



SCOTTISH EXECUTIVE
Development Department

PLANNING

Public Participation in Environmental Impact Assessment

Consultation Report

October 2006



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October 2006

Dear Consultee

PUBLIC PARTICIPATION IN ENVIRONMENTAL IMPACT ASSESSMENT : CONSULTATION REPORT

You may recall that the Executive issued a consultation paper on 12 May 2005 seeking views on proposals for Implementing Article 3 of European Directive 2003/35/EC (known as the Public Participation Directive). A copy of the consultation paper can be viewed at www.scotland.gov.uk/Publications/2005/05/12110026/00285

A Copy of the Executive's consultation report ; Public Participation in Environmental Impact Assessment is attached. Copies of the submitted responses may be viewed at the Scottish Executive Library, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD or on the Scottish Executive website www.scotland.gov.uk/planning

This consultation report sets out the Executive's response to the issues raised by the respondents.

Yours faithfully

Cara Davidson

CARA DAVIDSON

Introduction

This report has been prepared by the Scottish Executive and is intended to summarise and respond to those points raised by respondents to the May 2005 consultation paper on “Public Participation in Environmental Impact Assessment”.

“Public Participation in Environmental Impact Assessment” sought views on the Executive’s proposals for implementing Article 3 of the European Directive 2003/35/EC (known as ‘the Public Participation Directive’) which amends Council Directive 85/337/EEC (known as the Environmental Impact Assessment or ‘EIA’ Directive) mainly in regard to public participation. The consultation paper contained a draft Regulatory Impact Assessment (RIA) and draft Scottish Statutory Instrument (SSI): The Environmental Impact Assessment (Scotland) Amendment Regulations 2005. The consultation paper was issued on 12 May 2005. Responses were requested by 5 August, however representations received after this date were accepted for the purpose of analysis.

A copy of the consultation paper can be viewed at the following link: <http://www.scotland.gov.uk/Publications/2005/05/12110026/00285> .

Acknowledgements

The Scottish Executive is grateful to those who responded to the consultation. This consultation report is intended to provide feedback on the results of the consultation and respond to specific issues raised by those who contributed to the consultation process.

Overview of Responses

In total 35 responses were received, 10 from local authorities 2 from private individuals, 5 from environment/amenity groups, 5 from industry, 8 from non-departmental government bodies, 3 from representative organisations and 1 from planning and development consultants. This analysis responds to the key issues raised in the responses but it is not a comprehensive report on every comment received. A small number of respondents either requested that their replies be treated as confidential, or did not provide consent for their publication. These responses have not been reproduced here in any form but have nevertheless been taken into consideration in the final analysis.

Copies of the responses may be seen at the Scottish Executive Library, Saughton House, Broomhouse Drive, Edinburgh EH11 3XD (contact the enquiries desk – Tel: 0131 244 4556 for an appointment). Alternatively they can be found on the Scottish Executive website at www.scotland.gov.uk/planning .

List of Respondents

1	BGS	British Geological Survey
2	DCS	Deer Commission for Scotland
3	B&P	Bruce & Partners
4	SQA	Scottish Qualifications Authority
5	GCC	Glasgow City Council
6	MH	An Officer's View, Shetland Islands Council
7	CR	Professor Colin Reid
8	IR	Iain Ross – Officer View, Dundee City Council
9	SWT	Scottish Wildlife Trust
10	ACC	Aberdeen City Council
11	SQS	Scottish Quality Salmon
12	RICS	Royal Institute of Chartered Surveyors in Scotland
13	CSA	Council for Scottish Archaeology
14	SB	Scottish Badgers
15	HEACS	Historic Environment Advisory Council for Scotland
16	ECC	Edinburgh City Council
17	SQS	Scottish Quality Salmon (2 nd Submission)
18	SRPBA	Scottish Rural Property and Business Association
19	SCCL	The Scottish Coal Company Limited
20	SRF	Scottish Renewables Forum
21	ACC	Aberdeen City Council (2 nd Submission)
22	LSS	The Law Society of Scotland
23	MLRI	Macaulay Land Use Research Institute
24	SSE	Scottish Southern Energy Group
25	FiC	Fife Council
26	SEn	Scottish Enterprise
27	FaC	Falkirk Council
28	FOE	Friends of the Earth Scotland
29	SEPA	Scottish Environmental Protection Agency
30	CTC	Cyclists' Touring Club Scotland
31	BH	Barry Hutton, Chartered Town and Transport Planner
32	SCNP	Scottish Council for National Parks
33	ADS	Architecture + Design Scotland
34	EDC	East Dunbartonshire Council
35	HC	Highland Council

Summary of Responses

1. BGS (22 May 2005)

They had no specific geological comments or points relevant to the consultation to make.

2. DCS (6 June 2005)

They had no comment to make on the consultation for the time being, but wish to be kept informed of developments.

4. SQA (13 June 2005)

They felt that they had nothing of relevance to contribute.

5. GCC (5 July 2005)

In relation to **Question 1** they acknowledged that there may be potential problems in setting appropriate criteria for NGOs, but felt that there would be “considerable merit” in doing so. They felt that this would reduce the potential for misuse of the right to seek a review by groups who have no particular interest in a project, or that may be set up with the sole purpose of seeking a “frivolous or inappropriate review”.

In relation to **Questions 2 & 3**, GCC simply had “No Comments.”

In relation to **Question 4**, the only comment they had to make was on Sections 5 & 6 of the draft RIA, dealing with costs to businesses and affects on businesses. GCC accepted that there were unlikely to be any significant additional direct costs to business, but they considered that there was an increased risk of delay to projects arising from Article 10a (i.e. increased access to judicial review) and that this could result in indirect costs for business.

In relation to **Question 5**, GCC commented that there would be merit in providing national planning advice to cover projects being promoted through the Town and Country Planning Act and the Roads (Scotland) Act.

GCC had no comment to make with regard to **Question 6**.

In relation to **Question 7**, GCC comments that costs do not fall solely on Scottish Ministers where a trunk road is being promoted by a partnership. GCC reiterates the point made above in relation to Question 4 that there is potentially an issue in respect of the definition of a NGO under Article 10a with potential delay leading to additional costs.

SE: A few trunk road schemes are promoted in partnership with Local Authorities. However, the majority of costs for these are borne by the Scottish

Executive. We do not consider that there will be substantive costs to either Local Authorities or Scottish Ministers arising from the proposed amendments.

7. **CR** (19 July 2005)

Professor Reid is Professor of Environmental Law at the University of Dundee, but he made the following comments in a wholly personal capacity.

In relation to **Question 1**, he made the following comments. Professor Reid felt that it would be misleading to deal with the issue of NGO in isolation from the wider issues of environmental justice. He felt that producing a clear, principled and coherent approach to environmental justice should be a priority.

On the specifics of the question, Professor Reid felt that setting detailed criteria for NGOs would almost certainly include or exclude some inappropriate organisations, whilst taking focus away from the original spirit and purpose of the directive to the technicalities of the NGO definition. He feels that the whole area of title and interest to sue is one of “considerable uncertainty”, reliant on case-law that “leaves some important questions unanswered”. For the present purposes (pending a wider consideration of access to justice) Professor Reid feels the best approach is to just repeat in legislation the requirement that standing be given to NGOs promoting environmental protection (as in draft Regs. 16, 19(7)) He felt this would give a clear signal to the courts to overcome any “imagined obstacles” on the standing of NGOs, without setting detailed criteria.

In relation to **Questions 2 and 5**, Professor Reid felt that if there was a need for planning guidance, then there was a need for guidance in other areas of environmental law, suggesting that this highlighted again a fragmented approach to environmental justice. He also felt there may be an issue as to the status of the guidance – would it be officially adopted planning guidance or guidance as part of a “wider enterprise of public information and education”?

