Wildlife and Countryside Link response to the Environmental Impact Assessment – Joint Technical Consultation

31st January 2017

Introduction

Wildlife and Countryside Link (Link) brings together 46 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over 8 million people in the UK and manage over 750,000 hectares of land. This response is supported by the following members of Link:

- Buglife
- Butterfly Conservation
- CPRE
- Friends of the Earth England
- Plantlife
- RSPB
- Salmon and Trout Conservation
- Wildfowl and Wetlands Trust
- WWF-UK

Link welcomes this opportunity to comment on the proposals to amend the UK EIA regulations to bring them into line with the EIA Directive 2014/52/EU. In general we are very supportive of the changes that have been brought in by the Directive and believe that the Government's proposed approach in most cases is compliant. We would like to particularly note our support for coordinated procedures over joint procedures. However, the Government should go further than it is proposing in ensuring that revisions to the EIA regulations ensure a higher level of environmental protection.

The 2014 EIA Directive makes clear reference to changes that both 'simplify' **and 'strengthen'** the overall EIA process. We do not agree that the broad intention of the 2014 amendments is deregulatory; the primary purpose of EIA remains "high level of protection of the environment" and the first reason given for the new Directive is to "strengthen the quality of the environmental impact assessment procedure". In addition, the first reason given for amending Directive 2011/92/EU is to ensure "that environmental protection is improved". Indeed, there are a number of areas where we believe the revised EIA Regulations as proposed will not ensure that the UK achieves the purpose of the EIA Directives to ensure a "high level of protection of the environment"; we set these out below.

Wildlife and Countryside LINK

1) Agriculture

Thresholds

We believe that the thresholds for uncultivated grassland conversion are too high and the opportunity should be taken to remove them to halt wildlife destruction and to achieve the purpose of the Directives.

A significant proportion of remaining semi-natural grasslands occur in patches smaller than the 2ha regulatory threshold. Small sites are very important for biodiversity conservation, heritage, and health and landscape quality. They also contribute significantly to landscape-scale conservation. There is strong anecdotal evidence of continued loss of important grassland sites and better assessment and protection of the remaining resource should be ensured. The threshold also creates a loophole by which larger wildlife areas can be destroyed piecemeal over several years.

To enable the protection of valuable grassland sites, we recommend that the thresholds on uncultivated land are removed.

Site Inventories

The Agriculture EIA regulations are undermined by the lack of a comprehensive inventory of the quality and extent of semi-natural grassland sites in England. Uncatalogued losses have been recognised by Natural England in a recent report.

Semi-natural grassland sites need to be identified and assessed in order to fill the knowledge void and create a comprehensive inventory. There should be a programme of regularly updating the inventory.

Enforcement

We are concerned that our member organisations are aware of several cases where it would appear that the EIA regulations are not being enforced by Natural England. We trust that examples raised with Defra will be adequately investigated, lessons learnt and efforts with Natural England redoubled to ensure that the EIA regulations are successfully stopping further environmental damage.

Change to the current definition of "cultivated"
Question 10. Do you agree with the proposed change?
Question 11. Do you have an alternative proposal?

We do not support the proposed new definition of uncultivated land as it is unclear. It would introduce significant new uncertainty whether, for example, spiking the soil for aeration purposes, over-grazing with horses, ragwort pulling or hand planting yellow rattle seeds would be "agricultural

activities that break the soil surface". If so then there is a clear risk that relatively superficial or sparse soil surface breaking activities could remove the appropriate EIA protection from a grassland.

Furthermore, in the past there have been instances where high quality grassland has been ploughed, but people have manually turned the soil back over again to save the wildlife. Clearly, non-cultivation *per se* is not a sufficient safety net. It is also recommended that a grassland that was illegally cultivated in contravention of the EIA regulations should still benefit from the same protection as it would have received before it was cultivated.

An ideal definition would not exclude sites from the 'uncultivated' arm of the EIA process where a single or partial 'cultivation' had not removed the semi-natural and species-rich nature of the grassland. Such a definition would have to in part be based on the biological impact of the cultivation and the site's continuing biodiversity significance. Alternatively, the current definition could be kept: it explicitly refers to ploughing and harrowing, which in most instances are the activities that trigger an EIA screening decision and importantly there is scope for the regulator to interpret cultivation in another way.

