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Llywodraeth Cymru
Welsh Government

Welsh Government Consultation Document

Proposed changes to how Environmental Impact Assessment applies to Town and Country Planning

Date of issue: 22/08/2016

Action required: Responses by 11/11/2016

Overview	This consultation seeks your views on proposed changes to the Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016 to implement European Directive 2014/52/EU on Environmental Impact Assessment.
How to respond	The closing date for responses is 11/11/2016. You can respond in any of the following ways: <p data-bbox="459 517 555 544">Email:</p> <p data-bbox="459 555 1209 622">Please complete the consultation response form and send it to:</p> <p data-bbox="459 667 1007 694">planconsultations-e@wales.gsi.gov.uk</p> <p data-bbox="459 734 539 761">Post:</p> <p data-bbox="459 772 1182 840">Please complete the consultation response form at Annex 1 and send it to:</p> <p data-bbox="459 884 959 1099">Development Management Branch Planning Directorate Welsh Government Cathays Park Cardiff CF10 3NQ</p>
Further information and related documents	Large print, Braille and alternative language versions of this document are available on request. <p data-bbox="459 1288 1203 1355">Information on Environmental Impact Assessment is available here:</p> <p data-bbox="459 1400 1031 1467">http://ec.europa.eu/environment/eia/eia-legalcontext.htm</p>
Contact details	For further information: <p data-bbox="459 1621 1118 1648">E-mail: planconsultations-e@wales.gsi.gov.uk</p> <p data-bbox="459 1693 1015 1720">Tel: Owen Struthers on 029 2082 6430</p>

How the views and information you give us will be used

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

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1. Introduction

Background

- 1.1 The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016 ("**the EIA Regulations**") transpose Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ("**the EIA Directive**") in relation to development under the Town and Country Planning Act 1990.
- 1.2 Environmental Impact Assessment (**EIA**) is a process by which information is collected and consulted upon, in a systematic way, to inform an assessment of the likely significant environmental effects arising from a proposed development.
- 1.3 EIA ensures that authorities responsible for making planning decisions consider the likely significant environmental effects of development and that the public have the opportunity to comment on them before an authority makes its decision. In particular the EIA Directive aims to prevent, reduce or offset the significant adverse environmental effects of development proposals and enhance positive ones.
- 1.4 The EIA Directive has been amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ("**the 2014 EIA Directive**"). The European Commission has produced an unofficial consolidated version which is available [here](#).
- 1.5 Broadly, the intention of the 2014 EIA Directive is to:
 - Clarify and strengthen the screening process, in particular by specifying the content of the screening decision;
 - Strengthen the quality of the Environmental Statement (**ES**) related elements of the EIA Directive by:

- Requiring it to be based on the scoping decision where there is one;
- Expanding the required content;
- Requiring it to include information on new environmental challenges (such as climate change);
- Enhance policy coherence and synergies with other EU/international law and simplify procedures by:
 - Co-ordinating certain environmental assessments;
 - Specifying timeframes for the various stages of the EIA process.

Implications of the EU referendum

- 1.6 The outcome of referendum held on 23 June was that the UK should leave the European Union. Importantly before, and during the negotiations, the UK continues to participate in EU activities, the EU institutions, and abides by EU law. Therefore until the completion of the negotiations the Welsh Ministers are obliged to make legislation to transpose the requirements of the Directive.

Purpose of consultation

- 1.7 This consultation paper sets out the Welsh Government's proposals for transposing the provisions of the 2014 EIA Directive and making other changes to national legislation. The consultation below sets out our proposals on the following areas:
- Third party screening requests;
 - Screening and scoping timeframes;
 - Co-ordination;
 - Consultation and participation in the decision making process;
 - Monitoring of significant effects;
 - Penalties and enforcement;
 - Competent experts;
 - Purchase notices under Section 141 of the Town and Country Planning Act 1990 ("TCPA");
- 1.8 There are other areas where there is no substantive choice in how transposition can be achieved (for example, the selection criteria used to determine if a project falls within EIA) and so have not been included in this consultation paper.

