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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Subordinate Legislation considered on 2 May 2017**



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# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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# Introduction

1. At its meeting on 2 May 2017, the Committee agreed to draw to the attention of the Parliament the following instruments—

Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017 (2017/113)

Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017 (2017/114)

Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (2017/115)

2. The Committee's recommendations in relation to the above instruments are set out in the following chapter of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out at the end of this report.

# Points raised: instruments subject to negative procedure

## Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017 (2017/113) (Environment, Climate Change and Land Reform)

### Purpose

4. The purpose of these Regulations is to amend and consolidate the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999 in order to implement provisions of Directive 2014/52/EU. That Directive amended Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.
5. The Regulations integrate environmental considerations into the preparation of projects related to the Scottish forestry system, with a view to reducing their environmental impact. This is achieved by requiring an Environmental Impact Assessment (“EIA”) in relation to qualifying developments.
6. The Regulations are subject to the negative procedure and come into force on 16 May 2017.

### Comment

7. Through correspondence with the Scottish Government, the Committee has identified drafting errors in the instrument which the Scottish Government has acknowledged. (See Annex A)
8. The Committee notes that there is an error of drafting clarity in regulation 14(4)(a). It would be clearer if the provision referred to the “date of receipt of the request”, rather than the “date of the request” as drafted. This is particularly the case when regulation 14(5) refers to the “date of receipt” and regulation 14(7) also refers to the “date of receipt” when cross-referencing to paragraphs (4) and (5) of regulation 14.
9. The Committee also notes that the Regulations could be clearer in respect of regulation 15(5)(a). Inserting the words “location and technical capacity” into regulation 15(5)(a) would more closely reflect article 5(2) of Directive 2011/92 as amended.
10. It is also the Committee's view that regulation 15(2)(a) should provide that a request for a scoping opinion of the Forestry Commissioners includes “a description of the location of the development”, in addition to the existing words “including a plan sufficient to identify the land”. This would ensure consistency with regulation 12(2)(b)(ii) and equivalent provisions in the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 considered at the Committee's meeting on 25 April 2017.
11. The Scottish Government intends to bring forward an amending instrument to rectify the errors identified.

### Recommendation

**The Committee draws the instrument to the attention of the Parliament under reporting ground (h) as the meaning of the following provisions could be clearer:**

- **Regulation 14(4)(a) refers to the “date of the request”, but it was intended to refer to the “date of receipt of the request”.**
- **Unlike article 5(2) of Directive 2011/92, as amended by Directive 2014/52/EU, regulation 15(5)(a) does not state that the “specific characteristics” of the project include its “location and technical capacity”.**

**The Committee also draws the instrument to the attention of the Parliament under the general reporting ground, on the basis that regulation 15(2)(a) is inconsistent with regulation 12(2)(b)(ii) and equivalent provisions in the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017. Regulation 15(2)(a) does not provide that a request for a scoping opinion of the Commissioners should include “a description of the location of the development”.**

**The Committee welcomes the Scottish Government’s commitment to bring forward an amending instrument.**

**Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017 (2017/114) (Environment, Climate Change and Land Reform)**

### **Purpose**

12. The purpose of these Regulations is to update and replace the Environmental Impact Assessment (Agriculture) (Scotland) Regulations 2006 and Part IV of the Environmental Impact Assessment (Scotland) Regulations 1999, in order to implement provisions of Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment.
13. The Regulations integrate environmental considerations into the preparation of projects in relation to agriculture, land drainage and irrigation projects with a view to reducing their environmental impact. Previously separate regimes for these areas have been combined under these Regulations.
14. The Regulations are subject to the negative procedure and come into force on 16 May 2017.

### **Comment**

15. The Committee has identified that the Regulations could be clearer, which the Scottish Government has acknowledged in its response to correspondence received from the Committee (see Annex B for further information).
16. Paragraph (1) of regulation 3 provides that the Regulations apply to any “project” in Scotland which is not exempt by virtue of paragraphs (2) to (4) of that regulation.



