

The Environmental Impact Assessment (Water Management) Regulations (Scotland) 2003

REGULATORY IMPACT ASSESSMENT

Issue

1. EC Directive 97/11/EC amends EC Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. As amended the Directive requires that certain types of project are subject to an assessment of their environmental effects before consent can be granted for the project to go ahead. This assessment process – “Environmental Impact Assessment” or “EIA” – is required if the project is likely to have a significant effect on the environment.

2. The Environmental Impact Assessment (Water Management) (Scotland) Regulations 2003 (“the Regulations”) implement the Directive in as far as it relates to certain water management projects in Scotland. The developments to which these Regulations may apply are water management projects for agriculture. Virtually all such projects in the annexes to Directive 97/11/EC will already constitute, in whole or in part, “development” for the purposes of the Town and Country Planning system and will be covered by the Environmental Impact Assessment (Scotland) Regulations 1999 (“the 1999 Regulations”). Certain water management projects, such as mobile spray irrigation, may not constitute “development”, therefore the meaning of development is amended to ensure that all water management projects for agriculture come within the meaning of “development”. The scheme of the 1999 Regulations will then apply to all such projects when appropriate.

3. The regulatory impact assessment (TCP RIA) prepared for the 1999 Regulations explained in some detail the options which were considered for implementing Directive 97/11/EC in Scotland generally and, in the light of consultation on these options, the Government’s preferred approach.

4. The Executive intends to introduce, in 2005, comprehensive water abstraction controls under the Water Environment and Water Services (Scotland) Act 2003. It is anticipated that water management projects for agriculture which are not currently covered by the Town and Country Planning EIA regime will be covered by the proposed consent regime. These alterations to the planning system are intended to implement the Directive in the intervening period. These provisions will be reviewed when the comprehensive water abstraction controls, and related EIA regime, are introduced.

Objective

5. To implement the Directive as amended by Directive 97/11/EC into UK law with the minimum burden on business and public authorities. That is, we have used the existing planning EIA regime (see paragraphs 7-9 below), which, with its system of thresholds and criteria, does not seek to screen every single project, but to ensure those which might be likely to have significant environmental effects are screened for the need for EIA. Projects not covered by the thresholds and criteria are free to proceed without any additional controls being brought to bear.

Risk Assessment

6. Obligations under EU law must be implemented by legislative means and an alternative method of implementation is not possible. Failure to implement properly may result in proceedings in the European Court of Justice and an increased risk of challenges on individual decisions in the UK courts.

Options

7. As mentioned in paragraph 3 above, the options for implementing the amendments made by 97/11/EC were set out in the TCP RIA. The latter considered options for amending the existing regulatory regime for EIA, namely

- Case-by-case consideration of every development
- Case-by-case consideration using non-binding, ‘indicative’ thresholds
- Fixed thresholds above which EIA is required (‘inclusive’ thresholds)
- Lower level criteria above which projects need to be scrutinised for EIA

The preferred approach was the fourth one which built on the existing system, retaining the case by case scrutiny and complementing it with low level criteria and thresholds. The aim being to rule out projects too small to have significant environmental effects, except where these were to be located in specified “sensitive areas”, consisting of certain designations associated with the built and natural environment, where even small projects may have a disproportionate effect on the environment.

8. Once the need to complete implementation was identified, and in the absence of comprehensive water abstraction controls, the decision was taken to implement by amending the Town and Country Planning system and the 1999 Regulations. This approach was the subject of public consultation, including farming and horticultural interests. As a consequence the Regulations amend the existing Town and Country Planning EIA regime as follows:

- Extend the definition of “development” in the Town and Country Planning system to include water management projects for agriculture, including irrigation and land drainage;
- grant permitted development rights (PDR) for such projects, removing the need to obtain planning permission from the planning authority, except in certain circumstances;
- amend the 1999 Regulations to introduce a new threshold for irrigation projects based primarily on the area to be irrigated rather than the area of the works.

9. The effect of the amendments is that all water management projects for agriculture are subject to planning control, however, for the most part, these projects will benefit from PDR which grant a general planning permission removing the need to obtain planning permission from the planning authority. Projects which meet/exceed the criteria/thresholds, as amended, in the 1999 Regulations, can only proceed under PDR where the planning authority or the Scottish Ministers have formally indicated that EIA is not required. If the planning authority or the Scottish Ministers indicate that EIA is required, a planning application and EIA would be required.

