The Infrastructure Act 2015 was the subject of significant media and pressure group focus, most notably around its efforts to relax the consenting regime for onshore oil and gas extraction. The parliamentary debate was the subject of in-depth coverage on social media sites and the debate in both the House of Commons and the House of Lords was hotly contested.

The amendments to the EIA Directive are widely thought to be a missed opportunity to make EIA mandatory for all operations which involve hydraulic fracturing. The Infrastructure Act is also now being seen in the same way.

One of the key areas of debate centred on the introduction of a series of environmental controls over fracking, which would need to be applied in order to secure a well consent from DECC. One of these controls was to make EIA a mandatory requirement for all stages of the process.

This suggestion potentially had benefits for the industry, as it would have facilitated a clear expression of both impact assessment work and the nature of the operational controls which are common working practices for onshore oil and gas operators.

However, it would have imposed a requirement for all stages of activity to be subject to EIA which is clearly not in line with the current regulatory regime. Simple vertical bore holes for geological exploration are, in most cases, well controlled and do not have any significant effects on the environment.

The list of 11 safeguards was accepted as drafted in the House of Commons, but was amended through the House of Lords to simply require that the Secretary of State be satisfied that the environmental impact of the well has been taken into account by the Local Planning Authority.

This amended version was adopted and is now an integral part of the licensing process.

So what do these changes mean for EIA practitioners?

Firstly, Local Authorities will need to provide a notice to operators which confirms that they have taken into account the environmental information in deciding the associated planning application.

There is no definition of what constitutes "environmental information" in the Act. Thus there is scope for disagreement around whether this means EIA, or simply a collection of other information about the environmental effects of the operation. It seems fairly clear that the Act intends this information to be generic in nature, as it does not specify that formal EIA is required, but the lack of definition makes this unclear.

Given the controversial nature of these applications, there is bound to be a level of challenge associated with how far officers ought to take their assessment. Indeed there is still a debate to be had on the merits of undertaking EIA regardless, given the attention which any fracking applications are bound to attract.

At the very least, planning officers will have to ensure that their reports are clear that either a range of technical documents, or an ES, has been produced and that their / its findings are reflected in their decisions, both in the form of planning conditions and a statement to the effect that they have considered the relevant information. Similarly, officers reports will need to be clear on the basis on which the decision has been made.
Practitioners and Operators will need to consider the merits of formal screening, and how their associated ES or technical assessment reports are presented to planning officers. There is a lot of convincing to be done in respect of public environmental concerns and the efficacy of mitigation, and a robust EIA is one way of ensuring that the public are well informed.

However, as it stands, EIA is not required unless (a) it is proposed in a sensitive area and effects on the environment are likely, as with any form of development, or (b) where extraction exceeds 500,000m³ per day or (c) where the site area exceeds 1Ha and where effects on the environment are likely.

Therefore, depending on a range of circumstances, practitioners and operators may wish to simply apply the EIA regime as they normally would. They could consider submitting a robust screening request, and undertaking a range of focussed technical reports which are used to inform both the screening, planning application, permit applications and the new requirements of the Infrastructure Act.

The Act is seen by anti-fracking groups as a lost opportunity to secure robust and effective environmental assessment work for all operations associated with fracking. However, it is likely given the history of protests and high potential for judicial review, that applicants will begin to take a more focussed approach to environmental information. Hopefully they will also offer some of the benefits of high quality non-technical summaries, which may in turn help with a wider understanding of this industry. This ought to be expected regardless of whether EIA is undertaken.

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