

**EXPLANATORY MEMORANDUM TO
THE GAS TRANSPORTER PIPE-LINE WORKS (ENVIRONMENTAL IMPACT
ASSESSMENT) (AMENDMENT) REGULATIONS 2007**

2007 No. 1996

1. This explanatory memorandum has been prepared by the Department for Business, Enterprise and Regulatory Reform (“BERR”) and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 These Regulations amend the Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999 (“the 1999 Regulations”) to bring them into line with Directive 2003/35/EC (the “Public Participation Directive”).

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

3.1 None.

4. Legislative Background

4.1 Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (the “EIA Directive”) applies to projects to construct onshore gas transporter pipe-lines. The 1999 Regulations implement the EIA Directive (as amended by Council Directive 97/11/EC) in relation to proposals in Great Britain for such projects.

4.2 The EIA Directive requires environmental impact assessment to be carried out, before development consent is granted, for projects which are likely to have significant effects on the environment.

4.3 The Public Participation Directive amends the EIA Directive to align the public participation provisions of the EIA Directive more closely with those of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the “Aarhus Convention”). The Aarhus Convention was signed by the European Commission and the United Kingdom, among others, on 25 June 1998.

4.4 These Regulations amend the 1999 Regulations to bring them into line with amendments made to the EIA Directive by the Public Participation Directive.

4.5 A Transposition Note is annexed to this Explanatory Memorandum.

5. Territorial Extent and Application

5.1 These Regulations apply to Great Britain.

5.2 Scottish Ministers are the determining authority for projects wholly in Scotland.

6. European Convention on Human Rights

6.1 As these Regulations are subject to a negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

7.1 These Regulations improve access to information for the public on proposed developments and increase the transparency of the decision making process for energy infrastructure.

7.2 These Regulations implement the changes made by the Public Participation Directive for the 1999 Regulations. These Regulations improve public participation in applications for consent under the 1999 Regulations in Great Britain in particular by:

- requiring materially relevant additional information received after submission of the environmental statement to be made available for public inspection;
- requiring supplementary reports and advice submitted by the applicant within 14 days of the environmental statement to be made available for public inspection;
- requiring notices to be published in the London Gazette or the Edinburgh Gazette;
- requiring notices to be published alerting the public to the fact that additional information has started to be received;
- increasing the information about the public participation process to be included in the published notices.

7.3 These Regulations also provide for provisions on access to justice by requiring the statement accompanying the Secretary of State's determination of the application to include information about the availability of judicial review procedures.

Commencement Date

7.4 These Regulations will come into force on [20] August 2007, and will only apply to applications received by the Secretary of State after that date.

Consultation

7.5 BERR (then the DTI) carried out a consultation from 10 October 2006 to 2 January 2007 on the regulatory amendments proposed to 3 regimes covering energy infrastructure, including the Gas Transporter Pipeline Works regime. The consultation document was sent to key stakeholders such as energy companies, statutory advisers, environmentalist groups and a sample of local authorities, and placed on the Department's website. It was also publicised in the Planning Portal run by the Department for Communities and Local Government

7.6 There were only twelve responses to the consultation, largely from industry sources. The responses recognised that some amendment to the existing Regulations implementing the EIA Directive were necessary. The main concerns raised were that developers should not be responsible for disseminating additional information received from other parties and the potential for increased delays to the process following receipt of additional information.

7.7 These Regulations address the former concern by making the Secretary of State responsible for forwarding additional information received from third parties to the local planning authority and to the developer. As for increased delay the Regulations propose no change to the current position as this is information which is already generated in the process and which should be taken into account.

7.8 The Scottish Executive carried out a separate consultation of key stakeholders north of the border on the proposed changes to the Pipe-lines Act regulations and Gas Transporter regulations. No responses were received.

7.9 The full Government response to the consultation will be available on BERR's website.

Guidance

7.10 The Department intends in due course to revise its public guidance on the 1999 Regulations to take account of the amendments made by these Regulations.

8. Impact

8.1 The Impact Assessment for the 3 regimes is attached to this Explanatory Memorandum.

9. Contact

9.1 Lawrence Cadman at the Department for Business, Enterprise and Regulatory Reform,, Tel: 020-7215-2889 or e-mail: lawrence.cadman@dti.gsi.gov.uk, can answer any queries regarding these Regulations.

Revised public participation provisions in environmental impact assessment regulations for energy infrastructure

Final Impact Assessment

URN 07/1202

1. Title of proposal

Proposals to improve the ability of the public to participate in the environmental assessment of proposed energy infrastructure.

