

## **EXECUTIVE NOTE**

### **THE ENVIRONMENTAL IMPACT ASSESSMENT (SCOTLAND) REGULATIONS 2006 (S.S.I 2006/614)**

The above instrument was made in exercise of powers conferred on the Scottish Ministers by Section 2(2) of the European Communities Act 1972 and section 40 of the Town and Country Planning (Scotland) Act 1997. The instrument is subject to a negative resolution procedure.

## **POLICY OBJECTIVES**

### **Introduction**

The purpose of the above instrument is to transpose Article 3 of European Commission Directive 2003/35/EC on Public Participation (the PPD) into four of the Environmental Impact Assessment regimes currently in force in Scotland and amend the UK wide EIA (Fish Farming in Marine Waters) Regulations 1999 so far as they apply to Scotland. Article 3 inserts amendments into various Articles of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (the EIA Directive).

### **Background**

The PPD is concerned with the rights of the public to participate in the decision-making process in a range of environmental matters. The PPD lays down general rules for ensuring public participation rights in the preparation or review of relevant plans and programmes. It has two main strands. This Statutory Instrument is, however, concerned solely with implementing the required amendments to public participation rights set out in the EIA Directive.

The PPD brings Community legislation into line with the public participation provisions of the Aarhus Convention, importing much of the wording used in the Convention. To comply with the requirements of the PPD, Scottish Ministers are required to legislate to give effect to this Directive. This Scottish Statutory Instrument will amend three sets of existing EIA provisions and one statute, the Roads (Scotland) Act 1984. These are:

- Town and Country Planning and Land Drainage - Environmental Impact Assessment (Scotland) Regulations 1999 –SSI 1999/1
- Trunk Roads – Roads (Scotland) Act 1984 c. 54
- Forestry – Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999. SSI 1999/43
- Marine Fish Farming – The Environmental Impact Assessment (Fish Farming in Marine Waters) Regulations 1999. SI 1999/367

## **The Changes**

This Scottish Statutory Instrument will amend the above legislation to strengthen and clarify the regulations as per the requirements of the PPD. These changes include arrangements for public participation, information to be made available to the public and the public concerned, and the provision to provide for non governmental organizations (NGOs) promoting environmental protection to seek review before a court. The Executive is also using this opportunity to amend/update a small number of existing provisions in the above legislation. These include amending the definition of consultation bodies to include other bodies designated by statutory provisions as having specific environmental responsibilities, the inclusion of requirements pertaining to the Environmental Information (Scotland) Regulations 2004 and the inclusion of National Parks as “sensitive areas” in the Forestry and Fish Farming in Marine Waters regulations.

## **CONSULTATION**

A draft of the instrument was the subject of public consultation, having been contained in the consultation paper *Public Participation in Environmental Impact Assessment*, published by the Scottish Executive in May 2005. This consultation paper was part of a suite setting out the Scottish Executive’s proposals for implementing the PPD and was distributed widely to a diverse range of organizations and individuals. The organisations consulted included all planning authorities, potentially affected members of industry such as Scottish Quality Salmon and Scottish Power, and environmental groups such as Friends of the Earth (Scotland) and the Scottish Wildlife Trust. The consultation generated a total of 35 responses. The comments made by respondents helped to inform Ministers in their consideration of the consultation proposals and in the production of the final statutory instrument. A consultation report covering the responses received during the consultation period was published in September 2006.

## **FINANCIAL EFFECTS**

A draft partial Regulatory Impact Assessment was included as part of the consultation. This draft RIA concluded that there would be no extra costs to businesses, however responses to the consultation felt that there would be increased costs to businesses. It is the Scottish Executive’s view that the burden of the additional requirements will fall mainly on Planning Authorities and the Scottish Ministers and concern the detail of the information to be publicised for EIA applications. There may be some increased costs to businesses through the requirement to advertise additional information, however it is anticipated that these costs will be minimal in comparison to the costs of preparing a statement and any fee that applications might attract. The RIA accompanies this Note.

## **REGULATORY IMPACT ASSESSMENT**

of proposed regulations to amend Environmental Impact Assessment legislation in Scotland to implement amendments to Directive 85/337/EEC made by Article 3 of Directive 2003/35/EC.

