

Explanatory Memorandum to The Waste (Miscellaneous Provisions) (Wales) Regulations 2011.

This Explanatory Memorandum has been prepared by Department for Environment and Sustainability and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Waste (Miscellaneous Provisions)(Wales) Regulations 2011. I am satisfied that the benefits outweigh any costs.

JANE DAVIDSON AM

Minister for the Environment, Sustainability and Housing

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1. Description

These Regulations are supplementary to The Waste (England and Wales) Regulations 2011. They make amendments to several Welsh Statutory Instruments, and revoke one Welsh instrument, for the purposes of transposing for Wales, EC Directive 2008/98/EC on Waste, known as the revised Waste Framework Directive (rWFD).

2. Matters of special interest to the Constitutional Affairs Committee

The 21-day rule has not been complied with in the making of these Regulations. The Minister for Business and Budget has written to the Presiding Officer notifying him of the reasons pertinent to the breach.

In summary, it was necessary, in order to provide a timely, consistent and complete transposition of the rWFD, for these Regulations to contain references to provisions of (and to be made and to come into force at the same time as) the Waste (England and Wales) Regulations 2011. As those Regulations have been made under the affirmative procedure, but it would not have been appropriate to apply that procedure to these Regulations, it has followed that simultaneous making and coming into force could only be achieved by breach of the 21 day rule.

3. Legislative background

The Regulations are made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972. Section 59(2) of the Government of Wales Act 2006 empowers the Welsh Ministers to exercise the section 2(2) powers if they have been appropriately designated for the purposes of section 2(2). The Welsh Ministers have been designated in relation to the prevention, reduction and management of waste. The relevant Designation Order is SI 2010/1552. By virtue of section 59(3) of the 2006 Act, 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. As the Regulations make provision for supplementary consequential amendment and revocation, and do not amend an Act of Parliament, the Welsh Ministers have determined that the Regulations are to be subject to the negative procedure.

4. Purpose & intended effect of the legislation

The rWFD is being transposed principally through a composite SI, The Waste (England and Wales) Regulations 2011. The Waste (England and Wales) Regulations 2011 (“the 2011 England and Wales Regulations”) are subject to the Affirmative Resolution Procedure. They were laid in draft before the Assembly on 8 February 2011 and, following debate in Plenary and approval by the Assembly on the 8 March 2011 were made on 28 March 2011. They came into force on 29 March 2011. These Regulations transpose in England and Wales the revised WFD and in addition revise or repeal existing legislation in place which transposed the original WFD.

The Waste (Miscellaneous Provisions)(Wales) Regulations 2011 are required in order to make a number of consequential amendments to Welsh SI's, revoke The Environmental Protection (Duty of Care) (Wales) (Amendment) Regulations 2003 and to transpose changes introduced in the rWFD to the Hazardous Waste Directive. The provision made by the Regulations is equivalent in effect to provision made by the 2011 England and Wales Regulations in relation to England-only legislation. Separate legislation is required for Wales as provision in relation to Welsh instruments must be made bilingually, and the UK Government, for administrative reasons in the context of the transposition timetable, were unwilling to include such amendments in the 2011 England and Wales Regulations. The Regulations are therefore supplemental to the 2011 England and Wales Regulations and should be considered alongside them.

The Waste (Miscellaneous Provisions)(Wales) Regulations 2011:

1. Amend the Landfill Allowances Scheme (Wales) Regulations 2004,
2. Amend the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005,
3. Amend the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009
4. Amend the List of Waste (Wales) Regulations 2005
5. Amend the Hazardous Waste (Wales) Regulations 2005,
6. Revoke the Environmental Protection (Duty of Care) (Amendment) (Wales) Regulations 2003

The amendments to the regulations listed at 1-4 are minor, essentially substituting references to the original WFD with references to the "new" rWFD and (in the Town and Country Planning (Local Development Plan)(Wales) Regulations 2005) to substitute a new definition of "Waste Strategy for Wales" so as to align it with the requirements for Waste Management Plans contained in the rWFD.

The revocation at 6 is consequential to the revocation, by the 2011 England and Wales Regulations, of the Environmental Protection (Duty of Care) Regulations 1991. The 2003 Regulations, which are revoked, made provision only to amend the 1991 Regulations in relation to Wales. The equivalent England-only instrument (the Environmental Protection (Duty of Care) (England) (Amendment) Regulations 2003) is revoked by the 2011 England and Wales Regulations.