Although not mentioned directly in relation to **Question 3**, Prof Reid’s concern over the proposed amendments to the definition of “consultation bodies” to include “any other body designated by statutory provision as having specific environmental responsibilities” does relate. This statement is included in draft regulation 3(1)(b), an amendment to current EIA planning regulation 2(1). Professor Reid is concerned that the amendment is too vague and that it should provide a clearer instruction to regulatory bodies (in this case planning authorities) as to which bodies must be consulted. He goes on to question what the statement does cover, citing the following examples: if the duty to further biodiversity under section 1 of the Nature Conservation (Scotland) 2004 qualifies then all public bodies and office holders are covered, and in relation to the Conservation (Natural Habitats etc.) Regulations 1994 he asks if it would be only the Minister and the conservation bodies that have these “specific environmental responsibilities”, or also the competent marine authorities or indeed all competent authorities?

SE: We will consider whether the term ‘consultation bodies’ requires to be defined further.

Professor Reid also made the following **general comments**. His main comment was that he found it “regrettable” that a fragmented approach was being taken to implement the directive, and that an opportunity had been lost to put in place a coherent structure on public participation across the whole of environmental law, not just EIA regs. He also felt that present revisions could have been used to overcome what he see as a fragmented approach to EIA regulations and produce one single model set of rules, with minimal variation between subjects. Professor Reid felt this would make the law clearer, more consistent and accessible, and would make future revisions of the EC directive easier to incorporate.

Professor Reid, did however welcome the amendment to assorted Regulations to make provision for the status of National Parks, albeit overdue.

SE: The Executive is content with its approach to incorporating the Directive into existing EIA regimes.

8. IR (28 June 2005)

Iain A Ross, Team Leader for Development Quality at Dundee City Council noted that his comments, provided below, represent an officer view which may need to be endorsed by the council following Summer Recess

SE: No further endorsement has been received therefore this will be treated as an officer level reply

In relation to **Question 1**, he felt that the proposal not to provide additional criteria to identify environmental NGOs was understandable as it would be “extremely cumbersome”. Mr Ross felt that the cost implications of challenging the legality of EIA consents (subject to the public participation provisions of the Directive) would be an important consideration for any environmental NGO and sufficient, in itself, to discourage inappropriate or frivolous challenges.

In relation to **Question 2**, Mr Ross felt that any planning guidance provided must make clear that environmental NGOs, as well as the general public, have access to the courts/judicial review procedures. He then went on to provide the following three suggestions as to how this guidance should be promoted:

- i. Make it available electronically from the Executive’s website;
- ii. For the public notice (published upon the final decision on EIA applications) to include a hyperlink to the Executive’s webpage containing the guidance.
- iii. To include a copy of the guidance within Part 1 of the Register

SE: We will consider these options should guidance be published.

In relation to **Question 3**, Mr Ross made particular reference to draft regulation 3(2), amendment to regulation 4(4). He broadly supports the amendment but is concerned that it does not go far enough to meet the amended provisions under Article 6(2) of the EIA directive. He feels that it does not seem to require Ministers or the relevant planning authority to publish the determination and associated reasons

for the decision in the local press and Edinburgh Gazette or via electronic means where possible. Mr Ross felt that the amended regulation implied a copy of any such decision would be sent from Scottish Ministers to the relevant planning authority and that they would then have to make this information “available”. He felt this would not be consistent with Article 6(2) of the EIA Directive which requires the public to be informed by way of public notices or other appropriate means such as electronic media where available.

SE: Draft regulation 3(2)(b)(iv) places the onus on Scottish Ministers to provide that information is made available to the public. However Article 2.3 does not give any more specification regarding making information available to the public concerned.

Mr Ross also raised concerns that, in respect of general procedures relating to screening, there is no requirement in the existing regulations for the relevant planning authority to publish the screening determination where that authority or Scottish Ministers decide that the development is not EIA development. Presently Planning Authorities are required only to make a copy of the opinion or direction available for public inspection. Mr Ross felt it would be preferable if any screening determination had to be published in the local press and on the planning authority’s website as well. He also indicated that this would be consistent with the provisions of The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 whereby all screening determinations are published.

SE: We have no plans to introduce this requirement, however it would be for individual planning authorities to decide whether they wished to make copies of screening or scoping opinions or directions available on-line.

Furthermore Mr Ross commented on the issue of publicity and procedures on submission of environmental statements that Regulation 3(5) should perhaps be extended to encourage, where possible, publication on the relevant planning authority’s website. He felt that this would be in keeping with the spirit of Article 6(2) of the Directive.

SE: Again this would be a matter for each individual authority. There would be nothing to preclude an authority from including any further/additional information provided in respect of the application or the Environmental Statement on their websites should they wish to do so.

In relation to **Question 4**, Mr Ross was concerned that the closing date for consultation responses was some six weeks after the date for Member state compliance with the directive, as provided in section 2 of the draft RIA (i.e. 25 June 2005). Mr Ross was looking for clarification on the extent to which local authorities may be exposed to challenge in respect of EIA applications granted in the time between the compliance date and the implementation of the amended Regulations.

SE: It would be for local authorities to consider seeking their own legal advice on individual cases.

Mr Ross also made the **general comment** that he felt that the proposed changes could go further in establishing consistency with the approach to public participation

provisions of The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004.

9. **SWT** (21 July 2005)

In relation to **Question 1**, SWT accepted that drawing up detailed criteria would be difficult. They were, however, keen to ensure that the proposed regulations would cover:

- Any organisation with a legitimate interest in the factors set out in Article 3 of the EIA Directive;
- All member bodies of the Scottish Environment LINK network: a network open only to Environmental NGOs, as defined by the sector itself.

In relation to **Question 2**, SWT felt that planning guidance may not be the most appropriate solution. Rather they felt that Local Authorities and the Executive should explain people's rights of appeal when communicating any decision. They felt this should indicate details of the full scope for recourse through review, appeal and arbitration. SWT recommended that a short circular or specific guidance note be drafted for *this* purpose: to ensure that all bodies provide the appropriate information and so comply with the Directive's requirements

SE: The draft regulations currently provide that the decision making authority should make available information regarding the right to challenge the validity of the decision and the procedures for doing so when informing the public of final decisions. We will take SWT's comments into consideration in making any future revisions to planning guidance on EIA.

Article 1

SWT welcomed the proposals to look at defence related projects on a case-by-case basis and hoped that all projects brought forward during peacetime would be subject to assessment. They felt that the MOD should meet the same standards as other bodies when proposing new developments and "looked forward" to the SE signing a concordat to this effect with the MOD.

SE: Any cases coming before the Department for Communities and Local Government, as the relevant government department, will be considered on the merits of each individual case. Under the terms of the proposed Town and Country Planning (Environmental Impact Assessment) (Amendment) (England) Regulations 2006, where a project is exempted from those regulations consideration must be given as to whether another form of assessment would be appropriate.

Article 2

SWT welcomed the requirement placed on Scottish Ministers to make available detailed reasons for exempting projects from assessment. They hoped, however,

that the occasion would never arise where Ministers are required to use this procedure.

Article 6

This section of comments from SWT refers back to the specifics of the Directive, rather than directly discussing the proposed amendments.

They sought clarification on whether the amended EIA Directive's reference to "possible decisions" or "draft decisions" (Article 6 [2(d)]) would have implications for Ministerial advice which can be withheld under the Environmental Information Regulations, e.g. advice given to Ministers prior to deciding a planning appeal or ministerial call-in.

SE: We consider that draft regulations 3(7)(c) and 3(15)(a)(i) fully implement the requirements of the Directive with respect to the 'nature of possible decisions' and 'draft decisions'.