The proposals relate to three Regulations:

- (i) The Electricity Works (Environmental Impact Assessment) (England and Wales) (Amendment) Regulations 2007;
- (ii) The Gas Transporter Pipe-line Works (Environmental Impact Assessment) (Amendment) Regulations 2007; and
- (iii) The Pipe-line Works (Environmental Impact Assessment) (Amendment) Regulations 2007.

2. Purpose and intended effect

The proposals cover new power stations (including offshore wind farms), overhead lines, gas transporter pipelines and commercial pipelines and have the objective of improving the transparency of existing requirements for energy infrastructure, in line with the requirements of the Public Participation Directive (2003/35/EC).

- Since 1985 the EU has laid down requirements on how the environmental impact of public and private projects is considered, before a decision is made on such developments. The EU updated the requirements in 1997 and current UK regulations reflect that updating. Further updating is now required following the European Community's signature of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention). This led to the Public Participation Directive which amends prevailing requirements and which the UK Government is required to implement. The main amendments are:

- The public should be informed of Environmental Impact Assessment (“EIA”) proposals, supplementary information gathered in the process, and decisions, by both local and national notices. The Directive requires the public to be informed by appropriate means.
 - When an EIA application is made, any supporting documents submitted by the developer with the EIA, should be made available to the public concerned by being lodged with the relevant local planning authority.
 - Additional information gathered in the process, as well as the formal supplements to the EIA currently provided for in the regulations, should be made available to the public concerned by being lodged with the relevant local planning authority. And the public should be informed of the existence of that information by both local and national notices.
 - The public notice and the decision statement will include reference to the public participation process and the concerns and opinions expressed during the public participation process, and will flag up the right to challenge the decision and the procedure for doing so.
 - The regulations also incorporate a change in the definition of “consultative bodies” or “consultation bodies” in the regulations to meet the European Commission’s concerns that the existing definition was too narrow and did not adequately transpose the original requirements.
- *Rationale for government intervention*
To increase the accountability and transparency of the decision-making processes in the regimes for proposed electricity and gas developments. These cover electricity generation and overhead lines, gas transporter pipelines and onshore, cross-country commercial pipelines for gas, oil and chemicals.
 - *Rationale for action now*
The UK is already under Article 226 infraction proceedings for not transposing the Public Participation Directive into national law.

3. Consultation

- Within government

In formulating its proposals the Department had regard to the proposals of the Department for Communities and Local Government (DCLG) to transpose the requirements of the Public Participation Directive into the general planning regime under the Town and Country Planning Act 1990, whilst recognising the need to reflect the fact that the BERR regimes cover national energy infrastructure in which more than local interest is often shown.

- **Public consultation**

Soundings, prior to public consultation, were taken of a representative sample of developers handling power station developments, both large and small, overhead lines, and gas pipelines. The need for changes to the existing regimes to transpose the European Directive was recognised. There was a consensus that the cost implications were likely to be marginal with concern being more about distraction of resources and potential for the process to become more protracted if additional information attracts interest. But against that it was recognised that this was information that would be likely to already exist and which people could already seek to access, albeit that it might be by a somewhat circuitous route.

Public consultation was formally carried out on 10 October 2006 ending on 2 January 2007. Twelve responses were received, not all within time, but all have been considered. The responses were largely from industry sources. Late in the day it emerged that while the consultation had been intended as an England and Wales exercise, the Scottish Executive needed to consult in Scotland on the changes to the gas transporter and commercial pipelines regimes. This they did, contacting key stakeholders, but no responses were received.

4. Options

The three options identified for the consultation were:

- (i) do nothing;
- (ii) implement the Directive through regulations; or
- (iii) seek to implement the requirements by voluntary measures such as guidance and codes of practice.

Option (i) would mean that the UK would not be compliant with EU legislation. However, the UK is already subject to infraction proceedings by the EU Commission for failure to comply with the requirements of the Public Participation Directive and so this option is not a possibility.

Option (ii) would put the UK in the best position to defend any challenge of decisions on developments based on alleged non-compliance with the Directive. While this option does add slightly to the burden on business, it does mean the public can participate in the process, and the credibility of the process in terms of subjecting the environmental impact of a development to open scrutiny, is

reinforced. The proposals do not change the position as regards confidential information set out in the existing EIA Directive at Article 10.

