

EXPLANATORY MEMORANDUM TO

THE TOWN AND COUNTRY PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT)(UNDETERMINED REVIEWS OF OLD MINERAL PERMISSONS)(WALES) REGULATIONS 2009

This explanatory memorandum has been prepared by the Environment, Sustainability and Housing Department and is laid before the National Assembly for Wales in accordance with Standing Order 24.1.

1. Description

- 1.1 The Environmental Impact Assessment Directive (EIA Directive) requires that, before development consent is given, projects likely to have significant effects on the environment are made subject to an assessment with regard to their effects. The Town and Country Planning (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2000 applied the requirements of the EIA Directive as transposed by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) regulations 1999 to applications for the review of old mineral permissions (ROMP) made on or after 15 November 2000 (together, "the EIA Regulations"). The 2009 regulations apply the requirements of the EIA Directive to ROMP applications in Wales made before 15 November 2000 which still remain to be determined at the date the Regulations come into force. These cases are otherwise known as stalled reviews.

2. Matters of special interest to the Subordinate Legislation Committee

Obligations under the EIA Directive

- 2.1 An adverse European Court of Justice (ECJ) judgement was given against the UK on 12 November 2009 (C-495/08 Commission v UK) where the Court held that by failing to make ROMP applications lodged in Wales prior to 15 November 2000 subject to the requirements of the EIA Directive, the United Kingdom has failed to fulfil its obligations under Article 2(1) and 4(2) of that Directive. These Regulations fulfil the UK's obligations under those Articles of the Directive.

Modification of the Town and Country Planning Act 1990

- 2.2 These Regulations modify paragraphs 3 and 4 of Schedule 9 to the Town and Country Planning Act 1990 (regulation 51). The modifications apply for the purposes of the duty imposed on mineral planning authorities by the Regulations, to consider whether to make a prohibition order in relation to minerals development which is suspended under the Regulations.
- 2.3 In line with the 1999 EIA Regulations, these Regulations apply the automatic sanction of suspension of minerals development for failures to provide environmental information, or to take other procedural steps, within the required timescales. Suspension is lifted when all the required steps have been taken.
- 2.4 These Regulations require mineral planning authorities to consider whether to make a prohibition order in relation to the whole or part of a site which is the subject of a ROMP application, where automatic suspension has been in operation for a period of two years and the required action has still not been taken.
- 2.5 The effects of the modifications are as follows:
- to permit a prohibition order to be made in relation to part of a site (in addition to the whole of a site);
 - to require a relevant mineral planning authority to make a prohibition order where it appears to the authority that minerals development has permanently ceased;

- to require a relevant mineral planning authority to assume that minerals development has permanently ceased where minerals development has been suspended for a period of two years and it appears to the authority that resumption of minerals development to any substantial extent is unlikely;
- to require a relevant mineral planning authority to disregard minerals development which is suspended when considering the preceding question, such that that the question to be addressed is whether it appears to the authority that the resumption of lawful minerals development to any substantial extent is unlikely;
- to alter the effect of a confirmed prohibition order so it can have effect to terminate planning permission for part of the minerals development to which it originally extended.

SLC(3)-19-08: SLC192

2.6 In response to a reporting point made by the Subordinate Legislation Committee last year concerning regulation 9(3) of the Town and Country Planning (Environmental Impact Assessment) (Amendment) (Wales) Regulations 2008 (SLC(3)-19-08; SLC192), the Government undertook to make a correction when making further amendments to the EIA scheme for ROMPs. Although these Regulations concern both the EIA Directive and ROMPs, they intentionally establish a bespoke EIA scheme for the cases to which they apply, and do not include any provision to amend the 1999 EIA Regulations. Further regulations will be made in due course to amend the 1999 EIA Regulations and in accordance with the undertaking given to the Committee last year, the correction to the 2008 Regulations will be made at that time.

3. Legislative Background

3.1 These regulations are made under section 2(2) of the European Communities Act 1972. The Welsh Ministers are designated for the purposes of section 2(2) of the 1972 Act 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. Welsh Ministers have devolved responsibility for the planning service in Wales.

3.2 These regulations are subject to negative resolution procedure. This procedure is appropriate as the Regulations do not include provision of the kind which normally merits affirmative procedure, such as:

- powers substantially affecting provisions of Acts of Parliament;
- powers to impose or increase financial burdens on the subject, or to raise statutory limits on the amounts which may be borrowed by, or granted to, public bodies;
- powers involving consideration of special importance not falling under (a) or (b) above;

4. Purpose and intended effect of the legislation

4.1 When the minerals review legislation was introduced in the 1990s (Planning and Compensation Act 1991 and the Environment Act 1995), the view was taken that because the reviews did not grant permission for mineral extraction, but merely introduced up-to-date operating conditions, there was no need to apply the provisions of the EIA Directive before new operating conditions were determined either by mineral planning authorities or by the Welsh Ministers on appeal. Because the consent which allows a quarry to operate is the mineral permission to which it is subject, the imposition of new operating conditions was not considered at that time to be a “development consent” within the meaning of the Directive.

