

EXPLANATORY MEMORANDUM TO
THE ENVIRONMENTAL IMPACT ASSESSMENT (LAND DRAINAGE
IMPROVEMENT WORKS) (AMENDMENT) REGULATIONS 2017

2017 No. 585

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument amends the UK's existing implementation of the Environmental Impact Assessment Directive 2011/92/EU (the EIA Directive) to bring into effect changes made to the Directive by EU Directive 2014/52/EU (the 2014 Directive).
- 2.2 The EIA Directive ensures that projects likely to have significant effects on the environment are subject to an environmental assessment, prior to their approval or authorisation. In respect of land drainage projects, the EIA Directive has been implemented into national legislation by The Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, as amended (the Regulations). The EIA Directive was amended by the 2014 Directive and it is these amendments which need to be incorporated into national legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Due to the decision to call a general election and the consequent dissolution of Parliament on 3 May 2017 there are not 21 days available between the laying date and the date on which the Regulations need to come into force in order to meet the deadline of 16 May 2017 set in the EIA Directive. A failure to meet this deadline could result in infraction proceedings being taken and the UK being fined.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 This Regulation is made in order to transpose the amendments to Directive 2011/92 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. This instrument is one of a group of instruments which will implement changes to the EIA Directive across different consenting regimes: marine, land drainage, forestry, water abstraction and agriculture.

4.2 Insofar as was possible, the 2014 Directive has been transposed by copy-out with additional text inserted where necessary to give clarity. The European Scrutiny Committees were provided with an Explanatory Memorandum on the Commission's proposals in December 2012 and were updated following a vote in the European Parliament in October 2013 and following the agreement of a compromise text in February 2014. The House of Commons committee released the proposal from scrutiny on 19 March 2014 and the House of Lords scrutiny committee did so on 3 April 2014.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

7.2 Environmental impact assessment (EIA) is a procedure that ensures that the environmental implications of decisions are taken into account before the decisions are made. The EIA Directive ensures that projects likely to have significant effects on the environment are made subject to an environmental assessment, prior to their approval or authorisation. This process is part of European law under the EIA Directive and, in respect of land drainage projects, has been implemented into national legislation by the Regulations.

7.3 The broad intention of the 2014 amendments is deregulatory – to simplify and clarify the requirements of the current EIA Directive, by focusing on environmental factors that are significantly impacted, rather than on any potential impact. It also improves the level of environmental protection, with a view to making business decisions on public and private investments more sound, more predictable and sustainable in the longer term.

7.4 There are no alternatives to legislation to implement the 2014 Directive. However, in line with the Government's Better Regulation agenda the Government has sought to minimise additional regulatory burden by copying out the text of the 2014 Directive except where an alternative approach was considered beneficial.

7.5 There has been liaison with other government departments to ensure that as far as possible a consistent approach has been followed.

- 7.6 Under the Regulations, drainage bodies must follow the EIA procedure, and may be required to prepare an environmental statement, before carrying out any improvement works, if those works are likely to cause significant effects on the environment. Drainage bodies are defined as the Environment Agency (EA), Natural Resources Wales (NRW), Internal Drainage Boards (IDBs) and Local Authorities. The Regulations cover not only land drainage but also include other defence against water related risks i.e. flood defence. Improvement works include: projects to deepen, widen, straighten, improve or alter existing watercourses; projects to remove or alter mill dams, weirs or other obstructions; and various water related maintenance and development projects permitted under Part 13 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015.
- 7.7 The following paragraphs set out the main changes introduced by the 2014 Directive and the corresponding impact on the Regulations. Unless stated otherwise, the changes are transposed by copying out the text with necessary additional text inserted:
- The addition of a definition of the environmental impact assessment process - Article 1(2)g.
 - Changes to the circumstances in which a project may be exempt from the requirements of the EIA Directive – Articles 1(3). The EIA Directive has been amended to restrict the existing exemption for defence projects so that it can only apply where a project, or part of a project, has defence as its sole purpose. The exemption has also been extended to include projects which have the response to civil emergencies as their sole purpose.
 - Introduction of Joint and/or Coordinated procedures for projects which are subject to the Habitats or Wild Birds Directives as well as the EIA Directive – Article 2(3). We have maintained the current position that drainage bodies may adopt either the co-ordinated or joint assessment procedures.
 - Changes to the list of environmental factors to be considered as part of the EIA process – Article 3. The criteria have been amended, largely to provide more clarity about the issues to be considered.
 - Clarification of the options for screening and amendments to the information which is required and the criteria to be applied when screening projects to determine whether the EIA Directive applies – Article 4, Annex IIA and Annex III. The amendments seek to standardise the type of information to be provided when deciding whether an environmental statement should be prepared. It is hoped this will help focus the EIA process on those cases where there really is a likelihood of significant effects. The 2014 Directive also confirms that a drainage body may provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment. The 2014 Directive has also introduced a requirement that the ‘screening’ decision as to whether a project requires an environmental statement and the main reasons why should be published. There is also a new requirement that this ‘screening’ decision is made soon as possible and within 90 days (extendable in exceptional circumstances) from the date all the information required is available. There was no previous time limit. The Regulations now provide for two 45 periods during which the drainage body, and then the relevant Minister (if required), will decide whether an environmental statement should be prepared.

