

To: Business Committee

From: Andrew Davies AM
Minister for Enterprise, Innovation and Networks

EXPLANATORY MEMORANDUM

HIGHWAYS, ENGLAND AND WALES

THE HIGHWAYS (ENVIRONMENTAL IMPACT ASSESSMENT) REGULATIONS 2007

Summary

These Regulations amend the procedures, contained in Part VA of the Highways Act 1980, for the environmental impact assessment of projects for the construction or improvement of highways for which in England the Secretary of State and in Wales the National Assembly for Wales (“the authorities”) are respectively the highway authority, i.e. trunk roads (and certain other highways).

1. This Memorandum is submitted to the Assembly's Business Committee in relation to The Highways (Environmental Impact Assessment) Regulations 2007, in accordance with Standing Order 25, section 3.
2. A copy of the Instrument is submitted with this Memorandum.

Enabling Power

3. The National Assembly for Wales has been designated, under section 2(2) of the European Communities Act 1972 to make Regulations for the purpose of implementing Community requirements for the assessment of highway projects likely to have a significant effect on the environment, by virtue of European Communities (Designation) (No.3) Order 2000 (SI 2000/2812)). The Assembly and the Secretary of State are acting together to make Regulations for England and Wales; the Secretary of State as respects England and the Assembly as respects Wales. I agreed to composite Regulations as the nature of the requirements imposed by Article 3 of the Public Participation Directive allows little scope to adopt different approaches in Wales and England. As the transposition date has passed, there is a risk of the current infraction proceedings being progressed by the European Commission.
4. The consent of the Treasury to the making of these Regulations is required under section 56 (1) of the Finance Act 1973. The Department for Transport expect to receive the Treasury's consent by the 15 March 2007. Assembly functions in relation to this designation have been delegated to my portfolio as Minister for Enterprise, Innovation and Networks. Under the post-2007 arrangements, we foresee that this legislation would follow the Negative procedure.

Effect

5. These Regulations would make three principal changes to Part VA of the Highways Act 1980 (the Act):

- Firstly, they transpose those provisions of Directive 2003/35/EC (the Public Participation Directive), which amends Directive 85/337/EEC (the Environmental Impact Assessment (EIA) Directive) with regard to public participation and access to justice. The Public Participation Directive is one of the legislative instruments that transpose the provisions of the United Nations Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (known as the Aarhus Convention (Annex A)) into Community Law. Article 3 of the Directive amends the Environmental Impact Assessment (EIA) Directive in order to align the public participation provisions of the EIA Directive with the Aarhus Convention and adds provisions with regard to access to justice to comply with the Convention. These provisions help to ensure that the importance of the predicted environmental effects, and the scope for reducing them, are properly understood by the public and the relevant authority before it makes a decision.
- The Regulations specify in more detail requirements for public notice of environmental statements, for making the statements available to the public, for members of the public, and certain consultation bodies, to make representations in relation to such environmental statements and the projects to which they relate, and for those representations to be taken into account in the making of decisions whether to carry out projects. When decisions on projects are published additional information is to be included about the consultation process and results.
- Secondly, the effect of regulation 3(2) is to require the application of the same criteria for determining the need for environmental impact assessment for projects to construct and improve "special roads" (mostly motorways) that currently apply to other trunk road improvement projects.
- Thirdly, they amend Part VA of the Act to reflect the application of Directive 85/337/EEC (the EIA Directive) to the European Economic Area (EEA) by Decision No.20/1999 of the European Economic Area Joint Committee of 26 February 1999 (regulations 2(2)(b), 3(6) and 4(2), 4(c), (5), (6) and (7)). The effect is to extend the application of Part VA to enable States, which are EEA States but not also EC Member States, (i.e. Iceland, Liechtenstein and Norway), to participate in the procedures for notification and consultation on trunk road projects in England and Wales where projects are likely to have a significant effect on the environment in those States.

Target Implementation

6. It is intended that this Instrument will be made on 20 March 2007 and for it to be laid before Parliament on 4 April 2007 in order to come into force on 20 April 2007.
7. If the target dates are not met it would almost certainly result in the European Commission continuing with infraction proceedings against the United Kingdom for failure to complete transposition of article 3 of the Public Participation Directive and the potential imposition of substantial fines if the case is referred to the European Court of Justice and until compliance has been achieved. There is a meeting of Infraction Chefs (this is the recognised EU term) on 14 March 2007 and it is likely a decision will be made then whether or not to refer this issue to the European Court of Justice.

