**Explanatory Memorandum to** The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations.

This Explanatory Memorandum has been prepared by the Planning Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

**Minister's Declaration**

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016. I am satisfied that the benefits justify the likely costs'.

Carl Sargeant
Minister for Natural Resources
1 February 2016

## 1. Description

1.1 These Regulations consolidate, update and replace the Town and Country Planning (Environmental Impact Assessment) Regulations 1999, as amended, ("the 1999 EIA Regulations"). These Regulations transpose, amongst other things, the European Directive 2011/92/EU, on the assessment of the effects of certain public and private projects on the environment, (known as 'the EIA Directive') into the Welsh planning system.

1.2 The EIA Directive aims to ensure the authority giving the primary consent for a particular project makes its decision in full knowledge of any likely significant effects on the environment. 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. EIA aims to prevent, reduce or offset the significant adverse environmental effects of development proposals, and enhance positive ones. It also provides for engagement with statutory consultees, local and national groups, and the public. The Directive also applies, through separate regulations, to other consenting regimes outside the scope of these Regulations.

1.3 The EIA Directive has been transposed through a number of Statutory Instruments and it is over 15 years since the 1999 EIA regulations came into force. Since this time the regulations have been amended substantially and further changes are required.

1.4 The purpose of these Regulations is to consolidate, with amendments, the 1999 regulations in order to take account of court rulings and to generally update EIA provisions as they apply to the Welsh planning system. Having considered the criteria in Annex 3 of the Directive, this Statutory Instrument will make the following key changes:

- Increase some screening thresholds;
- Make new provisions determining the need to screen certain planning applications for changes or extensions to existing projects;
- Make new provisions to clarify the requirement that, where the Welsh Ministers or a Planning Authority issue a screening decision such that EIA is not required, they shall make available the reasons for that conclusion;
- Amend the consultation requirements on a Multi-stage consents where the Environmental Statement remains valid;
- Introduce new categories of development to which EIA procedures apply in accordance with European Directive 2009/31/EC on the Geological Storage of Carbon Dioxide;
- Provide for EIA where LPAs make LDOs for development schemes that comprise Schedule 2 EIA development;
- Make provision to apply EIA procedures to Modification and discontinuance orders; and,

- Make provision to apply EIA procedures to Developments of National Significance.

## 2. Matters of special interest to the Constitutional and Legislative Affairs Committee

2.1 These Regulations are linked to the proposed Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2016.

2.2 The Planning (Environmental Impact Assessment) (Wales) Regulations 2016 make provision, in regulation 38, Schedule 5 (local development orders) and Schedule 9, paragraph 8(3), in relation to environmental impact assessments for local development orders . These provisions will only come into force if and on the date on which the Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2016 comes into force. That proposed order will amend the restriction in the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 that an LDO may not grant EIA development to enable an LDO to be made in relation to Schedule 2 development.

2.3 The Regulations are made under section 2(2) of the European Communities Act 1972. There is a choice of procedure in relation to instruments made under section 2(2) of that Act.

2.4 In addition to section 2(2), section 71A of the Town and Country Planning Act 1990 (the "1990 Act") is used to make these Regulations. That power is subject to the negative procedure. There was no factor indicating the use of affirmative procedure for these Regulations, considering in particular that the amendments contained in these consolidated Regulations are driven largely by case law and the requirements of the EIA Directive.

## 3. Legislative background

3.1 The Welsh Ministers make these Regulations in exercise of the powers provided by section 2(2) of the European Communities Act 1972 and by section 333 of, and paragraph 1 of Schedule 6 to, the Town and Country Planning Act 1990. The functions under section 71A of the Town and Country Planning Act 1990 cited above were transferred to the National Assembly for Wales by S.I. 1999/672. Those functions were subsequently transferred to the Welsh Ministers by virtue of section 162 of and paragraph 30 of Schedule 11 to the Government of Wales Act 1998. The Welsh Ministers were designated by The European Communities (Designation) (No.3) Order 2007 (S.I. 2007/1679) for the purposes of section 2(2) of the 1972 Act, to make regulations 'in relation to the requirement for an assessment of the impact on the environment

of projects likely to have significant effects on the environment, in so far as it concerns town and country planning'.

3.2 The functions under section 71A of the 1990 Act were transferred to the National Assembly for Wales by S.I. 1999/672. Those functions were subsequently transferred to the Welsh Ministers by virtue of section 162 of and paragraph 30 of Schedule 11 to the Government of Wales Act 1998.

## 4. Purpose & intended effect of the legislation

### Background

4.1 The main aim of the Directive and of the transposing Regulations is to ensure that consent for development which is likely to have significant effects on the environment should be granted only after an assessment of the likely significant effects has been carried out. 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 EIA – helps to ensure the importance of the predicted effects, and the scope for reducing them, are properly understood by the competent authority before it makes its decision. The 1999 EIA Regulations integrated this procedure into the existing framework of planning control.

### The issue

4.2 The existing EIA process is well established and is generally considered fit for purpose. Although the Regulations do not currently need significant changes, there are a number of areas where amendments are required to: take account of case law and a related Directive; make provision for other consenting mechanisms that are not covered by the existing Regulations; and make other changes to improve the process.

Changes or extensions to existing projects

4.3 A judgment[1] from the High Court of Justice provides that any applicable screening threshold applies to the development as a whole once modified, and not just to the change or extension as currently provided in the 1999 EIA Regulations. As an interim measure only, guidance has been issued to ensure that where changes or extensions to projects are considered the correct procedure is followed. This change needs be reflected in the legislation to ensure full transposition of this aspect of the Directive.

Reasons for negative screening decisions

[1] R (on the application of Baker) v Bath and NE Somerset Council, 2009 J.P.L. 1498 [2009] A.C.D. 37.

