

**EXPLANATORY MEMORANDUM TO
THE PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT)
REGULATIONS (NORTHERN IRELAND) 2012**

2012 No. 59

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of the Environment to accompany the Statutory Rule 2012 No. 59 which is laid before the Northern Ireland Assembly.

1.2 The statutory rule is made under section 2(2) of the European Communities Act 1972 and is subject to the negative resolution procedure.

1.3 The rule is due to come into operation on 13th March 2012.

2. Purpose

2.1 These Regulations consolidate with amendments the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 (“the 1999 Regulations”) and subsequent amending regulations. The amendments give effect to recent domestic and European court judgments and introduce a number of necessary procedural changes. Consolidation of the 1999 Regulations at this time is appropriate as they are now over 12 years old, and will provide clarity and ease of access.

3. Background

3.1 The 1999 Regulations transposed Directive 85/337/EC (“the EIA Directive”) as amended. The EIA Directive aims to ensure that a planning authority giving consent for a project makes its decision with the full knowledge of any likely significant effects on the environment by setting out a procedure known as environmental impact assessment to assess such effects. The Department is the sole planning authority in Northern Ireland.

4. Key Changes

4.1 The domestic case referred to in paragraph 2.1 is High Court of Justice, *R (on the application of Baker) v Bath and North East Somerset Council* (known as the 'Baker' case). The ruling was that in limiting consideration of the environmental effects of a change or extension to existing or approved development to the effects of the change or extension alone, rather than looking at the effects of the development as a whole, once modified, Schedule 2.13 of the 1999 Regulations did not properly implement the EIA Directive.

4.2 The European Court of Justice case referred to is C-75/08 (the “Mellor” case). Where the Department determines that EIA is not required, the

ruling clarified that if an interested party so requests, reasons for the determination or copies of the relevant information and documents must be communicated to that party.

4.3 The EIA Directive was amended by Directive 2009/31/EC, (O.J. No. 140, 5.6.2009, p.114) Geological Storage of Carbon Dioxide. This has required the addition of new categories of development to Schedules 1 and 2 to the Regulations.

4.4 A 2008 amendment to the Regulations, which inadvertently went beyond the requirements of the Directive by requiring public consultation on the environmental statement to be repeated at each stage of a multi-stage consent process even if it remained adequate at the latter stage, has been removed.

4.5 The Department also decided to address uncertainty about publicity and consultation arrangements for “further information” and “any other information” received as part of a statement of case or rebuttal evidence for the purposes of a public inquiry or hearing under Article 31 of the Planning (Northern Ireland) Order 1991. Under that Article, the Department can designate an application as one of “major importance” and request a public inquiry or hearing to be held by the Planning Appeals Commission. After the operational date of these Regulations, the Department will publish notice of the inquiry with details of arrangements for inspection and copying of information provided for inquiry purposes. The Planning Appeals Commission will provide reasonable opportunity for such inspection and copying.

5. Consultation

5.1 A Consultation Paper was issued in September 2011 for 8 weeks together with an early draft of the Regulations. The Consultation Paper was sent to a wide range of bodies on the Department's standard consultation list and was also advertised in local newspapers and on the Department's website. The consultation paper can be found at:
[EIA Regulations 2012 consultation](#)

5.2 Substantive responses were received from 26 consultees, with a further 3 offering no comment. This is a satisfactory response level and those who commented can be regarded as a reasonable cross-section of interested opinion. The responses and an analysis of them will be made available at the link provided above shortly after the Regulations are made.

5.3 The bulk of respondents supported the amendments in respect of the Baker judgment. Some respondents queried whether very minor change or extension to existing development would now be subject to EIA; others had concerns about the possible erosion of extant permitted development rights for statutory undertakers. In response the Department made a minor change to the draft Regulations to remove all references to “new” or “proposed” development from the descriptions of development in Schedule 2, thereby making it easier to understand the amendment in respect of the Baker

judgment. The Department considers there will be limited impact on existing permitted development rights as changes or extensions of a minor nature are unlikely to have significant environmental effects.

5.4 Most respondents agreed with the proposed amendment in respect of the Mellor judgment.

5.5 The amendments in respect of the Geological Storage Directive were accepted as necessary.

5.6 The removal of the further consultation requirement at reserved matters stage was generally accepted by those who offered comments. Two respondents were concerned that significant changes that might arise between survey or research dates should be taken into account. The Department is content to implement the amendment as drafted as the need for updated environmental information is carefully considered at the reserved matters stage of an application.

5.7 The publicity amendments attracted most comments ranging from full acceptance to concerns such as whether the late submission of environmental information might delay the inquiry process or prejudice consideration by all parties. Possible breach of the Aarhus Convention on public participation through the amendment was raised by two respondents. Opposing views were put forward as to whether the publicity amendments should apply to existing undetermined Article 31 applications or appeal cases. The Planning Appeals Commission (PAC) sought further clarification of its new responsibilities.

