

EXPLANATORY MEMORANDUM TO
THE CONTAMINATED LAND (AMENDMENT) (ENGLAND) REGULATIONS 2012

2012 No. 263

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 These new Regulations amend the Contaminated Land (England) Regulations 2006 (SI 2006/1380) (“the 2006 Regulations”) by

- limiting the application of regulation 11 (modification of a remediation notice) so that this final stage of representation/hearing, currently additional to representations/hearing permitted prior to the decision on an appeal, will only be available to appeals commenced prior to the coming into force of these Regulations;
- taking account of the existence of protected areas under the Water Framework Directive (2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy (OJ No L 327, 22.12.00, p1)), relevant to the circumstances in which contaminated land affecting controlled waters is required to be designated as a special site;
- taking account of the updated definition of “controlled waters” in section 78A(9) of the Environmental Protection Act 1990 (c. 43); and
- Removing an incorrect reference to the repealed section 2(1) of the Land Compensation Act 1961 (c. 33) and providing for the appropriate application of particular references.

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

3.1 None

4. Legislative Context

4.1 Part 2A of the Environmental Protection Act 1990 (“Part 2A”) provides the legislative framework for the contaminated land regime in England, Wales and Scotland. It provides for contaminated land to be identified and dealt with in a risk-based manner. Local authorities are the primary enforcing authorities under Part 2A and are required to identify contaminated land in their areas and deal with land where the risks of contamination to human health and the environment are unacceptable. The Environment Agency is the secondary regulator for land designated as “special sites”, for example

where land is causing significant pollution of controlled waters in specified circumstances.

4.2 The 2006 Regulations set out provisions for procedural matters under Part 2A including identification of special sites, the attribution of remediation responsibilities to appropriate persons where possible, remediation notices, appeals against such notices and public registers.

4.3 These amendment Regulations streamline the appeals procedure against remediation notices. They also update the provisions on special sites to make clear that the existing (special site) protection afforded to particular controlled waters will continue to apply not only to descriptions of waters currently classified using s82 of the Water Resources Act 1991, but also where such waters are now being classified as certain 'protected areas' under Annex IV of the Water Framework Directive.

5. Territorial Extent and Application

5.1 This instrument applies to England.

5.2 It is expected that a similar instrument covering Wales be made by the Welsh Ministers.

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 These amendment Regulations are a much smaller part of broader changes being made to the contaminated land regime under Part 2A, namely the proposed issuing of revised statutory guidance. There is also, being made at the same time as this instrument, an Order commencing the remainder of section 86 of the Water Act 2003, which is relevant to the definition of contaminated land found in Part 2A. A 12 week consultation was launched on 21 December 2010 on proposals to update the contaminated land regime in England, which had been in place for 10 years since 2000.

7.2 Regulation 8 of the 2006 Regulations provide for affected persons to make appeals to the Secretary of State against remediation notices issued under the Regulations, with hearings and inquiries provision provided for in regulation 9. Appeals can either take the form of an oral hearing or be decided on the basis of written representations. The Secretary of State then decides whether or not to uphold the appeal, and doing so may modify the remediation notice. However, Regulation 11 additionally requires that the Secretary of State must notify interested parties involved (e.g. appellants and others with a direct interest) before modifying a remediation notice in any respect that would be less favourable to the parties, with a view to allowing the parties to make further

representations, or to request an appeal against the proposed decision to modify the remediation notice. This provision is unusual. In most similar areas of law, a right of appeal would be provided by the legislation (as will remain here), and an appellant could seek judicial review if they disagreed. But under the 2006 Regulations, the parties have an additional right to make further representations and have another hearing after the decision on appeal has been made.

