An Taisce
The National Trust for Ireland

2014-01-17 DECLG Consultation EIA Regs & Foreshore Jan 2014

EIA Regulations Consultation
Marine Planning and Foreshore Section
Department of the Environment, Community and Local Government
Newtown Road
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17-01-2014

Re. Public Consultation on Draft European Union (Environmental Impact Assessment) (Planning and Development) Regulations

Dear Sir/Madam,

The following is An Taisce's response to the public consultation on the proposed new "**EUROPEAN UNION (ENVIRONMENTAL IMPACT ASSESSMENT) (PLANNING AND DEVELOPMENT) REGULATIONS 2014",** which consultation closes today January 17th at 17.45.

Our comments below are divided into two parts, General Comments and Specific Comments, where the latter deals with the specifics of each of the three amendments proposed.

Part 1. General Comments:

An Taisce welcomes the opportunity to comment on these important changes to ensure the compliance of the specified elements of the Irish Legislative Code with the obligations to conduct Environmental Impact Assessment under the codified "DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment", hereafter referred to as: the Environmental Impact Assessment Directive, or the EIA directive, or the Directive.

As a preliminary and over-riding comment An Taisce would like to reiterate its view about the unnecessary, and un-navigable complexity of Ireland's transposition of the Directive and request again that a single comprehensive legislative instrument be devised to appeal existing requirements and address comprehensively, and simply the requirements and obligations of the EIA Directive.

Making changes as is proposed here using the approach used in these and other regulations – necessarily relies on existing sections of the Irish legislative code which in turn must also be compliant for the transposition to be correct and the implementation to be effective.

Consequently the extent of cross-referencing and over-lay of one paragraph and section with another and then back to the Directive to check if the sum of the Irish provisions covers those of the Directive all serve to make an assessment of conformance most complex and confusing.

The first amendment in these draft regulations is to the Planning and Development Act of 2000, and specifies the legislative provisions which detail the developments where there are mandatory obligations to conduct Environmental Impact Assessment, EIA; and also specifies the requirements in respect of developments where EIA non-mandatory and a further screening decision is necessary.

The third amendment effectively does so for the Foreshore Act – while relying on the provisions within the Planning and Development Act for the Minister to detail the classes of development triggering EIA obligations.

As these pieces of proposed text then represent the most fundamental point at which the requirement to consider Environmental Impact Assessment obligations is triggered, as outlined earlier above, **it is essential that they and any associated provisions and schedules accurately and comprehensively address the obligations under the Directive,** so as to ensure that:

- EIA is carried out for all projects listed in Annex I of the Directive, and
- For those projects not listed in Annex I of the Directive that the obligations of Art 4 of the Directive are fully met and that such provisions are accurately reflected in Irish law; and
- That thresholds or limits in respect of non-mandatory projects are appropriately specified; and
- That the criteria of the Directive's Annex III are addressed and correctly transposed together with the associated obligations in respect of them; and
- That obligation under the Directive and the Aarhus Convention are fully addressed in respect of decision-making; and
- That the obligations under Art 2 (1) of the Directive are fully addressed - where Art 2(1) provides for the fundamental obligation of the Directive to conduct an EIA and make projects subject to a "Development Consent" before consent is given where the project is "likely to have significant effects on the environment".

  For convenience, Art 2(1) is detailed below.

  "Article 2

  1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4."

Those are the considerations which are paramount and must guide the specification of the new provisions, and the Department's and Ireland's assessment of their robustness in completing the transposition obligation, together with the clarity necessary on such requirements.

In the context of the significant development pressures which present frequently in areas of environmental sensitivity, the requirements of the Directive in respect of screening decisions where EIA is non-mandatory are critical. This raises the obligations under the Directive on the specification of any thresholds or limits for non-Annex I projects, together with the obligations to

also consider the Annex III criteria when making a screening decision on a project where EIA is non-mandatory, and to conform with the obligations under Art 4 of the Directive in their entirety.

