

EXPLANATORY MEMORANDUM TO
THE INFRASTRUCTURE PLANNING (WATER RESOURCES) (ENGLAND)
ORDER 2019

2019 No. 12

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.

2. Purpose of the instrument

- 2.1 This Order makes changes to the Planning Act 2008 (“the Act”).
- 2.2 This Order amends the criteria for when a project will be considered a nationally significant infrastructure project (“NSIP”) in the field of water resources. It introduces a threshold of ‘a deployable output expected to exceed 80 million litres per day’ as a qualifying metric for all schemes. It also increases the threshold for when the construction or alteration of a dam or reservoir will be an NSIP to a hold back capacity of 30 million cubic metres, and introduces a new type of NSIP for desalination plants.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 This entire instrument applies to England only because it only affects NSIPs in England (see sections 27(1)(a), 27(2)(a) and 28(1)(a) of the Act and article 2(5) of the instrument).
- 3.3 The instrument does not have minor or consequential effects outside England.
- 3.4 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament and the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.
- 3.5 The Department has reached this view because it considers that the purpose of the instrument is to facilitate a streamlined planning process for certain nationally significant pieces of water resources infrastructure. Planning is within the devolved competence of the Northern Ireland Assembly. The instrument does not relate to an excepted or reserved matter in Schedules 2 and 3 to the Northern Ireland Act 1998

and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act). Planning is also within the devolved legislative competence of the Scottish Parliament. The instrument does not relate to a reserved matter in Schedule 5 to the Scotland Act 1998 and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act). Planning is partially within the devolved legislative competence of the National Assembly for Wales. Section M3 of Schedule 7A to the Government of Wales Act 2006 contains a reservation in respect of planning, the Act and NSIPs, but not in relation to water resources. The instrument therefore does not relate to a reserved matter, and it is not otherwise outside the competence of the National Assembly for Wales (see section 108A of that Act).

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is set out in Section 3 under “Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)”.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State for the Environment, Dr Thérèse Coffey has made the following statement regarding Human Rights:
- 5.2 “In my view the provisions of the Infrastructure Planning (Water Resources) (England) Order 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The Act introduced a new system of development consent for NSIPs. Development consent is a streamlined planning process, which replaces a number of other consent requirements such as planning permission, listed buildings consent and scheduled ancient monument consent. The Act, together with any relevant National Policy Statement, provides a framework for examining and determining applications for development consent, with the Secretary of State as the decision-maker. National Policy Statements outline the government’s policies for NSIPs in a particular sector. They also include any other policies or circumstances that Ministers consider should be taken into account in decisions on infrastructure development. If an application is successful in respect of a particular NSIP, a Development Consent Order is granted.
- 6.2 The Act defines a number of categories of NSIP in the fields of energy, transport, water, waste water and waste. In the field of water, these categories are: the construction or alteration of a dam or reservoir; and development relating to the transfer of water resources.
- 6.3 Section 27 of the Act sets out when the construction or alteration of a dam or reservoir will be considered nationally significant. This will be the case where the project is in England, the work will be carried out by one or more water undertakers, and the size of the dam or reservoir is expected to exceed a threshold. For new constructions, the threshold is a hold-back capacity of 10 million cubic metres. For alterations, the threshold is an additional hold-back capacity (as a result of the alterations) of 10 million cubic metres.

- 6.4 Section 28 of the Act sets out when development relating to the transfer of water resources will be considered nationally significant. This requires the development to be in England and to be constructed by one or more water undertakers. Additionally, the development must enable the transfer of at least 100 million cubic metres of water per year and be a transfer either between river basins, between water undertakers' areas or between a river basin and water undertaker's area. The development also cannot relate to the transfer of drinking water.
- 6.5 This Order uses the power under Section 14(3) of the Act to add a new category of NSIP and amend the existing categories of NSIP in the field of water. Where this Order adds a new category of NSIP, it complies with the subject matter and territorial limitations in section 14(6) and (7) respectively, as the new category is in the field of water and applies only in respect of England and waters adjacent to England up to the seaward limits of the territorial sea.

7. Policy background

What is being done and why?

