

# Report

## Cabinet Member for Regeneration and Investment

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### Part 1

Date: 8 November 2016

Item No:

**Subject** **Welsh Government Consultation: Proposed changes to how Environmental Impact Assessment applies to Town and Country Planning**

**Purpose** To respond to a Welsh Government consultation paper seeking views on the proposed changes to the Town and Country Planning (Environmental Impact Assessment)(Wales) Regulations 2016 to implement European Directive 2014/52/EU

**Author** East Area Planning Manager

**Ward** All wards

**Summary** The EIA Directive has been amended by a 2014 Directive of the European Parliament and the European Council. This makes changes to the assessment of effects of certain public and private projects on the environment. 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:
  1. Requiring it to be based on the scoping decision where there is one;
  2. Expanding the required content;
  3. 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:
  1. Co-ordinating certain environmental assessments;
  2. Specifying timeframes for the various stages of the EIA process.

As the UK continues to abide by EU law before and during exit negotiations, Welsh Ministers are obliged to transpose the requirements of the Directive into national regulations.

This purpose of the consultation is to set out how the Welsh Government intends to do this and make other changes to national legislation. The consultation relates to the following areas:

- Third party screening requests;

- Screening and scoping timeframes;
- Co-ordination;
- Consultation and participation in 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)

**Proposal** To respond to the Welsh Consultation paper as per the contents of this report and answers to specific questions set out in Appendix 1.

**Action by** Head of Regeneration, Investment & Housing

**Timetable** Immediate

This report was prepared after consultation with:

- Head of Finance – Chief Finance Officer
- Head of Law and Regulations – Monitoring Officer
- Head of People and Business Change

**Signed**

## 1. Background

This report summarises the main points from the consultation paper and responds to specific questions asked by Welsh Government. The issues raised in the report are proposed to form the basis of the Council's response to the consultation exercise. The suggested comments are set out in Appendix 1 of this report.

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

### Third Party Screening Requests

- 2.1 **Currently** 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. It is usually undertaken by the LPA either before the application is received or when an application is submitted. If a third party disagrees with the LPA 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 on the environment has been properly considered. However, recent case law suggests there is a danger of them being used to frustrate and delay planning decisions if they are made late in a determination period.
- 2.2 **The proposal** is 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. In the case where no screening opinion has been issued, the current situation will continue to apply (i.e. no time limit).
- 2.3 **NCC comments** are that the proposals for third party screening are reasonable and agreeable.

### Timeframe to provide a scoping request:

- 2.4 **Currently**, 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"). Recent feedback from LPAs suggests that the 5 week timeframe allowed to an LPA to respond to a scoping opinion request is not long enough to allow full consideration of the issues and engagement with relevant consultees. The 2014 Directive has amended the scoping process and where a developer requests an opinion, the ES must now be based on that opinion.
- 2.5 **The proposal** is to increase the timeframe for scoping to ensure sufficient time is given to LPAs and other parties to consider the issues and provide a proportionate response. However, no suggested timeframe is given and LPAs are asked to consider what they think this timeframe should be.
- 2.6 **NCC comments** are that the timeframe should be revised and that a minimum of 8 weeks would be more appropriate. This would enable a period for checking, allocating and consulting upon the request, a 21 day period for consultees to respond to the consultation and a further 4-5 weeks to enable consideration of the issues raised, build in potential delays in consultee responses, and time required to prepare responses.

### Co-ordination

- 2.7 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.
- 2.8 The 2014 Directive requires Member States to ensure that co-ordinated and/or joint procedures fulfilling the requirements of the legislation are provided for.

- 2.9 **The proposals** are to require co-ordinated procedures be undertaken by designating an authority to coordinate the individual assessments (rather than do one single, joint assessment) for EIA, Habitats and Birds Directives. LPAs need to confirm if they agree to this approach and what coordinating measures would be most useful, and what benefits would they generate.
- 2.10 **NCC comments** are that a co-ordinated approach has merit. Considerations under the Directives have similarities but are different. Where applicable, assessment required to comply with, for example, the Habitats Directive, should be separate to an ES and clearly (and separately) refer to the legislation and guidance applicable to the specific Directives. The onus is upon the developer to undertake an ES and the competent authority to do the appropriate assessment. The assessments should be capable of standing in isolation as effective assessments for the purposes of the relevant legislation and do not necessarily have to be done at the same time but always prior to the development. It can and should be capable of being undertaken separately. The effect of the provisions of the Habitats Directive is likely to cover a wider range of projects than those affected by the EIA Directive. It is likely that EIA will be submitted with an application whereas appropriate assessment, for example, will be undertaken during the course of an application being considered. It will, however, be important for an ES or a clearly identified separate document to contain information that will adequately inform the competent authority's appropriate assessment and the need for this will have to be identified at scoping stage. As NRW are the key consultee on such matters at scoping stage, it must advise upon and/or highlight this as a requirement in its scoping response. There needs to be co-ordination also between strategic and project level assessments. Strategic level assessments are likely to be policy/plan led and scoping opinions should clearly have regard to it.

