Scottish Government
Riaghaltas na h-Alba
gov.scot

ANNEX 1
Consultation on Environmental Impact Assessment amending Scottish Environmental Impact Assessment Regulations to transpose Directive 2014/52/EU

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response.

Are you responding as an individual or an organisation?

☐ Individual

☒ Organisation

Full name or organisation's name

Scottish Property Federation

Phone number

0131 220 6304

Address

6th Floor, 3 Cockburn Street, Edinburgh

Postcode

EH1 1QB

Email

mcatterall@bpf.org.uk

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

☒ Publish response with name

☐ Publish response only (anonymous)

☐ Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

☒ Yes

☐ No

Questionnaire

Please provide your feedback on these proposals in the form of responses to the questions below.

Regimes

If you are answering the consultation questions in relation to a particular regime, please select the relevant box clearly highlight which regime you are referring to in the comments section.

- ☐ Agriculture
- ☐ Energy
- ☐ Forestry
- ☐ Land Drainage
- ☐ Marine Works
- ☒ Planning
- ☐ Transport and Works Projects
- ☐ Trunk Roads

Section 1. Assessment Process

Q1. Do you agree with proposals to provide for a coordinated rather than joint procedure?

- ☒ Yes
- ☐ No
- ☐ Unsure

Comments

We have reservations in principle in relation to both options. While the same environmental baseline and survey information may be used to undertake each assessment under each regime, the legal requirements and evidential standards and the outcome of the two assessments are different (e.g. HRA requires the decision-maker to be "certain" of no adverse effect on integrity otherwise consent cannot be granted unless derogation criteria are met).

However, on the basis it is mandatory to implement one or other, **of the two options, a coordinated approach is preferable**.

In relation to the Scottish Government's proposed approach to a "coordinated procedure", it is unclear from the draft EIA Regulations exactly what is envisaged, in terms of procedure and how it may be expected to operate in practice. The proposed Regulation (55) is broad-brush and skeletal – it does little more than set a broad objective of seeking coordinated "where appropriate".

The EIA Directive envisages the appointment of a "lead authority". It is not clear from the draft Regulation if this is what is envisaged? The draft Regulation purports to oblige the LPA to ensure coordination (but qualified to circumstances where considered appropriate) and stops short of describing the LPA as a "lead authority" or giving them any specific powers in this regard to bring about coordination. We would anticipate amendment of the Habitats Regulations would also be required to give effect to any coordinated procedure but no such change is proposed.

At the very least, guidance is required as to how this will be approached in practice.

Q2. What would the regulatory impact be if legislation was introduced which required that no construction of any EIA development should take place until any operational permits or consents required under the Habitats and Birds Directives, Water Framework Directive, the Industrial Emissions Directive, the Waste Framework Directive or the SEVESO III Directive had been granted?
(Please provide details in the comments box below)

Comments

We disagree with the proposal to ensure that no construction takes place until all relevant operational permits are in place.

This is not a requirement of the EIA Directive and current regulation is considered adequate. If consent is needed to begin an activity, it must be obtained otherwise an offence may be committed. Conversely, activities authorised under each permit should be able to commence upon granting of the relevant permit (unless that activity cannot lawfully begin without some other consent being in place).

A blanket approach to the linking of permits is disproportionate, would reduce flexibility and would risk introducing further unnecessary delays to the implementation of projects. For example, this provision is likely to be problematic for large, phased projects or linear schemes. Initial development works at one end of the project would not have an effect on a water feature at the opposite end of the scheme but may be delayed if this proposal were adopted.

It seems to be envisaged that this would be introduced via the EIA Regulations but it is not clear exactly how, e.g. would it be a new statutory offence?

No research or evidence has been presented to suggest this is necessary or what the benefit would be.

It may also have significant implications for the way that consenting regimes operate. At present, for projects consented under the planning regime, local planning authorities consider the environmental implications of the development as part of their consideration of whether the use of land is suitable for the proposed project, while the Scottish Environmental Protection Agency and relevant authorities consider operational matters such as the control of emissions under their environmental permitting regime. Developers often wait for planning consent to be granted before applying for the environmental permit.

