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SCOTTISH STATUTORY INSTRUMENTS

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**2017 No. 112**

**The Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Amendment Regulations 2017**

**Substitution of Part II of the 2010 Regulations**

**3.** In Part II of the 2010 Regulations (environmental impact assessment), for regulations 3 to 10 substitute—

**“Restrictions on confirming a proposed scheme or a modified scheme**

**3.—(1)** A local authority must not—

- (a) confirm a proposed scheme under paragraph 4(1) of schedule 2 of the Act;
- (b) make a preliminary decision to confirm a proposed scheme (with or without modifications) under paragraph 5(1) of that schedule; or
- (c) confirm a proposed scheme (with or without modifications) under paragraph 9(1) of that schedule,

unless it has fulfilled its obligations under this Part in relation to the scheme.

(2) The Scottish Ministers must not confirm a proposed scheme (with or without modifications) under paragraph 7(4) of schedule 2 of the Act unless the requirements of this Part have been fulfilled in relation to the scheme.

**Pre-notice requirements**

**4.—(1)** Before notice is given in relation to a proposed scheme by a local authority under paragraph 1 of schedule 2 of the Act or, as the case may be, the proposed scheme with modifications under paragraph 7(5) or 9(3) of that schedule, the local authority must—

- (a) determine, in accordance with paragraphs (2) and (3), whether the proposed scheme or, as the case may be, the modified scheme is required to be subject to an environmental impact assessment;
- (b) where required, request and obtain a screening opinion from each consultative body in accordance with regulation 5; and
- (c) where required, prepare an EIA report in accordance with regulation 6.

(2) Where any of the scheme operations comprise a project described in Annex I of the Directive, the local authority must determine that the scheme is required to be subject to an environmental impact assessment.

(3) Where paragraph (2) does not apply and any of the scheme operations comprise a project described in Annex II of the Directive, the local authority must determine whether the scheme is required to be subject to an environmental impact assessment—

- (a) on the basis of the information compiled under paragraph (4); and
- (b) taking into account the relevant selection criteria specified in schedule 1.

- (4) The following information must be compiled by the local authority taking into account, where relevant, the available results of any relevant assessment—
- (a) a description of the location of the scheme, including a plan sufficient to identify—
    - (i) the site which is the subject of the scheme; and
    - (ii) any land that may be affected by the scheme, or over which access may be required;
  - (b) a description of the scheme, including in particular—
    - (i) a description of the physical characteristics of the scheme and, where relevant, of demolition works; and
    - (ii) a description of the location of the scheme, with particular regard to the environmental sensitivity of geographical areas likely to be affected;
  - (c) a description of the aspects of the environment likely to be significantly affected by the scheme; and
  - (d) a description of any likely significant effects (to the extent of the information available on such effects) of the scheme on the environment resulting from—
    - (i) the expected residues and emissions and the production of waste, where relevant; and
    - (ii) the use of natural resources, in particular soil, land, water and biodiversity.
- (5) The local authority must publish any determination made by it under this regulation, and that determination must—
- (a) where the local authority determines that the scheme is required to be subject to an environmental impact assessment, state the main reasons for this determination with reference to the relevant selection criteria specified in schedule 1; and
  - (b) where the local authority determines that the scheme is not required to be subject to an environmental impact assessment—
    - (i) state the main reasons for this determination with reference to the selection criteria specified in schedule 1; and
    - (ii) where proposed, state any features of the scheme which are envisaged to avoid or prevent significant adverse effects on the environment.

### **Screening by consultative bodies**

5.—(1) Where a local authority determines that a proposed scheme or a modified scheme is not required to be subject to an environmental impact assessment, it must request and obtain a screening opinion from each consultative body.

(2) Each request for a screening opinion must be accompanied by the information compiled by the local authority in respect of the scheme under regulation 4(4).

(3) Each request for a screening opinion may be accompanied by such further information or representations as the local authority may wish to provide or make.

(4) Within a period of 4 weeks beginning with the day on which the request is received by a consultative body, the consultative body must, if it considers that it has not been provided with sufficient information to give an opinion, give notice to the local authority of the particular matters on which it requires further information, and the local authority must provide such further information as it is reasonably able to provide.

