

REGULATORY IMPACT ASSESSMENT – JUNE 2002 ENVIRONMENTAL IMPACT ASSESSMENT (SCOTLAND) REGULATIONS 2002

1. Issue and objective

Issue: Unlike other planning permissions, there is a legislative requirement for all mineral permissions to be subjected to review procedures so that their working conditions can be considered afresh to take account of modern working conditions and standards. The English Courts have determined that EC Directive 85/337/EEC (as amended by EC Directive 97/11/EC) on the assessment of the effects of certain public and private projects on the environment (the “EC Directive”) should apply to these reviews. This means that English Mineral Planning Authorities must *consider* the need for environmental impact assessment (EIA) in all review cases and *require* EIA for those projects likely to have significant environmental effects. These rulings are not legally binding in Scotland. However, because of the identical legislative framework and the equal applicability of the EC Directive, it must be assumed that the ruling is of similar relevance to Scotland.

Objective: The proposed Regulations will bring domestic legislative review procedures for old mineral permissions in Scotland into line with the EC Directive.

2. Risk Assessment

Failure to implement EU obligations properly may not only lead to infraction proceedings in the European Court of Justice but also leave open individual decisions to potential legal challenge. The Scottish Ministers fully support the Directive’s main aim of ensuring that decisions on a particular project are taken in the knowledge of any likely significant effect on the environment. These procedures better ensure that the environmental risk of mineral workings is properly addressed by drawing together, in a systematic way, an assessment of a project’s likely significant environmental effects. This helps to ensure that the predicted effects of a project, and the scope for reducing them, are properly understood before a decision is made. This understanding should deliver environmental benefits and minimises disturbance to communities in addition to enabling operators to bring forward better formulated proposals.

3. Options

There are a number of possible ways in which the Executive can respond to the Court rulings:

- Option 1:** do nothing;
- Option 2:** seek voluntary compliance with the objective;
- Option 3:** extend the provisions of the Environmental Impact Assessment (Scotland) Regulations 1999 to mineral reviews without modification;
- Option 4:** extend the provisions of the Environmental Impact Assessment (Scotland) Regulations 1999 to mineral reviews with modification.

4. Costs to business

Option 1: Maintaining the current arrangements would not impose any additional costs to the industry although permissions that have been subject to review without complying with the Directive would be open to challenge in the Courts. This increases uncertainty for operators. English decisions confirm that Court challenges are likely to be successful. Court action is likely to generate considerable costs for all involved.

Option 2: The typical costs to the industry would be those associated with the preparation of an EIA. Following the English Court decisions, planning authorities and operators were advised to co-operate to ensure voluntary compliance with the Directive for each individual case. Although these arrangements appear to be working well in most instances there is no power in Scottish planning law for authorities to take action where an operator does not undertake EIA or where there is delay in doing so. There is evidence to suggest that this is already happening. During this period, there is uncertainty for communities and possible damage to the environment whilst work continues to previously required (and possibly unacceptable) standards.

Option 3: Again, the typical cost to the industry would be those associated with the preparation of an EIA. The 1999 Regulations currently apply to new applications for planning permission. In such cases, if a planning authority considers that EIA is necessary and the operator does not comply then permission is deemed to be refused. However, the review procedures for mineral permission reverse this: if a planning authority does not determine a review application within statutory time limits then the application is deemed to be approved. This is in breach of the EC Directive because proper consideration must be given to the environmental effects before a proposal can proceed. The “deemed approved” provisions must therefore be revoked.

Option 4: This would deliver the required changes to ensure compliance with the EC Directive. Most of the provisions in the 1999 Regulations would apply. However, to ensure proper compliance with the Directive, the “deemed approval” provisions for review cases will be removed and if operators fail or are slow to provide the necessary information then their working must cease until they have done so. In addition to the costs of preparing an EIA, the suspension of permission is likely to have significant implications. However, such action is necessary to comply with the Regulations. To counter this, the Regulations propose an extension of the period for submitting information from 3 to 6 weeks or such other time as is agreed between the planning authority and the operator. The Executive would propose to advise planning authorities not to consider suspension of permission if there are indications that the operators are positively seeking to comply with the requirements without unacceptable delays. The current voluntary procedures are generally working well in most cases. This option is simply placing the requirement on a statutory basis and ensuring full compliance with the EC Directive in domestic legislation. If co-operation continues then the SI itself places no additional burden upon businesses but rather is a safety net for the EU obligation and will ensure that authorities can take action where there are unacceptable delays.