Issues of Equity and Fairness

10. The Regulations will affect primarily those whose water management activities did not previously constitute “development” under the planning system, for example, those engaged in spray irrigation. Also, the new threshold on irrigation may catch new irrigation development which previously would have been beneath the earlier threshold of “area of works exceeds 1 hectare” for water management projects for agriculture. Directive 85/337/EEC requires the cumulative effects of projects to be taken into account. In conducting screening opinions on the need for EIA, planning authorities will routinely take account of the cumulative effect of earlier screenings, which may have an impact upon those who come later to seek such screening opinions.

Business Sectors Affected

11. Any new EIAs required by these Regulations are likely to come from the agriculture sector (which includes horticulture under the Town and Country Planning (Scotland) Act 1997).

Compliance costs for a typical business

12. It is anticipated that the introduction of the Regulations may result in a rise in the number of requests to planning authorities for screening opinions for irrigation activities which would not previously have been considered “development” and which meet/exceed the amended thresholds/criteria. There is no fee associated with such requests and any costs to individual businesses would be limited to providing details of, for example, the location, timing and extent of their irrigation activities.

13. The TCP RIA drew attention to the relatively small number (55) of additional EIAs which it was estimated would arise through the implementation of amending Directive 97/11/EC on top of the 300 or so projects each year in the UK which have required EIA under 85/337/EEC. This number was an estimate of the total number of EIAs required in the UK across the whole range of projects covered in the annexes to the Directive and data from the existing EIA system, initiated under Directive 85/337/EEC, suggested that at least half would arise under the town and country planning system. The actual increases in the number of EIA cases since the changes introduced in 1999 has been considerably higher than forecast. The figure for Scotland in 2002 under the planning regime alone was 69 cases, whereas, prior to 1999, the highest number of EIA cases had been 54 in 1994, with the figures mainly being in the 30s to 40s for most of the 1990s. The increase may in part be due to improved screening procedures as a result of the statutory procedures introduced in 1999 rather than changes in the types of projects covered by the 1999 Regulations.

14. The changes introduced by the Regulations are not expected to lead to a significant increase in EIA cases. As indicated previously, most water management projects for agriculture likely to have significant effects on the environment would already constitute “development” and would be covered by existing Town and Country Planning EIA requirements in the 1999 Regulations. In England and Wales, where water abstraction is more common and water shortages are more of an issue than in Scotland, the amendments this year to the existing water abstraction and impoundment control regime in England and Wales are thought likely to lead to about 2 additional EIA cases per year. In the 3 years in

which the Environment Agency in England and Wales applied EIA requirements administratively to their water abstraction and impoundment control regime, in anticipation of the statutory changes in 2003, no EIA cases were found to require EIA. In Scotland, given the different numbers of such projects and the different climatic conditions, we do not expect to have any more EIA cases arise as a result of the Regulations.

15. Where the need for EIA is triggered, a planning application will be required. This will mean a planning application fee will be payable. The current fee likely to be payable is based on a calculation of site area, which, in the case of spray irrigation for example, may mean the fee is disproportionate to the operations being undertaken. Work is continuing on developing a new fee regime to deal with such applications to be introduced before the Regulations come into force.

16. The TCP RIA also explained the difficulties of disentangling the cost of preparing an environmental statement from the other costs of a development proposal. It referred to research indicating that in the majority of cases costs fell in the range £10,000-£35,000 within an overall range of £1,000 up to £100,000. The external evidence available supports the wide variation in costs of EIA, placing them in the range of between 0.000025% and 5% of project costs. A 1995 survey showed that consultancies received on average £34,000 for preparing a whole environmental statement, £40,000 for several sections of a statement and £14,750 for one section and pointed out that this in itself highlights the variability of the costs involved.

Total Compliance Costs

17. As indicated above, it is expected that only a very small number of EIAs will arise from the Regulations. On the assumption that the Regulations might give rise to, say, 2 EIAs for the year prior to the introduction of comprehensive abstraction controls, then, using the range of costs of £10,000 to £35,000, the total cost arising from the Regulations might be in the range £20,000 to £70,000. This would be in addition to the revised planning fee.

18. Subject to there being no material changes in their activities, operators are expected to only have to go through the screening process (and, if necessary, the planning application process) once.

