Mr Graeme Day
Convener
Environment Climate Change and Land Reform Committee
Scottish Parliament
Edinburgh
EH99 1SP

Our ref: 2017/
18 December 2017

Dear Graeme,

The Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017

The above amending instrument was made on 14 December 2017 by the Scottish Ministers under sections 2(2) of the European Communities Act 1972, and section 36C(2) of the Electricity Act 1989. It is being laid before the Scottish Parliament today, and comes into force on 18 December 2017. I attach a copy of the instrument for your information.

This instrument is required to amend the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations (SSI 2017/101). SSI 2017/101 was laid before Parliament on 31 March 2017 and came into force on 16 May 2017. The amendment clarifies the procedure for dealing with applications to vary consents under section 36 of the Electricity Act 1989, and updates references to “the Conservation of Habitats and Species Regulations 2010” which have been revoked.

Without these amendments, SSI 2017/101 as drafted requires variations to section 36 consents under the Electricity Act 1989 to go through a full EIA assessment process even where there are no additional adverse environmental effects from the variation, therefore going well beyond the requirements of Directive 2011/92/EU (the “EIA Directive”). This process places a significant regulatory burden on both the Scottish Government as the competent authority and consultation bodies. The amendment brings SSI 2017/101 into line with the EIA Directive.
SSI 2017/101 requires an EIA to be carried out for applications for “EIA development” (as defined in Regulation 2(1) of SSI 2017/101). Regulation 2(2) of the amending instrument updates the definition of EIA development to make it clear that a variation application relates to EIA development only if the proposed variation is likely to have significant effects on the environment. This adopts the approach taken within the EIA Directive, and it means that changes to developments which do not have significant effects on the environment are no longer brought within the EIA process.

The other amendments within the instrument update associated provisions within SSI 2017/101 to ensure that this updated approach is reflected throughout the entire instrument (particularly in Regulation 28 and Schedules 1 and 2 which needed to be amended to effect this updated approach).

In addition, Regulation 2(4) and (6)(g) update references in SSI 2017/101 following the replacement of the Conservation of Habitats and Species Regulations 2010 by the Conservation of Habitats and Species Regulations 2017”.

I want to make clear that I regret the necessity to breach the 28 day rule, which ordinarily gives time for the Committee to consider the instrument. I acknowledge this is far from ideal, and the decision has not been taken lightly, but I consider it necessary to bring the instrument into force as soon as possible to unify the scope of the EIA process within the 2017 Regulations and the EIA Directive and have sought reassurance that this will not result in significant impacts on the environment. This change will reduce regulatory burden, and avoid potential additional delays to development of offshore wind development, and through doing so, it will allow the Scottish Government to support the unanimously approved greenhouse gas emission targets approved by the Scottish Parliament, as well as to deliver sustainable economic growth.

I would be pleased to meet with the Committee, at the earliest mutually convenient opportunity, to explain the rationale behind the necessity to breach the 28 day rule in these exceptional circumstances.

PAUL WHEELHOUSE
The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(1), section 36C(2) of the Electricity Act 1989(2) and all other powers enabling them to do so.

Citation and commencement

1. These Regulations may be cited as the Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 and come into force on 18th December 2017.

Amendment of the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017

2.—(1) The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017(3) are amended in accordance with paragraphs (2) to (6).

(2) In regulation 2(1) (interpretation)—

(a) for the definition of “EIA development” substitute—

“EIA development” means—

(a) in the case of an application for Electricity Act consent, development which is either—

(i) Schedule 1 development; or

(ii) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location; and

(b) in the case of a variation application, a proposed variation which is either—

(i) Schedule 1 development; or

(ii) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location;”;

(b) after the definition of “multi-stage consent” insert—

“proposed variation” has the meaning given in regulation 28(3);”;

(1) 1972 c.68. Section 2(2) was amended by the Scotland Act 1998 (c.46), schedule 8, paragraph 15(3), (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 (c.51) (“the 2006 Act”). Section 2(2) was also amended by section 27(1)(a) of the 2006 Act, and Part 1 of the schedule of the European Union (Amendment) Act 2008 (c.7). Functions relating to the assessment of the effects of certain electricity works projects on the environment are exercisable concurrently by the Scottish Ministers and Minister of the Crown by virtue of S.I. 1999/1750, article 3 and schedule 2.

(2) 1989 c.29. Section 36C was inserted by section 20(2) of the Growth and Infrastructure Act 2013 (c.27).

