

**DEPARTMENT FOR BUSINESS
ENTERPRISE & REGULATORY REFORM**

**Provisions in environmental
impact assessment regulations
for energy infrastructure**

Final Impact Assessment

1. Title of proposal

Proposals to improve the ability of the public to participate in the environmental assessment of proposed energy infrastructure.

The proposals relate to three Regulations:

- (i) The Electricity Works (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2007;
- (ii) The Gas Transporter Pipe-line Works (Environmental Impact Assessment) (Amendment) Regulations 2007; and
- (iii) The Pipe-line Works (Environmental Impact Assessment) (Amendment) Regulations 2007.

2. Purpose and intended effect

The proposals cover new power stations (including offshore wind farms), overhead lines, gas transporter pipelines and commercial pipelines and have the objective of improving the transparency of existing requirements for energy infrastructure, in line with the requirements of the Public Participation Directive (2003/35/EC).

- Since 1985 the EU has laid down requirements on how the environmental impact of public and private projects is considered, before a decision is made on such developments. The EU updated the requirements in 1997 and current UK regulations reflect that updating. Further updating is now required following the European Community's signature of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention). This led to the Public Participation Directive which amends prevailing requirements and which the UK Government is required to implement. The main amendments are:
 - The public should be informed of Environmental Impact Assessment ("EIA") proposals, supplementary information gathered in the process, and decisions, by both local and national notices. The Directive requires the public to be informed by appropriate means.
 - When an EIA application is made, any supporting documents submitted by the developer with the EIA, should be made available to the public concerned by being lodged with the relevant local planning authority.

- Additional information gathered in the process, as well as the formal supplements to the EIA currently provided for in the regulations, should be made available to the public concerned by being lodged with the relevant local planning authority. And the public should be informed of the existence of that information by both local and national notices.
- The public notice and the decision statement will include reference to the public participation process and the concerns and opinions expressed during the public participation process, and will flag up the right to challenge the decision and the procedure for doing so.
- The regulations also incorporate a change in the definition of “consultative bodies” or “consultation bodies” in the regulations to meet the European Commission’s concerns that the existing definition was too narrow and did not adequately transpose the original requirements.
- *Rationale for government intervention*
To increase the accountability and transparency of the decision-making processes in the regimes for proposed electricity and gas developments. These cover electricity generation and overhead lines, gas transporter pipelines and onshore, cross-country commercial pipelines for gas, oil and chemicals.
- *Rationale for action now*
The UK is already under Article 226 infringement proceedings for not transposing the Public Participation Directive into national law.

3. Consultation

- Within government

In formulating its proposals the Department had regard to the proposals of the Department for Communities and Local Government (DCLG) to transpose the requirements of the Public Participation Directive into the general planning regime under the Town and Country Planning Act 1990, whilst recognising the need to reflect the fact that the BERR regimes cover national energy infrastructure in which more than local interest is often shown.

- Public consultation

Soundings, prior to public consultation, were taken of a representative sample of developers handling power station developments, both large and small, overhead lines, and gas pipelines. The need for changes to the existing regimes to transpose the European Directive was recognised. There was a consensus that the cost implications were likely to be marginal with concern being more about distraction of resources and potential for the process to become more protracted if additional information attracts interest. But against that it was recognised that this was information that would be likely to already exist and which people could already seek to access, albeit that it might be by a somewhat circuitous route.

Public consultation was formally carried out on 10 October 2006 ending on 2 January 2007. Twelve responses were received, not all within time, but all have been considered. The responses were largely from industry sources. Late in the day it emerged that while the consultation had been intended as an England and Wales exercise, the Scottish Executive needed to consult in Scotland on the changes to the gas transporter and commercial pipelines regimes. This they did, contacting key stakeholders, but no responses were received.

4. Options

The three options identified for the consultation were:

- (i) do nothing;
- (ii) implement the Directive through regulations; or
- (iii) seek to implement the requirements by voluntary measures such as guidance and codes of practice.

Option (i) would mean that the UK would not be compliant with EU legislation. However, the UK is already subject to infraction proceedings by the EU Commission for failure to comply with the requirements of the Public Participation Directive and so this option is not a possibility.

Option (ii) would put the UK in the best position to defend any challenge of decisions on developments based on alleged non-compliance with the Directive. While this option does add slightly to the burden on business, it does mean the public can participate in the process, and the credibility of the process in terms of subjecting the environmental impact of a development to open

scrutiny, is reinforced. The proposals do not change the position as regards confidential information set out in the existing EIA Directive at Article 10.