#### **Consultation and participation in the decision making process**

- 2.11 **Currently** 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. To enhance public participation, the 2014 Directive has amended the publicity and participation requirements. The revised Article requires the public to be informed electronically of the application and how to participate in the decision making process; that the relevant information is also available electronically through at least a central portal; and the public consultation on the ES should last for at least 30 days. It is currently 21 days.
- 2.12 **The proposals** are that LPAs that have a website and publish documentation in connection with applications online, already satisfy the publicity requirements of the Article and nothing needs to change. To facilitate LPA adherence to the accessibility of electronic versions of the ES, it is proposed to update the Regulations by requiring applicants to provide both a paper and electronic version of the ES. It is proposed to increase the public consultation period to 30 days.
- 2.13 **NCC comments** are that it has no objections to the above.

#### **Monitoring of significant effects**

- 2.14 The 2014 Directive requires that the decision to grant development consent should include, where appropriate, monitoring measures. It requires what is monitored and the duration of monitoring to be proportionate to the nature, location and size of the project and the significance of its effects on the environment.
- 2.15 **The proposals** are 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. This can be done via planning conditions and obligations.
- 2.16 **NCC comments** are that so long as the Regulations are explicit in granting such flexibility to the LPA or Welsh Ministers, no objections are raised.

### **Conflict of Interest and Functional Separation**

- 2.17 This may arise where an LA is both decision maker and applicant.
- 2.18 **The proposals** are to include a requirement in the Regulations to state that when an authority has a duty under the EIA Regulations they must “take any steps to ensure they do so in an objective manner”. 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 planning applications and those responsible for the management of land or buildings to which an application relates. It is nevertheless proposed to define in the EIA Regulations how a body should undertake this provision by requiring 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.
- 2.19 **NCC comments** are that the inclusion of such wording would, in practice, make no difference to processes at NCC. However, what is or is not “functional separation” must be clearly defined in the Regulations for clarity sake.

### **Penalties and Enforcement**

#### Provision of false information

- 2.20 This relates to the provision of false information in the EIA process and to unlawful development.
- 2.21 Currently, 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. In practice, the criminal offence in the EIA Regs is limited to the Notice and the provision of misleading information is covered by other legislation in any event and would constitute fraud.
- 2.22 **The proposal** is to remove the narrow offence contained within the existing Regulations.
- 2.23 **NCC comments** are that the removal of this narrow offence is welcomed as is in practice unenforceable anyway.

### **Planning enforcement system**

- 2.24 **The proposal** is to place an explicit duty on LPAs to consider if the requirements of the EIA Directive have been met when they are considering taking enforcement action. There is considered to be no cause to impose other enforcement powers or requirements as the current enforcement system is fit for purpose for the purpose of providing a penalty system for unlawful development.
- 2.25 **NCC comments** are that in respect of the first proposal this is arguably an implicit requirement anyway and there are no objections to it becoming explicit in the Regulations. As for the adequacy of the current enforcement system, it is considered appropriate to review the current levels of fines applicable to formal enforcement Notices. For current environmental crimes, the £20,000 limit to Enforcement Notice fines is not a deterrent and in most cases of environmental crime does not assist in ceasing the breach where profits are well in excess of the fines that can be threatened or sought. Environmental crimes can generate significant sums of money for developers potentially running into millions of pounds. Six figure fines must be considered and where unlawful EIA development is undertaken, fines of minimum £200,000 must be considered.

### **Competent Experts**

- 2.26 **The proposals** are that the EIA legislation will include a requirement 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. It is also proposed to include a requirement in the Regulations that the competent authority ensures that it has access to sufficient expertise to examine the ES.

2.27 **NCC comments** are that the proposals in relation to those preparing the ES are acceptable. The proposals in relation to the competent authority are less clear and the wording “sufficient expertise” must be defined. Such expertise may be in house or in the form of external consultants, statutory consultees such as NRW, etc and this “access to” requirement must also be clearly prescribed. It is likely to encourage LPAs to more readily seek external consultants, particularly in cases involving new technologies or having particularly complex environmental effects. Whilst this may have occurred anyway, an explicit requirement for such expertise in the Regulations, makes it more likely to be challenged and consequently will likely impact upon the financial resources of LPAs.

**Purchase notices**

2.28 **Currently**, 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”. The Welsh Ministers then consider whether to confirm the notice or to take action under s.141 of the Act which provides that instead of confirming the notice, the Welsh Ministers can grant planning permission on the land. This could comprise EIA development.

2.29 **The proposals** are to amend the EIA regulations so that under s141 the general procedures relating to EIA screening will be undertaken by Welsh Ministers and they may only grant consent following the provision of an ES by a developer and full consideration of the ES.