Financial Implications

8. The changes introduced by these Regulations are largely procedural, but include publicity arrangements that have cost implications although these are generally small and would be accommodated within existing administration cost budgets.
9. Part VA of the Highways Act 1980 presently provides for the environmental assessment of projects for the construction and improvement of highways for which the Assembly is the highway authority. The Public Participation Directive and these Regulations would impose some minor additional obligations on the Assembly. The cost of consultation and publicity currently undertaken are met from the existing budget and satisfy most of the requirements of the Environmental Impact Assessment (EIA) Directive. The anticipated additional procedural costs are likely to arise from the supplementary consultant and publicity costs involved in informing the public about the reasoning and decisions taken.
10. These additional costs are estimated to be £30,000 to £50,000 pa and would be met from the Improving Trunk Road Network budget of £56m pa i.e. just 0.05-0.09%. There will be no costs to industry or any others as a result of making these Regulations.

Regulatory Appraisal

11. As these Regulations fall outside the definition of Assembly subordinate legislation in section 58 of the Government of Wales Act 1998, a Regulatory Appraisal is not required to be undertaken.

Consultation

With Stakeholders

12. A public consultation on the provisions of these Regulations was carried out between 21 September 2006 and 14 December 2006. The Department for Transport led this consultation on behalf of England and Wales. A list of those consulted is attached at Annex B. Eight responses were received and a summary of the responses and the conclusions is at Annex C. No amendments were made to the Regulations as a result of the consultation.

With Subject Committee

13. The Regulations were first notified to the then Economic Development and Transport Committee via the list of forthcoming legislation on 26 January 2006 (EDT(2) 02-06 (p.4)) and have remained on the list ever since. However, the title at the time was The Highways (Assessment of Environmental Effects) (England and Wales) (Amendment) Regulations 2006. The Regulations were identified for detailed scrutiny.
14. The Regulations were scrutinised by the Enterprise, Innovation and Networks Committee on 14 February 2007 (EIN(2) 02-07 (p 3)). Committee Members raised two queries. The first query raised concern that the Regulations would not impact on the A494 Drome Corner to Ewloe scheme. The Committee was advised that although the Draft Orders for the scheme had been published the Welsh Assembly Government is already implementing procedures similar to the Regulations. The second was a query about the six-week period for objections. It was explained that this six-week period was in keeping with the other objection period time scales used for the Draft Orders for Trunk Road projects. The Committee approved the Regulations as drafted. A transcript of the proceedings is attached at Annex D.
15. The draft Regulations have been amended since they were scrutinised by the Enterprise, Innovation and Networks Committee; amendments have been made to regulation 3(10), which deals with consultation bodies, to reflect Parliamentary Counsel's review of the draft. This was a technical issue identified by Parliamentary Counsel that CADW, as it is a part of the Welsh Assembly Government, should not be a separately identified consultee. Internal processes are already in place to ensure that CADW is consulted on environmental matters connected with road schemes. I wrote to the Chair of the Enterprise, Innovation and Networks Committee on 8 March 2007, to inform the Committee of this minor amendment.
16. The Regulations were also notified to the Environment, Planning and Countryside Committee, via their forward look, of the intention to make these Regulations, on 28 September 2006 (EPC(2)-12-06 (p3). The Committee did not identify them for scrutiny.

Recommended Procedure

17. Subject to the views of Business Committee, I recommend that these Regulations proceed to Plenary under the Standard procedure to give Assembly Members the opportunity to debate them.

Compliance

18. 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).

19. The information in this Memorandum has been cleared with the Legal Services Department (LS).

20. Drafting lawyer: Elaine Osborne, ext. 5663

21. Head of Division: Tony Parker, ext. 6252

22. Drafting Policy Officials: Harriet Cozens, ext. 5678
Russell Dewey, ext. 6515

ANDREW DAVIES

MARCH 2007

MINISTER FOR ENTERPRISE, INNOVATION AND NETWORKS

Annex A

Summary of the Åarhus Convention

On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the Åarhus Convention).

