

Case No: CO/6689/2005

Neutral Citation Number: [2006] EWHC 995 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 5th May 2006

Before:

Mr GEORGE BARTLETT QC
(sitting as a Deputy High Court Judge)

Between :

BRIAN ATKINSON	<u>Claimant</u>
- and -	
THE SECRETARY OF STATE FOR TRANSPORT	<u>Defendant</u>
- and -	
TYNE AND WEAR PASSENGER TRANSPORT AUTHORITY	<u>Interested Party</u>

(Transcript of the Handed Down Judgment of
Smith Bernal WordWave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

David Wolfe (instructed by **Public Interest Lawyers**) for the Claimant
Tim Mould (instructed by **Treasury Solicitor**) for the Defendant
Stephen Sauvain QC (instructed by **Herbert Smith**) for the Interested Party

Judgment
As Approved by the Court

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Mr George Bartlett QC :

Introduction

1. This is an application under s 22 of the Transport and Works Act 1992 to quash the River Tyne (Tunnels) Order 2005 made under that Act by the defendant. The ground of challenge is that the Secretary of State acted unlawfully in that he made the order without there being an environmental statement that complied with the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2000 and/or Directive 85/337/EEC as amended (the EIA Directive). The Order, which was promoted by the interested party, the Tyne and Wear Passenger Transport Authority (TWPTA), gives powers to construct a new road tunnel under the River Tyne in Newcastle. The contention is that there was a failure to specify how the large volume of waste material that construction of the tunnel would produce would be dealt with or the environmental effects of handling and disposal. The claimant, who lives about 4 miles from the proposed tunnel, appeared as the representative of the South Tyneside Friends of the Earth at a public inquiry that was held between 4 March and 17 April 2003 into the proposed order.

The facts

2. The Order authorises the construction and operation of a road tunnel known as the New Tyne Crossing (NTC) between Jarrow on the south bank of the Tyne and East Howden on the north bank. The road would form part of the A19. The A19 is at present taken across the Tyne through a single tunnel that was opened for traffic in 1967. Substantial congestion occurs at both ends of the tunnel for periods of the day. The objectives of the NTC are to relieve traffic congestion and improve traffic safety at the existing tunnel crossing, to improve public transport access across the Tyne and to boost the economy of the area.
3. The NTC would be constructed as a private finance initiative (PFI) scheme. Article 43 of the Order empowers the undertaker to enter into one or more concession agreements and through them to provide for the exercise of the undertaker's powers by the concessionaire. The concessionaire would be contracted to finance, design and build the NTC and to maintain and operate both the existing tunnel and the new tunnel in return for the toll revenue from each of them. Article 42 makes provision for the charging of tolls.
4. The new tunnel would be of the immersed tube type. On the north side of the Tyne there would be an open cutting of about 650 m and the road would then enter a cut and cover section approximately 320 m long. The cut and cover section would extend as far as the river bank and would connect at that point with the immersed tube section. The immersed tube would sit in an excavated trench on the river bed. It would be about 360 m long. On the south bank of the river it would connect to a cut and cover section of about 840 m, and the highway works would continue southwards for a further 500 m. The amount

of excavation would thus be substantial. A large proportion of the excavated material would be used to back-fill the trench created in the cut and cover process. Further amounts would be used in construction, and the rest would be disposed of off site.

