

EXPLANATORY MEMORANDUM TO
THE NITRATE POLLUTION PREVENTION (AMENDMENT) REGULATIONS 2012

2012 No. 1849

1. This explanatory memorandum has been prepared by the Department for Environment, Food & Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations further amend the Nitrate Pollution Prevention Regulations 2008 (“the principal Regulations”) to introduce new provisions in relation to the review by the Secretary of State of the designation of Nitrate Vulnerable Zones in England, including new provisions for appeals to the First-tier Tribunal.

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

3.1 The JCSI’s attention is drawn to the remarks made in sub-paragraph 7.2 below about the prior publication of the Environment Agency’s recommendations, ahead of the making of these Regulations. This publication anticipated the requirement in new regulation 11A to be inserted into Part 2 of the principal Regulations by regulation 2(4) of these Regulations. There are no other matters of special interest to the JCSI.

4. Legislative Context

4.1 We are required by the Nitrates Directive (Council Directive 91/676/EEC) to review our implementation of the Directive every four years, and to make any changes found to be necessary. These Regulations make provision to facilitate that process. They amend the principal Regulations, which, as previously amended, implement the Nitrates Directive in England.

4.2 These Regulations set out a revised process for the periodic review of designation of areas of land as Nitrate Vulnerable Zones, providing for the Environment Agency to make recommendations to the Secretary of State about which areas should be designated, by reference to matters described in regulation 11(4)(a), (b) and (c) of the principal Regulations. Those matters include in particular, the identification of waters as polluted and of land draining into those waters. Before revising or adding to the designation of Nitrate Vulnerable Zones pursuant to regulation 11(d) of the principal Regulations, the Secretary of State must have regard to the Environment Agency’s recommendations, and must publish her proposals and serve notice on owners or occupiers of holdings in the proposed zones.

4.3 In particular, the Regulations establish new appeal arrangements for those farmers whose holdings are in the proposed Nitrate Vulnerable Zones. The Regulations confer

upon the First-tier Tribunal the function of hearing such appeals, specifying the grounds of appeal for purposes of the procedural rules applying in relation to that Tribunal (SI 2009/1976), and providing that the outcome of any appeal will be binding upon the Secretary of State. The grounds are that either: (a) the holding concerned does not drain into waters the Secretary of State proposes to identify as polluted, or waters which are similarly identified in Wales or Scotland; or (b) that it drains into waters the Secretary of State should not identify as polluted.

4.4 It is planned that these designations, reflecting the outcome of any appeals which may be brought, will be given statutory effect in further regulations planned to be made near the end of this year either amending or consolidating the principal Regulations. It is also anticipated that the planned regulations will make changes to the statutory requirements for farming practices that farmers whose land is within a Nitrate Vulnerable Zone must observe (the “action programme” required under the Nitrates Directive). The proposals for changes to the farming practice requirements have been consulted on, and the nature of the changes needed to the principal Regulations is to be determined in light of the Department’s analysis of the evidence and consultation responses.

4.5 Similar Regulations were laid before the National Assembly for Wales by Welsh Ministers in relation to the designation of Nitrate Vulnerable Zones in Wales (SI 2012 No. 1238 (W. 151)). (They provide for a different appeal procedure, however.) The Scottish Government is not reviewing the designation of Nitrate Vulnerable Zones in Scotland until later in 2013, with implementation planned from January 2014. In Northern Ireland, discrete zones are not identified and the action programme applies throughout that part of the United Kingdom.

4.6 Lastly, a provision requiring a review of the principal Regulations is introduced to those Regulations, in accordance with Government policy. Periodic review of the need for the Regulations and their regulatory effectiveness will be undertaken and reported on.

