The Scottish Parliament

Environment and Rural Development Committee

11th Meeting, 2005

Wednesday 20 April 2005

The Committee will meet at 10.30 am in Committee Room 1

1. **Environmental Assessment (Scotland) Bill:** The Committee will take evidence at Stage 1 from—

   Panel 1
   Professor Colin T Reid, Professor of Environmental Law, University of Dundee;

   Dr Elsa Joao, Director of Research, Graduate School of Environmental Studies, University of Strathclyde;

   David Tyldesley, Principal, David Tyldesley and Associates;

   Panel 2
   Councillor Alison Hay, Environment, Sustainability and Community Safety Spokesperson, COSLA;

   John Rennilson, Director of Planning and Development, Highland Council, COSLA;

   Kathy Cameron, Policy Manager, COSLA; and

   Iain Sherriff, Head of Transportation, Dundee City Council, representing the Society of Chief Officers of Transportation in Scotland.

2. **Subordinate legislation**: The Committee will consider the following negative instruments—

   the Agricultural Subsidies (Appeals) (Scotland) Amendment Regulations 2005, (SSI 2005/117);

   the Inshore Fishing (Prohibition of Fishing for Cockles) (Scotland) Amendment Order 2005, (SSI 2005/140); and

   the Common Agricultural Policy Single Farm Payment and Support Schemes (Scotland) Regulations 2005, (SSI 2005/143);

   and may take evidence from the following Scottish Executive officials on SSI 2005/143—

Linda Rosborough, Head of CAP Management Division, SEERAD;

John Brunton, CAP Reform Implementation Branch, SEERAD; and

Paul Neison, Assistant Chief Agricultural Officer, SEERAD.

3. **Inquiry into climate change (in private):** The Committee will consider a further draft report.

Mark Brough
Clerk to the Committee
Direct Tel: 0131-348-5240

The following papers are attached:

Agenda Item 1	
SPICe briefing 05/21	ERD/S2/05/11/1a
SPICe briefing paper *(for members only)*	ERD/S2/05/11/1b
Submission from Professor Colin T Reid	ERD/S2/05/11/1c
Submission from Dr Elsa Joao	ERD/S2/05/11/1d
Submission from David Tyldesley	ERD/S2/05/11/1e
Submission from COSLA	ERD/S2/05/11/1f
Submission from SCOTS	ERD/S2/05/11/1g
Agenda Item 2	
The Agricultural Subsidies (Appeals) (Scotland) Amendment Regulations 2005, (SSI 2005/117)	ERD/S2/05/11/2a
The Inshore Fishing (Prohibition of Fishing for Cockles) (Scotland) Amendment Order 2005, (SSI 2005/140)	ERD/S2/05/11/2b
The Common Agricultural Policy Single Farm Payment and Support Schemes (Scotland) Regulations 2005, (SSI 2005/143)	ERD/S2/05/11/2c
Extract for the Subordinate Legislation Committee's 11th report	ERD/S2/05/11/2d
Agenda Item 3	
Draft report *(for members only)*	ERD/S2/05/11/3a

SPICe briefing

18 April 2005

05/21

ENVIRONMENTAL ASSESSMENT (SCOTLAND) BILL

ALASDAIR REID

The Environmental Assessment (Scotland) Bill [as introduced] Session 2 (2005) was introduced to the Parliament on 2 March 2005 and the Environment and Rural Development Committee has been designated lead Committee for consideration of the Bill at Stage 1.

This paper gives a brief explanation of the process of Strategic Environmental Assessment and its key stages. It then describes the provisions outlined in the Bill, and summarises the views of key organisations from the Bill's consultation.

CONTENTS

KEY POINTS OF THIS BRIEFING

- SEA is an iterative and systematic process for identifying, predicting, reporting and mitigating the environmental impacts of proposed plans and programmes

- the term Environmental Assessment includes both Strategic Environmental Assessment (SEA) and Environmental Impact Assessment (EIA)

- SEA is carried out on plans and programmes at a strategic level, EIA is carried out on specific development projects

- **public consultation and participation** is fundamental to SEA

- SEA must also clearly identify **feasible alternative** plans or programmes

- the SEA Directive was transposed in Scotland by the Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 on 20 July 2004

- the Partnership Agreement commits the Executive to go further than obliged by the Directive and include all new and amended **strategies** as well as plans and programmes

- the Environmental Assessment (Scotland) Bill is the new transposition vehicle for the SEA Regulations; it also goes beyond the Directive by requiring certain organisations to carry out SEA, with some exemptions, on **all** their plans and programmes

- there is no rigorous legal distinction between *plans*, *programmes* or *strategies*; Section 4(4) states that any reference in the Bill to plans or programmes includes strategies

- Sections 2(4) and 5(4) extend the Bill to include **all** plans and programmes (that are not already specified in the Bill or subject to some exclusions) prepared by Responsible Authorities such as the Scottish Ministers, the Scottish Parliament, or Scottish public authorities with mixed functions or no reserved functions. It is not clear to what extent the Bill will impact private bodies and individuals who carry out functions of a public character

- the Bill requires SEA to be carried out on plans and programmes in areas such as agriculture, forestry, fisheries, water management and telecommunications

- there is widespread support for this legislation

- the Bill does not apply retrospectively to any plans or programmes

INTRODUCTION

During recent years, there has been considerable development in both the acceptance of the need to manage the way in which humans interact with the environment, and the tools available to achieve such management.

Amongst the assessment tools available are Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA). Collectively known as Environmental Assessment, these procedures are designed to ensure that the environmental implications of certain strategic actions can be taken into account before they are carried out. For example, before undertaking an individual project such as a dam, motorway, airport or factory, an EIA may be required, and for plans and programmes that set a framework for and enable such projects; an SEA may have to be undertaken.

Two briefing papers have previously been published by SPICe on this subject. They are:

- Strategic Environmental Assessment (Reid 2004a)
- Environmental Impact Assessment (Reid 2004b)

Similarly, the Parliamentary Office for Science and Technology (Scrase 2004) at Westminster has published the following briefing:

- Strategic Environmental Assessment

EU Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment (commonly known as the SEA Directive) was formally adopted on 5 June 2001. It evolved because of a realisation that although EIA had been required since 1985 (Directive 85/337/EEC), it only enters the decision-making process once decisions at policy or planning level that could broadly influence project environmental planning and design have already been taken (João 2004). SEA ensures that cumulative and synergistic[1] environmental consequences of certain plans and programmes and alternatives to these are identified and assessed during their preparation and before adoption. Similarly, fundamental to the preparation phase of both EIA and SEA is public consultation and participation. The Royal Society for the Protection of Birds (RSPB) (2004) also note that another reason for the promotion of SEA is that, in the past, economic and social issues have dominated policy-making processes. SEA therefore establishes a process for assimilating environmental issues into decision-making.

The SEA Directive was transposed by The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 on 20 July 2004. The Regulations were considered by the Environment and Rural Development Committee on 23 June 2004, when the Minister for Environment and Rural Development gave evidence (Scottish Parliament 2004).

To date (European Commission 2005), eleven European countries claim compliance with the Directive; these include the UK, Czech Republic, Estonia, Ireland and Denmark. Three claim partial compliance; these are Belgium, France and Austria. Eleven have made no claim; these include Finland, Sweden, the Netherlands, Greece, Spain and Italy.

[1] Synergistic effects are those of activities which act in conjunction with other human activities (eg fishing and crude oil transport)

The European Commission (2005) holds bi-annual meetings with policy experts from all member states to assess the effectiveness and progress of the environmental assessment directives. The next meeting is in June 2005. The 11 countries that have yet to confirm compliance with the SEA Directive have been notified that they are in breach, and the Commission is currently awaiting responses.

No Environmental Reports[2] have been completed in Scotland under the auspices of the Regulations; however 12 are currently known to be underway. Prior to the introduction of the Regulations, and using various methodologies, the assessment of development plans has been undertaken voluntarily in a few instances in Scotland; these are highlighted in Interim Planning Advice on the Environmental Assessment of Development Plans (David Tyldesley and Associates 2003), and are examined in more detail, along with those currently registered under the Regulations, in Appendix 1.

The Partnership Agreement (Scottish Labour Party and Scottish Liberal Democrats 2003) makes a commitment to go further than obliged to by the Directive, and introduce legislation for Strategic Environmental Assessment that includes all new and amended strategies as well as programmes and plans. It states that the Executive will:

> *…introduce strategic environmental assessment to ensure that the full environmental impacts of all new strategies, programmes and plans developed by the public sector are properly considered.*

The Environmental Assessment (Scotland) Bill [as introduced] Session 2 (2005) (the Bill) encompasses the provisions of the 2004 Regulations. A key difference between the Bill and the Regulations is that the Bill provides that certain authorities and bodies, such as local authorities or the Scottish Executive, will be required to carry out an SEA for ***all*** of their plans and programmes, as opposed to just ***certain*** plans and programmes, unless they believe them to have no or minimal environmental effects or they have no likely significant effects. Some specific exclusions and exemptions still apply; these are explored later in this document.

The other key difference is that the Bill now specifically includes "strategies". Historically, the overriding principle of SEA is that it should apply to 3 decision-making levels: policies (i.e. including strategies in Scotland), plans and programmes (João 2005). The SEA Directive only applies to the latter 2.

It should however be noted that there is no rigorous legal distinction between the terms *"plans, programmes, or strategies"*. Therefore Section 4(4) of the Bill ensures that any reference to plans or programmes includes strategies. Similarly, in this paper, any reference to plans or programmes includes strategies. The Minister for Environment and Rural Development (Finnie, R 2004) states:

> *…it is important not to be concerned so much with the name (plan, programme or strategy) but with the nature of the document and the degree of significance of environmental effects to result from any actions flowing from the document.*

Due to the specific nature of some of the definitions in environmental assessment, it will be useful to refer to the glossary in Appendix 2 before reading the briefing.

[2] a report detailing all the significant positive and negative environmental impacts of a plan. It will be published along with the plan or programme for public comment

WHAT IS STRATEGIC ENVIRONMENTAL ASSESSMENT?

In the context of the Bill, Strategic Environmental Assessment (SEA) is a systematic process for predicting, assessing, reporting, mitigating, and monitoring the environmental effects **of certain proposed plans and programmes with significant environmental effects**. In pure terms, the process of SEA could be applied to any high level decision making.

João (2004) states two fundamental principles for implementing SEA; firstly, it must clearly identify feasible alternative plans or programme options and compare them in an assessment context, and secondly, SEA must ***improve***, rather than just analyse, the plan or programme. It is further explained that alternatives at a strategic level should not solely be concerned with choosing between different types of development to achieve the same aims eg choosing between producing energy by coal or biomass, but about demand reduction, for example reducing the demand for energy production by insulating buildings. The following alternatives might be considered at a strategic level (Thérivel and Partidário 1996):

- do nothing, or continue with present trends
- demand reduction eg reduce the demand for water through metering
- different location approaches eg build new houses elsewhere
- different types of development which achieve the same objective eg produce energy by nuclear power or wind
- introduce fiscal measures eg toll roads or congestion charges
- different forms of management eg waste management by incineration or recycling

European Commission guidance (2001) on the interpretation of the SEA Directive concurs that:

> *It is essential that the authority or parliament responsible for the adoption of the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option.*

Similarly, in their Guidance for Planning Authorities on the Strategic Environmental Assessment Directive the Office of the Deputy Prime Minister (ODPM) (2004a) states that *"Assessment always involves comparison. The effects of a plan or policy can only be understood by comparing it with a state, an option or an objective."*

However, Interim Planning Advice on the Environmental Assessment of Development Plans (David Tyldesley and Associates 2003) states:

> *There is no expectation on planning authorities to assess options that would be incompatible with national planning guidance or the structure plan.*

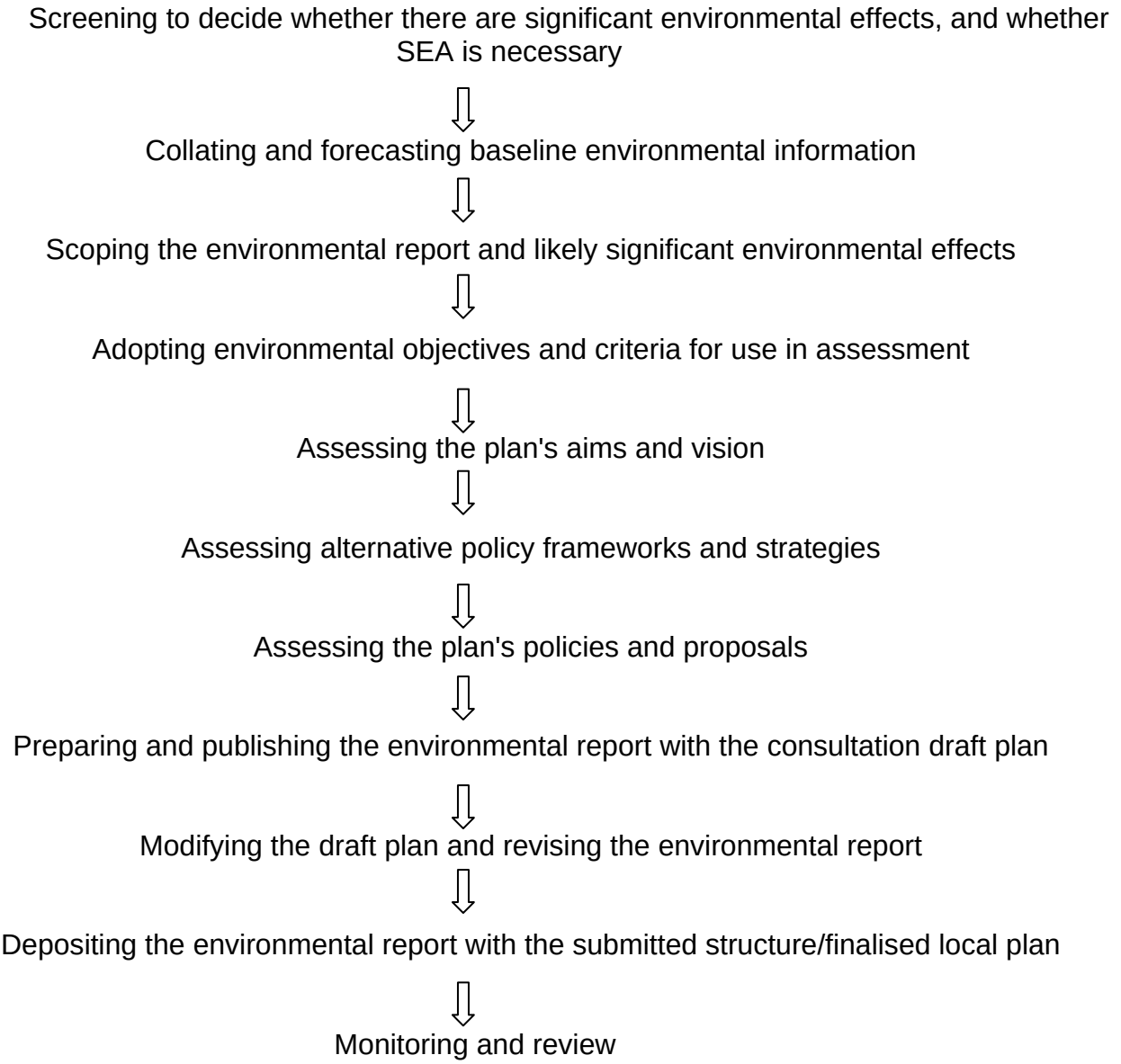
Levett and Therivel (2003) note that SEA should not be thought of as separate from the plan-making process, rather as a tool to aid decision making during the design cycle of the plan or programme. They further advise that best practice assumes that strategic actions are subject to multiple stages of decision-making, and SEA should be integrated into each of these decisions, rather than adjusting strategy-making to include a single SEA stage. It is because of this that Levett and Therivel (2003) state *"preparation of an SEA report is probably the **least** important part of the SEA"*.

After a Structure Plan has been finalised or other policy decisions, eg on waste management or fisheries, have been informed by the SEA process, an EIA can be carried out to assess and

mitigate against the environmental impact from specific projects or operations resulting from strategic plans or programmes.