Among the Objectives of the Convention is the desire to:

- guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.
- Article 6 provides for public participation in decisions on specific activities related to areas such as mineral oil and gas refineries, production and processing of metals, the mineral industry and waste management.
- Provides for public participation concerning plans and programmes relating to the environment
- Provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation

The provisions being added are:

- Ensuring that the public is informed, whether by public notices or other appropriate means such as electronic media where available
- The public is entitled to express comments and opinions when all options are open before decisions on the plans and programmes are made
- In making those decisions, due account shall be taken of the results of the public participation
- Having examined the comments and opinions expressed by the public, the competent authority makes reasonable efforts to inform the public about the decisions taken and the reasons and considerations upon which those decisions are based, including information about the public participation process.

Annex B

Consultation on The Highways (Environmental Impact Assessment) Regulations 2007

List of organisations consulted on an England Wales basis

Government - Regional and local bodies; Arms length bodies

Local Highway/Transport Authorities in England
Local Planning Authorities in England
Regional Assemblies
Regional Development Agencies
Regional Planning Bodies in England

Commission for Integrated Transport
Countryside Agency
English Heritage
English Nature
English Tourist Board
Environment Agency
Transport for London

Motoring groups, professional associations, lobby groups, and other stakeholders

Association of British Drivers
Association of National Park Authorities
AA Motoring Trust
The Bar Council
Brake
British Chambers of Commerce
British Horse Society
Byways and Bridleways Trust
Campaign to Protect Rural England
Chartered Institute of Logistics and Transport
Confederation of British Industry
Confederation of Passenger Transport UK
Council for National Parks
Country Land and Business Association
Countryside Alliance
Disabled Drivers' Association & Disabled Drivers' Motor Club (Mobilise Organisation)
Federation of Small Businesses
Freight Transport Association
Friends of the Earth
Green Alliance
Greenpeace
Institution of Highways and Transport

Land Access and Recreation Society
Law Society
Living Streets
Local Government Association
National Farmers Union
National Playing Fields Association
National Society for Clean Air and Environmental Protection
National Trust
Open Spaces Society
Planning Officers Society
RAC Foundation
Ramblers Association
Road Haulage Association
Royal Institution of Chartered Surveyors
Royal Society for the Protection of Birds
Royal Society for Wildlife Trusts
Royal Town Planning Institute
Sustrans
Town and Country Planning Association
Transport 2000
Transport Planning Society
The Woodland Trust
Youth Hostels Association

Organisations specific to Wales

Campaign for the Protection for Rural Wales
Cadw
CBI Wales
Civic Trust for Wales
Countryside Council for Wales
Environment Agency Wales
Forest Enterprise
National Farmers Union Cymru
National Playing Fields Association Cymru
The National Trust
Ramblers' Association Wales
Sustrans Cymru
The Woodland Trust Wales
Visit Wales
Wales Social Partners Unit
Welsh Local Authorities
Welsh Local Government Association
Welsh Assembly Government - Department for the Environment, Planning and Countryside

Annex C

THE HIGHWAYS (ENVIRONMENTAL IMPACT ASSESSMENT) REGULATIONS 2007

Summary of consultation responses

COMMENT	CONCLUSION
<u>Respondent 1</u> - Content	Noted
<u>Respondent 2</u> - Added whether the regulations needed to be widened to cover other issues e.g. health and general amenities	Regulations are designed to be consistent with the precedent of the equivalent powers of the High Court which already exist in relation to orders and schemes which relate to trunk road projects.
<u>Respondent 3</u> - Content	Noted
<u>Respondent 4</u> - Welcomes the Regulations	Noted
<u>Respondent 5</u> - In principle welcomes but raises some legal points	Please see attached for full response to comments.
<u>Respondent 6</u> - Large response – welcomes the transposition of the Public Participation Directive but is critical of the Access to Justice, has concerns on “special road” projects and comments on the 6 week time period for the Environmental Statements to be commented on.	Please see attached for full response to comments
<u>Respondent 7</u> - No substantial comments	Noted
<u>Respondent 8</u> - Suggested a revision about size of land and cost of the project as to whether an EIA is required.	The view is that project cost is not a suitable indicator for use as a threshold to identify projects suitable for EIA. Indeed cost is not used a threshold in Schedule 2 of the 1999 Regulations. Furthermore we would not want to adopt revised thresholds or criteria which may reduce further the number of projects qualifying for EIA.

