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THE TOWN AND COUNTRY PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) (SCOTLAND) REGULATIONS 2017

# ■ circular



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**THE TOWN AND COUNTRY  
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## **PLANNING SERIES:**

**Scottish Planning Policy (SPP)** is the statement of Scottish Government policy on nationally important land use planning matters.

**National Planning Framework (NPF)** is the Scottish Government's strategy for Scotland's long term spatial development.

**Circulars** contain Scottish Government policy on the implementation of legislation or procedures.

Statements of Scottish Government policy in the SPP, NPF and Circulars may be material considerations to be taken into account in development plans and development management decisions.

Designing Places and the West Edinburgh Planning Framework have the same status in decision making as the SPP and NPF.

**Planning Advice Notes** provide advice and information on technical planning matters.

Further information in the Scottish Government's role in the planning system is available on <https://beta.gov.scot/policies/planning-architecture/>

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## INTRODUCTION

1. This Circular gives guidance on the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017, (“the 2017 Regulations”), as the Regulations which transpose the Environmental Impact Assessment or ‘EIA’ Directive<sup>1</sup> into the Scottish planning system. The 2017 Regulations entered into force on 16 May 2017.
2. This Circular concerns development under the Town and Country Planning (Scotland) Act 1997 as amended. Guidance on procedures for projects which are the subject of private legislation through the Scottish Parliament is available online via the Scottish Parliament’s web pages. Procedures for projects which are granted consent under other legislation are the subject of separate guidance issued by the relevant Scottish Government or UK Government department or agency respectively.
3. This Circular is intended as a guide. It should be read in conjunction with the 2017 Regulations. Where guidance is offered on the interpretation of the legislation, it should be borne in mind that only the Courts can definitively interpret the law authoritatively. Further practical advice on EIA is to be set out in a PAN.

### The EIA Directive

4. The main aim of the EIA Directive is to ensure that the authority granting consent (the ‘competent authority’) for a particular project 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 or ‘EIA’ - is a means of drawing together, in a systematic way, an assessment of a project’s likely significant environmental effects. This helps to ensure that the importance of the predicted effects, and the scope for reducing any adverse effects, are properly understood by the public and the competent authority before it makes its decision.
5. Projects of a type listed in Annex I to the Directive must always be subject to EIA. Projects of a type listed in Annex II must be subject to EIA where they are likely to have significant effects on the environment. This will usually be determined by the planning authority based on information to be provided by the developer prior to the submission of a planning application.
6. EIA is a process, as defined in Regulation 4. Where EIA is required, the following broad stages apply:

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<sup>1</sup> Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU.

- a) The developer must compile detailed information about the likely significant environmental effects. The developer can ask the ‘competent authority’<sup>2</sup> for their opinion (known as a ‘scoping opinion’) on the information to be included. The information compiled by the developer is known as an EIA report, previously referred to as Environmental Statement in the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (the ‘2011 Regulations’).
  - b) The EIA report (and the application to which it relates) must be publicised. The consultation bodies and the public must be given an opportunity to give their views about the development and the EIA report.
  - c) The competent authority must examine all the environmental information, including the EIA Report and any comments and representations received, and must reach their reasoned conclusion on the significant effects of the development on the environment.
  - d) The environmental information, and the conclusions reached, must be taken into account by the competent authority in deciding whether or not to give consent for the development. The authority must also consider whether any monitoring measures are appropriate.
  - e) The competent authority must inform the public and the consultation bodies of the decision and must publish a ‘decision notice’ which incorporates the authority’s reasoned conclusion on the significant effects of the development on the environment.
7. The EIA Directive was amended and updated in 2014 by Directive 2014/52/EU. Key changes introduced include; new information requirements falling to the developer when making a screening request; the introduction of statutory provisions on the co-ordination of EIA and Habitats Regulations Appraisal; statutory provision on the use of competent experts to prepare an EIA Report, and requiring competent authorities to have access to sufficient expertise to examine the EIA Report; a new requirement to consider whether it is appropriate to require the monitoring of any significant adverse effects; changes to the information to be included in decision notices; and, the introduction of penalties for certain offences.

## **The 2017 Regulations**

8. The 2017 Regulations must be interpreted in the context of the Directive itself. The Regulations apply to development in Scotland:
- for which an application for planning permission is received by a planning authority or which is referred to the Scottish Ministers for determination (including a retrospective application); or
  - for which an application for approval, consent or agreement required by any planning permission granted, or deemed to be granted under Section 57 of the Act<sup>3</sup>, where that approval, consent or agreement must be obtained before all or part of the development permitted by the planning permission may be begun (an ‘application for multi-stage consent’); or

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<sup>2</sup> For the purposes of the 2017 Regulations, the competent authority is the relevant planning authority or Scottish Ministers, as the case may be.

<sup>3</sup> The Town and Country Planning (Scotland) Act 1997, as amended.



- which is carried out under permitted development rights; or
  - which is carried out under permission granted by a simplified planning zone scheme or enterprise zone order;
  - for which an application for a review of mineral permission under Sections 8, 9 or 10 of the 1997 Act is received by a planning authority, and applications for approval of ROMP conditions;
  - for which an urgent application (for Crown development) is made to the Scottish Ministers under Section 242A of the 1997 Act (see paragraph 159)
9. The Regulations also apply to development with significant transboundary effects (Regulations 41 and 42).
10. Planning authorities already have a well-established general responsibility to consider the environmental implications of developments which are subject to planning control, and the 2017 Regulations integrate EIA procedures into this existing framework. In this way EIA can provide a more systematic method of assessing the environmental implications of developments that are likely to have significant effects. While only a small proportion of development will require EIA, it is stressed that EIA is not discretionary. If a planning application is made for schedule 1 development, or for schedule 2 development which is likely to have significant effects on the environment, EIA is required.
11. Where the EIA procedure shows that a development will have an adverse impact on the environment, it does not automatically follow that planning permission must be refused. It remains the task of the planning authority to judge each planning application on its merits within the context of the Development Plan, taking account of all material considerations, including the environmental impacts.

## **The benefits of EIA**

12. For developers, EIA can help to identify the likely significant environmental effects of a particular development at an early stage. This can produce improvements in the planning and design of the development and in decision making by both parties. In addition, developers may find EIA a useful tool for considering alternative approaches to a development. This can result in a final proposal that is more environmentally acceptable, and can form the basis for a more robust application for planning permission. The presentation of environmental information in a more systematic way may also simplify the planning authority's task of appraising the application and drawing up appropriate planning conditions, lead to more meaningful consultations, and can help enable swifter decisions to be reached.

## **General Principles and Policy**

13. Applications for planning permission for which EIA is required are referred to in the Regulations and the Circular as 'EIA applications'. Subject to any direction by Scottish Ministers, an application is, or would be, an EIA application if:

- the relevant planning authority has adopted a screening opinion such that the development in question is EIA development; or
  - where no screening opinion has been adopted or screening direction made by the Scottish Ministers, the developer submits an EIA Report.
14. Planning authorities, or as the case may be, Scottish Ministers must not grant planning permission for EIA development unless an environmental impact assessment has been carried out and the environmental information taken into account. That EIA must identify the likely significant effects of the proposed development on the environment before any decision to grant planning permission is made unless the competent authority consider the likely significant effects on the environment are not identifiable at the time of their determination of the application, and they are minded to grant planning permission subject to a multi-stage condition. The procedures outlined in paragraphs 141 to 144 apply in respect of applications for consent required by a multi-stage condition.
15. Although the submission of an EIA report is not subject to statutory time limits, every effort should be made to submit it within a reasonable time scale. Until it is submitted, the application cannot be determined except by refusal.
16. Regulation 49 extends the time period for determining an EIA application from 2 to 4 months. Where the date on which the EIA report is submitted is later than the validation date, that 4 month period runs from the date on which the EIA report and accompanying documents are submitted.

## **Electronic Communications**

17. Regulations 44 to 46 allow for the use of electronic communications when carrying out certain procedures. Further information and guidance on electronic communication within the planning system can be found in Circular 3/2004 and in PAN 70.

## **Establishing whether EIA is required**

### **Schedule 1 and Schedule 2 development**

18. Figure 1 sets out the process for determining whether a proposed development requires EIA.
- **Schedule 1 development;** Development of a type listed in Schedule 1 always requires EIA.
  - **Schedule 2 development;** Development of a type listed in Schedule 2 requires EIA if it is likely to have significant effects on the environment by virtue of factors such as its nature, size or location. See paragraphs 22-23 for guidance on identifying schedule 2 development.

- **Changes or extensions to Schedule 1 or Schedule 2 developments;** developments which may have significant effects on the environment also fall within the Regulations. Further guidance is contained in paragraphs 151-153 and Figure 2.