19. While the number of EIA cases is expected to be small, there are likely to be considerably more requests for screening opinions. The new threshold applies primarily to irrigation projects where the area of land to be irrigated exceeds 50 hectares. The 1998 Agricultural Census suggests that there were around 60 holdings in Scotland where more than 50 ha of potatoes were grown although the British Potato Council claim to have 161 registered members in this cohort in 2003. There were around 35 holdings where more than 50 ha of horticultural crops were grown according to the 1998 Census and a number of soft fruit growers in addition to that. This will give some indication of the size of the affected group. Added to this will be those located in “sensitive areas”, as defined in the 1999 Regulations, where the 50 hectare threshold does not apply and screening will be required for all water management projects for agriculture. The vast majority of farms likely to carry out irrigation lie outwith the areas designated as “sensitive areas”.

Impact on small businesses, charities and the voluntary sector

20. Generally, developments subject to EIA are those proposed by larger companies. It is possible, though, that the need for EIA will fall to some small agricultural business if their proposed abstractions are in a sensitive area, as defined in the 1999 Regulations. In the unlikely event that EIA was required in such a case, this presumably would be based on a very specific environmental effect associated with the designation of the area which qualifies it as a sensitive area. The costs of EIA are unlikely therefore to enter into the range identified in paragraph 17 above, which relate to much larger projects with wide ranging environmental effects. There is expected to be no impact for charitable bodies or the voluntary sector who would not normally abstract water.

Any other costs

21. As with the TCP EIA Regulations generally, most of the cost of the Regulations will fall to developers, i.e. those who propose to abstract or impound water.

22. There will be procedural costs which will fall to the planning authorities and to the Scottish Environment Protection Agency (SEPA). As these planning arrangements are expected to be in place temporarily, the administrative burden on planning authorities is expected to be largely a one off associated with the introduction of the temporary changes to the planning system and the need for screening opinions. Given the experience of SEPA regarding the water environment, it is anticipated that planning authorities will consult SEPA on requests for screening opinions in this area and will rely on their advice. SEPA is already gearing up to implement the proposed comprehensive water abstraction control regime in 2005 and is receiving appropriate increases in resources. Given the distribution of irrigating activities, planning authorities in the east of Scotland will receive the majority of requests for screening, the overall number of which is anticipated to be in the low 100s. As indicated above, we anticipate that the vast majority of these screening requests will not result in EIA being required.

23. Statutory consultees will also incur costs in scrutinising water resource EIAs but, again, the small number of projects concerned will not impose any significant burden.

Competition Assessment

24. The Executive believes that these Regulations will not have a detrimental impact on competition. The main users of spray irrigation are growers of potatoes, where there are no dominant players. Paragraph 10 refers to the differential effects on those engaged in water management projects for agriculture.

Results of Consultation

25. The consultation exercise did not identify any conclusive views on suggested thresholds, the numbers of operations likely to be affected, the extent of irrigation activities, the level of fees or the impacts of the proposed changes. Broadly speaking, planning authorities were concerned about the impact on their resources of screening proposals and determining cases involving EIA and about the operation of the changes generally; farming and horticultural businesses were concerned about the costs in terms of administration, fees and delays, additional bureaucracy of the changes, while environmental interests were

primarily concerned about ensuring a tight regime was in place to ensure the fullest consideration of environmental impacts.

26. In light of the responses, the Executive has sought to put in place a regime that will identify projects with the potential to have significant effects on the environment, while minimising the costs and bureaucracy associated with additional control regimes.

Summary and recommendation

27. Costs as a result of these Regulations are considered to be reasonable and appropriate for the purpose of implementing 97/11/EC. The Executive's approach has been to implement the Directive with the minimum burden on businesses and public authorities. This is intended as an interim measure until such time as a comprehensive water abstraction control regime is in place which will deal with the projects not previously considered to involve "development" under the Town and Country Planning system.

Enforcement, sanctions, monitoring and review

28. Anyone carrying out development in breach of the 1999 Regulations as amended may be subject to formal enforcement action under Town and Country Planning legislation and ultimately may be subject to prosecution in the Courts. Planning permission granted in breach of the 1999 Regulations as amended are vulnerable to court challenge. The operation of the Regulations will be reviewed when the new comprehensive water abstraction control regime is developed under the water Environment and Water Services (Scotland) Act 2003. This RIA will be reviewed once the Regulations have been in place for a year.

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the balance between cost and benefit is the right one in the circumstances.

Signed by Mary Mulligan
Date: June 2003
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