The changes to the Hazardous Waste Regulations 2005 are required because whilst the rWFD repeals and re-enacts the Hazardous Waste Directive and the Waste Oils Directive, it also introduces some changes which impact on the management of hazardous waste. The Hazardous Waste (England and Wales) Regulations 2005 and the Hazardous Waste (Wales) Regulations 2005 already transpose the Hazardous Waste Directive and are largely effective to transpose all the requirements of the provisions in relation to the management of Hazardous Waste in the rWFD. However some amendments are required to the Hazardous Waste Wales Regulations. These amendments

are the same in England and Wales. The 2011 England and Wales Regulations will make the necessary Hazardous Waste amendments for England and these Regulations will make the Hazardous Waste amendments for Wales. The amendments made by these Regulations are of necessity technical and fragmented in nature. They comprise various minor amendments to update references and definitions, but in addition some more substantive amendments are made: the following paragraphs describe their nature and effect:-

Article 17 of the rWFD requires Member States to *“take the necessary action to ensure that the production, collection and transportation of hazardous waste...including action to ensure traceability from production to final destination...”*. (i.e. cradle to grave tracking).

Cradle to grave tracking enables the Environment Agency to verify that businesses have handled their hazardous waste properly to prevent it from harming the environment, to have passed it only to someone authorised to deal with it and to have correctly entered the details of the waste on the consignment note so as to help others know how to handle it. These provisions are currently transposed in the Hazardous Waste (England and Wales) Regulations 2005 (in relation to England) and the Hazardous Waste (Wales) Regulations 2005 (in relation to Wales). However, where hazardous waste is collected from multiple premises on a single journey, it has become apparent that the system of associated paperwork provided for in the 2005 Regulations does not provide the Environment Agency with a fully effective cradle to grave tracking system format in the context of the rWFD requirements. The Regulations therefore amend the procedures in the current system for tracking multiple consignments by providing for a revised multiple consignment system which removes the requirement for a multiple collection summary note. This is because post-consultation research has confirmed that the summary note is not an essential requirement for cradle-to-grave monitoring movements of hazardous waste – however, the new requirement for a round number to be included on the consignment note and in the consignee returns will ensure the requisite cradle-to-grave tracking of hazardous waste.

Article 4(1) of the rWFD requires the application of a five step waste hierarchy as a priority order. To assist in meeting this requirement, the Regulations provide for the revised consignment notes to include a declaration to ensure that, when hazardous waste is transferred between owners, the person transferring the waste confirms they have applied the waste hierarchy as a priority order when taking their decision on the treatment option to which the waste is being consigned.

The new consignment note is provided at Part 3 of the Schedule to the Regulations.

Article 18 : Ban on the mixing of hazardous waste

The controls on hazardous waste in the rWFD are similar to those in the existing Hazardous Waste Directive. However, Article 18(2) of the rWFD introduces an additional condition that must be met to allow a derogation from the ban on mixing hazardous waste, which is that the mixing operation must conform to best available techniques.

The rWFD also provides that the reclassification of hazardous waste as non-hazardous waste may not be achieved by diluting or mixing the waste with the aim of lowering the initial concentrations of hazardous substances to a level below the thresholds for defining waste as hazardous. Although Part 4 of the Hazardous Waste (Wales) Regulations 2005 bans the mixing of hazardous waste unless it is permitted as part of a disposal or recovery operation, it does not account for diluting waste with the intention of lowering the initial concentrations of hazardous substances to a level below the thresholds for defining waste as hazardous.

The Regulations therefore amend the 2005 Regulations to transpose the new dilution requirements and it is proposed to issue, jointly with the UK, revised guidance on dilution.

The Hazardous Waste (Wales) Regulations 2005 are also amended to transpose the requirement of Article 21(1)(c) of the rWFD so that where technically feasible or economically viable, waste oils are not mixed with other kinds of waste or substances, if such mixing impedes their treatment.

Article 20 : Hazardous waste produced by households

The rWFD uses the term “hazardous waste produced by households” whereas the Hazardous Waste (Wales) Regulations 2005 refer to “domestic waste”. The Assembly Government and the UK Government consider the two terms to be equivalent and the 2005 Regulations will maintain the term “domestic waste”. However, the Regulations insert into the 2005 Regulations a definition to the effect that “domestic waste” means “waste produced by a household”. Guidance will be produced to avoid the potential for confusion with the wider definition of “household waste” which includes waste from universities, schools and hospitals.

Dealers and brokers

Article 35 of the rWFD sets out record keeping requirements. These are similar to those set out in the Hazardous Waste (Wales) Regulations 2005. However, the requirement now extends to hazardous waste dealers and brokers. They are now required to keep records of the quantity, nature and origin of the waste, and, where relevant, the destination, frequency of collection, mode of transport and treatment method foreseen in respect of the waste, and to make that information available, on request, to the competent authorities. To transpose this new requirement, the Regulations amend regulation 49 of the Hazardous Waste (Wales) Regulations 2005.

