

EXPLANATORY MEMORANDUM TO
THE TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT
PROCEDURE (AMENDMENT) (NO. 2) (ENGLAND) ORDER 2006

2006 No. [2375]

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The amendments made by this statutory instrument provide for the Environment Agency to be a statutory consultee in relation to a wider range of applications for planning permission than at present.

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

3.1 None.

4. Legislative Background

4.1 Section 74 of the Town and Country Planning Act 1990 gives the Secretary of State power, in a development order, to regulate the manner in which applications for planning permission are dealt with by local planning authorities. In particular it may require the local planning authority to consult with prescribed persons before granting planning permission. Article 10 of the Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419), (“the 1995 Order”), is made under this power and prescribes the statutory consultees. Article 2 of this instrument amends the list in article 10 to extend the cases in which the Environment Agency is a statutory consultee.

5. Extent

5.1 This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

7.1 The aims of the Government's planning policy on development and flood risk are to ensure that flood risk is taken into account at all stages in the planning process, to avoid inappropriate development in areas at risk of flooding, and to direct development away from areas at highest risk. Where new development is necessary in such areas, policy aims to make it safe, without increasing flood risk elsewhere, and where possible, reducing flood risk overall.

7.2 The Environment Agency has a key role to play in flood management in England and supports the planning system by providing local planning authorities with information and advice on flooding issues. Crucially it provides advice to those proposing developments, on planning applications and on flood risk assessment.

7.3 To date, Government advice has been that the Environment Agency should be consulted on planning applications in flood risk areas. However until now it has not been a statutory requirement, except in a limited number of cases. The Secretary of State is concerned that cases of inappropriate development continue to be approved in flood risk areas against advice from the Environment Agency. For this reason the amendments to the 1995 Order made by this instrument will require local planning authorities to consult the Environment Agency on a wider range of planning applications in defined flood risk areas, before granting planning permission. It will only be appropriate for the Environment Agency's statutory consultee role in the 1995 Order to be extended to include development which could have an effect on flooding. For this reason household development and minor non-residential extensions and alterations are excluded from the new requirements.

7.4 In addition to this legislative change, new guidance in the form of Planning Policy Statement 25 "Development and Flood Risk" (PPS25), will be issued as well as a planning Direction on flooding. The Direction, made under the 1995 Order, requires a local planning authority to notify the Secretary of State of any application for major development where it is minded to grant planning permission, despite there being a sustained objection on flood risk grounds from the Environment Agency.

7.5 Draft PPS25, including the amendments to the 1995 Order and the planning Direction on flooding were consulted on between 5 December 2005 and 28 February 2006. A copy of the consultation paper is at <http://www.communities.gov.uk/index.asp?id=1162059>. There was strong and widespread support for the proposal to extend the Environment Agency's statutory consultee role, although a few concerns were raised. These included: the capacity of the Environment Agency to deal with the resulting extra workload; whether Internal Drainage Boards should also become statutory consultees; with the definition of certain of the terms proposed to be used in the amendment; and with some operative thresholds. These issues were considered further in consultation with the Environment Agency and have been satisfactorily resolved. Terms and thresholds used in the amendment have been agreed with the Environment Agency.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum .

8.2 The financial impact on the public sector is not expected to be significant.

9. Contact

Peter Bide at the Department for Communities and Local Government Tel: 020 7944 3842 or e-mail: Peter.Bide@communities.gsi.gov.uk can answer any queries regarding this instrument.

**AMENDMENT TO THE GENERAL DEVELOPMENT PROCEDURE ORDER 1995 through:
THE TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT PROCEDURE)
(AMENDMENT) (No2) (ENGLAND) ORDER 2006**

REGULATORY IMPACT ASSESSMENT

Purpose

1. This Regulatory Impact Assessment (RIA) deals only with the amendment of the Town and Country Planning (General Development Procedure) Order 1995 (GDPO) to make the Environment Agency a statutory consultee for certain types of development where direct consideration needs to be given to the issue of flood risk in individual cases. This is part of a wider package of measures to strengthen the planning system's response to the issue of flood risk in development in England, centred on the revision of Planning Policy Guidance Note 25 (PPG25)(DTLR 2001) into Planning Policy Statement 25 (PPS25).

2. The opportunity is taken to make a small technical amendment to extend, from present varying regional distances below 20m, to a standard national distance of 20m, the distance from a "main river" within which the Environment Agency must be consulted before the carrying out of works, and also to require consultation of the Agency in respect of the proposed culverting or control of flow of any river or stream.

