## Updated Practice: EIA Screening

### Abstract
Changes to EIA legislation and indicative thresholds and criteria for screening are now influencing screening decisions. This article reviews practical implications for those processes.

### Introduction
Development proposals are now being put forward under the 2017 EIA Regulations and with the benefit of the revised thresholds and criteria for EIA Screening set out in Planning Practice Guidance. Recent case law remains predominately related to the 2015 Regulations but will, in due course, emerge in relation to interpretation of the more recent legislation.

The legislative changes mean, amongst other matters, that measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment can be considered as part of the screening process. The indicative thresholds and criteria set out in PPG are considerably higher than those previously applied: in the case of residential development, increasing the indicative threshold to 1,000 dwellings.

### The Courts’ Interpretation
Court cases remain focussed on interpretation of the 2015 Regulations (or earlier) but some principles are transferable to the new legislation. In the case of *R (Kenyon) v Secretary of State for Communities and Local Government* the authority vested in decision makers (whether a local planning authority, or the Secretary of State) was again reinforced.

However, the obligation for an authority to act lawfully and reasonably, and with regard to due process, remains pivotal in the Courts’ judgements. Case law has strongly established that the Courts will not interfere in matters of professional judgement, but *Kenyon* is helpful in that it expressly considers the issue in relation to EIA Screening.

Of particular interest in the *Kenyon* case is the approach to taking prospective mitigation measures into account in screening decisions. Heard under the 2011 EIA Regulations where no explicit provision is made for taking mitigation into account, Lang J drew upon *R (Champion) v North Norfolk District Council* which set out the balancing needed in the screening process – that there is nothing to rule out consideration of mitigation measures at the screening stage, but that the EIA process is intended to provide, through EIA, for the efficacy of mitigation measures to be considered and subject to scrutiny, in determining whether any potential significant effects are indeed adequately and appropriately mitigated. That principle is of course clarified by the provision of Regulations 6(2)(e) and 6(3)(d) of the 2017 EIA Regulations which explicitly allow for mitigation measures to be considered in forming a screening opinion. Regulations provide for additional safeguards in those cases – Regulation 5(5)(b) requires features envisaged to avoid significant adverse effects (and where a negative opinion is issued) to be stated in that opinion and one assumes that those measures would be controlled as required by a planning authority by condition or obligation to any subsequent planning permission.
Concern expressed by the Courts at that time about proportionality and reasonableness is equally applicable under current Regulations.

**Practical implications**
Changes in legislation and practice guidance continue to reinforce the notion that EIA should be undertaken where there is the prospect of significant effects on the environment, not simply because the proposed development is significant in its scale. In our experience, planning authorities have tended to err on the side of caution (arguably being more cautious than is appropriate with respect to the precautionary principle) in determining that proposals are EIA Development. Continued reassurance by the Courts coupled with the greater discretion afforded by legislation and practice guidance is already leading to negative screening opinions being adopted where under previous legislation a positive opinion (that proposals would be EIA Development) would have been expected.

**Conclusions**
The onus remains on decision-makers to act in a reasonable and informed way in determining whether prospective development would be EIA Development. This means being clear whether and what mitigation has been considered in determining whether prospective development is EIA Development and ensuring that by objective assessment that decision is reasonable and evidenced. Opinions remain vulnerable either where consideration is absent or where reasoning is not well set out. We continue to see opinions (both screening and scoping) being adopted without adequate reasoning, at which time the prospective applicant must determine whether to voluntarily submit additional environmental information, or whether to seek a Secretary of State Direction. It is a judgement for the applicant as to what legal advice may be necessary in either case.

The Courts will continue to take a dim view of poor practice but will equally continue to support decision makers who apply the greater flexibilities with rigour.

*Arwel Owen, Partner, David Lock Associates, April 2019.*

---

4. R on the Application of Kenyon v Secretary of State for Communities and Local Government. Case Number: CO/424/2017

---

For access to more EIA articles, case studies and hundreds of non-technical summaries of Environmental Statements visit:
http://www.iema.net/eia-quality-mark/