Department for Transport and Welsh Assembly Government
Consultation on Draft Highways (Environmental Impact Assessment) Regulations 2006

CONSULTATION RESPONSE EVALUATION FORM

Respondent : Personal / Organisation ? Organisation	Response ref no. 005
	Date response received: 14/12/06
	Confidentiality requested? (Y/N) No

Chapter and Question	Y/ N	Summary of respondent's comments	DfT / NAW comments and further DfT / NAW action to be taken, including any amendments to SI required
Chapter 3 : Public Participation The UK is obliged to give effect to the Public Participation Directive. Do you have any comments on the way it is proposed to transpose the relevant parts of it into Part VA of the Highways Act 1980 ?		In principle we agree with the way it is proposed to transpose the Directive into the Highways Act	Noted
Chapter 4 : Access to justice With reference to draft regulations 3(7) and 5 : (a) Is it appropriate to assimilate the procedure for legal challenge of the decision to proceed with a project, (as referred to in section 105B (6) of Part VA of the Act), with the procedures for legal challenge of any associated orders or schemes ?		(a) We concur with the assimilation of the right to legal challenge through the provision of a statutory procedure for review. (b) However, we cannot accept the exclusion of any other legal challenge, i.e. judicial review. (c) Moreover, there is a view that the provision of a statutory right of challenge does not fulfil the requirements of the Directive as that course is prohibitively expensive for all but	(a) Noted. (b) We have considered this point but conclude that it would not be appropriate to accept it. The proposed new section 105D to the Highways Act 1980 would provide a statutory right of legal challenge to the decision of the Secretary of State or the National Assembly for Wales, as the case may be, to proceed with the construction or improvement to which the environmental

<p>(b) Is it appropriate to incorporate a statutory requirement for the co-ordination and concurrent running (as far as practicable) of the Part VA procedures with the procedures for any statutory schemes and orders necessary to be promoted in connection with the same project ?</p>	<p>the wealthy and the small and diminishing number of people who are still eligible for legal aid.</p>	<p>statement relates.</p> <p>This decision is the final outcome of the deliberation process following full assessment and consideration of the proposals and representations received. It would not therefore seem appropriate to provide for two separate procedures for this decision to be challenged. Nor would it seem necessary as the section 105D right would in effect be a statutory right to judicial review of the decision providing adequate opportunity for any legal arguments against the decision to be considered.</p> <p>The core legal procedures, (identified in paragraph 10 of Chapter 4 of the consultation paper), to authorise the construction and improvement of trunk road schemes are all statutory. Those procedures all provide for statutory rights of challenge to the High Court within a 6 week time limit, with identical or almost identical grounds of challenge, and with provision that the orders or schemes may not be challenged in any other legal proceedings. These statutory rights of challenge are instead of, not in addition to, any common law rights for judicial review.</p> <p>The proposed new section 105B (5A) would make it a statutory requirement to bring together the procedures and decisions on the related legal schemes and orders (in cases where there are any) so that the decision to proceed with the project is taken with, and in effect forms part of, the decisions on those matters. Indeed this reflects current practice.</p> <p>The Public Participation Directive requires that provision be made to allow a right of legal challenge of decisions to grant development consent for projects. Given the context that trunk road schemes in England and Wales are governed by statutory procedures, that those procedures incorporate</p>
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			<p>statutory rights of challenge, and that those statutory rights of challenge are closely assimilated, it seems appropriate and desirable to address the requirements of the Directive by providing a statutory right of challenge, closely assimilated with the other challenge procedures.</p> <p>In practice major trunk road schemes usually require some form of statutory procedure such as a trunk road order, a special road scheme, and associated side roads order and compulsory purchase order. The decision on these schemes and orders is typically taken simultaneously as a package giving rise to a consistent statutory right of legal challenge subject to the same six week time limit. This means that if the orders or schemes are not challenged within the time limit the trunk road authority will not be left exposed to the risk of a later High Court challenge to quash the orders or schemes after the contract for the construction of the project has been let.</p> <p>The Secretary of States', or the National Assembly's, decision letter setting out the decision whether or not to make the orders or schemes constitutes the decision whether or not to proceed with the project. This also constitutes the decision referred to in section 105B (6) of the Highways Act 1980 in cases where an environmental impact assessment has been made. That decision is subject to the relevant statutory legal challenge procedures referred to in paragraphs 11 and 16 of Chapter 4 of the consultation document, and may not be challenged in any other legal proceedings.</p> <p>A parallel common law right of judicial review of this decision cannot co-exist with these statutory legal challenge procedures because of the statutory bar on any other legal proceedings. (c) We do not share the view that a statutory right of challenge to the High Court would be prohibitively</p>
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			<p>expensive for all but the wealthy and those eligible for legal aid. Furthermore if an alternative independent and impartial body was established or appointed to consider legal challenge applications it would not necessarily be any less expensive for applicants.</p> <p>As already outlined the existing statutory legal rights of challenge relating to the core trunk road procedures are exercised by application to the High Court. In cases where such orders or schemes are required, for the reasons outlined above, it would not be practical to segregate the decision on the orders or schemes from the decision to proceed with the project. So it would not be practical to have challenges to the former determined by the High Court but challenges under the proposed new section 105D determined by an alternative body.</p> <p>Providing for challenges to be determined by the High Court follows well established precedent, not only in highway law but in other areas of public law e.g. town and country planning.</p>
<p>Chapter 6 : Special road projects Is it appropriate for the criteria for determining whether "special road" improvements within Annex II of the EIA Directive need to be subject to EIA, to be assimilated as proposed in this chapter?</p>	Y	Yes.	Noted
<p>Chapter 10 : Regulatory Impact Assessment Do you have any general comments concerning the Regulatory Impact Assessment?</p>	Y	It would be helpful if the document could have confirmed that the Department for Transport has ensured that its Regulations are consistent with the Environmental Information Regulations 2004.	We believe that the draft Regulations are consistent and compatible with the Environmental Information Regulations 2004.

