Planning briefing note | May 2017

#10ThingsSH Undertaking robust EIA

Robust environment impact assessment (EIA) is vital to the success of planning applications for large development projects. Due to the importance of EIA and the resulting environmental statements (ES), EIA is a fertile ground for legal challenges, which can result in planning permissions being quashed following judicial review.

As planning lawyers we have experience being on both sides of EIA – including:

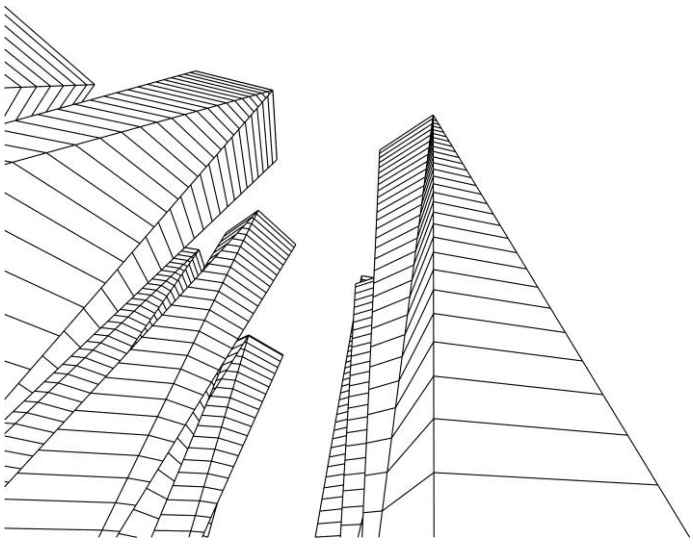
- **assisting client teams undertaking EIA by ensuring compliance and consistency with the EIA regulations, thereby helping to reduce the chances of success of judicial review claims; and**
- **assisting third parties challenging the grant of planning permission for EIA developments.**

This note sets out ten things that we think are crucial to undertaking a robust EIA and protecting ES from future legal challenges.

Types of development for which EIA is required

1. In broad terms, EIA may be required where:

- The development is a large industrial or infrastructure project and therefore falls within Schedule 1 of the EIA Regulations. This will include power stations, waste installations, water treatment plants, quarries, etc; or
- The development falls outside of Schedule 1, but is likely to have significant effects on the environment and meets the criteria in Schedule 2 of the EIA Regulations. For example, 'urban development projects' (not including the construction of homes) will require EIA if the development exceeds one hectare. If the development is planned within a sensitive area or meets the relevant threshold, then screening (see point 2 below) must be carried out. If screening determines that the development would be likely to have significant environmental effects, then EIA must be carried out.



Occasionally, projects that are borderline EIA developments will still undertake EIA to remove the risk associated with a planning permission granted without EIA. We are often involved with weighing up the pros and cons of making this difficult decision.

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The timing and uncertainty surrounding screening and scoping

2. Screening is undertaken by local planning authorities (LPAs) or the Secretary of State and is used to assess the environmental effects of a development and to determine whether EIA is required. Even if the LPA undertakes screening and determines that EIA is not required, the Secretary of State can overrule this by issuing its own positive screening opinion. Additionally, in an almost cruel twist to the rules, the LPA can change its mind and determine that EIA is actually required once an application for planning has been received without an ES; however, to do this it must notify the developer that an ES is required within three weeks of the LPA receiving the application. An extreme case we've heard about is where the LPA issued a negative screening opinion, but an objector to the application sought a screening direction from the Secretary of State. In the meantime, the planning permission was granted. The Secretary of State issued a screening direction stating that an ES was required, overriding the opinion of the LPA, and so the planning permission was quashed in the courts. The key takeaway is that the EIA Regulations can be difficult to navigate and sometimes produce unexpected results. Later in this article we set out some ways to reduce EIA judicial review risk.

3. Once it has been determined that an ES is required, developers and their advisors will need to decide what the scope of the ES should be. It will be a rare (but welcome) occurrence that the scope of the ES will be abundantly clear, in which case a developer can 'crack on' and prepare the ES for submission. However, if there is any uncertainty about which environmental impacts of the development should feature in the ES, then a scoping opinion should be sought. The key benefit of a scoping opinion is, in reality, to agree what can be left out.