5. The application for the Order was made on 31 May 2002. At the same time application was made for deemed planning permission for the development provided for in the Order under section 90(2A) of the Town and Country Planning Act 1990. The application for the Order was accompanied by an environmental statement (ES) as required by rule 7(1) of the Transport and Works (Application and Objections Procedure) (England and Wales) Rules 2000. The ES was prepared by Ove Arup and Partners Ltd. It was in five volumes with a non-technical summary. Section 19 dealt with waste arisings and disposal. Section 5 dealt with traffic and access. Section 21 contained proposals for a Code of Construction Practice (CoPA). This, it said, would comprise general environmental management procedures and detailed environmental management plans dealing with a range of topics. It would contain a waste management plan. The CoPA or relevant parts of it would be submitted to and approved by the local planning authorities prior to the commencement of each phase of the works.
6. Section 19 of the ES provided information on waste arisings and disposal. It concluded that the impact of contaminants and the mitigation of this from disposal to landfill would be dealt with in the licensing process for the landfill site; that transportation of the waste materials offsite had the potential to cause moderate adverse impacts; that the requirement for landfill void space representing about 55% of the annual inputs of the Tyne and Wear Unitary Development Authorities would be a moderate adverse impact on the availability of void space; and that re-use and recycling of waste arisings could have a minor beneficial impact. On mitigation the ES stated that the waste management plan to be prepared as part of the CoPA would include measures to minimise waste and reduce traffic impacts in particular ways. The residual effects would be minor adverse.
7. The application for the Order gave rise to objections, and among those who objected were South Tyneside Friends of the Earth, whose co-ordinator was the claimant. One of the grounds of objection was that the ES was inadequate. The Environment Agency too objected to the proposal on this ground in a letter of 18 July 2002, in which it said:

“The Agency considers that the means of disposal of waste materials and dredging has not been properly addressed in the Environmental Statement. The potential effects of such disposal must be addressed to assess the effects of the overall scheme on the Environment.”

The Environment Agency repeated and expanded on this point in its statement of case for the public inquiry.

8. In its evidence to the public inquiry TWPTA produced a proof of evidence on spoil and waste management prepared by Ian Lofthouse, an associate of Ove Arup. It supplemented the material in the ES and contained a discussion of the disposal options. It concluded that the further work done since the ES had not identified anything which would cause the assessment of the environmental impact of the construction waste generation to be changed.
9. The Environment Agency withdrew its objection to the application and did not appear at the public inquiry. In his report the inspector included a section on the ES and addressed the objections that had been raised. He summarised his conclusions as follows:

“8.126 In summary, I consider that in broad terms the ES is sufficiently comprehensive and adequate in the establishment of baseline conditions and for the vast majority of impacts and, where appropriate, in identifying effective remediation.

8.127 My one concern is the area pertaining to the excavation, remediation and deposition of material. While recognising the flexibility ‘required’ by the TWPTA to pass on to the eventual Concessionaire, I recommend strongly that the SoS consults further with the EA to ensure first, that its concerns lodged when the Order was advertised were unfounded. Secondly, having regard to the licensing/permit protocol likely to be invoked, that the information contained in the ES is adequate to guarantee that the construction operation could be carried out without material effect on environmental interests and risk to the public. In the event that the EA proposes to adopt a ‘passive’ role, then additional conditions would seem apposite and the ES would no doubt advise on an appropriate form of wording to suit these particular circumstances.”

10. In the immediately preceding paragraphs the inspector had made clear that the second of these matters on which he thought that the Environment Agency could provide assistance was in relation to the licensing/permit regime that it would intend to employ on the construction site, and in particular whether the excavation and remediation would be treated as a contaminated land operation or whether only the plant would require a permit.
11. The inspector also included in his report a section on “Earthworks: Excavation, Treatment and Disposal”. At the end of it he summarised his conclusions as follows:

“8.182 Briefly, the question of land contamination, remediation and material sorting and disposal are areas where there is not as much detail contained in the proposal and the ES as I would have liked. As such, I consider that further consultation should be undertaken with the Environment Agency. Notwithstanding this, I am satisfied that there are options for achieving satisfactory excavation, remediation and

disposal/deposition that would not impinge materially on the reasonable expectations of the public or impact significantly on the environment.”