4.4 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' case[2] confirmed that the EIA Directive does not require reasons for a negative screening decision, but in the interests of transparency and to satisfy requirements relating to accessible information; it did clarify that if a reason for a negative screening opinion is requested by an interested party, it must be provided.

Multi stage consent procedures.

4.5 In response to a House of Lords ruling[3], amending regulations (The Town and Country Planning (Environmental Impact Assessment) (Amendment) (Wales) Regulations 2008) 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.

4.6 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 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 an Environmental Statement had already been produced. In cases where either (i) EIA was required or (ii) additional environmental information was needed, public consultation would be required.

4.7 However the 2008 Amending Regulations also inadvertently 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.

The Geological Storage Directive

4.8 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. 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.

Local development orders

[2] European Court of Justice, case C-75/08 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0075:EN:HTML.
[3] R v the London Borough of Bromley ex parte Barker [2007] J.P.L. 744.

4.9 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. LDOs can facilitate large-scale development that can have significant impacts, providing difficult planning issues are resolved before the LDO is adopted.

4.10 Article 27 of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (DMPO) relates to LDOs. It currently prevents a LDO being made that would grant permission for EIA development. The policy is to enable LDOs to be made in relation to EIA development which falls within a description in Schedule 2 of the EIA Regulations. So it is necessary to ensure that an EIA process will apply to any such LDOs.

Orders under sections 97 and 100, 102 and 104 of the Town and Country Planning Act 1990

4.11 Section 97 of the Town and Country Planning Act 1990 provides the power for LPAs to revoke or modify any planning permission . Section 100 of the 1990 Act provides similar powers for the Welsh Ministers. Section 102 of the Town and Country Planning Act 1990 provides the power for local planning authorities to make an order that would require discontinuance of the use of land, conditions to be imposed on its continuance, 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 (discontinuance orders). Section 104 of the Planning Act 1990 provides the Welsh Ministers with the power to make a discontinuance order.

4.12 It was accepted in a Court of Appeal case[4] that orders modifying an existing planning permission comprise development consent for the purposes of the EIA Directive. Section 102 and 104 orders may grant planning permission or require the alteration or removal of buildings or works. The 1999 EIA Regulations do not make provision for these consent types.

Developments of national significance

4.13 The Planning (Wales) Act 2015 established a new process for applications to be made directly to the Welsh Ministers for certain projects. These are known as developments of national significance (DNS). Those projects which are to be ascribed DNS status largely fall within Schedules 1 and 2 of the 1999 EIA Regulations. The 1999 EIA Regulations do not make provision for applications made directly to the

[4] Smout v Welsh Ministers and Wrexham CBC[2011] EWCA Civ 1750.

Welsh Ministers. Provisions are required to ensure that the EIA regime applies to DNS when that is introduced.

4.14 The Regulations also consolidate the 1999 EIA Regulations, to which numerous amendments have been made, to make them more accessible.

**Purpose and intended effect**

4.15 The amendments ensure the Regulations: take account of case law and other Directives; make provision for other consenting mechanisms that are not covered by the existing regulations; and make other changes to improve the process.

4.16 The main changes will:

- Increase screening thresholds;
- Introduce new provisions determining the need to screen certain planning applications for changes or extensions to existing projects;
- Include new provisions to clarify the requirement that, where Welsh Ministers or a Planning Authority issue a screening decision such that EIA is not required, they shall make available the reasons for that conclusion;
- amend the consultation requirements on a multi-stage consents where the Environmental Statement remains valid;
- Introduces new categories of development to which EIA procedures apply in accordance with European Directive 2009/31 /EC on the Geological Storage of Carbon Dioxide;
- Amend regulations to provide for an EIA Directive-compliant procedure which will apply if LPAs to make LDOs for development schemes that comprise Schedule 2 EIA development;
- Make provision to apply EIA procedures to orders made under section 97, 100, 102 and 104 of the Town and Country Planning Act 1990 ; and,
- Make provision to apply EIA procedures to DNS.

**Risks if legislation changes are not made**

4.17 If the proposed revisions are not introduced, the following issues may arise:

<u>Infraction costs</u>

4.18 Failure to transpose the Directive would risk infraction proceedings. Where the issues relate to town and country planning these costs would be borne by the Welsh Government.

<u>Increased burden on industry and LPAs</u>

4.19 Not introducing the new Regulations will mean that the thresholds for projects in urban areas will remain at too low a level resulting in many proposals for development being screened and in some cases made subject to an assessment unnecessarily. This adds unnecessary costs and delays to the planning system.

Confusion amongst stakeholders

4.20 Not making the new Regulations will mean that stakeholders will be uncertain as to the procedures that should apply to development consents which are not referred to in the existing Regulations, or where the existing regulations do not correctly implement EU Directives. Should this continue, those who need to apply the Regulations may be confused over the statute that should apply to projects.

## 5. Consultation

5.1 Details of consultation undertaken are included in the RIA below.

## PART TWO – REGULATORY IMPACT ASSESSMENT

### 6. Introduction

6.1 The cost and benefit analysis has been undertaken separately for each of the provisions. The costs identified for the do nothing options are existing costs.

6.2 The changes in the Regulations are aimed at clarifying the existing policy position and ensuring consistency between Welsh planning policy and the EIA Directive. None of the changes are expected to result in significant additional costs being incurred by developers or the LPAs and in some cases the provisions are expected to result in cost-savings. The changes will also ensure Wales is not at risk of infraction proceedings.

### 7. Increase screening thresholds

**Option one – Do nothing**

7.1 Schedule 2 of the EIA Regulations establishes the screening thresholds for certain types of development projects. Where development exceeds the thresholds the LPA undertake screening to see if EIA is required. Where screening thresholds remain unamended, many proposals for development are screened unnecessarily. This adds costs and delays to the planning system.