SWT noted also that Article 6 [3(b)] of the amended Directive makes reference to the availability of "advice issued to the competent authority or authorities" and they sought further clarification as to how this related to advice to Ministers. They felt it important to note that non-departmental bodies such as SNH can be classed as advisers to Ministers, thus allowing certain provisions in FOI regulations to be applied and preventing the release of classified information. This was something SWT felt it important to clarify as they believe views of the government's own advisers are of great interest and importance to environmental NGOs in considering their response to a particular appeal.

SE: Any request to see advice to Ministers would require to be considered on a case by case basis under the terms of the relevant legislation.

SWT welcomed the adoption of Article 6 [3(c)], which would see the publicising of any environmental information supplied to authorities after the initial assessment. They felt this would address cases where specialist environment surveys, such as those for fauna, breeding birds or invertebrates, are completed after the initial assessment without bodies such as SWT gaining knowledge of their availability.

Continuing on this point, SWT sought clarification as to whether the publicity requirements of Article 6 [3(c)] applied also to information only loosely tied to the environmental statement such as cost benefit analysis or economic impact assessments. They felt it clear that these factors influence aspects of the project such as location or design and therefore have indirect environmental implications.

SE: It would impractical to list in legislation every relevant type of information which had to be publicised. It would be for the decision making authority to decide on a case by case basis what constitutes 'environmental information'.

In relation to **Question 3**, SWT generally welcomed the proposals. They did, however, make the following comments and had particular concerns about the implementation of Article 10a:

Article 10(a)

This was where SWT had “serious concerns” about the proposed amendments. Their main concerns were as follows:

- SWT were looking for clarification that environmental NGOs previously involved in a planning matter would be recognised as having an “interest” by the courts. They felt this should be clarified prior to finalising the new regulations and then made clear in any subsequent guidance.
- They were concerned that the Executive’s proposals on providing “practical” advice might not go far enough to comply with the Directive. SWT felt “practical” advice might suggest something more than simply producing standardised literature explaining the process and that in most cases this would mean provision of professional legal advice on particular legal matters. SWT indicated that this would have financial implications and they were unaware of any publicly supported services or funds currently available for this purpose. They therefore felt that many (especially smaller) NGOs would be “blocked” from any genuinely useful “practical” advice needed to access the review process.
- Following on from this, SWT highlighted their serious concerns about the equity and costs of judicial review/ courts procedures, indicating their belief that the process does not represent a “fair, equitable, timely and not prohibitively expensive” review mechanism, as required by the Article. SWT’s concerns can be broken down as follows:
 - Judicial procedures are the only review measures available to NGOs wishing to challenge planning decisions. SWT believed that introducing, and so giving environmental NGOs, third party right of appeal would provide a less costly and more efficient review mechanism, fully compliant and more in line with the Directive;
 - There are prohibitive costs involved, SWT estimates legal costs to be in the range of £20-£40k. This means that SWT, even as one of the few larger Scottish environmental NGOs, would only pursue a judicial review in exceptional circumstances, due to the financial risk to the charity and its wider work. They believe this problem would therefore be more acute for smaller organisations;
 - The tight timescale for petitioning the courts makes it difficult to instigate and complete successful fundraising campaigns to support action through the courts.
 - Environmental NGOs are not eligible for any assistance through legal aid –preventing them from testing legal opinions in court due to prohibitive cost. SWT felt this situation to be clearly inequitable: NGOs being “considerably disadvantaged” compared to public authorities/ private companies that can afford high and variable legal costs.

To guarantee compliance with the Directive, SWT therefore believed that the Executive must actively consider the following:

A) Providing access to legal aid for certain environmental bodies that need assistance with the costs of pursuing judicial remedies

B) Developing new less costly review mechanisms, e.g. environmental courts or measures such as third party rights of appeal in the planning system

SE: Whilst the Scottish Executive does not necessarily share the concerns expressed by SWT and other parties regarding access to judicial review, nevertheless we note this point of view. With regards to specific proposals to introduce a third party right of appeal into the planning system, The Executive has given careful consideration to this idea. Following extensive consultation, in which strong arguments were presented both for and against introducing third party appeals, Scottish Ministers have decided not to include third party appeals in the planning bill currently before parliament. In reaching their decision Ministers have taken into account the wide range of proposals in the Bill to improve public participation at the appropriate stages in the planning process.

SWT also made the **general comment** that they hoped proposed changes would ensure that advice and evidence offered by SWT, and similar organisations, is fully taken into account in the EIA process. They felt that this has not always been the case and has led to the approval of developments that are environmentally unsustainable.

10. ACC (22 July 2005)

ACC felt that the proposed changes would implement, accurately and proportionately, the requirements of the Directive. Furthermore they felt that the changes would strengthen provisions for public participation in the EIA Regulations and would impose only “negligible” additional burdens or costs on the Council.

(This response was sent out by the City Development Services department)

11. SQS (26 July 2005)

Although SQS were speaking about the EIA (Fish Farming in Marine Waters) Regulations 1999, it may be worth noting their concerns with regard to the judicial review process, perhaps of some relevance to **Question 1**. They comment that the salmon farming industry has, in the past, been “the victim of a small number of persistent and ill-informed activists” and were concerned that the judicial review process could be used by certain activists to make frivolous objections. They agreed that the public should have the opportunity to make genuine representations, but wanted to see the Court use its discretion in considering objections made purely with the intent of causing delay or impairment to the industry.

SE: We support the idea that full and sufficient access to the court system, if appropriate through judicial review, is necessary to provide an independent check to ensure that decisions made are legally sound. While noting concerns that the possibility of courts being used in a way which is frivolous or inappropriate, we believe, through decisions, for example, on awards of expenses, that the courts are best placed to address such concerns.

12. RICS (27 July 2005)

RICS Scotland did not have any comments to make.

13. CSA (29 July 2005)

In relation to **Question 1**, CSA wanted to see a wide and inclusive interpretation of the definition of Environmental NGOs, such that not only the CSA but the several hundred local heritage organisations and community groups in Scotland would be covered by the legislation. They did not see this as implying that all such organisations would be formally consulted, unless directly or indirectly affected by projects falling under this regulation.

Following on from this, the CSA felt that the important distinction was rather in designing an open and speedy system for disseminating information on proposals. They hoped, for example, that information on all projects listed under EIA consent would be listed on an updated and accessible online source, similar to that already operated by the Forestry Commission Scotland. The CSA felt that having a register would allow the general public to see whether the proper consent regime had been followed and thus would allow the appropriate authorities to institute consent regimes where required.

SE: We consider that the existing publicity requirements contained within the EIA regulations are adequate to ensure that appropriate information is made available to the public. Land-use planning has already issued guidance on the use of e-communication to increase public awareness of planning applications and issues. With regard to the uncultivated and semi-natural area regulations, the Executive is looking at the issue of online listing over the coming months. In relation to Land Drainage, the number of projects falling into types of drainage works covered by Part 1V of the Environmental Impact Assessment (Scotland) Regulations 1999 are very rare. Therefore, while procedures will be in place to disseminate information to the public the Executive have no immediate plans to introduce an online system for this purpose. With regards to fish farming in marine waters, following the extension of planning controls to marine fish farming, projects will fall under the land-use planning regime. Electricity works EIA regs contain publicity requirements for advertising of applications and where the public might see or obtain copies of an Environmental Statement. The Roads (Scotland) Act is amended through these regulations to allow Scottish Ministers to use a website to make copies available online.

In relation to **Questions 2, 5 and 9** the CSA simply indicated that they would welcome more guidance on procedures for gaining access to the courts and the legal review of controversial EIA decisions.

In relation to **Questions 3 and 4** (as well as **questions 5-17**) the CSA commented that they could see no value in responding because “the way the document has been set out makes it impossible to compare the amended wording with the original wording in context”. They felt it would be difficult to comment without expending a lot of time searching out original documents, and so noted with regret that they did not have the capacity to answer the questions further.

