

**EXPLANATORY MEMORANDUM TO
THE TOWN AND COUNTRY PLANNING (ENVIRONMENTAL IMPACT
ASSESSMENT) (AMENDMENT) REGULATIONS 2006**

2006 No.3295

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. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 These Regulations implement Article 3 of Directive 2003/35/EC, which amends the Environmental Impact Assessment Directive (85/337/EEC as amended by 97/11/EC) (“the EIA Directive”) to align its public participation provisions more closely with those of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (known as the Aarhus Convention). The Regulations also apply the requirements of the EIA Directive to local development orders made under section 61A of the Town and Country Planning Act 1990. Local development orders were introduced by section 40 of the Planning and Compulsory Purchase Act 2004.

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

3.1 None.

4. Legislative Background

4.1 Directive 85/337/EEC, amendments to which are implemented by these regulations, requires environmental impact assessment (EIA) to be carried out, before development consent is granted, for projects which are likely to have significant effects on the environment. The EIA procedure includes: the preparation of environmental information on a proposed project by the developer, consultation of statutory environmental bodies and the public on this information, and a requirement on the decision-making body to take it into account in reaching a decision on consent.

4.2 A Transposition Note is attached to this Memorandum. The Regulations are already largely compliant with the Aarhus Convention, and only a few relatively small changes are needed to ensure full compliance with the amended Directive.

4.3 These Regulations implement the amendments to the Directive for projects subject to planning permission. Separate legislative instruments are being introduced for projects falling within consent regimes outside the planning system.

5. Extent

5.1 The Regulations apply to England, with the exception that Regulation 22 gives the Secretary of State the power to direct that projects serving national defence purposes in Scotland, Wales, and Northern Ireland are exempt from the requirements of the Regulations if compliance would have an adverse effect on those purposes. This is because national defence is a reserved matter. Separate legislative instruments are being introduced to implement the requirements of the Directive in Scotland, Wales and Northern Ireland.

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 Directive 2003/35/EC is one of the legislative instruments that transpose into Community law the public participation provisions of the "Aarhus" Convention. Article 3 amends the EIA Directive 85/337/EEC as amended by 97/11/EC. Although the EIA regulations which implement the EIA Directive - The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) - are largely compliant with the new requirements, some changes are needed. The main ones are that:-

- Information provided voluntarily by applicants after submission of an Environmental Statement will be subject to the same publicity requirements as the Statement
- Information about EIA applications will be notified to national environmental bodies considered to have an interest, such as non-Governmental organisations
- The statement accompanying determinations of EIA applications will include information about the public participation process, and practical information about procedures for challenging the validity of the decision
- Determinations will be publicised by electronic means (in addition to newspaper notice) if the planning authority maintain a website for advertising applications
- The exemption for projects serving national defence purposes will apply only where compliance with the regulations will adversely affect those purposes.

7.2 A consultation document was issued in March 2005, together with an early draft of the Regulations. The consultation document was deposited in the Library of both Houses of Parliament and sent to a wide range of bodies on the Department's standard consultation lists.

7.3 There were 15 responses, most of which were broadly in support of the proposals. The main reservations concerned the proposed provisions to identify non-Governmental organisations with an interest, and the type of information provided voluntarily by applicants which would necessitate full publicity requirements. It has been possible to address these issues in ways that should meet respondents' concerns.

8. **Impact**

A Regulatory Impact Assessment accompanies this memorandum. It concludes that the costs on business will be de minimis, and on the public sector will not be substantial.

9. **Contact**

9.1 Phil Weatherby at the Department for Communities and Local Government (tel. 020 7944 3888 or e-mail phil.weatherby@communities.gsi.gov.uk) can answer any queries regarding the Regulations.

5 December 2006

REGULATORY IMPACT ASSESSMENT

Title of Proposal

1. The Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006.

Purpose and Intended Effect of Measure

Objective

2. The regulations are being introduced to transpose, for projects within the planning system in England, Article 3 of European Directive 2003/35/EC. That Article amends the public participation and access to justice provisions of the Environmental Impact Assessment (EIA) Directive 85/337/EEC.

3. Article 3 of Directive 2003/35/EC applies throughout the UK. It is being transposed separately in Scotland, Wales, Northern Ireland and Gibraltar.

Background

4. Directive 2003/35/EC is one of the legislative instruments that transpose the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (known as the Aarhus Convention) into European Community law.