Further comments		[None]	
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Response checked by Name:

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Department for Transport and Welsh Assembly Government
Consultation on Draft Highways (Environmental Impact Assessment) Regulations 2006

CONSULTATION RESPONSE EVALUATION FORM

Respondent :	Response ref no. 006
	Date response received: 15/12/06

Personal / Organisation ? Organisation	Confidentiality requested? (Y/N) No
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Chapter and Question	Y/ N	Summary of respondent's comments	DfT / NAW comments and further DfT / NAW action to be taken, including any amendments to SI required
Chapter 3 : Public Participation The UK is obliged to give effect to the Public Participation Directive. Do you have any comments on the way it is proposed to transpose the relevant parts of it into Part VA of the Highways Act 1980?	Y	We welcome the proposed changes to transpose the provisions of the Public Participation Directive.	Noted
Chapter 4 : Access to justice With reference to draft regulations 3(7) and 5 : (a) Is it appropriate to assimilate the procedure for legal challenge of the decision to proceed with a project, (as referred to in section 105B (6) of Part VA of the Act), with the procedures for legal challenge of any associated orders or schemes? (b) Is it appropriate to incorporate a statutory requirement for the co-ordination and concurrent running (as far as practicable) of the Part VA procedures with the procedures for any statutory schemes and orders necessary to be promoted in connection with the same project?	Y	(1) We do not feel that the present wording covers the main circumstances where judicial review can be sought. Judicial review is not limited to abuse of powers and/or procedure. In addition, a party can claim that the Secretary of State has been unreasonable, biased, taken irrelevant material into consideration and / or not taken relevant material into account. In our view, Section 105D(1) is unduly narrow in its wording and does not cover these possibilities. We recommend that this Section be amended to include the other possibilities. (2) Secondly, the start of section 105D (1) refers to “ <i>a person aggrieved</i> ”. However, it is common law that a person does not have to show grievance or been personally affected by a decision in order to challenge. Additionally, this paragraph fails to reflect the spirit of the Aarhus Convention and Public Participation Directive, in particular their provisions on access to justice. We therefore question the necessity of the phrase “ <i>a person aggrieved</i> ” at the start of this section.	(1) The proposed High Court grounds of challenge follow the precedent of the grounds of challenge provided for the various trunk road orders and schemes referred to in paragraphs 10 and 16 of chapter 4 of the consultation paper. Similar grounds of challenge are provided in town and country planning legislation (sections 287 and 288 of the Town and Country Planning Act 1990). It is well established in the decided cases that the courts interpret these grounds of challenge as being in effect a form of statutory judicial review and all the heads of claim referred to in this part of the respondent response would be valid grounds under the proposed section 105D. The possible arguments the respondent refers to would, if made out, show the trunk road authority had acted outside its powers. (2) Again the expression “a person aggrieved” is used in the legal challenge procedures applicable to the various trunk road orders and schemes referred to in paragraph 10

