

EXPLANATORY MEMORANDUM TO
THE HIGHWAYS (ENVIRONMENTAL IMPACT ASSESSMENT) REGULATIONS
2007

2007 No. 1062

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 These Regulations amend the procedures contained in Part VA of the Highways Act 1980 for the environmental impact assessment (“EIA”) of trunk road projects in England and Wales. In England the Secretary of State, and in Wales the National Assembly for Wales, are respectively the highway authority for these roads.

2.2 The Regulations do so to improve public participation in the decision making process relating to trunk roads projects which are subject to EIA, (i.e. those trunk road projects which may have significant effects on the environment), and also to make provision for legal challenge of decisions to carry out such projects. These changes are to give effect to article 3 of the “Public Participation Directive” (2003/35/EC).

2.3 The Regulations also:

(a) replace references to Member States of the European Community with references to Member States of the European Economic Area in order to bring Part VA of the Highways Act 1980 into line with other UK regulations relating to EIA;

(b) assimilate, for consistency, the criteria for determining if motorway improvement projects of the Secretary of State or National Assembly should be subject to EIA with the criteria applied to their other trunk road projects and to local highway authority projects; and

(c) make provision for improving the scope of consultation by expanding the list of consultation bodies (i.e. the list of public bodies with environmental responsibilities which the Secretary of State, or the National Assembly for Wales, should consult about proposed trunk road projects subject to Part VA of the Highways Act 1980).

2.4 Annex A of this Memorandum sets out Part VA showing how it is amended.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 European Directive 85/337/EEC, (“the EIA Directive”), introduced a requirement for EIA of those public and private projects which are likely to have significant effects on the environment. Its requirements span many areas of activity from industrial production to agriculture.

4.2 Today various regulations are in place in England and Wales which transpose its provisions such as those relating to town and country planning, land drainage, forestry, uncultivated land and semi-natural areas, water resources, electricity works, and transport and works.

4.3 As far as highway construction and improvement is concerned the EIA Directive was transposed for local highway authority projects through the relevant town and country planning regulations, (today the “Town and County Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999”, SI 1999/293 as amended), and for trunk roads by the insertion of Part VA into the Highways Act 1980.

4.4 The original version of Part VA was inserted into the Highways Act, using the powers conferred by section 2(2) of the European Communities Act 1972, by the Highways (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1241). Part VA was further amended under these powers by the Highways (Assessment of Environmental Effects) Regulations 1994 (SI 1994/1002).

4.5 The EIA Directive was significantly amended by Directive 97/11/EC. For trunk roads, transposition of the amendments was effected by the Highways (Assessment of Environmental Effects) Regulations 1999 (SI 1999/ 369), also made under section 2(2). These regulations inserted the current version of Part VA in substitution for the earlier version.

4.6 The EIA Directive has been further amended by article 3 of the Public Participation Directive with regard to public participation and access to justice. The principal reason for making the Regulations to which this Memorandum relates is to amend Part VA of the Highways Act to transpose, for trunk roads in England and Wales, the amendments made to the EIA Directive by the Public Participation Directive.

4.7 Similar changes have been made or are being made to the EIA regulations for other areas of activity by the Department for Transport, other Government Departments and the devolved administrations, in order that Article 3 of the Public Participation Directive is implemented in full.

4.8 The UK Government is currently subject to infraction proceedings for failure to complete full transposition of article 3 of the Public Participation Directive.

4.9 A transposition table is shown in Annex B of this Memorandum.

4.10 A Parliamentary scrutiny history is shown in Annex C of this Memorandum.

5. Territorial Extent

5.1 This instrument applies to England and Wales.

5.2 The effect of the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) is that, with few exceptions, highway functions of the Secretary of State under the Highways Act 1980, so far as exercisable in relation to Wales, are transferred to the National Assembly¹. References in Part VA of the Act to the Secretary of State should therefore be read as references to the National Assembly where the road project is in Wales. This is generally reflected in the way the Regulations are written.

6. European Convention on Human Rights

Stephen Ladyman, Minister of State for Transport, has made the following statement regarding Human Rights:

In my view the provisions of the Highways (Environmental Impact Assessment) Regulations 2007 are compatible with the Convention rights.

7. Policy background

7.1 The Public Participation Directive is one of the legislative instruments that transpose the provisions of the United Nations – Economic Commission for Europe “Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters”, (also known as the “Aarhus Convention”), into European Community law. The European Community signed the Convention on the 25th June 1998. The Directive is the main instrument to align Community legislation with the public participation provisions and parts of the access to justice provisions of this Convention.

7.2 Article 3 of the Directive amends the EIA Directive. It has two stated aims in doing so. Firstly to improve public participation in the making of decisions whether to carry out projects subject to EIA and secondly to provide for access to justice in relation to such decisions.

Public Participation

7.3 In particular it states that effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision making process and contributing to public awareness of environmental issues and support for the decisions taken.

