

EXPLANATORY MEMORANDUM TO
THE ENVIRONMENTAL IMPACT ASSESSMENT (FORESTRY) (ENGLAND AND WALES) (AMENDMENT) REGULATIONS 2017

2017 No. 592

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the 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 Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (“EIA Directive”). It brings into effect Directive 2014/52/EU amending Directive 2011/92/EU (“2014 Directive”), which amends the EIA Directive. It also makes changes to afforestation thresholds and procedures in England, which determine whether or not afforestation projects are likely to have a significant impact on the environment.

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 instrument amends the EIA (Forestry) (England and Wales) Regulations 1999 to transpose amendments to the EIA Directive made by the 2014 Directive. 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 2014 Directive has been transposed by copy-out with additional text inserted where necessary to give clarity. 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 England and Wales.
- 5.2 The territorial application of this instrument is England and Wales.

6. European Convention on Human Rights

- 6.1 Because 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 The EIA Directive requires projects likely to have significant effects on the environment to undergo an environmental impact assessment before being authorised. The EIA Directive has been transposed into national legislation for forestry projects by the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999, as amended. The 1999 Regulations need amending to transpose amendments made to the EIA Directive by the 2014 Directive. The date for transposition is 16 May 2017.
- 7.3 The amendments are, broadly, deregulatory; simplifying and clarifying the requirements of the EIA Directive whilst improving the level of environmental protection. Legislation is required to transpose the 2014 Directive. But, in line with the Government's Better Regulation agenda we have sought to minimise additional regulatory burden by copying out as far as possible the text of the Directive whilst retaining the existing approach to EIA, which is understood by those involved in the process.
- 7.4 The changes made by the 2014 Directive, which this instrument gives effect to are:
 - Article 5 and Annex IV - the information to be included in the environmental statement when an EIA is needed. These have been copied out.
 - Article 1(2)g - a definition of the EIA process.
 - Article 1(3) - certain projects may be exempt from the EIA process (where Defence and responses to Civil Emergencies would be compromised by the EIA process).
 - Article 2(3) - where a project is subject to an assessment under the EIA Directive and also under the Habitats and/or Wild Birds Directives, either a 'coordinated procedure' or a 'joint procedure' should be used. Provision is made for both co-ordinated and joint assessments to provide more flexibility.

- Article 3 – clarification of the environmental factors to be considered as part of the EIA process. These have been copied out.
- Article 4 - 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 (nuclear power stations, long distance railways etc.). Other project types are considered likely to have significant effects depending on their nature, size and location. These project types are listed in Annex II of the EIA Directive and include urban development and smaller energy projects. Member States can decide whether a project listed in Annex II should be subject to EIA on a case-by-case basis and/or by setting thresholds or criteria. The 2014 Directive clarifies that process.
- Article 4(3) 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 1999 Regulations already include thresholds as guidelines to determine whether a project requires an EIA. We will retain this flexibility for forestry projects which enables reasoned decisions to be made on the need for an EIA.
- Article 4, Annex IIA and Annex III - applicants must provide results of other assessments on the project's effects on the environment at the screening stage. The applicant can also provide details of mitigating features that avoid/prevent significant adverse effects on the environment. These changes will focus assessments on cases where there is a likelihood of significant effects and reduce the number of projects subject to EIA. The competent authority (Forestry Commission ("FC") or Natural Resources Wales (NRW)) will decide if EIA is needed on the basis of the information provided by the developer and taking into account the results of 'preliminary verifications' or assessments. When considering the information provided by the proposer, the competent authority, as now, must take into account the criteria listed in Annex III. The criteria in Annex III have been amended to provide more clarity about the issues to be considered.
- Articles 4(4) and 4(5) - screening decisions must be published and reasons given for why an EIA is needed or not. This reflects existing practice and will be adopted in the new regulation.
- Article 4(6) - the competent authority must make a screening decision as soon as possible and within 90 days from the date the developer provides all the information required. This period can be extended in exceptional circumstances. We will retain the current timescale of 28 days for forestry projects (with extensions possible). No change will be made where screening is undertaken under the competent authority's own initiative. In this situation no timeframe applies and this enables screening to be done in conjunction with the processing of applications for grant aid for forestry projects.
- Article 5(2) - after screening, if a proposed project needs an EIA, it can go through the 'scoping' stage. This is voluntary and allows an applicant to request an opinion from the competent authority on the scope and level of detail the EIA must address. While scoping is good practice we have retained it as a voluntary process rather than making it mandatory. A new requirement

is that where a scoping opinion is requested, the EIA is “based on” that opinion.

