Explanatory Memorandum to The Town and Country Planning (Environmental Impact Assessment) (Amendment) (Wales) Regulations 2008

This Explanatory Memorandum has been prepared by the Department for Environment, Sustainability and Housing and is laid before the National Assembly for Wales in accordance with Standing Order 24.1.

(i) Description

These Regulations amend the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 [S.I.1999/293]. They apply the requirements for Environmental Impact Assessment (EIA) to applications for approval of reserved matters and applications for approval of certain conditions attached to the grant of planning permissions ("subsequent applications").

(ii) Matters of special interest to the Subordinate Legislation Committee

None

(iii) Legislative background

The power to make the Regulations is provided by section 2(2) of the European Communities Act 1972 and by section 333 of, and paragraph 1 of Schedule 6 to, the Town and Country Planning Act 1990. The Welsh Ministers were designated by The European Communities (Designation) (No.3) Order 2007 (S.I. 2007/1679) for the purposes of section 2(2) of the 1972 Act, to make regulations 'in relation to the requirement for an assessment of the impact on the environment of projects likely to have significant effects on the environment, in so far as it concerns town and country planning'.

Negative Resolution: The negative resolution procedure is pursued as Section 333(5) of the 1990 Act, provides that the standard parliamentary procedure for statutory instruments under the 1990 Act is a negative resolution procedure. There are some exceptions but they do not apply in this instance. The regulations are therefore made using the negative resolution procedure

(iv) Purpose and intended effect of measure

There have been a number of recent judgements about the need for Environmental Impact Assessments (EIAs) and at what stage of the planning process it is required. Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC requires public and private projects that are likely to have significant effects on the environment to be subject to Environmental Impact Assessment prior to receiving development consent. For land use planning, the current legislation that gives effect to the Directive requires EIA prior to the grant of planning permission. For outline planning applications where certain matters are reserved for subsequent approval (referred to as "reserved matters"), planning permission is granted at the outline stage. Therefore EIA was not applied to the subsequent approval of the "reserved matters".

The European Court of Justice (ECJ) considered the issue of whether an EIA could be required at the “reserved matter” stage or if it could only be required at the initial outline planning application stage. In its judgements of 4 May 2006 (cases C-290/03 and C-508/03), the ECJ ruled that in cases involving the grant of outline planning consent where there is a subsequent requirement for the approval of reserved matters before a developer can begin to implement the permission, the two stages must, as a whole, be considered to constitute the development consent for the purposes of Article 1(2) of Council Directive 85/337/EEC. This ruling has since been followed by the domestic courts (the House Of Lords in the case of *R v London Borough of Bromley ex parte Barker*).

It was accepted by the UK Government that relevant national legislation would have to be amended to provide for the possibility of EIA after outline planning consent had been granted but before approval of reserved matters.

The overall objective is therefore to comply with the judgements of the ECJ by ensuring EIA can be applied to applications for reserved matters and the discharge of certain conditions attached to planning permissions where, together with the initial planning permission, they constitute a 'multi-stage consent procedure' for development consent within the meaning of the EIA Directive. Definitions of “subsequent application” and “subsequent consent” have thus been inserted into the 1999 Regulations and applied to the procedural and other requirements of the Regulations. The opportunity has also been taken to remove obsolete provisions which prevented Planning Inspectors from determining enforcement appeals to which the Directive applied, and to update references to the National Assembly on the face of the 1999 Regulations to references to the Welsh Ministers.

(v) Implementation

If these regulations are annulled, then it is almost certain that the European Commission would refer the case back to the European Court of Justice for non-compliance with the earlier ruling of the Court. This would, in turn, result in significant financial penalties, and damage the United Kingdom's reputation for timely compliance with European law.

Similar regulations have recently been made in respect of England and they are due to come into force on the 1 September 2008. Corresponding regulations were made in respect of Scotland during 2007, while in Northern Ireland regulations are expected to be made during the next few weeks.

(vi) Consultation

A consultation paper containing draft regulations was issued in November 2007 for 10 weeks. Details can be found in the following Regulatory Impact Assessment.

(vii) REGULATORY IMPACT ASSESSMENT

a) Options

We have considered the following options in the light of the judgements of the ECJ and the House of Lords.

Option (i) Do Nothing

We could do nothing; but this is not a realistic option.

If we fail to take action to remedy the breach in our regulations identified by the ECJ the European Commission will maintain its legal action against the UK. This would lead to the matter again being referred to the ECJ which has the power to impose fines against the UK until such time as action has been taken to comply with the its judgement. We cannot know the extent or scale of such fines but they would probably be very significant and would probably increase the longer we were judged not to comply with the ECJ judgement. The potential cost is so high that this option is not considered further.