	<p>(3) Thirdly, when considering members of the public and their right to challenge planning decision, the respondent feels that it would inappropriate to reduce the time limit for applying for permission to judicially review to six weeks, particularly considering the judgement (On Application of Burkett) v. London Borough of Hammersmith and Fulham [2002]UKHL 23). This judgement made it clear that although applications for judicial review should ideally be made within six weeks, it is sometimes appropriate for members of the public to be allowed three months.</p>	<p>and 16 of chapter 4 of the consultation paper; (and also in sections 287 and 288 of the Town and Country Planning Act 1990).</p> <p>The courts interpretation of this phrase has been relaxed over the years such that a person does not have to have a legal grievance or be subjected to a legal burden before being regarded a person aggrieved in such a context. Decided cases indicate any person with a genuine grievance would be regarded as a person aggrieved. The expression “a person aggrieved” is still needed to allow the courts to be able to distinguish between persons with a genuine complaint and frivolous or vexatious complainants.</p> <p>We believe the proposed regulations do reflect the spirit of these measures and their provisions on access to justice. The word “person” as used in proposed regulation 105D includes any body of persons corporate or unincorporate (by virtue of section 5 and Schedule 1 of the Interpretation Act 1978).</p> <p>(3) The Public Participation Directive does not prescribe the time limit for applications for legal challenge.</p> <p>In practice major trunk road schemes usually require some form of statutory procedure such as a trunk road order, a special road scheme, and associated side roads order and compulsory purchase order. As described in paragraphs 12 and 16 of Chapter 4 of the consultation document, all these procedures provide for a six week High Court challenge period and provide a statutory bar preventing any other legal challenges to their validity. This means that if the orders or schemes are not challenged within the time limit the trunk road authority will not be left exposed to the risk of a later High Court challenge to quash the orders or schemes after the contract for the construction of the project has been let.</p>
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			<p>The decision on these schemes and orders is typically taken simultaneously as a package giving rise to a consistent statutory right of legal challenge subject to the same six week time limit. The Secretary of States', or the National Assembly's, decision letter setting out the decision whether or not to make the orders or schemes constitutes the decision whether or not to proceed with the project. This also constitutes the decision referred to in section 105B (6) of the Highways Act 1980 in cases where an environmental impact assessment has been made.</p> <p>As the decision to proceed with a project is bound up with and taken simultaneously with the decisions on the associated orders and schemes it would be unworkable to allow a longer time limit to challenge the decision to proceed with the project than applies to challenges to the associated orders and schemes.</p>
<p>Chapter 6 : Special road projects Is it appropriate for the criteria for determining whether "special road" improvements within Annex II of the EIA Directive need to be subject to EIA, to be assimilated as proposed in this chapter?</p>	Y	<p>(a) We disagree that "special road" improvements should be subject to exclusive screening thresholds which automatically exclude projects below an arbitrary size from being subject to an individual assessment of their likely significant effects. The respondent remains opposed in principle to the use of exclusive thresholds in EIA and we believe the UK Government is in breach of the spirit of the EIA Directive in this respect.</p> <p>(b) We continue to believe that exclusive screening thresholds are particularly inappropriate for highways projects. There is always a major risk that extensions to</p>	<p>(a) Article 4(2) of the EIA directive expressly provides that for projects listed in Annex II of the directive Member States shall determine through a case by case examination or "thresholds or criteria set by Member States" whether a project shall be made subject to EIA. In England and Wales the 1 hectare threshold applies to local highway authority road improvement schemes within Annex II and also to trunk road improvement schemes within Annex II other than those for special roads. Hence it would be consistent to apply the same threshold to special road improvement schemes within Annex II.</p>

¹ European Commission 2002 Report from the Commission to the European Parliament and the Council on the application and effectiveness of the EIA directive (Directive 85/337/EEC as amended by Directive 97/11/EC). How successful are the member states in implementing the EIA directive.

