

## **EXPLANATORY MEMORANDUM TO**

### **THE KEEPING AND INTRODUCTION OF FISH (ENGLAND AND RIVER ESK CATCHMENT AREA) REGULATIONS 2015**

**[2015. No. [XXXX]]**

1. This explanatory memorandum has been prepared by 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 Regulations provide a new regulatory scheme for the introduction and the keeping of, fish in inland waters.

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

3.1 In relation to the powers of entry, and associated powers, that these Regulations confer on officers of the Environment Agency, the Regulations have been approved by the Powers of Entry Gateway which was established by the Home Office to consider new powers of entry in light of Chapter 1 of Part 3 of the Protection of Freedoms Act 2012. The powers of entry in regulation 11, and the associated powers in regulation 12, conform with the Government's Powers of Entry Guidance on creating powers of entry. In particular, the Regulations require that a warrant is required before a right of entry exists to a premises used as a private dwelling. Regulation 11(1) confers a right of entry to premises not used as a private dwelling in limited circumstances. These are that an officer of the Environment Agency suspects that an offence under these Regulations has been, or is about to be, committed or that other certain other circumstances apply which are serious enough to require entry, such as an environmental emergency or where the owner of the premises cannot be ascertained. In accordance with the Guidance these powers "achieve the balance between the rights of individuals and businesses (ensuring that the power to enter without warrant is not excessive) with the need for effective enforcement".

3.2 In accordance with section 47 of the Protection of Freedoms Act 2012, the Government has prepared a draft code of practice containing guidance about the exercise of powers of entry and associated powers. The Code of Practice has been consulted upon and the Home Office is now considering the responses to the consultation.

3.3 As a public body, the Environment Agency must exercise the powers conferred on it in accordance with the European Convention on Human Rights (the "ECHR"). Article 1 of Protocol 1, which may be engaged by powers contained in the Regulations, is a qualified right, and if entering land and seizing equipment is disproportionate action for the Agency to take in specific circumstances of a case, then that right will be infringed in that case. It is therefore implied that the exercise of the powers contained in the Regulations is subject to the protections afforded by the ECHR.

#### **4. Legislative Context**

4.1 The Regulations would be made under the powers conferred on the Secretary of State by sections 232 and 316 of the Marine and Coastal Access Act 2009. These powers have not yet been exercised.

4.2 The Regulations introduce a more cost effective and risk-based management system for the introduction and keeping of fish in inland fisheries. They replace and repeal section 30 of the Salmon and Freshwater Fisheries Act 1975. They also overlap with section 1 of the Import of Live Fish Act 1980, and they dis-apply that provision to the extent that there is an overlap.

#### **5. Territorial Extent and Application**

5.1 This instrument applies to England and the catchment area of the Border Esk in Scotland.

5.2 Historically England has managed fisheries in the Border Esk River and Scotland manages the River Tweed as rivers are best managed on a total catchment approach. The introduction of fish into inland water in the Border Esk river in Scotland is managed by the Environment Agency in England through the Salmon and Freshwater Fisheries Act 1975. This regulation maintains this approach.

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

The Minister for Fisheries has made the following statement regarding Human Rights:

In my view the provisions of the Keeping and Introduction of Fish (England and River Esk Catchment Area) Regulations 2015 are compatible with the Convention rights.

#### **7. Policy background**

- What is being done and why

7.1 Invasive non-native species have been identified as one of the key causes of loss of biodiversity in England, and the world at large. These species can have significant economic and social impact, and can undermine England's sustainable development and biodiversity objectives. This means that requirements for the stocking of fish into inland water for recreational angling have to be balanced with appropriate safeguards for aquatic environments.

7.2 The Regulations would replace the current controls on placing live fish into inland waters with a new permitting system, which would require all introductions of fish into, and subsequent keeping of fish in, inland waters to be permitted by the Environment Agency. The effect of the Regulations is also that transporting fish for introduction into inland waters must also be permitted. These controls currently exist in the implementation of section 30 of the Salmon and Freshwater Fisheries Act 1975, and in secondary legislation made under section 1 of the Import of Live Fish Act 1980. These provisions are being repealed or amended in whole or in part (see paragraph 7.6 below) so that the more streamlined and cost effective system contained in the Regulations may be introduced.

7.3 The main objective of the Regulations is to support the economic value and growth of the angling sector, whilst ensuring adequate protection for the aquatic environment from the risks associated with the use of invasive non-native and locally absent fish species. The proposed permitting scheme enables us to adopt a risk based approach to the use of such species, whereby those that are high risk are given greater scrutiny and low risk fish movements are allowed to take place more freely. This approach is consistent with Government policy in relation to the regulation of non-native species, which recognises that preventing the introduction of potentially invasive species is more cost-effective than trying to apply controls retrospectively.

