

EXPLANATORY MEMORANDUM TO

THE NITRATE POLLUTION PREVENTION (AMENDMENT) (No. 2) REGULATIONS 2016

2016 No. 1254

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

2. Purpose of the instrument

- 2.1 This instrument amends the Nitrate Pollution Prevention Regulations 2015 (S.I. 2015/668) (“the 2015 Regulations”) to make further consequential amendments as a result of amendments made by the Nitrate Pollution Prevention (Amendment) Regulations 2016 (S.I. 2016/1190) (“the Amending Regulations”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Urgent action is needed to make further consequential amendments to the 2015 Regulations in conjunction with the coming into force of the Amending Regulations on 31st December 2016. This instrument will therefore also come into force on 31st December 2016, which will breach the 21-day rule. A later coming into force date would result in legal uncertainty for those at whom the 2015 Regulations, as amended, are directed. In particular, the Amending Regulations, which insert a new Schedule 4 into the 2015 Regulations containing transitional provisions for ‘new holdings’ (including in relation to regulation 18), omitted to amend regulation 18 to remove a spent transitional provision. Failure to amend this provision until after 31st December 2016 will result in two provisions giving conflicting dates for when regulation 18 applies to a new holding.
- 3.2 The amendments to regulation 6 of the 2015 Regulations, which ensure that a right of appeal arises from notices sent under new regulation 5(3A)(b) (inserted by the Amending Regulations), should also be in place before the first notices are sent out in early January 2017. Delaying the coming into force date until after 31st December 2016 would result in uncertainty as to whether such notices could be appealed, and any appeals submitted could be rejected on that basis.
- 3.3 Bringing the instrument into force on 31st December 2016 does not place anyone affected at a disadvantage, as this instrument does not make any independent provisions. The substantive policy changes are made by the Amending Regulations which were laid on the 8th December 2016 and comply with the 21-day rule, allowing time for Parliament and others to consider them. This instrument only makes consequential changes resulting from the Amending Regulations to ensure that the

2015 Regulations work as intended from 31st December 2016. The Department therefore considers that breaching the 21-day rule is justified in the circumstances.

- 3.4 As this instrument is made in consequence of defects in the Amending Regulations, it will be issued free of charge to all known recipients.

Other matters of interest to the House of Commons

- 3.5 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The 2015 Regulations are the principal means by which Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ No. L375, 31.12.1991, p1) is implemented.
- 4.2 This instrument makes further consequential amendments to the 2015 Regulations, following changes made by the Amending Regulations.
- 4.3 A Transposition Note has not been prepared for this instrument as it does not substantively change the transposition of the Directive.

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.

6. European Convention on Human Rights

- 6.1 As this instrument is subject to 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 objective of Council Directive 91/676/EEC is to reduce nitrate pollution of fresh water by farming activity. It does so by requiring the identification of land that drains to nitrate-polluted waters as nitrate vulnerable zones (“NVZs”), and by requiring farmers in NVZs to be subject to a programme of measures (“the Action Programme”).
- 7.2 The Secretary of State is required to review the NVZ designation in England at least every four years and, where necessary, to revise or add to the designated NVZs. The current NVZs must be revised or added to before 1st January 2017. Further policy background was set out in the Explanatory Memorandum to the Amending Regulations.
- 7.3 The Secretary of State must send written notice of the NVZ designation to any person appearing to be the owner or occupier of a relevant agricultural holding. On receipt of this written notice, the owner or occupier may appeal against the proposed NVZ designation. The 2017 NVZ designation will come into effect on 31st December 2016 and, for operational reasons, notices are to be issued in January and February 2017. This is reflected in regulation 5(3A)(b), which is inserted into the 2015 Regulations by the Amending Regulations. This instrument amends regulation 6 of the 2015

Regulations to ensure that those in receipt of a notice under regulation 5(3A)(b) can appeal the designation to the First-tier Tribunal.

- 7.4 This instrument also makes a minor amendment to regulation 18 of the 2015 Regulations to remove a spent transitional provision as new transitional arrangements for new holdings were inserted by the Amending Regulations.

Consolidation

- 7.5 The 2015 Regulations were a consolidation of the previous regulations dating from 2008 and regulations that amended them. This is the second time the 2015 Regulations are being amended and a consolidation is not considered necessary.

8. Consultation outcome

- 8.1 The amendments made by this instrument are consequential on those made by the Amending Regulations. As explained in the Explanatory Memorandum accompanying the Amending Regulations, consultation was not considered necessary as the NVZ designation is consistent with existing policy. Where farmers believe their land should not have been designated as an NVZ, they can appeal to the First-tier Tribunal General Regulatory Chamber. The Secretary of State will be reviewing the Action Programme measures in 2017 and any changes proposed will be subject to public consultation.

9. Guidance

- 9.1 There is already considerable guidance aimed specifically at farmers and their advisors on the meaning of the 2015 Regulations. Guidance on the NVZ designation and how to appeal has been published on GOV.UK at <https://www.gov.uk/guidance/nutrient-management-nitrate-vulnerable-zones>. This guidance will reflect the consequential amendments made to the right to appeal brought in by this instrument.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies at this point. The rules applying to those in NVZs are not being changed by this instrument, and the transitional arrangements introduced by the Amending Regulations ensure that there will be no impact on farmers newly in NVZs during the first year after designation. The impact of the designation changes will be assessed as part of the review of Action Programme measures.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument.

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 by the 2015 Regulations is to apply transitional arrangements to help farmers with holdings newly in a NVZ to adjust their farming practice. Transitional arrangements for new holdings are inserted into the 2015 Regulations by the Amending Regulations. This instrument has no additional impact

on small businesses over and above that which arises from the 2015 Regulations and the Amending Regulations.

12. Monitoring & review

- 12.1 The 2015 Regulations require the NVZ designation to be reviewed every four years. The next review will be held in 2020. The 2015 Regulations themselves will also be reviewed by 2020 in accordance with the review clause, as amended by the Amending Regulations.

13. Contact

- 13.1 Alison Gadsby at the Department for Environment, Food and Rural Affairs (Tel: 020 8026 2696 or email alison.gadsby@defra.gsi.gov.uk), or Jan Kiernan at the Department for Environment, Food and Rural Affairs (Tel: 020 8026 3316 or email jan.kiernan@defra.gsi.gov.uk).