THE KEY STAGES OF STRATEGIC ENVIRONMENTAL ASSESSMENT

It is generally felt that SEA works best as an iterative process, ie as potentially significant environmental effects are revealed, the assessment will return to earlier stages to consider reasonable alternatives to the plan or programme and decide whether policies and proposals need altering. The plan is subsequently improved and reassessed, taking into account its original objectives and geographical scope. David Tyldesley and Associates (2003) consider a stage-by-stage approach to SEA of development plans, summarised below:



It should be remembered that the above model is **not** linear, and alternative courses of action can be considered at any of the previous stages to alter the plan or programme, and avoid or mitigate against environmental impacts.

It should also be noted that the above diagram is adapted from a document (Davis Tyldesley and Associates 2003) that applies primarily to planning authorities, and Area Structure Plans. The majority of SEA experience in the UK to date has been in a planning context. This is

expected to change in the future, as the Bill requires SEA in sectors such as tourism, fisheries and energy. These requirements are fully explored later in this briefing.

What are the benefits of SEA?

Fundamentally, SEA, by considering environmental effects at plan or programme level, identifies those areas of environmental concern that may not be obvious if considering impacts resulting from individual projects or operations in isolation. For example, the Department of Trade and Industry (DTI) recently carried out an SEA as part of their offshore energy strategy, entitled Future Offshore (DTI 2003). The SEA allowed the consideration of multiple issues relating to the development of offshore wind energy, such as visual impact, the impact on birds and marine ecology, and the possible impact on other marine activities on a regional level. Similarly, the DTI have carried out SEAs of future strategies for offshore energy licensing. These are considered in more detail in Appendix 1.

A Discussion paper on Strategic Environmental Assessment by The Wildlife Trusts/WWF-UK Joint Marine Programme (2003) highlights how SEA for offshore developments can involve habitat mapping, risk analysis and visual and ecological sensitivity mapping, and ultimately determine appropriate and inappropriate sites for projects. The paper further states that SEA can help with interpretation of cumulative impacts, for example the visual impact of two or three offshore wind farms. The Wildlife Trusts/WWF-UK (2003) further believes that SEA:

> *Facilitates consultation between various government bodies and stakeholders and enhances public involvement in the evaluation of environmental and social aspects of policies, plans and projects*

Full public consultation and participation are fundamental to the SEA process. The United Nations Economic Commission for Europe (UNECE) (2005) recognises that this can promote the timely disclosure of relevant information to participants in the environmental decision making process; help people understand and respect the final decisions on projects, and give an insight into environmental protection and long term environmental problems.

Furthermore, Fischer (2002) considers the 5 key benefits of SEA to be:

- *wider consideration of impacts and alternatives*
- *pro-active assessment - SEA as a supporting tool for strategic action formulation for sustainable development*
- *strengthening project EIA - increasing the efficiency of tiered decision making*
- *systematic and effective consideration of the environment at higher tiers of decision-making*
- *consultation and participation on SEA-related issues*

The RSPB (2003) notes that SEA can help to strengthen, streamline and shorten Environmental Impact Assessments by the early identification of potential impacts and cumulative effects, and by addressing strategic issues relating to the justification and location of proposals.

THE ENVIRONMENTAL ASSESSMENT (SCOTLAND) BILL

This Bill aims to improve protection of the environment and to improve decision making. It will become the new transposition vehicle for Directive 2001/42/EC (the SEA Directive) which requires an SEA of certain plans and programmes to be undertaken. The Bill extends the current provisions by specifically stating that plans and programmes include "strategies" and by requiring certain authorities and bodies to carry out an SEA on **all** their plans and programmes (as opposed to just **certain** plans and programmes), unless they believe them to have no/minimal environmental effects or no significant environmental effects. Some specific exclusions and exemptions still apply; these are explored later in this document.

The Scottish Executive (2004b) published a consultation paper on the draft Bill in September 2004, and a summary of consultation comments and Scottish Executive response (Scottish Executive 2005) was published in January 2005. A previous Consultation on Proposed Legislative Measures to Introduce Strategic Environmental Assessment in Scotland (Scottish Executive 2003) was held between December 2003 and March 2004. A summary of responses to this is considered in SPICe briefing 04/46 (Reid 2004a).

A total of eighty-eight written responses to the 2004 consultation were received from a variety of commentators, including academics, environmental organisations, the NHS, and local authorities. There was broad support for the principles of the Bill from Scottish Natural Heritage, the Scottish Environment Protection Agency, Scottish Environment LINK, Scottish and Southern Energy, COSLA and many others.

The Scottish Executive (2005a) echoes this when it states:

> *There was widespread support for SEA and respondents recognised the contribution it will make to environmental protection, the quality of public policy and decision making, open government and environmental justice.*

Friends of the Earth Scotland (Scottish Executive 2005b) said:

> *We are fully supportive of the Executive's Partnership Agreement commitment to introduce Strategic Environmental Assessment which goes beyond the requirements of the European Regulations and Directive and believe that it can make a significant contribution towards sustainable development and environmental justice.*

The following quotations are not wholly supportive of the Bill.

Scottish Enterprise (Scottish Executive 2005c) supported the Bill in general, however stated that:

> *…one important aspect of this…would be to ensure that…the process is not cumbersome and **does not undermine the Executive's top priority with regard to economic growth**. For example, it is essential to avoid any further constraints and lengthening of timeframes in the planning and development cycle.*

However, Shell UK (Scottish Executive 2005d) stated:

> *Having just implemented the EC Directive…on SEA… the Scottish Executive now wants to go beyond the existing Regulations in such a short space of time. This looks like overregulation and will possibly create confusion in the minds of the bodies concerned…*

It further stated that:

> *It is difficult to get a clear view on how the proposals will impact the industry…The obvious ones are the local authority structure plans and local plans under town and country planning legislation but it is difficult to get a clear view beyond that.*

SEA: A SIMPLIFIED PROCESS

The following diagram provides a simplified visual reference to the SEA process as set out in the Bill. It should be remembered that, in practice, SEA is iterative, and not linear; reasonable alternative courses of action can be considered at any stage to alter the plan or programme. There are also exclusions and exemptions which might apply at different stages.

Pre-screening to ascertain whether there are no, or minimal environmental effects, and whether SEA is necessary. There is no obligation to publish or publicise the decision

⇩

Screening by Responsible Authority[3] and Consultation Authorities[4] via the SEA Gateway[5] to ascertain whether there are significant environmental effects, and whether SEA is necessary. There is an obligation to publish and publicise this decision

⇩

Collating and forecasting baseline environmental information by Responsible Authority

⇩

Scoping report, detailing likely significant environmental effects for assessment, submitted to the Consultation Authorities via the SEA Gateway for comments

⇩

Scoping report returned to Responsible Authority with comments, and proposed changes if necessary

⇩

Public consultation process seeking comments on the scope and level of detail of SEA

⇩

Assessment of likely significant environmental impacts, and reasonable alternative plans or programmes (in practice this should happen at every stage)

⇩

Preparing and publishing the environmental report with the consultation draft plan or programme

⇩

Modifying the draft plan or programme and revising the environmental report if necessary following consultation

⇩

Publishing the finalised environmental report and plan or programme

⇩

Monitoring and review

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[3] the owner of the plan or programme, any person, body or office holder that exercises functions of a public character

[4] specialist body with environmental expertise that will consider the environmental effects of the plan or programme; ie SNH, SEPA and Historic Scotland

[5] team based within the Scottish Executive who advise on the administration of SEA, and liaise with Consultation Authorities

PART 1. ENVIRONMENTAL ASSESSMENTS FOR PLANS AND PROGRAMMES

Part 1 of the Bill establishes a requirement for environmental assessment of plans and programmes by Responsible Authorities. A Responsible Authority is any person, body or office holder that exercises functions of a public character. It also:

- describes the plans and programmes which qualify for SEA, and includes provisions for exemptions for certain plans and programmes

- defines the Scottish Ministers (Historic Scotland), Scottish Environment Protection Agency, and Scottish Natural Heritage as Consultation Authorities for environmental assessment

Section 4 of Part 1 establishes that the Bill applies to plans, programmes (and strategies as referred to in Section 4(4)), subject to preparation and/or adoption by a Responsible Authority at a national, regional or local level (or prepared by a Responsible Authority for adoption through a legislative procedure). The Bill only applies to plans and programmes that relate solely to the whole or any part of Scotland.

REQUIREMENT FOR ENVIRONMENTAL ASSESSMENT

The primary requirement of the Bill is set out in Section 1, and ensures that an environmental assessment is carried out during the preparation of qualifying plans and programmes. Also defined are the required component parts of an assessment. These include:

- the preparation of an environmental report
- the carrying out of consultations
- the taking into account of the environmental report and the result of the consultations in decision-making

Section 1 provides that the environmental assessment shall be carried out during the preparation of a qualifying plan or programme. Section 12 provides that the qualifying plan or programme should be neither adopted by nor submitted to the legislative procedure before the Bill provisions have been met. This effectively places a restriction on the adoption or submission of the plan (Environmental Assessment (Scotland) Bill: Explanatory notes (and other accompanying documents) Session 2 (2005) (Explanatory notes)). This requirement aims to ensure that SEA should be integrated into the early stages of the decision making process, and used to enhance the whole process.

RESPONSIBLE AUTHORITIES AND CONSULTATION AUTHORITIES

Section 2 focuses the responsibility for environmental assessment on *any person, body or office-holder exercising functions of a public character*. It is intended that this will cover the full extent of the public sector, including central and local government, all public bodies, and private bodies and individuals who carry out functions of a public character.

Responsible Authorities will be required to carry out an SEA on **certain** qualifying plans and programmes described in Sections 5(1) to (3). Some Responsible Authorities (listed in Section

2(4)) will be required to carry out an SEA on **all** plans and programmes to which the Bill applies[6].

The Responsible Authorities listed in Section 2(4) are:

- *the Scottish Ministers*
- *any holder of an office in the Scottish Administration which is not a ministerial office*
- *the Scottish Parliament*
- *the Scottish Parliamentary Corporate Body*
- *a Scottish public authority with mixed functions or no reserved functions*
- *any other person, body or office-holder of a description (and to such an extent) as may be specified by the Scottish Ministers by order*

The significance of Section 2(4) (in conjunction with 5(4)) is such that a number of plans and programmes that will not previously have been subject to SEA will now qualify. However, it appears that there is some concern over the requirement for private bodies and individuals who carry out functions of a public character to carry out SEA. Commenting on this, the RSPB (2005) stated that:

> *…the Executive have successfully excluded almost any document produced by a private company even if they were about issues of a public character…*

To put this into context, a private energy utility is likely to not be required to carry out SEA on their corporate plan. The Explanatory Notes state that the policy intention *is to ensure that the private activities of Responsible Authorities are not affected*. However, if they were to publish a plan or programme for upgrading the transmission system, it is unclear whether the Bill would apply. The ambiguity lies in Section 5(3)(a)(ii) whereby an SEA is required if a plan or programme *sets the framework for future development consent*, and the RSPB (2005) query whether a plan or programme for upgrading the transmission system *sets a framework for development consents or does it set out a programme of action for which* they *will be seeking development consents?* Professor Colin Reid (Scottish Parliament Environment and Rural Development Committee 2005) states:

> *Although the structure may make sense from the drafting point of view, the interaction between sections 2, 5 and 6 does not make it easy for those reading the legislation to work out exactly what plans and programmes are covered by the requirement for an environmental assessment, and a less complex way of constructing the boundaries should be considered.*

The further significance of Sections 2(4) and 5(4) is discussed later in this document.

Under the Bill there can only be one Responsible Authority per plan or programme; therefore, where numerous authorities have an interest, they are obliged to decide between themselves who should act to carry out the environmental assessment. If there is a dispute over this, Scottish Ministers decide who should carry it out. Similarly, Scottish Ministers may also designate further Responsible Authorities if necessary.

The 3 Consultation Authorities are named in Section 3. They are:

- Scottish Ministers (in practice Historic Scotland)

[6] unless the Responsible Authority believes there are no or minimal environmental effects, there are no likely significant environmental effects, or it relates to an individual school

- Scottish Environment Protection Agency
- Scottish Natural Heritage

If one of the above authorities is also the Responsible Authority, then it may not act as consultee for its own plan or programme. In this situation, the Consultation Authority owning the SEA (Responsible Authority) would step back and the appropriate duties would be performed by the other two. For example, SNH and Historic Scotland would act in conjunction as Consultation Authorities for SEPA's forthcoming River Basin Management Plan (required under the Water Environment and Water Services (Scotland) Act 2003), which is required by 2006.

Friends of the Earth Scotland (Scottish Executive 2005b) called for additional consultee bodies:

> *…to be consulted for information on specific plans, programmes or strategies where it is deemed that SEPA, SNH, or the Scottish Ministers may not be best placed to provide the information to adequately consider the impacts…*

Examples of additional consultee bodies might include the Forestry Commission or NHS Scotland.

PLANS AND PROGRAMMES

Sections 4, 5, and 6 concern plans and programmes that may qualify for SEA, and those that are directly excluded.

Section 4 relates to the plans and programmes to which the Bill applies. It provides that the Bill applies to plans and programmes which are subject to preparation or adoption (or both) by a Responsible Authority at a national, regional, or local level. The qualifying plans and programmes must relate solely to the whole of, or any part of, Scotland. Those plans and programmes that relate to all or any part of Scotland **and any other part of the UK** fall under The Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633). Section 4(4) states that any reference in the Bill to plans or programmes includes strategies.

Section 5 goes on to describe qualifying plans and programmes. The following plans and programmes qualify for SEA due to their specific subject matter and character.

- plans and programmes required by legislative, regulatory or administrative provision that are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use **and** set the framework for future development consent of projects listed in Schedule 1

They do not have to submit to the screening process, and can move directly to the scoping stage (unless they relate only to a small local area or are a minor modification of an existing plan in which case screening is required).

Also included in this Section are plans or programmes which are likely to affect Natura 2000 sites designated under EU Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna.

The following plans and programmes have to be screened to establish whether there are **significant environmental effects** before determining whether an SEA is required:

- plans and programmes listed for the subjects above but which only relate to a small local area or are a minor modification of an existing plan

- plans and programmes required by legislative, regulatory or administrative provision which are not in the list of subjects above, but which do **set the framework for future development consent** of projects listed in Schedule 1. (These include crude oil refineries, power stations, quarries, ski developments, transport projects, golf courses, and brewing and malting projects). Schedule 1 may be amended by the Scottish Ministers

SEA is required if the plan or programme is likely to have significant environmental effects.

Which plans and programmes will qualify?

It is difficult to make bold statements regarding the applicability of the Bill to individual plans and programmes due to the fact that the screening determination to decide whether an environmental assessment is required depends on its specific details. It is the duty of the Responsible Authority to make this determination.

However, the significance of Sections 2(4) and 5(4) is such that, under the Bill, a number of plans and programmes that will not previously have been subject to SEA will now qualify. The Scottish Environment LINK, in written evidence submitted to the Scottish Parliament Environment and Rural Development Committee (2004b) for consideration of the Regulations, identified a list of plans and programmes which (potentially) had significant environmental effects, and which might be subject to SEA. Appendix 3 provides a summary of this evidence.

Notwithstanding the extension of the Bill to cover plans and programmes beyond the scope of the Directive, it appears that this is limited by the definition in Section 2(4) of Responsible Authorities who will be required to carry out SEA on **all** plans and programmes to which the Bill applies. Private bodies and individuals who carry out functions of a public character will be excluded from the application of the extension to **all** plans and programmes in practice. It should however be noted that Section 2(4)(f) allows Scottish Ministers to include *any other person, body or office-holder of a description (and to such an extent) as may be specified*.

There are plans and programmes to which the Bill does not apply. Section 4(3) ensures that the Bill does not apply to those solely concerned with national defence or civil emergency, finance or budget proposals. Plans and programmes co-financed under the 2000-2006 European Regional Development Funds, and European Social Fund, or those funded under the 2000-2007 Rural Development Plan are also exempt. The latter exemptions are to avoid duplication because they already contain a similar environmental assessment mechanism. Future rounds of regional development, rural development and social funding will be covered under the Bill.