	<p>motorways are likely to have significant effects regardless of their physical footprint, particularly through climate change impacts from the additional traffic supported and encouraged. Therefore, all projects should be formally screened on a case-by-case basis using the EIA Directive Annex III criteria. This should not be an onerous task. The minimal costs imposed should easily be outweighed by the long-term benefits of ensuring all projects likely to have a significant environmental effect are identified and subject to EIA.</p> <p>(c) The amendments and Act do not appear to make provision for requiring EIA for a series of projects which form part of an upgrade programme, and which taken together are likely to have significant effects, even though individually each is below the size threshold. This loophole encourages the splitting up of projects up to escape the EIA obligations in a situation termed ‘salami slicing’. Member states were urged by the European Commission¹ to identify and remedy provisions in national legislation that may permit ‘salami slicing’.</p> <p>(d) The fact that the Secretary of State or Welsh Assembly Government is both developer and competent authority for highways projects gives us even less confidence that the use of exclusive screening thresholds can achieve the requirements of the EIA Directive.</p>	<p>(b) This Chapter of the proposals is designed to remove the anomaly of the inconsistency of treatment of special road improvement schemes within Annex II and other road improvement schemes (i.e. both other trunk road schemes and also local highway authority schemes) within Annex II.</p> <p>The Secretary of State and the National Assembly are satisfied that the one hectare threshold is reasonable and appropriate and is set too low to allow schemes which should be made subject to statutory EIA to avoid such assessment.</p> <p>It is worth pointing out however that updated internal guidance issued by the Highways Agency requires some level of environmental assessment for schemes which will not be required to undergo statutory EIA under Part VA of the Act. (Interim Advice Notes 76-82/06 of July 2006 - updating the UK trunk road authorities’ “Design Manual for Roads and Bridges”). This guidance is used by the National Assembly for their road projects too.</p> <p>(c) As indicated above, article 4(2) of the EIA directive permits Member States to use thresholds. The Report of the Commission (COM(2003) 334 final) on the application and effectiveness of the EIA Directive did not conclude that this or indeed any other provisions of the EIA directive should be further amended, indicating instead that further assessment and consideration would be required before such a conclusion could be reached. The Public Participation Directive makes no amendments to article 4(2). Although Member States were recommended to check their national legislation and remedy any shortcomings with regard to, amongst other matters, “salami slicing” the Secretary of State and the National Assembly are satisfied that the one hectare threshold is reasonable and appropriate and too low to give effective scope for “salami slicing”. This is</p>
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			<p>especially so bearing in mind the one hectare threshold includes “the area of the completed works together with any area occupied during the period of construction or improvement by requisite apparatus, equipment, machinery, materials, plant, spoil heaps or other such facilities”. It should also be borne in mind that the threshold does not apply where any such area is situated in whole or in part in a sensitive area (SSSI, national park, AONB etc).</p> <p>(d) The requirements of the EIA directive are reflected in Part VA of the Highways Act 1980 with which the Secretary of State and the National Assembly must comply in relation to their trunk road projects. Both authorities are in any event committed to taking a responsible approach to the environment and aim to minimise and mitigate any environmental effects projects may have.</p>
<p>Chapter 10 : Regulatory Impact Assessment Do you have any general comments concerning the Regulatory Impact Assessment?</p>	Y	<p>The respondent suggests that the DfT consider undertaking monitoring of requests by stakeholders for further time to comment on Environmental Statements. By keeping a record of such requests, the DfT can review whether 6 weeks is adequate for public participation or if this timescale should be lengthened. Such a system of review would seem more proactive and resource efficient than simply waiting for a potentially costly and lengthy legal challenge to arise - as currently proposed in this document.</p>	<p>Noted. The period of six weeks was chosen as this is the same period provided for all the other Highways Act 1980 statutory procedures referred to in paragraph 10 of Chapter 4 of the consultation document. The six week period is a minimum period.</p>
<p>Further comments</p>		[None]	-

Response checked by Name: RMcDonald

Division: DfT LSD

Date : 3-1-07 and 10-1-07

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Annex D

Transcript of discussion at EIN Committee on 14 February 2007

The Highways (Environmental Impact Assessment) Regulations 2007

Christine Gwyther: We have not received any amendments or points of clarification. Minister, do you want to briefly introduce this item and then we will go to Members' comments?