There is also an increased risk of challenge from third parties with potential costs and delays to projects and is likely to make the assessment process more complex and less manageable.

Q3. Do you have any further comments on the changes proposed to implement articles 1 and 2 of the EIA Directive?
(Please provide details in the comments box below)

Comments

No Comment

Section 2: Information to be Assessed

Q4. Will you have to change your current practice to take account of the risk of major accidents?

☐ Yes

☐ No

☐ Unsure

Comments

It is not possible to answer this question meaningfully in our view. The draft Regulations simply repeat and do not seek to interpret the language used in the EIA Directive and the consultation does not explain what the Scottish Government believe this to mean and what it may require in practice.

It is not clear what should be taken to be a "major accident" or "disaster". Nor is it clear when a risk (which may or may not be likely) needs to be considered. Is it only risks or events which are "likely"?

We would prefer that the draft Regulations provide greater clarity as to what it is that will be required. At the very least, some clear and early guidance is needed.

Q5. Do you consider that our approach to transposition of information to be assessed appropriately implements the requirements of the Directive?

☐ Yes

☐ No

☐ Unsure

Comments

We believe this aspect needs further consideration to ensure that the new requirements are clear.

Section 3: Screening

Q6. Will you have to change your current practices to meet the new screening requirements?

☒ Yes

☐ No

☐ Unsure

Comments

The draft Regulations set very wide characteristics for the purposes of EIA Development screening, which appear to apply to all projects, regardless of size or characteristics, in order to assess whether they need an EIA. This would bring smaller projects within the EIA, including those currently with Permitted Development Rights, dramatically increasing the number of projects which would need to be screened. There is also a proposed obligation on the developer to provide specific information to the LPA at the screening stage in accordance with the newly introduced 'Annex IIA', which includes a description of the mitigation measures to avoid significant impacts. The design would therefore need to be reasonably progressed before requesting a screening opinion, further delaying and complicating the already complex system.

Please see responses to questions 7 and 8.

Q7. Are you content with the current timescales for providing a screening opinion?

☐ Yes

☐ No

☐ Unsure

Comments

In our view the current periods (e.g. 21 days) should be retained, albeit subject (as proposed) to the ability to extend the period where the developer / applicant agrees to an extension. Competent authorities should (in general) not be able to extend the determination period unilaterally and 90 days (as a maximum time) should be for exceptional cases and not the norm.

We have some concern that the new discretionary power which would allow the decision-maker to serve notice *at any time* giving themselves more than 90 days could be open to abuse. Given the longest determination period in existing EIA Regulations is less than half the 90 day maximum and there will be a new option to extend by agreement, there is no clear need in the UK context to introduce any such mechanism.

If this is retained, it should be an exception rather than the norm. We would suggest it should be a requirement that any such notice is given at an early point (in the first week or two) when it should be readily apparent that there is an exceptional degree of complexity etc. and not late in the day when there may be a temptation to use this power when the real issue is lack of resource (not complexity).

There is also a risk of inconsistency in its use which needs to be monitored somehow - a project (e.g. wind farm) which may be routine in one authority area could be regarded as "complex" in another with less experience / exposure to that type of development.

As such, perhaps for an interim period (and subject to review / 'sunset provision'), there could be a notification requirements to Scottish Ministers with a power to ‘call-in’ so that its application can be monitored and dealt with consistently.

We assume that these deadlines only relate to the assessment of the environmental information and are not intended to extend to the decision on the application for the development consent, but it would be helpful for this to be clarified.

Q8. Do you consider that our approach to transposition of screening appropriately implements the requirements of the Directive?

☐ Yes

☐ No

☐ Unsure

Comments

The screening process, as drafted, would apply to all projects, regardless of size or characteristics, in order to assess whether they need an EIA. This would bring smaller projects within the EIA, including those currently with Permitted Development Rights, dramatically increasing the number of projects which would need to be screened. There is also a proposed obligation on the developer to provide specific information to the LPA at the screening stage in accordance with the newly introduced 'Annex II.A', which includes a description of the mitigation measures to avoid significant impacts. The design would therefore need to be reasonably progressed before requesting a screening opinion, further delaying and complicating the already complex system.