Option (iii), whilst capable of delivering the aims of the Public Participation Directive, would mean the UK had not legislated to implement it. This would not guarantee that the aims of the Directive were fulfilled nor would it comply with the requirement of the Directive that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive. Option (iii) is therefore also not a realistic possibility.

The consensus from the soundings and the public consultation was a recognition that some regulation was necessary but what mattered was getting the burden on the developer right.

5. Costs and benefits

Sectors and groups affected

The enhanced public participation requirements will impact on the electricity and downstream gas sectors. They will apply to proposals for new power stations (including wind farms), overhead lines, gas transporter pipelines and commercial pipelines. Such proposals are critical to ensuring the continued security and reliability of the energy delivery systems that the public depend on for their electricity and gas supplies. Businesses bringing forward the projects will thus be affected by the requirements. But the local public, and the public more generally who take an interest in energy developments, will also be affected by the requirements.

Summary of costs and benefits

There are no benefits associated with options (i) or (iii) since the UK is already subject to infraction proceedings. A continued failure to legislate to implement the Public Participation Directive could result in fines.

Option (ii) offers the prospect of improved credibility for the processes through improved public participation arrangements, at what looks to be a marginal cost.

The additional compliance costs are in the nature of additional publicity costs and the assemblage of the additional information now to be lodged in the public domain. All the existing regimes lay down public notice requirements, requiring in general local publicity. These are to be enhanced by adding national notice where this is not currently provided for. At the application, supplements to the EIA and decision stages, adding London Gazette advertising can cost in the region of £750 per advert adding in the worst case up to £5k to compliance costs. To this has to be added the publicity costs for the new requirement on additional information which could add a further £5k to compliance costs. Assemblage costs for additional information are unknown as this is a new requirement but it is worth noting that it is recorded information already available rather than the generation of new material, so the costs should be modest.

To put additional compliance costs in context, the main existing cost of complying with the EIA regulations is that of the production of an environmental impact assessment, which remains unaltered, and can cost in the region of £50k upwards, with major cases costing over £100k. The next major existing cost is the supplements to the environmental impact assessment, where that is required. That can vary considerably in production cost depending on whether it is clarifying existing information or providing further, new, information such as ecological studies or further alternative sites/routes analysis.

At the same time all these costs are relatively small in the context of multi-million pound projects. A major power station development will cost in the region of £300m, a 400 kV overhead line can cost between £0.5m - £1.5m per km and a high pressure gas pipeline between £0.8m - £1.5m per km. An onshore windfarm development can cost in the region of £50m.

Making additional information available may also make the process more challenging for business through the potential for additional probing by third parties and drip-feeding of information into the process, with consequential impact on timescales. But the proposal is to corral dissemination of additional information and to impose a deadline for representations on additional information so that timely decisions can still be made.

Option (ii) appears to offer the best prospect of better environmental impact analysis and improved decision taking, at what looks to be a marginal cost. Option (ii) also offers business greater certainty over the requirements and a level playing field across projects.

Views were sought in the consultation on the analysis of costs and benefits and the additional regulatory burden. There was support for the view that key costs and benefits had been captured, and that the additional regulatory burden might be marginal. But this was subject to the proviso the developers should not have to be responsible for handling third party information, and that the analysis does not take into account any costs stemming from increased delay if the process becomes more protracted. On the production costs associated with an environmental impact assessment one respondent considered they were on the low side and expected to see £100k to £200k on average for the production of EIAs.

The Department has accepted the need to avoid an unreasonable burden on the developer and recognises the concerns over more protracted timescales. It has therefore reined back the developer's responsibility with the Secretary of State becoming responsible for the dissemination of third party additional information, and the developer being responsible for an initial public notice alerting the public once additional information starts being received on a proposal. That notice will indicate where the public can inspect such material and who to contact on additional information. Given that much of the additional information will occur early on in the process the Department does not feel that in general it will lead to a more protracted process.

6. Small Firms Impact Test

To gauge the impact on small businesses, meetings were held with two representative companies who develop energy infrastructure and who could be said to be among the smaller firms operating in the sector – one developing windfarms, and one developing power generation and gas facilities before the consultation was launched. Both accepted that the EU would expect implementation by regulation and that the driver in the changes was the EU. They acknowledged that seen against the costs of producing an EIA and the cost of the project itself, the additional costs were not likely to be that great. Their concerns were more if the process became more protracted, and if the arrangements for publishing and advertising additional information led to an unhelpful distraction of scarce resources.