5. Territorial Extent and Application

5.1 This instrument applies in England only.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 The Nitrates Directive is an environmental measure that aims to reduce water pollution caused or induced by nitrates from agricultural sources, and to prevent such

pollution in the future. The Directive requires Member States every four years to identify polluted waters or potentially polluted waters, which are those waters where nitrate levels exceed 50mg per litre, or surface waters which are eutrophic, or where these effects could occur if measures under the action programme are not put in place. (The process of eutrophication is defined in the Directive as the enrichment of water by nitrogen compounds, causing accelerated growth of algae and higher forms of plant life to produce an undesirable disturbance to the balance of organisms in the water and water quality.) The Directive then requires periodic designation of areas of land which drain into those waters as “Nitrate Vulnerable Zones”. In 2008/09 the Secretary of State formally designated Nitrate Vulnerable Zones and then gave owners and occupiers the chance to challenge those designations before an independent panel. After reviewing the process, and taking account of the views of the farming sector, the Department concluded it would be better to provide for appeals against proposals to designate before the designations took effect.

7.2 These Regulations therefore establish a system to do that. They require the Environment Agency to make recommendations as to the designation of Nitrate Vulnerable Zones to the Secretary of State, who must have regard to them before she revises or adds to the zones as provided for under the Regulations. The timeframe given to the Agency to make its recommendations will appear on the face of the statutory instrument to be very tight (between coming into force and the date by when the recommendations must be made) but in fact the Department and Agency have been working together on the timing for this, and the Agency’s recommendations have been formulated and posted on their website in anticipation of this requirement since 17th May 2012, in order to give farmers as much informal notice of the recommendations as possible.

7.3 Before revising the zones, the Secretary of State must publish her proposals and send notice to any person appearing to her to be the owner or occupier of a holding in the areas proposed to be designated as Nitrate Vulnerable Zones. The Department will use the best data available to it to ensure as far as it practicably can that those affected will be sent a notice, and will be placing advertisements in the farming press and engaging with representative organisations to publicise the proposals to farmers as widely as possible.

7.4 A map indicating the proposed zones will be sent out with the notices, which, in accordance with these Regulations, must include a website address where full details of the recommendations can be found as well as information about alternative means of obtaining the information. The website is interactive and will enable farmers to establish whether their holding is partly or wholly in an area recommended for designation in England, and other information such as where land is identified as draining into waters identified as polluted. There is also to be a telephone helpline for those requiring access to the information by means other than the web page.

7.5 Those owners or occupiers who are sent a notice and whose holdings fall within a proposed Nitrate Vulnerable Zone may then appeal against the Secretary of State’s proposals referred to in the notice. (In the event there are owners or occupiers of holdings

who have not been sent a notice but who believe their holding is within the proposed zones, they can contact Defra and will be sent a notice if they do appear to be an owner or occupier of an affected holding.) In 2008/09 appeals were heard by a specially convened panel. Since then, the Environment jurisdiction of the First-tier Tribunal's General Regulatory Chamber has been established. The Department consulted on a proposal to give the Tribunal the function of hearing appeals against proposed designations. Consultation responses on this point were favourable. It was accordingly decided to confer the appeal function upon the Tribunal and these Regulations make provision for this. It is intended that the Environment Agency will act as the Secretary of State's representative in the conduct of any appeals which may be brought.

7.6 Farmers in England will be able to challenge designation on the basis that their land does not drain into polluted waters (whether identified as such in England or across the border in Wales or Scotland). They will also be able to challenge a proposed designation on the grounds that the water their land does drain into should not be identified by the Secretary of State as polluted. If waters are identified in Wales as polluted, and a proposed designation in England depends only on that identification, then a farmer in England will not have standing to appeal under these Regulations against the decision of the Welsh authorities. But if it emerges that there are farmers affected in this way wishing to challenge proposals on this basis, Defra will work with the Welsh Government to provide a suitable means by which representations may be made and considered, and has agreed to do the same with the Welsh Government in relation to any Welsh farmers who may be similarly affected in relation to waters in England. (The situation is not expected to arise in relation to holdings on the Scottish border for the foreseeable future as there are no bodies of water exclusively in Scotland likely to affect the designation of areas in England.)

