The Department of Agriculture, Food and the Marine,

Kildare Street,

Dublin 2.

10th July 2023

Sent by email to: EIAReview@agriculture.gov.ie

RE: Public Consultation on review of EIA (Agriculture) Regulations

A Chara,

An Taisce welcomes the opportunity to comment on the public consultation on the review of EIA (Agriculture) Regulations and have the following comments to make.

1. Adequacy of the Consultation Process

The communication by the Department of Agriculture (DAFM) on the public consultation of the review of the EIA (Agriculture) Regulations is untimely and inadequate to exercise public participation rights. On 25 May 2023, when addressing a parliamentary question to the Oireachtas, Minister McConalogue announced that "the public consultation informing the review will be open for a period of six weeks."[1] However, the official press release from 12 June 2024 clearly stated that "Members of the public are advised to email your observations or comments … by 10 July 2023."[2] This amounts to less than four weeks to file submissions regarding the review.

This reduced timeframe is detrimental to the procedural rights of the public, given the highly complex nature of the consultation. Furthermore, the consultation lacks specific questions to

[1] Dáil Deb 25 May 2023, vol 25216, 62 <https://www.oireachtas.ie/en/debates/question/2023-05-25/62/#pq-answers-62> Accessed 5 July 2023

[2] Department of Agriculture, Food and the Marine, 'Minister McConalogue Announces Review of EIA (Agriculture) Regulations' (*Press Release 2023*) < https://www.gov.ie/en/press-release/b01dd-minister-mcconalogue-announces-review-of-eia-agriculture-regulations/> Accessed 5 July 2023

guide the public, nor is there any further information on which to base submissions. This can be evidenced by accessing the DAFM's website.[3]

The Consultation Principles & Guidelines 2016 of the Department of Public Expenditure and Reform have set out three principles to public consultations carried out by institutional bodies. These are: effectiveness, accessibility and participation.[4] In our view, all these principles are inadequately fulfilled by the Department's communication. First, the consultation feels like a "pro-forma exercise for bureaucratic purposes", as it has failed to ensure real engagement and greater understanding by the public of the benefits and consequences of reviewing the EIA (Agriculture) Regulations. Second, the consultation process does not allow for the highly complex subject matter at hand, nor does it provide for the public and the farming community's ability to fully appreciate and understand the implications of the review at hand. And finally, the fact that the consultation period has been reduced by two weeks compounds the issues around the public having the effective opportunity to engage in this consultation effectively.

2. Current State of the Regulations

The current Regulations are widely considered to be inadequate in terms of a) the insufficient detail of the Regulations, b) the poor standard of current implementation and c) a failure to monitor and enforce them. To be fit for purpose, it is crucial that the Regulations are significantly improved and that monitoring and enforcement processes are fully implemented.

Current monitoring and enforcement procedures are completely inadequate. Landowners are openly breaching the Regulations without adequate response from DAFM. Unregulated hedgerow removal and land drainage are frequently reported to us by members of the public, with little, if any, response from DAFM when we highlight these issues with them in writing.

We would recommend that prior to amending any operational proposals DAFM should conduct an independent review of the operation of the Regulations. The review should seek to identify issues with the current implementation, including those raised throughout this consultation, and provide recommendations for future operation.

Any changes to the Regulations as a result of this review should be accompanied by a strong media campaign to highlight the changes, and the responsibilities of landowners in regard to them.

[3] < https://www.gov.ie/en/service/161a7-environmental-impact-assessment-screening-service/> Accessed 5 July 2023

[4] These are the following: (1) The consultation with the public must be genuine, meaningful, timely, balanced and with the ultimate object of leading to better outcomes and understanding of the proposal; (2) The consultation should be targeted at and easily accessible to the interested public; and (3) Government departments and agencies should make systematic efforts to ensure interested parties can participate in open consultations at all stages of the policy process.