- 4.2 However, High Court judgements in 1999 (*R v North Yorkshire County Council ex parte (1) Brown and (2) Cartwright (1999) and R v Peak District National Park ex parte Bleaklow Industries Ltd 1999*) held that the imposition of conditions by mpas in accordance with the provisions of Schedule 2 to the 1991 Act and Schedule 13 to the 1995 Act were “development consent” under the EIA Directive. Therefore, the need for EIA has to be considered prior to the imposition of new operating conditions under these legislative provisions. The need for EIA must similarly be considered when applications are determined for the periodic review of conditions under Schedule 14 to the 1995 Act.
- 4.3 In response to these judgments, the Town and Country Planning (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2000 (SI 2000 No 293) were introduced to apply the provisions of the 1999 Regulations to applications for mineral conditions reviews made after the Regulations came into force on 15 November 2000. These are applications for mineral conditions reviews made under the 1991 Act and the 1995 Act (collectively called “ROMP applications” in the 2000 Regulations). The 2000 Regulations inserted a new paragraph 26A to the 1999 Regulations which applied the 1999 Regulations to mineral conditions reviews with certain modifications.
- 4.4 Informal guidance issued to accompany the implementation of the 2000 Regulations advised that the 1999 Regulations, as amended by the 2000 Regulations, were not retrospective and only applied to applications for determination of new mineral operating conditions made after 15 November 2000 (the date on which the 2000 Regulations came into force). Mineral planning authorities and mineral operators were advised to voluntarily apply the principles of the 1999 Regulations, as amended, to applications pre-dating 15 November 2000 but which at that date remained to be determined. This meant that for EIA applications pre-dating 15 November 2000 applicants were asked to provide an Environmental Statement (ES) voluntarily within a reasonable timescale. Most did so and new conditions have been determined for those mineral sites. However, there are a number of applications which are ‘stalled’ for a variety of reasons. Some are stalled because operators have not provided an ES or further information when requested to do so.
- 4.5 The mineral conditions reviews, which have been stalled for want of an ES or further information, or for other reasons, have been outstanding for some considerable time. They may have previously been subject to non-statutory screening and scoping decisions and ESs may have been submitted voluntarily. However, the substantial amount of time which has elapsed in some of these cases, since the date on which screening or scoping decisions were first made, or voluntary ESs were first submitted, means that the information upon which those decisions were based, or the information included in those (voluntary) ESs, may not now be up to date. This, together with the fact that mpas and the Welsh Ministers have not had statutory powers available to them to compel applicants or appellants to comply with the requirements of the Directive, underpins the rationale for the establishment of a bespoke, strictly time-limited statutory scheme for the expeditious determination of all stalled reviews.
- 4.6 The provision made in the 2009 Regulations is, briefly, that all stalled ROMP development is automatically deemed to be EIA development, subject to a time-limited right to request a screening direction from the Welsh Ministers; that scoping decisions are mandatory; that ESs must be submitted in draft for pre-consultation checks by mineral planning authorities (or the Welsh Ministers on appeal or referral) as to their appropriateness for the purposes of publication and consultation; that any failure on the part of an applicant or appellant, or in some cases other operators, to take any step required to be taken under the regulations results in the automatic suspension of minerals development until such time as all requirements imposed by the Regulations have been fulfilled; and that the sanction for a continued failure to comply with the requirements of the regulations is the potential permanent cessation

of permission to carry out the ROMP development which is the subject of the stalled review (other than restoration and aftercare conditions).

5. Consultation

5.1 In November 2006 the Welsh Assembly Government consulted on a proposal to make regulations to amend the 1999 Regulations so as to apply those Regulations to the stalled review cases and make a number of amendments to other ROMP cases. The consultation, relating to the Application of the Environmental Impact Assessment Directive to 'Stalled' Reviews and Periodic Reviews of Old Mineral Permissions in Wales was undertaken between 1 November and 27 December 2006. The consultation requested comments on the following key proposals:

- expressly prohibit the determination of new conditions without consideration of the relevant environmental information in the case of review applications received before 15 November 2000;
- introduce a new sanction of suspension of operations where an applicant fails to provide sufficient information to enable a determination to be made as to whether an environmental statement is required in respect of a review application;
- apply the existing sanction of suspension of operations to stalled cases where an applicant fails to provide an environmental statement (or further information in respect of an environmental statement previously provided) within 6 months of the coming into force of the regulations;
- require local planning authorities to make orders to prohibit the resumption of working where the suspension has endured for 2 years in certain circumstances;
- require local authorities to consider making orders to protect the environment where operations have been suspended for 12 months in certain circumstances.