12. The Secretary of State undertook the further consultation that the inspector recommended. On 14 November 2003 he wrote to the Environment Agency and sent copies of the letter to the relevant objectors. On 16 December 2003 the Environment Agency provided its response. It said that initially it had been concerned that the ES was not sufficiently detailed in relation to the means of disposal of waste materials and dredgings. However, TWTPA had provided further information in relation to those matters and this had been reported by TWPA to the public inquiry. The response went on:

“On considering this further information, the Agency took the view that the material from the construction works for the Tunnel could in principle be disposed of without unacceptable pollution to the environment or harm to human health and that the need for appropriate licences under the waste management licensing regime and/or PPC regime would ensure that the necessary controls are in place to protect the environment and human health.”

13. The Environment Agency went on to say that it was not possible for TWPTA definitively to identify specific sites at which waste from the project would be disposed as this would depend on the availability of particular sites at the relevant points in time in the construction programme, and that could not always be predicted so far in advance of the works being commenced. They then went on to consider in a little more detail the likely control arrangements for treatment on and off site of materials arising from the construction of the NTC.
14. After receiving a copy of the Secretary of State’s letter of 14 November 2003 to the Environment Agency Friends of the Earth wrote to him on 8 December 2003. Their short letter reiterated the general stance they had taken at the public inquiry that the ES was inadequate, and it went on to quote from an opinion of their counsel, Mr David Wolfe, to the effect that the inadequacies of the ES could not be cured by later information. It quoted his overall conclusion that the environmental impact of landfill needed to be assessed, but had not been, and that, given that sea disposal remained an option, its impacts also needed to be assessed. Friends of the Earth were given the opportunity to comment on the Environment Agency’s letter of 16 December 2003, but they did not do so.
15. The Secretary of State gave his decision in a letter dated 21 July 2005. He decided that the Order should be made with modifications. He also directed that planning permission be deemed to be granted, subject to a substantial body of conditions. One extensive condition required that, prior to the commencement of development, a Code of Construction Practice and related Environmental Management Plans must be submitted to and approved in

writing by the relevant local planning authority. Another extensive condition required the submission of detailed schemes of works and method statements.

16. Under the heading “Environmental effects and mitigation measures” the decision letter referred to the inspector’s recommendation that further information should be obtained from the Environment Agency and to the residual concerns of the inspector that led him to make that recommendation. The response of the Environment Agency was then summarised. The decision letter then went on:

“51. Representations about waste management arrangements were also received from Friends of the Earth, NECTAR and the TCA. These objectors took the view that, despite the Environment Agency’s explanation of its position, the TWPTA’s ES was inadequate in not addressing the impacts of the different maritime and land options for waste disposal. They were concerned about the lack of opportunity to examine the Agency’s views at the inquiry and considered it would be crucial for the scheme, if it were to proceed, to be subject to comprehensive control by the Agency to prevent any damage to the environment.

52. The Secretary of State has considered the Inspector’s conclusions on these matters and the representations made in response to the Department’s letter of 14 November 2003. He is satisfied, firstly, that the TWPTA’s ES, taken with the evidence submitted to the inquiry, provides sufficient information to enable him properly to assess the likely impacts of the NTC scheme on the environment. He does not accept that the provision of supplementary environmental information after the Order application invalidated the TWPTA’s ES. Rather, he considers that it was legitimate and appropriate as part of the environmental impact assessment process for the TWPTA to produce further information on these matters for examination at the inquiry.

53. Taking into account the Environment Agency’s assessment of the TWPTA’s ES and inquiry evidence, the Secretary of State is further satisfied that the excavation, treatment and disposal of materials can be carried out without significant harm to the environment and without prejudicing public health and safety. He accepts the Agency’s view that the statutory procedures for regulating these activities, taken with the proposed planning conditions relating to waste management, are sufficient. He accepts also that for the purposes of assessing the effects of the NTC scheme, bearing in mind the available landfill capacity, it is not possible or necessary at this stage to identify exactly which landfill sites or haul routes would be used.

