EXPLANATORY MEMORANDUM TO

THE RESERVOIRS ACT 1975 (REFEREES) (APPOINTMENT, PROCEDURE AND COSTS) (ENGLAND) RULES 2013

2013 No. 1676

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 Rules make provision, as to reservoirs in England, as to the time within which a referee may be appointed by agreement between the undertakers and the engineer for the purposes of section 19 of the Reservoirs Act 1975; the manner in which any request to the Secretary of State to appoint a referee in default of agreement must be made; the procedure for appointing a referee and the payment of the referee's costs.

2.2 These regulations also revoke the Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986, so far as relating to reservoirs in England.

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

3.1 None.

4. Legislative Context

4.1 The Reservoirs Act 1975 (the 1975 Act) seeks to ensure public safety through imposing statutory obligations on large raised 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. Section 19 of the 1975 Act provides for the reference of disputed recommendations or determinations of such engineers to a referee. A reference may be made where the engineer includes in a report relating to a large raised reservoir recommendations as to measures to be taken in the interests of safety, the maintenance of the reservoir or as to the time of the next inspection, or where an engineer determines that the requirements of a direction made by the Secretary of State relating to the preparation of flood plans are not satisfied. The undertakers if aggrieved by a recommendation or determination may refer their complaint to the referee, who will investigate the complaint.

4.2 These Rules are made under section 19(5) of the 1975 Act, in relation to reservoirs in England. Amendments to section 19 (and other provisions) of the 1975 Act will be commenced by SI 2013/1590 (C. 64).

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

4.4 Section 19(5) provides for rules to be made concerning the time within which any appointment of a referee may be made by agreement. This is addressed by rule 2 of this instrument. Rule 2 also provides for the time and the manner within which a request for the appointment of a referee may be made to the Secretary of State in default of such agreement, in accordance with section 19(5). Section 19(5) also provides for rules to be made concerning the procedure before a referee and this is addressed by rule 3. Rule 4 addresses the costs of the proceedings before the referee, as provided for by section 19(5).

4.5 Rule 5 revokes the Reservoirs Act 1975 (Referees) (Appointment and Procedure) Rules 1986 (SI 1986/467).

5. Territorial Extent and Application

5.1 England.

6. European Convention on Human Rights

As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

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 1975 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 and discontinuance, 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 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 further secondary legislation will be made and 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 Section 19 of the Reservoirs Act 1975 is amended by Schedule 4 of the 2010 Act and replaces earlier legislation made under the 1975 Act so as to establish new rules for referees consistent with these amendments to the Act and that provide more clarity to the process.

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.

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

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

An impact assessment is not needed because no additional burdens are expected to arise from this rule.

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 Changes to the referee rules were considered as part of the consultation on amendments to the Reservoirs Act 1975 and these rules take account of the feedback from that consultation. There is no increase of burden on an undertaker associated with the appointment of a referee under these rules as a result of the revisions to these rules and for that reason a review clause has not been included.

13. Contact

David Lees at the Department for Environment, Food and Rural Affairs Tel: 07920 534782 or email: david.lees@defra.gsi.gov.uk can answer any queries regarding the instrument.