

EXPLANATORY MEMORANDUM TO
THE INCIDENTAL FLOODING AND COASTAL EROSION (ENGLAND) ORDER 2011

2011 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.

2. Purpose of the instrument

2.1 This Order applies certain provisions of Water Resources Act 1991 to the exercise of works powers under the Flood and Water Management Act 2010 (“the Act”). The Act requires this order to be made.

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

3.1 None.

4. Legislative Context

4.1 The requirement to make this Order is contained in sections 38 and 39 of the Act. These two sections provide powers to the Environment Agency and local authorities to carry out certain works in the interests of nature conservation, the preservation of cultural heritage or people’s enjoyment of the environment or of cultural heritage. Sections 38 and 39 require this Order to ensure the powers are accompanied by adequate compensation provisions. It also requires the Order to provide powers of entry, and compulsory acquisition (with appropriate safeguards built in). This Order applies relevant provisions of the Water Resources Act 1991, with appropriate modifications to impose additional restrictions on their use.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 The Secretary of State for the Environment, Food and Rural Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Incidental Flooding and Coastal Erosion (England) Order 2011 is compatible with the Convention rights.

7. Policy background

- What is being done and why

7.1 The policy objective of the empowering provisions (sections 38 and 39 of the Act) is to allow the Environment Agency and local authorities to carry out certain works in the interests of nature conservation, the preservation of cultural heritage or people's enjoyment of the environment or of cultural heritage. An example of this might be allowing an area of land to flood in order to restore habitat for wetland birds. This will assist in the UK's compliance with certain EU Directives¹.

7.2 The need for specific environmental powers arose due to the definition of flood and coastal erosion risk management in the Act, which otherwise limits powers to measures necessary to reduce the harmful effects of flooding or erosion. Much of the work that is needed to meet environmental objectives and requirements involves managing flooding and erosion to gain the beneficial effects of those processes.

7.3 Coastal areas, wetlands and river corridors are particularly important areas for the natural environment and these areas depend on the processes of flooding and erosion to maintain their special interest and value. Many of these areas are also designated under the EU Habitats, Birds and Water Framework Directives. Works for the benefit of the environment will sometimes need to be undertaken by flood and erosion risk management authorities in order to comply with requirements under those Directives. Voluntary approaches were considered but would not have empowered authorities to take the necessary action in light of the definition of flood and coastal erosion risk management in the Part 1 of the Act or have secured the policy objectives.

7.4 There was widespread support of powers to enable authorities to manage flooding and erosion for the benefit of the environment in response the public consultation on the Flood and Water Management Bill. However, concerns were raised by some that compensatory measures should be put in place to support these powers. This is part of the purpose of this Order.

7.5 The provisions are legally important because they establish that authorities have powers to carry out work with is needed to maintain and enhance the natural environment and cultural heritage. The protective provisions in the Orders ensure that the rights of property owners are protected. Voluntary approaches would not be sufficient to secure these outcomes.

- Consolidation

¹ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"), Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy ("the Water Framework Directive"), and Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds ("the Wild Birds Directive").

7.6 It is likely that at some point in the future the Act will be consolidated with other flood-related legislation, in line with the Pitt Review recommendations on a single unifying Act, although currently there is no timetable for this. A specific power has been included in the Act to allow for pre-consolidation amendment to be made.

8. Consultation outcome

8.1 There was a full public consultation on the Flood and Water Management Bill in 2009. This included a draft clause relating to powers for authorities to undertake works for the benefit of the natural environment. Analysis of the responses to the public consultation showed 88% support (229 out of 261 respondents) for a wide range of approaches including working with natural processes. Many respondents referred directly to the need for powers to carry out works for the benefit of the environment. Some wanted to go further by introducing duties as well as powers on the face of the Act.

8.2 Informal engagement on the protective provisions in the Order was carried with stakeholders including flood management authorities, the Country Land and Business Association, National Farmers Union and environmental bodies. There was strong support from landowners' representatives for limiting the Environment Agency's powers of compulsory purchase to work that are necessary to meet legal requirements under EU Directives and for the extended, 7 day, notice period before exercising powers of entry in relation to agricultural land. A formal impact assessment was undertaken.

9. Guidance

9.1 Since the sections 38 and 39 provide enabling powers, rather than duties, no formal government guidance is proposed specifically relating to these provisions. Existing government guidance on project appraisal and investment in publically funded flood and erosion management projects will include works carried out under section 38 and 39 powers. This guidance will be kept under review. If specific guidance on section 38 and 39 powers proves necessary, Defra will support local authorities and delivery bodies in developing their own best practice guidance. Authorities are already familiar with the applications of compulsory purchase, compensation and powers of entry under the Water Resources Act 1991. Therefore, no new guidance is proposed on the use of these provisions in relation to works under Sections 38 and 39 of the Act.

10. Impact

10.1 The potential impact on business, charities or voluntary bodies is small. The Order is drafted to ensure that any such impact of works carried out under Sections 38 or 39 are fully compensated or as close to cost neutral as possible.

10.2 The impact on the public sector is assessed as small. Projects carried under sections 38 and 39 powers will either be the minimum necessary to meet legal requirements or have to comply with investment criteria which ensure that the economic costs are greater than the benefits.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Monitoring and review of this new order will be incorporated into monitoring and review of the main Act which is planned within 10 years of commencement. An interim post implementation review of these Orders will be made 5 years after commencement.

13. Contact

Policy contact details Paul Murby at the Defra, email: paul.murby@DEFRA.GSI.GOV.UK can answer any queries regarding the instrument.