7.4 Part VA of the Highways Act already provides for the preparation and publication of an environmental statement in relation to trunk road projects, for consultation on it, and for the trunk road authority to take representations received into account before deciding whether to proceed. Provision is already included to allow affected EC member

¹ By virtue of paragraph 26 of Schedule 11 of the Government of Wales Act 2006 this Order will continue in force as if made under section 58 of that Act.

states to participate in these consultation procedures. However the amendments made to Part VA resulting from the Public Participation Directive improve these provisions.

7.5 In transposition of the Directive the Regulations specify in more detail requirements for public notice of environmental statements, for making the statements available to the public, for members of the public, and certain consultation bodies, to make representations in relation to such environmental statements and the projects to which they relate, and for those representations to be taken into account in the making of decisions whether to carry out projects. When decisions on projects are published additional information is to be included about the consultation process and results. As required by the Directive, equivalent amendments are made to the provisions in Part VA which relate to other EEA States, providing an opportunity for such States to participate in the Part VA procedures in cases where projects are likely to have a significant effect on their environment.

7.6 Provision has been included to co-ordinate the Part VA procedures with other relevant highway procedures. The Regulations require that where environmental statements are produced for projects for which orders or schemes under the Highways Act 1980 or compulsory purchase orders under the Acquisition of Land Act 1981 are required, the authorities must, so far as it is practicable to do so, take the steps required by Part VA concurrently with the corresponding steps required for such orders or schemes. In fact this reflects current practice of the Department and the National Assembly.

Access to Justice

7.7 The Regulations insert into Part VA a new statutory right for legal challenge, by way of application to the High Court, of decisions to proceed with projects for which environmental statements have been made.

7.8 Although Part VA has hitherto made no provision for legal challenge, typically trunk road projects have necessitated the making of statutory orders under the Highways Act 1980 and often also compulsory purchase orders under the Acquisition of Land Act 1981. These associated procedures include statutory rights of challenge in the High Court of such orders, within six weeks, with a statutory bar on their being questioned in any other legal proceedings.

7.9 However in cases where no orders are necessary, (e.g. certain road widening projects where all the land is already owned by the Secretary of State), persons aggrieved by a decision to proceed would have to rely on common law rights for judicial review of that decision, with a time limit of up to three months. In cases where the majority of the project has not necessitated a statutory order but a small part of it has, (e.g. a compulsory purchase order for a small plot of land ancillary to the main road works), the only statutory rights of challenge available apply to that order and not to the project decision as a whole. A person aggrieved by the decision, but not specifically the order, may therefore have to apply for judicial review of the decision. The interplay between the existing statutory rights of challenge and judicial review may not always be clear.

7.10 In transposing the Directive's requirements for there to be access to justice to challenge the substantive or procedural legality of decisions, the Regulations, in effect, assimilate the judicial review rights with the existing statutory rights in order to rationalize them. They do so by creating a new statutory right of challenge in place of the common law judicial review right and require the new statutory right to be published with the public notice of the decision.

7.11 To make the new right compatible and consistent with the existing statutory rights, the grounds of challenge are modelled on the same grounds, the time limit for applications is made the same (i.e. six weeks), and the same statutory bar on any other legal proceedings is applied to the decision to proceed. Provision is included to require, so far as is practicable to do so, the co-ordination and concurrent running of any decision to construct a project with the decisions on related orders, and of the publication of those decisions and the respective six week time limits. This largely reflects the current practice of the Department and the National Assembly.

EEA States

7.12 The Regulations replace, in Part VA of the Highways Act 1980, references to Member States of the European Community with references to Member States of the European Economic Area.

7.13 The effect is to extend the rights of EC Member States to participate in the EIA procedures to EEA Member States which are not also EC Member States, (currently Iceland, Liechtenstein and Norway.)

7.14 This amendment is made in order to reflect the application of the EIA Directive to the European Economic Area by Decision No. 20/1999 of the European Economic Area Joint Committee of 26th February 1999. The amendment will bring Part VA into line, in relation to EEA States, with other UK regulations giving effect to the EIA Directive. However in practice it is not envisaged that the Part VA procedures will ever need to be invoked by the additional States.

EIA for motorway improvement projects

7.15 Regulation 3(2) repeals section 105B (2) in Part VA of the Highways Act 1980. The purpose and effect of this is to assimilate the criteria for determining whether motorway improvements of the Secretary of State, and of the National Assembly for Wales, should be subject to EIA with the criteria which already applies to other trunk road improvements and local authority road improvements.