2) Forestry

Question 3. Please give us your views on the following proposals for increasing afforestation thresholds in England:

a) Retain the current thresholds in non-sensitive areas (5 hectares) but, in the low risk areas, increase the threshold from 5 to 20 hectares.

b) Retain the current thresholds in non-sensitive areas (5 hectares) but, in the low risk areas, increase the threshold from 5 to 50 hectares.

c) Retain the current thresholds in non-sensitive areas (5 hectares) but, in the low risk areas, increase the threshold from 5 to 100 hectares.

Wildlife and Countryside Link (Link) wants to see sustainable woodland expansion in England that benefits and does not harm wildlife or the landscape. **Link strongly opposes all of the proposals to increase the Forestry EIA threshold**. We believe that the current thresholds are already higher than would be ideal to prevent environmental damage.

Many of the habitats at risk from this proposal are highly fragmented due to past conversion to forestry plantation, agriculture and development. Flower-rich grasslands have declined by 97% in England, and even brownfield sites are regularly home to nationally important populations of threatened species. Low grade agricultural land is particularly at risk because it is often targeted for afforestation but tends to be the best areas for existing biodiversity. We are concerned that the existing 5 ha threshold is already too high and may not be compliant with the requirement on Government to take practical steps to conserve priority habitats and species as established by the biodiversity duty in the NERC Act[1] 2006.

[1] http://www.legislation.gov.uk/ukpga/2006/16/contents

We strongly support the principle of using species and habitats data to inform land use planning and opportunity mapping. However, while our member organisations are developing systems to enable this in the future, the tools are not there at the moment. Implementing a makeshift approach using old data would expose wildlife to unacceptable risk. This is typified by the proposal that areas lacking biological data will be mapped as "low risk". Any basic application of the precautionary principle would indicate that this is an unsafe approach and 'unknown' sites should be protected until their value is understood.

One of the proffered drivers for this change is that the risk of having to do an EIA is believed to be discouraging tree planting. However, only 10 afforestation projects have needed an EIA over the last 10 years[23]. This is despite the fact that the average planting scheme size under countryside stewardship was above the EIA threshold. This suggests that any problem is more about perceived than actual risk. If the problem actually exists it would be better addressed through improved communication, guidance, early stakeholder dialogue and data sharing to address the misperceptions, and not by eroding environmental protections.

Proposing changes to the thresholds for afforestation projects when so few EIAs are required is a disproportionate response that undermines the Government's ability to meet its national and international biodiversity duties.

We would view any increase in the threshold as **a clear roll back and erosion of an EU environmental protection measure**, that would not 'provide a high level of protection of the environment' and would be counter to the principle of non-regression of environmental law, a principle recently endorsed by the UK Government at the 2016 IUCN World Congress.

Question 4. Please give us your views for the following proposals for ensuring environmental protection if the threshold in England is increased:

Link does not support raising the forestry EIA threshold in any areas. None of these options sufficiently mitigate raising the threshold, nor is it clear that options b and c would reduce the burden on the regulator. The implications for on the ground compliance checking would increase regulatory burden.

"Monitoring of significant environmental effects"

There are no provisions relating to monitoring in the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999. The consultation appears to indicate that it is not the intention to incorporate the new monitoring provisions.

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[2] Page 1 http://www.forestry.gov.uk/pdf/England_EIAConsultation_annex2.pdf/$FILE/England_EIAConsultation_annex2.pdf

In all cases monitoring should be established as per the new requirements with provision made for remedial action. It is essential that the objectives of monitoring are clear i.e. to monitor the effects arising through the EIA process. This must be clear when considering if it is appropriate to make use of existing monitoring arrangements

We believe that monitoring of effects and associated provisions should be written into the Regulations.

3) Annex III selection criteria

The below section refers to Water Resources to illustrate Link members' views and recommendations on the Annex III proposals. However, the recommendations are relevant to all the EIA Regimes under consideration.