We strongly urge the Department to consider and address these obligations most closely, and its obligation to exercise a precautionary approach to the specification of thresholds in accordance with the fundamental obligation of the Directive, underpinned as it is by the Treaty of the Functioning of Europe, not limited to but in particular : A191(2) – which in brief requires that Environmental policy shall be based on precautionary/preventative principles, and A191(1) providing for the basis of Environmental Legislation, detailed for convenience below. The

> A191(2)
> *"Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union.* ***It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay****"*
>
> A191(1)
> *"Union policy on the environment shall contribute to pursuit of the following objectives:*
> • *preserving, protecting and improving the quality of the environment,*
> • *protecting human health,*
> • *prudent and rational utilisation of natural resources,*
> • *promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change."*

Further information and evidence on such considerations and associated decisions would be appropriate.

The comments are equally applicable to the second amendment, which addresses a necessary correction to the Planning and Development Legislation in respect of the category of "Deep Drilling" in Annex II of the Directive.

Finally in terms of our General Comments, we would also highlight the obligations arising from the Directive and the Aarhus Convention in respect of public participation and transparency in decision-making, and how those considerations must permeate and be given effect to, within the decisions on EIA obligations which these amendments provide for.

Further to the above general comments, each of the three amendments contained within the proposed new regulations are dealt with in turn below as sections A, B and C.

Part 2. Specific Comments:

A) Regarding the proposed amendment of the Planning and Development Act 2000 (No. 30 of 2000), "the PDA"

Section 2 of the proposed regulations proposes to amend by replacement paragraphs a and b of the existing 172(1) of "Part X ENVIRONMENTAL IMPACT ASSESSMENT" of the PDA.

Further to earlier amendment as we understand it that section currently states:

> **"172.**—(1) An environmental impact assessment shall be carried out by a planning authority or the Board, as the case may be, in respect of an application for consent for—
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> (*a*) proposed development of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which exceeds a quantity, area or other limit specified in that Schedule, and
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> (*b*) proposed development of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which does not exceed a quantity, area or other limit specified in that Schedule but which the planning authority or the Board determines would be likely to have significant effects on the environment."

The new regulations propose to change this to the following with the changes in blue:

> **"172.**—(1) An environmental impact assessment shall be carried out by a planning authority or the Board, as the case may be, in respect of an application for consent for—
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> "(a) proposed development where environmental impact assessment is mandatory under Part 10 and Schedule 5 of the Planning and Development Regulations 2001, and
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> (b) proposed development where environmental impact assessment is not mandatory by virtue of the fact that the development does not exceed a quantity area or other limit specified in Schedule 5 of the Planning and Development Regulations 2001, but the planning authority or the Board determines that the development would be likely to have significant effects on the environment."

Re. The new Paragraph a.

This purports to address the obligation arising from the EIA Directive that Environmental Impact Assessment is mandatory for all projects listed in Annex I of the directive. It also purports to address the EIA obligation in respect of projects for which some threshold has been established which determines that an EIA is mandatory.

Consequently, the provisions under Part 10 and Schedule 5 of the PDR to which this section refers need to encompass those obligations accurately and in their entirety in respect of the Annex I and Annex II elements of the Directive, and the obligations in respect of thresholds for projects listed in Schedule 5, and their manner of specification.

The new paragraph b.

This purports to address those projects which are not encompassed by the mandatory obligations either by virtue of being a project listed in Annex I or exceeding a threshold imposed by the Members State in respect of Annex II projects, and where a screening decisions is required by the competent authority to determine EIA requirements. The requirement for such a 'screening' decision needs to explicit about the obligation:

- That it be done in accordance with the criteria laid out in Annex III of the Directive, and the adequacy of Schedule 7 of the Planning and Development Regulation then also needs to be considered in that context; and
- That it be in accordance with the associated obligations regarding decision making in the Directive and in accordance with the obligations of the Aarhus Convention.

B) Regarding the proposed amendment of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), specifically, Schedule 5, Part 2 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) is amended by the substitution of the following for paragraph 2(e):

Ireland has failed to transpose accurately the requirements of the directive in respect of "Deep Drilling". This proposed change is in respect of a purported correction to the Planning and Development Regulations.

The Planning and Development Regulation, Schedule 5 as it stands we understand states for paragraph 2 (e),

> "All geothermal drilling and drilling for the storage of nuclear waste material; drilling, other than test drilling, for water supplies, where the expected supply would exceed 2 million cubic metres per annum"

and this is to be substituted with the proposed paragraph of these new regulations.

