

**EXPLANATORY MEMORANDUM TO
THE LOCALISM ACT 2011 (INFRASTRUCTURE PLANNING) (CONSEQUENTIAL
AMENDMENTS) REGULATIONS 2012**

2012 No. 635

1. 1.1 This explanatory memorandum has been prepared by the Department for Communities and Local Government 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, in consequence of provisions within the Localism Act 2011 (the “Localism Act”), secondary legislation that prescribe procedures for the obtaining of development consent for nationally significant infrastructure projects under the Planning Act 2008 (the “Planning Act”).

These are The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI 2009/ No.2263); The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (SI 2009/No.2264); The Infrastructure Planning (Interested Parties) Regulations 2010 (SI 2010/No.102); The Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/No.103); The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (SI 2010/No.104); The Infrastructure Planning (Fees) Regulations 2010 (SI 2010/No.106); The Infrastructure Planning (Decisions) Regulations 2010 (SI 2010/No.305); The Conservation of Habitats and Species Regulations 2010 (SI 2010/No.490); The Community Infrastructure Levy Regulations 2010 (SI 2010/No.948); and the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (SI 2011/No.2055).

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

3.1 None.

4. Legislative Context

4.1 The Planning Act established the Infrastructure Planning Commission and a system for obtaining development consent for nationally significant infrastructure projects. The Localism Act provides for the abolition of that Commission, the transfer of its functions to the Secretary of State, and amends provisions within the Planning Act for the obtaining of development consent for nationally significant infrastructure projects.

4.2 A suite of secondary legislation (listed in paragraph 3 of this Memorandum) sets out the procedures for obtaining development consent under the provisions of the Planning Act.

4.3 These Regulations make changes to this secondary legislation in consequence of the changes made by the Localism Act.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales and Scotland in accordance with the scope of the Planning Act (see section 240).

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 The Planning Act established a new system for granting development consent for nationally significant infrastructure projects. It also established an Infrastructure Planning Commission as the body to provide pre-application advice, examine the applications and, where a relevant National Policy Statement for infrastructure was in force, make the decision about whether or not to grant development consent through the making of a Development Consent Order (DCO). A suite of secondary legislation prescribes procedures for the pre-application, application, examination, and decision making stages for development consent proposals, and for changing or revoking previously granted consents. This instrument amends the secondary legislation so that it reflects the consequences of the Localism Act's abolition of the Infrastructure Planning Commission, and other amendments that the Localism Act has made to the Planning Act.

7.2 To reflect the transfer of functions to the Secretary of State, throughout the secondary legislation the instrument substitutes "Secretary of State" for references to "Infrastructure Planning Commission" and "IPC", and also for "Commission" where that has the meaning of the Infrastructure Planning Commission. The instrument also substitutes "appointed person(s)" for references to "Commissioner(s)" (following the equivalent change in the Planning Act). The Secretary of State will appoint persons for the handling of cases at the pre-application and application stages, and to form the Examining authority for the examination stage.

7.3 Various other amendments are made so that the abolition of the Infrastructure Planning Commission and the transfer of its functions to the Secretary of State by the Localism Act are fully reflected. Further amendments apply changes to application and examination procedures that have been made by Localism Act amendments to the

Planning Act. The principle amendments are described below in the context of the instrument being amended.

The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (regulation 2)

7.4 These Regulations implement, in relation to applications for development consent for nationally significant infrastructure projects, the Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment (the “Environmental Impact Assessment (‘EIA’) Directive”)¹. The Regulations are amended throughout to reflect that the Secretary of State is now the ‘competent authority’ for the purposes of determining whether environmental information has sufficiently been taken into account within an application for a DCO. The Secretary of State is also made the appropriate authority for the making of screening and scoping opinions, these being, respectively, the determination of whether a proposal would require an EIA and what issues should be addressed within an EIA.

7.5 Regulations 9, 16 and 22 are amended to reflect that the Secretary of State will no longer make screening ‘directions’ for DCO applications, as these directions are no longer relevant given that the Secretary of State will now be the competent authority. A screening direction is where the Secretary of State can intervene and require an EIA to now be undertaken in the circumstances either where the DCO application had not included an Environmental Statement (the output of an EIA), or the development proposal had previously been given a screening opinion by the competent authority to the effect that an EIA was not required.

The Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009 (regulation 3)

7.6 These Regulations set out various matters relating to the making of an application for development consent. These include pre-application consultation requirements, the form and content of an application, publicity for an application that has been accepted for examination, and the list of statutory parties who are to be consulted and notified. Draft Development Consent Orders contain ‘provisions’ which describe the development for which consent is being sought, with an Explanatory Memorandum providing a further explanation of these provisions. Regulation 5 is amended to remove the requirement that divergences from prescribed model provisions be explained within the Explanatory Memorandum. These model provisions had been set out within the Infrastructure Planning (Model Provisions) Order 2009, however that Order will no longer have effect as its enabling powers have been removed by paragraph 6 of Schedule 13 to the Localism Act 2011.

The Infrastructure Planning (Interested Parties) Regulations 2010 (regulation 4)

¹ The EIA Directive has recently been codified and is now 2011/92/EU, OJ L26/1 28.1.2012.

7.7 These Regulations provide a list of specified persons, and specified descriptions, of statutory parties who were automatically interested parties to, and therefore able to take part in, an examination of a DCO application. Regulation 3 is amended so as to reflect that the power within the Planning Act for the Secretary of State to prescribe such statutory parties has been amended by section 138(5) of the Localism Act. The title to the Schedule has been amended to reflect that, now, a statutory party will only become an interested party if it satisfies the new requirements of either (a) having submitted a relevant representation in response to a notification about the application, or (b) has otherwise responded positively to the Examining authority's notification that it may become an interested party. This is a new process that has been established by section 138(6) of the Localism Act.

The Infrastructure Planning (Examination Procedure) Rules 2010 (regulation 5)

7.8 These Rules set out the procedure to be followed for the examination of an application for development consent. The Rules are amended throughout to reflect that applications for development consent will now be made to, and decided by, the Secretary of State. Amendments also provide for it now being the Secretary of State that is either obliged, or has the power, to make and publicise appointments and other procedural decisions where previously these roles fell to the Infrastructure Planning Commission, or the Chair to that Commission.

7.9 References to 'specified matters' have been removed throughout these Rules. Where the Secretary of State had directed that an application be dealt with by the Secretary of State because the proposal raised issues of defence or national security, the Secretary of State could direct that 'specified matters' be examined by the Infrastructure Planning Commission. All applications will now be submitted to the Secretary of State, with a different approach taken to ensuring that the defence or national security issues are not examined in public. Amendments to rules 2 and 4, and paragraph 1 of the Schedule, apply changes to the procedures for the handling of information whose public disclosure would be contrary to the national interest. They include cross-referring to the new section 95A (Hearings: defence and national security) of the Planning Act. Rule 19 is amended to reflect that the Examining authority will now always submit a written report to the Secretary of State after completing its examination, as it will no longer decide an application for development consent.

The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (regulation 6)

7.10 These Regulations set out the procedure to be used when an applicant wants to compulsorily acquire land, in addition to land that had been identified within an application that had already been submitted for examination. The Regulations also prescribe the forms that must be used when an order granting development consent authorises the compulsory acquisition of land. Various amendments are made to these Regulations so as to implement the equivalent amendments that have been needed to be

made to the Infrastructure Planning (Examination Procedure) Rules 2010 (described above).

The Infrastructure Planning (Fees) Regulations 2010 (regulation 7)

7.11 These Regulations specify the circumstances in which fees are payable, and the amounts to be charged.

7.12 Regulation 10 provided for the waiving of fees where the Secretary of State had directed that a development proposal be treated as an application for a DCO under section 35 of the Planning Act where that proposal has already been submitted to another authority for determination and the relevant fees to have been paid. Amendments to section 35 mean this direction can also now be made on a proposal which has yet to have been submitted to another authority. This has required an amendment to regulation 10 so that fees may still only be waived for proposals that had already been submitted to another authority.

7.13 Regulation 11 provided for where the Secretary of State had directed that an application be referred to the Secretary of State, rather than to the Infrastructure Planning Commission. As all applications will now be submitted to the Secretary of State, this regulation is no longer applicable and so is being omitted.

The Infrastructure Planning (Decisions) Regulations 2010 (regulation 8)

7.14 These Regulations set out matters to which the decision-maker must have regard when deciding applications for development consent. The Regulations are amended to reflect that the Secretary of State will always now be the decision-maker for DCO applications. Regulation 7 is amended to specify that it is now the Secretary of State that must, when deciding DCO applications, have regard to the United Nations Environmental Programme Convention on Biological Diversity of 1992.