### **1. Title**

Regulatory Impact Assessment for Transposing Article 3 of the Public Participation Directive (2003/35/EC) in Scotland

### **2. Purpose and Intended Effect of the Measures**

#### **The Objective**

The objective is to transpose into certain national legislation, by regulation, the amendment of Directive 85/337/EEC (on the assessment of the effects of certain public and private projects on the environment, otherwise known as “the EIA Directive” made by Article 3 of Directive 2003/35/EC (known as the Directive on public participation or “the Public Participation Directive”). One of the Directive’s objectives is to improve the public participation within the EIA Directive. Article 6 of the Public Participation Directive required Member States to comply with the Directive by 25 June 2005.

This regulatory impact assessment refers to the transposition of amendments to the EIA Directive made by Article 3 of the Public Participation Directive into certain EIA regimes in Scotland<sup>1</sup>. While many of the requirements contained in Article 3 of the Public Participation Directive are already provided for in existing Environmental Impact Assessment regulations, further amendments are proposed to fully implement its provisions.

#### **Background & Risk Assessment**

The importance of fostering increased public participation in environmental decision-making was recognised at the international level in the UNECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (“the Aarhus Convention”) which the Community signed on 25 June 1998 and which has also been signed by the UK. Since signing the Aarhus Convention in 1998, the EU has taken steps to update existing legal provisions in order to meet the requirements of the Aarhus Convention by means of legislation directed to Member States. The main legal instrument used to align Community legislation with the provisions of the Aarhus Convention on public participation is the Public Participation Directive. Directive 85/337/EEC, as amended by Directive 97/11/EC, was first transposed in Scotland in 1988. These regulations were subsequently

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<sup>1</sup>Amendments are proposed to three sets of existing EIA provisions and one statute. These are; Trunk Roads - the Roads (Scotland) Act 1984, c.54; Town and Country Planning and Land Drainage The Environmental Impact Assessment (Scotland) Regulations; SSI 1999/1; Forestry - Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999. SSI 1999/43; and Marine Fish Farming - The Environmental Impact Assessment (Fish Farming in Marine Waters) Regulations 1999 SI 1999/367.

added to and updated to take account of amendments to the EIA Directive adopted in 1997. Similar Regulations have been made for the rest of the UK.

The main aim of the EIA Directive is to ensure that the authority giving the primary consent for a particular project to proceed makes its decision in the full knowledge of any likely significant effects on the environment. The Directive therefore sets out a procedure that must be followed for certain types of project before they can be given 'development consent'. This procedure – known as Environmental Impact Assessment (EIA) – is a means of drawing together, in a systematic way, an assessment of a project's likely significant environmental effects. This helps to ensure that the importance of the predicted effects, and the scope for reducing them, are properly understood by the public and the relevant competent authority before it makes its decision.

Article 2 of the EIA Directive provides that EIA may be integrated into existing procedures for consent to projects in Member States. In Scotland the majority of projects fall within the planning system and for these projects the EIA Directive is implemented through Part II of The Environmental Impact Assessment (Scotland) Regulations 1999. A smaller number of projects are picked up by other consent regimes to which separate EIA regulations apply.

This impact appraisal deals primarily with the Regulations in relation to planning. Paragraphs 13-16 refer specifically to Trunk Roads; Land Drainage, Forestry and Marine Fish Farming legislation respectively.

If the UK does not transpose the Public Participation Directive, it will be subject to infraction proceedings by the European Commission.

There are no associated health effects. The Public Participation Directive is about public consultation and not about setting environmental targets or standards.

### **3. Options**

#### **Option 1: Do Nothing**

This is not a realistic or desirable option. Our obligations under EU law must be implemented by legislative means and an alternative method of implementation is not possible. Failure to implement properly will result in proceedings in the European Court of Justice and an increased risk of challenge on individual consent decisions.

#### **Option 2: Transpose into UK law using Regulations**

The Directive on public participation places an obligation on Member States to ensure that the Directive is transposed by 25th June 2005. In transposing the Directive into national legislation, it is necessary to place an obligation on an individual or organisation with the powers to ensure that the Directive's objectives are met as far as possible. It is for this reason that it is proposed to transpose the Directive's amendment of Directive 85/337/EEC into national legislation, including through the means described above.

## **4. Benefits**

### **Option 1**

There are no benefits associated with this option, as by failing to transpose The UK would risk infraction proceedings by the European Commission.