Option (iii), whilst capable of delivering the aims of the Public Participation Directive, would mean the UK had not legislated to implement it. This would not guarantee that the aims of the Directive were fulfilled nor would it comply with the requirement of the Directive that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive. Option (iii) is therefore also not a realistic possibility.

The consensus from the soundings and the public consultation was a recognition that some regulation was necessary but what mattered was getting the burden on the developer right.

5. Costs and benefits

Sectors and groups affected

The enhanced public participation requirements will impact on the electricity and downstream gas sectors. They will apply to proposals for new power stations (including wind farms), overhead lines, gas transporter pipelines and commercial pipelines. Such proposals are critical to ensuring the continued security and reliability of the energy delivery systems that the public depend on for their electricity and gas supplies. Businesses bringing forward the projects will thus be affected by the requirements. But the local public, and the public more generally who take an interest in energy developments, will also be affected by the requirements.

Summary of costs and benefits

There are no benefits associated with options (i) or (iii) since the UK is already subject to infraction proceedings. A continued failure to legislate to implement the Public Participation Directive could result in fines.

Option (ii) offers the prospect of improved credibility for the processes through improved public participation arrangements, at what looks to be a marginal cost.

The additional compliance costs are in the nature of additional publicity costs and the assemblage of the additional information now to be lodged in the public domain. All the existing regimes lay down public notice requirements, requiring in general local publicity. These are to be enhanced by adding national notice where this is

not currently provided for. At the application, supplements to the EIA and decision stages, adding London Gazette advertising can cost in the region of £750 per advert adding in the worst case up to £5k to compliance costs. To this has to be added the publicity costs for the new requirement on additional information which could add a further £5k to compliance costs. Assemblage costs for additional information are unknown as this is a new requirement but it is worth noting that it is recorded information already available rather than the generation of new material, so the costs should be modest.

To put additional compliance costs in context, the main existing cost of complying with the EIA regulations is that of the production of an environmental impact assessment, which remains unaltered, and can cost in the region of £50k upwards, with major cases costing over £100k. The next major existing cost is the supplements to the environmental impact assessment, where that is required. That can vary considerably in production cost depending on whether it is clarifying existing information or providing further, new, information such as ecological studies or further alternative sites/routes analysis.

At the same time all these costs are relatively small in the context of multi-million pound projects. A major power station development will cost in the region of £300m, a 400 kV overhead line can cost between £0.5m - £1.5m per km and a high pressure gas pipeline between £0.8m - £1.5m per km. An onshore windfarm development can cost in the region of £50m.

Making additional information available may also make the process more challenging for business through the potential for additional probing by third parties and drip-feeding of information into the process, with consequential impact on timescales. But the proposal is to corral dissemination of additional information and to impose a deadline for representations on additional information so that timely decisions can still be made.

Option (ii) appears to offer the best prospect of better environmental impact analysis and improved decision taking, at what looks to be a marginal cost. Option (ii) also offers business greater certainty over the requirements and a level playing field across projects.

Views were sought in the consultation on the analysis of costs and benefits and the additional regulatory burden. There was support for the view that key costs and benefits had been captured, and that the additional regulatory burden might be marginal. But this

was subject to the proviso the developers should not have to be responsible for handling third party information, and that the analysis does not take into account any costs stemming from increased delay if the process becomes more protracted. On the production costs associated with an environmental impact assessment one respondent considered they were on the low side and expected to see £100k to £200k on average for the production of EIAs.

The Department has accepted the need to avoid an unreasonable burden on the developer and recognises the concerns over more protracted timescales. It has therefore reined back the developer's responsibility with the Secretary of State becoming responsible for the dissemination of third party additional information, and the developer being responsible for an initial public notice alerting the public once additional information starts being received on a proposal. That notice will indicate where the public can inspect such material and who to contact on additional information. Given that much of the additional information will occur early on in the process the Department does not feel that in general it will lead to a more protracted process.

6. Small Firms Impact Test

To gauge the impact on small businesses, meetings were held with two representative companies who develop energy infrastructure and who could be said to be among the smaller firms operating in the sector – one developing windfarms, and one developing power generation and gas facilities before the consultation was launched. Both accepted that the EU would expect implementation by regulation and that the driver in the changes was the EU. They acknowledged that seen against the costs of producing an EIA and the cost of the project itself, the additional costs were not likely to be that great. Their concerns were more if the process became more protracted, and if the arrangements for publishing and advertising additional information led to an unhelpful distraction of scarce resources.

