

EXPLANATORY MEMORANDUM TO
THE MARINE WORKS (ENVIRONMENTAL IMPACT ASSESSMENT)
(AMENDMENT) REGULATIONS 2017

2017 No. 588

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Department for Environment Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends our existing implementation of the Environmental Impact Assessment EIA Directive 2011/92/EU to bring into effect changes made in 2014 by the EU Directive 2014/52/EU (the 2014 Directive).
- 2.2 The EIA Directive ensures that projects likely to have significant effects on the environment are subject to an environmental assessment prior to their approval or authorisation. In respect of marine works projects, the EIA Directive has been implemented into national legislation by The Environmental Impact Assessment (Marine Works) Regulations 2007, as amended. The EIA Directive was amended by the 2014 Directive and it is these amendments which need to be transposed into national legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Due to the decision to call a general election and the consequent dissolution of Parliament on 3 May 2017 there are not 21 days available between the laying date and the date on which the Regulations need to come into force in order to meet the deadline of 16 May 2017 set in the EIA Directive. A failure to meet this deadline could result in infraction proceedings being taken and the UK being fined.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 This Regulation is made in order to transpose the amendments to Directive 2011/92 of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. This instrument is one of a group of instruments which will implement changes to the EIA Directive across different consenting regimes: marine, land drainage, forestry, water abstraction and agriculture.
- 4.2 Insofar as was possible, the Directive has been transposed by copy-out with additional text inserted where necessary to give clarity and address specific matters under the Marine Works Regulations. The European Scrutiny Committees were provided with

an Explanatory Memorandum on the Commission's proposals in December 2012 and were updated following a vote in the European Parliament in October 2013 and following the agreement of a compromise text in February 2014. The House of Commons committee released the proposal from scrutiny on 19 March 2014 and the House of Lords scrutiny committee did so on 3 April 2014.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the English inshore region, English offshore region, Scottish inshore region (with respect certain reserved projects), Scottish offshore region, Welsh inshore region, Welsh offshore region, Northern Ireland inshore region and Northern Ireland offshore region.
- 5.3 Scotland is taking forward separate legislation to transpose the 2014 Directive generally for the Scottish inshore region.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

- 7.1 On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.
- 7.2 Environmental assessment is a procedure that ensures that the environmental implications of decisions are taken into account before the decisions are made. The EIA Directive ensures that projects likely to have significant effects on the environment are made subject to an environmental assessment, prior to their approval or authorisation. This process is part of European law and has been implemented into national legislation by The Marine Works (Environmental Impact Assessment) Regulations 2007, as amended. The EIA Directive was amended by the 2014 Directive and it is these amendments which need to be incorporated into national legislation no later than 16 May 2017.
- 7.3 The broad intention of the 2014 amendments is deregulatory – to simplify and clarify the requirements of the EIA Directive, by focusing on environmental factors that are significantly impacted, rather than on any potential impact. It also improves the level of environmental protection, with a view to making business decisions on public and private investments more sound, more predictable and sustainable in the longer term.
- 7.4 There are no alternatives to legislation to implement the Directive. However, in line with the Government's Better Regulation agenda we have sought to minimise additional regulatory burden by copying out the text of the Directive except where an alternative approach was considered beneficial. In transposing the amendments to the

EIA Directive, our view has been that there is merit in retaining, as far as practical, the existing approach to environmental impact assessment as it is well understood by those involved in the process. This approach will minimise familiarisation costs and business uncertainty. This instrument therefore amends the existing regulations as little as possible rather than introduce wholly new regulations because applicants and decision making bodies are already familiar with these and this should, therefore, reduce costs.

7.5 There has been liaison with other government departments to ensure that as far as possible a consistent approach has been followed.

