

STATUTORY INSTRUMENT CONSENT MEMORANDUM

THE ENVIRONMENTAL IMPACT ASSESSMENT (MISCELLANEOUS AMENDMENTS RELATING TO HARBOURS, HIGHWAYS AND TRANSPORT) REGULATIONS 2017

1. This Statutory Instrument Consent Memorandum is laid under Standing Order (“SO”) 30A.2. SO 30A prescribes that a Statutory Instrument Consent Memorandum must be laid and a Statutory Instrument Consent Motion may be tabled before the National Assembly for Wales (“Assembly”) if a UK Statutory Instrument makes provision in relation to Wales amending primary legislation within the legislative competence of the Assembly.
2. The Environmental Impact Assessment (Miscellaneous Amendments relating to Harbours, Highways and Transport) Regulations 2017 were laid before Parliament on 13 November 2017 and before the Assembly on 15 November 2017. The regulations can be found at:

<http://www.legislation.gov.uk/ukxi/2017/1070/contents/made>

Summary of the Regulations and their objective

3. The objective of the regulations is to transpose Directive 2014/52/EU, which amends Directive 2011/92/EU¹ on the assessment of the effects of certain public and private projects on the environment. This assessment is known as the Environmental Impact Assessment (‘EIA’).
4. The Directive:
 - Confirms the inter-relationships between the EIA Directive and other environmental directives (e.g. Habitat Directive).
 - Requires additional information to be included in the environmental statement (also referred to as the environmental impact assessment report), such as information about the impact on climate change, and population and human health.
 - Increases the requirement for transparency within the EIA process, particularly in terms of the role of the Overseeing Organisation.
 - Strengthens the requirements of the determination and screening processes.
5. These provisions are technical in nature, covering the procedural requirements of an EIA and clarifying elements of the existing regime. In many cases the existing legislation is likely to be sufficient to meet the requirements of the 2014 Directive, but a copy out approach has been

¹ Throughout this document, ‘the EIA Directive’ refers to Directive 2011/92/EU as amended by Directive 2014/52/EU. ‘The 2014 Directive’ refers to Directive 2014/52/EU only, and ‘the 2011 Directive’ refers to Directive 2011/92/EU only. These terms will be used as necessary to illustrate the changes under 2014/52/EU that are required to be transposed, compared to the existing regulatory scheme required by Directive 2011/92/EU.

taken in all appropriate places in order to minimise the risk of failure to properly transpose. The practical impacts of the changes are minor, as EIAs in Wales are already being carried out with a regard to the 2014 Directive.

6. The Regulations cover England and Wales. Elements of the Regulations also apply in Scotland.

Relevant provision to be made by the Regulations

7. Transposition of this Directive will not affect schemes which have already been determined (i.e. confirmation has been received that an EIA is required) and a scope of works has been requested. Article 3(1) of the 2014 Directive allows for such schemes to carry on under the un-amended provisions of the 2011 Directive. The following provisions will apply to new schemes which have not reached this point only.
8. The regulations cover areas within devolved competence and outside of devolved competence. It covers a range of transport related matters. The Highways Act 1980 is the only element which is entirely within the devolved competence of the National Assembly. The National Assembly has legislative competence over harbours which are used for fishing, for recreation, and/or for communication between places in Wales, though not all harbours in Wales. However, the Welsh Ministers are only designated to transpose the provisions of this Directive in relation to major transport schemes, which excludes fisheries harbours even though fisheries harbours are within the legislative competence of the National Assembly.
9. It is the view of the Welsh Government that the provisions described in paragraph (8) above fall within the legislative competence of the National Assembly for Wales in so far as they relate to harbours, highways and transport which are used or required wholly or mainly for the fishing industry, for recreation, or for communication between places in Wales (or for two or more of those purposes, listed under paragraph 10 of Part 1, Schedule 7 to the Government of Wales Act 2006.

Harbours Act 1964

10. Schedule 2 of the regulations copy out the definition of the EIA process into Schedule 3 of the Harbours Act, including the changes to terminology and that the assessment should be of likely significant effects of the project on the environment.
11. The regulations transpose the exemption for projects which have the response to civil emergencies or defence as their sole purpose, and the additional flexibility conferred in exceptional circumstances. The regulations set out when certain steps of the EIA process may be deferred.
12. The regulations transpose the requirement that when a project requires an EIA and an assessment under the Habitats Directive (Directive 92/43) or

the Birds Directive (Directive 2009/147) the authority that must ensure, where appropriate, that the relevant assessments are coordinated. The regulations transpose the projects for which an EIA is required and the type of information required or might be provided in an application by reference to the Directive.