**Option two – increase screening thresholds**

7.2 Amending Regulations to increase screening thresholds will reduce the number of smaller projects, which are not likely to give rise to significant environmental effects, from unnecessary screening.

**Cost and Benefits Analysis**

7.3 The sectors most likely to be affected by the proposals include:

- businesses/industry who request screening opinions/directions;
- local planning authorities (LPAs) and the Welsh Government who undertake screening opinions and Directions; and,
- the wider public, who are interested in the protection of the environment and participate in EIA projects.

**Option one – Do nothing**

**Costs**

Business/industry

7.4 As the screening threshold is set low, developers may request screening on projects to provide certainty that EIA is not required. Where a

developer seeks a screening opinion from the LPA they must produce certain information. The cost to the developer of producing the information is considered to be £400[5] per application to prepare.

Local planning authorities

7.5 Where required, the LPA undertakes a screening assessment on projects. Evidence suggests that straight forward cases that clearly do not require screening often take a half to full day of work which equates to approximately £250 to £500[6]. For more borderline schemes or contentious cases this could rise to £2,000 for a screening opinion.

The wider public

7.6 There are no costs to the wider public.

**Benefits**

Business/Industry

7.7 There are no benefits to business from the current system. Where applicants seek a screening opinion from the LPA, the process can take three weeks for a decision. Should no decision be provided, a request for a screening direction may be made to the Welsh Minsters, extending the period of time before a decision is made. Unnecessary screenings can add delay to the planning system.

Local planning authorities

7.8 The process of screening should not be onerous, and where those undertaking the procedure have experience it can take a little as a few hours to carry out screening of a project. By undertaking screening on a number of projects the LPA has certainty that projects that can have a significant effect on the environment are subject to the EIA procedure.

7.9 As the threshold is low, the LPA may be required to screen a large number of applications as they fall above the threshold. These screenings are undertaken even though the projects would not likely to have a significant effect on the environment. The resources required to deal with such screenings could be utilised more effectively within other areas of the authorities planning function.

The wider public

7.10 As screening is undertaken on a wide range of projects the public are able to see the reasons for a negative screening opinion (if they request to do so). This provides transparency that the project will not have significant environmental impacts.

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[5] Addison & Associates with Arup. Research on the Costs and Benefits of Environmental Impact Assessment. Research for the Department for Communities and Local Government

[6] Addison & Associates with Arup. Research on the Costs and Benefits of Environmental Impact Assessment. Research for the Department for Communities and Local Government

**Option two – increase screening thresholds**

**Costs**

Business/industry

7.11 The cost for a developer to prepare and submit the relevant information for the local planning authority to undertake a screening exercise is estimated to be £400. Where screening is no longer required, as the threshold has increased, this saving will be made by the developer.

Local planning authority

7.12 Raising the thresholds would reduce the number of screening opinions undertaken by LPAs. This could save approximately £250 to £500[7] per screening opinion undertaken.

The wider public

7.13 There are no costs to the public of increasing screening thresholds.

**Benefits**

Business/Industry

7.14 Applicants will benefit from a speedier system. As screening thresholds have been increased, the number of developments being screened will reduce. The screening process can take three weeks, or should a direction be made to the Welsh Minsters longer.

Local planning authority

7.15 The local planning authority will benefit as screening thresholds have been increased, the number of developments being screened will reduce.

7.16 The threshold has been set at a level 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. This will provide certainty that projects that could have a significant effect on the environment are still subject to screening, and if required, the EIA procedure.

The wider public

7.17 The threshold has been set at a level 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. This will provide certainty that projects that could have a significant effect on the environment are still subject to screening, and if required, the EIA process will still occur for these projects. Where the project is not subject to EIA, the procedures for notification and consultation set out in The

[7] The lower figures have been used for this estimate as the increase in thresholds will remove the simple and uncontentious cases.

Town and Country Planning (Development Management Procedure) (Wales) Order 2012 will apply to the project.

**Preferred option**

7.18 Based on the analysis undertaken on both options, it is considered that option two, which increases the screening thresholds, should be introduced. This option is preferred in order to:

- Reduce delays in the planning system through unnecessary screening;
- Reduce costs to the developer and LPA in undertaking screening; and,
- Ensure that projects that could have a significant effect on the environment are subject to screening, and if required, the EIA procedure.

## 8. Changes or extensions to existing projects

**Option one – Do nothing**

8.1 Where changes or extensions are made to projects, the Regulations will be inconsistent with the Directive and case law, causing confusion to applicants and competent authorities.

**Option two -apply thresholds to the whole project and not the change or extension.**

8.2 Under this option the legislation is amended so that it correctly implements the Directive and follows case law providing clarity to developers and applicants as well as preventing infraction proceedings being brought against the Welsh Government.

**Cost and Benefits Analysis**

8.3 The sectors most likely to be affected by the proposals include:

- businesses who may make changes or extensions to projects;
- local planning authorities (LPAs) who consider changes or extensions to projects; and,
- the Welsh Government who are required to transpose the Directive.

**Option one – Do nothing**

**Costs**

<u>Business/industry</u>

8.4 As case law and guidance has stated that EIA should assess the existing development as changed or extended, as opposed to assessing only the change or extension developments, projects are already subject to the EIA process.

8.5 Should the case law be incorrectly applied (although this should be in very limited circumstances as the subject is widely known), the decision may be subject to legal challenge. Should an application be made to the Court, and they are satisfied that there was a legal error in the decision

to grant planning permission, they have a discretion as to whether or not to quash the decision. The applicant may therefore incur costs associated with defending a decision or reapplying for the consent should the decision be quashed.

Local planning authority.

8.6 As case law and guidance has stated that EIA should assess the existing development as changed or extended, as opposed to assessing only the change or extension developments, projects are already subject to the EIA process where required.