5. Article 3 amends EIA Directive 85/337/EEC in order to align EIA requirements with the public participation and access to justice provisions of the Convention. This involves some relatively minor (since the unamended version of the EIA Directive is largely Aarhus-compliant) changes to the Directive and, consequently, to domestic regulations. The main effects of the amendments to the regulations are:-

- Supplementary environmental information provided by applicants following submission of an Environmental Statement will have to be publicised, and any comments taken into account by the decision-maker;
- A new requirement for the public affected by or with an interest in an EIA application to be notified. This includes bodies promoting environmental protection, such as NGOs;
- The statement accompanying determinations of EIA applications will include information about the public participation process, and practical information about procedures for challenging the validity of the decision;
- An exemption for projects serving national defence purposes will apply on a case-by-case basis and where compliance with EIA requirements would have an adverse effect on such purposes (previously there was a blanket exemption for all national defence projects).

Rationale for government intervention

6. Failure to transpose an EU Directive results in infraction proceedings by the European Commission. The UK is already late in transposing this Directive. If these regulations are not introduced the infraction proceedings already commenced by the Commission will proceed to judgment by the European Court of Justice, with the possibility of fines being imposed on the UK until the Directive has been properly transposed.

Consultation

Within government

7. All Departments and agencies responsible for implementing the Directive in respect of EIA regimes outside the planning system were consulted - DEFRA, DTI, DfT, HSE, and the Forestry Commission, as well as the devolved administrations and Gibraltar.

Public consultation

8. A large number of public and private organisations, including all English local planning authorities, were consulted on our proposals and on a draft of the amending regulations. Fifteen responses were received. These were generally supportive, though two particular concerns were raised. Firstly, it was felt that the provision requiring notification of the public (including environmental NGOs) with an interest was too open-ended. It has been possible to address this concern by limiting the provision to those with an interest who are unlikely to become aware of the proposal through existing requirements for local advertisement and site notice. Secondly, the consultation proposal requiring the publicity of environmental information relating to an Environmental Statement but submitted after the Statement, was also thought to be open-ended and liable to abuse by those who simply wanted to delay consideration of an application. This concern was addressed by restricting the provision to information of a substantive nature submitted by the applicant. This would not deprive any member of the public from commenting on any aspect of the Environmental Statement, and such comments must be taken into account by the decision-maker.

Options

9. There are two options:

A) Do nothing

B) Transpose Article 3 of Directive 2003/35/EC

Option A - Do nothing

10. This is not a feasible or desirable option for the reason given in paragraph 6 above.

Option B - Transpose Article 3 of Directive 2003/35/EC

11. These regulations transpose Article 3 insofar as projects falling within the scope of the planning system in England are concerned. Corresponding regulations are being introduced by the devolved administrations. A number of separate legislative instruments have been or are to be introduced to transpose Article 3 in respect of projects falling outside the planning system.

Alternative options considered

12. It is considered that the requirements covered by these regulations are the minimum necessary to comply with the amended EIA Directive 85/337/EEC.

Costs and Benefits

Sectors and groups affected

13. The amending regulations are aimed at enhancing public participation in environmental decision-making. They involve relatively minor changes in local planning authorities' procedures for making environmental information on developments that are subject to EIA available to the public. Planning authorities and the public are therefore the sectors affected.

Race equality assessment

14. The measures will not affect any racial group disproportionately.

Health impact assessment

15. The measures will not have any effects on health.

Rural considerations

16. The measures will not impact on those in rural or remote areas to a greater or lesser extent than those in urban areas.

Breakdown of costs and benefits

Option A - Do nothing

17. There are no economic, environmental or social benefits from doing nothing.

18. The only costs in the do-nothing option are those noted in paragraph 6 above, ie. any fines imposed by the European Court for failure to transpose a European Directive.

Option B - Transpose Article 3 of Directive 2003/35/EC

Environmental and social benefits/costs.

20. Effective public participation in the environmental decision-making process brings environmental and social benefits. It gives the public the opportunity to express their views and concerns about proposed development, and the decision-maker to take these into account before reaching a decision on whether to grant consent. This enhances the transparency and accountability of the decision-making process and contributes to public awareness of environmental issues. To the extent that these regulations will provide some relatively small enhancement of the public participation process in EIA procedures, the existing environmental and social benefits in those procedures will be correspondingly enhanced.