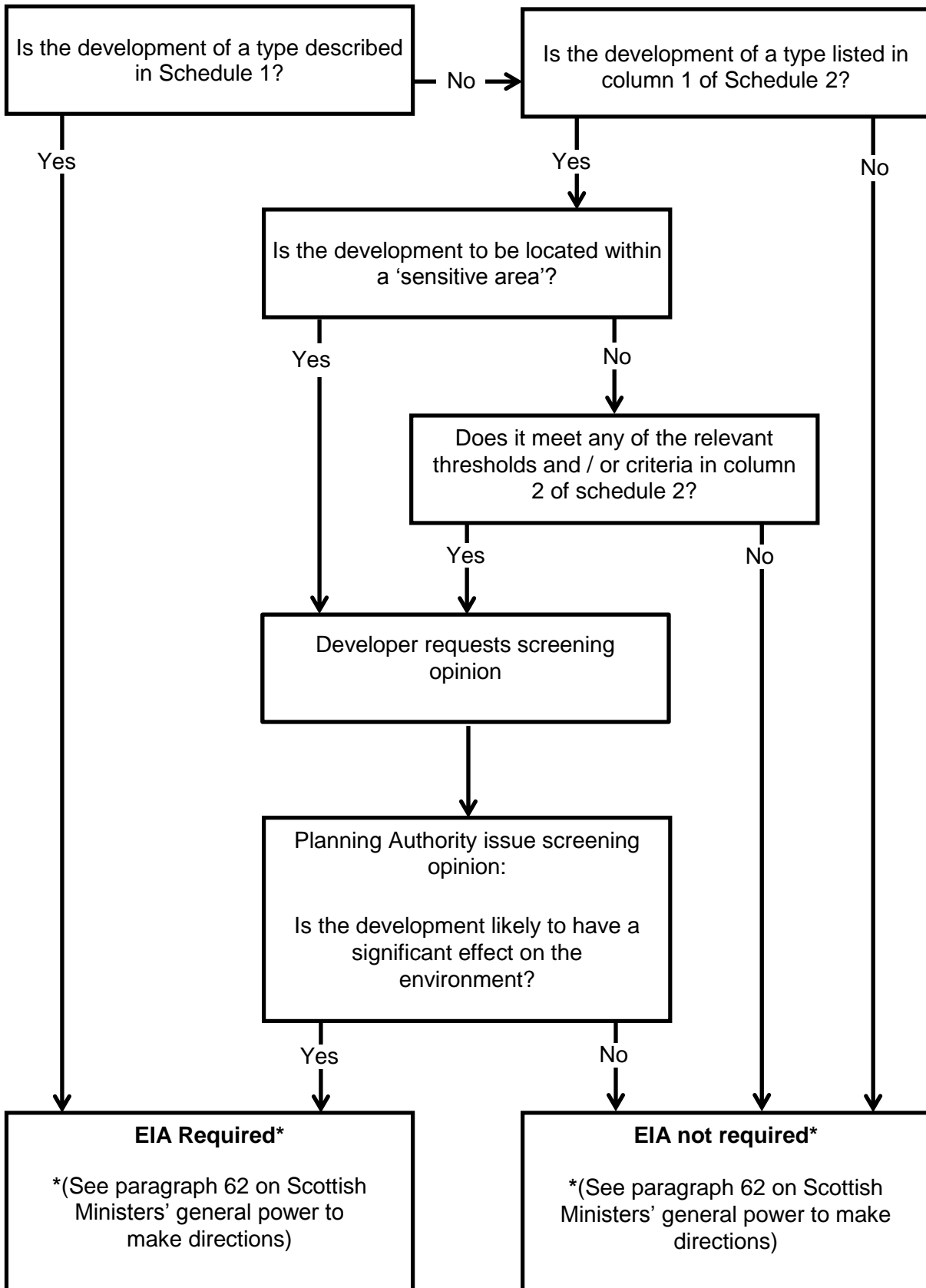
## Scope and purpose of EIA

19. In determining whether a particular development is of a type listed in Schedule 1 or 2, planning authorities should have regard to the ruling of the European Court that the EIA Directive has a “wide scope and broad purpose”. The fact that a particular type of development is not specifically identified in one of the Schedules does not necessarily mean that it falls outside the scope of the Regulations. In particular, authorities should be aware that “urban development” in paragraph 10(b) of Schedule 2, embraces residential development (houses and flats) as well as what might be regarded as development of a more obviously urban nature. It should also be borne in mind that, in this context, the term “urban” applies not only to development which is to be sited in an already existing urban area. It could apply to development proposed for out of town or even rural areas which might have an urbanising effect on the local environment. This might be the case for example, where the development will bring a significant increase in the amount of traffic in that area (e.g. an out of town shopping complex).
20. The European Court of Justice has also previously made clear, in the case of *Commission vs Ireland (C-50/09)*, that demolition works may constitute a ‘project’ for the purposes of the EIA Directive. In this respect, authorities should be aware that the schedules of the 2017 regulations refer to sectoral categories of projects, without describing the precise nature of the works provided for. As an illustration, the ECJ has noted that ‘urban development projects’ can include the demolition of existing structures.
21. The wide scope of the EIA Directive should also be noted in connection with the paragraph headings in Schedule 2 to the Regulations. For example, paragraph 10, which amongst other things includes urban development and industrial estate development, is headed “Infrastructure projects”. In the case of *Goodman and another v Lewisham Borough Council [2003]* the planning authority took the view that a storage and distribution facility did not constitute Schedule 2 development. The court, however, stated that “The examples of urban development projects set out in paragraph 10(b) of the Regulations demonstrate that in this instance ‘infrastructure’ goes wider, indeed far wider, than the normal understanding, as quoted to us from the Shorter Oxford Dictionary, of “the installations and services (power stations, sewers, roads, housing, etc) regarded as the economic foundations of a country.” The case also referred to the decision in the case of *Kraaijveld (ECJ C- 72/95,1-5403)* where it was stated that “The wording of the directive indicates that it has wide scope and a broad purpose.” In this connection it is important to consider the scope and purpose of a project, and not simply its label. Further guidance on the Interpretation of definitions of certain project categories of annex I and II of the EIA Directive is available on the European Commission’s web pages.

## Identifying Schedule 2 Development (Schedule 2)

22. Schedule 2 development is development of a type listed in column 1 of Schedule 2 which:
- is located wholly or in part in a 'sensitive area' as defined in Regulation 2(1) (see paragraph 37); or
  - meets one of the relevant criteria or exceeds one of the relevant thresholds listed in the second column of the table in Schedule 2.
23. Development which does not exceed the thresholds or meet the criteria in the second column of the table in Schedule 2 and which is not wholly or partly in a "sensitive area" as defined in Regulation 2(1), is not Schedule 2 development and therefore does not require EIA. Development which does not exceed the thresholds or meet the criteria in Schedule 2 but is in or partly in a "sensitive area", is Schedule 2 development but will require EIA only if it is screened as being likely to have significant effects on the environment. However, there may be circumstances in which development of a type listed in column 1 of Schedule 2 that does not fall under (a) or (b) in paragraph 18 above might give rise to significant environmental effects. In those exceptional cases, Scottish Ministers can use their powers under Regulation 7(5) (see paragraph 62) to direct that EIA is required.

**Figure 1: Establishing whether a proposed development requires EIA**



# THE NEED FOR EIA FOR SCHEDULE 2 DEVELOPMENT

## Requesting a screening opinion from the planning authority (Regulation 8)

24. Before submitting an application for planning permission for schedule 2 development, developers may ask the planning authority to adopt a screening opinion (Regulation 8(1)). The screening process is an opportunity for both parties to ensure that EIA is only undertaken for those projects which are likely to have significant effects on the environment. When making a screening request, the developer should therefore clearly and succinctly set out the information specified in Regulation 8, taking into account, where relevant, the selection criteria in Schedule 3 to the Regulations (reproduced at Annex A). In compiling this information, developers should bear in mind that what is in question at this stage is whether or not there are likely to be significant effects on the environment. It is not expected, that developers will have full knowledge of every environmental effect. The information must include:
- a) a description of the location of the development, including a plan sufficient to identify the land;
  - b) a description of the proposed development including;
    - i. a description of the physical characteristics of the proposed development and, where relevant, of demolition works;
    - ii. a description of the location of the proposed development, 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 proposed development; and,
  - d) a description of any likely significant effects, to the extent of the information available on such effects, of the proposed development on the environment resulting from –
    - i. the expected residues and emissions and the production of waste, where relevant;
    - ii. the use of natural resources, in particular soil, land, water and biodiversity.
25. The developer may also include a description of any features of the proposed development, or proposed measures, envisaged to avoid or prevent significant adverse effects on the environment.
26. When compiling the above information, Regulation 8(4) requires the developer to take into account where relevant the available results of any 'relevant assessment', which is defined in Regulation 2 as meaning, "in relation to a proposed development, an assessment, or verification, of effects on the environment carried out pursuant to national legislation which is relevant to the assessment of the environmental impacts of the proposed development". For example, this could include the SEA of the relevant Local Development Plan.

27. Developers are advised to consult planning authorities as early as possible where EIA might be required, particularly where the proposed development would otherwise benefit from permitted development rights (paragraph 67-70 refers). Developers submitting applications for developments categorised as national developments or as major developments under the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009, which includes all Schedule 1 development, will be required to undertake statutory Pre-Application Consultations with communities, unless it relates to a Section 42 application. Whilst there is no requirement to consult the relevant planning authority or the consultation bodies prior to submitting such applications, nevertheless Circular 3/2013 as revised continues to encourage pre-application discussions between prospective applicants, agencies and the planning authority. It also proposes a more formal tool for project managing the planning process for national and major developments – ‘the processing agreement’. It will generally be helpful for developers to be aware of the concerns of planning authorities and consultation bodies well before a planning application is submitted. To provide some certainty for the developer, they can apply formally for a ‘screening opinion’ (Regulation 8) from the planning authority before making a planning application. A valid planning application may be made without prior recourse to this procedure, but developers should bear in mind that any informal view from an authority has no legally-binding effect.

### **Reaching a screening determination**

28. In each case, the basic question to be asked is: ‘Would this particular development be likely to have significant effects on the environment?’ That will be a matter of professional judgement for the planning authority, based on the information provided by the developer. On receipt of a screening request, the planning authority should therefore consider whether the proposed development is likely to have significant effects on the environment by virtue of factors such as its nature, size or location, taking into account the selection criteria in Schedule 3 (Annex A); the information supplied by the developer under Regulation 8(2); and, the available results of any relevant assessment (see paragraph 26 above).
29. The information supplied by the developer should usually be sufficient to enable the planning authority to adopt a screening opinion. However, where the authority considers that is not the case, it must notify the developer of those points on which further information is required (Regulation 9(4)). Very exceptionally, authorities may also wish to seek advice from one or more of the consultation bodies or non-statutory bodies.

### **General considerations**

30. The planning authority must screen every application for Schedule 2 development not already accompanied by an EIA Report in order to determine whether or not EIA is required. Where an EIA Report has been submitted, it would be open to the Scottish Ministers, to determine that EIA is not required and to issue a screening direction to that effect.

31. The Regulations reflect the requirement in the Directive to determine whether the proposed development is likely to have significant effects on the environment by virtue of factors such as “its nature, size or location”. The word “or” indicates that EIA may be required by reason of just one of these factors. That certain types of development can be likely to have significant environmental effects solely because of their characteristics is evidenced by the mandatory requirement for EIA for all types of development listed in Schedule 1, regardless of where they are to be located.
32. In the majority of cases, it will however be necessary to consider the characteristics of the proposed development in combination with its proposed location in order to identify the potential for interactions between it and its environment and therefore to determine whether there are likely to be significant environmental effects. In determining whether a particular development is likely to have such effects, authorities must take account of the selection criteria in Schedule 3 to the Regulations (Annex A refers). Three categories of criteria are listed:-
  1. Characteristics of the development
  2. Location of the development
  3. Characteristics of the potential impact
33. Consideration of the third of these categories is designed to help in determining whether any interactions between the first two categories (i.e. between a development and its environment) are likely to be significant. Planning authorities may wish to consider using some form of checklist as an aid to this determination.
34. There is no requirement to use screening checklists or other screening aids, but there are advantages in doing so: they provide a systematic approach to the process of screening, which should make for a more considered and balanced screening opinion; and a record of the basis on which the opinion was reached, in the event that a decision is subsequently questioned or challenged in the courts. Authorities will also wish to refer back to that record in the event the need for EIA is subsequently queried in connection with an application for multi-stage consent.
35. It is emphasised that the basic test of the need for EIA in a particular case is the likelihood of significant effects on the environment. It should not be assumed, for example, that conformity with a development plan rules out the need for EIA. Nor is the amount of opposition or controversy to a development relevant to this determination, unless the substance of opponents’ arguments reveals that there are likely to be significant effects on the environment.
36. As indicated above, in some cases, the scale of a development can be sufficient for it to have wide-ranging environmental effects that would justify EIA. There will be some overlap between the circumstances in which EIA is required because of the scale of the development proposed and those in which Scottish Ministers may wish to exercise their power to “call in” an application for



their own determination. However, there is no presumption that all called-in applications require EIA, nor that all EIA applications will be called in.

## **Development in environmentally sensitive locations**

37. The relationship between a proposed development and its location is a crucial consideration. For any given development proposal, the more environmentally sensitive the location, the more likely it is that the effects will be significant and will require EIA. Certain designated sites are defined in Regulation 2(1) as 'sensitive areas' and the thresholds/criteria in the second column of Schedule 2 do not apply there. All developments of a type listed in Schedule 2 to be located in such areas must be screened for the need for EIA. The 'sensitive areas' are:
- Sites of Special Scientific Interest
  - Land subject to Nature Conservation Orders
  - European Sites<sup>4</sup>
  - National Scenic Areas
  - World Heritage Sites
  - Scheduled Monuments
  - National Parks
  - Marine Protected Areas
38. For the purposes of reaching a screening determination, special considerations will apply to all of these sensitive areas, and regard should also be given to any connectivity where a proposal is located close to, but not in, a sensitive area. In certain cases other statutory and non-statutory designations which are not included in the definition of 'sensitive areas,' but which are nonetheless environmentally sensitive, may also be relevant in determining whether EIA is required, such as local landscape or biodiversity designations.
39. In considering the sensitivity of a particular location, regard should also be given to whether any national or internationally agreed environmental standards are already being approached or exceeded. Examples include air quality, drinking water and bathing water. Where there are local standards for other aspects of the environment, consideration should be given to whether the proposed development would affect these standards or levels.
40. A small number of developments may be likely to have significant effects on the environment because of the particular nature of their impact. Consideration should be given to development which could have complex, long term, or irreversible impacts, and where expert and detailed analysis of those impacts would be desirable and would be relevant to the issue of whether or not the development should be allowed. Industrial development involving emissions which are potentially hazardous to human health may fall in to this category. So occasionally, may other types of development which are proposed for severely contaminated land and where the development might lead to more hazardous contaminants escaping from the site than would otherwise be the case if the development did not take place.

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<sup>4</sup> Habitats Directive 92/43/EEC and Wild Birds Directive 79/404/EEC

## **Reaching a screening opinion: proposed mitigation measures**

41. The Regulations expressly provide that a developer may, when requesting a screening opinion, include a description of any features of the proposed development, or proposed measures, envisaged to avoid, or prevent significant adverse effects on the environment, and the planning authority must take this information into account in reaching a screening opinion.
42. The extent to which mitigation or other measures are taken into account in reaching a screening opinion will depend on the facts of each case. In some cases, the measures may form part of the proposal, be modest in scope or so plainly and easily achievable that it will be possible to reach a conclusion that there is no likelihood of significant environmental effects. The planning authority must have regard to the information provided by the developer, and should interpret this in light of the precautionary principle and taking into account the degree of uncertainty in relation to the environmental impact, bearing in mind that there may be cases where the uncertainties are such that Environmental Impact Assessment is required.
43. Where, in reaching a screening opinion, a planning authority takes into account proposed mitigation measures, the authority should subsequently consider the need for appropriate obligations to ensure these measures are delivered and included in any subsequent grant of permission, regardless of whether or not the development is EIA development.