3. Aarhus and public participation

The Regulations must require public / stakeholder consultation at both the screening and the consent stages. Timely public notice should be made by DAFM to indicate that an application has been made under the Regulations and relevant information should be made publicly available, and notice of an application should be circulated to relevant stakeholders, with a defined period for public comment.

All Decisions must be published in a timely manner – including screening decisions, and published Decisions must include reasoning, this includes where screening indicates that consent is not required.

Article 8(1) of the existing regulations provides:

> *"8. (1) Where the Minister, having considered all relevant information including the criteria set out in schedule 2, is of the opinion that the activity is not likely – (a) to have significant effects on the environment (b) to have significant effects on a European site, (c) to impact adversely on an NHA, or a nature area, or (d) to damage a monument He or she shall inform the applicant that the activity may proceed within such period as the Minister may specify in his or her decision."*

Following the rationale set out in Article 4(5) of the EIA Directive regarding screening for Annex II projects, we note that the review of this Regulation should include the duty for the Minister to make the screening decision available to the public. This is also in keeping with Article 2(2)(d) of Directive 2003/35/EC, which aims for effective public participation – also achieved by making reasonable efforts to inform the public about decisions taken in environmental matters of their concern – as the way to increase accountability and transparency of decision-making processes.

Article 12 of the regulations provides for publication of a notice of application:

> *"12. (1) Where the Minister receives an application for consent under Regulation 9 which is accompanied by an EIS or an Natura impact statement, he or she shall, before making a decision, publish a notice of the application."*

An Taisce notes that this same provision is also present in other relevant environmental legislation for certain decisions, such as s. 10(1) of the S.I. 191/2017 (Forest Regulations 2017) and s. 34(1A)(a) of the PDA 2000. However, in compliance with Article 7(1) of Directive 2003/4/EC and considering that the DAFM holds environmental information in the public interest, necessary measures should be taken by this review to ensure that the DAFM organises this environmental information with the view of its active and systematic dissemination to the public. The Irish courts have established that environmental information for the purpose of that Directive is one that has a real and substantial possibility of environmental impact,[5] so these decisions on applications would be included in that definition. This could be achieved by expressly establishing in that provision the duty to make public the decisions on such applications for consent using electronic means.

[5] Redmond v CEI & Coillte [2020] IECA 83 (Collins J), para. 63

This EU law provision sets out a clear, unconditional, and automatic duty with direct effect in this jurisdiction, regardless of whether Irish law transposes it correctly or at all. The direct effect of the Public Participation Directive has been already recognised by the Court of Appeal, who also acknowledged that those Directives had to be construed having regard to the Aarhus Convention.[6]

Additionally, the Regulations must include a mechanism for first- and third-party challenges to decisions, similar to what is provided in both the Forestry and Aquaculture licencing processes.

3. Standard of Information for Screening

In regard to screening, Article 7 provides that:

> *"7. (1) Subject to Regulation 9, a person who wishes to undertake an activity shall submit an application to the Minister for a screening decision. (2) Application under paragraph (1) shall contain- (a) the name and address of the applicant, (b) the location of the land, Land Parcel Identification System (LPIS) number assigned by the Minister, townland and county to which the application relates, (c) the nature and extent of the proposed activity including the anticipated outcomes of the activity and any features or measures to avoid or present significant adverse effects on the environment, (d) information on the characteristics of the activity and its likely significant effects on the environment, including at a minimum the information specified in Annex IIa to the Directive, (e) the name and address of the person who will perform the activity, and (f) such other information as the Minister considers necessary."*

There is a significant issue with poor standard of information being provided, and accepted, for the purposes of screening. For hedgerow removal the information to be clearly recorded should include: Details of the precise location and length of the hedgerow proposed to be removed; Public roads; Designated Sites; Aquatic zones and relevant watercourses; Wayleaves; and Archaeological or cultural sites or features, including relevant buffer zones,

An equivalent level of detail should be required for other land restructuring, land drainage works and uncultivated land or semi-natural areas which are proposed to be used for intensive agriculture. All applications should undergo an assessment by an ecologist.

