• Introduce James Alflatt, Partner and Head of EIA Services at Bidwells
• Hopefully, some of you came along to our seminars last year where we outlined the key changes to the regulations.
• Biggest news and possibly biggest shake up for EIA in the last 18 years, since (1999 Regs)
• So here we are 12 months on since these regs came into force,
• Over the next 20 minutes or so, I will take you through practitioner perspective on the changes and the opportunities/challenges this raises
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• Over the next 20 minutes or so, I will take you through practitioner perspective on the changes and the opportunities/challenges this raises
The impact this is now having in practice and EIA development projects on a daily basis.
Couldn’t do an EIA seminar without covering Brexit
1.0 BACKGROUND: WHAT A DIFFERENCE A YEAR MAKES

- 2017 EIA Regulations came into force on 16th May 2017
- Transitional arrangements for ESs or ES scoping requests submitted before 16 May 2017
- Draft NPPF - 5 March 2018
- Brexit - 29 March 2019

2017 EIA Regulations came into force in May 2017, just over a year ago.

Transitional arrangements in place for ESs and scoping requests submitted before 16 May 2017.

Currently a mixed of EIA projects progressing through consent process, some under the 2011 Regs and others under the 2017 Regs

In summary, EIA work has changed substantially over the last year. The implications of the new Regs are not all clear either, so the process of adjustment will continue.

In parallel to establishing this “new norm” for EIA, the revised NPPF and Brexit also have implications for EIA for the coming year.

A time of flux but also opportunity.
2017 UK EIA REGULATIONS RECAP - WHAT CHANGED?

- Definition of EIA
- Revisions to Screening Process – time limits & mitigation reliance
- Revisions to Scoping – binding
- Introduction of new/revised topics
- Introduction of Competent Experts
- ES Report content
- Procedures for examination of ES & sufficient expertise
- EIA and decision notices
- Mitigation & Monitoring
- Penalties
- Transitional arrangements

For those who are either not aware, or did not attend last year’s seminars, just run through the key headlines from the new regulations.
- Definition of EIA – first time in regulation, have definition of what EIA is and what it should constitute
- Revisions to Screening Process – time limits remain unaltered, but more stringent screening requirements with clear benefit of being able to rely upon industry standard, tried and tested mitigation to negatively screen away impacts.
- Revisions to scoping – Remains voluntary, but scoping opinion will be binding if undertaken formally.
- New topics introduced, particularly relating to assessing a development’s impact/vulnerability to major accidents and disasters, and human health.
- Competent Experts – topic of continued debate how this is determined, but we will attempt to set out how this has evolved in last 12 months from our experience
- ES report – tension between making them more comprehensive, whilst being proportionate
- Sufficient expertise – focus on LPA resource levels and having access to sufficient expertise to review
- EIA & Decision notices – focus on transferring output from EIA process into decision notice conditions/legal agreement
- Mitigation & Monitoring – often forgotten element of current regime, more focus on monitoring to make sure significant adverse effects are having the desired effect, and ability to revisit post consent.
- Penalties – Infringements of the Directive to result in ‘effective, proportionate and dissuasive penalties’ – dealt with under current T&CP Enforcement regime
- Transitional Arrangements – Have since passed, but if screening or scoping opinion had been requested or ES submitted, prior to 16 May 2017,
2.0 LESSONS LEARNED – EIA SCREENING

Previous & 2017 Regulations Screening Request

- A Plan
  - Description of Development
  - Development proposal
  - Sensitivities of proposed location
  - Aspects of Environment likely to be significantly affected
  - Description of likely significant effects from a list of specifics
- Any other information, developer wishes to provide incl: mitigation

To demonstrate how more prescriptive regs have become
Take EIA Screening Req
Key test remains in determining whether an EIA is requires, i.e. whether significant env effects are likely.
Reg req more focus on having tech evidence to support the screening stage
Help to signpost LPA to where mitigation measures can be relied upon
How this is being tracked through planning process
2.0 LESSONS LEARNT: EIA SCREENING

- Local Authorities must screen.
- Voluntary for applicant.
- Frontloading:
  - Mitigation – avoid/prevent significant effects
  - Results of “any relevant EU environmental assessment”
  - Mitigation must be taken through to decision.
  - Screening Reports must be up to date.

- More complicated Screening Reports.
- Screening Report strategies for applicants.

- Enhanced screening request submission is embedded in Regulation 6.
- More complexed screening reports, with appended technical evidence
- Timing of screening is much later in a project
- Screening becoming a more involved/costly element to a project, particularly to achieve negative opinion.
- Good practice – screen multiple times during project – i.e. prior to committee

- How mitigation is being tracked through planning process
2.0 LESSONS Learnt: EIA SCOPING

- Pre-application scoping is voluntary for applicants.
- If scoping is adopted, the ES is required to be ‘based on’ the most recent Scoping Opinion
- Remains materially the same vs iterative/proportionate EIA

- Increased informal scoping
- Scoping strategies for applicants

• Given the binding nature of scoping, timing of formal scoping is now key
• EIA Scoping strategy is now more closely aligned with wider planning strategy, particularly where you have controversial scheme
• Political/public sensitivities will influence timing of formal scoping
• Much earlier informal scoping with key stakeholders
• Much later formal scoping process, so have confidence/acceptance in the binding scoping opinion which comes back
• Success of informal scoping, and no surprises is very much determined by the level of engagement supporting consultant team have with statutory consultees
2.0 LESSONS LEARNT: BROADER EIA TOPICS

- Risk of Accidents and Disasters
- Climate Change

- New regs more focussed on project vulnerability to major accidents/natural disasters, including climate change/biodiversity
- Stimulated a lot more good practice and guidance from the profession and industry which is assisting.
- Increased pressure on scoping and getting this right from outset
- Not accepting a one size fits all approach.
2.0 LESSONS LEARNT: BROADER EIA TOPICS

- Human Health
- Risk adverse approach is to scope it in.
- Proportionate EIA?