54. The Secretary of State’s overall view on the environmental impact of the NTC scheme, having regard to the Inspector’s conclusions and to the post-inquiry representations on waste management, is that with the proposed mitigation measures in place any remaining adverse

effects would be acceptable and would be outweighed by the benefits of the scheme. He confirms that, in reaching his decision on the Order, he has complied with the requirements of paragraphs (a) to c) of section 14(3A) of the TWA about consideration of the ES and of representations relating to it. For the purposes of section 14(3AA) of the TWA, the Secretary of State considers that the main measures to avoid, reduce and, if possible, remedy any major adverse environmental effects are those set out in the attached planning conditions, in the Code of Construction Practice and in the protective provisions agreed with parties.”

The relevant provisions

17. Article 2(1) of the EIA Directive requires that all projects likely to have significant effects on the environment should be made subject to an environmental assessment. Article 3 provides:

“The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora;
- soil, water, air, climate and the landscape;
- material assets and the cultural heritage;
- the interaction between the factors mentioned in the first, second and third indents.”

18. The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2000 (“the T & W Procedure Rules”) contain in relation to projects to which they apply the provisions required in respect of environmental assessment by the EIA Directive. Under rule 7 (as interpreted by reference to rule 4(1)) TWPTA was required, when making its application, to submit an environmental statement containing (a) the information referred to in rule 11(1) and (b) such of the information referred to in Schedule 1 of the Rules “as may reasonably be required in order to assess the environmental effects of the proposed works and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile”. Under rule 11(1)(b) the ES had to include “a description of the measures to be taken to avoid, reduce and, if possible, remedy any significant adverse effects on the environment of the proposed works”; and under paragraph (c) “the data required to identify and assess the main effects which the proposed works are likely to have on the environment.” Schedule 1 paragraph 4 required the ES to include:

“A description of the likely significant effects of the proposed project on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short-term, medium-term and long-

term, permanent and temporary, positive and negative effects of the project, resulting from –

- (a) the existence of the project,
- (b) the use of natural resources, and
- (c) the emission of pollutants, the creation of nuisances and the elimination of waste.

And the description by the applicant of the forecasting methods used to assess the effects on the environment.”

The basis of challenge

19. The claimant seeks to challenge the decision on the basis that the Secretary of State had no power to make the Order in the absence of an environmental statement that complied with the requirements of the EIA Directive and T & W Procedure Rules. Specifically it is claimed that the ES was deficient in that it kept open the options for the disposal of waste, leaving to subsequent procedures the determination of where the waste should be disposed of and by what routes it should be taken to the disposal sites; and that it failed to give the requisite information to enable the evaluation of the effects of disposal and the traffic that would be generated. It is said that the deficiency of the ES could not be remedied by the later provision of further information. Reliance is placed on the views on the adequacy of the ES that the Environment Agency had expressed and the inspector’s conclusions on these.

Supplementing the ES

20. In paragraph 52 of his decision letter, in a passage I have quoted above, the Secretary of State said that he was satisfied

“...that the TWPTA’s ES, taken with the evidence submitted to the inquiry, provides sufficient information to enable him properly to assess the likely impacts of the NTC scheme on the environment. He does not accept that the provision of supplementary environmental information after the Order application invalidated the TWPTA’s ES. Rather, he considers that it was legitimate and appropriate as part of the environmental impact assessment process for the TWPTA to produce further information on these matters for examination at the inquiry.”

In *R (Blewett) v Derbyshire County Council* [2004] EnvLR 569 Sullivan J (in a conclusion that was not challenged when the case went to appeal) held that deficiencies in an environmental statement may be made good by the provision of further information obtained through subsequent procedures. At paragraph 41 he said:

“...In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant’s environmental statement will always contain

the ‘full information’ about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting ‘environmental information’ provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (*Tew* was an example of such a case), but they are likely to be few and far between.”