CSA also made the following **general comments**. They felt that there was an issue in Scotland relating to a lack of understanding on how to engage with the planning system. They highlighted their own booklet on this subject, produced in 2001 and titled *The Archaeological Resource and the Historic Environment: balancing conservation with development*, which aims to give advice and information to the lay-person on planning policy and practice. Their final comment was that the information as presented did not go far enough in making it easier for the public and NGO's to participate. They commented that all areas where regulations were being changed potentially affect archaeological sites and so they felt the Executive needed to take further action to ensure that the public can participate in the process as fully as possible.

14. SB (2 August 2005)

In relation to **Question 1**, SB commented that there are a large number of organisations that fit the criteria of an NGO, with a broad range of political and philosophical positions. They therefore put forward the idea that NGOs should have to be registered charities before they would be allowed to seek a judicial review subject to the public participation provisions of the Directive.

SB commented that most NGOs are already registered and so meet the criteria of management arrangements, longevity and experience along with conforming to requirements now being introduced through changes to legislation in Scotland. SB could see no reason why a particular NGO would find it a problem to register, but they felt that it would prevent a single party interest group, created specifically to react to a new development and without having established sufficient interest or that their rights have been impaired, from abusing the judicial review process.

In response to **Question 2**, SB felt it was vital that understandable and accessible guidance be provided. They felt the need for this was illustrated by the consultation document which they believed contained too many cross references to other legislation. They felt that an NGO, such as theirs, would need far clearer guidance, given that they have neither the experience, resource or financial capability to employ someone with the required experience and understanding of the regulations.

In **general** terms they felt that the proposed amendments fulfilled their objectives.

15. HEACS (2 August 2005)

HEACS made the following **general comments**: They were concerned that environmental impact studies tended to overlook the historic context of the environment and so recommended that any guidance, issued with the regulations, should contain a specific reminder of heritage issues within environmental impact studies. They recommended that Historic Scotland be asked to provide this.

They were also concerned about the financial implications of the bill for planning authorities, and recommended that the Executive look again at assumptions of financial and human resources within the sectors affected by the amended legislation. (relating to **Question 4**)

SE: We will consider the resource implications within the regulatory impact assessment.

16. CEC (3 August 2005)

In relation to **Question 1**, CEC felt that introducing additional criteria to try and control what constitutes an NGO would go against the objectives of the Public Participation Directive.

In relation to **Question 2**, they felt that, given the relative complexity of the legislation and court process, any simple and practical guidance would be helpful. They felt that this would, in turn, demonstrate commitment to encouraging the public to take advantage of participation rights.

In relation to **Question 3**, they had no concerns with the approach taken.

In relation to **Question 4**, CEC commented generally that it was clear the Directive had to be fully transposed into national legislation, both because of the legal requirement and because of the “obvious” advantages in increasing public participation.

More specifically they felt that there may be some impact on the business sector where a planning consent is challenged by a member of the public and/or an environmental NGO, in terms of additional time and costs on a proposed development project. CEC therefore felt it important that local authorities follow the correct EIA procedures to try and ensure these problems are averted. For this reason, CEC suggested that clear guidance be produced for local authorities, outlining the changes and perhaps clarifying the whole EIA process. They posed the question: “will PAN 58 require amendment?”.

SE: It is the Executive’s intention to take account of the final amendments to the Regulations including procedural matters, and other changes, by issuing a revised version of Circular 15/1999 *The Environmental Impact Assessment (Scotland) Regulations*. We will consult on draft text in due course. A decision on when to update PAN 58 has not yet been made.

17. **SQS** (4 August 2005)

This response was exactly the same as their response of 26 July 2005 apart from the addition of a new final sentence. In this sentence SQS expressed their concerns, in reference to Article 10 (a), about NGOs being afforded the same status as the public concerned.

SE: It is anticipated that the provisions included in the new regulations will bring forward greater transparency and public involvement in the decision making process.

18. **SRPBA** (4 August 2005)

The SRPBA were content with the proposals in the consultation paper. They included Town and Country Planning amendments in their scrutiny and were content that the interests of land-based businesses across rural Scotland would not be “unduly impeded further”. Given that EIA consent regimes already operate in each of the areas where amendments are proposed, the SRPBA felt that their implementation should not result in further “bureaucratic” costs for individual business.

19. **SCCL** (4 August 2005)

In relation to **Question 1**, the SCCL were concerned that the phrase “environmental protection” had not been defined, and that this would result in almost any grouping, including single issue anti-development groups, being given the rights conferred by the revised Regulations, including the right to challenge a decision in the Courts.

They felt that without some form of definition, there would be a real threat of frivolous or inappropriate challenges to decisions. Moreover, SCCL felt there could be concern that some NGOs or other ad hoc bodies may not genuinely represent the view of communities they claim to represent.

SCCL therefore felt that some clear criteria should be laid down to define exactly which bodies are NGOs for the purpose of the revised Regulations. They felt a minimum requirement could be that an NGO has to be a properly constituted legal entity, but suggested that there should be a more comprehensive qualification procedure as well, possibly involving demonstration of experience, track record and authorisation by an established body e.g. a local environmental group would be referenced by say, SNH.

SCCL’s understanding of existing court rules was that associations can only engage in litigation through authorised representatives. They felt that this practice discourages frivolous or inappropriate court actions by requiring a degree of personal responsibility (not least for expenses which are typically awarded against a party which raises an unsuccessful action). Following on from that they considered that it might also be appropriate to require any prospective NGO litigant to demonstrate that, in the event that the action which they propose to raise is unsuccessful, they will

have the means to meet the expenses of the other parties to the action should such expenses be awarded by the court.

They felt that this style of “Quality Assurance” should be encouraged for public groupings, particularly where they are being given a role which has hitherto been solely performed on their behalf by professional staff in publicly funded organisations.

In relation to **Question 3**, SCCL felt that the general approach set out in the proposed Regulations seemed appropriate in implementing the requirements of the Directive.

They did, however, have some concerns about the requirement for the need to publicise the submission of ‘**any**’ other additional information, lodged with the determining authority after the submission of the Application and ES. They felt that a strict interpretation of the Regulations would mean any further information, no matter how minor, would have to be advertised in a local newspaper and in the Edinburgh Gazette and be subject to the other notification requirements.

SCCL felt this would be wholly impractical as there is always a healthy exchange of information and ideas between an applicant and the responsible consultees which can result in a series of changes being made to the proposals. They felt this process to be entirely appropriate, leading to the best overall solution for all parties, and were concerned that if it were stifled by the need to readvertise any/all additional information, the process would become cyclical and self perpetuating.

Their comments on the cost implications of this requirement are contained in the section on Question 4 below, but in practical terms they felt the requirement could lead to a lengthening of the time taken to process applications, particularly if requests for further information and clarification of points are received by an applicant on an intermittent basis over a period of time.

SCCL felt this may lead to applicants being forced to submit delayed, composite responses to the determining authority, rather than submitting information incrementally, in order to avoid the cost and resources involved in multiple advert fees and notifications. They felt this could well result in the decision-making process being extended.

In relation to **Question 4** (and the draft RIA as a whole) SCCL had two comments on the likely impact upon business. Firstly, they commented that the requirement to undertake further publicity such as newspaper advertising when any additional information is submitted to the determining body will add cost given that those fees are recoverable from the applicant. From their experience SCCL felt this cost would be substantial in certain cases (such as Electricity Act applications where the associated Regulations have fairly extensive public notice requirements).

Secondly, they felt that widening the right to challenge decisions in the Courts would, by definition, increase the potential for challenges to decisions to be made. They felt that any challenge to a development consent would bring with it additional and substantial cost and delay, and that this burden would fall directly upon business as well as public bodies. SCCL felt that the right to challenge could be used

inappropriately by certain groups, and so care should be taken to ensure that only professionally sound (as opposed to subjective and general) challenges can be made. Again they commented that the definition of the NGOs to be consulted should be clearly defined to avoid spurious or inappropriate legal challenges.