## **Considering Cumulative Effects**

44. Each application (or request for a screening opinion) should be considered for EIA on its own merits. The development should be judged on the basis of what is proposed by the applicant.
45. In determining whether significant effects are likely, planning authorities should have regard to the cumulative effects of the project under consideration, together with any effects from existing or approved development. Generally, it would not be feasible to consider the cumulative effects with other applications which have not yet been determined, since there can be no certainty that they will receive planning permission. However, there could be circumstances where 2 or more applications for development should be considered together. Such circumstances are likely to be where the applications in question are not directly in competition with one another so that both or all of them might be approved, and where the overall combined environmental impact of the proposals might be greater or have different effects than the sum of the separate parts. The consideration of cumulative effects is different in principle from the issue of multiple applications which need to be considered together.

## **Multiple applications**

46. For the purposes of determining whether EIA is required, a particular planning application should not be considered in isolation if, in reality, it is properly to be regarded as an integral part of an inevitably more substantial development. In such cases, the need for EIA must be considered in respect of the total development. This is not to say that all applications which form part of some wider scheme must be considered together. In this context, it will be important to establish whether each of the proposed developments could proceed independently and whether the aims of the Regulations and Directive are being frustrated by the submission of multiple planning applications. In the event that multiple applications are received by different planning authorities which ought properly to be regarded as an integral part of a more substantial development, for example where such a development crosses an authority boundary, the respective parties will wish to liaise at screening and scoping stages.

## **STAGES AT WHICH SCREENING MAY BE CARRIED OUT**

47. The determination of whether or not EIA is required for a particular development proposal can take place at a number of different stages:
- I. where no screening opinion has been adopted or a screening direction is made by the Scottish Ministers, the developer may decide that EIA will be required and submit an EIA Report. (See paragraph 13);
  - II. the developer may, before submitting any application, including an application for multi-stage consent, request a screening opinion from the planning authority (paragraphs 24-26). If the applicant disputes the need for EIA (or a screening opinion is not adopted within the required period), the developer may apply to Scottish Ministers for a screening direction (paragraphs 51-52). Similar procedures apply to permitted development (paragraph 69);
  - III. the planning authority may determine that EIA is required following receipt of a planning application (paragraphs 30-32), including an application for multi-stage consent (paragraph 44-46). If the developer disputes the need for EIA, they may ask the Scottish Ministers for a screening direction (paragraphs 51-52);
  - IV. the determinations at II) and III) also apply in relation to urgent applications (for Crown Development) made directly to the Scottish Ministers (see paragraph 159);
  - V. Scottish Ministers may determine that EIA is required for an application that has been called-in for their determination or is before them on appeal (paragraphs 59-61);
  - VI. Scottish Ministers may direct that EIA is required at any stage prior to the final consent being granted for a particular development (paragraph 62).
  - VII. a Local Review Body may determine that EIA is required for an application which is before them for review (references to planning authority include reference to Local Review Bodies and the same procedures and considerations apply).
48. Applicants should bear in mind that if the need for EIA only arises after the planning application has been submitted, time periods relating to the consideration of the application will be suspended pending submission of an EIA report (Regulation 49).

### **Procedures following a screening request**

49. The planning authority must, unless a screening direction is made by Scottish ministers, adopt a screening opinion within:
- The period of 21 days beginning with the date of receipt of the request; or,

- Such longer period, not exceeding the period of 90 days beginning with the date of receipt of the request, as may be agreed in writing between the planning authority and the applicant.
50. The Regulations provide (Regulation 9(2)) that where a planning authority consider that due to exceptional circumstances relating to the nature, complexity, location or size of the proposed development that it is not practicable to adopt a screening opinion within 90 days, the authority may extend that period by notice in writing to the applicant. It is however unlikely that such exceptional circumstances will arise within the planning system.

### **Applying to Scottish Ministers for a screening direction**

51. Where a developer disagrees with the planning authority's opinion that EIA is required, or where an authority fails to adopt any opinion within 21 days (or any agreed extension), the developer may ask Scottish Ministers to make a screening direction (Regulation 9 (5)). The request must be accompanied by all the previous documents relating to the request for a screening opinion, and any screening opinion adopted or requests for further information issued by the planning authority and any response made, as well as any representations that the developer wishes to make. The developer should also send a copy of the request and any representations to the planning authority, which has 14 days to make its own further representations.
52. Scottish Ministers should make a screening direction within 21 days from the date of receipt of the request, or such longer period as they may reasonably require not exceeding 90 days. Scottish Ministers may extend the period beyond 90 days by notice where they consider that, due to exceptional circumstances relating to the nature, complexity, location or size of the development it is not practicable to adopt a screening direction within that time period. In such circumstances, Scottish Ministers must write to the developer stating the justification for the extension and must specify the date by which a screening direction is to be made.

### **Procedures on adoption of a screening opinion or direction**

53. When adopting a screening opinion or screening direction, the planning authority or Scottish Ministers as the case may be must accompany it with a written statement giving the main reasons for their conclusion, with reference to the relevant criteria in Schedule 3 to the Regulations (Annex A refers). Where the screening opinion or direction is to the effect that the development is not EIA development, the statement must also state any features of the proposed development or proposed measures envisaged to avoid or prevent significant adverse effects on the environment.
54. A copy of any screening opinion or direction and the written statement referred to above must be sent to the developer and, where applicable, will help them to prepare the EIA Report by indicating those aspects of the proposal considered likely to have significant environmental effects (see also the sections on scoping opinions). Where Scottish Ministers adopt a screening direction the

above information must be sent to the relevant planning authority as well as to the developer.

55. Where a planning authority adopts a screening opinion, a copy of that opinion and of any accompanying statement of reasons must be made available on a website and at the place where the planning register is kept. The documents must remain available for at least two years. Where a planning application is made for the development, the opinion should be made available on Part 1 of the register along with the application. Any screening direction by Scottish Ministers and received by a planning authority must be made available in the same way. Regulation 28 refers.

### **Planning application or request to review made to a planning authority without an EIA report**

56. Where a planning authority receives a planning application or a request for Review of a planning decision by a Local Review Body, which is for Schedule 1 or Schedule 2 development and is not accompanied by an EIA Report, they should check their records for any associated screening opinion or screening direction. Where no such opinion or direction exists, the planning authority must adopt a screening opinion within 21 days (or such longer period as may be agreed) from receipt of the application. If the authority considers the application does not include the information set out in Regulation 8(2) (see paragraph 24 above), it must ask the developer to provide the relevant information.
57. Where the screening opinion is that an EIA is required, the authority must notify the developer in writing, in accordance with Regulation 12, that submission of an EIA report is necessary. On receipt of that notice the developer should, within 21 days of the date of the notice, reply to the authority stating their intention either to provide an EIA Report or to ask Scottish Ministers for a screening direction. If the developer does not reply within the 21 days, the planning application will be deemed to have been refused and will not give rise either to any appeal to Scottish Ministers against such a deemed refusal or to a review of the case by the Local Review Body where applicable.
58. Where the developer responds indicating an EIA Report will be provided, the authority should suspend consideration of the planning application (unless they are already minded to refuse planning permission because of other material considerations, in which case they should proceed to do so as quickly as possible and in any event before the end of the 21 day period when the application is deemed to be refused).

### **Application or appeal to the Scottish Ministers without an EIA report (Regulations 14, and 15)**

59. When an application for planning permission for schedule 1 or schedule 2 development is called in for determination by Scottish Ministers or an appeal made to Scottish Ministers which is not accompanied by an EIA Report, and for which no previous screening opinion or direction exists, Scottish Ministers must

issue a screening direction. If the Scottish Ministers consider the application does not include the information set out in Regulation 8(2) (see paragraph 24 above), it must ask the developer to provide the relevant information.

60. If Scottish Ministers direct that EIA is required, they must notify the applicant and the planning authority accordingly. A developer who wishes to continue with the application must reply within 21 days of such a notification, stating that an EIA report will be provided. The developer may also ask the Scottish Ministers to make a scoping direction under Regulation 18. If no reply has been received at the end of the 21 day period, Scottish Ministers will inform the applicant that no further action will be taken on the application (Regulation 14(5)). If no EIA Report is submitted the application can only be refused (Regulation 14(5)).
61. If Scottish Ministers conclude that EIA is not required, (and there has been no previous screening opinion to that effect) they shall make a screening direction and send a copy to the planning authority. The authority must ensure that the direction is made available for inspection at the office of the planning authority where the register is kept and on a website (Regulation 28).

## **SCOTTISH MINISTERS' GENERAL POWER TO MAKE DIRECTIONS**

62. Scottish Ministers are empowered to make directions in relation to the need for EIA (Regulations 7(4), 10 and 50 refer). Such directions will normally be made in response to an application from a developer who is in dispute with the planning authority about whether EIA is required (Regulation 10, see paragraph 51). However, Scottish Ministers also have a number of wider powers:
- Scottish Ministers may make a screening direction as to whether development (of a type listed in Schedule 1 or Schedule 2 to the Regulations) is EIA development at any time prior to consent being granted, either at their own volition or where requested to do so in writing by any person (Regulation 7(4)).
  - Scottish Ministers may direct that a particular development which, although of a type listed in column 1 of Schedule 2 does not constitute Schedule 2 development for the purposes of the Regulations, is nonetheless EIA development (Regulation 7(5)).
  - Scottish Ministers may direct (Regulation 50) that EIA is always required for particular classes of development. Any such general directions will be notified to all planning authorities.
  - Scottish Ministers may make a direction that the Regulations do not apply in relation to a particular proposed development if the sole purpose of the development is to respond to civil emergencies and where the Scottish Ministers consider that compliance with the EIA Regulations would have an adverse effect on the purpose of the development (Regulation 6(4)).
  - Scottish Ministers may make a direction under Regulation 6(6) exempting a particular project in accordance with article 2(4) of the Directive, where in their opinion, compliance with the Regulations would have an adverse effect on the purpose of the proposed development.

### **Request for a screening direction from Scottish Ministers by any person (Regulation 7(4))**

63. Generally, it will fall to planning authorities in the first instance to consider whether a proposed development requires EIA. Regulation 7(4) provides that any person may, where they consider a proposed development requires EIA, even though neither the planning authority nor the applicant takes that view, write to the Scottish Ministers requesting a screening direction. Any such requests will be considered on a case by case basis, in light of the 2017 Regulations. Some indication will therefore be looked for to demonstrate that the person making the request has seriously considered the basis on which an EIA might be needed, and has offered relevant grounds for that request. Where a planning authority has previously issued a screening opinion, the Scottish Ministers will consider whether the issues raised are sufficient to call into



question the validity of that screening opinion, and whether therefore a direction should be issued.

### **Procedure for making a screening direction**

64. Before making a direction, Scottish Ministers will normally give the planning authority and the developer the opportunity to offer comment.
65. Where Scottish Ministers issue a screening direction they must send, as soon as possible, copies of the direction and the accompanying statement (see paragraphs 53-54 above) to the planning authority, the developer and, where appropriate, to the person who made the request where this was not the developer.

## **EFFECT OF SCREENING OPINIONS AND SCREENING DIRECTIONS**

66. There may, exceptionally, be cases where a screening opinion has been issued but it subsequently becomes evident that it needs to be changed. This is most likely to be after a negative screening opinion has been issued and new evidence comes to light. Where new evidence comes to light concerning an application for multi-stage consent in connection with a development for which a negative screening opinion or direction has previously been issued, the provisions of Regulations 32 - 35 set out the circumstances in which a new screening opinion or screening direction may be issued which supersedes the terms of an earlier screening opinion or direction (see paragraphs 138-144 for more information on multi-stage consents). Similar provision is made in article 3(8)(C) of The Town and Country Planning (General Permitted Development) (Scotland) Order 1992, as amended, in relation to prior notifications or applications for prior approvals. In all other circumstances, the authority could seek to persuade the applicant to voluntarily carry out an assessment and to submit an EIA Report in accordance with the Regulations. Alternatively, the planning authority may ask Scottish Ministers to issue a screening direction. In these circumstances any direction issued by Scottish Ministers, whether it agrees or disagrees with the authority's screening opinion, supersedes the previous screening opinion.