Section 4: EIA Report

Q9. Will you have to change your current practice to prepare a reasoned conclusion?

☐ Yes
☐ No
☐ Unsure

Comments

We would suggest consideration ought to be given to whether it is appropriate to adopt the exact language of the EIA Directive in this instance, i.e. the requirement that there be a 'reasoned conclusion'.

On one interpretation this is simply a codification of existing practice in that reasons should be given by decision-makers with the determination (which reasons would generally not be open to challenge save on the well understood grounds that they were 'Wednesbury unreasonable'). Another view might be that the requirement to provide a 'reasoned conclusion' goes further and may raise the bar as to what is required.

Q10. Do you consider that our approach to transposition of requirements concerning the content of the EIA report appropriately implements the Directive?

☐ Yes
☐ No
☐ Unsure

Comments

We have some concerns in relation to certain aspects of the approach to the content of the EIA Report.

(1) Scoping - The draft Regulations require that the EIA Report "must be based" on the formal scoping opinion that has been issued. In practice, scoping will often continue thereafter and often agreement is reached with statutory consultees on an alternative scope to that set out in the scoping opinion. The draft Regulations do not recognise this and would appear to tie the applicant to whatever is set out in the formal scoping opinion.

(2) The draft Regulations set out the information to be provided by the developer in its EIA Report and these include the "reasonable alternatives studied by the developer". This directly transposes the wording of the Directive. This aspect is ambiguous (e.g. does this require the developer to consider all reasonable alternatives or just report on the reasonable ones they have considered?) and continues to raises concerns. The straight transposition of the wording of the Directive into the draft Regulations offers no further clarity on the extent of this requirement.

The Scottish Government appear content to leave the precise meaning of this requirement to be established by evolving practice and potentially through the courts. At the very least, further guidance on this will be needed before the entry into force of the provisions.

There is also a question around the determination of relevance in relation to other assessments which must be taken into account in the preparation of the environmental impact assessment report.

Section 5: Scoping

Q11. Do you consider that our approach to transposition of scoping appropriately implements the requirements of the Directive?

- ☐ Yes
- ☐ No
- ☐ Unsure

Comments

Subject to the comments in response to Q10 above, the draft Regulations appear to adequately reflect the EIA Directive provisions.

Unduly burdensome requests for information from a developer are already a major problem. The use of EIA and their associated Environmental Statements as a "catch all" for addressing all impacts of a scheme is in our view a concern. Responses to scoping requests and consultation processes as part of the current system typically result in requests for very detailed, topic specific information without any bearing on whether this is relevant to the case in question or will assist in identifying potentially significant effects.

We would stress that scoping should not be the tick box exercise that it has become in so many cases. In order to avoid this, there should be a requirement on local authorities to explain why particular bits of data are needed. In the alternative, there could be an option put in place for the applicant to request such information in order to ensure that all information requested is relevant and necessary.

Section 6: Assessment quality and expertise

Q12. Do you consider that our approach to transposition of assessment quality and expertise appropriately implements the requirements of the Directive?

☐ Yes

☐ No

☐ Unsure

Comments

Some of our members caution against a restrictive definition of 'expertise' by way of reference to required accreditations so as to avoid unintended consequences, which may exclude relevant and suitably qualified practitioners from examining the EIA report.

The draft Regulations suggest that accredited experts must be used to prepare the environmental report, and/or by local authorities to verify the report. The intention is to improve the quality of the environmental assessment but it could add significant costs to the process. This proposal is aimed at improving the quality of the EIA, however, we are concerned that it will merely increase costs for the developer. The Directive already required Members States (MSs) to consult authorities with 'specific environmental responsibilities; who are qualified to comment on any aspect of environmental information that is considered deficient in any way'.

Some developers and competent authorities have in-house capacity of staff competent for EIA who are not necessarily accredited. Imposing accreditation will merely foster a whole new accreditation industry and may encourage consultants to over advise their clients.

Our members have raised concern that there is no clear definition of what constitutes qualified and/or accredited experts

Section 7. Consultation and Publicity

Q13. Do you consider that our approach to transposing consultation and publicity appropriately implements the requirements of Directive?

