

## **EXECUTIVE NOTE**

### **THE ELECTRICITY WORKS (ENVIRONMENTAL IMPACT ASSESSMENT) (SCOTLAND) AMENDMENT REGULATIONS 2008 SSI/2008/246**

The above instrument was made in exercise of the powers conferred by section 36, Schedules 8 and 9 of the Electricity Act 1989. The instrument is subject to negative resolution procedure.

#### **Policy Objectives**

The purpose of the Regulation is to implement the EU Directive on Public Participation by amending the consent procedures to strengthen public participation in the decision making process, including measures to increase the range of documentation to be placed on Council planning registers. The Planning Directorate have already transposed this directive for the planning regime and parallel action is need now to cover consents under the Electricity Act 1989.

In this context, it is important to note that a key objective of our announced streamlining measures is to increase the quality of applications through better public and community consultation. These changes can therefore be seen as support for this objective, especially if there has been effective pre application consultation.

#### **Background to the section 36 consents regime**

Electricity Act 1989 consents are required for the construction, operation or extension of generating stations with an installed capacity in excess of 50 MW, or in the case of hydro and marine developments 1MW, and for most overhead power lines. Electricity generating station applications are considered under Section 36 and overhead power lines under section 37 of the Electricity Act 1989. Applications for generating stations that fall below these thresholds are considered under the land use planning system.

Over the last few years, moves to seek more renewable forms of electricity generation have resulted in a significant increase in the number of consent applications to both Scottish Ministers and Planning Authorities. This increase has put enormous pressure on the consenting process and has resulted in applications which are often complex, take an increasingly long time to reach a conclusion.

The Scottish Government has made a commitment to streamline the consent timescales for new applications through a number of procedural and legislative changes. However this must be balanced against new EU legislation that also makes a commitment to more open and fair assessment and consultation of large scale energy applications. In this context it is important to note that a key objective of these streamlining measures is to increase the quality of applications through better public and community consultation. These measures help uphold this objective.

#### **Consultation implications for section 36 applications**

The provisions in the proposed regulations dealing with section 36 and 37 consent applications would amend the procedures set out in the Electricity Works (Environmental

Assessment) (Scotland) Regulations 2000. Sections 1 to 5 and section 7 to 12 of this partial Regulatory Impact Assessment apply to the proposed regulations to amend the Environmental Impact Assessment legislation in Scotland with respect to proposed developments under sections 36 and 37 of the Electricity Act 1989. The costs associated with the new procedures in the proposed regulations will fall on the developers and the Scottish Ministers.

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 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 carried out by Scottish Ministers and therefore the additional cost will be de minimus.

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 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.

### **Corporate Implications**

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.

The Directives on Environmental Impact Assessment places an obligation on Member States to ensure that the Directive is transposed by 30 June 2008. 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.

Planning authorities and Scottish Ministers frequently take decisions which may have a significant effect on the environment. Effective environmental impact assessment and public participation in the decision making process has several benefits. It enables full evaluation of the potential environment impacts of the proposed development and for 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.

### **Costs**

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 will also fall to developers. It is expected that business sectors affected will be mainly larger scale developers.

Compliance costs for business - The Scottish Government do not consider there will any significant costs over and above those associated with compliance with the Regulations.

## **Consultation**

Within Government - UK Government Departments, in consultation with the Scottish Government, consulted on the UK position in the negotiation of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 and the Public Participation Directive as a whole.

Public consultation - A full public consultation on the policy to deliver option 2 was undertaken in May 2005. A partial regulatory impact assessment was included in the consultation and respondents were asked their views on its contents. Their comments have been taken into account in this assessment.

## **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 Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 and 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.

Howard Steele  
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## **REGULATORY IMPACT ASSESSMENT**

of proposed regulations to amend The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 (S.I. 2000/320) which extend to Scotland only.

### **1. Title**

**Regulatory Impact Assessment for The Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2008.**

The principal Regulations implement Council Directive 85/337/EEC(a) on the assessment of the effects of certain public and private projects on the environment (as amended by Council Directive 97/11/EC(b) in relation to applications under section 36 or 37 of the Electricity Act 1989 (c29) in Scotland for consent to construct, extend or operate an electricity generating station or for consent to install or keep installed an electricity transmission line above ground.

These Regulations aim to implement, as regards the principal Regulations, the amendments to Council Directive 85/337/EEC made by Article 3 of Directive 2003/35/EC(c) of the European Parliament and of the Council. Article 3 of that Directive provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amends with regard to public participation and access to justice Council Directive 85/337/EEC.

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

#### **The Objective**

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.

The purpose of the Regulation is to amend the procedures for consent to reflect the amendments to the Directive and provide strengthened public participation in the decision making process, including measures to increase the range of documentation to be placed on the planning register.

