

DRAFT PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) (AMENDMENT) REGULATIONS (NI) 2005 – A CONSULTATION PAPER

Introduction

This consultation paper contains DOE's proposals for:

- implementing Article 3 of the EU Directive 2003/35/EC which is aimed at developing the public participation and access to justice provisions in EIA; and
- amending the Planning (Environmental Impact Assessment) Regulations (NI) 1999, as a result of a recent review of EIA procedures.

The paper deals only with changes to the planning process. Similar changes are being made to other regulations, eg. transport, in order to ensure full implementation of the Directive.

Present requirements for processing EIA applications are set out in the Planning (Environmental Impact Assessment) Regulations (NI) 1999.

A - Implementation of the Public Participation Directive

Draft Regulation 3

This draft regulation deals with amendments to definitions the implications of which are picked up in the subsequent regulations. The Directive includes definitions of:

- 'the public', meaning the public at large; and
- 'the public concerned' meaning those directly affected or with a direct interest in the proposal.

DOE has taken the view, in line with other UK regions, that it is not necessary to define the terms in order to make the distinction. DOE is therefore not proposing to incorporate these particular definitions into the regulations. Other definitions will be

included under the relevant regulation below. **The DOE approach is a reasonable one.**

Draft Regulation 4

This draft regulation deals with exemptions from EIA requirements.

**Present Position*

Currently, exemptions are provided in two circumstances. All projects serving national defence purposes are exempted from EIA.

The Department may also currently exempt ‘a specific project’ in exceptional circumstances. In such cases the Department must consider:

- whether another form of assessment would be appropriate; and
- whether to make the information available to the public.

**Proposed Changes*

With respect to national defence projects, the proposal is that the Department will consider the need to exempt projects on a case by case basis, judging whether EIA would have an adverse effect on national defence purposes.

With respect to ‘a specific project’, the proposed changes require the Department:

- to make available the information it considered in making the exemption and its reasons for so doing;
- to consider whether another form of assessment would be appropriate; and
- to make information obtained under the other form of assessment available to the public.

**Assessment*

This draft regulation, while not directing the reduced use of exemptions, gives the Department the flexibility to apply EIA to previously exempted cases if it so chooses; it also leaves the Department more open to account where it does decide to exempt. The regulation also provides for environmental information to be made available to the public.

The proposed changes reflect the trends towards open government and the application of normal planning procedures to public projects. **As such they are considered reasonable.**

Draft Regulation 7

This draft regulation deals with publicity where an environmental statement (ES) is submitted.

**Present Position*

Currently, the Department is required to publicise an ES in at least one newspaper circulating in the local area.

**Proposed Changes*

Two changes are proposed:

the current requirement is replaced by a requirement to publicise ‘by local advertisement’. This is defined in draft regulation 3 as meaning publication in at least one local newspaper; and publication on the website; and

- the Department is also required to inform ‘any particular person’ it considers is likely to be affected by or have an interest in the application by sending them a notice of the receipt of an EIA application and allowing 4 weeks for representations. ‘Any particular person’ is defined in draft regulation 3 as including ‘any non-governmental organisation promoting environmental protection’.

**Assessment*

The publicity arrangements proposed using the internet represent a modernising of current arrangements.

With respect to the proposed obligation to notify ‘any particular person’, there are likely to be difficulties at an initial stage in processing an application in identifying all persons likely to be affected by or to have an interest in the proposals. The obligation to send a notice on the other hand suggests precise knowledge – this may not be the case. Persons who consider themselves affected but who had not been notified could challenge the process.

The CEF wish to comment that it would be better and clearer for all concerned, not least anyone likely to be affected, to stick with accepted notification procedures for the general public i.e. press advertisement, neighbour notification, plus proposed use of the internet; and to send notices only to identified NGOs. The Public Participation Directive in Article 2 leaves the detailed arrangements for public participation to be determined by Member States.

Clarity is needed on what constitutes an NGO and the CEF seeks from a definition from the department. There is no definition of NGOs provided in the Regulations. NGOs could therefore be argued to include:

- quangos, under the accepted definition of these;
- environmental groups, such as Friends of the Earth and the Ulster Society for the Protection of the Countryside which operate on a regional basis; and
- local amenity groups, often established in response to specific development proposals.

It is in everyone's interests that there is simplicity, clarity and certainty on these matters – otherwise the process will be open to challenge with the delay and wasteful use of resources that can result.

Draft Regulation (8b)

This draft regulation deals with the publicising of information provided by the applicant in EIA cases.

***Present Position**

Currently the Department is required to publicise only information which it or the Planning Appeals Commission (PAC) has specifically requested.

***Proposed Changes**

It is proposed to require publicity for 'any other information' submitted voluntarily by the applicant, which relates to the ES. 'Any other information' is defined in draft regulation 3 as 'any other information relating to the environmental statement'. Information provided for an inquiry where there is a statutory requirement to publicise the information is excluded from this requirement.

Where such information is received, the publicity arrangements relevant to the receipt of an ES apply, including the changes proposed in the consultation paper, namely:

- publicity ‘by local advertisement’;
- informing ‘any particular person’;
- consultation with the district council and other relevant bodies; and
- allowing 4 weeks for response.