5.8 Following careful consideration of the comments received and further legal advice on the issues raised, the Department amended regulation 19(6) and (9) and agreed the changes with the PAC. The Department is satisfied that the inquiry process and revised publicity and consultation arrangements will meet requirements.

6. Equality Impact

6.1 An Equality Impact Assessment screening carried out in respect of this proposal found no evidence of any additional impact on any Section 75 categories.

7. Regulatory Impact

7.1 A Regulatory Impact Assessment accompanies this memorandum. at Annex 1.

8. Financial Implications

8.1 Costs to business are expected to be minimal as it is considered that only a small number of additional positive EIA determinations will arise. The Department will incur additional costs for advertising public inquiries under Article 31 and for making reasons for negative EIA determinations available if

requested to do so. The PAC will incur some new costs associated with its obligations for making information supplied for such inquiries available for inspection and copying. The Department will no longer have the unnecessary cost of consultation at reserved matters stage where the environmental statement provided at the outline stage is still considered adequate.

9. Section 24 of the Northern Ireland Act 1998

9.1 The Department considers that the legislation complies with the requirements of Section 24 of the Northern Ireland Act 1998.

10. EU Implications

10.1 The Regulations are being introduced in part to comply with an ECJ ruling and to give effect to amendments to the EIA Directive. As they repeal the 1999 Regulations and subsequent amendments they now transpose the EIA Directive in respect of planning. A Transposition Note is not required for consolidated Regulations.

11. Parity or Replicatory Measure

11.1 The domestic and ECJ rulings are being implemented separately in England, Scotland, Wales and Northern Ireland, with account also being taken of the amendment to the EIA Directive described above.

12. Additional Information

Contact

Joe Torney at the Department of the Environment Tel: 028 9025 6505 or e-mail: Joe.Torney@doeni.gov.uk can answer any queries regarding the new regulations.

Regulatory Impact Assessment

1. Title of Proposal

The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012.

2. Purpose and Intended Effect

(i) The Objective

The objective is to consolidate and update the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 (“the 1999 EIA Regulations”) to reflect recent EIA case-law and to ensure they remain fit for purpose and more accessible. The recent legal cases relate to 'Mellor' (the need to give reasons for negative screening decisions) and 'Baker' (where screening is required for modifications or extensions to existing planning permissions) - see Key Changes for further information.

(ii) The Background

The 1999 EIA Regulations apply the EIA Directive (85/337/EEC) to the planning system in Northern Ireland. The main aim of the Directive is to ensure that the authority giving the primary consent for a particular project to proceed makes its decision in the full knowledge of any likely significant environmental effects on the environment. The Directive therefore sets out a procedure known as Environmental Impact Assessment (EIA) as a means of assessing the effects of certain projects on the environment. This helps to ensure that a project’s likely significant environmental effects and the scope for reducing them are understood by the public and the relevant competent authority before it makes its decision.

It is 12 years since the 1999 EIA Regulations came into force and they have been amended substantially over the intervening years to take account of case law or transposition issues. It is the Department’s intention to consolidate the Regulations to make them more accessible. In consolidating the regulations we are also proposing to take the opportunity to make a number of additional changes to take account of the latest case law, and to generally update the regulations.

Key changes being proposed are:

- **'Baker' Case:** Changes or extensions to existing development – screening of Schedule 2 development (projects which require screening by the Department to determine whether a planning application requires an

environmental statement (ES)) shall apply to the development as a whole once modified and not just to the change or extension. There is also a new provision for Schedule 1 projects (where screening is not necessary as EIA is mandatory for these projects) which requires that all changes or extensions must be screened where these projects are not Schedule 1 developments in their own right. These changes would rectify the failure to properly transpose the EIA Directive as identified in a recent High Court judgment.

- **'Mellor' Case:** Reasons for negative screening decisions - where the Department issues a screening opinion that an EIA is not required ("negative screening decision"), it shall make available reasons for that conclusion, as it currently does when an EIA is required. This change is required to rectify the failure to properly transpose the EIA Directive as identified in a European Court judgment.
- **Multi-stage consents:** will remove the requirement which was unintentionally introduced by the Planning (Environmental Impact Assessment) (Amendment No.2) Regulations (Northern Ireland) 2008, for an ES to be publicised again in a multi - stage consent where the ES was still adequate for purpose at the later stage (e.g. application for approval of reserved matters). The Department is responsible for publicising the ES in the local press and on its website. Copies of the ES may be obtained from the developer.
- **Publicity arrangements at Public Inquiries**

Removal of the present uncertainty about whether additional environmental information submitted as part of a statement of case or rebuttal evidence for the purposes of an Article 31 public inquiry or hearing can be construed as substantive information "relating to the environmental statement" and "received by the Department". The amendments disapply the Department's current publicity responsibilities in EIA cases where further information is provided or any other information is received for the purpose of an inquiry, and insert a provision requiring the Department to advertise details of the holding of an Inquiry and where, and how, the public may inspect statements of case and rebuttals including any additional environmental information received.