8.7 Should the case law be incorrectly applied (although this should be in very limited circumstances as the subject is widely known), the decision may be subject to legal challenge. Should an application be made to the Court, and they are satisfied that there was a legal error in the decision to grant planning permission, they have a discretion as to whether or not to quash the decision. The LPA may therefore incur costs associated with defending a decision or reassessing the application should the decision be quashed.

Welsh Government

8.8 Failure to correctly transpose the Directive would risk infraction proceedings. Where the issues relate to land use planning these costs would be borne by the Welsh Government.

8.9 It is difficult to predict with any degree of certainty the fine that may be imposed by the European Court of Justice in any individual case. To give a indication of historic fines, in a Spanish bathing water case, the levy was €624,000 per year for each one % of bathing waters in breach of the relevant Directive. In a French fishing case the levy was a €20 million lump sum fine and €58 million every 6 months until the issue is resolved. In a Greece state aid case the levy was €16,000 for each day of delay in complying with the judgement and a lump sum of €2 million. Due to the major uncertainty around the actual imposition and size of the potential fine the benefit of avoiding this have not been monetised.

**Benefits**

8.10 There are no benefits with the current system.

**Option two –apply thresholds to the whole project and not the change or extension.**

**Costs**

8.11 There are not expected to be any additional costs to developers, the LPAs or the Welsh Government as a result of this change.

Business/industry

8.12 The key benefit to developers is greater clarity and understanding of the rules that apply to changes and extensions to existing projects. As these

are costs associated with clarity, they have not been monetised. The risk of legal challenge is reduced as there is less chance of incorrect application of the Directive to projects that are changed or extended.

Local planning authority

8.13 The key benefit to LPAs is greater clarity and understanding of the rules that apply to changes and extensions to existing projects. As these are costs associated with clarity, they have not been monetised. The risk of legal challenge is reduced as there is less chance of incorrect application of the Directive to projects that are changed or extended.

Welsh Government

8.14 The saving to the Welsh Government results from not incurring fines that the ECJ would impose if no action taken to remedy breach in implementing legislation. It is not possible to quantify amount of any fine that might be imposed, but they would increase until remedial action is taken. Fines could be very substantial over time.

**Benefits**

Business/industry

8.15 The key benefit to developers is greater clarity and understanding of the rules that apply to changes and extensions to existing projects.

Local planning authority

8.16 The key benefit to LPAs is greater clarity and understanding of the rules that apply to changes and extensions to existing projects.

Welsh Government

8.17 In addition to the potential saving from not incurring fines, aligning the legislation with case law and the Directive may reduce questions from stakeholders over the application of EIA to certain projects.

**Preferred option**

8.18 It is considered on balance that option two, which apply thresholds to the whole project and not the change or extension, should be introduced. This option is preferred in order to:

- Transpose the requirements of the Directive, preventing infraction proceedings against the Welsh Government;
- provide greater clarity and understanding of the rules that apply to changes and extensions to existing projects; and,
- reduce the risk of legal challenge to decisions.

## 9. Negative screening decisions

### Option one – Do nothing

9.1 Where negative screening opinions are provided, the competent authority does not have to provide a reason for reaching that decision. In the interests of transparency, and to satisfy requirements relating to accessible information if a reason for a negative screening opinion is requested by an interested party, it must be provided.

### Option two – Provide screening opinions on all screenings.

9.2 Amend the legislation so that where negative screening opinions are provided, the competent authority must provide a reason for reaching that decision.

### Cost and Benefits Analysis

9.3 The sectors most likely to be affected by the proposals include:

- local planning authorities (LPAs) who undertake screening opinions; and,
- the public and developers who may wish to see the reasons for negative opinions.

### Option one – Do nothing

#### Costs

Local planning authority

9.4 Where negative screening opinions are provided, the competent authority does not have to provide a reason for reaching that decision.

9.5 Should someone wish to see the screening decision a request may be made under the Freedom of Information or Environmental Information Regulations (FOI/EIR). The cost of undertaking an average FOI request is £293[8]. As the authority will have produced the information requested as part of the screening process, the cost of complying with the FOI/EIR request could be less as the information should be readily available.

The Public / Business/industry

9.6 To satisfy requirements relating to accessible information if a reason for a negative screening opinion is requested by an interested party, it must be provided. Third parties are therefore able to see the reasons for decisions. The cost of submitting a request is limited to 'administration' time (sending emails etc) of the applicant. It is not considered possible to quantify the cost to the public or business in undertaking these actions.

[8] The Cost of Freedom of Information, University College London, December2010

**Benefits**

Local planning authority

9.7 LPAs do not have to publish the decision where a negative screening has been undertaken.

The Public / Business/industry

9.8 Where a third party wants to see a screening opinion they can request the information. This information is provided upon request, not actively provided to the public. Therefore there is a small burden on parties who must submit requests and have these processed through the FOI/EIR Regulations.

**Option two – Provide screening opinions on all screenings.**

**Costs**

Local planning authority

9.9 There will be costs to LPAs associated with stating formal reasons for a negative screening decision, when an EIA is not required. The process of reaching a screening determination still has to be made and is not affected by this proposal. The only additional burden is to formally publish the reason for a negative screening, calculated as follows.

9.10 Data on the number of screenings undertaken by local planning authorities each year are not collected centrally, although based on the number of major applications submitted in Wales, plus the total number of applications submitted in National Parks the following calculations can be made.

9.11 Taking an average of 1700[9] screening opinions issued each year by Welsh Local Authorities. 93% or 1581 of these screening opinions are negative, for which full reasons must now be published. The additional time per decision to publish a formal 'decision' is considered to equate to 0.5 to 1 hour of administrative time.

