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The Amended European Environmental Impact Assessment Directive: UK marine experience and recommendations

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ABSTRACT

Environmental Impact Assessments (EIAs) are a key legislative requirement used to ensure sustainable development. A notable example of the enabling legislation is the European Union Environmental Impact Assessment Directive (2011/92/EU). In the 25 years since its implementation it has been revised, most recently in 2014, with amendments to accommodate policy, legal and technical changes. The 2014 amendment to the EIA Directive is reviewed here in the marine context with areas identified where the Directive and its implementation may still be deficient. This arises from the experience of the authors of reviewing EIAs, and our recommendations are mainly that standardised guidance and approaches should be applied for comparability. These recommendations have general relevance to all EIA practitioners, not just marine, and to environmental assessments within and beyond the EU.

1. Introduction

The widespread importance of the ecosystem services and societal goods and benefits provided by the environment has resulted in legislation being implemented to provide environmental protection; the Environmental Impact Assessment (EIA) Directive is one such legal instrument (Fischer, 2016; Fischer et al., 2016; Guerra et al., 2015; Jha-Thakur and Fischer, 2016; Jones and Fischer, 2016; Elliott and Whitfield, 2011). The EIA process was created to determine the potential adverse or beneficial environmental effects of a project or development while also considering scientific, political, social and economic factors prior to and informing the consent process. The European Union (EU) EIA legislation sits within a complex and multisectoral governance regime (Boyes and Elliott, 2014, 2015). It has subsequently evolved into an integrating process linked to relevant directives, legislation and policies which can be documented, for example measures under the Water Framework Directive (WFD).

EIA has been a requirement in EU law since 1988 and, since its implementation, it has undergone four amendments (i.e. 1997, 2003, 2009 and 2014), the most recent (2014/52/EU) entered into force on May 15th, 2014 (to be transposed into law by Member States by May 16th, 2017; hereafter referred to as the 'Amended EIA Directive'). The EU Directives are legally binding in all Member States and then implemented locally within the state by regulations interpreted by the competent bodies. Boyes and Elliott (2014, 2015) show the governance hierarchy within Europe and give an example of the administrative bodies for one of the states.

The most recent amendment aims to simplify the assessment process and reduce the administrative burden without weakening existing environmental safeguards. It also aims to harmonise the regulatory framework between Member States and increase consideration of resource efficiency, climate change and biodiversity, and disaster prevention in the assessment process. In the UK, the Directive has been transposed into UK law through the Marine Works (Environmental Impact Assessment) Regulations 2007 for marine projects and the Town and Country Planning Act 1990 for terrestrial projects. Both set out the requirements for an EIA using the criteria as set out in the Directive in their respective environments including those projects for which an EIA is mandatory and those projects where an EIA may be optional depending on the risk to the environment. For the UK, whilst the Directive is legally binding, it is for the Regulators to consider how to implement it. This is ultimately for the responsible and devolved Governments (Department for Environment, Food and Rural Affairs (Defra) via the Marine Management Organisation (MMO) in England, the Welsh Government via Natural Resources Wales in Wales, Marine

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Scotland for Scotland and the Department for Environment, Food and Agriculture (Defa) in Northern Ireland). For terrestrial projects, the regulators are the Local Planning Authorities. For both terrestrial and marine projects, the Regulators also have statutory consultees that aim to ensure a minimal risk to the environment (including humans). In the UK, the overall framework for EIA is similar irrespective of the size of project although, as expected, the level of detail differs with size of project such that the effort required is proportionate (see below).

As advisors to the regulators, here we review the Directive to determine if the amendments are sufficient to address apparent gaps when reviewing EIAs such as lack of information, receptors omitted, different approaches being used and lack of transparency in the assessment process for determining the spatial and temporal magnitude of impacts.

2. Methods

The authors have experience in reviewing Environmental Statements across a wide range of human activities in the marine environment such as port developments, aggregate extractions, offshore wind farms. Hence, the emphasis of this review is on the marine environment but where applicable also highlights relevance to terrestrial and freshwater environments. We examine the Amended EIA Directive by reviewing the amendments and determining whether these address existing historic shortcomings. We categorise the amendments based on our own individual interpretations and then agree a common set of 'categories' within which these amendments lay and where previous versions of the Directive or its implementation have had shortcomings.

