

Explanatory Memorandum to the Environmental Impact Assessment (Agriculture) (Wales) (Amendment) Regulations 2020

This Explanatory Memorandum has been prepared by the Department for Environment, Energy and Rural Affairs and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Environmental Impact Assessment (Agriculture) (Wales) (Amendment) Regulations 2020. I am satisfied the benefits justify the likely costs.

Lesley Griffiths MS
Minister for Environment, Energy and Rural Affairs

8 December 2020

1 Description

The Environmental Impact Assessment (Agriculture) (Wales) (Amendment) Regulations 2020 (“the Regulations”) amend the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017 (“the 2017 Regulations”), which implement Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011, as amended by Directive 2014/52/EU (“the EIA Directive”), on the assessment of the effects of certain public and private projects on the environment.

The 2017 Regulations require those wishing to carry out certain agricultural projects on uncultivated or semi-natural areas and/or large scale restructuring projects on rural land holdings to apply to the Welsh Government for a decision on whether the project is likely to have a significant effect on the environment. This is known as a screening decision. EIA consent is required where the screening decision identifies significant effects.

The Welsh Government seeks to protect common land as part of its strategic objectives in relation to biodiversity and the sustainable use of natural resources to improve the benefits to local communities, the economy and the environment. To protect common land, any application for restricted works must be approved by the Welsh Ministers under section 38 of the Commons Act 2006 (“the 2006 Act”). Applications are considered by Planning Inspectorate Wales on behalf of the Welsh Ministers.

Restricted works are any that prevent or impede access to or over the land, and also include resurfacing works, such as a new car park or access road. Some restricted works on common land also fall within the definition of restructuring projects in the 2017 Regulations e.g. fencing.

In order to prevent certain restricted works on common land being caught by the requirements of both consenting regimes, applications made under section 38 of the 2006 Act are currently exempt from the 2017 Regulations by virtue of regulation 3(2)(f). This gives rise to the expectation the section 38 process itself will deliver an EIA-compliant regime.

The Regulations remove this exemption to ensure sufficient implementation of the EIA Directive.

2 Matters of special interest to the Legislation, Justice and Constitution Committee

None.

4 Legislative background

The EIA Directive establishes the rules on the assessment of the effects of certain public and private projects on the environment. The 2017 Regulations primarily

transpose the EIA Directive into domestic legislation, for the purposes of agricultural improvement projects on uncultivated or semi-natural land.

The Welsh Ministers are designated for the purposes of section 2(2) of the European Communities Act 1972 (“the 1972 Act”) 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. 2) Order 2001.

The Regulations are being made by the Welsh Ministers in exercise of the powers conferred by section 2(2) of the 1972 Act. That Act was repealed by section 1 of the European Union (Withdrawal) Act 2018 (“the 2018 Act”) with effect from 31 January 2020. Section 2(2) of the 1972 Act is saved by section 1A of the 2018 Act until the end of the implementation period (31 December 2020), after which that power will no longer be available. The Welsh Ministers are under an obligation to comply with EU law during the implementation period.

The Regulations amend the 2017 Regulations to remove the exemption for applications for restricted works on common land under section 38 of the 2006 Act, to ensure the EIA Directive is sufficiently complied with.

5 Purpose & intended effect of the legislation

The 2017 Regulations primarily implement the EIA Directive. They require farmers to apply for screening decisions where they wish to undertake certain agricultural projects on semi-natural areas and/or large scale restructuring projects on rural land holdings. Screening allows any significant environmental effects of a proposal to be identified at an early stage.

Schedule 1 to the 2017 Regulations sets out the following thresholds over which EIA screening is required (thresholds are halved for projects in sensitive areas e.g. National Park, Areas of Outstanding Natural Beauty):

- Boundary restructuring project - 4km
- Area restructuring project - 100 hectares
- Volume restructuring project - 10,000 cubic metres

Applications made under section 38 of the 2006 Act are currently exempt from the requirements of the 2017 Regulations by virtue of regulation 3(2)(f).

