EXPLANATORY MEMORANDUM TO

THE TOWN AND COUNTRY PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) REGULATIONS 2011

2011 No. 1824

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 These Regulations replace the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI No. 293) ("the 1999 Regulations") and subsequent amending instruments. The Town and Country Planning (Environmental Impact Assessment) (Mineral Permissions and Amendment) (England) Regulations 2008 remain in force. These Regulations, except for the provisions relating to projects serving national defence purposes, extend to England only. The 1999 Regulations remain in force for Wales.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Following the 2008 amendments to the 1999 Regulations the Joint Committee on Statutory Instruments (JCSI) expressed the expectation that any future amendments should be made by way of a consolidation.

4. Legislative Context

4.1 The Environmental Impact Assessment Directive[1] ("the EIA Directive") requires that, before granting "development consent" for projects, including development proposals, authorities should carry out a procedure known as environmental impact assessment ("EIA") and produce an environmental statement ("ES") for any project that is likely to have significant effects on the environment. The EIA Directive was first transposed by the Town and Country (Assessment of Environmental Effects) Regulations 1988 (SI No. 1199), which was replaced by the 1999 Regulations. The 1999 Regulations required EIA for relevant proposals for new development, including relevant proposals for new mineral development.

[1] Council Directive 85/337/EEC, on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC and Article 3 of Council Directive 2003/35/EC.

4.2 Since the 1999 Regulations came into force they have been amended on several occasions to take account of case law and amendments to the EIA Directive. Further changes are now required to take account of recent case law (Baker[2] and Mellor[3] cases) and the need to make a limited number of other amendments. The 1999 Regulations are to be consolidated following a commitment given to the JCSI to do this when the Regulations were next amended.

5. Territorial Extent and Application

5.1 This instrument applies to England only, except for the provisions relating to projects serving national defence purposes in Scotland, Wales and Northern Ireland.

6. European Convention on Human Rights

The Minister, Bob Neill, has made the following statement regarding Human Rights: In my view the provisions of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 are compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

7.1 As set out in section 3.1 the consolidation of the amended 1999 Regulations meets the expectations of the JCSI.

7.2 The consolidation has in part been brought about by two court cases where changes were necessary to correctly transpose the EIA Directive into UK legislation as described below.

7.3 The Baker case concerned the application of the EIA Directive to changes or extensions to existing or approved development. The Court held that paragraph 13 of Schedule 2 ("Schedule 2.13") to the 1999 Regulations did not properly implement the EIA Directive, because it limited consideration of the environmental effects of a change or extension to only the change or extension, rather than looking at the effects of the development as a whole, once modified. This has been rectified in the current regulations.

7.4 The Court of Justice of the European Union ruling in the Mellor case has clarified that if an interested party so requests, reasons for the determination or copies of the relevant information and documents must be communicated to that party. Third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law that an EIA was or was not necessary. The Regulations now

[2] R (on the application of Baker) v Bath and North East Somerset Council [2009] EWHC 595.
[3] R (on the application of Mellor) v Secretary of State for Communities and Local Government [2009] EWCA 1201 and ECJ case C-75/08, 30 April 2009.

require reasons to be made available where a screening opinion does not require EIA, in addition to reasons where EIA is required.

7.5 The 2008 amending Regulations inadvertently introduced a provision that went beyond the requirement of the Directive in relation to multi-stage consents (e.g. applications for outline planning consent and the subsequent application for approval of reserved matters). They unintentionally made it a requirement to repeat the public consultation exercise on the environmental statement at each stage where the environmental statement, for example, produced at the outline stage satisfies the requirements of the EIA Regulations at the later reserved matters stage. This unnecessary provision has been removed and the intended procedure is now set out in Part 3 to the Regulations.

7.6 The EIA Directive has been amended by a new Directive 2009/31/EC on the geological storage of carbon dioxide. This has required the addition of new categories of development to Schedules 1 and 2 to the Regulations.