Regulation 2(1) defines “project”. This definition is used in many places throughout the instrument.

The definition is:

“project” means—

(a) the execution of construction works or other installations or schemes; or

(b) other interventions in the natural surroundings and landscape involving-

(i) the use of uncultivated land or semi-natural areas for intensive agricultural purposes,

(ii) restructuring of rural land holdings on agricultural land,

(iii) irrigation, or

(iv) drainage.”

17. The response from the Scottish Government has clarified that, in connection with paragraph (a) of the definition, it is intended to include the execution of construction works or other installations or schemes which involve (only) the uses listed at (i) to (iv) above. The definition might be read as meaning the execution of construction works or other installations or schemes, in general.
18. In addition, there is an instance of defective drafting as the definition of “scoping opinion” in regulation 2(1) includes an informal drafting comment which should have been omitted before the instrument was made.
19. The Scottish Government intends to bring forward an amending instrument to rectify these errors.

### **Recommendation**

**The Committee draws the Regulations to the attention of the Parliament under reporting ground (h) as the meaning of the definition of “project” in regulation 2(1), used throughout the Regulations, could be clearer.**

**The definition could more clearly provide that it includes the execution of construction works or other installations or schemes which involve:**

**(i) the use of uncultivated land or semi-natural areas for intensive agricultural purposes,**

**(ii) restructuring of rural land holdings on agricultural land,**

**(iii) irrigation, or**

**(iv) drainage,**

**rather than construction works or other installations or schemes in general.**

**The Committee draws the Regulations to the attention of the Parliament under reporting ground (i), as the definition of “scoping opinion” in regulation 2(1) appears to be defectively drafted. The definition includes an informal drafting comment, “[why not written statement]”, which should have been omitted before the instrument was made.**

**The Committee welcomes the Scottish Government’s commitment to bring forward an amending instrument.**

### **Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (2017/115) (Environment, Climate Change and Land Reform)**

#### **Purpose**

20. The purpose of these Regulations is to replace the Marine Works (Environmental Impact Assessment) Regulations 2007 insofar as they apply to Scotland in order to implement Directive 2014/52/EU in Scotland. That Directive amended Directive 2011/92/EU.
21. The Regulations integrate environmental considerations into the preparation of projects related to the Scottish marine area, with a view to reducing their environmental impact. This is achieved by requiring an EIA in relation to qualifying developments.
22. The Regulations are subject to the negative procedure and come into force on 16 May 2017.

#### **Comment**

23. Correspondence with the Scottish Government identified drafting errors in the instrument, which the Scottish Government has acknowledged (see Annex C for further information).
24. The Committee notes that the Regulations contain instances of defective drafting. Regulations 40 to 42 purport to revoke, and make transitional provision in respect of, the “2007 Regulations”, which are not defined. In addition, paragraphs 19 and 20 of schedule 1 and paragraph 3(k) of the table in schedule 2 refer to the “CCS Directive”, which is also not defined.
25. The Committee also notes that there are instances where the Regulations could be clearer. Regulation 11(2) refers to the “date of the request”, but it was intended to refer to the “date of receipt of the request”. It is also not clear if regulation 16(1) permits publication of an EIA report other than by notice and whether such an alternative method of publication would engage regulation 16(2).
26. There are also some relatively minor drafting errors in relation to cross-referencing in regulation 34(4)(b) and (c) and in the third line of regulation 41 where the word “regulation” is missing.
27. The Scottish Government intends to bring forward an amending instrument to rectify these errors.

## **Recommendation**

**The Committee draws the instrument to the attention of the Parliament under reporting ground (i), in respect of the following instances of defective drafting:**

- Regulations 40 to 42 purport to revoke and make transitional provision in respect of the “2007 Regulations”. However, there is no definition of this term.
- Paragraphs 19 and 20 of schedule 1 and paragraph 3(k) of the table in schedule 2 refer to the “CCS Directive”. However, there is no definition of this term.

