

## Response ID ANON-5EES-8HXJ-M

Submitted to **Consultation on Transposition of Environmental Impact Assessment Directive EU2014/52**

Submitted on **2016-10-28 10:53:49**

### About You

#### 1 What is your name?

**Name:**

Historic Environment Scotland

#### 2 What is your email address?

**Email:**

adele.shaw@hes.scot

#### 3 Are you responding as an individual or an organisation?

Organisation

#### 4 What is your organisation?

**Organisation:**

Historic Environment Scotland

#### 5 The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response with name

**6 We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?**

Yes

### PART ONE - INTRODUCTION

#### PART TWO - PROPOSALS - Section 1. Assessment Process

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

#### 1 Do you agree with proposals to provide for a coordinated rather than joint procedure?

Yes

**Comments::**

No comments.

**2 What would the regulatory impact be if legislation was introduced which required that no construction of any EIA development should take place until any operational permits or consents required under the Habitats and Birds Directives, Water Framework Directive, the Industrial Emissions Directive, the Waste Framework Directive or the SEVESO III Directive had been granted?**

**(Please provide details in the comments box below):**

It is not clear what the effect of co-ordinated procedures would be in circumstances where the SEA process had not concluded and a project level EIA was submitted for consent. This could include situations where a site was subject to assessment through the development plan process which would be undergoing SEA but for which a planning application and EIA was submitted to the planning authority.

#### 3 Do you have any further comments on the changes proposed to implement articles 1 and 2 of the EIA Directive?

**Please provide details in the comments box below:**

We welcome the clarity brought by the definition of the EIA process in regulation and the additional transparency likely to be brought by the requirement for a reasoned conclusion.

### Section 2. Information to be Assessed

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

**4 Will you have to change your current practice to take account of the risk of major accidents?**

Unsure

**Comments::**

When we are consulted our current processes take into account aspects of impacts within our remit, which would include any information submitted which covers the risk of major accidents as far as our expertise extends. However, this will depend on the nature of the information submitted in respect of this requirement and this is unlikely to become clear until the practice develops in this area.

**5 Do you consider that our approach to transposition of information to be assessed appropriately implements the requirements of the Directive?**

Yes

**Comments::**

Assuming that all EIA regimes in Scotland will follow the approach set out in the draft Town and Country Planning Regulations, we are satisfied with the approach proposed.

**Section 3. Screening**

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

**6 Will you have to change your current practices to meet the new screening requirements?**

Unsure

**Comments::**

It is likely that there may be issues with the need to identify significant effects at this early stage, and with the need to identify measures to avoid or reduce them at screening stage. Competent authorities will need to ensure that screening decisions are robust, to ensure that this does not become used as a means to circumvent the need for EIA, particularly where a decision is taken to screen a project out of EIA.

It is possible that competent authorities will seek input from the consultation bodies at this stage more often under the terms of the new regulations than they do at present. If this is the case, there will be a resource implication for us as this could lead to a significant addition to our workload.

It is not clear whether there is a requirement for access to expertise on both the competent authority and developer's part at screening. The Scottish Government should consider providing guidance on this issue to minimise the risk of legal challenge later in the process.

**7 Are you content with the current timescales for providing a screening opinion?**

No

**Comments::**

We recommend that the timescales for consultation are standardised across all EIA regimes in Scotland and that given the information requirements that this should be amended to 28 days, particularly in light of the new requirements for information to be provided and potentially the need for competent authorities to consult more widely at this stage.

**8 Do you consider that our approach to transposition of screening appropriately implements the requirements of the Directive?**

Unsure

**Comments::**

We consider that the definition of sensitive areas in the draft regulations may not appropriately implement the Directive for the historic environment. The current definition within the regulations for these areas as far as they relate to the historic environment are currently limited to properties appearing in the World Heritage list under article 11(2) of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage and scheduled monuments as defined in the Ancient Monuments and Archaeological Areas Act 1979.

However, Directive 2014/52/EU includes a definition of cultural heritage in its preamble which includes urban historical sites and landscapes and the inclusion of 'sites' within the selection criteria for the location of development in the Annex IIa. This has been transposed into schedule 3 of both sets of draft regulations accompanying this consultation.

We recommend that in addition to the inclusion of world heritage sites and scheduled monuments the definition of what constitutes a sensitive area should be amended to reflect this aspect of the Directive across all EIA regimes. This could be worded to include 'sites of national importance as defined in the Ancient

Monuments and Archaeological Areas Act 1979, as amended, the Planning (Listed Buildings and Conservation Areas) Act 1997 and Marine (Scotland) Act 2010'. This would broaden the definition of sensitive areas to include nationally important Gardens and Designed Landscapes and nationally important Historic Battlefields in addition to scheduled monuments under the amended 1979 Act and listed buildings under the 1997 Act. The inclusion of the 2010 Act would also bring historic Marine Protected Areas within the meaning of sensitive areas.

