EXPLANATORY MEMORANDUM TO

THE ENVIRONMENTAL PROTECTION (MICROBEADS) (ENGLAND) REGULATIONS 2017

2017 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 These Regulations ban the manufacture and sale of rinse-off personal care products containing microbeads. This will reduce the release of plastic into the marine environment and lessen harm to marine organisms caused by this form of microplastic.

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 This entire instrument applies only to England.

3.3 The instrument extends to England and Wales only, and applies to England only (see regulation 1(5) of the instrument). The instrument does not have minor or consequential effects outside England and Wales.

3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament and the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

3.5 The Department has reached this view because it considers that the primary purpose of the instrument relates to the protection of the environment, which is within the devolved legislative competence of the three devolved legislatures: the primary purpose of the instrument is not within Schedule 5 to the Scotland Act 1998 (c. 46) and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act); the primary purpose of the instrument is not within Schedules 2 or 3 to the Northern Ireland Act 1998 (c. 47) and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act); the primary purpose of the instrument is within paragraph 6 of Schedule 7 to the Government of Wales Act 2006 (c. 32), and it is not otherwise outside the legislative competence of the National Assembly for Wales (see section 108 of that Act).

4. Legislative Context

4.1 These Regulations are being made to restrict the use and supply of plastic microbeads in order to prevent pollution of the marine environment or harm to the health of animals.

4.2 The small but avoidable contribution of microbeads to marine microplastic pollution has long been recognised.

4.3 With this understanding, there has been voluntary action taken by industry to remove plastic microbeads in some products associated with personal care. However, given microbeads are used for a number of reasons and exist in a range of rinse-off personal care products, it was felt regulation was required to further manage their negative impact. This legislative ban, without limitation to the purpose of the microbead in the product, will provide clarity for industry, and will provide consumer confidence that the products they buy will not lead to marine pollution.

4.4 This ban forms part of a wider strategy to combat marine plastic pollution.

5. Extent and Territorial Application

5.1 The instrument extends to England and Wales.

5.2 The territorial application is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 The Secretary of State Michael Gove has made the following statement regarding Human Rights: "In my view the provisions of The Environmental Protection (Microbeads) (England) Regulations 2017 are compatible with the Convention rights".

7. Policy background

7.1 In 2016, the results of a five year Defra funded study on the impact of microplastics in the marine environment was published. The study was conducted by the University of Plymouth and showed that microplastics ingested by marine organisms can cause harm either directly or by transporting other chemical contaminants into their systems. These findings reinforced the growing body of evidence of harm caused to marine organisms by ingestion of microplastics.

7.2 One form of microplastic is the microbead, a water-insoluble solid plastic particle that measures less than or equal to 5mm in any dimension. These are deliberately added to a variety of products and have been in use for many years.

7.3 The growing evidence on microplastics associated with many studies (including the Defra one) has underpinned activity to improve the marine environment. Since 2014, the UK has been working with neighbouring countries through the OSPAR Regional Acton Plan (RAP) to tackle Marine Litter. Part of this work has looked at engaging with the cosmetics industry to promote a voluntary phase-out of the use of microplastics in cosmetics and personal care products.

7.4 This work led to a recommendation in October 2015 from the European trade association for the cosmetics industry, Cosmetics Europe, to voluntarily phase out

the use of microbeads added for cleansing and exfoliating purposes. Many cosmetics companies, both large and small, issued public commitments to do so.

7.5 In January 2016, Greenpeace launched a petition calling for the UK Government to ban microbeads from cosmetics. This petition received over 385,000 signatures. In August 2016 the Environmental Audit Committee's inquiry into the environmental impact of microplastics was published. It included a recommendation to introduce legislation to ban the use of microbeads in cosmetic and personal care products. The EAC advocated consistency with international legislation.

7.6 Microbeads are an avoidable source of marine pollution. Up to 680 tonnes of plastic microbeads are used in personal care products in the UK every year, billions of which are being washed into drainage systems and entering our seas. Microbeads accumulate in the marine environment because they do not biodegrade and because it is impossible to recover them once released.

7.7 The increased understanding and awareness of microbeads and the harm they cause, has resulted in substantial public interest in reducing microbead pollution in the oceans.

7.8 The voluntary action by industry, along with increasing pressure from consumers, has been successful to the extent that more than 70% of producers have already removed microbeads from their products. However, introducing a legislative ban will ensure consistency in understanding of what is meant by "microbead" and as a result will ensure that all relevant products are free from microbeads.

7.9 Accordingly, Ministers took the decision to introduce legislation to bring in a national ban on the manufacture and sale of rinse-off personal care products containing microbeads, while continuing to engage with other countries to support the development of similar bans internationally.

7.10 The ban extends to all rinse-off personal care products, as defined in the regulations. Rinse-off personal care products include, but are not limited to: products designed for use on the body, skin, hands, feet, nails, face, hair and oral cavity, including to exfoliate, cleanse, lighten or colour, soften skin or hair, remove hair, deodorise or perfume, as well as bath products with personal care properties and dental products.