The authors reviewed the amendments to the Directive and by consensus placed the changes into 10 categories: one stop shop; limited understanding of cumulative impacts; consistency; baseline information; consultation and timing; lack of alternatives; monitoring; quality of information; EIA in sustainable development, and inclusion of climate change impacts. Paragraphs 1–42 of the Amended Directive were administrative explanations giving the rationale for the amendments and although these were considered when reviewing the amendments, these were not specifically included in the review.

We discuss these categories and with our experience include which amendments would benefit the EIA process and which still had major shortcomings and/or limitations; this shows which of these could potentially benefit from further amendment or guidance from the European Commission.

Following the categorisation of the amendments with our experience of Environmental Statements (ES) we note that there are still some areas absent from the EIA Directive that could benefit the EIA process: the use of frameworks and guidance; the development of new software and tools in carrying out EIA; the incorporation of ecosystem goods and services, and applying an ecosystem approach.

These categories are further sub-divided into those that would benefit the EIA process (Section 3), and those which are still considered as shortcomings and/or limitations and which could potentially benefit from further amendment or guidance (Section 4). Following the categorisation of the amendments using our experience of reviewing over 200 English and Welsh marine Environmental Statements over the past 15 years, we note that there are still some areas that were omitted from the Amended EIA Directive that could benefit the EIA process.

Using marine applications, this review considers whether the Amended EIA Directive has resolved any of these issues. If so, we show the implications for developers and regulators which will be relevant to other jurisdictions that apply similar processes for environmental management similar to EIAs, e.g. the USA and the National Environmental Policy Act of 1969 (Jay et al., 2007), to improve the EIA process and its outputs.

In this review, we provide an overview of the major amendments and suggest future improvements to the Directive and its implementation.

3. Amendment to the EIA Directive

All legislation evolves and is amended as the limitations are realised through practice and precedence. This review examines the most recent amendment, discusses the potential repercussions, and provides practical recommendations for further improvements to the Directive or its future implementation. The recommendations here are generally applicable to all EIAs in allowing for a more consistent approach whilst recognising that for different environments, projects and geographic locations, there will be different regulators, consultees and stakeholders.

3.1. Consultation timing and transparency

Article 6, Paragraph 6.7 of the Amended Directive states "*The time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(1) shall not be shorter than 30 days*." This, amongst the other amendments, emphasises the proviso that there should be pre-application consultation and that the ESs can be reviewed by the public.

The voluntary (i.e. scoping) (Wood et al., 2006; Kennedy and Ross, 1992) and mandatory (i.e. application) (Gray et al., 2005) parts of stakeholder (those likely to be impacted by the development) involvement have long been a part of EIA. However, in recent years there have been significant moves towards increasing the quantity and quality of public (anyone interested in the development) participation through international conventions and agreements (Bell and McGillvray, 2008). The Amended EIA Directive emphasises public participation for three main reasons: to obtain public input into decisions by providing information to the public; filling information gaps; preventing information contestability and allowing problem solving and social learning; secondly, to share decision making with the public to reflect democratic principles and enhance representation (Mostert, 2003), and thirdly to alter the distribution of power and structures of decision making, by involving and reducing marginalised groups (O'Faircheallaigh, 2010).

Public participation in EIA is now considered an intrinsic part of the process and should influence all aspects of the project (Saarikoski, 2000). This is especially true for nationally important projects, for example, in the UK Nationally Significant Infrastructure Projects (NSIP) whereby the Planning Act 2008 requires early consultation with stakeholders and regulators (e.g. Part 5, Chapter 2, sections 48 and 49 Planning Act 2008 (Available from http://www.legislation.gov.uk/ukpga/2008/29/contents, accessed 4th January 2016)). It is a recommendation, but not mandatory in the Amended EIA Directive, to engage with the Regulators and its consultees prior to submitting an application i.e. during the scoping stage (Amended EIA Directive, Paragraph 29). If there is no early engagement in the process, issues and conflicts may occur between the developer and stakeholders as well as with the Regulator. This can result in delays, for example, due to the collection of inappropriate baseline data, objections, new/missing data, or additional receptors being identified late in the process.

Consultation currently mostly occurs after fundamental decisions has been made by the developer and there is an inherent risk of antagonism between the different groups; this could be avoided by early consultation (i.e. during the scoping stage) with