## PERMITTED DEVELOPMENT

67. The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (GPDO) grants a general planning permission (usually referred to as permitted development rights - PDRs) for various specified types of development. Although many permitted development rights concern development of a minor, non-contentious nature such as development within the curtilage of a dwelling house, minor operations, temporary buildings and uses, and small business developments, there are some that could fall within the descriptions in Schedules 1 or 2.
68. The provisions of the GPDO (insofar as they relate to Schedule 1 or Schedule 2 development) are such that:
- Schedule 1 development is not permitted development. Such developments always require the submission of a planning application and an EIA report;
  - Schedule 2 development does not constitute permitted development unless the planning authority has adopted a screening opinion to the effect that EIA is not required. Where the authority's opinion is that EIA is required, permitted development rights are withdrawn and a planning application must be submitted and accompanied by an EIA report.

These requirements do not apply to certain types of permitted development, described in paragraphs 157-159.

69. Requests to the planning authority for a screening opinion can be made alongside any "prior notification" or application for prior approval which may be required under the particular PDR, although developers may wish to establish at an earlier stage whether or not EIA and a planning application will be required. (See paragraphs 71-72 on prior approvals.)
70. Planning authorities should be on the lookout for work being carried out under PDRs to ensure that the developer has, where necessary, obtained a screening opinion that EIA is not required.

### Prior Approvals

71. There may be circumstances in which an authority receives an application under the GPDO for a prior approval, or for a determination as to whether prior approval will be required (known as 'prior notification'), which the authority considers relates to Schedule 1 development. Regulation 56 amends the GPDO to require that the authority must adopt a screening opinion. Planning authorities should bear in mind that for schedule 1 development the screening opinion must always be that EIA is required.
72. Where an application for prior approval or prior notification is received, which the authority considers relates to schedule 2 development which may have significant effects on the environment, and those effects have not previously

been identified (whether in any earlier opinion or direction, or because no opinion or direction has been issued) the authority must adopt a screening opinion. Any screening opinion adopted in those circumstances will supersede the terms of any earlier opinion or direction.

## **EIA AND OTHER TYPES OF ENVIRONMENTAL ASSESSMENT**

73. There are a number of other European Community Directives which require the assessment of effects on the environment. For example:
- Developments which will affect a Special Protection Area designated under the Wild Birds Directive or Special Areas of Conservation designated under the Habitats Directive must be subject to an assessment of those effects in accordance with the Conservation (Natural Habitats &c.) Regulations 1994.
  - Most major industrial developments will require a permit under the Pollution Prevention and Control (Scotland) Regulations 2012.
  - Certain establishments, which have the potential to cause a major accident hazard involving dangerous substances, require a consent under the Control of Major Accident Hazards Directive.
  - The “Strategic Environmental Assessment” (SEA) Directive which is given effect in Scotland through the Environmental Assessment (Scotland) Act 2005. The Act requires an environmental assessment of plans, programmes and strategies, including all new or replacement development plans.
74. These requirements and EIA are independent of each other in that the requirement for one does not mean another automatically applies. The individual tests set out in each system still apply. However, there are clearly some links between them and developers will benefit from identifying the different assessments required at an early stage and coordinating them to minimise undesirable duplication where more than one regime applies. For example, the EIA Report should include consideration where relevant of the operational effects of a development, and the EIA Report should inform any application for a PPC permit.
75. With regards to paragraph 73 above, the Regulations specifically require that, where a development is EIA development and also requires a Habitats Regulation Assessment, the planning authority (or Scottish Ministers as the case may be) must where appropriate ensure the Regulation Assessment and the environmental impact assessment are coordinated (regulation 54(1)).

# PREPARATION AND CONTENT OF AN EIA REPORT

## General requirements

76. It is the applicant's responsibility to prepare the EIA report. There is no statutory provision as to the form of an EIA report but it must constitute a 'single and accessible compilation'. (Berkeley v SSETR (2000) WLR 21/7/2000 p420). It must contain at least the information specified in Regulation 5 and any additional information specified in Schedule 4 of the 2017 Regulations (reproduced in Annex B to this Circular) which is relevant to the specific characteristics of a particular development and to the environmental features likely to be affected. It is emphasised that the requirement is to include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the project on the environment, taking into account current knowledge and methods of assessment. Other impacts may be of little or no significance for the particular development in question and, if included in the EIA report, will need only very brief treatment to indicate that their possible relevance has been considered. Where a scoping opinion has been adopted or a scoping direction issued, (see paragraph 98) the EIA report must be based on that opinion or direction.
77. Regulation 5(2)(d) and paragraph 2 of Schedule 4 requires the applicant to include in the EIA report a description of the reasonable alternatives (development design, technology, location, size and scale) studied by the developer, which are relevant to the proposed project and its specific characteristics, and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects.
78. The EIA Report is one output from the environmental impact assessment process. That process must identify and assess, in an appropriate manner, in light of the circumstances relating to the proposed development, the direct and indirect significant effects of the proposed development on a number of factors and the interaction between these factors (Regulation 4(2) and (3)). The factors are:
- a) population and human health;
  - b) biodiversity, and in particular species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
  - c) land, soil, water, air and climate;
  - d) material assets, cultural heritage and the landscape.

The effects to be identified, described and assessed must include the expected effects deriving from the vulnerability of the development to risks, so far as relevant to the development, of major accidents and disasters (Regulation 4(4)). Paragraph 4 of Schedule 4 sets out more detailed aspects of some of the factors listed above. Paragraph 5 of Schedule 4 indicates, among other things, that consideration should, where relevant also be given to the likely significant effects resulting from use of natural resources, the emission of pollutants, the creation of nuisances and the elimination of waste.

79. The description of likely significant effects should, in addition to the direct effects of a development, also cover the indirect, secondary, cumulative, transboundary, short-term, medium-term, long-term, permanent and temporary, positive and negative effects. These are comprehensive lists, and a particular project may of course give rise to significant effects, and require full and detailed assessment, in only one or two respects.
80. The information in the EIA report must be summarised in a non-technical summary (paragraph 9 of Schedule 4 see Annex B). The non-technical summary is particularly important for ensuring that the public can comment fully on the EIA report. The EIA report may, of necessity, contain complex scientific data and analysis in a form which is not readily understandable by the lay person. The non-technical summary should set out the main findings of the EIA report in accessible plain English.

## **Compiling an EIA report**

81. It is the developer's responsibility to prepare the EIA report. As a starting point, applicants may like to study the advice produced by the Scottish Government in the relevant Planning Advice Note on Environmental Impact Assessment, which should be read in conjunction with this guidance and with the Regulations themselves.
82. In order to ensure the completeness and quality of the EIA report, the developer must ensure that it is prepared by competent experts and that the report is accompanied by a statement outlining their relevant expertise, or qualifications, sufficient to demonstrate that this is the case (Regulation 5(5)).
83. There is no obligation on the applicant to consult anyone about the information to be included in a particular EIA report. However, there are good practical reasons to do so. Planning authorities will often possess useful local and specialised information and may be able to give preliminary advice on those aspects of the proposal that are likely to be of particular concern to the authority. The timing of such informal consultations is at the developer's discretion; but, it will generally be advantageous for them to take place as soon as the developer is in a position to provide enough information to form a basis for discussion. The applicant can ask that any information provided at this preliminary stage be treated in confidence by the planning authority and any other consultees, subject to statutory provisions including under the Environmental Information (Scotland) Regulations 2004.
84. It will normally also be helpful to a developer when preparing an EIA report to obtain information from the consultation bodies (see paragraph 101). Where a developer has formally notified the planning authority that an EIA report is being prepared, the planning authority will inform each of the consultation bodies of the details of the proposed development and that they may be requested to provide relevant, non-confidential, information (see paragraph 103). Non-statutory bodies also have a wide range of information and may be consulted by the applicant.

## **Provision to seek a formal opinion from the planning authority on the scope of an EIA Report ('scoping opinion') (Regulation 17)**

85. A developer may ask the planning authority for their formal opinion on the information to be supplied in the EIA Report (a 'scoping opinion'). This provision allows the developer to be clear about what the planning authority considers the significant effects of the development are likely to be and, therefore, the topics on which the EIA report should focus.
86. A request for a scoping opinion must include (Regulation 17(2));
  - a) a description of the location of the development, including a plan sufficient to identify the land,
  - b) a brief description of the nature and purpose of the development and its likely significant effects on the environment,
  - c) such other information or representations as the person making the request may wish to provide or make.
87. As this information is similar to that required to be submitted to accompany a request for a screening opinion (see paragraph 24), it could be beneficial to submit both requests at the same time (Regulation 17(7)). A developer may also wish to submit a draft outline of the EIA report, giving an indication of what he or she considers to be the main issues, to provide a focus for the planning authority's considerations.
88. If the authority considers that it needs further information to be able to adopt a scoping opinion, the developer must be asked to provide it. This request must be made within 21 days of receipt of the scoping request.
89. The authority must consult the consultation bodies (see paragraph 101-103) before adopting its scoping opinion. Where the request relates to an application in respect of which the Health and Safety Executive ('HSE') would require to be consulted under paragraph 3 or 4 of Schedule 5 of the Development Management Procedure Regulations ('the DMR'), or the Office for Nuclear Regulation under paragraph 3A of schedule 5, the authority must also consult with that body before adopting any scoping opinion. Finally, the authority must also consult any other public body which it considers likely to have an interest in the proposed development by reason of its specific environmental responsibilities or local and regional competencies.
90. The planning authority must also take into account the information provided by the developer, in particular in respect of the specific characteristics of the development, including its location and technical capacity and its likely impact on the environment (Regulation 17(5)).
91. The planning authority must adopt the scoping opinion within 35 days of receiving the request or such longer period as may be agreed in writing. Where both a screening and a scoping opinion have been requested, the 35 day period will run from the date of adoption of the screening opinion (Regulation 17(6) and (7) respectively). This period may be extended if the authority and developer so agree in writing.



92. The scoping opinion must be made available for public inspection for 2 years on a website and at the place where the planning register is kept. This requirement also applies to any request for a scoping opinion and, if applicable, any request for a scoping direction. If a planning application is subsequently made for development to which the scoping opinion relates, the opinion, request for the opinion and any request for a scoping direction, if applicable, should also be placed on Part 1 of the register with the application (Regulation 28).

### **Provision for a planning authority to adopt a scoping opinion without being asked to do so (Regulation 17(10))**

93. Where a request is made to a planning authority for a screening opinion but no request is made for a scoping opinion, the planning authority may at their own volition adopt a scoping opinion and must follow the process outlined in paragraphs 85-92 above, as if a request for a scoping opinion had been made on the date on which the authority adopted the screening opinion.

### **Request to Scottish Ministers for a scoping direction (Regulation 18)**

94. There is no provision to refer a disagreement between the developer and the planning authority over the content of an EIA Report to Scottish Ministers (although on call-in or appeal Scottish Ministers will need to form their own opinion on the matter). However, where a planning authority fails to adopt a scoping opinion within 35 days (or any agreed extension), the developer may ask the Scottish Ministers to make a scoping direction (Regulation 17(8)).
95. A developer may also request a scoping direction in respect of;
- An EIA application referred to the Scottish Ministers without an EIA report (see paragraph 59)
  - An appeal to the Scottish Ministers without an EIA report (see paragraph 59).

The request should be accompanied, by all the previous documents relating to the request for the scoping opinion, where appropriate, together with any additional representations the developer wishes to make. If the request for a scoping direction is made because the planning authority has failed to adopt a scoping opinion, the developer must also send a copy of the request to the planning authority.

96. Scottish Ministers must make a scoping direction within 35 days from the date of receipt of a request, or such longer period as they may reasonably require. They must consult the consultation bodies and the developer beforehand. Where the request relates to an application in respect of which either the 'HSE' or the Office for Nuclear Regulation would be required to be consulted under paragraph 3 or 4 of Schedule 5 or of paragraph 3A to the DMR respectively, the Scottish Ministers must also consult with that body before adopting any scoping

direction. The Scottish Ministers must also take into account the matters set out in paragraph 90.

97. Copies of the scoping direction must be sent to the developer and to the planning authority, which must ensure that a copy is made available for inspection.

