

**EXPLANATORY MEMORANDUM TO THE**  
**THE PROTECTION OF WATER AGAINST AGRICULTURAL NITRATE**  
**POLLUTION (ENGLAND AND WALES) (AMENDMENT) REGULATIONS 2006**

**2006 No. 1289**

**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. Description**

2.1 These Regulations transpose Article 2 of Directive 2003/35/EC (“the Public Participation Directive”) of the European Parliament and Council providing for public participation in respect of drawing up of certain plans and programmes relating to the environment. The Public Participation Directive provides for public participation in a number of environmental plans and programmes required to be drawn up under several existing environmental directives (e.g. waste, air pollution and protection of waters against nitrate pollution). These Regulations relate only to the transposition of provisions relating to plans and programmes required to be drawn up under the Nitrates Directive. The Action Programme for Nitrate Vulnerable Zones (England and Wales) Regulations 1998 (S.I. 1998/1202) established an action programme for nitrate vulnerable zones in England and Wales.

**3. Matters of special interest**

3.1 None.

**4. Legislative background**

4.1 The Protection of Water Against Agricultural Nitrate Pollution (England and Wales) (Amendment) Regulations 2006, are made in order to transpose Article 2 of Directive 2003/35/EC of the European Parliament and Council providing for public participation in respect of drawing up of certain plans and programmes relating to the environment (O.J.No L 156, 25.6.2003, p17). The programmes to which that Article applies includes action programmes in relation to nitrate vulnerable zones designated under Directive 91/676/EEC. The Action Programme for Nitrate Vulnerable Zones (England and Wales) Regulations 1998 (S.I. 1998/1202) established an action programme for nitrate vulnerable zones in England and Wales.

4.2 A transposition note is attached to this Explanatory Memorandum.

**5. Extent**

5.1 These amending Regulations apply to England and Wales. Scotland and Northern Ireland have made separate legislation to implement the Public Participation Directive.

5.2 Transposition of the Public Participation Directive is dependent on the need for Action Programmes under the Nitrates Directive. There is currently no requirement for an Action Programme in Gibraltar and therefore transposition of the Public Participation Directive is not required at this time.

## **6. European Convention on Human Rights**

6.1 Not applicable.

## **7. Policy Background**

7.1 The importance of fostering increased public participation in environmental decision making was recognised at the international level in the UN/ECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (“the Aarhus Convention”) which the Community signed on 25 June 1998 and which has also been signed in the UK. Since signing the Aarhus Convention in 1998, the EU has taken steps to update existing legal provisions in order to meet the Convention’s requirements by means of legislation directed to Member States. The main legal instrument used to align Community legislation with the provisions of the Aarhus Convention on public participation is the Public Participation Directive.

7.2 Present policies within the UK are expected to satisfy the Directive’s provisions. Many of the requirements of the Directive, to provide for public participation in relation to plans and programmes required to be drawn up under the The Protection of Water Against Agricultural Nitrate Pollution (England and Wales) (Amendment) Regulations 2005, already exist by way of good practice in the UK. It is the view of the Government that the amendments to existing Regulations will formalise existing practice.

7.3 Specific provisions for public participation in these Regulations include:

- Early and effective opportunities for the public to participate in the preparation, review or revision of the Nitrates Directive Action Programme.
- The decision making process to take due account of the results of such public participation and that reasonable efforts are made to inform the public regarding the decision making process.
- For the public to have reasonably sufficient time to participate effectively.
- That information should be made publicly available to enable effective participation.

7.4 There are measures in place within the UK to meet the Directives provisions to inform the Commission about implementation.

7.5 The Nitrates Directive consultation on transposition of the Public Participation Directive and revisions to Nitrate Vulnerable Zones, issued on 15 November 2004, sought the views of over 120 industry, environmental and other organisations. A total of 9 responses were received showing general support. Further details are included in the accompanying Regulatory Impact Assessment

## **8. Impact**

8.1 In principle, many of the requirements of the Public Participation Directive are already implemented in the UK. There will be only some small costs on the Secretary of State and National Assembly for Wales which will be met within existing budgets. A regulatory impact assessment has been prepared and a copy is attached to this explanatory memorandum (Annex I).

## **9. Contact**

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# ***ANNEX I: FINAL REGULATORY IMPACT ASSESSMENT***

## **1. Title**

The Public Participation Directive (Council Directive 2003/35/EC<sup>1</sup>) provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the Public Participation Directive by 25 June 2005 at the latest.

