CIRCULAR

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

circular

PLANNING SERIES

Scottish Planning Series

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

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INTRODUCTION

1. This Circular gives guidance on the Environmental Impact Assessment (Scotland) Regulations 2011[1], ("the 2011 Regulations"), the regulations which transpose the EIA Directive[2] into the Scottish planning system.

2. The 2011 Regulations consolidate, update, and replace Part II of the Environmental Impact Assessment (Scotland) Regulations 1999[3], with effect from 1st June 2011. Parts III and IV of the 1999 Regulations, concerning Roads and Bridges, and Land Drainage, remain extant. Correspondingly, this Circular itself supersedes guidance previously contained in Circular 8/2007, other than Annex E to Circular 8/2007, which continues to apply to the 1999 Regulations.

3. This Circular also supersedes guidance previously given in Circular 1/2003 (The Environmental Impact Assessment (Scotland) Amendment Regulations 2002 Review of Old Mineral Permissions (ROMPs)); and, following changes to the consenting arrangements for irrigation activities, Circular 3/2003 (Environmental Impact Assessment) (Water Management) (Scotland) Regulations 2003. Further information on corresponding changes to the EIA arrangements for certain water management projects is provided in paragraph 188 of this Circular. Guidance on EIA procedures specific to ROMP applications is contained in paragraphs 166 – 185 of this Circular.

4. Further, practical guidance is contained in Planning Advice Note (PAN) 58 on Environmental Impact Assessment, published in 1999. It is our intention to update PAN 58 in due course, and the 2011 Regulations and this Circular take precedence over the advice in that PAN.

5. This Circular concerns development under the Town and Country Planning (Scotland) Act 1997. Corresponding provisions for development subject to planning control have been made in England, Wales and Northern Ireland.

6. 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[4]. The Transport & Works (Scotland) Act 2007, which received Royal Assent on 14 March 2007, enables approval for certain transport projects to be achieved through Ministerial order, replacing the use of Private Bills to authorise transport projects. Procedures for projects which are granted consent under other legislation are the subject of separate

[1] Scottish Statutory Instrument 2011 No 139
[2] Council Directive No. 85/337/EEC, as amended by 97/11/EC, 2003/35/EC, and 2009/31/EC on the assessment of the effects of certain public and private projects on the environment
[3] Scottish Statutory Instrument 1999 No 1, as amended
[4] http://www.scottish.parliament.uk/business/bills/billguidance/gprb-1.htm#2_293

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legislation and guidance issued by the Scottish Government, relevant UK Government departments or agencies.

7. This Circular is intended as a guide. It should be read in conjunction with the 2011 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.

THE EIA DIRECTIVE

8. 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 (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.

9. Since the Directive first came into effect in 1988, it has been amended several times. The most recent amendments were made by Directive 2009/31/EC ('the Geological Storage Directive'), to update the list of projects falling within the scope of the Directive in light of new technology around carbon capture and storage.

10. Projects of the types listed in Annex I to the Directive must always be subject to EIA. Projects of the types listed in Annex II must be subject to EIA whenever they are likely to have significant effects on the environment.

11. Where EIA is required, there are three broad stages to the procedures:

a) the developer must compile detailed information about the likely significant environmental effects. To help the developer, public authorities are to make available any relevant environmental information in their possession. The developer can also ask the 'competent authority' for their opinion on what information needs to be included. The information finally compiled by the developer is known as an 'Environmental Statement' (ES).

b) the ES (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 ES.

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c) the ES, together with any other information, comments and representations made on it, must be taken into account by the competent authority (the planning authority or the Scottish Ministers) in deciding whether or not to give consent for the development. The public must be informed of the decision and the main reasons for it.

THE 2011 REGULATIONS

12. The 2011 Regulations must be interpreted in the context of the Directive itself. The Regulations apply to development in Scotland:

a) for which an application for planning permission is received by a planning authority or which is referred to the Scottish Ministers for determination; or

b) for which an application for approval, consent or agreement required by any planning permission granted following an application under Part III of the 1997 Act or section 242A of the Act is received, where that approval, consent or agreement must be obtained before all or part of the development permitted by the planning permission may be begun ('**a multi-stage application'**); or

c) which is carried out under permitted development rights; or

d) which is carried out under permission granted by a simplified planning zone scheme or enterprise zone order;

e) 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 (see paragraph 144), and applications for approval of ROMP conditions[5];

f) for which an urgent application (for Crown development) is made to the Scottish Ministers under Section 242A of the 1997 Act (see paragraphs 171-172);

The Regulations also apply to development with significant transboundary effects (regulations 36 and 37).

13. Planning authorities already have a well established general responsibility to consider the environmental implications of developments which are subject to planning control, and the 2011 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

[5] ROMP condition as defined by regulation 2(1) of the 2011 Regulations.

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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 likely to have significant effects on the environment, EIA is required.

14. Where the EIA procedure shows that a project 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.

15. For developers, EIA can help to identify the likely effects of a particular development at an early stage. This can produce improvements in the planning and design of the development; in decision making by both parties; and in consultation and responses thereto, particularly if combined with early consultations with the planning authority and other interested bodies during the preparatory stages. 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, enabling swifter decisions to be reached.

General Principles and Policy

16. In this Circular, **Environmental Impact Assessment (EIA)** refers to the whole process by which environmental information is collected, publicised and taken into account in reaching a decision on a relevant planning application.

17. 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:

    a) the relevant planning authority has notified the applicant in writing that EIA is required; or

    b) the applicant submits a statement which they refer to as an Environmental Statement for the purposes of the Regulations.

18. Development that falls within a relevant description in Schedule 1 of the Regulations always requires EIA. Such development is referred to in this Circular and the Regulations as **'Schedule 1 development'.**

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19. Development of a type listed in Schedule 2 to the Regulations which:

a) meets any relevant criteria and exceeds any relevant threshold listed in the second column of the table in Schedule 2; or

b) is located wholly or in part in a 'sensitive area' as defined in regulation 2(1)

is referred to in this Circular as '**Schedule 2 development'**.

20. Regulations 3 and 4 prohibit the granting of planning permission or of any application for 'multi-stage consent' (see paragraphs 144 – 155 for more information on multi-stage consents) for:

a) Schedule 1 development; or,

b) Schedule 2 development likely to have significant effects on the environment because of factors such as its nature, size or location, unless the EIA procedures have been followed.

21. For all Schedule 2 development (including that which would otherwise benefit from permitted development rights), the planning authority must make its own formal determination of whether or not EIA is required (referred to in the Regulations and this Circular as a '**Screening Opinion**'). This may be done before any planning application has been submitted (regulation 6) or after (regulation 8). In making this determination, the planning authority must take into account the relevant "selection criteria" in Schedule 3 to the Regulations (Annex A to this Circular). The applicant may appeal to Scottish Ministers for a '**Screening Direction'** where a planning authority adopts a screening opinion that EIA is required (regulation 6(6)). The planning authority must make all screening opinions and directions available for public inspection (regulation 25).

22. Where EIA is required, information must be provided by the applicant in an **Environmental Statement (ES)**. This document (or series of documents) must contain the information specified by regulation 2(1) and in Schedule 4 of the Regulations. Regulation 14 allows developers to obtain a formal opinion from the relevant planning authority on what should be included in the ES ('**a Scoping Opinion**'). Under regulation 16, certain public bodies (defined in regulation 2(1) as '**the consultation bodies**') must, if requested, make information in their possession available to the developer for the purposes of preparing an ES.

23. Regulations 17 and 18 set out the publicity procedures, including notification and publication arrangements, which must be followed by planning authorities on receipt of a planning application with an ES. Regulation 19

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details the consultation arrangements where an ES is received by the planning authority including a Local Review Body (references in the regulations to the planning authority include a Local Review Body where an application is being considered on review under section 43A(8) of the Act, as amended). Similar procedures apply where an ES is submitted to Scottish Ministers (regulation 21). In all cases, applicants must also make a reasonable number of copies of the ES available to the public and may make a reasonable charge for them (regulation 22). Although the submission of an ES 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.

24. Regulation 44(2) extends the time period for determining an EIA application from 2 to 4 months. In addition, where the date on which the ES is submitted is later than the validation date, that 4 month period runs from the date on which the ES and accompanying documents are submitted.

25. Where a statement has been submitted which does not contain all the required information, the planning authority, Scottish Ministers or reporter (references in the Regulations to Scottish Ministers include a reporter where one has been appointed to consider an application or appeal) must ask the applicant or appellant (as the case may be) to supply **'further information'** (regulation 23). This information, and any other substantive information provided voluntarily by the applicant and relating to the ES is defined as **'additional information'** (regulation 2(1)) and must be publicised in the same way as the statement itself (regulation 24).

26. When determining an EIA application, the planning authority, Scottish Ministers or reporter must inform the public of their decision and the procedures for challenging its validity (regulation 26). See paragraph 142 for more information.

27. The 2011 regulations introduce an amended definition of '**application for multi-stage consent**' (regulation 2(1)). This definition now includes applications for approval, consent or agreement required by any planning permission granted following an application under Part III of the Town and Country Planning (Scotland) Act 1997 ('the Act'), or section 242A of the Act, where that approval, consent or agreement must be obtained before all or part of the development permitted by the planning permission may be begun. Previously the definition of multi-stage consent extended only to certain applications for approval of conditions to a planning permission in principle, and not to conditions related to a planning permission in full.