(5) When a consultative body considers that it has sufficient information it must give a screening opinion to the local authority which requested it within 4 weeks of whichever is the later of—

- (a) the date of receipt of the request for a screening opinion; and
- (b) the date by which it has received the further information referred to in paragraph (4).

(6) Where any of the scheme operations comprise a project described in Annex I of the Directive, the screening opinion of the consultative body must state that the scheme is required to be subject to an environmental impact assessment.

(7) Where paragraph (6) does not apply and any of the scheme operations comprise a project described in Annex II of the Directive, the consultative body must consider whether the scheme is required to be subject to an environmental impact assessment—

- (a) on the basis of the following information in respect of the scheme:—
    - (i) the information provided under paragraph (2);
    - (ii) any information provided, and representations made, under paragraph (3); and
    - (iii) any information provided under paragraph (4); and
  - (b) taking into account the relevant selection criteria specified in schedule 1.
- (8) A screening opinion by a consultative body must—
- (a) where the consultative body considers that the scheme is required to be subject to an environmental impact assessment, state the main reasons for this opinion with reference to the relevant selection criteria specified in schedule 1; and
  - (b) where the consultative body considers that the scheme is not required to be subject to an environmental impact assessment—
    - (i) state the main reasons for this opinion with reference to the selection criteria specified in schedule 1; and
    - (ii) where proposed, state any features of the scheme which, in its opinion, would avoid or prevent significant adverse effects on the environment.
- (9) A local authority must publish each screening opinion given to it under paragraph (5).

### **Preparation of EIA report**

6.—(1) Where—

- (a) pursuant to regulation 4(1)(a), a local authority determines that a proposed scheme or a modified scheme is required to be subject to an environmental impact assessment; or
- (b) pursuant to regulation 4(1)(b), a screening opinion given to the local authority states that the scheme is required to be subject to such an assessment,

the local authority must prepare an environmental impact assessment report (referred to in these Regulations as an “EIA report”).

(2) The EIA report must include—

- (a) a description of the scheme comprising information on the site, design, size and other relevant features of the scheme;
- (b) a description of the likely significant effects of the scheme on the environment;

- (c) a description of the features of the scheme and any measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
  - (d) a description of the reasonable alternatives studied by the local authority, which are relevant to the scheme and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the scheme on the environment;
  - (e) a non-technical summary of the information referred to in sub-paragraphs (a) to (d); and
  - (f) any additional information specified in schedule 2 relevant to the specific characteristics of the scheme or of the type of operations in the scheme in question and to the environmental features likely to be affected.
- (3) With a view to avoiding duplication of assessments, account is to be taken of the available results of other relevant assessments in preparing the EIA report.
- (4) In order to ensure the completeness and quality of the EIA report—
- (a) the local authority must ensure that—
    - (i) the report is prepared by competent experts; and
    - (ii) it has, or has access to, sufficient expertise to examine the report; and
  - (b) the report must be accompanied by a statement from the local authority outlining the relevant expertise or qualifications of the competent experts who prepared it.
- (5) In order to ensure the completeness and quality of the EIA report, the local authority must where necessary, having regard in particular to current knowledge and methods of assessment, obtain supplementary information about any matter referred to in paragraph (2) which in the opinion of the local authority is directly relevant to reaching a reasoned conclusion on the significant effects of the scheme on the environment.
- (6) Where a local authority is required to prepare an EIA report in respect of a modified scheme, the local authority may prepare the report by updating an EIA report previously prepared (if any) in respect of the proposed scheme (without modifications) so as to take account of the proposed modifications.