1581 x £20.00 (up-scaled administrators hourly wage) / 1581 x £10.00 = £15,810 to £31,600

9.12 Further reductions in this estimate may be possible if LPAs already publish negative screening decisions.

9.13 As information is now actively made available and is within the public domain, there could also be a reduction in requests for information under the FOI/EIR. The saving will be £293 for each FOI/EIR request that is no longer required. If this saves 10% of requests, the total cost saved is £4,688.

[9] The number of major applications submitted plus the total number of applications submitted in National Parks.

9.14 The total maximum estimated additional annual cost is £26,912

The Public / Business/industry

9.15 There are no financial implications to the public or business. Where a third party wants to see a screening opinion this is publically available and requests under the FOI/EIR Regulations no longer have to be made. This may provide a very minor saving of submitting a request under the FOI/EIR regime. This is not possible to quantify.

**Benefits**

Local planning authority

9.16 The benefits include greater transparency of why and when an Environmental Impact Assessment is not required. As this information is publically available the LPA may receive fewer queries on this matter.

The Public / Business/industry

9.17 The benefits include greater transparency of why and when an Environmental Impact Assessment is not required. Further, publicising all decisions also provides consistency in the Regulations, which may make them more accessible to users.

**Preferred option**

9.18 Based on the analysis undertaken on both options, it is considered on balance that option 2, so that where negative screening opinions are provided, the competent authority must provide a reason for reaching that decision, should be introduced. This option is preferred in order to:

- Provide greater transparency of why and when an Environmental Impact Assessment is not required
- Reduce the number of requests for information under the FOI/EIR.

**10. Amend the consultation requirements on Multi-stage consents where the Environmental Statement remains valid**

**Option one – Do nothing**

10.1 The public consultation process is repeated at the subsequent consent stage (reserved matters or pre-commencement conditions) even in cases when the environmental statement provided at outline stage remains fit for purpose.

**Option two – Undertake publicity on a subsequent application only where the ES has changed**

10.2 Amend the legislation so that when the environmental statement provided at an early stage of development consent remains fit for

purpose the publicity of the ES by advertisement in a newspaper is not repeated.

**Cost and Benefits Analysis**

10.3 The sectors most likely to be affected by the proposals include:

- local planning authorities (or the applicant in certain circumstances) who publicise applications; and,
- the public, who are informed of applications.

**Option one – Do nothing**

**Costs**

Local planning authority

10.4 The Regulations provide for the environmental statement to be publicised again via newspaper during a multi stage consent process (e.g. outline planning and reserved matters) even where the initial environmental statement was adequate for purpose at the later stage.

10.5 Where the LPA is required to undertake newspaper advertisement the costs is £1260[10] per advertisement. The other publicity costs associated with the application could be an additional ten percent.

The public

10.6 There is no financial cost to the public.

**Benefits**

Local planning authority

10.7 There are no direct benefits to the LPA.

The public

10.8 The publicity requirements of the existing regulations currently exceed those required by the Directive, with additional publicity undertaken on the ES. Therefore, with this additional publicity, those who did not become aware of the process before may become aware of the ES at a later stage.

**Option two – Undertake publicity on a subsequent application only where the ES has changed**

**Costs**

Local planning authority

10.9 Where the LPA are no longer required to undertake advertisement as the ES remains fit for purpose they will save £1260 per application.

[10] Planning (Wales) Act 2015 EMRIA

The public

10.10 There are no financial costs to the public.

**Benefits**

Local planning authority

10.11 There are no direct benefits to the LPA. Indirectly, as the LPA does not need to organise and manage the press notice, they are able to allocate this time and resources to other areas of their planning function.

The public

10.12 The public are still informed of the ES on the original consent, which sets out the principle of granting consent on the site. Where the ES requires amendment to accompany a subsequent consent the public will also be notified. The ES may change because new information has come to light on previously unidentified likely significant environmental effects, or because EIA was not required at the outline stage, but likely significant effects have been identified for the first time at the subsequent application stage. In both these scenarios the new or amended environmental statement has to be publicised.

10.13 The removal of advertisement only occurs where the ES remains 'fit for purpose' and so no new information is presented for comment. Further, the procedures for notification and consultation set out in The Town and Country Planning (Development Management Procedure) (Wales) Order 2012 will still apply to the project.

**Preferred option**

10.14 Based on the analysis undertaken, it is considered that option two, where publicity on a subsequent application is only undertaken where the ES has changed, should be introduced. This option is preferred in order to:

- Provide proportionality, so that where no information is submitted local planning authorities (or the applicant in certain circumstances) do not need to republicise applications.
- Provide proportionality, so that where new information is submitted local planning authorities (or the applicant in certain circumstances) do need to republicise applications.

## 11. Introduce new categories of development to which EIA procedures apply in accordance with European Directive 2009/31 /EC on the Geological Storage of Carbon Dioxide

**Option one – Do nothing**

11.1 The new categories relating to Carbon Capture and Storage Projects will apply. These projects will be subject to the EIA regime without transposition into the Regulations. However, the failure to include the

categories in the Regulations may lead to infraction proceedings and inconsistent practice.

**Option two – Insert new categories relating to Carbon Capture and Storage Projects**

11.2 Amend the legislation to insert new categories relating to Carbon Capture and Storage Projects into schedules one and two to the regulations. This will provide transparency and consistency between the regulations and Directive.

**Cost and Benefits Analysis**

11.3 The sectors most likely to be affected by the proposals include:

- Local planning authorities (LPAs) and developers who develop and determine projects for carbon capture and storage project.
- Parties, such as the public or interested bodies, who may take part in the EIA process.
- Welsh Government who have a duty to transpose EU Directives.

**Option one – Do nothing**

**Costs**

Local planning authorities (LPAs) and developers.

11.4 The Directive applies direct and therefore projects for carbon capture and storage should be subject to the existing EIA process. As the categories are not included in the Regulations there is the possibility that the Regulations may be misapplied.