### **Effect of a scoping opinion or direction**

98. Regulation 5(3) provides that where a scoping opinion has been issued, the EIA report must be based on that scoping opinion and include the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment at the point at which scoping is undertaken.
99. As these documents represent the considered view of the planning authority or Scottish Ministers, a report which does not cover all the matters specified in the scoping opinion or direction is likely to be subject to calls for additional information under Regulation 26 (see paragraphs 116-118).
100. The fact that a planning authority or the Scottish Ministers given a scoping opinion or scoping direction does not however preclude them from requesting additional information in connection with an EIA report (Regulations 17(11) and 18(9) and paragraphs 116 - 118 refer).

### **Provision of information by the consultation bodies (Regulation 19)**

101. Under the Environmental Information (Scotland) Regulations 2004, public bodies must make environmental information available to any person who requests it. The Regulations supplement these provisions in cases where a developer is preparing an EIA report. Under Regulation 19(3), once a developer has given the planning authority (or the Scottish Ministers as the case may be) notice in writing that they intend to submit an EIA report, the authority (or Scottish Ministers) must inform the consultation bodies, and any other public body they consider likely to have an interest (Regulation 19(3)(a)(ii)), to remind them of their obligation under Regulation 19(4) to make available, if requested, any relevant information in their possession. The planning authority (or Scottish Ministers) must also notify the developer of the names and addresses of the bodies to whom they have sent such a notice.
102. The consultation bodies as defined in Regulation 2(1) are:-
  - any adjoining planning authority, where the development is likely to affect land in their area;
  - Scottish Natural Heritage (SNH);
  - Scottish Water;
  - The Scottish Environment Protection Agency (SEPA);
  - Historic Environment Scotland (HES);

- For marine fish farming applications only, the district salmon fishery board for that area and Scottish Ministers (Regulation 40(2)) are consultation bodies in addition those bodies listed above.

103. The consultation bodies are only required to provide information already in their possession. There is no obligation on the consultation bodies to undertake research or otherwise to take steps to obtain information which they do not already have. Nor is there any obligation to make available information which is not required to be disclosed under the Environmental Information (Scotland) Regulations 2004, although a decision to withhold particular information must be carefully considered under the terms of those Regulations. The consultation bodies may make a reasonable charge reflecting the cost of making available information requested by a developer.

# **SUBMISSION OF EIA APPLICATION AND INITIAL PUBLICITY PROCEDURES**

## **Submission of EIA report by developer**

104. When submitting an EIA report along with a planning application, the developer should send to the planning authority all the documents which must normally accompany a planning application, together with the requisite fee (which is not affected by the fact that an EIA report is required).
105. The developer must provide the planning authority with sufficient copies of the EIA report for the authority to send copies to Scottish Ministers and the consultation bodies plus an additional copy. Alternatively, a single copy may be submitted electronically to the planning authority for onward transmission, provided it satisfies the provisions of Regulation 43. In practice, and regardless of the format in which it is provided, developers will wish to ensure that the EIA Report is readily accessible and clearly labelled.
106. The developer must also make a reasonable number of copies of the EIA report available to the public, either free of charge or at a reasonable cost, reflecting printing and distribution costs (Regulation 25). Planning authorities and developers may wish to consider whether these copies should be held at the authority's offices, and whether the authority's staff should collect any charges for those copies on behalf of the developer.

## **Notification and Publication of EIA Report (Regulations 20 and 21)**

107. Where a developer submits an EIA Report to a planning authority or Scottish Ministers, the authority or the Scottish Ministers as the case may be must notify those with an interest in "neighbouring land"<sup>5</sup> to that on which the proposed development would take place, of the availability of the report. The form of notification is specified in Schedule 5 to the Regulations and the process should, when the EIA Report is submitted at the same time as the planning application, be combined so far as possible with the neighbour notification requirements under Regulation 18 of the Development Management Procedure Regulations. Where an EIA Report is only later submitted to the Scottish Ministers to accompany an application which they have called-in for their determination or which is before Scottish Ministers on appeal, the relevant planning authority should provide the Scottish Ministers with full details, including the postal address, of all premises situated on "neighbouring land" as defined by Regulation 3(1) of the Development Management Procedure Regulations.
108. On receipt of the EIA Report, the planning authority (or as the case may be the Scottish Ministers) must publish a notice in the local press, the Edinburgh Gazette and on the application website (Regulation 21(5)). The applicant must,

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<sup>5</sup> Neighbouring land has the same meaning as in Regulation 3(1) of the Development Management Procedure Regulations

when submitting the EIA report, pay the costs of publishing the notice in the local newspaper and the Edinburgh Gazette. The notices published must (in accordance with Regulation 21(2)):-

- Describe the application and the proposed development to which the EIA report relates;
- State that the proposed development is subject to EIA and, where relevant, that it is likely to have significant effects on the environment in another EEA state;
- state that the report is available for inspection free of charge and the times and places, and the means by which (including the application website), the report is available for inspection;
- state how copies of the report may be obtained;
- state the cost of a copy of the report;
- state how and by what date representation may be made (not less than 30 days from date of notice);
- provide details of the arrangements for public participation in the decision making process including a description of how notice will be given of the subsequent submission by the developer of any additional information and how representations in relation to that additional information may be made;
- state the nature of possible decisions to be taken in relation to the application and provide details of the authority by whom such decisions are to be taken.

### **Consultation where EIA report received by planning authority**

109. The planning authority should consult the consultation bodies, and any other public body they consider may have an interest, on the EIA report and the related planning application. Additionally, where the request relates to an application in respect of which the Health and Safety Executive ('HSE') would be required to be consulted under paragraph 3 or 4 of Schedule 5 to the Development Management Procedure Regulations ('the DMR') - i.e. broadly speaking developments involving or in the vicinity of major accident hazards - the authority must also consult the HSE on the EIA Report. Authorities will wish to clearly differentiate between a consultation on the EIA Report and any consultation, where relevant, on the related planning application, to which different procedures apply.

110. The planning authority must inform all bodies consulted how and by when they may make representations. The date by which representations may be made must be no earlier than 30 days after the date on which copies of the report were sent to these bodies.

### **EIA report submitted after a planning application**

111. Where an applicant is submitting an EIA Report which relates to a planning application that has already been made, the procedures are essentially the same as described in paragraphs 105-108 above.

## **CONSIDERATION OF EIA APPLICATIONS**

112. The planning authority should determine the EIA application within 4 months from the date of receipt of the EIA report, instead of the usual 2 months from the receipt of the planning application (Regulation 49). The period for determination may be extended by written agreement between the authority and the applicant. Where an EIA Report is not submitted with an EIA application and the applicant indicates they propose to provide one, the time period for determining the application is suspended until the EIA report is received.

### **Adequacy of the EIA Report**

113. The Regulations require that the planning authority (or the Scottish Ministers, as the case may be) must ensure that they have, or have access to, sufficient expertise to examine the EIA report (Regulation 4(7)). In practice, planning authorities are used to taking into account environmental information in the decision making process, and the case officer should identify those issues on which advice from specialists within the council may need to be sought. The independent review of planning, undertaken in 2016, highlighted there was an opportunity for authorities to make better use of shared services. In response it was agreed that this was worth further investigation and a commitment to working with stakeholders to identify priorities for shared services was given. The examination of the EIA report may also identify issues on which the specific views of the Consultation bodies will be required, in which case the Consultation bodies should be advised accordingly from the outset.
114. Planning authorities should satisfy themselves in every case that the submitted EIA report contains the information specified in Regulation 5(2) and, where relevant, Schedule 4 to the Regulations (see Annex B). Planning authorities must also ensure, where a scoping opinion or direction has been issued, that the EIA report is based on that opinion or direction. To avoid delays in determining EIA applications, consideration of the need for further information and any necessary request for such information should take place as early as possible in the scrutiny of the application.
115. It is important to ensure that all the information that may reasonably be required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment, is provided. Planning authorities will wish to exercise care and judgment if using conditions to secure further ecological surveys after planning permission has been granted, to ensure that conditions designed to mitigate the likely effects of a proposed development are not used as a substitute for EIA or to circumvent the requirements of the EIA Directive.

### **Provision of additional information (Regulation 26)**

116. Where the required information has not been provided, the authority (or Scottish Ministers as the case may be) must use its powers under Regulation

26 (having regard in particular to current knowledge and methods of assessment) seek from the developer supplementary information about a matter to be included in the EIA report in accordance with Regulation 5(2) which they consider is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment. Any information provided in response to such a written request must, in accordance with Regulation 27(1), be publicised, and consulted on, in a similar way to the EIA report. The provisions of Regulation 26 are without prejudice to the more general powers planning authorities have to request further information to enable them to deal with a planning application, under the DMR.

117. Where an applicant has voluntarily submitted any other information which, in the opinion of the planning authority or the Scottish Ministers, as the case may be, is substantive information about a matter to be included in the EIA report, that information should be advertised, sent to the consultation bodies, and taken into account in reaching a decision on the application.
118. The period of 4 months referred to in paragraph 112 continues to run while any correspondence about the adequacy of the information in a report is taking place (unless the information in the report is not sufficient for it to constitute an “EIA report”, in terms of the definition in Regulations 2(1)). A planning application is not invalid purely because an inadequate EIA Report has been supplied nor because the applicant has failed to provide further information when required to do so under Regulation 26. However, if the applicant fails to provide enough information to complete the environmental impact assessment the application can be determined only by refusal (Regulation 3).

### **Additional information provided for a public inquiry**

119. Scottish Ministers may use Regulation 26 to request further information for the purposes of a local inquiry under the Town and Country Planning (Scotland) Act 1997. By virtue of Regulation 27(2) if the request specifically states that the further information is to be provided for the purpose of an inquiry, the publicity and consultation procedures in Regulations 20 to 22, 24 and 25 do not apply to the extent that the information is required to be published as part of the inquiry.

### **Verification of information in an EIA report**

120. Regulation 26(4) empowers a planning authority or Scottish Ministers to require an applicant or appellant to produce such evidence as they may reasonably call for to verify any information in the EIA report or such additional information as the case may be. Any such request for evidence must be made in writing.

### **Development with significant transboundary effects (Regulations 41 and 42)**

121. Planning authorities are required to send a copy of the EIA Report to Scottish Ministers and this enables them to consider whether the proposed development is likely to have significant effects on the environment of any EC Member State,

or any other country that has ratified the UNECE Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention). This will also enable Scottish Ministers to respond promptly if a country asks for information about a particular development.

122. Developments that are likely to have significant effects on the environment of another country will be rare. However, should such a development occur in Scotland, Scottish Ministers must send information about the development to the government of the affected country, and invite them to participate in the consultation procedures. At the same time, Scottish Ministers will publish a notice in the Edinburgh Gazette giving details of the development and any available information on its possible transboundary impact. In any such case, Scottish Ministers will direct (under Regulation 32 of the Development management Procedure Regulations) that planning permission may not be granted until the end of such time as may be necessary for consultations with that government.
123. Where the environment in Scotland is likely to be significantly affected by a project in another EC Member State, Scottish Ministers will liaise with that country to agree how Scotland and its public are to be consulted so that they may participate fully in that country's EIA procedure.



## **DETERMINING THE PLANNING APPLICATION**

124. The planning application may not be determined without first examining and taking into consideration the environmental information, including the EIA report, any additional information (see paragraphs 114-119), any comments made by the consultation bodies, and any representations from members of the public about environmental issues, and a reasoned conclusion reached by the planning authority (or the Scottish Ministers as the case may be) on the significant effects of the development on the environment.

### **Content of a decision notice for EIA development**

125. Where an EIA application is determined, the planning authority or the Scottish Ministers must notify the developer of the decision. Regulation 29 sets out the information to be included in the 'decision notice' which must - in addition to the information required to be contained in a decision notice under Regulation 28(3) of the Development Management Procedure Regulations – also contain the following information:

- a) a description of the development;
- 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; and
- e) a summary of—
  - i. the environmental information; and
  - ii. the results of the consultations and information gathered and how those results, in particular comments received from an EEA State pursuant to consultation under Regulation 41, have been incorporated or otherwise addressed;
- f) if the decision is to grant planning permission—
  - i. any conditions to which the decision is subject;
  - ii. the reasoned conclusion on the significant effects of the development on the environment; and
  - iii. a statement that the planning authority or the Scottish Ministers, as the case may be, are satisfied that the reasoned conclusion is still up to date; and
  - iv. a description of any features of the development and any measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment (see paragraphs 132 –134); and
  - v. a description of any monitoring measures required under Regulation 30 (see paragraphs 135-137); and
- g) information regarding the right to challenge the validity of the decision and the procedures for doing so.