8. Consultation outcome

8.1 A 12-week consultation exercise on the proposed consolidated Regulations closed on 25 October 2010. The consultation document has been deposited in the Library of both Houses of Parliament and sent to a wide range of bodies on the Department's consultation lists - Chief Planning Officers for England, DCLG Minerals Consultation Circulation list, DCLG Planning Consultation Circulation list, Regional Planning Bodies and Government Office Planning Directors. A copy of the consultation document can be found at www.communities.gov.uk/corporate/publications/consultations/.

8.2 There were around 100 responses to the consultation, most of which were broadly supportive of the proposals. There were a number of comments about how the Regulations had been amended to take account of the Baker judgment and drafting to correct gold plating unintentionally introduced by the 2008 amending Regulations for screening and publicising subsequent applications.

Details of responses are set out below.

Baker case (Questions 1 and 2 in the consultation document)

The consultation draft Regulations required all changes and extensions to existing Schedule 1 development be screened, and the thresholds and criteria set out in Schedule 2 to be applied, not just to a change or extension, but also to the existing development as changed and/or extended.

A large number of consultation responses were of the opinion that amendments made to the Regulations went beyond what is required by the Baker judgment, and would require the screening of very minor developments (e.g. those with and without permitted development rights) which are uncontroversial and were not reflected in the impact assessment. Such a

change would place an unnecessary burden on developers' and planning authorities' resources.

In the light of these responses, DCLG redrafted Schedule 2.13 in a way which is considered to satisfy the judgment in Baker, the requirements of the Directive and addressed concerns expressed by the consultees.

The wording that was of concern to Justice Collins in Schedule 2.13 of the 1999 Regulations, "and not to the development as changed or extended", has been removed. Also, an amendment has been made to the second columns of both 2.13 (a) and (b) of these Regulations which takes into account the Baker judgment and the concerns expressed in consultation responses about the consultation draft. The criteria and thresholds used in the 1999 Regulations are retained.

The effect of the changes is to require developers and local planning authorities to consider if significant adverse environmental effects may result from an existing or approved development being changed or extended, whereas the 1999 Regulations only required the effects of the change or extension alone had to be considered. If a view is reached that the change or extension will not have significant adverse effects there is no requirement to screen the development. This is, for example, likely to be the outcome in the vast majority of cases involving a minor change or extension, and minor development which may have permitted development rights.

However, where it is clear that a development to be changed or extended may lead to significant adverse environmental effects the application for development consent must be screened. In this case permitted development rights are removed and can only be restored where the local planning authority issue a negative screening opinion.

Changes and extensions to existing Schedule 1 and 2 development that meet or exceed the criteria and thresholds in sections (ii) of the second column to 2.13(a) and (b) have to be screened by the local planning authority as currently required under the 1999 Regulations.

The judgment was also concerned that there is an obligation, under Article 10a of the Directive, to make it known to members of the public, where they are of a view that environmental impact assessment is required for an application and the authority has decided it is not EIA development, that they can make representations to the Secretary of State pursuant to regulation 4(8) in the 1999 Regulations.

In view of the judgment it was decided, in addition to providing guidance, to clarify that the Secretary of State may make a screening direction when a representation is received a member of the public requesting him to do so (new regulation 4(8)).

Disapplying the word "new" in the criteria and thresholds in Schedule 2 when considering a change or extension (Question 4)

This will no longer be necessary as a result of the Schedule 2.13 being redrafted following the comments described above in response to answers received for questions 1 and 2. The disapplication of the word "new" was proposed to help clarify the application of the Schedule 2 when applied to changes or extensions.

No changes necessary for Schedule 3 and 4 (question 5)

Of 58 responses around 71% agreed that no changes were necessary to Schedules 3 and 4. Another 25% proposed minor changes to the Schedules.