Given that the frequency with which additional information has to be disseminated is likely to be a feature of the project rather than the company doing the project, it is not felt that the changes in themselves convey any disproportionate effect. But it was acknowledged that in handling the dissemination of additional information, a small firm with a core of say 5 people, is likely to face more of a concern over distraction of resources than a major player with project teams.

This is now not likely to be an issue given the Department has reined back the developer's responsibility for the dissemination of third party information.

7. Competition assessment

This RIA covers three Regulations (see section 1 above) which would impact on the energy market, in particular the electricity and downstream gas sectors. For the purposes of a competition assessment it is necessary to distinguish between those aspects which are regulated and those which are not. Thus the aspects of overhead lines and gas transporter pipelines which are implemented by regulated network companies can be discounted from the analysis. This leaves electricity generation and onshore commercial pipelines. The conclusions from looking at those activities are:

Option (ii) will impose some additional costs on those developing new infrastructure in those sectors. But those costs would be faced by any firm wishing to participate in those sectors since they are costs associated with running a proposal through a development control procedure. Such costs will be dependent on the project itself rather than the firm putting the project together. As such the Regulations are not seen as conveying any benefit to existing firms. Nor, given the nature of the additional costs, is it felt that they will impose any disproportionate cost on some firms such as small firms rather than on others. It is therefore concluded that they are unlikely to have an effect on competition.

8. Simplification assessment

In bringing forward its proposals the Department has sought to comply with better regulation practice.

It notes the need for "joined-up Government", and regulating to bring into effect the Public Participation Directive would ensure the BERR regimes were in step with other UK development control regimes, such as the general planning regime of the Town and Country Planning Act, where regulations have already been consulted on, and with the Transport and Works Act regime where regulations are being produced. The BERR regimes would also be in step with other development control regimes in Europe which have to include the requirements of the Public Participation Directive.

The Department also notes that these regulations facilitate public access to more information on energy developments, making the regimes more transparent. At the same time it notes that the additional information, which is envisaged to include supporting information from the developer and information from third parties such as statutory bodies, is information which is already generated in the process. And it is information which currently the public may have to pursue more circuitous routes to obtain, such as through Freedom of Information requests or Environmental Information Regulations requests. The proposed way forward avoids the public having to invoke other procedures and thereby simplifies their access to such information.

The Department has also considered the scope for simplification in the process itself but notes the thrust of the Directive is to increase requirements to benefit the public and their participation in the processes. Thought has therefore been given to compensating simplification. It is not considered fruitful to look for this in the existing requirements laid down in the processes as the regulations have only recently been “proofed” by the Commission and infraction proceedings launched at any that were not considered up to the required standard of transposition. The Department has also considered whether rationalising matters through rationalising development control regimes would achieve simplification but concluded that this raised issues more suitable for handling in a policy review than the modest step change being addressed here.

9. Enforcement, sanctions and monitoring

The existing regulations are enforced by the Department for Business, Enterprise and Regulatory Reform. The fundamental sanction for ensuring compliance is that within the regulations themselves, the Secretary of State is barred from granting consent unless he is satisfied that the applicant has provided the required information and the procedures laid down in the regulations have been complied with.

Option (ii) provides a statutory basis for BERR assessing whether the enhanced public participation requirements have been complied with and for refusing to grant consent if the requirements had not been met. At the same time in order to ensure that the requirements have actually been met there is a need for BERR to make clear in guidance that before granting consent it will check on compliance.

10. Implementation and Delivery Plan

All the amending Regulations will enter into force on 20 August 2007. The Government's response to comments received to the public consultation exercise is being published on the DBERR web site at the same time as the Regulations are laid. In due course revised public guidance on the various EIA processes will be produced by the Department.

11. Post implementation review

As with the previous amending Directive to the EU EIA Directive, the Commission can be expected to verify satisfactory transposition of its Directive. In the meantime the Department will monitor the working of the Regulations to see that they are effective in terms of developers knowing what they have to do and, that they have led to improved access to information for the public.

12. Summary and recommendation

The Department's conclusion is that the existing environmental impact assessment requirements do need to be amended in order to implement the provisions of the EU Public Participation Directive and this can be achieved only by introducing amending Regulations if the UK Government is to avoid continued infraction proceedings from the Commission.

As a result of the consultation the Department has made changes to its approach, and the amending Regulations to be laid reflect that. The Department believes that with the changes to the amending Regulations they now represent a proportionate, balanced way to meet the EU requirements.