126. The decision to grant development consent must include, where appropriate, a description of any measures for monitoring the significant adverse effects of the development on the environment. In practice authorities may wish to use

conditions or a planning obligation to agree the detailed measures to be implemented (Regulation 29(5)).

127. The reasoned conclusion must set out the planning authority's (or the Scottish Ministers) consideration of the significant effects of the development on the environment. It must take account of the results of the examination of the EIA report, any other environmental information and, where appropriate, any supplementary examination. The reasoned conclusion is still up to date if, the planning authority or the Scottish Ministers as the case may be, are satisfied, having regard to current knowledge and methods of assessment, that the reasoned conclusion addresses the likely significant effects of the development on the environment.
128. In the case of a decision relating to a multi-stage consent where Regulation 4(6) applies, (likely significant effects not fully identifiable at the time of determination of the application for planning permission,) the decision notice must describe those matters which the authority or the Scottish Ministers consider are not fully identifiable.
129. With regard to paragraph 125 (g) above, this should include a note of the main means of challenge available, which in respect of any statutory means of challenge under the 1997 Act, will depend on whether or not the EIA application is determined by the planning authority, the Scottish Ministers or a reporter. When it is the planning authority which makes the determination, usually the reference would be to section 47 of the 1997 Act although the provisions of Regulation 12(5) have to be borne in mind; when it is the Scottish Ministers or a reporter then this is likely to be by reference to section 239 of the 1997 Act. However, each case must be considered with regard to its own set of circumstances and the appropriate reference should be inserted accordingly. In addition to any statutory means of challenge, the availability of proceeding with a petition for judicial review of the determination would need to be mentioned. In all of these scenarios the statement should also provide information about the general circumstances of application and where further information on such means of challenge and the procedures for these can be found (such as through the Scottish Courts Service or through the Citizens Advice Bureau).

### **Publicising determinations of EIA applications (Regulation 31)**

130. When the planning authority has determined an EIA application, must send a copy of the decision notice to the Scottish Ministers and must inform the public and those bodies consulted under paragraph 102 above of the decision and of where a copy of the decision notice can be inspected, either by publishing a notice in a local newspaper or by such other means as are reasonable in the circumstances. The authority must also make a copy of the decision notice available on the application website and at an office of the planning authority where the register (of planning applications) may be inspected.

131. Where Scottish Ministers have, or a reporter has determined an EIA application, they will send a copy of their determination to the planning authority for them to publicise in the same way as if it were a decision of the authority.

## **Securing mitigation measures**

132. For the purposes of the decision notice, mitigation measures are taken to mean “any features of the development and any measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment...” Planning authorities will need to consider carefully how such measures are secured, however this will usually be through either a planning condition or a planning obligation (under section 75 of the Town and Country planning (Scotland) Act 1997, as amended by the Planning etc. (Scotland) Act 2006). A planning obligation is enforceable by the planning authority, who have powers to take direct action to ensure compliance with the terms of the obligation. Detailed guidance on the use of planning obligations is set out in Circular 3/2012.
133. Authorities should bear in mind that a condition requiring the development to be “in accordance with the EIA Report” is unlikely to be valid unless the EIA Report was exceptional in the precision with which it specified the mitigation measures to be undertaken. Even then, the condition would need to refer to the specific part of the EIA Report rather than the whole document. Planning conditions should not however duplicate other legislative controls. In particular, planning authorities should not seek to substitute their own judgement on pollution control issues for that of the bodies with the relevant expertise and the statutory responsibility for that control. Advice on planning conditions is contained in The Scottish Office Development Department Circular 4/1998 and the Addendum issued in April 1999. Advice on the links between the Town and Country Planning system and environmental Regulation are dealt with in PAN 51 (Planning, Environmental Protection and Regulation).
134. Developers may wish to adopt environmental management systems to demonstrate implementation of mitigation measures.

## **Monitoring Measures (Regulation 30)**

135. In considering whether to require monitoring measures, and the nature of any measures to be imposed, planning authorities should bear in mind that monitoring arrangements under other regulatory regimes may be used if appropriate, with a view to avoiding duplication. In all cases, authorities should ensure that the type of parameters to be monitored and the duration of the monitoring should be proportionate to the nature, location and size of the project, and the significance of its effects.
136. Monitoring should not be used as a general means of gathering environmental information; rather it is a means of monitoring, where appropriate, the effectiveness of any measures to avoid, prevent, reduce or offset significant adverse effects of the development identified through the EIA process. It follows that authorities should give consideration to whether any required

monitoring measures should also make provision for any remedial action to be taken where appropriate.

137. Where it is considered appropriate that monitoring measures are attached to a consent this can be achieved through the use of existing mechanisms, including through the use of planning conditions and planning obligations, information on which is provided in paragraphs 132 – 133 above. Regardless of the mechanism used, authorities should ensure that provisions are clear and precise, to ensure clarity for all parties concerned. Regulation 30(4) sets out that, where monitoring measures are required, the planning authority must take steps to ensure those measures are implemented.

## **SPECIAL CASES**

### **Multi Stage Consents**

138. In cases where a consent procedure comprises more than one stage (a 'multi-stage consent'), one stage involving a principal decision and the other an implementing decision which cannot extend beyond the parameters set by the principal decision, the European Court of Justice has made clear that the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. (Cases C-201/02 and C-508/03 refer.) However, the courts have equally made clear that if those effects are not identified or identifiable at the time of the principle decision, assessment must be undertaken at the subsequent stage.
139. If sufficient information is given with the application for planning permission (whether an application for planning permission in full, or for planning permission in principle), it ought to be possible for the authority to determine whether the EIA undertaken at that stage will take account of all potential environmental effects likely to follow as consideration of an application proceeds through the multi-stage process. Furthermore, if when granting planning permission the authority ensures the permission is conditioned by reference to the development parameters considered in the EIA report, it will normally be possible for an authority to treat the EIA at the permission stage as sufficient for the purposes of granting any subsequent multi stage consents. Where this is the case, as no additional information would have been submitted, it will simply remain for authorities to publicise the Decision Notice in accordance with Regulation 29 as modified by regulation 36(2). Ultimately, authorities will wish to seek to 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.
140. The ruling in case Commission v UK (C-508/03) made it clear that there may be circumstances in which certain significant effects on the environment are not identifiable until the time of the procedure relating to the implementing decision. In that event the assessment of those effects should be carried out in the course of the subsequent stage.

### **Determining an Application for Multi Stage Consent**

141. Regulation 2(1) defines an 'application for multi-stage consent' as an application for approval, consent or agreement required by a multi stage condition. A multi stage condition means;
- a) a condition imposed on planning permission granted on an application made under Part III of the Act or section 242A (urgent crown development)
  - b) a condition specified in a simplified planning zone scheme,
  - c) a condition imposed on planning permission deemed to be granted by a direction made under section 57 of the Act (development with government authorisation; or,
  - d) a condition specified in an enterprise zone scheme, or

e) a ROMP condition (as defined below), and where (in terms of the condition) the approval, consent or agreement of the planning authority must be obtained before all or part of the development permitted by the planning permission may begin, or in the case of a ROMP condition, be continued.

142. Before determining an application for multi-stage consent in respect of EIA development, Regulation 33 requires the authority to take into account any EIA previously undertaken, and to consider whether the application before them may have any significant effects on the environment that have not previously been identified. When submitting an application for multi-stage consent in respect of an EIA development, applicants should therefore ensure that sufficient information is included to;
- enable the authority to identify the original planning permission; and
  - identify any EIA report previously submitted, whether in connection with the original permission or in relation to any previous application for multi-stage consent.
143. Applicants will not usually be required to re-submit any previous EIA report, but may exceptionally choose to submit a revised or updated statement along with their application for multi-stage consent. Where an EIA report is either submitted for the first time, revised or updated, or where additional information is supplied, the publicity and consultation provisions of the Regulations are triggered, and will apply as appropriate. In such cases the authority should also ensure that a copy of the original planning permission and supporting documents are made available for public inspection alongside the EIA report.
144. Where an EIA report has not been submitted for the first time and no additional information supplied, the planning authority or the Scottish Ministers as the case may be must comply with the requirements of regulation 29 as modified by regulation 36(2) concerning the notification of the decision.

### **Provision to request additional information (Regulation 26)**

145. Where an application for multi-stage consent is received in respect of an EIA development for which an EIA report has previously been submitted, the provisions of Regulation 26 (additional information and evidence relating to EIA reports) apply as they would in relation to an EIA application. The authority or the Scottish Ministers must, notwithstanding whether an EIA report has previously been revised or updated, require in writing the submission of such supplementary information as is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment. In considering whether supplementary information is required, the authority must examine the adequacy of the EIA report for the development as a whole in the light of those matters which are now before them for approval. See paragraphs 113-115 for further guidance on the adequacy of reports. In practice, where sufficient information has been supplied with the application for planning permission, the need for additional information should rarely arise.

## **Application for multi-stage consent in connection with a development for which EIA has not previously been undertaken (Regulation 34)**

146. Before submitting an application for multi-stage consent, developers who are in any doubt about whether EIA will be required may request a screening opinion. See paragraphs 24-27 for more information on obtaining a screening opinion.

### **Provision to supersede earlier screening opinions or directions**

147. Where an application for multi stage consent is made to an authority without an EIA report in connection with a development for which EIA has not previously been undertaken, and it appears to that authority 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,

the authority must adopt a screening opinion in respect of the development. Provision is made in the Regulations that a screening opinion adopted in these circumstances shall supersede the terms of any earlier opinion or direction (Regulation 34(5)).

148. Where an authority adopts a screening opinion such that EIA is required pursuant to paragraph 147 above, the provisions of the Regulations apply in a similar way as they would to an application for planning permission in full. This includes provision for the developer, if they disagree with that screening opinion, to ask the Scottish Ministers to make a screening direction. (Regulation 9(5)).

149. Regulation 35 makes similar provisions in respect of applications for multi-stage consent referred or appealed to the Scottish Ministers without an EIA report, requiring Ministers to issue a screening direction where appropriate.

### **Extension of the period for an authority's decision on a planning application**

150. Regulation 49 (applied by Regulation 36) extends the time period for determining an application for multi-stage consent from 2 months to 4 months.

## **Changes or Extensions to approved Development**

151. Changes or extensions to Schedule 1 or Schedule 2 developments which may have significant effects on the environment also fall within the scope of the Regulations.

### ***Schedule 1 development***

Where the change or extension is of a type listed in Schedule 1 and where the change or extension itself meets any thresholds or description set out in that schedule, it constitutes a Schedule 1 development and EIA is always required.

### ***Schedule 2 development***

If the change or extension is listed in Schedule 1 but does not itself meet any thresholds or criteria set out in that schedule, or if it is listed in column 1 of Schedule 2, it is considered to be a Schedule 2 development where the following additional criteria are met (this process is set out in figure 2):

- the corresponding thresholds and criteria applied to the development as changed or extended are met or exceeded; and
- where the thresholds are met or exceeded, the change or extension may itself have significant adverse effects on the environment; or
- the application concerns development to be located wholly or in part in a 'sensitive area' as defined in Regulation 2(1) (see paragraph 37).

Some changes or extensions may fall within classes of development to which permitted development rights may apply (see paragraphs 67-70). Development of a minor nature or which concerns the day to day operations of existing sites is unlikely to result in a significant environmental effect, and will not require screening. However, developers will wish to be on the look-out for changes or extensions which may have significant adverse effects, and in such cases will wish to request a screening opinion from the planning authority.

### **Identifying Schedule 1 and Schedule 2 development**

152. In determining whether a change or extension is of a type listed in Schedule 1 or Schedule 2, planning authorities should have regard to the "wide scope and broad purpose" of the Directive (see paragraphs 19-21 for more information). Where an application is made for a change or extension to an existing development, authorities must consider the purpose of that change or extension, and not just the works to be undertaken. For example, the European Court of Justice, in the case of *Abraham and Others* (ECJ C-2/07), held that it 'would be contrary to the very objective of [the EIA Directive] to exclude works to improve or extend the infrastructure of an existing airport from the scope of [the Directive] on the ground that Annex I covers the 'construction of airports' and not 'airports' as such.' In that case the European Court of Justice ruled that works to modify an airport thus comprise not only works to extend the runway, but all works relating to the buildings, installations or equipment of that airport where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic.