The Conservation of Habitats and Species Regulations 2010 (regulation 9)

7.15 These Regulations consolidated the Conservation (Natural Habitats, &c.) Regulations 1994, that had implemented Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. Regulations 82 and 83 are amended so as to omit a process which is now superfluous following abolition of the Infrastructure Planning Commission. The process required that Commission to review a previously granted development consent, when the location of the development has subsequently been designated as a European site or European offshore marine site for the purpose of the Council Directive 92/43/EEC (the 'Habitats Directive').

The Community Infrastructure Levy Regulations 2010 (regulation 10)

7.16 These Regulations brought into force the detail of the Community Infrastructure Levy that was established under the Planning Act. Regulations 11 and 78 are amended so

as to omit references to the Infrastructure Planning Commission as being a relevant development consenting authority for the purposes of the Community Infrastructure Levy

The Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (regulation 11)

7.17 These Regulations prescribe application, examination and decision-making procedures for proposals to make changes to, or revoke, a development consent that had been previously granted. As these Regulations closely followed the procedures for DCO applications under the Planning Act, particularly for changes that would have significant effects ('material changes') similar amendments are applied to those which have been made to the other secondary legislation.

7.18 The Regulations are amended throughout to replace "appropriate authority" with "Secretary of State", as all applications will now be submitted to, and decided by, the Secretary of State. They are also amended throughout to reflect that the examination is undertaken by an Examining body that will now be made up of one or more "appointed persons" (instead of Commissioners) and which is appointed by the Secretary of State.

7.19 The "interested party" definition in regulation 2 is amended so the prescribed statutory parties, and any local authorities that are adjacent to the local authority area in which the development proposal is situated, will now only become interested parties for the examination if they either submit a relevant representation or notify the Examining body that they wish to become an interested party. Any person who is or becomes an interested party now has the option of ceasing to be one at any point during the examination.

7.20 Regulation 13 is amended so that the applicant is now only required to make its Statement of Community Consultation available to be viewed within the vicinity of the land, instead of publishing it in full in a local newspaper. As the Secretary of State will always now make the decision on the application, regulation 43 is amended to require the Examining body to make a written report to the Secretary of State, and to do so within three months of the earliest of either the close of the examination or the end of the examination period.

7.21 Regulation 49 is amended to require the Secretary of State to have made the decision within three months of the earliest of either the receipt of the written report from the Examining body, or the end of the three month deadline by which the Examining body was required to have made the report.

7.22 Regulation 52 is amended to require a copy of the statement of reasons for a decision now only to be sent to those persons who were an interested party during the examination and still are at the close of the examination. Regulations 60 to 64 relating to compensation are amended to reflect that the Secretary of State is now always the "responsible authority" for the purpose of these compensation provisions.

- Consolidation

7.23 The Department has no plans to consolidate the legislation, at present.

8. Consultation outcome

8.1 A consultation was not undertaken, as this instrument is amending existing secondary legislation so that it reflects the nationally significant infrastructure projects provisions within the Localism Act 2011.

9. Guidance

9.1 The Secretary of State's existing suite of guidance for the nationally significant infrastructure planning system is already the subject of a review to refresh it in light of experience gained to date in its operation. The intention is to publish revised guidance by July 2012. That will now also reflect this instrument's amendments to the Planning Act and other relevant provisions within the Localism Act 2011.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible with respect to this instrument.

10.2 The main impact on the public sector is negligible with respect to this instrument.

10.3 An Impact Assessment has not been prepared for this instrument. The instrument only amends secondary legislation to reflect the provisions of the Localism Act 2011. An Impact Assessment was prepared for the Localism Bill².

11. Regulating small business

11.1 Although the legislation applies to small business, the Government believes it is highly unlikely that a small business will apply for a development consent order for a nationally significant infrastructure project under the Planning Act 2008.

12. Monitoring & review

12.1 A review of the nationally significant infrastructure planning system, which is currently intended to take place in 2014, is likely to include a review of the secondary legislation which this instrument amends.

² The Impact Assessment can be viewed on the website of the Department for Communities and Local Government at - <http://www.communities.gov.uk/publications/localgovernment/localisminfrastructureprojects>

13. Contact

Paul Lancaster at the Department for Communities and Local Government Tel: 0303 44 41597 or email: paul.lancaster@communities.gsi.gov.uk can answer any queries regarding the instrument.