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Department
for Environment
Food & Rural Affairs



Llywodraeth Cymru
Welsh Government

Consultation on integrating flood defence consents into the Environmental Permitting regime in England and Wales

Government and Welsh Government response

January 2016

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Introduction

1. This Government response follows the consultation published in December 2014 by the Department for Environment, Food and Rural Affairs (Defra) and Welsh Government (WG) on proposals to integrate flood defence consents for activities affecting statutory main rivers into the Environmental Permitting regime in England and Wales. The consultation sought views on a package of measures designed to reduce regulatory burdens.
2. Certain activities on or near main rivers and streams can affect flood risk. To avoid this a flood defence consent must be sought from the Environment Agency (EA) (for activities in England) or Natural Resources Wales (NRW) (for activities in Wales). With no regulation, watercourses or flood plains might be blocked or constrained by works, leading to flooding of other property that might not have happened otherwise, flood defence structures might be damaged with the same effect, or activities could cause environmental harm. Flood defence consents are issued with conditions in order to make sure that the activities are carried out in a way that avoids increasing flood risk or damaging the environment.
3. The Coalition Government announced in November 2011 that it intended to further expand the Environmental Permitting framework to cover flood defence consents. This integration would streamline processes, reducing administrative burdens on both applicants and regulators. Integration would also support a risk-based approach to regulation, allowing regulators to target resources at higher risk activities. Powers to enable these changes to be made were included in the Water Act 2014.
4. The public consultation on 'integrating flood defence consents into the Environmental Permitting regime in England and Wales' was launched on December 2014 and closed on 17 February 2015. Views were sought on how the new powers will be used, and the revised Impact Assessment that had been produced. A total of 42 responses to the consultation were received. The responses were from a range of interested parties ranging from water and sewerage companies, internal drainage boards, to other public bodies, organisations and individuals.
5. This document provides a summary of the responses received to each of the proposals and the United Kingdom and Welsh Governments' response to them. A list of names of organisations that responded is in Annex A.

Government response to issues raised in the public consultation

Question 1: Do you consider the proposals to apply the general Environmental Permitting provisions in the way proposed above, is reasonable?

What would you change?

6. There were 41 responses to this question of which 35 respondents (85%) agreed with the proposal to apply the general Environmental Permitting provisions. There was broad agreement that the general provisions are in line with existing Environmental Permitting system requirements and that it would be sensible from an environmental perspective to include flood defence consenting as part of environmental permitting.
7. Where respondents expressed concern about the proposals, this related to the proportionality of the new scheme; 6 respondents suggested that the type of permit required should be proportionate to the flood risk and watercourse size. Respondents recognised that rationalising all necessary permits into one process was fundamentally a good step but in doing so there should be a risk based approach and a fast-track system for simple, low risk applications. They were concerned that the extensive set of limits and conditions placed on exemptions and standard rules permits were overly restrictive and would mean many activities would require a full bespoke permit application. This would appear to run counter to the aim of the proposals to reduce regulatory burdens on business.

Government response

8. We welcome the strong support for the general Environmental Permitting provisions. The new provisions will introduce a simpler and more transparent system that incorporates a risk-based and proportionate approach designed to help regulators focus resources on higher risk activities. This means the level of regulatory controls applied to business will be proportionate to the activity requiring a permit.
9. We understand respondents' concern that exemptions and exclusions have been tightly defined. Under the current scheme all activities require bespoke consent. This is time consuming for both the applicant and the regulator, and the Environmental Permitting framework gives us the opportunity to identify low risk activities that need not be subject to such individual control. However, the conditions need to be carefully defined in order that the exemptions and exclusions can be used across the country, and so that the activities are undertaken in such a way that flood risk management and environmental protection are not undermined. In many situations applicants will be able to change their practices so that they

qualify for an exemption, exclusion or standard rules permit. In a situation where that is not possible, the EA/NRW will need to assess the proposal fully. The distribution of applications under the current scheme suggests that 50% of applications will be eligible for standard rules permits or exemptions, or even be excluded from the need for a permit at all.

10. All proposals for standard rules permits, exemptions or exclusions have been carefully reassessed in the light of all of the comments made through this consultation. Further conditions have been added to the exemptions and exclusions where appropriate and we have reviewed the extent and necessity of buffer zones around protected areas such as SSSIs. In many cases we have concluded that the activities present a very low risk of environmental harm or flood risk, and the buffer zones can be significantly reduced from the proposed 1km or even removed absolutely. In other cases, such as for dredging activities, we have increased the buffer zones so that those exemptions may not be used upstream of sensitive sites. Further details on particular changes to exemption and exclusions are outlined in the relevant sections below.

