

## EXECUTIVE NOTE

### THE TOWN AND COUNTRY PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) (SCOTLAND) REGULATIONS 2011

#### SSI 2011/139

The above instrument was made in exercise of powers conferred on the Scottish Ministers by Section 2(2) of the European Communities Act 1972, section 56 of the Finance Act 1973 and section 40 of the Town and Country Planning (Scotland) Act 1997. The instrument is subject to a negative resolution procedure.

Section 40 of the 1997 Act enables provision to be made about the consideration to be given to the likely environmental effects of a proposed development before planning permission is granted. Section 2(2) of the 1972 Act is the enabling power for the provisions in these Regulations relating to applications for multi-stage consents. Section 56 of the 1973 Act is cited as the Regulations enable the Scottish Ministers to impose charges for certain services which they are to carry out.

## POLICY OBJECTIVES

### Introduction

The purpose of the above instrument is to consolidate, update and replace Part II of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 1999 (SSI 1999/1) as amended, (“the 1999 EIA Regulations”), the regulations which (amongst other things) transpose the EIA Directive into the Scottish planning system.

### Background

European Directive 85/337/EEC as amended, (known as ‘the EIA Directive’) aims to ensure the authority giving the primary consent for a particular project makes its decision in full knowledge of any likely significant effects on the environment. In Scotland the EIA Directive has been transposed through a number of Scottish Statutory Instruments, including the 1999 EIA Regulations.

It is over 11 years since the 1999 EIA regulations came into force, and in that time Part II has been amended substantially. Further changes are required to take account of recent court rulings. The purpose of these regulations is to consolidate, update and replace Part II of the 1999 EIA Regulations. The other Parts of the 1999 Regulations (which do not relate to planning) will remain in force.

### Key Changes

To take account of recent court rulings and to generally update EIA provisions as they apply to the Scottish planning system, this Scottish Statutory Instrument will make the following key changes:

- **Reasons for negative screening decisions;** following a preliminary ruling from the European Court of Justice in Case C-75/08, introduce new provisions to clarify the requirement that, where Scottish Ministers or a Planning Authority issue a screening

decision such that EIA is not required, they shall make available on request the reasons for that conclusion.

- **Multi-stage consents;** following amendments in 2007 applying EIA to reserved matters applications (now applications for approval of matters specified in conditions attached to a planning permission in principle), new provisions requiring the need for EIA – including a revised or updated EIA – to be considered before approving certain applications for approval required by conditions attached to a planning permission in full and to certain other types of planning permission.
- **Changes or extensions to existing development;** following a ruling in the English High Court of Justice, new provisions determining the need to screen certain planning applications for changes or extensions to existing development.

The instrument also makes a number of other, miscellaneous changes to generally update procedures in light of experience since 1999, including changes to the circumstances in which the Health and Safety Executive is required to be consulted on an Environmental Statement, to help achieve a more targeted approach to consultation. The instrument also introduces new categories of development to which EIA procedures apply in accordance with European Directive 2009/31/EC on the Geological Storage of Carbon Dioxide.

## CONSULTATION

The Scottish Government consulted on proposals for replacing Part II of the EIA Regulations through “*The Environmental Impact Assessment (Scotland) Regulations 2010; Consultation Paper*” published in May 2010. The consultation included extracts of draft new regulatory provisions. The consultation paper was distributed widely to a diverse range of organisations and individuals and received over 30 responses from a range of sectors. The comments received have helped to inform the final statutory instrument. A consultation report was published on 9 February 2011 and is available to view on the Scottish Government’s web pages.

## FINANCIAL EFFECTS

The Scottish Government consulted on a draft Business and Regulatory Impact Assessment (BRIA) as part of its May 2010 consultation paper. The draft BRIA concluded that some additional procedural and financial requirements will fall on planning authorities, the Scottish Ministers and the Consultation Bodies, and some additional procedural and financial requirements may fall to developers. The Scottish Government does not consider there will be any significant costs over and above those of compliance with existing statutory provision on EIA. Responses to the consultation have not altered this overall view. Some minor amendments have been made to the final BRIA to reflect consultation responses received. The final Business and Regulatory Impact Assessment accompanies this Note.