7.6 The changes introduced by the 2014 Directive are:

- The addition of a definition of the environmental impact assessment process - Article 1(2)g;
- Changes to the circumstances in which a project may be exempt from the requirements of the EIA Directive – Articles 1(3);
- Introduction of Joint and/or Coordinated procedures for projects which are subject to the Habitats or Wild Birds Directives as well as the EIA Directive – Article 2(3);
- Changes to the list of environmental factors to be considered as part of the environmental impact assessment process – Article 3;
- Clarification of the options for screening and amendments to the information which is required and the criteria to be applied when screening projects to determine whether the Directive applies – Article 4, Annex IIA and Annex III;
- Amendments to the information to be included in the environmental statement – Article 5 and Annex IV;
- A requirement for environmental statements to be ‘based on’ a scoping opinion, where one is issued – Article 5(2);
- The use of competent experts - Article 5(3);
- A requirement to inform the public of projects electronically - Article 6(2) and 6(5);
- A new article elaborating on information to be given in decision notices and the decision making procedures – Article 8a;
- Monitoring significant adverse effects - Article 8a(4);
- A new Article requiring the avoidance of conflicts of interest – Article 9a;
- The introduction of penalties for infringements of national provisions – Article 10a.

7.7 The 2014 Directive introduces a definition of the environmental impact assessment process. In our view the definition reflects existing practice. In order to maintain consistency with the current approach, this definition is adopted in the new regulation.

7.8 Article 1(3) in the EIA Directive has been amended to restrict the existing exemption for defence projects so that it can only apply where a project, or part of a project, has defence as its sole purpose. The exemption has also been extended to include projects which have the response to civil emergencies as their sole purpose. These changes are transposed into the new regulations.

- 7.9 Where a project is subject to an assessment under the EIA Directive and also under the Habitats and/or Wild Birds Directives, the 2014 Directive requires that either a ‘coordinated procedure’ or a ‘joint procedure’ should be used. The requirement for an appropriate authority to ensure that the assessments are coordinated is now set out in the new regulation.
- 7.10 The 2014 Directive has introduced a new detailed list of the information that the applicant provides to the competent authority to help it screen the application. The criteria have been amended, largely to provide more clarity about the issues to be considered. These changes have been copied out in the regulations.
- 7.11 The 2014 Directive requires that applicants provide results of other assessments relating to the project’s effects on the environment at the screening stage. Currently these are provided later in the EIA process. The applicant can also provide details of any features of the project designed to avoid or prevent significant adverse effects on the environment. It is hoped these changes will help focus environmental impact assessment on those cases where there really is a likelihood of significant effects. This requirement is transposed into the new regulation, which also now sets out in detail the range of information to be provided by an applicant. Online advice provided to applicants will be updated to reflect this detail.
- 7.12 In addition to the above, the 2014 Directive has also introduced a requirement that the competent authorities should publish their screening decisions and explain the main reasons why an EIA is needed or not. Publication of the decisions ensures transparency of the process.
- 7.13 Under the EIA Directive, some project types are always considered likely to have significant effects on the environment and must have an EIA in all cases. These project types are listed in Annex I of the EIA Directive. They include nuclear power stations, oil refineries and long distance railways. Other project types are only considered likely to have significant effects in some cases depending on their nature, size and location. These project types are listed in Annex II of the EIA Directive. These include urban development and smaller energy projects. Member States can decide whether a project listed in Annex II should be subject to EIA through a case-by-case examination and/or by setting thresholds or criteria. The 2014 Directive amends the process that allows Member States discretion to set thresholds beneath which projects listed in Annex II are not required to undertake an EIA or the level to be met before an application needs to go through the screening stage of the EIA process. Article 4(3) of the EIA Directive requires the relevant selection criteria in Annex III to be taken into account where Annex II projects are assessed on either a case-by-case basis or where thresholds or criteria have been set by Member States. The selection criteria in Annex III have been revised. The amendments seek to standardise the type of information to be provided by a developer when asking the competent authority to screen a proposal. The information to be provided is set out in a new annex to the Directive, Annex IIA. It is hoped this will help focus environmental impact assessment on those cases where there really is a likelihood of significant effects. The 2014 Directive also confirms that a developer may provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.
- 7.14 The competent authority will be required to make its screening determination on the basis of the information provided by the developer under Article 4(4) and taking into

account the results of ‘preliminary verifications’ or assessments of the effects on the environment carried out pursuant to other EU legislation. When considering the information provided by the developer, the competent authority, as now, must take into account the criteria listed in Annex III. The criteria in Annex III have been amended, largely to provide more clarity about the issues to be considered.

