

To: Business Committee

From: Carwyn Jones, AM
Minister for Environment, Planning and Countryside

EXPLANATORY MEMORANDUM

LAND DRAINAGE, ENGLAND AND WALES

THE ENVIRONMENTAL IMPACT ASSESSMENT (LAND DRAINAGE IMPROVEMENT WORKS) (AMENDMENT) REGULATIONS 2005

Summary

These joint Regulations amend the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999 (S I 1999 No. 1783) to bring them into line with recent European legislation. The purpose of the Regulations is to transpose the requirements of EC Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EEC (The Public Participation Directive).

1. This Memorandum is submitted to the Assembly's Business Committee in relation to the Environmental Impact Assessment (Land Drainage Improvement Works) (Amendment) Regulations 2005, in accordance with Standing Order 25 (Section 3).
2. A copy of the Instrument is submitted with this Memorandum.

Enabling power

3. The power enabling this Instrument to be made is contained in section 2(2) of the European Communities Act 1972. These powers may be exercisable jointly by the National Assembly for Wales and the Secretary of State for Environment, Food and Rural Affairs. The National Assembly for Wales has been designated, under section 2(2) of the 1972 Act to make Regulations in relation to measures relating to the requirement for an assessment of the impact on the environment of projects likely to have significant effects on the environment, by virtue of the European Communities (Designation) (No. 3) Order 2000 (SI 2000/2812).

Effect

4. The intended effect of these Regulations is to include CADW and English Heritage as statutory consultees which will bring the Regulations into line with the Strategic Environmental Assessment Directive and will improve the protection of the historic environment.
5. In recognition of the need to ensure that public money is spent efficiently, and that the cost of advertising in local newspapers is of concern to some of the drainage bodies, these Regulations provide drainage bodies with choice:
 - public notices may be advertised in two local newspapers, as is currently required; or
 - public notices may be displayed on the site, where such a notice can be placed so that it is clearly readable from a public highway, and also advertised in a single local newspaper.

This change will bring these Regulations into line with requirements for public notification of proposed works subject to planning permission.

6. In recognition of the fact that some land drainage works are actually designed to stop or reduce drainage for environmental benefits, and that the definition of 'improvement works' in the 1999 Regulations does not make it sufficiently clear that such works also require Environmental Impact Assessment, the definition in these Regulations is amended to include alteration as well as 'improvement' to drainage structures.

Target Implementation

7. It is intended that the proposed Instrument will be made on the 24 May 2005 and come into force on 25 June 2005. The deadline for transposition of the EC Directive is 25 June 2005, therefore, a delay in making these Regulations could lead to infraction proceedings against the National Assembly.

Financial Implications

8. There are no additional financial implications for the Assembly as a result of implementing these Regulations. There are no additional financial implications for flood defence operating authorities.

Regulatory Appraisal

9. As this Instrument falls outside the definition of Assembly general subordinate legislation in section 58 of the Government of Wales Act a Regulatory Appraisal is not required to be undertaken. However, a Regulatory Impact Assessment prepared by the Department for Environment, Food and Rural Affairs (Defra) is attached at Annex 1.

Consultation

With Stakeholders

10. There has been consultation with a range of stakeholders in Wales and England. A list of consultees is attached at Annex 2.

11. The consultation period began on 21 March 2005 and ended on 3 May 2005. No objections were received from interests in Wales within the objection period. Other consultees were broadly supportive of the proposals. Concerns were raised about the use of site notices in place of newspaper advertising, as many land drainage sites are in remote rural areas. This concern has been addressed by providing drainage bodies with a choice as outlined in paragraph 5 above.
12. A small number of consultees were concerned that the amendment of the definition of 'improvement works', outlined in paragraph 6 above, would extend the scope of the Regulations to include routine maintenance and repair works. We have addressed this concern by writing a guidance note to drainage bodies to accompany the Regulations, which explicitly states that improvement and alteration can only be interpreted with respect to the function and effect of the original structure.

With Subject Committee

13. The Regulations were included in the list of forthcoming legislation provided to the Environment, Planning and Countryside Committee on 13 April 2005 (EPC(2)04-05 (P.3) Annex 1, item No.38). They were not identified for detailed scrutiny.

Recommended procedure

14. Subject to the views of the Business Committee, I recommend that this order proceed to Plenary under the Accelerated procedure as the subject matter is entirely non-controversial and the amendments proposed are minor in nature.