The 2014 EIA Directive amends the existing process by introducing a new Annex III selection criteria for projects listed in Annex II. The consultation, without explanation, proposes no change to existing Water Resources regulations with regards this amendment.

The revised 2014 EIA Directive focuses significant attention on the screening process. In our view, the screening process plays a critical part to the EIA scheme, helping to determine which projects are caught by the need for a full EIA and those which are not.

The screening process is one of the areas the EC deemed necessary to be strengthened in order to facilitate decision making. The analysis of existing State practice recognised that the broad discretion of Member States in this domain had led to wide variation in the number of EIAs conducted and given rise to considerable litigation. However, the purpose of the new Annex III is to provide a greater structure for the exercise of discretion without constraining the flexibility of the decision maker. To that extent it offers helpful guidance.

In particular, the new wording in revised Annex III includes important criteria in relation to climate change and biodiversity. This is criteria which when used in the context of water abstraction would help to guide the decision maker on whether or not to request an EIA. The preamble to the 2014 EIA Directive underlines the importance of taking this type of information into account at an early stage.

We consider that the new Annex III introduces important new criteria in the above respect such as:

- New (c) introduces specificity to the term 'natural resources'. In terms of water resources the focus on biodiversity is important.
- New (f) introduces the need to assess 'significance' in terms of risk of major accidents and/or disasters in the light of climate change. This is highly relevant to water abstractors in terms of the potential for future droughts or flooding as a result of climate change and ought to be of major concern in any assessment of 'significance'.
- New (g) would seem particularly important in terms of abstraction and general water management given its concern with the 'risks to human health.

In terms of the 'Location of projects' the new Annex III requires the environmental sensitivity of geographical areas likely to be affected by projects to be considered. Again, criteria such as 'riparian areas, river mouths, coastal zones and the marine environment' are criteria that are both relevant and important to the environmental assessment of water abstraction projects.

Further, the new 2(vi) makes a subtle but important amendment to existing wording. This changes the need for an 'assessment of areas where environmental standards have been exceeded' to assessing significance when the area is one which has already 'failed to meet environmental quality standards, or in which it is considered that there is such a failure'. This is a significant change requiring the decision maker to consider, for instance, the current standards achieved under the Water Framework Directive within a particular river basin area when determining the significance of projects under the Water Resources Act.

A further important revision is made under new Annex III section 3 requiring the decision maker to have regard to the impact of the project on the Article 3(1) factors. Finally, Annex III provides two important additions to the listed criteria. We can see no reason for their exclusion from environmental assessments for water resources. These are:

- New (g) the cumulation of the impact with the impact of other existing and/or approved projects and
- New (h) the possibility of effectively reducing the impact

We consider that the amendments relating to the criteria and thresholds should be transposed into the Water Resources regulations.

4) General

"sufficient expertise"

It is essential that authorities and statutory agencies are properly resourced, equipped and required to respond to the new EIA requirements. While we agree that for the purposes of these regulations Natural England and the Environment Agency currently have sufficient expertise to undertake the EIA processes, there is clear evidence that Planning Authorities usually lack sufficient in house expertise – 65% have no in-house ecological expertise. Defra have previously acknowledged that this deficit has an impact on the quality of decisions taken and have highlighted that consultants provide inconsistent advice[4]. We have similar concerns when drainage authorities undertake the EIA process and are not confident that Natural England and the Environment Agency have the resources to ensure that the process is carried out correctly. We do not believe that Planning Authorities can reliably, readily or promptly obtain this expertise from consultants and reliance on another agency, namely Natural England, to provide advice is no replacement for in-house expertise and is not the best use of the very limited resources available to NE. **We believe that competent authorities should have access to the in house expertise needed to carry out the full EIA process**.

[4] Defra 2012 Report of the Habitats and Wild Birds Directives Implementation Review

Exemptions

While the 2014 Directive gives member states the authority to exclude military and civil emergencies from the EIA process in certain circumstances, we are disappointed that in applying this discretion this consultation contains no discussion about the rationale that the Government is proposing to apply, any evidence supporting the route chosen, or any discussion of potential circumstances. Exemptions must be on a case by case basis and it is not clear from this consultation how such a process will operate.