- 7.15 The 2014 Directive has introduced a requirement that the competent authority must make its screening decision as soon as possible and within 90 days from the date the developer providing all the information required. This period can be extended in exceptional circumstances with the authority explaining the reason for the extension. The new regulation requires that an appropriate authority must provide its screening opinion as soon as possible within a period of 90 days beginning with the day on which the request is made.
- 7.16 After the screening stage, if a proposed project needs an environmental impact assessment, it can go through the ‘scoping’ stage. This is voluntary and allows an applicant to request an opinion from the competent authority to list the scope and level of detail of the information to be included their report. It also introduces the requirement that where a scoping opinion has been requested, the environmental statement should be “based on” that opinion. No further change was necessary in the new regulation as this requirement already exists.
- 7.17 The 2014 Directive has introduced a requirement that information is made available electronically, in addition to more traditional methods. We considered removing specific references to newspapers in the regulations in order to reduce the cost of advertising. However, following consideration of the possible implications, as part of our Equalities Impact Assessment, we have kept the requirement to use non-electronic methods for notices. The majority of respondents to the consultation agreed with this approach.
- 7.18 The 2014 Directive has introduced a requirement for a new minimum time for public consultations of at least 30 days. This is an increase from 28 days. This amendment will allow those with an interest slightly more time to consider the contents of the report. This increase should not present a significant impact on the overall process. Existing regulation sets out a minimum public consultation period of 42 days. This new regulation clarifies that the 42 day period begins with the date of first publication of the notice under paragraph.
- 7.19 This 2014 Directive sets out requirements for information to be included in a decision. The decision includes: the reasoned conclusion; environmental conditions; and a description of any parts or actions in the project to reduce the risk of significant adverse effects on the environment. Where the decision is to refuse consent, the main reasons for the refusal are given. A notice of a decision must also include any planned monitoring measures. These changes set out in greater detail the matters for consideration by the appropriate authority, the scope of any decision in writing and the requirements for publication of its EIA decision. Our view is that it is likely in practice that all of the issues listed in the amended Annex should already be included in an environmental statement.
- 7.20 The 2014 Directive has introduced a requirement that the applicant must ensure that the environmental statement is prepared by competent experts. In addition, the competent authority must also have sufficient experts to assess the environmental statement. Most decision makers have people with sufficient expertise within their

teams or can readily obtain access to people with expertise. Applicants will also have access to the comments of the statutory consultation bodies to assist them. We therefore do not expect this requirement to differ to current established practice.

8. Consultation outcome

8.1 A consultation was published on 14 December 2016. The consultation was open for a period of 7 weeks and closed on 31 January 2017.

8.2 Out of the 30 responses received the majority supported the proposed changes. There were more equal views on the proposed time period for screening; with respondents making comparison to other processes.

9. Guidance

9.1 The new regulations set out requirements in greater detail to applicants and appropriate authorities or regulators. Online advice provided to applicants will be updated accordingly to provide greater clarity.

10. Impact

10.1 The 2014 Directive's changes aim to reduce the burden by cutting the number for cases that go through the EIA process. The benefits will mainly be seen in the bigger developments that usually need an environmental impact assessment report. Defra's economists have undertaken an assessment of cost to business, charities and voluntary bodies of the proposed changes and this has shown that the cost level is considerably lower than the £1million limit required to trigger the need for an Impact Assessment.

10.2 The impact on the public sector is the same as that for the private sector, charities and voluntary bodies because the regulations apply equally to public projects subject to EIA.

10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum and transposition note on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 A review provision is included in the Regulations (regulation 31 of the 2007 Regulations). The provision requires that a report setting out the conclusions of the review be published before 16 May 2022.

13. Contact

13.1 Amanda Desmond at the Department for Environment Food and Rural Affairs
Telephone: 0208 02 64311 or email: Amanda.Desmond@defra.gsi.gov.uk can answer any queries regarding the instrument.