Compliance

15. The proposed legislation will (as far as is applicable):
 - have due regard to the principle of equality of opportunity for all people (Government of Wales Act 1998 Section 120);
 - be compatible with the Assembly's scheme for sustainable development (Section 121);
 - be compatible with Community law (Section 106)
 - be compatible with the Assembly's human rights legislation (Section 107); and
 - be compatible with any international obligations binding the UK Government and the Assembly (Section 108).
16. This Memorandum has been cleared by the Directorate of Legal Services and by the Assembly Compliance Officer.
17. Drafting Lawyer Sean Bradley Ext 3202
18. Head Of Division June Milligan Ext 3256
19. Policy Division contact – Cedric Moon Ext 1338

CARWYN JONES

MAY 2005

MINISTER FOR ENVIRONMENT, PLANNING AND COUNTRYSIDE

Regulatory Impact Assessment (Prepared by Defra)

1. Title of Proposal

Amendment of the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999

2. Purpose and intended effect of measure

(i) The objective

To transpose the requirements of EC Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EEC (The Public Participation Directive)

(ii) The background

The Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999 transposed into English law the provisions of Council Directive 85/337/EEC (the Environmental Impact Assessment Directive)

In 2003, the Public Participation Directive amended the Environmental Impact Assessment Directive and those amendments must be transposed into English law before 25 June 2005.

(iii) Risk assessment

Failure to transpose, either as a result of a decision to do nothing or make non-regulatory provisions, would result in infraction proceedings from the EC. These proposed amendments will avoid this situation from arising.

Late transposition is also highly likely to result in infraction proceedings, and the risks of transposition being delayed are as follows:

- Failure by officials to draft new regulations in a timely manner
 - drafting of the new Regulations is well underway so this risk is small.
- Consultation resulting in major alterations to draft regulations
 - we propose to undertake a limited consultation exercise with key stakeholders, as the Regulations cover a specific and well-defined set of works, and apply only to the flood and coastal defence operating authorities, i.e. the Environment Agency, Internal Drainage Boards and Local Authorities.
 - The changes required are relatively minor as the Regulations already provide for a high level of public participation; the additional burden on the operating authorities is not likely to be significant and we do not anticipate that the changes will be controversial.

- Decision not to transpose Article 10a may lead to concern from Consultees or infraction proceedings
 - The amended EIA Directive includes a new article (10a) requiring that the public must have access to an independent administrative or judicial review of decisions. The proposal does not include new provision for this. There is a risk that some Consultees may consider that an independent body should be set up to review EIA decisions as judicial review is an expensive process. However, we consider that (a) independent review of operating authorities' decisions is already provided by Defra Ministers, and (b) that judicial rather than administrative review is appropriate for questioning Ministerial decisions. Legal advice is that English law already provides for any Ministerial decision to be subject to review by the courts and therefore transposition of this article is not required.

3. Options

Transposition is required by EC law, meaning that 'Do nothing' or 'alternatives to legislation' are not legal options and can be discarded.

The remaining options are:

1. Transposition of the requirements of EC Directive 2003/35/EC into English law by means of amendments to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999
2. Transposition of the requirements of EC Directive 2003/35/EC into English law by means of new legislation

Option 2 would be more costly and provide no additional benefit, therefore the only reasonable option is Option 1 as proposed.

4. Benefits

- Economic – no economic benefits have been identified
- Environmental – The proposed inclusion of English Heritage as a statutory consultee will bring the Regulations into line with the Strategic Environmental Assessment Directive and will improve the protection of the historic environment. There may be minor environmental benefits due to increased public information under certain circumstances, and alterations to the way in which information is publicised, but this is not likely to be significant.
- Social – there may be minor social benefits if public participation increases as a result of increased public information under certain circumstances, and alterations to the way in which information is publicised, but this is not likely to be significant.

5. Costs

- Economic – there may be a minor increase in operating authorities' costs in preparing EIA in certain circumstances, but these are not likely to be significant.

- Environmental – no environmental costs have been identified.
- Social – no social costs have been identified.

6. Equity and Fairness

Flood Management and Land Drainage works are permissive and jointly funded from general taxation and local funding. The benefits of the proposal, i.e. increased public participation in environmental assessment, are mainly gained by those who would be directly affected, whereas the costs are borne by the wider public who may benefit very little if at all from the proposals. However, the Regulations require consultation with bodies representing the national interest, therefore the wider public is not significantly disadvantaged.