Question 2: What are your views on our proposals to integrate both s109 and byelaw consents and enforcement into the Environmental Permitting framework?

11. There were 28 responses to this question of which 27 respondents (96%) agreed with the proposal to integrate both s109 and byelaw consents and enforcement into the Environmental Permitting framework.
12. The standardisation of byelaws was welcomed. In particular it was felt that introducing nationally consistent rules was sensible, and that it makes sense to have a single access point for all of the relevant consents required. Respondents also commented that the proposals will make the legislation easier to understand. They did however question why the 8 and 16 metres zones had been used, rather than being consistent with the 10m zones used in the EA's Pollution Prevention Guidance.

Government response

13. In order to improve transparency we are proposing integrating into the Environmental Permitting framework both flood defence consents required under section 109 of the Water Resources Act 1991 and any consents needed under EA and NRW land drainage and sea defence byelaws. Those wishing to undertake activities in or near to main rivers will be able to see in one place which activities require consent.
14. The 8m non tidal and 16m tidal distances reflect the most common distances from the watercourse set in byelaws. While some regional byelaws have different distances, we have looked to introduce a standardised approach. We considered

using distances consistent with the Pollution Prevention scheme in order to standardise the approach between the two schemes, however applying a standard 10m distance would have unnecessarily extended the number of activities being regulated.

Question 3: Do you consider that this list of activities adequately covers all activities on or near main rivers, their flood plains and sea defences that might affect flood risk?

15. There were 30 responses to this question, 25 of whom (83%) considered that this list of activities adequately covers all activities on or near main rivers, their flood plains and sea defences that might affect flood risk. A few respondents suggested that it would be helpful if a list of activities requiring consent could be set out in guidance.

Government response

16. We intend to call the activities set out in paragraph 16 of the consultation document “flood risk activities”. The permit will be called a “flood risk permit”.
17. We understand respondents’ concern about how the rules will be interpreted in practice. The EA and NRW will publish guidance setting out clearly which activities need consent, when standard rules permits, exemptions and exclusions apply, and other aspects of the new scheme.

Standard rules

18. The EA carried out a separate, though linked, consultation on proposals for standard rules that would apply to permits for standard activities in England. Questions 4 to 8 were asked by EA in relation to these proposals. They will separately publish a summary of replies received, and their response to the points made.

Question 9: Do you consider that these are appropriate activities to be exempted from the requirement to seek prior approval?

How could the conditions (set out in Annex 1 of the consultation document) be better drafted to best ensure flood risk is not increased or environmental protection decreased?

19. There were 32 responses to the first part of this question of which 20 (63%) considered that the activities listed were appropriate for exemptions. 17 respondents made a number of suggestions for revising the conditions associated with exemptions, to improve clarity, ensure practicality or more carefully control the activity. In addition, respondents made a number of general points about the way exemptions will operate in practice:

- statutory duties should not be compromised by the need for a permit
- the competency and experience of the applicant/operator should be assessed and included as a factor in deciding whether a proposal is exempt or to enable appropriate conditions to be stipulated.
- the proposed use of exemptions should be subjected to consultation with third parties

Government response

20. We note the support for these proposals and are grateful for the points made and amendments suggested. We have reviewed the exemptions in light of these suggestions and made amendments where these improve clarity, or address particular issues. For example we have included conditions to protect priority river habitats in recognition that some activities can cause harm across a wider area.
21. The EA and NRW byelaws currently include provisions that mean that certain authorities such as internal drainage boards are not required to seek prior consent when undertaking byelaw activities in pursuit of their statutory powers (called “protected undertakings”). This will continue, and protected undertakings will not require prior consent when carrying out the flood risk activities set out in bullets 4 – 11 (in paragraph 16 of the consultation document). These bullet points reflect the existing provisions of EA and NRW byelaws. They will require consent for the flood risk activities described by the first 3 bullets, which reflect the existing provisions of section 109 of the Water Resources Act 1991. There will be some activities that are caught by more than one heading. In these cases prior consent will be needed, as at present.
22. While organisations with protected undertakings will not need prior permission when undertaking some activities, we would urge them to share their plans with the relevant regulator. We encourage discussions about the way in which such works are undertaken to ensure that flood risk is not increased (for example by damaging or weakening structures which are not immediately identifiable as flood defences). In many cases such discussions can help to identify joint work programmes to the benefit of both organisations.
23. We note the suggestions that regulatory controls should be focused on the highest risk applicants, and that the competency and experience of the applicant should be a relevant factor. It is not possible, however, to introduce exemptions for use by particular groups. The EPRs work on the basis that exemptions are available to whoever considers that they are able to meet the conditions specified. We have therefore ensured that exemptions are drawn up in such a way that can be applied by any person in any place across the country subject to the location conditions that apply.