*Assessment

The definition refers to **any** other information – there is no qualifying adjective with respect to scale or significance. That being the case, Planning Service will be obliged to apply the regulation literally in order to inform the public and avoid legal challenge.

However the provisions should not add to processing times in EIA cases if the information submitted voluntarily is provided at the same time as information submitted at the request of the Department. In these circumstances the publicity and consideration of the two categories of information will run in parallel.

If, however, information is provided voluntarily and independently of requested information, then the potential implication is a delay of at least 4 weeks in processing time. Applicants who are minded to submit information relating to the ES voluntarily will need to judge whether the information is likely to be significantly material to the determination of their applications; or is of only marginal significance and therefore likely only to delay processing.

This change which may lead to delay and therefore to reluctance on the part of applicants to volunteer information.

Draft Regulation 9

This draft regulation deals with the duty of the Department to inform the public of decisions on EIA applications.

**Present Position*

Currently the Department is required to publicise its determination of an EIA application in at least one local newspaper.

In cases which are determined by the PAC, the Commission is obliged to provide a statement containing the decision and conditions attached; the reasons for it and the considerations on which the decision was based; and a description of measures to reduce offset major adverse effects of the development.

**Proposed Changes*

The draft regulation requires:

- the Department to publicise determinations of EIA applications ‘by local advertisement’ as defined in regulation 3; and
- that where the PAC determines an EIA application, the Commission is required to provide the Department with a statement containing information about the public consultation process; and about the right to challenge the validity of the decision and the procedure for doing so.

**Assessment*

These are post-decision requirements which are reasonable.

Draft Regulation 10

This draft regulation makes changes to the EIA process with respect to development likely to have significant effects on the environment of another Member State.

**Present Position*

Current regulations make provision for notification of Member States in such EIA cases; for provision of information; for consultation; and for notification of the planning decision.

**Proposed Changes*

The draft regulation expands on current provisions by:

- requiring the Department to make available to the Member State in question further information provided by the applicant, either at the request of the Department or the PAC, or voluntarily; and

- following determination of the application, requiring the Department to provide the Member State with information about the public participation process.

*Assessment

These provisions are reasonable in informing people in other jurisdictions affected by major proposals on a basis comparable to that applied to people living in NI. However the comments made in the assessment of the implications of regulation 8(b) apply here also.

Draft Regulation 11

This draft regulation deals with development in other Member States likely to have significant environmental effects on the environment of NI.

*Present Position

Currently where the department receives information from a Member State on a proposed EIA project, the Department must:

- consult with the Member State on the significant effects and the measures to deal with these;
- agree a period within which the public can make representation to the State;
- make information received available to relevant authorities and the public; and
- ensure that opportunity is given to comment on the information.

*Proposed Changes

The draft regulation requires the Department to make available to relevant authorities and the public the decision of the Member State including:

- conditions attached;
- reasons and considerations on which the decision was based, including information about public participation; and
- a description of the main measures to deal with major adverse effects.

*Assessment

These are reasonable reciprocal provisions with respect to trans-boundary implications of major development proposals.

Draft Regulation 12

This draft regulation deals with procedures where the PAC receives an ES in connection with an enforcement appeal.

***Present Position**

Currently the PAC must:

- serve a copy of the ES on the Department and relevant authorities; and
- allow 4 weeks for the Department and relevant authorities to make representations.

***Proposed Changes**

The draft regulation requires the PAC to inform ‘any particular person’ likely to be affected or to have a direct interest in the application.

***Assessment**

The provisions are reasonable consequences of the proposed changes to the regulations set out earlier.

Draft Regulation 13

This draft regulation deals with publicity for an ES received by the PAC in connection with an enforcement appeal.

***Present Position**

Currently the PAC is obliged to publish in a local newspaper:

- the name of the appellant;
- the location and nature of the development;
- where the ES may be inspected; and
- that 4 weeks are allowed for representations.

The Commission is also required to inform the Department and the public of its decision.

**Proposed Changes*

The draft regulation applies the ‘by local advertisement’ and ‘any other information’ provisions described above to the processing of enforcement cases involving an EIA.

**Assessment*

These are reasonable consequences of the changes to regulations described earlier in the paper.

Draft Regulation 14

This draft regulation deals with changes to procedures where enforcement cases involving EIA have effects on other Member States.

**Present Position*

The provisions applying to planning applications involving EIA described in relation to draft regulation 10 above are mirrored for enforcement cases.

**Proposed Changes*

The draft regulation provides for ‘any other information’ submitted by an applicant to be made available to a Member State affected by development.

**Assessment*

Comment in relation to draft regulation 10 applies.

Draft Regulation 15

This draft regulation involves some tidying-up of wording in other legislation.

Draft Regulation 16

This draft regulation deals with the public register of EIA applications.

**Present Position*

DOE is required to keep a register for public inspection of all determinations, opinions and decisions made under the EIA regulations, including any ES submitted and planning decisions taken.