(c) in the definition of “Schedule 1 development” for “of a description set out” substitute—
“„, or a change to or extension of development, described”; and
(d) in the definition of “Schedule 2 development” for “of a description set out” substitute—
“„, or a change to or extension of development, described”.

(3) In regulation 28 (application of Regulations to variation applications)—
(a) for paragraph (1) substitute—
“(1) The Scottish Ministers must not—
(a) in relation to a variation application in respect of EIA development, vary the relevant section 36 consent; or
(b) when varying a section 36 consent, direct that planning permission is deemed to be granted under section 57(2) or (2ZA) of the 1997 Act in respect of EIA development,
unless an environmental impact assessment has been carried out in respect of the proposed variation and in carrying out such an assessment the Scottish Ministers must take the environmental information into account.
(1A) These Regulations, other than regulation 3, apply in relation to a variation application as they apply in relation to an application for consent under section 36 of the Electricity Act 1989 with the modifications specified in paragraph (2).”.
(b) in paragraph (2)—
(i) for sub-paragraph (a) substitute—
“(a) references (however worded)—
(i) to an application for a section 36 consent or Electricity Act consent are to be treated, other than in regulation 2, as if they are references to a variation application;
(ii) to an EIA application are to be treated as if they are references to a variation application for EIA development;
(iii) to the proposed development and to the development in respect of which the application for a section 36 consent relates are to be treated, other than in schedules 1 and 2, as references to the proposed variation to which the variation application relates; and
(iv) to the grant of consent are to be treated as if they are references to the variation of a section 36 consent;”;
and
(ii) in sub-paragraph (c)(i) after “proposed” insert, “varied”; and
(c) in paragraph (3) before the definition of “proposed varied development” insert—
“„proposed variation”, in relation to a variation application, means the proposed change to (including a proposed change in the manner or period of operation), or the proposed extension of, the development—
(a) authorised by the relevant section 36 consent; or
(b) in respect of which a section 57 direction has been given in connection with that relevant section 36 consent;”.

(4) In regulation 36(2) (co-ordination of assessments)—
(a) for “61” substitute, “63”; and
(b) for “2010” substitute, “2017”.

(5) In schedule 1 (descriptions of development for the purposes of the definition of “Schedule 1 development”)—
(a) for “The carrying” substitute, “1. The carrying”;
(b) after paragraph (2) insert, “or”;
(c) for “kilometres; or” substitute, “kilometres.”;
(d) for “(4) any” substitute, “2. Any”; and
(e) for “paragraphs (1) to (3)” substitute, “paragraph 1”.

(6) In schedule 2 (descriptions of development for the purposes of the definition of “Schedule 2 development”)—
(a) for “The carrying” substitute, “1. The carrying”;
(b) after paragraph (1) insert, “or”;
(e) for “paragraphs (1) or (2)” substitute, “paragraph 1”;

(f) for “For the purpose” substitute, “3. For the purpose”; and

(g) in the definition of “sensitive area” for sub-paragraph (c) substitute—

“(c) a European site within the meaning of regulation 8 of the Conservation of Habitats and Species Regulations 2017(4);”.

Authorised to sign by the Scottish Ministers

St Andrew’s House,
Edinburgh
2017

(4) S.I. 2017/1012.
EXPLANATORY NOTE

(This note is not part of the Regulations)


A variation application is an application to vary an existing consent granted under section 36 of the Electricity Act 1989 to construct and operate a generating station. Regulation 28 of the 2017 Regulations applies the 2017 Regulations to variation applications as the 2017 Regulations apply to section 36 consents, subject to certain modifications. The 2017 Regulations require an environmental impact assessment to be carried out for applications for EIA development. The changes made by regulation 2(2) to regulation 2(1) of the 2017 Regulations make it clear that a variation application relates to EIA development if the proposed variation is likely to have significant effects on the environment. A definition of “proposed variation” is included. Regulation 2(3) amends regulation 28 of the 2017 Regulations. New paragraph (1) makes it clear that, as for other EIA applications, Ministers may not grant a variation application (or make a related direction under section 57 of the Town and Country Planning (Scotland) Act 1997 unless an environmental impact assessment has been carried out. New paragraph (1A) operates to apply the 2017 Regulations subject to the modifications set out in regulation 28(2) (as read with regulation 28(3)) as amended by regulation 2(3)(b) and (c).

Regulation 2(5) and (6)(a) to (f) rearrange the structure of schedules 1 and 2 in consequence of changes to regulation 28.

Regulation 2(4) and (6)(g) update references following the replacement of the Conservation of Habitats and Species Regulations 2010 by the Conservation of Habitats and Species Regulations 2017.