It is essential that exemptions are only applied when the EIA process would have a demonstrable adverse effect on defence or the response to civil emergencies and is not used as a blanket exemption for those types of projects.

For example, we are concerned that work carried out in response to flooding or coastal erosion events could be described as response to a civil emergency but is generally planned and delivered through multi-year plans. We are not aware of any evidence that the current requirements of the EIA process prevent or delay achieving the objectives of flood and coastal erosion risk management programmes. Rather, it is our view that the process ensures that the potential impact of schemes on the environment and the communities they serve are properly taken into account in project design and approval.

We seek clarity on the scope of the proposed exemption for responses to civil emergency, the reason such an exemption is considered necessary and an explanation of how the required high level of environmental protection will be achieved if an exemption is applied.

We recommend that accompanying guidance provides examples of the types of projects which are likely to be deemed 'national defence' and 'civil emergencies' and what would be considered to be a 'demonstrable adverse effect' on the project. Provision should be made in the Draft Regulations for retrospective assessment if required, for the provision of mitigation measures and for assessment information to be made available to the public.

Common Land

Question 16. Do you agree with the proposed change?

The consultation paper proposes to retain, but update, the present exemption of works on common land from the requirement for EIA, because such works may require consent under section 38 of the Commons Act 2006. Many proposed works on common land fall within the scope of rural restructuring contemplated by the directive. For instance fencing works on common land are often of a kind which exceeds the Schedule 1 threshold. However, nothing in the section 38 consent process replicates the requirement for EIA of rural restructuring projects.

We also question whether the exemption of the removal of hedgerows under the Hedgerows Regulations 1997 is also lawful, for the same reasons in relation to works on common land — because the 1997 Regulations do not themselves secure compliance with the requirements of the

directive where the proposed removal of hedgerows would fall within the scope of the annexe III criteria.

Therefore we do not agree with the proposed changes. Projects for works on common land should fall within the scope of the 2006 EIA Regulations in the usual way

Penalties and Accountability

The 2014 Directive requires that Member States have in place penalties for infringements of our EIA regulations. The penalties have to be effective, proportionate and dissuasive.

The consultation proposes no change to the existing regulatory provisions.

Link disagrees with this approach.

It is clear, in our view, that Article 10 (a) should be read in the context of its objective, which is to strengthen the existing compliance framework. We do not consider the government is fully compliant by placing reliance upon the existing national legislative framework without further justification as to how it achieves the purpose of the new article 10 (a)

Moreover, the regulations contain no compliance mechanism relevant for attaching penalties to decision makers for their failure to comply with their obligations. The current regulations refer to penalties for failures by the developer, but not the decision maker.

There appears to be no robust compliance mechanism that equates to the needs of Article 10 (a). Overall, enforcement is left to the remedy of applying to a High Court for judicial review. We question whether this provides an 'effective, proportionate and dissuasive' compliance mechanism. We consider judicial review as a compliance mechanism has the following defects relevant here:

- There is limited ability to review on substantive or purposive grounds, and yet the compliance mechanisms are directed at the quality and provision of information. Indeed, quality decisions on environmental impact depends on the quality of the information accepted and the appropriate interpretation and weighting of this evidence by the decision maker.
- It is disproportionate in that it challenges the whole of the decision, rather than requiring compliance with the subject matter of section 8 and 8 (a). Furthermore, the lessons drawn from the case-law are that the Court has stressed the need for "sufficiently reasoned" (C-75/08) screening decisions, which contain or are accompanied by all the information that makes it possible to check that the decision is based on adequate screening (C-87/02).
- Lack of effectiveness as a remedy because there is a cost hurdle that is often prohibitively expensive.
- There are no penalties attached to the compliance.

Question 7. Do you agree that we should continue to use non-electronic methods for notices for alerting the public to consultation?

This is important for public participation and should be welcomed.

Wildlife and Countryside Link, January 2017.