

## Position of the Non Energy Extractive Industry Panel (NEEIP) on the proposal of the Commission amending Directive 2011/92/EU on environmental impact assessment

Brussels, 20 March 2013



### Key Messages

- Environmental Impact Assessment (EIA) is a key step in the permitting of industrial projects. Ensuring that the EIA Directive sets suitable requirements to assess projects likely to have significant environmental effects on the basis of a comprehensive, cost and time-conscious procedure is, therefore, of utmost importance.
- The Non-Energy Extractive Industry Panel (NEEIP) supports the objective to streamline EIA procedures and align the EIA Directive “with the principles of smart regulation”, as expressly stated in the proposal.
- However, a substantial number of new requirements introduced by the proposal run against these principles by making the EIA procedure disproportionately complex, costly, unpredictable and longer for both developers and public authorities.  
**If adopted as such, the proposal would put at risk a number of present and future industrial projects that would otherwise contribute to the concrete realisation of the EU’s widely stated Europe 2020 and industrial policy objectives.**
- **The NEEIP, after careful analysis of the proposal, calls for substantial changes in order to ensure that the proposed revision of the EIA Directive:**
  - Contributes to effectively streamline EIA procedures and will not result in unnecessary additional procedural steps;
  - Does not foster legal uncertainty, which is detrimental to investments and to a smooth administrative assessment, because of a retroactive application of the revised EIA Directive or future amendments by the European Commission on the basis of delegated powers.
  - Does not extend its scope and encroach upon other EU legislation by introducing inadequate and or unclear definitions, selection criteria or information to be provided which would undermine the consistency and predictability of the EU legal framework;
  - Provides for quality control mechanisms of environmental reports and monitoring obligations that are fit-for-purpose and do not overlap with existing EU requirements.

The NEEIP represents key actors in the Non-Energy Extractive (NEEI) sector, providing minerals that are vital to the EU economy and its sustainable growth as well as a substantial number of jobs across the EU.

The impact assessment carried out by the Commission found that a “large majority of [stakeholders] (>60%) disagrees with radical changes of the scope and structure of the Directive”<sup>1</sup>. The NEEIP supports a revision of the EIA Directive which would take into consideration this finding by:

### **1. Streamlining administrative procedures**

Unnecessary administrative burdens can deter companies from investing in projects which would foster a sustainable minerals supply from European sources. The NEEIP therefore supports the proposed “one-stop-shop or joint procedure” but rejects the mandatory scoping procedure for the following reasons:

➤ Support for the “one-stop-shop or joint procedure” – [New art. 2§3 of the EIA Dir.](#)

Implementing a one-stop-shop or a joint procedure when the requirement to carry out an EIA arises from different EU legislations would contribute towards streamlining administrative procedures. However, the choice for Member States to opt for either the one-stop or joint procedures must be preserved so as to maintain the **flexibility** needed for each particular assessment procedure.

➤ Opposition to the mandatory scoping – [New art. 5§2 of the EIA Dir.](#)

A mandatory scoping procedure will, in many cases, represent an additional procedural step in the EIA process. The need for a scoping procedure must be assessed on a case by case basis, taking into account the characteristics and size of projects. The NEEIP therefore believes that the scoping procedure should remain at the request of the developer as currently provided for in the existing EIA Directive.

### **2. Respecting legal certainty which is necessary for securing investments in Europe**

A predictable legal framework is key for investments in the NEEI sector whose planning horizon is usually much longer than that of other industries. The NEEIP is therefore firmly opposed to the following proposed changes which would foster legal uncertainty:

➤ Opposition to the retroactive application of the revised Directive – [Art. 3 of the proposal](#)

Article 3 of the proposal would require all project developers who started an impact assessment procedure **before** the transposition of the amended EIA Directive to comply with it if this procedure was not concluded at the time of transposition. In practice, this would mean that in most cases the EIA procedure will have to be started again from the beginning. Such a requirement is in contradiction with the basic principles of law, such as non-retroactivity and legal certainty and is, consequently, firmly opposed.

➤ Opposition to delegated powers – [New art. 12 a and b of the EIA Dir.](#)

The possibility for the Commission to modify annexes, in particular selection criteria applied by public authorities and information requested from developers, via delegated acts, would hamper further the predictability of the requirements stemming from the EIA Directive, as the latter, despite their legislative nature, could be amended at any time outside of the ordinary legislative procedure. The NEEIP is therefore firmly opposed to any delegated powers granted by the EIA Directive to the Commission.

### **3. Avoiding an inadequate extension of the scope of an EIA via substantial changes to definitions or criteria and information requested within the framework of EIA procedures**

The EIA Directive should respect its very purpose of assessing projects which bear **significant** environmental effects. The NEEIP objects to modifications which run against this objective by extending its scope via unsuitable requirements stemming from changes to definitions or to the EIA procedures.

➤ Opposition to the inclusion of “demolition works” – [New art. 1§1 \(a\) of the EIA Dir.](#)

The inclusion of “demolition works” in the definition of a project over-stretches the finding of the case-law [C-50/09](#) it allegedly implements, which refers to a specific implementation issue. It would be disproportionate to require an EIA for all demolition works. Consequently, we suggest deleting this change or alternatively clearly provide that, if kept, “demolition works” would only refer to projects (i) listed in annexes I or II, (ii) that are likely to have “significant environmental effects” and (iii) that a single EIA would be needed to assess both the project at stake and the demolition work potentially needed for its completion.