Section 6 details types of excluded plans and programmes over and above those set out above. These are those relating to an individual school, and any others specified by order of Scottish Ministers. With reference to schools, the Explanatory Notes state:

> *…it is considered that such developments will have no strategic element to which environmental assessment could be applied and would not be likely to have significant environmental effects.*

With reference to those excluded by Scottish Ministerial order, the Explanatory Notes state that:

> *…it will be possible to exclude certain types of plans and programmes, which are proved, over time, to have no need for an environmental assessment. This will help to ensure that the Bill provisions are targeted appropriately at plans and programmes which are likely to have significant effects on the environment.*

This exclusion can only be applied if Scottish Ministers are of the opinion that the plan or programme is likely to have *no effect* or *minimal effect in relation to the environment*.

The consultation exercise produced minimal comment on the above exclusions; however Scottish Environment LINK (Scottish Executive 2005e) stated:

> *We are disappointed that financial and budgetary plans are still excluded and recommend that this be modified.*

The NHS Scotland Centre for Infection and Environmental Health (Scottish Executive 2005f) stated:

> *The introduction of additional exemptions is a necessary step to ensure the effective running of the process. However, the exemptions must only be made in the light of clear evidence.*

If the Bill is passed, non statutory guidance will be provided by the Scottish Executive. This guidance will include an indicative list of plans and programmes which are likely to be covered by the Bill. Professor Colin Reid (Scottish Parliament Environment and Rural Development Committee 2005) states:

> *…the proposed provision of guidance to clarify the position is an acceptable way forward rather than trying to produce more precise, but inevitably very complex and technical, definitions. It must always be remembered, though, that ultimately it is the words of the statute, not the guidance that must be observed and there must be a willingness to accept the possibility of legal challenges and to introduce amending legislation if the current wording produces unacceptable levels of uncertainty or results quite different from those envisaged.*

PRE-SCREENING

Pre-screening only applies to plans and programmes that fall under Section 5(4). Pre-screening aims to ensure that SEAs are not carried out for plans or programmes which will have no or minimal environmental effects.

Section 5(4) provides that a plan or programme qualifies for SEA if it is owned by a Responsible Authority listed in Section 2(4) and is not already caught by Sections 5(3) or exempted by Section 6(1) (individual schools). If, in the opinion of the Responsible Authority such a plan or programme, has no or minimal environmental effects they may exempt the plan on their own (this is called pre-screening). There is no requirement to consult on, publicise or report such exemptions.

The Explanatory Notes state:

> *This is essentially an in-house review carried out by the Responsible Authority to determine whether an environmental assessment is required. When exempting a plan or programme at the pre-screening stage, Responsible Authorities are not required to consult formally either the Consultation Authorities or the public.*

Pre-screening engendered considerable and wide ranging discussion during the consultation exercise. The Executive (2005a) further stated that:

> *In line with most respondents the Executive believes pre-screening is a legitimate and practical tool which will help to target resources effectively. To address concerns raised the Executive will provide guidance on pre-screening and consider administrative procedures for the recording of pre-screened cases.*

Schedule 2 of the Bill lists criteria for determining the likely significance of effects on the environment. It includes:

- *the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources*
- *the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development*
- *the transboundary nature of the effects*
- *the risks to human health or the environment*
- *the effects on areas or landscapes which have a recognised national, Community or international protection status*

Responsible Authorities are required to apply these criteria when determining whether a pre-screening exemption under Section 7 should apply. The Explanatory Notes state:

> *The intention of this schedule is to assist Responsible Authorities in their determinations as to whether an environmental assessment is required and to facilitate the transparency, consistency and quality of those determinations.*

Friends of the Earth Scotland (Scottish Executive 2005b) are against pre-screening, and stated:

> *Inclusion of a pre-screening opt-out clause for Responsible Authorities who deem that a proposal would not have a significant environmental impact should not be considered. The weakness of such a system would be compounded by the lack of i) a requirement to publicise the decision itself and the reasons for it and ii) an opportunity for the decision to be challenged. This process would therefore compromise the Government's commitment that SEA should both improve Scotland's environment, achieve better policy making and a more open government.*

Similarly, RSPB Scotland (Scottish Executive 2005m) stated that this provision *gives cause for concern* as:

> *There is no requirement to publicise the decision so how can the public find out what decision was made and why?*

COSLA (Scottish Executive 2005g) welcomed the principle of pre-screening, however:

> *…would like to see more detail on what criteria could be used as part of this process. We have a concern that a Responsible Authority may have a view that an SEA is not necessary, a view that then could be challenged by environmental lobbyists, which might include not only organisations, but also individuals, in particular, those given to vexatious objections, as experienced in the development planning system. To that end…draft Schedule 2 seems a reasonable starting point, but more quantification linked to the*

criteria would be necessary to make this effective. For example, a clear, quantified definition of the minimum land area that would be appropriate for environmental assessment would be helpful.

Dr Elsa João (Scottish Executive 2005h) stated:

> *The concept of pre-screening is, in a way, a contradiction in terms. Screening at SEA level is the process of separating the strategies with potential significant (i.e. important) environmental impacts (positive or negative), from the ones that would not benefit from the SEA process. By doing "pre-screening" you are really doing screening, except without the required support and transparency. I would therefore suggest that it is better not to have pre-screening.*

A number of the consultation responses highlighted that the Bill did not define either **minimal** or **significant environmental effects**. For example, Friends of the Earth Scotland (Scottish Executive 2005b) stated:

> *The absence of definitions of what constitutes 'minimal' or 'significant' environmental impact within the Bill or accompanying guidance may lead to difficulties in robustly delivering SEA and ensuring a uniform implementation across all plans, programmes and strategies.*

Further guidance on the definition of "significant" will be provided by the Executive as part of non statutory guidance if the Bill is passed. Specific criteria for determining likely significant effects are listed in Schedule 2 of the Bill.

SCREENING

The screening process intends to ensure that SEA is targeted only at plans and programmes that are likely to have significant environmental effects.

Therefore, screening is not required for plans and programmes under Section 5(3). This is because they are deemed to have significant environmental effects and can therefore bypass screening and go straight to the scoping stage. An example of this might be a transport plan that is required by a legislative provision, and which sets the framework for future development consent of projects in Schedule 1.

Screening involves the Responsible Authority seeking the views of the Consultation Authorities as to whether a plan or programme is likely to have significant environmental effects, in which case an SEA will be required. The Responsible Authority makes the determination as to whether an SEA is required, and the screening process informs that determination.

Screening is required for plans and programmes that are described in Section 5(3)[7] but only for those which determine the use of small areas at local levels or are a minor modification of one of those plans. It is also required for plans or programmes that are not specifically listed, but which still set a framework for future development consent of projects.

Additionally, screening is required for those plans or programmes described in Section 5(4) and owned by a Responsible Authority in 2(4) which have not already been excluded (individual schools) or exempted by pre-screening. An example of this might include a local authority plan

[7] agriculture, forestry, fisheries etc

not required by a legislative provision and which cannot be exempted by pre-screening because it will have more than minimal environmental effects.

Sections 9 and 10 make provisions for the formal screening procedure. Screening gathers views on whether there are likely to be significant environmental effects. These views then inform the Responsible Authority's determination as to whether an SEA is required. If it is likely that there will be significant environmental effects their determination should be that an SEA is required, and the determinations of this procedure should be published.

Section 9 requires that Responsible Authorities apply the criteria set out in Schedule 2 to determine whether the plan or programme is likely to have significant environmental effects. A summary of this view is then sent to the Consultation Authorities (via the SEA Gateway described below) who have 28 days to respond with their view as to whether the plan or programme is likely to have significant environmental effects. On receipt of the views from the Consultation Authorities, the Responsible Authority determines whether an SEA is required. Any disagreement may be referred to Scottish Ministers who will make a final determination.

The Explanatory Notes state:

> *The intention behind the screening provisions is to ensure that due and transparent consideration is given to whether an environmental assessment is required. Moreover, they are designed to ensure that the Bill environmental assessment requirements are targeted effectively at plans and programmes that are likely to have significant environmental effects.*

Section 10 requires the Responsible Authority to publicise their determination, and a statement of the reasons for it. Various media routes should be employed by the Responsible Authority to publicise their determination, including a hard copy available for free consultation at the Responsible Authority's principal office, digital copies on their websites, and an advertisement in at least one local newspaper, drawing the public's attention to the decision, and the availability of the determination documents.

Almost 75% of those who responded to the Bill consultation agreed that there should be a timescale in the Bill for screening. Of those who stated a specific period, 28 days was favoured.

The possibility of a conflict of interest arising from Scottish Ministers determining on disagreements did attract some comment.

SEPA (Scottish Executive 2005i) asked:

> *…whether the Scottish Ministers were best placed to exercise this function in respect of plans, programmes and strategies being prepared by the Scottish Executive given the potential for dual interest… Whatever mechanism is used, the arbitration body should be required to clearly explain the reasons for its decision.*

COSLA (Scottish Executive 2005g) stated:

> *The dispute process should be a clear, transparent process that leaves no party open to legal challenge. Equally there should be a clear timescale set out for this action, which needs to be quantified in the same manner as the other stages of consultation…COSLA would also point out that there is potential for conflict of interest to arise in terms of such adjudication. Has the Scottish Executive considered the transparency of seeking*

comment from the consultative bodies, during an adjudication, when they have already made their determination?

The Executive (2005a) responded that it remained of the belief that Scottish Ministers should determine on screening disputes as it was the most cost effective and efficient approach. Furthermore, it highlighted that:

> *…the risk of a situation arising where the Scottish Ministers will be required to determine on their own dispute is negligible. Moreover, we believe that concerns about impartiality will be met by the fact that determinations will be evidence based and made public. However…the Executive will give consideration to administrative provisions for the Scottish Ministers to make their determination within a specific period.*

SEA Gateway

The SEA Gateway is an administrative team based within the Scottish Executive. Its structure and functions are still under development but its key activities will include; advising on administration of SEA; co-ordinating screening and scoping submissions; liaising with Consultation Authorities; and collating management information.

Question 2 of the Bill consultation gave 5 options[8] for administering the SEA system, and over 50% of respondents favoured option 1. Some respondents favoured option 2 (Scottish Environment Link, Friends of the Earth Scotland, Scottish Wildlife Trust), and have published a report (Scottish Environment LINK 2005) to inform the debate. This is entitled: An independent body to oversee strategic environmental assessment in Scotland: bureaucratic burden or efficient accountable administration?

One of the report's authors (Dr Elsa João), in her consultation response (Scottish Executive 2005h) stated:

> *When evaluating the options available it is important to consider that in some cases the Consultation Authority will be the same as the Responsible Authority. The issue of bias and lack of independence can therefore arise. Option 2, that would involve a freestanding independent body, sounds the best. This is because this potential new body would be dealing not only screening but it could also deal with the administration of scoping, prepare guidance, record examples of good practice, be an arbiter in cases of dispute, and it could audit the quality of Environmental Reporting. Overall, it could monitor SEA effectiveness and procedures, and could support linkages between SEA and Project EIA.*

The Scottish Executive (2005a) recognised these views, but believed that it would not be a cost effective approach; it therefore committed to giving further consideration to effective liaison between the SEA Gateway and Consultation Authorities and to *give further consideration to the structure and duties of the SEA Gateway to ensure that it offers as efficient and transparent a service as possible*.

SNH (Scottish Executive 2005j) supported the Executive's view by stating that:

[8] Option 1 the use of a focal point performing advisory, co-ordinating and management functions.
Option 2 setting up an independent body to over see the SEA process.
Option 3 suggested Responsible Authorities making submissions direct to Consultation Authorities.
Option 4 suggested a gateway operated by a Consultation Authority
Option 5 suggested a gateway in the Executive, but including staff from Consultation Authorities

> *…a strengthened Option 1 supported by strong working relations with the Consultation Authorities and central access to sources of information, advice and guidance on approaches to SEA (perhaps via a dedicated website) would provide the most effective and efficient mechanism for the implementation of SEA in Scotland.*

It further stated that:

> *…the creation of a free-standing administrative body would incur considerably greater costs and that the establishment of such a body could detract from joint working between the Responsible Authority and the consultation bodies. This could have negative implications for the SEA process and the preparation of the plan or programme itself. It would also remove responsibility for involvement in SEA from those directly involved in guiding the policy process and could hamper the integration of SEA into policy planning and hinder the development of expertise and organisational capacity building*.

MISCELLANEOUS

Section 11 makes provision for Scottish Ministers to direct a Responsible Authority to submit a plan or programme to them, and to subsequently require that authority to enter the screening process, or carry out an environmental assessment. This is to *help to ensure that no qualifying plan deemed to have significant environmental effects will proceed without an environmental assessment being carried out* (Explanatory Notes).

Section 12 ensures that no qualifying plan or programme will be adopted or submitted to legislative procedure until the requirements of this Bill have been met.

Section 13 ensures that the Bill does not prejudice other European Community Law requirements.

PART 2. ENVIRONMENTAL REPORTS AND CONSULTATION

Part 2 of the Bill introduces 4 Sections concerning the preparation of environmental reports, scoping, consultation procedures, and a requirement for Responsible Authorities to take account of the environmental report during the decision-making process. Appendix 2 provides a glossary of terms, to which it may be useful to refer before reading this Section.

ENVIRONMENTAL REPORTS

Section 14 requires Responsible Authorities to prepare an environmental report which describes and evaluates the likely significant effects on the environment of the plan or programme, and any alternative approaches considered.

Schedule 3 of the Bill sets out in detail the requirements for an environmental report by setting out what information should be included. These provisions are outlined below.

An environmental report must state the contents and main objectives of the plan or programme, and detail its relationship, if any, with other qualifying plans and programmes. It should also outline the current state of the environment, the environmental characteristics of areas likely to be significantly affected and its future condition, should the plan or programme not go ahead.

Furthermore, the assessment should explore and highlight existing environmental problems and environmental protection objectives or considerations that have been taken into account. The impact (positive or negative) of plans or programmes on Natura 2000 designations is of particular importance to the report, as are the following issues:

- biodiversity, flora, fauna
- population, & human health
- soil, water, air & climatic factors
- material assets, architectural & archaeological heritage (cultural heritage)
- landscape
- the inter-relationship between the above factors

The above should be considered, whatever the nature of the impacts[9]. For example, SEA of the National Waste Strategy might highlight increased recycling, reduced landfill rates, and positive effects on landscape whilst recognising the negative issues surrounding new waste facilities in order to minimise adverse impacts on landscape, biodiversity and communities.

Central to these issues is the consideration, at any stage of the assessment process of reasonable alternatives to the plan or programme options and an assessment of their environmental effects. The consideration of all of the issues in the context of the strategic objectives and geographical scope of the plan or programme is also imperative.

The environmental report should also set out the proposed measures to prevent, reduce, and, as fully as possible, offset the significant environmental effects of implementing the chosen plan or programme. It should also outline the reasons for selecting these measures and describe the SEA methodology, whilst detailing deficiencies in technical knowledge or lack of expertise in compiling the assessment.

[9] permanent or temporary, primary or secondary, cumulative, synergistic, positive or negative and in the short, medium and long-term

Section 19 requires the Responsible Authority to carry out ongoing monitoring of the significant environmental effects of the implementation of the plan or programmes for which an SEA has been carried out. The key purpose of the monitoring is to identify any unforeseen adverse effects and to undertake appropriate remedial action. The environmental report should therefore also contain a description of the monitoring measures. A non-technical summary of the entire document should be included. The report should consider each of the alternative implementation options contained in the plan or programme.

In order to avoid duplication of assessment with other parallel studies, and make best use of existing data, Responsible Authorities are expected to take into account available information and to make qualitative judgements in the absence of firm data, within the scope agreed with the consultation bodies.