The Environment Agency currently handles brokers in the same way as it handles carriers. They can register with the Agency either as a carrier, carrier/broker or broker. Where dealers/brokers register as carriers or carrier/brokers, they can consign waste on behalf of the producer and where they do this are required to keep a copy of the relevant documentation for 3 years at their principal place of business. In such cases the new requirement may make little practical difference, but the overall impacts of this change are not yet known. The view of the Assembly Government and the UK Government,, which is shared with the Environment Agency, is that for the time being it will be sufficient to adopt a pragmatic monitoring approach towards the implementation of this new requirement in order to ensure a proportionate application of Article 35.

Retention of consignment notes

In the Hazardous Waste (Wales) Regulations 2005, operators and transfer stations are required to keep consignment notes for the life of the site. This means that they are accumulating large quantities of notes. The Assembly Government and the UK Government consider that there is no reason for these types of facilities to keep the notes for such a length of time. The Regulations therefore amend the 2005 Regulations so that the period for which all treatment facilities (i.e. facilities carrying out disposal or recovery of hazardous waste), except landfills, are required to retain consignment notes is 5 years rather than the life of the site.

There are some recovery operations that can take place at the site of a landfill, and for which the permit may be consolidated. Where this is the case, the time limit in relation to recovery will require retention of the consignment note for the life of the permit.

Hazardous Waste Properties

Annex III to the rWFD also introduces changes to hazardous properties. These changes are given effect by these Regulations.

Risks

There are risks if this instrument is annulled. Member States are required to transpose the rWFD by 12 December 2010. The UK has not met that deadline and the European Commission is likely to begin infraction proceedings early in 2011, which if successful carry the risk of substantial fines being awarded against the UK (of which the Assembly Government would be expected to meet a proportionate part in accordance with its responsibilities for transposition and failure to do so). The UK Government and the Assembly Government are transposing the rWFD, through the 2011 England and Wales Regulations 2011 and these Regulations. It follows that although these Regulations comprise only a limited element of the transposition, they are essential to it and their annulment would amount to a substantive transposition failure. Moreover, in a domestic context, annulment of these Regulations would result in an incomplete and ineffective regime and

thus cause substantive prejudice to business, public authorities and other sectors.

5. Consultation

Two consultations were held on the transposition of the rWFD: the second consultation included the proposed amendments to the Hazardous Waste Regulations in England and Wales.

There were 87 responses to the stage one consultation from people/organisations living/operating on a Wales only basis plus those who operate on an England and Wales basis. The responses were submitted by a wide cross section of stakeholders, ranging from private individuals, public bodies, large waste management companies, small third sector organisations and campaign groups. Information about the stage one consultation, and the report summarising the responses to that consultation, are available at: <http://wales.gov.uk/consultations/environmentandcountryside/stage2waste/?lang=en>

The responses to the stage one consultation were considered and taken into account in the preparation of the stage two consultation proposals.

There were 166 responses to the stage two consultation across England and Wales. Generally, the responses received to the consultation did not differentiate between England and Wales. Many of the organisations who replied operate on an England and Wales basis. The responses were submitted by a wide range of stakeholders, including businesses, public bodies and trade associations. 9 respondents covered Wales only. Information about the stage two consultation, and the report summarising the responses to that consultation, are available at: <http://wales.gov.uk/consultations/environmentandcountryside/stage2waste/?lang=en>

The responses to the stage two consultation have been considered and taken into account in preparing the 2011 England and Wales Regulations and these Regulations.

6. Regulatory Impact Assessment (RIA)

These Regulations are supplemental to the regulations that are principally responsible for transposing the rWFD i.e. the 2011 England and Wales Regulations, which are being made on a composite basis with England. The Impact Assessment of the 2011 England and Wales Regulations has been progressed and completed on an England and Wales basis and sets out the costs and benefits associated with the policy options adopted in relation to the entirety of the transposition of the rWFD. Accordingly, an RIA has not been completed for these Regulations because the costs and benefits of the policy options covered by their provisions have been assessed in the Impact

Assessment of the 2011 England and Wales Regulations and were consulted on as detailed above in section 5.

The Impact Assessment indicates that the impact on business, charities and voluntary bodies is limited because the revised WFD principally re-enacts existing waste management controls and there are no additional costs for businesses etc in continuing to comply with these controls.

In terms of the proposed change, within the Hazardous Waste regulations, to the use of a standard single consignment note to track movements of hazardous waste that form part of a multiple consignment round, the Impact Assessment indicates that there will be reduced costs for a typical business currently using the statutory regulatory procedure. It follows that making the changes through these Regulations to a single consignment note will result in a reduction of administration costs to a typical business. If this is projected to the 846 businesses across England and Wales reporting multiple collections this will result in a national cost reduction of £3,045,600.