Notwithstanding additional considerations included in the proposed amendment – the construction of the proposed amendment appears unecessarily convoluted and complex, in comparison with the provisions of the Directive in respect of "deep drilling".

The provisions of the Directive are worded so as to require all deep drilling, and emphatically emphasise 3 categories through the use of the term "in particular" with one exception.

In addressing transposition requirements for the purposes of the Planning and Development Act and associated Regulations thereof, and any discretionary screening element - the effect of any Irish provisions need to:

- Give effect to and specify clearly the obligation in respect of Article 4 (2), (3) and (4) of the Directive, and
- Address the obligation in respect of the Directive's Annex III screening criteria correctly; and
- Address the obligations pursuant to Art 2(1) of the Directive; and
- Be in accordance with the Directive's obligations in respect of specification of thresholds, and

- Ensure the conformance of Schedule 7 of the Planning and Development Regulations with the Directive; and also
- Be in accordance with obligations in respect of decision making under the Directive and the Aarhus Convention.

C) Regarding the proposed amendment of the Foreshore Act 1933 (No. 12 of 1933)

Section 13 (A) 1 B of the Forshore Act as we understand it currently states:

> (*b*) An environmental impact assessment shall be carried out by the appropriate Minister in respect of a relevant application for consent in respect of:
>
> (i) a class or classes of development prescribed by regulations under section 176 of the Act of 2000 which exceeds a quantity, area or other limit prescribed by those regulations, or
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> (ii) a class or classes of development prescribed by regulations under section 176 of the Act of 2000 which does not exceed a quantity, area or other limit prescribed under those regulations but which the appropriate Minister determines would be likely to have significant effects on the environment.

Where "The Act of 2000" is defined as the Planning and Development Act 2000.

Section 176 makes provision for the Minister to specify the development for which EIA is required as follows:

> **"176.**—The Minister shall, for the purpose of giving effect to the Environmental Impact Assessment Directive, make regulations—**]**
> (*a*) identifying development which may have significant effects on the environment, and
> (*b*) specifying the manner in which the likelihood that such development would have significant effects on the environment is to be determined.
> (2) Without prejudice to the generality of *subsection (1)*, regulations under that subsection may provide for all or any one or more of the following matters:
> (*a*) the establishment of thresholds or criteria for the purpose of determining which classes of development are likely to have significant effects on the environment;
> (*b*) the establishment of different such thresholds or criteria in respect of different classes of areas;
> (*c*) the determination on a case-by-case basis, in conjunction with the use of thresholds or criteria, of the developments which are likely to have significant effects on the environment;
> (d) where thresholds or criteria are not established, the determination on a case-by-case basis of the developments which are likely to have significant effects on the environment;
> (e) the identification of selection criteria in relation to—
> (i) the establishment of thresholds or criteria for the purpose of determining which classes of development are likely to have significant effects on the environment, or
> (ii) the determination on a case-by-case basis of the developments which are likely to have significant effects on the environment.

(3) Any reference in an enactment to development of a class specified under Article 24 of the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No. 349 of 1989), shall be deemed to be a reference to a class of development prescribed under this section.

The amendment proposes to amend subparagraph 13 (A) (1) (b) (i), so that the EIA obligation arises consequent on that which is provided for by the Ministers decision on classes of development and their EIA obligation through Section 176 of the Planning and Development Act. Therefore those provisions needs to provide for the obligations in their entirety in respect of the Annex I and Annex II elements of the Directive, and the obligations in respect of thresholds.

In respect of the further proposed amendment to paragraph 13 (A) (1) (b) (ii) of the Foreshore Act which provides for screening decisions for projects for which EIA is non-mandatory projects, the provision need to specify clearly and encompass the obligation in respect of the Directive's Annex III screening criteria and the obligations pursuant to Art 2(1); and encompass obligations under Art 4 of the Directive; and be in accordance with the Directive's obligations in respect of thresholds, and also ensure the conformance of Schedule 7 of the Planning and Development Regulations with the Directive; and be in accordance with obligations in respect of decision making under the Directive and the Aarhus Convention.

Thank-you for your consideration of our remarks.

Yours sincerely,

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