Given that the frequency with which additional information has to be disseminated is likely to be a feature of the project rather than the company doing the project, it is not felt that the changes in themselves convey any disproportionate effect. But it was acknowledged that in handling the dissemination of additional information, a small firm with a core of say 5 people, is likely to face more of a concern over distraction of resources than a major player with project teams.

This is now not likely to be an issue given the Department has reined back the developer's responsibility for the dissemination of third party information.

7. Competition assessment

This RIA covers three Regulations (see section 1 above) which would impact on the energy market, in particular the electricity and downstream gas sectors. For the purposes of a competition assessment it is necessary to distinguish between those aspects which are regulated and those which are not. Thus the aspects of overhead lines and gas transporter pipelines which are implemented by regulated network companies can be discounted from the analysis. This leaves electricity generation and onshore commercial pipelines. The conclusions from looking at those activities are:

Option (ii) will impose some additional costs on those developing new infrastructure in those sectors. But those costs would be faced by any firm wishing to participate in those sectors since they are costs associated with running a proposal through a development control procedure. Such costs will be dependent on the project itself rather than the firm putting the project together. As such the Regulations are not seen as conveying any benefit to existing firms. Nor, given the nature of the additional costs, is it felt that they will impose any disproportionate cost on some firms such as small firms rather than on others. It is therefore concluded that they are unlikely to have an effect on competition.

8. Simplification assessment

In bringing forward its proposals the Department has sought to comply with better regulation practice.

It notes the need for "joined-up Government", and regulating to bring into effect the Public Participation Directive would ensure the BERR regimes were in step with other UK development control regimes, such as the general planning regime of the Town and Country Planning Act, where regulations have already been consulted on, and with the Transport and Works Act regime where regulations are being produced. The BERR regimes would also be in step with other development control regimes in Europe which have to include the requirements of the Public Participation Directive.

The Department also notes that these regulations facilitate public access to more information on energy developments, making the regimes more transparent. At the same time it notes that the additional information, which is envisaged to include supporting

information from the developer and information from third parties such as statutory bodies, is information which is already generated in the process. And it is information which currently the public may have to pursue more circuitous routes to obtain, such as through Freedom of Information requests or Environmental Information Regulations requests. The proposed way forward avoids the public having to invoke other procedures and thereby simplifies their access to such information.

The Department has also considered the scope for simplification in the process itself but notes the thrust of the Directive is to increase requirements to benefit the public and their participation in the processes. Thought has therefore been given to compensating simplification. It is not considered fruitful to look for this in the existing requirements laid down in the processes as the regulations have only recently been "proofed" by the Commission and infraction proceedings launched at any that were not considered up to the required standard of transposition. The Department has also considered whether rationalising matters through rationalising development control regimes would achieve simplification but concluded that this raised issues more suitable for handling in a policy review than the modest step change being addressed here.

9. Enforcement, sanctions and monitoring

The existing regulations are enforced by the Department for Business, Enterprise and Regulatory Reform. The fundamental sanction for ensuring compliance is that within the regulations themselves, the Secretary of State is barred from granting consent unless he is satisfied that the applicant has provided the required information and the procedures laid down in the regulations have been complied with.

Option (ii) provides a statutory basis for BERR assessing whether the enhanced public participation requirements have been complied with and for refusing to grant consent if the requirements had not been met. At the same time in order to ensure that the requirements have actually been met there is a need for BERR to make clear in guidance that before granting consent it will check on compliance.

10. Implementation and Delivery Plan

All the amending Regulations will enter into force on 20 August 2007. The Government's response to comments received to the public consultation exercise is being published on the DBERR web site at the same time as the Regulations are laid. In due course

revised public guidance on the various EIA processes will be produced by the Department.

11. Post implementation review

As with the previous amending Directive to the EU EIA Directive, the Commission can be expected to verify satisfactory transposition of its Directive. In the meantime the Department will monitor the working of the Regulations to see that they are effective in terms of developers knowing what they have to do and, that they have led to improved access to information for the public.

12. Summary and recommendation

The Department's conclusion is that the existing environmental impact assessment requirements do need to be amended in order to implement the provisions of the EU Public Participation Directive and this can be achieved only by introducing amending Regulations if the UK Government is to avoid continued infraction proceedings from the Commission.

As a result of the consultation the Department has made changes to its approach, and the amending Regulations to be laid reflect that. The Department believes that with the changes to the amending Regulations they now represent a proportionate, balanced way to meet the EU requirements.

13. Declaration and publication

I have read the Impact Assessment and I am satisfied that the benefits justify the costs.

Signed.....

Date:

Malcolm Wicks
Minister of State for Energy
Department for Business, Enterprise and Regulatory Reform