

POLICY NOTE

THE FORESTRY (ENVIRONMENTAL IMPACT ASSESSMENT) (SCOTLAND) REGULATIONS 2017

SSI 2017/113

The above instrument was made in exercise of the powers conferred by Section 2(2) of the European Communities Act 1972 and section 56 of the Finance Act 1973. The instrument is subject to negative procedure.

Policy Objectives

Introduction

The purpose of the Regulations is to consolidate, with amendments to, the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999 (“the 1999 Regulations”) in order to transpose paragraphs (1) to (15) of Article 1 of Directive 2014/52/EU (“the 2014 Directive”) which itself amends Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (“the 2011 Directive”). The Regulations integrate environmental considerations into the preparation of projects in the Scottish Forestry System with a view to reducing their environmental impact.

The 2011 Directive aims to ensure the authority giving the primary consent for a particular project makes its decision in full knowledge of any likely significant effects on the environment. New provisions take into account the requirements of the 2014 Directive, which seek to define, clarify and expand upon aspects of the assessment process, on the basis of minimal additional regulatory burden, whilst ensuring protection of the environment.

Key changes

The following is a summary of the main changes made to the 2011 Directive by the 2014 Directive as they apply to the Scottish Forestry System. The 2014 Directive also makes allowance for some transitional arrangements. References to “current” requirements in this note are to those under the 2011 Directive before amendment by the 2014 Directive.

Environmental Impact Assessment Process

Article 1(1) of the 2014 Directive introduces a definition of “environmental impact assessment”. This sets out what an environmental impact assessment process is to consist of and regulation 5 transposes this. The process starts by the applicant preparing an Environmental Impact Assessment (EIA) report. The content of this is set out in regulation 6. The changes made by the 2014 Directive now specifically refer to a “report”. This is, in effect, what is currently referred to in the 1999 Regulations as the “environmental statement”. The Regulations now refer to an EIA report rather than to an environmental statement.

The next step in the EIA process is the carrying out of consultations required under Article 6 and where relevant Article 7. The 2014 Directive includes some procedural changes including a new express requirement to make information available

electronically as provided for in regulation 23(1)(a). The requirement to consult is an existing requirement of the 2011 Regulations.

The 2014 Directive requires the competent authority to reach a ‘reasoned conclusion’ on the significant effects of the project on the environment and to integrate its reasoned conclusions into its decision. Regulations 5(1)(c), 5(1)(d) and 5(1)(e) transpose these requirements. In the Scottish Forestry System, the competent authority is defined as the Forestry Commissioners (“the Commissioners”) constituted under the Forestry Acts 1919 to 1945 and preserved in existence by section 1 of the Forestry Act 1967 c.10).

Regulation 9(3) sets out the powers to disapply the Regulations in respect of projects whose purpose is in response to civil emergencies. This power of exemption was introduced by Article 1(b) of the 2014 Directive.

The main change made by Article 1(2) of the 2014 Directive is the introduction of a new requirement in Article 2(3) of the 2011 Directive to carry out, where appropriate, coordinated or joint procedures for EIA and assessments required under the Habitats and Wild Birds Directives. This is transposed by regulation 37.

Screening

The determination that a project should be made subject to EIA, is known as a screening opinion. Changes made to Article 4(4) of the 2011 Directive introduce a requirement for the applicant is to provide certain information on the characteristics of the project and its likely significant effects to enable a screening opinion to be made. This requirement is set out in regulations 12(2) and 12(4). Regulation 12(3) specifically allows the applicant to include a description of mitigation measures which include both features of the project and other measures which are envisaged to avoid or prevent significant adverse effects on the environment.

Article 4(5) of the 2011 Directive, as amended, requires the competent authority (the Commissioners in the Regulation) to make its screening opinion on the basis of the information provided by the applicant but also taking into account the results of other assessments carried out pursuant to other EU legislation. These requirements are to be found in regulation 11(1)(a)(ii).

Under current requirements the screening opinion had to be made public but reasons did not have to be given for negative screening opinions unless asked for. Article 4(5) of the 2011 Directive now also requires the main reasons for screening opinions to be given and that to be done with reference to the Annex III criteria. Regulations 11(1)(a) and 11(3)(a) transpose these requirements. Article 4(5)(b) of the 2011 Directive also requires – where there is a negative screening opinion – the determination to set out any proposed mitigation measures and this requirement is contained in regulation 11(3)(b).

Article 4(6) of the 2011 Directive as amended introduces new time limits for making screening opinions. These should be made as soon as possible after the submission of the requisite information by the applicant but in any event no later than 90 days after that date. There is room for an exception in “exceptional cases” but this needs to be justified and the applicant informed. Regulation 13 transposes the relevant provisions.

EIA report

Article 5(1) is amended by the 2014 Directive. It refers to the submission of an EIA report and sets out what it is to contain. Regulation 6(3) and schedule 3 sets out what an EIA report has to contain. The applicant is now specifically required to base the EIA report on the scoping opinion, if one has been issued, and to ensure that the EIA report is prepared by “competent experts”. This is required by regulation 6(4) and 6(6), respectively.

The 2014 Directive also introduces an express duty, in Article 5(3)(c), on competent authorities to seek further information (in accordance with Annex IV) from the applicant in order to ensure the completeness and quality of the EIA report. This information is directly relevant to reaching their reasoned conclusion on the significant effects of the project on the environment. Regulation 21(2) sets out this duty.

Article 6(7) of the Directive now requires a minimum consultation period of 30 days with the public concerned in respect of the EIA report and the minimum period set in regulation 18(2)(f) is therefore altered to refer to this period.

