EXPLANATORY MEMORANDUM TO

THE ENVIRONMENT, FOOD AND RURAL AFFAIRS (ENVIRONMENTAL IMPACT ASSESSMENT) (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 25

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs (Defra) and is laid before Parliament by Act.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument uses the power in section 8 of the European Union (Withdrawal) Act 2018 to make necessary changes, which arise as a result of the UK leaving the EU, to domestic legislation which governs the process for Environmental Impact Assessment (EIA). It will specifically make amendments to the five EIA regulations covering the following Defra policy areas: land drainage improvement works, forestry, water resources, agriculture and marine works. The principal regulations being amended by this instrument include:

- The Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999;
- The Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999;
- The Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003;
- The Environmental Impact Assessment (Agriculture) (England) (No. 2) Regulations 2006; and
- The Marine Works (Environmental Impact Assessment) Regulations 2007.

Explanations

What did any relevant EU law do before exit day?

2.2 This instrument amends, in part, our existing implementation of Directive 2011/92/EU[1] ("the EIA Directive") of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment. The EIA Directive sets out principles that Member States must adopt in assessing and mitigating the environmental impacts of a project before consent is given.

The regulations to be amended by this instrument set out what an EIA is; what it must identify, describe and assess; what is to be included in any environmental report prepared and the public consultation and other procedures relating to EIA.

[1] OJ No L 26, 28.1.2012, p. 1

Why is it being changed?

2.3 This instrument makes minor and technical changes to ensure that the above legislation works sensibly in a UK-only context. The instrument makes no substantive changes to the way the existing legislation operates. All changes make only the technical drafting fixes required to maintain continuity of approach after exit. More information on the changes being made is at section 7.

What will it now do?

2.4 The five regimes amended by this instrument will continue to function as they did before exit.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument was presented to the Sifting Committees for consideration on 14 November 2018. On 29 November 2018, the Sifting Committees agreed with the Government that this instrument does not have to have a debate in Parliament, though one may still occur. This instrument will therefore remain subject to the negative resolution procedure.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales, Scotland and Northern Ireland, and is the same as the provisions it is amending.

4.2 The territorial application of the regulations is the same as the provisions it is amending. More specifically:

The territorial application of the regulations for agriculture is England only.

The territorial application of the regulations for land drainage improvement works, forestry and water resources is England and Wales only.

The territorial application of the regulations for marine works is the English inshore region, English offshore region, Scottish inshore region (with respect to certain reserved projects), Scottish offshore region, Welsh inshore region, Welsh offshore region, Northern Ireland inshore region and Northern Ireland offshore region.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 The principal regulations (listed in section 2 above) implement, in part, Council Directive 2011/92/EU[2] ("the EIA Directive") on the assessment of the effects of certain public and private projects on the environment. The EIA Directive was previously amended by EU Directive 2014/52/EU[3] to incorporate changes made at EU level: the main intention of those amendments was to simplify the rules for assessing the potential effects of projects on the environment in line with the drive for smarter regulation and a reduction in unnecessary administrative burdens. In May 2017, those amendments were transposed into national legislation and incorporated into the five regulations amended by this instrument.

6.2 The five regulations amended by this instrument are concerned with EIA in the context of land drainage improvement works, forestry, water resources, agriculture and marine works. The amendments to these regulations will be made under the powers in the European Union (Withdrawal) Act 2018.

6.3 The European Union (Withdrawal) Act 2018 repeals the European Communities Act 1972 on the day the UK leaves the EU. It converts EU law as it stands at the moment of exit into domestic law, and preserves laws made in the UK to implement EU obligations. The European Union (Withdrawal) Act 2018 also creates temporary powers, in section 8, to make secondary legislation, to enable corrections to be made to retained EU law that will not operate appropriately once the UK has left the EU.

7. Policy background

What is being done and why?

7.1 The EIA Directive requires projects likely to have significant effects on the environment to undergo an EIA before consent is given. This instrument makes the minimum changes required to ensure that all regimes for EIA, within Defra policy areas, remain operable after exit.

7.2 The amendments can be broadly categorised as:

- Removing references to provisions being 'in accordance with EU legislation' and other references to EU law/obligations, and instead referring to *retained* EU law/obligations;
- Copying out definitions within the regulations themselves, instead of referring to definitions that sit within EU Directives, or specifying that references should be to specific 'versions' of pieces of EU legislation;
- Updating references to other sets of legislation that will be changed following EU exit or where an update was required anyway due to the reference being to an out of date piece of legislation;
- Changing references from 'Member State level' to 'any law of any part of the UK; and
- Under the regimes for forestry, agriculture and marine works, updating the provision which requires the UK to notify 'other EU Member states' about

[2] OJ L 26, 28.1.2012, p. 1–21
[3] OJ L 124, 25.4.2014, p. 1–18

transboundary environmental impacts to reflect the UK's new status outside of the EU.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address deficiencies in retained EU law arising from the withdrawal of the UK from the EU. In accordance with the requirements of that Act, the Minister has made the relevant statements as detailed in Part 2 of Annex 1 to this Explanatory Memorandum.