5.2 The responses to the 2006 consultation exercise uncovered a number of issues which required further consideration. The results of this consideration then fed into the ongoing refinement of the policy underpinning the proposed Regulations such that the resulting policy proposals differed in some substantive respects, from those which formed the subject of the 2006 consultation exercise. That there were such substantive differences, and particularly in light of the more onerous proposals which were then considered appropriate, it was proper to give those to be affected by the Regulations a further opportunity to consider and respond. For this reason, a further consultation exercise was undertaken between 3 August and 2 October 2009 in which consultees were given the opportunity to make representations in relation to the draft regulations and draft guidance. In particular, comments were requested on the following new proposals:

- that all stalled ROMP development is automatically deemed to be EIA development, subject to a time-limited right to request a screening direction from the Welsh Ministers;
- that scoping decisions are mandatory and that ESs must be submitted in draft for assessment by MPAs (or the Welsh Ministers on appeal or referral) as to their adequacy for publication and consultation purposes;
- the imposition of obligations on operators who are not applicants and appellants;
- that any failure on the part of an applicant or appellant or, in some cases, other operators, to take any step required to be taken under the Regulations results in the

automatic suspension of minerals development until the stalled review is finally determined; and,

- Where it appears to the Welsh Ministers that a MPA fails to take a required step and this was brought about by the fault or intention of the MPA, the Welsh Ministers can recover from the MPA, the costs and expenses incurred by them in dealing with the stalled review.

5.3 Comments were invited from MPs in Welsh constituencies, Assembly members, Local Planning Authorities and around 70 organisations to 19 specific questions. The consultation documents, comprising drafts of the regulations and guidance, including a partial regulatory appraisal was posted onto the Planning section of the Welsh Assembly Government website at: www.wales.gov.uk/consultations/www.cymru.gov.uk/ymgyngoriadau.

5.4 Consultation responses were received in total: 4 from Mineral Planning Authorities, 1 Assembly Member, 2 from agents for mineral operators, 1 minerals industry trade association representing a high proportion of the industry's operators, and 6 responses from environmental and professional organisations. A detailed summary of the consultation responses is to be posted on the Assembly Government website at: <http://wales.gov.uk/consultations/planning/?lang=en&status=closed>. The Welsh Assembly Government considered the responses made to the consultation in determining the final form of the 2009 Regulations and guidance.

6. Regulatory Impact Assessment

6.1 A partial Regulatory Appraisal (RA) was included as part of both consultation exercises detailed in 6 above. Although no specific responses were received on the RA, the assessment has been refined on the basis of the overall consultation responses received.

6.2 The Welsh Ministers are firmly of the view that it is unreasonable for reviews of conditions to be delayed, in some cases for a considerable number of years. Delays at active mineral sites mean that mineral operations are continuing under old permissions with few, if any, conditions to mitigate the environmental impacts of mineral working, contrary to the objectives of the legislation introduced in the 1990s and subsequent clarification that the EIA Directive should be applied to these reviews. This has an unacceptable impact on local environments and communities and is unfair to mineral operators at other sites who have produced the requested environmental information voluntarily.

6.3 It is essential that all environmental information which is required to properly consider the likely environmental effects of development is provided as promptly as possible so as to enable expeditious progress to be made towards the final resolution of all stalled reviews. The principle of advance warning and transparency of consequences is intended to promote compliance with the Regulations, rather than the imposition of sanctions. This is particularly so, given the considerable amount of time which has elapsed during which operations have continued in these cases, without up to date conditions designed to protect the environment. For these reasons, and for the hopefully few cases where applicants, appellants or operators do not constructively engage with the EIA procedure, the Regulations impose stringent deadlines within which substantive action must be taken by applicants and appellants, and impose sanctions for all failures to take that substantive action within the time periods allowed for doing so. The Welsh Ministers consider that the sanctions imposed by the Regulations strike a fair balance between the interests of individual applicants, appellants and operators and the general public interest; and that the sanctions are proportionate in pursuit of the legitimate aim of protecting the environment. The Welsh Ministers encourage applicants and appellants to constructively engage with the EIA procedure so as to bring to an end the delay in determining appropriate and up to date conditions in the stalled review cases.

- 6.4 The Welsh Ministers are also of the view that where operations at a site are suspended for failure on the part of operators to provide the environmental information required to progress their case in accordance with the obligations imposed by the EIA Directive, the continuing validity of the associated mineral permissions or consents (until, by default, 2042) is unacceptable. The Regulations therefore introduce a requirement for mpas to consider whether to make prohibition orders under paragraph 3 of Schedule 9 to the 1990 Act where a suspension engaged under the regulations continues in effect for a period of two years (except for restoration and aftercare conditions) and it appears to the mineral planning authority that resumption of lawful minerals development to any substantial extent is unlikely. Where there is more than one operator using the same mineral permission, the regulations enable prohibition orders to be focused solely on the non-compliant operator who has failed to provide environmental information required to enable the mpa to determine the application.

Options

Option 1: 'Do nothing'/ voluntary provision of the environmental information

- 6.5 Continued non-application of the EIA Directive in respect of this small number of reviews has resulted in infraction proceedings by the European Commission and the ECJ has found the UK to have failed to comply with its obligations under the EIA Directive. This option will therefore ultimately, and certainly result in the European Court imposing substantial lump sum and daily fines on the UK Government until such time as the breach is remedied. These fines can amount to several million pounds. Additionally, continued non-transposition may provoke challenges in the UK courts.
- 6.6 The Welsh Assembly Government has written to operators and owners of sites where reviews are stalled encouraging them for a final time to provide the required environmental information voluntarily. In addition, the British Aggregates Association and the Minerals Products Association (formerly the Quarry Products Association) have sought to encourage those of the operators who are members of the associations and who have not been prepared to provide the relevant information to do so as soon as possible voluntarily. It was hoped that this encouragement would result in progress of the reviews stalled simply because the operators are not prepared to provide the necessary information. However, it is clear that this voluntary approach has not been successful except in one or two cases and the majority of cases remain stalled.

