

ENVIRONMENTAL ASSESSMENT (SCOTLAND) ACT 2005 (ASP15)

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Part 1 – Environmental Assessment for Plans and Programmes

Section 1 – Requirement for environmental assessment

5. **Section 1** sets out the primary requirement of the Act which is to secure the carrying out of an environmental assessment during the preparation of a qualifying plan or programme. Section 4 identifies which plans and programmes are covered by the provisions of the Act, and section 4(4) provides that the phrase “plans or programmes” includes “strategies”. Section 1 also defines what constitutes an environmental assessment as the preparation of an environmental report, consultation and the taking into account of the report and the results of the consultations in the decision making process. Further provision on the report and consultation is made in sections 14 and 16 respectively.
6. Subsection (1) makes clear that the environmental assessment must be carried out before adoption or before submission to a legislative procedure for adoption of the plan or programme. It is anticipated that “Adoption” may be something as informal as deciding to act on the final plan or programme developed, or it may be more formal, for example, requiring approval under a statutory regime. The expression “submission for adoption through a legislative procedure” is derived from the European Directive [2001/42/EC](#) and will take Directive meaning. It is understood to mean that the finalised plan or programme is submitted to the Scottish Parliament or other legislative body for endorsement. That body will then make the legislation necessary to allow the plan or programme to be carried out. Whether adopted through a legislative procedure, or in a less formal manner, it is intended that the environmental assessment be carried out before the plan or programme is finalised.
7. More than that, the environmental assessment should be carried out as an integral part of the plan and programme development and decision making process. This is implicit in the description of the environmental assessment given in subsection (2). Whilst the steps that form the parts of an assessment can be taken at any time before a plan or programme is adopted, it is expected that the assessment will be integrated into the early stages of the process. Environmental assessment can then be used to enhance the entire process and help to ensure that the best available outcome is achieved.

Section 2 – Responsible Authorities

8. The Act is focussed solely on the public sector, defined in this section “as any person, body or office-holder exercising functions of a public character”. This phrase seeks to capture the full extent of the public sector from central and local government, across the range of public bodies and to those private persons or bodies which perform functions of a public character. This might apply to a private body operating under licence or

in accordance with statutory powers. The Responsible Authority is in charge of the qualifying plan or programme and each qualifying plan or programme may only have one Responsible Authority at any one time. Where several authorities have an interest in a particular plan or programme they should agree amongst themselves who should be nominated as the Responsible Authority for that plan or programme. Where agreement cannot be reached, the Scottish Ministers will decide who should be the Responsible Authority.

9. [Section 2\(4\)](#) sets out the public sector bodies to which section 5(4) applies. The bodies listed include most Scottish public sector bodies. Paragraph (f) allows Scottish Ministers to specify further responsible authorities by order. Any additions would be made in respect only of functions of a public character being carried out by a person, body or office holder in Scotland. Any order made by the Scottish Ministers in this respect is subject to annulment in pursuance of a resolution of the Scottish Parliament.

Section 3 – Consultation Authorities

10. The Act provides for named Consultation Authorities to have particular functions at various stages in the assessment procedure. These authorities are listed in section 3 and they are the Scottish Ministers, Scottish Environment Protection Agency and Scottish Natural Heritage. Although the Scottish Ministers are named, in practice, it is expected that Historic Scotland will be the part of the Executive to fulfil the Consultation Authority functions conferred on Scottish Ministers.
11. A Consultation Authority will not perform that statutory role in respect of its own plans and programmes.

Section 4 – Plans and programmes

12. This section describes the plans and programmes, and modifications to them, that are potentially subject to environmental assessment. The plan or programme must relate solely to the whole or any part of Scotland. Those that relate to Scotland and any other part of the UK come within the provisions of [The Environmental Assessment of Plans and Programmes Regulations 2004 \(SI 2004/1633\)](#) (“The UK Regulations”)
13. [Section 4 \(3\)](#) details certain absolute exclusions. These are plans or programmes that relate solely to national defence or civil emergency; finance and budgetary plans or programmes and the specified EU co-financed plans and programmes.
14. As mentioned previously, section 4(4) provides that any reference to plans and programmes in the Act includes strategies.

