EXPLANATORY MEMORANDUM TO

THE ENVIRONMENTAL IMPACT ASSESSMENT (AGRICULTURE) (ENGLAND) (No. 2) (AMENDMENT) REGULATIONS 2017

2017 No. 593

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.

2.2 In addition to the amendments made to comply with the 2014 Directive we have removed exemption 3 (2) (f) which meant that Commons had previously been exempted from these regulations and allowed for an extension of the period before an appeal has to be made, if both parties agree, by 14 days (31 (3A)).

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 Environmental Impact Assessment (Agriculture) (England) (No. 2) Regulations 2006 Regulation 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 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.

5.2 The territorial application of this instrument is England only.

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 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 ensures that projects likely to have significant effects on the environment are made subject to an environmental assessment, prior to their approval or authorisation. This procedure ensures that the environmental implications of decisions are taken into account before said decisions are made. In respect of agricultural projects, the EIA Directive has been implemented into national legislation by The Environmental Impact Assessment (Agriculture) (England) (No. 2) Regulations 2006 ("2006 Regulations"). The 2006 Regulation needs amending to transpose amendments made to the EIA Directive by the 2014 Directive. The date for transposition is 16 May 2017.

7.3 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 the text of the Directive except where an alternative approach was considered beneficial. There has been liaison with other government departments to ensure that as far as possible a consistent approach has been followed.

7.4 The main changes made by the 2014 Directive, which this instrument gives effect to are:

- Article 1(3) -The Directive has been amended to restrict the existing exemption for defence projects so that it can only apply where a project, or part of a project, has defence as its sole purpose. The exemption has also been extended to include projects which have the response to civil emergencies as their sole purpose. These changes are transposed into the 2006 Regulations at 3(A).
- Article 2(3) -Introduction of Joint and/or Coordinated procedures for projects which are subject to the Habitats or Wild Birds Directives as well as the EIA Directive. We have opted for a co-ordinated procedure, as this gives a greater flexibility to the process (see regulation 3(C)).

- Article 4 (4) -Has introduced a more detailed list of information that the applicant must provide for the screening application. This gives greater clarity about the issues to be considered. These changes have been copied out in to the Regulations at Schedule 2.
- Clarification of the options for screening and amendments to the information which is required and the criteria to be applied when screening projects to determine whether the Directive applies – 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, (currently these are provided later in the EIA process) and may also provide details of any mitigation to avoid or prevent significant adverse effects on the environment. These changes should focus assessments on cases where there really is a likelihood of significant effects. These changes are transposed into the Regulations at 7 (1A).
- Articles 4 (5) and (6) – Have introduced a requirement that the competent authorities should publish their screening decisions and explain the main reasons why an EIA is needed or not. These changes are transposed into the Regulations at 8 (2). There is also a new requirement that the competent authority must make its screening decision as soon as possible and within 90 days from the date the developer provides all the information required. We will continue with our current 35 day minimum period and use the 90 day as a backstop. This is set out in the Regulations at 8(5) and 5 (A).
- Amendments to the information to be included in the environmental statement – Annex IV – We have copied this out into the Regulations at Schedule 3.
- Article 5 (3) - The use of competent experts - The Directive has introduced a requirement that the applicant must ensure that the environmental statement is prepared by competent experts and that the competent authority must also have sufficient experts to assess the environmental statement. Most decision makers already have people with sufficient expertise within their teams or can readily obtain access to people with expertise. These changes are transposed into the Regulations at 12 (1A(a)), 12(1) (D) and 15A.
- A requirement to introduce a new minimum time for public consultations of at least 30 days – Article 6(7) – The regulations already comply with this change having a 42 day minimum and so no change was made.
- A new article elaborating on information to be given in decision notices and the decision making procedures – Article 8a - Information to be included in a decision includes: the reasoned conclusion; environmental conditions; and a description of any parts or actions in the project to reduce the risk of significant adverse effects on the environment. Where the decision is to refuse consent, the main reasons for the refusal are given. A notice of a decision must also include any planned monitoring measures. This has been transposed at Regulation 16.
- A new Article requiring the avoidance of conflicts of interest – Article 9a – We have not copied out this requirement Natural England already has a statutory duty to act in a fair manner.

7.5 In addition to what was required as part of the transposition we will be removing the exemption for common land projects in regulation 3(2)(f) of the 2006 Regulations. Therefore an uncultivated land project or restructuring project which either meets a relevant threshold, as set out in regulation 5 of, and Schedule 1 to, the 2006

Regulations, or which is to be carried out on land to which a screening notice applies, under regulation 6 of the 2006 Regulations, must not be carried out unless a screening decision has first been obtained which permits the project to proceed under regulation 4 of the 2006 Regulations, or the project, having been identified following screening as significant, receives EIA consent from Natural England under regulation 9 of the 2006 Regulations. In addition the Secretary of State's consent will be required for any "restricted work" under section 38 of the Commons Act 2006 before the works may be carried out.

7.6 We have introduced a new provision at regulation 31(3A) whereby both sides (Natural England and the potential appellant) may, on agreement, extend the period before an appeal has to be made by 14 days, so as to allow for further discussion of any unresolved matters.

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. (https://www.gov.uk/government/consultations/environmental-impact-assessment-joint-technical-consultation-planning-changes-to-regulations-on-forestry-agriculture-water-resources-land-draina)

8.2 A total of 462 responses were received, 400 from individuals and 62 from organisations including farming organisations, developers, professional bodies, public bodies and charities (third sector bodies). The majority supported the proposed changes. Numerous respondents sought guidance which will provide clarity. As a result of consultation responses we have introduced the opportunity to extend the period before an appeal has to be made and have also removed the Commons exemption. Further details are included in the Government response.

9. Guidance

9.1 We will issue guidance setting out the changes to the Regulations on or before 16 May 2017.

10. Impact

10.1 Defra's economists have undertaken an assessment of cost to business of the proposed changes and the impact of these changes are set out in the Impact Assessment (attached). There is likely to be no impact on charities/voluntary bodies.

10.2 In transposing the amendments to the Directive, our view has been that there is merit in retaining, as far as practical, the existing approach to environmental impact assessment as it is well understood by those involved in the process. This approach will minimise familiarisation costs and business uncertainty. There would be minimal impact on the public sector.

11. Regulating small business

11.1 This regulation already applies to small businesses. Therefore no specific action is being proposed.

12. Monitoring & review

12.1 This instrument amends the 2006 Regulations and will 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 Russell Todd at the Department for Environment, Food and Rural Affairs Telephone: 0208 026 3994 or email: russell.todd@defra.gsi.gov.uk can answer any queries regarding the instrument.