21. *Blewett* was a case to which the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“the EIA Regulations”) applied. Under article 3 of those Regulations the decision maker is required before granting planning permission to take into consideration “the environmental information.” Article 2(1) defines “environmental information” as “the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development.”
22. There is no equivalent of article 2 of the EIA Regulations in the T & W Procedure Rules, so that the Secretary of State’s entitlement to treat information subsequently supplied as making good deficiencies in the ES cannot be inferred in the same way. There is, however, provision in section 14(3A) of the 1992 Act requiring the Secretary of State to include in his notice of the making of an order a statement that he considered the environmental statement, that he complied with his obligations under the Act in respect of the consideration and hearing of objections, and that he considered or referred to an inquiry any representation relating to the environmental statement. Paragraph 54 of the decision letter contained the requisite statement. Subsection (3AA) of section 14 requires the notice to contain a description of the main measures to avoid, reduce and, if possible, remedy the major adverse environmental effects. Paragraph 54 said that the Secretary of State considered that the main measures to avoid, reduce and, if possible, remedy any major adverse environmental effects were those set out in the planning conditions, in the Code of Construction Practice and in the protective provisions agreed with parties.
23. It is, in my judgment, implicit in the statutory provisions that, as with a planning authority under the EIA Regulations, the Secretary of State must take into account not only information contained in the ES but information put forward in relation to objections and representations about the ES. It would indeed be nonsensical were he not able to do so or if, having done so, he was obliged to get the applicant to start the process again with a new ES that included all the information which he had considered and found satisfactory.

The ES as seen by the Environment Agency and the inspector

24. The Environment Agency made clear in their response to the post-inquiry consultation that their concerns about the adequacy of the ES had been met by the further information provided by TWPTA for the purposes of the public inquiry. The inspector's concern, as he made clear in paragraph 8.127 of his report, was the lack of information about whether the Environment Agency would treat the excavation and remediation as a contaminated land operation or whether only the plant would require a permit, and the Environment Agency cleared this matter up in their response. There is thus nothing, it seems to me, in the views expressed by the inspector or the Environment Agency to support the claimant's contention that the ES was inadequate, supplemented as it was by the further information.

Reliance on subsequent procedures

25. Mr David Wolfe for the claimant submitted that the Secretary of State was not entitled to avoid considering the impact of the proposal in a particular area by treating it as a matter for a competent licensing authority under procedures that would have to be followed subsequently. He referred to *Smith v Secretary of State for the Environment* [2003] Env LR 32, and in particular to the judgment of Waller LJ, who said at para 27:

“...the planning authority or the Inspector will have failed to comply with article 4(2) [of the Directive] if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given.”

26. Mr Wolfe said that leaving matters for decision as part of CoCP was open to the same objection as leaving significant matters for decision at the detailed planning stage. The Secretary of State could not avoid consideration of the impact of construction traffic by treating this as a matter that would be dealt with under the CoCP, nor that of disposal of waste to land on the basis that planning and licensing approval would need to be given for additional void space to replace that which the project would use up.
27. The extent to which a decision maker in determining the adequacy of the environmental information is entitled to rely on subsequent procedures was the subject of consideration in *R v Rochdale Metropolitan Borough Council ex p Milne* [2001] Env LR 22 as well as in *Smith*. In *Milne* Sullivan J said at para 128:

“Any major development project will be subject to a number of detailed controls, not all of them included within the planning permission. Emissions to air, discharges into water, disposal of the waste produced by the project, will all be subject to controls under legislation dealing with environmental protection. In assessing the likely significant effects of a project the authors of the environmental statement and the local planning authority are entitled to rely on the operation of those controls with a reasonable degree of competence on the part of the responsible authority; see, for example, the assumptions made in respect of construction impacts, above. The same approach should be adopted to the local planning authority’s power to approve reserved matters. Mistakes may occur in any system of detailed controls, but one is identifying and mitigating the ‘likely significant effects’, not every conceivable effect, however minor or unlikely, of a major project.”

28. In *Smith* at para 33 Waller LJ, having quoted this passage, went on:

“In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision maker will act competently. Constraints must be placed on the planning permission within which future details can be worked out, and the decision maker must form a view about the likely details and their impact on the environment.”