21. There are not considered to be any environmental or social costs in introducing these regulations.

Economic benefits/costs

22. The costs to business will be de minimis. Under present arrangements developers are already responsible for publicising planning applications which are subject to EIA requirements, in cases where an Environmental Statement is submitted after the application. They do so by publication in a local newspaper and by site notices. The only additional obligation under these amending regulations will be to provide the same information to any specific bodies notified to them by the planning authority as having a particular interest in the development and who would not be likely to see any local publicity.

23. The additional obligations on decision-makers (in most cases local planning authorities, but occasionally central government) will be relatively minor. Planning authorities are already responsible for publicising EIA applications which are accompanied by an Environmental Statement, and the only changes are that they will need to: notify the details, either directly or via applicants, to bodies outside the local area whom they are aware of having a particular interest in the development; publicise information provided voluntarily by an applicant after an Environmental Statement has been submitted (this is already recommended practice so is unlikely to make a significant difference) and keep such information on the planning register; publish determinations on the web site if they use one for advertising applications (many do so anyway), and include information about the public participation process in the statement that accompanies determinations (this is likely to be no more than a standard paragraph). Similar obligations will fall on central government in the minority of cases referred for determination.

24. It is considered that these additional obligations will result in only a marginal increase in the resources needed to deal with EIA applications, by far the greater part of which is devoted to existing requirements to (i) screen planning applications to determine whether EIA is required, and (ii) examine Environmental Statements and take their contents into account when determining applications. In terms of numbers,

about 350 out of over half a million planning applications per year require EIA, an average of about one per authority. It is recognised that some authorities may not receive any EIA application during the course of the year, whilst others may have to deal with a handful.

Small Firms' Impact Test (SFIT)

25. As noted in paragraph 22 above, the effect of the regulations on business generally will be de minimis. It would be rare for small firms to seek planning permission for development that would have significant effects on the environment (thus triggering the need for EIA), and we have been unable to identify any negative impacts on small firms either before or as a result of the consultation exercise. A small firms impact test has not therefore been undertaken. We have consulted with the Small Business Service, who are content.

Competition Assessment

26. Not applicable. The proposals almost exclusively relate to the public sector, and will not impact on competition within UK markets. All the Member States are required to transpose this Directive.

Enforcement, Sanctions and Monitoring

Enforcement

27. The EIA public participation requirements of the Directive apply almost exclusively to local and central government, which will be bound by the requirements in the same way as by any other legislation.

Sanctions

28. Failure to comply would bring the risk of domestic legal challenge or infraction proceedings.

Monitoring and review

29. The proposed changes comprise relatively minor adjustments to existing provisions on public participation in the EIA process. The existing requirement for a local planning authority to inform the Secretary of State of any EIA application it has determined provides a means of monitoring whether these changes in procedures have been carried out. Breaches of EIA requirements have also been the subject of a significant amount of litigation in recent years, and failure to comply with procedures runs a high risk of challenge by judicial review brought by those looking for proposed development to be stopped or delayed.

Post-Implementation Review

30. The Government Circular on Environmental Impact Assessment is currently in the process of being revised following a public consultation exercise. It will include advice, mainly aimed at local planning authorities, on the changes introduced by the amending regulations. These will also be covered in new good practice guidance on EIA, which was also the subject of the same public consultation exercise and will be issued at the same time as the revised Circular.

31. It is intended that these changes, together with other changes in EIA guidance particularly relating to screening procedures, will be the subject of seminars run by the Department for local planning authorities.

Summary and Recommendations

| Option | Cost | Benefit |
|---|---|--|
| A - do nothing | Fines imposed by European Court for non-transposition | No economic, environmental or social benefit |
| B - Transpose Article 3 of Directive 2003/35/EC | De minimis costs to business. Minor resource implications for decision-makers | Some small environmental and social benefits in a more transparent public participation element of the EIA process |

32. The regulations are necessary in order to transpose the amendments to the EIA Directive 85/337/EEC introduced by Article 3 of Directive 2003/35/EC. The costs on business will be de minimis; those on the public sector (local planning authorities and, to some extent, central government) will be marginal. It is recommended that we transpose Article 3 of Directive 2003/35/EC in respect of projects falling within the planning system through the Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006.

Declaration and Publication

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

SignedKay Andrews.....

Date 11th December 2006

*Baroness Andrews
Communities and Local Government*

Contact point for enquiries and comments

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