7.16 Trunk road improvements (i.e. other than motorways) are required to have EIA where the Secretary of State, or the National Assembly for Wales as the case may be, considers that:-

(a) the area of the completed works together with any additional areas to be occupied for working space during the construction phase:

(i) will exceed 1 hectare, or

(ii) will wholly or partly be within a sensitive area, (e.g. a site of special scientific interest, an area of outstanding natural beauty, a National Park etc); and

(b) the project comprises a change or extension of a trunk road which may have significant adverse effects on the environment; and

(c) having regard to the selection criteria in Annex III of the EIA Directive (e.g. size, location and probability of impact), the project should be made subject to EIA.

Virtually the same criteria are applied by local authorities in determining whether their road improvement projects should be subject to EIA.

7.17 Section 105B (2) of the Highways Act 1980 in effect disapplies the criteria in paragraphs (a) and (c) above in the case of motorway improvement projects. The effect of repealing this is to apply those paragraphs to such projects and thus remove the inconsistency in approach.

7.18 Whilst the EIA Directive provides for mandatory EIA for construction of motorways it does not require mandatory EIA for all changes or extensions to motorways. Instead, for those changes or extensions which may have significant adverse effects on the environment, it requires the decision whether or not to require EIA being based on a case by case examination, or the application of thresholds or criteria, together with the application of the selection criteria set out in Annex III of the Directive. This latter approach is applied to non motorway trunk road improvement projects and to local authority road improvement projects and the Regulations will now apply this approach to motorway improvement projects of the Secretary of State and the National Assembly.

Consultation Bodies

7.19 The Regulations provide for improvement of consultation by expanding the list of consultation bodies (i.e. the list of public bodies with environmental responsibilities which the Secretary of State or the National Assembly for Wales, as the case may be, must consult about proposed highway projects to which Part VA of the Highways Act 1980 applies). The European Commission has criticised the existing provision regarding consultation bodies for being inflexible and this change addresses this.

7.20 The list is expanded by providing for the relevant trunk road authority to consult:-

(a) the relevant Welsh or English environmental bodies (the National Assembly for Wales, the Countryside Council for Wales, Natural England, and English Heritage,) over the border where in the opinion of the relevant trunk road authority the land on which the project is proposed to be constructed is sufficiently near to Wales or England, as the case may be, to be of interest to those bodies; and

(b) any other public authority which has environmental responsibilities and which the relevant trunk road authority considers to be likely to have an interest in the project.

Consultation

7.21 A 12 week consultation exercise commenced on the 21st September 2006 and closed on the 14th December 2006. The consultation document was published on the Department's web site and letters inviting representations were despatched to 690 consultees. These comprised a wide range of public sector bodies with responsibilities for highways, land use planning and the environment, and a wide range of other stakeholders including motoring groups, professional associations, and lobby groups. Consultees included agencies or organisations with interests specific to Wales including the Countryside Council for Wales, and the Welsh Local Government Association. A full list of consultees is attached to the Department's consultation report published on its web site (www.dft.gov.uk).

7.22 Eight responses were received. They were from the Council for National Parks, Durham County Council, the Highways Agency (an executive agency of the Department), the Law Society, Mott McDonald, Natural England, Neath and Port Talbot County Borough Council and the Royal Society for the Protection of Birds.

7.23 The responses were supportive or content with the proposals although some concerns were raised as briefly described below. However after consideration of those concerns no amendments to the draft Regulations were thought appropriate.

7.24 The RSPB, although welcoming the proposed changes to transpose the Public Participation Directive, were concerned about the scope of the grounds of legal challenge of project decisions, the right of persons to be able to challenge decisions and the time limit for doing so. Also they were concerned about applying a 1 hectare threshold to the criteria for applying EIA to motorway improvements. Finally they suggested the Department monitor the adequacy of the 6 week period provided in the Regulations for persons to make representations on environmental statements.

7.25 The Department's and National Assembly's policy response to these points is briefly that the grounds of challenge are modelled on the grounds applying to other trunk road related orders, person's with a genuine grievance would be able to challenge, and the 6 week time limit applies to all other trunk road related orders. The 1 hectare threshold for motorway improvements is for consistency with all other trunk road and local highway authority improvement projects. Also 1 hectare (approximately the area of two football pitches side by side) would be a reasonable and appropriate threshold (especially bearing in mind this area would include all working space for plant and materials etc during construction) and is too low to allow projects which should be made subject to statutory EIA to avoid such assessment. Finally the 6 weeks for receipt of representations on environmental statements was chosen because the same minimum period is provided for all other equivalent Highways Act statutory procedures for trunk roads.

7.26 The Law Society, although indicating that in principle they agreed the way it was proposed to transpose the Directive, and the new statutory right of High Court challenge, were concerned about the bar on any other judicial review of project decisions, and that such proceedings may not satisfy the Directive's requirement not to be prohibitively expensive.

