

EXPLANATORY MEMORANDUM TO
THE INFRASTRUCTURE PLANNING (ENVIRONMENTAL IMPACT
ASSESSMENT) (AMENDMENT) REGULATIONS 2012

2012 No. 787

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. **Purpose of the instrument**

- 2.1 These Regulations amend the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (S.I. 2009 No.2263) (“the 2009 Regulations”).

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

- 3.1 None

4. **Legislative Context**

- 4.1 The Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment¹ (“the EIA Directive”) requires that, before granting development consent for projects, including development proposals, authorities should carry out a procedure known as environmental impact assessment (“EIA”) and produce an environmental statement (“ES”) for any project that is likely to have significant effects on the environment. The EIA Directive was first transposed for the purposes of nationally significant infrastructure projects² by the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. These were amended in 2011 by the Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2011 (S.I.2011 No.2741) to transpose EC Directive 2009/31/EC which had amended the EIA Directive.

5. **Territorial Extent and Application**

- 5.1 This instrument applies to England, Wales and Scotland in accordance with the scope of the Planning Act 2008 (see section 240).

¹ The EIA Directive has recently been codified and is now 2011/92/EU, OJ L26/1 28.1.2012.

² The nationally significant infrastructure planning system was established by the Planning Act 2008.

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 The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 implemented the provisions of the EIA Directive with respect to nationally significant infrastructure proposals that fall to be determined under the Planning Act 2008. Those regulations are being amended so that they reflect, as far as is appropriate for the infrastructure planning system, various court judgements on cases relating to the Town and Country Planning system's approach to the EIA Directive. These cases are known as 'Mellor'³, 'Barker'⁴ and 'Baker'⁵.

7.2 With respect to the Mellor case, when the competent authority makes a screening opinion to the effect that a proposed development would not require the undertaking of an EIA (i.e. a 'negative' screening), amendments to regulation 6 mean it must now issue a statement giving the reasons for that decision. Previously, the regulations only required reasons to be given when an EIA is required (i.e. a 'positive' screening).

7.3 With respect to the Barker case, some of the procedures relating to applications for the 'subsequent approval of requirements' have been amended. These are applications to finalise details of provisions contained within previously granted development consent orders. Effectively, they are the equivalent of 'reserved matters' applications under the Town and Country Planning Act 1990. The competent authority is required to satisfy itself that it is in possession of sufficient environmental information before deciding whether to grant consent for the subsequent approval. Amendments to regulation 6 remove the requirement for an applicant to always have to request a screening opinion when it was not intending to provide an updated Environmental Statement with the application. That requirement constituted an element of 'gold-plating', in that it did not allow for the competent authority to just consider whether the original Environmental Statement was still sufficient.

7.4 Also with respect to the Barker case, further clarity has been introduced through amendments to regulations 6 and 8 regarding what information potential applicants should include within screening and scoping requests (the latter being the requesting of a view from the competent authority on what issues the applicant should address in its environmental statement).

³ R (on the application of Mellor) v Secretary of State for Communities and Local Government [2009] EWCA 1201 and ECJ case C-75/08, 30 April 2009.

⁴ R v London Borough of Bromley ex parte Barker (FC) [2006] UKHL 52

⁵ R (on the application of Baker) v Bath and North East Somerset Council [2009] EWHC 595.

7.5 With respect to the Baker case, regulation 5 has been amended to state that the Secretary of State can make a ‘screening direction’ either at his own volition or if requested to do so in writing by any person. A screening direction is where the Secretary of State intervenes in a case in the circumstances where an application that had been accepted for examination had not been the subject of an EIA and/or had been given a negative screening opinion by the competent authority, and the Secretary of State now considers and directs whether the development proposal should or should not be subject to an EIA. The policy had always allowed for third parties to make such a request, but the regulations previously did not explicitly state that they could do so. This amendment improves the transparency and clarity of the Regulations.

7.6 Regulation 19 of the 2009 Regulations has been reworded so that it appropriately reflects the various relevant amendments that have been enacted throughout these amendment Regulations, including the removal of now superfluous procedures relating to when an application for subsequent approval does not comply with the EIA requirements.

7.7 In addition to amendments to address the points raised in the three cases, the other main amendment is the removal from regulations 14, 16, 17, 18 and 19 of what are now considered to be unnecessary criminal offences that had been applied to the making of false statements, by or on behalf of the applicant, that certain publicity and notification requirements had been fulfilled regarding proposed or actual applications. The removal of these is consistent with the approach that was taken within The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (S.I. 2011 No.1824).

8. Consultation outcome

8.1 A consultation was not undertaken for these regulations. This is because the amendments relate to issues that had already been addressed during a consultation in 2010 on proposals to amend and consolidate the EIA regulations for the Town and Country Planning system.

9. Guidance

9.1 Some environmental impact assessment issues are addressed within existing guidance on the nationally significant infrastructure planning system. This guidance is being reviewed to reflect any alterations considered appropriate in light of these amendment Regulations. It is intended to have any amendments published by July 2012.

10. Impact

10.1 The impact on business, charities or voluntary bodies will be minimal. They will benefit from an increase in transparency and clarity in the operation of some aspects of the EIA procedures. For example, applicants that intend to

seek subsequent approval consents without submitting an updated Environment Statement will no longer have to first request a screening opinion.

10.2 The impact on the public sector will be minimal. The actions required of the competent authorities will not alter how they currently already operate in practice. For example, in the interests of transparency, the Infrastructure Planning Commission already issues written reasons for negative screening opinions.

10.3 An Impact Assessment has been produced that sets out in more detail a description of the impacts, and is being published alongside this Explanatory Memorandum on the Legislation website.

11. Regulating small business

11.1 Although the legislation applies to small business, the Government believes it is highly unlikely that a small business will apply for a development consent order for a nationally significant infrastructure project under the Act.

12. Monitoring & review

12.1 Regulation 1A⁶ requires the Secretary of State to review the operation and effect of the Regulations and publish the report within 5 years after the 2011 amendment Regulations came into force and every 5 years after that. Because the Regulations transpose an EU Directive, they do not contain a sunset clause.

13. Contact

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Tel: 0303 44 41597 or email: paul.lancaster@communities.gsi.gov.uk can answer any queries regarding the instrument.

⁶ Inserted by the Infrastructure Planning (Environmental Impact Assessment) (Amendment) Regulations 2011 (S.I. 2011 No.2741)