

1. Title of Proposal

Transposition of the European Directive 2014/52/EU (the 'EIA Directive')

2. Purpose and intended effect

2.1 Background

The European Commission has set out a number of changes to the 2011 EIA Directive through EIA Directive 2014/52/EU. The requirements of the Environmental Impact Assessment (EIA) Directive form part of European law and must be incorporated into the domestic legislation of Member States. However, the Directive leaves it to Member States to decide how best to transpose these requirements into domestic law with effect from 16 May 2017.

EIA aims to ensure that the likely significant environmental effects of a development proposal are properly understood before any development consent is granted. EIA therefore provides a means of assessing the likely significant environmental effects of a proposal, and the potential for avoiding, reducing, or offsetting any adverse impacts.

2.2 Objectives

In Scotland there are eleven separate EIA regimes, as such the Scottish Government is responsible for the implementation of the European Directive across all eleven separate regimes. This BRIA assesses the potential business and regulatory impact resulting from the implemented changes of the Directive to the following regimes in Scotland; Planning, Energy Consents, Marine Licensing, Transport and Works Projects, Trunk Roads, Agriculture, Land Drainage, Forestry. Separate assessments will be undertaken for the Flooding, Controlled Activities Regulations and Ports and Harbours regimes.

The objective is to transpose the requirements of the amended Directive into the regulations in a manner that adheres to the guiding principles for transposition set out in current Scottish Government guidance. These principles ensure that the domestic regulations meet the minimum requirements of the Directive, and the implementing measures come into force by the transposition deadline. Where changes in the Directive are mandatory these will be transposed directly, where there are discretionary measures we will apply the principle of minimal additional regulatory burden whilst ensuring protection of the environment.

2.3 Rationale for Government Intervention

The requirements of the EIA Directive form part of European law and must be incorporated into the domestic legislation of Member States. As such Scottish Government intervention is required to transpose these requirements into our domestic legislation.

In Scotland there are eleven separate EIA regimes with their own competent authority/authorities and their own requisite legislation. As such there are a number of different statutory instruments which prescribe the process to assess the environmental impacts of a proposed project under a particular consenting regime.

The EIA Directive has been transposed into Scots Law through a number of Scottish Statutory Instruments relating to the individual EIA consenting regimes.

This BRIA covers the impact requirements of the Directive for the Planning, Energy consents, Marine Licensing, Trunk roads, Transport and Works projects, Agriculture (which now includes the previous Land Drainage regime) and Forestry regimes. Separate arrangements are being made in respect of Ports and Harbours, Flooding and Controlled Activities Regulations.

Legislation will be laid in Parliament to implement the changes to the EIA Directive as noted below with separate arrangements being made in respect of Ports and Harbours, Flooding and Controlled Activities Regulations. Listed below are the working titles for the legislation:

- The Town And Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017
- The Electricity Works (Environmental Impact Assessment) Regulations 2017
- The Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017
- The Transport and Works (Scotland) Act 2007 (Applications and Objections Procedure) Amendment Rules 2017
- The Transport and Works (Scotland) Act 2007 (Environmental Impact Assessment) Regulations 2017
- The Roads (Scotland) Act 1984 (Environmental Impact Assessment) Regulations 2017
- The Environmental Impact Assessment (Agriculture) (Scotland) Regulations 2017
- The Environmental Impact Assessment (Land Drainage) (Scotland) Regulations 2017
- The Environmental Impact Assessment (Forestry) (Scotland) Regulations 2017

Transposition will ensure the Scottish Government avoids infraction proceedings for late introduction of the Directive.

The changes contribute to delivering Scottish Government outcomes, by ensuring that assessments of the effects of certain projects on the environment are undertaken and that where appropriate mitigation measures are in place to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment. These changes in particular support the following National Performance Framework objectives:

- National Outcome 6: We live longer, healthier lives
- National Outcome 10 We live in well-designed, sustainable places where we are able to access the amenities and services we need;
- National Outcome 12: we value and enjoy our built and natural environment and protect it and enhance it for future generations
- National Outcome 14: we reduce the local and global environmental impact of our consumption and production.

The proposed regulations are also in line with the Scottish Government principles of better regulation and through the transposition of these new measures we will be seeking to ensure that revised legislation is proportionate; consistent; accountable; transparent; and targeted.