4. Screening and scoping opinions can be sought at the same time. When this strategy is adopted, the scoping opinion must be given to the developer by the LPA within five weeks of the screening decision, although a longer period can be agreed between the developer and the LPA.

Is there any way you can beat the system?

5. Not likely. Developers have now had over thirty years to come up with creative ways to try and beat the EIA Regulations. In the past, some developers have sought to phase their developments to avoid the EIA thresholds – "salami slicing" the development. The courts and third parties are now awake to this strategy and it is unlikely to fly except in rare cases.

What about changes to the development after planning permission has been granted?

6. In an ideal world, developments would be fully designed prior to applying for planning permission. But we understand that this is rarely the case. In order to prevent the need for an updated EIA being triggered by section 73 applications (effectively to vary the scheme), flexibility can be brought into the ES so that changes can be made to the development easily and without further EIA. The EIA process can also be triggered when applying for reserved matters approvals. This most commonly arises if new information has come to light through the submission of the application for reserved matters. Equally, if the EIA was previously undertaken, the LPA can require the ES be updated.

7. Often a Rochdale approach will be taken to ensure that planning applications and EIA have enough flexibility to enable the developer to tweak elements of a scheme down the track. Under the Rochdale approach, an envelope of environmental impacts is assessed due to the fact that certain elements of a scheme have not been

fully finalised prior to submission of the application. We help client teams walk the tight-rope between providing maximum flexibility to the developer, but still providing enough certainty to the decision-maker so that it can feel comfortable accepting the EIA and granting the permission.

Make my EIA and ES bulletproof, please

8. From a legal point of view, the most obvious way to protect your planning permission from judicial review is to ensure that screening (i.e. does the development need an ES?) and scoping (i.e. what should the ES cover?) are done correctly.

9. We assist a lot of client teams by assessing ES critically (playing the devil's advocate) and identifying weaknesses within ES, which could be exploited to challenge planning permissions. If successful, legal challenges could cause the planning permission to be quashed by the courts causing both delays and the developer to provide additional information to the LPA to enable it to reconsider the application. Key areas of focus for legal review are:

    - baselines (against which the new development proposals are assessed) – making sure all proposals are considered / covered off by the EIA;
    - development parameters – ensuring sufficient detail is included to enable proper assessment but enough flexibility to allow a developer to amend a development (e.g. to take account of future occupiers' needs) without triggering further EIA;
    - the description of the development in the application for planning permission should be flexible and care should be taken when relying on 'ancillary' uses; and
    - cumulative impacts – whether the environmental effects of other projects have been taken into account properly.

    Early drafts of key chapters should be shared within the client team and also with the LPA so that there are no surprises. In addition, early and thorough consultation with the public is not only required under the EIA Regulations, but it is also useful for the developer in order to determine whether particular aspects of the development are likely to be controversial and what measures can be addressed whilst the scheme is still being worked up.

    

    Overall, the ES must be clearly structured, and avoid drafting inconsistencies and illogical statements, which more often than not arise merely from the fact that EIA are a culmination of work from multiple disconnected authors working on the same document.

Just tell me quickly what the recent changes are all about

10. On 16 May 2017, a suite of amendments were made to the EIA regime. The changes are now in force, and we set out a brief summary of the key points below:

    - The consultation period for ES has increased for town and country planning regime developments to no less than 30 days (up from 21 days). This means that the application for planning permission must not be determined until 30 days have passed from publication of the ES.

- Elements of the environment against which developments must be assessed have been amended to include: biodiversity (previously 'flora and fauna'), climate, and human health (previously, 'human beings').
- Requests for screening opinions must now be more comprehensive. Requests should include planned mitigation measures to avoid significant adverse effects.
- Previously, if a scoping opinion was requested then the developer could choose whether or not to rely on that scoping opinion. Under the changes, if a scoping opinion is requested and the proposed development does not change materially, then the scoping opinion must be followed by the developer.

There are other changes too. Please contact us if you would like to discuss further the EIA or the changes to the EIA Regulations.

How can Stephenson Harwood help?

Stephenson Harwood's planning lawyers provide quick and commercial advice to our clients to enable them to maximise their chances of planning success. Planning law cannot be given in isolation to our clients' commercial objectives; we work closely with all members of our clients' professional team to secure the best results, delivered in a timely fashion and in an accessible format.

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