Explanatory Memorandum to the Environmental Assessment of Plans and Programmes and the Environmental Impact Assessment (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019

This Explanatory Memorandum has been prepared by the Environment and Communities Division of the Welsh Government 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 Environmental Assessment of Plans and Programmes and the Environmental Impact Assessment (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019.

I have made the statements required by the European Union (Withdrawal) Act 2018. These statements can be found in Part 2 of the annex to this memorandum.

Julie James AM
Minister for Housing and Local Government
15 January 2019

PART 1

1. Description

1.1 These Regulations ("the 2019 Regulations") make amendments to secondary legislation relevant to environmental impact assessment and the environmental assessment of plans and programmes. The 2019 Regulations address failures of retained EU law and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. Specifically, the instrument amends the following pieces of Welsh secondary legislation:

- The Environmental Assessment of Plans and Programmes (Wales) Regulations 2004
- The Town and Country Planning (Environmental Impact Assessment) (Undetermined Reviews of Old Mineral Permissions) (Wales) Regulations 2009
- The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016
- The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017
- The Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017.

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

2.1 These Regulations are made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 (c.68) and by paragraph 1(1) of Schedule 2 and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018 (c.16).

2.2 As set out in the Ministerial statement in Part 2 of this Explanatory Memorandum it is proposed that the instrument be subject to negative procedure. The instrument makes minor and technical changes and as such should be subject to annulment.

3. Legislative background

3.1 This instrument is being made using the power conferred by paragraph 1(1) of Schedule 2 and paragraph 21 of Schedule 7, to the 2018 Act in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union.

3.2 Amendments made under the European Communities Act 1972 update out of date references in EU and domestic legislation to ensure the effective operation of the law following the UK's withdrawal from the European Union. They also make minor changes.

4. Purpose and intended effect of the legislation

What did any relevant EU law do before exit day?

4.1 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (the EIA Directive") applies to a wide range of public and private projects, which are listed in Annexes I and II of the Directive. The EIA Directive sets out principles that must be adopted in assessing and mitigating the environmental impacts of a project before consent is given.

4.2 The EIA Directive applies to projects across a number of policy areas. The Directive is transposed and implemented in Wales via various regulations (including some made on an England and Wales basis). The following implementing legislation applies only in relation to Wales:

- The Town and Country Planning (Environmental Impact Assessment) (Undetermined Reviews of Old Mineral Permissions) (Wales) Regulations 2009
- The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016
- The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017
- The Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017.

4.3 The regulations to be amended by this instrument set out what an EIA is, what it must identify, describe and assess, what is to be included in any environmental report prepared and the public consultation and other procedures relating to EIA.

4.4 The Environmental Assessment of Plans and Programmes (Wales) Regulations 2004 implement Directive 2001/42/EC (the SEA Directive) of the European Parliament and Council on the assessment of the effects of certain plans and programmes on the environment where those plans relate solely to Wales. The SEA Directive aims to ensure that authorities at national, regional or local level integrate strategic environmental impact assessments into their plans and programmes at the earliest possible stage.

4.5 The SEA and EIA Directives transpose international obligations and ensure that plans and projects with a likely significant impact on the environment are fully assessed.

Why is it being changed?

4.6 The changes made by the instrument are necessary to ensure that the current regulatory regimes continue to operate effectively after the UK's exit from the EU. The 2019 Regulations do not introduce any changes to policy.

4.7 The amendments made under the European Union Withdrawal Act 2018 can be broadly categorised as:

- Removing references to provisions being 'in accordance with EU legislation' and other references to EU law/obligations, and instead referring to *retained* EU law/obligations;
- Substituting references to EU legislation with references to the domestic legislation which transposed it;
- Changing references to "Member States" to national, particularly in the context of the law at 'Member State level' to 'any law of any part of the UK;
- Updating the provision which requires the UK to notify 'other EU Member states' about transboundary environmental impacts to reflect the UK's new status outside of the EU;
- Including text from the EIA Directive;
- Under the regime for agriculture, substituting the reference to the European Commission with a reference to the Welsh Ministers and inserting a requirement for them to consult specified bodies before making a decision (see regulation 5(9).