- Amendments to the information to be included in the environmental statement - Article 5 and Annex IV.
- A requirement for environmental statements to be ‘based on’ a scoping opinion, where one is issued - Article 5(2). If a proposed project needs an environmental statement, a drainage body may request an opinion from a relevant Minister to list the scope and level of detail of the information to be included in the statement.
- The use of competent experts - Article 5(3). The 2014 Directive has introduced a requirement that the environmental statement is prepared by competent experts and that the decision maker must have sufficient expertise to assess the environmental statement. Most decision makers have people with sufficient expertise within their teams or can readily obtain access to people with expertise. Applicants will also have access to the comments of the statutory consultation bodies to assist them. We therefore do not expect this requirement to differ to current established practice.
- A requirement to inform the public of projects electronically - Article 6(2) and 6(5).
- A requirement to introduce a new minimum time for public consultations of at least 30 days – Article 6(7). This is an increase from 28 days. This increase should not present a significant impact on the overall process.
- A new article elaborating on information to be given in decision notices and the decision making procedures – Article 8a. Information to be included in a decision includes: the reasoned conclusion; environmental conditions; and a description of any parts or actions in the project to reduce the risk of significant adverse effects on the environment. Where the decision is to refuse consent, the main reasons for the refusal are given. A notice of a decision must also include any planned monitoring measures.
- Monitoring significant adverse effects - Article 8a(4). The Regulations will include the requirement that the drainage body or relevant Minister, as appropriate, will monitor significant adverse effects of improvement works.
- A new Article requiring drainage bodies must be objective and avoid conflicts of interest where they are both the applicant and the decision maker – Article 9a. As public authorities, drainage bodies must carry out their functions in a way which does not give rise to a conflict of interest. We consider that compliance with the requirements of Article 9a is best achieved through administrative arrangements.
- The introduction of penalties for infringements of national provisions – Article 10a. We consider that existing provisions in the Regulations allowing for the relevant Minister to apply to court where the requirements of the Regulations are not met are sufficient to meet the 2014 Directive’s requirements.

8. Consultation outcome

- 8.1 A consultation was published on 14 December 2016. The consultation was open for 7 weeks and closed on 31 January 2017. The majority of respondents supported the proposed changes. Numerous respondents sought guidance which will provide clarity. Further details are included in the Government response.

9. Guidance

- 9.1 Guidance will be made available, taking account of consultation responses where clarification was sought.

10. Impact

- 10.1 The 2014 Directive's changes aim to reduce the burden by cutting the number for cases that go through the EIA process, the benefits will mainly be seen in the bigger developments that usually need an environmental statement. Defra's economists have undertaken an assessment of cost to business of the proposed changes and this has shown that the cost level is considerably lower than the £1million limit required to trigger the need for an Impact Assessment. The impact of these changes will be on public bodies, as all drainage bodies are public sector bodies.
- 10.2 There is no impact on business, charities or voluntary bodies.
- 10.3 An Impact Assessment has not been produced with this memorandum as no impact on the private or voluntary sectors is foreseen. A transposition note is available and will be published alongside this memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 As the Regulations do not impact upon activities that are undertaken by small business, there are no current plans for scheduled monitoring and review of the legislation.

13. Contact

- 13.1 Nichola Whiteman at the Department for Environment, Food and Rural Affairs
Telephone: 0208 026 3777 or email: Nichola.Whiteman@defra.gsi.gov.uk can answer any queries regarding the instrument.