

EXPLANATORY MEMORANDUM TO
THE OFFSHORE PETROLEUM PRODUCTION AND PIPE-LINES
(ENVIRONMENTAL IMPACT ASSESSMENT AND OTHER MISCELLANEOUS
PROVISIONS) (AMENDMENT) REGULATIONS 2017

2017 No. 582

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Department for Business, Energy and Industrial Strategy (BEIS) and is laid before Parliament by Command of Her Majesty.
- 1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The Offshore Petroleum Production and Pipe-lines (Environmental Impact Assessment and other Miscellaneous Provisions) (Amendment) Regulations 2017 (“the Transposing Regulations”) implement the provisions of Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment (the “2014 Directive”) as it applies to certain offshore hydrocarbon-related developments including pipe-lines, onshore pipe-line projects, and to pipe-line works by a public gas transporter, and to oil, gas or chemical pipe-lines on land. The 2014 Directive entered into force on 15 May 2014 and must be transposed into national law by 16 May 2017.
- 2.2 The Transposing Regulations also make provisions to correct the implementation of:
 - (a) Article 6 of Council Directive 92/43/EEC as it applies offshore to oil and gas activities plus carbon capture and storage (CCS) operations and gas unloading and storage activities; and
 - (b) the Offshore Petroleum Licensing (Offshore Safety Directive) Regulations 2015.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments (JCSI)

- 3.1 The Transposing Regulations make minor corrections, as advised by the JCSI in its Third Report of Session 2015 - 2016, to the Offshore Petroleum Licensing (Offshore Safety Directive) Regulations 2015 (S.I. 2015/385).

Other matters of interest to the House of Commons

- 3.2 As the Transposing Regulations are subject to the negative resolution procedure and have 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 The Transposing Regulations implement the obligations of the 2014 Directive as it applies to certain offshore hydrocarbon-related developments including pipe-lines (i.e.

oil and gas extraction activities, carbon capture and storage (CCS) operations and gas unloading and storage activities) and onshore pipe-line projects. The requirements for environmental impact assessments have been changed to take into account amendments to Directive 2011/92/EU (“the 2011 Directive”) on the assessment of the effects of certain public and private projects on the environment by the 2014 Directive. The 2011 Directive is itself a consolidation of earlier Directives.

- 4.2 Given therefore that the environmental impact assessment regime is well established in the UK as it applies to the offshore hydrocarbon and onshore pipe-line sectors, the Transposing Regulations maintain the existing approach to environmental impact assessments as it is well understood by project developers and others involved in the procedures. The 2011 Directive is currently integrated into the consenting regimes for offshore hydrocarbon-related developments and onshore pipe-line projects through:
- (i) the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (S.I. 1999/360) (as amended)¹ as modified by Article 2 of the Energy Act 2008 (Consequential Modifications Offshore Protection) Order 2010 (S.I. 2010/1513);
 - (ii) the Public Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999 (as amended) (S.I. 1999/1672)²; and
 - (iii) the Pipe-line Works (Environmental Impact Assessment) Regulations 2000 (as amended) (S.I. 2000/1928)³.

These sets of Regulations are together referred to as “the existing EIA Regulations”.

- 4.3 The Transposing Regulations will consequently transpose the obligations of the 2014 Directive by amending the existing EIA Regulations where appropriate. The Government’s Better Regulation agenda includes the requirement that when transposing EU law the Government will ensure that the UK does not go beyond the minimum requirements of the measure which is being transposed and will use copy out for transposition where it is available, except where doing so would adversely affect UK interests. These principles have been followed in transposing the 2014 Directive, and copy out has been used where possible in the Transposing Regulations, except where alternative or additional text is required for clarity. A separate Transposition Note is submitted with this Explanatory Memorandum.
- 4.4 The European Scrutiny Committees were provided with an Explanatory Memorandum on the Commission’s proposals which ultimately resulted in the 2014 Directive and were updated following a vote in the European Parliament in October 2013 and following agreement on a compromise text in February 2014. The House of

¹ Key amending instruments are the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) (Amendment) Regulations 2007 (S.I. 2007/933); the Pollution Prevention and Control (Fees) (Miscellaneous Amendments and Other Provisions) Regulations 2015 (S.I. 2015/1431); and the Energy (Transfer of Functions, Consequential Amendments and Revocation) Regulations 2016 (S.I. 2016/912).