3. Consultation

The Scottish Government undertook extensive engagement on the European Commission's draft Directive¹. Responses received formed the basis of our approach to the consultative draft provisions. Full details of this early engagement are set out in the Scottish Government's 2013 Stakeholder Engagement Report².

Since the Directive was formally adopted, there has been continuing engagement and dialogue with stakeholders to inform the Scottish approach to transposition, including through our annual EIA and Development Management Forum, our participation and support for joint EIA training with Scottish Natural Heritage/Scottish Environment Protection Agency and Historic Environment Scotland, regular meetings with officials from the UK and other Devolved Administrations, monthly meetings of the Scottish Transposition Advisory Group.

Prior to the public consultation we have also sought views from the following bodies:

- Convention of Scottish Local Authorities;
- Scottish Environment Protection Agency;
- Scottish Natural Heritage;
- Historic Environment Scotland; and
- Heads of Planning Scotland.

3.1 Public Consultation

The approach to the transposition will be subject to full public consultation for 12 weeks from 09 August to 31 October 2016. This will be accompanied by two sets of draft legislation, Town And Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 and the Electricity Works (Environmental Impact Assessment) Regulations 2017. Comments will be invited on all the regimes. Where there are differences in how regimes have applied the Directive these will be highlighted throughout the consultation.

As well as the written consultation we will also be meeting with Scottish Natural Heritage, the Scottish Environment Protection Agency, Historic Environment Scotland, COSLA, the Heads of Planning Scotland and all competent authorities throughout the consultation period.

3.2 Business

During the consultation we will be holding a one day seminar to which a variety of stakeholders and developers will be invited. Following the consultation process we will develop a full BRIA to assess the costs and benefits of the proposed changes.

¹ Proposal for amending Directive 2011/92/EU (European Commission October 2012)
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012PC0628>

² EIA Directive Proposals: Stakeholder Engagement Report (Scottish Government, May 2013).
<http://www.gov.scot/Resource/0042/00422324.pdf>

4. Options

The following options were considered:

Option 1: 'Do nothing'

This would mean maintaining the current sets of Scottish EIA regulations without transposing the requirements of the Directive.

Choosing this option would result in being open to the European Commission initiating infringement proceedings against Scotland through the UK for failure to implement the Directive, potentially leading to fines imposed by the European Court.

Option 2: 'Implement the EIA Directive'

This would mean implementing the Directive in accordance with the Government's principles for transposing European Directives. This will ensure compliance with the amended Directive in a way that minimises regulatory burden whilst ensuring protection for our environment.

We will be transposing the Directive using the Scottish Government's Better Regulation agenda which seeks to support and promote sustainable economic growth through ensuring that regulation adheres to the five Principles of Better Regulation. These Principles provide that regulation should be: proportionate; consistent; accountable; transparent; and targeted.

4.1 Benefits

Option 1 'Do nothing'

This would mean that there would be no familiarisation costs to competent authorities and no potential costs to competent authorities from reviewing and making changes to their operational policies and practices. No costs to developers, competent authorities and statutory consultees.

Option 2: 'Implement the EIA Directive'

The amended Directive allows for the consideration of mitigation measures at the screening stage which will reduce the number of project applications requiring an EIA.

The Better Regulation principles should bring about more consistency across the various regulations. The introduction through article 3 of the Directive of an assessment based on 'significant' effects³ should reduce the number of EIAs.

The anticipated benefits of the main changes are set out below.

³ Informal consolidated version of EIA Directive
http://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf

4.2 Costs

Option 1 'Do nothing'

There are no direct monetary costs associated with this option. However this would result in being open to the European Commission initiating infraction proceeding against Scotland potentially leading to fines imposed by the European Court.

Option 2: 'Implement the EIA Directive'

The main direct financial costs arising from the Directive fall to developers in commissioning consultants to prepare an EIA Report. These costs are unlikely to change. There are also procedural and administrative obligations falling to Competent Authorities and the Statutory Consultees, including SEPA, SNH and Historic Environment Scotland.

The anticipated costs resulting from the amendments are set out below.

Assessment Process

The Directive defines the environmental impact assessment process for the first time and introduces the requirement for competent authorities to provide a reasoned conclusion which describes the impacts on the environment and the manner in which they have been dealt with.