Option 2: Regulations to bring forward periodic reviews of conditions where initial reviews are 'stalled'

- 6.7 It had initially been the intention to deal with cases which are stalled for want of the provision of the necessary environmental information by use of powers in Schedule 14 as amended by the Planning and Compulsory Purchase Act 2004 to bring forward the date of the first periodic (15 year) review of conditions at the relevant sites and so subject them to EIA according to the EIA Regulations 1999, as amended, with the sanction of suspension where the necessary information was not provided within a specified period. This option could, because of the more generous compensation provisions for periodic reviews, inadvertently reward operators of the sites where reviews were stalled for a failure to provide environmental information. Operators of these sites, unlike the majority of operators with initial reviews outstanding in November 2000, have not voluntarily complied with requests from the mineral planning authorities for environmental information.

Option 3: Regulations to apply the EIA Directive by modifying the 1999 EIA regulations so that they apply to conditions reviews which are stalled, and

additional sanctions to make environmental impact assessment more effective and avoid potential environmental problems.

- 6.8 The third option, in summary, proposes modifying the 1999 regulations, as amended by the 2000 regulations so that the requirements of the EIA Directive apply to stalled mineral reviews, and includes additional sanctions with regard to automatic suspension and the potential permanent cessation of permission to carry out some or all of the ROMP development which is the subject of the stalled review (other than restoration and aftercare conditions) for the continued failure to comply with the requirements of the Regulations. That is, where a suspension engaged under the regulations continues in effect for a period of two years an mpa would be required to consider whether to exercise its modified functions under paragraph 3 of Schedule 9 to the 1990 Act to make Prohibition Orders. The main provisions would also include widening the definition of the ROMP applications in the EIA regulations to include stalled applications, including the requirement in appropriate cases for ES's; a specific time limited procedure for mpas and Welsh Ministers to follow in giving screening and scoping decisions and for those operators to provide a new ES; the application of automatic suspension, apart from restoration and aftercare conditions, where certain procedural requirements are not met and there is insufficient information to enable screening and scoping decisions to be given, until such time as all the information is provided to enable new operations to be determined.

Option 4: Regulations to apply the EIA Directive specifically, to conditions reviews which are stalled through bespoke EIA procedures, to make environmental impact assessment more effective and avoid potential environmental problems.

- 6.9 The fourth option, in summary, involves making new regulations which apply a bespoke scheme for all stalled mineral reviews. In summary, the provisions are that all stalled ROMP development is automatically deemed to be EIA development, subject to a time-limited right to request a screening direction from the Welsh Ministers; that scoping decisions are mandatory; that ESs must be submitted in draft for assessment by mpas (or the Welsh Ministers on appeal or referral) as to their adequacy for publication and consultation purposes; that any failure on the part of an applicant or appellant, or in some cases other operators, to take any step required to be taken under the Regulations results in the automatic suspension of minerals development until the relevant substantial step has been complied. This proposal also includes the sanction proposed by option 3, concerning the potential permanent cessation of permission to carry out some or all of the ROMP development which is the subject of the stalled review (other than restoration and aftercare conditions) for the continued failure to comply with the requirements of the Regulations. That is, where a suspension engaged under the regulations continues in effect for a period of two years an mpa would be required to consider whether to exercise its modified functions under paragraph 3 of Schedule 9 to the 1990 Act to make Prohibition Orders.

Preferred option

- 6.10 In view of the fact that reviews of conditions are considered by the courts to constitute "development consent" for the purpose of the EIA Directive, the only lawful and practical options are to implement the new Regulations as soon as possible by either option 3 or option 4. Pursuing option 1, 'do nothing' will result in, the non-transposition of the Directive in respect of these reviews. Pursuing option 2, that is, transposition by regulations bringing forward the first periodic review, would have the unfortunate potential to reward operators for the delay or refusal to provide ESs or environmental information. Either of these options will fail to secure the results necessary and appropriate to address environmental concerns and to meet the UK's obligations under the EIA Directive.