These provisions mirror those of the original Directive, and the Scottish Executive (2005a) reported that *the vast majority agreed with the basic provisions regarding the contents of environmental reports*. There was some debate amongst consultation respondents surrounding the question of whether indicators should be included in the environmental report. The Strategic Rail Authority (Scottish Executive 2005k) stated:

> *The use of core set of environmental indicators may aid simplicity of appraisal across differing plans and programmes, but runs the risk of introducing a mechanistic process which undermines the principles established earlier that plans and programmes should only examine significant environmental effects relevant to a particular plan or programme.*

The RSPB (Scottish Executive 2005m) stated:

> *The use of a core set of indicators would not only allow a comparison between Environmental Reports but would help ensure that for at least some aspect of the ER sufficient, accurate baseline data is available to encourage informed assessments.*

SEPA (Scottish Executive 2005i) highlighted their view that *the environmental report is…the very heart of SEA*. However, COSLA (Scottish Executive 2005g) were concerned that:

> *…there may be difficulty to differing degrees for individual local authorities in both accessing the relevant datasets and interpreting the necessary information. COSLA is also concerned that councils will be challenged under the Freedom of Environmental Information legislation, on issues that they cannot themselves access, for want of resource.*

The Scottish Executive (2005a) responded:

> *Given the importance of indicators to respondents, and to the Executive, we will commit to giving this complex issue further consideration. In the meantime, the expectation is that Responsible Authorities will make every effort to set environmental objectives and utilise available indicators as appropriate.*

A further consultation question asked whether social and economic factors should also be considered in environmental reports. Views on this varied. West Lothian Council (Scottish Executive 2005l) stated:

> *A true SEA should include social and economic information if it is to be undertaken in the spirit of sustainable development. In this context social and economic drivers may*

justifiably take precedence over environmental impacts. That is the nature of the balance that has to be addressed in policy. An environment report may well have to determine negative environmental impacts arising from social and economic decisions when responding to, for example, Structure Plan housing requirements. How this is reconciled, to minimise environmental impact is part of the reporting process. However, the Consultation Authorities are not selected on their social and economic expertise but are purely environmental.

The RSPB (Scottish Executive 2005m) disagreed:

The development of SEA was caused by past policy making processes where economic and social issues dominated decision-making. The SEA Directive establishes a clear process for incorporating environment into decision-making and appropriate methodologies have been developed to support this. While public bodies are obviously free to address economic and social issues should they so wish we do not support any statutory requirement to do so.

The Executive (2005a) responded:

The Executive acknowledges that consideration of social and economic factors is important to the quality of public policy making. However, the Executive also accepts respondents' concerns that a statutory requirement for their inclusion in environmental reports risks obscuring the environmental considerations that we are setting out to identify.

Therefore, the Executive's proposal is to make no statutory provision for the inclusion of social and economic factors in environmental reports.

SCOPING

Section 15 makes provision for a *quality assurance measure* (Explanatory Notes) called scoping.

This is essentially a requirement for the Responsible Authority to detail the scope and level of detail that they propose to address in the environmental report. They should also propose a suitable public consultation period for the completed report and submit this to the Consultation Authorities for their opinions.

The next step requires the Consultation Authorities, within 5 weeks, to respond with comments on the scope and level of the environmental report, having taken into account their expert knowledge of the environmental impacts of the plan or programme. To ensure a combined approach on cumulative and synergistic effects, Consultation Authorities are required to send a copy of their views to each other.

Section 15(3) binds the Responsible Authority to taking the views of the Consultation Authorities into account when preparing and consulting on the environmental report. Section 15(4) allows Scottish Ministers to adjust the proposed consultation period if they deem that the Consultation Authorities or the public have not had *an early and effective opportunity to express their opinion on the plan or programme and the accompanying environmental report*.

CONSULTATION PROCEDURES

Section 16 provides for a formal consultation procedure with the Consultation Authorities and the public.

Specifically, it requires Responsible Authorities, within 14 days, to send a copy of the environmental report and the plan or programme to which it relates to the Consultation Authorities, and invites them to express their opinion within a specified time.

Furthermore, this Section requires them to advertise and carry out a public consultation within 14 days of the preparation of the environmental report. The process for this commences with the publication of a notice giving details of the environmental report, the plan or programme to which it relates, and stating where it can be accessed so that expressions of opinion from the public may be submitted. Additionally, Responsible Authorities are required to publish the notice in such a way as to ensure that the contents of the notice are likely to come to the attention of the public eg *in at least one newspaper circulating in the area to which the plan or programme relates*.

This Section defines "public" as those *affected or likely to be affected by; or having an interest in, the plan or programme*.

As noted above, public consultation and participation are fundamental to the SEA process.

ACCOUNT TO BE TAKEN OF ENVIRONMENTAL REPORT

Section 17 is fundamental to this legislation as it requires the Responsible Authority to take *account of both the environmental report and consultation responses in its preparation of the plan or programme* (Explanatory Notes). Transboundary effects notified by consultation under the UK Regulations also have to be taken into account.

Failure to apply this correctly would open up the Responsible Authority to a challenge through judicial review, and any failure to comply with this Section will be transparent because the following Section (18) requires the publication of a statement declaring (amongst other issues) how opinions expressed in the consultation have been taken into account. Section 17 is further supported by Section 12's restriction on the adoption of qualifying plans and programmes that have not been subjected to SEA.

PART 3. POST ADOPTION PROCEDURES

This part of the Bill introduces 2 Sections which make provision for the publication of a statement bringing the plan or programme to the public's attention and detailing the methodology of the environmental assessment. This part also makes provision for the implementation of a monitoring programme.

Section 18 requires the Responsible Authority, *as soon as is reasonably practicable after the adoption of the qualifying plan or programme* to publicise it, advise where it might be viewed, and set out (Explanatory Notes):

- *how environmental considerations have been integrated*
- *how the environmental report and consultation responses have been taken into account*
- *the reasons for choosing the selected approach over the alternatives considered*
- *the arrangements for monitoring the significant environmental effects of the plan or programme*

Section 19 places a duty on the Responsible Authority to monitor the significant environmental effects of its plan or programme. The key purpose is to identify unforeseen environmental effects and to take remedial action. In many cases Responsible Authorities may already have environmental monitoring arrangements in place; the use of these is encouraged to avoid duplication of effort. A description of these monitoring measures should have been included in the Environmental Report and the finalised proposals must be included in the SEA statement discussed above.

PART 4. GENERAL

Part 4 introduces 5 Sections of general provisions, the most important being Section 23 which revokes the Regulations.

The others make provision for:

- Crown application (Section 20)
- general powers and procedures for orders which may be made under powers conferred by the Bill (Sections 21 and 22)
- interpretation, commencement and short title (Sections 24 and 25)

APPENDIX 1. STRATEGIC ENVIRONMENTAL ASSESSMENT IN SCOTLAND TO DATE

The following Sections provide a brief summary of SEA in Scotland to date.

BEFORE THE INTRODUCTION OF THE SEA REGULATIONS

Prior to the introduction of the Regulations in July 2004, certain local authorities had carried out some type of environmental assessment of their structure plans. These include (David Tyldesley and Associates 2003):

- Clackmannanshire/Stirling in 2000
- Fife in 2001
- Highland in 1999
- Falkirk in 2001
- Perth and Kinross in 2002

Differing methodologies were applied to all of these; however certain parts of the assessment process are relevant. For example, they all used environmental indicators as part of the assessment criteria. The methodology for the Finalised Fife Structure Plan asked questions such as (David Tyldesley and Associates 2003):

- Does the policy or project have significant implications for the conservation or enhancement of biodiversity (eg habitat protection, designated sites etc)?
- Does the policy or project provide information on environmental impacts and support mitigation?

Similarly, an assessment of policy options, and alternative strategies for the Perth and Kinross Structure Plan recorded the examination of three development strategy options to accommodate future growth. Option 1 concentrated on focusing development primarily on Perth, its immediate edges and key transport corridors. Option 2 considered widely dispersing new development across the area in other towns and villages whilst tightly constraining Perth and Option 3 favoured selective growth of Perth and key towns such as Aberfeldy or Blairgowrie. Each option was appraised against the following criteria:

- existing development pattern
- energy efficiency
- efficient use of infrastructure
- access to employment
- relationship to services and amenities
- reducing travel
- impact on landscape
- impact on cultural heritage

Option 3 (selective growth of Perth and key towns) came forward as the favoured option and was subsequently promoted in the Consultative Draft Structure Plan.

An Environmental Assessment (Scottish Executive 2004c) of Scotland's first National Planning Framework (Scottish Executive 2004d) has also been carried out. This is considered in Appendix 1 of SPICe Briefing 04/46 (Reid 2004a) on Strategic Environmental Assessment.

UK LEVEL STRATEGIC ENVIRONMENTAL ASSESSMENT BY THE DTI

Across the UK, the DTI has voluntarily carried out 8 SEAs (others are underway) to determine future strategies for offshore energy licensing. These were prepared to assess the implications of licensing oil and gas exploration; therefore, they were sector specific rather than completely comprehensive. A comprehensive SEA would have addressed all of the environmental implications of all activities in the area. The DTI's SEA archive gives detailed information on all of the assessments.

Of the above 8, SEA 2 is most pertinent to Scotland as it includes the majority of the UK's North Sea oil and gas fields. This was undertaken in line with the SEA Directive, and aimed to facilitate *the consideration of environmental protection and sustainable development objectives in the decisions relating to oil and gas licensing in parts of the North Sea* (DTI 2004). The assessment process considered issues such as:

- contaminant status
- existing activities
- fish and fisheries
- geology
- marine mammals
- plankton

The alternatives to the proposed licensing were not to offer any blocks, to license a restricted area, or to stagger the timing of activity in the area. Consultation was facilitated with the public, environmental authorities, other bodies and neighbouring states by making the assessment document available in a number of different formats and media. The formal public consultation phase extended for ninety days from the date of publication. Some of the environmental impacts identified were as follows:

- physical damage
- noise
- atmospheric emissions
- accidents

It was found that the cumulative overlapping of "footprints" of detectable contamination or biological effects were limited or unlikely. No synergistic effects were identified that were considered to be potentially significant.

The areas studied are adjacent to the continental shelves of Norway, Denmark, Germany and the Netherlands. Prevailing winds and water circulation in the North Sea will result in the transboundary transport of underwater noise, produced water, drilling discharges, atmospheric emissions and oil spills. The scale and consequences of these environmental effects was determined to be comparable to those in UK waters; therefore, only oil spills were regarded as having the potential to result in significant negative environmental effects.

The environmental and safety consequences of accidental gas releases were considered; it was decided that these depend both on scale, and on whether the released gas ignites. The DTI states (2004):

> *The major constituent of natural gas is the greenhouse gas methane, and gas releases on all scales will therefore contribute to global climatic effects. Any foreseeable contribution of methane, including a sustained gas blowout, to global emissions will be negligible.*

Project-specific licences can specify timing, spatial and activity constraints relevant to the environmental sensitivities of the area. Therefore, interference with and damage to seasonal seabird vulnerability, actual or potential conservation sites, and other users of the sea and other marine resources can be taken into account and mitigated against.

As a result of the SEA, some gaps in information about and understanding of potential environmental sensitivities have been identified. These are being addressed through industry cooperation and ongoing monitoring. The DTI (2004) therefore concluded that there:

> *…are no overriding reasons to preclude the consideration of further oil and gas licensing within the SEA 2 areas.*

SEA IN SCOTLAND SINCE THE INTRODUCTION OF THE REGULATIONS

Since 20 July 2004, the SEA Gateway has received 10 screening, and 3 scoping reports. No environmental reports have been completed under the SEA Regulations.

Of the 10 screening requests, the following is currently with the Consultation Authorities for consideration under the 28 day statutory deadline:

- Cairngorms National Park Authority; National Park Plan and Local Plan

The other 9 have been responded to by the Consultation Authorities within the 28 day deadline.

- West Dunbartonshire Council; Local Plan
- Aberdeen City Council; Local Transport Strategy
- Glasgow City Council; Review of the City Plan
- Falkirk Council; Revised Sustainability Strategy
- Communities Scotland; Corporate Plan[10]
- East Ayrshire Council; Alteration to the adopted Local Plan
- City of Edinburgh Council; Granton Waterfront Masterplan
- Deer Commission Scotland; Corporate Plan 2005-2015
- Highlands and Islands Airports Ltd; Corporate Plan 2005-2015

In all of the above cases the Consultation Authorities have confirmed that the plan or programme is likely to have significant environmental effects. Of the above 9, only one has so far been submitted to the Consultation Authorities, via the SEA Gateway for the next stage (scoping). This was:

- West Dunbartonshire Council; Local Plan

The two remaining Scoping requests received by the SEA Gateway are from, Loch Lomond and Trossachs National Park, (Draft National Park Plan) and Moray Council (Development Plan) these were both submitted directly for Scoping, without having to go through Screening. The Regulations allow a Responsible Authority to submit a plan directly to scoping if they relate to a specific subject and set the framework for future development consent. The Consultation Authorities replied to West Dunbartonshire Council and Loch Lomond and Trossachs National Park within the 35 day statutory deadline and have provided their views on the content of the scoping report.

[10] This was subsequently withdrawn because the screening process ascertained that the first formal preparatory act had taken place before 21 July 2004; therefore SEA is not required.

West Dunbartonshire Local Plan Case Study[11]

The first formal preparatory act for this was in August 2004, and as such this was the first to be submitted for screening to the SEA Gateway. Following the statutory 4-week consultation period the determination was returned indicating that SEA was required. On 12 October, a determination advert, and a notice of intention to prepare the West Dunbartonshire Local Plan was placed in a local newspaper.

Work then began on establishing baseline data; this involved collating in-house information and contacting and working closely with external organisations such as SEPA, HS, SNH and Scottish Water to gather additional relevant data.

It was agreed with the Consultation Authorities that a draft scoping report would initially be submitted for informal consultation and then formally submitted through the SEA Gateway. The draft scoping report was submitted on 7 December with a week given for comments. The scoping report was then formally submitted to the Consultation Authorities, via the Gateway, on 23 December. The comments made about the scoping report were felt to be constructive but no major changes were proposed by any of the Consultation Authorities.

Following this, consultation was opened up to a wider audience to engage local interest groups and other interested parties from an early stage. 73 organisations/individuals were contacted with a 3-week consultation period. A number of consultees did not respond formally but of those who did a considerable number were particularly interested in renewable energy and how it was being taken into consideration in the SEA and the local plan. West Dunbartonshire Council (2005) state:

> *The consultation process was an awareness raising activity as much as it was seeking constructive comments on the scope and level of detail of the SEA. The true benefit of this exercise is that at latter stages of the SEA and local plan process local interest groups will already be aware of SEA and they will feel that they have been offered sufficient information and opportunity to influence the process.*

Subsequently, it was identified that the local plan objectives were not consistent with the SEA objectives. The local plan objectives have been modified to narrow their focus, emphasise the importance of the environment and reduce the scope for interpretation. West Dunbartonshire Council (2005) state:

> *Changing the objectives to have a more environmental emphasis was the first positive outcome of the SEA and it represents an important change that would not have occurred without the influence of the SEA.*

Constraint, *supply* and *expansion* were initially considered as suitable spatial strategic alternatives to the local plan; however these were thought to be unrealistic on their own, and a number of alternative topic options (housing, transport, education) are also being assessed. These are being agreed with the Consultation Authorities. West Dunbartonshire Council (2005) state:

> *To date the SEA has had a very positive influence on the local plan, to the extent that changes have been made to the local plan objectives and the SEA is currently helping to determine the most environmentally beneficial and reasonable options... The SEA*

[11] The information for this case study was supplied by West Dunbartonshire Council (2005)

involves a significant amount of time and thought, but it is a positive process and one that fits well with the established local plan process.

Following the approval of the scoping report, the Council is currently assessing alternatives, and policy options. The next output will be the environmental report.