28. The effect of the 2011 regulations is to require that the environmental information must be taken into account before determining any application for multi stage consent in respect of EIA development, in the same way as it

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would before determining an EIA application. Regulation 30 makes a number of modifications to the regulations as they apply to applications for multi stage consent. See paragraphs 144 – 155 for more information.

29. Regulation 44 extends the time period for determining an EIA application from 2 months to 4 months. In addition, where the date on which the ES is submitted is later than the validation date, that 4 month period runs from the date on which the ES and accompanying documents are submitted.

30. Regulation 47 introduces new screening provisions for certain applications made under the Town and Country Planning (General Permitted Development) (Scotland) Order 1992, as amended, for prior approval or for a determination as to whether prior approval will be required (known as **'prior notification'**). See paragraphs 71 to 75 for more information on permitted development rights.

Electronic Communications

31. Regulations 38 to 40 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[6] and in PAN 70[7].

[6] Circular 3/2004; The Town and Country Planning (Electronic Communications) (Scotland) Order 2004
[7] PAN 70; Electronic Planning Service Delivery

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ESTABLISHING WHETHER EIA IS REQUIRED

SCHEDULE 1 AND SCHEDULE 2 DEVELOPMENT

32. Generally, it will fall to planning authorities in the first instance to consider whether a proposed development requires EIA. For this purpose they will first need to consider whether the development is described in Schedule 1 or Schedule 2 to the Regulations (see figure 1):

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 size, nature or location. See paragraphs 36 – 37 for guidance on identifying schedule 2 development.

Changes or extensions to Schedule 1 or Schedule 2 developments

Changes or extensions to Schedule 1 or Schedule 2 developments which may have significant effects on the environment also fall within the regulations. Further guidance is contained in paragraphs 156 – 159.

33. 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).

34. The European Court of Justice has also made clear, in the case 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 2011 regulations refer to sectoral categories of projects, without describing the precise nature of the works

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provided for. As an illustration, the ECJ has noted that 'urban development projects' can include the demolition of existing structures.

35. 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] EWCA Civ 140 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 from the European Commission[8].

[8] Available online at http://ec.europa.eu/environment/eia/pdf/interpretation_eia.pdf

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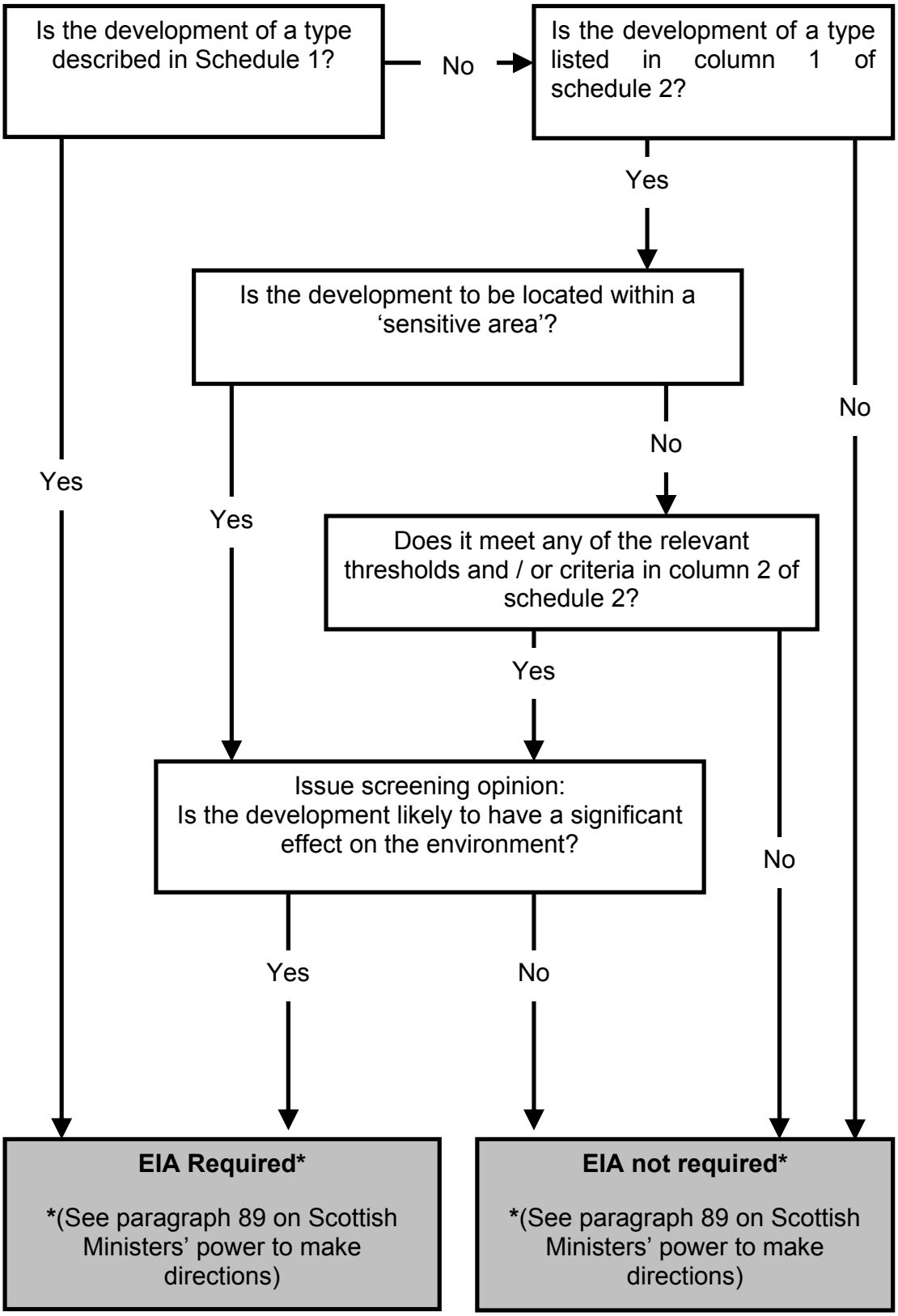
Figure 1: Establishing whether a proposed development requires EIA



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IDENTIFYING SCHEDULE 2 DEVELOPMENT

36. Schedule 2 development is development of a type listed in column 1 of Schedule 2 which:

    a) is located wholly or in part in a 'sensitive area' as defined in regulation 2(1) (see paragraph 45); or

    b) meets one of the relevant criteria or exceeds one of the relevant thresholds listed in the second column of the table in Schedule 2.

37. 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 30 above might give rise to significant environmental effects. In those exceptional cases, Scottish Ministers can use their powers under regulation 5(11) (see paragraph 89) to direct that EIA is required.

THE NEED FOR EIA FOR SCHEDULE 2 DEVELOPMENT

General considerations

38. The planning authority must screen every application for Schedule 2 development in order to determine whether or not EIA is required. This determination is referred to as a **'screening opinion'**[9]. In each case, the basic question to be asked is: 'Would this particular development be likely to have significant effects on the environment?'

39. 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" suggests 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

[9] Planning authorities may also receive applications for Schedule 1 development without an environmental statement, or receive requests for "screening opinions" for development which is Schedule 1 development or is neither Schedule 1 development nor Schedule 2 development. In any of these cases the Regulations require that a "screening opinion" be adopted.

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the mandatory requirement for EIA for all types of development listed in Schedule 1, regardless of where they are to be located. Similarly, whilst there is no corresponding list of locations for which EIA is mandatory regardless of the type of development proposed, there must be a presumption that certain locations are of such a type that EIA will be required for any development there.

40. For many types of development, perhaps the majority, it will be necessary to consider the characteristics of the development in combination with its proposed location in order to identify the potential for interactions between a development and its environment and therefore 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 (reproduced at Annex A to this Circular). Three categories of criteria are listed:-

- Characteristics of the development
- Location of the development
- Characteristics of the potential impact

41. 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. Some authorities have developed their own. The European Commission has published guidance on screening and scoping which includes such checklists[10] comprising a series of questions related to each of the selection criteria. As a further example, a possible checklist is also available on the Scottish Government's (Planning) EIA web page.

42. There is no requirement to use screening checklists or other screening aids, but there are two 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, they provide documentary evidence that screening has been carried out 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.

43. 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 which a

[10] http://ec.europa.eu/environment/eia/eia-support.htm

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development gives rise relevant to this determination, unless the substance of opponents' arguments reveals that there are likely to be significant effects on the environment.

44. 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[11]. 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

45. 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
International Conservation Sites
National Scenic Areas
World Heritage Sites
Scheduled Monuments
National Parks.

46. Special considerations apply to all of these sensitive areas, especially those which are also international conservation sites, such as classified and proposed Special Protection Areas under the Wild Birds Directive 79/404/EEC and designated and candidate Special Areas of Conservation under the Habitats Directive 92/43/EEC. In practice, the likely environmental effects of Schedule 2 development will often be such as to require EIA if it is to be located in or close to sensitive sites. Whenever planning authorities are uncertain about the significance of a development's likely effects on a sensitive area, they should consult the relevant Consultation Bodies such as Scottish Natural Heritage or Historic Scotland. Other agencies and bodies

[11] under section 46 of the 1997 Act.

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may have relevant information and can be consulted if it is thought this would be helpful.