### **Option 2**

Planning authorities and Scottish Ministers frequently take decisions which may have a significant effect on the environment. Effective public participation in the decision making process has several benefits. It enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to the decisions in question. This increases the accountability and transparency of the decision-making process and contributes to public awareness of environmental issues. The current regulations already contain a number of provisions aimed at securing effective public participation. The proposed amendments will serve to strengthen those provisions.

## **5. Costs**

### **Compliance costs**

#### **- Option 1**

Failure to transpose could result in considerable costs if successful infraction proceedings were brought against the UK by the European Commission.

#### **- Option 2**

Many of the requirements of the amendment to Directive 85/337/EEC are already implemented under existing legislation. The burden of the additional requirements will fall mainly on Planning Authorities and the Scottish Ministers and concern the detail of the information to be publicised for EIA applications. There may be some increased costs to businesses through the requirement to advertise additional information, however it is anticipated that these costs will be minimal in comparison to the costs of preparing a statement and any fee that applications might attract.

Specific provision is proposed to implement new article 10A of the EIA Directive in giving special standing to environmental NGOs to challenge decisions, acts or omissions subject to the public participation provisions of the EIA Directive. The Executive do not anticipate any significant costs to industry or to small business as a result of this specific change, over and above those associated with compliance with the Regulations.

The amendment whereby the present exemption for projects serving national defence purposes will apply only where compliance with EIA requirements would have an adverse effect on such purposes, should have a minimal impact. Environmental Statements are already provided for such projects in appropriate circumstances and subject to national security considerations. As national defence is a reserved matter this will be dealt with through the English regulations.

## **6. Business Sectors affected**

The burden of the additional procedural requirements will fall mainly on Local (or competent) Authorities and the Scottish Ministers, However some procedural and financial requirements may fall to developers. It is expected that business sectors affected will be mainly larger scale developers.

## **7. Compliance costs for business**

The Executive do not consider there will any significant costs over and above those associated with compliance with the Regulations.

## **8. Issues of Equity and Fairness**

None. The burden of the additional procedural requirements will fall mainly on Planning Authorities and the Scottish Ministers.

## **9. Consultation with small business: the Small Firms' Impact Tests**

No direct costs to small businesses are anticipated. A small Firm's Impact Test has therefore not been carried out.

## **10. Enforcement and Sanctions**

Permissions granted in breach of the Regulations are vulnerable to court challenges; there is no change in this respect.

## **11. Monitoring and Review**

The Directive requires Member States to provide information to the European Commission on their application of the Directive. In line with Scottish Executive guidelines we will review the legislation within 10 years of it coming into force.

## **12. Consultation**

### **Within Government**

UK Government Departments, in consultation with the Scottish Executive, consulted on the UK position in the negotiation of the Public Participation Directive as a whole.

### **Public consultation**

A full public consultation on the policy to deliver option 2 has been undertaken. A partial regulatory impact assessment was included in the consultation and respondents were asked their views on it's contents. Their comments have been taken into account in this assessment.

### **13. Trunk Roads**

The provisions in the proposed regulations dealing with trunk roads would amend the procedures set out in the Roads (Scotland) Act 1984 as amended by the Environmental Impact Assessment (Scotland) Regulations 1999.

Sections 1 to 4, 8 and 10 to 12 of this Regulatory Impact Assessment apply to the proposed regulations to amend the Environmental Impact Assessment legislation in Scotland with respect to trunk roads.

The costs associated with the new procedures in the proposed regulations will fall on Scottish Ministers as the competent authority. In the case of trunk roads, Scottish Ministers are also the developer. Few trunk road schemes are promoted in partnership with Local Authorities. The majority of costs for these are borne by the Scottish Executive.

Many of the requirements of amendment to the EIA Directive are already implemented under existing legislation. The burden of the additional requirements will fall to the Scottish Ministers and concern the detail of the information to be publicised regarding the environmental impact assessment procedure. Many of the proposed amendments to the regulations are in fact currently carried out by Scottish Ministers during this procedure. It is anticipated that the costs to Scottish Ministers (and any Local Authority partner) will be minimal in comparison to the costs of preparing a statement.