SCCL therefore did not agree with paras 6 and 7 of the RIA that there would be no direct cost or impact on business sectors and they urged the Scottish Executive to consider further the likely impacts upon business resulting from changes to the various Regulations.

They were also concerned that unless rules and definitions were very clearly defined, there would be a huge amount of administrative work for the established Government and Non Government organisations required to comment on developing information and arguments and subsequently on the decision making process and/or legal challenges. They felt there would therefore be a direct cost to the public sector as well.

SE: It is anticipated that the provisions included in the new regulations will bring forward greater transparency and public involvement in the decision making process. We support the idea that full and sufficient access to the court system, if appropriate through judicial review, is necessary to provide an independent check to ensure that decisions made are legally sound. While noting concerns that the possibility exists of the courts being used in a way which is frivolous or inappropriate, we believe, through decisions, for example, on awards of expenses, that the courts are best placed to address such concerns.

SCCL had no specific comments to make on **questions 6, 7, 8 and 9.**

20. SRF (5 August 2005)

In relation to **Question 1**, SRF were concerned that the lack of a clear definition of NGOs could lead to “frivolous or inappropriate” challenges from bodies not necessarily representing the views of the community or expert opinion. They suggested therefore that a qualification procedure should be considered to ensure only bodies with a demonstrable track record in the sector and appropriate authorisation could make challenges.

In relation to **Question 3 and 10**, SRF questioned the need to publicise ‘any’ additional information after a formal EIA application and ES have been lodged. They felt that a strict interpretation would mean that any additional information, however small, would have to be publicised, whilst they would suggest that only significant changes should be publicised.

They highlighted their concern that complex proposals involving EIAs regularly require change and if every change had to be notified, considerable cost and time would be added to the application process. SRF also felt that the requirement to publicise was open to abuse and could be used to delay projects where additional information or ‘minor clarifications’ are requested in a deliberately staggered manner.

SE: The proposed amendment requiring planning authorities to advertise 'additional' information would place in statute the recommendation currently contained in Circular 15/1999 that any information relating to the environmental statement, which is submitted voluntarily by the applicant, after the initial publicity has taken place, should also be publicised. However, the Executive will give further consideration to the precise wording of this draft regulation, in light of those comments received.

In relation to **Question 4** (and the draft RIA as a whole), SRF disagreed with paragraph six of the RIA that there would be no burden on the business sector from the proposed changes. They felt that:

- The requirement to publicise 'any' additional information post-application would add cost to the applicant; and that
- Widening the right to challenge was likely to lead to more legal challenge and therefore would add cost and delay, often "very substantial", to the applicant.

SE: We are aware that there may be increased costs to the applicant but in terms of the whole cost of the planning application and provision of an EIA we consider that these will still be relatively minimal. It is anticipated that the provisions included in the new regulations will bring forward greater transparency and public involvement in the decision making process. We support the idea that full and sufficient access to the court system, if appropriate through judicial review, is necessary to provide an independent check to ensure that decisions made are legally sound. While noting concerns that the possibility exists of the courts being used in a way that is frivolous or inappropriate, we believe, through decisions, for example, on awards of expenses, that the courts are best placed to address such concerns.

21. **ACC** (05 August 2005)

This was the second response received from Aberdeen City Council, this time with specific comments on the proposals made.

In relation to **Question 1**, ACC felt that the definition given in Article 2 of the Aarhus Convention 1998 on the 'public', the 'public concerned' and 'non-governmental organisations' should be used. They felt that leaving the definition open (i.e. providing no further additional criteria) would ensure that all relevant bodies can be involved in the EIA process. They commented that this would be in line with their own commitment to provide citizens with "the opportunity to become actively involved in influencing the decisions made by the Council" and would assist them in their work within their Community Plan and Best Value requirements to improve community engagement.

ACC also made the **general comment** that at the implementation stage relevant organisations undertaking an EIA and public participation should be referred to Community Scotland's Strategy on Community Engagement.

SE: It is for the applicant to decide whether they wish to consult more widely than is required by the regulations. We have no plans to introduce specific

lists of bodies who should be consulted other than those already specified in the current and proposed amendments to the regulations.

(This response was sent out by the Community Development Department)

22. LSS (05 August 2005)

The LSS response was prepared by their Planning Law Sub-Committee.

In relation to **Question 1**, they did not consider that any additional criteria were required, providing an NGO can satisfy the Court it is an aggrieved person. They felt that the tests developed by the Courts on title and interest to sue are adequate for the purpose.

In relation to **Question 2**, LSS agreed that planning guidance on access to the courts/judicial review procedures would be useful. They considered that the public would find it helpful to have access to clear and advisory guidance, written in plain English.

LSS suggested that such guidance should include definitions and terms used in the court/judicial review processes such as who can be involved; information on the public's rights; information on the merits of cases; information on how to appeal; and information on costs. They suggested that it might also be of assistance to provide an indication of the limitations which can arise. LSS agreed that any guidance should not be confused with expressions of policy, and commented that they would welcome the opportunity to provide input into the preparation of any such guidance.

SE: We note your comments about guidance on this issue and we will give the matter further consideration.

In relation to **Question 3**, they considered that the Executive's approach as outlined in the consultation paper does appear to meet the general requirements.

LSS had no comments on **Question 4, 14 and 15**.

In relation to **Question 5**, LSS referred to its answer to Question 2 above.

In relation to **Question 6**, LSS agreed that the approach appeared to appropriately implement the Directive and had no further comment in this regard.

LSS had no comments on **Question 7 and 9**.

In relation to question **8**, the LSS Sub Committee agrees that the Scottish Executive's approach as outlined in the consultation paper does appear to implement the Public Participation Directive in regard to the Land Drainage part of the Environmental Impact Assessment (Scotland) regulations 1999. However, the Sub Committee queried whether the National parks are adequately covered by the legislation.

SE: The consultation contained proposals to amend the definition of “consultation bodies” in regulation 2(1) of the above regulations to include “other bodies designated by statutory provisions as having specific environmental responsibilities”. Regulation 55 of the same regulations provides that the new definition will apply to the land drainage part of the regulations. In this respect, bodies such as National Park Authorities will be given the opportunity to comment on and receive information in accordance with the regulations.

23. MLRI (05 August 2005)

MLRI made the following **general** comments:

- They felt that under the Aarhus convention any organisation or individual should have the right to make representations on EIAs and legal challenges to EIA decisions. They were therefore concerned at the singling out of environmental NGOs, believing that all NGOs and other interested parties should have the same access to judicial review/court procedures. They believed that court costs, for example, would deter frivolous claims.
- They considered that more detailed comments on the actual techniques and processes of public participation would be helpful. They felt that this omission along with statements regarding the lack of impact on business etc suggested that active involvement with the public was being “neither encouraged nor envisaged”.
- They welcomed the provision regarding publicising information received post initial EIA launch, but were concerned with the following details:
 - How long will the period (post EIA launch) last?
 - Where will it be publicised?
 - Who has this responsibility?

SE: Further information will be advertised in the same manner that the original EIA is advertised.

- Where is the statement about how the client and statutory bodies respond to information supplied by both the public and the concerned public?

SE: It is for the relevant authority to consider all the information before them when considering an application that requires an EIA.

In relation to **Question 1** (and also questions 6, 8 and 10), they were concerned at the lack of definition of environment in the paper (in relation to environmental NGOs), and suggested that all NGOs with an interest in the development should have a voice. MLRI believed that the legitimacy of an NGO should be based on their conduct and argument, rather than by some structural or operational criteria, with sanctions like costs deterring frivolous claims.