(iii) Risk Assessment

If the UK does not legislate to take account of the court rulings it will be subject to infraction proceedings by the European Union (EU) with the possibility of subsequent heavy fines for non-compliance.

3. Options

Option 1: Do Nothing

This is not a realistic option. Failure to take account of recent case law could

result in infraction proceedings by the EU and ultimately by the European Court of Justice which could result in financial penalties on the UK.

Option 2: Amend the Regulations without a consolidation

This is not a feasible option given that there have been a number of amendments since the 1999 EIA Regulations came into operation. There would be an expectation that the current amendments would form part of a consolidation of the EIA Regulations.

Option 3: Amend and consolidate the Regulations

This is the preferred option because it will make the necessary changes to take into account recent court judgments to ensure the EIA Directive is properly transposed. The consolidation will ensure the Regulations are up-to-date and generally fit for purpose which will make them easier to use and interpret.

4. Costs & Benefits

Option 1: Do Nothing

There are no benefits to this option. Costs would be substantial as failure to amend the Regulations would undoubtedly result in infraction proceedings and subsequent heavy fines by the EU for non-compliance.

Option 2: Amend Regulations without a consolidation

This would make the Regulations less accessible for developers, applicants and members of the public.

Option 3: Amend and consolidate the Regulations

The preferred option. Making the necessary amendments will avoid EU infraction fines. Consolidation of the Regulations will enable time savings for applicants and the Department as the Regulations would be more accessible and generally fit for purpose.

The costs to business associated with this option would be minimal.

Changes or extensions to existing development

Although the proposed amendment could result in a small increase in the number of screening opinions issued by the Department, it is not expected that there would be a significant rise in the number of Environmental Statements produced by developers. Any resulting costs to business should therefore be minimal.

Reasons for negative screening decisions

The proposed amendment is intended to clarify existing provisions concerning the availability of reasons for negative screening decisions. It is not anticipated there will be any resulting cost to business associated with this amendment.

Multi-stage consents

The proposed amendment will reduce the administrative burden as an ES will no longer need to be publicised again if it is still adequate for purpose at the later stage of the consent process (e.g. application for approval of reserved matters).

Publicity arrangements at Public Inquiries

The amendments will speed up the public inquiry process.

5. Business Sectors Affected

The requirements of the EIA Directive are mainly limited to projects which are likely to have significant effects on the environment. Business sectors currently involved in such EIA projects are likely to be large scale developers. While these amendments may place some additional procedural and financial requirements on such developers, the Department does not consider there will be any significant costs over and above those of compliance with existing statutory provisions on EIA.

The Department and the Planning Appeals Commission will also face some additional procedural requirements, but the impact is likely to be minimal.

6. Small Firms Impact Test

Impact on small businesses is expected to be minimal as the additional costs will be small and should only occur in a small number of cases. The Department would welcome views from any small businesses, or their representatives, who feel that they may be affected by these proposals.

7. Enforcement and Sanctions

The Department and the PAC will enforce the Regulations by applying the statutory requirements to planning applications for projects with significant environmental effects.

8. Equality Impact Assessment

An Equality Impact Assessment screening carried out in respect of this proposal found no evidence of any additional impact on any of the Section 75 categories.

9. Health Impact

No impact on health has been identified.

10. Human Rights Assessment

The Department considers that the proposed amendments are fully compliant with the Human Rights Act 1998.

11. Monitoring and Review

Planning permissions granted in breach of the 1999 EIA Regulations will continue to be vulnerable to court challenges.

12. Consultation

(i) Within Government

These proposals have been drawn up in discussion with the Planning Appeals Commission and colleagues from the other UK planning administrations in England, Scotland and Wales

(ii) Public Consultation

A full public consultation on the policy to deliver option 3 was carried out in September 2011 for 8 weeks and included an early draft of the Regulations. The Consultation Paper was sent to a wide range of bodies on the Department's standard consultation list and was also advertised in local newspapers and on the Department's website.

Substantive responses were received from 26 consultees, with a further 3 offering no comment. This is a satisfactory response level and those who commented can be regarded as a reasonable cross-section of interested opinion.

Following analysis of the responses to the consultation, the Department finalised the Regulations, with minor amendment, to take forward Option 3 above.

13. Summary and Recommendation

Option 3 is the recommended option as it is the only option which ensures full compliance with the EIA Directive and the court rulings.

14 Declaration

Signed by a Senior Officer of the Department of the Environment

A handwritten signature in black ink, appearing to be 'A. L.', is written below the text.

Date: 21 February 2012

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