5. Identify the benefits.

The first three options contain flaws that could result in infraction proceedings, frustrate planning authorities, cause uncertainty amongst communities and possible unnecessary damage to the environment. The fourth option will implement the obligations of the Directive and is in accordance with House of Lords and English High Court judgements. Such obligations must be implemented by legislative means. No alternative method of implementation is possible.

Option 4 should also provide benefits to minerals operators, planning authorities, the general public and the environment by clarifying in domestic legislation the intentions of EC law as it applies to review cases. This will, in turn, contribute to:

- a framework in which decision-makers can consider the environmental aspects of the proposal before applying appropriate and up-to date conditions. This is likely to be cheaper and more effective if considered at the beginning rather than through ad hoc arrangements;
- ensuring proper assessment of all sites where there is considered to be a significant environmental impact from the portion of the permitted development yet to be carried out;
- the provision of a source of information from which interested individuals and groups may gain an understanding of the proposal, the alternatives, the environment which would be affected, the impacts that may occur and the measures taken to minimise these impacts;
- the proposals assisting sustainable development objectives by ensuring that regard is paid to environmental considerations at all stages in the minerals review process.

One inevitable disbenefit of the requirement is that formal, mandatory EIA is a process which can cover many months. During this time, mineral working at active sites can continue under the existing, unmodified, planning conditions. Where EIA is required, the introduction of modern conditions to implement improved environmental standards will be delayed compared to a review process not informed by a full, formal EIA. But, overall, it is considered that there will be long term environmental benefits from the systematic application of EIA in these cases where the planning authority believes the operations still to be carried out under existing planning permissions at mineral sites will have significant environmental impacts. The Executive will issue guidance encouraging pre-application discussion in an attempt to avoid unnecessary delay.

6. Quantifying and valuing the benefits

Benefits will relate to environmental gain and are therefore difficult to quantify in monetary terms. The EC Directive requires that an EIA should be undertaken for quarrying where the surface of the site exceeds 25 hectares. In other instances, the Directive requires an EIA if extraction is likely to have significant effects on the environment by virtue of factors such as its size, nature or location.

The ROMP Regulations will apply to all sites where working takes place over a period of 15 years. Opencast coal sites are relatively short term so there will be very few that will fall within the scope of the ROMP Regulations but hard rock quarrying can operate over a lengthy

time span, often extending to 60 years. In the context of ROMPs, the Scottish Ministers take the view that determining whether a project is likely to have significant environmental effects, it is that part of the project which remains to be carried out that is relevant.

The likelihood of significant effects will tend to depend on the scale and duration of the works, and the likely consequent impact of noise, dust, discharges to water and visual intrusion. All open cast coal mines and underground mines will generally require EIA. For clay, sand and gravel workings, quarries and peat extraction sites, EIA is more likely to be required if they would cover more than 15 hectares or involve the extraction of more than 30,000 tonnes of mineral per year. Guidance on the general considerations to be adopted in order to determine whether or not an EIA is required is given in SEDD Circular 15/1999.

EIA will not be required in every case, but only where the development yet to be carried out is considered against the Directive's primary test - i.e. whether it is likely to have significant effects on the environment. If required, EIA must then be carried out, and its findings taken into account, before new conditions can be finally determined.

7. Business Sectors Affected

The amendments to the Regulations will apply solely and equally to all mineral operators in Scotland. Almost similar provisions are already in place in England and Wales.

8. Compliance costs for a typical business

Research carried out in 1990 for the Department of the Environment indicated that while it is generally difficult to disentangle the cost of ES from other costs of a development proposal, the cost of the majority was in the range £10,000-50,000 with an overall range of £1,000–100,000. The industry itself, in the document "The New Deal from the Aggregates Industry" estimated that an EIA for a new proposal or extension to an existing proposal could cost anywhere in the region of £20,000-£100,000. Other unpublished research, while reinforcing the difficulty of isolating the costs, suggests that additional costs of preparing an environmental statement ranges from below 0.1% up to 5% of the total cost of the project – with an average of 0.6%. The European Commission estimates the costs of EIA at normally less than 1% of the project.

The average length of time to carry out EIA and prepare an ES is 4-6 months, but longer periods are not unusual depending on the complexity of the case. Mineral developments are among the most complex cases with evidence that ROMP proposals can take 12-18 months to consider. EIA is a one-off additional "entry" cost to a typical non-mineral business where the development is likely to have a significant effect on the environment. However, minerals development can last for many years. Under present law, a periodic review of the conditions attached to mineral permission must be conducted every fifteen years; EIA may be required in appropriate circumstances before each further phase of the development can proceed, for example, where there has been a material change in the land use planning circumstances, or in mitigation technology, since the last review. EIA may therefore be a recurring cost at intervals of fifteen years for some longer lasting developments.