4.8 The remaining amendments are made under the European Communities Act 1972. The provisions in regulations 2(8)(a)(i), 3(2) and 3(4)(a)(iii) correct out-of-date references to European law.

4.9 The provisions in regulations 4(5)(b)(iv), 4(5)(c), 5(2)(c), 6(4)(b) and 6(12)(c) make changes to correct minor errors in the existing legislation. These include clarifying that representations are made to the authority in an EEA State (not just Member States) which has responsibility for performing duties arising from the EIA Directive and ensuring that the term "Natura 2000" has a clear meaning.

What will it now do?

4.10 The 2019 Regulations will ensure that the EIA and SEA regulatory regimes continue to operate effectively in Wales after the UK's exit from the EU.

5. Consultation

5.1 As there is no policy change, no public consultation was undertaken.

6. Regulatory Impact Assessment (RIA)

6.1 No impact assessment has been produced in relation to these Regulations as no impact on the private, voluntary or public sectors are foreseen.

Other statutory duties and statutory partners

This legislation has no impact on the statutory duties in sections 77-79 of the Government of Wales Act 2006 or the statutory partners in sections 72-75 of the Government of Wales Act 2006.

Annex
Statements under the European Union (Withdrawal) Act 2018

Part 1
Table of Statements under the 2018 Act

This table sets out the statements that may be required of the Welsh Ministers under the 2018 Act. The table also sets out those statements that may be required of Ministers of the Crown under the 2018 Act, which the Welsh Ministers have committed to also provide when required. The required statements can be found in Part 2 of this annex.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(7) and 4(3), Schedule 7 *Paragraph 3(7) (anticipated to be a requirement on Welsh Ministers in Standing Orders)*	The Welsh Ministers exercising powers in Part 1 of Schedule 2 to make a Negative SI Paragraph 3(7) applies to Ministers of the Crown, but Welsh Ministers have committed to make the same statement	A statement to explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation of the CLA Committee (as sifting committee)
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have	A statement to explain the good reasons for making the instrument and that what is being done is a reasonable course of action.

		committed to make the same statement when exercising powers in Schedule 2	
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2	A statement to explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. A statement that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 77	Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2	A statement to explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g. whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Applies to Ministers of the Crown exercising powers in sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2. Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2	A statement setting out the 'good reasons' for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Applies to Ministers of the Crown exercising powers in sections 18(1), 9 and paragraph 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority.	A statement to explain why it is appropriate to create such a sub-delegated power.

		Welsh Ministers have committed to make the same statement when exercising powers in Schedule 2 or paragraph 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority	
Urgency	Sub-paragraph (2) and (8) of paragraph 7, Schedule 7	Welsh Ministers exercising powers in Part 1 of Schedule 2 but using the urgent procedure in paragraph 7 of Schedule 7	A statement that the Welsh Ministers are of the opinion that it is necessary to make the SI using the urgent procedure and the reasons for that opinion.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

The Minister for Housing and Local Government has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Environmental Assessment of Plans and Programmes and the Environmental Impact Assessment (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of the National Assembly for Wales (i.e. the negative procedure). This is the case because the changes made are minor and technical in nature.”

2. Appropriateness statement

The Minister for Housing and Local Government has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Environmental Assessment of Plans and Programmes and the Environmental Impact Assessment (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019 do no more than is appropriate. This is the case because all the changes being made are solely in order to address deficiencies arising from EU exit.”

3. Good reasons

The Minister for Housing and Local Government has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These are the benefits of continuing to have operable environmental noise legislation following EU exit, and the existence of inoperabilities in this legislation if changes are not made.”

4. Equalities

4.1 The Minister for Housing and Local Government has made the following statement:

"The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

4.2 The Minister for Housing and Local Government has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, Julie James, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

5. Explanations

The explanations statement has been made in paragraph 4 (Purpose and intended effect of the legislation) of the main body of this explanatory memorandum.

6. Criminal offences

Not applicable/required.

7. Legislative sub-delegation

Not applicable/required.

8. Urgency

Not applicable/required.