- 7.1 The Act established a new system of development consent for infrastructure projects which were designated as nationally significant. The new system streamlined the planning process by reducing the number of applications and permits required. The framework in which decisions are taken is set within any relevant National Policy Statement.
- 7.2 This Order will amend the thresholds and definitions within the Act for NSIPs which relate to water resources to reflect current understandings as to the types of project which are considered to be nationally significant.
- 7.3 These amendments are being made ahead of, and support, the delivery of a new National Policy Statement for Water Resources Infrastructure ("the NPS"), a draft of which will be laid before Parliament in November 2018.
- 7.4 Article 2 of this Order amends Section 27 of the Act by raising the hold back capacity that a dam or reservoir must have to be considered nationally significant to exceeding 30 million cubic metres. It also introduces deployable output as an alternative qualifying threshold. "Deployable output" means, in relation to a given facility, the annual average volume of water that can be produced per day from that facility in drought conditions, having regard in particular to certain specified constraints. The threshold is set at a deployable output in excess of 80 million litres a day. This threshold has been developed through public consultation, and reflects the Department's analysis of what is nationally significant. Guiding principles for what constitutes "nationally significant" include consideration of the population served, the size, the economic or economic growth impact, the impact area, and the complexity of the project. Deployable output is also the metric used within Water Resource Management Plans, and therefore is widely used within the sector. This amendment would mean that future schemes would need to be expected to have a hold back capacity of more than 30 million cubic metres or to have a deployable output of in excess of 80 million litres a day to qualify as an NSIP. For alterations to existing dams or reservoirs, the additional hold-back capacity or deployable output resulting from the development must also meet these thresholds.
- 7.5 This amendment will increase the volume that a dam or reservoir must have to qualify as nationally significant, ensuring that the definition is appropriate. The introduction

of deployable output as an alternative threshold will capture some smaller volume dams or reservoirs which are significant because of their daily output.

- 7.6 Article 2 also amends Section 28 of the Act by altering the thresholds for when development relating to the transfer of water resources will be considered nationally significant. It replaces the current threshold of a transferred volume of 100 million cubic metres a year with a deployable output exceeding 80 million litres per day. The remaining conditions for this development type are not amended.
- 7.7 The current thresholds for development relating to water transfers are too large with few, if any, schemes ever likely to qualify. This amendment, the introduction of a deployable output exceeding 80 million litres per day, will reduce the current qualifying metric of transfers exceeding 100 million cubic metres per year and make the threshold more realistic in view of anticipated future projects. This Order also introduces a new type of NSIP to the Act in the field of water resources, namely desalination plants. This Order sets the qualifying threshold for desalination plants at providing a deployable output exceeding 80 million litres per day.
- 7.9 The introduction of desalination, alongside the current schemes of reservoirs and water transfers, will create a level playing field between these types of project so that developers can choose the scheme most appropriate to meet the need in each specific context.
- 7.10 These amendments will see a net increase in the number of water resources schemes qualifying as NSIPs. The overall reduction in the thresholds will also avoid the creation of perverse incentives for developers, who under the original thresholds may be inclined to build larger than necessary schemes in order to qualify as an NSIP.
- 7.11 Evidence suggests that due to population and economic growth, climate change and the need to protect the environment, pressure on water resources is likely to build further.
- 7.12 New water resources infrastructure is required under a ‘twin track’ approach to improving resilience. This approach will be delivered through increasing the amount of water available for supply, while simultaneously reducing the demand for water and improving efficiency of water usage.
- 7.13 Building resilience through a twin track approach will help to ensure future water resources needs are met while also protecting and enhancing the environment. This amendment brings a net reduction in the thresholds for NSIPs relevant to water and will reduce the burden on developers. Ultimately, this amendment will therefore enable more schemes to benefit from the streamlined planning process created by the Act.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 There are no plans to consolidate this legislation.

10. Consultation outcome

- 10.1 In November 2017, a consultation was launched entitled “Consultation on developing a National Policy Statement for Water Resources and proposals to amend the definition of nationally significant water infrastructure in the Planning Act 2008”. The consultation ran for six weeks. There were a significant number of responses but no definitive consensus.
- 10.2 A follow-up consultation was then launched in April 2018. This consultation consulted on a number of specific proposals relating to the size and types of water resources infrastructure which should be considered nationally significant within the Act, and ran for a period of three weeks.
- 10.3 The follow-up consultation received 20 responses from a range of stakeholders including water undertakers, interest groups, charitable organisations and members of the public. There was broad agreement with the proposed amendments.
- 10.4 More than half of respondents agreed with the proposal to introduce deployable output as a universal metric across all schemes. It was suggested by a number of respondents that the introduction of deployable output brings a desirable consistency in size which is useful when comparing across scheme types.
- 10.5 One respondent raised concerns that there is no fixed definition or calculation for deployable output, and therefore multiple and potentially contradictory meanings may exist across the sector. Deployable output is a technical concept which is calculated based on a number of constraints. The Order sets out the factors to be considered when calculating the deployable output of a specific NSIP. While the relevance of each factor is context specific, there are clear methodologies for how deployable output should be calculated, and as a concept it is well understood by industry.
- 10.6 The Environment Agency provides guidance on deployable output through its guidelines for Water Resource Management Plans and supporting planning and guidance documents. This guidance is updated regularly and accompanies each planning cycle. The NPS will point developers in the direction of this guidance.
- 10.7 More details on the first consultation and the Government’s response can be found at: https://consult.defra.gov.uk/water/nps-water-supply-planning-act-2008/supporting_documents/Consultation%20document%20for%20National%20Policy%20Statement%20for%20Water%20Resources.pdf
- 10.8 Further detail regarding the second consultation, a summary of its findings and the Government’s response is available to view at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/734974/nsip-consult-sum-resp.pdf