Option (ii) Amend our existing EIA Regulations to allow for EIA at approval of reserved matters stage

This option recognises that in a few exceptional circumstances, the requirement for EIA may not, for whatever reason, have been fully met at the earlier outline approval stage. It proposes amendment of current implementing regulations to allow for the possibility of environmental impact assessment to be carried out when an application for approval of reserved matters is being considered.

Although it provides for EIA at the later stage in a multi-stage consent procedure, it is considered that, in practice, substantive assessment at that stage will rarely be necessary. It is expected that with few exceptions, applications for outline planning permission that are also EIA development will comply fully with the requirements of the Directive prior to approval of outline planning permission, and there should be no need for further substantive assessment at the subsequent approval of reserved matters stage. This is in accordance with existing Government policy. It also reflects the judgement of the ECJ which made clear that:

> "where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure."

Save for those cases on which the European Commission took action against the UK, and a few other cases we are aware of, there is no evidence of widespread failure by developers or local planning authorities to carry out an assessment at the outline planning permission stage. Indeed it is in the interest of both to ensure compliance at the earliest possible stage in the development consent procedure if they are to avoid potentially lengthy delays and costly challenges to the development.

However, in the light of the courts' judgements, it is accepted that there could be occasions where there is a need for EIA at the later stage prior to approval of reserved matters, and that it is necessary to provide for such a possibility in regulations. The amending regulations are an appropriate means of remedying the lacuna the ECJ identified.

It should not result in additional financial cost to or significant administrative burdens, on local planning authorities. They have an obligation to ensure full compliance with the EIA Directive, which remains unchanged. The proposed amendment to our regulations will simply mean that if, for whatever reason, they are unable to discharge this obligation at the earliest stage in the development consent procedure they will now have to do so at the later stage. For similar reasons, it should not result in additional costs or work for developers.

Alternative Options Considered

An alternative considered was abolishing outline planning permissions when considering how to avoid the submission of 'bare' planning applications. The option was rejected as it would deny developers, large and small, the opportunity to test the principle of a proposed development without the need to incur substantial, and potentially nugatory, expenditure on preparing detailed plans. This might in turn deter developers from bringing forward development and investment initiatives.

Removing outline planning permission for non-EIA Development was also considered. Even though under this option the number of cases where outline planning permission could not be sought would be far fewer than abolishing outline planning permission altogether, it was also judged it to be disproportionate. It would still deprive the developers in these cases of the benefits of certainty and flexibility that the granting of outline planning permission provides and upon which the commercial success of many of the types of projects that seek this form of planning permission depends.

Additional cases

Further examination of the House of Lords judgement in R v London Borough of Bromley ex parte Barker, and a subsequent High Court judgement drawing upon that judgement, has suggested there are other situations in the planning system broadly analogous to outline planning permission and approval of reserved matters that the ECJ determined comprised a multi stage consent procedure. These may arise when a full planning permission is granted but is made subject to conditions that require the subsequent (written) approval of the local planning authority before the permission may be implemented.

It is not considered that there will be many such cases where conditions attached to a full planning permission may be likely to have significant effects on the environment that have not been assessed prior to the planning permission being granted. Nonetheless, it would be prudent to make provision for them and this is included in the amending regulations.

Sectors and Groups Affected

The following organisations will be affected:

Welsh Assembly Government.
All work associated with the changes to the EIA regulations including administering the changes made in the legislation will be accommodated within existing and planned administration costs budgets.

Local Planning Authorities
It is likely that the need for a substantive assessment at reserved matters stage will be exceptional, particularly so if local planning authorities are vigilant at the outline stage, and that in the vast majority of cases there will be little new material for authorities to consider beyond updates of the information considered at outline stage. It is however possible that authorities may have to undertake some additional screening opinions; it is not possible to predict with certainty how many there are likely to be. In any event, the EIA regime in general attaches only to development that is of major or strategic significance and consequently any additional screening would be a small part of considering such applications. Therefore we believe these costs will be met from existing budgets.

Development Industry
The changes will mean that projects which are only found to be EIA development at reserved matters stage will now require assessment, and that development which has been assessed at outline stage may require further substantive assessment at reserved matters stage. However, each of these scenarios is likely to be very rare, and will in any event represent no more than full compliance with European law, which is what current guidance already seeks to ensure.

The Voluntary Sector and General Public
The same publicity and participation requirements will apply for applications for subsequent consent, as they do for full and outline planning applications. So given the low number of cases anticipated, the main effect on these sectors will be in terms of understanding the revisions to EIA procedures and how to respond in a meaningful and effective way to EIA should such cases arise.

b) Benefits

Option (ii) Amend Existing EIA Regulations

Economic benefits
The saving to UK government resulting from not incurring fines that the ECJ would impose if no action taken to remedy breach in implementing legislation. It is not possible to quantify amount of any fines that might be imposed, but they would increase until remedial action is taken. Fines could be very substantial over time.