3. This RIA is submitted now, ahead of the submission of the full PPS25 package, with its own full RIA, because it is desirable to make the GAPE amendment on the common regulatory commencement date of 1 October 2006 on a precautionary basis, in case there are any potential impacts on business. Although this is a regulatory change within the public sector, there is a theoretical possibility that there could be secondary impacts on business. As argued below, these changes should reduce the overall impacts, but it remains in principle necessary to cover that possibility. **The main PPS25 package and the full RIA will follow in September 2006.** They are not tied to the 1 October Common Commencement Date.

Government and stakeholder consultation and the Partial Regulatory Impact Assessment (PRIA).

4. The PPS25 consultation document in December 2005, which included this proposal among the wider package, was preceded by interdepartmental clearance by DA Committee. It included a PRIA. Paragraph 27 of the consultation document (page 67) referred to this proposal, and consultation Question 13 (page 90) sought views on it.

The Proposal

5. That the Environment Agency in England be made a statutory consultee under the GDPO 1995 on:

- (a) development, other than minor development, which is to be carried out on land -
 - (i) in an area within Flood Zones 2 or 3 (that is land with a greater chance than 1 in 1000 (0.1%) of river or sea flooding in any year); or
 - ii) in an area within Flood Zone 1 which has "critical drainage problems.
- (b) any development exceeding 1 Ha.

- (c) development involving the carrying out of works within 20m of a “main river” or the culverting or control of flow of any river or stream.

The consultation responses

6. These were:

on (a) and (b) -

strongly in favour, with 39% of respondents fully in support, and a further 21% with some reservations. 29% did not comment. Only 6% were opposed though with some reservations, and a further 5% wholly opposed. Those concerns that were expressed centred on the Environment Agency’s ability to resource its responses within the required timescale and the risk that might pose to local authorities meeting their planning application targets. There was also some concern over the contactability of Agency staff, their local expertise and consistency around the country.

Technical concerns centred on the key terms in the proposed amendment.

on (c) -

a few comments were made on various technical aspects, on both sides of the issue, suggesting the threshold increase is broadly correct. No major regulatory or business burden issues emerged, and this aspect is not pursued further in this RIA.

The Options

7. The options compared are “Do nothing” and “The Proposed GDPO Amendment”. No other options were considered – this is simply an issue of whether or not the Environment Agency is made a statutory consultee.

Option 1 – “Do nothing”

8. This has the effect of leaving discretion with the local planning authority as to whether to seek the Environment Agency’s views on planning applications in respect of flood risk issues. While the rate of voluntary consultation has increased since the publication of PPG25 in 2001, it is still not routine in all authorities, a matter commented on in the Agency’s annual High Level Target 5 (HLT5) reports on local authority performance in flood risk management in development control. Where the Agency is consulted informally, there is no obligation for it to respond in a fixed period. This position contrasts with the Agency’s status in respect of development plans, where it is a statutory consultation body for Regional Spatial Strategies and Local Development Frameworks.

9. The **economic benefits of doing nothing** would be that local planning authorities would not have to incur the up-front costs of referring all applications in the designated areas to the Agency for comment, and the Agency will not have to establish and maintain a structured system for receiving, processing and replying to them. Some applicants, whose proposals might involve flood risks, might benefit in the short term, as they do now, from those proposals escaping scrutiny in the continuing haphazard approach to reference and Agency comment, and thereby escaping requirements for more information or changes to mitigate assessed risks. There are no **environmental and social benefits**.

10. The **economic costs of doing nothing** would be various. In some cases, where significant development in locations at unacceptable risk goes ahead unscrutinised by the Agency, there could be eventual damage or loss to the owners and occupiers of property that could have been avoided by mitigation measures or an alternative choice of location. It is also likely, in cases where such proposals come to the attention of the Agency by another route and at a later stage, that its ad hoc scrutiny will be more intensive and potentially more costly to developers and local planning authorities than if handled through a structured process of consultation under an Agency policy of risk-based assessment (see below under Option 2). The **environmental and social costs** would be the environmental damage to habitats, soils and the social costs (in terms of loss of homes and businesses, possible losses of jobs, personal trauma, adverse health effects and the disruption of local and community life) from a measure of flooding that could be avoidable. It is impossible to quantify the reduction in risk that would be foregone by the “do nothing” option, but against predicted

increased incidence of flooding these costs can be expected to rise over time. Without wishing to over-dramatise this, the ultimate cost is a small number of fatalities in the more extreme flood events.

