EXPLANATORY MEMORANDUM

The Agricultural Wages (Abolition of Permits to Incapacitated Persons) Regulations 2004 No. 2178

This explanatory memorandum is laid before Parliament by Command of Her Majesty.

Department responsible
Department for Environment, Food and Rural Affairs.

Description
These regulations are made under section 2(2) of the European Communities Act 1972. They repeal the provisions in the Agricultural Wages Act 1948 which give Agricultural Wages Committees in England and Wales the power to grant permits of exemption to incapacitated workers (section 5). The permit arrangements are not compatible with the EU Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC).

Matters of special interest to the Joint Committee on Statutory Instruments / Select Committee on Statutory Instruments
There are no issues to highlight here.

Legislative Background
Permits granted under section 5 of the 1948 Act exempt an agricultural employer from the requirement to pay the incapacitated worker the full statutory minimum wage set in the Agricultural Wages Order. Regulation 6 of the Disability Discrimination (Employment) Regulations 1996 (SI 1996/1456) preserved the permit arrangements when the Disability Discrimination Act 1995, outlawing discrimination against disabled people, came into force. However, Defra and the Department for Work and Pensions have concluded that paying a disabled worker less than a non-disabled worker who is doing the same job amounts to direct discrimination and is, therefore contrary to Directive 2000/78/EC. The majority of the Directive's disability provisions will be implemented in Great Britain by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673) and the Disability Discrimination Act 1995 (Pensions) Regulations 2003 (SI 2003/2770) which come into force on 1 October 2004. Regulation 6 of the 1996 Regulations ceases to have effect then because of the repeal by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 of its founding power. It is necessary to repeal the permit provisions in the 1948 Act with effect from the same day.

A Transposition Note is attached.

Extent
The instrument applies to England and Wales.

European Convention on Human Rights (ECHR)
Although legislation setting a minimum wage for agricultural workers is likely to be within the ambit of Article 1 of the First Protocol (A1P1) (Protection of Property), avoiding exploitation of workers will normally provide an objective justification. However, legislation allowing a disabled agricultural worker, by virtue of a permit, to be paid less than a non-disabled agricultural worker for equivalent work is difficult to justify for the purposes of Article 14 (Prohibition of Discrimination) of the ECHR. These regulations remove this inequality.

When a disabled worker's permit is withdrawn that worker will be entitled to the same (higher) minimum wage in line with non-disabled workers undertaking comparable work. An employer might argue that, unless the worker has transferred to another scheme under which the employer receives a wage subsidy, the increased minimum wage for no additional work has the effect of depriving him of his possessions under A1P1. Such an argument is likely to fail because of the need to ensure equality of treatment of all workers.

Accordingly, in the Minister's view, the regulations are compatible with the ECHR.

Policy Background
In recent years incapacitated agricultural workers applying for permits have been steered to the Government's Supported Employment Programme (SEP) and its successor, WORKSTEP and a number of permit holders have transferred to these schemes. SEP and WORKSTEP provide support to people in employment. The employer pays the normal rate of pay for the job and may receive a wage subsidy from the WORKSTEP provider, or other support depending on the needs of the individual to be able to carry out their work.
Early in 2003 when a decision was taken to repeal the permit arrangements there were just 35 agricultural permit workers in England and none in Wales. Defra realised that employers might have difficulty in paying their permit workers the full rate set by the Wages Order, without any assistance. Arrangements were put in place, in consultation with the Department for Work and Pensions, to help permit workers to apply for a WORKSTEP placement or similar support where that was appropriate. By July 2004 satisfactory arrangements had been made for all but three workers. Work is in hand to put suitable arrangements in place for these three workers.

Impact:
Regulatory Impact Assessment attached.

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TRANSPOSITION NOTE

MEMORANDUM SHOWING HOW A PROVISION IN COUNCIL DIRECTIVE 2000/78/EC OF 27 NOVEMBER 2000 ESTABLISHING A GENERAL FRAMEWORK FOR EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION

The Directive

The Directive 2000/78/EC prohibits discrimination in employment and vocational training on grounds of religion or belief, disability, age and sexual orientation.

