

**EXPLANATORY MEMORANDUM TO THE
ENVIRONMENTAL IMPACT ASSESSMENT (LAND DRAINAGE IMPROVEMENT
WORKS) (AMENDMENT) REGULATIONS 2005**

2005 No.1399

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.

2. Description

2.1 These Regulations amend the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999 (Statutory Instrument 1999 No. 1783) to bring them into line with recent European legislation. The changes improve public participation in the process of carrying out Environmental Impact Assessment on proposed land drainage works carried out by drainage authorities.

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

3.1 None

4. Legislative Background

4.1 Directive 85/337/EEC as amended by Council Directive 97/11/EC *on the assessment of the effects of certain public and private projects on the environment* (usually known as the Environmental Impact Assessment, or EIA, Directive) is applied to Land Drainage improvement works carried out by drainage bodies in England and Wales, which are exempt from planning permission procedures, being permitted development under the Town and Country Planning (Environmental Impact Assessment) Regulations 1999, by The Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999 (SI 1999 No. 1783).

4.2 The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (usually known as the Aarhus Convention) was adopted by the European Commission, among others, on 25th June 1998.

4.3 Directive 2003/35/EC *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 85/337/EEC and 96/61/EC* (usually known as the Public Participation Directive) was introduced to bring Community legislation into line with the public participation provisions of the Aarhus Convention.

4.4 Article 3 of the Public Participation Directive amends the Environmental Impact Assessment Directive.

4.5 This Statutory Instrument amends SI1999 No.1783 to bring it into line with the amendments to the Environmental Impact Assessment Directive.

4.6 A Transposition Note is attached to this explanatory memorandum at Annex A

4.7 Scrutiny History of the Public Participation Directive

- 4 April 2001 - Commons - cleared Not Legally Important
- 27 March 2001 – Lords – sifted
- 30 July 2001 – Lords – cleared by report

5. Extent

5.1 These Regulations apply to England and Wales.

6. European Convention on Human Rights

Not applicable

7. Policy background

7.1 In addition to the legislative requirements outlined in section 4 above, this Statutory Instrument also makes a number of other updates and alterations to SI1999 No. 1783

7.2 In recognition of the need to ensure that Environmental Impact Assessment includes the effects of works on the historic environment, these Regulations make English Heritage a statutory consultee.

7.3 In recognition of the need to ensure that public money is spent efficiently, and that the cost of advertising in local newspapers is of concern to some of the drainage bodies, these Regulations provide drainage bodies with a choice:

- Public notices may be advertised in two local newspapers, as is currently required, or
- Public notices may be displayed on the site, where such a notice can be placed so that it is clearly readable from a public highway, and also advertised in a single local newspaper.

This change will bring these Regulations into line with the requirements for public notification of proposed works subject to planning permission.

7.4 In recognition of the fact that some land drainage works are actually designed to stop or reduce drainage for environmental benefits, and that the definition of 'improvement works' in the 1999 Regulations does not make it sufficiently clear that such works also require Environmental Impact Assessment, the definition in these Regulations is amended to include alteration as well as 'improvement' to drainage structures.

7.5 Consultation was carried out with all drainage bodies (local authorities, internal drainage boards and the Environment Agency), the statutory consultees (English Nature, English Heritage and the Countryside Agency), and other stakeholders including environmental NGOs. A full list of consultees can be found on the Defra website at <http://www.defra.gov.uk/environ/fcd/consult/eiacons.htm>

Consultees were broadly supportive of the proposals. Concerns were raised about the use of site notices in place of newspaper advertising, as many land drainage sites are in remote rural areas. We have addressed this concern by providing drainage bodies with a choice as outlined in paragraph 7.3. above.

A small number of consultees were concerned that the amendment of the definition of 'improvement works', outlined in paragraph 7.4 above, would extend the scope of the Regulations to include routine maintenance and repair works. We have addressed this concern by writing a guidance note to drainage bodies to accompany the Regulations, which explicitly states that improvement and alteration can only be interpreted with respect to the function and effect of the original structure, i.e. maintenance and repair works are not covered by the Regulations.

The full consultation report is available on the Defra website at <http://www.defra.gov.uk/environ/fcd/consult/eiacons.htm>

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum at Annex B

9. Contact

Lucy Toman at the Department for Environment, Food and Rural Affairs, Tel: 01904 455586 or e-mail: lucy.toman@defra.gsi.gov.uk can answer any queries regarding the instrument.