11.5 Should the Directive be incorrectly applied the decision may be subject to legal challenge. Should an application be made to the Court, and they are satisfied that there was a legal error in the decision to grant consent, they have a discretion as to whether or not to quash the planning permission. The applicant and LPA may therefore incur costs associated with defending a decision or reapplying for the consent should the decision be quashed.

Parties involved in the process

11.6 The Directive applies direct and therefore projects for carbon capture and storage should be subject to the EIA process. As the categories are not included in the regulations there is the possibility that the regulations may be misapplied.

11.7 Should the Directive be incorrectly applied third parties may seek a legal challenge on the process or decision. Should the third party make an

application to the Court they may bare these costs, which can be considerable.

The Welsh Government

11.8 Failure to correctly transpose the Directive would risk infraction proceedings. Where the issues relate to land use planning these costs would be borne by the Welsh Government.

11.9 It is difficult to predict with any degree of certainty the amount of fine that may be imposed by the European Court of Justice and indications are provided in paragraph 8.9. Due to the major uncertainty around the actual imposition and size of the potential fine the benefit of avoiding this have not been monetised.

**Benefits**

Local planning authorities (LPAs) and developers

11.10 There may be uncertainty about the application of the EIA process to these projects. This uncertainty may lead to confusion and additional time spent considering the matter to prevent the miss-application of regulations. Due to the emerging nature of the technology, the numbers who may need to consider the application of the Directive to their scheme is limited.

Parties involved in the process

11.11 There may be uncertainty about the application of the EIA process to these projects. This uncertainty may lead to confusion and additional time spent considering the matter to prevent the miss-application of regulations. Due to the emerging nature of the technology, the numbers who may need to consider the application of the Directive to a scheme is likely to be limited.

The Welsh Government

11.12 Where there is uncertainty over the application of the regulations, parties, such as those identified above, may contact the Welsh Government for advice. The Welsh Government may spend time clarifying the regulations.

**Option two – Insert new categories relating to Carbon Capture and Storage Projects**

**Costs**

Local planning authority / Business/Industry

11.13 As these projects are already subject to the existing EIA regime (as the Directive applies direct), there is no financial cost of adding the categories to the Regulations.

11.14 The addition of the categories to the legislation should prevent the incorrect application of the Directive to projects. This will reduce the risk

of legal challenge to decisions and the associated costs of defending decisions.

Parties involved in the process

11.15 As these projects are already subject to the existing EIA regime (as the Directive applies direct), there is no financial cost of adding the categories to the Regulations.

11.16 The addition of the categories to the legislation should prevent the incorrect application of the Directive to projects. This will reduce the risk of legal challenge to decisions and the associated costs of defending decisions.

The Welsh Government

11.17 Transposition of the Directive prevents infraction proceedings. The potential cost saving is not possible to monetise; although indications of previous costs have been identified in option one above.

**Benefits**

Local planning authority / Business/Industry

11.18 The addition of these categories to the legislation provides legal clarity that these projects fall within the EIA regime. As this is an emerging technology, clarity in the legislation may assist those who wish to develop such projects.

Parties involved in the process

11.19 The addition of these categories to the legislation provides legal clarity that these projects fall within the EIA regime. As this is an emerging technology, clarity in the legislation may assist LPAs who are approached by those who wish to develop such projects.

The Welsh Government

11.20 The addition of these categories to the legislation provides legal clarity that these projects fall within the EIA regime. Clear legislation may reduce the time the Welsh Government spend clarifying the Regulations.

**Preferred option**

11.21 Based on the analysis undertaken on both options, it is considered on balance that option two, which inserts new categories relating to Carbon Capture and Storage Projects, should be introduced. This option is preferred in order to:

- Transpose the requirements of the Directive, preventing infraction proceedings against the Welsh Government;
- provide greater clarity and understanding of the rules that apply to these projects; and,
- reduce the risk of legal challenge to decisions.

## 12. Amend regulations associated with Local Development Orders (LDOs) in order to allow LPAs to make LDOs for development schemes that comprise Schedule two EIA development.

**Option one – Do nothing**

12.1 LPAs will not be able to allow LDOs that could grant planning permission for Schedule two EIA development.

**Option two –amend the Regulations associated with LDOs in order to allow LPAs to make LDOs for development schemes that comprise Schedule two EIA development.**

12.2 Amend the legislation in order to allow LDOs that could grant planning permission for Schedule two EIA development, subject to consideration of an environmental statement.

**Cost and Benefits Analysis**

12.3 The sectors most likely to be affected by the proposals include:

- Local planning authorities who make LDOs; and,
- Developers who may benefit from an LDO.

12.4 As the production of a LDO is discretionary, the costs and benefits below are based on a LPA seeking to make a LDO for EIA development.

**Option one – Do nothing**

**Costs**

Developers

12.5 Developers would need to apply for a specific planning permission and pay the associated fee. Fees vary by type and size of development. As it is not possible to identify the exact costs the following provides examples of the fees that apply to development that may be allowed under a LDO:

- Change of use - £380
- Erection of a 3000 sq meter warehouse - £15,200

Local planning authorities

12.6 The LPA would receive and determine specific planning permissions within their area. They would also receive the associated fee, which would vary by type and size of development.

**Benefits**

Developers

12.7 There are no benefits to developers.

local planning authorities

12.8 There are no benefits to LPAs.

**Option two –amend the Regulations associated with LDOs in order to allow LPAs to make LDOs for development schemes that comprise Schedule two EIA development.**

**Costs**

Developers

12.9 Developers would benefit by not having to apply for a specific planning permission and pay the associated fee. Fees vary by type and size of development.

Local planning authorities

12.10 LPAs will lose the fee income where development can be carried out without applying for planning permission. There is no way of assessing how much fee income could be lost as this is dependent on application size.