2. Third party screening requests

Background

- 2.1 Screening is a procedure used to determine whether a proposed project is likely to have significant effects on the environment. It should take place at an early stage in the design of the project.
- 2.2 In the first instance screening is usually undertaken by the LPA, either before the application for development consent is finalised, or shortly after it has been submitted. If a third party disagrees with a LPA's screening opinion, a request can be made to Welsh Ministers for a screening direction which, if

made, will determine conclusively whether the development is to be subject to an environmental assessment. The third party screening system allows interested parties to be able to satisfy themselves that the need for an assessment of the effects of a proposed project on the environment (“EIA”) has been properly considered, in accordance with the rules laid down by national law that an EIA is or is not necessary.

- 2.3 Third party screening requests are an important part of the EIA process. However, as a result of recent case law¹ there is the danger they could be used to frustrate and delay planning decisions if they are made late in the determination period. Under such circumstances, the LPA are likely to wait for the outcome of any screening direction request before granting planning permission.
- 2.4 Our intention is to ensure that third party screening requests occur early in the process so that all parties have certainty.

Our proposals

- 2.5 In the case where a screening opinion has been made by an LPA, we propose to limit the ability of third parties to request a screening direction from the Welsh Ministers to no later than 35 days after the LPA places its screening opinion on the planning register kept pursuant to section 69 of the TCPA. In the case of applications where no screening opinion has been sought or issued, we do not propose a limit on the time at which a screening direction may be sought by a third party.
- 2.6 Our proposal of 35 days is based on it taking up to 14 days to place the screening opinion on the planning register so that it is known to the public. 21 days are then provided for the public to understand the decision and submit a request for a screening direction to the Welsh Ministers. The Welsh Ministers would retain the ability to make a screening direction at any time.

Q1	Do you agree with our proposals for third party screening? If not, what proposals would you recommend to ensure third party screening requests are made early in the application process.
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3. Timeframe to provide a scoping request

Background

- 3.1 An applicant is not required to consult about the information to be included in an ES to accompany an EIA application. However, they may ask the LPA for its formal opinion on the information to be supplied in the ES (a “scoping opinion”). This allows the LPA to clarify the aspects on which the applicant’s ES should focus and the level of detail required.

¹ R (on the application of Silke Roskilly) v Cornwall Council & Shire Oak Quarries Limited [2015] EWHC 3711 (Admin)

- 3.2 The Welsh Government recently commissioned training on EIA scoping to help deliver a consistent and proportionate approach to the scoping process. During the events, concerns were expressed that the existing timeframe of 5 weeks to provide a scoping request did not allow sufficient time to consider the issues or engage with consultees, sometimes resulting in disproportionate scoping – where the resultant opinion does not focus only on the significant issues. Confirmation that this is an issue is also reflected in our understanding that LPAs often agree extensions of time to provide the scoping request with the developer.
- 3.3 The 2014 EIA Directive has amended the scoping process. Where a developer requests an opinion, the ES must now be based on that opinion. The purpose of this change is to provide more certainty for the developer when preparing their ES – and reducing concern that they may be asked to cover additional topics following submission of their application. It is possible that it will have the opposite effect and result in some competent authorities taking a more risk averse approach and asking for more information at the scoping stage.

Our proposals

- 3.4 We want to encourage proportionate scoping. If used correctly it is a tool that can reduce the size of ESs by focusing ESs on the significant issues where the development is likely to have significant effects on the environment.
- 3.5 We want your opinions on increasing the timeframe for scoping to help ensure that LPAs and other parties have sufficient time to consider the development and provide a proportionate response. This should also help ensure that competent authorities are less risk averse as they have sufficient time to consider the information.

