

Explanatory Memorandum to: The Water Environment (Water Framework Directive) (England and Wales) (Amendment) Regulations 2016.

This Explanatory Memorandum has been prepared by the Department for Economy, Skills and Natural Resources and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of The Water Environment (Water Framework Directive) (England and Wales) (Amendment) Regulations 2016.

Carl Sargeant,
Minister for Natural Resources
One of the Welsh Ministers

10 February 2016

1. Description

These Regulations amend the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 (“2003 Regulations”) to provide specific powers for the designation of transitional and coastal waters where shellfish are commercially harvested and to place requirements regarding the monitoring of any designated waters.

These amendments are made following the repeal of the Shellfish Waters Directive (79/923/EEC) by the Water Framework Directive (2000/60/EC) and are intended to ensure that the protections provided by the Shellfish Waters Directive continue. These Regulations also revoke the Surface Waters (Shellfish) (Classification) Regulations 1997, which implemented the Shellfish Waters Directive.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

For the reasons set out in paragraph 3, in so far as these Regulations relate to cross-border river basins, they are to be made jointly with the Secretary of State. In so far as relating to river basin districts wholly in Wales or wholly in England, the Regulations are to be made compositely. The Regulations will apply to England and Wales and are subject to negative resolution procedure in the National Assembly for Wales and in both Houses of the UK Parliament.

Because the Regulations will be subject to UK Parliamentary scrutiny, it is not considered reasonably practicable for this instrument to be made or laid bilingually.

To date, the Welsh Government has tended towards transposing EU Directives compositely with Defra. This was due in part, to the fact that the Environment Agency acted as the main environment regulator for both the Welsh Government and UK Government.

With the creation of Natural Resources Wales in 2013, there is more scope to operate differently in Wales; however with respect to this particular Directive, there is limited scope to transpose directions differently due to the river basin areas that are partly in Wales and partly in England.

The Welsh Ministers have the power to give Natural Resources Wales directions for the implementation of EU obligations such as this. However, that power only covers river basin districts wholly in Wales. If the Welsh Government were to undertake a separate transposition it would only apply to the Western Wales river basin and the Severn and Dee River Basins would still need to be directed jointly with Defra.

Transposing the Directive jointly with the UK Government also ensures there is consistency in delivery something that the European Commission is keen to see with regards to the overall Water Framework Directive.

These Regulations are made in reliance on section 2(2) of the European Communities Act 1972. By virtue of section 59(3) of the Government of Wales Act 2006, the Welsh

Ministers are to determine whether an instrument made in exercise of the section 2(2) powers is to be subject to the negative or affirmative procedure.

This statutory instrument is subject to annulment of the Assembly (negative procedure). The Regulations are made to ensure correct transposition of the Water Framework Directive and so there is little discretion involved. The Regulations do not amend any provision of an Assembly Act or Measure. Accordingly, the Welsh Ministers have determined that these Regulations are to be subject to the negative resolution procedure.

3. Legislative background

The Shellfish Waters Directive (79/923/EEC) was implemented in England and Wales by the Surface Waters (Shellfish) (Classification) Regulations 1997 (S.I. 1997/1332). In December 2013 the Shellfish Waters Directive was repealed by the Water Framework Directive (2000/60/EC). Article 4.9 of the Water Framework Directive sets out that it offers a level of protection at least equal to any Directive which it repeals. These Regulations amend the 2003 Regulations to continue the protections which were provided by the Shellfish Waters Directive.

Section 80 of the Government of Wales Act 2006 (“GOWA 2006”) states that an obligation of the UK is also an obligation of the Welsh Ministers if and to the extent that the obligation could be implemented (or enabled to be implemented) or complied with by the exercise by the Welsh Ministers of any of their functions.

Section 59 of GOWA 2006 enables the Welsh Ministers to be designated for the purposes of section 2 (2) of the European Communities Act 1972 (“the ECA 1972”). Section 2 (2) of the ECA 1972 enables designated Ministers or departments to implement EU obligations and rights. The Welsh Ministers are designated for the purposes of section 2(2) of the ECA 1972 in relation to water resources by virtue of Article 3 of European Communities (Designation) (No. 4) Order 2003/2901 (the original designation has transferred to the Welsh Ministers from the National Assembly for Wales by virtue of sections 59 and 162 of, and paragraph 28 of Schedule 11 to the Government of Wales Act 2006). . That designation also provides that where regulations are to be made under this designation in relation to or identifying river basin districts which lie partly in England and partly in Wales, they shall be made jointly with the Secretary of State.

The Welsh Ministers can therefore make the Regulations using the enabling powers in section 2(2) of the ECA 1972 in relation to river basin districts which lie wholly in Wales, and jointly with the Secretary of State in relation to districts lying partly in England and partly in Wales.