47. For any Schedule 2 development, EIA is more likely to be required if it affects the special character of any of the other types of 'sensitive area' listed above. However, it does not follow that every Schedule 2 development in (or affecting) these areas will automatically require EIA. In each case, it will be necessary to judge whether the likely effects on the environment of that particular development will be significant in that particular location. Any views expressed by the consultation bodies (see paragraph 111) should be taken into account, and authorities should consult them in the cases where there is a doubt about the significance of a development's likely effects on a sensitive area.

48. 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. In the case of the latter, Local Biodiversity Action Plans may be of assistance in determining the sensitivity of a location.

49. 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.

50. 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 humans and nature 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.

51. The Regulations do not alter the relationship between authorities' planning responsibilities and the separate statutory responsibilities exercised by local authorities and other pollution control bodies under pollution control legislation. However, they do strengthen the need for appropriate consultations with the relevant bodies at the planning application stage. Advice on the role of the planning system in controlling pollution is set out in

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Planning Advice Note (PAN) 51 "Planning, Environmental Protection and Regulation".

52. Given the range of Schedule 2 development, and the importance of location in determining whether significant effects on the environment are likely, it is not possible to formulate criteria or thresholds which will provide a universal test of whether or not EIA is required. The question must be considered on a case-by-case basis. The fundamental test to be applied in each case is whether *that* particular type of development and its specific impacts are likely, in *that* particular location, to result in significant effects on the environment.

Reaching a screening opinion: proposed remediation measures

53. In reaching a screening opinion as to whether there are likely to be significant effects on the environment, planning authorities should be cautious of the extent to which the opinion takes account of proposed remediation measures, even where these are intended to be the subject of conditions attached to the planning permission. The courts may quash a permission where EIA has not been required on the grounds that any significant adverse effects could be offset by appropriate conditions. (Roao Lebus v South Cambridgeshire DC [2002] EWHC 2009 Admin). In such a case, the court has held, the safer course is to require EIA and enable the proposed remediation measures to be included in the Environmental Statement, so that they can be made available to the statutory consultation bodies and the public for comment and taken into account by the authority when determining the planning application.

54. The extent to which proposed remediation measures may be taken into account for screening purposes depends on the facts in each individual case. The extent to which remediation measures are required to avoid significant effects on the environment will vary. In some cases the measures will be modest in scope or be so plainly and easily achievable so that it may be possible to reach a view on the likelihood of significant environmental effects. In reaching a view on the likelihood of significant environmental effects, consideration should also be given to the stage which investigations have reached, the nature and extent of any remediation measures, including any uncertainties, the effects on the environment during remediation and the likely final result. It may not be assumed that the measures would be successfully implemented (Urban Renewal Southern v John Gillespie [2003 EWCA Civ 400]).

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Applying the guidance to individual development

55. 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.

56. 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

57. 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[12]. 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 authorities will wish to liaise at screening and scoping stages, in order that the applicant may prepare a single Environmental Statement to cover the whole development.

[12] Judgement in the case of R v Swale BC ex parte RSPB (1991) 1 PLR 6, BAA Plc v Secretary of State for Transport, Local Government and Regions [2002 EWHC 1920 Admin

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STAGES AT WHICH SCREENING MAY BE CARRIED OUT

58. The determination of whether or not EIA is required for a particular development proposal can take place at a number of different stages:

a) the applicant may decide that EIA will be required and submit a statement which he refers to as an Environmental Statement for the purpose of the Regulations with the planning application (paragraphs 61-63);

b) the developer may, before submitting any application, including an application for multi-stage consent, request a screening opinion from the planning authority (paragraphs 64-67). If the developer 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 69-70). Similar procedures apply to permitted development (paragraphs 71-75);

c) the planning authority may determine that EIA is required following receipt of a planning application (paragraphs 77-80), including an application for multi-stage consent (paragraph 152). Again, if the applicant disputes the need for EIA, the applicant may apply to Scottish Ministers for a screening direction (paragraphs 81 and 153);

d) the determinations at b) and c) also apply in relation to urgent applications (for Crown Development) made directly to the Scottish Ministers (see paragraph 165 below);

e) 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 82-87);

f) Scottish Ministers may direct that EIA is required at any stage prior to the final consent being granted for a particular development (paragraph 89).

g) a Local Review Body may determine that EIA is required for an application which is before them for review.

59. 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 Environmental Statement (regulation 44).

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Procedures prior to submission of a planning application

60. 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. Developers submitting applications for developments categorised as national or major under the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009[13] which includes all Schedule 1 development, will be required to undertake statutory Pre-Application Consultations with communities. Whilst there is no requirement to consult the relevant planning authority or the consultation bodies prior to submitting such applications, nevertheless Circular 4/2009[14] 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 pollution control bodies well before a planning application is submitted. To provide some certainty for the developer, they can apply formally for a 'screening opinion' (regulation 6) 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.

Environmental Statement submitted 'voluntarily'

61. Applicants may decide for themselves (in the light of the Regulations, the guidance in this Circular, and any discussions with the planning authority) that EIA will be required for their proposed development. The applicant may, therefore, submit a statement with a planning application without having obtained a screening opinion to the effect that one is required.

62. If an applicant expressly states that they are submitting a statement which they refer to as an Environmental Statement (ES) for the purposes of the Regulations, the application is an EIA application (regulation 5(2)(a)) and must be treated as such by the planning authority. Exceptionally, where an authority is of the view that the application to which the statement relates is clearly not one which they would have determined to be an EIA application, they may ask Scottish Ministers for a direction on the matter (see paragraph 89).

[13] (SSI 2009/51)

[14] Scottish Government Planning Circular 4/2009; Development Management Procedures. Available at http://www.scotland.gov.uk/Topics/Built-Environment/planning/publications/circulars

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63. Occasionally, the applicant may not have made it clear that the information submitted is intended to constitute an ES for the purposes of the Regulations. In such cases, the planning authority should contact the applicant to clarify their intentions. In case of any remaining doubt, the authority should issue a screening opinion, in accordance with the procedures in regulation 9 (see paragraphs 77-80). Where is it determined that EIA is not required, the information provided by the applicant should still be taken into account in determining the application, if it is material to the decision.

Obtaining a screening opinion from the planning authority (regulation 6)

64. Before submitting an application for planning permission, developers who are in doubt whether EIA will be required may request a screening opinion from the planning authority (regulation 6(1)). The request should include a plan indicating the proposed location of the development, and a brief description of the nature and purpose of the proposal and its possible environmental effects, giving a broad indication of their likely scale.

65. On receipt of a request, the authority should consider whether the proposed development is either Schedule 1 development or Schedule 2 development that 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) (regulation 5(6)). The developer should normally be able to supply sufficient information about the development to enable the planning authority to form a judgement and give a ruling on the need for EIA. However, where the authority considers that it needs further information, the developer should be asked to provide it (regulation 6(3)). Authorities should bear in mind that what is in question at this stage is the broad significance of the likely environmental effects of the proposal. This should not require as much information as would be expected to support a planning application. Very exceptionally, authorities may also wish to seek advice from one or more of the consultation bodies or non-statutory bodies.

66. The planning authority must adopt its screening opinion within three weeks of receiving a request. This period may be extended if the authority and developer so agree in writing. When adopting an opinion that EIA is required, the authority must state the full reasons for their conclusion clearly and precisely (regulation 5(7)). If the authority decides that EIA is not required they must, if requested to do so, make their reasons for that decision available regulation 5(8). This requirement reinforces the need for authorities to record and retain full reasons for all their screening decisions. In practice, planning authorities may choose to publish these reasons proactively.

67. A copy of the screening opinion must be sent to the person making the screening request (regulations 6(5) and 5(7)) and, where applicable, will help

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him to prepare the ES by indicating those aspects of the proposed development's environmental effects which the authority considers to be likely to be significant (see also paragraphs 101-104).

68. Where a planning authority adopts a pre-application screening opinion, a copy of the relevant documents must be made available for public inspection for 2 years at the place where the planning register is kept. If a planning application is subsequently made for the development, the opinion and related documents should be transferred to Part 1 of the register with the application (regulation 25).

Applying to Scottish Ministers for a screening direction (regulation 7)

69. Where the planning authority's opinion is that EIA *is* required and the developer disagrees, or where an authority fails to adopt any opinion within three weeks (or any agreed extension), the developer may ask Scottish Ministers to make a screening direction (regulation 6(6)). The request must be accompanied by all the previous documents relating to the request for a screening opinion, together with any additional 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 2 weeks to make its own further representations.

70. Scottish Ministers should make a screening direction within 3 weeks from the date of receipt of the request, or such longer period as they may reasonably require. Where they direct that EIA is required, the direction must be accompanied by a clear and precise statement of their full reasons (regulation 5(7)), and reasons for a negative screening direction must be made available on request (regulation 5(8)). They must send copies of the direction to the developer and to the planning authority (regulations 5(12) and 5(7)), which must ensure that a copy of the direction is made available for inspection with the other documents referred to in paragraph 69 above (regulation 25).

PERMITTED DEVELOPMENT

71. 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.

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72. The provisions of the GPDO (insofar as they relate to Schedule 1 or Schedule 2 development) are such that:

a) Schedule 1 development is not permitted development. Such developments always require the submission of a planning application and an Environmental Statement;

b) 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 Environmental Statement.

These requirements do not apply to certain types of permitted development, described in paragraphs 161-164.