24. The use of exemptions will not be subject to consultation with third parties. Exemptions are available to all who consider they can meet the conditions, and require registration rather than application. As a result in the majority of cases the regulator does not generally have the power to agree or deny the use of that exemption to any individual or in any location (other than as set out in the conditions). For this reason we have made sure that the conditions are framed in such a way that undertaking the activity in the way specified cannot increase flood risk or cause environmental harm.

Question 10: What length of watercourse do you think people should be allowed to dredge under the new scheme under an exemption? Should it be

- a) 100 metres**
- b) 1.5km**
- c) Another length (please specify)**

What evidence do you have to support your view?

Do you consider that the conditions proposed under standard rule permit No.37 and exemption XM21 are appropriate?

25. Of the 27 responses received for this question, 3 (11%) supported an exemption allowing people to dredge up to 100 metres and 6 (22%) up to 1.5km under an exemption. Others proposed a variety of other lengths ranging from 50m to 1km, they suggested that lengths should be set based on a number of site-specific factors such as location, sensitivity, scale & type of dredging, or that the exemption should apply to anything that needs cleaning out or maintaining.
26. 6 respondents argued that dredging should not be defined as an exempt activity for any length of watercourse. They considered that deregulating dredging through exemptions was inappropriate as it would not be supervised sufficiently to ensure that the bed and gravels of the river were not disturbed or that large quantities of weed and vegetation were not removed along with silt. It was also suggested that any longer than the proposed lengths could result in a greater risk of introducing river bed instability.
27. Of the 12 people who responded to this question, 6 considered the conditions proposed under Standard rule permit No.37 and exemption XM21 to be appropriate, and 6 did not.
28. Some consultees made comments about the 9 river maintenance pilots. They were concerned that proposals concerning the dredging of watercourses had been made before any results from the pilots were published. Some considered that the

regulatory approach trialled within the pilots had not been reflected in the proposals contained within the consultation.

Government response

29. The River Maintenance Pilots were launched by the EA in October 2013, and ended in March 2015. The watercourse maintenance pilots published regular progress reports, and these were used to inform proposals for the possible permits and exemptions that might be available for dredging.
30. The pilots trialled a regulatory approach where consents were not obtained for desilting for a maximum of 1.5km or 20% of a landowner's watercourses. Those taking part in the pilots were, instead, only required to register their intended works with the EA. The pilots demonstrated that desilting could be undertaken by farmers and other landowners in an environmentally sensitive way. For that reason we have concluded that operators should be allowed to dredge a maximum of 1.5km of man-made ditches, land drains and agricultural drains under an exemption.
31. Given the potential damage that desilting can cause, for example through the settling downstream of disturbed sediment, we have added some additional conditions, which mimic those used in the pilots, in order to protect designated sites and Water Framework Directive sensitive waterbodies. In addition the EA will review and revise the environmental good practice guide published for the pilots, setting out how dredging activities must be undertaken. It will cover, for example, the need to leave a fringe of undisturbed vegetation, the spreading of the silt, and the use of silt control measures. The guidance will also make clear how to avoid damaging the bed and banks of the watercourse. Following this guidance will be a condition of using the exemption.

Question 11: Do you consider that these are appropriate activities to be excluded from the requirement to seek prior approval?

How could the conditions (set out in Annex 2 of the consultation document) be better drafted to best ensure flood risk is not increased or environmental protection decreased?

32. There were 30 responses to this question of which 24 (81%) considered that the activities listed were appropriate for exclusions. 15 respondents made suggestions for revising the conditions associated with exclusions to extend their applicability or to reflect their own experience of working practices.
33. Some respondents were concerned that the displaced water from a property using property level protection devices (PLP) could cause flooding to another property that had not historically flooded. They suggested that PLP installations should be preceded by an adequate survey to prevent such issues. However, others questioned why this exclusion was not available for non-residential properties.