To that end, the Department is proposing to amend various existing environmental regulations. This document is a partial regulatory impact assessment (RIA) of proposals to amend the regulations establishing and requiring the periodic review of the Action Programme required by Directive 91/676/EEC<sup>2</sup> (the 'Nitrates Directive Action Programme').

## **2. Purpose and Intended Effect of the Measures**

### ***2.1 Objective***

To bring into force, by 25 June 2005, amendment regulations that insert the provisions of the Public Participation Directive within the Protection of Water Against Agricultural Nitrate Pollution (England and Wales) Regulations 1996<sup>3</sup>.

The amendment regulations will require the Secretary of State to provide for effective public participation in the decision-making process involved with future reviews of the Nitrates Directive Action Programme.

### ***2.2 Devolution***

The Public Participation Directive applies throughout the United Kingdom.

The information in this RIA reflects the position in England and Wales. Scotland and Northern Ireland are making separate arrangements for transposition.

Transposition of the Public Participation Directive is dependent on the need for Action Programmes under the Nitrates Directive. There is currently no requirement for an Action Programme in Gibraltar and therefore transposition of the Public Participation Directive is not required at this time.

### ***2.3 Background***

The Government, public authorities and other bodies frequently take decisions that may have a significant effect on the environment.

Effective public participation in environmental decision-making enables the public to express, and the decision-maker to take account of, opinions and concerns that may be relevant to those decisions. This helps increase the accountability and transparency of

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<sup>1</sup> Text of Directive 2003/35/EC via [www.europa.eu.int/eur-lex/pri/en/oj/dat/2003/l\\_156/l\\_15620030625en00170024.pdf](http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_156/l_15620030625en00170024.pdf)

<sup>2</sup> Text of Directive 91/676/EEC via [www.europa.eu.int/comm/environment/water/water-nitrates/directiv.html](http://www.europa.eu.int/comm/environment/water/water-nitrates/directiv.html)

<sup>3</sup> SI 1996/888 establishes and requires the periodic review of the Nitrates Directive Action Programme – full text available via [www.legislation.hmsi.gov.uk/si/si1996/Uksi\\_19960888\\_en\\_1.htm](http://www.legislation.hmsi.gov.uk/si/si1996/Uksi_19960888_en_1.htm)

the decision-making process and contributes to public awareness of environmental issues and support for the decisions taken.

The importance of fostering increased public participation in environmental decision-making was recognised at the international level in the 1998 UN/ECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (the Århus Convention). Community legislation is needed to ensure the Community and Member States fully meet their obligations under the Convention.

The consequences of not taking appropriate Community action would be to damage the Community's international standing through failure to ratify and implement an international agreement it has signed. Inaction could also result in inconsistent decision-making in environmental matters between Member States, inadequate application and enforcement of environmental legislation, and the occurrence of possible environmental damage.

Since signing the Århus Convention in 1998, the EU has ensured that new Community legislation includes provisions for public participation from the outset. However, there are a number of environmental directives introduced before 1998, which do not require Member States to provide for effective public participation. As such they are inconsistent with the provisions of the Århus Convention.

Some of these directives are listed within the Public Participation Directive, which the EU introduced in 2003 to align Member States' implementation of the listed directives with the provisions of the Århus Convention. The Action Programme required by the Nitrates Directive is listed within the Public Participation Directive. Therefore, whenever Member States prepare, review, or modify their Action Programme they are henceforth obliged to provide for effective public participation during the decision-making process.

Whilst the Department was not previously legally obliged to involve the public at any stage of its implementation of the Nitrates Directive, it has in practice done so, and intends to continue to do so in the future. For example, the Department issued the following consultation documents:

Mar 1992:	Criteria and Procedures for Identifying Sensitive Areas and Less Sensitive Areas (Urban Waste Water Treatment Directive) and Criteria and Procedures for Identifying Polluted Waters (Nitrates Directive).
Mar 1993:	Methodology for Identifying Sensitive Areas (Urban Waste Water Treatment Directive) and Methodology for Designating Vulnerable Zones (Nitrates Directive).
May 1994:	Designation of Vulnerable Zones In England and Wales under the EC Nitrates Directive (91/676).
May 1995:	Government Response to the Consultation on the Designation of Nitrate Vulnerable Zones in England and Wales.
Oct 1995:	Report of the Independent Review Panel on Nitrate Vulnerable Zones.
Nov 1995:	Proposed Measures to Apply in Nitrate Vulnerable Zones and Draft Regulations Transposing the Directive in England and Wales.
Mar 1996:	Explanation of the Final Decisions on Nitrate Vulnerable Zone Designations.
Dec 1997:	Draft Regulations Establishing the Action Programme Measures to Apply in Nitrate Vulnerable Zones in England and Wales.
Dec 2001:	The Protection of Waters Against Agricultural Nitrate Pollution in England: How Should England Implement the 1991 Nitrates Directive? –NVZs vs. Whole Territory Approach.