- Article 6(2) and 6(5) - notices of projects must be made available electronically, in addition to more traditional methods.
- Article 6(6) - a new minimum time for public consultations of at least 30 days. This is an increase from 28 days and has been adopted.
- Article 8a - new requirements for information that must be included in an EIA decision (reasoned conclusion, environmental conditions and mitigation features) and, where the decision is to refuse consent, the main reasons for the refusal. A notice of a decision must also include any planned monitoring measures.
- Article 5(3) - the environmental statement must be prepared by competent experts. Applicants must provide evidence of this when they submit their EIA for a consent decision. The competent authority must also have sufficient expertise to assess the environmental statement. Applicants will also have access to the comments of the statutory consultation bodies, including Natural England and the Environment Agency to assist them.

7.5 We are also introducing changes to the threshold for afforestation projects in England in non-sensitive areas (no changes are being made to thresholds in sensitive areas). What is a sensitive/non-sensitive area is defined in the Instrument. These changes are aimed at stimulating interest in woodland creation by giving land managers greater certainty over the EIA process but without compromising environmental protection.

7.6 We will reduce the threshold from five to two hectares. Applicants with proposals between two and five hectares must provide FC basic information about their proposal (Prior Basic Notification). FC will have 28 days to confirm if EIA screening is needed otherwise the planting may proceed. This will protect remnants of priority habitat less than five hectares in area. Applications for grant aid in relation to the proposal will fulfil this requirement for notification.

7.7 In non-sensitive areas identified and mapped as Low Risk Areas (using national datasets) a threshold of 50 hectares will apply. Where the proposal is between five and 50 hectares, a more detailed prior notice (Prior Full Notification) must be provided to FC. This will show how environmental impacts not accounted for by the Low Risk Mapping have been addressed in the woodland’s design. FC will have 42 days to confirm if full EIA screening is needed, including publishing the proposals on a Public Register for local stakeholders to review, otherwise planting may proceed.

8. Consultation outcome

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

8.2 The focus of consultation responses was on changes to afforestation thresholds in low risk areas. Views were highly polarized. On one hand, thresholds should be raised because the forestry sector already adhered to the UK Forestry Standard. On the other, thresholds should be reduced to protect remnants of priority habitat and historic features and that the use of data sets to define Low Risk Areas was not

adequate to support an increase in the threshold. The requirements for applicants to provide prior notification before planting strikes a balance between these positions.

- 8.3 Responses on the questions posed in relation to the wider transposition of the 2014 Directive were fewer. Where there was a strong consensus we have responded to this in the SI, for example by keeping a 28 day timeframe for screening rather than changing to 90 days. Where there was not a strong consensus we have applied the changes proposed in the consultation document, where possible ensuring the specifics of the change accord with the approaches adopted by other Defra EIA regimes.

9. Guidance

- 9.1 Guidance on the EIA procedures will be refreshed to account for the changes arising from the 2014 Directive and adjustments to thresholds for afforestation projects in England.

10. Impact

- 10.1 The 2014 Directive's changes aim to reduce the burden by cutting the number of cases that go through the EIA process; the benefits will mainly be seen in the bigger developments that usually need an EIA 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 that triggers 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 and, because this regulation derives from an EU Directive, no special measures can be applied to minimise the impact on small business. However, the requirement for more information on environmental impacts in Low Risk Areas (where the threshold for afforestation projects will increase) will build on existing good practice. The acceptance of grant applications as a basic notification of small scale planting. These measures will minimise the impacts for all applicants.

12. Monitoring & review

- 12.1 This instrument amends the 1999 Regulations so as to include a review clause. This clause will require that a report setting out the conclusions of the review be published before 16 May 2022.

13. Contact

- 13.1 Either Stephen Penlington at Defra (Telephone: 0208 026 7569 and email: stephen.penlington@defra.gsi.gov.uk) or Ewan Calcott at Forestry Commission

(Telephone: 0300 067 4244 and email: ewan.calcott@forestry.gsi.gov.uk) can answer any queries regarding the instrument.