7.27 The Department's and National Assembly's policy response to these points is briefly that, as the decision to proceed with construction of a project is the final outcome of the deliberation process, it would not be appropriate to provide for more than one legal procedure for the decision to be challenged. Nor would it seem necessary as the new statutory right of challenge would in effect be a statutory right to judicial review of the decision. It would be consistent with the existing trunk road order procedures which all provide for statutory rights of challenge of trunk road related orders to the High Court with a bar on their being challenged in any other proceedings. The view that a statutory right of challenge to the High Court would be prohibitively expensive is not shared.

7.28 Durham County Council suggested the powers of the court to quash project decisions should be widened to enable decisions to be quashed in so far as they may affect the "health, general amenities and other quality of life issues, legitimate concerns or business" of applicants. This has not been accepted because the new power of the court is designed to be consistent with the equivalent powers of the High Court which apply to other trunk road related orders. In practice these powers are wide.

7.29 The Highways Agency suggested provisions should be added to prescribe in more detail the requirements in Part VA of the Highways Act concerning public notice of the determination by the trunk road authorities as to whether projects qualify for EIA. This has not been accepted because such provision is not required by the Public Participation Directive or the EIA Directive and the Regulations do not take such provisions beyond what is required by those Directives.

7.30 Finally Mott McDonald suggested some amendments to the definition of the thresholds and criteria for determining if schemes should be subject to EIA. Again the Public Participation Directive makes no amendments to the EIA directive which necessitates a revision of this. Furthermore the definition is designed to be consistent with the equivalent definitions which apply to local highway authority road projects as set out in the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, (SI 1999/293). Also the Department and National Assembly would not want to adopt revised thresholds or criteria which may reduce the number of projects qualifying for EIA.

8. Impact

8.1 A full regulatory impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

8.2 The impact on the public sector is not substantial as the Public Participation Directive and these Regulations will only impose some additional procedural obligations on the Secretary of State and the National Assembly for Wales in complying with Part VA of the Highways Act.

9. Contacts

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ANNEX A PART VA HIGHWAYS ACT 1980 SHOWING THE EFFECT OF THE AMENDMENTS
MADE BY THE REGULATIONS

(Deletions are indicated by crossings out and new text is shown bold and underlined.

This document was prepared as an aid to explaining how the Regulations amend the Act. Although every care has been taken in its preparation it is not intended to be a definitive text. Only the Regulations, and the Act as amended by it, are definitive).

Highways Act 1980

1980 CHAPTER 66

Part VA Environmental Impact Assessments

105A Environmental impact assessments

(1) In this Part -

~~"the Directive" means council Directive No 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive No 97/11/EC;~~

"Annex" means an Annex to the Directive; and

"the Directive" means Council Directive No. 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive No. 97/11/EC and Directive No. 2003/35/EC of the European Parliament and Council;

"member of the public" includes any body of persons corporate or unincorporate;

"public authority" means any authority or other body on which functions are conferred by or under an enactment, including an enactment comprised in, or an instrument made under, an Act of the Scottish Parliament; and

"relevant project" means a project for constructing or improving a highway where the area of the completed works together with any area occupied during the period of construction or improvement by requisite apparatus, equipment, machinery, materials, plant, spoil heaps or other such facilities exceeds 1 hectare or where any such area is situated in whole or in part in a sensitive area.

(2) If the Secretary of State is considering a project for constructing or improving a highway for which he is the highway authority he must, before details of the project are published, determine whether or not it falls within Annex I or II.

(3) If the Secretary of State —

(a) considers that the project falls within Annex I, or

(b) considers that it is a relevant project falling within Annex II and determines, having regard to the selection criteria contained in Annex III, that it should be made subject to an environmental impact assessment in accordance with the Directive,

he must, not later than the date when details of the project are published, ~~publish~~ **prepare** an environmental statement **and publish notice of it in accordance with subsections (3), (3A) and (7) of section 105B.**

(4) To the extent to which the Secretary of State considers —

(a) that it is relevant to the specific characteristics of the project and of the environmental features likely to be affected by it, and

(b) that the information may reasonably be gathered (having regard among other matters to current knowledge and methods of assessment),

the environmental statement must contain the information referred to in Annex IV.

(5) That information must include at least —

(a) a description of the project (comprising information on the site, design and size of the project);

(b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;

(c) the data required to identify and assess the main effects to which the project is likely to have on the environment;

(d) an outline of the main alternatives studied by the Secretary of State and an indication of the main reasons for his choice (taking into account the environmental effects);

(e) a non-technical summary of the information mentioned in paragraphs (a) to (d).

(6) "Sensitive area" means any of the following:-

(a) a site of special scientific interest (within the meaning of the Wildlife and Countryside Act 1981);

- (b) land adjacent to such an area that is notified to the local planning authority in accordance with paragraph (u)(ii) in the table in article 10 of the Town and Country Planning (General Development Procedure) Order 1995;
- (c)
- (d) a National Park within the meaning of the National Parks and Access to the Countryside Act 1949;
- (e) an area of outstanding beauty designated as such under section 82 of the Countryside and Rights of Way Act 2000;
- (f) the Broads as defined in the Norfolk and Suffolk Broads Act 1988;
- (g) a property appearing on the World Heritage List kept under article 11(2) of the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage;
- (h) a scheduled monument within the meaning of the Ancient Monuments and Archaeological Areas Act 1979;
- (i) a European site within the meaning of regulation 10 of the Conservation (Natural Habitats etc) Regulations 1994.

