

**EXPLANATORY MEMORANDUM TO**  
**THE WATER RESOURCES ACT 1991 (AMENDMENT)**  
**(ENGLAND AND WALES) REGULATIONS 2009**

**2009 No. 3104**

1. This explanatory memorandum has been prepared by Department for Environment, Food and Rural Affairs 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 To amend certain provisions of the Water Resources Act 1991 (“the Act”) in order to implement requirements of the Water Framework Directive<sup>1</sup> (“WFD”) to improve the water quality of water bodies by, in particular, the control of diffuse pollution and the protection and improvement of the hydromorphological quality elements of such bodies

- 2.2 Hydromorphological quality elements include physical characteristics of water bodies such as quantity and dynamics of flow; shape, width, depth and pattern of the channel; condition of beds, banks and riparian zone (in the case of rivers) and shores (in the case of lakes and coastal waters). These interact with and affect the biological and chemical quality of water.

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

- 3.1 The Act is being amended in exercise of the powers contained in subsections (2) and (4) of section 2 of the European Communities Act 1972 which allows Acts of Parliament to be amended for the purpose of implementing any EU obligation or for dealing with matters arising out of or related to any such obligation.

4. **Legislative Context**

- 4.1 The WFD establishes an integrated approach to water management, based on river basin planning, and sets environmental objectives which are designed to protect and improve the ecological health of aquatic eco-systems as a whole. The WFD requires Member States to establish enforceable controls on all activities that are capable of causing adverse effects on the ecology of the aquatic environment.

- 4.2 Existing regulatory controls on “end of pipe” water pollution are well established and effective. Controls on water pollution from diffuse sources are less well developed. Ecological harm to aquatic ecosystems caused by changes to the physical characteristics of a water body (hydromorphological quality elements) has not previously been addressed by existing legislation.

- 4.3 The Water Resources Act 1991 (Amendment)(England and Wales) Regulations 2009 amend the Act as follows.

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<sup>1</sup> Directive 2000/60/EC of the European Parliament and Council of 23 October 2000.

4.3.i Section 93, which provides for the Secretary of State, by order, to designate an area as a water protection zone (WPZ) where it is appropriate, to prevent the pollution of controlled waters, to prohibit or restrict the carrying out of activities that the Secretary of State considers are likely to result in the pollution of such waters. The amendments:

- provide for an Order made under this section to require steps to be taken to limit pollution caused by activities specified in the order in addition to the existing options of “..prohibiting or restricting..” those activities;
- provide for an Order to “regulate” activities in order to protect the hydromorphological quality elements so far as they affect the ecological quality of water bodies where necessary to meet WFD objectives;
- remove an exception for nitrate pollution resulting from agricultural activity
- repeal provisions relating to designation of nitrate sensitive areas which have been superseded by provisions made in relation to the Nitrates Directive<sup>2</sup>
- amend the maximum penalties for offences created under this provision to the maxima set out in paragraph 1 of Schedule 2 to the European Communities Act 1972.

4.3.ii Sections 161 - 161A are amended and some new sections inserted so that the same powers can be used to protect and remediate adverse effects on water bodies caused by damage to any hydromorphological quality element affecting controlled waters. Section 161 provides a power for the Environment Agency to carry out anti pollution works and operations to prevent the entry of polluting or waste matter into a controlled waters and to remediate the effects of polluting matter that has already entered a controlled water. S161A provides for the Agency to serve a Works Notice requiring a person responsible for causing such pollution to carry out anti pollution works and operations.

4.3.iii A new Section 161ZB provides a power for the Environment Agency to carry out improvements to hydromorphological quality elements at its own expense where necessary to achieve WFD objectives.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

## **6. European Convention on Human Rights**

The Minister for the Natural and Marine Environment, Wildlife and Rural Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Water Resources Act 1991 (Amendment) (England and Wales) Regulations 2009 are compatible with the Convention rights

## **7. Policy background**

7.1 The WFD was developed under the UK presidency in 1998 and adopted in 2000. It is the most substantial piece of EC water legislation to date and is designed to improve the way water bodies are managed throughout Europe. Member States must

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<sup>2</sup> Council Directive 91/676/EEC of 12 December 1991

aim to achieve good chemical and ecological status in inland and coastal surface waters and good chemical and quantitative status in groundwater by 2015. Member States are required to set out in River Basin Management Plans how the environmental objectives established under the WFD will be met through Programmes of Measures.

7.2 The WFD introduces for the first time in an environmental directive an economic component whereby the costs, benefits, distributional and social effects are taken into account in selecting improvement measures to achieve the objectives it sets. It also provides for alternative objectives to be set to accommodate water uses such as abstraction, navigation, power generation, irrigation and flood defence.