11. Guidance

- 11.1 No specific guidance in relation to this Order will be produced. However, the NPS will contain details of Government policy and expectations in relation to NSIPs. As set out in paragraph 7.3 above, the Secretary of State for the Department for Environment, Food and Rural Affairs intends to designate an NPS for Water Resources Infrastructure. The NPS will set out the need for, and the Government’s policies to deliver, development of NSIPs. Once designated, the Secretary of State must have regard to this NPS when considering whether to grant development consent for proposed NSIPs in the field of water resources. The NPS provides a clear

framework for those making development consent applications for water resources infrastructure, in particular by setting out the need for infrastructure and what should be included in the assessment of the potential impacts of a particular development, and how these impacts should be mitigated. The NPS is prepared on the basis that the changes made by this Order will take effect prior to its designation. The Government intends to lay the draft NPS in Parliament in late November 2018 with the public consultation completed eight weeks later.

- 11.2 The NPS will also include reference to the Environment Agency's water resources planning guidelines. This accompanies the water resource management planning cycle and contains relevant and up to date guidance including the methodology for calculating deployable output.

12. Impact

- 12.1 The impact on business is positive, as this amendment is a deregulatory measure. There is no, or no significant, impact on charities or voluntary bodies. Project developers, who will be water undertakers or their subcontractors, are likely to be the main beneficiaries of this Order. The national planning route created by the Act is streamlined and, as a result, brings a reduction in time taken to complete an application for development consent and therefore will bring significant cost savings. Current analysis suggests that amending the Act in accordance with this Order would bring £29 million in planning cost savings to developers, when compared to the current qualifying thresholds.
- 12.2 Ensuring projects are delivered through the appropriate planning route also brings wider benefits. The detailed policies within the NPS which apply to NSIPs and Development Consent Orders protect local communities and the environment from construction and operational impacts, and ensure a final sustainable and effective design. It is estimated that the national planning route would significantly reduce the length of the planning process. It will also reduce delays and deliver schemes more efficiently. For NSIPs, public consultation is necessary at the pre-application stage, improving transparency and giving charities and voluntary bodies a direct platform to share their views.
- 12.3 The impact on the public sector is small. The cost associated with an increase in the number of projects that meet the NSIP criteria falls to the Planning Inspectorate because additional resourcing will be required to advise on applications. This cost is paid for by the project developer and is outweighed by the benefit. It is also possible that by amending the thresholds to enable more schemes to qualify as nationally significant, there will be a slight increase in costs to Local Authorities and central government, as more resource will be required in order to advise on applications. The economic assessment for this Order considers these costs as negligible.
- 12.4 An Impact Assessment has not been prepared for this instrument. The Department has conducted a Regulatory Triage Assessment to consider the impacts of this Order. The only foreseen costs of this Order are on the public sector, and these are judged to be below £5 million. As a result, a full impact assessment has not been produced.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The Order does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Dr Thérèse Coffey MP has made the following statement.
- 14.2 “I do not consider it appropriate to include a review clause in the legislation. The Department’s Regulatory Triage Assessment suggests the impact on business is less than £5 million per year. Furthermore, based on current knowledge, fewer than 10 schemes meeting the new thresholds are expected over the next decade and the time they will come forward is uncertain. It would not be proportionate to require a review before a reasonable number of schemes have come forward.”
- 14.3 The Department for Environment, Food and Rural Affairs will monitor and review this legislation on an ongoing basis using information collected from its internal systems and processes, as well as regular engagement with stakeholder groups.

15. Contact

- 15.1 Edmund Beard at the Department for Environment, Food and Rural Affairs, Telephone: 020 8026 3071 or email: Edmund.Bead@defra.gov.uk can answer any queries regarding the instrument.
- 15.2 Sebastian Catovsky, Deputy Director for Water Services, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister Dr Thérèse Coffey at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.