105B Procedure

- (1) The Secretary of State must ensure that any determination made by him as to whether or not a relevant project should be made subject to an environmental impact assessment in accordance with the Directive is published.
- (2) ~~Any project for the construction or improvement of a special road which falls within Annex II is to be treated as having characteristics that require it to be made subject to an environmental impact assessment.~~
- (3) An **Notice of the** environmental statement must be published so as to ensure that members of the public who are likely to be concerned are given a reasonable opportunity to express their opinion before the Secretary of State decides whether to proceed with the construction or improvement to which the assessment relates.

(3A) The notice must state —

- (a) that the Secretary of State, as the relevant highway authority, is considering implementing the project;**
- (b) the proposed location and nature of the project;**

- (c) that the project is subject to the environmental impact assessment procedure required by this Part of this Act and, where relevant, that section 105C applies;**
 - (d) that a copy of the environmental statement may be inspected at an address in the area in which the project is proposed to be situated during the period specified under paragraph (i);**
 - (e) the times at which the copy of the environmental statement may be so inspected;**
 - (f) an address from which copies of the environmental statement may be obtained and from which further information about the project may be requested during the period specified under paragraph (i);**
 - (g) if a charge is to be made for a copy of the environmental statement, the amount of the charge;**
 - (h) if the Secretary of State uses a website for the publication of information about projects that are subject to the procedure required by this Part of this Act, that a copy of the environmental statement may be inspected on the website during the period specified under paragraph (i);**
 - (i) that any person wishing to make any representations about the project and the environmental statement may do so in writing to the Secretary of State at a specified address within a specified period, being not less than 6 weeks from the date of publication of the notice and**
 - (j) that the Secretary of State will take into consideration any representations so made before deciding whether or not to proceed with the project with or without modifications.**
- (3B) The Secretary of State shall ensure that during the period specified under subsection (3A)(i) —**
- (a) copies of the environmental statement are available for inspection by any person free of charge at all reasonable hours at the address specified under subsection (3A)(d);**
 - (b) copies of the environmental statement are available to be obtained by any person from the address specified under subsection (3A)(f); and**
 - (c) where under sub-section (3A)(h) the notice states the address of a website, that a copy of the environmental statement is available for inspection by any person on that website.**

(3C) A reasonable charge reflecting the costs of printing, copying and distribution may be made by the Secretary of State for the supply of a copy of the environmental statement —

(a) to a person other than a consultation body, or

(b) to a consultation body to which one copy has already been supplied free of charge.

(4) The Secretary of State must ensure that the consultation bodies are given an opportunity to express an opinion on the ~~published details of the project and the environmental statement before he decides whether to proceed with the construction or improvement to which the assessment relates.~~

(5) Before deciding whether to proceed with the construction or improvement in relation to which an environmental impact assessment has been made, the Secretary of State must take into consideration —

(a) the environmental statement; ~~and~~

(b) ~~any opinion on that statement expressed by a member of the public, by any of the consultation bodies or by any Member State consulted under section 105C~~ **or the project which is expressed in writing by —**

(i) any of the consultation bodies; or

(ii) any other person;

and is received by the Secretary of State within any period specified for the purpose by him; and

(c) where section 105C applies, and the EEA State has indicated in accordance with subsection (4) of that section that it wishes to participate in the procedure required by this Part of this Act, any opinion on that statement or the project which is expressed in writing by —

(e) the EEA State;

(ii) a member of the public in the EEA State, or

(iii) an authority having environmental responsibilities designated by the EEA State to be consulted about the project under Article 6 (1) of the Directive;

and is received by the Secretary of State within any period specified for the purpose by him.

(5A) Where in order to proceed with the construction or improvement in relation to which an environmental statement has been made it is necessary for the Secretary of State to make —

(a) an order or scheme to which Schedule 1 to this Act applies; or

(b) a compulsory purchase order in the exercise of highway land acquisition powers;

the Secretary of State shall, so far as it is practicable to do so, take the steps required of him by this Part of this Act concurrently with the corresponding steps required of him by Schedule 1 to this Act or, as the case may be, the Acquisition of Land Act 1981 in connection with the making of the related instruments.