It is difficult to effectively estimate costs for this exercise, however since December 2004 (5 months into the project), the SEA has accounted for 100% of the workload of one staff member on a scale of £27,054 - £29,541 per annum. It has also reduced the capacity of the Local Plan Team by 22%, and therefore indirectly increased the time taken to complete the plan by an estimated 3 months. Additionally, an independent audit of the environmental report will cost £1,500. The Council (2005) noted that because this is their first SEA, the collation of baseline information has cost more than it will in the future. In the future, because of the time consuming nature of carrying out a SEA, It is likely that it will be more cost effective to employ private consultants.

ONGOING MONITORING

The Minister for Environment and Rural Development has agreed in principle to carry out a case evaluation exercise, in conjunction with COSLA and the Loch Lomond and Trossachs National Park Authority, to review and understand better how the SEA process is working.

APPENDIX 2. GLOSSARY OF TERMS

Consultation Authority	Specialist body with environmental expertise that will consider the environmental effects of the plan or programme when asked to do so by the Responsible Authority at the screening and/or scoping stage. They are the Scottish Environment Protection Agency, Scottish Natural Heritage, the Scottish Ministers (in practice, Historic Scotland). The Bill makes provision for Consultation Authorities in Section 3.
Cumulative Effects	The combination of effects which, in some cases, may not be significant in themselves, but which taken together amount to a significant impact. There might be several of the same effects, for example too many houses in one place, or the combination of different types of effect in one area, for example one causing noise, another reducing air quality.
Environmental report	A report detailing all the significant positive and negative environmental impacts of a plan. It will be published along with the plan or programme for public comment.
Pre-screening	This allows Responsible Authorities to exempt a plan or programme from SEA on their own cognisance, if they are of the opinion that there are no or minimal environmental effects.
Plan or Programme	The terms *Plan* and *Programme* are general descriptors of frameworks for action set out by Responsible Authorities. Throughout the Bill, reference to plans or programmes also includes *Strategies* as set out in Section 4(4). These terms are broadly interchangeable; the nature of the plan or programme, as set out in Section 5, is more important.
Project	The execution of construction works or of other installations or schemes; other intervention in the natural surroundings and landscape including those involving the extraction of mineral resources. The framework for a project is set by a plan or programme; examples of qualifying projects can be found in Schedule 1.
Responsible Authority	A body or person exercising functions of a public character. In relation to plans and

	programmes, it is the authority by which, or on whose behalf, the plan or programme is prepared. Defined in Section 2.
Scoping	The stage in the assessment process which seeks to define what the scope and level of detail should be for the environmental report.
Screening	The stage in the assessment process which determines whether a particular plan or programme, or alteration to one, is likely to have significant environmental effects and should therefore be subject to the full environmental assessment process.
Synergistic	Synergistic effects are those of activities which act in conjunction with other human activities (eg fishing and crude oil transport)

APPENDIX 3. LIST OF PLANS AND PROGRAMMES THAT MIGHT BE SUBJECT TO SEA

This is a summarised list of plans and programmes which Scottish Environment LINK (Scottish Parliament Environment and Rural Development Committee 2004b) members have identified as having (potentially) significant environmental effects, and which might be subject to SEA.

It should be noted that **this list is indicative, not definitive**. Also, many of the plans listed have already been adopted, and therefore will not be subject to retrospective SEA. Some of these plans may be re-issued or altered in the future; at this point, they may qualify for SEA subject to the usual procedures.

KEY: + May be subject to SEA under this legislation
- Is not likely to be subject to SEA under this legislation
? Uncertain

Plan or Programme	Subject to SEA under the Regulations?	Subject to SEA under the Bill?
Town and Country Planning		
Structure Plans Statutory, prepared by local planning authorities under the Town and Country Planning Act	+	+
Local Development Plans Statutory, prepared by local planning authorities under the Town and Country Planning Act	+	+
Supplementary Planning Guidance Non-statutory. Discretionary, limited to supplements to statutory plan policy and to be clearly cross referenced to it	-	+
Local Agenda 21 Strategies Sustainable Development strategies, prepared by Local Authorities and partners including local communities Non-statutory, Community Planning	-	+
WASTE		
National Waste Strategy	-	+
Area Waste Plans	-	+
HISTORIC ENVIRONMENT		
Passed to the Future: Historic Scotland policy for sustainable management of the historic environment 2002	-	+
Architecture policy for Scotland 2001	-	+
WATER MANAGEMENT		
River Basin Mgt plans and sub basin plans (from 09) arising from WEWS Act 03	+	+
Water Company Infrastructure or Abstraction Plans	+	+
ACCESS AND RECREATION		
A Walking Strategy for Scotland 2003 (SE)	-	+
Scottish Outdoor Access Code	-	+

MARINE ENVIRONMENT		
Harbour plans: Non-statutory plans prepared by Harbour Authorities for management of recreation, watercraft etc.	-	+
Strategic Framework for Scottish Aquaculture 2003	-	+
ENVIRONMENT		
SNH Policy Statements on topic areas– e.g. Agriculture, renewable energy, opencast mining, sustainable development etc.	-	+
SEPA Corporate Plan	-	+
SSSI Management Statements Statutory nature conservation agencies producing management statements for all SSSIs, listing key interest & what management is needed to maintain/ enhance that interest	-/?	+
TOURISM		
A Strategy for Scottish Tourism 2000	-	+
Visitscotland Corporate Plan	-	+
ECONOMIC DEVELOPMENT		
Scottish Executive Expenditure Plans/budget?	-	-
A modern regional policy for the UK: consultation on the future of structural funds, 2003	-	?/+
TRANSPORT		
"Transport delivery report." nonstatutory, was published first in March 2002 as 'Scotland's Transport: Delivering Improvement', and had an update entitled 'Building Better Transport' published in 2003.	-	+
National Cycling Strategy	-	+
Local Authority Transport Strategies: Non-strategy, prepared by all local planning authorities	?/-	+
ENERGY		
UK Energy Strategy 2003	-	-
UK Fuel Poverty Strategy	-	-
A Climate Change Mitigation Strategy for Scotland 1999 (due for review 04)	-	+
DEFENCE		
Rural Estate Strategy: prepared by MOD, identifying objectives for use of the Rural Estate. Government policy, non-statutory.	-	+/?
OTHER AREAS		
Social Justice Strategy 1999	-	+
Scotland's Health Strategy 2000	-	+

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Agenda Item 1

Environment and Rural Development Committee

20 April 2005
ERD/S2/05/11/1c

Environmental Assessment (Scotland) Bill

Evidence to the Environment and Rural Development Committee of the Scottish Parliament.

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13 April, 2005

The following comments are made in a purely personal capacity and do not represent the views of any institution or organisation

General

The extension of environmental assessment to plans, policies and strategies is to be welcomed, since by the time the individual projects covered by the existing environmental impact assessment rules are proposed, fundamental choices of environmental significance will already have been made. The proposals do largely meet the standards set out in the Aarhus Convention.

Where there may be some uncertainty over the application of the Bill because of rather general wording, the proposed provision of guidance to clarify the position is an acceptable way forward rather than trying to produce more precise, but inevitably very complex and technical, definitions. It must always be remembered, though, that ultimately it is the words of the statute, not the guidance, that must be observed and there must be a willingness to accept the possibility of legal challenges and to introduce amending legislation if the current wording produces unacceptable levels of uncertainty or results quite different from those envisaged.

Relationship with Sustainable Development

In relation to the wider policy of promoting sustainable development, there will need to be clarification of the relationship between the new legal obligation to carry out an environmental assessment and other aspects of sustainability appraisal. In the first place it is important to assert the importance of environmental assessment remaining as a distinct element. Although sustainability appraisal offers the advantage of a more integrated approach, there is a real danger that this can lead to a dilution of attention to specific aspects and a return to the position where economic and social concerns always override environmental ones.

In *One future - different paths: The UK's shared framework for sustainable development* (March 2005) five principles are stated to help governments to achieve sustainable development. Environmental assessment as set out in the Bill will make a major contribution to one (Living within Environmental Limits) reflects two others through its scientific basis (Using Sound Science Responsibly) and opportunities for public participation (Promoting Good Governance), but touches only one aspect of a

fourth (the environmental costs of Achieving a Sustainable Economy) and is silent in relation to the fifth (Ensuring a Strong and Healthy and Just Society). These other aspects of sustainability will have to be assessed through some other process which does not have the same legal status. It is only in very rare circumstances that there is a legal obligation to carry out a wider sustainability appraisal, e.g. in relation to Regional Spatial Strategies in England (Planning and Compulsory Purchase Act 2004, s.5(4)).

This creates a rather lop-sided process, where the environmental assessment is the result of a legal procedure with statutory provisions on consultation, clear responsibilities in terms of publishing initial reports and reasoned conclusions on how environmental issues have been taken into account, and definite opportunities for legal challenge in the event of unreasonable decisions. Meanwhile for the other aspects of sustainability, even though in practice a similar process may be adopted, the position is much less formal and there will be no legal rights to guarantee public participation etc. The determination of the final content of the plan will involve balancing various considerations, the environmental ones that are the product of an open, legal process and the others that have emerged by other means. This difference may have an effect on how the different considerations are viewed, and perhaps more significantly on perceptions of how the balancing exercise has been undertaken. To maintain public confidence, thought will have to be given to how the assessment of the non-environmental factors is done and the final decisions made to ensure public confidence that appropriate conclusions are being reached. The comments in the final paragraphs of the Policy Memorandum show that the issue has been identified but a clearer and more consistent approach to sustainability appraisal across the range of responsible authorities would be beneficial.

Administrative Procedures

The incorporation of environmental assessment into the process of making plans and policies will be comparatively straightforward where there already exists a clear procedure for producing the plan, as is the case with development plans and river basin management plans. In such cases there are clearly defined procedural stages and it is simply a question of making sure that these are adapted to include an environmental report that is subject to consultation in the same way as the draft plan is at present. The task is much harder where there is no formal procedure in existence, such as for forestry or waste strategies (and indeed sustainable development policies). This was the experience when project-based environmental assessment was first introduced, with its ready assimilation into the mainstream planning system where it could be added to established procedures but long delays and in some cases (e.g. forestry) at least one false start in areas where no formal procedure was already in place.

For most plans where there is no formal approval mechanism the practice has been to go through what is in effect a similar procedure, including a full opportunity for consultation at a suitable stage, but nevertheless the change from an informal process to a formal legal procedure, with a set timetable and the opportunity for legal challenge in the event of things going awry, is a very significant change. The fact that such a process must on occasions be repeated for subsequent modifications, not just when a wholesale revision is contemplated, again will be a significant change. This

suggests that there will have to be a major exercise carried out by all responsible authorities to categorise and to some extent standardise the various forms of plans, programmes and strategies that they produce and the processes they use for their preparation and adoption, so that those that fall within the new rules can be clearly identified and appropriate formal procedures put in place.

Potential for Legal Challenges

Given the experience of project-based environmental impact assessment, legal challenges to aspects of the assessment and plan-making procedure can be expected. These may be inspired by genuine environmental concerns or (as the experience in planning has shown) flaws in the environmental assessment process might be identified as providing the means of challenging a plan where the real objection to it is based on other grounds. Given that judicial review does not allow a challenge based solely on the merits of the decision, challenges have to be based on some legal flaws in the decision-making process and points that may form the basis of challenge include:

- whether particular plans meet the criteria for "qualifying plans and programmes" (s.5);
- whether there has been an "irrational" or "unreasonable" determination
    - of whether environmental effects exist or are "minimal" (ss.6-7),
    - of whether the scale of a plan or modifications are such that the environmental assessment requirement is triggered (s.8), or
    - of the exclusion of matters as a result of a scoping exercise (s.15)
- failure to follow the correct procedure in terms of time-limits or consultation arrangements;
- the adequacy of the reasons and explanations provided as required by s.18(3);
- whether all aspects of the environmental report and *every* opinion expressed in response to the consultation (s.17(b)) have been taken into account;
- whether there has been adequate monitoring of the implementation of the plan (s.19).

Authorities must be aware of the possibility of such challenges, even if they prove to be ill-founded, and ensure that their procedures allow them to demonstrate their compliance with the law. At present the courts tend to set a high threshold before being willing to declare that an authority's judgment has been unreasonable – some might argue too high to ensure adequate protection for the environment – but especially as noted below, this may change.

A further dimension to potential judicial challenge is presented by the constitutional limitations on the powers of the Scottish Parliament and Executive. The fact that action cannot be taken that is incompatible with Community law or the European convention on Human Rights may provide a basis for challenge if European courts require different approaches to those initially favoured here. For the European Court of Justice this is likely to arise from interpretations of the Directive requiring environmental assessment of plans itself (Dir. 2001/42/EC) or from the interpretation of related issues in the project-based environmental impact assessment Directive (Dir. 85/337/EEC as amended) or the assessment provisions in the habitats and species Directive (Dir. 92/43/EEC). For the European Court of Human Rights the fact that the adoption of plans and programmes may affect the rights of individuals (and companies) to respect for their health, homes and property might further justify

intervention in the process leading to the adoption of plans (cf. the original decision in *Hatton v UK* (2002) 34 EHRR 1). The further restrictions on action that has effects outwith Scotland or that relate to reserved matters may provide additional scope for argument, especially as the divide between devolved and reserved matters can create difficulties for creating the sort of integrated approach called for if sustainable solutions are to be promoted (e.g. if any aspect of energy or transport is affected).

Access to Justice

The reliance on judicial review as the means of challenging decisions under this Bill raises questions of the adequacy of this in terms of the access to justice requirements under the Aarhus Convention. The Executive's view that this is generally an adequate remedy may be questioned in terms of the costs of this procedure, but a more significant issue may be standing to sue. The requirement that a party can demonstrate title and interest to sue (some direct connection with the issue) before being able to mount a challenge may cause problems in this context.

There are clearly people with standing to raise actions once the process has reached the stage of public participation process since any person who has made representations is entitled to ensure that these representations have been properly taken into account in accordance with the statutory procedure. However (other than the consultation authorities) there will be no party with such a direct connection with the matter at the stage of determining whether a proposal is a "qualifying plan or programme" or should have an exemption or at the stage of subsequent monitoring. It would be open to the courts to take the view that the obligations on responsible authorities are owed to the public at large and can therefore be enforced by any member of the public (cf. *Wilson v IBA* 1979 SLT 274), but this is far from certain and may be seen as creating too wide an opportunity for those seeking to "put a spanner in the works" for political or other motives, rather than to reflect the public interest in proper environmental consideration.

It is interesting that this issue has been considered in the recent consultation paper *Public Participation in Environmental Matters*, where in relation to Pollution Prevention and Control it is proposed that non-governmental organisations promoting environmental protection should be given access to the courts. A role for such bodies is also provided in the EC Directive on Environmental Liability (Dir. 2004/35/EC). A similar move might be considered in this context.

Plans and Programmes

It could be argued that it is wrong to exclude all financial and budgetary plans and programmes (s.4(2)). In the same way as it is recognised that environmental impact assessment of projects is limited because these have been shaped by the content of plans and programmes, so it could be argued that in turn the plans and programmes have often been significantly moulded by budgetary allocations. By not subjecting the financial plans to environmental assessment the proposals will fall short of trying to ensure that at all important stages of policy formulation the environmental consequences of the decisions are taken into account.

The exclusion of plans, programmes and strategies that extend beyond Scotland (s.4(1)(b)) and of authorities with reserved functions (s.2(4)(e)) similarly mean that some important strategies that affect Scotland will be omitted, since the UK Regulations (SI 2004 No.1633) adopt a narrower definition than that in the Bill. Whilst accepting that this is beyond the powers of the Bill to alter, this difference, when coupled with point noted above about the various elements that contribute to an integrated sustainability appraisal mean that there will not be a single, unified approach for all important policy-making processes.

Qualifying and Excluded Plans and Programmes

Although the structure may make sense from the drafting point of view, the interaction between sections 2, 5 and 6 does not make it easy for those reading the legislation to work out exactly what plans and programmes are covered by the requirement for an environmental assessment, and a less complex way of constructing the boundaries should be considered.