² Key amending instruments are section 76(7) of the Utilities Act 2000 (c. 27); section 73(2) of the Countryside and Rights of Way Act 2000 (c.37), and the Public Gas Transporter Pipe-line Works (Environmental Impact Assessment) (Amendment) Regulations 2007 (S.I. 2007/ 1996).

³ Key amending instruments are section 73(2) of the Countryside and Rights of Way Act 2000 and the Pipe-line Works (Environmental Impact Assessment) (Amendment) Regulations 2007 (S.I. 2007/1992).

Commons committee released the proposal from scrutiny on 19 March 2014, and the House of Lords scrutiny committee did so on 3 April 2014.

- 4.5 The 2011 Directive as amended by the 2014 Directive also applies to energy project types which fall outside of the existing EIA Regulations including those granted under the Planning Act 2008. These projects are subject to separate consenting regimes and EIA Regulations. The 2014 Directive must be implemented through each of these regimes, and other Government Departments⁴ are leading on that transposition. The Devolved Administrations of Scotland, Wales and Northern Ireland are responsible for transposing the 2014 Directive in respect to matters which are devolved.
- 4.6 Supplemental to transposition and to the corrections outlined in paragraph 3.1 the Transposing Regulations will:
- (i) make a slight clarifying adjustment to regulation 17A (fees) of the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (as amended);
 - (ii) take the opportunity to transfer into the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 the modifications set out in Article 2 of the Energy Act 2008 (Consequential Modifications) (Offshore Environmental Protection) Order 2010 - and to revoke Article 2; and
 - (iii) amend the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (as amended) to implement a review requirement under Article 6 of Council Directive 92/43/EEC on the conservation of habitats and wild flora and fauna (“the Habitats Directive”) as it applies offshore to oil and gas activities plus CCS operations and gas unloading and storage activities, and under Directive 79/409 on the conservation of wild birds (now Directive 2009/147/EC) (“the Wild Birds Directive”). The requirement imposes an obligation on the Secretary of State, when a special area of conservation or a special protection area is created, to carry out a review of existing consents, approvals or authorisations (as defined in the 2001 Regulations) that are likely to have a significant effect on the new site and to make an appropriate assessment of their implications for the site in view of that site’s conservation objectives. The Secretary of State (or as the case may be, the Oil and Gas Authority) shall then affirm, modify or revoke the consent, approval or authorisation in light of the outcome of the review.

5. Extent and Territorial Application

- 5.1 The Transposing Regulations extend to any designated area of the United Kingdom Continental Shelf (including tidal waters and parts of the sea adjacent to the UK from the low water mark up to the seaward limits of territorial waters) and the UK mainland (except where specified legislative functions in respect to onshore pipe-line projects, or those under the Habitats Directive, in Scotland have been transferred to Scottish Ministers).

⁴ Department for Communities and Local Government (e.g., town and country planning and nationally significant infrastructure projects under the Planning Act 2008); Department for Environment, Food and Rural Affairs (e.g. agriculture and marine works); and Department for Transport (e.g. highways and transport).