Implementation

A number of provisions of the directive, so far as it relates to disability discrimination were implemented (in Great Britain) by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673). The Department for Work and Pensions produced a Transposition Annex in respect of that SI. This document pointed out that certain provisions in the Disability Discrimination (Employment) Regulations 1996 (SI 1996/1456) conflicted with the principle of equal treatment and would cease to have effect when the 2003 Regulations came into force. Amongst these was regulation 6 which preserved the permit provisions for incapacitated agricultural workers in section 5 of the Agricultural Wages Act 1948 which applies in England and Wales.

In order for the Directive 2000/78/EC to be fully implemented, it is necessary to repeal section 5 of the Agricultural Wages Act 1948 and also paragraph 5 of Schedule 2 to the National Minimum Wage Act 1998 which amends section 5 of the 1948 Act. Provisions in subordinate legislation relating to permits need to be revoked. **These repeals and revocations are implemented by this Regulation 2 of the Agricultural Wages (Abolition of Permits to Incapacitated Persons) Regulations 2004.**

Department for Environment, Food and Rural Affairs
August 2004

REGULATORY IMPACT ASSESSMENT

LEGISLATION TO REPEAL THE PERMIT PROVISIONS IN THE AGRICULTURAL WAGES ACT 1948

1. Executive Summary

1.1 This Regulatory Impact Assessment assesses the impact of the proposed Agricultural Wages (Abolition of Permits to Incapacitated Persons) Regulations 2004. It is necessary to make an SI repealing provisions in the Agricultural Wages Act 1948 which allow permits to be granted to incapacitated workers. These permits exempt an agricultural employer from the requirement to pay the incapacitated worker the full statutory minimum wage set in the Agricultural Wages Order. The permit provisions are not compatible with the EU Council Directive establishing a general framework for equal treatment in employment and occupation and must be repealed by 1 October 2004 to meet the UK deadline for implementation.

1.2 In recent years incapacitated agricultural workers applying for permits have been steered to the Government's Supported Employment Programme (SEP) and its successor, WORKSTEP and a number of permit holders have transferred to these schemes. Under the SEP and WORKSTEP programmes workers are entitled to the normal rate of pay for the job and the employer receives a payment in recognition of the extra cost of employing someone who is not fully productive. Workers are better off under these schemes.

1.3 When it became apparent that the permit provisions must be withdrawn, Defra realised that employers might have difficulty in paying their permit workers the full rate set by the Wages Order, without any assistance. Arrangements were put in place, in consultation with the Department for Work and Pensions, to help permit workers to apply for a WORKSTEP placement or similar support where that was appropriate. Satisfactory arrangements have been made for all but three of the workers who are still employed in agriculture and discussions about a WORKSTEP placement are in progress in respect of two of these. The employer of the remaining worker is aware that the worker will be entitled to the Wages Order rates when the permit is revoked with effect from 1 October 2004.

1.4. The withdrawal of a worker's permit will cost his or her employer a maximum of £1115.40 per worker per year at the Agricultural Wages Board proposed Standard Worker rate from 1 October 2004 (assuming the worker does not work any overtime). It is probable that one employer will have to bear an increased cost of this magnitude.

1.5. The cost to the Government is not expected to exceed £35,000 over five years. This arises from additional funding to WORKSTEP from Defra in respect of a business which employs a significant number of permit workers who are already on WORKSTEP.

2. Title of Regulatory Proposal

2.1 The Agricultural Wages (Abolitionl of Permits to Incapacitated Persons) Regulations 2004

3. The policy objectives and the issue.

Agricultural permits of exemption

3. 1. The Agricultural Wages Act 1948 (the 1948 Act) makes provision for an Agricultural Wages Board for England and Wales (section 1) and for Agricultural Wages Committees (section 2).

3.2. The Agricultural Wages Board is required to fix minimum rates of wages for workers employed in agriculture and also has the power to fix their minimum holiday entitlement, Agricultural Wages Sick Pay (AWSP) and other terms and conditions of employment. The Board produces an Agricultural Wages Order in which the rates etc are set and this has the force of law. It is enforced by Defra.

3.3. The Agricultural Wages Committees are local committees covering one county (or former county) or a group of counties (or former counties). The Act gives them a number of powers including the power to grant permits of exemption to incapacitated workers (section 5). The permit exempts an agricultural employer from the requirement to pay the worker the full statutory minimum wage set in the Wages Order. The Committee may make the permit subject to conditions as to the wages to be paid to the worker and where this is done, the lower rate is statutorily enforceable (Section 5(1)). The rate set by the permit must not be less than the National Minimum Wage (NMW). Permit rates apply to a worker's normal wages and to his/her holiday pay and AWSP. A few permits have been granted which exempt an employer from paying AWSP but do not affect the worker's minimum rate of pay.