**The Committee draws the instrument to the attention of the Parliament under reporting ground (h), as the meaning of the following provisions could be clearer:**

- Regulation 11(2) refers to the “date of the request”, but it was intended to refer to the “date of receipt of the request”.
- It is not clear if regulation 16(1) permits publication of an EIA report other than by notice and whether such an alternative method of publication would engage the requirements of regulation 16(2).

**The Committee draws the instrument to the attention of the Parliament under the general reporting ground, in respect of the following relatively minor drafting errors:**

- Regulation 34(4)(b) and (c) refer respectively to regulations 26 and 30, but were intended to refer to regulations 30 and 31 respectively.
- The word “regulation” is missing between the words “screening opinion under” and “10(1)” in the third line of regulation 41.

**The Committee welcomes the Scottish Government’s commitment to bring forward an amending instrument.**

# No points raised

## **Health and Sport**

Public Bodies (Joint Working) (Prescribed Local Authority Functions etc.) (Scotland) Amendment Regulations 2017 [draft]

Mental Health (Scotland) Act 2015 (Commencement No. 3) Order 2017 (2017/126)

## **Local Government and Communities**

Air Weapons and Licensing (Scotland) Act 2015 (Commencement No. 6 and Saving Provisions) Order 2017 (2017/119)

## **Rural Economy and Connectivity**

Disabled Persons (Badges for Motor Vehicles) (Scotland) Amendment Regulations 2017 (2017/118)

# Annex A

## Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017

(SSI 2017/113)

**On 19 April 2017, the Scottish Government was asked:**

28. Is it intended that reference is made in the second and third lines of regulation 14(4)(a) to the period of 90 days beginning with “the date of the request” when regulation 14(5) refers to 90 days beginning with “the date of receipt of the request” and regulation 14(7) also refers to the date of receipt when cross-referencing to paragraphs (4) and (5)?
29. For consistency with regulation 12(2)(a) (scoping opinions) of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (the “Electricity Works EIA Regulations”), regulation 8(2)(a) of those Regulations and regulation 12(2)(b)(ii) of this instrument (screening opinions), should regulation 15(2)(a) of this instrument also refer to “a description of the location of the development” generally, in addition to “including a plan sufficient to identify the land”?
30. Article 5(2) of Directive 2011/92/EU as amended by Directive 2014/52/EU refers to the factors the Commissioners must take into account before adopting a scoping opinion. One of those factors is the specific characteristics of the project, including *its location and technical capacity*. Regulation 15(5)(a) refers to the specific characteristics of the particular forestry project. However, unlike the equivalent regulation 12(5)(a) of the Electricity Works EIA Regulations, it does not refer specifically to “location and technical capacity”. Should regulation 15(5)(a) of the instrument refer to these particular characteristics to ensure consistency with the Directives and the Electricity Works EIA Regulations?
31. Paragraph 2(3)(a) of schedule 4 provides that the authorised person may enter the land to which the enforcement notice relates and take the measures (if any) set out in that notice. The list of measures is contained at paragraph 3(2)(a)-(d).

Is it intended that the authorised person should be able to enter the land and apply for EIA consent or discontinue work in relation to the EIA forestry project (sub-paragraphs (a) and (b))? Alternatively, should paragraph 2(3)(a) refer specifically to the measures at sub-paragraphs (c) and (d) of paragraph 3(2)?

32. Is any corrective action proposed in relation to the above matters?

**The Scottish Government responded as follows:**

1. In response to question 1, the Scottish Government intends that the period of 90 days mentioned in the second line of regulation 14(4)(a) of the Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017 (the “Forestry Regulations”) begins with the date of receipt of the request (with such date to be construed in accordance with regulation 14(7)) and considers that regulation 14(4)(a) could be clearer if the words “receipt of” were inserted before the words “the request” in the third line of regulation 14(4)(a).

2. In response to question 2, the Scottish Government agrees that for the purposes of consistency with the provisions cited by the Committee (and in relation to the minority of cases in which no prior screening opinion has been given) a requirement to include “a description of the location of forestry project” should be included in regulation 15(2).