## **BUSINESS AND REGULATORY IMPACT ASSESSMENT**

### **1. TITLE**

1.1 Proposed regulations to consolidate, update and replace Part II of The Environmental Impact Assessment (Scotland) Regulations 1999<sup>1</sup> ('the 1999 EIA regulations'), the regulations which apply the EIA Directive to the Scottish planning system.

### **2. PURPOSE AND INTENDED EFFECT OF THE MEASURE**

#### **The Objective**

2.1 The objective is to consolidate and update the EIA regulations to ensure they remain fit for purpose and to make them more accessible. We are also taking the opportunity to make a number of changes to reflect recent EIA case-law.

#### **Background**

2.2 The 1999 EIA regulations apply the EIA Directive to the Scottish planning system. The main aim of the Directive and of the transposing regulations is to ensure that the authority giving the primary consent for a particular project to proceed makes its decision in full knowledge of any likely significant effects on the environment. The Directive therefore sets out a procedure that must be followed for certain types of project before they can be given 'development consent'. This procedure – known as Environmental Impact Assessment (EIA) – helps to ensure the importance of the predicted effects, and the scope for reducing them, are properly understood by the public and the competent authority before it makes its decision. The 1999 EIA regulations integrate this procedure into the existing framework of planning authority control.

#### **Rationale for Government intervention**

2.3 It is over 11 years since the 1999 EIA regulations came into force and since then they have been amended substantially, both to take account of case law, and more recently changes to the planning system itself. It is our intention to consolidate the regulations to make them more accessible. In consolidating the regulations we are also proposing a limited number of additional changes to take account of the latest case law, and to generally update the regulations.

2.4 Key changes being proposed are:

#### Changes to take account of case-law

- **Changes or extensions to existing development;** following a recent judgement from the High Court of Justice we propose making new provision such that any applicable screening threshold applies to the development as a whole once modified, and not just to the change or extension. Where those thresholds are met or exceeded, screening will be

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<sup>1</sup> SSI 1999/1, as amended.

required where the change or extension may have significant adverse effects on the environment

- **Reasons for negative screening decisions;** following a preliminary ruling from the European Court of Justice, we are proposing new provision to clarify that, where Scottish Ministers or a planning authority issue a negative screening decision, they shall make available on request the reasons for that conclusion.
- **Multi-stage consents;** following amendments in 2007 applying EIA to reserved matters applications (now applications for approval of matters specified in conditions attached to a planning permission in principle), new provisions requiring the need for EIA – including a revised or updated EIA – to be considered before approving certain applications for approval required by conditions attached to a planning permission in full, and to certain other types of planning permission.

#### Other changes

- **Targeted consultation with EIA consultation bodies;** we propose streamlining arrangements for consultation with the Health and Safety Executive, to ensure a more targeted and proportionate consultation process.
- **Transposition of amendments made by European Directive 2009/31/EC ('the Geological Storage Directive');** following amendments to the EIA Directive by the Geological Storage Directive, we propose inserting new categories relating to Carbon Capture and Storage Projects into schedules 1 and 2 to the regulations.

### **3 OPTIONS**

#### **Option 1: Consolidate only**

- 3.1 This is not an option: Failure to take account of recent case-law could result in infraction proceedings by the European Commission and ultimately by the European Court of Justice.

#### **Option 2a: Consolidate plus case-law amendments only**

- 3.2 The costs to business associated with these changes will be minimal, for the reasons set out below:

### Changes or extensions to existing development

- 3.3 Whilst it is anticipated that the proposed amendments could result in a small rise in the number of screening opinions required to be issued by planning authorities or the Scottish Ministers as the case may be, it is not anticipated that there will be any significant rise in the overall number of Environmental Statements required to be produced by developers. It is anticipated therefore, that any resulting costs to business will be minimal.

### Reasons for negative screening decisions

- 3.4 The proposed amendments are intended to clarify existing provisions concerning the availability, on request, of certain environmental information held by public bodies. It is not anticipated there will be any resulting cost to business associated with these amendments.