- Same relates to health and how health impact assessment is integrated into EIA.
- The danger here is to scope a lot more in than necessary.
- Key lessons is to ensure the scoping stage is well informed by technical evidence.
- Put forward a defensive position on why certain topics can be scoped out, whilst can still form part of app, doesn’t need to undergo rigours of EIA.
- Remember – key test is if impacts are likely to be significant. If this can be proven to the contrary with evidence, then have confidence to stand your ground and scope out.
- If you get this right, then proportionate EIA, which is talked about widely in the industry, in my mind, will look after itself.
- Proportionate – Reg 18(4) requires ES to take into account relevant UK Environmental Assessments reasonably available to avoid duplication of assessment.
2.0 LESSONS LEARNT: COMPETENCY & EXPERTISE

- Competent Experts - The developer must ensure that the ES is prepared by competent experts
- Sufficient Expertise – Local Authorities shall ensure that it has, or has access to, sufficient expertise to examine the ES report
- No expertise requirements at Screening/Scoping

= Motivator to improve practice
= Professional qualifications increasingly valuable

- Remains poorly defined.
- Worrying fact, given the increased focus/stringent requirements on screening stage – key area of challenge, that this is omitted from the elements of the EIA process which needs to be undertaken by a competent expert.
- Sufficient expertise – suggest this will continue to be muddled through by most, but are noticing more LPAs seeking external advice, and requiring audits of submitted ESs
- Qualifications/Expertise key to success going forward.
- Not just competent authors of the ES, but also its technical contributors, and what technical expertise looks like.
2.0 LESSONS LEARNT: COMPETENCY & EXPERTISE

So How is Competent Expert Interpreted?

What to watch out for:

Bespoke Route – Self declared & justify via evidenced experience

Best Practice – Based upon professional memberships – IEMA
An organisation’s EIA Quality Mark
An Individual’s Registered Practitioner status
2.0 LESSONS LEARNT – ES REQUIREMENTS

• “Reasonable alternatives”, no longer “outline of main alternatives”
• Cumulative impacts with existing and approved projects only?
• Monitoring of mitigation for likely significant effects now needs to be considered by consenting authority
• Environmental information needs to be up to date
• Public consultation on the ES extended to at least 30 days

• Untested in the courts

• Reasonable alternatives, no longer outline of main alternatives – and only those considered by the applicant
• Don’t need to be worried if you have no alternatives – but these are not just about alternative sites, could also include alternative design, layouts, technologies
• Monitoring of mitigation – needs to be considered and implemented through decision making and decision notice process.
• Change of consultation period – extended, not seeing any real impact to this, given the determination period is 16 weeks, but still need to be alive to the fact if submitted additional info under the regs, during course of project, that 30 day consultation is allowed for in your programmes so you don’t get a last minute surprise that you won’t make a certain committee meeting, as consultation has not concluded.
• Too early for changes to really find themselves through the courts
4.0 EIA & BREXIT: WHAT A DIFFERENCE A YEAR MAKES

WITHDRAWAL BILL:

• Aims to ensure that the whole body of existing EU environmental law continues to have effect in UK law, including EIA.
  • Devil in the detail as the bill progresses.

• DEFRA: 25 new Statutory Instruments to implement EU environmental directives. Environment Act or a national policy statement on Environmental policy?

• Withdrawal bill is currently progressing through Parliament

• This should ensure whole body of existing EU law continue to have effect in UK law

• But much can change as the Withdrawal Bill progresses.
  • Govt proposals recently defeated over environmental governance

• After the Withdrawal Bill and Brexit there will be a new system of environmental statutory instruments and policy. Content TBC.
4.0 EIA & BREXIT: WHAT A DIFFERENCE A YEAR MAKES

- Lack of oversight in environmental governance, as no EU commission or Court of Justice
- UK Courts?
- New environmental body?
- International conventions? (e.g. Espo, Rio, Aarhus, Paris)

- Lack of oversight without EU Commission or ECJ
- Courts will step into this role (as they have been already, e.g. the Client Earth cases?)
  - 25 Year Env Plan to become world-leader in protector of natural world
  - Build upon the success achieved through EU membership
  - 1st generation to leave env in better state than inherited – bold ambitions.
- Increased calls for a new independent environmental policy with governance role.
- Current DEFRA Consultation – closes 2 Aug
  - Development of an Environmental Principles & Governance Bill.
  - New, world-leading, statutory and independent env watchdog to hold govt to account after Brexit
THANK YOU

James Alflatt
Partner, Head of EIA
IEMA Registered EIA Practitioner
t: 01603 229345
e: james.alflatt@bidwells.co.uk
www.bidwells.co.uk/eia