The Regulations should be written to permit the Minister to add mitigating conditions to ensure that no adverse environmental impact ensues.

5. Boundary removal

The existing thresholds are failing to ensure that environmentally significant effects are addressed in the EIA process. The current threshold limits for hedgerow removal are currently set at 500 m below which no application for screening assessment is required. Any restructuring of field boundary projects involving hedgerow removal below this level do not

[6] *Conway v Ireland* [2017] IESC 13 (Hogan J), para. 2.8

require screening, and therefore decision making is almost entirely within the landowner's remit.

An analysis of field boundary related screening applications in 2017 found significant issues with: low levels of consultation with NPWS during the applications process; a lack of opportunity for third party representation related to the application and decision process; a high approval rate of screening applications; an absence of precise clarity in the screening process; and a lack of ecological assessment on bat populations, climate mitigation, and cultural heritage. The same analysis also raised concerns over the speed at which applications were processed, leaving little time for proper assessment or public consultation; geographic bias in the applications; data deficits; an absence of follow-up and a lack of assessment of the cumulative environmental impacts on the ground.

Recommendations

- The thresholds for boundary removal are current set so high as to be ecologically negligent. Screening be required irrespective of the length of hedgerow removal. At a maximum a limit of 10-50m should be set for screening.
- That screening be required irrespective of hedgerow length in instances where the cumulative impact threshold has been exceeded in the previous two years.
- That hedgerows classified as Heritage hedgerows under the Hedgerow Appraisal System should require mandatory consent to be removed, irrespective of length or size criterion.
- Hedgerows proposed to be removed should be subject to a (recorded) field inspection by a suitably qualified party to a standard methodology – the Hedgerow Appraisal System is recommended as it was developed with such a purpose in mind.
- The EIA Screening form completed by the DAFM inspector should be based on a clearly defined standard operating procedure which sets out step-by-steps instructions for inspectors to ensure consistency and standardisation of decision making and assessment.
- Replacement hedgerows should be maintained to minimum dimensions. Where hedgerow replacement is required, details should include Species composition (% of each species); Density of planting (number of plants per metre); the provenance of planting material; and construction dimensions (height and width of the bank and cross-sectional volume of the drain).
- All screening applications for field boundary removal should require an ecologist's report on the potential impact on any species listed under Annex IV of the Habitats Directive, notably bats.
- Assessment for whether hedgerows constitute an important commuting route or feeding habitat for bat species must be carried out by an ecologist not the applicant.

6. Land Drainage

The EIA Agri regulations are sorely lacking in a definition of what constitutes agricultural land which would require drainage, but yet would not be classified as a formal wetland. No

definition is provided in the EIA Agri regulations for what a wetland is, but the Planning and Development regulations define it as such:

> ""*Wetlands" means natural or artificial areas where biogeochemical functions depend notably on constant or periodic shallow inundation, or saturation, by standing or flowing fresh, brackish or saline water."*

Section 6(8)(b) of planning regs provides for this exemption:

> *"Works consisting of field drainage for agriculture, other than drainage and/or reclamation of wetlands, shall be exempted development."*

There is no definition of what constitutes agricultural land requiring drainage. The only description given in the EIA Agricultural regs is this, in Section 3:

> "3. (1) These Regulations apply to the following –
>
> (a) restructuring of rural land holdings
>
> (b) commencing to use uncultivated land or semi-natural areas for intensive agriculture, or
>
> (c) l**and drainage works on lands used for agriculture**"

This lack of definition allows for wide scale misuse of this exemption, given that under the EIA Agri regulations an area of 15 hectares needs to be drained before screening is even considered, and 50 hectares or above for a mandatory EIA. The discrepancy between the two regulatory frameworks is stark. Class 11 of Part 3 of the Planning and Development Regulations 2001-2023 (Article 11, S.I. 454/2011 and Article 4, S.I. 464/2011) requires planning permission once the area to be drained exceeds 0.1 hectares:

> *"1. The area to be affected shall not exceed 0.1 hectares.*
>
> *2. Where development has been carried out within a farm holding under this class, the total area of any such development taken together with the area of any previous such development within the farm holding shall not exceed the limits set out in 1. above."*

We are of the view that the thresholds within the current EIA Agriculture Regulations are set are far too high, which when compounded by the lack of definitions provides for widespread land drainage of land which is likely to be valuable wetland habitat. Both authorised and unauthorised land drainage has been found by LAWPRO to be a significant driver of silt loss to waterbodies, with knock on ecological impacts on freshwater habitats. This has direct

Water Framework Directive implications, with hydromorphology found to be the second most prevalent pressure on waterbodies in Ireland[7] (the majority as a result of drainage activity).

Article 4 (1) of the WFD provides:

> "In making operational the programmes of measures specified in the river basin management plans: (a) for surface waters (i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water (ii) Member States shall protect, enhance and restore all bodies of surface water …"

In Case C- 461/13 Weser the CJEU held:

> *"Article 4(1)(a)(i) to (iii) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy must be interpreted as meaning that the Member States are required*
>
> *— unless a derogation is granted*
>
> *— to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive."*

As such, providing for a screening exemption for an activity which has been found to be potentially damaging to water quality is likely to be in contravention of the requirements of Article 4 of the Water Framework Directive. This legislation should provide for an authorisation process for drainage projects, to ensure they are assessed against WFD objectives. In order to do that, it is imperative that the thresholds be substantially reduced, as the thresholds currently in place do not align with the strict requirements of the Water Framework Directive. The high thresholds for screening and mandatory EIA also overlook the risk as a result of cumulative drainage projects. While the Planning and Development Regulations account for this risk, there is no such stipulation in the EIA Agriculture regulations. Research indicates that relatively small-scale drainage works can have major impacts cumulatively. Therefore, having the majority of drainage activities/events 'captured' individually at any kind of scale within a regulatory process is important if Ireland is to comply with Article 4 of the Water Framework Directive in relation to hydromorphology.

As such, An Taisce would recommend that the same threshold be applied to drainage of agricultural land, as exists for wetland drainage under the planning regulations, whereby any area greater than 0.1 hectares is subject to screening by an expert body, with a specific focus on water quality and potential impacts, with particular regard to cumulative impacts.

[7] EPA_WaterQualityReport2016_2021.pdf

Additionally, we would highlight that this review is taking place in isolation from the proposed Water Framework Directive measures put forward in the draft River Basin Management Plan to address pressures resulting from drainage works. Any changes to these regulations pertaining to land drainage should be cognisant of and aligned with the wider RBMP measures and should feed into a more integrated approach.

7. Commencing to use uncultivated land or semi-natural areas for intensive agriculture

The concept of High Nature Value Farmland (HNVf) has been around since the early 1990's. High Nature Value farmland has most commonly been defined as

> "*those areas in Europe where agriculture is a major (usually the dominant) land use and where that agriculture supports or is associated with either a high species and habitat diversity, or the presence of species of European, and/or national, and/or regional conservation concern, or both*."

HNVf is an important reservoir for biodiversity, ecosystem services, and cultural heritage. In the EU, the need to identify and protect HNVf is part of an integrated approach to rural and environmental policy which regards farming as being about more than just comprising food production.

Recommendations:

- The existing 5ha threshold for mandatory screening is too high and should be revised downwards.
- The existing definitions of semi-natural areas in the EIA (Agriculture) Regulations need to be made more explicit. As is, they are vague, and are based on a non-exhaustive list of semi-natural habitats.
- The safeguards relating to the commencement to use uncultivated land or semi-natural areas for intensive agriculture should be extended to all types of High Nature Value farmland.
- All areas known to host semi-natural habitats or areas with a high probability of hosting semi-natural and High Nature Value farmland should be subject to mandatory EIA screening.
- The Department should use all available maps of the known and predictive distribution of semi-natural and High Nature Value farmland to trigger both screening and full EIA.

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