13. The regulations amend the process for the scoping report, requiring that the Secretary of State must inform the applicant of their decision in writing within 90 days, unless exceptional circumstances apply. The regulations now add that where insufficient information has been provided the Secretary of State may write within 90 days requesting further information with subsequent impacts on the timescales for decisions.
14. The regulations transpose the type of information to be provided by a developer in order for a competent authority to screen a proposal, transpose the selection criteria by reference to the Directive, and include a copy out reference to 'authorities with local and regional competencies' alongside the existing consultation provisions.
15. The regulations make amendments to the requirements for documentation to be submitted for an application for a Harbour Revision Order. The regulations set out the minimum information that a developer must provide in their environmental statement as part of the assessment process in paragraph 8 of the Harbours Act. The regulations copy out that the competent authority must issue an opinion on the scope and level of detail of the information required in the statement, taking into account the information provided by the developer on the specific characteristics of the project and its likely impact on the environment.
16. The regulations update publication arrangements for notices, to make them available electronically within specified times.
17. The regulations set out the information which the Secretary of State must consider when making a decision on the environmental impact of a project, including provisions to ensure any necessary monitoring conditions are included in a project when appropriate.
18. The regulations insert a requirement in paragraph 19 that the Secretary of State must make a determination under that paragraph within a reasonable period of time, taking into account the nature and complexity of the application and proposed works, as well as any additional procedures required, from the date on which the Secretary of State has been provided with the environmental information provided. The regulations also update the provisions for the publication of that decision.

Amendments to the Highways Act 1980

19. The regulations amend Section 105A (1) of the Highways Act to refer to the amended Directives of 2011 and 2014, including the new definition of

“environmental impact assessment” included in the 2014 Directive. The amended section 105A sets out the procedures for determining whether an EIA is required for a highway project and the factors that must be taken into account in making that determination. The amendments to 105A clarify that the environmental factors that should be considered as part of the assessment should be the likely significant effects of the project on the environment. It also amends some of the terminology used.

20. Amendments to 105A also specify that where a project is subject to an assessment under the EIA Directive and under the Habitats or Birds Directives, where appropriate these assessments should be coordinated. Section 105A has been amended to set out the content of an environmental statement. Amendments to 105A also include the requirement for the developer to ensure that the environmental statement is prepared by competent experts, while the competent authority must ensure that it has, or has access to, sufficient expertise to examine the EIA report.
21. Amendments to Section 105B sets out procedures for making a determination on whether or not an EIA is required. Section 105B (1C) in the Highways Act 1980 will require the determination to be made as soon as possible and within 90 days. Amendments to 105B incorporate the requirement that the public should be informed about an application and the matters set out in Article 6(2) electronically. Amendments to this section set a 30 day minimum for public consultation on the environmental impact assessment report and a new minimum time frame for public consultations on the environment statement.
22. New Sections have been added to 105B to reflect the requirement that the competent authority’s reasoned conclusion must be integrated into any decision; that competent authorities must also ensure that any mitigation measures and, where appropriate, monitoring measures are identified in the consent; requires that the decision to grant development consent should also now include, where appropriate, monitoring measures; and that the competent authority takes any of the decisions referred to within a reasonable period of time.
23. Section 105B (6) of the Highways Act has been amended to implement the changes to article 9(1) of the 2011 Directive, regarding procedures and content for making known a decision whether or not to proceed with a project that is subject to an EIA.
24. Section 105C has been amended to include consultations on transboundary effects may be conducted through an appropriate joint body.
25. The regulations transpose the exemption for defence and civil emergencies projects and confer some additional flexibility in exceptional circumstances into new section 105E and 105F.

Why is it appropriate for the regulations to make this provision

26. EIAs are required under EU law to be carried out for a range of developments. The EIA Directive has updated the EIA requirements, and must be transposed into UK law. The Directive affects a range of policy areas, including planning, agriculture, forestry and transport. This Statutory Instrument Consent Memorandum concerns the transport elements of transposition, the regulation for which is proposed to be made by the Secretary of State.
27. It is the view of the Welsh Government that it is appropriate to deal with these provisions in these regulations as it represents the most practicable and proportionate legislative vehicle to enable these provisions to apply in Wales. These regulations amend primary legislation which applies in Wales and England, and it was not practical or proportionate to make separate Welsh regulations to make identical changes to the same pieces of primary legislation.
28. Additionally, the Welsh Ministers are not designated to transpose the provisions relating to harbours and therefore only part of these regulations could be transposed in Wales. The Wales Act 2017 will extend devolved competence over ports and harbours, though at this point the enabling legislation (the Harbours Act 1964 and the Highways Act 1980) will still apply on an England and Wales basis. This approach ensures a common approach to transposing the Directive across the UK, and will support a smooth transition to further devolution.
29. This Statutory Instrument Consent Memorandum relates to regulations laid in the UK Parliament under the negative procedure which automatically become law unless there is an objection from a member of either House of Parliament. If there is no such objection, the regulations would come into force on 5 December 2017.

Financial implications

30. There are costs associated with carrying out EIAs, which are included within the budgets for individual projects. The new Directive has additional requirements for monitoring, which could lead to additional costs to confirm the validity of the measures put in place to reduce, minimise and offset the environmental effects. Approaches to implementation may also affect costs of individual projects, and these would need to be considered on a case by case basis. The transitional provision means that these regulations will not affect projects which are already underway.

Ken Skates AM
Cabinet Secretary for Economy and Transport
15 November 2017