9. Consolidation

9.1 There are no current plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 No separate consultation exercise was conducted as this instrument makes technical amendments with the purpose of maintaining continuity of approach after exit, and makes no changes to the substantive policy. No impact on stakeholders is envisaged.

10.2 The devolved administrations and relevant public bodies responsible for implementing the regimes (Environment Agency, Forestry Commission, Natural England, Natural Resources Wales and the Marine Management Organisation) have been closely engaged with development of this instrument and are content with the approach being taken.

11. Guidance

11.1 The responsible authorities will amend any existing operational guidance as necessary before this instrument takes effect. No further guidance is necessary.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies as a result of this instrument.

12.2 There is no, or no significant, impact on the public sector. Local authorities are likely to incur similar, negligible familiarisation costs as those listed under section 12.3: an assessment of these impacts is included in Annex 2.

12.3 A full Impact Assessment has not been prepared for this instrument because no significant impact on business, charities or voluntary bodies is foreseen, with any costs or benefits falling below £5 million in any one year. Defra has produced an initial assessment of the impacts attached to this document in Annex 2. The assessment demonstrates negligible costs to a select number of businesses as a result of the time taken in familiarising themselves with the amendments made by this instrument.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses, but no specific action is proposed to minimise impacts to them because this instrument seeks only to maintain the way the current regimes function.

14. Monitoring & review

14.1 The approach to monitoring this legislation will follow the general approach taken for EU exit statutory instruments.

14.2 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 Jordan Stanley at the Department for Environment, Food and Rural Affairs (Defra) email: Jordan.Stanley@defra.gsi.gov.uk can be contacted with any queries regarding the instrument.

15.2 Marie Southgate, Deputy Director for Land Use at the Department for Environment, Food and Rural Affairs (Defra) can confirm that this Explanatory Memorandum meets the required standard.

15.3 Dr Thérèse Coffey MP at the Department for Environment, Food and Rural Affairs (Defra) can confirm that this Explanatory Memorandum meets the required standard.

ANNEX 1

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/ESIC
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 77	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s.2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

1.1 The Parliamentary under Secretary of State for the Environment, Dr Thérèse Coffey MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Environment, Food and Rural Affairs (Environmental Impact Assessment) (Amendment) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)."

1.2 This is the case because the instrument does not fall within the categories for which use of the affirmative procedure is required under the European Union (Withdrawal) Act 2018. The instrument corrects deficiencies in retained legislation in the fields of land drainage improvement works, forestry, water resources, agriculture and marine works, arising out of the UK's withdrawal from the EU. The instrument makes changes of a minor and technical nature only, to ensure the continued effective operability of the legislation after EU exit.

2. Appropriateness statement

2.1 The Parliamentary under Secretary of State for the Environment, Dr Thérèse Coffey MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Environment, Food and Rural Affairs (Environmental Impact Assessment) (Amendment) (EU Exit) Regulations 2019 do no more than is appropriate."

2.2 This is the case because the amendments the instrument makes are minor and do no more than is strictly necessary to ensure the legislation amended functions correctly once the UK has left the EU.

3. Good reasons

3.1 The Parliamentary under Secretary of State for the Environment, Dr Thérèse Coffey MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action."

3.2 These are ensuring that the legislation amended by this instrument continues to function correctly once the UK has left the EU and ensuring clarity for the public and stakeholders.

4. Equalities

4.1 The Parliamentary under Secretary of State for the Environment, Dr Thérèse Coffey MP, has made the following statement(s):

"The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

4.2 The Parliamentary under Secretary of State for the Environment, Dr Thérèse Coffey MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, Dr Thérèse Coffey MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

5. Explanations

5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.

Annex 2

Findings of the Regulatory Triage Assessment

With reference to section 12

Viable policy options (including alternatives to regulation)

The intention of this instrument is to update and correct relevant UK law and the law of England and Wales, thereby maintaining the status quo, with no other desired effects for business. There are two options:

- **"Do nothing"** – This involves keeping legislation exactly as it is now after leaving the EU. Under this option it is assumed that Defra will provide emergency guidance for business and its arms-length bodies (ALBs). This guidance would either be delivered on the day of exit or shortly thereafter following EU exit.
- **Use a statutory instrument (SI) to amend the law ("do something")** – This involves amending current legislation, without altering its function, so that it performs exactly as it does now after exit. This is our preferred option.

Rationale for triage rating

The preferred option is expected to produce a one-off negligible cost to businesses of around £8,000, and the "do nothing" benchmark will prove to be more expensive due to cost from delays to business. The expected impact of the preferred option to business is below the £5 million threshold and does not merit a full impact assessment.

Initial assessment of impact on business

There are an estimated 566 applications made by developers to the respective bodies under the remit of the aforementioned legislation. This is based on average annual data included in the 2017 SIs relating to the same legislation. The table below shows the number of applications and who the applications are made to by consent regime. The regulations for land drainage improvement works were not included since they only influence land drainage bodies (i.e. Environment Agency, Natural Resource Wales, Internal Drainage Boards and Local Authorities) and not business.