Decisions and Monitoring

Article 1(8) of the 2014 Directive replaces the current Article 8. Article 8 currently requires the competent authority (the Commissioners in the Regulation) to take into consideration the information gathered under Articles 5, 6 and 7 when making a decision on development consent. This information is what the 1999 Regulations refer to as “environmental information” and includes not just the information submitted by the applicant (under Article 5) but also the information obtained as a result of consultation with the consultation bodies and the public (under Article 6) and, where applicable, member states (under Article 7). The new Article 8 is essentially the same but rather than a requirement for this information to be “taken into consideration” it now must be “duly taken into account”. An express requirement to take the environmental information into account is contained in regulations 3(2)(b). “Environmental information” is defined in regulation 2(1) to include all the information mentioned in the new Article 8.

Article 1(9) of the 2014 Directive introduces a new Article 8a into the 2011 Directive as amended. This sets out certain new information which is to be included in the decision to grant, or refuse, development consent which must include the competent authority’s reasoned conclusion on the significant effects of the project on the environment. Regulation 24(2) sets out the information which a decision notice must contain and in particular requires a decision notice to include a description of any mitigation measures and to confirm that the Commissioners are satisfied that the “reasoned conclusion” (i.e. on the significant effects of the project on the environment which is required as part of the EIA process) is still up to date. In addition the new Article 8a introduces measures

relating to the inclusion of monitoring measures and regulation 25(1) requires monitoring measures to be required where it is appropriate to do so.

Regulation 7 confers on the competent authority (the Commissioners in the Regulations) the functions of granting and refusing EIA consent and sets out requirements relating to the period in which their determination may be made. Article 8a(5) requires that the decision to grant or to refuse consent is made within a “reasonable period of time”. Regulation 7 (2) transposes Article 8(a)(5) of the 2011 Directive by requiring that the Commissioners must determine an EIA application within 6 months of all relevant information being received. This period can be extended by agreement with the applicant.

Article 1(10) of the 2014 Directive makes changes to Article 9 of the 2011 Directive. Article 9 is currently a duty to inform the public that a decision has been made to grant or refuse development consent and to make certain information available to the public. The amended terms of Article 9 extend this duty to inform to a duty to inform the consultation bodies and to make information available to the consultation bodies. The decision notice is to contain the relevant information. A copy of the decision notice must be sent to the consultation bodies in terms of regulation 26(1)(b). The public are also to be notified of the decision and a copy of the decision notice is to be made available for inspection by members of the public in terms of regulation 26(1)(c) and 26(1)(d).

Objectivity and Conflict of Interest

Article 1(11) of the 2014 Directive inserts new Article 9a into the 2011 Directive. This introduces an express requirement that member states shall ensure that competent authorities (the Commissioners in the Regulation) are objective and are not in situations giving rise to a conflict of interest. This is most likely to arise where the competent authority is also the applicant. New Article 9a recognises this particular situation and requires an “appropriate separation between conflicting functions”. Regulation 36, reflecting current good practice, sets out this duty.

Offences

New Article 10a, inserted by Article 1(13) of the 2014 Directive, provides for penalties applicable to infringements of the national provisions adopted pursuant to the Directive. Regulation 38 provides that it is an offence for a person to knowingly or recklessly make a false or misleading statement or, with the intent to deceive, uses a false or misleading document or withholds material information in order to obtain a favourable decision on an application. Existing offence provisions relating to breach of enforcement notices which were contained within the 1999 Regulations have been carried forward by regulation 39.

Transitional Arrangements

Article 3(1) of the 2014 Directive provides for transitional measures concerning certain applications for EIA screening of projects which are listed in Annex II of the 2011 Directive. The article states that 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. This is reflected in Regulation 41(2)(b)(i).

Article 3(2) of the 2014 Directive provides transitional measures whereby the current 2011 Directive will continue to apply, as unamended by the 2014 Directive, for applications in which the applicant has, before 16th May 2017, submitted an environmental statement or where a scoping opinion has been sought. This is reflected in Regulation 41(2)(b)(ii) and 41(2)(b)(iii).

Thresholds for projects

Article 4(2) of the Directive sets out the powers for Member States to set thresholds for Annex II projects. Article 4(3) specifies that such thresholds are to determine when projects need not undergo a determination or an environmental impact assessment, these are provided in Schedule 1. Paragraph (3)(2)(a) of Schedule 1 sets a higher threshold for afforestation projects which are outside sensitive areas than was contained within the 1999 Regulations.

Consultation

The Scottish Government consulted on proposals for amending the EIA Regulations through *The Consultation on Transposition of Environmental Impact Assessment Directive 2014/52/EU* between August and October 2016, this was accompanied by draft new regulatory provisions. The comments received have helped to inform the final statutory instrument. The responses, analysis paper and a full list of those consulted and who agreed to the release of this information are available on the Scottish Government website at <http://www.gov.scot/Publications/2016/08/2499>.

Impact Assessments

A suite of impact assessments have been undertaken and an Equality Impact Assessment (EQIA) has been published, this found that the legislation is not likely to generate any negative impacts on any of the equalities groups. In addition a strategic environmental pre-screening exercise and Children's Rights and Wellbeing screening have determined that the legislation is again unlikely to have a significant impact on the environment or a negative impact on children's rights and wellbeing.

Financial Effects

The Scottish Government consulted on a draft partial Business and Regulatory Impact Assessment (BRIA) as part of its August 2016 consultation paper. The partial BRIA concluded that some additional procedural and financial requirements will fall on local authorities, the Scottish Ministers and the Consultation Bodies, and some additional procedural and financial requirements may fall to developers. The Scottish Government does not consider there will be any significant costs over and above those of compliance with existing statutory provision on EIA. Responses to the consultation have not altered this overall view and minor amendments have been made to the final BRIA to reflect the responses received.