EXPLANATORY MEMORANDUM TO

THE ENVIRONMENTAL PERMITTING (ENGLAND AND WALES)

(AMENDMENT) (No. 2) REGULATIONS 2016

2016 No. [XXXX]

1. Introduction

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

2. Purpose of the instrument

2.1 This instrument provides for the regulation of "flood risk activities" within the Environmental Permitting framework, replacing the current "flood defence consent scheme". It is intended to reduce administrative burdens on applicants undertaking activities which require prior approval because they may impact on flood risk or flood risk management. It enables the regulators (Environment Agency and Natural Resources Wales) to concentrate their resources on higher risk activities.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument varies between provisions.

4. Legislative Context

4.1 Section 109 of the Water Resources Act 1991 and local land drainage and sea defence byelaws made by the Environment Agency and Natural Resources Wales under powers in Schedule 25 to that Act require prior consent by those bodies before certain activities are undertaken on main rivers. (A main river is defined as a watercourse marked as such on a main river map. Main rivers are usually larger streams and rivers, but also include some smaller watercourses.). In addition, section 339 of the Highways Act 1980 requires that highway authorities and others wishing to undertake certain highways activities that impact on main rivers must seek the permission of the Environment Agency and Natural Resources Wales. In many cases this means that the highways authorities must apply for both a Highways Act consent and a flood defence consent.

4.2 This instrument is made under powers in sections 61 and 90 of, and Schedule 8 to, the Water Act 2014. This instrument establishes a new scheme under the Environmental Permitting framework to regulate activities on or near watercourses in England and Wales.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is England and Wales excluding the Isles of Scilly. The territorial application varies between provisions.

6. European Convention on Human Rights

6.1 The Secretary of State for Environment, Food and Rural Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Environmental Permitting (England and Wales) (Amendment) Regulations 2016 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 If poorly executed, construction works or maintenance activities on or near watercourses can cause problems such as increasing flood risk, cause or exacerbate flooding and/or cause environmental damage. Prior permission (known as a flood defence consent) is needed to avoid these problems being created. The Environment Agency and Natural Resources Wales issue about 5,000 flood defence consents each year.

7.2 There is no intention to change the general requirement for a permit, but improvements are needed to the way the scheme operates:

- Consents are required under the Water Resources Act 1991, regional byelaws and the Highways Act 1980. These various regimes have differing charges, application times, appeal mechanisms and other provisions leading to a complex position for someone trying to take forward a proposal and determine the requirements of the legislation that applies.
- Applicants must follow the same process for low risk activities as for high risk activities. In many cases this level of regulation is unnecessary for either flood risk management or environmental protection purposes.
- Much of the process is enshrined in primary legislation which makes it difficult to readily amend the regime to suit changing circumstances.

7.3 We are proposing to integrate into the environmental permitting framework all flood defence consent and enforcement activities on and near main rivers. The framework, established by the Environmental Permitting (England and Wales) Regulations 2007 and expanded in 2010 has rationalised various permitting regimes into a common platform that is easier to understand and use by utilising a common set of processes and controls for the permitting of specified activities. Making the current flood defence consents scheme more risk-based and proportionate will help to cut red tape, and should increase clarity and certainty for stakeholders regarding the contribution of the system to the reduction of flood risk and protection of the environment.

7.4 The UK and Welsh Governments considered a non-legislative approach to improving the flood defence consents regime, but concluded that the benefits were too limited to pursue; legislation is needed to remove lower risk activities from the need for a bespoke permit, and to permit the issuing of a single permit for activities that would normally need a number of permits from several different schemes. The only benefit from a non-

legislative approach would be the introduction of improved guidance which would help the application process.

Consolidation

7.5 The Environmental Permitting (England and Wales) Regulations 2010 have been amended 12 times thus far. The UK and Welsh Governments intend to lay a consolidated set of Regulations in 2016, with a view to them coming into force on 1/1/2017.

8. Consultation outcome

8.1 A joint public consultation was held by Department for Environment, Food and Rural Affairs (Defra) and Welsh Government between 10 December 2014 and 17 February 2015. This consultation lasted 10 weeks in line with the Government's consultation principles. The Environment Agency held a linked consultation at the same time on proposals for standard rules that would apply to permits for standard activities in England. (There are no standard rules permits proposed for Wales at this time.) These consultations were coordinated in order to give stakeholders a clearer idea of the complete scheme.

8.2 Out of the 53 responses received from various sectors, 74% supported the proposals described in the consultation. The majority of comments related to the detail of the standard rules permits, exemptions, exclusions, making proposals to broaden their scope and to make a number of technical amendments. As a result a series of amendments were made to improve clarity, ensure practicality or more carefully control the activity. For example, an exclusion allowing the erection of agricultural fencing was extended to cover all fencing of particular specified construction no matter its purpose. Further details are included in the Government response to points made in the consultation; https://www.gov.uk/government/consultations/making-flood-defence-consents-part-of-the-environmental-permitting-framework.

9. Guidance

9.1 The Environment Agency and Natural Resources Wales will issue guidance on the scheme, each exclusion, exemption and standard rule permit and how to comply with the various conditions. The guidance will also explain the application process.

10. Impact

10.1 The environmental permitting framework is a common framework for applying for, receiving, varying, transferring and surrendering permits, along with compliance, enforcement and appeals arrangements. It seeks to rationalise various permitting and compliance regimes into a common framework that is intended to be easier to understand and simpler to use. A key component is that it allows applicants that would otherwise require several permits for activities falling under various regulations on a single site to complete a single application, and to be issued with one permit. The framework introduces a variety of different permits: exclusions (very low risk activities which may be undertaken without any permit), exemptions (lower risk activities which may be undertaken after registering, registration will be free), standard rules permits (standard requirements and conditions for the relevant activities are set out so that applicants can see in advance whether the permit is applicable to

their proposals) and bespoke permits (permits written specifically for activities which are unique or of higher risk).

10.2 The impact on business, charities or voluntary bodies will be reduced administrative costs; about 20% of current consent applications will be eligible for a standard rules permit, while 30% will not need to apply for a permit at all.

10.3 The impact on the public sector will also be reduced administrative costs and to enable the regulators to focus resources on higher risk activities; the Environment Agency and Natural Resources Wales will have 30% fewer applications for permits, and a further 20% that will undergo a simpler process to verify the application rather than the current full determination process.

10.4 We expect the new scheme to achieve a net benefit of £18.1m in NPV terms over 10 years, 82% (£14.8m) by applicants, 17% (£3.0m) by the Environment Agency and 3% (£258k)by Natural Resources Wales.

10.5 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

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

11.2 The proposal is not anticipated to negatively affect small or micro businesses, their customers or competitors. The Environmental Permitting system enables a risk-based approach to regulation. The activities regulated under this proposal are capable of exacerbating flood risk no matter whether carried out by large or small businesses. It is not therefore possible to simply exclude all small or micro firms from regulation. Environmental Permitting is focussed upon reducing administrative burdens, and its risk-based approach allows the Environment Agency and Natural Resources Wales to minimise burdens to all regulated businesses, but its benefits will be greatest for small and micro businesses who have less resources available to afford additional time spent on administration.

12. Monitoring & review

12.1 A review of the regulations will be undertaken as part of a wider statutory review in England of the Environmental Permitting Regulations in 2019.

13. Contact

13.1 Ruth Thirkettle, at the Department for Environment, Food and Rural Affairs Tel: 0207 238 4389 or email: ruth.thirkettle@defra.gsi.gov.uk, can answer any queries regarding the instrument.