The exemption in regulation 3(2)(f) of the 2017 Regulations gives rise to the expectation the section 38 process itself will deliver an EIA-compliant regime. However, the 2006 Act does not require an assessment as to whether the project is likely to have a significant effect on the environment, nor does it require projects which are likely to have such an effect to be subject to an assessment with regard to their effects on the environment. Therefore the consenting regime for certain restricted works on common land under the 2006 Act does not fulfil all the requirements of the EIA Directive.

The changes remove the exemption in regulation 3(2)(f) of the 2017 Regulations, in exercise of the powers conferred by section 2(2) of the European Communities Act 1972. The amendment is of a corrective nature to properly implement the EIA Directive.

As a result, certain restricted works on common land will require an EIA screening decision and EIA consent (where needed) as well as obtaining section 38 consent under the 2006 Act.

6 Consultation

Consultation has not been undertaken as the amendment proposed is of a corrective nature to properly implement the EIA Directive.

Regulatory Impact Assessment

Summary of Policy Options

Option 1 – Do Nothing:

Not making this change will expose Welsh Government to legal challenge and potential infraction proceedings as the consenting regime for restricted works on common land under the 2006 Act does not fulfil all the requirements of the EIA Directive.

Challenge by way of judicial review could be detrimental, both financially and in terms of staff resources. If the High Court challenge was found in favour of the appellant, Welsh Government would likely have to bring about legislative change in order to comply with the decision.

Infraction proceedings from the European Commission (EC), could result in significant financial penalties for continued non-compliance from the time the 2017 Regulations were implemented to the current day they remain non-compliant with the EIA Directive.

The Welsh Government has no contingency budget in place to deal with infraction penalties. It is UK Government policy that any non-compliance issue which fall under Wales' responsibility would need to be paid by the Welsh Government.

Example of infraction penalties applied:

Case C-304/02, Commission v French Republic. In this judgment of 12 July 2005, the European Court of Justice ordered a Member State to pay both a periodic

penalty payment and a lump sum fine for a serious and persistent failure to comply with Community law.

The case concerned compliance by France with Community measures for fisheries conservation. France had infringed Community law by letting undersized fish be offered for sale. Following inspection at certain French ports in the course of 11 years, the Commission took the view that France was still not yet complying fully with its obligations. Undersized fish were still offered for sale, and the French authorities maintained a lax attitude in enforcing EC rules.

In failing to comply with the pre-litigation procedure, the ECJ ordered France to pay a penalty payment of EUR 57 761 250 for each period of six months, from the 12 July 2005 onwards, taking into account the duration and the seriousness of the infringement and its ability to pay, and a lump sum of EUR 20 000 000. With this amount, the ECJ took into account the persistence of the breach of obligations and the public and private interests at issue.

Option 2 – Change the Legislation:

Amending the legislation will give proper effect to the EIA Directive. It will also provide for a consistent approach to rural restructuring projects, whether on enclosed or common land, and ensure any significant environmental effects are identified and mitigated against at an early stage.

The amendment will result in two related, but separate consenting regimes. Those wishing to undertake certain restricted works on common land will have to apply for EIA screening and EIA consent (where needed) as well as obtaining section 38 consent. This will increase the time and effort it takes to obtain consent for such works and may lead to some increased costs.

However, it is anticipated Welsh Government will continue to carry the administrative and financial burden of processing EIA screening applications.

Based on the scale and nature of section 38 applications processed by Planning Inspectorate Wales to date it is expected this will only increase Welsh Government's caseload by two applications per year.

The resource required by Welsh Government to process the additional workload is estimated to be within the region of 0.6 full-time equivalent (FTE) at Higher Executive Officer grade. This equates to an annual cost of approximately £29,200.

Where a screening decision cannot be made based on the information provided by the applicant, Welsh Ministers may request additional information under section 6(2) of the 2017 Regulations.

