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Consultation Document

Proposed changes to the Environmental Impact Assessment Regulations and Local Development Orders

Date of issue: **26 March 2015**

Action required: Responses by **18 June 2015**

Overview

This consultation seeks your views on proposed changes to the Environmental Impact Assessment Regulations (EIA) 1999. It also proposes changes to the (Development Management Procedure) (Wales) Order 2012 in order to facilitate Local Development Orders that grant permission for EIA development.

How to respond

The closing date for responses is 18 June 2015. You can respond in any of the following ways:

Email:

Please complete the consultation form at Annex 2 and send it to:

planconsultations-f@wales.gsi.gov.uk

Post:

Please complete the consultation response form at Annex 2 and send it to:

Development Management Branch
Planning Directorate
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

Further information and related documents

Large print, Braille and alternative language versions of this document are available on request.

Contact details

For further information:

E-mail: planconsultations-f@wales.gsi.gov.uk

Tel: Alan Groves on 029 2082 5362

Data protection

How the views and information you give us will be used

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

Contents

INTRODUCTION	1
Background	1
Purpose of consultation	1
Why is there a need to update and consolidate legislation?	1
Screening Thresholds.....	3
Changes or extensions to existing development.....	4
Reasons for Negative Screening Decisions.....	5
Multi-stage consents.....	5
Geological Storage Directive	6
Local Development Orders	6
Modification Orders.....	7
Discontinuance Orders	8

INTRODUCTION

Background

1. The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, as amended (“the EIA Regulations”), transpose Directive 85/337/EEC (replaced by Directive 2011/92/EU) on the assessment of the effects of certain public and private projects on the environment, as amended (‘the EIA Directive’), in its application to development under the Town and Country Planning Act 1990.
2. Environmental Impact Assessment (EIA) is a process by which information is collected, in a systematic way, to inform an assessment of the likely significant environmental effects arising from a proposed development.
3. EIA aims to prevent, reduce or offset the significant adverse environmental effects of development proposals, and enhance positive ones. It ensures that planning decisions consider the environmental effects of development. The EIA process also provides for engagement with statutory consultees, local and national groups, and the public.
4. The EIA Directive is subject to further amendment following the adoption of Directive 2014/52/EU¹ by the European Parliament and Council on 16 April 2014. Member states are required to comply with the provisions of Directive 2014/52/EU by 16 May 2017. The Welsh Government will issue a separate consultation on the new Directive.

Purpose of consultation

5. This consultation paper sets out the Welsh Government’s proposals for consolidating and amending the EIA Regulations. It also proposes changes to the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 in order to facilitate Local Development Orders (LDOs) that grant permission for EIA development.

Why is there a need to update and consolidate legislation?

Screening thresholds

6. EIA is required for all development projects that are listed in Schedule 1 of the EIA Regulations. Development listed in Schedule 2 of the EIA Regulations needs to be screened if it exceeds certain thresholds or is in a sensitive area.
7. Schedule 2 of the EIA Regulations establishes the screening thresholds for certain types of development projects. We have analysed requests for

¹ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2014_124_R_0001

screening decisions that are submitted to the Welsh Ministers and the evidence suggests that some of the existing screening thresholds are too low, leading to many developments being screened unnecessarily. This delays the planning application process and places an administrative burden on the planning system. To address this issue, the consultation paper proposes raising the screening thresholds for certain development projects. These proposed changes are the same as those which will be implemented in England in April².

Local Development Orders

8. The consultation paper also proposes amendments to regulations associated with LDOs in order to allow LPAs to make LDOs for development schemes that comprise Schedule 2 EIA development. This could encourage LPAs to make LDOs for larger development proposals, supporting economic growth and regeneration.

Consolidation and amendments

9. We intend to consolidate the regulations, which have been subject to many amendments since 1999, and use the opportunity to incorporate a number of changes that take account of case law. These include:

Proposals to change or extend existing development – it is proposed to apply the thresholds in Schedule 2 to the development as a whole once modified, and not just to the change or extension. We are also proposing a new provision that requires all changes or extensions to Schedule 1 projects, where these are not Schedule 1 developments in their own right, must be screened as to the need for EIA.

Reasons for negative decisions – We are proposing a new provision that will make it clear that when the Welsh Ministers or a planning authority issue a negative screening decision, they shall make available their reasons for that decision.

Multi-stage consents – Amending Regulations in 2008 required public consultation on the environmental statement at each stage of a multi-stage consent, even in cases where the environmental statement produced at outline stage satisfies the requirements of the EIA Regulations at the later stage. We intend to remove this requirement to reduce the burden on applicants and local planning authorities.

Geological Storage Directive – European Directive 2009/31/EC ('the Geological Storage Directive') amends annexes I and II of the EIA Directive. The consultation paper sets out the proposed approach to implement the requirements of the Geological Storage Directive.

² S.I. 2015/660 The Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2015

10. We are also asking whether specific provision should be made in the EIA Regulations to address discontinuance and modification orders.