6. European Convention on Human Rights

- 6.1 As the Transposing Regulations are subject to the negative resolution procedure and do 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 The UK is required to implement the 2014 Directive (which amends the 2011 Directive) in so far as the obligations apply to the consenting regimes for offshore hydrocarbon-related developments and onshore pipe-line projects.
- 7.3 The objective of the 2011 Directive is to provide a high level of protection for the environment and to help integrate environmental considerations into the preparation of proposals for development to reduce their impact on the environment. The 2011 Directive prohibits a consenting authority from granting consent for development which is likely to have a significant effect on the environment unless an environmental impact assessment has been carried out.
- 7.4 Environmental impact assessment is a process. It involves: **(a)** the preparation and submission by the developer (i.e. the “undertaker”, “gas transporter” or “applicant” under the existing EIA Regulations) of an Environmental Impact Assessment (EIA) consent application either with an Environmental Statement (ES) (the detailed assessment of the likely significant effects of a project on the environment) where a project meets / exceeds the thresholds in Annex I to the Directive or without an ES if a project satisfies the Directive’s Annex II criteria and the Secretary of State has given a determination that no ES is needed; **(b)** consultation (including public consultation) on an EIA application and on the ES (if needed); **(c)** an examination by the relevant authority of an EIA application plus other pertinent information (e.g. information received through consultation); **(d)** the authority reaching a reasoned conclusion on the significant environmental effects of a proposed project; and **(e)** the authority integrating the conclusion into the decision on whether or not to grant consent.
- 7.5 The basic requirements for environmental impact assessments have been in place since 1985 when the original EIA Directive 85/337/EEC came into force. A key aim of amending the 2011 Directive is to simplify the rules for assessing the potential effects of projects on the environment in line with the drive for smarter regulation, and to lighten unnecessary administrative burdens. The amendments also seek to improve 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.

- 7.6 The most prominent amendments introduced by the 2014 Directive are:
- The introduction of a definition of the environmental impact assessment process.
 - The introduction of joint and / or coordinated procedures for projects which are subject to assessment under the Habitats Directive or under the Wild Birds Directive as well as the 2011 Directive. BEIS has chosen to provide for coordinated procedures in the Transposing Regulations as this provides flexibility for developers and enables them to phase the various assessments where considered appropriate.
 - The inclusion of new powers to exempt projects from the Directive's requirements.
 - Changes to the list of environmental factors to be considered as part of the EIA process. The term 'human being' has been replaced by the term 'population and human health'; the term 'fauna and flora' has been replaced by 'biodiversity' and there is a new requirement to consider, where relevant, the effects on the environment deriving from the vulnerability of a project to risks of major accidents or disasters.
 - There are new requirements to use experts in the EIA process. The developer must ensure that an ES is prepared by competent experts, while the consenting authority must ensure that it has, or has access as necessary to, sufficient expertise to examine an ES.
 - There are new requirements relating to the publication of information electronically and to publishing the reasons for decisions.
 - The decision to grant consent should also now include, where appropriate, monitoring measures. Existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication.
- 7.7 The average number of EIA applications submitted in accordance with the existing EIA Regulations are outlined below:
- (i) Offshore hydrocarbon-related developments (including pipe-lines)**
- Applications supported by an ES: around 3 to 5 per year.
 - Applications seeking a determination that no ES is required: approximately 214 to 220 per year.
- (ii) Onshore Pipe-line projects**
- Applications supported by an ES: around 2 to 4 over a 10 year timescale.
 - Applications seeking a determination that no ES is required: approximately 22 to 24 per year.
- 7.8 There are no alternatives to legislation to implement the 2014 Directive. However, as outlined above, we have sought to minimise additional regulatory burden by copying out the text of the Directive except where another approach was judged appropriate i.e. when considering the provisions of the existing EIA Regulations.