29. The position, therefore, as I understand it, is this. The decision maker must make his decision in the light of an environmental statement that describes the likely significant effects of the project and the measures to be taken to avoid, reduce or remedy any significant adverse effects. In determining whether the statement does provide the necessary description he is not entitled, in relation to a particular area of potential impact, to take the view, simply because subsequent consent from some other responsible body will be required, that no consideration needs to be given as to whether there are likely to be significant effects in that area or what they will be or what mitigation measures are needed. What he is entitled to do, however, is to reach the conclusion, on the basis of such information as he has that is of relevance to the particular area of potential impact, and in the light of the need for subsequent consent from the other responsible body, that the effects in that area are unlikely to be significant or that appropriate mitigation measures will be taken. He must, that is to say, have some information before him that, when coupled with the need for subsequent consent, enables him to conclude that the effects will not be significant or that appropriate mitigation measures will be taken. As

Sullivan J put it in *Milne* (at para 114) in relation to reserved matters in a planning permission:

“The local planning authority are entitled to say, ‘We have sufficient information about the design of this project to enable us to assess its likely significant effects on the environment. We do not require details of the reserved matters because we are satisfied that such details, provided they are sufficiently controlled by condition, are not likely to have any significant effect.’”

30. For the Secretary of State to have relied as he did on the need for subsequent approvals to be obtained would only have been unlawful, in my judgment, if he had had no information before him that, when coupled with the need for such approvals, was capable of enabling him to reach the decision that he did. The question thus comes down to the adequacy of the information.

Adequacy of the ES information

31. Whether an ES contains the material that it is required to contain under the T & W Procedure Rules (and thus whether it constitutes an ES for the purpose of the Rules) is a matter for the Secretary of State, and the court can only interfere with his decision on *Wednesbury* grounds. In *Milne*, where one of the grounds of challenge to the grant of planning permission was that the ES that was submitted failed to provide “a description of the development proposed” as required by the EIA Regulations, Sullivan J said this:

“106. Whether the information provided about the site, design, size or scale of the development proposed is sufficient for these purposes is for the local planning authority, or on appeal or call in, the Secretary of State, to decide. I reject Mr Howell’s submission that the issue is one for the court to decide, as a question of primary fact. That would be contrary, not merely to the structure of regulations, but to the statutory Town and Country Planning framework of which they are but a part. Under the regulations it is for the local planning authority, or the Secretary of State, to decide whether a proposed development falls within the descriptions of the development set out in schedules 1 and 2, and in the case of the latter whether it would be likely to have significant effects on the environment: see the speech of Lord Hoffmann at page 429H to 430A in *Berkeley*. The local planning authority’s or the Secretary of State’s decision is subject to review on *Wednesbury* grounds. Regulation 4(2) requires the local planning authority or the Secretary of State to take the environmental information (which includes the environmental statement) into consideration before granting planning permission. Against this background the regulations plainly envisage that the local planning authority or the Secretary of State will also consider the adequacy of the environmental information, including any document or documents which purport to be an environmental statement.”

Application for permission to appeal was refused by the Court of Appeal, and on this point Pill J said the following:

“33. In my judgment what is sufficient is a matter of fact and degree. There is no blueprint which requires a particular amount of information to be supplied. What is necessary depends on the nature of the project and whether, given the wording of Article 2 of the directive, enough information is supplied to enable the decision-making body to assess the effect of the particular project upon the environment. I agree with Sullivan J that the court cannot place itself in the position of re-considering the detailed factual matters considered by the local planning authority. Equally I accept that the court does have a role and there may be cases where the court can and should intervene and hold that no reasonable local authority could have been satisfied with the amount of information with which it was supplied in the circumstances of the particular case.”