Although minerals are likely to be more complex than other cases, an EIA for a ROMP will not be for the whole development but rather that still to be undertaken after 15 year intervals.

It is therefore likely that the typical cost of an EIA will be at the bottom end of the scale. Using industry figures, this is likely to mean anywhere between £20,000-£50,000. The Executive's consultation paper suggested a mean cost of £35,000 without generating much adverse comment although one industry respondent did suggest that an average cost of £50,000 would be a more reasonable estimate and pointed out that a medium to large operators could have several applications per annum.

9. Total Compliance Costs

Research by the Executive shows that there were 167 extant permissions granted between June 1948 and February 1982. Reviews for these cases are either taking place or have been completed. In future years, the total compliance cost for the industry will be the number of sites that were granted consent 15 years previously and working is still taking place. EIA will be required only for those cases where the work still to be completed is likely to have significant environmental effects. A very crude calculation, based on extant permissions before 1982, suggests that around 5 approved sites each year will involve working of over 15 years. However, such a calculation does not reflect that there is likely to be more extant consents dating from the most recent years. Available information does not enable firm estimates to be made but if there were 20 review cases per annum then the total cost to industry would be in the region of £700,000 to £1 million.

10. Impact on small businesses

The Regulations will impact on small minerals businesses to the extent that the development proposed by those businesses may require EIA. In this requirement, there is no distinction between the sizes of business: the criterion is the need (or not) for EIA. The costs of EIA will be the same regardless of the size of business although the likelihood is that, for small and micro business, the cost of preparing an EIA is proportionally greater so the costs of an EIA could be felt most acutely by quarries where profit margins are minimal. If a ROMP permission is suspended then there may be implications for jobs, customers, markets and investments and on the small/local businesses that are dependent on the continued operation of the quarry.

11. Other costs

Most of the costs will fall to mineral operators. However, there will also be resource implications for planning authorities, the Scottish Executive and others with an interest such as statutory consultees and local communities. Planning authorities must now formally consider environmental statements. This may, in some instances, require them to obtain their own expert advice on technical and complex matters. Nevertheless, as most mineral proposals already require detailed environmental information to be submitted, though not formally branded as EIA, the additional costs are unlikely to be significant. Unlike planning applications, applicants do not have to submit a fee for ROMP applications to cover the planning authorities costs of processing the application.

The Regulations also introduce a new right of appeal for operators where planning authorities fail to determine an application within 4 months. Appeal costs are impossible to quantify and it is very difficult to arrive at even an illustrative figure because of the range of factors affecting each one, i.e. - whether the appeal is dealt with by written submissions or a public

inquiry, the number of parties involved, complexity of the issues involved and timescale; etc. Total costs for applicants and planning authorities will generally be the preparation for and presentation of their case, associated travel and subsistence expenses, and legal counsel or expert witnesses. The Scottish Executive Inquiry Reporters Unit cover the costs of statutory advertising; the costs of the venue; and all its associated administration and Reporter costs.

The introduction of the Regulations, particularly the appeals mechanisms, will also have cost and time implications for those who will be involved in the review process such as statutory consultees and local communities.

12. Enforcement, Sanctions, Monitoring and Review

Failure of an operator to comply with a requirement to carry out EIA will result in the planning authority suspending the right to win and work minerals or deposit mineral waste until the necessary requirements have been complied with. Such a sanction is required to ensure that the EC Directive is fully complied with. When the operator has complied with EIA procedure, working can recommence subject to any conditions imposed by planning authorities. Research has just been published on the effectiveness and progress made by planning authorities on reviewing old mineral permissions. This is currently being considered but the examples of good practice highlighted should lead to improvements on the ground and may lead to further legislative change. The effect of the Regulations will be monitored through ongoing correspondence which the Department receive on this issue. The provisions will also be reviewed in light of any new proposals which may come forward from the EC.

13. Results of consultation

The Executive's proposals were the subject of full public consultation and a summary of the responses received is publicly available.

14. Review of RIA

This RIA will be updated in the form of a review RIA within 10 years. That RIA will be the subject of public consultation to confirm if the regulations remain fit for purpose and proportionate.

Scottish Executive Development Department
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