The impacts on rural areas have been considered; the public in rural areas are not adversely affected or less able to engage with the Regulations than those in urban areas.

The proposal does not have a greater impact on any particular group or sector of society.

7. Consultation with small business: the Small Firms' Impact Test

A Small Firms Impact Test is not required in this Regulatory Impact Assessment as the proposal only affects the flood and coastal defence operating authorities.

8. Competition Assessment

A competition assessment is not required in this Regulatory Impact Assessment because the proposal impacts only on public services. This has been verified by the completion of a Public Service Threshold Test.

9. Enforcement and Sanctions

(i) How will the proposal be enforced?

If works are carried out without complying with the Regulations, the Regulations provide the Minister with powers to apply to the Court for orders for the operating authority to cease and remove such works, and to reinstate the site.

(ii) Who will enforce this legislation?

Defra

(iii) Will the legislation impose criminal sanctions for non-compliance?

No.

Compliance with the current Regulations is satisfactory; occasional cases of non-compliance are usually the result of misunderstanding. The proposed amendments will clarify which works are covered by the Regulations, and the stakeholder consultation will refresh awareness of the requirements among the operating authorities. The risk of non-compliance is low.

10. Monitoring and Review

On applying for grant-aid, local authorities and internal drainage boards advise Defra whether the works are subject to the EIA Regulations, whether an Environmental Statement has been produced and whether objections have been made and their outcome. This information is maintained centrally in a Defra database. The Environment Agency maintains its own records and provides information to Defra on request. Compliance with EIA Regulations (where appropriate) is a condition of grant aid for all operating authorities.

11. Consultation

i) Within government

Consultation took place with other public bodies affected by the legislation, namely the Environment Agency, the Local Authorities, the Internal Drainage Boards, English Nature, English Heritage, and the Countryside Agency.

ii) Public Consultation

Consultation also took place with other interested stakeholders, such as RSPB, the Wildlife Trusts, and relevant members of the Flood Management Stakeholder Forum.

Consultees were broadly supportive of the proposals; a full list of consultees and the consultation report is available on the Defra website at <http://www.defra.gov.uk/environ/fcd/consult/eiacons.htm>

12. Summary and Recommendation

Option	Total cost per annum Economic, environmental, social	Total benefit per annum Economic, environmental, social
Transposition of the requirements of EC Directive 2003/35/EC into English law by means of amendments to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999	No significant costs identified. The considerable costs of infraction proceedings as a result of failure to transpose the legislation are avoided.	Historic environment will be better protected. No other significant benefits have been identified.

13. Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed:

Date:

[NAME]

Minister of State, Department for Environment, Food and Rural Affairs

Annex 2

CONSULTATION LIST

All Wales Ethnic Minority Association
Association of Drainage Boards
Association of National Park Authorities
Blaenau Gwent County Borough Council
Bridgend County Borough Council
Caerphilly County Borough Council
Caldicot & Wentlooge Levels IDB
Campaign for the Protection of Rural Wales
Carmarthenshire County Council
CBI Wales
Ceredigion County Council
Cheshire County Council
City and County of Cardiff
City and County of Swansea
CIWEM
Council of Mortgage Lenders
Country Landowners Association
Countryside Agency
Countryside Council Wales
Engineering Employers Association
English Heritage
English Nature
Environment Agency
Environment Agency Wales
Equal Opportunities Commission
Farmers Union Wales
Forestry Commission
Friends of the Earth Cymru
ICE Wales
Local Government Association
Local Government Association Wales
Lower Wye Drainage Board
Merthyr Tydfil County Borough Council
Monmouthshire County Council
National Assembly for Wales
National Farmers Union
National Trust
Neath Port Talbot County Borough Council
Newport County Borough Council
Pembrokeshire County Council
Powys County Council
Racial Equality Wales Office
Regional Flood Defence Committee

Rhondda Cynon Taf County Borough Council
RSPB
The Vale of Glamorgan Council
Torfaen County Borough Council
Voluntary Sector Assembly Centre
Wales Disability Rights Commission
Wales TUC Cymru
Wales Women National Coalition
Wildlife Trusts
World Wide Fund for Nature
Wrexham County Borough Council
And all Local Authorities in England and Wales.