3. In response to question 3, the Scottish Government agrees that regulation 15(5)(a) expressly transposes the requirement to consider the “specific characteristics of the project” but omits to expressly transpose the words “including its location and technical capacity”. We agree with the Committee that it would be beneficial for the requirement to consider both “location and technical capacity” to be made express in the Forestry Regulations.

4. In response to question 4, the Scottish Government confirms that an authorised person would not enter onto land for the purpose of discontinuing work on an EIA forestry project. We consider that this purpose is however excluded from the scope of the power at paragraph 2(3)(a) of schedule 4 of the Forestry Regulations by the introductory text of paragraph 2(3) which provides that: “Subject to sub-paragraph (4) where an enforcement notice served under paragraph 3(1) requires measures to be taken (other than the discontinuance of the forestry project)....”.

Paragraph 2(3)(a) also contains a power to enter land in order to carry out the measure listed at paragraph 3(2)(a) (i.e. to apply for EIA consent). This power reflects regulation 23(2) of the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999. The Scottish Government confirms that the taking of this power is intentional, to allow an authorised person to make an application for EIA consent where the notified person has failed to do so timeously. Access to the land is required for this in order to perform surveys etc. in connection with the application. No change to the provision is considered necessary.

5. The Scottish Government intends to bring forward an amending instrument to make changes to SSI 2017/101 and 2017/102 in light of comments on those instruments and intends that that amending instrument will deal with the matters raised in paragraphs 1 to 3.

# Annex B

## **Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/114)**

**On 20 April 2017, the Scottish Government was asked:**

1. Generally, paragraph (1) of regulation 3 provides that the Regulations apply to any “project” in Scotland which is not exempt by virtue of paragraphs (2) to (4) of that regulation. Regulation 2(1) defines “project”.

(a) Please initially clarify in relation to paragraph (a) of that definition in regulation 2(1) whether it is intended to include the execution of construction works or other installations or schemes which involve (i) the use of uncultivated land or semi-natural areas for intensive agricultural purposes, (ii) restructuring of rural land holdings on agricultural land, (iii) irrigation, or (iv) drainage?

(b) Given the significance of the definition to the Regulations, could its meaning be clearer in specifying the uses involved in “the execution of construction works or other installations or schemes” (rather than such works, installations or schemes in general), and that the definition can be properly read as meaning that those uses specified in the subparagraphs (i) to (iv) pertain only to other interventions in the natural surroundings and landscape as described in paragraph (b), and not to construction works or other installations or schemes as described in paragraph (a)?

2. There is an error in the definition of “scoping opinion” in regulation 2(1), which means “[why not written statement] the opinion of the Scottish Ministers as to the scope and level of detail of information to be provided in the EIA report”.

Was it intended to omit the bracketed words, or that the definition should be adjusted to refer to a written statement of the opinion?

3. Is any corrective action proposed in relation to the above matters?

**The Scottish Government responded as follows:**

1. We are grateful to the Committee for bringing this to our attention. The intention is indeed to include the execution of construction works or other installations or schemes which involve (i) the use of uncultivated land or semi-natural areas for intensive agricultural purposes, (ii) restructuring of rural land holdings on agricultural land, (iii) irrigation, or (iv) drainage. We agree the meaning could be clearer.

2. We are grateful to the Committee for bringing this to our attention. It was intended to omit the bracketed words.

3. The Scottish Government intends to bring forward an amending instrument to make changes to the Regulations as identified in paragraphs 1 and 2 above.

## Annex C

### Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/115)

On 20 April 2017, the Scottish Government was asked:

1. Is it intended that reference is made in the third line of regulation 11(2) to the period of 90 days beginning with “the date of the request” when regulation 11(a)(iii) refers to 90 days beginning with “the date of receipt of the request”?

2. Regulation 16(1) refers to publicising the EIA report “*by notice, in accordance with this regulation or in such other manner as they consider appropriate.*” Paragraph (2) sets out a list of requirements that the notice referred to in paragraph (1) must comply with.

