

Explanatory Memorandum to the Environmental Permitting (England & Wales) (Amendment) (No. 2) Regulations 2018

This Explanatory Memorandum has been prepared by Department for 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.

Cabinet Secretary/Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Environmental Permitting (England & Wales) (Amendment) (No. 2) Regulations 2018.

Lesley Griffiths
Cabinet Secretary for Environment, Planning & Rural Affairs

28 March 2018

1. Description

The primary purpose of the instrument is to amend the Environmental Permitting (England and Wales) Regulations 2016 (S.I. 2016/1154, “the 2016 Regulations”), so as to transpose parts of Council Directive 2013/59/EURATOM of 5 December 2013 (BSSD) on laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation.

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

With regards radioactivity, it is highly desirable, where possible, to ensure similar provision across the four UK administrations as this makes the regulatory landscape simpler and more transparent which is of benefit to regulators, Industry, Government and the public and avoids potential cross border issues within the UK.

Many of the changes required to transpose BSSD will be made by amending Schedule 23 of the 2016 Regulations. The 2016 regulations are on an England and Wales basis and it is therefore appropriate to transpose the necessary changes arising from BSSD on the same basis. Similar changes will be made to the equivalent legislation affecting Scotland and Northern Ireland.

Late transposition of an EU obligation

Article 106 of BSSD requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 6 February 2018. Delays to finalising these composite regulations following consultation have meant this deadline will not be met.

3. Legislative background

Powers

The power to make these regulations is section 2 of, and Schedule 1 to, the Pollution Prevention and Control Act 1999 (“the 1999 Act”). Section 1 of that Act states that section 2 may be used to make provision for or in connection with regulating activities that are capable of causing any environmental pollution (this includes radioactive substances activities), or for otherwise preventing or controlling emissions capable of causing any such pollution. The Environmental Permitting (England and Wales) Regulations 2016 were made under this power.

Section 2(1) of the 1999 Act provides that regulations may make provision for any or the purposes listed in Part 1 of Schedule 1 to that Act. Paragraphs 1-19 contain purposes relevant to a permitting regime.

Paragraph 20(1)(b) of Schedule 1 to the 1999 Act also enables regulations made under Section 2 of that Act to make any provision made, or capable of being made under section 2(2) European Communities Act 1972 in connection with “a relevant directive”.

Paragraph 20(2)(c) enables the Welsh Ministers to, by order, designate any EU Directive as a 'relevant directive'. In order to make use of the wider purpose in paragraph 20(1)(b) of Schedule 1 to the 1999 Act, the BSSD 2013 has been designated as a 'relevant directive' - the Pollution Prevention and Control (Designation of Directives) (England and Wales) Order 2017.

Originally powers of the Secretary of State, functions under or in relation to section 2 of the 1999 Act were, in relation to Wales, transferred to the then National Assembly for Wales, except in relation to offshore oil and gas exploration and exploitation, by the National Assembly for Wales (Transfer of Functions) Order 2005 (S.I. 2005/1958). Those functions are now exercisable by the Welsh Ministers by virtue of section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006.

The Environmental Permitting (England & Wales) (Amendment) (No. 2) Regulations 2018 are being made on a composite basis and under the negative procedure.

4. Purpose & intended effect of the legislation

This Instrument amends the 2016 Regulations so as to transpose the revised requirements contained in the Directive, laying down basic safety standards for the protection against the dangers arising from exposure to ionising radiation. The Instrument ensures the highest standards of protection for members of the public from the dangers arising from ionising radiation, whilst also implementing some additional measures to streamline and clarify existing legislation.

Transposing BSSD requirements with regards public radiation exposures into domestic legislation will bring Wales into line with international standards (agreed at the IAEA and in the Euratom BSSD Directive) and will comply with Welsh Government's obligation under the Government of Wales Act 2006 to fully implement EU legislation.

5. Consultation

A UK-wide public consultation on the proposals for transposing the public exposures and justification requirements in the Directive took place between 5 October and 15 November 2017 (six weeks). The consultation included a draft of the proposed amendments to the 2016 Regulations. The consultation asked 12 substantive questions, of which 7 focused on the proposed amendments to radioactive substances regulation.

48 consultation responses were received from professional bodies, industry associations, private and public sector organisations engaged in radioactive substances activities and from individual respondents from across the UK. The majority of consultees supported the proposals. Below is an overview of the general responses from consultees on the proposed changes:

- In relation to the removal of the requirement for information about High Activity Sealed Sources (HASS) to be reported on an annual basis, 57%

of respondents agreed that annual reporting was unnecessary and the frequency of reporting should be reduced. Following consultation, it has decided that the appropriate interval for reporting is 5 years.

- 88% of people agreed with the proposed changes for Naturally Occurring Radioactive Material (NORM) waste, as long as the changes do not impact on public safety. All landfill sites are required to follow the As Low as Reasonably Practicable (ALARP) principle^[1], so the proposed changes do not increase public exposure.
- 84% of consultees agreed that geothermal energy production should be subject to radioactive substances regulation.
- 92% of respondents agreed that changes to reduce the regulatory burden for the remediation of sites contaminated with radium from legacy activities are proportionate. 36% of respondents thought “legacy” should not be defined by reference to a date, but by a description. It was agreed that, if a date were used, this should be the commencement date of the relevant legislation. Prior to the 1996 BSSD coming into force on 13 May 2000, activities involving radioactive substances were subject to less stringent regulation, so this is an appropriate date to use.
- 90% of respondents agreed that it would be proportionate to exempt accumulation and disposal of NORM wastes where flaring and venting are the only radioactive substances activity taking place in oil and gas production.
- The full government response to the consultation can be found at the gov.uk website.

6. Regulatory Impact Assessment (RIA)

A Regulatory Impact Assessment has not been completed for these Regulations. The Regulations implement the Basic Safety Standards Directive (2013/59/Euratom) and failure to implement would risk infraction proceedings against the UK and the associated costs.

The Regulations are considered to be deregulatory, with the proposals around i) additional exemptions for ‘Naturally Occurring Radioactive Material’ (NORM) from certain regulatory requirements and ii) changes to the system for determining which sources are ‘High Activity Sealed Sources’ (HASS) both expected to generate cost-savings for private businesses and the regulators. The Regulations are expected to impose only small additional costs on private businesses operating in Wales, with those costs reflecting the time required for organisations to familiarise themselves with the new requirements.

[1] “As low as reasonably practicable” - this principle of radiation protection involves weighing a risk against the trouble, time and cost needed to control it.