Implementation of EU Council Directive establishing a general framework for equal treatment in employment and occupation

3.4. The Government is required to introduce legislation to implement the EU Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC) in GB (separate arrangements are being made for NI). The final date for implementation of the Directive's requirements in relation to disability is 2 December 2006. However, legislation implementing the majority of the Directive's provisions in relation to disability discrimination – the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673) and the Disability Discrimination Act 1995 (Pensions) Regulations 2003 (SI 2003/2770) - comes into force on 1 October 2004. Amongst other things, the legislation will explicitly outlaw direct discrimination against a disabled person in employment. Broadly speaking, direct discrimination arises where a disabled person is treated less favourably

than another person who does not have that particular disability is treated, in a comparable situation, on the ground of his/her disability.

3.5. Regulation 6 of the Disability Discrimination (Employment) Regulations 1996 (SI 1996/1456) ("the 1996 Regulations"), preserved the effect of the permit provisions in the 1948 Act despite the commencement in 1996 of legislation outlawing discrimination against disabled people (the Disability Discrimination Act 1995). This means that, at the present time, a disabled agricultural worker with a valid permit can lawfully be paid less than a non-disabled worker who is doing the same job (but not less than the National Minimum Wage). Defra in consultation with the Department for Work and Pensions has concluded that this would allow direct discrimination contrary to the EU Directive and that therefore the permit provisions in the 1948 Act are not compatible with the Directive.

4. Risk Assessment

4.1. After the 1948 Act came into force much use was made of the permit provisions. In 1972 there were over 900 permit workers in England and Wales. However, by the end of 1998 the number had dropped to 76 in England and Wales.

4.2 At the time when it was decided that the permit provisions should be repealed, there were just 35 workers with permits all of whom were in England. Defra realised that employers might have difficulty in paying their permit workers the full rate set by the Wages Order, without any assistance. Arrangements were therefore put in place, in consultation with the Department for Work and Pensions, to help permit workers to apply for a WORKSTEP placement or similar support where that was appropriate. Table 1 summarises the outcome to date. While it is hoped that satisfactory arrangements will be in place for the remaining three workers, this does depend on the willingness of both workers and employers to show a degree of flexibility. In all cases, the worker and employer are aware that the worker will be entitled to the agricultural Standard Worker minimum wage from 1 October 2004.

Table 1: Arrangements for initial 35 permit workers

4	No longer employed in agriculture. Permits have been revoked
2	Put on the agricultural minimum wage after visit from AWC representative. Permits have been revoked.
8	Permits revoked / rescinded. (A permit relating only to Agricultural Wages Sick Pay is no longer required; six workers have been accepted onto WORKSTEP and another worker has been informed that he will be given a place on WORKSTEP if he becomes well enough to resume work and requires a place.)
17 (**12 still holding permits)**	Workers all employed by one employer. One is no longer employed, two are not employed on any agricultural work and their permits have been revoked. A couple already receive the agricultural minimum wage and their permits have been revoked.

	The remaining 12 workers will be paid the agricultural minimum wage for any agricultural work which they undertake from 1 October 2004. Defra will supplement the WORKSTEP budget for the first five years.
1	the worker will retire in September 2004 and the permit will be revoked.
3	Future arrangements still to be resolved. Two are In discussion with their Disability Employment Advisers. (One of these has been offered a WORKSTEP contract but its duration has not yet been agreed.) One worker has been reluctant to follow up the options which have been identified as possibly available to him.

Figures in bold indicate workers still holding a permit

5. Options

5.1. Two options were identified:

Option 1

Do nothing. Agricultural Wages Committees would continue to be allowed to grant special exemptions to incapacitated workers. However, because the permit provisions in the 1948 Act are not compatible with the Directive, employers who relied upon the permits would be acting unlawfully. It was concluded that this option was not feasible given the requirement for our legislation to be compatible with the European Union Directive and this option is not considered further.

Option 2

The special exemption provided by the 1996 Regulations would be ended in so far as it relates to the 1948 Act and the permit provisions in the 1948 Act would be repealed by 1 October 2004. Incapacitated agricultural workers would still be eligible to the same protection and support under other Government / Local Authority support programmes as all other disabled people. The remainder of this assessment considers the impact of option 2.

