EXPLANATORY MEMORANDUM TO

THE RESERVOIRS ACT 1975 (EXEMPTIONS, APPEALS AND INSPECTIONS) (ENGLAND) REGULATIONS 2013

2013 No. [XXXX]

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.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The Minister is obliged under paragraphs 7 and 30 of Schedule 4 to the Flood and Water Management Act 2010 ("the 2010 Act") to provide, by regulations, the right to an appeal. These regulations provide an undertaker of a large raised reservoir with a right of appeal against (a) a designation of that reservoir as high-risk, and (b) a requirement in a notice served by an engineer appointed under the Reservoirs Act 1975 ("the 1975 Act") to carry out certain works in the interests of safety. An appeal is made to the First-tier Tribunal.

2.2 Paragraph 12 of Schedule 4 to the 2010 Act also obliges the Minister to make regulations to set out the timings for inspections of a high-risk reservoir by a qualified civil engineer. These regulations provide for the timings of inspections and make transitional arrangements and savings to ensure that safety inspections of a large raised reservoir continue without interruption until the requirements for a high-risk reservoir become effective.

2.3 Paragraph 2 of Schedule 4 to the 2010 Act confers powers to the Minister to make regulations to provide for specified things not to be treated as large raised reservoirs for the purposes of the 1975 Act.

2.4 These regulations contain a review clause – see paragraph 12.4.

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

3.1 None

4. Legislative Context

4.1 The 1975 Act seeks to ensure public safety through imposing statutory obligations on reservoir undertakers to have their reservoirs supervised and periodically inspected by qualified civil engineers, with a requirement to carry out any works recommended in the

interests of safety in the report of an inspection. Schedule 4 of the Flood and Water Management Act 2010 (the 2010 Act), which mainly amends the 1975 Act to introduce a more risk-based regulatory regime linked to the danger to human, contains a number of provisions allowing England and Wales to make a number of pieces of secondary legislation.

4.2 The powers to make these regulations have been commenced (SI 2011/2204). These regulations address exemptions from the 1975 Act made under section A1(8), a right of appeal against designations under section 2B made under section 2E(1), a right of appeal against several requirements to appoint an engineer and to carry a recommendation of an engineer into effect made under section 19A(1), and the timing of inspections made under section 10(2).

4.3 All of these provisions have been the subject of consultation and the regulations reflect the responses to that consultation.

4.4 Section 1(1) of the 1975 Act sets out what water bodies are not to be included within the scope of the Act (which will be omitted when its repeal is effective). Section A1(8) inserted by Schedule 4 to the 2010 Act gives the power to make regulations providing for specified things not to be treated as large raised reservoirs for the purposes of this Act. Regulation 3 provides for mine and quarry lagoons, canals and other inland navigations, and road and railway embankments not used to deliberately store water to be exempted from the scope of the 1975 Act.

4.5 Sections 2A-2D of the 1975 Act inserted by Schedule 4 to the 2010 Act set out the process whereby the enforcement authority designates a reservoir as a “high-risk reservoir”. Section 2E requires the Minister to make regulations that provide a right of appeal against designations as a “high-risk reservoir”, which is addressed by regulation 4 of this instrument.

4.6 Section 19A as inserted by the 2010 Act requires the Minister to make regulations that provide a right of appeal against several requirements to appoint an engineer and to carry a recommendation of an engineer into effect, which is addressed by regulation 5 of this instrument.

4.7 The timing of inspections of all large raised reservoirs is currently covered by section 10(2) of the Act. Section 10 is amended by the 2010 Act to require the inspection only of “high-risk” reservoirs and to provide the power to make regulations setting timing requirements for the inspections. This is addressed by regulation 6 of this instrument.

4.8 The general requirement for periodic review of new regulations is contained in regulation 8 of this instrument. (see paragraph 12).

5. Territorial Extent and Application

5.1 England.

6. European Convention on Human Rights

The Secretary of State for the Environment has made the following statement regarding Human Rights:

In my view the provisions of The Reservoirs Act 1975 (Exemptions, Appeals and Inspections) (England) Regulations 2013 are compatible with the Convention rights.