Given the countless different ways in which public and private sector bodies (and partnerships involving both) are nowadays engaged in the provision of public services, the fact that such arrangements change frequently and the inevitable scope for argument over what counts as "matters of a public character", it must be accepted that no clear and sharp boundary can be provided by simple definitions in the legislation. The uncertainty that this produces can be eased by guidance that identifies what plans are and what are not covered by the requirement (always subject to the reminder that it is the courts' interpretation of the law (and the underlying EC law) that must have the final say). The provision in s.2(4)(f) provides a clear way of expressly including a number of plans whose status might be arguable.

A specific issue is the interpretation of s.5(3)(a)(ii) – "which sets the framework for future development consent of projects"; this wording comes from the Directive itself. One view would be to say that it is only the plans of the body responsible for awarding consent that can "set the framework" in this way, so that any plans or strategies produced by operational bodies do not qualify, since these set the framework for the proposals that are going to be submitted for consent, not for the consent itself. Yet if there is to be an environmental assessment of the overall pattern of development, this is probably best directed at that underlying plan rather than taking place indirectly when individual proposals are submitted for consent and alternatives have to be discussed, or when the consent-awarding body itself decides to formulate a plan to deal with the issue. This is a question which might ultimately fall to be determined by the European Court of Justice, where it is not wholly inconceivable that a purposive interpretation (see, for example, recitals 4 and 5 in the Preamble to the Directive), coupled with a desire not to allow the national choice of private or public sector responsibility for certain utilities and services to override the practical impact of planning decisions, may lead to the view that since the important decisions are being taken when the operational body formulates its plan, then that is the stage at which environmental assessment should be required.

The relationship between sections 5(3), 5(4) and 6 could be more clearly expressed. It is conceivable that a plan for an individual school could have a significant effect on a European Site. In such a case it is not wholly clear what takes priority - its inclusion

as a qualifying plan under section 5(3)(b) (the probable answer) or its initial inclusion under section 5(4) but then exclusion through the operation of section 6(1)(a). This is typical of the less than straightforward process of analysis needed to apply the law as currently drafted.

A separate issue is the treatment of plans that develop in several stages: a strategy produces a plan that leads to a programme of works that generates specific projects. Whilst it is sensible to avoid duplication of assessments, it must be recognised that different issues and levels of detail may be appropriate at different stages and that trying to limit the assessment to a single stage may not achieve the objectives of the Directive (cf. the problems over environmental impact assessment and outline planning permission). More than one assessment may be appropriate, but at each stage the presence of the others should help to simplify the process, providing a sharper focus and avoiding the need to reopen issues already thoroughly examined.

Screening and Cumulative Effects

A possible weakness of the provisions in the Bill is in relation to the cumulative effect of small-scale plans and of modifications to plans. In themselves these may be minor and as such exempted from the environmental assessment (s.8(1)), but when added together a series of these may have a significant impact. As part of the consideration of whether an exemption is justified, there should be a requirement to consider the combined impact of the particular minor plan or modification and any other such developments, judging either against the position today or against the last fully assessed plan or programme.

Monitoring

The provisions on monitoring the implementation of plans and programmes appear very weak. Any pre-decision environmental assessment is inevitably an estimate of the likely effects, which in practice may turn out to be much more or less severe than originally predicted. There should be a stronger requirement to monitor the actual effects and to consider revisions to the plan (whether a tightening or a relaxation of environmental constraints) where the reality is different from the predicted position. Although creating a formal review mechanism may be unduly burdensome, the present obligation is very vague and it is uncertain who would be able to enforce it (see above).

Schedule 1

The inclusion of Schedule 1 for the convenience of the reader as opposed to simply referring to other legislation is a stylistic feature of the drafting that is very welcome.

Agenda Item 1

Environment and Rural Development Committee

20 April 2005
ERD/S2/05/11/1d

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Written evidence for stage 1 consideration of the Environmental Assessment (Scotland) Bill

(Please note that this written evidence should be read in conjunction to my answers given to the questions raised in the consultation paper "Environmental Assessment (Scotland) Bill".)

1. What the effect will be of extending the implementation of SEA to cover a broader range of plans and programmes than is applicable to the rest of the UK?
The most innovative aspect of the Environmental Assessment (Scotland) Bill is that it includes higher-level strategic actions (what the Partnership document calls "strategies" and the SEA literature usually refers to as "policies"). This ties in more closely to the ultimate aim of SEA. SEA should apply to the three main levels of decision-making that come before the project level: policies, plans and programmes (sometime called, in an abbreviated way, PPP). One serious omission of the European SEA Directive is that it only applies to plans and programmes and fails to address policies. It is likely that in future years when the SEA Directive is revised then the higher-level policy level will be included, as it should, in the SEA Directive. When that happens Scotland will be a step ahead of most other member states (e.g. Ireland) that have not done the same as Scotland. It is important to bear in mind that the SEA Directive does not mark the start of SEA legislation in Europe and that other countries have done SEA at the higher-level policy level for a long time (see Schmidt, João and Albrecht 2005). For example, the Netherlands has had SEA since 1987 and the Czech Republic since 1992 (João 2005).

The fact that the Environmental Assessment (Scotland) Bill includes higher-level strategic actions ("strategies" or "policies", depending of terminology) should make it a more efficient system. The SEA of policy should affect and inform the SEA of plans, which in turn should affect and inform the SEA of programmes, which in turn should affect and inform the EIA of projects. This linkage is called 'tiering' (see João 2005). Tiering means that aspects of decision-making and SEA carried out at one level do not necessarily need to be subsequently revisited at 'lower' levels, so that "tiering can potentially save time and resources" (Therivel 2004 p. 13). In California, for example, the SEA experience has been that certain aspects of *subsequent* projects have not then needed to be assessed in detail (see João 2005).

2. What the effect will be of the proposed system of administrative arrangements chosen to implement SEA, e.g. pre-screening and screening?
Screening is an established process in both SEA and Project EIA. In the case of SEA, screening is the process of separating the strategies with potential significant (i.e. important) environmental impacts (positive or negative), from those that would not benefit from the SEA process. Very importantly, it is possible that responsible authorities might not need to perform SEA according to the law but might still choose to carry it out as part of "best practice". This has happened in the past – for example Scottish Power carried out an SEA because their environmental managers felt it was a good idea to do so – see Marshall and Fischer 2005. I would argue therefore that the

results of screening only need to be checked if a responsible authority is screening a strategic action *out* of the SEA process. This would be an obvious way to simplify the screening process – only include the consultation authorities if you are taking a particular strategy, plan or programme out of the SEA process.

What is also crucial to consider is that the key aim of SEA is to *improve* the proposed strategic action. This means that even if a strategic action has positive impacts, carrying out SEA could enhance the strategic action even further. It is important that screening does not only select strategic actions that have potential negative impacts that need *mitigating* but also selects strategic actions that have potential positive impacts that could be *enhanced.*

3. Is the provision of a SEA Gateway within the Executive a sufficient method of managing the SEA process?

Before deciding if the SEA Gateway, an independent SEA body or other mechanism is a good way to manage the SEA process, it is necessary to discuss what does it mean "to manage the SEA process". What main tasks need to be performed? I suggest that the following needs to be done:

a) Administration of screening.
b) Administration of scoping.
c) Prepare guidance.
d) Record examples of good practice.
e) Be an arbiter in cases of dispute.
f) Audit the quality of Environmental Reporting.
g) Monitor SEA effectiveness and procedures overall.
h) Monitor the appropriateness and quality of the alternatives considered.
i) Support linkages between SEA and Project EIA.
j) Check that monitoring that is proposed by the Environmental Report is done.
k) Make sure that monitoring that was not proposed by the Environmental Report but is later found to be necessary is also carried out.
l) Ensure that mitigation and enhancement measures are put in place as was suggested in the Environmental Report.
m) Ensure that data is gathered that was missing so data gaps in future SEA work are solved.
n) Decide what to do when monitoring shows that things are not going according to plan and negative environmental effects are larger than expected or positive effects are smaller than it was hoped.
o) Create and maintain a database for data that can be used for SEA purposes – this would grow as monitoring increases.
p) Create and update list of targets and thresholds to be used in the SEA process.
q) Review the quality of the strategic actions themselves – are they achieving what they proposed? Are mitigation and enhancement measures really working?

As defined at the moment, the SEA Gateway at the Executive is doing less than half of these tasks. The current SEA Gateway role could be extended to cover the rest of the tasks. Alternatively, an additional system could be put in place that might involve consultation authorities, an accredited list of SEA experts (this could include both academics and practitioners – this system is used in the Czech Republic and in Belgium with good success), and/or an independent SEA body.

A key task of the SEA Gateway at the Executive is to monitor the appropriateness and quality of the alternatives considered, and to help linkages between different sectors and different levels of decision-making (e.g. local, regional, and national) in terms of alternatives. It is important to note that alternatives at the strategic level are not just about different types of development which achieve the same objective (e.g. produce energy by coal or by wind), they are also about demand reduction (e.g. reduce the demand for energy production by insulating buildings). In other words true SEA alternatives are also about *obviating development*, e.g. making new power stations redundant (João 2005). However, responsible authorities only need to consider alternatives that they are responsible for. Unfortunately this will eliminate many innovative alternatives that might be better at achieving the aims of the strategic action (e.g. the sensible alternative of insulating buildings to make more energy available might not be the responsibility of a energy producer and therefore will slip through the gap). This is when the SEA Gateway at the Executive could have a crucial holistic view of what is the best alternative (or combination of alternatives) and help the dialogue between different sectors and different levels of government.

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Environment and Rural Development Committee

20 April 2005
ERD/S2/05/11/1e

THE SCOTTISH PARLIAMENT

ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE STAGE 1 CONSIDERATION OF THE ENVIRONMENTAL ASSESSMENT (SCOTLAND) BILL

Wednesday 20th April 2005

Written Submission

David Tyldesley MIEEM, FRTPI, FRSA (see Annex)
Principal of David Tyldesley and Associates, Environmental Planning Consultancy

Introduction

1. I welcome the opportunity to assist the Committee in its examination of the Bill. I commend the initiative of the Scottish Ministers in seeking to exceed minimum compliance with the SEA Directive. The Ministers wish to lead in Europe on SEA. To the best of my knowledge, Scotland is leading in Europe; it was the first country to produce guidance to local authorities and others, following the making of the SEA Directive[1]. The Scottish Executive, in my opinion, has the most positive approach to SEA of any EU Government that I am aware of. However, to stay in front Scotland must continue to work hard to extend and develop SEA. The Bill is a major step to achieve that aim.

2 I would like to comment on the following issues that are relevant to the Committee's deliberations:

- Whether the Bill will achieve the aims of the Scottish Ministers;
- How SEA fits in with other environmental law;
- Resources;
- Engaging the community in SEA;
- The SEA Gateway; and
- The need for a register of Pre-Screening Decisions.

3. To keep this submission succinct I do not enlarge on any of the points at length, but I would be pleased to justify or explain any of the matters in this submission.

Whether the Bill will achieve the aims of the Scottish Ministers

4. The Bill should achieve the aims of the Scottish Ministers and fulfill their commitment in *A Partnership for a Better Scotland*. It extends the range of plans and programmes (and strategies) beyond that required to be assessed by the Directive. The critical sub-section is 5(4). The system of exclusion, exemption and screening is not easy to follow at first reading but essentially I see the effect of the Bill would be to require the assessment of all strategies, plans and programmes unless they are:
    - Absolutely excluded (S.4 (3)); or
    - Excluded by a reference in the Bill that could be amended by Order (individual schools and those specified in an Order (S.6 (1) & (2)); or
    - Exempt by pre-screening (S.7); or
    - Exempt by screening (S.8).

[1] Thérivel, R., Caratti, P., do Rosário Partidário, M., Theodórsdóttir, A. H., and Tyldesley, D. *Writing strategic environmental assessment guidance* Impact Assessment and Project Appraisal, volume 22, number 4, December 2004. ISSN 1461 5517

5. The criteria that would be applied by the Ministers in making an Order under S.6, and by Responsible Authorities in pre-screening opinions, are logical[2]; no effect or only a minimal effect could not be a "significant effect", within the meaning of the Directive. However, when considering the effects that should trigger the need for assessment, the Directive refers to both significance and likelihood. Thus, a further criterion may need to be added after Section 6 (3)(b) " *in relation to the environment or that any potentially significant effect would be unlikely*." This is a matter for lawyers to consider, but I believe that likelihood of effects will, in practice, prove to be as important a consideration in pre-screening opinions and Order making as the scale of the effect.

How SEA fits in with other environmental law

6. As a key mechanism helping to deliver better environmental protection and more sustainable development, SEA fits well with other environmental law. This is not surprising because much of Scotland's environmental law has been introduced to give effect to EC Directives and these, in turn, are meshed and coordinated at European level. There are particularly strong links between SEA and

- Environmental Impact Assessment of plans and projects[3]; and
- Assessments required of plans and projects likely to have a significant effect on a Natura 2000 (European) Site[4].

The Bill does not inhibit these links, or those with other environmental protection legislation[5]. The interaction with the UK-wide SEA Regulations should be adequate.

Resources

7. To date, SEA has been used almost entirely for assessing planning authorities' development plans. The SEA process fits well with the pre-existing procedures for development plan production. No new steps in development plan making were required in order to accommodate SEA. Rather, it was a matter of ensuring that existing consultation, publicity, examination, modification and adoption stages of development plans were adapted to embrace the requirements of SEA[6].

8. However, one of the inevitable effects of extending the application of SEA is that it will involve a number of public bodies that may not have such detailed procedures for plan making as planning authorities. It is almost certain that they will need to introduce new steps in their procedures to ensure compliance with the provisions set out in the Bill. It will also require flexibility and innovation in its application to ensure it is fit for purpose at all levels of strategies, plans and programmes, from the National Planning Framework to small-scale local strategies.

9. If the objectives of the Scottish Ministers are to be achieved through the Bill and the assessments that flow from it, the system must be properly resourced. SEA obviously incurs additional costs, as recognised in the Bill's Explanatory Notes, but the

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[2] The Bill S.6 (3)(a) and (b) and S.7 (1)(a) and (b)
[3] For example, the Environmental Impact Assessment (Scotland) Regulations 1999
[4] Regulation 48 The Conservation (Natural Habitats &c) Regulations 1994
[5] For example, integrated pollution prevention and control
[6] Scottish Executive Development Department, Interim Planning Advice *Environmental Assessment of Development Plans* August 2003

estimates in the Financial Memorandum are too low. The tasks of drafting an adequate scoping report (S.15-16), environmental report (S.14) and the statement on adoption of the plan (S.18(3)), are underestimated. The Memorandum estimates costs for only one report in the process. The idea that the SEA process as a whole would only produce a single report of 20 pages is neither realistic nor compliant with the Bill[7].

10. Time will tell, but in addition to the Environmental Report, a scoping report is likely to be 5 - 20 pages long, depending on the plan. I am not aware of a published SEA adoption statement, but to fulfill its statutory purpose [8] it is going to have to be a significant document, another 5 - 10 pages. Whilst I accept that production costs of SEA documents do not amount to a high proportion of the overall anticipated costs of SEA, it is nevertheless significant to most public bodies. The underestimation of the scale of documentation leads me to think that the scale of the effort required to produce it has been similarly underestimated. There is an urgent need for examples to be made available of reports that the SEA Gateway and Consultation Authorities have found to be acceptable, together with their comments on those reports.

11. However, the additional cost of extending SEA to other plans and programmes is likely to be far lower than the cost of remedying environmental harm that could be caused by not assessing the plans and programmes. At the very least it is a low-cost environmental insurance policy that will lead to better informed decisions.

Engaging the community in SEA

12. In my view engaging the community in SEA will be the biggest challenge in the application of SEA to a wider range of plans and programmes for two reasons. Firstly, SEA does not particularly inspire public interest! Secondly, some Responsible Authorities will not have such effective procedures for community involvement as planning authorities, where most of the SEA experience lies.

13. I do not have a panacea for the problems of community involvement, but I can foresee it will be very difficult for some Responsible Authorities to engage the public meaningfully. I have thought about whether there is anything that the Bill might do to assist or recognise this. My only suggestion is that consideration could be given to adding after "*the consultation authorities*" in both cases in S.16 (1) "*and any other organisations with a particular interest in the environment of the area that may be affected*". It can be argued that such bodies could respond to the general publicity under the provisions of S.16 (2), but I wonder if this explicit reference may be a better reflection of Article 6.4 of the Directive, and a more enticing invitation to be involved. It is probably what a good authority would be doing anyway.