Q2	Do you think the timeframe associated with scoping should be revised? If yes, what timeframe do you consider appropriate and why?
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4. Coordination

Background

- 4.1 The 2014 EIA Directive has sought to reduce the complexity of consenting and assessment processes for developers by requiring the coordination of procedures where projects fall to be assessed simultaneously under the EIA, Habitats and Birds Directives (Directives 2011/92/EU, 92/43/EEC and 2009/147/EC respectively).
- 4.2 The 2014 EIA Directive requires Member States to, where appropriate, ensure that coordinated and/or joint procedures fulfilling the requirements of the legislation are provided for. The coordinated procedure is undertaken by designating an authority to coordinate the individual assessments, whereas the joint procedure requires a single assessment. The 2014 EIA Directive

enables Member States to extend the coordinated and/or joint procedures to include assessments required by other European Union legislation.

Our proposals

- 4.3 We do not intend to provide for joint procedures. We consider that coordinated procedures offer the greatest flexibility for developers on the phasing and timing of EIA and HRA.
- 4.4 We do not intend to create coordinating procedures for the wider set of directives referred to in article 1(2) of the 2014 EIA Directive. However we are considering how best to provide for coordination in relation to the EIA, Habitats and Birds Directives and wish to provide procedures that are not unduly burdensome to developers, retaining flexibility and choice. We are seeking stakeholders views on which elements of the planning EIA and the HRA procedures could be coordinated in order to make them work better together.

Q3	Do you agree with proposals to provide for a coordinated rather than joint procedure?
Q4	What coordinating measures would be most useful, and what benefits would they generate?

5. Consultation and participation in the decision making process

Background

- 5.1 One of the aims of EIA is to ensure that the public are given early and effective opportunities to participate in the decision making process. To achieve this, after submission of the application for development consent, the application and ES are publicised. This provides statutory consultation bodies and the public the opportunity to give their views about the proposed development and the ES. The ES, together with any other information which is relevant to the decision, comments and representations made on it, must be taken into account before deciding whether or not to give consent for the development.
- 5.2 To enhance public participation, the 2014 EIA Directive has amended the publicity and participation requirements. The revised Article 6(2) requires the public to be informed electronically of the application and how to participate in the decision making process, Article 6(5) requires that the relevant information (application and ES) is also available electronically through at least a central portal or easily accessible points of access, and Article 6(7) has required that the public consultation on the ES should last for at least 30 days.

Our proposals

[Electronic publicity to implement Article 6\(2\) and 6\(5\) of the 2014 EIA Directive](#)

- 5.3 We consider that LPA websites satisfy the Directive's requirement for easily accessible points of access. Where the developer must advertise the ES (because it was submitted after the application was made) we propose that the LPA will still need to make the application and ES available online so that it satisfies the electronic aspect of the publicity requirements being available through an easily accessible point. DNS applications will be publicised by the Welsh Ministers.
- 5.4 As the majority of LPAs (20 out of 25) have websites that allow members of the public to view information online they will not need to make any amendments to their current systems. In respect of those consenting authorities that do not have existing systems we do not propose that they will be required to introduce interactive systems, but that they should make the information available online.
- 5.5 Due to the different formats of LPA websites LPAs and other competent authorities, we propose that the Regulations specify the content of the advertisement but do not specify exactly where or how the application is published on their website. However it should be clear and obvious to ensure to viewers of the website so that it amounts to publicity. Guidance will assist in identifying suitable options for LPAs.

Q5	Do you agree with our proposals for making information available electronically?
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Electronic and paper copies of applications

- 5.6 The EIA Regulations already provide for electronic communication between parties (such as the service of notices) and the provision of materials between parties (such as copies of the ES). However, as the 2014 EIA Directive has sought to increase the electronic accessibility of the EIA process it is appropriate for the methods of communication within the EIA Regulations to reflect and assist in the increasing use of electronic forms of communication.
- 5.7 We propose to update the Regulations so that where an EIA application is made, it includes both a paper and electronic version. Ensuring the application includes an electronic copy will allow the LPA to easily fulfil its duty to publicise the ES online. We propose a similar arrangement where an appeal is submitted to the Welsh Ministers.

