

EXPLANATORY MEMORANDUM TO
THE WATER USE (TEMPORARY BANS) ORDER 2010

2010 No. 2231

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and the Welsh Assembly Government and is laid before Parliament and the National Assembly for Wales by Command of Her Majesty.

2. Purpose of the instrument

2.1 This order provides for certain exceptions to the categories of use of water in section 76(2) of the Water Industry Act 1991 (as substituted by section 36 of the Flood and Water Management Act 2010), provides that certain activities are to be or not to be treated as falling within the categories of use in that section and defines words and phrases used in that section.

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

None.

4. Legislative Context

4.1 Section 36 of the Flood and Water Management Act 2010 substituted section 76 of the Water Industry Act 1991 (“the Act”) to confer powers on water undertakers to temporarily prohibit specified uses of water. Section 76(1) of the Act (as substituted) increases the scope of water uses that a water undertaker may prohibit if it thinks that it is experiencing or may experience a serious shortage of water for distribution.

4.2 The categories of water use that a water undertaker may prohibit under section 76(1) of the Act are specified in section 76(2) of the Act (as substituted by section 36 of the Flood and Water Management Act 2010). This order specifies in more detail what these categories of water use include or do not include and defines words and phrases used in section 76(2) of the Act.

4.3 During committee stage in the House of Commons an amendment was tabled to provide definitions of some terms used in one of the categories of water use. The amendment was withdrawn following the Government’s response that an order under section 76(2) of the Act would be used to define and clarify these, and other, terms and to enable Government to address any future uncertainties as to scope that may emerge. (Hansard Official Report of Public Bill Committee, Flood and Water Management Bill, Vol 2, 14-21 January 2010, columns 385-389).

5. Territorial Extent and Application

This instrument extends to England and Wales.

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 During the 2004-06 drought in south-east England the limited scope of water undertakers' powers to impose temporary hosepipe bans under section 76 of the Water Industry Act 1991, which applied only to the watering of private gardens and the washing of private motor cars, gave rise to a good deal of public criticism. The focus of the powers was seen as unfair and unreasonable by water undertakers' customers, for example, in preventing garden watering with a hosepipe whilst the filling of private swimming pools by hosepipe could continue.

7.2 Climate change scenarios forecast hotter, drier summers and more frequent droughts. Historic information on droughts shows that as well as the recent 2004-06 drought, there have been four other major multi-year droughts that have occurred over the last century, which suggests that such a multi-year drought would occur once in every 20 years. Such a prolonged shortage of rain would put a severe strain on existing water resources, which would require the implementation of restrictions on water use to conserve water supplies and protect the environment.

7.3 In light of the 2004-06 drought and the likely implications of climate change on water supply, Defra Ministers undertook to review the scope of the legislative framework relating to these powers. Defra and the Welsh Assembly Government subsequently launched a joint consultation on proposals to widen the scope of the temporary hosepipe ban power. The Defra and the Welsh Assembly Government response to the consultation indicated a joint intention to widen the scope of the hosepipe ban powers to enable water undertakers to realise more water savings without the need to apply for drought orders. The Defra and the Welsh Assembly Government response indicated that the updated powers would include an express power to enable water undertakers to give concessions to the restrictions and this would provide greater flexibility, when imposing restrictions, to enable water undertakers to take proportionate action to protect public water supplies.

7.4 Section 36 of the Flood and Water Management Act 2010 extended the water uses that water undertakers may prohibit under section 76(1) of the Act in times of water shortage to enable them to conserve more water early on in a drought and protect supplies for essential domestic use. As well as the express provision for water undertakers to make concessions, it also allowed the relevant Minister to make an order in relation to the

categories of use listed in section 76(2) of the Act. This order-making power enables the Minister to clarify and fine tune the scope of the categories of water use. This order will ensure that the prohibitions which may be issued by water undertakers under section 76(1) of the Act reflect the scope of the water uses that the Government believes that water undertakers should be able to prohibit under this section.

7.5 By extending the water uses that water undertakers may prohibit under section 76(1) of the Act, water undertakers may be able to delay or avoid the need for drought orders under the Water Resources Act 1991 which can allow water undertakers to impose more restrictive measures on the use of water that have a greater impact on domestic customers and also on businesses. The purpose is to ensure that a balance is struck between the needs of the water company to conserve water for essential domestic purposes at times of water shortage, and the interests of the customers who may be affected by the decision to restrict particular non-essential uses.

8. Consultation outcome

8.1 In Spring 2007, Defra and the Welsh Assembly Government launched a joint consultation on the proposed changes to powers to restrict non-essential uses of water. The document was entitled 'Proposed changes to powers to restrict non-essential uses of water' and ran for 12 weeks from 23 March to 15 June 2007. The document discussed the modernisation of the scope of the hosepipe ban powers under section 76(1) of the Act—proposing to widen these powers to include further uses of water that would principally, but not exclusively, affect domestic users. The document specifically discussed the types of wider water uses that the wider temporary ban power could cover.