6. Benefits of option 2

6.1. In recent years a number of permit holders have transferred to the Government's Supported Employment Programme (SEP) and its successor WORKSTEP. Under these schemes employers pay workers the normal rate of pay for the job (in the case of agricultural workers this will normally be the minimum rate set in the Wages Order for a Standard Worker). The employer may receive a payment in recognition of the extra cost of employing someone who may not be fully productive. The WORKSTEP programme differs from the SEP in that it is also geared more to helping disabled workers to work towards being unsupported in the workplace. Workers are, therefore, better off under the SEP or WORKSTEP than they were under the permit arrangements. Since 1999 agricultural workers applying for a permit have, wherever possible, been steered to the SEP or WORKSTEP programmes and

only 6 new agricultural permits have been issued. Five of these were for workers at a sheltered work provider where 12 workers already held permits.

6.2. No permit worker may be paid less than the National Minimum Wage (NMW). From 1 October 2004 this will be £4.85 an hour. The Agricultural Wages Board has proposed an increase in the standard worker rate to £5.40 an hour from the same date. Based on these rates the maximum increase a permit worker will be entitled to in October when the permit arrangements end is 55p an hour (£5.40 - £4.85). This equates to an additional £21.45 a week or £1115.40 a year for a worker working a 39 hour week. Unless any of the workers is entitled to overtime under the Wages Order or receives pay greater than that in the Order, this is the maximum pay increase any will receive. Those workers who work for less than 39 hours a week will receive proportionately less, as will those whose permits entitle them to an hourly rate above the National Minimum Wage.

7. Costs associated with Option 2

Costs to businesses

7.1. On the basis of the calculations in paragraph 6.2, the cost to employers through the increase in wages will be a maximum of £1115.40 a year per worker (based on the proposed Wages Order rates from 1 October 2004), provided the worker is not entitled to any overtime pay under the Wages Order (or a higher rate contractually). Where the permit worker works less 39 hours a week, the maximum cost will be less, depending on the actual hours worked. Where a permit worker has been accepted onto the WORKSTEP programme, the employer may receive payment in recognition of the extra cost of employing someone who may not be fully productive.

Implementation costs

7.2. The impact on the WORKSTEP budget in future years is expected to be minimal. Since 1999 virtually all the agricultural workers who have applied to Agricultural Wages Committees for a permit for an incapacitated person, have been referred to their local Disability Employment Adviser and it is assumed that those who met the criteria have been offered a place on WORKSTEP. Since mid 2003, WORKSTEP has also accepted seven permit workers and has offered a contract to another. Discussions regarding a further worker are in progress. It is therefore possible that by the end of September WORKSTEP will have accepted nine additional workers as a result of the decision to repeal the agricultural permit arrangements. As the WORKSTEP budget is fixed this will not increase overall expenditure. Part of the funding of WORKSTEP is that fixed monthly payments are made to providers for each participant they are supporting. This funding may be used as a wage subsidy which is an agreement drawn up between the provider, the participant and the employer. People in employment and supported by WORKSTEP should be

paid at the appropriate rate for the job, and with the same terms and conditions as their colleagues.

7.3. Table 1 shows that 17 of the original 35 permit workers were employed by one employer. They were in an anomalous position in that they were already on WORKSTEP. Some of these workers are not employed on agricultural work or are already paid in accordance with the Wages Order. For the remaining workers who undertake some agricultural work, the support under the WORKSTEP programme brings their pay up to the rate stipulated under the permit rather than the agricultural minimum wage. Defra has agreed to provide some additional funding to increase WORKSTEP payments to the WORKSTEP provider for a five year period in respect of these workers. This should not exceed £7,000 per year (i.e. £35,000 over five years).

7.4. When the permit provisions are repealed the Agricultural Wages Committees will, in practice, be left with no work other than re-valuing farm workers' houses, provided by the employer under the contract of employment, for the purposes of determining the amount which the house can contribute, as payment in kind, towards the minimum agricultural wage. There have been just 7 such applications since 1995. However, the savings on the Agricultural Wages Committee budget will be negligible because Committees have dealt with very few permit applications in recent years and their main costs arise from the annual meeting which the legislation requires each Committee to hold.