#### **Notification of proposed scheme etc. by local authority**

- 7.—(1) Where, pursuant to regulation 6(1), a local authority is required to prepare an EIA report in respect of a proposed scheme, it must ensure that each notice of the proposed scheme given under paragraph 1 of schedule 2 of the Act also gives notice of the following matters (in so far as these matters are not already required to be contained in each notice)—
- (a) that the local authority proposes to make the scheme;
  - (b) the proposed location and nature of the scheme;
  - (c) that the scheme is subject to an environmental impact assessment;
  - (d) that the local authority is responsible for taking any decision to confirm the scheme in accordance with paragraph 4(1) or 9(1) of schedule 2 of the Act, whereas the Scottish Ministers are responsible for taking any decision to confirm the scheme in accordance with paragraph 7(4) of that schedule;
  - (e) if the scheme is confirmed, the Scottish Ministers must direct that planning permission for the development be deemed to be granted, subject to such conditions (if any) as may be specified in the direction;

- (f) that any person wishing to make any representations about the EIA report may do so in writing to the local authority before the expiry of the 30-day period;
  - (g) that any such representations about the EIA report which are received by the local authority within the 30-day period will be considered before any decision is made on whether to confirm the scheme;
  - (h) that the local authority uses a website for the purpose of giving information on each scheme proposed by it which is subject to an environmental impact assessment;
  - (i) the address of the website where a copy of the scheme and a copy of the EIA report will be available for inspection by the public during the 30-day period;
  - (j) an address (within the area of the local authority) at which a copy of the proposed scheme and a copy of the EIA report may be inspected during the 30-day period;
  - (k) the times at which a copy of the proposed scheme and a copy of the EIA report may be inspected at that address during the 30-day period;
  - (l) an address (within the area of the local authority) from which—
    - (i) copies of the EIA report may be obtained; and
    - (ii) information about the scheme may be requested, during the 30-day period; and
  - (m) if a charge is to be made for a copy of the EIA report, the amount of the charge.
- (2) The local authority must ensure that throughout the 30-day period—
- (a) it uses a website for the purpose of making information available to the public on each scheme proposed by it which is subject to an environmental impact assessment;
  - (b) a copy of the proposed scheme and a copy of the EIA report are both available for inspection by any person free of charge—
    - (i) at the website address specified pursuant to paragraph (1)(i); and
    - (ii) at all reasonable hours at the address specified pursuant to paragraph (1)(j); and
  - (c) a copy of the EIA report is available to be obtained by any person from the address specified pursuant to paragraph (1)(l).
- (3) The local authority must ensure that—
- (a) notice of the proposed scheme given under paragraph 1(1) of schedule 2 of the Act is, in so far as it is not otherwise required, also given to each consultative body;
  - (b) a copy of the EIA report and other information gathered pursuant to regulation 6 is provided to each consultative body on or before the date on which the notice referred to in sub-paragraph (a) is given to the consultative body; and
  - (c) throughout the 30-day period, a copy of the EIA report is available for inspection alongside each set of scheme documents that are required to be made available in accordance with paragraph 2 of schedule 2 of the Act.
- (4) A reasonable charge reflecting the costs of printing, copying and distribution may be made by the local authority for the supply of a copy of the EIA report—
- (a) to a person other than a consultative body; or
  - (b) to a consultative body to which one copy has already been supplied free of charge.
- (5) The local authority—

- (a) must not make a decision to confirm the scheme under paragraph 4(1), 5(1) or 9(1) of schedule 2 of the Act before the expiry of the 30-day period; and
  - (b) must, before taking any such decision—
    - (i) consider any written representations about the EIA report which it receives within the 30-day period; and
    - (ii) take into account other environmental information in respect of the scheme; and
  - (c) must, when taking any such decision, be satisfied that the reasoned conclusion (referred to in regulation 2A(1)(d)) in respect of the scheme is still up to date.
- (6) Where the local authority obtains supplementary information under regulation 6(5) and this information is reasonably required to give proper consideration to the likely environmental effects of the scheme, a reference to the EIA report in paragraphs (1) to (5) and in regulation 9 is a reference to the EIA report together with any such supplementary information.
- (7) In this regulation—
- “the 30-day period” means the period of 30 days beginning with the first day on which notice of the proposed scheme is given in accordance with sub-paragraphs (1) and (2) of paragraph 1 of schedule 2 of the Act; and
- “website” means the website referred to in paragraph (2)(a).