Government response

34. Exclusion XC7 concerns the use of property level protection measures. We understand respondents' concern that flood defence works by one person should not cause flooding, or increase flooding for another person. However, we consider that the attachment of these devices will have little effect on neighbours' flood risk. It is reasonable to allow home owners to attach devices directly to their homes in order to avoid the distressing effects of flooding, and to be able to do so without the need for prior consent.
35. The consultation responses also suggested that it was unfair to discriminate against non-residential property using property level protection devices. We agree. Non-residential buildings can be very large, but usually the land they remove from flood storage is factored into flood modelling, and thus allowing PLP would not cause unexpected impacts on others. However, some buildings are only permitted to be built on the understanding that, in the event of a flood, flood waters will be able to flow through the building. We have therefore amended the exclusion so that it applies to the attachment of flood protection devices direct to any existing building in order to protect its interior. The exemption will not be available if there is a planning condition or other restriction covering flood risk management, which should be followed instead. The device will also only be permitted to protect the building itself, and not any garden, car park, hard standing, open storage or delivery areas or any similar areas.
36. We have revised the proposals for exclusions in the light of the suggestions made and have made amendments (in addition to those outlined above) where these improve clarity or address new issues.

Question 12: Are there any activities you consider should be added to the lists of standard rules permits, exclusions or exemptions?

37. 7 respondents made suggestions for further standard rules permits, exclusions or exemptions.

Government response

38. We are grateful to respondents for making these suggestions which we have carefully considered. We can only take forward suggestions that have low flood and environmental risk and that can be carried out using standardised approaches. Unfortunately, while some of the ideas were low risk, they were not suitable for standardised approaches that could be applied across the country, e.g. some were suitable for rural areas, but inappropriate in urban areas. Some of the activities put forward are already covered by the exemptions set out in the consultation paper; others will not need permission at all. While we were not able to take forward many of these ideas at this time, we will continue to look for new activities to deregulate in this way, and welcome any further suggestions. The review of this scheme,

planned for 2019, will be one such opportunity to introduce further standard rules permits, exemption and exclusions.

Question 13: What size buffer zone do you consider appropriate?

Would you prefer a standard buffer zone to be applied to all exemptions, or for different buffer zones to be applied?

Do you have any alternative suggestions of how to ensure works do not harm sensitive sites?

39. 22 consultees responded to this set of questions. Respondents were equally split between those supporting a standard size of buffer zone, and those who would prefer buffer zones to be set individually for each activity and each protected areas type. Those supporting a standard buffer zone welcomed the simplicity and considered it would be easier to understand and apply in practice. Those proposing different buffer zones considered that it was more important that unnecessary restrictions should be removed from low risk activities, but that conversely the potential damage some activities could cause meant that significantly greater buffer zones were appropriate for these activities. Those supporting a standard buffer zone proposed a range of buffer zones, from 6-9metres to 1.5km.

40. Other respondents considered that the blanket disapplication of exemptions in protected areas (such as SSSIs etc.) or in buffer zones around these areas would be disproportionate for some activities (such as XM3 or XM7), and would mean that exemptions will not be available along whole river systems or large areas of catchments. Some respondents also suggested that the buffer zones and conditions concerning protected species and sites duplicates protection offered through separate legislation

Government response

41. We recognise that those wishing to undertake exempt activities within protected areas and their buffer zones will require a bespoke permit. We want to reduce administrative burdens wherever appropriate and after considering the various views put forward in the consultation, consider that a standard buffer zone would not be appropriate. While a standard buffer zone is simple to understand, it unnecessarily prevents some activities from enjoying lighter touch regulation. We have therefore set individual buffer zones in the regulations, and consider that any problems with understanding differing buffer zones can be overcome by clear mapping or guidance.

42. The Welsh Government has decided that no exemptions should be applicable in high morphological status Water Framework Directive designations in Welsh main rivers. While no main rivers have such designations at present, this policy future proofs any future new designations.

43. A wildlife licence is required before any activities can be undertaken that have the potential to affect protected species. We agree that the proposed conditions in the exemptions duplicated this requirement and have concluded that they should be removed. Applicants will, however, be reminded of the need to ensure they meet such requirements in the guidance accompanying the scheme.
44. There is no similar duplication between this scheme and permissions for protected and priority sites and priority species as suggested because there is no separate licensing or permitting scheme as there is for protected species. We therefore intend to keep the proposed provisions relating to protected and priority sites, and for priority species other than when an applicant has a relevant Wildlife and Countryside Act licence.

Question 14: Do you support the changes we're proposing to make to the Highways Act?

What do you think the impact of these changes will be for you or your organisation?

