriate), the local highway authority, Natural England and Environment Agency (but not English Heritage).

The HSE has 21 days to respond to the request for an opinion after the period allowed by the HSE for responses to its consultations (Reg. 8(2)). Any consultation body must provide information relevant to the preparation of an environmental statement if requested to do so by the licensee, and ‘may’ do so without such a request (Reg. 7).

3. Submission

On submission of an environmental statement, the HSE must consult the consultation bodies within 21 days of its receipt, providing them with the information contained in the statement. The HSE must specify a “reasonable time” within which consultees are ‘required’ to respond. The HSE is required (Reg. 8(3)) before it can grant a consent to take into account the environmental statement, the responses of those consulted, and any other

views supplied (in writing to the specified address by the specified date) as a result of wider publicity for the EIA.

There is a difference in the consultation arrangements between the scoping and submission stages in that the requirement on the HSE to consult “such other bodies as appear to the Executive to be appropriate having regard to the circumstances of the case” does not apply at the submission stage. This omission from the 1999 Regulations was to some extent addressed by the Amendment Regulations in 2006 which required HSE to “inform any particular person who they are aware is likely to be affected by, or has an interest in, the application, who is unlikely to become aware of it by means of a local advertisement, by sending them a notice...” advising that this is a project subject to EIA and that representations may be submitted. “Any particular person” is then defined so that it “includes any non-governmental organisation promoting environmental protection”.

Summary table on consultation requirements:

<u>Stage in EIA process</u>	<u>Any statutory consultations?</u>	<u>Consultations with English Heritage?</u>
Screening	N/A	N/A
Scoping	Yes	Yes if HSE considers “appropriate”
Submission	Yes	Yes if HSE considers EH a “person who... has an interest”

Commentary

The revised consultation arrangements on an environmental statement at submission stage would still not be a reliable legal obligation on HSE to consult English Heritage: much would revolve around whether “any particular person” ‘includes’ English Heritage or not.

More generally, the legislative procedures rely on the HSE having sufficient appreciation of heritage issues to know whether a decommissioning proposal would be of sufficient interest to English Heritage to merit consultation, especially at the scoping stage. HSE reports that in general, where they have conducted consultation exercises on Environmental Statements (ES) / Environmental Impact Assessments (EIA) for sites in England, they have included English Heritage as a consultee.

There is a case for clarifying through good practice guidance or a protocol between English Heritage and the HSE matters such as the circumstances in which English Heritage should be consulted at scoping and submission stages.