73. A request for a screening opinion in relation to permitted development should be made in accordance with the provisions which apply to requests for a pre-application screening opinion set out in regulation 6 (see paragraphs 64-68). There are similar rights to request Scottish Ministers to make a screening direction if a developer disagrees with an opinion that EIA is required, or where the planning authority fails to adopt any opinion within 3 weeks (or such longer period as is agreed in writing). Such requests should be made in accordance with the procedures in regulation 7 (see paragraphs 69-70). 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 paragraph 75 on prior approvals.)

74. 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

75. 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 47 amends the GPDO to require that the authority must adopt a screening opinion in such cases, unless the development has already been the subject of a screening opinion or direction such that EIA is required. Where an application for prior approval or prior notification is received, which the authority considers relates to schedule 2 development which may have

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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. (Regulation 47(4)) amends the GPDO to provide that any screening opinion adopted in those circumstances will supersede the terms of any earlier opinion or direction.

EFFECT OF SCREENING OPINIONS AND SCREENING DIRECTIONS

76. 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 27, 28(5) & (6) and 29(5) set out the different circumstances in which a new screening opinion or screening direction may be issued which supersedes the terms of an earlier screening opinion or direction. Similar provision is made in article 3(8C) of the GPDO in relation to prior notifications or applications for prior approvals (see paragraph 75 above). In all other circumstances, the authority could seek to persuade the applicant to voluntarily carry out an assessment and to submit an ES in accordance with the Regulations (see paragraphs 61-63). Alternatively, it may ask Scottish Ministers to issue a screening direction. In these circumstances a direction by Scottish Ministers, whether it agrees or disagrees with the authority's screening opinion, is determinative.

PLANNING APPLICATION NOT ACCOMPANIED BY AN ENVIRONMENTAL STATEMENT

Initial consideration by planning authority (regulation 9)

77. When a planning authority receives a planning application without an accompanying Environmental Statement, if there appears any possibility that it is for Schedule 1 or Schedule 2 development, they should check their records for any screening direction, or any pre-application screening opinion they may have adopted. Where no screening opinion or direction exists, the planning authority must adopt such an opinion. If the authority needs further information to be able to adopt an opinion, the applicant should be asked to provide it.

78. Where the planning authority's opinion is that EIA is not required, a screening opinion to that effect should be adopted and placed on Part 1 of the planning register with the planning application within three weeks of the receipt of the application (regulations 6(3) to (5) applied by regulation 8,

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regulation 9(1) and regulation 25(1)). The application should then be determined in the normal way.

79. Where the authority's opinion is that EIA is required, they must notify the applicant that the submission of an environmental statement is required (regulation 9(1)). Notice is to be given within 3 weeks of the date of the making of the application or if the screening opinion is made after the application is made, within 7 days of the adoption of that screening opinion. A copy of the notification should be placed on Part 1 of the planning register with the application (regulation 25(1)(e)). For monitoring purposes, authorities are also asked to send a copy to Scottish Ministers[15].

80. An applicant who still wishes to continue with the application must reply within 3 weeks of the date of such a notification. The reply should indicate the applicant's intention either to provide an Environmental Statement or to ask Scottish Ministers for a screening direction. If the applicant does not reply within the 3 weeks, the application will be deemed to have been refused. No review of the case by the Local Review Body or appeal to Scottish Ministers is possible against such a deemed refusal. If the applicant does reply to the notification, 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 3 week period when the application is deemed to be refused). The 4 month period after which the applicant may appeal against non-determination of the planning application does not begin until an Environmental Statement has been submitted. If Scottish Ministers direct that no such statement is required the normal (2 or 4 month) period applies, but the period begins to run at the date of the direction (regulation 44(1).

Application to Scottish Ministers for a screening direction (regulations 9(3) and 9(6))

81. An applicant requesting a screening direction from Scottish Ministers (see paragraph 80 above), must include a copy of the planning application together with all supporting documents and correspondence with the planning authority concerning the proposed development. The same procedures apply to such requests as apply to requests for a screening direction prior to the submission of a planning application (see paragraphs 69-70 above).

[15] Copies can be sent to; Planning Decisions Unit, The Scottish Government, 2-H Victoria Quay, Edinburgh EH6 6QQ.

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Called-in application not accompanied by an Environmental Statement (regulation 11*)*

82. When an application for planning permission is called in for determination by Scottish Ministers (under section 46 of the Town and Country Planning (Scotland) Act 1997) and it is not accompanied by an Environmental Statement, Scottish Ministers will consider whether it is for permission for Schedule 1 development or for Schedule 2 development for which EIA is required and, where necessary, make a screening direction.

83. If Scottish Ministers direct that EIA is required, the applicant and the planning authority will be notified accordingly. There is no appeal against such a notification. An applicant who wishes to continue with the application must reply within three weeks of such a notification, stating that an Environmental Statement will be provided. Otherwise, at the end of the three week period, Scottish Ministers will inform the applicant that no further action will be taken on the application.

84. 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 to that effect and send a copy to the planning authority, which must ensure that the direction is placed on the planning register (regulation 25(1)(b)).

85. Regulation 2(6) allows a reporter appointed to consider a called-in application to carry out the role of Scottish Ministers under Regulation 8.

Appeal not accompanied by an Environmental Statement (regulation 10)

86. On receipt of an appeal made under section 47 of the 1997 Act which is not accompanied by an Environmental Statement, Scottish Ministers will consider whether the proposed development is a Schedule 1 development or a Schedule 2 development for which EIA is required. Where necessary, they will make a screening direction. If Scottish Ministers direct that EIA is required, the appeal will not be determined (except by refusing permission) until the appellant submits an Environmental Statement. Scottish Ministers may direct that EIA is required at any time before an appeal is determined.

87. The procedures set out in paragraphs 82-85 above apply to appeals as they apply to called-in applications.

Application under review not accompanied by an Environmental Statement (regulations 8 and 9)

88. Where an application comes before a Local Review Body which appears to be either Schedule 1 or Schedule 2 Development and is not accompanied

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by an Environmental Statement, the authority must check its records for any screening direction or screening opinion previously issued. Where no such opinion or direction exists, the authority must adopt an opinion. If a screening opinion is adopted that the application is an EIA application, then the planning authority acting in its capacity as Local Review Body must notify the applicant that submission of an environmental statement is required. Regulation 9 applies to the planning authority acting in its capacity as Local Review Body as it applies to the authority when considering an application in the first instance.

SCOTTISH MINISTERS' GENERAL POWER TO MAKE DIRECTIONS

89. Scottish Ministers are empowered to make directions in relation to the need for EIA (regulations 5(4), (10) and (11), regulation 6(6) and regulation 45 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 6(6), see paragraphs 69 - 70). However, Scottish Ministers also have a number of wider powers:

a) 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 5(10)). See paragraph 90 below for more information on requests under regulation 5(10). They may also make a screening direction in relation to development described in the General Permitted Development Order.

b) The 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 5(11)).

c) Scottish Ministers may direct (regulation 45) that EIA is always required for particular classes of development. Any such general directions will be notified to all planning authorities.

d) Scottish Ministers may make a direction under regulation 5(4) exempting a particular project, as specified in the direction, from the application of the regulations. Such exemptions may be made in exceptional cases in accordance with Article 2(3) of the Directive[16].

[16] Article 1(4) of the Directive also provides that projects serving national defence purposes may be exempted on a case by case basis, if compliance with EIA would have an adverse effect on those purposes. Since national defence is a reserved matter for the UK Government, the power to exempt such developments from the requirements of the regulations is provided through a UK wide provision in The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, as amended by regulation 22 of the Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006 (SI 2006/3295).

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Request for a screening direction from Scottish Ministers (regulation 5(10))

90. Generally, it will fall to planning authorities in the first instance to consider whether a proposed development requires EIA. Regulation 5(10) 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 2011 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

91. Before making a direction under regulation 5, Scottish Ministers will normally give the planning authority and the applicant the opportunity to make representations. Any direction will be copied to the applicant (where known) and the planning authority, which must make a copy of any direction available for public inspection. Where Scottish Ministers have used any of these powers to direct that EIA is required they must send a copy of the direction to the planning authority. The authority must write to the applicant within 7 days of receiving the copy of the screening direction to tell him that an Environmental Statement is required (regulation 9(2)(b)(ii)).

EIA AND OTHER TYPES OF ENVIRONMENTAL ASSESSMENT

92. There are a number of other European Community Directives which require the assessment of effects on the environment. For example:

(a) developments which will affect a Special Protection Area designated under the Wild Birds Directive[17] or Special Areas of Conservation designated under the Habitats Directive[18] must be subject to an assessment of those effects in accordance with the Conservation (Natural Habitats &c.) Regulations 1994[19];

(b) most major industrial developments will require a permit under the Pollution Prevention and Control (Scotland) Regulations 2000, as

[17] Directive 79/409/EEC
[18] Directive 92/43/EEC
[19] S.I. 1994/2716, as amended.

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amended (the PPC Regulations) which flow from the Integrated Pollution Prevention and Control Directive[20] (similar arrangements apply at present under the IPC regime (Part I of the Environmental Protection Act 1990)). Specifically, applicants for PPC permits are required to provide a description of any foreseeable significant effects of emissions on the environment and human health; and,

(c) 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[21].

(d) The "Strategic Environmental Assessment" (SEA) Directive[22] 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 and replacement structure and local plans.