7. Policy background

- What is being done and why

7.1 The policy objective of the 1975 Act is to ensure public safety through imposing statutory obligations on undertakers of large raised reservoirs (LRRs) to have their reservoirs supervised and periodically inspected by a qualified civil engineer (QCE). QCEs, which include Supervising and Inspecting Engineers, are appointed under the Act by the Secretary of State who takes advice from the Institution of Civil Engineers as to their suitability for appointment. The Act provides for construction and alteration of a raised reservoir large enough to fall under the Act as a LRR to be under the supervision of a QCE. Currently, all LRRs must be under the supervision of a Supervising Engineer and inspected periodically by an Inspecting Engineer. Any work needed in the interests of safety identified in an inspection report must be carried out, which minimises the likelihood of an uncontrolled release of water from the reservoir that may endanger human life. The Act was preceded by the Reservoirs (Safety Provisions) Act 1930 enacted following a series of reservoir failures around 1925 that resulted in significant loss of life.

7.2 During the major flooding of 2007, there was a near-miss incident at Ulley Reservoir where complete failure was averted only by emergency action. Sir Michael Pitt carried out a review of the 2007 flood event and included in his report recommendations for improvements to reservoir safety legislation. The recommendations for reservoir safety were addressed through amendments to the 1975 Act made by schedule 4 of the 2010 Act.

7.3 The 1975 Act currently applies to all LRRs. A key recommendation in Sir Michael Pitt's report was to introduce a risk-based approach for the regulation of LRRs. The approach chosen to address this recommendation was to fully regulate only those LRRs that were thought likely to endanger human life in the event of an uncontrolled release of water from the reservoir. Such LRRs will be designated as 'high-risk reservoirs'. Designations of high-risk will be made by the Environment Agency in England. LRRs that are not designated as 'high-risk reservoirs' will not need to be supervised or inspected periodically by a QCE. The Environment Agency has developed a methodology for deciding whether it thinks that a LRR should be designated as 'high-risk' and this will be publicly available when the amendments to the 1975 Act come into force.

7.4 Other significant amendments to the 1975 Act include the reduction of the capacity of a raised reservoir that will be in scope, various measures to improve clarity (such as in the calculation of capacity), a requirement for an undertaker to register a LRR, the introduction of appeals provisions for offences, the move to strict liability for offences to reduce ambiguity and the possibility of using civil sanctions as an option instead of criminal sanctions, improved clarity of requirements for flood planning, discontinuance and abandonment, and a requirement to provide reports of incidents that might affect safety at a LRR.

7.5 Commencement will be carried out in two phases, with a number of the amendments made by the 2010 Act being commenced and secondary legislation made at Phase 1, but only for those reservoirs that are already covered by the 1975 Act (those LRRs with a capacity greater than 25,000 cubic metres). At phase 2 the remainder of the amendments will be commenced such that the lower capacity qualification of 10,000 cubic metres or more will apply and further secondary legislation will be made. This phasing allows the Environment Agency to develop experience with the designation process on those reservoirs that they already regulate during phase 1, as well as giving time to engage with the undertakers of those LRRs that will fall under the 1975 Act at phase 2 to explain their new responsibilities in advance of commencement of phase 2.

7.6 There are currently over 2000 LRRs registered under the 1975 Act in England and Wales. 47% are owned by utility companies mostly for water supply, 11% are owned by the Environment Agency or other government agencies mostly for flood risk management (flood storage reservoirs), 10% are used for irrigation or aquaculture mainly by farmers, horticulturalists and golf clubs, 8% are used for industry and transport (canals), and the remainder are used for leisure such as angling and other water sports or are in private hands. A significant number of the reservoirs are over 100 years old and their condition is variable. Since the introduction of reservoir safety legislation in 1930, there has been no loss of life as a result of reservoir breaches, but there are on average about 4 incidents each year at reservoirs of all sizes (not just those that fall under the Act) that require emergency action in the interests of safety.

7.7 Regulation making power inserted into the 1975 Act by the 2010 Act includes allowing for specific exemptions from the 1975 Act under section A1(8), the introduction of section 2E(1) setting out in regulations appeal rights against the designation of a LRR as high-risk, amendment of section 10(2) setting out in regulations the timing of inspections, and section 19A(1) setting out in regulations appeal rights against a requirement to appoint an engineer or to carry out the recommendation of an engineer.

7.8 Current exemptions from the Act include tips that are covered by mines and quarries legislation and canals and inland navigations. The new regulations maintain these exemptions for Phase 1. A consequence of the new definition of LRR in section A1 is that other kinds of water bodies potentially fall within the scope of the 1975 Act. Therefore, there is a new exemption which is road and rail embankments where the drains through them have not been artificially blocked (such as with gates) such that water is

stored in the areas upstream or the drains are constructed in such a way that water is stored. This provides clarity. Where a road or rail embankment effectively acts as a flood storage reservoir, it should be declared as such and managed accordingly.