In relation to **Question 2**, MLRI felt it important that such guidance be made available. They felt it important the information be targeted effectively, by providing the guidance within the environmental statements themselves.

Furthermore, MLRI believed it vitally important to raise awareness and provide information on the rest of the participation process as well.

In relation to the **Partial RIA** (and so **Question 4**) MLRI were concerned that the provisions allowed all “interested publics” to make representations but not legal challenges. They felt that some of the text implied a distinction between these different types of public, which in their view would be inequitable particularly if this was pre-determined.

They felt that the RIA needed to work through the following different options.

Option 1 - as stated

Option 2 - as stated

Option 3 - all public allowed to make representations. (An option provided by MLRI, which they believe is required for the spirit of the Public Participation Directive to be met)

Their other concerns on the draft RIA related to the financial implications. They were concerned that the costs to local authorities and businesses of active involvement by the public had been understated, and as a result the process would not function properly. In particular, they felt that the burden on business had been underestimated, as they believed the client would have now to respond to representations from the public/NGOs with further information and iterations. Again MLRI felt these statements suggested the Executive do not envisage or account for active involvement by the public.

24. SSE (05 August 2005)

In relation to **Question 1 and 10**, SSE felt that, like any other member of the public, NGOs should be able to demonstrate sufficient interest and impairment of right to facilitate a challenge through the existing Judicial Review process. Therefore they believed there would be no need to provide any further criteria and that the courts should be left to decide whether an NGO’s interest/ impairment is sufficient.

SSE also made the following comments on the Draft RIA in response to Question 11 (on electricity works), though their comments could be said to apply to **Question 4** also. They commented that if NGOs were to be given some form of preferential right to take matters to court then the funding of these organizations and of the counterparty to the cases would have to be taken into account.

Finally they commented that there would likely be additional compliance costs for the applicant and for the Planning Authorities through the proposed changes in legislation to capture “extensions” in Schedules 1 and 2.

SE: We accept that the advertising of further information may lead to overall higher costs for the applicant, however we feel that these will only be a small fraction of the cost of an EIA. It is anticipated that that the provisions of the new regulations will bring forward greater transparency and public involvement in the decision making process. We support the idea that full and sufficient access to the court system, if appropriate through judicial review, is necessary to provide an independent check to ensure that decisions made are legally sound, including the ability for the courts, for example to award expenses, if the court system is used in a way which is frivolous or inappropriate.

With regard to the comment on extensions, Circular 15/1999 has always stated that where a change or extension itself would fall to Schedule 1 it constitutes Schedule 1 development.

25. FiC (05 August 2005)

In relation to **Question 1**, FiC believed that, whilst appreciating the complexity/difficulty involved, it would be preferable to name and identify the NGOs rather than leave the term undefined. They considered that if the definition includes NGO's promoting environmental protection and also meeting requirements under national law then this could be used to identify bona fide NGOs.

In relation to **Question 2**, FiC felt that such guidance would be welcome and would assist third parties to be aware of the legal rights of challenge. They felt that this could be a complex and costly process but that there "appears to be no harm" in providing and simplifying the information. FiC believed that the information should be prepared and provided at the national level by the Scottish Executive to ensure consistency of approach across Scotland rather than leaving the implementation to 32 different authorities.

In relation to **Question 3**, FiC considered the approach outlined to appropriately implement the Directive.

In relation to **Question 4**, FiC commented on the idea that costs will be absorbed in the existing Planning fees as many of the requirements are already in place. They felt that there had in fact been a considerable amount of small, incremental changes to processes and procedures (along with more set out in the Planning White Paper) and that these add up to significant resource requirements which should be made more explicit and recognised.

In relation to **Question 5**, FiC comments that its approach as set out in Question 2 would be sensible for all environmental regimes in the consultation paper.

FiC agrees that for **Question 6 and 8** the approach appears to appropriately implement the Directive's requirements.

In relation to **Question 7**, FiC comments that the draft RIA confirms that the cost impact will be on Scottish Ministers.

FiC acknowledges for **Question 9** the draft RIA also included specific provision relating to Environmental NGO's to challenge decisions, acts or omissions.

In relation to **Question 14**, FiC also welcomed the broadening of the definition of "countryside bodies" and inclusion of National Parks in Scotland within the definition of "sensitive areas".

26. SEn (03 August 2005)

SEn were keen to note their continuing support for the principles behind the Aarhus Convention and it's calls for greater public participation. Although they felt there was no specific measure which would extend the planning process within the proposed legislation, they did comment that greater participation had to be tempered against any prolongation of an already time consuming planning process.

27. FaC (04 August 2005)

FaC offered no comment beyond that they were of the opinion there was merit and justification in the Executive's proposed changes.

28. FOE (04 August 2005)

In relation to **Question 1**, FOE felt there was little need for further clarification on "the wider public" as Article 2 paragraph 5 of the Aarhus Convention 1998 clearly lays this matter out. They commented that they would be concerned at any attempt to narrow the definition to exclude small charities or organisations who could otherwise meet the criteria of having environmental concerns and decision making at their heart or who have an interest in, or are affected by, such decisions.

In relation to **Question 2**, FOE could see no benefit in issuing generic advice, as they believe each case passing through the courts/ judicial review is so different. Given that Local Authorities and Executive decisions have to be communicated to those who participated in the process, they felt that details of any appeal procedure should be communicated to participants at this stage. This would remove the need to issue guidance on "such a large and variable topic".

In relation to **Question 3**, FOE started by fully endorsing comments made by LINK relating to the various articles. (We have no record of any comments made by LINK). They then went on to provide their own detailed comments on the implementation of **Article 10a**.

FOE felt that the existing judicial review system does not represent a review procedure that is fair, affordable and accessible to all, and so does not fulfill the objectives of the Aarhus Convention. Their main criticisms of the judicial review process were as follows:

- The “very tight” criteria of ‘right and title’ would, FOE believed, restrict those who qualify to instigate proceedings to only a few.
- The actual scope of the reviews is too restricted: looking only at the lawfulness (or otherwise) of the decision made and not the merits of the case.
- There are prohibitive costs involved in the process. FOE commented that even for large NGOs judicial review can seem a financially daunting process.
- It is not a swift process, with current cases frequently taking 12 months or so to come to court.

FOE therefore felt that judicial review does not meet the appeal procedure criteria set out in the Convention of a “fair, equitable, timely and not prohibitively expensive” process, and so the proposed amendments fail to implement the spirit of the Convention. They asked that we seek further clarification from OSSE on this matter.

Finally FOE put forward the idea that there might be a case for reviewing the White Paper proposal to reject a limited Third Party Right of Appeal. They commented that it would be up to the Executive to propose where such an appeal would be heard, but they felt that this need not necessarily be in the courts.

SE: The Executive is satisfied that its proposals implement in full the relevant requirements of the Public Participation Directive, and of the Aarhus Convention. Therefore, whilst the Scottish Executive does not necessarily share the concerns expressed by FOE and other parties regarding access to judicial review, nevertheless we note this point of view. With regards to specific proposals to introduce a third party right of appeal into the planning system, The Executive has previously given careful consideration to this idea. Following extensive consultation, in which strong arguments were presented both for and against introducing third party appeals, Scottish Ministers have decided not to include third party appeals in the Planning Bill currently before parliament. In reaching their decision Ministers have taken into account the wide range of proposals in the Bill to improve public participation at the appropriate stages in the planning process.

29. SEPA (08 August 2005)

SEPA’s comments related to issues of consistency across the seven EIA consent regimes, and in particular between the EIA consent regimes and the Pollution Prevention and Control (Scotland) Regulations 2000 (PPC Regulations). SEPA noted that the Public Participation Directive also requires amendments be made to the PPC Regulations, and that this had been the subject of an earlier Executive consultation. Their comments, therefore, sought to comment on the effectiveness of the current proposals in implementing the Directive, but also sought to highlight issues of consistency between the seven regimes and the modifications proposed to PPC Regs in the earlier consultation. (these comments therefore relate, in planning terms at least, to **Question 3**).