Specific provision is proposed to implement new article 10A of the EIA Directive in giving special standing to environmental NGOs to challenge decisions, acts or omissions subject to the public participation provisions of the EIA Directive. There is not anticipated to be any substantive additional cost to Scottish Ministers in terms of this provision.

### **14. Land Drainage**

The provisions in the proposed regulations dealing with land drainage would amend the procedures set out in the Land Drainage Environmental Impact Assessment (Scotland) Regulations 1999, SSI 1999/1 ('the Regulations'). The Regulations apply to proposed drainage works which are likely to have significant effects on the environment by virtue inter alia of their nature, size or location and for which authority under the Land Drainage (Scotland) Act 1958 to execute these works is sought from the Scottish Ministers on or after 1 August 1999.

Sections 1 to 5 and 7 to 12 of this Regulatory Impact Assessment apply to the proposed regulations to amend the Environmental Impact Assessment legislation in Scotland with respect to land drainage works outlined above.

Land Drainage projects under the Land Drainage (Scotland) Act 1958 are very rare and those which are the subject of an Environmental Impact Assessment are even less common. Many of the requirements of amendment to the EIA Directive are already implemented under existing legislation. The cost of implementing the additional requirements will fall mainly on the Scottish Ministers as the competent authority and concern the detail of the information to be publicised for EIA applications. The cost to Scottish Ministers is expected to be de minimis.

Specific provision is proposed to implement new article 10A of the EIA Directive in giving special standing to environmental NGOs to challenge decisions, acts or omissions subject to the public participation provisions of the EIA Directive. There is not anticipated to be any significant additional cost to Scottish Ministers or the agricultural landowners coming within the auspices of the regulations as a result of this specific change, over and above those associated with compliance with the Regulations

## **15. Forestry**

The provisions in the proposed regulations dealing with forestry would amend the procedures set out in the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999.

Sections 1 to 5 and 7 to 12 of this Regulatory Impact Assessment apply to the proposed regulations to amend the Environmental Impact Assessment legislation in Scotland with respect to forestry. The costs associated with the new procedures in the proposed regulations will fall on the Forestry Commissioners and the Scottish Ministers as the competent authority.

Many of the requirements of amendment to the EIA Directive are already implemented under existing legislation. The burden of the additional requirements will fall to the Forestry Commissioners and Scottish Ministers and concern the detail of the information to be publicised regarding the environmental impact assessment procedure. Many of the proposed amendments to the regulations are in fact currently carried out by the Forestry Commissioners and Scottish Ministers during this procedure. The additional cost will therefore be de minimis.

## **16. Marine Fish Farming**

The provisions in the proposed regulations dealing with marine fish farming would amend the procedures set out in the Environmental Impact Assessment (Fish Farming in Marine Waters) Regulations 1999, in so far as they relate to Scotland.

Sections 1 to 5 and 7 to 12 of this Regulatory Impact Assessment apply to the proposed regulations to amend the Environmental Impact Assessment legislation in Scotland with respect to marine fish farms.

Any costs associated with the new procedures in the proposed regulations may fall on the applicant and relevant authority concerned.

Many of the requirements of amendment to the EIA Directive are already implemented under existing legislation. The burden of the additional requirements will fall to the relevant authorities and concern the detail of the information to be publicised regarding the environmental impact assessment procedure. Many of the proposed amendments to the regulations are in fact currently carried out by applicants and relevant authorities during this procedure. The cost to both applicants and relevant authorities will be de minimis.

Specific provision is proposed to implement new article 10A of the EIA Directive in giving special standing to environmental NGOs to challenge decisions, acts or omissions subject to

the public participation provisions of the EIA Directive. We do not anticipate any significant costs to relevant authorities in terms of this provision.

## **17. Summary and Recommendations**

The proposed amendments to the regulations are necessary in order to transpose the amendment of Directive 85/337/EEC made by the Public Participation Directive. Many of those requirements were previously in place within the regulations or as recommended in guidance. Additional burdens and their attendant costs are not considered substantive in comparison to the overall costs of preparing a statement and any fee that such applications may attract. It is our recommendation that we transpose the amendment of Directive 85/337/EEC made by the Public Participation Directive by making appropriate amendments to the EIA Regulations.

## **18. Declaration**

**I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.**

*Signed: D McNulty.....*

*Date: 21<sup>st</sup> December 2006.....*

**Des McNulty**  
**Deputy Minister for Communities**