

EXPLANATORY MEMORANDUM TO
THE WATER RESOURCES (ENVIRONMENTAL IMPACT ASSESSMENT)
(ENGLAND AND WALES) (AMENDMENT) REGULATIONS 2006

2006 No. 3124

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 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003 (Statutory Instrument 2003 No. 164) 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 water management projects for agriculture carried out by those who abstract or impound water. The Regulations also incorporate provisions to reflect changes which have been made to the abstraction and impounding licensing system under the Water Resources Act 1991.

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) applies to water management projects for agriculture in England and Wales and was implemented by the Water Resources (Environmental Assessment) (England and Wales) Regulations 2003.

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

4.4 This Statutory Instrument implements Article 3 of the Public participation Directive and amends SI 2003 No.164 to bring it into line with the amendments to the Environmental Impact Assessment Directive.

4.5 A Transposition Note is attached to this explanatory memorandum at Annex A.

4.6 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. Territorial Extent and Application

5.1 These Regulations apply to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

7.1 In addition to the legislative requirements outlined in section 4 above, this Statutory Instrument also makes several other alterations to SI 2003 No.164.

7.2 In recognition of the need to ensure that environmental impact assessment is as comprehensive as possible, the Department's consultation document¹ indicated that the definition of bodies to be consulted should be extended to include unspecified other bodies having specific environmental responsibilities.

7.3 The consultation document¹ which discussed the changes proposed to SI 2003 No.164 also invited comments on extensive changes proposed to the abstraction and impoundment licensing system as a consequence of the legislative changes introduced in the Water Act 2003. These included changes to the publicity arrangements, principally to transfer responsibility for publicity from the applicant to the Environment Agency, but also to dispense with the need to advertise in the London Gazette in favour of publication on the Environment Agency's website. The changes to SI 2003 No.164 also therefore include these changes to mirror the revised publicity arrangements for abstraction licensing changes that were introduced on 1 April 2006.

7.4 The abstraction licensing threshold for the purposes of SI 2003 No.164 is 20 cubic metres per day, which is the same as that now applying for all abstraction licensing under section 27 of the Water Resources Act 1991. The Environment Agency may, however, apply to the Secretary of State or National Assembly for Wales for an Order (under section 27A of the 1991 Act) setting a different licensing threshold in a specified area which may be higher or lower than the standard threshold. In recognition of the fact that the licensing threshold may be altered at some point in the future, these regulations ensure that the same threshold will apply in the same area for the purposes of SI 2003 No.164.

7.5 Consultation was carried out with all water companies, organisations representing the interests of those that abstract or impound water, the statutory consultees or those representing them (Countryside Agency, English Nature (now Natural England), English Heritage, Local Government Association, Countryside

¹ Consultation on proposed new abstraction and impounding licensing regulations to apply in England and Wales and proposed changes to the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003. Published by Defra/Welsh Assembly Government - September 2005

Council for Wales and Welsh Local Government Association), and other stakeholders including environmental NGOs. A full list of consultees can be found on the Defra website at

<http://www.defra.gov.uk/corporate/consult/waterresource-regs/index.htm>

7.6 Consultees were broadly supportive of the proposals. Concerns were raised by three consultees about the proposed broadening of the definition of “consultation bodies” to include unspecified other public bodies having specific environmental responsibilities. This was considered too vague and those who commented considered that the bodies concerned should be named. The broadening of the definition was designed, however, to ensure that other bodies would be consulted only where it was appropriate to do so. Bodies such as the Scottish Environmental Protection Agency, whilst not named as an example, may have a legitimate interest in projects close to the border with Scotland. We required a mechanism to embrace consultation with such bodies when and where it was appropriate to do so.

7.7 We have addressed this concern not by naming the bodies to whom it may apply but by qualifying the definition so that the Environment Agency, or the appropriate Minister, would have to have reason to consider that the body would be likely to have an interest in the application.

7.8 It was pointed out by one consultee that there could be overlap of jurisdiction where a water management project for agriculture falling within the scope of SI 2003 No.164 also falls within the scope of the proposed Environmental Impact Assessment (Agriculture) (England) Regulations. This has been resolved through the Agriculture Regulations² excluding from their scope such projects as are subject to these regulations. The Welsh Assembly Government has been asked to make a similar exclusion in respect of its equivalent regulations if there is potential for duplication.