93. 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 co-ordinating them to minimise undesirable duplication where more than one regime applies. Advice on planning and EIA issues with regard to the Habitats Regulations is contained in The Scottish Office Environment Department Circular 6/1995 (updated June 2000), Scottish Planning Policy, and Planning Advice Note 60: *Planning for Natural Heritage*. The links between the Town and Country Planning system and environmental regulation are dealt with in PAN 51 (Planning, Environmental Protection and Regulation).

[20] Directive 96/82/EC (as amended)
[21] Directive 96/82/EC (as amended)
[22] Directive 2001/42/EC

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PROCEDURES WHEN EIA IS REQUIRED

PREPARATION AND CONTENT OF AN ENVIRONMENTAL STATEMENT

General requirements

94. It is the applicant's responsibility to prepare the Environmental Statement (ES). There is no statutory provision as to the form of an ES. It may consist of one or more documents but it must constitute a 'single and accessible compilation'. (Berkeley v SSETR (2000) [WLR 21/7/2000 p420). It must contain the information specified in Part II, and such of the relevant information in Part I of Schedule 4 to the Regulations (reproduced in Annex B to this Circular) as is reasonably required to assess the effects of the project and which the applicant can reasonably be required to compile (see definition of environmental statement in regulation 2(1)). Whilst every ES should provide a full factual description of the development, the emphasis of Schedule 4 is on the 'main' or 'significant' environmental effects to which a development is likely to give rise. Other impacts may be of little or no significance for the particular development in question and will need only very brief treatment to indicate that their possible relevance has been considered.

95. Where alternative approaches to development have been considered, paragraph 4 of Part II of Schedule 4 requires the applicant to include in the ES an outline of the main alternatives, and the main reasons for his choice. Although the Directive and the Regulations do not expressly require the applicant to study alternatives, the nature of certain developments and their location may make the consideration of alternative sites a material consideration. In such cases, the ES must record this consideration of alternative sites. More generally, consideration of alternatives (including alternative sites, choice of process, and the phasing of construction) is widely regarded as good practice, and resulting in a more robust application for planning permission. Ideally, EIA should start at the stage of site and process selection, so that the environmental merits of practicable alternatives can be properly considered. Where this is undertaken, the main alternatives considered must be outlined in the ES.

96. The list of aspects of the environment which might be significantly affected by a project is set out in paragraph 3 of Part I of Schedule 4, and includes human beings; flora; fauna; soil; water; air; climate; landscape; material assets, including architectural and archaeological heritage; and the interaction between any of the foregoing. Paragraph 4 of Part I of Schedule 4 indicates, among other things, that consideration should 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. In addition to the direct effects of a development, the ES should also cover indirect, secondary, cumulative, short, medium and long-term, permanent and

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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.

97. The information in the ES must be summarised in a non-technical summary (paragraph 5 of Part II of Schedule 4). The non-technical summary is particularly important for ensuring that the public can comment fully on the ES. The ES 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 ES in accessible plain English.

Compiling an Environmental Statement

98. It is the applicant's responsibility to prepare the ES. As a starting point, applicants may like to study the advice produced by this Department in Planning Advice Note 58 on Environmental Impact Assessment, which should be read in conjunction with this guidance and with the regulations themselves.

99. There is no obligation on the applicant to consult anyone about the information to be included in a particular ES. 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 developer can ask that any information provided at this preliminary stage be treated in confidence by the planning authority and any other consultees.

100. It will normally also be helpful to an applicant when preparing an ES to obtain information from the consultation bodies (paragraph 111). Where a developer has formally notified the planning authority that an ES is being prepared (see paragraph 110) 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. 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 ES ('scoping') (regulation 14)

101. Before making a planning application, a developer may ask the planning authority for their formal opinion on the information to be supplied in the ES (a 'Scoping Opinion'). This provision allows the developer to be clear about

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what the planning authority considers the main effects of the development are likely to be and, therefore, the topics on which the ES should focus.

102. The developer must include the same information as would be required to accompany a request for a screening opinion (see paragraph 64), and both requests may be made at the same time (regulation 14(2) and (5)). A developer may also wish to submit a draft outline of the ES, giving an indication of what he considers to be the main issues, to provide a focus for the planning authority's considerations. If the authority considers that it needs further information to be able to adopt a scoping opinion, the developer should be asked to provide it. The authority must consult the consultation bodies (see paragraph 111) and the developer 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 to the Development Management Procedure Regulations[23] ('the DMR') - i.e. broadly speaking developments involving or in the vicinity of major accident hazards - the authority must also consult with the HSE before adopting any scoping opinion.

103. The planning authority must adopt a scoping opinion within 5 weeks of receiving a request (or, where relevant, of adopting a screening opinion – regulation 14(4) and (5)). This period may be extended if the authority and developer so agree in writing. As a starting point, authorities should study the definition of environmental statement in regulation 2(1) and Schedule 4 to the Regulations (see Annex B) and the guidance elsewhere in this Circular (paragraphs 94-97). In addition, authorities may find it useful to consult other published guidance, such as the European Commission's "Guidance on Scoping"[24].

104. The scoping opinion must be kept available for public inspection for 2 years (with the request including documents submitted by the developer as part of that request) at the place where the planning register is kept. If a planning application is subsequently made for development to which the scoping opinion relates, the opinion and related documents should be transferred to Part 1 of the register with the application (regulation 25).

Request to Scottish Ministers for a scoping direction (regulation 15)

105. There is no provision to refer a disagreement between the developer and the planning authority over the content of an ES 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

[23] Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008, SSI/432 as amended.

[24] Guidance on EIA; Scoping June 2001. Available online at http://ec.europa.eu/environment/eia/eia-support.htm

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scoping opinion within 5 weeks (or any agreed extension), the developer may apply to Scottish Ministers for a scoping direction (regulation 14(7)). This application must be accompanied by all the previous documents relating to the request for a scoping opinion, together with any additional representations that the developer wishes to make. The developer should also send a copy of the request and any representations to the planning authority, who are free to make their own additional representations.

106. Scottish Ministers must make a scoping direction within 5 weeks 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 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 - i.e. broadly speaking developments involving or in the vicinity of major accident hazards - they must also consult with the HSE before adopting any Direction.

107. Copies of the scoping direction will be sent to the developer and to the planning authority, which must ensure that a copy is made available for inspection with the other documents referred to in paragraph 105 above.

Effect of a scoping opinion or direction

108. An ES is not necessarily invalid if it does not fully comply with the scoping opinion or direction. However, as these documents represent the considered view of the planning authority or Scottish Ministers, a statement which does not cover all the matters specified in the scoping opinion or direction will probably be subject to calls for further information under regulation 23 (see paragraphs 127-129).

109. The fact that a planning authority or Scottish Ministers have given a scoping opinion or scoping direction does not prevent them from requesting further information at a later stage under regulation 23. Where Scottish Ministers have made a scoping direction in default of the planning authority, the authority must still take into account all the information they consider relevant. In practice, there should rarely be any difference between the relevant information and that specified by Scottish Ministers.

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Provision of information by the consultation bodies (regulation 16)

110. Under The Environmental Information (Scotland) Regulations 2004[25], 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 ES. Under regulation 16, once a developer has given the planning authority notice in writing that he intends to submit an ES, the authority must inform the consultation bodies, and remind them of their obligation to make available, if requested, any relevant information in their possession. The planning authority must also notify the developer of the names and addresses of the bodies to whom they have sent such a notice. The notification to the planning authority must include similar information to that which would be submitted if the developer were seeking a screening opinion under regulation 6 (see paragraph 64).

111. The consultation bodies are:-

a) any adjoining planning authority, where the development is likely to affect land in their area;

b) Scottish Natural Heritage;

c) Scottish Water;

d) The Scottish Environment Protection Agency;

e) The Scottish Ministers;

f) Other bodies designated by statutory provision as having specific environmental responsibilities and which the planning authority or Scottish Ministers, as the case may be, considers are likely to have an interest in the application.

112. 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. Further information and guidance is available at www.scotland.gov.uk/Publications. The consultation bodies may make a

[25] SSI 2004/520

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reasonable charge reflecting the cost of making available information requested by a developer.

SUBMISSION OF EIA APPLICATIONS AND INITIAL PUBLICITY PROCEDURES

Notification and Publication of Environmental Statement (regulations 17 and 18)

113. Where an applicant or appellant submits an Environmental Statement 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" to that on which the proposed development would take place, of the availability of the statement. The form of notification is specified in Schedule 5 to the Regulations and the process should, when the Environmental Statement 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 a statement 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[26]. The time limit for representations must be no earlier that 4 weeks from the date on which the notice is published.

114. On receipt of the Environmental Statement, the planning authority must advertise the statement in the local press and the Edinburgh Gazette and the applicant must pay the cost of the advertisement. The notices published must:-

a) state that a copy of the statement and of any other documents submitted with the application will be available for inspection by the public and give the address (and where available website address) where the documents can be inspected free of charge;

b) give an address in the locality where copies of the statement may be obtained; state that a copy may be obtained there while stocks last; and, state the amount of any charge to be made for supplying a copy; and

[26] The definition of neighbouring land in regulation 3 of the Town and Country Planning (Development Management Procedure)(Scotland) Regulations 2009 has been amended by regulation 7(3) of the Town and Country Planning (Miscellaneous Amendments)(Scotland) Regulations 2009 (SSI 2009/220)

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c) state the date by which any written representations about the application should be made to the planning authority. This date must be at least 4 weeks after the date on which the notice was published; and

d) note that the possible decisions relating to a planning application are to;

- Grant planning permission without conditions
- Grant planning permission with conditions
- Refuse permission

115. The application is not to be determined before the end of the 4 week period for written representations to be made.

Copies of Environmental Statement for the consultation bodies

116. The planning authority must consult the consultation bodies on the ES (regulation 19). 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 Environmental Statement. Authorities will wish to clearly differentiate between a consultation on the ES and any consultation, where relevant, on the related planning application, to which different procedures apply[27].