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Annex A - Transposition Note

| Article | Purpose | Implementation | Comments |
|----------------|---|--|--|
| 3.1 | To define the 'public' and the 'public concerned' referred to in the Directive. | Not required. | The 1999 Regulations are sufficiently clear that the public should be consulted; the distinction between 'public' and 'public concerned' is not considered relevant. |
| 3.2 | To provide Member States with the option to exempt projects serving national defence purposes. | Not required. | The 1999 Regulations apply to land drainage improvement projects carried out by drainage bodies for which the Town and Country Planning (General Permitted Development) Order 1995 (S.I. 1995/418) grants planning permission without any requirement for an application to be made under Part III of the Town and Country Planning Act 1990. Works for National Defence purposes would never be subject to these Regulations. |
| 3.3 | To increase the amount of information available to the public if the appropriate authority considers that an alternative form of assessment would be appropriate for a specific case. | Implemented by Regulation 5(3) of the 2005 Regulations, amending Regulation 3(2) and inserting a new Regulation 3(2A) of the 1999 Regulations. | This amendment requires that where the appropriate authority exercises their power to direct that particular works are exempted from the application of these Regulations, they must also consider whether another form of assessment would be appropriate and to make available to the public information on the results of any alternative assessment. |

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|------|--|---|--|
| 3.4 | To define the information given in public notices regarding the proposed works, and to ensure that the public have access to all the relevant information. | Implemented by Regulation 3 (3) of the 2005 Regulations, amending Regulation 6 of the 1999 Regulations, and by Regulation 3(6) of the 2005 Regulations, inserting new Regulation 13A into the 1999 Regulations. | The Article details the information that must be provided in the public notices, this is reproduced in the new Regulations. |
| 3.5 | To set out the information that should be provided to another Member State where a proposed project is likely to have significant on the environment of the other Member State. | Implemented by Regulation 5(4) of the 2005 Regulations, amending Schedule 3 (4) of the 1999 Regulations which refer back to Regulation 6 of the 1999 Regulations as amended by Regulation 3(3) of the 2005 Regulations. | The Article details the information that must be provided to other Member States, this is reproduced in the new Regulations. |
| 3.6a | A minor addition, clarifying that the Appropriate Authority, having made a decision to grant or refuse consent for works, must make available to the public the main reasons for the decision – having examined the concerns and opinions expressed by the public. | Implemented by Regulation 3(4) of the 2005 Regulations, amending Regulation 12(7) of the 1999 Regulations. | |
| 3.6b | The Appropriate Authority, having made a decision to grant or refuse consent for works, must make the same information as outlined in 3.6a available to any other Member State consulted. | Not required | Paragraph 7 of Schedule 3 already requires this information to be supplied to any other MS consulted. The second paragraph of 3.6b is not required as it refers to the duties of the other Member State. |

| | | | |
|-----|--|--------------|--|
| 3.7 | To provide for the public to have access to a legal and/or administrative review procedure to challenge decisions made by the Appropriate Authority. | Not required | The Appropriate Authority for these Regulations is the Government Minister. Ministerial decisions are already subject to judicial review in England and Wales. |
| 3.8 | Addition to Annex I, applying the Directive to changes and extensions to projects listed in the Annex where the alteration would in itself meet the thresholds set out in the Annex. | Not required | Land drainage improvement works are not Annex I projects. |
| 3.9 | Minor amendment to Annex II of the Directive, applying the requirements of Annex II projects to changes and extensions to projects listed in Annexes I and II where the alteration would not meet the thresholds set out in Annex I. | Not required | Changes and alterations to land drainage improvement works are already covered by the Regulations. |

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REGULATIONS 2005**

Annex B – Regulatory Impact Assessment

1. Title of Proposal

The Environmental Impact Assessment (Land Drainage Improvement Works) (Amendment) Regulations 2005

2. Purpose and intended effect of measure

(i) The objective

To transpose the requirements of EC Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 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 85/337/EEC and 96/61/EEC (The Public Participation Directive)

(ii) The background

The Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999 transposed into English law the provisions of Council Directive 85/337/EEC (the Environmental Impact Assessment Directive)

In 2003, the Public Participation Directive amended the Environmental Impact Assessment Directive and those amendments must be transposed into English law before 25 June 2005.

(iii) Risk assessment

Failure to transpose, either as a result of a decision to do nothing or make non-regulatory provisions, would result in infraction proceedings from the EC. These proposed amendments will avoid this situation from arising.

Late transposition is also highly likely to result in infraction proceedings, and the risks of transposition being delayed are as follows:

- Failure by officials to draft new regulations in a timely manner
 - drafting of the new Regulations is well underway so this risk is small.
- Consultation resulting in major alterations to draft regulations
 - we propose to undertake a limited consultation exercise with key stakeholders, as the Regulations cover a specific and well-defined set of works, and apply only to the flood and coastal defence operating authorities, i.e. the Environment Agency, Internal Drainage Boards and Local Authorities.
 - The changes required are relatively minor as the Regulations already provide for a high level of public participation; the additional burden on the operating authorities is not likely to be significant and we do not anticipate that the changes will be controversial.
- Decision not to transpose Article 10a may lead to concern from Consultees or infraction proceedings
 - The amended EIA Directive includes a new article (10a) requiring that the public must have access to an independent administrative or judicial review of decisions. The proposal does not include new provision for this. There is a risk that some Consultees may consider that an independent body should be set up to review EIA decisions as judicial review is an expensive process. However, we consider that

(a) independent review of operating authorities' decisions is already provided by Defra Ministers, and (b) that judicial rather than administrative review is appropriate for questioning Ministerial decisions. Legal advice is that English law already provides for any Ministerial decision to be subject to review by the courts and therefore transposition of this article is not required.