**Proposed Changes*

The draft regulation requires the Department to make available ‘any other information’ submitted by the applicant, information on the public participation process and details of review procedures.

**Assessment*

These provisions follow logically from earlier draft regulations.

Draft Regulations 17 and 18

These draft regulations deal with changes to Annexes 1 and 2 of the EU Directive.

**Present Position*

Annexes 1 and 2 of the EIA Directive, which are incorporated as Schedules 1 and 2 of the NI EIA Regulations, set out the types of development which potentially fall within the scope of the EIA procedures. Annex 1 sets out the types of development for which an EIA is mandatory; Annex 2 sets out the developments which have to be screened by the Department for EIA and a determination made as to whether the nature of the proposal and its potential environmental implications require the submission of an EIA.

**Proposed Changes*

Draft regulation 17 introduces into Schedule 1 of the NI EIA Regulations a new project category for which EIA is mandatory, covering a change to or extension of a Schedule 1 project where the change or extension itself does not meet the Schedule 1 thresholds for that type of project.

Draft regulation 18 excludes such projects from Schedule 2 of the EIA Regulations.

*Assessment

These are reasonable changes.

B – Amendment to EIA Procedures

There are two elements to the proposals;

- firm proposals which are included in the consultation paper as draft regulations; and
- provisions with respect to the PAC which are said to be still under consideration and are not included in draft regulations.

Draft Regulation 5

This draft regulation amends the procedures for dealing pre-application determinations.

*Present Position

Developers can request the Department for a determination before submitting a planning application as to whether a proposal would be an EIA development; and what information should be provided with an EIA application. The Department has 6 weeks in which to respond to such requests.

Where the Department gives a determination as to whether a proposal is an EIA development, the applicant must indicate his acceptance or otherwise within 4 weeks. No timescale is currently imposed for response to the Department's determination as to what information should be provided in an EIA application – a 'scoping' opinion.

*Proposed Changes

This draft regulation sets a timescale of 4 weeks for response to a scoping opinion.

*Assessment

The purpose of the proposed change is stated in the consultation paper to be to ensure that the Department knows what to expect and to plan accordingly. **This change is considered reasonable.**

Draft Regulation 6

Thus draft regulation clarifies the date at which an EIA application is regarded as 'received' for processing purposes.

****Present Position***

Currently the Department has by statute 16 weeks in which to determine an EIA application which run from the date of receipt of the ES.

****Proposed Changes***

The draft regulation amends current provisions by providing that where further information is requested, the 16 week period will commence on the date when this information has been received.

****Assessment***

Where an incomplete ES is received and further information has to be requested, it is reasonable that the processing period for the application should not begin until this has been received.

Draft Regulation 8(a)

This draft regulation sets a timescale for the submission by applicants of further information requested in EIA applications.

****Present Position***

Currently there is no timescale imposed on applicants for submitting further information requested.

****Proposed Changes***

The draft regulation proposes to require applicants to submit further information requested within 3 months or such extended period as may be agreed with the

Department. If the information is not submitted in time, the application will be deemed to be refused and there is no right of appeal.

*Assessment

The purpose of the amendment as stated in the consultation paper, namely to speed up this part of the EIA process, is understood.

The discretion to extend the period appears in our reading of the draft regulation to apply at the time of the request for information and not as an extension of time to be requested at a later date when difficulty in meeting the deadline is apparent. Further, the example in the consultation paper when extension of time might be considered refers to the need to collect seasonal data – this suggests that the Department might be regarding this exception in that light rather than as a device to provide more time to applicants where, for example, there is a volume of material to be collected.

CEF should consider:

Can the Department clarify the time extension provided by the regulation and we suggest the wording is amended to allow extension of time at any time during the 3 month period. E.g. to allow for an unexpected high volume of data or seasonal data.

Provisions with respect to the PAC

Two changes are ‘under consideration’ with respect to the PAC:

- to provide statutory authority for the PAC to make EIA determinations in appeal cases. The provisions will enable the PAC to carry out the full range of administrative procedures associated with the EIA process; and
- a timescale will be inserted for an applicant to notify the PAC of his intention to seek a hearing where he disagrees with the Department’s determination that his proposals constitute EIA development.

The paper states that these provisions are not included in the draft regulations; that they will be finalised and included in the new regulations; and that comment on them would be welcomed. **They are reasonable.**

Conclusions

- the purposes of the proposals, to enhance public participation and access to justice in the EIA process, are reasonable and consistent with the Planning Service's Modernising Planning Processes initiative;
- in this context the individual proposals are, in general, reasonable;
- CEF wish to express concerns over changes proposed in draft regulations 7, 8(a) and 8(b);
- cumulatively the proposed changes will add to the workload of Planning Service and to the complexity of planning procedures;
- as procedure becomes more complex, it is more likely to become slower, and more susceptible to challenge by judicial review if all steps are not fully complied with;
- in major applications falling under the EIA process, this can delay the achievement of development of value and significance to the future on NI;
- The Planning Service must ensure that it is resourced to deal effectively and expeditiously with the full range of changes proposed in the consultation paper.