#### **Notification of modified scheme etc. by local authority**

- 8.—(1) Where, pursuant to regulation 6(1), a local authority is required to prepare an EIA report in respect of a modified scheme, paragraphs 1 to 3 of schedule 2 of the Act and regulation 7 apply to the modified scheme as they apply to a proposed scheme.
- (2) Where, by virtue of paragraph (1), a local authority is required to give notice (“the notice”) of a modified scheme in accordance with paragraph 1 of schedule 2 of the Act—
- (a) it must give the notice on or before the day on which any other notice is given in relation to the proposed modifications to the proposed scheme under paragraph 7(5) or, as the case may be, paragraph 9(3) of that schedule; and
  - (b) the notice must (in addition to any other matters)—
    - (i) give notice of the proposed modifications to the proposed scheme;
    - (ii) describe the proposed modifications; and
    - (iii) explain the reasons for the modifications.

#### **Consideration of modified scheme etc. by the Scottish Ministers**

- 9.—(1) Before giving notice under paragraph 7(5) of schedule 2 of the Act of proposed modifications to a proposed scheme by a local authority, the Scottish Ministers must by notice to the local authority—
- (a) state that they propose to confirm the scheme with modifications;
  - (b) describe the proposed modifications; and
  - (c) explain the reasons for the modifications.
- (2) Where the local authority is not required to prepare an EIA report in respect of the modified scheme, it must send to the Scottish Ministers a copy of—
- (a) its determination under regulation 4(5); and

- (b) each screening opinion received under regulation 5(5),  
in respect of the modified scheme.
- (3) Where the local authority is required to prepare an EIA report in respect of the modified scheme, it must send to the Scottish Ministers a copy of—
- (a) the EIA report;
  - (b) the notice of the modified scheme given, or to be given, by it under paragraph 1(1) of schedule 2 of the Act (pursuant to regulation 8(1));
  - (c) any written representations about the EIA report which it receives within the 30-day period;
  - (d) any valid objections to the modified scheme which it receives; and
  - (e) any late objection to the modified scheme which it receives, if satisfied that it was reasonable for the objector to make the objection after the deadline for doing so.
- (4) The Scottish Ministers must not give notice under paragraph 7(5) of schedule 2 of the Act in relation to a modified scheme until they have received, pursuant to paragraph (2) or (3), a copy of the determination and screening opinions or, as the case may be, the EIA report.
- (5) Where the local authority is required to prepare an EIA report in respect of the modified scheme, the Scottish Ministers—
- (a) must not make a decision to confirm the scheme under paragraph 7(4) of schedule 2 of the Act before the expiry of the 30-day period; and
  - (b) must, before taking any such decision, (in addition to considering any objection made pursuant to paragraph 7(5) of schedule 2 of the Act)—
    - (i) consider any written representations about the EIA report which the local authority receives within the 30-day period;
    - (ii) take into account any other environmental information in respect of the scheme;
    - (iii) consider any valid objections to the modified scheme (unless withdrawn) which the local authority receives; and
    - (iv) consider any late objection to the modified scheme received from the local authority; and
  - (c) must, when taking any such decision, be satisfied that the reasoned conclusion (referred to in regulation 2A(1)(d)) in respect of the scheme is still up to date.
- (6) In paragraphs (3) and (5), “the 30-day period” means the period of 30 days beginning with the first day on which notice of the modified scheme is given (pursuant to regulation 8(1)) in accordance with sub-paragraphs (1) and (2) of paragraph 1 of schedule 2 of the Act.

**Decision notice: supplementary**

- 10.**—(1) Paragraphs (2) to (8) apply where a local authority is required to prepare an EIA report in respect of a proposed scheme or a modified scheme and either—
- (a) the local authority makes a decision to confirm or reject the scheme under paragraph 4(1) or 9(1) of schedule 2 of the Act; or
  - (b) the Scottish Ministers make a decision to confirm or reject the scheme under paragraph 7(4) of that schedule.

(2) Where the Scottish Ministers make the decision under paragraph 7(4) of schedule 2 of the Act, they must inform the local authority of the decision.

(3) The decision notice must include the information specified in paragraph (4).