8.2 The consultation paper was brought to the attention of over 600 organisations that could be affected by the proposals in respect of discretionary and non-essential water uses. A significant proportion of consultees comprised individual local authorities. A total of 80 replies were received, and the summary of consultation responses can be found at <http://www.defra.gov.uk/environment/quality/water/resources/documents/summary-responses-2007.pdf> . Most respondents agreed that the Secretary of State/National Assembly for Wales should have the power to prescribe further uses of water which would become subject to the powers. On the specific question inviting views and comments on the range of uses the consultation proposed should become subject to the new discretionary use ban powers, most respondents supported the proposals and some suggested the restrictions should go further. However, some concern was also expressed by individuals, companies and organisations representing those sectors of the community that could be affected by the proposals. In light of the representations some changes have been incorporated within this order.

8.3 Further consultation was undertaken on the draft Flood and Water Management Bill. However, at that stage the clauses in the draft Bill did not specify any additional uses of water that water undertakers would be allowed to prohibit under section 76(1) of the Act and instead contained an order-making power to allow the Secretary of State and Welsh Ministers to add to the list at a later date. A total of 71 responses were received to

the hosepipe ban section of the consultation and these were supportive of the need to conserve water in times of water shortage. Many respondents said that the uses of water covered by the provisions should be wide ranging and flexible to meet the challenges of the future. 34% of respondents considered the cost of inconvenience to householders to be low or unquantifiable or offset by the benefit of avoiding the impacts that might follow if no restrictions were put in place – such as the impact on the environment or the cost of more severe restrictions. An additional 25% responded that the cost of inconvenience was ‘irrelevant’ at a time of water shortage. Whilst customers valued unrestricted supply, the Consumer Council for Water responded that their research showed that customers were not willing to pay more to avoid specific measures such as hosepipe bans and were willing to change water use behaviour to conserve water during a drought. Others responded that business interests should be protected and that decisions to add new non essential uses should be based on evidence of the benefits and costs. The summary of responses can be found at <http://www.defra.gov.uk/environment/flooding/documents/policy/fwmb/bill-consult-response.pdf> . The clauses were amended following an amendment during the passage of the Bill through parliament to include the categories of water use contained in section 76(2) and this order clarifies meanings and provides for exemptions to refine the scope of what is covered by the temporary ban powers. Whilst some businesses may be affected where they provide a service to domestic customers, it is primarily domestic customers that will be impacted in terms of loss of amenity or through inconvenience. New section 76(3) of the Water Industry Act also enables the Secretary of State and Welsh Ministers to remove a use of water from the list if evidence demonstrates it is appropriate to do so.

9. Guidance

The Environment Agency, in conjunction with Defra and the Welsh Assembly Government, is proposing to update the guidance to water undertakers contained in the Water Company Drought Plan Guideline 2005 to reflect the new power under section 76(1) of the Act.

10. Impact

10.1 The impact on business, charities or voluntary bodies is not monetised. Evidence is not yet available to demonstrate a positive cost benefit analysis in respect of each additional water use which water undertakers may prohibit using their new powers under section 76(1) of the Act. The main directly affected group would be domestic customers, impacted in terms of loss of amenity and inconvenience. Where commercial enterprises are affected it is small and micro firms that predominantly would be impacted (but see paragraph 11 below). In so far as these measures delay or avoid the need for a drought order, businesses overall benefit from these measures.

10.2 The impact on the public sector is not monetised for the reasons set out in 10.1. The public sector would be impacted on through such restrictions as the watering of public sector gardens.

10.3 The Impact Assessment for the Flood and Water Management Act will be published alongside the Explanatory Memorandum on the OPSI website. It has not been updated in respect of this order because it included the policy assumptions reflected in this order.

11. Regulating small business

11.1 The legislation applies to small businesses.

11.2 To minimise the impact of the requirements on small firms employing up to 20 people, the approach taken is to provide water undertakers with the flexibility to apply exceptions to a prohibition issued under section 76(1) of the Act where they believe that it is appropriate to avoid unnecessary hardship.

11.3 The basis for the final decision on what action to take to assist small business was based on the fact that whilst some businesses will be affected by a temporary ban under section 76(1) of the Act at an earlier stage; by delaying or preventing the need for further restrictions through drought orders (which largely fall on businesses), the impact on the commercial sector as a whole is reduced.

12. Monitoring & review

12.1 A post implementation review of the impacts of these provisions will be event driven and will be undertaken by Defra and the Welsh Assembly Government once there have been at least 2 droughts of sufficient severity to have required a number of water undertakers to have exercised their new temporary ban powers under section 76(1) of the Act. The review will be based on a review of the predicted and actual water savings achieved through use of these powers and by an analysis of representations and evidence of impacts received by water undertakers before, during and after droughts. The objective of the review will be to identify any disproportionate or unforeseen impacts on businesses as a result of implementation of hosepipe restrictions. The Secretary of State has the power to remove uses of water from the list of water uses that can be prohibited by water undertakers whose areas are wholly or mainly in England under section 76(1) of the Act and Welsh Ministers have the power in respect of water undertakers whose areas are wholly or mainly in Wales and would act to do so if the impacts on business were disproportionate to the public interest in conserving water during a drought.

13. Contact

If you have any queries regarding the instrument please contact either Carol Skilling at the Department of the Environment, Food and Rural Affairs Tel: 020 7238 5125 or email: carol.skilling@defra.gsi.gov.uk or Claire Bennett at the Welsh Assembly Government Tel: 029 2082 5915 or email Water@Wales.gsi.gov.uk.