

**IAIA Perth 2008 Track: Application of SEA and the EU SEA Directive**  
**“Using SEA to mainstream sustainable development: the Scottish example”**

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**Abstract**

Scottish strategic environmental assessment (SEA) encompasses all new public sector strategies, plans and programmes, whether statutory or voluntary, which are considered likely to have significant environmental effects. This extension of the EU SEA Directive has been designed to mainstream sustainable development in Scottish policy formulation. The paper considers current progress in this direction.

## **1. Introduction**

Legislative devolution in the 1990s created four different jurisdictions for the UK, which has resulted in four separate sets of statutory obligations under the EU strategic environmental assessment (SEA) Directive. The Scottish Parliament has competence in SEA for matters pertaining to purely Scottish issues. Any issue extending beyond its boundaries is covered by the UK Parliament, which legislates for both the English and UK-wide aspects of the Directive. Transposition of the Directive has been markedly different in these two legislatures.

The UK Parliament has confined itself to issuing a statutory instrument putting into effect the minimum requirements of the Directive at English and UK levels, and providing guidance to this end (ODPM, 2005; 2006). The Scottish Parliament quickly replaced its equivalent statutory instrument with primary legislation, the Environmental Assessment (Scotland) Act 2005, which Scottish Ministers described as “offering an opportunity for Scotland to be a world leader in SEA” (Jackson & Illsley, 2006: 369). This discarded the restrictions confining application of the Directive to statutory plans and programmes which ‘set the framework for future development’, and extended it to the preparation of all new public sector strategies, plans and programmes (SPPs), including non-statutory ones, that are considered likely to have significant environmental effects.

The Scottish Government has created an SEA Gateway to co-ordinate implementation of the 2005 Act. This unit collates and distributes the opinions of the Scottish statutory environmental consultees on SEA (Scottish Natural Heritage, Scottish Environment Protection Agency and Historic Scotland) on the screening and scoping of SPPs potentially liable to SEA, and provides an electronic toolkit to assist ‘responsible authorities’ undertaking SEA (SE, 2006). It also monitors compliance by responsible authorities with the terms of the legislation, including public consultation, and is funding a pathfinder project to identify good SEA practice (SEEG, 2005a).

The scope of its SEA legislation, together with the arrangements for overseeing its implementation, suggest that Scotland is better placed to monitor and evaluate the impact of SEA on public sector policy formulation and implementation than other parts of the UK, which currently have no co-ordinating body for implementing a Directive that exempts large areas of policy formulation from the SEA process. Our paper outlines some of the issues of principle and of practice that have emerged in Scotland under this regime.

## **2. Issues of principle: does SEA simply operationalise sustainability or provide an opportunity for reflexive governance?**

The minimalist approach taken by the UK government to the transposition of the SEA Directive implies that its primary purpose is to offer expert assessors the means to operationalise sustainability, using the technique to translate a concept agreed in principle into something workable in practice. Jackson & Illsley (2007: 614) contend that such an assumption conveniently masks a host of conflicting value judgements about the purpose of SEA, arguing that:

“[g]reater transparency about the ambiguous, constructed nature of the decision criteria in these expert-driven methodologies would do much to enhance the integrity of SEA practice. It would also imbue assessors with the professional credibility necessary to pursue a dialogue with stakeholders on ways of using the technique to reconcile alternative interpretations of sustainability”.

SEA can instead be seen as part of a process of reflexive governance, which envisages a shift from purely expert-driven methodologies towards “more inclusive ‘upstream’ processes of participatory deliberation” (Stirling, 2006: 260). The Scottish approach goes some way towards meeting this objective. SEA forms a major element in the delivery of an explicitly normative policy agenda, based on the concept of procedural and substantive environmental justice. Procedural equity is focused on the adequacy of “information and opportunities for people to participate in decisions about their environment”; its substantive component seeks to address “the distribution of the factors affecting environmental quality (both good and bad)” (SEEG, 2005: 2).

The comprehensive application of SEA to virtually all new Scottish public sector SPPs, regardless of whether these are statutorily required or simply voluntary, is intended to bring its public servants up to speed on the need for environmental proofing of their future proposals, and to mainstream the environment in Scottish public sector policy formulation. It is estimated that these provisions will more than double the number of Scottish SEAs undertaken annually, compared with the obligations under the SEA Directive (Jackson & Illsley, 2006). This additional commitment to formal public engagement in the environmental implications of Scottish governance allows SEA to assume a central role in discharging the procedural aspects of environmental justice.

The capacity to track the application of the technique throughout Scotland via its SEA Gateway enables the growing database of tiered assessments to provide a spatial and sectoral mapping of the environmental impacts of Scottish policy formulation. If this is then linked to an explicit mechanism for reconciling the conflicting values so revealed, SEA will form part of a reflexive approach to governance that addresses the substantive aspects of environmental justice. To date, however, there has been no attempt to flesh out the Scottish Government’s commitment to environmental justice by enunciating principles or opening a debate on what environmental rights, if any, should be embodied in efforts to promote a more equitable distribution of the environmental consequences of public sector actions.

## **3. Issues of practice**

Scotland is now in the fourth year of applying the Directive, and it is becoming possible to identify certain patterns. The first three years saw 56 Scottish responsible authorities commence 220 PPPs requiring an SEA. The Scottish SEA Gateway handled 350 formal consultations seeking screening and scoping opinions from the three Scottish statutory

environmental consultees (Deasley, 2007). While more than a third of the SEAs generated have been for statutory and non-statutory spatial plans, a wide range of other SPPs has been subject to SEA, including energy, transport, waste management, tourism, agriculture, forestry and fisheries. Many of these would not have triggered an SEA under the restricted scope of the Directive.