PROPOSED AMENDMENTS

Screening Thresholds

11. Development projects that fall within Schedule 1 of the EIA Regulations always require EIA. Development listed in Schedule 2 of the EIA Regulations needs to be screened if it exceeds certain thresholds or is in a sensitive area.
12. We have undertaken an analysis of requests for screening directions made to the Welsh Ministers and have found that a significant majority did not require EIA. This suggests that there may be scope for increasing the existing screening thresholds, as subjecting projects to screening for EIA when they are unlikely to have significant effects on the environment causes unnecessary delay in the planning application process.
13. In considering whether to revise the screening thresholds for Schedule 2 development we have assessed the evidence base against the indicative thresholds and criteria for the identification of Schedule 2 development requiring EIA (see paragraph A.19 of circular 11/99)³, the selection criteria in Annex III of the EIA Directive, and the need to ensure that only those projects that are not considered likely to give rise to significant environmental effects are removed from the need for screening.
14. Based on this assessment we consider that there is scope to increase the screening thresholds associated with "urban development projects" and "industrial estate development". The existing screening threshold for both types of development is 0.5ha, as set out in paragraph 10 in the table to Schedule 2 of the EIA Regulations.
15. We remain committed to protecting the environment and all Schedule 2 urban development projects that are located in a 'sensitive area', irrespective of their size, will still be subject to screening.
16. We propose the following:
 - The screening threshold for "industrial estate development" (paragraph 10 (a) of the table in Schedule 2) to be raised from 0.5ha to 5ha.
 - The screening thresholds for "urban development projects" (paragraph 10 (b) of the table in Schedule 2) to be raised and amended so that projects will need to be screened if -
 - (i) the development exceeds 1 hectare and does not include the construction of dwellinghouses; or
 - (ii) the development includes more than 150 dwellinghouses; or
 - (iii) the overall area of the development exceeds 5 hectares.

³ <http://wales.gov.uk/topics/planning/policy/circulars/welshofficecirculares/circular1199/?lang=en>

17. The reason for proposing a specific screening threshold for dwellinghouses based on number of units is to address the potential significant environmental effects of high density residential accommodation.

Q1

Do you agree that the screening thresholds for urban development projects and industrial estate projects, as set out in Schedule 2 of the EIA Regulations, are too low?

Q2

Do you agree with our proposed screening thresholds?

Changes or extensions to existing development

18. The High Court in the Baker case⁴ held that paragraph 13 of Schedule 2 ('Schedule 2.13') to the 1999 EIA Regulations does not properly implement the Directive as it limits consideration of the environmental effects of a change or extension to the change or extension itself, rather than the effects on the whole development, as modified.

Changes to Schedule 2 development

19. To address the implications of the Baker judgement we propose to amend paragraph 13 of Schedule 2 to the EIA Regulations so that the references to thresholds in 13 (a) (i) apply to the whole development, as modified by the change or extension, and not just to the change or extension itself.

Q3

Do you have any comments on the proposed approach to addressing changes or extensions to Schedule 2 development?

Changes to Schedule 1 development

20. Paragraph 21 of Schedule 1 of the existing EIA Regulations relates to extensions or changes to development, which comprise Schedule 1 development in their own right. We do not propose any changes to paragraph 21 of Schedule 1.
21. Paragraph 13 (a) (ii) of Schedule 2 of the 1999 EIA Regulations deals with changes or extensions to Schedule 1 development that fall below the Schedule 1 thresholds. These thresholds are currently applied only to the change or extension, rather than to the whole development.

⁴ High Court of Justice, R (*on the application of Baker*) v Bath and NE Somerset Council, 2010.

22. Again to address the Baker judgement, we propose that any change or extension to Schedule 1 development (where that change or extension is not Schedule 1 development in its own right) must be screened when either :
- the thresholds set out in Schedule 2.13(a)(ii) of the existing 1999 EIA Regulations, applied to the change or extension, are met or exceeded; or
 - the development as changed or extended may have significant adverse affects on the environment.

Q.4

Do you have any comments on the proposed approach to addressing changes or extensions to Schedule 1 development?

Reasons for Negative Screening Decisions

23. The 1999 EIA Regulations provide that any screening opinion which states that EIA is required must be supported by reasons for the determination. The ‘Mellor’ case⁵ confirmed that the EIA Directive does not require reasons for a negative screening decision – a screening opinion that states that EIA is not required. But it did clarify that if a reason for a negative screening opinion is requested by an interested party, it must be provided. In the interests of transparency, and to satisfy requirements relating to accessible information, we intend to amend the EIA Regulations to require reasons to be provided for all screening opinions or directions.

Q.5

Do you have any comments on the proposal to amend the EIA Regulations to require reasons to be provided for all screening opinions and screening directions?