117. The applicant must provide one copy of the statement for each of the consultation bodies without charge, and 3 copies of the statement for Scottish Ministers. The applicant may either send a copy of the statement direct to the bodies concerned, or may send copies of the statement to the planning authority for onward transmission (see paragraph 119)). Alternatively, a single copy may be submitted electronically to the planning authority for onward transmission, provided it satisfies the provisions of regulation 38. In practice, it will be sensible for the applicant and planning authority to agree prior to submission of the application how the copies of the statement will be distributed.

[27] Planning authorities should consult on planning applications in accordance with Regulation 25 and Schedule 5 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008, and individual directions where relevant.

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Additional publicity

118. Applicants are encouraged to publish the non-technical summary (which must be included in every ES) as a separate document, and to make copies available free of charge so as to facilitate wider public consultation. Applicants and planning authorities may also wish to make further arrangements to make details of the development available to the public.

Submission of planning application with environmental statement

119. When submitting a statement - which the applicant refers to as an Environmental Statement - along with a planning application, the applicant 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 Environmental Statement is required). In addition, the applicant must submit:-

a) 5 copies of the statement (3 will be for onward transmission to Scottish Ministers); and,

b) such further copies of the statement as are needed to allow the planning authority to send one to the other consultation bodies (see paragraph 110).

The applicant should also provide a note of the name of every body to whom the applicant has already sent or intends to send a copy of the statement under the procedures described in paragraph 117.

120. Applicants must also make a reasonable number of copies of the ES available to the public, either free of charge or at a reasonable cost, reflecting printing and distribution costs (regulations 22). Planning authorities and applicants 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 applicant.

121. On receipt, the planning authority is required to treat a planning application submitted with a statement referred to by the applicant as an ES in the same way as any other planning application, with the following additional requirements:-

a) carry out the publicity exercise described in paragraphs 113-114 above;

b) copies of the statement and application must be sent to the consultation bodies;

c) 3 copies of the statement and a copy of the application must be sent to Scottish Ministers;

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d) the statement must be placed on Part 1 of the planning register. Any related screening or scoping direction or opinion given under the pre-application procedures should also be placed on the register.

Environmental Statement submitted after a planning application

122. Where an applicant is submitting an ES which relates to a planning application that has already been submitted, the procedures are essentially the same as described in paragraphs 119-121 above.

CONSIDERATION OF EIA APPLICATIONS

123. The planning authority should determine the planning application within 4 months from the date of receipt of the statement, instead of the normal 2 months from the receipt of the planning application (regulation 44). Where an application or appeal is before the Scottish Ministers for determination when the statement is submitted, the planning authority should provide the Scottish Ministers with full details of the notification previously carried out under regulation 18 of the Development Management Procedure Regulations. Paragraph 113 gives further information. The period may be extended by written agreement between the authority and the applicant. Where the planning authority has not determined the application after 4 months or any agreed extension, the applicant may appeal to Scottish Ministers on the grounds of non-determination.

124. The planning application may not be determined without taking into consideration the environmental information and this cannot be done until at least 4 weeks after the last date on which a consultation body was served with a copy of the ES (regulation 19(3)). Where an ES is not submitted with an EIA application and the applicant indicates he proposes to provide one, the time period for determining the application is suspended until the ES is received.

Adequacy of the Environmental Statement

125. Planning authorities should satisfy themselves in every case that submitted statements contain the information specified in Part II of Schedule 4 to the Regulations (see Annex B) and include all the relevant information set out in Part I of that Schedule that the applicant can reasonably be required to compile. 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.

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126. It is important to ensure that all the information needed to enable the likely significant environmental effects to be properly assessed is gathered as part of the EIA process. If tests or surveys are needed to establish whether there are likely to be significant effects, the results of these should be taken into account in deciding whether planning permission should be granted. If the full environmental information as defined in Regulation 2(1) is not taken into account due to the inadequacy of the Environmental Statement, any planning permission granted runs the risk of being quashed. (See the case of R v Cornwall CC ex parte Hardy [2001 JPL 786, where a condition attached to a planning permission required, on the advice of environmental bodies, surveys to be carried out to obtain information on the likely effects on protected species. The permission was quashed on the grounds that the outcome of the surveys, and any necessary mitigation measures, should have been included in the Environmental Statement, enabling the public to comment and the competent authority to take account of the information in determining the application).

Provision of additional information (regulation 23)

127. Where the required information has not been provided the authority must use its powers under regulation 23 to require the applicant to provide further information concerning the relevant matters set out in Schedule 4. Any information provided in response to such a written request must, in accordance with regulation 24(1), be publicised, and consulted on, in a similar way to the document submitted as an ES. The provisions of regulation 23 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 regulation 24 of the Town and Country Planning (Development Management Procedure)(Scotland) Regulations 2008.

128. Where an applicant has voluntarily submitted any other information relating to the Environmental Statement which is of a substantive nature, that information must be treated in the same way as information required by the planning authority. Such additional information should be advertised, sent to the consultation bodies, and taken into account in reaching a decision on the application.

129. The period of 4 months referred to in paragraph 123 continues to run while any correspondence about the adequacy of the information in a statement is taking place (unless the information in the statement is not sufficient for it to constitute an "Environmental Statement", in terms of the definition in regulations 2(1)). A planning application is not invalid purely because an inadequate ES has been supplied nor because the applicant has failed to provided further information when required to do so under regulation 23. However, if the applicant fails to provide enough information to complete the ES the application can be determined only by refusal (regulation 3).

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Additional information provided for a public inquiry

130. Scottish Ministers may use regulation 23 to request further information for the purposes of a local inquiry under the 1997 Act[28]. By virtue of regulation 24(1), 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 17 to 19, 21 and 22 do not apply to the extent that the information is required to be published as part of the inquiry.

Verification of information in an Environmental Statement

131. Regulation 23(4) empowers Scottish Ministers or a reporter (in writing) to require an applicant or appellant to produce such evidence as they may reasonably call for to verify any information in the ES.

Development with significant transboundary effects (regulations 36 and 37)

132. Planning authorities are required to send copies of Environmental Statements 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)[29]. This will also enable Scottish Ministers to respond promptly if a country asks for information about a particular development.

133. Developments that are likely to have significant effects on the environment of another country will be rare in Great Britain. However, should such developments 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 31 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.

134. Where the environment in Scotland is likely to be significantly affected by a project in another EC Member State, Scottish Ministers will liaise (via the UK Government) 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.

[28] including local inquiries held into planning appeals arising under section 47 of that Act and into planning applications referred to Scottish Ministers under section 46 of the Act.
[29] Available at www.unece.org/env/eia/eia.htm

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DETERMINING THE PLANNING APPLICATION

135. Before determining any EIA application, the planning authority, Scottish Ministers or a reporter as the case may be, must take into consideration the information contained in the Environmental Statement (ES), including any additional information (see paragraphs 127-129), any comments made by the consultation bodies, and any representations from members of the public about environmental issues.

Securing mitigation measures

136. Mitigation measures proposed in an ES are designed to limit any negative environmental effects of a development. Planning authorities will need to consider carefully how such measures are secured, particularly in relation to the main mitigation measures specified in the decision to grant planning permission (paragraph 142).

137. Conditions attached to a planning permission may include mitigation measures. However, a condition requiring the development to be "in accordance with the Environmental Statement" is unlikely to be valid unless the ES 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 ES rather than the whole document.

138. A planning condition may require a scheme of mitigation for more minor measures to be submitted to the planning authority and approved in writing before any development is undertaken. However, planning conditions should not 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).

139. Another possible method of securing mitigation measures is through the use of 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

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obligation. Detailed guidance on the use of planning obligations is set out in Circular 1/2010 and the Annex to Circular 1/2010.[30]

140. Developers may wish to adopt environmental management systems to demonstrate implementation of mitigation measures and to monitor their effectiveness.

Publicising determinations of EIA applications (regulation 26)

141. When the planning authority has determined an EIA application, it must notify Scottish Ministers, the consultation bodies, and any other body consulted under regulation 19(1)(d), in addition to the normal requirement to notify the applicant. The authority must also inform the public of the decision; where that authority maintains a website for advertising applications they may also wish to publish the notice on that site. The notice should give the content of the determination, state that the documents relating to the determination will be open to inspection by the public and give the address where the documents can be inspected free of charge (see paragraph 134 below). Where Scottish Ministers have or a reporter has determined an EIA application or issued an 'intentions letter', they will send a copy of their determination to the local authority for them to publicise.

142. A copy of the decision, including any conditions imposed, should be kept in the same place as the planning register with such other documents as contain:

a) the main reasons and considerations on which the decision is based, including information about the participation of the public; and

b) where permission has been granted, a description of the main measures to avoid reduce and, if possible, offset the major adverse effects of the development; and

c) information about the right to challenge the validity of the decision and the procedures for doing so.

With regard to paragraph c) 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 9(4)

[30] Planning Circular 1/2010: *Planning Agreements*; and, Annex to Circular 1/2010: *Planning Agreements. Planning Obligations and Good neighbour Agreements.*

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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 the Scottish Courts service[31] or through the Citizens Advice Bureau).

