



**Non Energy Extractive Industry Panel (NEEIP) position on the report voted by the ENVI Committee on 11 July regarding the proposal amending Directive 2011/92/EU on Environmental Impact Assessment (EIA)**

August 2013

Since the publication of the proposal of the European Commission to revise the Environment Impact Assessment (EIA) Directive, the Non Energy Extractive Industry Panel (NEEIP) has consistently called for streamlining the current EIA regime in order to achieve a clear, more predictable and less costly legislation meeting high environmental standards. An effective EIA process is of utmost importance for the permitting of industrial projects which would contribute to the concrete realisation of the EU's widely stated Europe 2020 and industrial policy objectives.

The NEEIP therefore followed with a particular attention the adoption of the amended Report by the ENVI Committee of the European Parliament on 11 July 2013 (hereafter "the Report"). The latter expressly acknowledges the need for "the simplification of the procedures". Concrete examples of simplification provided by the Report relates to 1. the scoping procedure initiated at the request of the developer or of the public authorities, instead of being mandatory as proposed by the Commission and to 2. the so-called "one shop stop".

However, a vast number of amendments adopted by the ENVI Committee run against the objective of a simplification of the EIA procedure. The NEEIP is pleased to share, in advance of the forthcoming meetings of the Working Party on the Environment in the draft Council and of the on-going discussions in the European Parliament, its position on major concerns for the NEEI sector as identified in the Report. Some of the proposed amendments, did not undergo an impact assessment, therefore it is difficult to weight the potential costs and benefits of the proposed measures.

### **1/ Scope of the EIA Directive**

The NEEIP is firmly opposed to extensions of the scope of the EIA Directive proposed in the Report impacting the non-energy mineral resource industry, in particular the ones implying a modification of the annexes I or II, which were not amended in the Commission's proposal.

**Rationale:** The NEEIP is concerned that the extension of the annexes will not simplify, but on the contrary will result in difficult implementation by various Member States (MSs).

**NEEIP proposal:** Support the Commission and draft Council proposal which do not require the extension of the annexes I and II.

- **Inclusion of mining “exploration” activities into the scope of the EIA**

Amendments 36, 80 and 92 include non-energy mineral resource exploration within the mandatory scope of the EIA by respectively adding, on the one hand, “the research (...) of mineral resources” in the definition of a project and, on the other hand, “the research and exploration of minerals (...) by marine or fluvial dredging” in Annex II (screening procedure).

**Rationale:** Requiring a full EIA or even a screening procedure – whose prescriptive nature has been considerably extended in the Commission’s proposal – for exploration activities would be disproportionate in the light of their low environmental impacts and because exploration involves large investments without any revenue generated. Such a requirement would also be discriminatory as those activities are usually carried by SMEs or even by government geological surveys. Concretely, such a requirement would in the vast majority of cases simply rule out exploration activities in Europe, which would completely undermine one of the three main pillars of the European Raw Materials Initiative adopted by the Council. The research and exploration are not defined as project within the EIA directive therefore, should not be included in the EIA scope.

**NEEIP proposal:** Leave the exploration activities carried out by non-extractive energy sector outside the scope of EIA, as it is extremely costly and defines the potential for future extraction activities, therefore an EIA is undertaken in a later phase by the developer.

- **Inclusion of all “open-air” mining activities in Annex I (full EIA procedure)**

The current EIA Directive currently makes a consistent distinction between larger scale quarries and open-cast mining (>25 ha) listed in Annex I, point 19, subject to a compulsory EIA and smaller scale quarries and open-cast mining (i.e. <25 ha) listed in Annex II, point 2 (a), subject to a screening procedure. Amendment 79, initially proposed by the PETI Committee, and adopted by the ENVI Committee provides that all “Open-cast mining and similar open-air extractive activities”, regardless of the size of the operation, should be listed in Annex I and therefore subject to a compulsory full EIA procedure.

**Rationale:** Such a requirement is completely disproportionate and discriminatory as it would require an EIA procedure for very small-scale mineral resource extraction (<25 ha), which is, by nature, local – e.g. extraction of industrial minerals, usually carried out by SMEs and has a lower likelihood of significant impact on the environment.