Andrew Davies: Tim Dorken is the official who is leading on this, so do you want to say anything, Tim?

Mr Dorken: The principal purpose of the regulations is to transpose the requirements of the public participation directive, which were originally to have been transposed by July 2005. The main provisions are to include more detailed participation requirements in the environmental impact assessment of trunk road schemes and other schemes of the National Assembly. The other main issue is to change some of the provisions concerning access to justice, which are contained in the public participation directive. There are some minor amendments to the requirements to change the members referenced in the regulations to include those of the European economic area, which are the three states outside the EC. There are some other minor amendments relating to the assessment of special roads. It is a technical adjustment to do with ensuring that minor and relatively small schemes for special roads, such as motorways, are subject to the same assessment procedures as those for trunk roads. Those are the key changes.

Christine Gwyther: Are there any Members who wish to ask a question on this—apart from Mike? I am joking.

Carl Sargeant: The interesting detail of public participation is key to this new document. I have concerns. The Minister will not be surprised that I raise the issue of the A494 trunk road, which runs through my constituency. It has caused extreme concern to members of the public and there has been a great deal of public participation on this issue to date. I am aware that this document suggests that these regulations will not have any effect on this scheme as the draft Orders have already been published. This is a hypothetical question, I suppose. If this document was in place and had the ability to impact on the A494 scheme, what difference would it make to public participation? What strength does this give to constituents across Wales? What benefits does the document bring?

Mr Dorken: The principal strength relates to the amount of detail required in the publication of information. The draft Orders published for that scheme have been subject to an environmental impact assessment, under the 1999 regulations. The publication process is very similar. The procedures that we have at present in Transport Wales cover most of the provisions of the regulations and the directive. Therefore, the way in which the public participation information is published in the press is already in that document.

Therefore, that procedure is, currently, largely undertaken. The main changes are that, at the decision-making stage, the responses from the public and consultation bodies have to be reported in more detail, and the decision-making process has to be published in the local paper, in the *London Gazette*, for example, and on the website. Therefore, the main change will occur at the end of the process.

Carl Sargeant: I probably have this wrong, but I will give it a go anyway. Are you saying that the changes to the decision-making process mean that the outcome in relation to individual objections—as they normally are—submitted must now be recorded?

Mr Dorken: That is correct.

Carl Sargeant: So, am I right in thinking that submissions made on the A494 now could be dealt with en masse, and that you do not really have to provide any reason for rejecting those objections?

Mr Dorken: As the regulations stand, that amount of detail is not required. However, we do do that. The main representations are recorded in the decision-making letter. We set out the reasons for the decisions relating to those recorded representations. The process in the regulations makes that much more specific. At the moment, those are our procedures, but this will become a legal requirement when the regulations come into effect.

Christine Gwyther: Presumably, you are content with that.

Carl Sargeant: I am not content, because I would much prefer that this regulation had applied to the process with the A494. However, I recognise that the fact that the draft Orders have already been published prevents that. I do not think that there is a way around that.

Mr Shaw: I understand that, but it is already our established procedure to follow this route; we have been doing this for some time, so the difference in terms of your constituencies is not actually significant.

Carl Sargeant: Okay.

Janet Davies: Some of the people consulted wanted to allow judicial reviews, if requested, in certain instances. I just wondered why that was rejected.

Mr Dorken: The judicial review process is related to the other Orders attached to those schemes, which have a six-week judicial review period, or period during which a challenge can be made in the High Court. The reason why it was felt that it was not appropriate was because they wanted to ensure that all those procedures were concurrent, and that the block period at the end of the six weeks could not prevent someone from coming back, once you had awarded a contract, and requiring a judicial review. My understanding of the law is that you could still possibly carry out a judicial review, as against a High Court challenge, as a matter of procedure.

Christine Gwyther: Thank you. We will send a report of our findings this morning to the Business Committee.