- 6.11 The stalled cases may have been subject to previous non-statutory screening and scoping decisions, and ESs may have been submitted voluntarily in the spirit of the existing EIA legislation. However, the substantial amount of time which has elapsed in some of these cases, since the date on which screening or scoping decisions were first made, or voluntary ESs were first submitted, means that the information upon which those decisions were based, or the information included in those (voluntary) ESs, may not now be up to date. In addition, there are a limited number of cases in Wales and it is considered to be expedient to address these cases by distinct and bespoke procedures. The costs and benefits of option 4 and option 3 are similar, however, the certainty provided by a bespoke scheme would have greater benefits to all those concerned.
- 6.12 Both options 3 and 4 include a mechanism to secure that minerals development which is suspended under the Regulations does not remain suspended indefinitely. Without this indefinite suspension could result, with the consequence of the land falling into decay without the means to impose conditions to require the alteration or removal plant and machinery, or the removal or alleviation of injury to amenity. Although any restoration and aftercare conditions attached to the relevant planning permission continue in effect during the period of suspension, there could well be difficulties inherent in seeking to enforce those conditions during the suspension period. A requirement to fill in a void or to restore the land to its original state for example could, as a matter of fact, have the same effect as a prohibition order, given that the costs of recommencing activity after having implemented such conditions could well be prohibitive, particularly for smaller operators. Furthermore, the enforcement of restoration and aftercare conditions during the course of a suspension would not attract the statutory compensation arrangements which apply to the prohibition order regime.
- 6.13 Mineral planning authorities already have powers to make prohibition orders under paragraph 3 of Schedule 9 to the Town and Country Planning Act 1990. Those powers would be available to mineral planning authorities in respect of suspended minerals developments, whether or not the Regulations made provision in connection with those powers. Without the provision made by the Regulations, mineral planning authorities would be required, from time to time, to consider whether to exercise their prohibition order powers; they would not be required to do so at the expiration of every two year period of suspension. Minerals Technical Advice Note 1: Aggregates (March 2004) states (in paragraph 31) that landbanks of hard rock are excessive particularly in North Wales and where further extraction is unlikely, Prohibition Orders should be made without delay. A number of Prohibition Orders have been confirmed since 2004 but there are also many mineral planning authorities that have not pursued using these powers to resolve the issue of long dormant sites.
- 6.14 We do not wish the inadvertent effect of the Regulations to be to add further sites to the current list of dormant sites through indefinite suspension of mineral permissions, nor do we wish to exacerbate any environmental consequences of minerals developments. If sites remain suspended for two years because of the lack of environmental information, then it is appropriate to question whether operations are in fact likely to recommence.
- 6.15 For these reasons, it is appropriate to require mpas to address their minds to the question of whether a Prohibition Order should be made in respect of every suspended minerals development which has remained in suspension for a period of two years. This will, in addition, offer certainty to local communities about further working, avoid any potentially damaging environmental consequences which could occur as a result of unrestored sites remaining indefinitely suspended, and act as a strong motivating factor for operators to engage constructively with the EIA regime.
- 6.16 Option 3 and 4 both apply the EIA Directive to mineral reviews which are stalled. However, option 4, unlike option 3, provides a bespoke application of EIA requirements to stalled cases, which give a greater degree of clarity and transparency

to the process of determining the stalled cases. This, in addition to the transitory nature of the Regulations and the complexity of the modifications which would result from Option 3 led to the conclusion that Option 4 would provide the greatest benefits to those affected by the legislation.

6.17 *Sectors and groups affected*

The following organisations and individuals will be affected:

- Certain mineral operators and owners
- Environmental and amenity organisations
- Certain mpas
- Local interest groups and the general public

6.18 *Race equality assessment*

These proposed Regulations do not have any race equality impacts.

6.19 *Health impact assessment*

The provision of an environmental statement under options 3 and 4 to inform the mpas consideration of new conditions would assess the impact of continued mineral working on residents, wildlife and landscape. Its provisions could help to reduce the health impact of future mineral working to a greater degree than if no EIA was carried.

6.20 *Rural considerations*

Minerals can only be worked where they are found and most mineral working therefore takes place in rural areas. However if environmental information to determine conditions is not forthcoming this may have a deleterious effect on the landscape. When working, all stalled review sites would provide employment opportunities for local communities.

6.21 **Costs and benefits of option 1**

Economic benefits

The only benefit would be to the operators of the 'stalled' sites who would not have to pay for the provision of environmental statements or further environmental information and would be able to continue operating with sub-standard conditions.

Economic costs

There would be significant (but at this stage, unquantifiable) costs to the Welsh Assembly Government arising from the failure to comply with the ECJ's ruling, through the certain re-referral to the ECJ, and possibly also through litigation nationally.

Environmental benefits

None have been identified.

Environmental costs

Mineral sites without modern working conditions because of the absence of EIA can potentially have an adverse impact on the environment and on local communities as operations can continue under the terms of the old permissions with little or no mitigation of the environmental impacts.

Social benefits

This option would prevent the potential for minerals development to be suspended at stalled review sites if environmental information continues not to be provided and hence may maintain employment opportunities at working sites.

Social costs

This option would maintain the status quo and result in continuation of environmental impacts of the works at these sites on local communities without conditions reflecting up to date environmental standards.

6.22 **Costs and benefits of option 2**

Economic benefits

The main benefit will be to the operators of the sites where conditions reviews are 'stalled'. These operators would be able to claim compensation under Schedule 14 to the 1995 Act on the brought forward first periodic review where the mpa determines different conditions from those submitted by the applicant and the effect of the determined conditions (other than restoration and aftercare conditions) is to restrict working rights.