7.9 Both appeals provisions introduced at phase 1 allow appeals on any grounds to the First-tier Tribunal (FTT). In the case of an appeal against a designation, the designation is suspended while the appeal is pending. On deciding such an appeal, the FTT must either confirm or cancel the designation. In the case of an appeal against an enforcement notice, the requirement is suspended while the appeal is pending. On deciding such an appeal, the FTT must either confirm the requirement or determine that the requirement is to cease to have effect. The FTT is administered by HM Courts and Tribunals Service, an executive agency of the Ministry of Justice. The FTT is an established independent appeal tribunal. The process for bringing an appeal is governed both by these regulations and by the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009. The appeals regulations are legally important as they will meet the express requirements in the 1975 Act for an appeals mechanism to be established, and are necessary to help facilitate the effective and fair operation of the 1975 Act.

7.10 The regulations setting out the timing of inspections mostly have the same effect as was previously set out in sections 10(2)(a)-(d) of the Act. They meet the express requirements in the 1975 Act for regulations to be made concerning inspection timings. Previously all LRRs had to be supervised and inspected, whereas the amended 1975 Act only requires those LRRs designated as 'high-risk' to be supervised and inspected. Until the undertaker is notified that a LRR is not designated as 'high-risk', the case for deregulation is not established so transitional arrangements and savings ensure that LRRs continue to be supervised and inspected until the undertaker is notified accordingly. The new provisions clarify the timing point for inspections (completion of inspection versus the start, which allows for multiple visits to complete an inspection where necessary). Since the inspection requirement is now for high-risk reservoirs, the inspection clock is effectively reset by the amendments to the legislation, so there is provision to use existing inspection reports where these would have been valid if made under the new regulations.

- Consolidation

7.11 Consolidation of the amended Reservoirs Act 1975 is under consideration at some point in the future after all current amendments have been commenced and their effectiveness assessed. The opportunity will be taken at that time to look at new reservoir safety legislation in both Scotland and Northern Ireland.

7.12 In addition to further regulations being made using the new regulation making powers in the amended 1975 Act, existing 1975 Act regulations will be revoked, replaced and consolidated in new regulations, planned to be made at phase 1.

8. Consultation outcome

8.1 A 12 week full public consultation was held between 23 February and 17 May 2012. 72 responses to the consultation were received from a mix of agricultural bodies

(3%), consultants (8%), environmental bodies (8%), individuals (mostly panel engineers) (21%), local authorities and councils (21%), professional and representative bodies (3%, 18%), and utility companies (18%). There have been ongoing discussions with a stakeholder group comprising representatives from the Welsh Government, the Environment Agency, local authorities, the Canal and River Trust, the National Farmers' Union, the Country Land & Business Association, the Angling Trust, England Golf, consultants and utility companies. There has also been consultation with the Ministry of Justice on the appeals provisions.

8.2 There were three questions related to exemptions from the 1975 Act and the majority of responses were in favour of the proposals. Most objections were from sector representatives wishing for a blanket exemption with no adequate explanation of how safety would be effectively maintained. There was general support of the proposed inspection timing arrangements and negligible support for consideration of longer inspection periods under exceptional circumstances. The majority of respondents agreed with the proposal to use the FTT for deciding appeals using the General Regulatory Chamber Rules, but there was concern about how the FTT would consider appeals on technical as opposed to legal matters. This will be addressed through discussion with the FTT. Respondents were also concerned that 28 days was insufficient time to prepare a complex appeal and three months was recommended. These timings are set out in the Chamber rules and are not addressed by the regulations.

8.3 The response to the consultation will be available on www.defra.gov.uk.

9. Guidance

9.1 The existing non-statutory "Guide to the Reservoirs Act 1975" is in the process of being updated to reflect the amendments to the 1975 Act through a contract with the Institution of Civil Engineers. Publication is planned soon after the commencement of phase 1 amendments and the coming into force of the different statutory instruments and will provide for update as necessary at phase 2. The guidance is non-statutory and sets out how the Government and the Institution of Civil Engineers considers that those providing professional services under the Act should interpret the Act, particularly those sections where historically there has been inconsistency of interpretation. It also provides route-maps for particular activities for ease of use.