8. Consultation outcome

8.1 Proposals for a ban were drawn up following considerable engagement with key stakeholders including cosmetics companies, non-governmental organisations and those with specific expertise in marine pollution. A public consultation entitled "Proposals to ban the use of plastic microbeads in cosmetics and personal care products in the UK and call for evidence on other sources of microplastics entering the marine environment" was held between 20th December 2016 and 28th February 2017. This was made publically available on gov.uk, and publicised in the national media via a press release, engagement with national news outlets and environmental campaign groups. Stakeholders with marine interests were additionally notified by email and cosmetics companies, non-governmental organisations and those with marine pollution expertise were particularly encouraged to respond.

8.2 The consultation set out proposals to ban the manufacture and sale of cosmetics and personal care products containing microbeads in the UK (including all devolved territories). It explained that the ban would apply to solid microbeads less than 5mm in size in every dimension that are used as an ingredient in rinse-off cosmetics and

personal care products. It set out timescales for introducing the ban, and the proposal, in England, to introduce civil sanctions to allow for proportionate enforcement of it.

8.3 The consultation asked for comments on the proposals, including specific questions on scope; potential exemptions; timescales; compliance monitoring and enforcement; costs to industry (including in particular small and medium enterprises (SMEs)); impact on imports, and environmental risks of alternatives to plastic microbeads. It also raised awareness of the potential for those with an interest to make representations on the legislation when it was notified prior to being made.

8.4 A total of 437 responses to the consultation were received. The majority of these were from individuals, although responses were gathered from a wide range of organisations including cosmetics companies and associations, environmental charities and campaign groups, academic institutions, local authorities and fishing organisations.

8.5 Most respondents welcomed the proposed ban. Many suggested modifications to the scope of the ban and/or when the ban should come into force. Suggestions were also provided on alternative wording of the ban, exemptions, methods for compliance monitoring and enforcement, and potential impacts on industries, imports and the environment. Analysis of the consultation outcome is available on the gov.uk website.

8.6 Proposals were refined after consideration of the responses received during the consultation and taken into account.

8.7 On 30th July 2017 the draft statutory instrument was notified to the European Union (EU) under the Technical Standards Directive (TSD), as well as to the World Trade Organization (WTO) under the Technical Barriers to Trade Agreement (TBTA).

8.8 On 15th September 2017 a notice was published in the London Gazette, notifying the draft statutory instrument and inviting public representations to the Secretary of State. This opportunity was additionally publicised via a web link on gov.uk and by email to those who responded to the original public consultation and to Defra's wider network of marine stakeholders. The period for comment was extended from the statutory 2-week requirement to a 1-month period. Responses to these cosnsultation were received from NGOs, cosmetics companies and industries, environment charities and trading standards.. The main issues raised related to the interpretation of our definitions of "plastic" and "microbead".

8.9 In response, the definition of plastic was refined in consultation with stakeholders and chemicals experts and the Impact Assessment amended accordingly. This ensured the correct distinction between substances which were "plastic" and those which were polymers but not "plastic". To ensure the ban remains effective at tackling marine microplastic pollution the definition of microbead was not changed.

8.10 In the Regulations "plastic" is now defined as meaning a synthetic polymeric substance that can be moulded, extruded or physically manipulated into various solid forms and which retains its final manufactured shape during use in its intended applications.

9. Guidance

9.1 The Regulations will be enforced by Local Authorities (and their trading standards officers) in accordance with published guidance. Such guidance will assist manufacturers, suppliers, retailers and the public in understanding the enforcement and sanctions regime. DEFRA intends to raise awareness of the new legislation by meeting representatives and providing extensive explanation to local authorities on what constitutes a microbead, the likely products to contain them and therefore potential locations of sale.

10. Impact

10.1 The impact on the public sector constitutes minimal additional regulatory burden with respect to enforcement of the ban as outlined in the Statutory Instrument. Local authorities are to be responsible for ensuring businesses compliance with the ban on manufacture and sale of rinse-off personal care products containing plastic microbeads. A small amount of additional burden is anticipated in the form of additional time for trading standards officers and administration of sanctions where appropriate. The best estimate for the cost of administrating the regulation is £38,000 during the familiarisation year and £660 per year thereafter. Due to previous voluntary actions from industry, rates of non-compliance are expected to be low.

10.2 There is no anticipated impact upon charities or voluntary bodies.

10.3 The impact has been verified in light of consultation responses and this is reflected in the Impact Assessment is submitted with this memorandum.

11. Regulating small business

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

11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken follows a lead-in time exceeding 12 months since the announcement of the proposed ban. While the extent of microbead use by small businesses is difficult to determine, engagement with the UK Cosmetics, Toiletries and Perfumery Association has indicated that it is likely that few small businesses use, or have used, microbeads in their products. In response to Cosmetics Europe's 2015 recommendation to stop microbead use, small businesses committed to removing plastic microbeads from their products.

12. Monitoring & review

12.1 These Regulations will be subject to regular review. The obligations are set out in regulation 12 and include (i) a review of the operation of the provisions in Part 3 (Enforcement and Civil Sanctions) and the Schedule within 3 years from the date these Regulations come into force, as required by section 67 of the Regulatory Enforcement and Sanctions Act 2008 and (ii) a review of the regulatory provision (including Part 3 and the Schedule) at least every 5 years from the date the Regulations come into force, as required by the Small Business, Enterprise and Employment Act 2015. The conclusions of such reviews are to be published.

13. Contact

13.1 James Brown at the Department for the Environment, Food and Rural Affairs, email: marinelitter@defra.gsi.gov.uk can answer any queries regarding the instrument.