Economic costs

Conversely there will be an economic cost on mpas if they have to pay compensation to operators because they determine conditions which have an adverse impact on the asset value of the 'stalled' sites. The amount of compensation cannot be calculated at this stage as this would be subject to the type and number of conditions determined by the mpas. The operators of the sites where conditions reviews are 'stalled' would be required to produce an environmental statement earlier than the normal 15 years after conditions were finally determined on initial review. However, the costs of providing a statement are in other respects no different to those falling to operators of any mineral site where the mpa has requested an ES. In addition, the costs to operators of the management time involved in preparing conditions for the first periodic review would occur in earlier rather than later. But again, these costs are no different to the costs falling on all mineral operators now that, under Schedule 14 to the 1995 Act, all mineral permissions are to be periodically reviewed every 15 years. The costs to the mpas of determining conditions under brought forward first periodic reviews at sites where initial reviews are stalled would fall before the end of the standard 15 year period.

Environmental benefits

Full environmental information will assess the impact of continued mineral working on residents, wildlife and landscape. Conditions determined following the submission of an environmental statement could help to improve local amenity by reflecting up to date environmental standards against which the environmental assessment had been made.

Environmental costs

The higher compensation implications for mpas of this option could deter them from imposing necessary stringent environmental conditions and so result in potential lack of environmental controls.

Social benefits

Completion of periodic reviews of the conditions for these sites at which conditions reviews are 'stalled' would alleviate any local resident concerns and uncertainty over

the environmental impact caused by these sites. It would enable the sites to operate with new conditions, continuing to generate employment opportunities and producing material for economic use. However, the compensation implications could result in less stringent conditions being imposed with less controls than are needed to protect the amenity of local residents.

Social costs

No social costs have been identified from this option.

6.23 **Assessment of the costs and benefits of option 3**

Economic benefit

The introduction of regulations under this approach will reduce, so far as possible, the likelihood of fines being imposed on the UK for the failure to implement the EIA Directive in relation to the stalled cases.. Measures intended to mitigate the impact of mineral working on the environment are likely to be more effective if considered afresh through the provision of a new ES, rather than through more ad hoc procedures where costs are less capable of being managed. The Welsh Assembly Government also believes that EIA is a useful tool in helping to achieve sustainable development, by ensuring that full regard is paid to environmental considerations for all stalled minerals review cases. The use of Prohibition Orders would attract the statutory compensation scheme which applies to those orders and consequently reduce the costs to mpas, as compared with option 2.

Economic costs

There would be costs to the operators of providing the environmental information. Producing an environmental statement as part of the review of conditions might cost on average around £35,000 for each site, with some estimated to be at around £100,000. 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. 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, 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.

Failure to comply with a requirement to carry out EIA where the remaining development is considered to have significant environmental effects will result in the suspension of the right to win and work minerals or deposit mineral waste until the necessary requirements have been complied with. There would be a cost to operators, landowners and the local economy if the sanction of suspension were imposed on any of the sites. It is difficult to quantify this as each case will depend on the size of operation, number of people employed and turnover.

Environmental benefits

The benefit of a time limited information procedure ensures there is clarity about the provision of a new ES, where appropriate. This will provide a timely route to the implementation of modern operating conditions in accordance with up-to date environmental standards, which will benefit the environment.

Environmental costs

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. Under this option however, this situation will persist for a limited time, as opposed to potentially indefinitely, as it would under options 1 and 2. But, overall, the Assembly Government considers that there will be long term environmental benefits from the application of EIA in these cases where the mpa believes the operations still to be carried out under existing planning permissions at mineral sites will have significant environmental impacts.

Social benefits

Local residents will benefit from knowing that where reviews are currently stalled for want of full environmental information sites will in future meet the required environmental standards. Individual operators and the mining industry as a whole will benefit from the updating of permissions to meet environmental standards in terms of, respectively, local communities and better public relations for the industry.

Social costs

There may be wider social costs to local communities if there are job losses as a result of non-compliance with the Regulations and site operations are suspended. Further, the absence of an additional sanction could result in uncertainty for communities about the status of the site with respect to the potential for future working or restoration.

6.24 Assessment of the costs and benefits of option 4

Economic benefit

The introduction of the proposed regulations will reduce, so far as possible, the likelihood of fines being imposed on the UK for the failure to implement the EIA Directive in relation to the stalled cases. Measures intended to mitigate the impact of mineral working on the environment are likely to be more effective if considered afresh through the provision of a new ES, rather than through more ad hoc procedures where costs are less capable of being managed. The Welsh Assembly Government also believes that EIA is a useful tool in helping to achieve sustainable development, by ensuring that full regard is paid to environmental considerations for all stalled minerals review cases. The procedures governing the submission of an ES, including the definition of an ES and the submission of a draft ES for checks prior to consultation, seeks to avoid continual requests for additional information and to minimise unnecessary costs for operators associated with advertising inadequate ESs. The key principles underlying the proposed new procedures are to enable effective participation by all those with an interest whilst at the same time minimising unnecessary costs for operators.

The use of Prohibition Orders would attract the statutory compensation scheme which applies to those orders and consequently reduce the costs to mpas, as compared with option 2. This would significantly reduce the debate at Public Inquiries into future mineral proposals where the extent of landbanks of existing permissions has been a contentious issue.

Economic costs

There would be costs to the operators of providing the environmental information. Producing an environmental statement as part of the review of conditions might cost on average around £35,000 for each site, with some estimated to be at around £100,000. 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. 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.