13. Declaration and publication

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

Signed Malcolm Wicks

Date: 9th July 2007

Malcolm Wicks

Minister of State for Energy and Sustainable Development

Department for Business, Enterprise and Regulatory Reform

TRANSPOSITION NOTE RELATING TO AMENDMENTS TO COUNCIL DIRECTIVE 85/337/EEC ARISING FROM DIRECTIVE 2003/35/EC (the “Public Participation Directive”) IN THE CONTEXT OF THE GAS TRANSPORTER PIPE-LINE WORKS (ENVIRONMENTAL IMPACT ASSESSMENT) (AMENDMENT) REGULATIONS 2007

Transposition note for 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 (the “Public Participation Directive”).

The Public Participation Directive amends Council Directive 85/337/EEC on the effects of certain public and private projects on the environment (“the EIA Directive”). The EIA Directive was transposed (to the extent that it applies to pipe-lines falling within the class of development described as permitted development in Class F(a) of Part 17 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995) by the Pipe-line Works (Environmental Impact Assessment) Regulations 1999 (“the 1999 Regulations”). The Public Participation Directive is transposed by amendment of the 1999 Regulations through amending Regulations (the “Amending Regulations”).

In order to help the reader to identify the method of transposition adopted, cross references in this Transposition Note are both to the 1999 Regulations as amended (the “Consolidated Regulations”) and the Amending Regulations.

These regulations do what is necessary to implement the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply:

Articles of Directive 2003/35/EC	Objective	Implementation	Responsibility
3.4	(1) Requires publication of information as soon as can reasonably be provided. (2) Requires that the public concerned is given within reasonable time-frames: (a) The information gathered pursuant to Article 5 of the EIA Directive;	(1) Transposed by supplementing requirements relating to the notice to be published after an environmental statement has been submitted (see regulation 8 of the Amending Regulations which amends regulation 10 of the Consolidated Regulations). (2) Transposed by: (a) Regulation 8 of the Amending Regulations which amends regulation 10 of the Consolidated Regulations requires this information to be served on the public concerned.	(1) The Gas Transporter. (a) The Gas Transporter.
	(b) The main reports and advice issued to the competent authority at the time when the public concerned is informed of the matters pursuant to Article 6(2) of the EIA Directive (as amended).	(b) This type of information is defined as “supplementary information” (see regulation 4 of the Amending Regulations and regulation 2 of the Consolidated Regulations) and is now to be served on the public concerned (see regulation 8 of the Amending Regulations and regulation 10 of the Consolidated Regulations).	(b) The Gas Transporter.
	(c) Information which only becomes available after the public concerned is informed of the matters pursuant to Article 6(2) of the EIA Directive (as amended).	(c) Provision is made with respect to this type of information, defined as “additional information” (see regulations 4 and 10 of the Amending Regulations, and	(c) The Secretary of State must serve additional information on the public concerned, and the Gas Transporter must notify the public that additional information is available for

		regulations 2 and 11A of the Consolidated Regulations).	inspection.
3.6(a)	Requires that the Secretary of State, having examined the concerns and opinions expressed by the public concerned must inform the public of his determination of the application and that specified information is made available to the public.	This was already largely transposed by regulation 14 of the 1999 Regulations, but the requirements as to the information to be taken into consideration and the specified information to be made available to the public are transposed by regulation 13 of the Amending Regulations.	The Secretary of State is required to provide the public concerned with the specified information, and the Gas Transporter must notify the public of the decision and the fact that the specified information is available for inspection.
3.6(b)	The Secretary of State must make the same information as outlined in article 3.6(a) available to any other Member State consulted.	Transposed by regulation 13 of the Amending Regulations which amends regulation 14 of the Consolidated Regulations.	Secretary of State.
3.7	Requires that there is a review procedure in relation to decisions of the Secretary of State and that the public concerned be made aware of its existence.	Decisions of the Secretary of State may already be challenged by way of application to the High Court in England and Wales or the Court of Sessions in Scotland (see regulation 16 of the 1999 Regulations). The publicity requirements are transposed by a requirement that notices of determination of applications by the Secretary of State are accompanied by a statement containing information on the availability of review procedures (see regulation 13 of the Amending Regulations and regulation 14 of the Consolidated Regulations).	Secretary of State.
3.8	Addition to Annex I of the EIA Directive, applying that 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.	Transposed by regulation 15 of the Amending Regulations (which amends Part 1 of Schedule 3 of the Consolidated Regulations).	Secretary of State.