Period of public consultation

- 5.8 The period of public consultation is currently 21 days and it is proposed that this be extended to the minimum period of 30 days as required by the Directive.

6. Monitoring of significant effects

Background

- 6.1 The 2014 EIA Directive requires that the decision to grant development consent should include, where appropriate, monitoring measures. Member States have freedom to determine the procedures regarding the monitoring of significant adverse environmental effects.
- 6.2 The 2014 EIA Directive requires what is monitored and the duration of the monitoring to be proportionate to the nature, location and size of the project and the significance of its effects on the environment. Existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication.

Our proposals

- 6.3 Given that the potential monitoring arrangements will depend on the project before the decision maker it is considered that the arrangements should be flexible. We propose to impose a general requirement on the LPA, or Welsh Ministers to include monitoring measures where appropriate, leaving it to their discretion as to what factors should be monitored and for how long.
- 6.4 We consider the existing system of planning conditions and obligations provides the necessary mechanisms to implement the Directive while retaining flexibility.

Q6	Do you agree our approach provides the most flexible approach to the 2014 EIA Directives requirements?
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7. Conflict of interest and functional separation

Background

- 7.1 The 2014 EIA Directive requires that competent authorities perform the duties of the EIA Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest.
- 7.2 The 2014 EIA Directive also requires that where the competent authority is also the developer there shall be an appropriate separation between functions.

Our proposals

Conflict of interest

- 7.3 It is a principle of administrative law that a decision maker should be impartial and unbiased. Therefore public bodies should already carry out their functions in a way which does not give rise to a conflict of interest.
- 7.4 The role of members and officers in the determination of a planning application should be undertaken in accordance with the Authorities code of practice, including provisions for conflict of interest. Those provisions require

decisions to be made with an open mind and objectively. The authority's Monitoring Officer and subsequently the Public Services Ombudsman for Wales can investigate allegations that elected Members and officers have breached their authority's Code of Conduct. The Ombudsman cannot however instruct an authority to reconsider a planning decision it has made. A planning application must be judicially reviewed in order to challenge a decision on the basis that a competent authority had a conflict of interest.

- 7.5 Although these existing provisions should ensure that this requirement of the 2014 EIA Directive are implemented, we propose to highlight in the EIA Regulations that:

when any authority (such as LPA or the Welsh Ministers) has a duty under the EIA Regulations they must take any steps to ensure they do so in an objective manner.

Functional separation

- 7.6 LPAs are already subject to provisions in the Town and Country Planning (General Regulations) 1992 that require the LPA to have a functional separation between committees and officers that determine applications and those responsible (wholly or partly) for the management of any land or buildings to which the application relates.
- 7.7 Given the different bodies involved in EIA, and that functional separation may be achieved through a number of different means, we do not propose to define in the EIA Regulations how a body should undertake this provision. We propose simply to require that:

where the developer and the relevant authority are the same person, the relevant authority must ensure a functional separation between those persons seeking development consent and those responsible for determining whether development consent should be granted.

Q7	Do you agree with our proposals for conflict of interest and functional separation?
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8. Penalties and enforcement

Background

- 8.1 The 2014 EIA Directive requires that "*Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.*"

Our proposals

8.2 We consider that the enforcement provisions should relate to both the provision of false information in the EIA process, and to unlawful development.

Provision of false information

8.3 The EIA Regulations contain a criminal offence relating to applicants who intentionally provide misleading information or are reckless in providing information when certifying they have placed a notice on land publicising the ES.

8.4 This provision is only applicable to the placing of the notice. If someone intentionally provided false or misleading information in a screening request or ES, intending by doing so to make a gain, this would constitute the offence of fraud by false representation. Fraud is covered by criminal law.