Failure to comply with a requirement to carry out EIA where the remaining development is considered to have significant environmental effects will result in the suspension of the right to win and work minerals or deposit mineral waste until the necessary requirements have been complied with. There would be a cost to operators, landowners and the local economy if the sanction of suspension or a requirement to make a Prohibition Order with new restoration and aftercare were imposed on any of the sites. It is difficult to quantify this as each case will depend on the size of operation, number of people employed and turnover.

Environmental benefits

Given the considerable amount of time which has elapsed since the mineral review applications, which are stalled, were submitted, the introduction of legislation to require the submission of environmental information will secure the protection of the environment from harm and will enable a more effective consideration of the need to mitigate adverse environmental impacts at the relevant sites and as a result will deliver better decisions on the modernising of these permissions. The clear distinction between procedures governing the preparation, submission and publicity as well as definitions of an ES will help to avoid situations where continual requests for, and provision of, additional information results in a fragmented and incoherent collection of information, which does not provide the transparency required by the EIA Directive. This in turn should provide benefits to minerals operators who have been frustrated by receiving repeated requests for new information, mpas and the general public, as well as for the physical environment.

The prevention of resumption of working following the making of a Prohibition Order after initial suspension would provide certainty to local communities about future mineral working and would enable the restoration of the site to proceed.

Environmental costs

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. But, overall, the Assembly Government considers that there will be long term environmental benefits from the systematic application of bespoke EIA procedures in the case of all stalled cases.

Social benefits

Local residents will benefit from knowing that where reviews are currently stalled for want of full environmental information sites will in future meet the required environmental standards and in certain cases earlier restoration will be achieved through the making of Prohibition Orders. Individual operators and the mining industry as a whole will benefit from the updating of permissions to meet environmental standards in terms of, respectively, local communities and better public relations for the industry.

Social costs

There may be wider social costs to local communities if there are job losses as a result of non-compliance with the Regulations and site operations are suspended or the resumption of operations is prohibited through the making of Prohibition Orders.

Small Firms' Impact Test (SFIT)

- 6.25 In June 2006 the operators of the sites where condition reviews are 'stalled' were notified of the decision by the Welsh Assembly Government to bring regulations into force and were encouraged to voluntarily provide the environmental information. There was little response to these letters except from one operator disagreeing with their site being a "stalled" application and one operator who provided the required environmental information so that the determination of the mineral review application could proceed. In England in response to similar letters sent out in April 2006, some operators responded that the cost of providing the environmental information would be prohibitive as they were small, low key operations, and in some cases mineral operations had ceased making the provision of an ES unnecessary. It was clear from the responses that the applications were 'stalled' for a variety of reasons, not always simply because environmental information has not been provided to enable new conditions to be determined. For example the site may currently be dormant and a new use of the site is being promoted, for example, housing, through a new planning permission.
- 6.26 In England, the April 2006 letter was followed up with telephone interviews of a sample of four small firms operating at 'stalled' sites. Each firm confirmed that there would be a 'significant' financial impact, including in one case the possibility of going 'bankrupt' if an ES was required. While none of the operators could be precise on the cost of providing the information at this stage, they estimated that the cost would range from £10,000 to over £100,000 which reflected the scope of information requested by the mpas. In the latter case, an operator was hoping to re-negotiate with the mpa on the requirements for information in order to reduce the cost. The work of producing the information would also draw staff away from the day to day operation of the business.
- 6.27 The vast majority of mineral extraction sites can be termed small or medium sized businesses. However, identifying mineral businesses as SMEs does not reveal the ability of operators to produce and pay for environmental statements, nor does it exempt them from having to comply with the requirement for environmental assessment imposed by the Directive. Depending on the nature and quantity of mineral being extracted, turnover and profits can be substantial, compared to the number of people employed. While the requirement to produce an ES will tend to bear more heavily on smaller businesses as a proportion of turnover, it is a requirement that has been applied to the mineral industry in general since 2000, with the overwhelming majority of operators complying. There is no provision in environmental regulations for smaller firms to operate to lower environmental standards than larger ones and we have a duty to fully transpose the EIA Directive or face proceedings in the European Court of Justice.
- 6.28 To help mitigate the impact of the proposed regulations on small firms, the ability to use previous information, so long as it remains up-to date and the clear definition of what constitutes an ES and the emphasis that operators should only provide the information which they can be reasonably required to compile given current knowledge and methods of assessment will help small businesses manage the requirements contained in the regulations. The ability to agree extensions of time with the mpas for complying with any of the steps contained within the regulations will assist in ensuring compliance in appropriate circumstances.

Competition Assessment

- 6.29 It is currently competitively unfair that most mineral operators, the majority of whom are small or medium sized firms, have voluntarily produced environmental information

to inform initial conditions reviews while a minority have refused to provide the information. It is also competitively unfair for some operators to have to adhere to more stringent environmental conditions in the operation of their undertakings whilst others do not.

- 6.30 There are no robust competition issues arising under options 3 or 4 because after the proposed regulations come into force EIA will be applied to all minerals conditions reviews. However, it is acknowledged that the 2009 regulations contain additional sanctions relating to permanent cessation of minerals development in comparison to the 2000 EIA regulations for all other ROMP applications. The guidance accompanying 2009 regulations acknowledges this (paragraph 12) and makes clear that amendments will be forthcoming. Finally, the operators of the sites where reviews are stalled have had the chance to voluntarily avoid the imposition of regulations applying EIA to the cases in question but have not chosen to go down that route.