7.3 The WFD is of interest to a range of sectors, in particular agriculture, water and sewerage companies, ports operators, environmental NGOs and regulators and the navigation sector. A stakeholder group representing these and other interests was established shortly after the WFD came into force and has met regularly to discuss and contribute to all aspects of transposition and implementation. In addition, Defra and the Environment Agency have held extensive discussions and consultation on all the significant issues relating to transposition, implementation and river basin planning.

7.4 As Competent Authority for implementation of the WFD, the Environment Agency is responsible for assessing the current status of the water environment and identifying where it requires improvement. This assessment indicated that around 33% of water bodies are at risk of failing to achieve the required environmental objectives due to hydromorphological conditions and approximately 40% due to diffuse pollution.

7.5 As a matter of policy, it is preferred to address adverse impacts on the water environment from diffuse pollution and hydromorphological pressures by voluntary means and this position will be reflected in guidance to the Environment Agency on the use of Water Protection Zones. However, legal mechanisms are necessary to back up the voluntary approaches since the WFD requires Member States to establish enforceable controls to prevent or limit the input of pollutants from diffuse sources and to ensure that hydromorphological conditions are consistent with the achievement of good ecological status.

7.6 Defra held consultations in 2007 and 2008 to inform Government policy on tackling diffuse water pollution from agriculture. A consultation on mechanisms to deliver WFD requirements on hydromorphology was held in 2007. A further consultation on the use of Water Protection Zones to control diffuse agricultural pollution and on extending the use of Water Protection Zones and the mechanisms referred to in paragraph 4.3.ii to manage hydromorphological pressures took place from 22 December 2008 to 31 March 2009. This consultation invited views on a draft SI and draft guidance to the Environment Agency.

7.7 Consultation on the power for the Agency to improve hydromorphological conditions was an element of the consultation on a Floods and Water Management Bill. That provision is included in the SI because the Bill has been refocused to concentrate on urgent matters relating to flood and coastal erosion risk management, and all provisions not directly related to the core requirements have been removed.

## **8. Consultation outcome**

8.1 Stakeholders from the agriculture sector and other land managers, academia, the environmental sector, the water industry, navigation and ports sectors responded to the consultation on amendments to Sections 93 (Water Protection Zones) and Sections 161/161A (anti pollution works and operations). Environmental interests were most enthusiastic about the application of statutory controls; those likely to experience regulation were keen to emphasise support for voluntary approaches allied to incentives. A number of helpful suggestions were provided on details of the provisions. Overall, the proposals received a high level of support. A brief summary of responses is at Annex A. The full consultation, summary of responses and the Government response can be found at <http://www.defra.gov.uk/corporate/consult/water-protection-zones/index.htm>

8.2 A similar range of stakeholders, with the addition of many local authorities and internal drainage boards replied to the consultation on the power to improve hydromorphological conditions. The consultation paper sought views on whether a power was needed and set out the extent of the proposed power and criteria for its use. Support for all propositions was high (above 94% in all cases). A brief summary of responses is attached at Annex B. The consultation papers on the Bill are at <http://www.defra.gov.uk/corporate/consult/flood-water-bill/index.htm>. Consultation text on this provision is at Section 5.3 of the consultation paper.

## **9. Guidance**

9.1 The Secretary of State has powers to issue Statutory Guidance to the Environment Agency on any matter relating to implementation of the WFD. The draft guidance on which views were sought in the consultation of December 2008 to March 09, is being further developed in association with the Environment Agency and external stakeholders.

9.2 Copies of the Statutory Guidance will be sent to the libraries of both Houses.

## **10. Impact**

10.1 Impact on business, charities or voluntary bodies.

- Section 93 is an enabling provision. The amendments will not have any effect unless and until an Order is made to designate a WPZ. An Impact Assessment will form part of the evidence supporting each application for an Order.
- The amending provisions in the Act only have effect in the event that it appears to the Environment Agency that harm to a water body is likely to occur or has occurred. Where this happens, the person whose activities have created the risk of or actual damage, if identified, would be responsible for the cost of preventing or remediating the damage. There are no data to indicate the likely frequency or magnitude of such events.

10.2 The impact on the public sector is minimal, for the provisions relating to WPZ, being limited to changes in administrative practice within Defra and the Environment Agency.

10.3 The power to improve hydromorphological conditions created in the new Section 161ZB is an enabling provision. The river basin planning process determines what measures are required to meet the requirements of the WFD. Each River Basin Management Plan, as noted, is subject to extensive consultation and an Impact Assessment is required as part of that process. Any financial costs arising from the use of this power must be met by the Environment Agency.

10.4 A separate Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

11.1 The legislation does apply to small businesses insofar as a small business could be required to take action to avoid causing environmental damage or to remediate damage that it has caused, but there are no regulatory burdens arising directly from the SI.

## **12. Monitoring & review**

12.1 Implementation of the Water Framework Directive requires ongoing monitoring and review of all measures and River Basin Management Plans are reviewed and updated on a 6 year planning cycle.

## **13. Contact**

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