Can the DCLG Replacement EIA Regulations consultation result in effective change?


Consultation on the draft Regulations has now closed. Once the Government has concluded its consideration of the consultation responses proposed changes will be published. This will likely be within a relatively short time-scale in order that they are ready to come into force by 16th May 2017 (the date by which Member States must have transposed the amendments to the Directive into domestic legislation).

The draft replacement Regulations seem sensible. On the one hand, Government has taken an ‘easy road’, retaining much of the existing Regulations as far as possible; after all, unnecessary complexity is no-ones’ desired outcome, and the replacement Regulations are not a priority in light of Article 50 negotiations.

Whether or not the replacement Regulations, as currently drafted, achieve the main aim of the updated EU Directive - to reduce the number of projects being subject to assessment and to reduce the size and cost of Environmental Statements - is somewhat debateable.

A truly user-friendly (and by that token likely to avoid an increased burden and risk of Judicial Review) set of Regulations should be achievable, but whether this materialises will depend on Government’s willingness to act on some key matters currently being openly debated by EIA practitioners.

Of the many changes proposed in the draft replacement Regulations, a few immediately draw attention and raise questions for the development industry, EIA practitioners and competent authorities.

The draft replacement Regulations confirms that there will be an increased emphasis on climate change, human health, biodiversity, and accidents and disasters. In practice, all of these should already be included in an Environmental Statement in some form, where there is a likelihood of significant environmental effects and where they cannot be scoped out. Nevertheless, the strong possibility of more ‘bespoke’ consideration of these matters being required could change the structure of Environmental Statements, as well as the range of technical practitioners involved in their preparation and assessment.

The requirement to consider Alternatives has also increased and includes the obligation to provide ‘an indication of the main reasons for selecting the preferred option including a comparison of the environmental effects’. Careful documentation of key design changes and reasoning will need to form an increasingly important part of the EIA co-ordinator’s role.
The suggested requirement for a description of measures envisaged to avoid or prevent significant environmental effects to be provided earlier in the EIA process, is for many, good practice. That said, front-loading in this way will require committing to clear methods for implementing mitigation and monitoring at an early stage; something that will place a burden on developers who are unused to identifying reliable project parameters so early in the design process.

And what happens if your Environmental Statement is not ‘based on’ the LPA’s Scoping Opinion, either due to scheme change or an unclear Scoping response? This will require developers to scrutinise Scoping Opinions very carefully, as is already commonplace among competent practitioners, but re-scoping could be advised where the detail of a project materially changes through an iterative design process. The timing of submission of Scoping Opinion requests relative to the status of a scheme’s design may become increasingly important.

In light of the above responsibilities, it seems surprising to see that Government appears to have decided that it should be crystal clear who is qualified to prepare and assess EIA projects. The proposed Regulations set out that an Environmental Statement should be prepared by persons who ‘in the opinion of the competent authority’, have sufficient expertise to ensure the completeness and quality of the Environmental Statement. Decision-makers are required to have ‘sufficient expertise’ to examine an Environmental Statement.

Defining competence and expertise is somewhat dangerous ground, and Government may be unwilling to add much by way of further explanation.

They envisage business as usual, but a growing rift - albeit amicable - seems to be appearing amongst those professionals who hold a recognised qualification, and those who do not.

Whatever the outcome of the ongoing debate surrounding expertise, everyone would do well to consider the project implications of Article 3(1) and 3(2) that outline the transitional measures. Where an application for screening was initiated prior to 16 May 2017, or where an Environmental Statement was submitted, or where a scoping opinion has been sought before 16 May 2017, the provisions of the 2011 Directive will continue to apply. For some projects, being able to rely on a familiar (and to a degree ‘comfortable’) set of Regulations, could make all the difference in terms of increased investor certainty and ultimately, project delivery.

The original DCLG consultation documents are available here:

Helen Tilton, MSc, BA(Hons), MRTP, PIEMA, Associate Director, Turley, February 2017.