The SEA Gateway

14. I strongly support the principle of the SEA Gateway. It is an innovative, simple and effective idea. From a small number of enquiries I have made, I understand it is working efficiently. The lack of a similar system in England is a considerable impediment to the efficient operation of the SEA (and in England the Sustainability Appraisal) process.

[7] Explanatory Notes, para 62, Financial Memorandum
[8] The Bill section 18 (3)

15. However, not surprisingly at this stage, it is largely reactive. I am in favour of the Gateway being much more proactive. Like the majority of consultation respondents, I am against the establishment of a single body overseeing and auditing all SEA processes and products. However, the Gateway could be more than the coordinator of the Consultation Authorities and point of contact for Responsible Authorities. The Gateway should be the home of a body of expertise, employing (or being able to direct enquiries to) people with practical experience of SEA - a sort of SEA helpline. I understand this role is already beginning to develop, if it is, I am not surprised because it is necessary. The Gateway should also:

- Encourage capacity building and quality to speed the SEA process;
- Be the main catalyst for the development of good practice including examples of scoping reports, environmental reports and SEA adoption reports;
- Monitor the provision of training for those involved in SEA;
- Motivate research, for example, into better predictive techniques and mitigation measures; and
- Provide advice to Responsible Authorities on how and where to find baseline data (without handling the data themselves in any way)

16. The Executive is seeking to achieve some of these things as cost mitigation measures[9]. However, these measures should be the explicit responsibility of the Gateway, so that there is a single, integrated, proactive, coordination of all aspects of SEA nationally, with a sound knowledge base. I urge the Ministers to ensure that the Gateway is able to give positive direction for all of these vital elements of SEA. Indeed, I urge that the Gateway is given statutory status and statutory roles in the Bill.

The need for a register of Pre-Screening Decisions

17. There is a need for a pre-screening process. The process in S.7 has the potential to achieve its objective. I cannot suggest a different process that would be better and proportional to the purpose. However, I believe that the Scottish Ministers' power of Direction (S.11) and the possibility of judicial review, are not a complete response to the potential for non-compliance. If, as I assert, costs are significant, there could be a tendency for public bodies to seek to avoid SEA where they can. It is essential to monitor pre-screening decisions, not merely to audit the compliance of the Responsible Authorities but, more importantly, to provide consistency of decisions across Scotland. It would also be an invaluable check on the efficacy of the Act.

18. The Bill should require Responsible Authorities to send all of their pre-screening decisions, within say 14 days, to the SEA Gateway for entry on a central register. This could be done entirely electronically, it would take very little time and incur negligible costs. The register could be on the Gateway web site and open for all to see. It would be a transparent and effective quality control. It would be a huge advantage to Responsible Authorities when they are making pre-screening decisions (e.g. they could see how similar plans and programmes had been judged by other Responsible Authorities). It would allow periodic review to check the implementation and efficacy of the Act. The register is needed from the outset.

[9] The Bill's Explanatory Notes, para 94 Financial Memorandum

Annex

Introduction to the Witness

I am David Tyldesley. I am a Chartered Town Planner, a Member of the Institute of Ecology and Environmental Management and a qualified Landscape Architect. I had 17 years experience in local government planning and environment departments, before establishing the practice of David Tyldesley and Associates 21 years ago. With my Associate Ian Collis, I worked with the Gordon District Council and SNH on the first SEA of a development plan in Scotland (1995). As a result of that project we prepared a draft guide to the SEA process. It was used, informally, by the Scottish Office and the Executive to help planning authorities develop SEA. I wrote the first published guidance for development plan assessments in Ireland, which was published by the Heritage Council and supported by the Department of Environment and Irish Planning Institutes. I was the lead author of the Scottish Executive Development Department's Interim Planning Advice to Planning Authorities on the *Environmental Assessment of Development Plans* (August 2003). With Dr. Graeme Purves and others of the Executive, I facilitated the SEA of the National Planning Framework for Scotland (2003-2004). I have been involved in the SEA or Sustainability Appraisal of over 70 plans of various kinds but mainly local authority development plans. I contributed to an international article describing the experience of drafting guidance for the SEA Directive with fellow authors of guidance for England, Iceland, the Lombardia Region of Italy and Portugal (2004 see footnote 1).

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Agenda Item 1

Environment and Rural Development Committee

20 April 2005
ERD/S2/05/11/1f

COSLA

Environmental Assessment (Scotland) Bill: COSLA Comments

INTRODUCTION

COSLA welcomes the chance to give evidence on the Environmental Assessment (Scotland) Bill to the Scottish Parliament's Environment and Rural Development Committee.

COSLA has no objections to the principles of Strategic Environmental Assessment (SEA), in terms of the original objectives as laid down by the European Directive. COSLA has been supportive of the need for environmental awareness, the need for renewable energy and the need to address waste management and recycling.

COSLA's member councils have done much to promote these issues and recognise their importance in terms both of sustainable development and their responsibility as service providers to their communities.

SUMMARY OF KEY POINTS

A summary of the key points of this submission are:

- Local authorities are taking positive action to protect and enhance the environment, while also delivering efficiency savings;
- The EU Directive already covers local authority development plans. These have the greatest and most direct effect on the environment. Extension of the regulation may, in comparison, add little of value to environmental protection;
- Extension of the regulations will be extremely resource and time intensive for local authorities;
- There is a lack of understanding across the public sector as to the full impact of Strategic Environmental Assessment.
- The resource implications are likely only to be fully realised after implementation, or by having a small number of comprehensive pilot projects. Indeed COSLA volunteered to help set up pilot projects, but the Scottish Executive's response on this proposal would have failed to fully test the proposed legislation;
- Strategic Environmental Assessment may divert resources from other initiatives, and delay environmentally beneficial plans, programmes and strategies;
- COSLA believes that since the legislation will apply to 'all new strategies, plans and programmes' the financial memorandum underestimates the costs to councils.
- COSLA recommends taking time to fully quantify the costs, and the practical implications of the Bill. An incremental and properly planned approach to extending SEA is required.

POSTITIVE ENVIRONMENTAL ACTION

Local Government is taking practical steps to protect and enhance the environment, not only for the benefit of wildlife and habitats, but because people deserve to live in a high quality environment. The health, community safety and economic reasons for looking after the environment are clear, but local authorities face the unenviable challenge of balancing positive action on the environment against the available resources.

Councils are taking up this challenge, and alongside delivering efficiency savings, are promoting initiatives such as:

- Energy conservation and efficiency in council buildings and domestic homes;
- Renewable generation of heat and power, including biomass and small scale wind;
- Local delivery of the aims of the Scottish Biodiversity Strategy;
- Countryside access and core path planning; and
- Eco-schools.

Local Authorities are also dealing with the huge rise in the number of wind farm planning applications, and in the last year have had to adapt to the new duties of the Land Reform (Scotland) Act 2003 and the Nature Conservation (Scotland) Act 2004.

COSLA strongly supported the Nature Conservation (Scotland) Act 2004 and has also been actively working with Scottish Natural Heritage, Scottish Environment LINK and the British Geological Survey to prepare new guidance for local authorities on local biodiversity and geodiveristy sites.

We feel however that the new legislation on Strategic Environmental Assessment, although admirable in its intentions, is unnecessary and will in fact impede practical action on the environment by diverting resources, and slowing the implementation of positive plans, programmes and strategies.

RESOURCES

COSLA finds it difficult to understand the need to place an unnecessary burden on local authorities, by demanding that they undertake resource intensive exercises to determine environmental impact, not just on issues such as development planning, but on a range of other policies and strategies, where the processes suggested run at odds with the need to deliver services efficiently and effectively, a demand placed on local authorities by Ministers.

Councils are reporting to COSLA that they are finding it difficult to estimate the extent of financial impact that the proposed legislation would have on their ability to deliver council services, except to say it would be substantial.

There is extreme concern at the lack of financial resource and guidance by the Scottish Executive to deal with this legislation in the manner that it is intended. It goes without saying, therefore, at the very least in the short to medium term, there will be

- Delays to the timing of plans, programmes and strategies;
- The need for an extensive staff training programme to conduct and evaluate SEAs;
- A requirement to set up a corporate environmental database;
- The need to buy in information and expertise; and
- A requirement for the allocation of additional resources to cover extended public consultation.

COSLA PROPOSED PILOT PROECTS

COSLA has tried to make these concerns known to the Minister for Environment and Rural Affairs on a number of occasions, and indeed COSLA suggested to the Minister that it would be helpful if a pilot exercise be carried out to determine the impact of this proposed legislation on local authorities and demonstrate both the ability to deliver the terms of the proposals, while identifying key issues that would cause problems in terms of delivery. It would seem, however, that the interpretation of this proposal by the Executive has taken the pilot process along a route that will not identify these issues. Additionally no offer of financial assistance has been made, in any way other than 'in kind', by the offer of access to external consultants to assess the work of those councils that have volunteered to take part in the exercise.

FINANCING THE LEGISLATION

The Scotland wide costs will be determined by the total number of SEAs conducted. Research carried out by the Scottish Executive estimates that approximately 94 to 156 assessments per year are likely. However, these figures are subject to an error of 25%, which could lead to between 66 and 195 annual assessments. This is a very large discrepancy and makes any quantification of the costs difficult.

Based on this research the total costs for all assessments in Scotland would range from £3.3 million to £5.5 million (+/- 25%). Since there is an assumption, which has yet to be countered, that all local authorities will prepare a similar number of assessable plans, then this cost will be divided equally between all 32 councils. It is considered likely that due to the frequency of plan preparations a figure to the higher end of the range will a reasonable approximation. This could lead to a figure of £172,000 (+/- 25%) for each Local Authorities, and is largely independent of council size and geography. This would therefore have a disproportionate effect on smaller councils.

There is also an issue of staff time. Local authority staff will have to be moved from other responsibilities, at least temporarily, to deal with SEA. Councils have very limited staff capacity and any movement of staff may be to the detriment of other essential work, and may require additional 'back filling' of vacated posts.

Given that all local authority projects and plans will be subject to SEA, it is the belief of COSLA, as stated in answer to question 2 of the response on the financial memorandum , that the above figures are likely to be an underestimate and do not reflect the real costs for councils.

For example the Scottish Executive figures suggest that on average, local authorities can expect to conduct around 5 SEAs per year. A response from one council suggests that the true figure may be even double this number i.e. 10 SEAs per year. This could lead to a figure of £344,000 (+/- 25%). COSLA would suggest that even this larger estimate may be an underestimate, as despite best efforts, there is still a lack of understanding of the full implications of this Bill across the public sector.

There is sufficient uncertainty to warrant increased research, and time for comprehensive pilot proposed by COSLA and detailed previously. To rush into extending SEA beyond the regulations is likely to strain all responsible authorities considerably, where a more measured approach will, in the long run, deliver the same environmental benefits but allow all those affected to adapt.

COSLA therefore recommends taking time to consider the full implications of this Bill, before going beyond the regulations. This will ensure that Scotland can become a 'World Leader' in Strategic Environmental Assessment, but in a measured and steady way.

CONCLUSION

In conclusion, COSLA acknowledges that the EU Directive on SEA is in place and that planning authorities are already subject to the provisions under secondary legislation. However, it would have been better for all concerned, including the consultative authorities, which have their own issues regarding resources to deliver the relevant aspects of this proposed Bill, if more time had been taken to assess the impact that the Minister's proposals would have, notwithstanding the Partnership Agreement. In essence, 'legislation' has already been laid on this matter, being the secondary legislation to implement the EU Directive.

It is COSLA's view, that, given time to develop expertise and with sufficient additional resources to do so, local authorities would be able to implement SEA, to the extent that Scotland could be seen as a 'world leader'. However, this will only happen if more time is given to develop the proposals and the best way to do that, would be for the Minister and the Scottish Executive to engage with local authorities more fully on this matter, rather than rush to deliver something that will have little or no value to the work of the public sector and will simply increase paperwork for the sake of it.

Local authorities are extremely positive about the environment, but are placed in the difficult position of delivering efficiency savings, implementing new legislation while also attempting to protect and enhance the environment. COSLA therefore asks that the Environment and Rural Development Committee helps produce legislation that is practical and deliverable. As stated previously time must be taken to build understanding, full quantify the costs, and to allow councils to adapt to any extension of the EU Directive. If this can be done then Scotland will become a 'world leader' in Strategic Environmental Assessment, but it will have been achieved in a way that adds true value to environmental protections, and which lessens the implications for local authorities.

COSLA looks forward to building on this response in positive discussion with the Environment and Rural Development Committee on Wednesday 20 April 2005.

FOR FURTHER INFORMATION CONTACT

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13 April 2005

Agenda Item 1

Environment and Rural Development Committee

20 April 2005
ERD/S2/05/11/1g

ENVIRONMENTAL ASSESSMENT (SCOTLAND) BILL

The Society of Chief Officers of Transportation Scotland (SCOTS) welcomes the opportunity to give evidence on the Environmental Assessment (Scotland) Bill.

General Comments

Whilst supporting the implementation of SEA legislation in Scotland, it is clear that with the introduction of the SEA (Scotland) Bill the impact on service delivery for most, if not all, Responsible Authorities will be significant. Both Responsible Authorities and Consultation Authorities will have to find ways of incorporating these new duties into their existing management frameworks with no additional resources to train Officers in the administrative and environmental reporting processes for SEA. This is notwithstanding the lost opportunity of staff time.

It must be said that SEA approach is not new to transport and transportation. DMRB and STAG have incorporated environmental appraisals as a fundamental part of the process. What this new approach offers is transportation's environmental awareness in sureness to other plans. What is not clear is the weighting of "importance" that is given against other measures of eg the economy, accessibility and land use.

Having undertaken a scoping exercise to determine the number and type of strategies, plans and programmes that Council's have that are likely to be subject to the Directive and forthcoming Bill, an average of over 50 were identified. We therefore still have particular concerns that without additional funding for Responsible Authorities to deal with the legislation, the Bill could prove onerous in terms of resources and the time it will take to complete assessments for individual strategies, plans and programmes, in addition to the actual plan making process. The Executive also states in the consultation document that most bodies will have to raise their game to be able to implement SEA which "will inevitably raise costs" (P1, Para 5). If the Executive want to adopt an approach to SEA that minimises bureaucracy and develop a streamlined system as outlined in the consultation document, then financial assistance to Responsible Authorities will be required as they will be placed at the heart of SEA and seen as the key element to ensuring that the SEA process in Scotland is run effectively and efficiently.

Other key issues include:

There is no mention of the term 'Strategy' in the wording of the Bill itself. This needs to be included and explicitly defined as the key aim of implementing the SEA Bill is to extend the scope of the Directive to include strategies. Clear examples should also be given to enable Responsible Authorities to work to the same meaning of the statement and ensure uniformity in the screening process across the country.

In the Scottish Executive's previous consultation for the SEA Directive (Para 4.69) it was estimated that the annual impact on the Scottish Executive could be in the order of £2.6 m - £5.5 m (depending on whether Environmental Reporting is carried out in-house or contracted out). The estimated cost to the rest of the public sector could be at least double that. It was stated that a full Regulatory Impact Assessment would be produced by the Scottish Executive to help estimate in monetary terms the impact of the Directive and the Bill. There is no mention of this Assessment in the SEA Bill document, yet it is vital that Responsible Authorities are made aware of its results and outcomes. Has the Regulatory

Impact Assessment been carried out and if so what were its findings? If it has not been under undertaken, why not and when is the Executive likely to carry this work out?

We have been asked to consider amongst the general topic three distinct questions viz:

- What the effect will be of extending the implementation of strategic environmental assessments to cover a broader range of plans and programmes than is applicable to the rest of the UK?

  To quote G B Shaw

  "Some people see things that are and say why -
  I see things that never were and say why not?"

  We should all strive for the highest level and not the lowest common denominator therefore in the context of the rest of the UK - why not?