(a) Could this provision be clearer? In particular, could there be different ways of interpreting this provision, including that the EIA report can be publicised:

(i) by notice that is not in accordance with regulation 16 if the Scottish Ministers consider that is appropriate (including, in particular, not being in accordance with regulation 16(2), albeit that appears to conflict with the first line of paragraph (2))?

(ii) in a manner other than by notice if the Scottish Ministers consider that is appropriate (in which case, it appears that paragraph (2) would not be engaged on the basis that it refers to a “notice” in the first line)?

(b) If the latter interpretation is intended, is it also intended that the requirements in regulation 20(1) and (2), insofar as they refer to “the notice published under regulation 16(1)”, would not apply if a manner other than a notice is used to publicise the EIA report?

(c) Please explain how regulation 16 (and, in particular, the wording quoted in italics above) complies with Directive 2011/92/EU as amended by Directive 2014/52/EU.

3. Is there an error in paragraph (4)(b) and (c) of regulation 34, having regard to paragraph (8) of the regulation? Reference is made to requirements under regulation 26 and 30. Should this refer to regulations 30 and 31?

4. Regulations 40 to 42 make various transitional provisions in relation to “the 2007 Regulations” and revoke those Regulations, and therefore include several references to “the 2007 Regulations”. Is it agreed there is an error as this term does not appear to be defined within the instrument, as the Marine Works (Environmental Impact Assessment) Regulations 2007?

5. In regulation 41 in the third line, should “regulation” be inserted between “screening opinion made under” and “10(1)”?

6. Is it agreed there is an error in relation to the references to “CCS Directive” in paragraphs 19 and 20 of schedule 1 and in paragraph 3(k) of the table in schedule 2, as it appears that “the CCS Directive” is not defined by the instrument or the primary legislation under which it is made?

7. Is any corrective action proposed in relation to the above matters?



**The Scottish Government responded as follows:**

1. In response to question 1, the Scottish Government intends that the period of 90 days mentioned in the third line of regulation 11(2) of the Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (the “Marine Works Regulations”) begins with the date of receipt of the request and considers that regulation 11(2) could be clearer if the words “receipt of” were inserted before the words “the request” in the third line of regulation 11(2).
2. In response to question 2, regulation 16(1) of the Marine Works Regulations closely follows the approach that was taken in regulation 16(1) of the Marine Works (Environmental Impact Assessment) Regulations 2007 (S.I. 2007/1518), as made. The Scottish Government’s intention was to reflect article 6.2 of Directive 2011/92/EU, as amended by Directive 2014/52/EU, by allowing some flexibility as to the means of publication of the EIA report rather than the content of the notice referred to in regulation 16(2). Following the Committee’s helpful comments we have considered the provisions further and accept that the drafting could be clearer notwithstanding that we consider that the provisions of article 6.2 of Directive 2011/92/EU, as amended by Directive 2014/52/EU, would assist in the interpretation of regulation 16(1). Accordingly, the Scottish Government intends to take forward an amending instrument which will omit “or in such other manner as they consider appropriate” from regulation 16(1) of the Marine Works Regulations.
3. In response to question 3, the Scottish Government agrees that there is an error in paragraph (4)(b) and (c) of regulation 34 of the Marine Works Regulations and that the references should be to regulations 30 and 31.
4. In response to question 4, the Scottish Government agrees that “the 2007 Regulations” should be a defined term.
5. In response to question 5, the Scottish Government agrees that in the third line of regulation 41 of the Marine Works Regulations, “regulation” should be inserted between “screening opinion made under” and “10(1)”.
6. In response to question 6, the Scottish Government agrees that “CCS Directive” should be defined in the Marine Works Regulations.
7. The Scottish Government is grateful to the Committee for drawing these matters to their attention. The Scottish Government intends to bring forward an amending instrument to make changes to the Marine Works Regulations as identified in paragraphs 1 to 6 above.