- ☐ Yes
- ☐ No
- ☐ Unsure

Comments

We note the draft Regulations require decision makers to consult with "*any other public body which the planning authority considers is likely to have an interest in the proposed development by reason of that body's specific environmental responsibilities or local and regional competencies*" as well as the usual, defined statutory consultees at the scoping stage and in relation to the Environmental Statement.

While the Scottish Government has not requested views on this specifically, we question the need for this "catch all" addition. It is not clear if the Scottish Government believe that there are any gaps in the existing list of consultee for any particular cases?

This new limb merely restates the EIA Directive and arguably creates ambiguity (which could lead to legal challenge) where previously there was certainty.

Consideration might also be given to whether this provides the flexibility that we assume intended, in that it is framed as an absolute obligation in all cases (i.e. must) rather than a right / option (i.e. may) in a given case. While it is for the LPA / Scottish Ministers to determine if there are relevant bodies, they may find themselves being challenged on account of omitting a body alleged to have an "interest in the proposed development".

Greater certainty is also needed as to which consultees would be approached and when.

Q14. Do you feel that the current arrangements for informing the public meet your needs?

- ☐ Yes
- ☐ No
- ☐ Unsure

Comments

No comment

Section 8. Monitoring

Q15. Do you consider that the regulations meet the requirements of the Directive concerning the information to be included in the development consent?

- ☐ Yes
- ☐ No
- ☐ Unsure

Comments

Of all the new measures, the requirement to monitor is the one which will have the biggest potential impact on developers, landowners and local planning authorities. Under Article 8a of the New Directive, and Regulation 30 of the draft Regulations, decision makers will be obliged to consider whether monitoring measures are required. Specifically, under the Regulations, they must consider 'whether monitoring measures are proportionate to the nature, location and size of the proposed development and the significance of the effects on the environment'.

In addition, if monitoring measures are required, the decision maker must consider whether provision should be made to require appropriate remedial action. The draft Regulations suggest that this would be provided for by way of Section 75 agreements or planning conditions, which must be enforced by the planning authority. Our members have serious concerns about the resulting additional costs and the impact this would have on the viability of developments.

Our members are also concerned about the requirement for the development consent to provide for the monitoring of significant adverse environmental effects, in order to assess the implementation and the expected effectiveness of mitigation and compensation measures and to identify any unforeseeable adverse effects. This may introduce scope for increased future mitigation if there are significant adverse effects.

It is unclear for how long this expensive post-consent monitoring must continue, but our members are concerned that it will place a hugely increased burden on the applicant and its usefulness to local authorities would need to be clear to ensure it does not become meaningless and wasteful. It also raises questions as to how realistic it is to attribute the relevant effects to one particular development, as opposed to a range of developments cumulatively. Given the current emphasis on facilitating sustainable development and economic growth, it makes no sense to place a hugely increased financial burden on large complex development schemes. For smaller scale developments that are only just within the scope of the EIA regime, the burden may be such that it prohibits such development taking place – with particularly detrimental repercussions for rural development and small scale commercial and housing projects. On-going monitoring obligations would be created for the Applicant, which could become an issue for developers wishing to 'sell on' a development shortly following consent, as there would be uncertainty in the duration of the monitoring (to be determined by the local authority), and a risk of unforeseen costs should this reveal that further mitigation is necessary over and above that anticipated.

Q16. What administrative changes are likely to be required to implement new provisions on the content of decision notices?

Comments

If a decision-maker has undertaken their own supplementary assessment drawing on their own information, we would envisage there would need to be administrative changes so as to allow for publicity and consultation on any substantive new environmental information before the decision is taken rather than this simply appearing in the report to committee / decision notice.

Q17. Do you consider that our approach to transposition of monitoring in the regulations implements the requirements of the Directive?

☒ Yes

☐ No

☐ Unsure

Comments

We agree this provision should be limited to residual "significant effects" as proposed. The approach is therefore, broadly, the right one subject to the following additional comments:

(1) It should be clear that the question of the proportionality of any monitoring must take account of the cost and its impact on the project and its viability. The monitoring should not result in excessive cost for minor environmental gain.