  That is the good news.

  The financial impact on the Councils are extremely difficult to predict however it is estimated that the costs associated with environmental reporting alone could be at least £0.5 m if contracted out to consultants. Additional costs will apply to procedural requirements of the legislation in respect of screening, scoping, publicity and consultation. Both administration and environmental reporting costs will have to be met out of existing Council budgets.

  I have attached a draft structure proposed within my own Council which attempts to minimise financial costs as far as possible particularly in respect of environmental reporting. Getting back to the "positive" mind set the application of SEA is something that good practice processes have already been doing albeit in a less structured manner.

- What the effect will be of the proposed system of administration arrangements chosen to implement this obligation eg pre-screening and screening?

  Pre-screening is a key element. The process should be included to act as an 'environmental check' to assist in reducing the burden for Responsible Authorities and Consultation Authorities by removing from the process those plans and programmes that are likely to have no or minimal environmental significance. It will also serve the dual purpose of raising awareness of wider environmental issues across the Responsible Authority.

  Whilst agreeing that the central administrative gateway should be hosted/ located in the Scottish Executive there is a body of opinion that a specialist team comprising members of the Consultation Authority together as a single gateway would provide the most efficient system for Responsible Authorities. This team would receive plans, collect statistics but also be able to offer specialist advice required by the Responsible Authorities without hopefully a complex bureaucracy.

- Is the provision of a Strategic Environmental Assessment (SEA) Gateway within the Executive a sufficient method of managing the SEA process?

  I have dealt with most of this question above however would summarise as follows as suggestions to improve administration and operation of SEA.

1 Ensure the SEA is suitably financed. Provide Responsible Authorities and the SEA Gateway with sufficient funding to ensure efficient implementation of the new Bill.

2 Provide further guidance on pre-screening screening and monitoring including benchmarks for measuring significant environmental effects to ensure consistency of approach throughout Scotland.

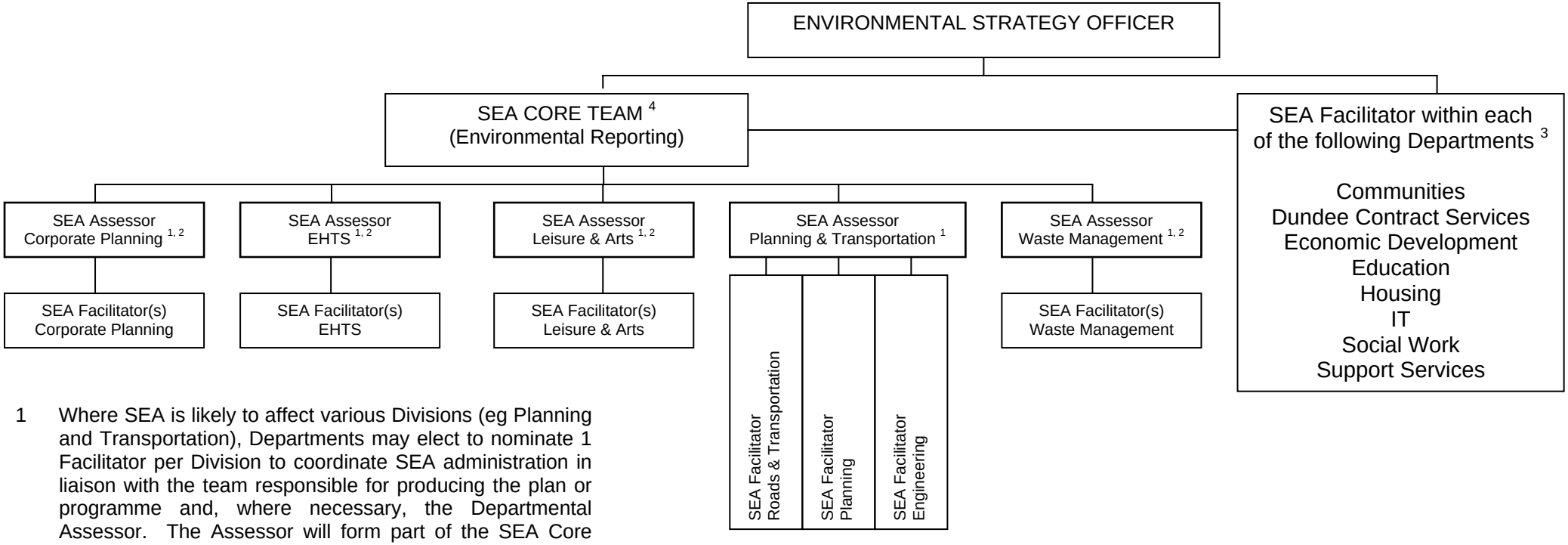
3 Minimise bureaucracy with the SEA Gateway by adopting a streamlined administration structure with representatives from Consultation Authorities who can reply directly to Responsible Authorities.

4 Minimise delays to the plan making process by establishing a time period for commencing pre-screening and screening as soon after plan preparation begins. Establish a reasonable time period for determination procedures by Scottish Ministers.

5 Standardise formats for press notices to facilitate publicity and consultation across Scotland.

6 Guidance is required on how any weightings will be applied in relation to Scottish Transport Appraisal Guidance.

PROPOSED SEA IMPLEMENTATION STRUCTURE FOR DUNDEE CITY COUNCIL



1 Where SEA is likely to affect various Divisions (eg Planning and Transportation), Departments may elect to nominate 1 Facilitator per Division to coordinate SEA administration in liaison with the team responsible for producing the plan or programme and, where necessary, the Departmental Assessor. The Assessor will form part of the SEA Core Team for Environmental Reporting purposes.

2 Where SEA is likely to affect plans and programmes produced by only one Division, each of these identified Departments will be required to nominate one Assessor to form part of the SEA Core Team for Environmental Reporting purposes. Departments may also wish to elect a separate Facilitator, responsible for co-ordinating administration in liaison with the "responsible team". If Departments choose to have only an Assessor, then this person would be required to co-ordinate the administration and form part of the Core Team for Environmental Reporting.

3 Departments that produce plans and programmes less frequently should nominate a Facilitator who will coordinate SEA administration at Departmental level and be pulled into the Core Team as appropriate to contribute to Environmental Reporting.

4 For each Environmental Reporting exercise, a chair should be identified from outwith the Department responsible for producing a plan or programme.

Note

Facilitators will monitor draft Committee Reports to ensure that relevant plans and programmes do not escape the SEA process. Where SEA Core Departments do not have a Facilitator, the Assessor will adopt this role.

SSI Title and No:	The Agricultural Subsidies (Appeals) (Scotland) Amendment Regulations 2005, **(SSI 2005/117)**		
Laid Date:	3rd March 2005	**Responsible Minister:**	Ross Finnie, Minister for Environment and Rural Development
SE Contact:	Robert Lamb, ext. 3111		
Standing Order:	10.4 Subject to negative procedure within 40 days		

RECOMMENDATION

Lead Committee:	Environment & Rural Development	**Other Committees:**	
Clerk Contact Room & No:	Mark Brough 85240	**Clerk Contact No:**	
Reason:	These Regulations amend the Agricultural Subsidies (Appeals) (Scotland) Regulations 2004 to extend coverage of the appeals procedure for farmers penalised in relation to their EU subsidy claims to the Single Farm Payment Scheme and other support schemes established through the 2003 reform of the Common Agricultural Policy.		

Time Limit for Parliament to Deal with Instrument	28th April 2005	**1st SLC Meeting** **SLC reporting deadline**	15th March 2005 23rd March 2005
Lead Committee To Report By:	25th April 2005	***Other Committees To Report to the Lead Committee:**	

SSI Attached	**X**	**Draft Motion Attached if Required**		**Date Motion and Designation Form E-Mailed to the Bureau**		**Laying Clerk Advised of Designated Lead Committee**	

*** 10 days before the lead committee reporting date. "Other" committees may wish to negotiate timing of their report with the lead committee.**

SSI Title and No:	The Inshore Fishing (Prohibition of Fishing for Cockles) (Scotland) Amendment Order 2005, **(SSI 2005/140)**		
Laid Date:	8th March 2005	**Responsible Minister:**	Ross Finnie, Minister for Environment and Rural Development
SE Contact:	Gabby Pieraccini, ext. 44756		
Standing Order:	10.4 Subject to negative procedure within 40 days		

RECOMMENDATION

Lead Committee:	Environment & Rural Development	**Other Committees:**	
Clerk Contact Room & No:	Mark Brough 85240	**Clerk Contact No:**	
Reason:	This Order amends the definition of an area in which fishing for cockles is prohibited in the Solway Firth, as presently defined in article 2 of the Inshore Fishing (Prohibition of Fishing for Cockles) (Scotland) Order 1995.		

Time Limit for Parliament to Deal with Instrument	3rd May 2005	**1st SLC Meeting** **SLC reporting deadline**	14th April 2005 23rd March 2005

Lead Committee To Report By:	25th April 2005	***Other Committees To Report to the Lead Committee:**	

SSI Attached	**X**	**Draft Motion Attached if Required**		**Date Motion and Designation Form E-Mailed to the Bureau**		**Laying Clerk Advised of Designated Lead Committee**	

*** 10 days before the lead committee reporting date. "Other" committees may wish to negotiate timing of their report with the lead committee.**

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SSI Title and No:	The Common Agricultural Policy Single Farm Payment and Support Schemes (Scotland) Regulations 2005, **(SSI 2005/143)**		
Laid Date:	10th March 2005	**Responsible Minister:**	Ross Finnie, Minister for Environment and Rural Development
SE Contact:	Brian Endicott, ext. 46546		
Standing Order:	10.4 Subject to negative procedure within 40 days		

RECOMMENDATION

Lead Committee:	Environment & Rural Development	**Other Committees:**	
Clerk Contact Room & No:	Mark Brough 85240	**Clerk Contact No:**	
Reason:	These Regulations make provision for the administration of Council Regulation EC/1782/2003 and Commission Regulations EC/795/2004 and EC/796/2004 in relation to establishing a new system of direct support schemes which came into force on 1st January 2005 under the Common Agricultural Policy.		

Time Limit for Parliament to Deal with Instrument	5th May 2005	**1st SLC Meeting** **SLC reporting deadline**	15th March 2005 16th April 2005

Lead Committee To Report By:	2nd May 2005	***Other Committees To Report to the Lead Committee:**	

SSI Attached	**X**	**Draft Motion Attached if Required**		**Date Motion and Designation Form E-Mailed to the Bureau**		**Laying Clerk Advised of Designated Lead Committee**	

*** 10 days before the lead committee reporting date. "Other" committees may wish to negotiate timing of their report with the lead committee.**

Subordinate Legislation Committee

Extract of 11th Report, 2005

The Committee reports to the Parliament as follows—

1. At its meeting on 22nd March 2005 the Committee determined that it did not need to draw the attention of Parliament to the instruments listed in the Annex to this report on any of the grounds within its remit.

2. The report is also addressed to the following committees as the lead committees for the instruments specified:

Environment and Rural Development	the Common Agricultural Policy Single Farm Payment and Support Schemes (Scotland) Regulations 2005, **(SSI 2005/143)**

The Common Agricultural Policy Single Farm Payment and Support Schemes (Scotland) Regulations 2005, (SSI 2005/143)

Regulation 2(1) contains a definition of "farmer". Paragraph (3) of that regulation also contains a definition of "farmer" but in different terms. The Committee asked the Executive for clarification.

The Executive explains (see appendix) that the inclusion of farmer in regulation 2(1) was an oversight which will be remedied at the earliest opportunity. **The Committee reports the Regulations as being defectively drafted in this respect.**

The Committee asked why it was considered necessary for regulation 2 to include a generic provision relating to the interpretation of Community instruments at paragraph (5), in addition to the definition of various community instruments at paragraph (1).

The Executive explained that there were a number of amendments to Commission Regulation 794/2004 agreed by the Commission but not yet published, and the policy intention was to provide for the implementation of these EU rules as fully as possible.

The Committee is not content with the Executive's response on this point. As regulation 2(1) already specifies the amendments, and further amendments will be made as required, the Committee considers that regulation 2(5) is both contradictory and generally misleading. **The Committee therefore draws the Regulations to the attention of the lead Committee and Parliament on the grounds that they are also defectively drafted to this extent.**

APPENDIX

THE COMMON AGRICULTURAL POLICY SINGLE FARM PAYMENT AND SUPPORT SCHEMES (SCOTLAND) REGULATIONS 2005, (SSI 2005/143)

On 15 March 2005 the Committee asked:

The Subordinate Legislation Committee today considered the above instrument and seeks an explanation of the following matters.

Regulation 2(1) contains a definition of "farmer" and paragraph (3) of that regulation also contains a definition but in different terms. The Committee therefore asks for clarification.

The Committee asks for explanation as to why it was considered necessary for regulation 2 to include a generic provision relating to the interpretation of Community instruments at paragraph (5), in addition to the definition of various Community instruments at paragraph (1), also containing detailed citations of amendments to those instruments.

The Scottish Executive Rural Affairs Department responds as follows:

The first question
The Executive thank the Committee for drawing this error to their attention. The inclusion of a definition of "farmer" in regulation 2(1) was an oversight which will be remedied at the earliest opportunity. SEERAD are considering further amendments in relation to recently agreed Commission Regulations which are due for publication, which should provide a convenient opportunity.

Although the word "Article" has also been omitted from regulation 2(1), the intention was for the definition of "farmer" throughout the Regulations with the exception only of regulation 27 to be as stated in regulation 2(3). Although the inclusion of the definition of "farmer" in regulation 2(1) duplicates and may draw the attention of the reader from the accurate drafting in regulation 2(3), the Executive considers that the Regulations read together with Council Regulation 1782/2003 as referred to in both regulation 2(1) and (3) would have to be interpreted as intended to refer to the definition of "farmer" which appears in Article 2(a) of that Council Regulation.

If the provision in regulation 2(1) casts doubt on the operative reference to "farmer" in regulation 27(4), where the definition in regulation 27(6) should have been clearly attracted, it is submitted that there is no doubt in practice. Regulation 27(4) saves the effect of regulation 12 of the 1996 Regulations on delivery notification for non-food raw materials, for declarations made or information provided under that provision after 18th April 2005, in light of the revocation of the Arable Area Payment Regulations 1996 (SSI 1996/3142, as amended) by this instrument. The definition of "farmer" in regulation 27 refers to that in the 1996 Regulations which in turn refers to the definition in Council Regulation (EC) 3508/92 (O.J. No. L 355, 5.12.1992, p. 1) on the subsidy

Integrated Administration and Control System which has been replaced by the definition in Article 2(a) of Council Regulation (EC) 1782/2003 (O.J. No. L 270, 21.10.2003, p. 1) as referred to in regulation 2(3) of this instrument. The new definition of "farmer" is wider in scope, as instead of referring to an agricultural producer it refers to a person exercising an "agricultural activity" as broadly defined in Regulation 1782/2003. There will however be no difference here in who is caught, as the saving provision will apply to producers under the 1996 Regulations, and the new wider definition of "farmer" means there would be no adverse impact on producers or farmers who should be able to rely on regulation 27(4).

The second question

Many of the provisions of the EC Regulations relevant to the subsidy schemes to which this instrument relates are directly applicable in domestic law as a matter of EC law. In addition, there were a number of amendments to Commission Regulations 795/2004 (O.J. No. L 141, 30.4.2004, p. 1) and 796/2004 (O.J. No. L 141, 30.4.2004, p. 18) agreed by the Commission but not yet published, the intention was to provide for the implementation of these EC rules as fully as possible. For instance, Commission Regulation (EC) No. 394/2005 amending Regulation 795/2004 was published in the Official Journal of the European Union on 10 March 2005 (O.J. L 63, p.17), coming into force the day after the Regulations were made. That Regulation will not on that basis be covered by the effect of this instrument under regulation 2(5), but the intention would have been to relate the provisions of these Regulations to such instruments if they had effect when the Regulations were made.

Care was however taken to list all the amendments which had effect in EC law as appropriate in the body of the instrument, and other relevant amending EC instruments will be added by amendment as appropriate.