143. The requirement to make available the main reasons and considerations on which the decision is based applies equally to cases where planning permission is granted and where it is refused. In practice, authorities may find that this requirement is met by the relevant planning officer's report to the Planning Committee.

[31] Further information on judicial review procedure can be obtained by contacting the Scottish Courts Service, Petition Department, Court of Session, Parliament House, Edinburgh EH1 1RQ (Tel: 0131 240 6747).

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SPECIAL CASES

MULTI-STAGE CONSENTS

144. 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.

145. 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 obtained 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 ES, 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. In this way authorities can 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.

146. The ruling in case *Commission v UK (C-508/03)* has nevertheless made it clear that there may be circumstances in which an authority is obliged to carry out EIA even after planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage that the project is likely to have significant effects on the environment. In that event account will have to be taken of all the aspects of the project which have not yet been assessed, or which have been identified for the first time as requiring assessment.

Determining an Application for Multi Stage Consent

147. Regulation 2 defines an 'application for multi-stage consent' as an application for approval, consent or agreement which must be obtained before all or part of the development permitted by the planning permission may be begun, where that approval consent or agreement is required by;

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- a condition imposed on planning permission (whether planning permission in full, or planning permission in principle) granted following an application made[32] under Part III, or section 242A(c), of the Act;
- a condition specified in a simplified planning zone scheme ('SPZ'); and
- a condition specified in an enterprise zone scheme ('EZS').

Further guidance on SPZs and EZSs is contained in paragraph 160.

148. Before determining an application for multi-stage consent in respect of EIA development, regulation 4 requires the authority to take into account any EIA previously undertaken, and to state in their decision that they have done so. 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 ES previously submitted, whether in connection with the original permission or in relation to any previous application for multi-stage consent.

149. Applicants will not usually be required to re-submit any previous ES, but may exceptionally choose to submit a revised or updated statement along with their application for multi-stage consent. Where an ES 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 ES.

Provision to request additional information (regulation 23)

150. Where an application for multi-stage consent is received in respect of an EIA development for which an ES has previously been submitted, the provisions of regulation 23 (additional information and evidence relating to Environmental Statements) apply as they would in relation to an EIA application. The authority or the Scottish Ministers may, notwithstanding whether an ES has previously been revised or updated, require in writing the submission of such further information as is reasonably required to give proper consideration to the likely environmental effects of the development. In considering whether further information is required, the authority must examine the adequacy of the ES for the development as a whole in light of

[32] While applications for approval required by condition on planning permission in full are not subject to formal requirements on their content, an application of some sort for approval will have to be made, for example a letter or other submission of information.

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those matters which are now before them for approval. See paragraphs 125 – 126 for further guidance on the adequacy of statements. In practice, where sufficient information has been supplied with the application for planning permission, the need for further information should rarely arise.

Application for multi-stage consent in connection with a development for which EIA has not previously been undertaken (part 8)

151. 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 from the planning authority. Regulations 6 and 7, as applied by Regulation 27, refer. See paragraphs 64 – 67 for more information on obtaining a screening opinion or direction.

Provision to supersede earlier screening opinions or directions

152. Where an application for multi stage consent is made to an authority without an ES in connection with a development for which EIA has not previously been undertaken, and it appears 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 within three weeks. Provision is made such that a screening opinion or direction adopted in these circumstances shall supersede the terms of any earlier opinion or direction.

153. Where an authority adopts a screening opinion such that EIA is required pursuant to paragraph 152 above, the provisions of the regulations apply in a similar way as they would to an application for planning permission in full. Regulation 30 refers. 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 as applied by regulation 28(7)).

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

154. Regulation 44 (as applied by regulation 30) extends the time period for determining an application for multi-stage consent from 2 months to 4 months.

Mitigation measures

155. Where, exceptionally a planning authority or the Scottish Ministers are required to take into account new environmental information in determining an

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application for multi-stage consent, regulation 4 makes express provision such that the authority or the Scottish Ministers may impose conditions in granting approval which relate not only to the subject matter of the application but to the development as a whole. Conditions relating to issues that go beyond the application under consideration should only be imposed where they are necessary in ensuring mitigation of newly identified impacts of the development on the environment. In this matter this Circular supersedes guidance contained in paragraph 42 of Annex A to Circular 4/1998 ('The Use of Conditions in Planning Permissions').

CHANGES OR EXTENSIONS TO EXISTING OR APPROVED DEVELOPMENT

Schedule 1 and Schedule 2 Development

156. 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:

a) the corresponding thresholds and criteria applied to the development as changed or extended are met or exceeded, **and**;

b) 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 45);

This process is set out in figure 2.

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Some changes or extensions may fall within classes of development to which permitted development rights may apply (see paragraphs 71 - 75). 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

157. 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 paragraph 33 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.

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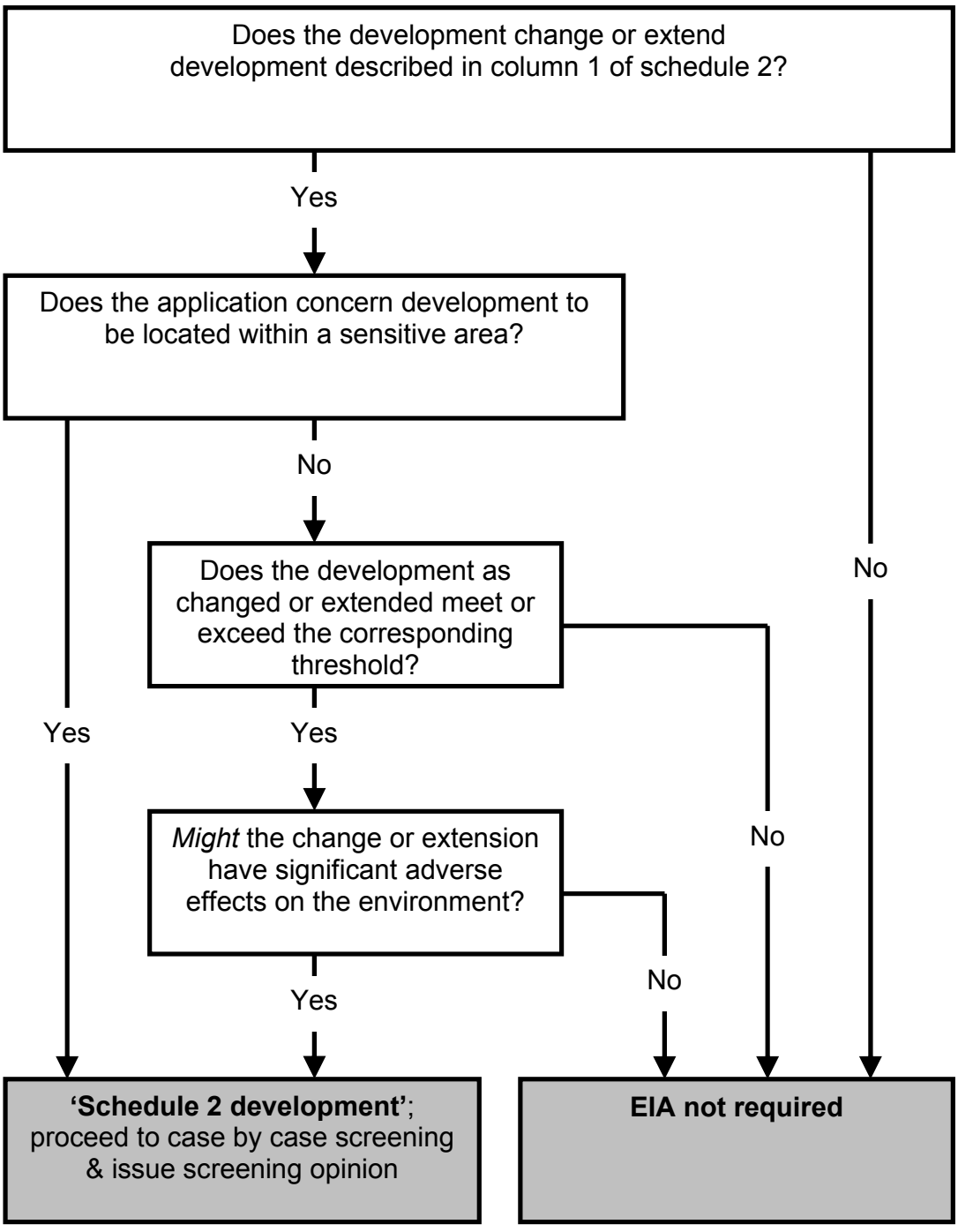
Figure 2: Establishing whether a change or extension is a schedule 2 development



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The need for EIA for Schedule 2 development

158. 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 Environmental Statement

159. It should be noted that the applicant can be asked to provide an Environmental Statement 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 Environmental Statement 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 Environmental Statement should accord with the requirements of Schedule 4 of the EIA Regulations. Further guidance on the content of Environmental Statements is given in paragraphs 94-97.