In addition to more fully implementing the Directive, we consider that this would also have the effect of bringing the regulations in line with practice in Scotland in which, in our experience although we are not normally consulted at this stage, has tended to include consideration by planning authorities of the potential effect of development within the types of sites identified above. Such an amendment would also more firmly tie EIA practice into planning policies for the historic environment as set out in SPP.

## Section 4. EIA Report

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

### 9 Will you have to change your current practice to prepare a reasoned conclusion?

No

#### Comments::

We welcome the transparency that this new requirement could bring by linking more clearly the findings of the EIA Report to the decision.

### 10 Do you consider that our approach to transposition of requirements concerning the content of the EIA report appropriately implements the Directive?

Unsure

#### Comments::

It is not clear what effect the requirement to base the EIA Report on the scoping opinion will have on current practice at this stage of the EIA process. It is also unclear how this requirement ties in with the iterative nature of the EIA process, given that in practice significant issues can come to light between the scoping of a project and the submission of the application for consent and the Environmental Statement. This is an area which may lead to legal challenges and in light of this it may be helpful for the Scottish Government to provide guidance on how it expects such issues to be addressed.

## Section 5. Scoping

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

### 11 Do you consider that our approach to transposition of scoping appropriately implements the requirements of the Directive?

Unsure

#### Comments::

We welcome the requirement for EIA Reports to be based on a scoping opinion where one has been issued. However, in light of the requirements of, for example, regulation 5(3) of the draft Town and Country Planning Regulations, the concerns outlined in question 10 and without making scoping mandatory there is the risk that scoping opinions will no longer be sought and the approach taken in the draft regulations could be detrimental to the process as this is a key area of current good practice which on the whole contributes strongly to proportionate and effective EIA. In addition, this is often the first time we are able to provide advice on a proposed project and this stage allows us to begin meaningful dialogue with a developer on the relevant scope, methods and guidance to be followed in an assessment.

In the absence of mandatory scoping the Scottish Government will need to provide clear guidance, setting out its expectations for the implementation of this area.

## Section 6. Assessment quality and expertise

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

### 12 Do you consider that our approach to transposition of assessment quality and expertise appropriately implements the requirements of the Directive?

Unsure

**Comments::**

We note that there are no proposals to define in the regulations what it meant by 'competent expert'. However, we consider that the Scottish Government should clarify what is meant by the term in order to ensure a common understanding of this term and what is considered acceptable.

We note the new requirement for determining authorities to have access to sufficient expertise to examine the Environmental Impact Assessment Report. It would be helpful if the Scottish Government provided guidance on its expectations in this regard. For example, is it anticipated that specific accreditation or qualifications would be required?

The role of competent experts at screening and scoping stages is not clear from the draft regulations.

I note that paragraph 102 of the consultation document refers to the advice provided by the statutory consultees, including Historic Environment Scotland. Whilst we welcome the statement included there, the role of the statutory consultees in providing advice is unclear, particularly the extent to which our advice may be relied on for matters beyond our remit. We recommend that these matters are clarified in guidance to support the implementation of the new regulations.

**Section 7. Consultation and Publicity**

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

**13 Do you consider that our approach to transposing consultation and publicity appropriately implements the requirements of Directive?**

Yes

**Comments::**

We welcome the requirement for planning authorities, in the case of the draft Town and Country Planning Regulations and the Scottish Ministers, in the case of the draft Electricity Works Regulations, to inform consultation bodies of decisions on EIA developments by sending a decision notice.

**14 Do you feel that the current arrangements for informing the public meet your needs?**

Yes

**Comments::**

We welcome the provisions within the draft regulations for competent authorities to inform those bodies consulted of the decision, and it would be helpful if this were to be transposed across all EIA regimes. We would welcome receipt of such notices electronically.

**Section 8. Monitoring**

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

**15 Do you consider that the regulations meet the requirements of the Directive concerning the information to be included in the development consent?**

Unsure

**Comments::**

We welcome the requirement to more closely link decisions for planning consent to the EIA Report and the mitigation measures identified within it, and to base consent on up to date information in the form of the competent authority's reasoned conclusion. However, it is not clear how competent authorities will establish that their reasoned conclusion remains up to date in circumstances where time has lapsed between its preparation and the issuing of a consent.

**16 What administrative changes are likely to be required to implement new provisions on the content of decision notices?**

**Comments:**

No comments.

**17 Do you consider that our approach to transposition of monitoring in the regulations implements the requirements of the Directive?**

Unsure

**Comments::**

No comments.

**18 Will you have to change your current practices to meet the new monitoring requirements?**

Unsure

**Comments::**

It is unclear from the regulations whether there is an expectation that the statutory consultees will have a role in monitoring.