Most competent authorities already detail their reasoning behind a decision. The consultation will ask a question seeking views on the potential effects of these changes.

Information to be Assessed

The Directive sets out broad requirements of the environmental factors that have to be considered in the assessment. The Directive replaces 'Human Health' with 'Population and Human Health', providing an example of the risks to human health as being due to water contamination or air pollution. We consider this is already taken into account and the change is therefore unlikely to have any additional impacts.

The Directive replaces 'Flora and Fauna' with 'Biodiversity'. We consider this is already taken into account and the change is therefore unlikely to have any additional impacts. It further defines 'cultural heritage' to comprise sites of historical, cultural or archaeological significance and the landscape which is aimed at addressing the impact of projects in environmental impact assessments. This is already taken into account in practice and is therefore unlikely to have any additional impacts

In the aftermath of the Japanese earthquake and tsunami that caused a major accident at the Fukushima Nuclear Power Plant the Directive asks that developers should consider if the project is vulnerable to risks of major accidents and natural disasters, including those caused by climate change.

The consultation will ask a question seeking views on the potential effects of these changes.

In the case of projects for which there is an obligation to carry out an assessment under the EIA Directive and also under the Habitats and/or Birds Directives, the EIA Directive requires that either a coordinated procedure or a joint procedure should be used. The coordinated procedure is undertaken by designating a lead authority to coordinate the individual assessments.

We feel that coordinated procedures offer the greatest flexibility for developers around the phasing and timing of EIA and Habitats Regulations Appraisal (HRA). The introduction of Joint or Coordinated Procedures should streamline the process and remove the risk of developers having to provide two separate sets of information.

Screening

The Directive introduces a more detailed list of information to be provided by the developer to enable screening when requesting a screening opinion on whether an EIA is required. The screening will identify if the project will likely have a significant adverse effect on the environment and should therefore be subject to an assessment.

The intention is that screening will be subject to clear upfront requirements in terms of data to be provided, which should help developers identify how they can avoid significant environmental effects at an early stage in their project's development. Legislating for early identification and consideration of significant effects will lead to a higher workload for all parties but should help to reduce the need for environmental impact assessment for a greater number of projects saving time in the long run. It should be noted that where proposed mitigation measures have meant that an EIA Report is not required, that failure to comply with the mitigation could lead to the project being re-screened.

In 2010 a Joint Statement⁴ was issued in Scotland by Architecture and Design Scotland, Forestry Commission Scotland, Historic Scotland, Scottish Environment Protection Agency, Scottish Natural Heritage, Scottish Water and Transport Scotland on pre-application engagement for National and Major Developments. The Joint Statement sets out a practical framework by which the agencies will deliver their commitment to effective and timely pre-application engagement with developers and planning authorities in relation to developments of national or major significance. The introduction of early engagement will further enable the Key Agencies Group to meet their commitments.

EIA Report

The Directive sets out in detail the content to be included in the EIA Report including a non-technical summary, mitigation measures and reasonable alternatives. The intention is to provide more certainty for the developer when preparing their EIA Report.

The key change is that the scope of the issues has expanded but should only be included in the assessment where there is likely to be a significant effect.

While the range of issues has expanded it is questionable, given the wide scope of existing environmental impact assessments, whether this will in practice result in further assessment work than is undertaken currently.

Scoping

The Directive has stated that Member States can decide to make it mandatory that competent authorities have to give a scoping opinion irrespective of whether the developer so requests. The premise is that scoping ensures that only the topics that need to be covered would be scoped in leading to more concise EIA Reports.

We do not propose to make scoping a statutory obligation.

⁴ Joint Agencies Statement <http://www.snh.gov.uk/docs/A668043.pdf>

Competent Experts

The Directive states that the developer shall ensure that the EIA Report is prepared by competent experts and that the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report.

Given the diverse range of EIA topics and different areas of specialist expertise, we do not propose to define in legislation any particular route to or procedures for accreditation in this respect.

Part of the environmental impact assessment process is to consult with statutory consultees such as Scottish Environment Protection Agency, Scottish Natural Heritage and Historic Environment Scotland and to take into account the consultees' comments; however there are issues where no statutory consultee has special expertise or a remit.

Consultation & Publicity

The Directive states that competent authorities should make the information available electronically through easily accessible points of access. This is in line with current practice for most regimes.

