Consultation on implementing European Directive 2014/52/EU

Open Spaces Society

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1 About us

1.1 The Open Spaces Society was founded in 1865 and is Britain's oldest national conservation body. It campaigns to protect common land, village greens, open spaces and public paths, and people's right to enjoy them.

2 Our response to the consultation

2.1 The society is responding to the Government's Joint Technical Consultation on Environmental Impact Assessment (EIA) (planning changes to regulations on forestry, agriculture, water resources, land drainage and marine works), published on 14 December 2016.

2.2 The society is particularly concerned by the proposal in question 16 of the consultation to retain the existing exemption from environmental impact assessment (EIA) of works on common land, but also wishes to comment on the changes proposed at questions 10 and 11.

3 Questions 10 & 11: definition of 'cultivated'

3.1 At present, land is within scope of EIA where it has been uncultivated for 15 years and improvement is intended. The consultation proposes to change the definition of 'cultivated' so that cultivation by physical means would 'include all agricultural activities that break the soil surface', and so that cultivation by chemical means would include 'the application of…soil enhancers'.

3.2 We are concerned that these changes inappropriately raise the threshold for the type of uncultivated land projects which fall within the scope of EIA. For example, land might be construed to be chemically cultivated because of the occasional application of manure or even manuring through grazing. And land might be construed to be physically cultivated (*i.e.* because of 'agricultural activities that break the soil surface') simply because a wild flower seed mix had been drilled rather than broadcast. The proposed definitions therefore unacceptably relax the criteria. In the absence of more coherent proposals, no change should be made.

4 Question 16: common land exemption

The exemption for common land

4.1 The consultation paper proposes to retain, but update, the present exemption of works on common from the requirement for EIA, because such works may require consent under (now) section 38 of the Commons Act 2006 ('the 2006 Act' — but formerly, section 194 of the Law of Property Act 1925). It states that applications for consent to such works, "will be determined by the Planning Inspectorate, on behalf of the Secretary of State, against the detailed criteria set out in section 39 of [the 2006] Act and in in accordance with the Defra's Common Land consents policy."

4.2 The Environmental Impact Assessment (Agriculture) (England) (No.2) Regulations 2006 (SI 2006/2522: 'the 2006 Regulations') give effect to the requirement for EIA for, *inter alia*, rural restructuring, in accordance with directive 2011/92/EU ('the 2011 directive'). Rural restructuring includes, broadly speaking, proposals to erect or dismantle extensive lengths of field boundary works (fencing, hedges, walls, ditches *etc*.), as well as proposals for reprofiling the land (*e.g*. moving earth around). The 2006 Regulations adopt thresholds for the purposes of rural restructuring: proposed works which exceed these thresholds must be screened to decide whether they require EIA. The thresholds adopted in the 2006 regulations are in Schedule 1: 4km of field boundaries, but 2km in a designated area (such as a national park or AONB).

4.3 Regulation 3(2)(f) of the 2006 Regulations exempts works which require consent under section 194 of the Law of Property Act 1925, the predecessor to section 38 of the 2006 Act. According to the explanatory memorandum to the 2006 Regulations (paragraph 7.13), this is because: 'The Regulations avoid overlap with similar regulatory regimes by specifically excluding work which is covered by other regimes: [including]…work on common land.' Regulation 3(2)(f) continues to have effect in excluding works which require consent under section 38 of the 2006 Act, by virtue of section 17(2)(a) of the Interpretation Act 1978 (references to repealed but substantially re-enacted legislation). It is this exemption which the consultation proposes to renew, but update by reference to section 38 of the 2006 Act.

4.4 Of the six exemptions from the EIA regime contained in sub-paragraphs (a) to (f) of regulation 3(2) of the 2006 Regulations, sub-paragraphs (a) to (d) relate to projects which fall within the scope of another domestic implementation of EIA: these are very obviously exempted to avoid duplication of EIA. Sub-paragraph (e) relates to hedges, but see paragraph 4.7 below. Sub-paragraph (f), which exempts works on common land regulated under section 38 of the 2006 Act, does not rely on any duplicated domestic implementation of EIA. So the exemption gives rise to the expectation that the section 38 process itself will either deliver an EIA-compliant regime, or a regime which is compatible with it.