3. Options

Transposition is required by EC law, meaning that 'Do nothing' or 'alternatives to legislation' are not legal options and can be discarded.

The remaining options are:

1. Transposition of the requirements of EC Directive 2003/35/EC into English law by means of amendments to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999
2. Transposition of the requirements of EC Directive 2003/35/EC into English law by means of new legislation

Option 2 would be more costly and provide no additional benefit, therefore the only reasonable option is Option 1 as proposed.

4. Benefits

- Economic – no economic benefits have been identified
- Environmental – The proposed inclusion of English Heritage as a statutory consultee will bring the Regulations into line with the Strategic Environmental Assessment Directive. The 1999 Regulations already require that the environmental statement includes consideration of the historic environment, and that drainage bodies consult with any other body or organisation which may have an interest in the works. However, the inclusion of English Heritage as a statutory consultee may improve the protection of the historic environment by providing an additional safeguard in the unlikely event of a drainage body being unaware of a potential impact on historic assets. There may also be minor environmental benefits due to increased public information under certain circumstances, and alterations to the way in which information is publicised, but this is not likely to be significant.
- Social – there may be minor social benefits if public participation increases as a result of increased public information under certain circumstances, and alterations to the way in which information is publicised, but this is not likely to be significant.

5. Costs

- Economic – there may be a minor increase in operating authorities' costs in preparing EIA in certain circumstances, but these are not likely to be significant.
- Environmental – no environmental costs have been identified.
- Social – no social costs have been identified.

6. Equity and Fairness

Flood Management and Land Drainage works are permissive and jointly funded from general taxation and local funding. The benefits of the proposal, i.e. increased public participation in environmental assessment, are mainly gained by those who would be directly affected,

whereas the costs are borne by the wider public who may benefit very little if at all from the proposals. However, the Regulations require consultation with bodies representing the national interest, therefore the wider public is not significantly disadvantaged.

The impacts on rural areas have been considered; the public in rural areas are not adversely affected or less able to engage with the Regulations than those in urban areas.

The proposal does not have a greater impact on any particular group or sector of society.

7. Consultation with small business: the Small Firms' Impact Test

A Small Firms Impact Test is not required in this Regulatory Impact Assessment as the proposal only affects the flood and coastal defence operating authorities.

8. Competition Assessment

A competition assessment is not required in this Regulatory Impact Assessment because the proposal impacts only on public services. This has been verified by the completion of a Public Service Threshold Test.

9. Enforcement and Sanctions

(i) How will the proposal be enforced?

If works are carried out without complying with the Regulations, the Regulations provide the Minister with powers to apply to the Court for orders for the operating authority to cease and remove such works, and to reinstate the site.

(ii) Who will enforce this legislation?

Defra

(iii) Will the legislation impose criminal sanctions for non-compliance?

No.

Compliance with the current Regulations is satisfactory; occasional cases of non-compliance are usually the result of misunderstanding. The proposed amendments will clarify which works are covered by the Regulations, and the stakeholder consultation will refresh awareness of the requirements among the operating authorities. The risk of non-compliance is low.

10. Monitoring and Review

On applying for grant-aid, local authorities and internal drainage boards advise Defra whether the works are subject to the EIA Regulations, whether an Environmental Statement has been produced and whether objections have been made and their outcome. This information is maintained centrally in a Defra database. The Environment Agency maintains its own records and provides information to Defra on request. Compliance with EIA Regulations (where appropriate) is a condition of grant aid for all operating authorities.

11. Consultation

i) Within government

Consultation took place with other public bodies affected by the legislation, namely the Environment Agency, the Local Authorities, the Internal Drainage Boards, English Nature, English Heritage, and the Countryside Agency.

ii) Public Consultation

Consultation also took place with other interested stakeholders, such as RSPB, the Wildlife Trusts, and relevant members of the Flood Management Stakeholder Forum.

Consultees were broadly supportive of the proposals; a full list of consultees and the consultation report is available on the Defra website at <http://www.defra.gov.uk/enviro/fcd/consult/eiacons.htm>

12. Summary and Recommendation

| Option | Total cost per annum Economic, environmental, social | Total benefit per annum Economic, environmental, social |
|--|--|---|
| Transposition of the requirements of EC Directive 2003/35/EC into English law by means of amendments to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999 | No significant costs identified. The considerable costs of infraction proceedings as a result of failure to transpose the legislation are avoided. | Historic environment may be better protected. No other significant benefits have been identified. |

13. Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed by the responsible Minister: ...Elliot Morley.....

Date:23 May 2005.....