32. The legislation applying to applications under the 1992 Act is different from that which applies to applications for planning permission. Nevertheless the Secretary of State is required to consider the environmental statement and must necessarily in doing so satisfy himself that it contains the requisite information. It is for him to determine the adequacy of the information and not for the court.
33. Article 3 of the EIA Directive requires the direct and indirect effects of a project on the specified factors to be assessed. It is, of course, the case that the direct and indirect effects of a project on the matters referred to are effectively infinite, and the Directive is not to be taken as requiring that the ramifications are to be endlessly traced. Rule 11(1) of the T & W Rules, like the EIA Regulations, recognises this by providing that the ES must contain “(b) a description of the measures ... to avoid, reduce and, if possible remedy any significant effects on the environment...” and “(c) the data required to identify and assess the main effects ... on the environment”. It is to “significant effects” and “the main effects” that the ES is to be directed. What effects are significant and what are the main effects are essentially matters of judgment, and this question, as well as the question whether the ES adequately provides the information in relation to them, is for the Secretary of State: see *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603. In making the judgment that he is required to make in determining the adequacy of the environmental information, the decision maker, it seems to me, must be entitled to have regard to a range of considerations. They would include how far down the chain of causation a possible impact might occur; the probable level of impact; and any relevant regulatory regime. All these matters, in my view, could properly be taken into account by the decision maker in forming a view as to the adequacy of the environmental information.
34. Mr Wolfe submitted that the ES failed to contain the information required by the Rules because it did not include an assessment of the environmental impacts of the various options that TWPTA were keeping open for handling

and disposing of the waste materials. It was not, he said, a question of determining whether the Secretary of State had acted unreasonably in treating the information about waste disposal as adequate. The ES failed to comply with the Rules because it left over for later determination and evaluation the method and location of disposal.

35. The claimant in his witness statements had expressed particular concern about the option of sea disposal. He said that it was not clear from the ES whether land filling or sea disposal was the intended option. It was certainly the case that both the ES and the inquiry evidence of Mr Lofthouse had treated sea disposal as an option, but TWPTA had stated that sea disposal was not part of the proposals, so that only disposal to land required to be addressed. In paragraph 8.115 of his report the inspector made clear what TWPTA's approach was to sea disposal, and he endorsed it:

“Moving on to sea disposal, this does not form any part of the current proposals. It has merely been identified as a possible option. Accordingly, I have no hesitation in concluding that the TWPTA have been perfectly correct in concentrating on the environmental impacts of the land disposal method – the worst case scenario. If, at some time in the future, it were proposed to change to some measure of sea disposal at sea. This would not be granted by DEFRA unless it were satisfied that the environmental effects would not be material.”

36. That, it seems to me, was an unchallengeably correct approach, and I do not think that the Secretary of State was in error in not seeking an evaluation of the sea disposal option.
37. The ES set out in tabulated form the volume of waste arisings from the dredging and land based excavations. It estimated the total volume that could potentially need to be disposed of to landfill at 330,000 cubic metres, which, it pointed out, was the equivalent of approximately 55% of the annual inputs for the Tyne and Wear Unitary Development Authorities. It categorised this as a “moderate adverse” impact on the void space available. However, if a waste minimisation strategy, identified in a waste management plan and incorporated in the CoCP, were to be adopted, the ES indicated that the impact would be reduced to “minor adverse”. A recalculation of the amount of waste was contained in Mr Lofthouse's evidence to the inquiry. This showed the gross amount of material, before any recycling, to be 317,000 cubic metres and indicated that disposal would be likely to take place over two years and that the amounts (110,700 and 206,500 cubic metres) would constitute 18.9% and 35.3% respectively of annual landfill inputs.
38. The Secretary of State thus had information before him on the maximum volume of waste arisings requiring disposal to landfill and the relationship that this bore to annual landfill inputs. Whether that information was sufficient was a matter for him. It is clear that any disposal site would have had the benefit of planning permission, and an environmental assessment would have been carried out if it had been necessary. Mr Wolfe's ultimate stance on this

was to say that the information in the ES could not have been adequate because it left out of account the need to replace the void space used up and the effects of the use of such replacement sites as might be required. He recognised the difficulty in identifying replacement sites years in advance of the need for them or the grant of planning permission, but he said that an assessment should have been carried out in respect of a hypothetical replacement site. I am wholly unable to accept that it was *Wednesbury* unreasonable for the Secretary of State not to have required the information needed to enable such a hypothetical exercise to be carried out, nor is it easy to see how it would have been done.