7.9 The full consultation report is available on the Defra website at

<http://www.defra.gov.uk/corporate/consult/responses.htm>

8. Impact

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

9. Contact

Keith Bates at the Department for Environment, Food and Rural Affairs, Tel: 020 7082 8350 or e-mail: keith.bates@defra.gsi.gov.uk can answer any queries regarding the instrument.

² Now made and in force as The Environmental Impact Assessment (Agriculture)(England)(No2) Regulations 2006

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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 2003 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 2003 Regulations apply to water management projects for agriculture which require an abstraction or impoundment licence from the Environment Agency under the Water Resources Act 1991 or a consent under the provisions of the 2003 Regulations themselves. Works for national defence purposes would not 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.	Not required.	Article 2.3 was not transposed since it was not considered necessary to make exemptions in favour of another form of assessment for the limited range of projects subject to the 2003 Regulations.

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 2(5) of the 2006 Regulations, amending Regulation 7 of the 2003 Regulations.	The Article details the information that must be provided in the publicity and advertising arrangements. This is reproduced to the extent necessary in the 2006 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 effects on the environment of the other Member State.	Not required.	Article 7 was not transposed since the limited range of projects subject to the 2003 Regulations could have no impact on any other Member State.
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 2(6) of the 2006 Regulations, amending Regulation 8(3) of the 2003 Regulations.	The 2003 Regulations already provided for most of Article 3.6a and the amendments provide for information about the public participation process to be given.
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	Not relevant since Article 7 has not been transposed for the reason given above.

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 though Regulations 2(6) and (8) of the 2006 Regulations amend Regulations 8(3) and 15(8) of the 2003 Regulations to require that information is provided about any right of challenge to the validity of a decision and the procedure for doing so.	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.	Water management projects for agriculture 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 relevant projects for the purposes of the 2003 regulations are themselves relevant projects if they are likely to have a significant environmental effect. They are thus already covered by the 2003 Regulations.

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Annex B – Regulatory Impact Assessment

1. Title of Proposal

The Water Resources (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2006.

2. Purpose and intended effect of measure

(i) 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) Background

The Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003 transposed the provisions of Council Directive 85/337/EEC (the Environmental Impact Assessment Directive) in respect of water management projects for agriculture in England and Wales.

In 2003, the Public Participation Directive amended the Environmental Impact Assessment (EIA) Directive and those amendments are required to be transposed into English law.

The Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003 therefore need to be amended to transpose the relevant provisions of the Public Participation Directive.

(iii) Risk assessment

Failure to transpose, either as a result of a decision to do nothing or make non-regulatory provisions, will result in infraction proceedings from the EC. Indeed the European Commission issued a Reasoned Opinion to the UK Government on 18 October 2006 concerning failure to notify measures for the transposition into national law of Directive 2003/35/EC. The proposed regulations to amend the 2003 EIA regulations will help mitigate the likelihood of further action on infraction.

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

- Failure by Government to draft new regulations in a timely manner.
 - Drafting of the new regulations is now complete so this risk is small.

- Consultation resulting in major alterations to draft regulations.
 - In the event the consultation responses did not result in any major alterations and there were no comments on the partial RIA.
- 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 independent review of operating authorities' decisions is already provided by Defra Ministers, and 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. Consultation

We consulted on the proposed changes to the 2003 EIA regulations as part of a wider consultation on changes to the licensing system for abstraction and impounding. The changes required to be transposed into the 2003 EIA regulations are relatively minor as the regulations already provide for a high level of public participation. We did not anticipate that the changes would be controversial. For that reason they were subject to a shorter period of consultation, running from 2 September to 31 October 2005.

4. 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:

- (i) Transposition of the requirements of EC Directive 2003/35/EC into English law by means of amendments to the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003, or
- (ii) Transposition of the requirements of EC Directive 2003/35/EC into English law by means of new legislation.

Option (ii) would be more costly and provide no additional benefit, therefore the only reasonable option is Option (i) as proposed.