4.5 Many proposed works on common land fall within the scope of rural restructuring contemplated by the 2011 directive: in particular, works for fencing of common land to constrain the movement of livestock. Moreover, the thresholds set out in Schedule 1 to the 2006 Regulations for the purposes of rural restructuring are such that many fencing projects will exceed the thresholds. The threshold of 2km of field boundaries in a designated area represents a grazing enclosure of, typically, no more than 25 ha, but often much less where the fencing pattern is convoluted or sinuous to meet local requirements. So fencing works on common land are often of a kind which exceed the Schedule 1 threshold. However, nothing in the section 38 consent process replicates the requirement for EIA of rural restructuring projects, and the society believes that the exemption in regulation 3(2)(f) of the 2006 Regulations is in breach of the 2011 directive, unless the section 38 process is fundamentally redesigned to comply with the requirements of the 2011 directive. The section 38 process is prescribed in regulations[1], and a redesign would require substantial amending regulations. The consultation paper does not contemplate such a possibility.

4.6 The consultation paper sets out at paragraphs 2.9–2.13 the steps involved in the EIA process. None of these features in the process under section 38 of the 2006 Act. Moreover, the decision-making process under section 38 is not the appropriate forum for a determination under the EIA process. Such a determination must be made in advance of the decision-making process under section 38: either the project will be subject to an environmental impact assessment, in which case, no decision should be made under section 38 until that assessment has been completed, or it will not, in which case, all parties to the application should be informed that the application has been screened out. It is unacceptable, and contrary to the 2011 directive, that in objecting to a section 38 application, no one, including the applicant, knows where the proposal stands in relation to the directive. The section 38 determination process is not a substitute for a screening decision, still less for an EIA where one should be carried out, and it is not compliant with the 2011 directive.

The exemption for hedgerow removal

4.7 We also question whether the exemption of the removal of hedgerows under the Hedgerows Regulations 1997 ('the 1997 Regulations'), which is mentioned in sub-paragraph (e) of regulation 3(2) of the 2006 Regulations, is also lawful, for the same reasons in relation to works on common land — because the 1997 Regulations do not themselves secure compliance with the requirements of the 2011 directive where the proposed removal of hedgerows would fall within the scope of the annexe III criteria. This exemption too should be revoked, so that any proposal for the removal of hedgerows exceeding the thresholds set

[1] The Works on Common Land, etc. (Procedure) (England) Regulations 2007 (SI 2007/2588).

out in Schedule 1 to the 2006 Regulations should be screened in the usual way, prior to an assessment by the local planning authority.

Conclusion to question 16

4.8 Our response to question 16 is therefore that we do not agree with the proposed change. We expect to see the exemptions in regulation 3(2)(e) and (f) of the 2006 Regulations revoked, and call for projects for works on common land and the removal of hedgerows to fall within the scope of the 2006 Regulations, and of the EIA regime, in the usual way.

The sensitive areas threshold

4.9 Finally, we note that the lower thresholds specified in Schedule 1 to the 2006 Regulations, which relate to 'sensitive areas', do not apply to sites of special scientific interest (SSSI). Around half of common land is designated as SSSI.

4.10 Paragraph 2(c)(v) of Annex III to the 2011 directive (as substituted by the 2014 directive, but in this respect, unchanged from the 2011 directive) requires that in setting thresholds, the member state must take into account, *inter alia*, "areas classified or protected under national legislation; Natura 2000 areas". But for the purposes of the thresholds in Schedule 1 to the 2006 Regulations, a lower threshold is set for 'sensitive areas' which comprise national parks, areas of outstanding natural beauty, and scheduled monuments. It is manifest that SSSIs should be treated as sensitive areas for the purposes of the application of thresholds in accordance with the intention of the 2011 directive, and bizarre that Natura 2000 sites (which are all designated as SSSIs) are not automatically treated as 'sensitive areas'. We note, by comparison, that SSSIs are designated as 'sensitive areas' for the purposes of the thresholds in Schedule 2 to the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999.

4.11 We therefore call also for appropriate amendment to regulation 5(7) so that the lower thresholds apply to SSSIs.

30 January 2017