EIA Amendment Regulations 2015 come into force on 6th April

The long awaited update to raise the thresholds for EIA screening has been laid before Parliament.

These changes are designed to affect the majority of the screening requests prepared for urban development projects, most notably housing and commercial projects, with the aim of reducing the burden on developers and thus aiding delivery of more homes and much needed economic development.

The thresholds for defining Schedule 2 projects in the following categories are raised from 0.5 Ha to:

- Industrial estates: 5 Ha
- Urban development projects:
  - Non housing: 1Ha or
  - Housing: more than 150 dwellings or
  - Total development over 5Ha

The “Urban development projects” category has a broad definition, as explained in several ECJ judgements, and encompasses the vast majority of the planning applications submitted across the UK. There are no changes proposed to Intermodal transhipment / intermodal terminals or categories 10. (d) to (p).

These Regulations come into force on 6th April. Transitional arrangements are set out:

1. If you have an existing screening opinion that says EIA is needed: The amendment regulations will not change that opinion.
2. If you are submitting a reserved matters application (or even a conditions discharge) for a scheme which was EIA development, but would no longer be schedule 2 development as a result of this change: Again the Amendment regulations do not change that previous decision.

This revision is a significant step up in scale compared to the current 0.5Ha threshold, and whilst they are closer to the indicative screening thresholds already included in National Planning Policy Guidance, there are potential pitfalls associated with reading the associated press coverage too literally.

The Regulations change is promoted as reducing the amount of screening activity that needs to be undertaken for the bulk of planning applications. This is in turn intended to intended to reduce the burden on those delivering new housing and commercial development.

However, practitioners need to be aware that UK regulation cannot change the intentions of the EU Directive. The key test is still whether there is likely to be a significant effect on the environment as a result of the development, then EIA is needed regardless of the size of the site. The Directive does not allow blanket exclusions from this regime.

The risk for applicants is that this change “as advertised” will encourage them to stop screening.

This brings an associated risk later in a project that an ES is requested during the application process. This often happens at a time which is less convenient for the applicant, and when it is more difficult for practitioners to influence scheme design, or introduce mitigation measures which are essential to addressing key impacts. This could seriously weaken the effectiveness of the regime and its benefits.

The other key risk is that the lack of robust screening exercise opens up an avenue for challenging decisions. Most practitioners will be aware that the screening stage is the focus of the majority of EIA related case law, and is thus fraught with potential difficulties, both when effective screening has not been undertaken and also where the screening process itself was deficient.
Practitioners therefore need to give well reasoned advice to clients on why they may still wish to screen projects which are below the revised thresholds. This is particularly relevant if there is a known sensitivity, either with objectors or designations on or around the site which could be affected by the development.

There are some key areas where practitioners and applicants may wish to be wary of the higher thresholds:

- Where the site is in a sensitive area as defined in the Regulations.
- Cases where there is a known unusual effect, or other likely significant effects, despite the site not being designated as “sensitive”. Examples may include sites in AQMA’s, areas where heritage asset setting could be affected, or where protected species are present. Similarly, unusual contaminants without a tried and test mitigation regime may also suggest a need for caution.
- Tower Blocks resulted in a change of definition from site area to dwelling numbers, but still carries a risk that significant effects could arise despite fewer than 150 dwellings being proposed.
- Cumulative effects remains an area of practice which is subjective and difficult to define. A proliferation of applications, potential applications and sites rumoured to be coming forward for development all need careful consideration and weighing up.

This change is one of several over recent years which have been presented as a simplification or streamlining of the EIA regime. However, the process remains subjective in nature, and practitioners should keep in mind the case law which advises not to read the thresholds too literally.

Matthew Sheppard
Director, Head of EIA, Turley, March 2015.

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