➤ Opposition to the extended screening procedure – [New art. 4 and Annexes II.A & III of the EIA Dir.](#)

The purpose of a screening procedure is to assess the need for an EIA on the basis of whether or not a project is likely to have significant environmental effects. While the NEEIP welcomes the objective of ensuring a consistent application of this procedure, it does not support the proposed changes. We are strongly opposed to the new Annex II.A (information requested from developers) and extended Annex III (selection criteria intended to public authorities) that would amount, in practice, to making an EIA before the EIA and thus **penalise more heavily SMEs** which usually undertake smaller-scale projects that are unlikely to trigger significant environmental impacts.

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<sup>1</sup> Commission Staff Working Paper, [Impact Assessment](#), section 2.3 “Consultation of interested parties”, p.2.

The NEEIP is of the opinion that explanatory guidelines on screening would be more suited to achieve the targeted objectives than the proposed changes to the Annexes II.A and III. Alternatively, those annexes must be amended to delete references to the information to be provided or selection criteria that are insufficiently clear or disproportionate at the screening stage.

➤ Opposition to the EIA procedure as amended – New art. 3 and Annex IV of the EIA Dir.

The NEEIP objects to a number of new assessment factors (article 3) and information requested from developers (annex IV) which are insufficiently clear, proportionate and predictable and would render the completion of an EIA extremely burdensome and uncertain for both developers and public authorities.

The NEEIP is more specifically opposed to the following assessment factors and information requested:

- ✓ **Biodiversity**, when this factor is defined by reference to the Natura 2000 Directives although not all projects are located in protected areas. Keeping the wording of current EIA Directive referring to “fauna and flora” should consequently be preferred to avoid any misinterpretation;
- ✓ **Climate change**, as a project developer cannot be realistically required to quantify their contribution to climate change, which occurs at a global scale. Keeping the reference to “climate” is more suitable;
- ✓ **Disaster risks**, as this factor overlaps with the requirements laid down by the Seveso III Directive;
- ✓ Multiple references to **land**, the **use of natural resources** and to requirements stemming from the proposed “**Soil Directive**”, despite the fact that land use remains a Member States competence subject to unanimity under article 192(2) TFEU;
- ✓ **Ecosystem services**, as this concept lacks a clear definition which is commonly agreed;
- ✓ Information requested concerning “**cumulative effects**” of a project stemming from imprecise and open-ended provisions that would cause considerable compliance issues as a developer usually has little information about effects of other projects or the relevant geographic scope.
- ✓ The requirement linked to **project alternatives**: the latter should be limited to “reasonable” alternatives “studied by the developer”, as the latter cannot be realistically required to consider project alternatives for which he/she has no competence or control, in particular, the project’s location determined by land use and property rights’ constraints and, in the case of mining, the location of a deposit. The NEEIP is firmly opposed to the “**baseline scenario**”, as defined in the proposal, obliging a developer to assess the likely evolution of the state of the environment implementation of the project he/she promotes.

➤ Timeframes for various steps of the EIA – New art. 4§6 (screening procedure) / art. 6§7 (public consultation) / art. 8§3 (development consent) of the EIA Dir.

The NEEIP welcomes the principle of timeframes which are likely to increase the predictability of EIA procedures. However, the derogations enabling to substantially extend the proposed timeframes are so widely worded that the latter will not be reasonable. The potential for dragging out various steps of the EIA is very real and may result in even longer EIA procedures. The proposed timeframes must be improved so as to effectively lay down reasonable timeframes and clearly define the possibilities for extending them.

#### **4. Ensuring quality control of environmental reports and monitoring obligations that are fit-for-purpose and do not overlap with other EU regulatory instruments**

Developers have a genuine interest in ensuring the high quality of environmental reports which are a success factor for development consent. The NEEIP objects to new requirements related to quality control or monitoring which would not be fit-for-purpose or would overlap with existing ones.

➤ Expert accreditation to prepare and verify environmental reports – New art. 5§3 of the EIA Dir.

Requiring environmental reports to be prepared and verified by accredited experts will not improve their quality but will certainly result in additional administrative and cost burdens. Mining requires highly specific knowledge where skilled professionals are either companies’ in-house EIA experts or experts working at a global level. A mine developer must have the opportunity of preparing the environmental report him/herself, when he/she has the in-house expertise required, or alternatively have recourse to external skilled professionals outside of an accreditation scheme. Providing that these reports must be prepared and checked by “technically competent experts” is more suited than an accreditation scheme.

➤ Up to date requirement at development consent stage – New art. 8§4 of the EIA Dir.

EIA processes are usually long. Requiring competent authorities to verify only at the end of the procedure if the information in the environmental report is “up to date” would be disproportionate for developers as they have little control on the timing/delays of an EIA procedure.

➤ Ex-post monitoring obligations – New art. 8§2 of the EIA Dir.

The NEEIP is opposed to the inclusion within the EIA Directive of ex-post monitoring obligations for projects which have significant environmental effects as compliance with stringent monitoring requirements is already provided for by other EU regulatory instruments, such as the Industrial Emissions Directive or the Mining Waste Directive. Monitoring obligations within the EIA would unnecessarily duplicate legislation.