- 7.9 BEIS has chosen to further amend the existing EIA Regulations via the Transposing Regulations rather than produce new sets of Regulations, as this approach to implementation is deemed more straightforward than alternative options such as:
- (a) trying to replace the extant legislative framework with one statutory instrument (SI) which would essentially result in an overly complex SI that would be difficult for relevant industry sectors to use; or
 - (b) replacing the existing individual Regulations with three new Regulations, which would mean rewriting three separate regimes - this would be unnecessarily time consuming and would introduce disproportionate legislative uncertainty into three well-established regimes.
- 7.10 BEIS appreciates that this is not the first time that the existing EIA Regulations have been amended and will look to consolidating the individual instruments when a suitable opportunity arises.
- 7.11 In respect of the amendment to the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001, the result of the amendment is that where a special area of conservation or a special protection area is created under the Habitats Directive or Wild Birds Directive, the Government will now be obliged to review certain existing consents, approvals or authorisations relating to offshore petroleum, CCS and gas unloading and storage licences where the activity carried on under the consent could have a significant effect on that newly created site.
- 7.12 The review includes the power to affirm, modify or revoke the consent - the Secretary of State already has the power to review (and thus affirm, modify or revoke) consents etc. under regulation 7 of the 2001 Regulations, the difference is that now the Secretary of State will be obliged to carry out a review if such a site is created. This obligation exists in other sets of Regulations that implement the Habitats Directive and the Wild Birds Directive.⁵ This lacuna in the 2001 Regulations was identified recently and it was felt that the Transposing Regulations would be a suitable vehicle to make the correction, therefore removing the risk of infraction from the European Commission for inadequate implementation of these Directives.

8. Consultation outcomes

- 8.1 In order to inform policy deliberations for transposing the 2014 Directive, BEIS circulated - in August / September 2016 - questionnaires to the offshore hydrocarbon and onshore pipe-line sectors which:
- (i) outlined the Department's proposals for transposing the Directive via amendments to the existing legislative frameworks; and
 - (ii) sought views on what the likely costs to industry would be as a result of complying with the amended / new requirements. See Section 10 for further information on this aspect.
- 8.2 BEIS received thirteen responses from the offshore sector and one from the onshore sector to the questionnaires. The views expressed were considered when preparing the consultation document.

⁵ See for example regulation 27 of the Offshore Marine Conservation (Natural Habitats & c) Regulations 2007 (as amended).

- 8.3 BEIS subsequently conducted a technical consultation from 16 February to 16 March 2017 seeking views on a draft of the Transposing Regulations and other germane information. On the basis that the relevant sectors had already been pre-consulted, a four week consultation was deemed sufficient. The consultation document was sent to 300+ key stakeholders such as energy companies, trade associations, statutory advisers (under the existing EIA process), environmental groups, other Government Departments / Agencies, the Devolved Administrations and it was also placed on the Department's website.
- 8.4 BEIS received 10 responses from energy companies, an industry trade association, statutory advisers, NGOs and other Government Departments / Agencies. Respondents addressed some or all of the questions set out in the consultation document, offered comments on the draft changes, and in some cases made specific suggestions for revised wording.
- 8.5 The overall consensus of respondents was that the proposed changes were proportionate and appropriate. No responses considered that the proposals were inappropriate but a small number made suggestions for broader changes. A number of responses noted that the proposed changes largely reflected current practice.
- 8.6 BEIS considered all of the responses received and made, where apposite, minor changes to the Transposing Regulations to reflect comments received and to achieve greater consistency with other UK EIA implementing legislation. It was not considered appropriate to make broader changes beyond what was required to implement the 2014 Directive as this would increase the burden on business and, in some instances, constitute 'gold-plating'.
- 8.7 The Government's response to the consultation will be made available on the BEIS website at <https://www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy>.

9. Guidance

- 9.1 It is BEIS's intention to make available, as soon as possible after the Transposing Regulations have entered into force, updated legislative guidance covering all the obligations of, and expectations arising from, the 2014 Directive on project developers, BEIS and statutory advisers. If necessary, BEIS would be willing to hold meetings with industry and other interested stakeholders to further discuss the implementation of the Directive and issues relating to the revised guidance.