(6) When the Secretary of State has decided whether to proceed with the construction or improvement for which an environmental impact assessment has been made, he must publish his decision together with a statement confirming that he has complied with sub-section (5), **and describing the right under section 105D (1) to challenge the validity of the decision,** and must make available to the public documents containing —

(a) the content of the decision and any conditions attached thereto;

(b) the main reasons and considerations on which the decision is based; ~~and~~

(c) where his decision is to proceed with the construction or improvement, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the project; **and**

(d) **information about the consultation carried out in compliance with this section and section 105C, the representations received on consultation, and any changes made as a result of those representations.**

(7) Publication by the Secretary of State in accordance with sub-sections (1), (3) and (6) shall be —

(a) in the London Gazette;

(b) in at least one local newspaper circulating in the area in which the project for the construction or improvement of the highway is **proposed to be** situated; **and**

(c) **if the Secretary of State uses a website for the publication of information about projects that are subject to the procedure required by this Part of this Act, on that website.**

(8) In this section "the consultation bodies" means —

- (a) any principal council as defined in sub-section (1) of section 270 of the Local Government Act 1972 for the area where the land is situated;
- (b) where the land is situated in England —
 - (i) English Heritage and Natural England; and
 - (ii) the Countryside Council for Wales and the National Assembly for Wales where, in the opinion of the Secretary of State, the land is sufficiently near to Wales to be of interest to them;
- (c) where the land is situated in Wales —
 - (i) the Countryside Council for Wales; and
 - (ii) any organisation referred to in paragraph (b)(i) where in the opinion of the National Assembly for Wales, the land is sufficiently near to England to be of interest to the organisation;
- (d) the Environment Agency; and
- (e) any other public authority which has environmental responsibilities and which the Secretary of State or the National Assembly for Wales considers to be likely to have an interest in the project.

105C Other Member EEA States

- (1) This section applies if —
 - (a) it appears to the Secretary of State that a project to which section 105A(3) applies is likely to have a significant effect on the environment in another Member EEA State; or
 - (b) ~~a Member~~ an EEA State the environment of which is likely to be significantly affected by such a proposal asks the Secretary of State for information about it.
- (2) The Secretary of State must give the Member EEA State —
 - (a) a description of the project, together with any information available to him which suggests that it may have a significant effect on the environment in the Member EEA State;
 - (b) any information which he has on the nature of the decision which may be taken on the project;
 - (c) such information about the ~~environmental impact assessment procedure (if he considers it appropriate)~~ procedure required by this Part of this Act as he considers appropriate; and

- (d) a reasonable period within which to indicate whether it wishes to participate in that procedure.
- (3) Subsection (2) (a) and (b) must be complied with no later than the date of publication of the determination referred to in Section 105B (1).
- (4) If the Member **EEA** State indicates that it wishes to participate in the ~~environmental impact assessment~~ procedure **required by this Part of this Act**, the Secretary of State must give it —
- (a) a copy of the environmental statement for the project (if he has not already done so); ~~and~~
- (b) any **the** information ~~about the environmental impact assessment procedure which he considers it appropriate to give and which has not already been given to the Member State~~ **required by subsection (3A) of section 105B to be included in the notice under subsection (3) of that section; and**
- (c) any information about the procedure required by this Part of this Act which he considers it appropriate to give and which has not already been given to the EEA State.**
- (5) The Secretary of State, so far as he is concerned, must also -
- (a) arrange for the information which he has given to the Member **EEA** State to be made available within a reasonable time, to —
- (i) the authorities referred to in Article 6(1) of the Directive; and
- (ii) members of the public in the Member **EEA** State who are likely to be concerned; and
- (b) ensure that those authorities and the public concerned are given a reasonable opportunity to give him their views before he decides whether to proceed with the project to which the environmental impact assessment relates.
- (6) The Secretary of State must, in accordance with Article 7(4) of the Directive -
- (a) enter into consultations with the Member **EEA** State concerned regarding, among other matters, the potential significant effects of the project on the environment of that Member **EEA** State and the measures envisaged to reduce or eliminate those effects; and
- (b) agree with that Member **EEA** State a reasonable period for those consultations.

(7) Where a ~~Member~~ **an EEA** State has been consulted in accordance with subsection (4), ~~on the determination of the application concerned the Secretary of State must,~~ **after deciding whether to proceed with the project to which the environmental statement relates,** inform the Member **EEA** State of the decision and ~~must~~ give it documents containing the matters referred to in section 105B (6).

~~(8) In this section "Member State" has the same meaning as in the Directive.~~

105D Validity of decisions

(1) If a person aggrieved by a decision of the Secretary of State to proceed with the construction or improvement for which an environmental statement has been made desires to question the validity of the decision on the ground that—

(a) it is not within the powers of this Act; or

(b) any requirement of this Part of this Act has not been complied with in relation to the decision;

he may, within 6 weeks from the date on which the decision is first published under section 105B (6), make an application for the purpose to the High Court.

(2) On any such application, the Court —

(a) may by interim order suspend the operation of the decision, or any aspect of it, either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings; and

(b) if satisfied that the decision is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any requirement of this Part of this Act, may quash the decision or any aspect of it, either generally or in so far as it affects any property of the applicant.