(2) We agree that any monitoring requirements should not duplicate monitoring that would be undertaken under other environmental or regulatory regimes. As planning is usually the first consent sought (with other environmental consents only applied for later after planning is in place), this could be difficult to achieve in practice. Consideration should be given to imposing a duty on the decision-maker to consult with the other environmental regulators before imposing monitoring requirements

Q18. Will you have to change your current practices to meet the new monitoring requirements?

☐ Yes

☐ No

☐ Unsure

Comments

The purpose of the required monitoring must be absolutely clear and directly related to the development. As stated in the consultation, all monitoring requirements should also be proportionate to the nature, location, size and likely significant effects of the project. Some of our members support the statement that monitoring must not be used as a general means of gathering environmental information and should not duplicate monitoring required for other reasons.

Section 9. Decision

Q19. Do you consider that our approach to transposition for decisions appropriately implements the requirements of the Directive?

☐ Yes

☐ No

☐ Unsure

Comments

The reasoned conclusion (an assessment made by the regulator as to the likely significant effects of the proposed development on the environment) needs to be "up to date" at the point of granting development consent.

The reasoned conclusion is considered to be "up to date" if it "addresses" the likely significant effects of the development. The word "addresses" could be taken to mean either "considers" or "resolves". We would suggest the language is considered further to avoid ambiguity.

As the draft Regulation effectively leaves it to the decision-maker to decide when the information is up to date, at the very least further guidance is required with examples otherwise we will face inconsistent approaches from one authority area to another.

Section 10. Conflict of interests

Q20. Do you consider that our approach to conflict of interest appropriately implements the requirements of the Directive?

☐ Yes

☐ No

☐ Unsure

Comments

No comment

Section 11. Penalties

Q21. Do you agree with proposals to introduce penalties and sanctions for knowingly or recklessly providing false information should be applied across all eight EIA regimes?

☐ Yes

☒ No

☐ Unsure

Comments

New penalties and sanctions should not be introduced without a very clear evidence base. It would appear to be the case that this is proposed merely on the basis that two (i.e. a clear minority of EIA Regulations) contain such provision and without any analysis as to whether (a) there is a problem to address (i.e. are applicants routinely providing false information?) and (b) is so, would such penalties and sanctions have much impact? Is there any evidence that the regimes which include such sanctions are more effective?

Section 12. Transitional Arrangements

Q22. Do you consider that our approach to transitional arrangements appropriately implements the requirements of the Directive?

☒ Yes

☐ No

☐ Unsure

Comments

The transitional arrangements seem appropriate.

Section 13 Other Policy Issues

Q23. Do you have any comments on the proposal by the forestry regime to increase the afforestation threshold for non-sensitive areas from 5 hectares to 20 Hectares?

Comments

No comment

Q24. Do you have any comments on the proposal by the marine regime to adopt the thresholds used by the planning regime where they are relevant to marine developments?

Comments

The general principle of adopting the same threshold for the same activity where it is regulated across various EIA Regulations seems sensible.

Q25. Do you have any comments on the new provisions for multi stage consents?

Comments

No comment

Q26. Do you currently use EIA guidance? If so please provide further details.

☒ Yes

☐ No

☐ Unsure

Comments

Our members use the guidance.

Q27. Is there any particular area or regime where you feel that guidance would be helpful?

Comments

Yes. Please see responses to questions 1, 4, 9, 13 and 19. Clearer guidance on the form and content of Environmental Statements and other requirements with the clear objective of simplifying and reducing the volume and range of the documentation required would also be very welcome.

Part 3 – Assessing Impact

Q28. Do you think that the proposals presented might impact on people differently depending on characteristics such as age, disability, gender, race, religion or belief, sexual orientation, gender identity or children's rights and wellbeing?

Comments

No comment

Q29. What do you consider are the likely costs and benefits arising from the changes outlined in this consultation paper?
(Please specify which of the Scottish EIA regimes your comments refer to.)

Comments

We believe that the proposals are likely to increase significantly the cost and time burdens on both developers and competent authorities. It is vital that the regulations aim to achieve an appropriate balance between protecting the environment and imposing burdens on developers and the competent national authorities. Given the current global economic situation, achieving this aim is as important as ever.

Q30. Do you have any comments on the Draft Partial Regulatory Impact Assessment?

Comments