The Scottish Government

A USER'S GUIDE TO THE ENVIRONMENTAL IMPACT ASSESSMENT (SCOTLAND) REGULATIONS 2011

This Guide explains the implications of the Environmental Impact Assessment (Scotland) Regulations 2011. The Regulations came into force on 1 June 2011.

What is Environmental Impact Assessment (EIA)?

Environmental Impact Assessment ('EIA') is the process by which information about the likely significant environmental effects of a project, and the potential for reducing, avoiding or offsetting any adverse impacts, is collected and assessed by the developer; this information, together with comments received from the consultation authorities and the public, must be taken into account by the planning authority before any planning decisions are made.

When is an EIA required?

EIA may be required where a development is of a type described in Schedule 1 or Schedule 2 to the Regulations:

a) Schedule 1 development will require EIA in every case. Schedule 1 development includes large scale developments with obvious potential for environmental effects, such as crude oil refineries, major chemical and steel works, and larger scale quarries and open-cast mines.

b) Schedule 2 developments will require EIA only if the specific development in question is judged likely to give rise to 'significant' environmental effects. To determine whether an EIA is needed, a screening opinion will usually be required. Examples of schedule 2 development include certain large pig and poultry rearing units; certain energy generation developments and some urban development projects. Detailed guidance on identifying schedule 2 development is provided in Planning Circular 3/2011.

Why have the EIA Regulations been updated?

The Regulations consolidate, update and replace existing provisions which transpose the EIA Directive into the Scottish Planning System.

Why was consolidation necessary?

The existing 1999 Regulations had been repeatedly amended (12 times in 11 years) to take into account case law from domestic and European courts, and changes to the Directive and / or domestic legislation. This made the 1999 Regulations increasingly complex and difficult to follow. The Scottish Parliament's subordinate legislation committee called for the Regulations to be consolidated in order to make them more accessible.

Furthermore, new case-law emerged which had implications for the existing Regulations. There was also a need to update the 1999 Regulations to address minor issues which had emerged since 1999.

Who will be affected by the updated Regulations?

The majority of planning applications do not require EIA, and for those that do the overall process remains largely unchanged.

Planning authorities, or in some cases the Scottish Ministers, will need to take into account the new legislation when acting as 'the competent authority,' taking into account environmental information before granting a consent and carrying out key functions such as screening.

The 2011 Regulations are also relevant to the EIA consultation authorities, and developers who have responsibility for compiling Environmental Statements where required. The public, including environmental

organisations are also involved in the process, in their role commenting on the Environmental Statement.

What are the main changes to the Regulations?

The 2011 regulations make a number of changes to; take account of recent European and Domestic case law, add new categories pursuant to the Geological Storage Directive, and to generally update existing provisions to make the legislation more accessible. The overall structure and content remains broadly the same as the 1999 regulations.

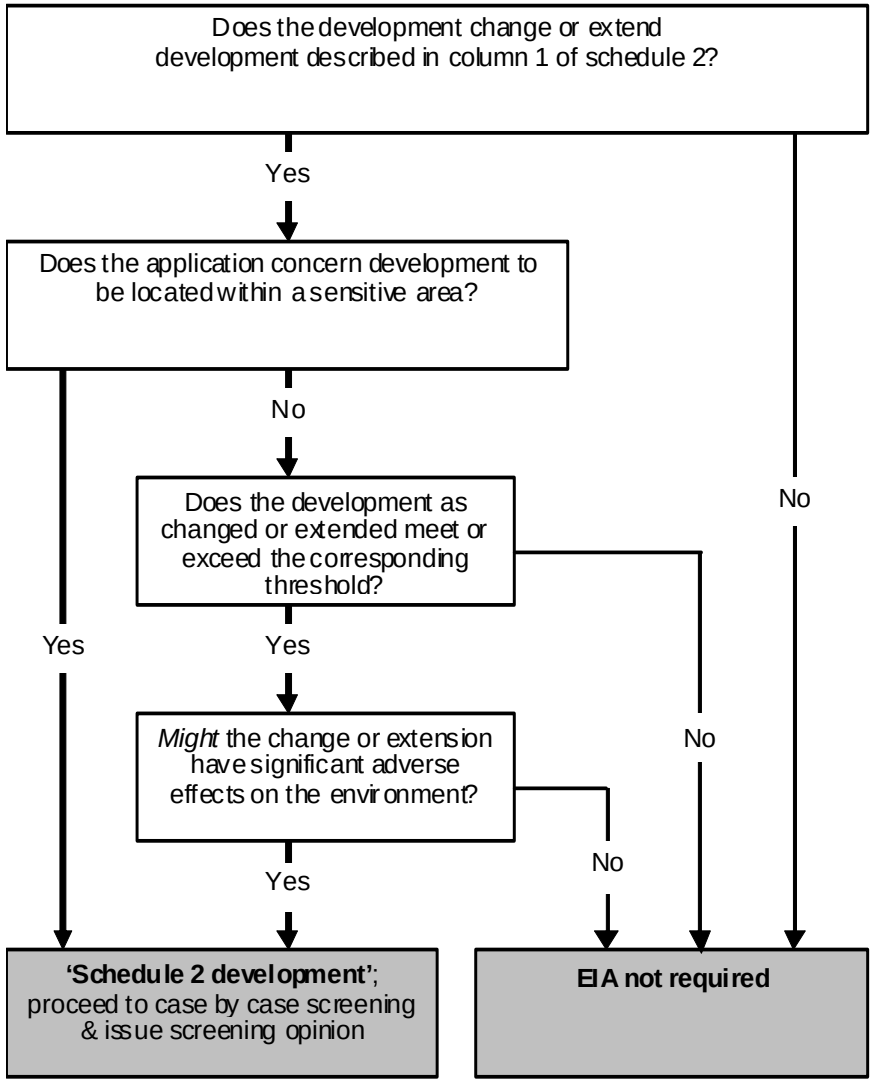
What do the Regulations say about changes or extensions to existing developments?