5. Costs and Benefits

(i) Sectors and groups affected

The 2003 regulations affect the agriculture industry. The regulations apply only where an abstraction or impounding licence, or consent, is required for a water management project for agriculture and the need for environmental impact assessment is not addressed through other regulatory regimes, such as planning law.

(ii) Costs

Economic – there may be a minor cost to the Environment Agency in making available to the public other documents relevant to its determination of the application and publicising information, with its decision, regarding the public participation process, but these are not likely to be significant.

Environmental – no environmental costs have been identified.

Social – no social costs have been identified.

(iii) Benefits

Economic – no quantifiable economic benefits have been identified though it might reasonably be assumed that increased public participation should help cause fewer disputes thus saving the expense of a protracted application process.

Environmental – the consultation bodies for the 2003 EIA regulations are presently the local planning authority (in England and Wales), the Countryside Agency, Natural England and English Heritage (in England) and, in Wales, the Countryside Council for Wales and the National Assembly for Wales. We have extended this definition to include other bodies designated by statutory provision as having specific environmental responsibilities which the Environment Agency, or appropriate Minister as the case may be, considers likely to have an interest in the application. Depending on the nature of the project involved this extension may provide additional environmental information which could allow a broader assessment of the effects of a water management project on the environment.

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.

6. The Small Firms' Impact Test

Small firms abstracting water at rates of less than 20 cubic metres per day will have been removed from licence control by provisions in the Water Act 2003 which have already been implemented. This will have been particularly beneficial to farmers and other small to medium size enterprises. The changes to the 2003 regulations will have little impact other than to improve public participation in the decision-making process. We are also, though, ensuring that the link between the threshold in the 2003 regulations and that obtaining for abstraction licensing remains in future. At present the threshold for both abstraction licensing and the 2003 regulations is 20 cubic metres per day. The abstraction licensing threshold may be varied in specified areas on application to the Secretary of State/Assembly by the Environment Agency. Where the Secretary of State/Assembly makes an Order varying the threshold we intend that the varied threshold applies also for the purposes of the 2003 regulations.

7. Competition Assessment

The Office of Fair Trading's guidelines for competition assessment, published in February 2002 sets out a competition filter of nine questions, the answers to which determine the need to complete a competition assessment as part of an RIA. The following grid summarises the questions and responses that are relevant to the proposals in this consultation.

Number	Question	Response
1	In the market(s) affected by the new regulation, does the firm have more than 10 per cent market share?	No
2	In the market(s) affected by the new regulation, does any firm have more than 20 per cent market share?	No
3	In the market(s) affected by the new regulation, do the three largest firms together have at least 50 per cent market share?	No
4	Would the costs of the regulation affect some firms more than others?	No
5	Is the regulation likely to affect the market structure, changing the number or size of small firms?	No
6	Would the regulation lead to higher set-up costs for new or potential firms compared with the costs for existing firms?	No
7	Would the regulation lead to higher on-going costs for new or potential firms compared with the costs for existing firms?	No
8	Is the market characterised by rapid technological change?	No
9	Would the regulation restrict the ability of firms to choose the price, quality, range or location of their products?	No

8. Enforcement and Sanctions

The consideration by the Environment Agency of a project for environmental impact assessment under the 2003 regulations forms part of the abstraction and impounding licensing, and consenting, processes. The enforcement provisions of these processes are not altered by these proposals.

9. Implementation and delivery plan

The Government response to consultation feedback is available on the Defra website at <http://www.defra.gov.uk/corporate/consult/responses.htm> It is planned that these regulations will come into force on 31 December 2006.

10. Post-implementation review

The Environment Agency will monitor the effectiveness of the regulatory changes to the way in which environmental impact assessment is applied through its existing performance monitoring arrangements and through any complaints arising from

operational experience. The Environment Agency has an established procedure for complaints.

11. 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 Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003.	No significant costs identified. The considerable costs of infraction proceedings as a result of failure to transpose the legislation are avoided.	The water environment may be better protected. No other significant benefits have been identified.

It is recommended that the amending regulations are made to come into force as soon as possible.

12. Declaration

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

Signed by the responsible Minister: Ian Pearson

Date: 23rd November 2006