The powers in sections 82 and 219(2) of the Water Resources Act 1991 are also being used in so far as they relate to the revocation of the Surface Waters (Shellfish) (Classification) Regulations 1997 and the Surface Waters (Shellfish) (Classification) (Amendment) Regulations 2009. Section 102 of that Act is also

being exercised by the Secretary of State for the same purpose, but this power has not been transferred to the Welsh Ministers

The Welsh Ministers therefore have the power to amend the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 under section 2(2) of the European Communities Act 1972, having been designated in relation to water resources.

These Regulations will apply to England and Wales and are subject to negative resolution procedure in both Houses of the UK Parliament and the National Assembly for Wales.

4. Purpose & intended effect of the legislation

The Surface Waters (Shellfish) (Classification) Regulations 1997 (“Shellfish Regulations 1997”) implemented the Shellfish Waters Directive (79/923/EEC as amended), and aimed to protect shellfish growth and contribute to a high quality product for human consumption. Directive 79/923/EEC has now been repealed by the Water Framework Directive (2000/60/EC) which is intended to replace its protections.

For the majority of parameters in the Shellfish Waters Directive, the Water Framework Directive provides a necessary update to the 1970s standards set in the Shellfish Waters Directive. These offer the same or improved levels of protection of shellfish growing in protected waters based on modern scientific recommendations.

The Water Framework Directive is designed to protect the ecological health of the water body, including the shellfish growing within it. Technical advice from the UK technical advisory group for the implementation of the Water Framework Directive and the European Commission indicates that the physical and chemical parameters set down within the Water Framework Directive for protecting water quality are equivalent or better than the requirements which were set in the Shellfish Waters Directive.

However the Water Framework Directive does not include the non-mandatory faecal indicator organism standard which was contained in the Shellfish Waters Directive. The aim of the faecal indicator organism standard is to contribute to a high quality shellfish product for human consumption. Shellfish hygiene rules set quality standards for human consumption based on faecal indicator organisms and protects human health from poor quality shellfish. These hygiene rules are the responsibility of the Food Standards Agency.

The amendments to the 2003 Regulations provide that the Welsh Ministers (in relation to areas wholly in Wales) may designate waters where shellfish are commercially harvested as “shellfish water protected areas”. Waters are designated through inclusion in a ‘relevant list’ that will be made by the Welsh Ministers prior to the making of the Regulations. Any subsequent amendments to the list of designated waters will require an amendment to the 2003

Regulations. Inclusion in the 'relevant list' places a requirement to include those protected areas in the water quality planning regime of the Water Framework Directive.

In addition to the general environmental objectives that must be pursued in relation to river basin districts there is an additional objective to be pursued in relation to shellfish water protected areas, as inserted by regulation 3. This objective is set under the definition of "environmental objectives" in regulation 2 of the 2003 Regulations and relates to 'the water quality objectives necessary or desirable to improve or protect a shellfish water protected area in order to support shellfish life and growth and to contribute to the high quality of the shellfish products suitable for human consumption'. This wording follows the objectives of the original Shellfish Waters Directive and ensures compliance with the requirement in article 4.9 of the Water Framework Directive to afford the same level of protection to shellfish waters as existed under previous Community legislation. Directions made by the Welsh Ministers to Natural Resources Wales in relation to Welsh areas (made compositely with Secretary of State in relation to areas partly in Wales and partly in Wales) will be used to set the technical details of the objectives, and will be used to ensure appropriate protection is afforded to shellfish waters in line with the Water Framework Directive. The first direction of this nature is the Shellfish Water Protected Areas (England and Wales) Directions 2016 which sets out that Natural Resources Wales, when meeting the water quality objectives placed by these Regulations, must also endeavour to meet the faecal indicator organism standard, that is, the microbial standard in shellfish protected waters. There is no substantive change to policy as the overall effect of the amendments is to replicate the requirements from the Shellfish Regulations 1997 and the Shellfish Waters Directive. Retaining these protections is important as shellfish are bio accumulators of pollution in the environment, and in order to protect and improve their quality, environmental standards for water quality are required to protect them from pollution from point and diffuse sources.

The only change to policy is to subject water quality improvements for shellfish waters to an explicit test of cost and benefit, which is a fundamental part of the Water Framework Directive. As a non-mandatory standard in the Shellfish Waters Regulations 1997, improvements were subject to an implicit process of cost benefit assessment in the past. As part of the Water Framework Directive, this process will now be open, explicit and offer stakeholders opportunities to comment on and inform the assessment.

5. Consultation

These amending Regulations affect functions of the Environment Agency, Natural Resources Wales, the Secretary of State and the Welsh Ministers. There is no substantive change to policy as the overall effect of the amendments is to replicate the requirements from the Shellfish Regulations 1997; since they do not have any novel implications for industry or the public, there has been no public consultation exercise, however, Natural Resources Wales have been engaged in the consideration of these amendments and their comments have been taken into account.

6. Regulatory Impact Assessment (RIA)

Since the amending Regulations have no direct impact on statutory duties or statutory partners, a separate impact assessment has not been prepared for this instrument.