### Multi-stage consents

- 3.5 The proposed changes are in addition to existing requirements to prepare an Environmental Statement ('ES') in accordance with the EIA Directive. Where an application for a development consent requires EIA, that application must already include the full detail required by the EIA Directive. Where an ES subsequently requires to be revised or updated when applying for approval of matters specified in condition(s) to a grant of planning permission in full, the cost of this revision will be minimal in comparison both to the original costs of preparing the statement, and any fees the application itself may attract.
- 3.6 The relevant ECJ rulings<sup>2</sup> make it clear that it is not possible to eliminate entirely the possibility that it will not become apparent until the subsequent stage that a project is likely to have significant effects on the environment, and hence that an ES will be required to be submitted for the first time at that stage. In practice however, the Scottish Ministers consider that where existing procedures are followed in full, it is unlikely such circumstances will arise for the consents discussed. Any resulting costs to business will therefore be minimal.

### **Option 2b: Consolidate plus case-law amendments AND other changes**

- 3.7 In addition to the changes discussed in option 2a above, we are also proposing additional miscellaneous changes to generally update the regulations and to adjust aspects of the drafting with a view to improving clarity. As such, it is anticipated the majority of these changes will have little or no regulatory impact. The exception is the proposed change to the circumstances in which the Health and Safety Executive is required to be consulted, which will help ensure a more targeted approach to consultation. It is anticipated there will be some savings to resources and time used by the Health and Safety Executive arising from this amendment. There will be no cost to business.

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<sup>2</sup> Cases C-290/03 and C-508/03 refer.

## **Business sectors affected**

- 3.8 The burden of some additional procedural requirements will fall on planning authorities, the Scottish Ministers and the Consultation Bodies. Some procedural and financial requirements may fall to developers. In the majority of cases the Scottish Government does not consider there will be any significant costs over and above those of compliance with existing statutory provisions on EIA.

## **4 SCOTTISH FIRMS IMPACT TEST**

- 4.1 Aspects of these proposals have been developed in consultation with the Scottish Property Federation, the Scottish Renewables Forum, and the Scottish Quarry Products Association, as representatives of developers likely to be affected. A draft Business and Regulatory Impact Assessment accompanied the Scottish Government's consultation paper. The consultation responses received have not altered the Scottish Government's overall view that there are no significant costs arising as a result of these changes, over and above those of compliance with existing statutory provision on EIA.

## **Test Run of Business Forms**

- 4.2 The Scottish Government does not propose introducing any new forms as a result of this legislation.

## **5 COMPETITION ASSESSMENT**

- 5.1 The proposals will affect all business seeking approval of a planning application for schedule 1 or schedule 2 development under the 1999 EIA regulations equally. As no competition impacts are anticipated, a competition assessment has not been completed.

## **6 CONSULTATION**

### Within Government

- 6.1 These proposals have been drawn up in discussion with colleagues from Whitehall and the Devolved Administrations.

### Public Consultation

- 6.2 A draft Business and Regulatory Impact Assessment formed part of the Scottish Government's public consultation on policy to deliver option 2b. Comments received have been used to inform the final statutory instrument, and the final BRIA. In responding to the consultation, the Scottish Rural Property and Business Association (SRPBA) indicated there would be costs involved to individual businesses in the event an EIA were required which might not otherwise have been. However, the consultation responses have not altered the Scottish Government's view that there are no significant overall costs arising as a result of these changes, over and above those of compliance with existing provision.

## Business

- 6.3 Aspects of these proposals have been drawn up in discussion with members of the Scottish Government's EIA Advisory Group, which includes representatives from the Scottish Property Federation, the Scottish Renewables Forum, and the Scottish Quarry Products Association.

## **7. ENFORCEMENT, SANCTIONS AND MONITORING**

- 7.1 Permissions granted in breach of the 1999 EIA regulations are vulnerable to court challenges; there is no change in this respect.

## **8. IMPLEMENTATION AND DELIVERY PLAN**

The Scottish Government will bring forward updated and comprehensive guidance to accompany the regulations.

## **9. POST-IMPLEMENTATION REVIEW**

- 8.1 The Government will monitor the impact of these changes through monitoring the number of EIA applications to planning authorities, and the number of requests for screening Directions made to Scottish Ministers. Reaction to how the changes have worked in practice and any particular areas of concern or uncertainty are likely to become quickly apparent through representations made by planning authorities, community bodies and business.

## **9. SUMMARY AND RECOMMENDATION**

- 9.1 Option 2b to consolidate and update the regulations is recommended.

## **10. DECLARATION**

*I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.*

**Signed:**

**Date:**