- Consolidation

7.7 The Regulations amend the Nitrate Pollution Prevention Regulations 2008, as amended by the Nitrate Pollution Prevention (Amendment) Regulations 2009. The Department will review the question of consolidation when it considers the amendments to be introduced later in the year (as per paragraph 4.4 above).

8. Consultation outcome

8.1 In December 2011 the Government consulted on proposals to further implement the Nitrates Directive. The consultation closed on 16 March 2012. It focused largely on the proposed changes to the farm practice requirements (referred to in paragraph 4.4 above), but also covered the question of whether the policy of individually designated Nitrate Vulnerable Zones within England should be continued – the alternative being to designate the whole of England – and if so, whether the proposals for new appeals arrangements to the First-tier Tribunal should be followed. A clear majority of 78% of respondents were in favour of continuing the individually designated NVZ approach.

8.2 There were fifty responses from a wide variety of farming business, environmental and regulatory interests. Twenty seven respondents commented on the proposals set out for appeals with a clear majority agreeing that the procedure described was suitable. Some of the views expressed have assisted in ensuring that our guidance and procedures draw attention to the availability of data and maps used to determine whether water was polluted or not.

8.3 The Government has not undertaken a public consultation on the draft Regulations as the proposals for the appeal arrangements were included in the December consultation.

9. Guidance

9.1 A comprehensive package of practical guidance material is available for owners and occupiers of holdings which are in areas of land in England designated as Nitrate Vulnerable Zones, to enable them to follow and apply the provisions in these Regulations. Guidance written by the First-tier Tribunal on how to complete the appeal application form will be available from its website upon these Regulations coming into force <http://www.justice.gov.uk/global/forms/hmcts/tribunals/environment/index.htm>

9.2 In addition, Defra has produced supplementary guidance to explain the steps in the appeal process and what kind of evidence will be needed in an appeal. This will be available on the Defra website (<http://www.defra.gov.uk/>) before the Regulations come into force.

9.3 Paper copies of the Tribunal appeal forms, the Defra guidance, proposed Nitrate Vulnerable Zones and data can be obtained and these arrangements will be clearly identified in the formal notice being served on relevant holdings.

10. Impact

10.1 An Impact Assessment has not been prepared for these Regulations. The changed appeal arrangements will not impose any additional costs or burdens on business, charities or voluntary bodies.

10.2 The costs to the public sector of operating the system are expected to be similar, per appeal, to the procedure used in 2009. The total cost is difficult to estimate because it depends on the number of appeals made. Planning assumptions are based on 500 submitted appeals, which would be about two thirds of the 2009 number.

11. Regulating small business

11.1 The Regulations apply to small businesses. The businesses affected are farming businesses, and the great majority of these are defined as small.

11.2 The impact on small businesses has been minimised by ensuring there are no fees to make an appeal and that each party to an appeal must bear its own costs which is the standard approach for the First-tier Tribunal. This means that where an appeal is

unsuccessful the appellant will not have to cover the Government's costs of defending its position.

12. Monitoring & review

12.1 The Government will determine whether these Regulations, intended to establish a clear and efficient mechanism for owners and occupiers to challenge Government proposals, are successful by gathering feedback from those involved in the process about their experience of it. We will seek the views of the First-tier Tribunal, appellants and the Environment Agency (as the body defending the Secretary of State's proposals) to determine whether the process was successful and how it could be improved by the end of 2013.

12.2 The new provisions in these Regulations are intended to be fit for purpose for future reviews of the designation of the Nitrate Vulnerable Zones in England. We will consider whether any further legislative changes to the appeals process are needed in light of the conclusions reached as a result of the exercise described in paragraph 12.1.

13. Contact

Alex Bowness at the Department for Environment, Food & Rural Affairs (tel: 020 7238 6710 or email: alex.bowness@defra.gsi.gov.uk) can answer any queries regarding this instrument.