7.4 Improved enforcement requirements will ensure fishery owners are fully accountable for the actions they take, or allow others to take, in their inland waters. Given that the environmental damage arising from inappropriate fish releases may be irreversible, the Regulations provide a more effective means of enforcement. The Regulations will also give the Environment Agency powers, which they currently do not possess, to remove inappropriate fish from inland waters if they are introduced or kept illegally.

7.5 These Regulations allow any decisions concerning the granting of permits, enforcement and notices for the keeping or introduction of fish into inland waters to be appealed.

- Consolidation

7.6 The Regulations repeal section 30 of the Salmon and Freshwater Fisheries Act 1975 and narrow the scope of secondary legislation made under section 1 of the Import of Live Fish Act 1980, so that there is no overlap with the Regulations. The permitting system imposed by the Regulations is a consolidation of these legislative provisions. This will have the effect of simplifying the system, as it would be managed by a single regulator rather than the two-regulator system which is currently in place.

## **8. Consultation outcome**

8.1 Formal public consultation on the proposal took place between 16 December 2009 and 10 March 2010. A total of 21 responses were received during the consultation. The responses were from:

- one angling club
- two salmon and trout associations
- three fishery aquaculture/supplier organisations
- one fisheries managers organisations
- four Regional Fisheries, Ecology and Recreational Advisory Committees;
- one borough council (fisheries manager)
- two environment groups
- one individual; and
- six government environmental organisations ( Environment Agency, Centre for Environment, Fisheries and Aquaculture Science (two), Natural England, Fish Health Inspectorate, Countryside Council for Wales, and Scottish Natural heritage).

8.2 The majority of respondents (17 -77%) agreed that the proposed risk based permit scheme should be introduced. The three people who objected are involved in the supply trade and argued that the current regulation of movements was adequate, and that the new scheme presents benefits only to the Environment Agency. They also suggested that difficulties in complying with the new scheme will inevitably lead to an increase in illegal trade. All those who responded to the consultation had queries about the detail of the scheme. Some respondents made suggestions for substantial amendments to the scheme (for example, the inclusion of fish farms and garden ponds), and most asked for clarification about practical details (such as how the Environment Agency would distinguish between high risk and low risk fish movements).

8.3 The Government response was published in April 2010 at <http://webarchive.nationalarchives.gov.uk/20100505154859/http://www.defra.gov.uk/corporate/consult/fish-movements/fish-movements-gov-response.pdf>

and whilst recognising the concerns expressed we still consider that the current scheme is overly bureaucratic and inflexible. For example, all fish movements, whether high or low risk, require consents and if, for whatever reason, the movement does not happen on the specified day or time a new consent must be sought.

8.3 The key benefit of the new scheme is to reduce burdens on industry which is supported by the analysis in the regulatory impact assessment. In response to the concerns raised, the Environment Agency has provided more guidance to industry on what the permit scheme will contain. The Environment Agency plan to proactively issue permits for the start of the scheme, again reducing the burden on industry. .

8.4 In summary the Government believes that this will be a more effective regulatory system, reducing burdens for industry, enabling the Environment Agency to more effectively use its own resources, but at the same time safeguarding biodiversity in England.

8.5 Defra and the Environment Agency have actively engaged with industry stakeholders since the consultation in 2010 directly via letters to stakeholders, through presentations to the industry and through an Environment Agency stakeholder forum – the England Fisheries Group. This group includes representatives of the bodies/consultees that responded to the original consultation, meets quarterly and has continued to support the proposal and pushed for its implementation. This legislative proposal was also consulted on as part of the marine and freshwater fisheries Red Tape Challenge initiative where it was also supported.

## **9. Guidance**

9.1 Guidance will be available on the gov.uk website. The Environment Agency has already sent draft guidance directly to fishery owners and will send links to the website for the final version.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is to reduce current administrative burdens.

10.2 The impact on the public sector is also to reduce current administrative burdens.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on [www.legislation.gov.uk](http://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 reduce the number of consents/permits required for low risk fish movements and focus resources and enforcement on high risk movement which are expected to account for only 20% of the angling fisheries trade.

11.3 The basis for the final decision on what action to take to assist small business is that the regulation aims to reduce the burden for all these businesses while protecting the environment from non- native invasive species which are costly to eradicate once in place. Enforcement will also be on the basis of intelligence gathered and be risk based Consultation showed that the majority of the industry, which is primarily made up of small businesses, supported this approach.

## **12. Monitoring & review**

12.1 A review of the instrument will be undertaken within five years of its implementation to ensure that the measures introduced are operating effectively.

## **13. Contact**

Delyth Dyne at the Department for Environment, Food and Rural Affairs (tel: 020 7238 1224 or email: [delyth.dyne@defra.gsi.gov.uk](mailto:delyth.dyne@defra.gsi.gov.uk)) can answer any queries regarding the instrument.