Multi-stage consents

24. In response to rulings from the European Court of Justice, amending regulations⁶ were issued in 2008 to transpose the requirement that consideration must be given to the need for EIA before determining a planning application for the approval of reserved matters. This was because the court held that outline planning permission and the decision which subsequently grants approval of reserved matters must be considered to comprise a grant of multi-stage development consent in terms of article 1(2) of the EIA Directive.
25. The 2008 amending regulations, in order to satisfy the requirements of the EIA Directive, required applications for multi-stage consents to be screened (i) to

⁵ European Court of Justice, case C-75/08 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0075:EN:HTML>

⁶ <http://www.legislation.gov.uk/wsi/2008/2335/contents/made>

check if EIA was needed when it had not been required at outline stage and (ii) to check if additional environmental information was required at the subsequent consent stage (i.e. an application for approval of reserved matters) when a ES had already been produced. In cases where either (i) EIA was required or (ii) additional environmental information was needed, public consultation would be required.

26. However the 2008 Amending Regulations also required a repeat of the public consultation process at subsequent consent stage even in cases when the environmental statement provided at outline stage remained fit for purpose. We intend to remove this requirement to reduce the burden on applicants and LPAs while maintaining the full transposition of the Directive.

Q.6

Do you agree that, in the case of a subsequent application (e.g. reserved matters application), where an environmental statement was provided with the original outline application and remains fit for purpose, there is no merit in repeating the public consultation process?

Geological Storage Directive

27. Directive 2009/31/EC ('the Geological Storage Directive') on carbon capture and geological storage establishes a legal framework for the environmentally safe geological storage of carbon dioxide.
28. Paragraphs 22 and 23 of Annex I and paragraph 3(j) of Annex II to Directive 2011/92 apply EIA requirements to the capture and transport of carbon dioxide streams for the purposes of geological storage, and to certain storage sites.
29. We propose to add new categories of development to Schedule 1 and 2 of the EIA Regulations to reflect these requirements.

Q.7

Do you have any comments on the proposed approach to implementing the Geological Storage Directive?

Local Development Orders

30. Local Development Orders (LDOs) grant planning permission for certain types of development, in a specified area, subject to conditions and limitations, without the need to submit a planning application to the LPA.
31. Article 27 of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (DMPO) relates to LDOs. It prevents a LDO being made that would grant permission for EIA development.

32. We want to encourage LPAs to adopt LDOs as they are a tool that can assist wider planning objectives by contributing towards streamlining the planning system through removing the need for developers to make applications to the LPA. They can add certainty to the planning system, helping to encourage developers. They can also save time and money for stakeholders in the planning system.
33. The Welsh Government has recently published a research report on Local Development Orders in order to demonstrate the opportunities offered by LDOs and to provide practical guidance on their design and implementation⁷. One of the conclusions of the report is that LDOs can facilitate large-scale development that can have significant impacts, providing difficult planning issues are resolved before the LDO is adopted.
34. To facilitate and encourage the use of LDOs we propose to make changes to the DMPO and the EIA Regulations in order to allow LDOs that could grant planning permission for Schedule 2 EIA development, subject to consideration of an environmental statement.

Q.8

Should the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (DMPO) and the EIA Regulations be amended in order to allow LDOs to grant planning permission for Schedule 2 development?

Modification Orders

35. Section 97 of the Town and Country Planning Act 1990 provides the power for LPAs to modify any planning permission. Section 100 of the 1990 Act provides similar powers for the Welsh Ministers.
36. When a LPA propose to make an order they must notify the owner and occupier of the land and all persons who in the authority's opinion will be affected by the order. In cases where the notified persons object to the order, it must be confirmed by the Welsh Ministers.
37. A Court of Appeal judgment⁸ makes it clear that modification orders comprise development consent for the purposes of Annex 2 of the EIA Directive. So if a LPA or the Welsh Ministers intend to make a modification order they should consider whether an environmental impact assessment is required.

Q.9

Do you have any comments on the proposal to prevent modification orders for EIA development being made or confirmed unless the order is accompanied by an Environmental Statement that is taken into account when making or confirming the order?

⁷ Local Development Orders: Impact and Good Practice. Welsh Government, January 2014

⁸ Smout v Welsh Ministers and Wrexham CBC, Case number C1/2011/0188

Discontinuance Orders

38. Section 102 of the Town and Country Planning Act 1990 provides the power for local planning authorities to make a discontinuance order that would require the removal of any buildings or works or the cessation of any use of land, in circumstances where planning permission was previously granted for the buildings, works or use.
39. Discontinuance orders are capable of granting planning permission for development of land to which the order relates. Discontinuance orders must be confirmed by the Welsh Ministers before they can take effect.
40. Section 104 of the Planning Act 1990 provides Welsh Ministers with the power to make a discontinuance order.
41. We intend to amend the EIA Regulations to make specific provision to prevent the Welsh Ministers from making or confirming a discontinuance order that is likely to have significant effects on the environment unless an environmental statement has been prepared in relation to the order and the decision to confirm the order takes account of the environmental statement.

Q.10

Do you have any comments on the proposal to prevent discontinuance orders for EIA development being made or confirmed unless the order is accompanied by an Environmental Statement that is taken into account when making or confirming the order?