Section 5 – Qualifying plans and programmes

15. This section describes in detail the plans and programmes to which the provisions of the Act apply and provides that these be called “qualifying plans and programmes”. The Act only applies to plans and programmes for which the first formal preparatory act takes place on or after the coming into force of section 5(1)(a) of the Act, and which are not exempt under sections 7(1) or 8(2).
16. [Section 5\(2\)](#) excludes those parts of plans and programmes that relate to matters that are not of a public character. The intention here is to ensure that the private activities of Responsible Authorities are not affected.
17. [Section 5\(3\)](#) deals with those plans and programmes required by the Directive. Section 5(3)(a) and (b) set out a group of activity areas which, by their nature, mean that plans and programmes relating to them are deemed always to be likely to give rise to significant environmental effects and therefore will always give rise to the requirement to carry out an environmental assessment. Subsection (5) allows Scottish Ministers to amend and update schedule 1 of the Act, to take account of any further amendments that may be made to Directive [85/337/EEC](#) on the assessment of the effects of certain public

and private projects on the environment (“ the EIA Directive ”) on which schedule 1 is largely based. The additions of Motorway service areas and Golf Courses and associated developments are included to be consistent with the provisions of [Environmental Impact Assessment \(Scotland\) Regulations S.I. 1999/1](#). Any order made in this respect by the Scottish Ministers is subject to annulment in pursuance of a resolution of the Scottish Parliament.

18. [Section 5\(3\)\(c\)](#) provides that even though a plan or programmes does not fall within sub-paragraph (a) or (b), it is still necessary to consider whether it sets the framework for future development consent of projects. So, for example, a core paths plan would not deal directly with the various categories of plans and programmes set out in schedule 1 to the Act, but it could set the framework for future development consent of those plans and programmes. That being so, the Responsible Authority would then have to determine whether the core paths plan would be likely to have significant environmental effects.
19. [Section 5\(4\)](#) introduces an additional set of plans and programmes that are subject to environmental assessment beyond those set out in section 5(3) and importantly therefore beyond those subject to assessment under existing regulations. Exclusions to this additional set are detailed in section 6. The ‘public’ bodies listed at section 2(4) are the Responsible Authorities for these additional plans and programmes. These bodies will require to apply pre-screening (see paragraphs 20-24) before entering the formal screening stage (see paragraphs 25-26).

Section 6 – Types of excluded Plans and programmes

20. [Section 6\(1\)\(a\)](#) provides that plans and programmes relating exclusively to individual schools are excluded because it is considered that such developments will have no strategic element to which environmental assessment could be applied and would not be likely to have significant environmental effects. Subsection (2) provides a power to modify section 6(1)(a) should circumstances arise where the exclusion of such plans and programmes, or some of them, from the provisions of the Act is no longer appropriate.
21. [Section 6\(1\)\(b\)](#) provides powers for the Scottish Ministers to specify further exclusions by order. The intention of section 6(1)(b) is to ensure that it will be possible to exclude certain types of plans and programmes, which are proved, over time, to have no need for an environmental assessment. This will help to ensure that the Act provisions are targeted appropriately at plans and programmes which are likely to have significant effects on the environment. The proposed powers in section 6(1)(b) and (2) are limited by section 6(3) so that they may only be used to exclude plans and programmes under sections 6(1)(a) and 6(1)(b) which, in the opinion of the Scottish Ministers, are likely to have no effect or minimal effect in relation to the environment

Section 7 – Exemptions: pre-screening

22. [Section 7](#) introduces pre-screening but only for plans and programmes referred to in section 5(4)(see paragraph 15). This is essentially an in-house review carried out by the Responsible Authority to determine whether an environmental assessment is required. When exempting a plan or programme at the pre-screening stage, Responsible Authorities are not required to consult formally either the Consultation Authorities or the public.
23. When carrying out a pre-screening the Responsible Authority has to decide whether the plan or programme will have no or minimal environmental effects, in which case they may determine that an environmental assessment is not required. Responsible Authorities are required, by section 7 (2) to apply the schedule 2 criteria in making this determination.
24. Having made a determination the Responsible Authorities must notify the consultation authorities as soon as practicable. The notification should include the title of the plan or

programme, the date of the opinion and a brief description of the plan or programme, including the area or location to which the plan relates.