2.30 **NCC has no comments** to make in respect of these changes.

**General Questions**

2.31 Two general questions are asked and give opportunity for comment on any other matters for which specific questions have not been raised under the above headings.

2.32 No additional comments are suggested.

**3. Financial Summary**

3.1 The proposed revisions to the Regulations raise limited issues with regards to staff resources. Some additional work will be required in matters such as monitoring for example but extensions to the time frame for responses to scoping opinions will limit the need to prepare and send extensions of time for example.

3.2 In terms of financial resources the explicit requirement for the LPA to have access to sufficient expertise to evaluate an ES (an explicit requirement of the Regulations as proposed), may give rise to a need to appoint external consultants in some cases, notably where development projects are particularly new in type or have particularly complex environmental effects. It is likely that such cases would have given rise to such a need in any event but with an explicit requirement in the Regulations for such expertise, failure to ensure its provision is now more readily open to challenge.

**4. Risks**

<b>Risk</b>	<b>Impact of Risk if it occurs* (H/M/L)</b>	<b>Probability of risk occurring (H/M/L)</b>	<b>What is the Council doing or what has it done to avoid the risk or reduce its effect</b>	<b>Who is responsible for dealing with the risk?</b>
Potential additional financial and resource burdens on the LPA.	H	L	Responding to this consultation raises relevant issues and areas of concern.	Development Services Manager

Developers failing to comply with EIA Regulations due to their complexity.	H	H	As above.	As Above.
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## 5. Links to Council Policies and Priorities

- 5.1 The Development Management service is a statutory function of the Council. The Welsh Government consultation paper is proposing to make changes to the statutory obligations of the service. The proposed system would affect the delivery of the Council's policies and priorities through the determination of planning applications and provision of EIA scoping opinions.

## 6. Options Available

- 6.1 To reply to the Welsh Government's consultation on the basis of this report and the responses given to the consultation questionnaire attached at Appendix 1;
- 6.2 To provide an alternative reply to this consultation;
- 6.3 Not to reply to the Welsh Government's consultation exercise.

## 7. Preferred Option and Why

Option 6.1 above is the preferred option. The proposed consultation and changes suggested have implications for the function of development management within Newport and raise a number of issues along with points to be welcomed. It is therefore important that the Council's views are taken into account in the preparation of the final version of the guidance.

## 8. Comments of Chief Financial Officer

The service currently reviews each assessment on a case by case basis and carries out as much of the work as possible in-house only using consultants where in-house knowledge is not available. It is anticipated that the changes in legislation will not increase costs to the service and they will be maintained within existing budgets.

## 9. Comments of Monitoring Officer

There are no specific legal issues arising from the Report as the Welsh Government is simply seeking responses at this stage to its consultation document on the proposed changes to the Town and Country Planning (Environmental Impact Assessment)(Wales) Regulations 2016 in the light of the new EIA European Directive. For the most part, the proposed changes to the screening and Environmental Impact Assessment procedures are acceptable, although there a certain technical points that require further clarification.

## 10. Staffing Implications: Comments of Head of People and Business Change

The consultation paper is technical in nature and as such officers from Planning Policy and Development Management are best placed to respond to the detailed questions however it is noted that the 2014 EIA Directive require Environmental Impact Assessments to include information on new environmental threats (such as climate change) and require the Environmental Statement to be consulted on through electronic media. These requirements are in line with sustainable development principles and priorities set out in key Council strategies and emerging policy contexts e.g. Digital Strategy, Single Integrated Plan and Wellbeing of Future Generations Act 2015.

## **11. Comments of Cabinet Member**

Cabinet Member has approved the report.

## **12. Local issues**

The proposals affect all wards of Newport.

## **13. Scrutiny Committees**

The Consultation Paper has not been through Scrutiny Committees.

## **14. Equalities Impact Assessment**

This report relates to a Welsh Government consultation paper and proposals. It is therefore for Welsh Government to undertake the necessary Equalities Impact Assessment.

## **15. Children and Families (Wales) Measure**

This report sets out the Council's proposed response to a Welsh Government consultation paper. The Welsh Government is responsible for co-ordinating the consultation and ensuring all sections of the community are consulted.

## **16. Comments from Non Executive Members**

None received

## **17. Consultation**

The Council has not undertaken any consultation in relation to this report as it is responding to a Welsh Government consultation paper, not proposing Council policies or procedures. Officers from Planning Policy and Development Management have been involved in devising the proposed response to Welsh Government.

## **18. Background Papers**

The Consultation Paper can be found on the Welsh Government website at:

<https://consultations.gov.wales/consultations/changes-how-environmental-impact-assessment-applies-town-and-country-planning>



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EIA CHANGES.DOCX

**Dated: 8 November 2016**