45. Of the 24 responses to question 14, 23 (96%) supported the changes proposed, considering that this would be a streamlined approach which would cause less confusion.
46. Some consultees specifically welcomed that the many activities that would become exempt or follow a standard rules would shorten project timelines and reduce costs. One respondent suggested that when works affect flood risk the flood defence consent regime should take precedence in order to ensure flood risk is not increased for private landowners. Another wished to temper rationalising the two schemes into one process with ensuring that there should be a risk based approach and a fast-track system for simple low risk applications.

Government response

47. We welcome the strong support for the principles of the changes proposed to make to the Highways Act and will implement the changes accordingly.
48. We recognise that people are concerned that third parties' activities, be they highways authorities or any other person working near or in a watercourse, should not increase flood risk. Our proposals for amending section 339 of the Highways Act 1980 will make it clear that highways authorities must seek a permit from the EA or NRW when wishing to carry out the majority of works in or near main rivers. Activities which are covered by a Highway Order or other similar legislation will not be required to seek separate permission. In these cases the EA or NRW will be able to set conditions on the works to ensure the works do not increase flood risk

Question 15: Do you have any comments to make on the Impact Assessment?

49. One respondent made a comment about the impact assessment. They felt that it should have included the likely impact of increasing fees, with an example given of how much these could impact the respondent's business if application fees were to be increased in the same way as other EPR charges. As a result, they questioned the impact assessment's assertion that fees would be cheaper as a result of the increased efficiency of the EPR system.

Government response

50. A revised impact assessment will be published alongside the regulations when these are published in Parliament and the Welsh Assembly.
51. The current charges for flood defence consents do not reflect the full cost of the EA and NRW work in determining permits and carrying out compliance activities. Whether or not the flood defence consenting scheme were to be integrated into the Environmental Permitting framework fees would need to be raised to a more appropriate level. Such fees would necessarily be higher under the existing scheme where every activity requires a permit, and the regulators have to consider each application individually. The reduction in the regulators' administrative burdens under the new scheme will mean that their costs are lower, and thus fees for the permits will also be lower than they would have been otherwise. The new scheme also introduces exemptions and exclusions for which there will be no charge.

Question 16: Is there anything else you wish to add in response to this consultation?

52. A number of respondents raised issues about the prospective increase in fees. Some considered that the fee structure should reflect the actual costs incurred in determining applications. Conversely, others were concerned that the fees for bespoke permits would be considerable, and could discourage people from applying for the relevant permits, potentially leading to an increase in flood risk or environmental damage.

Government response

53. Charges will need to cover the regulators' reasonable costs. While this will mean that the fees for standard rules and bespoke permits will inevitably increase from those under the current scheme (there will be no charge for activities regulated through exemptions or exclusions), we have looked to include as many activities as possible for now in standard rules permits, exemptions and exclusions in order to minimise the impact of the increase. Others may also follow in the future. The EA and NRW have considered all suggestions for fees in the light of Treasury

guidelines, and will consult on their proposals. NRW launched their consultation in September, while the EA will consult on their proposals shortly.

Next steps

54. We are very grateful to all those who responded to the consultation and for the information provided to assist in the finalisation of the proposals, all of which have been carefully considered. We have used this information to draft the necessary regulations to integrate the flood defence consent scheme into the Environmental Permitting regime. These Regulations will be laid in draft, and then debated in the Welsh Assembly and in both Houses of Parliament. If approved, the regulations will be made and come into force in April 2016.
55. We will review the new flood risk activity scheme in 2019 as part of the more general review into Environmental Permitting Regulations.
56. Many of the issues respondents raised concerns about, was the detail of how the changes will be implemented. These comments will be taken into account when implementing the regulations.

Annex A: List of respondents

Affinity Water
Association of Drainage Authorities (ADA)
Blueprint for Water
Bristol Water plc
Canal and Rivers Trust
Chartered Institute of Water and Environmental Management
City and County of Swansea
Countryside Land and Business Association
Countryside Land and Business Association Cymru
Coventry City Council
Devon County Council
Dudley Metropolitan Borough Council
Energy UK
Hertfordshire County Council
Institution of Civil Engineers Wales Cymru
Lafarge Tarmac
Land & Water Services Ltd
Local Government Association
Local Government Association Cymru
Marine Conservation Society
Morgan Sindall plc
National Farmers Union (NFU)
Natural England
Network Rail (Structures, London North-East)
Northumberland Rivers Catchment Partnership
RWE Generation UK plc
Severn Trent Water
South Cumbria Rivers Trust
Southern Water
The Clancy Group plc
The Law Society
The Rivers Trust
United Utilities
Warwickshire County Council
Wessex Water
West Berkshire District Council
West Cumbria Rivers Trust
Wildfowl and Wetlands Trust

Individuals: 4