25. **Section 7(5)** requires Scottish Ministers to ensure the maintenance of a register of the pre-screening notifications made under 7(3). The register of notifications is required to be available for public inspection and may include other information in relation to the plan or programme at the discretion of Scottish Ministers.
26. The intention of the pre-screening provisions is to ensure that the Act is effectively targeted at those plans and programmes which are likely to have significant effects on the environment. It will also reduce administration.

Section 8 – Exemptions: screening

27. Certain plans and programmes as listed in section 8(1) require to undergo a formal screening process to establish whether or not they should be subject to a full environmental assessment. It applies to plans or programmes referred to in section 5(3) which determine the use of small areas at local levels, a minor modification of a plan or programme referred to in section 5(3), a plan or programme described in section 5(3) (c); or a plan referred to in section 5(4) which a responsible authority has decided is not exempt under section 7(1).
28. **Section 8(3)** provides that the criteria in schedule 2 of the Act have to be applied when making a determination under section 8(1). Where the determination is that the plan or programme is unlikely to have significant environmental effects, then it is exempt from the requirements of the Act (section 8(2)). Reasons must be given for reaching that determination, and those must state how the criteria in schedule 2 were applied to reach that determination.

Section 9 – Screening: procedure

29. For plans and programmes that are subject to the formal screening procedure, section 9 provides that a Responsible Authority submit to the Consultation Authorities a summary of its views as to whether a particular plan or programme is likely to have significant environmental effects. The summary should be prepared with reference to section 8(3) which requires the Responsible Authority to have reached its view by applying the schedule 2 criteria for determining the likely significance of effects on the environment.
30. **Section 9(3)** provides that the Consultation Authorities shall respond to formal screening submissions within 28 days offering their views as to whether the plan or programme is likely to have significant environmental effects. Where agreement is reached between the Responsible Authority and Consultation Authorities then the Responsible Authority should make a determination accordingly. Section 9(6) and (7) make provision for any disagreements to be referred to the Scottish Ministers to make a final determination as to whether the plan or programme is likely to have a significant environmental effect.
31. The intention behind the screening provisions is to ensure that due and transparent consideration is given to whether an environmental assessment is required. Moreover, they are designed to ensure that the Act environmental assessment requirements are targeted effectively at plans and programmes that are likely to have significant environmental effects.

Section 10 – Screening: publicity for determinations

32. **Section 10** provides for how Responsible Authorities should publicise their determinations under section 8(1). This includes a requirement to send a copy of the determination (and any statement of reasons under section 8(2)(b)) to the Consultation Authorities and to make those items available to the public in various specified ways.

Section 11 – Directions as regards plans and programmes

33. **Section 11** provides that Scottish Ministers may, at any time, direct a Responsible Authority to send them a plan or programme and on consideration of it direct the Responsible Authority, as appropriate, to either enter the screening process or to carry out an environmental assessment. Section 11 helps facilitate compliance with the Act and should help to ensure that no qualifying plan deemed to have significant environmental effects will proceed without an environmental assessment being carried out.

Section 12 – Restriction on adoption or submission

34. **Section 12** provides that no qualifying plan or programme shall be adopted or submitted to a legislative procedure for adoption until the requirements of the Act have been met. The intention of this provision is to ensure compliance with the requirements of the Act.

Section 13 – Relationship with Community Law requirements

35. **Section 13** provides that the requirements of the Act are without prejudice to any other European Community Law requirements.