8.5 We therefore propose to remove the narrow offence contained within the existing Regulations and rely on the criminal law by way of transposition.

Q8	Do you agree with the proposed approach to false or misleading information within the EIA process?
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Planning enforcement system

8.6 Unlawful EIA development, like other forms of unlawful development, may be subject to enforcement proceedings. We consider the planning enforcement system is generally 'fit for purpose' for the purposes of providing a penalty system for unlawful development.

8.7 All planning enforcement action must be undertaken in accordance with case-law, which provides limited discretion as to whether action is taken. If an LPA issues an enforcement notice then a developer must comply with it, appeal it, or face criminal sanctions.

8.8 To reinforce the position, we propose to place an explicit duty on LPAs to consider if the requirements and objectives of the EIA Directive have been met when they are considering taking enforcement action.

Q9	Do you agree that our proposed approach to enforcement will ensure the effective compliance with the requirements of the EIA Regulations in a proportionate way and in a way which dissuades bodies which are part of the process from failing to comply?
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9. Competent experts

Background

9.1 The 2014 EIA Directive introduces a new requirement with respect to those who produce and consider the ES. The 2014 EIA Directive requires that:

- the developer must ensure that their ES is prepared by competent experts; and,

- the competent authority ensures that it has, or has access as necessary to, sufficient expertise to examine the ES.

Our proposals

- 9.2 The European Commission's original proposal to amend the Directive referred to accredited experts but this was not taken forward. Therefore it is not considered a requirement to have an accreditation system for competent persons as part of the EIA transposition.
- 9.3 We therefore propose to include a requirement in the legislation that the ES must be prepared by persons who by virtue of their qualifications or experience have in the opinion of the competent authority sufficient expertise to ensure the completeness and quality of the ES.
- 9.4 The terminology used in respect of the competent authority is different. It is considered that most decision makers have sufficient expertise within their planning and wider teams to examine the ES. They will also have the comments of the statutory consultation bodies, including Natural Resources Wales.
- 9.5 We therefore propose to include a requirement in the Regulations, that the competent authority ensures that it has access to sufficient expertise to examine the ES.

Q10	Do you agree our competent expert proposals provide the most flexible approach to the Directive's requirements?
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10. Purchase notices under Section of the TCPA

- 10.1 Provisions in Section 137 of the Town and Country Planning Act 1990 enable an owner whose land is refused planning consent to serve a purchase notice if he or she can show that the land has become incapable of 'reasonably beneficial use'.
- 10.2 Subject to other provisions, the Welsh Ministers must consider whether to confirm the notice or to take other action under section 141 of the Town and Country Planning Act 1990. Section 141(2) and (3) provides that instead of confirming the notice, the Welsh Ministers may grant planning permission on that land. This could comprise development consent for the purposes of the EIA Directive.
- 10.3 We intend to amend the EIA Regulations to make specific provision where the Welsh Ministers intend to grant development consent for EIA development under Section 141. The intention is to apply the general procedures to the process whereby the Welsh Ministers screen a proposal, and may only grant consent following the provision of an ES by a developer and consideration of that ES.

Q11	Do you have any comments on the application of procedures to secure that
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	Welsh Ministers have access to an ES which is consulted upon and considered before granting consent under Section 141 for EIA development?
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11. General Questions

11.1 This consultation asks specific questions, however the 2014 EIA Directive makes a number of changes to the EIA Directive. We welcome any comments you have areas where we have not asked specific questions.

Q12	Do you have any related comments on issues which we have not specifically addressed?
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11.2 To accompany the draft regulations, we have produced a draft partial Regulatory Impact Assessment. If you have thoughts, information or evidence that would inform our understanding of the effect of these changes, we would welcome your views.

Q13	Do you have any comments to make about the draft partial Regulatory Impact Assessment?
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