It also states that the timeframe for consulting with authorities should be no shorter than 30 days and that the information obtained from the consultees should be duly taken into account in the development consent procedure.

Most regimes have a longer timeframe than 30 days for consulting and the few that have 28 days will increase them to meet the new requirement. An increase of 2 days in the minimum consultation period for certain regimes will have minimal, if any, impact on business.

Monitoring

The Directive requires, for the first time, that the decision to grant development consent should include, where appropriate, monitoring measures. The development consent should set out the type of parameters to be monitored and the duration of the monitoring which should be proportionate to the nature, location and size of the project and the significance of its effects on the environment.

Existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication.

There may be some additional costs to developers in implementing monitoring measures. We would expect this to be minimal as monitoring is already considered and put in place where the competent authority considers it is required.

Decision

The Directive requires that competent authorities must make their decision regarding development consent within a reasonable period of time. Each regime currently has its own timescales dependant on the complexity of the project in line with the Directive. This will have no direct impact on business arising from the new regulations.

The Directive requires that the competent authority's reasoned conclusion shall be up-to-date, but does not set out what "up-to-date" means in this context.

The onus will be on the competent authority to ensure that they are satisfied, having regard to current knowledge and methods of assessment, that the reasoned conclusion addresses the likely significant effects of the development on the environment. This is in line with current practice and is unlikely to have any additional impact on business as a consequence of the regulations.

Conflict of Interest

The Directive requires that the competent authority must perform their duties arising from the Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest.

Where the competent authority is also the developer there has to be in place appropriate separation between conflicting functions when performing the duties arising from this Directive. The new provision is not expected to have an impact on business.

Penalties

The Directive requires that we lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.

The consultation includes proposals to introduce sanctions for any developer who knowingly or recklessly provides false information. It is anticipated that this is unlikely to be an issue in practice therefore there should be little burden, if any, arising.

Transitional Arrangements

The Directive has set out transitional measures concerning certain applications for EIA screening of those projects which are listed in Annex II of the 2011 Directive. Where an application for screening for such projects has been initiated prior to 16 May 2017 then that screening application will be subject to the current 2011 Directive.

It also provides transitional measures whereby the current 2011 Directive will continue to apply, as unamended by the 2014 Directive, for applications in which the developer has, before 16th May 2017, submitted an environmental statement or where a scoping opinion has been sought. These measures will allow business to proceed as normal.

4.3 Sectors and groups affected

The transposition will affect competent authorities, statutory consultees, developers and third parties.

Competent authorities

Planning and Architecture Division;
Energy and Climate Change Directorate;
Rural Payments and Inspections Division;
Marine Scotland;
Scottish Ministers;
Forestry Commissioners;
Local Planning Authorities; and
National Park Authorities.

Statutory consultees (not all applicable to each regime)

Scottish Environment Protection Agency;

Scottish Natural Heritage;

Historic Environment Scotland;

Scottish Water;

The Health and Safety Executive;

Local Authorities

For the purposes of fish farm development, District Salmon Fishery Boards

Third parties

Non-statutory consultees

The public

Enforcement, sanctions and monitoring

Permissions granted in breach of the new EIA regulations will remain vulnerable to court challenges.

Implementation and delivery plan and Post-implementation review

The Scottish Government is committed to transposing the Directive to legislation. The new legislation will come into effect on 16 May 2017. Similar legislation will come into force throughout the UK.

Article 12(2) of the new Directive requires that every 6 years from 16 May 2017 that Member states shall inform the Commission of the number of projects made subject to an environmental impact assessment, a breakdown of environmental impact assessments according to the project categories, the number of projects made subject to a determination, the average duration of the environmental impact assessment process, and a general estimates on the average direct costs of environmental impact assessments, including the impact from the application of this Directive to SMEs.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business will be assessed with the support of businesses in Scotland.

Signed:

A handwritten signature in blue ink, appearing to read "R. Cunningham".

Date: 26 July, 2016

Roseanna Cunningham Cabinet Secretary for Environment, Climate Change and Land Reform

Scottish Government Contact point:

Bill Brash
EIA Transposition Team
Scottish Government
Area 2H South
Victoria Quay
Edinburgh
EH6 6QQ

Tel: 0131 244 0039
Email: bill.brash@gov.scot