12.11 The LPA would also need to undertake work to produce the LDO and associated ES. The cost may be minimised by running the LDO process concurrently with other work and consultations, such as producing supplementary planning guidance.

**Benefits**

Developers

12.12 An LDO will remove the administrative burden of making applications and provides the ability to deliver development more quickly.

Local planning authorities

12.13 LPAs may wish to use LDOs to assist in the delivery of their local development plan policies. As this is a discretionary power and in such circumstances LPAs would only be doing so where they believe that the cost is worthwhile.

**Preferred option**

12.14 Based on the analysis undertaken, it is considered on balance that option two, which inserts new regulations in relation to LDOs, should be introduced. This option is preferred in order to:

- Allow LDOs that could grant planning permission for Schedule two EIA development, subject to consideration of an environmental statement.
- Allow LPAs to use LDOs to assist in the delivery of their local development plan policies
- Ensure that where they do grant a LDO the environmental impact is considered.

## 13. Make provision to apply EIA procedures to Modification and discontinuance orders

### Option one – Do nothing

13.1 The EIA Directive applies to modification and discontinuance orders direct. These projects will be subject to the EIA regime without specific provision within the Regulations. However, the failure to include the category in the Regulations may lead to inconsistent practice, or failure of LPAs to follow the correct procedures. Failure to transpose may lead to infraction proceedings against the Welsh Government.

### Option two – make provision to apply EIA procedures to Modification and discontinuance orders

13.2 Amend the legislation to insert procedures for making and confirming modification and discontinuance orders for EIA development. This will provide transparency and consistency between the regulations and Directive, ensuring consistent practice is followed by LPAs. Full transposition of the Directive will also prevent infraction proceedings against the Welsh Government.

### Cost and Benefits Analysis

13.3 The sectors most likely to be affected by the proposals include:

- local planning authorities who make or confirm modification and discontinuance orders;
- interested parties who take part in the process; and,
- The Welsh Government who make or confirm modification and discontinuance orders and have a duty to transpose the Directive.

13.4 The identified options are the same options that were identified in section 11. That is, under option one the Directive currently applies direct to these provisions. However the failure to transpose the Directive may lead to poor practice or failure to apply the Directive correctly. The failure to transpose the Directive may lead to infraction proceedings. Option two removes these issues.

13.5 The costs and benefits identified for section 11 will also apply to this provision and have not been replicated.

### Preferred option

13.6 Based on the analysis undertaken on both options, it is considered on balance that option two, which makes provision to apply EIA procedures to Modification and discontinuance orders, should be introduced. This option is preferred in order to:

- Transpose the requirements of the Directive, preventing infraction proceedings against the Welsh Government;
- provide greater clarity and understanding of the rules that apply to these projects; and,
- reduce the risk of legal challenge on decisions.

## 14. Make provision to apply EIA procedures to DNS, though dis-applying the provisions to obtain a screening or scoping opinion from the local planning authority.

14.1 The EIA Regulations must apply to DNS. Without applying the Regulations there would be risk of infraction. It is proposed to apply the Regulations to DNS with modifications and to make one major distinction between DNS applications directly to the Welsh Ministers and those made to local planning authorities relating to screening and scoping procedures. These provisions will affect approximately 5.9 applications per year[11].

**Option one – Do nothing**

14.2 Apply existing screening and scoping provisions to DNS so that local planning authorities may give a screening or scoping opinion.

**Option two – increase screening thresholds**

14.3 Amend Regulations to preclude local planning authorities from giving screening or scoping opinions in relation to applications for DNS. Applicants may only gain screening or scoping directions from the Welsh Ministers.

**Cost and Benefits Analysis**

14.4 The sectors most likely to be affected by the proposals include:

- businesses/industry who require request screening opinions/directions;
- local planning authorities (LPAs) and the Welsh Government who undertake screening or scoping opinions and Directions; and,
- the wider public, who are interested in the protection of the environment and participate in EIA projects.

**Option one – Do nothing**

**Costs**

<u>Business/industry</u>

[11] Welsh Government: Developments of National Significance Regulatory Impact Assessment (December 2015)
http://www.senedd.assembly.wales/documents/s47165/CLA629%20-%20EM%20The%

14.5 Developers may seek a screening opinion on projects to provide certainty that EIA is required. They may also obtain a scoping opinion to ascertain the likely content of an EIA. Where a developer seeks a screening or scoping opinion from the LPA or the Welsh Ministers they must produce certain information. This information may be combined as a single request. Generally, no further information is required to obtain a scoping opinion than that of a screening opinion. The cost to the developer of producing the information is considered to be £400 per application to prepare. The same information is required for the Welsh Ministers, along with the screening or scoping opinion.

Local planning authorities

14.6 Where required by the developer, the LPA undertakes a screening assessment on projects. DNS projects are likely to be contentious cases. The cost of which is estimated at around £4,000 for a screening opinion. It is estimated that the cost of providing a scoping opinion is also £4,000, given the similar amount of resource required to produce one.

Welsh Government

14.7 The estimated average cost for the Welsh Government to provide a screening direction is £400. It is also estimated that the cost of providing a scoping direction is £400.

The wider public

14.8 There are no costs to the wider public.

**Benefits**

Business/Industry

14.9 There are no benefits to business from the current system. Where applicants seek a screening opinion from the LPA, the process can take three weeks for a decision. Where an application is made directly to the Welsh Ministers, a screening direction will be undertaken in any case, were there is a negative screening opinion and the development is within Schedule two of the EIA regs. On occasion, the developer may require both a screening opinion and screening direction, which increases the period of time before an application can be decided. Unnecessary screening and scoping opinions can add delay to the planning system.

