EXPLANATORY MEMORANDUM TO

THE ENVIRONMENTAL CIVIL SANCTIONS (ENGLAND) (AMENDMENT) ORDER 2023

2023 No. [XXXX]

AND

THE ENVIRONMENTAL PERMITTING (ENGLAND AND WALES) (AMENDMENT) (ENGLAND) (NO. 2) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by Department for Environment, Food and Rural Affairs ("Defra") and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 These instruments are being made to strengthen the civil sanctions available for environmental regulators in England (Natural England and the Environment Agency), in order to provide a greater deterrent against environmental offences for operators. The changes are the removal of the cap on the amount of the penalty imposed (under the Environmental Civil Sanctions (England) (Amendment) Order 2023) and the expansion of penalties across more offences (under the Environmental Permitting (England and Wales) (Amendment) (No. 2) Regulations 2023).

3. Matters of special interest to Parliament

3.1 None.

4. Extent and Territorial Application

4.1 The extent of these instruments (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of these instruments (that is, where the instrument produces a practical effect) is England.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State for Defra, Rebecca Pow MP has made the following statement regarding Human Rights:

"In my view the provisions of the Environmental Civil Sanctions (England) (Amendment) Order 2023 and the Environmental Permitting (England and Wales) (Amendment) (England) (No. 2) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 These instruments are being made to provide for the regulators to employ a range of civil sanctions in dealing with environmental offences and to ensure that the civil sanctions available act as a sufficient deterrent for operators against breaches of environmental law. The instruments remove the cap of £250,000 on variable monetary penalties which may be imposed by the Environment Agency or Natural England under the Environmental Civil Sanctions (England) Order 2010 and add to existing powers in the Environmental Permitting (England and Wales) Regulations 2016 by allowing the Environment Agency to impose a variable monetary penalty of any amount in respect of offences under those Regulations.

7. Policy background

What is being done and why?

7.1 These instruments are being made to strengthen the civil sanctions available for environmental regulators in England, in order to provide a greater deterrent against breaches of environmental legislation by removing the cap on the amount of a variable monetary penalty in the Environmental Civil Sanctions (England) Order 2010 and making variable monetary penalties available under the Environmental Permitting (England and Wales) Regulations 2016.

7.2 Currently, the cap on penalties is £250,000 which does not act as a sufficient deterrent to large operators and means that it could be cheaper to pay the penalty than operate lawfully.

7.3 Variable monetary penalties are not currently available under the Environmental Permitting (England and Wales) Regulations 2016 leaving a "justice gap" between for moderate-to-serious offences where criminal prosecution, or advice and guidance, aren't appropriate enforcement powers.

7.4 These instruments will strengthen existing enforcement powers and see increased compliance with environmental regulations.

Explanations

What did any law do before the changes to be made by these instruments?

7.5 There is currently a cap of £250,000 on a variable monetary penalty imposed on persons under the Environmental Civil Sanctions (England) Order 2010 regardless of the person on whom the penalty is imposed or any aggravating factors relevant to the offence. The enforcement options currently available under the Environmental Permitting (England and Wales) Regulations 2016 are limited to: enforcement notices, suspension notices, and enforcement undertakings.

Why are they being changed?

7.6 To increase the enforcement deterrent against environmental offences by increasing the possible financial penalty amount and by expanding financial civil sanction penalties to additional, pre-existing offences.

What will they now do?

7.7 They will allow environmental regulators in England to impose appropriately determined penalties on persons who have committed environmental offences, using the Sentencing Council guidelines (for the Environment Agency) and existing

guidance and legal precedence (for Natural England), under the Environmental Civil Sanctions (England) Order 2010. They will also allow the Environment Agency to impose penalties on persons who have committed environmental offences, appropriately determined using the Sentencing Council guidelines, under the Environmental Permitting (England and Wales) Regulations 2016.

8. European Union Withdrawal and Future Relationship

8.1 These instruments do not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans to consolidate the legislation amended by these instruments.

10. Consultation outcome

10.1 A public consultation entitled "Strengthening environmental civil sanctions" was held between 4th April 2023 and 15th May 2023. In total, the consultation received 105 responses from a wide range of stakeholders, including 73 from members of the general public.

10.2 The scope of the consultation included increasing the penalty cap under the Environmental Civil Sanctions (England) Order 2010 from £250,000 to £25 million, £250 million, or removal of the cap i.e. unlimited and the introduction of penalties for offences under the Environmental Permitting (England and Wales) Regulations 2016.

10.3 The majority of respondents supported the proposals. Of the rest, the main objections were on the environmental regulators' capacity to undertake sufficient enforcement action to use the penalties. The regulators' capacity to enforce will be supported by the changes that introduce a new, simpler enforcement option to criminal prosecution for moderate-to-serious offences. The full government response to the consultation can be found here: https://www.gov.uk/government/consultations/strengthening-environmental-civil-sanctions.

11. Guidance

11.1 The regulators will update their public enforcement guidance once these instruments have come into force.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because it relates to maintenance of existing regulatory standards.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small business.

13.3 Sentencing Council guidelines will be followed by the Environment Agency to ensure that any penalties imposed take into account the size of the operator and their ability to pay.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Parliamentary Under Secretary of State for Defra has made the following statement: "A statutory review clause has not been included in this instrument, because the EPR already contains provision for a review of the regulations to take place every 5 years".

15. Contact

15.1 Mike Snowden at the Department for Environment, Food and Rural Affairs ("Defra") Email: mike.snowden@defra.gov.uk can be contacted with any queries regarding the instrument.

15.2 Amira Amzour, Deputy Director for Water Quality, at the Department for Environment, Food and Rural Affairs ("Defra") can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under Secretary of State, Rebecca Pow MP at the Department for Environment, Food and Rural Affairs ("Defra") can confirm that this Explanatory Memorandum meets the required standard.