Following the 'Baker' ruling in the English High Courts, changes have been made to provisions determining the need to screen certain applications for changes or extensions to existing development.

Previously the 1999 Regulations required that the thresholds contained within Schedule 2 should – in the case of an application for a change or an extension to an existing or consented development - apply only to the change or extension. However, the courts have made clear that the change or extension should not be considered in isolation, and the 2011 Regulations apply the applicable thresholds to the development as changed or extended.

For example, the construction of a 0.2 hectare extension to an industrial estate may not have previously qualified for EIA where it fell below the relevant schedule 2 threshold (0.5 hectares). However, as a result of the 2011 Regulations, the 0.2 hectare extension must be viewed in addition to the size of the original development. Where the existing industrial estate was 0.4 hectares, this would take the combined development over the threshold to a total size of 0.6 hectares.

Equally however, there may be circumstances in which a minor change is made to an existing development which is itself already over the screening threshold. There will be circumstances in which that change is quite clearly not capable of having an adverse effect on the environment. In such cases a screening opinion is not required.



What do the Regulations say about EIA screening?

The Regulations include amendments that aim to reflect a preliminary ruling by the European Court of Justice on screening decisions. Known as the 'Mellor' case, this highlighted the need for authorities to ensure that reasons for negative screening decisions are made available on request.

The 1999 Regulations required reasons for a screening decision that EIA is required to be included in the screening opinion. There was no requirement to include reasons for a negative screening decision, although such reasons are likely to be releasable under the Environmental Information Regulations. The 2011 Regulations clarify that reasons for a negative screening decision must be made available on request.

This requirement reinforces the need for authorities to record and retain full reasons for their screening decisions. In practice, planning authorities may choose to publish these reasons proactively.

What are the changes relating to multi-stage consents?

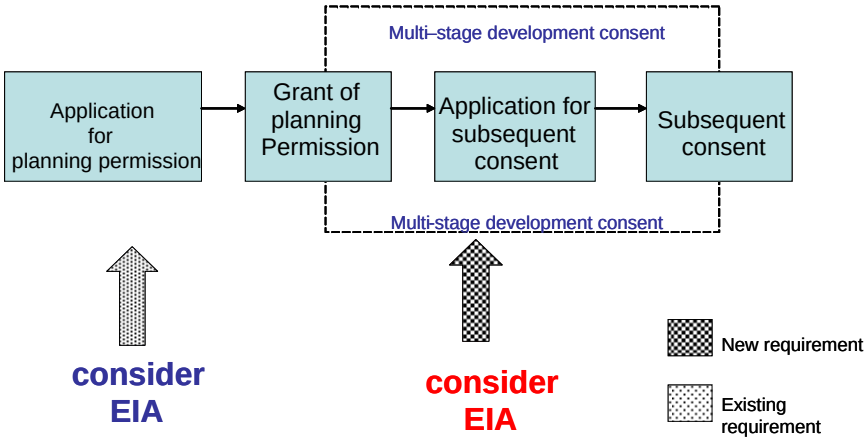
A further European Court of Justice ruling clarified that development consent is not necessarily the grant of planning consent, but more accurately defined as the consent(s) which allows the development to proceed. As a result, where planning conditions require the granting of further approval or consents, these can be regarded as part of a multi-stage consent.

An environmental assessment must take account of the likely significant effects arising before development consent is granted. This should allow environmental information to be taken into account in decision making at all stages prior to final consent being granted.

The 2011 regulations extend existing provisions on multi-stage consents concerning applications for approval of matters specified in a condition to a planning permission in principle, to also include applications for approval of matters covered by conditions attached to planning permission in full.

In practice, if EIA is done fully from the outset, if robust screening decisions are made and recorded at the earliest stage, if Permissions are *conditioned* by reference to development parameters considered in the ES, there should be no need for further assessment at any subsequent stage.