10. Impact

- 10.1 Whilst the industry responses to the questionnaires (as mentioned in paragraph 8.1) included useful comments from a policy and an administrative perspective (e.g. on the extra factors to be assessed or considered under the EIA regulatory process), many of the suggested levels of additional costs expected to be incurred by industry through complying with the Directive's amended obligations were, in BEIS's opinion, disproportionately high in relation to the scale of extra burdens that the offshore hydrocarbon and onshore pipe-line sectors would realistically face. The key reasons for this view was that even though the 2014 Directive amended several elements of the 2011 Directive and incorporated new requirements, it was nevertheless the case that most of the obligations reflected what presently happened in practice under the existing EIA Regulations and, in some instances, the new requirements would have

limited - or probably no - discernible impacts on the offshore and onshore sectors. Accordingly, the total cost to both sectors should be relatively low.

- 10.2 It was also apparent that savings (benefits) should be accrued by the offshore and onshore sectors due to the fact that, in accordance with the 2014 Directive, future EIA applications will only need to focus on the significant environmental effects of proposed projects - thereby leading to reductions in costs.
- 10.3 Therefore, utilising historical data pertaining to EIA consent applications submitted (with or without Environmental Statements) from 2009 to 2016 plus other relevant information, and applying low to high scenarios primarily centred on varying levels of future EIA applications for Annex I and Annex II type projects being received over a 10 year timescale (2017 - 2026), BEIS undertook an analysis of the potential costs (plus savings (benefits)) to the offshore hydrocarbon and onshore pipe-line sectors as a result of complying with the Directive's obligations. The analysis, which was included in the consultation document referred to in paragraph 8.3, concluded that: (a) the combined extra costs per year to the offshore and onshore sectors would be, on average, between £654,920 (low end) and £761,747 (high end); and (b) the combined savings (benefits) per annum to the offshore and onshore sectors would be, on average, between £75,988 (low end) and £151,975 (high end).
- 10.4 Out of the 10 consultation responses submitted, three comprised comments on the BEIS analysis which, although not fundamentally disagreeing with most of the data presented, raised a few specific points on certain elements underpinning the indicative costs (plus savings (benefits)). All of the points have been effectively addressed in the Government response referred to in paragraph 8.7.
- 10.5 Taking into account the consultation comments received plus BEIS's responses to them, an Impact Assessment (IA) has not been prepared for the Transposing Regulations because the Department remains convinced that its analysis fairly demonstrated that the total combined costs to the offshore hydrocarbon and onshore pipe-line sectors of complying with the 2014 Directive would be under the £1 million threshold for producing an IA. Therefore, the Transposing Regulations are being classified as a Non-Qualifying Regulatory Provision (NQRP) under the Better Regulation Framework.

11. Regulating small business

- 11.1 The Transposing Regulations will apply to all small businesses that are engaged in hydrocarbon-related developments and onshore pipe-line projects.
- 11.2 It is important to note that the potential for a project to result in adverse environmental effects is not proportionate to business size. The potential for poorly managed risks leading to a significant environmental incident is the same for small businesses as it is for large international companies.
- 11.3 With respect to the offshore hydrocarbons sector more specifically, in the light of previous offshore major accidents (e.g. the Deepwater Horizon disaster in the Gulf of Mexico in 2010) and the subsequent close scrutiny of the UK offshore industry, it is crucial that all businesses operating offshore, regardless of size, are subject to the same regulatory framework to ensure that they continue to provide a high level of protection for the marine environment.

12. Monitoring & review

- 12.1 The Transposing Regulations appropriately incorporate into the Public Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999 and the Pipe-line Works (Environmental Impact Assessment) Regulations 2000 suitable provisions providing for periodic (i.e. 5 yearly) reviews in line with section 28(2)(a) of the Small Business Enterprise and Employment Act 2015. The Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 already contain a review provision.

13. Contact

- 13.1 David Foskett at the Department for Business, Energy and Industrial Strategy, Tel: 0300 068 6063 or e-mail: David.Foskett@beis.gov.uk can answer any queries regarding the Transposing Regulations.