Option 2 – The proposed GDPO amendment

11. This has the effect of requiring the reference to the Agency by local planning authorities of the more significant development proposals set out in paragraph 5. As a statutory consultee under the GDPO the Agency will be required to respond within 21 days. The thresholds have been set in order that effort is focussed on the more significant development proposals and the higher flood risk areas. They will be accompanied by Standing Advice to be issued by the Agency for use by authorities and developers in cases below the threshold that are not referred.

12. The **economic benefits of the proposed GDPO amendment** are gained by more effective and better structured consideration of the flood risk aspects of the more significant proposals in the higher risk areas, and the very largest proposals in all locations. Since the knowledge of automatic reference will further reinforce the pressure to produce a flood risk assessment (FRA), (the absence of which is at present the largest single cause of Agency objection), the result will be better proposals coming in to the Agency's new structured system for their assessment. This will reduce the need for clarificatory inquiries, or even the production of missing FRAs from scratch, reducing delay and costs both to applicants and also the Agency and authorities in managing cases. Better development schemes in flood risk terms will also reduce later costs from flood damage and disruption, though this benefit cannot be quantified. The **environmental benefits** will be better designed and located schemes that reduce physical damage later on (eg in erosion and soil and habitat loss) and create opportunities to improve habitat and amenity space in development, eg through the creation of soft defences and infiltration areas, ponds and swales in sustainable drainage systems. The **social benefits** will be those derived from the removal of the human trauma, adverse health impacts and disruption to family and community life from avoidable flood damage.

13. The **economic costs of the proposed GDPO amendment** will be the additional effort local authorities and the Environment Agency will have to commit up front to automatic reference to the Agency as consultee of planning applications above the stated thresholds, and the costs to developers of producing FRAs which they might otherwise have hoped to avoid. It is impossible to quantify these relative to present costs, including those caused later on by the ad. hoc. investigation of problematic cases that require further investigation at later stages when proposals are further advanced and changes more costly to make. The additional costs of requiring and producing FRAs are not additional as a result of this proposal, but reflect a degree of failure properly to implement existing policy in PPG25 since 2001. Part of the intention of this proposal is to encourage compliance with existing policy. No **environmental or social costs** are apparent.

Equity, fairness and sectoral impacts

14. Flooding is no respecter of persons or property, and flash flooding can affect many locations, exacerbated by local topography and the permeability of surfaces, well away from the rivers and coastal areas where there is a permanent assessed risk. Flood avoidance and mitigation measures therefore benefit all sections of the economy and society, and there are few issues of sectoral differentiation to address. It is however necessary to review these for the record and for those instances where such issues must be considered.

15. This proposal primarily concerns the relationship between local planning authorities and the Environment Agency. The costs to applicants for permissions are incidental, arising if as a result there is additional or more effective scrutiny of applications that require more or better-prepared information in applicants' FRAs. The following assessments are based on the degree to which this may be a likely result, but it should be borne in mind that it is already the responsibility of applicants to provide an FRA appropriate to the degree of apparent risk. Additional costs will only be incurred to the extent this is not being done, or where the local planning authority and the Environment Agency is prompted to make good any possible past failures to address the issues properly.

Voluntary and community sector

16. Costs and funding is always an issue for the voluntary sector. Any action to reduce the adverse impacts of flooding on its activities and property will be a benefit – as will any associated improvements in its insurance position through avoidance of increased premiums or refusals to insure in certain locations.

17. Those parts of the community sector providing accommodation or other services for people of restricted mobility, for whatever reason, will benefit in particular from a more refined approach to flood risk in development. The ability to access and evacuate places where those of limited mobility live or are otherwise present is a prime cause of concern to the Environment Agency. In the absence of proper consideration of competent FRAs it is likely to object to all such applications on precautionary grounds. The proposed GDPO amendment should provide a framework within which possible mitigation and protective measures can be considered, allowing some if not all community sector proposals in higher risk areas to go ahead.

Equality and diversity issues

18. There are none, other than those regarding people of limited mobility, discussed above.

Small business issues

19. Where flooding occurs it affects all users and occupiers of the land, and mitigation of flood risk is not an issue where a lighter touch of regulation can be justified. If a small builder was to be exempt for example, would that exempt a small housing development, who's later occupants would be put at risk? Moreover, flood risk management is a collective matter for the community. Development on one site may not add to the risk on that site, but can generate risk of adjacent "downstream" sites. Small businesses cannot be allowed to generate displaced risk just because they are "small".