(4) The information is—

- (a) a description of the scheme;
- (b) the terms of the decision;
- (c) the main reasons and considerations on which the decision is based;
- (d) information about the arrangements taken to ensure the public had the opportunity to participate in the decision making procedures;
- (e) a summary of—
  - (i) the environmental information in respect of the scheme; and
  - (ii) the results of the consultations and information gathered pursuant to regulations 6 to 8 (as read with paragraphs 1 to 3 of schedule 2 of the Act) and how those results have been incorporated or otherwise addressed;
- (f) if the decision is to confirm the scheme—
  - (i) the reasoned conclusion (referred to in regulation 2A(1)(d)) in respect of the scheme;
  - (ii) a statement that the local authority is or, as the case may be, the Scottish Ministers are satisfied that the reasoned conclusion is still up to date;
  - (iii) a description of any mitigation measures; and
  - (iv) a description of any monitoring measures required under regulation 10A; and
- (g) information regarding the right to challenge the validity of the decision and the procedures for doing so.

(5) As soon reasonably practicable after the decision is made in respect of the scheme—

- (a) the decision notice must be given by the local authority in accordance with paragraph 10 of schedule 2 of the Act (as read with paragraphs (3) and (4)); and
- (b) the local authority must—
  - (i) send a copy of the decision notice to the Scottish Ministers;
  - (ii) inform the public and each consultative body of the decision and where a copy of decision notice may be inspected, by publishing a notice on a website which is accessible to the public or in a newspaper circulating in the locality of the scheme or by such other means as are reasonable in the circumstances; and
  - (iii) make a copy of the decision notice available for public inspection at an office of the local authority and on a website which is accessible to the public.

(6) For the purposes of paragraph (4)(f)(i), the reasoned conclusion is still up to date if the local authority is or, as the case may be, the Scottish Ministers are satisfied, having regard to current knowledge and methods of assessment, that the reasoned conclusion addresses the likely significant effects on the environment of the scheme.

(7) In this regulation “the decision notice”, in respect of a proposed scheme or a modified scheme, means the notice of the decision in respect of the scheme under paragraph 10(1) of schedule 2 of the Act.

(8) In this regulation and in regulation 10A—



“mitigation measures” means any features of the scheme and any measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment of the scheme; and

“monitoring measures” means measures requiring the monitoring of any significant adverse effects on the environment of the scheme.

### **Monitoring measures, etc.**

**10A.**—(1) Where a local authority is required to prepare an EIA report in respect of a proposed scheme and either—

- (a) the local authority is, in respect of the scheme, required to—
  - (i) make a preliminary decision under paragraph 5(1) of schedule 2 of the Act; or
  - (ii) make a final decision under paragraph 9(1) of that schedule; or
- (b) the Scottish Ministers are required to make a decision under paragraph 7(4) of schedule 2 of the Act in respect of the scheme,

the local authority or, as the case may be, the Scottish Ministers must consider (without prejudice to any other matters to be considered) whether it is appropriate to make modifications to the scheme so as to require monitoring measures to be carried out.

(2) When considering whether to make such modifications, and the nature of any such monitoring measures, the local authority or the Scottish Ministers must consider—

- (a) whether monitoring measures are proportionate to the nature, location and size of the scheme and the significance of its effects on the environment having regard in particular to the type of parameters to be monitored and the duration of the monitoring;
- (b) in order to avoid duplication of monitoring, whether monitoring arrangements required under Union legislation (other than legislation implementing the requirements of the Directive) or other legislation applicable in Scotland are more appropriate; and
- (c) if monitoring measures are to be required, whether provision should be made to require appropriate remedial action.

(3) Where the local authority considers or, as the case may be, the Scottish Ministers consider that it is appropriate to make modifications to the scheme so as to require monitoring measures to be carried out, the local authority or, as the case may be, the Scottish Ministers must do so.

(4) If the scheme is confirmed, the Scottish Ministers must, when giving a direction under section 57(2B) of the Town and Country Planning (Scotland) Act 1997<sup>(1)</sup> in relation to the scheme, consider whether it is appropriate to direct that planning permission is deemed to be granted subject to conditions which require monitoring measures to be carried out.

(5) When considering whether to include any such conditions in the direction, and the nature of any such monitoring measures, the Scottish Ministers must consider the matters specified in sub-paragraphs (a) to (c) of paragraph (2).

(6) Where the Scottish Ministers consider that it is appropriate to include such conditions in the direction, they must do so.

