

## **POLICY NOTE**

### **THE MARINE WORKS (ENVIRONMENTAL IMPACT ASSESSMENT) (SCOTLAND) REGULATIONS 2017**

#### **SSI 2017/115**

The above instrument was made by the Scottish Ministers in exercise of the powers conferred by section 2(2) of the European Communities Act 1972, section 56(1) of the Finance Act 1973 and all other powers enabling them to do so. The instrument is subject to negative procedure.

Section 2(2) of the 1972 Act is the enabling power for the provisions in these Regulations relating to applications for multi-stage consents. Section 56(1) of the 1973 Act is cited as an enabling power as the Regulations enable the Scottish Ministers to impose charges for certain services which they are to carry out.

The Scottish Ministers have taken into account the selection criteria in Annex III to Directive 2011/92/EU (“the 2011 Directive”).

### **Policy Objectives**

#### **Introduction**

The purpose of these Regulations is to replace, for Scotland, the Marine Works (Environmental Impact Assessment) Regulations 2007 (“the 2007 Regulations”), with necessary updates, in order to transpose Directive 2014/52/EU (“the 2014 Directive”) which amends the 2011 Directive. The Regulations integrate environmental considerations into the preparation of projects in the Scottish Marine Area, which is defined in Part 1 of the Marine (Scotland) Act 2010, with a view to reduce their environmental impact.

The Environmental Impact Assessment 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 amended Directive, which seek to define, clarify and expand upon aspects of the Assessment process, on the basis of minimal additional regulatory burden, whilst ensuring protecting 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 Marine Area. The 2014 Directive also makes allowance for some transitional arrangements. References to “current” requirements are to those under the 2011 Directive before amendment by the 2014 Directive.

#### **Environmental Impact Assessment Process**

Article 1(1) of 2014 Directive introduces a definition of “environmental impact assessment”. This sets out what an environmental impact assessment process is to consist of, Regulations 5 reflects these changes. The process starts by the applicant for regulatory approval (“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 domestic legislation 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 of the 2011 Directive, as amended. The 2014 Directive includes some procedural changes including a new express requirement to make information available electronically as provided for in Regulation 16(3)(a). The requirement to consult is an existing requirement of the 2007 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)(d) and (e) and 23 transpose these requirements.

Regulation 8(3) sets out the powers to disapply the Regulations in respect of projects whose purpose is in response to civil emergencies. Currently this power only relates to projects serving national defence purposes. This particular power is extended in Article 1(3) of the 2011 Directive, as amended.

The main change made by Article 1(2) of the 2014 Directive is the new requirement in paragraph (3) to carry out, where appropriate, coordinated or joint procedures for EIA and assessments required under the Habitats and the Wild Birds Directives. This is now reflected in the terms of Regulation 38.

## **Screening**

The determination that a project should be made subject to EIA is known as a screening decision. Changes made to Article 4(4) of the 2011 Directive introduce a requirement for an applicant to provide certain information on the characteristics of the project and its likely significant effects to enable a screening decision to be made. This requirement is set out in Regulation 10(2) and 10(4). Regulation 10(3) specifically allows an 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 to make its screening decision 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 9(1)(a)(ii).

Under current requirements the screening decision had to be made public but reasons did not have to be given for negative screening decisions unless asked for. Article 4(5) of the 2011 Directive, as amended, now also requires the main reasons for screening decisions to be given and that to be done with reference to the Annex III criteria. This is required by regulations 9(1)(a)(i) and 9(2)(a). Article 4(5)(b) of the 2011 Directive, as amended, also requires – where there is a negative screening decision – the determination to set out any proposed mitigation measures and this requirement is contained in regulation 9(2)(b).

Article 4(6) of the 2011 Directive, as amended, introduces new time limits for making screening decisions. 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 must be informed. Regulation 11 sets out the necessary provisions.

### **EIA report**

Article 5(1) of the 2011 Directive is changed by the 2014 Directive. It refers to the submission of an EIA report and sets out what it is to contain by reference to a list and to Annex IV. Regulation 6(2) 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(3) and 6(5)(a), respectively.

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

Article 6(7) of the Directive, as amended, now requires a minimum consultation period of 30 days with the public concerned in respect of the EIA report and the minimum period which is set in regulation 16(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 of the 2011 Directive. Article 8 of the 2011 Directive currently requires the competent authority 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 2007 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”. This is reflected in the wording of regulation 4. “Environmental information” is defined in regulation 2.

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, regulatory approval which must include the competent authority’s reasoned conclusion on the significant effects of the project on the environment. Regulation 23(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 consenting authority is 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 new provisions on monitoring which are transposed by regulations 23 and 24.

Article 1(10) of the 2014 Directive makes changes to Article 9 of the 2011 Directive. Article 9 currently provides a duty on competent authorities to inform the public that a decision has been made to grant or refuse regulatory approval 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 25 (1) (b) and (18)(1). 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.

### **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 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 for regulatory approval. New Article 9a recognises this particular situation and requires an “appropriate separation between conflicting functions”. Regulation 39, 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. Regulations 32 and 33 provides that it is an offence for a person or bodies corporate 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. Regulations 32 and 33 are in place of the current offence provisions which are provided by regulations 25, 26 and 27 of the 2007 Regulations, with necessary updates.

### **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.

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 40.

### **Multistage Consents**

Provisions for multi stage regulatory approvals are provided at Regulations 26, 27, 28 and 29. Although not required specifically by the 2014 Directive, ECJ caselaw has shown

that these provisions must be included for cases where a consent procedure comprises more than one stage – with one stage involving a principal decision and the other an implementing decision.

Where an approval procedure comprises more than one stage (a ‘multi-stage regulatory approval’), the Directive requires that the environmental effects of the project must be identified and assessed at the time of the principal decision. However, if those effects are not identified or identifiable at the time of the principle decision, assessment must be undertaken at the subsequent stage. The 2017 Regulations generally bring up to date and replace current provisions on multi-stage consents. Part 8 of the 2017 Regulations refers.

### **Thresholds**

Article 4(2) of the Directive sets out the powers for Member States to set thresholds for Annex II projects. Article 4(3) of the Directive specifies that such thresholds are to determine when projects need not undergo a determination or an environmental impact assessment. The Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017 have introduced thresholds for Annex II projects, as set out in schedule 2 of the Regulations. These thresholds are consistent with the thresholds used in the Town and Country Planning EIA (Scotland) Regulations 2017.

### **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 applicants. 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 were made to the final BRIA to reflect the responses received.

Scottish Government  
Marine Scotland  
April 2017