



EIA REGULATIONS UPDATE 2017

Introduction

DCLG has issued a consultation document on proposed changes to the EIA regulations. The consultation runs to 1st February 2017. The driver for the revisions has come from the requirement to transpose into UK domestic legislation the 2014 changes to the EU EIA directive.

The very first thing the consultation does is to set it in the context of 'Brexit'. It makes plain that the UK remains a full member of the EU until the negotiations for its departure have been concluded. Until that time the UK's European obligations remain in force.

Overall Approach

The Government's Better Regulation agenda requires that when transposing EU law the Government will ensure that the UK does not go beyond the minimum requirements of the measure which is being transposed. These principles have been applied in transposing the amendments made by Directive 2014/52/EU.

Additionally, it was considered that there is merit in retaining, as far as practical, the existing approach to environmental impact assessment in England as it is well understood by developers, local planning authorities and others involved in the procedures. The proposals represent what are considered to be the minimum changes necessary to the existing regulations in order to bring them into line with the amended Directive.

Proposed Regulation Changes

Given the approach to transposing the amended directive set out above, the proposed changes are in the main relatively minor, but some of the useful/obvious changes are identified below

Definition of EIA

The first of these is the definition of what 'Environmental Impact Assessment' means. The definition is provided at Article 1(2)(g) of the amended directive and transposed into the regulations at Regulation 4 and 26. What is clear from this is that EIA is not just the process



of producing the Environmental Statement. This is part of it but the EIA process as a whole includes the assessment of that information by the competent authority in reaching a 'reasoned conclusion on the significant effects of the proposed development' and their own supplementary examination of the proposals effects.

This is something which had been established in case law but I think it is still useful to have this explicitly stated. This is something which we may need to acknowledge in future Environmental Statements. The consultation does **not** propose adopting 'Environmental Impact Assessment Reports' as a replacement title for Environmental Statements.

Screening

The new regulations set out more specifically the information required to accompany a request for a screening opinion. These now include the option for developers to provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment. The option of including this information as a means of screening out developments had been established in case law but again it is useful to have this explicitly stated within the regulations.

When considering the information provided by the developer, the competent authority, as now, must take into account the criteria listed in Schedule 3 of the regulations. The criteria have been amended, largely to provide more clarity about the issues to be considered.

Where a local planning authority is adopting a screening opinion, the requirement to adopt an opinion within 3 weeks - or longer where agreed with the developer in writing is maintained. However, to comply with the directive any longer period so agreed may not exceed 90 days.

Scope of Assessments

The proposed new Regulation 4 sets out the environmental factors that should be considered as part of the assessment where they are likely to be significantly affected by the project. It makes it clear that the assessments must include operational effects, and the expected significant effects arising from the vulnerability of the proposed development to major accidents or disasters that are relevant to that development.

Introduction of Joint and/or Coordinated procedures



A new requirement has been introduced within the EU directive at Article 2(3). Where a project is simultaneously subject to an assessment under the Environmental Impact Assessment Directive and also under the Habitats and/or Wild Birds Directives, the 2014 Directive requires that, where appropriate, either a coordinated procedure or a joint procedure should be used. The consultation document identifies the difference between these as:

- The coordinated procedure requires designating an authority, or authorities, to coordinate separate assessments.
- The joint procedure, on the other hand, requires Member States to endeavour to provide for a single assessment of a project's impacts on the environment

It is considered that coordinated procedures provide the greatest flexibility for developers around the phasing and timing of environmental impact assessment and an 'appropriate assessment' under the Habitats Directive. This is thought to reflect existing practice in England. The joint procedure would, however, require the information to inform both assessments to be dealt with in a single assessment.

It is proposed to transpose the requirement through Regulation 27 in the Town and Country Planning regulations, by designating the authority responsible for taking the decision on an application as the authority that must ensure, where appropriate, that the relevant assessments are coordinated.

Information to be provided in an ES

A revised Schedule 4 of the regulations sets out the information required to be included within an ES. This is more detailed than the previous Schedule 4, and in particular:

- provides more guidance on 'alternatives';
- specifically requires assessment of the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change; and
- specifically requires a description of the expected significant adverse effects of the development on the environment deriving from the vulnerability of the development to risks of major accidents and/or disasters which are relevant to the project concerned.



Scoping

The proposed revised regulations now enable a prospective applicant for EIA development to seek a scoping opinion on the 'scope and level of detail of the information to be provided in the Environmental Statement'. The current regulations simply require the LPA to provide an opinion as to the information to be provided in the environmental statement. This is in line with current practice anyway but it is helpful to have a definitive statement that LPAs need to confirm the level of detail for each topic area for an ES.

A proposed new regulation sets out that an application for EIA development must be accompanied by an environmental statement and then goes on to set out the minimum requirements for an ES. It also requires that where a scoping opinion has been issued, the ES is based upon the most recent scoping opinion.

Competent Experts/Authority

The proposed new regulation at (3)(a) requires that an ES must *'be prepared by persons who in the opinion of the relevant authority or the Secretary of State, as appropriate, have sufficient expertise to ensure the completeness and quality of the statement'*; and at (3)(b) that an ES must *'contain a statement by or on behalf of the applicant setting out how the requirements of paragraph (3)(a) have been complied with'*

Proposed new regulation 4(5) comprises a requirement that: *'The relevant authority or the Secretary of State, as the case may be, must ensure that they have, or have access as necessary to, sufficient expertise to examine the environmental statement.'*

Consultation Timeframes

The minimum period for public consultation is increased to 30 days.

Monitoring of Environmental Effects

There is already the opportunity for LPAs to secure monitoring of environmental effects through planning conditions/legal agreements. However, the proposed regulations would include a specific requirement that if planning permission is to be granted LPAs should consider whether or not to *'impose monitoring measures'*. If monitoring is considered to be appropriate, LPAs should also consider whether to make provision for potential remedial action, and take steps to ensure that the type of parameters to be monitored



and the duration of the monitoring are proportionate to the nature, location and size of the proposed development and the significance of its effects on the environment (reg 26 (3)(a) and (b)).

Reasoned Conclusion

The regulations require the LPA to: '*reach a reasoned conclusion on the significant effects of the proposed development on the environment*' based upon their examination of the environmental information and their own 'supplementary examination'.

The requirement to reach a reasoned conclusion is perhaps something for us to be aware of in the wording of ES's.

Transitional arrangements

A proposed new regulation 77 makes it clear that these regulations will not apply to any proposals submitted with an ES or for which a scoping opinion was requested before the regulations come into force.

The consultation runs to 1st February and it is assumed that there will be a process of review following receipt of responses and potentially amendment before the regulations are made. Nevertheless, it might be good practise to start adopting some of the changes that could/will be introduced by these regulations, in any ESs currently in production principally:

- making reference to the emerging regulations, acknowledging that they are not in force but that some of the provisions have nonetheless been adopted;
- make reference to the fact that EIA process as a whole includes the assessment of that information by the competent authority;
- Include the provisions of the revised schedules when demonstrating that our ES's contain what they should;
- tailor our conclusions in ES's to assist the LPA in reaching a 'reasoned conclusion on the significant effects of the proposed development';
- ensure that assessments are carried out in a coordinated manner where they may include Habitat or wild bird assessments by including shadow Appropriate Assessments within ESs.