SEPA felt that this was an opportunity for the Executive to address discrepancies between the various pieces of legislation affected by the PP Directive, in order to establish a consistent approach to public involvement across the board. With that in mind, SEPA urged strongly that the EIA regulations be studied in conjunction with amendments to the PPC Regs.

Whilst SEPA felt that consistency between the PP Directive amendments to EIA and to PPC was important throughout, they highlighted proposed modifications 8(b) and 15(a) (to the EIA regs) as requiring particular attention. SEPA were concerned that:

- The consultation on PPC amendments proposed new measures would be required to implement Article 3(4) of the Directive, as compared with the minor modification proposed in the current consultation;
- Modifications 8(b) and 15(a) are not mirrored in the proposed amendments for the other EIA consent regimes;
- The interpretation of Article 3(4), in particular of the terms ‘the nature of possible decisions’ and ‘draft decision’, has resource implications and so it is particularly important to ensure that the different regimes reach a common understanding of what is required.

SEPA did not indicate which approach they believed to be preferable, but felt that the preferred option should be identified and implemented across the board (i.e. to all EIA consent regimes and the PPC Regs).

SE: The Executive has considered SEPA’s comments and is satisfied that it has fully implemented the requirements of Article 3(4) in a manner which is appropriate to the specific regime in question. The current EIA regulations were drawn up with the public participation provisions of the Aarhus Convention in mind, and many of the amendments, which might otherwise have been required, have therefore been provided for within existing EIA legislation. The Executive does not consider that an intentions letter - which may be issued by Scottish Ministers where a planning decision has been made but which is subject to the conclusion of a legal agreement – can be compared to a draft decision under PPC regulations where a final decision is still to be made.

Other discrepancies SEPA identified between the proposed modifications to the various consent regimes included:

- The degree of specificity of information provided to the public when an application is made and of the feedback on the decision taken, including how the consultation process informed the decision;
- Variation in consultation arrangements at different stages (screening, scoping and submission of the Environmental Statement), specifically:
 - Whether the authority responsible for determining the EIA application “shall” or “may” consult with the bodies specified at these stages;

- The length of consultation.

SEPA believed that the introduction of the PP directive provides an ideal opportunity to remove these outstanding differences between regimes. They suggested that this also be considered in the light of other discussion with their Sponsor Team in the Department on Public Participation.

31. BH (05 August 2005)

The majority of BH's comments related to the Electricity Works EIA Regs, and were born out of his interest in an application, made in May 2003, to construct a Hydro Electric Scheme at Glendoe under the Electricity Act (1989). Following on from these comments, he did however make the following suggestions for the other six sets of EIA regulations:

- Schedules 1 and 2 of all sets of Scottish EIA regs should be amended so that they conform identically with Annexes I and II of the European Directive.

SE: The Schedules reflect the regimes to which they apply.

- The seven sets of Regulations should be amended by the insertion of a new paragraph in Part 1 to the effect that all applications for development as listed in Annex I and Annex II of the European Directive (or Schedules 1 and 2 of the Scottish Regs if amended as above) should contain a specification of the proposed works as though the application were being made under the Town and Country Planning Acts.

SE: These provisions are already contained in planning regulations and in forestry Grants and Licences Regulations. Proposals to make roads orders under The Roads (Scotland) Act 1984 must be publicised through a public notice stating the general effect of the proposed order, and The EIA (Fish Farming in Marine Water) Regulations 1999 require an application for consent or, as the case may be, a licence to be accompanied by a plan of the site and an outline of production equipment and the effects of the development. Applications under the land drainage part of the EIA Scotland Regulations 1999, the EIA (Uncultivated Land and Semi-Natural Areas) Regulations, and applications under the Electricity Works EIA Regulations are required as a minimum to provide a description of the physical characteristics of the whole project and its likely significant effects on the environment. In addition, Planning authorities are also consulted on all Electricity Works applications and can look to the developer to provide such further information as they require. This could include, if necessary, a specification of works. In addition many such consents will also include a condition requiring the developer to provide a 'construction method statement' to the local planning authority.

- New Regulations in each of the seven sets should be added to ensure the following are placed in the public domain:

- All applications for development which falls or may fall within the definitions contained in Annex I and Annex II of the European Directive and irrespective of the Scottish Acts which may apply;

SE: Section 36 of the Town and Country Planning (Scotland) Act requires all planning applications be placed on planning register regardless of development type. The Roads (Scotland) Act 1984 requires that trunk road orders are made available for public inspection. All afforestation and deforestation applications, whether subject to EIA consent or not, are placed on a public register for 28 days. Land drainage applications considered under Part 1V of the Environmental Impact Assessment (Scotland) Regulations 1999 are published in accordance with Schedule 1 of the Land Drainage (Scotland) Act 1958. Under the EIA (Fish Farming in Marine Waters) Regulations 1999 the relevant authority shall make available for public inspection the relevant request and all documents which accompany it. All uncultivated applications whether subject to EIA consent or not are placed on the public register. There is already a requirement to publish the environmental statement for Section 36 and 37 applications.

All decisions made by Scottish Ministers upon whether such proposals constitute 'EIA development' or not together with the explanation of such decisions;

SE: Regulation 20 of the Environmental Impact Assessment (Scotland) Regulations 1999 requires that any screening opinions and any accompanying statement of reasons should be placed on Part I of the Planning register. For trunk roads this is already required under Sections 20A and 55A of the Roads (Scotland) Act 1984. For Forestry issues (afforestation, deforestation and forestry road/quarry projects), decisions made by Scottish Ministers are placed in a public register. Proposed amendments to the Drainage Works part of the Environmental Impact Assessment (Scotland) Regulations 1999 will make provision for this proposal in relation to improvement orders which fall within the auspices of these EIA regulations. Under the EIA (Fish Farming in Marine Waters) Regulations 1999 the relevant authority are required to make available for public inspections an opinion given as to whether an environmental assessment is required and any accompanying statement of reasons. Decisions by Ministers on Uncultivated applications are required to be placed on the public register. Scottish Ministers will seek the advice of the planning authority in screening an application under section 36 or 37 of the Electricity Act as to whether an application requires an environmental statement.

- The EIAs supporting the applications;

SE: Under the terms of article 6 of the EIA Directive all 7 regimes provide that the Environmental Statement should be publicised in a manner which is appropriate to the regime in question.

- All comments from members of the public as individuals or as members of groups making comments on behalf of their members;

SE: The new provisions of amended article 9 of the EIA Directive require that when a decision to grant or refuse development consent has been taken, the competent authority should make available to the public information on ‘the main reasons and considerations on which the decision is based, including information about the public participation process and the draft amending regulations provide for this in each of the 7 regimes. In addition, copies of all representations on planning applications should in practice be provided to the planning committee and summaries included in the committee report. With regard to Forestry issues, Trunk Roads, and uncultivated land applications, in practice all representations are held at the local Forestry Commission office, or by Transport Scotland or the appropriate Agricultural Area Office respectively and are made available to any enquirer. We have no plans to change these arrangements. The Executive is considering the possibility of posting all responses to consultations on applications under the Electricity Act - where these are not confidential - on the Scottish Executive web pages. Where the information is not pro-actively published, copies of all responses held by a public authority can be requested under the terms of Freedom of Information legislation and must be considered under those terms.

- A response from the developer to the comments submitted.

SE: We have no plans to introduce such provisions, which are not a requirement of the EIA Directive as amended.