However, the ECJ ruling emphasises that new environmental information may come to light at a later stage. In those circumstances account will have to be taken of all the aspects of the project which have not yet been assessed, or which have been identified for the first time as requiring assessment.



Where an application for multi stage consent is made to an authority without an ES, in connection with a development for which EIA has not previously been undertaken, and it appears that the application relates to a planning permission for

- Schedule 1 development, or
- Schedule 2 development *which the authority considers may have significant effects on the environment that have not previously been identified*,

authorities must adopt a screening opinion.

Provision is also made for authorities to request additional information before determining an application for multi-stage consent.

What are the key messages on multi-stage consents?

- New provisions on multi-stage consents emphasise the importance of *early* and *robust* screening decisions, and the need to record and retain reasons for those decisions;

- EIA should be undertaken at the earliest stage, and should take account of *'all potential environmental effects likely to follow as consideration proceeds through the multi-stage process'*

- Planning permissions should be *conditioned* by reference to development parameters considered in the ES**.**

In this way, authorities can minimise the risk that new environmental information comes to light at a later stage which, had it been known about previously, would have resulted in the principle decision being refused or which subsequently requires additional mitigation measures to be imposed.

Miscellaneous changes

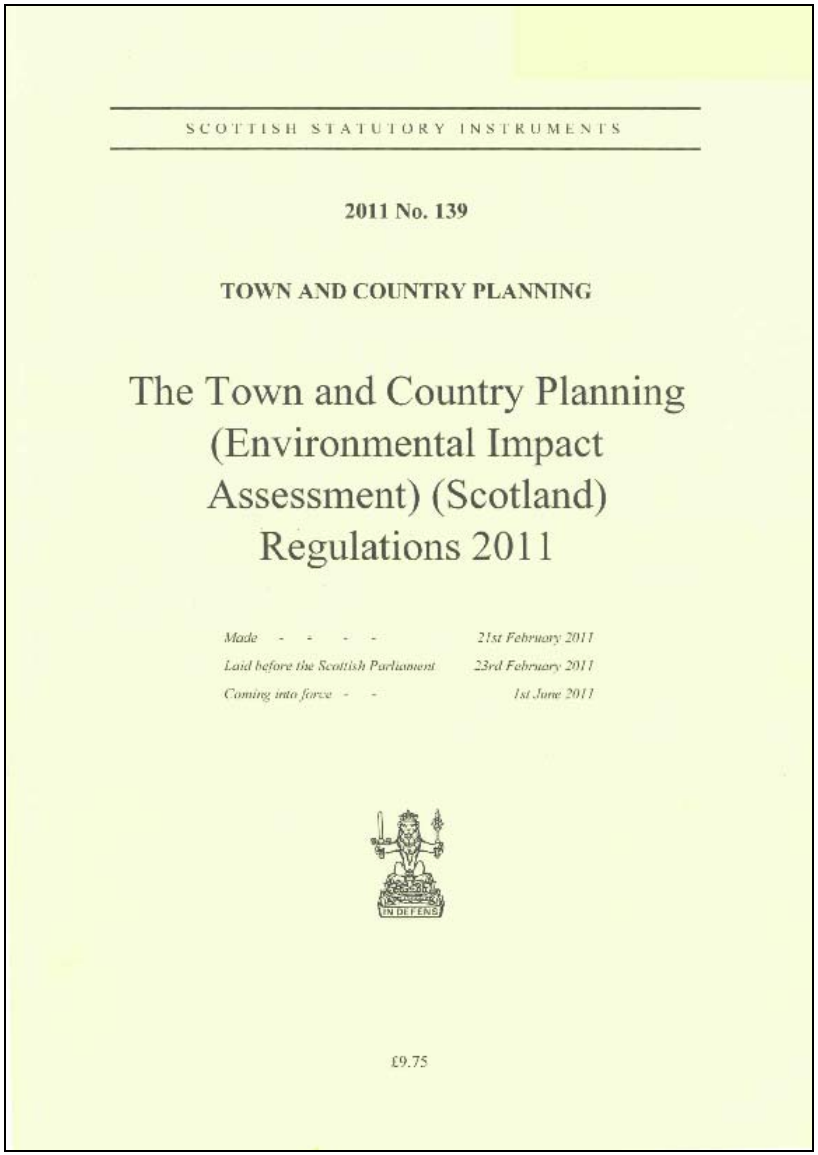
- The Regulations now require that the Health and Safety Executive is consulted only in cases that raise relevant health and safety issues.

- New categories for carbon capture and storage (CCS) projects have been included in both Schedules.

- The role of Scottish Ministers in screening has been clarified to reflect the right of third parties to request a screening direction from Ministers.

Links to Legislation and Guidance

Links to Planning Circular 3/2011, and The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 are available online on the Scotttish Government's Planning EIA web page



SCOTTISH STATUTORY INSTRUMENTS

2011 No. 139

TOWN AND COUNTRY PLANNING

The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011

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£9.75