Environmental benefits
It is recognised that projects to which public authorities give their consent may have significant effects on the environment. Changes in regulations would mean that planning authorities would more often consider the impact of a development on the environment by imposing an EIA.

Social benefits
None

c) Costs

Option (ii) Amend Existing EIA Regulations

Economic costs

Potential loss to economy through investment delay is non-quantifiable. Effects will be mainly felt by firms who carry out large scale development rather than small firms whose projects are less likely to have significant effects on the environment because of their comparatively smaller scale.

The proposed amendment does not create new categories of development for which EIA may be required nor does it alter the need for EIA in those cases where it is required under our existing regulations. All that the amendment proposes is, in effect, that where the assessment has not been completed at the earliest stage in the development consent procedure (i.e. prior to outline planning permission) it will now be completed prior to the second stage in the process. No substantive additional costs should therefore be incurred, although where EIA is not carried out fully prior to approval outline planning permission, some of the costs the developer incurs on EIA may be 're-distributed' to the approval of reserved matters stage. Similarly, costs incurred by the local planning authority in assessing the environmental impact assessment may move to reserved matters stage.

Environmental costs
None

Social costs
None

d) Competition Assessment

The requirement to consider EIA at reserved matters stage will affect some users of the planning system including business, charities and the voluntary sector. The competition filter test indicates that significant competition issues are unlikely.

e) Consultation

Public consultation was undertaken for 10 weeks between 3 December 2007 and 11 February 2008. Draft Regulations and an accompanying consultation document, including a draft regulatory impact assessment were sent to over 400 individuals and organisations to obtain views on whether the proposed approach was likely to address the ECJ judgements and whether the cost and benefits associated had been properly identified. Consultees included: all local authorities in Wales; all planning authorities in Wales; the Royal Town Planning Institute; environmental conservation organisations; economic and trade organisations; utility providers; waste and mineral companies; Assembly Members and Members of Parliament with constituencies in Wales.

Fifteen responses were received to the consultation and a list is attached at Annex 1. All respondents who made comments supported the approach taken to address the ECJ judgement, although a number of minor drafting amendments were suggested. Two respondents, British Waterways, and the Welsh Consumer Council did not wish to comment. Since the consultation the draft statutory instrument has been redrafted to be clearer and more understandable to those using the Regulations.

Of the eight respondents that commented on the draft regulatory impact assessment, six were of the opinion that it reasonably identified the costs and benefits that were likely to result from making the legislation.

However, one local authority planning authority considered the proposals would provide more opportunities to challenge planning consents, and RSPB Cymru considered that there would be less scope to challenge on EIA grounds because deficiencies at outline stage could be rectified at the 'subsequent consent' stage. The regulatory impact assessment has not been altered as it is considered on balance the risk of challenge will not significantly change and that the amendments should improve compliance with the Directive

RSPB Cymru also commented that while there will be few cases where EIA is needed to be carried out at the reserved matters stage they are likely to be large complex cases. They were also concerned that the drafting may lead to local planning authorities to lose focus on ensuring EIA is done at the outline stage. It is agreed that EIA must be undertaken at the outline stage and not deferred, with the result that substantive assessment would only exceptionally be required at the reserved matters stage (although the need to screen subsequent applications for EIA would be a routine task). It is intended to issue interim guidance to accompany the Regulations, which would address this issue, and a revised circular and good practice guide on EIA will follow this. These were subject to consultation in autumn 2006 but have been on hold pending these further changes to the EIA Regulations.

f) Post Implementation Review

No formal monitoring of the effect of the regulations is proposed. However the number of decisions on EIA applications that are challenged through a lack of information at outline stage will be monitored.

g) Summary and recommendation

The regulations are necessary in order to comply with ECJ judgements in cases cases C-290/03 (reference for a preliminary ruling in R v London Borough of Bromley ex parte Barker) and C-508/03 (Commission v UK). The costs on business will be insignificant while those of the public sector (both the Assembly Government and local authorities) will not be substantial. The risks and costs of not complying with the judgement are significant; therefore Option (ii) is considered necessary to ensure compliance.

ANNEX 1 - List of responses received

Bridgend County Borough Council
British Waterways, Wales and Border Counties
Campaign for the Protection of Rural Wales
Campaign for the Protection of Rural Wales, Newport and Valleys Branch
The Coal Authority
Conwy County Borough Council
Council for British Archaeology Wales/Cymru
Mr Clive James
NFU Cymru
Rhondda Cynon Taf County Borough Council
RSPB Cymru
RWE NPower plc
Welsh Consumer Council
Welsh Police Architectural Liaison Officers Group

One confidential response was also received.