- New regulations in each of the seven sets should be added stating that the publicity proposal above may be “entirely satisfied by a Public Inquiry”;
- The seven sets should be amended by the insertion of a new paragraph in Part 1 reminding those applying for permission to develop that an EIA is required to illuminate, not replace, an application.

SE: The Executive considers that the existing guidance and regulations currently in place already provide for this where appropriate to the regime in question.

In general these proposals were put forward to ensure conformity with changes BH suggested to the Electricity Works EIA Regs. However, he felt that publicizing a detailed description of the project and EIA decision process would enable people/organizations to demonstrate “title and interest” and so access the judicial review/courts procedure, something he felt was “impossible” to do without this information. Having made the above comments, BH then went on to provide specific answers to the following Questions:

In relation to **Question 1**, BH felt that a balance had to be struck between validating NGOs without appearing to monitor them. He cited the example of Local Public Inquiries where it is common practice to ask for the numbers and even the addresses of members of NGOs together with evidence that the individuals appearing at an Inquiry on behalf of an NGO have been properly mandated. BH thought NGOs should be invited to put their names on an address list and be given the opportunity to include membership numbers, but it should be made clear that

there are no penalties in failing to do so, other than not receiving direct notification of matters that may interest their members.

In relation to **Questions 2 and 5**, BH felt that guidance should be provided but it should not be restricted to Planning (and Roads Regulations). He felt that any form of selection which excluded legal advice on some projects, would not be looked on favourably by the European Commission.

In relation to **Question 10**, BH felt that the effects are inadequate and that it appears to be possible to accept an EIA referring to an outline proposal and then to grant consent. He believes that this is contrary to British case law.

SE: It is our view that the Glendoe consent was consistent with the Directive.

32. SCNP (05 August 2005)

In relation to **Question 1**, SCNP pointed out that NGOs with '*an interest in the environmental decision-making procedures*' or in '*promoting environmental protection*' can take a number of forms, with varied remits and varying degrees of experience/longevity. They therefore supported the Executive's view that the setting of conditions for the eligibility of NGO's to participate in the EIA process '*might deliver less than their perceived benefit*'.

However, SCNP were concerned that if the principle is to facilitate NGO participation, then the following issues might inhibit this aim:

- What implications would '*subject to any requirements under national law*' [1st paragraph page 12] have for a range of different NGO types?

SE: This would depend on each individual case.

- Under Scots Law [2nd paragraph, page 12], it should be easy enough for NGOs to show '*interest*', but demonstrating '*title*' derived from a definition of a right or a claim might be more difficult?

SE: It will be for the Courts to decide this particular issue

- Draft Statutory Instrument [your Annexe A] Part III Roads [pages 56] paragraph 8 (i) insert (e) '*other bodies designated by statutory provision as having specific environmental responsibilities*' – presumably this does not refer to NGOs?

SE: Correct

In relation to **Questions 2 and 5**, SCNP felt it would be very helpful for NGOs to have planning guidance about access to the courts/judicial procedures. They believed that the guidance should have a user friendly format and be expressed in plain English. They also felt that a clarification of the issues they raised in response to Q1 would be helpful to all parties, including NGOs.

In relation to **Question 3**, they felt that the approach appeared to do so.

In relation to **Question 4**, SCNP supported the assessments in the RIA, but commented that most Local Authority planning departments claim to be significantly under resourced and that this was something to be taken into account. They felt sufficient resources had to be allocated to enable planning departments to achieve high standards in the formulation of development plan policies and in the decisions taken in development control.

In relation to **Question 6**, SCNP agreed that the approach would appear to appropriately implement the Directive.

In relation to **Question 7 and 9**, SCNP agreed with the assessment.

In relation to **Question 8**, SCNP agreed that the approach would appear to appropriately implement the Directive.

SCNP also provided the following **general** comments. They urged a scrutiny of relevant statutory instruments and Acts to ensure that definitions of sensitive areas include National Parks and follow the example set out in Schedule 2 of the EIA (Forestry) (Scotland) Regulations 1999.

SE: We are satisfied that the appropriate amendments have been made to include National Parks within the relevant EIA regimes.

They also enquired whether other Acts, as well as the Roads (Scotland) Act 1984(5) mentioned in this paper, will be amended to comply with the Public Participation Directive, including the National Parks (Scotland) Act 2000.

SE: The Executive is satisfied that appropriate amendments have been provided for in the relevant legislation to comply with the Directive.

33. ADS (02 August 2005)

ADS's comments, whilst not explicitly assigned, relate in part to **Question 1**. They first outlined their role as a Non-departmental Public Body consulted by the Executive on the design aspects of major energy generation and roads projects, as well as by Local Authorities and other organisations on other projects that may have an environmental impact. ADS were looking to ensure that their organisation's remit would be compatible with the Directive's definition of environmental NGOs (relevant to this consultation in terms of Article 10(a) amendments).

Should we consider there to be an issue of compatibility then ADS would be looking to discuss an appropriate amendment.

SE: As an NDPB, ADS are not an NGO. However they may make their views known on any planning application. We have no plans to amend the regulations to include NDPB's.

34. EDC (12 August 2005)

EDC made their comments in relation to Section 7 of the paper – Uncultivated Land and Semi-Natural Areas. However, in commenting on the draft RIA they highlighted their concerns that there will be additional resource implications for Planning Authorities in both implementing the additional requirements and reporting back on them (of relevance to **Question 4**).

35. HC (22 August 2005)

In relation to **Question 1**, HC acknowledged the difficulties in defining NGOs: too restrictive and single action groups might be denied legitimate access to judicial review, too relaxed and frivolous actions may be pursued (though HC felt this to be less likely given the cost of a judicial review and the prospect that defeat means having to pay the other parties expenses).

HC felt that if the Executive believed it necessary to try and exclude more “frivolous” NGOs, then this could be done by:

- Carefully defining the phrase “NGOs promoting environmental protection”, or
- Insisting NGOs have a minimum number of members, such as the minimum 20 required by a community body or crafting community body under the Land Reform Act, or
- Insisting NGOs have (at least) an agreed constitution, memoranda and articles of association.

In relation to **Question 2**, HC felt it essential that clear planning guidance be provided. They felt the guidance should:

- Make clear when judicial review/court procedures might be considered, but also when it is not appropriate;
- Include an indication of the implications of pursuing an action that is subsequently lost;
- Be produced centrally by OSSE, in consultation with the Court of Session, in a standard format for all Planning Authorities. HC believed this would help ensure a consistent approach.

In relation to **Question 3**, HC felt the approach seemed to appropriately implement the Directive, though they wondered if this might not be best judged by the legal profession.

In relation to **Question 4**, HC believed Town and Country planning had not been included in the draft RIA. They also commented that it should be “de minimis” and not “de minimus”.

SE: Section 2, paragraph 7 of the RIA explains that the impact appraisal deals primarily with the Regulations in relation to planning, with paragraphs 13-18 referring specifically to the remaining 6 regimes. We note the incorrect spelling of de minimis”.

On the **proposed amendments to Town and Country Planning EIA Regs**, HC made the following comments:

Amendments relating to Article 6

They were concerned about the level of information required to be publicised after the submission of an ES. They wanted to ensure that minor details (e.g. dealing with SEPA initial objections about the content of method statements) would not need to be publicised, but only information on likely significant effects and information of a “more clarifying nature”. HC felt this may be the case in current proposed amendments, but if not then they proposed that “any other information relating to the ES” should be more carefully defined.

Definition of Consultation Bodies

They felt the broadened definition of consultation bodies to include “other bodies designated by statutory provisions as having specific environmental responsibilities” was too vague. HC understood that this arose as a result of difficulties experienced on cross-border development. They felt therefore that the addition could be made more specific, referring instead to the “equivalent bodies to b, c, d, e, and f in England where the development is likely to affect land or water within the area

SE: We will give both these proposals further consideration.

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