Get ready for the new EIA regime

The environmental impact assessment process is changing next month, and it is important for developers to be aware of what will be different. Alex Ground and Mark Child have the details

By 16 May 2017 we will see a revised version of the environmental impact assessment (EIA) regulations come into force – derived from the revised EIA Directive (2014/52/EU), which requires member states to have transposed it into domestic law by this May.

The types of project that will need an EIA are not changing. Schedule 1 projects will automatically remain as EIA development. However, in respect of Schedule 2 developments – which only become EIA development if there are likely significant effects by reference to certain prescribed thresholds and criteria – mitigation will now be capable of being taken into account when deciding whether there will be likely significant effects.

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Mitigation measures

The current screening rules only require a plan, description of the development and any other information the developer wishes to provide. However, the government proposes to increase the amount of information required and standardise the approach. Information on the environmental aspects likely to be affected are required, as well as information on proposed mitigation. This provides an opportunity for applicants to provide sufficient information to the local planning authority (LPA) to help reduce the number of its schemes that are subject to EIA.

This change to allow applicants to incorporate mitigation measures will increase burdens on the LPA at a time when they are already suffering from severe budgetary constraints. The LPA will be tasked with having to consider the likely influence of the proposed mitigation measures in the screening request and decide whether they are sufficient to negate the need for an EIA. As a result of this, we could see risk-averse LPAs granting positive screening opinions requiring EIAs where perhaps the mitigation measures should have reduced environmental effects to below a significant level. Any such screening opinion must be justified in a publicly available decision; the applicant will have the option of trying to get it reversed by applying to the secretary of state for a screening direction.

Alternatively, if the LPA is able to source competent advisers who are fully confident in the mitigation measures after appropriately critiquing them, then there is the opportunity for a streamlined application process where mitigation has been successfully designed into the scheme from the outset. However, this does not prevent a third party applying to the secretary of state asking for a screening direction. Either way, there is likely to be an increase in requests for screening directions from the secretary of state, which can provide a relatively timely second bite at the cherry for applicants.

For those schemes where mitigation is key to a decision that a scheme is not EIA development, the LPA will need to secure appropriate monitoring to ensure the measures are achieving their aims. It is suggested that conditions or planning obligations will also need to set out what is required if monitoring shows mitigation to be failing, eg cessation of operations, reduced operations, etc. Applicants can be proactive and suggest the same with their application to provide the confidence it will be delivered.

Applicants should also be aware that there will be a new requirement on LPAs to take these changes into account when making enforcement decisions. This could come into play where an LPA decided that a proposal was not EIA development based on mitigation, and then if that mitigation did not achieve its assessed aims, this new provision would weigh in favour of any breaches of relevant conditions being enforced against. Third parties could seek to use this when requesting LPAs to take enforcement action.

Third-party challenges

In terms of timescales, the proposed changes retain the 21-day deadline for the screening opinion to be produced unless agreed otherwise. It is expected that the provision for an extension to 90 days, if agreed with the applicant, will be heavily utilised in an attempt to make a sound and defendable decision.

Local community groups will likely make their presence felt as they make representations during the screening process. Even if the LPA issues a negative screening opinion, properly advised and well-funded groups have an opportunity to make a successful application to the secretary of state where they believe that an LPA has erred, especially where it has relied on what it may perceive as ambitious and complex mitigation measures proposed by the applicant.

The key will be whether or not, even with mitigation, effects remain likely and significant. If the secretary of state supports the LPA by issuing a negative screening direction then a judicial review could be sought. Any such application should be made within six weeks of the screening decision. Recent case law has suggested that making an application after the grant of planning permission may be too late. Third parties will also be able to challenge the LPA's screening opinion if it provides no (or improper) reasoning to support its decision.

Other things to note

If an EIA is required it will have to be prepared by "competent experts". There is no definition in the draft regulations, and therefore there may be some early challenges to test this new concept. If an EIA is required there are also changes to the list of environmental factors to be considered as part of the EIA process.

Finally, the transitional arrangements from the current to new regime are important – if you screen or have scoped your EIA project before 16 May 2017, then the current regime applies. If the project is screened after that date, it is the new regime. The date of the submission of the actual EIA is not relevant. As can be appreciated from the above considerations, it will be important to consider whether or not it is helpful to your project to get it screened before the key date.

Alex Ground is a partner at Russell-Cooke and Mark Child is a trainee

Alex Ground
Partner
+44 (0)20 8394 6457
Alex.Ground@russell-cooke.co.uk

Mark Child
Trainee
+44 (0)20 7440 6517
Mark.Child@russell-cooke.co.uk