In such circumstances we anticipate the cost to the applicant to be within the region of £290 - £3,126. Estimates are based on the following assumptions and figures from the Regulatory Impact Assessment accompanying the Environmental Impact

Assessment (Agriculture) (England) (No. 2) (Amendment) Regulations 2017 and adjusted for Wales:

- It will take a land manager / agent 1 day FTE to complete the initial screening application if existing survey data is found.
- If existing survey data is not found it will take a land manager / agent 0.5 day FTE to complete the application
- Average daily wages costs are estimated to be £179 for land managers and £852 for land agents. In both cases, gross wage rates are uplifted by 30% to account for non-wage costs.
- Local Biodiversity Records Centre search fee of £200
- Biodiversity record access fee of £306
- Historic environment record access fee of £129
- In certain circumstances a field survey carried out by a qualified agent or consultant may be required at an estimated cost of £2,500.

There is a risk the requirements may deter those planning to undertake such works from obtaining consent, leading to an increase in permitted works. However, based on the anticipated number of applications, the risk is deemed to be low.

There is also a risk consent could be granted through section 38 but significant environmental impacts identified at EIA screening. In this instance, the applicant would be required to abort the works or amend them and then reapply for EIA screening and EIA consent (if needed) and subsequently section 38 consent.

To prevent the scenario outlined above, existing EIA guidance will be revised, advising those wishing to undertake certain restricted works on common land to first seek an EIA screening decision from Welsh Government and EIA consent (where needed) before applying for consent under section 38 of the Commons Act 2006.

It is estimated it will take up to 90 hours to revise the guidance, at a cost of £3,600 to Welsh Government.

6. Conclusions

In conclusion, Option 2 offers more benefits compared to the status quo and reduces the risk of legal challenge. It will create two consenting regimes for certain restricted works on common land. This will increase the time and effort it takes to obtain consent for these works. It may also lead to some increased costs for applicants and additional costs to Welsh Government. This may deter those wanting to carry out restricted works on common land from applying, leading to an increase in unpermitted works. However, this risk is considered to be low given the small number of projects which will be effected.

7. Sector Impacts

Impact on Local Government

There is no immediate impact identified on Local Government. However each Local Authority will have Commons Officers who will need to familiarise themselves with the legislative changes. The total cost of this across Wales is not expected to

exceed £1,000. This is calculated on the basis of familiarisation taking no more than one hour of an officer's time in each LA.

Impact on Voluntary Sector

There is no identified impact on the Voluntary Sector.

Impact on Small Businesses

There is likely to be some impact for those wishing to undertake restricted works on common land. It will increase the time and effort it takes to obtain consent for such works and may lead to some increased costs. It is anticipated the change will only effect a small number of section 38 applications.

8. Duties

Equality

Equality has been considered in relation to this regulatory change. There is no impact identified which may impede on equality issues.

Welsh Language

No impact has been identified on the Welsh language in carrying out the Regulatory Impact Assessment.

Sustainable Development

The regulatory changes are likely to have a positive impact on the Welsh Government's sustainable development agenda. There is a direct benefit to the outcomes of the Wellbeing of Future Generations Act 2015 and the Environment Act 2016, in that the change will protect the natural environment and landscape of common land for our own and future generations.

9. Consultation

The amendment is corrective in nature, therefore consultation has not been undertaken.

10. Competition Assessment

Please see Annex A

11. Post Implementation Review

The Welsh Government will monitor the impact of the Regulations and will continue to gather data regarding EIA screening and consent on common land. The Welsh Government will also continue to have a dialogue with key stakeholders, including farming organisations and environmental bodies, in order to collate feedback on the

impact of the amending regulations and consider future legislative change. Amendment to the policy and legislation will be considered following the UK's exit from the European Union.

Revised EIA guidance will be issued once the new regulations come into force. Welsh Government officials will continue to advise and assist applicants navigate the EIA process.

Annex A

The competition filter test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No