(3) Subject to subsection (2), a decision to which subsection (1) applies shall not be questioned in any legal proceedings whatever.

ANNEX B TRANSPOSITION TABLE

	New or amended Article of the EIA Directive (85/337/EEC)	Article of the Public Participation Directive (2003/35/EC) inserting it	New or amended section of Highways Act 1980 giving effect to it	Regulation inserting the new or amended section of the Highways Act 1980	Summary of what the new or amended Articles of the EIA Directive provide? <i>(If no provision made in the Regulations for transposition the reasons for this are given in italics).</i>
1.	1(2)	3(1)	-	-	Add definitions of “the public” and “the public concerned”. <i>It is considered unnecessary to add these definitions because the Regulations use the expressions “person” and “member of the public” which also include bodies of persons corporate or unincorporate.</i>
2.	1(4)	3(2)	-	-	Member States may choose not to apply the Public Participation Directive to projects serving national defence purposes. <i>It is not envisaged that such an exemption would be needed for the schemes to which these Regulations relate.</i>
3.	2(3)(a) and 2(3)(b)	3(3)	-	-	Where (in exceptional cases) a Member State exempts a project from environmental impact assessment, these new provisions would require it to provide the public with environmental information obtained under other forms of assessment and also information relating to the decision to so exempt the project. <i>Part VA of the Highways Act does not provide for any exemptions to the environmental impact assessment regime, so these provisions do not apply.</i>
4.	6(2) opening paragraph	3(4)	105A (3), and 105B (3) and (3A)	2(3), 3(3) and 3(4)	The public shall be notified about the proposed project early in the environmental decision-making process. See rows 5-11 below.
5.	6(2)(a)	3(4)	105B (3A) (a) and (b)	3 (4)	The notice shall inform the public of the request for “development consent”. (Note: These Regulations only relate to highway schemes of the Secretary of State in England, and the National Assembly in Wales. There is therefore no request made to them by a third party for “development consent” as such. However the equivalent of a request for “development consent” for the purposes of

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					these Regulations is their consideration whether to implement a project the design of which has been developed in sufficient detail for an informed decision to be made).
6.	6(2)(b)	3(4)	105B (3A) (c)	3(4)	The notice shall inform the public that the project is subject to an EIA procedure and, where relevant, if another Member State may be affected by the project.
7.	6(2)(c)	3(4)	105B (3A) (a), (f) and (i)	3(4)	The notice shall give the public details of competent authorities responsible for taking the decision, from which information can be obtained, to which comments or questions can be sent and of the timescale for comments or questions.
8.	6(2)(d)	3(4)	105B (3A) (j)	3(4)	The notice shall inform the public of the nature of possible decisions on the project.
9.	6(2)(e)	3(4)	105B (3A) (d), (e), (f), (g), and (h)	3(4)	The notice shall give the public an indication of the availability of the required environmental information.
10.	6(2)(f)	3(4)	105B (3A) (d), (e), (f), and (h)	3(4)	The notice shall inform the public of the times and places and means by which the environmental information will be made available.
11.	6(2)(g)	3(4)	105B (3A) (d), (e), (f), (g), (h), (i), and (j)	3(4)	The notice shall give the public details of the arrangements for public consultation.
12.	6(3)(a)	3(4)	105B (3B) (a), (b), and (c)	3(4)	Environmental information to be made available to the public within reasonable time-frames.
13.	6(3)(b)	3(4)	105B (3B) (a), (b), and (c)	3(4)	The authority is to make available to the public, within a reasonable time, the main reports and advice issued to the authority at the time when the Article 6(2) publicity (rows 5 – 11 of this table) is made. This will be the same information as indicated in the row above.
14.	6(3)(c)	3(4)	-	-	Relevant environmental information which:

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					(a) is required to be made available under EC Directive 2003/4/EC but, (b) only becomes available after publicity has been given under Article 6(2), is to be made available. <i>This requirement is not transposed in these Regulations because provision to make such information available has already been made in SI 2004/3391 (e.g. regulation 4(4) (b) and 5).</i>
15.	6(4)	3(4)	Part VA (as amended by these Regulations) taken as a whole. In particular 105B (3A) (i) and (5) (b) and (c)	These Regulations taken as a whole, in particular regulations 3(4) and 3(6)	The public are to be given early and effective opportunities to participate in the environmental decision making procedures and be entitled to express comments and opinions when all options are open to the authority before the decision on the project is taken.
16.	6(5)	3(4)	105A (3), 105B (3), (3A), (3B), (5) and (7)	2(3), 3(3), (4), (6) and (7)	The detailed arrangements for informing the public and for consulting them are to be determined by the Member State.
17.	6(6)	3(4)	105A (3), 105B (3), (3A) (d), (e), (f), (h) and (i), (3B) and (5) (b)	2(3), 3(3), (4) and (6)	Reasonable time-frames for the different phases are to be provided, allowing sufficient time for informing the public and for the public to prepare and participate effectively in the environmental decision-making.
18.	7(1)	3(5)(a)	105C (2) (c)	4 (3)	Repeats existing wording of Article 7(1) with the following changes: (1) Substitutes for “the Environmental Impact Assessment procedure” (which is undefined), “the environmental decision-making procedures referred to in Article 2(2)” which is more certain. (2) Also makes clear that the reference in Article 7(1) to “paragraph 2” is a reference to paragraph (2) of article 7. (Note: (1) First objective transposed by regulation 4 (3). (2) <i>Second objective is a minor</i>