Schedules 3 and 4 are transposed directly from the EIA Directive and the Department would be reluctant to make any changes other than where there exist major concerns about the current wording, so in view of the response the two Schedules will remain unchanged. However, the comments made will be taken into account when discussions take place at EU level on amending the Directive in the near future.

Requirement to give reasons for screening that EIA is not required (question 6)

The European Court of Justice stated in its ruling on the Mellor case that if an interested party so requests, reasons for a screening determination or copies of the relevant information and documents must be communicated to that party.

In the interests of transparency, the Regulations require reasons for all screening opinions whether or not EIA is required.

The Regulations therefore require reasons to be given by the Secretary of State or planning authorities when either negative and positive screening directions or opinions are issued. The reasons will be made available to the person who has submitted the planning application and placed on the local planning authority's planning register so they can be inspected by members of the public.

Wind farm threshold (question 7)

The threshold in Schedule 2 to the Regulations for the harnessing of wind power for energy production was amended, as it was not clear whether the existing term, "any other structure" should be interpreted to include the rotor blades, and it was also the intention that it be consistent with the proposed threshold in draft Regulations for permitted development rights for microgeneration. It was not the intention of the proposal, in real terms, to decrease or increase the current threshold set out under column 2(ii) of the wind turbine category in Schedule 2.3(i).

Responses indicated that it was more appropriate for the threshold to relate to hub height as it is used as an industry standard and this was confirmed by dialogue with the body representing the industry. It has been decided, taking

into account the responses, together with the responses to the consultation exercise on permitted development rights for microgeneration development to revert back to the criteria and thresholds in the1999 Regulations.

Marine Management Organisation

The definition of "the consultation bodies" in regulation 2 (1) has been amended to set out the circumstances in which the Organisation has the role of a statutory consultee.

Removal of criminal offence

This was proposed in the consultation document, and is consistent with the policy which was announced in June 2010 by the Home Secretary that he wanted to clear all potential new offences to ensure no unnecessary criminal or civil penalties are created (the policy also applies to existing offences being re-enacted).

The Department has no record of the offence actually having been used. So a decision was made that a sufficient case for retention could not be made. The offence of fraud could be used in appropriate, egregious, cases.

There were a few responses concerned about the removal of the criminal clause, however adequate provisions exist elsewhere in which to prosecute fraudulent claims.

9. Guidance

9.1 The Department intends to issue web based guidance on the Regulations shortly after these Regulations come into force. The guidance will replace Circular 02/99.

10. Impact

10.1 The impact on business, charities or voluntary bodies is minimal.

10.2 The impact on the public sector is minimal.

10.3 A revised Impact Assessment is attached to this memorandum.

10.4 An administrative error relating to the original Impact Assessment has been corrected. The error related to the estimated Net Present Value of the regulations and included a monetisation of the benefits to developers arising from the consolidation. This benefit is now described qualitatively and an adjustment has been made to the Net Present Value in the Impact Assessment. The best estimate of the Net Present Value shows a slight cost. The costs arise from changes to the Regulations to address case law and to ensure the proper transposition of the Directive. They are incurred to avoid the risk of infraction fines. Infraction fines are worked out on a formulaic basis. For the UK a fine

could be substantially in excess of the costs of implementing the new regulations.

10.5 The Regulatory Policy Committee has advised that the measure should be treated as an 'out' with a value of zero. The overall impact is therefore deregulatory.

11. Regulating small business

11.1 Impacts on small businesses should be minimal as the additional costs will be small and only occur in a few cases.

12. Monitoring & review

12.1 Regulation 64 requires the Secretary of State to review the operation and effect of these Regulations and lay a report before Parliament within 5 years after they come into force and every 5 years after that. Because the Regulations transpose an EU Directive, they do not contain a sunset clause.

13. Contact

Mr Kim Chowns at DCLG (Tel: 0303 4441696 or email: kim.chowns@communities.gsi.gov.uk) can answer any queries regarding the instrument.