**NEEIP proposal:** Leave the small scale open-air activities (<25 ha), within Annex II, as it defines the potential for extending future extraction activities. If the surface of the quarry differs, then application of the annexes is anyway re-assessed. In addition, the NEEIP opposes amendment 79, as its inconsistency prevents any predictability and clarity for the extractive industry.

- **Demolition works: inclusion of the demolition of projects listed in Annex I**

Amendment 80 adopted by the ENVI Committee suggests to require an EIA for the demolition of projects listed in Annex I, which may have significant adverse effects. Such a requirement would be inconsistent with existing EU law, as a number of these projects are subject to compulsory mitigation and rehabilitation measures provided by EU binding instruments, such as the Industrial Emissions Directive.

**Rationale:** Requiring an EIA for every project with an “implementation of construction or demolition work” will be counter-productive as it would result in the obligation to carry out a new EIA for the demolition of facilities executed in accordance with plans previously approved in the initial EIA and/or in initial operating permits and whose ultimate purpose is environmental protection. In addition, this will increase the administrative burden and costs for the developer. As far as no archaeological, architectural or cultural features are present, this addition is impractical, unnecessary and disproportionate.

**NEEIP proposal:** Leave the demolition works outside the projects listed in Annex I.

## **2/ EIA requirements and process**

The EIA Directive is a procedural instrument. It should not be used as a proxy to add new requirements of a substantive nature or unclear environmental factors, overlapping with or even adding to existing EU binding instruments which lay down such kind of requirements. The ENVI Committee Report gives the authority the right to refuse development consent on the basis of the EIA alone (Art. 8 para. 2), whereas development consent can only be granted or refused according to the specific legislations concerned (e.g., Industrial Emissions Directive, Mine Waste Directive). As far as the amendments foresee that the authority can ask for additional mitigation or compensation measures, it is necessary to clarify that such measures must be justified “under the relevant law”. The wording proposed in the ENVI Committee Report is not precise enough. Equally, the procedure itself must be consistent, predictable as well as time- and cost-efficient. Many aspects of the Report detract from these aspects.

- **“Independence” of experts instead of an accreditation scheme**

The NEEIP welcomes the deletion of the proposed **accreditation scheme** for experts preparing and verifying environmental reports, which have been replaced by a requirement to ensure that experts are “independent”. It is unquestionable that developers’ experts who prepare the environmental report and competent authorities’ experts verifying it must be independent one from the other. However, the mechanism provided in the Report to ensure that experts are independent, go far beyond this requirement and put in place conditions which hardly differ from an accreditation scheme.

**Rationale:** In practice, such a mechanism might prevent in-house experts (employed by the developers or the competent authorities) from being able to draft or review the environmental reports as they are legally not independent from their employers (be it the developer or the competent authority) and, therefore, force them to outsource this work to consultants or Non-Governmental Organisations that lack the required experience in the relevant field. Such an outcome would be disproportionately costly, time-consuming and detrimental to the quality of environmental reports. As in the past the developer should be in the position to carry out environmental assessment himself – at least if there is in-house the necessary expertise.

**NEEIP proposal:** Use the term “technically competent experts from developer and competent authority must independent from each other to ensure no conflict of interest”. Ensuring the necessary independence between the developer and the competent authorities is critical to improve the confidence of all stakeholders in impartial and objective EIA procedures. However, the NEEIP is opposing the final voted amendment in ENVI which requires the independence of EIA experts from developer and member state competent authority since this will result in unbearable costs and likely delays for both.

- **Opposition to the extended screening procedure**

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.

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.