39. The second area of deficiency, Mr Wolfe said, was that there was effectively no assessment of the impacts of traffic generated by the waste disposal operations. In the skeleton argument of Mr Stephen Sauvain QC for TWPTA and in the witness statement filed in these proceedings by Paul Adrian Fenwick, the Project Director, TWPTA said that the assessment of the environmental impacts of disposing of the waste was to be found in section 19 of the ES and Mr Lofthouse's proof of evidence. In his submissions Mr Sauvain drew attention to other sections of the ES – section 5 (transport), section 6 (noise and vibration) and section 7 (air quality) – and said that these also provided part of the assessment of these impacts. In written submissions following the hearing, which I permitted Mr Wolfe to make in relation to these sections, Mr Wolfe contended that an examination of the material in section 5 showed that no relevant assessment had been carried out. In particular there was no information on the number of lorries required to transport the waste or the pattern of their movements or their environmental impact. Section 6 said that generic mitigation for potential impacts such as material transportation by road would be addressed in CoCP, so that any adverse effect was unlikely to be significant. That showed that no assessment of the environmental effects of waste disposal traffic had been undertaken. There was no assessment of the impact of off site noise from this source. Similarly section 7 provided no assessment of the impact of construction traffic on air quality. Mr Wolfe contrasted the information provided in relation to traffic using the works after construction with the lack of information in relation to construction traffic. He pointed out that in relation to one operation, dredging, the volumetric output was stated and also the number and size of the vehicles required to transport the material to the tip. Even this stopped short of actually assessing the environmental impact of the traffic, but it contrasted with the other works of excavation for which no such information was available.
40. The adequacy of the information in the ES is, as I have said, a matter for the Secretary of State. That there was information on the volume of spoil and the intention to remove this to landfill sites and an overall assessment of the impact is clear. Paragraph 5.4.1 of the ES identified the routes, north and south of the river, that would be taken by construction traffic, including spoil lorries, to gain access to the A19. There was no quantification on the number of spoil lorry movements or the routes that the vehicles would take to the as yet unidentified landfill sites, and there was no assessment of their effect in terms of noise and vibration and air pollution.

41. In his conclusions at paragraph 8.119 the inspector said:

“One of the main worries would be the haul routes along which unwanted material would be conveyed from the construction site to any licensed landfill site. At this juncture, I agree with the TWPTA that it is not possible, or sensible, to define any specific routes along which HGV and other traffic would have to follow. The routes that would be used would be dependent on the location of those licensed sites with available capacity for the particular waste stream and a willingness to accept the tipped material at the time the project proceeds. Having said this, I am confident that adequate control of routeing, frequency and vehicles to be used could be effected through the obligations placed on the Concessionnaire/contractor by the Code of Construction Practice (COCP) in preparing the Waste Management Plans.”

42. What the ES had to contain was the data required to assess the main effects on the environment of the proposed works and a description of the measures to be taken to avoid, reduce or remedy any significant adverse effects. The Secretary of State had information on the maximum volume of spoil that might require removal and the routes that lorries would take to gain access to the primary road network. He knew that it was not possible so far in advance to identify where the spoil would be taken to or, therefore, the haul routes. He proposed to impose conditions on the deemed planning permission requiring the production and agreement of a code of construction practice and a waste management plan that would control such things as the routeing of the lorries and the frequency of movements. I do not think that he was *Wednesbury* unreasonable in accepting that the information in the ES as supplemented was adequate for these purposes. It was a matter for him whether he considered it was necessary to have an estimate of the number of lorry movements in order that the required assessment of main effects might be made. Nor does it seem to me at all persuasive that in certain respects the ES provided more detailed information. It was a matter for the Secretary of State whether in this particular respect the information was sufficient, and he was satisfied that it was.

43. The application is accordingly refused.