7.3 The proposed amendment limits the application of Regulation 11 of the 2006 Regulations. This means that the Regulation 11 route for allowing parties to make further representations will no longer be available for any appeals commenced after 6 April 2012 – i.e. the Secretary of State would hear all relevant representations before making a decision on an appeal, and someone seeking a further right of appeal would be able to consider making use of the usual route of challenging administrative decisions, judicial review. Whilst it is important to retain a statutory right of appeal to the Secretary of State and to provide for fair notice of this change to anyone who has already instigated appeal proceedings prior to 6 April 2012 (which is being provided for), further challenge to the Secretary of State's decisions would be more appropriately be dealt with by judicial review.

7.4 The purpose of these amendment Regulations is to bring appeals against remediation notices in line with other similar areas of law. Where the Secretary of State has to give a decision on an appeal which is less favourable to the appellant or any other person served with the notice, regulation 11 of the 2006 Regulations (i) required the Secretary of State to notify those persons; and (ii) allowed those persons to make representations and have a further hearing in relation to the proposed modifications. The effect was the potential for remediation work to be delayed by an unnecessary further round of appeal, despite the adequate appeal provisions already provided for.

7.5 The purpose of the amendment to regulation 3 of the 2006 Regulations is to ensure the continued application of the special site provisions, without extending their scope or impact, to certain types of controlled waters already being identified nationally as Water Framework Directive 'protected areas' (including waters such as bathing waters, freshwater fish waters and shellfish waters). This is in anticipation of the repeal of certain Directives as a result of the coming into force of the Water Framework Directive regime; these are Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ No L 31, 5.2.76, p1-7 last amended by Directive 2006/7/EC), with effect from 31 December 2014, the repeal of Council Directive 78/659/EEC of 18 July 1978 on the quality of freshwaters needing protection or improvement in order to support fish life (OJ No L 222, 14.8.78, p1 codified by Directive 2006/44/EC), and the repeal of Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters (OJ No L 281, 10.11.79, p47 codified by Directive 2006/113/EC), with effect from 22 December 2013.

7.6 It is also necessary to amend regulation 3(c) (pollution of controlled waters) of the 2006 Regulations to take account of the updated definition of "controlled waters" in section 78A(9) of the Environmental Protection Act 1990.

7.7 There is no proposal at this time to consolidate the 2006 Regulations, but this may be considered in future if it becomes necessary to make further amendments as a result of future changes to Part 2A or otherwise.

8. Consultation outcome

8.1 A 12 week consultation was launched on 21 December 2010 on proposals to update the contaminated land regime in England, which had been in place for 10 years since 2000. Defra received 112 responses to the consultation from interested parties including local authorities, consultants/contractors, industry, lawyers and academics. Supplementary meetings also took place with interested parties during and after the consultation period. There was general support overall for the proposals including those for amending the 2006 Regulations. The consultation documents and a summary of responses to the consultation can be viewed on the Department's website at: <http://www.defra.gov.uk/corporate/consult/contaminated-land/index.htm>.

9. Guidance

9.1 Information on how the 2006 Regulations are being changed by these amendments will be made available on the Defra website at www.defra.gov.uk.

10. Impact

10.1 The impact of these amendment Regulations on business, charities or voluntary bodies and the public sector is expected to be limited. Regulation 11 of the 2006 Regulations has only been used in two (unconnected) appeals cases. Both cases led to unsuccessful applications for judicial review despite further representations made under the regulation. If such cases were to arise again the new Regulations would allow for a faster appeals process (in the two related cases it would have led to an appeal decision being taken perhaps six months earlier). The amendment of regulation 3 ensures that the Part 2A special site provisions will continue to apply to existing relevant waters, in light of the move towards Water Framework Directive protected areas designations, but does not have an impact in terms of scope or application of the special site provisions.

10.2 The impact of the main amendments to the 2006 Regulations is considered under the Impact Assessment for the proposals to update the contaminated land regime and a copy is available from the website of the Department for Environment, Food and Rural Affairs at www.defra.gov.uk.

11. Regulating small business

11.1 These amendment Regulations apply to small business, but no significant advantage or disadvantage for small business is expected.

12. Monitoring & review

12.1 Review of these amendment Regulations will be considered in the overall review of policy on the contaminated land regime, i.e. October 2016.

13. Contact

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