**Section 9. Decision**

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

**19 Do you consider that our approach to transposition for decisions appropriately implements the requirements of the Directive?**

Unsure

**Comments::**

As noted in response to question 15 it is not clear how the Scottish Government expects competent authorities to meet the requirement for ensuring that their reasoned conclusion remains up to date where there has been a significant lapse in time between the assessment and the production of such a report. Further advice on this issue should be provided in a revised Circular.

**Section 10. Conflict of Interests**

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

**20 Do you consider that our approach to conflict of interests appropriately implements the requirements of the Directive?**

Not Answered

**Comments::**

No comments.

**Section 11. Penalties**

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

**21 Do you agree with proposals to introduce penalties and sanctions for knowingly or recklessly providing false information should be applied across all eight EIA regimes?**

Yes

**Comments::**

No additional comments.

**Section 12. Transitional Arrangements**

**If you are answering questions in relation to a particular regime or a number of regimes, please select the relevant boxes below, or specify which regime you are referring to in the comments section. Otherwise please select all regimes for general comments.**

All of the above

**22 Do you consider that our approach to transitional arrangements appropriately implements the requirements of the Directive?**

Yes

**Comments::**

Further clarity on this matter may be required in a revised circular, however.

**Section 13. Other Policy Issues**

**23 Do you have any comments on the proposal by the forestry regime to increase the afforestation threshold for non-sensitive areas from 5 hectares to 20 Hectares?**

**Comments::**

Reasons for increasing the threshold are unclear. This proposal has the potential to have a significant impact on unscheduled archaeology and other sites not within the current meaning of 'sensitive areas'.

The explanation contained within the consultation document (to reduce the number of screening decisions) is not sufficient. Without understanding why this is considered necessary or appropriate it is difficult to support such a change. However, if the definition of sensitive areas is amended in line with our advice in response to question 8 we may be able to consider this further although the question of potential damage to unscheduled archaeology would remain. We would be happy to discuss this further with the Forestry Commission Scotland.

**24 Do you have any comments on the proposal by the marine regime to adopt the thresholds used by the planning regime where they are relevant to marine developments?**

**Comments::**

No comments.

**25 Do you have any comments on the new provisions on multi stage consents?**

**Comments::**

No comments.

**26 Do you use EIA guidance? If so please provide further details.**

Yes

**Comments::**

We currently use circular 3/2011, Planning Advice Note 1/2013 and Scottish Natural Heritage's EIA Handbook.

**27 Is there any particular area or regime where you feel that guidance would be helpful?**

**Comments::**

It would be helpful if one piece of guidance could address the principles of EIA across all regimes in Scotland, as this would help to encourage good practice across sectors. The following areas should be considered for inclusion

- Co-ordinated procedure where it relates to SEA and the development plan process (see question 2)
- Clarify what is meant by the terms 'competent experts' and 'sufficient expertise' within the regulations
- Requirements for access to 'sufficient expertise/competent experts', including the statutory consultees. This should also cover statutory consultees involvement at screening
- Scoping and how the provisions of the regulations requiring EIA Reports to be based on them are to be implemented, what this means for EIA Reports where a scoping opinion has not been sought by the developer and also where there are significant lapses of time between the issue of a scoping opinion and the publication of an EIA Report.
- Procedures where time has lapsed between the drafting of a competent authority's reasoned conclusions and the issue of a decision.

We would be happy to provide advice to the preparation of guidance by the Scottish Government.

### **PART THREE - ASSESSING IMPACT**

**28 Do you think that the proposals presented might impact on people differently depending on characteristics such as age, disability, gender, race, religion or belief, sexual orientation, gender identity or children's rights and wellbeing?**

**Comments::**

No comments.

**29 What do you consider are the likely costs and benefits arising from the changes outlined in this consultation paper? (Please specify which of the Scottish EIA regimes your comments refer to.)**

**Comments::**

We note that there is provision in the Directive for member states to monitor EIA activity (Article 12). The consultation document is silent on whether this is to be implemented. We recommend that measures to monitor EIA activity across all regimes in Scotland are put in place by the Scottish Government. This would help to provide a clear evidence base which would meet the provisions in the Directive, provide the basis for any future changes to the EIA regulations and would provide helpful information on EIA activity across sectors. This has proved helpful in Strategic Environmental Assessment (SEA) where the Scottish Government's SEA Gateway has played a vital role in monitoring SEA activity across a range of sectors and across Scotland.

**30 Do you have any comments on the Draft Partial Regulatory Impact Assessment?**

**Comments::**

Reducing the number of regulations could help to improve practice across the full range of regulations and we would encourage the Scottish Government to look consider models from other regulatory regimes of where this has been a successful way of transposing EU Directives into Scots Law, such as SEA. In the absence of such an approach, the transposition of the remaining regulations should be co-ordinated to ensure consistency across sectors.

### **Evaluation**

**7 Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)**

**Matrix 1 - How satisfied were you with this consultation?:**

Very satisfied

**Please enter comments here.:**

**Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:**

Neither satisfied nor dissatisfied

**Please enter comments here.:**