Table 1: Number of applications made per regulation

Regulation	Body applications are made to	Number of applications (annual average)
Forestry	Forestry Commission	263
Water resources	Environment Agency (EA) & Natural Resource Wales (NRW)	No data
Agriculture	Natural England	272
Marine works	Marine Management Organisation	31

The figures are taken from the respective 2017 SIs[4]. We assume that the number of businesses affected by the legislation is the same as the number of applications made (i.e. that every application is completed by a different business). Research published by the research commission estimated that the number of applications undertaken was around 2,700[5] - significantly larger than the number used here. However, the number of screening requests and EIAs carried out has dropped significantly since this report has been published. Therefore we chose to use the number of applications given in the table above (566) as this would be a better reflection of the actual number of businesses affected. Furthermore, it is likely that multiple screenings are carried out by the same developer and so the number of businesses affected will be significantly less than the number of applications.

For public sector costs, we assume that only local authorities and the respective ALBs are affected. There are 418 local authorities[6] across the UK (England – 353, Wales - 22, Scotland – 32, and Northern Ireland – 11) and 6 ALBs (see table 1) affected.

Under the "do nothing" option, it is assumed that Defra would develop and provide emergency guidance. There would be costs associated with a) the delays to business caused by being uncertain on how to interpret the legislation and b) businesses spending time and resources familiarising themselves with the guidance. Those costs would likely be short term and negligible in nature. There could also be reputational damage to government as a result of the uncertainty caused. However, the extent of these damages is not monetised.

Alternatively, our preferred option (to use this SI to amend the legislation) would prove less costly. Our preferred option would avoid the costs caused by delays to business while they waited on emergency guidance. The only costs involved would be as a result of the time taken for businesses to familiarise themselves with the new legislation (familiarisation costs).

Costs

The costs are calculated using the below formula:

Familiarisation costs (business) = familiarisation time per business x number of businesses affected x wage costs x overheads factor

Familiarisation costs (public sector) = familiarisation time per local authority or ALB x number of local authorities and ALBs affected x wage costs x overheads factor

SI option costs = familiarisation costs (business) + familiarisation costs (public sector)

For the purposes of this analysis, we assume that the "do nothing" option is at least as costly as laying the SI. In reality, the costs are likely to be greater under the "do nothing" option because of the higher familiarisation costs associated with emergency guidance and the uncertainty caused. However, we do not value the cost of uncertainty.

[4] Land Drainage: https://www.legislation.gov.uk/uksi/2017/585/made
Forestry: https://www.legislation.gov.uk/uksi/2017/592/contents/made
Water Resource: https://www.legislation.gov.uk/uksi/2017/583/made
Agriculture: https://www.legislation.gov.uk/uksi/2017/593/made
Marine Works: https://www.legislation.gov.uk/uksi/2017/588/contents/made

[5] GHK (2010) 'Collection of information and data to support the impact assessment study of the review of the Environmental Impact Assessment Directive – Final Report'
http://ec.europa.eu/environment/eia/pdf/collection_data.pdf

[6] https://www.lgiu.org.uk/local-government-facts-and-figures/#how-many-councils-are-there

Familiarisation time: 0.5 hours

Familiarisation would be a very simple matter of checking online what our approach to these regimes will be. This will be well publicised, likely via GOV.UK initially but then subsequently cascaded. A conservative assumption would be that this should take no more than 30 minutes, so the figure used here is 0.5 hours. This is assumed for both developers and the public sector.

Number of businesses affected: 566

While it is probable that businesses would complete more than one application, meaning this number would be less than 566, we had no evidence to determine a central estimate. Therefore it is assumed instead that each application is produced by a different business and consequently the number of businesses affected is equal to the number of applications made (given above). This number is indicative of the upper bound.

Number of local authorities and ALBs affected: 424

We assume that local authorities and ALBs incur the same familiarisation costs as business and are each affected by changes to legislation.

Wage costs (business): £21.81 per hour

Previous, similar impact assessments have used the ONS' mean wage of 'activities of head office; management consultancy services' figures as a proxy for developers' wages. We propose to do the same here. This figure is £21.81 using ASHE 2017 industry gross hourly pay.

Wage costs (public sector): £16.85 per hour

Previous, similar impact assessments have used the ONS' mean wage of 'public administration and defence, compulsory social activity' figures as a proxy for public sector wages. We propose to do the same here. This figure is £16.85 using ASHE 2017 gross hourly pay.

Overhead factor & costs: 1.3

The HMT Green Book suggests a standard assumption of 30% overheads on top of the hourly wage to cover non-wage costs – so the overheads factor is 1.3. We assume this for both developers and the public sector.
Familiarisation costs (business) = *0.5 x 566 x 21.81 x 1.3 = £8,024*
Familiarisation costs (public sector) *= 0.5 x 424 x 16.85 x 1.3 = £4,644*
SI option costs = *8,024 + 4,644 = £12,668*

From the above calculations, it is clear that using this SI to correct the respective legislation would produce negligible costs. Given this option avoids delays to business caused through uncertainty (as the "do nothing" option would) it can be concluded that making the SI is the better option.