8. Business sectors affected

8.1. The permit provisions apply only to workers employed in agriculture (which includes horticulture). As this legislation will have had a direct impact on just 12 businesses in this sector a small firms impact test has not been undertaken.

9. Equity and fairness

9.1. When the permit arrangements are withdrawn, disabled agricultural workers who formerly held a permit will be placed in the same position as all other workers in that they will be entitled to the same minimum wage as other workers engaged in comparable work.

10. Potential unintended consequences

10.1. No unintended consequences have been identified. However, as explained in paragraph 4.2, it is not certain that all the permit workers and their employers will be entirely satisfied with the arrangements which take effect from 1 October 2004. If the worker has not been accepted onto a programme such as WORKSTEP, the employer will have to pay the agricultural minimum wage and will receive no supplement in recognition of the fact that the worker is not fully effective.

11. Distributional factors

11.1. The majority of the remaining permit workers are in the area covered by the Northumberland, Tyne and Wear and Cumbria Agricultural Wages Committee because this is where the sheltered work provider who has made considerable use of the permit arrangements is located.

12. Consultation

12.1. When it was decided that the permit provisions should be repealed, the Chairmen of all the Agricultural Wages Committees were notified and so were all the remaining permit workers and their employers. Arrangements were put in hand to help permit workers to apply for a WORKSTEP placement or similar support where that was appropriate. The Agricultural Wages Committee Chairmen and Secretaries have been kept informed of progress and some have played an active part in ensuring that satisfactory arrangements are made for the permit workers.

12.2. A full public consultation was initiated on 16 March 2004 and consultees were given until 21 June to comment. Just four responses were received, three from people connected with the Agricultural Wages Board or Committees and one from an organisation representing agricultural employers. All the respondents accepted that it was necessary to repeal the permit provisions.

13. Implementation

13.1. The Agricultural Wages (Abolition of Permits to Incapacitated Persons) Regulations will be made and laid before Parliament shortly. They will come into force on 1 October 2004.

14. Guidance

14.1. The key stakeholders have been aware for over a year that the agricultural permit for incapacitated persons provisions would be repealed with effect from 1 October 2004. A press release will be issued towards the end of September to remind them that the provisions are about to be repealed. Anyone applying to Defra or the Agricultural Wages Committees for a permit will be advised to contact his or her local Disability Employment Adviser. Therefore no worker will be disadvantaged because he / she or the employer was not aware of the repeal of the permit provisions.

15. Enforcement and Sanctions

15.1. The remaining agricultural permits will be revoked with effect from 1 October 2004 and the employers will be reminded that from then on they must pay former permit workers not less than the minimum rates set in the Wages Order. The Agricultural Wages Order is legally binding and is enforced by Defra.

16. Summary and recommendation

16.1. The permit for incapacitated persons provisions in section 5 of the Agricultural Wages Act 1948 are not compatible with the EU Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC). UK legislation implementing the relevant provisions in the Directive comes into force on 1 October 2004 and it is therefore necessary to repeal the permit provisions at the same time.

16.2. Of the 35 agricultural workers who held permits at the time when the decision to repeal the legislation was made, 18 no longer need permits (because they have been accepted onto the WORKSTEP programme, are being paid Wages Order rates or are no longer employed in agriculture). Of the remaining 17 workers, arrangements are in hand for 13, one worker is due to retire shortly, two are in discussion about possible WORKSTEP placements and one, who has failed to take any action, will be entitled to the Wages Order rates but his employer will receive no assistance towards the costs.

16.3. Provided a permit worker does not work overtime, as defined in the Wages Order, the maximum cost per worker to an employer will be £1115.40 a year. Where the worker has been accepted onto the WORKSTEP programme, the employer will receive a payment which should go at least part way to compensate for this.

16.4. The cost to Defra of providing additional funding to WORKSTEP in respect of the business which employs a significant number of permit workers is not expected to exceed £35,000 over five years.

16.5. It is necessary for the permit provisions in the Agricultural Wages Act be repealed by 1 October 2004. All the remaining permits will be revoked and from 1 October 2004 the workers will be entitled to the Standard Worker rates in the Agricultural Wages Order.

17. Ministerial declaration

17.1 I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

Signed	Whitty
Date	22nd August 2004
Minister's Name	Lord Whitty
Title	Parliamentary Under Secretary of State
Department	Department for Environment, Food and Rural Affairs
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