Enforcement, Sanctions and Monitoring

- 6.31 Under options 3 and 4, the proposed Regulations would apply the sanction of suspension of operations to sites which are the subject of applications submitted before 15 November 2000 which remain undetermined when the proposed regulations come into force and where the applicant fails to comply with requirements at any of the trigger points contained in the proposed Regulations. Under both options mpas will retain the discretion to enforce against working in breach of planning control. Under option 4 if the suspension remains in place for 2 years the making of Prohibition Orders would prohibit the resumption of working except for restoration and aftercare conditions and provide a degree of environmental certainty.

Monitoring and review

- 6.32 Monitoring and review will be needed to ensure that the proposed Regulations under are appropriately and proportionately implemented in respect of the stalled reviews. This is provided for in option 4 where Welsh Ministers may require mpas to provide information relating to the exercise of their functions under the regulations. Follow up letters will therefore be sent to the mpas within 6 months of the proposed Regulations coming into force to check on the position of the stalled reviews and on whether there are any outstanding cases.
- 6.33 If it is clear that some mpas are failing to exercise their existing powers to make Prohibition Orders where it appropriate to do so, the Assembly Government will consider the use of its default powers to make the Orders where it is expedient to do so.

Implementation and Delivery Plan

- 6.34 Subject to Ministerial approval, the intention is that the proposed Regulations would come into force in January 2010. The benefit will be a more effective means of ensuring the provision of ESs or other environmental information to assess the environmental impacts at any sites where initial reviews remain stalled for want of the provision of necessary environmental information and as a result deliver better decisions on the modernising of these permissions. It will also ensure that existing powers can be used more effectively by mpas to address the potential for indefinite suspension. This in turn should provide benefits to minerals operators, mpas and the general public, as well as for the physical environment.

Summary and Recommendation

| Option | Total cost per annum Economic, environmental, | Total benefit per annum Economic, environmental, |
|--------|--|---|
|--------|--|---|

| | social | social |
|---|---|--|
| 1 - Do nothing | Substantial fines on the UK Government from the EC. Potential risk to the environment if environmental assessment not carried out or if delay due to reliance on the voluntary provision of information. | Operators would not have to pay for the environmental statements or further environmental information. Working sites remain in operation ensuring employment opportunities, but with few, if any, conditions thus endangering the environment and local amenity. |
| 2 – Bring forward the first periodic review of conditions | Cost to local and national taxpayers if operators able to claim compensation. EC may still fine UK Government for the delay in fully transposing the EIA Directive. Cost of EIA estimated by operators ranges from £10,000 to over £100,000. | Compliance with ECJ ruling. Will benefit the environment. Benefit to operators who have wider scope for compensation where mpas determine different conditions to those submitted by the operator which adversely impact on the asset value of the operation. Certainty as to the future use of the suspended sites for local residents. New operating conditions based on an up to date environmental assessment. |
| 3 – Apply the EIA Directive by modifying the 1999 EIA regulations so they apply to conditions reviews which are stalled. Apply the sanctions of automatic suspension and prohibition orders with restoration and aftercare where necessary. | Loss of employment opportunities and minerals if operations are suspended or resumption prohibited. Estimated costs to the operators of £10,000 to over £100,000 of providing the environmental information. Potential costs brought forward for designing and carrying out restoration and aftercare | Compliance with ECJ ruling. If accepted by the ECJ there would be no cost to the taxpayer. Will benefit the environment. Local residents benefit from knowing that sites where reviews are currently stalled' will in future meet the modern environmental standards. Certainty as to the future use of the site for local residents. The mining industry as a whole will benefit from having all sites meeting up to date environmental standards. |
| 4 - Apply the EIA Directive to conditions reviews which are stalled through bespoke EIA procedures. Apply the sanctions of automatic suspension and prohibition orders with restoration and aftercare where necessary. | Loss of employment opportunities and minerals if operations are suspended or resumption prohibited. Estimated costs to the operators of £10,000 to over £100,000 of providing the environmental information. Potential costs brought forward for designing and carrying out restoration and aftercare | Compliance with ECJ ruling. If accepted by the ECJ there would be no cost to the taxpayer. Will benefit the environment. Bespoke procedures provide a higher degree of certainty about the application of EIA, and are considered to represent a more effective EIA process, providing clarity and transparency. Local residents benefit from knowing that sites where reviews are currently stalled will in future meet the modern environmental standards. Certainty as to the future use of the site for local residents. The mining industry as a whole will benefit from having all sites meeting up to date environmental standards. Restoration and aftercare will be |

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| | | implemented within a reasonable time frame. |
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After considering all of the above, it is our opinion that **Option 4** is the most proportionate way forward. It ensures a reasonable application of the EIA Directive to stalled conditions reviews. The regulations will only be applicable to the stalled cases, and once all of these cases have been completed the regulations will lapse.

Jane Hutt

16 December 2009

Minister for Business and Budget, one of the Welsh Ministers