### **The need for EIA for Schedule 2 development**

153. Development which comprises a change or extension requires EIA only if the change or extension is likely to have significant environmental effects (determined through the screening process). However, the significance of any effects must be considered in the context of the existing development. For example, even a small extension to an airport runway might have the effect of

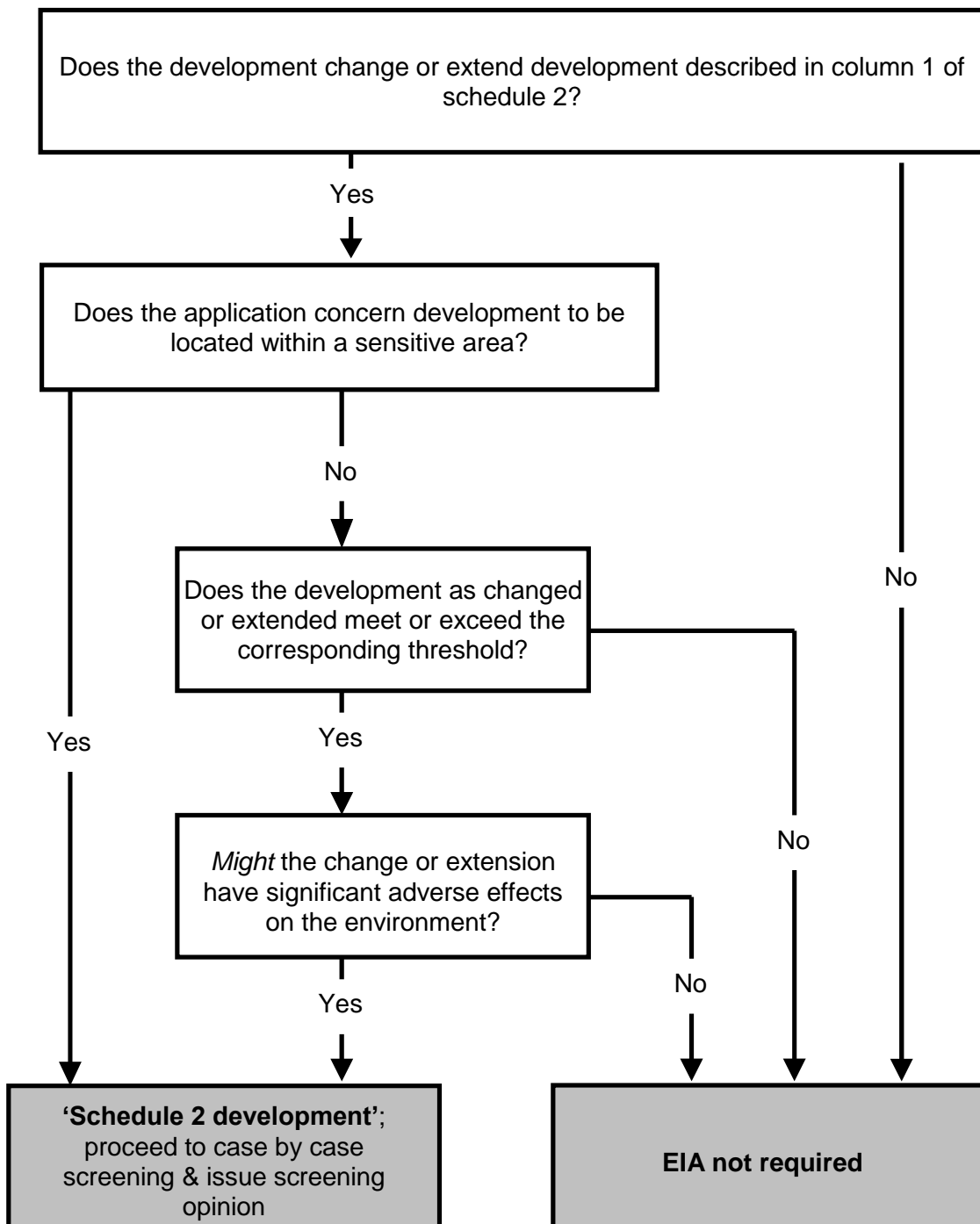


allowing larger aircraft to land, thus significantly increasing the level of noise and emissions. In some cases, repeated small extensions may be made to development. Quantified thresholds cannot easily deal with this kind of 'incremental' development. An expansion of the same size as a previous expansion will not automatically lead to the same determination on the need for EIA because the environment may have altered since the question was last addressed.

### **Preparation and content of an EIA Report**

154. It should be noted that the applicant can be asked to provide an EIA Report only in respect of the specific application made. Therefore, where an application concerns a change or extension to an existing development, the applicant should be asked to provide an EIA report only in respect of the proposed change or extension. However, the European Court of Justice has made clear in the case of Abraham and Others that it would be contrary to the Directive if, when assessing the environmental impact of a project, or of its modification, account were taken only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works. In any case, the information provided in the EIA report should accord with the requirements of Regulation 5 and Schedule 4 (Annex B refers) of the EIA Regulations. A scoping report can assist in setting out those effects that should be addressed.

Figure 2: Establishing whether a change or extension is a schedule 2 development



## **Simplified Planning Zones and Enterprise Zones (Regulation 37)**

155. No schedule 1 development can be granted planning permission by the adoption or approval of a Simplified Planning Zones (SPZ) or through the designation or modification of an Enterprise Zone (EZ). Schedule 2 development may be included in SPZs and EZs and can be granted permission by them, providing the particular development has been the subject of a screening opinion or direction that it is not EIA development.

## **Permitted Development (Exception to the Town and Country Planning EIA provisions)**

156. The provisions of the EIA Regulations do not apply to development within the following classes in Schedule 1 to the General Permitted Development Order (GPDO):

- Part 7 (forestry buildings and operations);
- Class 26 of Part 8 (development comprising deposit of waste material resulting from an industrial process);
- Part 11 (development under local or private acts or orders);
- Class 39(1)(a) of Part 13 (development by public gas transporters);
- Class 58 of Part 17 (development by licensees of the Coal Authority);
- Class 64 of Part 18 (deposit of mining waste);
- Class 73 of Part 26 (development by the Scottish Ministers as roads authority).

Development is also excluded which consists of the carrying out of drainage works to which The Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017 applies.

157. Development permitted under Part 7, under Class 29(1)(a) and (b) of Part 11, Class 29(1)(c) of Part 11, Class 39(1)(a) of Part 13 and Class 73 of Part 26 is the subject of alternative consent procedures to which separate Regulations or procedures apply. Development permitted under Class 26 of Part 8, Class 58 of Part 17 and Class 64 of Part 18 is excluded as it concerns projects begun on or before 1 July 1948, before the date on which the Directive came into operation.
158. Development having the response to civil emergencies as its sole purpose may be exempted on a case by case basis, if compliance with EIA would have an adverse effect on those purposes See paragraphs 62 to 63 (Scottish Ministers general powers to make directions).

## **Urgent Crown Development (Regulation 39)**

159. Special provision is made for development which is of national importance and is required urgently ('urgent crown development'). Where the appropriate authority responsible for Crown land certifies that a development meets those criteria, the application for planning permission can be made directly to the Scottish Ministers under section 242A of the 1997 Act. Regulation 39 applies the 2017 Regulations to the Crown subject to modifications. In particular, pre-

application requests for screening and scoping can be made to the Scottish Ministers in these urgent cases and there are requirements to pass screening and scoping decisions to the relevant planning authority to be kept alongside the register. The guidance in this Circular relating to screening will be applied to these urgent applications as it would to a called-in application or appeal to be determined by the Scottish Ministers.

## **Marine Fish Farming (Regulation 40)**

160. The 2017 Regulations apply to applications for planning permission relating to fish farm development. There are additional 'consultation bodies' for such applications (see paragraph 102) and the requirements of Regulation 20 (neighbour notification of the EIA report) do not apply.

## **ROMP Applications (Regulation 38)**

161. Regulation 38 sets out how the Regulations apply the EIA procedures when determining applications for the review of old mineral permissions ("ROMP applications") under Schedules 8, 9 and 10 of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act"). Regulation 38 requires planning authorities to consider and, if appropriate, require EIA before determining a ROMP application. It applies the generality of provisions contained in the Regulations to ROMP applications in the same way they would apply to a planning application, subject to certain necessary modifications. These modifications are discussed further below.

## **Existing ROMP Provisions**

162. There is a legislative requirement to review regularly the conditions attached to all mineral permissions so that improved operating and environmental standards can be secured. The Planning and Compensation Act 1991 introduced a requirement to upgrade Interim Development Orders ("IDOs") approved between 1943 and 1948. The legislative provisions were subsequently consolidated in Schedule 8 of the 1997 Act. The Environment Act 1995 introduced a requirement for reviewing mineral permissions granted between 1948 and 1982, as well as future 15-year periodic reviews of all extant mineral permissions (including IDOs). SDD Circular 34/1996 gives advice on the statutory procedures to be followed. The relevant provisions were subsequently consolidated in Schedule 9 and 10 of the 1997 Act.

## **Disapplication of deemed approved provisions**

163. Regulation 38 (18) confirms that deemed consent provisions under paragraphs 14(6)(b) of Schedule 8, 9(8) of Schedule 9 and 6(7) of Schedule 10 to the 1997 Act shall not operate where EIA may be required, unless either the relevant planning authority has adopted a screening opinion or the Scottish Ministers have made a screening direction to the effect that EIA is not required.

## **Suspension of planning permission**

164. Regulation 38(12) provides that where a competent authority requires an EIA report, or where supplementary information is required (paragraph 145) they shall notify the operator and specify the date by which the EIA report or supplementary information as the case may be is required.
165. If, on receipt of a notification that an EIA report is required the operator accepts that an EIA is needed they must:
- write within 42 days (this period is extended from 21 days to 42 days or such other period as may be agreed in writing by Regulations 38 (2), (5) and (6), stating that the operator accepts that an EIA report is needed and propose to provide it by the specified date; and
  - submit an EIA report by the specified date.

If the operator does not accept that EIA is needed they must, unless Scottish Ministers have made a screening direction to the effect that the ROMP development is not an EIA development, write within 42 days to the Scottish Ministers requesting a screening direction (see paragraph 51 on applying to Scottish Ministers for a screening direction).

166. If the operator does not comply with paragraph 165 above, or does not provide the required supplementary information by the date specified, then the planning permission to which the ROMP application relates will cease to have effect at the end of the 42 day period or on the day following the date specified or agreed by the authority of Scottish Ministers as the case may be, for submission of the EIA report, or supplementary information as appropriate. This suspension does not apply to any requirement to comply with restoration and aftercare conditions. Permission remains suspended until the EIA or supplementary information is submitted.
167. Regulation 38(16) requires planning authorities to enter in the register (provided for in Section 36 of the 1997 Act) any such suspension, and the dates that suspension commenced and is lifted.

## **Right of appeal against non-determination**

168. Regulation 38(22) – (23) provides for a right of appeal to the Scottish Ministers if a planning authority fails to give notice of its determination within 4 months (or any other time period agreed in writing) of receipt of an application accompanied by an EIA report. Or in the case where an EIA report, or additional information has been required after an application has been submitted, within 4 months (or any such longer period as may have been agreed in writing) of receipt of the EIA report or additional information. The Regulations also provide that, in determining the 4 month period (or any period extended as above), where a planning authority has notified an operator that submission of an EIA report is required, or the Scottish Ministers have given a screening direction, no account shall be taken of any period before the issuing of the direction.

## **Establishing whether EIA is required**

169. When considering whether a ROMP application is a Schedule 1 or Schedule 2 development, the 2017 Regulations require that any applicable thresholds or criteria apply to the development as changed or extended.
170. Further guidance on changes or extensions to existing development is provided in paragraph 151. For guidance on the need for EIA for Schedule 2 development, see paragraphs 18-23.