	New or amended Article of the EIA Directive (85/337/EEC)	Article of the Public Participation Directive (2003/35/EC) inserting it	New or amended section of Highways Act 1980 giving effect to it	Regulation inserting the new or amended section of the Highways Act 1980	Summary of what the new or amended Articles of the EIA Directive provide? (If no provision made in the Regulations for transposition the reasons for this are given in italics).
					<i>drafting amendment which does not necessitate an amendment to Part VA of the Highways Act 1980.)</i>
19.	7(2)	3(5)(a)	105C (4) (i.e. introductory words and new paragraphs (b) and (c))	4(4)	Repeats the existing wording of article 7(2) with the following changes:- (1) Substitutes for “the Environmental Impact Assessment procedure”, (which is undefined), “the environmental decision-making procedures referred to in Article 2(2)” which is more certain. (2) Redefines what information has to be supplied to an affected Member State which wants to participate in the procedure. (Note: (1) First objective transposed by regulation 4 (4) (a). (2) Second objective transposed by regulation 4 (4) (c) combined with existing section 105 C (4) (a)).
20.	7(5)	3(5)(b)	-	-	The detailed arrangements for implementing Article 7 to be determined by the States concerned and to be such as to enable effective public participation by members of the public in the State affected. <i>Section 105C (5) of the Highways Act 1980 already complies with this provision.</i>
21.	9(1)	3(6)(a)	105B (5)(b) and (c), and (6)(d)	3 (6) and (8) (d).	Repeats existing wording of article 9(1) with the following changes:- (1) makes clear that the decision on the project is taken “having examined the concerns and opinions expressed by the public concerned” and (2) the information to be made available to the public following the decision is to include information about the public participation process.
22.	9(2)	3(6)(b)	-	-	Repeats existing wording of article 9(2) with the following changes:- (1) Makes clear that existing

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					reference to “paragraph 1” is a reference to paragraph 1 of article 9. (2) Adds the following sentence - “The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.” <i>(1) First change is a minor drafting amendment not necessitating any amendment to Part VA of the Highways Act 1980. (2) Second change imposes an obligation on another Member State – thus not for transposition in these regulations.</i>
23.	10a	3(7)	(1) 105D (2) 105B (6)	(1) 5 (2) 3 (8) (a)	(1) Member States to ensure that procedures are in place to enable members of the public concerned to challenge the substantive or procedural legality of decisions. (2) Member States to ensure that practical information is made available to the public about access to such review procedures.
24.	Annex I - paragraph 22.	3(8).	105A (1) (updated definition of “the Directive”)	2 (2) (a) and (b)	Adds the following new category to the list, in Annex I of the EIA Directive, of projects subject to mandatory environmental impact assessment :- “22. Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.”
25.	Annex II - paragraph 13.	3(9)	105A (1) (updated definition of “the Directive”)	2 (2) (a) and (b)	Adds the following words to paragraph 13 of Annex II of the EIA Directive: “(change or extension not included in Annex I)”.

ANNEX C SCRUTINY HISTORY

Parliamentary scrutiny history relevant to the proposal for what is now Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 87/337/EEC and 96/61/EEC.

EXPLANATORY MEMORANDUM 5657/01

SCRUTINY COMMITTEES' RECOMMENDATIONS

Commons		Lords	
Cleared – Not legally or politically important	Date: 4 April 2001 (Session 00 – 01)	Not Cleared Sifted to Sub – Committee D	Date: 27 March 2001
		Cleared by Sub- Committee D at meeting of	Date: 18 July 2001

EXPLANATORY MEMORANDUM 15386/01

SCRUTINY COMMITTEES' RECOMMENDATIONS

Commons		Lords	
Cleared – Not legally or politically important	Date: 13 February 2002 (Session 01 – 02)	Not Cleared Sifted to Sub – Committee D	Date: 12 February 2002
		Cleared by Sub- Committee D	Date: 20 March 2002

EXPLANATORY MEMORANDUM 15523/02

SCRUTINY COMMITTEES' RECOMMENDATIONS

Commons		Lords	
Cleared – Not legally or politically important	Date: 20 November 2002 (Session 02 – 03)	Cleared	Date: 19 November 2002