Plan type	Total	SEA applied	Screened out	Undetermined*
Planning framework	2	2	0	0
Scottish Planning Policies	3	3	0	0
Structure Plans	7	7	0	0
Local Plans	29	29	0	0
Supplementary Planning Guidance	12	8	4	0
Masterplans	21	10	8	3

**Table 1: Spatial plans submitted to SEA Gateway for consideration (by 31.7.2007\*)**  
(Source: Deasley, 2007)

*Table 1* analyses the screening of Scottish spatial plans over this period. Although statutory development plans would have come under the SEA regulations applied prior to the more comprehensive 2005 Act, Scottish Planning Policies, supplementary planning guidance and masterplans would in most cases have been exempt. Under the comprehensive definition applied in the 2005 Act, most of these SPPs have been determined as requiring an SEA. As a result, Scottish planning authorities now assume that the preparation of any SPP relating to land use is likely to include formal proofing for its environmental implications.

Moreover, the assessment approaches adopted prior to the transposition of the Directive will no longer suffice. Scottish planning authorities applying forms of environmental assessment from the 1990s up to 2004 frequently employed consultants to undertake a short retrospective exercise at the end of plan preparation: few had a dedicated assessment unit in-house (Esson *et al*, 2004). As Jackson & Illsley (2007: 613) observed of this practice:

“Stapling a full [SEA] onto a finalised version of a plan without undertaking even a prior scoping stage frustrates attempts to use [SEA] iteratively to make informed choices about the relative sustainability of options in the early stages of preparation... The absence of formal arrangements for consultation with outside bodies and failure to monitor subsequent implementation has reduced many pre-Directive [SEAs] to little more than self-administered ‘stamps of approval’ (2007: 613).

There has been a gradual recognition of the need to comply with the ‘front-loaded’ emphasis of the SEA Directive. This requires that responsible authorities should start applying the technique in the initial stages of plan preparation, when the strategic options have to be examined for their environmental implications. An example of good practice in this respect is provided by the SEA for the second Scottish National Planning Framework, which is currently out for consultation.

The Planning Directorate of the Scottish Government, as the responsible authority, has not only issued a comprehensive consultative SEA (SG, 2008a) along with a non-technical summary (SG, 2008c), but accompanied this with a supplementary report on its environmental assessment of strategic alternatives, undertaken at the outset of the preparation cycle (SG, 2008b). This identifies the strategic options considered as part of the early development of the new national planning framework, and identifies their respective environmental effects. The supplementary report then goes on to demonstrate how these

findings were used to inform the development of the preferred strategy underpinning the consultative version of the national planning framework, which the main part of the SEA Environmental report assesses in more detail.

By contrast, two development plans undertaken in Northern Ireland have recently been ruled legally non-compliant with the SEA Directive, *inter alia* because of the failure to apply the technique sufficiently early in the plan preparation process. In its judicial review of the process finding in favour of the plaintiffs, the High Court ruled that the development of the draft plans had reached an advanced stage before their environmental reports had been commenced, so there was no opportunity for the latter to inform the development of the former, as required under the Directive. Moreover, there had been a failure to undertake public consultation on the environmental report during the preparation of the plan, which is also required under the Directive (Current Topics, 2008).

This judgement has had widespread reverberations across the Scottish planning community, with one planning authority announcing that it was preparing to abandon all its current preparation of new development plans, on the basis that these could be exposed to the same legal strictures (PKC, 2008). With other Scottish planning authorities in a similar position, the Scottish Government has moved to grant them exemptions from the strict requirements of the Directive in respect of ‘front-loading’. Willingness to grant such exemptions leaves the current generation of development plans little better in terms of public consultation and early proofing of strategic options than their predecessors.

#### 4. Conclusions

Table 2 indicates that more than three-quarters of the Scottish SPPs subject to SEA at the start of 2008 have been initiated by Scottish local planning authorities, which have had the most extensive prior experience of subjecting their SPPs to some form of environmental assessment (Jackson & Dixon, 2006). In theory, they should have been well-positioned to incorporate the requirements of the SEA Directive with regard to front-loading of SEA during the early stages of plan preparation. However, as noted in Winter (2007), old practices with regard to stapling a retrospective environmental report on at the later stages of finalising an SPP have threatened the integrity of SEA, and called into question the Scottish government’s commitment to using this as a way of realising environmentally-just outcomes.

Responsible Authority	No. of SEAs being processed	% total
Scottish local planning authority	169	76.5
Scottish local transport authority	7	3.2
Other Scottish governmental body	47	21.3
<b>Total</b>	<b>221</b>	

Table 2: Scottish PPPs subject to SEA as of January 2008 (Source: SP, 2008)

It is to be hoped that the responsible authorities newly brought into the SEA net by the 2005 Act will take as their model the exemplar of the Scottish National Planning Framework. It is reassuring that the UK legal system is applying a strict interpretation of the need for compliance with the terms of the SEA Directive. In due course, as has happened with environmental impact assessment obligations, case law will inform up-dated guidance from the Scottish government, and the benefits of applying SEA to promote reflexive environmental governance will begin to be felt.

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