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SIMPLIFIED PLANNING ZONES (SPZS) AND ENTERPRISE ZONES (EZS) (REGULATION 32)

160. No schedule 1 development can be granted planning permission by the adoption or approval of an SPZ or through the designation or modification of an 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 (EXCEPTIONS TO THE TOWN AND COUNTRY PLANNING EIA PROVISIONS) (REGULATION 47(3), (4), (5), (6))

161. The provisions described in paragraphs 68-72 do not apply to development within the following classes in Schedule 1 to the General Permitted Development Order (GPDO):

a) Part 7 (forestry buildings and operations);

b) Class 26 of Part 8 (development comprising deposit of waste material resulting from an industrial process);

c) Part 11 (development under local or private acts or orders);

d) Class 39(1)(a) of Part 13 (development by public gas transporters);

e) Class 58 of Part 17 (development by licensees of the Coal Authority);

f) Class 64 of Part 18 (deposit of mining waste).

g) 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 Part IV of the Regulations applies.

162. Development permitted under Class 29(1)(a) and (b) of Part 11 is excluded as Article 1.5 of the Directive states that the Directive shall not apply to projects the details of which are adopted by a specific act of national legislation.

163. Development permitted under Part 7, 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

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consent procedures to which separate Regulations 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.

164. Development which comprises or forms part of a project serving national defence purposes may be exempted on a case by case basis, if compliance with EIA would have an adverse effect on those purposes. See footnote 1 to paragraph 89 for further information.

URGENT CROWN DEVELOPMENT

165. 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 34 applies the 2011 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.

ROMP APPLICATIONS

166. Regulation 33 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 33 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.

167. The guidance in this Circular supplements the procedural guidance for ROMP applications given in Scottish Development Department Circular (SDD) Circular 34/1996[33]. This Circular supersedes guidance previously contained in Circular 1/2003.

[33] Environment Act 1995: Section 96: Guidance on the Statutory Provisions and Procedures.

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Existing ROMP Provisions

168. 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. Advice relating to these reviews was set out in Scottish Office Environment Department (SOED) Circular 26/1992.[34] 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.

Romp and Environmental Impact Assessment

Disapplication of deemed approved provisions

169. Regulation 33(17) 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

170. Regulation 33(13) – (16) provides that where a competent authority requires an ES, or where additional information is required (paragraphs 127 – 129 refer) they shall notify the operator and specify the date by which the ES or additional information as the case may be is required.

171. If, on receipt of a notification that an ES is required the operator accepts that an EIA is needed they must:

a. write within 6 weeks (this period is extended from 3 weeks to 6 weeks by regulations 33(3), (4) and (5)), or other agreed period, stating that the operator accepts that an ES is needed and propose to provide it by the specified date; and
b. submit an ES by the specified date.

[34] Planning and Compensation Act 1991: Interim Development Order Permissions: Operating, Restoration and Aftercare Conditions in Scotland.

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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 6 weeks to the Scottish Ministers requesting a screening direction (see paragraphs 69-70).

172. If the operator does not comply with regulation 33(13) – (16) then the planning permission to which the ROMP application relates will cease to have effect at the end of the 6 week 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 ES, or additional 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 additional information is submitted.

173. The Regulations require 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

174. Regulation 33(21) – (22) 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 ES. Or in the case where an ES, 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 ES 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 ES 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.

175. Appeals must be made by giving notice to the Scottish Ministers within 6 months from the date that the decision was due. A model appeal form is available from the Scottish Government's Directorate for Planning and Environmental Appeals ('DPEA')[35].

Establishing whether EIA is required

176. When considering whether a ROMP application is a Schedule 1 or Schedule 2 development, the 2011 regulations require that any applicable thresholds or criteria apply to the development as changed or extended.

[35] Directorate for Planning and Environmental Appeals; 4 The Courtyard, Callendar Road, Falkirk, FK1 1XR. Planning appeal forms are available online on the DPEA web pages .

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Further guidance on changes or extensions to existing development is provided in paragraphs 156 – 159. For guidance on the need for EIA for Schedule 2 development, see paragraphs 38 – 52.

Pre-application considerations

177. 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 ES, particularly if more complex or season (e.g ecological data collection) issues are likely to be raised.

178. 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.

179. 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 ES. 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.

Environmental Statement submitted voluntarily

180. Operators may decide for themselves that EIA will be required and submit an ES voluntarily (see paragraphs 61 – 63), without having first obtained a screening or scoping opinion from the planning authority. However, it will generally be advantageous for operators to be aware of the concerns of the planning authority and statutory consultees at the earliest possible stage given the possible consequences arising from the need to provide further information after the ROMP application is submitted.

Procedures when EIA is required

181. The objective of the process is to produce a ROMP application, and (where required) an accompanying ES, which can be agreed as mutually acceptable to all parties. This should better ensure that the planning authority

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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 ES.

Suspension of Mineral Permissions

182. 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 33(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.

183. 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 ES, 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 ES, or additional information, as appropriate. This suspension does not apply to restoration and aftercare conditions which continue in place.

184. On that date, any development consisting of the wining 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.

Application for Multi-stage consent (ROMP condition) (Regulation 31)

185. Where, following the determination of a ROMP application, a ROMP condition requires further approval, consent or agreement before all or any part of the development may be begun, that approval consent or agreement is itself subject to provisions outlined in paragraphs 144 – 155 of this Circular.

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PREVIOUS CIRCULARS CANCELLED OR AMENDED

186. This Circular supersedes Scottish Government Circulars 8/2007,[36] (with the exception of Annexes E[37]), the Addendum to Circular 8/2007[38], and Circular 1/2003[39]. In addition, guidance contained in paragraph 42 of Annex A to Circular 4/1998 ('The Use of Conditions in Planning Permissions) is superseded in the case of EIA applications only, by paragraph 155 of this Circular.

187. Guidance on procedures for projects which are the subject of private legislation through the Scottish Parliament is available online at http://www.scottish.parliament.uk/business/bills/billguidance/gprb-1.htm#2_293. The Transport & Works (Scotland) Act 2007 enables approval for certain transport projects to be achieved through Ministerial order, replacing the use of Private Bills to authorise transport projects. Procedures for projects which are granted consent under other legislation are the subject of separate legislation and guidance issued by the Scottish Government, relevant UK Government departments or agencies.

Water Management Projects

188. The Water Environment (Controlled Activities) (Scotland) Regulations 2011 introduce new provisions from 31st March 2011, reversing the 2003 extension of planning controls on irrigation. In future it will fall to SEPA to authorise any irrigation activities, and to consider any EIA undertaken where required, under the Controlled Activities Regulations. Circular 3/2003: Environmental Impact Assessment (Water Management) (Scotland) Regulations 2003 is hereby revoked.

FURTHER COPIES AND ENQUIRIES

189. Enquiries about the content of this Circular should be addressed to Cara Davidson, Environmental Assessment, Directorate for the Built Environment, Area 2-H, Victoria Quay, Edinburgh EH6 6QQ (Telephone 0131 244 0928; e-mail: cara.davidson@scotland.gsi.gov.uk). Further copies and a list of current planning circulars may be obtained online at http://www.scotland.gov.uk/Topics/Built-Environment/planning. .

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[36] Circular 8/2007: The Environmental Impact Assessment (Scotland) Regulations 1999

[37] Annex E to Circular 8/2007: The Environmental Impact Assessment (Scotland) Regulations 1999 remains extant until further notice and is available online on the Scottish Government's Planning EIA web pages

[38] Addendum to Circular 8/2007: Environmental Impact Assessment (Scotland) Regulations 1999

[39] Circular 1/2003: The Environmental Impact Assessment (Scotland) Regulations2002 Review of Old Mineral Permissions (ROMPs).

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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 19 and 38 above).

1. Characteristics of development

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

a) the size of the development;
b) the cumulation with other development;
c) the use of natural resources;
d) the production of waste;
e) pollution and nuisances;
f) the risk of accidents, having regard in particular to substances or technologies used.

2. Location of development

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

a) the existing land use;
b) the relative abundance, quality and regenerative capacity of natural resources in the area;
c) the absorption capacity of the natural environment, paying particular attention to the following areas:-

(i) wetlands;
(ii) coastal zones;
(iii) mountain and forest areas;
(iv) nature reserves and parks;
(v) areas classified or protected under Member States' legislation; areas designated by Member States pursuant to Council Directive 79/409/EEC on the conservation of wild birds[40] and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora[41];
(vi) areas in which the environmental quality standards laid down in Community legislation have already been exceeded;
(vii) densely populated areas;
(viii) landscapes of historical, cultural or archaeological significance.

[40] O.J. No. L103, 25.4. 1979,p.1.
[41] O.J. No. L 206, 22.7.1992, p.7

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3. **Characteristics of the potential impact**

The potential significant effects of development must be considered in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to:-

a) the extent of the impact (geographical area and size of the affected population);
b) the transfrontier nature of the impact;
c) the magnitude and complexity of the impact;
d) the probability of the impact;
e) the duration, frequency and reversibility of the impact.

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ANNEX B

INFORMATION TO BE INCLUDED IN AN ENVIRONMENTAL STATEMENT

This is a copy of Schedule 4 of the Regulations (see paragraphs 87-90, 119-121 and 123 above)

PART I

1. Description of the development, including in particular -

   (a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;

   (b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;

   (c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the development.

2. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

4. A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:

   (a) the existence of the development;

   (b) the use of natural resources;

   (c) the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the applicant of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

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6. A non-technical summary of the information provided under paragraphs 1 to 5 of this Part.

7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant in compiling the required information.

PART II

1. A description of the development comprising information on the site, design and size of the development.

2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.

3. The data required to identify and assess the main effects which the development is likely to have on the environment.

4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.

5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part.

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