10. Impact

10.1 The impact on business, charities or voluntary bodies is estimated to be an average additional cost of £60 per reservoir for activities associated with registration, which is not a matter covered by these regulations. Since at phase 1 the amendments to the Act are only being implemented for those reservoirs that are already regulated, there is no increase of current burdens associated with complying with the full inspection regime, the requirement to employ a supervising engineer, and other duties under the Act. For those reservoirs that are not designated as "high-risk reservoirs", there will be no further statutory requirement for supervision or inspection under the Act, but there is recognition

in the IA that responsible reservoir undertakers will still have their reservoirs checked and maintained. The estimated average saving for undertakers of these reservoirs is some £4,120 per year per reservoir. The expected overall net benefit is estimated as £4.34 million. There was no assessment of the impact on the engineers (a mix of small and larger businesses) providing supervision, inspection and other services to undertakers. Their workload is expected to reduce overall.

10.2 The impact on the public sector has not been estimated as the information available is too uncertain, especially in the area of how many representations against a provisional designation of high risk might be made and the number of appeals that might arise. Similarly, as there is no reliable information on how many reservoirs will be taken out of the regulatory regime, it is not possible to assess the reduced enforcement burden or the possible increase over time of emergency intervention at unregulated reservoirs because of future neglect by undertakers.

10.3 Since the provisions are deregulatory at phase 1, no assessment has been made of the impact of providing the rights of appeal. Since there is provision for making representations against a provisional designation of high risk which should address the key considerations related to that decision, the likelihood of appeals at phase 1 on this account after the designation process has been completed is considered negligible (although possible). We anticipate that the Environment Agency will endeavour to resolve disagreements prior to confirmation of a high risk designation, which should avoid appeals to the FTT. For appeals under section 19A(1) provisions, the responses to the consultation question on referee rules did not indicate any use of referee provisions by respondents for LRRs. If undertakers have not used current provisions for resolving disagreement, we considered it highly unlikely (although possible) that appeals would be used at phase 1 for resolving such disagreements.

10.4 An Impact Assessment will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to restrict the implementation of the amended legislation only to those large raised reservoirs that are currently regulated. This means there is no increase of the current burden on small business as a result of this safety legislation. Where the Environment Agency does not think that a large raised reservoir could endanger human life in the event of an uncontrolled release of water from the reservoir, the requirement to appoint a Supervising Engineer and to have the reservoir inspected at least every 10 years by a civil engineer qualified under the Act no longer applies. Where a small business is responsible for such a reservoir, they benefit from the deregulation.

11.3 All undertakers of large raised reservoirs registered by the Environment Agency were invited to respond to the consultation on amendments to the Act, which included the deregulatory provisions. This invitation included any small businesses that were registered at that time. There were no consultation responses that made useful suggestions about how small businesses responsible for potentially hazardous reservoirs could be further deregulated without either an increase of risk to those downstream or Government taking over responsibility for the safety of their reservoirs and so providing a subsidy.

12. Monitoring & review

12.1 By specifying more clearly the exemptions from the Act, this should add clarity about the scope of the 1975 Act, given the change of definition of a large raised reservoir. If there is an increase in emergency intervention at exempted structures or areas, this will indicate the need for review.

12.2 Data on the number and nature of appeals will be collected to judge if the provisions are working properly. At phase 1 we are anticipating few appeals, if any. A large number of appeals will prompt review of the reasons earlier than envisaged by the regulations.

12.3 Regulations concerning the timing of inspections in principle should not lead to any significant change of duty, however, improvement of the detail should lead to fewer arguments over interpretation and so a more efficient inspecting regime. The transitional and savings provisions provide continuity of supervision and inspection until the process of designation is completed, the rationale being that until the Environment Agency notifies an undertaker that the LRR is not designated as high-risk the case for deregulation has not been established. The impact of deregulating the inspection regime for those reservoirs not designated as high risk will be reflected in the periodic report on emergency interventions at the reservoirs. If there is an increase of emergency intervention, then the risk-based approach will need to be reviewed.

12.4 The instrument will be reviewed and a report produced within five years of the regulations coming into force. The report will consider how well stated objectives have been met, whether they remain appropriate, and whether they could be achieved with a system that imposes less regulation. Further reports will be produced at intervals not exceeding five years.

13. Contact

John Goudie at the Department for Environment, Food and Rural Affairs Tel: 020 7238 6173 or email: john.r.goudie@defra.gsi.gov.uk can answer any queries regarding the instrument.