### **3. Options**

#### ***3.1 Option 1***

##### **• Do nothing.**

We would continue to provide for public participation in relation to modifications to the Nitrates Directive Action Programme, but would not transpose the Public Participation Directive into domestic legislation.

#### ***3.2 Option 2***

##### **• Transpose the requirements of the Public Participation Directive into domestic legislation.**

We would be legally obliged to provide for public participation in accordance with the requirements of the Public Participation Directive.

Transposition would require the production of amendment Regulations that insert, within the Protection of Water Against Agricultural Nitrate Pollution (England and Wales) Regulations 1996, provisions that require the Secretary of State to:

1. identify the public who are entitled to participate in the decision-making process;
2. notify the public of any proposal to modify or review the Action Programme;
3. provide opportunities for the public to make comments on, or express opinions about, any such proposals, within a reasonable timetable;
4. take account of any comments or opinions made or expressed when deciding whether to make modifications or undertake a review; and
5. report in some way on the substance and outcome of the participation process.

In practice, at the start of each review/modification the Government shall develop and publish detailed arrangements for public participation tailored according to the reason for the review and the nature of the modification. These detailed arrangements will specify:

- a) “the public” with whom the Government will engage,
- b) the methods of engagement with the public (written consultation, presentations, meetings, web forums, public surveys, regional events etc),
- c) the time-frames for the different stages of the participation process,
- d) the method for notifying the public of the outcome of the participation process, and the reasoning behind the decisions made.

### **4. Costs and Benefits**

#### ***4.1 Costs and Benefits of Public Participation***

##### ***Benefits***

There are a number of benefits to the provision of public participation in the decision-making process. For example, it helps increase accountability and transparency, and

contributes to public awareness of environmental issues and support for the decisions taken.

Public participation also enables the Government to draw upon a broader range of knowledge, experience and viewpoints than is available in-house. Government officials can therefore test their assumptions by exposing them for consideration, comment and challenge. This 'testing' may highlight a number of important issues that would have otherwise remained undetected. For example, it may highlight:

- a) the benefits and costs attached to a proposal are incorrect,
- b) alternative options to the proposals put forward,
- c) implementation issues associated with a particular policy proposal, or
- d) unintended consequences of a policy proposal.

In the context of developing environmental legislation, effective public participation is expected to lead to greater protection of the environment whilst minimising any costs associated with the proposed legislation.

Businesses are also likely to benefit from public participation as they should be more aware of forthcoming policies and therefore better able to respond.

### ***Costs***

There are costs attached to public participation. These fall predominantly upon the Government, and are associated with facilitating the consultation process (production and dissemination of documents, hosting meetings/workshops, conducting public surveys etc). Depending on the scale and form of the consultation these costs can range from negligible to significant.

The costs to individual businesses are associated with the resources spent participating in the consultation process. Participation is voluntary, and therefore so is acceptance of the associated costs. Again, these costs can be either negligible (i.e. 15 minutes to complete and submit an electronic questionnaire) or substantial (i.e. attendance at a series of meetings and workshops, preparation of lengthy discussion documents in response to a consultation paper etc).

It should also be noted that there are risks and costs associated with over-consultation:

- a) the above costs to both stakeholders and Government increase. The level of costs may become prohibitively expensive to stakeholders, thereby reducing the level of their engagement.
- b) stakeholder disillusionment and cynicism may increase, again leading to a reduction in the level of their engagement.
- c) a reduced level of engagement may mean the benefits associated with consultation (as described above) would not be fully realised;

Such 'stakeholder fatigue' is likely to result in the costs of the consultation process outweighing any benefits.