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(1) 1997 c.8. Section 57(2B) was inserted by section 65 of the Flood Risk Management (Scotland) Act 2009 (asp 6). There are other amendments to section 57 of the Act which are not relevant for the purposes of these Regulations.

(7) As soon reasonably practicable after receiving a direction under section 57(2B) of the Town and Country Planning (Scotland) Act 1997 in relation to the scheme, the local authority must—

- (a) inform the public and each consultative body of the direction and where a copy of the direction may be inspected, by publishing a notice on a website which is accessible to the public or in a newspaper circulating in the locality of the scheme or by such other means as are reasonable in the circumstances; and
- (b) make a copy of the direction available for public inspection at an office of the local authority and on a website which is accessible to the public.

(8) Where mitigation measures or monitoring measures are—

- (a) contained in a proposed scheme or a modified scheme which has been confirmed under paragraph 4(1), 7(4) or 9(1) of schedule 2 of the Act; or
- (b) specified as conditions in a direction under section 57(2B) of the Town and Country Planning (Scotland) Act 1997 in relation to the scheme,

the local authority must take steps to ensure that those measures are implemented.

#### **Co-ordination of assessments**

**10B.**—(1) Where, pursuant to regulation 6(1), a proposed scheme or a modified scheme is required to be subject to an environmental impact assessment and there is, in addition, a requirement to carry out a Habitats Regulation Assessment in respect of the scheme operations, the local authority must, where appropriate, ensure that the Habitats Regulation Assessment and the environmental impact assessment are co-ordinated.

(2) In paragraph (1) “Habitats Regulation Assessment” means an assessment under regulation 48 of the Conservation (Natural Habitats, &c.) Regulations 1994(2).

#### **Avoidance of conflict of interest**

**10C.**—(1) A local authority must perform its duties under this Part in an objective manner and so as not to find itself in a situation giving rise to a conflict of interest.

(2) Where a local authority is responsible for taking a decision on whether or not to confirm a proposed scheme under paragraph 4(1), 5(1) or 9(1) of schedule 2 of the Act, it must implement (within its organisation of administrative competencies) an appropriate separation between conflicting functions when performing its duties under this Part.

#### **Offence: provision of false etc. information**

**10D.**—(1) A person commits an offence if that person, for the purpose of procuring a particular decision under this Part or under schedule 2 of the Act in connection with a proposed scheme, a modified scheme, or an EIA report (including its scope and content)—

- (a) knowingly or recklessly makes a statement which is false or misleading in a material particular;
- (b) with intent to deceive, uses any document which is false or misleading in a material particular; or
- (c) with intent to deceive, withholds any material information.

(2) A person who commits an offence under paragraph (1) is liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum; or

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(2) [S.I. 1994/2716](#), to which there are amendments not relevant to these Regulations.

(b) on conviction on indictment, to a fine.

(3) No act or omission of the Crown constitutes an offence under this regulation.

(4) The Court of Session may, on the application of the Scottish Ministers, the chief constable or any other public body or office-holder having responsibility for enforcing this Part, declare unlawful any act or omission of the Crown which would but for paragraph (3) be an offence under this regulation.

(5) Despite paragraph (3), this regulation applies to a person in the public service of the Crown as it applies to other persons.

### **Offences by bodies corporate etc.**

**10E.**—(1) Where—

- (a) an offence under regulation 10D has been committed by a body corporate or a Scottish partnership or other unincorporated association; and
- (b) it is proved that the offence was committed with the consent or connivance of, or was attributable to neglect on the part of—
  - (i) a relevant individual; or
  - (ii) an individual purporting to act in the capacity of a relevant individual,

the individual as well as the body corporate, Scottish partnership or unincorporated association commits an offence and is liable to be proceeded against and punished accordingly.

(2) In paragraph (1), “relevant individual” means—

- (a) in relation to a body corporate—
  - (i) a director, manager, secretary or similar officer of the body; or
  - (ii) where the affairs of the body are managed by its members, a member;
- (b) in relation to a Scottish partnership, a partner; and
- (c) in relation to an unincorporated association other than a Scottish partnership, a person who is concerned in the management or control of the association.”.