## **Pre-application considerations**

171. Planning authorities and operators should bear in mind that if the need for EIA only emerges after the ROMP application is submitted, failure to comply with procedural requirements may ultimately lead to the mineral development being suspended until such time as the requirements are met. Operators and planning authorities should therefore work closely together to ensure that all relevant environmental issues are considered at the earliest possible stage of the review process. This means ensuring sufficient time to allow for the preparation and submission of any EIA report, particularly if more complex or seasonal (e.g. ecological data collection) issues are likely to be raised.
172. Under Section 4(1) of Schedule 10 to the 1997 Act, planning authorities must give at least 12 months advance notice to land and mineral owners that a periodic review of a mineral permission is due. The timing of the notice should take account of the complexities of individual cases. In the interests of certainty, it is recommended that this notice confirms that consideration must be given to whether EIA is required.
173. If necessary, operators should be pro-active in instigating the commencement of review procedures, ahead of any statutory notice, by formally asking the planning authority for their written opinion on the need for EIA, and if required, what information should be included in any EIA report. If no such request is made prior to receipt of the statutory notice, it is recommended that operators immediately request a screening opinion following receipt of the 12 month notice.

## **Procedures when EIA is required**

174. The objective of the process is to produce a ROMP application, and (where required) an accompanying EIA report, which can be agreed as mutually acceptable to all parties. This should better ensure that the planning authority can proceed to determine the ROMP application without unnecessary complications or delay, and minimise the risk of the existing permission being suspended. The scheme of conditions eventually submitted by the operator should include conditions that are intended to mitigate any adverse effects identified in any accompanying EIA report. See also paragraphs 135 – 137 on monitoring.

## **Suspension of Mineral Permissions**

175. If the procedures outlined in this Circular are followed, and the planning authorities and operators work closely at all stages of the ROMP application, then the suspension provisions at Regulation 38(14) should not be required. Where operators have not complied with procedural requirements then the preference should be for any problems to be resolved through discussion and co-operation. If operators are genuinely seeking to supply the required information and are expected to do so within an acceptable period then planning authorities should consider any requests for an extension to the submission of information favourably.
176. In certain circumstances, planning authorities will need to consider the use of the suspension provision. These circumstances may include the environmental damage that may be caused by a delay in submitting an EIA report, the uncertainty that is caused to communities by unnecessary delays in completing the review process; and the failure of operators to make genuine attempts to comply with set deadlines. If a deadline is set (including any agreed extension) and is not complied with then the planning permission to which the ROMP application relates will be suspended following the date specified by the authority for the submission of the EIA report, or additional information, as appropriate. This suspension does not apply to restoration and aftercare conditions which continue in place.
177. On that date, any development consisting of the winning and working of minerals, or involving the depositing of mineral waste, will amount to unauthorised development. The operator should not continue the work. If working does continue, then the planning authority has available to it a range of enforcement powers, including enforcement notices, temporary stop notices and applications for interdict, and it may have to use these in order to prevent further unauthorised development taking place. Further guidance is given in SEDD Circular 10/2009.

## OFFENCES AND PENALTIES

178. The 2017 regulations introduce arrangements for offences and subsequent penalties. It is now an offence for any person or bodies corporate, in order to obtain a particular decision on an EIA application to;

- knowingly or recklessly make a false or misleading statement in a material particular;
- with intent to deceive, use a document which is false or misleading in a material particular; or,
- to withhold any material information with intent to deceive,

A person guilty of any of the above offences is liable to a fine.



## **TRANSITIONAL MEASURES**

179. The 2017 Regulations enter into force on 16th May 2017. Regulation 60 of the 2017 Regulations revokes the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 but the 2011 Regulations will nevertheless continue to apply in the following circumstances:

- Where a developer has submitted, before 16th May 2017, an 'Environmental Statement' in connection with an application for planning permission, the 2011 Regulations continue to apply to that application.
- Where a developer who is minded to make an EIA application requests a scoping opinion in respect of the proposed development under Regulation 14(1) of the 2011 Regulations before 16th May 2017, the 2011 Regulations continue to apply to an application for planning permission subsequently submitted for that same proposed development for which the scoping opinion was sought.
- Where before 16 May 2017 an applicant asks the Scottish Ministers under Regulation 11(3) of the 2011 Regulations, to make a scoping direction in connection with an application for planning permission referred to the Scottish Ministers without an Environmental Statement, the 2011 Regulations apply to the determination of the application.
- Where in connection with an appeal relating to the grant of planning permission an appellant asks the Scottish Ministers to make a scoping direction under Regulation 12(2) of the 2011 Regulations before 16th May 2017, the 2011 Regulations apply to the determination of that appeal.

### **Applications for multi-stage consent**

180. Where an application for multi-stage consent is made and an EIA Report (or 'Environmental Statement') was previously submitted in connection with the development before 16<sup>th</sup> May 2017, the 2017 Regulations apply with certain modifications. In such cases any assessment, under Regulation 33(2)(a), as to whether there may be significant effects on the environment not previously identified or assessed is to be made with reference to Schedule 4 of 2011 Regulations. Similarly, the consideration in such cases of whether any supplementary information is to be required or any additional information submitted is to be made with reference to Schedule 4 of the 2011 Regulations.

### **Screening**

181. The policy intention of the transitional arrangements is to provide certainty and continuity for developers regarding the criteria to be applied in determining whether or not EIA is required. To achieve this, Parts 1 and 2 and Schedules 1, 2 and 3 of the 2011 Regulations continue to apply in the following circumstances:

- Where a person who is minded to carry out development requests a screening opinion before 16th May 2017 under Regulation 6(1) of the 2011 Regulations.
- Where, following a request to the planning authority under Regulation 6(1) made before the 16th May 2017, a developer subsequently asks the Scottish Ministers for a screening direction under Regulation 6(6).
- The 2017 Regulations provide that Scottish Ministers may, under Regulation 7(4), make a screening direction either at their own volition or where requested to do so in writing by any person. To provide continuity for developers, where any screening direction is subsequently issued by the Scottish Ministers under Regulation 7(4) for a development for which a request for a screening opinion was previously made under Regulation 6(1) before 16th May 2017, the screening criteria to be applied in making the subsequent screening direction are those contained in Schedule 3 of the 2011 Regulations.

Where schedule 3 of the 2011 Regulations are applied in connection with the screening opinion or direction, the 2017 Regulations will apply to any subsequent EIA application or appeal except in the circumstances described in paragraphs 179 and 180 above.

## **PREVIOUS CIRCULARS CANCELLED OR AMENDED**

This Circular withdraws Scottish Government Circular 3/2011, Circular 8/2007 and Circular 26/1991

## **FURTHER COPIES AND ENQUIRIES**

Enquiries about the content of this Circular should be addressed to William Carlin, Environmental and Natural Resources Team, Planning and Architecture, Area 2-H, Victoria Quay, Edinburgh EH6 6QQ, Telephone 0131 244 5094 e-mail William.carlin@gov.scot. Further copies and a list of current planning circulars may be obtained online at <https://beta.gov.scot/publications/circulars-index/>

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# **ANNEX A: SELECTION CRITERIA FOR SCREENING SCHEDULE 2 DEVELOPMENT**

This is a reproduction of Schedule 3 of the Regulations (see paragraphs 24, 28, 32, 53, of the Circular).

## **Characteristics of development**

1. The characteristics of development must be considered having regard, in particular, to:-

- a) the size and design of the development;
- b) cumulation with other existing development and/or approved development;
- c) the use of natural resources, in particular land, soil, water and biodiversity ;
- d) the production of waste;
- e) pollution and nuisances;
- f) the risk of major accidents, and/or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge;
- g) the risks to human health (for example due to water contamination or air pollution).

## **Location of development**

2. The environmental sensitivity of geographical areas likely to be affected by development must be considered having regard, in particular, to:-

- a) the existing and approved land use;
- b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground;
- c) the absorption capacity of the natural environment, paying particular attention to the following areas:-
  - i. wetlands, riparian areas, river mouths;
  - ii. coastal zones and the marine environment;
  - iii. mountain and forest areas;
  - iv. nature reserves and parks;
  - v. european sites and other areas classified or protected under national legislation;
  - vi. areas in which there has already been a failure to meet the environmental quality standards, laid down in Community legislation and relevant to the project, or in which it is considered that there is such a failure;
  - vii. densely populated areas;
  - viii. landscapes and sites of historical, cultural or archaeological significance.

### **Characteristics of the potential impact**

3. The potential significant effects of development must be considered in relation to criteria set out under paragraphs 1 and 2 above, with regard to the impact of the development on the factors specified in Regulation 3A(3), taking into account -

- a) the magnitude and special extent of the impact (for example geographical area and size of the population likely to be affected);
- b) the nature of the impact;
- c) the transfrontier nature of the impact;
- d) the intensity and complexity of the impact;
- e) the probability of the impact;
- f) the expected onset, duration, frequency and reversibility of the impact;
- g) the cumulation of the impact with the impact of other existing and/or approved development;
- h) the possibility of effectively reducing the impact.

## **ANNEX B: INFORMATION TO BE INCLUDED IN AN EIA REPORT**

This is a copy of Schedule 4 of the Regulations (see paragraphs 76-78, 80, 114, 154 in the Circular)

### **Information for inclusion in environmental impact assessment reports**

1. A description of the development, including in particular:
  - a) a description of the location of the development;
  - b) a description of the physical characteristics of the whole development, including, where relevant, requisite demolition works, and the land-use requirements during the construction and operational phases;
  - c) a description of the main characteristics of the operational phase of the development (in particular any production process), for instance, energy demand and energy used, nature and quantity of the materials and natural resources (including water, land, soil and biodiversity) used;
  - d) an estimate, by type and quantity, of expected residues and emissions (such as water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation and quantities and types of waste produced during the construction and operation phases.
  
2. A description of the reasonable alternatives (for example in terms of development design, technology, location, size and scale) studied by the developer, which are relevant to the proposed project and its specific characteristics, and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects.
  
3. A description of the relevant aspects of the current state of the environment (baseline scenario) and an outline of the likely evolution thereof without implementation of the development as far as natural changes from the baseline scenario can be assessed with reasonable effort on the basis of the availability of environmental information and scientific knowledge.
  
4. A description of the factors specified in Regulation 4(3) likely to be significantly affected by the development: population, human health, biodiversity (for example fauna and flora), land (for example land take), soil (for example organic matter, erosion, compaction, sealing), water (for example hydromorphological changes, quantity and quality), air, climate (for example greenhouse gas emissions, impacts relevant to adaptation), material assets, cultural heritage, including architectural and archaeological aspects, and landscape.
  
5. A description of the likely significant effects of the development on the environment resulting from, inter alia:
  - a) the construction and existence of the development, including, where relevant, demolition works;
  - b) the use of natural resources, in particular land, soil, water and biodiversity, considering as far as possible the sustainable availability of these resources;

- c) the emission of pollutants, noise, vibration, light, heat and radiation, the creation of nuisances, and the disposal and recovery of waste;
- d) the risks to human health, cultural heritage or the environment (for example due to accidents or disasters);
- e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;
- f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change;
- g) the technologies and the substances used.

The description of the likely significant effects on the factors specified in Regulation 4(3) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project [including in particular those established under Council Directive 92/43/EEC3 and Directive 2009/147/EC].

6. A description of the forecasting methods or evidence, used to identify and assess the significant effects on the environment, including details of difficulties (for example technical deficiencies or lack of knowledge) encountered compiling the required information and the main uncertainties involved.

7. A description of the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment and, where appropriate, of any proposed monitoring arrangements (for example the preparation of a post-project analysis). That description should explain the extent, to which significant adverse effects on the environment are avoided, prevented, reduced or offset, and should cover both the construction and operational phases.

8. A description of the expected significant adverse effects of the development on the environment deriving from the vulnerability of the development to risks of major accidents and/or disasters which are relevant to the project concerned. Relevant information available and obtained through risk assessments pursuant to Union legislation such as Directive 2012/18/EU of the European Parliament and of the Council or Council Directive 2009/71/Euratom or relevant assessments carried out pursuant to national legislation may be used for this purpose provided that the requirements of this Directive are met. Where appropriate, this description should include measures envisaged to prevent or mitigate the significant adverse effects of such events on the environment and details of the preparedness for and proposed response to such emergencies.

9. A non-technical summary of the information provided under paragraphs 1 to 8.

10. A reference list detailing the sources used for the descriptions and assessments included in the EIA report.



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