### ***4.2 Assumptions***

IT IS ASSUMED THAT WE WOULD CONSULT UPON ALL AMENDMENTS TO THE NITRATES DIRECTIVE ACTION PROGRAMME IRRESPECTIVE OF THE PUBLIC PARTICIPATION DIRECTIVE, AND THAT ITS TRANSPOSITION IS SIMPLY FORMALISING EXISTING PRACTICE. IN OTHER WORDS, IRRESPECTIVE OF WHICH OPTION IS TAKEN FORWARD, WE WOULD CONTINUE TO PROVIDE FOR PUBLIC PARTICIPATION WITHOUT A CHANGE TO THE VOLUME OR THE STYLE OF CONSULTATIONS.

The costs and benefits presented below are therefore over-and-above those identified in Section 4.1.

#### ***4.3 Option 1: Do nothing***

There is a significant risk of the European Commission initiating infraction proceedings against the UK if we fail to bring into force the laws, regulations and administrative provisions necessary to transpose the Public Participation Directive by 25 June 2005. Infraction proceedings have serious implications to the Department in terms of financial cost and damage to reputation.

Therefore it is our view that this is not a viable option.

#### ***4.4 Option 2: Transpose into domestic legislation***

It is our view that transposition of the Public Participation Directive into domestic legislation will:

- a) minimise the risk of infraction by helping to fulfil our Community obligations to implement the Public Participation Directive.
- b) ensure our implementation of the Nitrates Directive is consistent with the provisions of the Århus Convention
- c) formalise existing practice
- d) help protect the public's right to participate in the decision-making process in relation to environmental legislation.
- e) help contribute to a consistent implementation of the Århus Convention across Europe.

There may be circumstances when the costs of public participation may outweigh the benefits, such as very minor amendments to the Action Programme that are of little practical substance. Public participation in these circumstances could result in an unnecessary cost to the Government, stakeholder fatigue, and public cynicism of the consultation process.

Transposition of the Public Participation Directive increases the risk of having to consult in such circumstances. To manage this risk we will ensure our transposing Regulations are drafted such that we are able to tailor our approach to consultation according to the reason and nature of the amendments to the Action Programme (i.e. 'light' consultation for minor amendments; 'full' consultation for significant amendments).

## **5. Equity and Fairness**

Transposition of the directive (Option 2) may mean that hard to reach groups are enabled to participate more effectively. Additionally, transposition will mean that stakeholders in England will get the same rights in law as stakeholders in other European countries.

## **6. Consultation with small business: the Small Firms' Impact Tests**

Neither option should impose any significant costs on small businesses. Representative bodies for small businesses and the Small Business Service will be consulted on this draft Regulatory Impact Assessment.



## **7. Competition Assessment**

Businesses are likely to benefit from public participation as they should be more aware of forthcoming policies and therefore better able to respond.

## **8. Enforcement and Sanctions**

The public's participation within the decision making process is voluntary, therefore no sanctions are proposed.

Option 2 imposes a legal obligation of the Secretary of State to provide the public with the opportunity to participate in the preparation and modification or review of the Nitrates Directive Action Programme. If the public does not feel the Secretary of State has given full effect to this obligation, then they can challenge this through the domestic courts.

## **9. Monitoring and Review**

Article 5 of Directive 2003/35/EC provides that by 25 June 2009, the Commission must send a report on the application and effectiveness of this directive to the European Parliament and Council. This provision also allows the Commission to review the directive, taking into account the experiences acquired by the Member States during implementation.

This article does not impose an obligation on Member States to report to the Commission, but for the Commission to report to the Council and Parliament and for the Commission to review the directive.

## **10. Consultation**

Appropriate representatives of other Government Departments and the Devolved Administrations of Wales, Scotland, and Northern Ireland have been appropriately consulted on the UK position with regard to this proposal.

A full public consultation on our policy proposal is being carried out.

## **11. Summary and Recommendations**

It is our recommendation that we pursue Option 2: Transpose the requirements of the Public Participation Directive into domestic legislation.

Regulations are necessary in order to transpose the requirements of Directive 2003/35/EC into national legislation and to place the legal obligation on the Secretary of State for the Environment, Food and Rural Affairs to ensure that measures are in place for providing effective public participation in environmental decision-making.

Many of the requirements of the directive to provide for public participation in relation to the Nitrates Directive Action Programme are already implemented in the UK. Therefore, it is our view there will not be an additional cost to industry or small businesses as a result of the proposed implementing regulations over and above those costs associated with complying with existing international agreements to which the UK is committed.

## **12. Regulatory Quality Declaration**

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

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