- **Environmental factors**

The NEEIP favours generic factors to open-ended lists of environmental factors, which would require developers and public authorities to consider either overlapping criteria or impacts that a given project will not even trigger. The NEEIP is in particular concerned by the following factors adopted in the Report:

- Addition of “subsoil” in the list of factors to be taken into account in both the screening and the EIA procedures, as this factor overlaps with the more generic factors of “soil” and “water”, the protection of which is already provided in the current Directive;
- Addition of “biodiversity” next to “fauna and flora” while the two factors are largely overlapping and the difference between the two terms is far too imprecise to be of sufficient legal certainty;
- New requirement to assess “visual impact” while assessing the effects on “landscape” or on “cultural heritage” is already required by the current Directive (2011/92/EU);
- Standardisation of EIA procedures: while the NEEIP fully supports all provisions aiming at simplifying EIAs, it is difficult to see how the new “standardisation” requirements introduced in the Report could be applied in practice. An EIA is by nature a case by case analysis where standards might provide either little or even no help at all.

- **Baseline scenario**

While the Report slightly improves the conditions surrounding the baseline scenario, its proposed definition, which requires the assessment of “the likely evolution of the existing state of the environment without implementation of the project”, is unacceptable.

**Rationale:** Obliging a developer to assess the likely evolution of the state of the environment without implementation of the project he/she promotes is not reasonable.

**NEEIP proposal:** Instead, if any, the baseline scenario description should, as a reference point, aim at describing the state of the environment before the implementation of a project, which could then in turn be used to assess environmental impacts at the end of the project’s life.

- **Ex-post monitoring and mitigation measures**

The report further strengthens the ex-post monitoring requirements provided in the Commission’s proposal.

**Rationale:** Those ex-post monitoring requirements are inappropriate as they overlap with other binding sectorial EU instruments such as IED, BAT References. They already provide for adequate monitoring measures and stringent measures to mitigate environmental impacts. Any new duplication in obligations will be confusing, burdensome and costly for industry.

**NEEIP proposal:** If kept, the EIA Directive must clearly include a “mutual recognition clause” to ensure that existing monitoring and mitigation measures provided under the relevant EU legislation must be taken into account / or even take precedence and deemed sufficient to meet such kind of requirements.

- **EIA “Up to date” information**

The ENVI Committee has voted for the EIA information “up to date” (Amend. 68).

**Rationale:** Although there is a full support for the embedding of new timelines in the revised EIA directive, it is beyond the control of the developer to foresee the time periods for the permitting step following the EIA. Therefore, including the requirement of information “up to date” will result in disproportionate costs and add uncertainty to the planning for both developers as well as Member States.

**NEEIP proposal:** To take out the amendment for “up to date” information.

### **3/ Implementation and future modification of the EIA Directive**

The NEEIP supports compliance with basic principles of law such as non-retroactivity and legal certainty.

- **Retroactive application of the EIA Directive**

The Report does not rule out the retroactive application of the Directive to projects whose assessment started under the current regime but are pending at the time of transposition of the EIA Directive. Instead, the amendment adopted lays down an unclear obligation according to which projects “for which the environmental impact assessment has not been concluded before [the] date of transposition must be executed within eight months of the approval of the amended Directive.”

**Rationale:** To preserve legal certainty, which is key for both developers and public authorities, the amended EIA directive must only apply to projects which initiated the EIA procedure after the time-limit for transposition of the revised directive.

- **Delegated powers to modify the EIA Directive**

The Report maintains the possibility for the Commission to modify annexes via delegated acts.

**NEEIP proposal:** The NEEIP is firmly opposed to this possibility which would hamper the predictability of the requirements stemming from the EIA Directive as the latter, despite their legislative nature, could be amended outside of the ordinary legislative procedure.

The Non Energy Extractive Industry Panel (NEEIP) represents key actors in the Non-Energy Extractive Panel (NEEI) sector, providing minerals that are vital to the EU economy and its sustainable growth objectives as well as a substantial number of direct jobs to more than 530,000 people across the EU. NEEIP’s membership via the European associations represents large and small companies and subsidiaries in Europe. The NEEI industries provide raw materials that thanks to the multiple uses are crucial for the competitiveness of various industry sectors and the development of green technologies and have a strong growth potential. The European extractive industries carry out its activities in a highly-regulated and ever-evolving EU regulatory framework and, at the same time, face a fierce and, sometimes, unfair competition at international level. The NEEIP promotes the implementation of best practices for the continuous improvement of industry’s environmental as well as health & safety high performances and for the well-being of local communities benefiting from our activities.