Local planning authorities

14.10 Under this option, the LPA will process screening and scoping opinions for applications which they will not determine. The resources required to deal with such screenings could be utilised more effectively within other areas of the authorities planning function.

Welsh Government

14.11 The Welsh Government will continue to give screening and scoping directions for certain development types following the issuance of a screening and scoping opinion. This may result in some continued duplication in processes with the local planning authority.

The wider public

14.12 Opinions and directions are both available for the public to view. This option will not affect their access to information.

**Option two – Removing the requirement to obtain a screening opinion from local planning authorities**

**Costs**

Business/industry

14.13 Developers may seek a screening direction on projects to provide certainty that EIA is required. They may also obtain a scoping direction to ascertain the likely content of an EIA. Where a developer seeks a screening or scoping opinion from the Welsh Ministers they must produce certain information. This information will be the same as that for screening and scoping directions. The cost to the developer of producing the information is estimated to be the same as option one at 400 per application to prepare.

Local planning authority

14.14 The local planning authority will not be required to produce a screening or scoping opinion for DNS applications. There will be no cost to them.

Welsh Government

14.15 The estimated average cost for the Welsh Government to provide screening and scoping directions is £400 each. This will not change.

The wider public

14.16 There are no costs to the public.

**Benefits**

Business/Industry

14.17 Applicants will benefit from a speedier system. As screening or scoping will only be undertaken by one body. The process will be more user friendly for developers in that directions will be obtained from the determining authority.

Local planning authority

14.18 Local planning authorities will benefit through a decreased amount of screening opinions to handle as those opinions will be made as directions by the Welsh Ministers. The resources required to deal with such screenings will be utilised more effectively.

Welsh Government

14.19 The Welsh Government will continue to give screening and scoping directions for certain development types. However, there will be no duplication in process as applicants will ask directly to the Welsh Ministers for such directions.

The wider public

14.20 Opinions and directions are both available for the public to view. This option will not affect their access to information. There will be more certainty for the public in where to obtain such directions as they will be issued by the determining authority.

**Preferred option**

14.21 Based on the analysis undertaken, it is considered on balance that option two, which amend Regulations to preclude local planning authorities from giving screening or scoping opinions in relation to applications for DNS, should be introduced. This option is preferred in order to:

- Provide a speedier system. As screening or scoping will only be undertaken by one body, the time taken will be decreased. The process will be more user friendly for developers in that directions will be obtained from the determining authority
- Provide certainty for the public in where to obtain such directions as they will be issued by the determining authority.
- Reduce the burden on LPAs, allowing them to utilise the resources required to deal with such screenings elsewhere within the planning function.

## 15. Summary

15.1 Based on the cost-benefit analysis undertaken the preferred option is option two for all options.

## 16. Analysis of Other Effects and Impacts

### Equality of Opportunity

16.1 The proposed amendments to the EIA regime have equal benefit across all sectors of society. The proposed requirement for written reasons to accompany both negative and positive screening decisions will improve understanding of the decision process and therefore improve transparency for all members of society and enhancing equality of opportunity.

### Sustainable Development

16.2 The EIA Directive seeks to ensure that the environmental impact of development is considered at the earliest possible point of the development process. As the proposed changes represent minor changes to existing legislation they will not have a direct impact upon sustainable development.

**The Welsh Language**

16.3 The proposed changes to the EIA Regulations will have no impact on the Welsh language and Welsh Communities. The changes seek to transpose Directives 2011/92/EU and 2009/31/EC and the relevant case law into the Welsh EIA regulations which will help to prevent infraction proceedings from the European Commission. The Directive does not address issues of language and so there is no scope to go beyond its requirements to promote, support and develop the Welsh language.

16.4 Failure to transpose the EIA Directive adequately will lead to fines from infraction proceedings brought against the Welsh Government.

**Rights of Children and Young People**

16.5 Due regard has been given to the United Nations Convention on the Rights of the Child (UNCRC) and it has been determined that there is negative effect.

16.6 Two key aspects of the Convention are that respect must be had for the views of children and that they have the right to freedom of expression. All consultation responses will be considered equally in response to the proposed changes, in line with these objectives. Furthermore, the publishing of negative screening decisions will assist in young people's understanding of the EIA decision process which will encourage their participation.

## 17. Consultation

17.1 The 'Proposed changes to the Environmental Impact Assessment Regulations and Local Development Orders' consultation document was issued on 26 March 2015. A 12 week period for responses was provided for the consultation, closing on18 June 2015.

17.2 The consultation paper, and annex, were made available on the Welsh Government's website. In addition, stakeholders from the private, public and third sectors were notified in writing.

17.3 The consultation exercise generated 16 responses. Respondents supported the proposed changes, although some did raise technical issues and areas where clarity is required. These issues have either been addressed within the legislation or in the 'Summary of Consultation' document that is available on the Welsh Government website.

## 18. Competition Assessment

18.1 A competition filter test has been applied to the proposed amendments. The results of the test suggest that the proposals are unlikely to have any significant detrimental effect on competition.

18.2 The Regulations cover a varied range of development types and the proposed changes will not have an unduly negative effect upon any particular sector of the market nor will they penalise certain firms.

18.3 In few instances, the Local Authority may incur additional cost i.e. if they are required to produce an Environmental Statement prior to issuing a modification/discontinuance order. However, this will be off-set to some degree by the consultation process and the benefits in terms of protecting the environment.

## 19. Post implementation review

19.1 The changes proposed do not represent major changes to the operation of the EIA regime. On the basis that many of the amendments are already in operation in practice (to take into account judgements in the High Court and European Court of Justice, or because the Directive applies directly) there is considered no need to introduce a formal monitoring system.

19.2 Notwithstanding this, the Welsh Government has close dialogue with all stakeholders involved with the planning system, which will allow general feedback and assessment of how the changes have impacted stakeholders.