### **3. Background to the section 36 consents regime**

Electricity Act 1989 consents are required for the construction, operation or extension of generating stations with an installed capacity in excess of 50 MW, or in the case of hydro and marine developments 1MW, and for most overhead power lines. Electricity generating station applications are considered under Section 36 and overhead power lines under section 37 of the Electricity Act 1989. Applications for generating stations that fall below these thresholds are considered under the land use planning system.

Over the last few years, moves to seek more renewable forms of electricity generation have resulted in a significant increase in the number of consent applications to both Scottish Ministers and Planning Authorities. This increase has put enormous pressure on the consenting process and has resulted in applications which are often complex, take an increasingly long time to reach a conclusion. The Scottish Government has made a commitment to streamline the consent timescales for new applications through a number of procedural and legislative changes. However this must be balanced against new EU legislation that also makes a commitment to more open and fair assessment and consultation of large scale energy applications. In this context it is important to note that a key objective of these streamlining measures is to increase the quality of applications through better public and community consultation. These measures help uphold this objective.

### **4. Consultation implications for section 36 applications**

The provisions in the proposed regulations dealing with section 36 and 37 consent applications would amend the procedures set out in the Electricity Works (Environmental Assessment) (Scotland) Regulations 2000.

Sections 1 to 5 and section 7 to 12 of this partial Regulatory Impact Assessment apply to the proposed regulations to amend the Environmental Impact Assessment legislation in Scotland with respect to proposed developments under sections 36 and 37 of the Electricity Act 1989. The costs associated with the new procedures in the proposed regulations will fall on the developers and the Scottish Ministers.

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 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 carried out by Scottish Ministers and therefore the additional cost will be de minimus.

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 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.

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.

**5. The Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2008** - if approved by Ministers would come into effect 30 June 2008 and are specifically intended to:

- Regulation 2 - Clarify existing definitions included in the consultation process.
- Regulation 3 - Add procedures that must be followed before Scottish Ministers determine section 36 and section 37 applications.
- Regulations 4, 5 and 6 - Make minor drafting changes.
- Regulation 7 - Increase the information to be contained in the notice to be published by developers where an Environmental Statement is submitted to Scottish Ministers; impose new requirements as to the timing of the publication of the notice and for the publication of the notice in the Edinburgh Gazette.
- Regulation 8 – Widen the range of documents to be placed on the planning register following receipt by the planning authority; increase the information to be included in the statement of the Scottish Ministers’ determination of the application; impose a new requirement for the applicant to publish notice of the determination in the Edinburgh Gazette and in one or more local newspapers.
- Regulation 9 – requires the applicant to serve a copy of the environmental statement on the planning authority and to inform the Scottish Ministers when this has been done.
- Regulation 10 – amends the list of documents that the Scottish Ministers must send to any EEA state likely to be significantly affected by the proposed development.
- Regulation 11 – impose a new requirement for the notice of further information to be published in the Edinburgh Gazette and require the applicant to serve a copy of the further information together with a copy of the notice of further information on the principal planning authority.
- Regulation 12 sets out a procedure which the Scottish Ministers must follow after receipt of “additional information” and the notice that the applicant must publish relating to “additional information”.
- Regulation 13 – amends Schedules 1 and 2 to the principal Regulations, concerning the descriptions of development in respect of which an environmental statement is required.

## **6. 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 Directives on Environmental Impact Assessment places an obligation on Member States to ensure that the Directive is transposed by 30 June 2008. 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.

## **7. 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 environmental impact assessment and public participation in the decision making process has several benefits. It enables full evaluation of the potential environment impacts of the proposed development and for 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.

## **8. 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. In any case the benefits of achieving better buy-in from communities and the public generally to the proposed developments have to be justified against the extra costs.

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 Scottish Government 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 UK (English) regulations.

## **9. 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 will also fall to developers. It is expected that business sectors affected will be mainly larger scale developers.

## **10. Compliance costs for business**

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

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

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

## **12. 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.

## **13. Enforcement and Sanctions**

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

## **14. 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 Government guidelines we will review the legislation within 10 years of it coming into force.



## 15. Consultation

### Within Government

UK Government Departments, in consultation with the Scottish Government, consulted on the UK position in the negotiation of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 and the Public Participation Directive as a whole.

### Public consultation

A full public consultation on the policy to deliver option 2 was been undertaken in May 2005. A partial regulatory impact assessment was included in the consultation and respondents were asked their views on its contents. Their comments have been taken into account in this assessment.

## 16. 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 Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 and 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.

## Declaration

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

*Signed.....*

*Date.....*

*Ministers details (name, dept etc)*