20. It is obviously the case that, proportionally, regulatory compliance can bear harder on smaller enterprises unable to benefit from economies of scale. Small businesses are more vulnerable to flood risk, but this means they can benefit accordingly from protective measures, because:

- single site enterprises are at proportionately higher risk of loss and trading disruption from flooding;
- small businesses are proportionately more affected by higher insurance premiums or refusal of insurance in flood risk grounds;
- small businesses are more likely to be found in the customer service and leisure sectors where proximity to rivers or the coast is a business asset or part of their business model – that attracts costs in contributing to management of the risk though effective regulation, (A riverside caravan park, where there are particular flood risks to life than can and are successfully managed (as policies in PPS25 demonstrate), cannot expect a free ride from the regulatory processes without which the business could not exist).

21. The answer is to regulate in proportion to the risk and the nature of the business, which is what the present proposal aims to facilitate. Failure to participate in this – especially by failing to produce an FRA – is a false economy, leading either to a precautionary refusal of permission or later additional expense to make good the original omission. Overall this is a matter of collective community protection, where it appears likely that any possible proportional increased costs of compliance by the small business sector will be offset by proportionate benefits through the reduction of risk by more effective assessment of development proposals. The benefit to small businesses will be that by understanding and assessing flood risk through the preparation of an FRA, they will be able to reduce possible future problems through resilience and mitigation measures.

Competition issues

22. Since flooding affects all uses and occupiers of land equally when it occurs there should be no general competition issues. The inter-business issues are as discussed above in relation to small firms.

23. Compliance with FRA requirements when submitting planning applications could be said to raise the costs of entry to new enterprises and to that extent would be anti-competitive. But set

against that, since most new entrants will be small businesses, are the advantages to such enterprises noted above which will benefit them. Moreover, to exempt new entrants, apart from being unacceptable in terms of possibly displacing risk to existing neighbours, could be argued to be anti-competitive in giving them an unfair cost advantage. This simply serves to reinforce the point that flooding is a collective and shared risk and its management requires a collective and shared participation by all sectors of the community and economy.

Enforcement and sanctions

24. This proposed GDPO amendment is about the relationship between two statutory bodies, the Environment Agency and a local planning authority. Compliance will be secured through the normal process of administrative management and external stakeholder scrutiny, backed up by the general option of seeking a mandatory order at judicial review in the unlikely event of sustained and wilful non-compliance. The wider economic sanction would be through a loss of confidence in the regulatory process by the insurance industry with resulting increases in premiums and eventual withdrawal of insurance cover.

Monitoring

25. This will be done initially through the Environment Agency's annual HLT5 reports on its response to planning applications referred to it, and the extent to which it objects to proposals and sustains those where the local authority is minded to approve the development against Agency advice.

26. In discussing annual reports with the Agency and local government DCLG will be reviewing the extent to which authorities appear to be complying with the requirements to refer cases as specified in this amending Order.

Summary and recommendations

27. No information came back from the consultation on the PRIA on which to base any quantified assessment of the additional costs to the Environment Agency or local planning authorities in their overall work in assessing flood risk in planning applications. Nor was it clear how far any additional costs would fall back on applicants in improving the flood risk information they submit with planning applications.

28. While it is clear that administrative costs will be increased up front by systematic reference of applications above the stated thresholds by authorities to the Environment Agency, these should be offset (both to authorities and the Agency) by less ad hoc consideration at later stages in problematic cases arising from fewer Agency objections on precautionary grounds or simply through lack of FRAs, and consequent costs to applicants in supplying missing information or in re-designing proposals. There are also wider benefits to the development community and the economy and society at large from a more systematic consideration of flood risk and retained or even enhanced confidence in this process on behalf of the insurance industry.

29. This judgment appears reflected in the strongly positive balance of consultation responses on this aspect of the PPS25 package, with 60% expressing varying degrees of support, 11% expressing varying degrees of opposition and 29% expressing no view. **Accordingly, the Minister is recommended to sign the following declaration and approve that this Order be laid before Parliament.**

Declaration and Publication

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

Signed ...Angela Smith.....

Date 4th September 2006.....

Angela Smith MP
Parliamentary Under Secretary of State
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Contact point for enquiries and comments

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29 August 2006