

Explanatory Memorandum to the Bathing Water (England and Wales) Regulations 2013

This Explanatory Memorandum has been prepared by the Department for Natural Resources & Food and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standard Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Bathing Water (England and Wales) Regulations 2013.

I am satisfied that the benefit outweigh any costs.

Alun Davies - Minister for Natural Resources and Food

28 June 2013

1. Description

These Regulations revoke and replace the Bathing Water Regulations 2008 (S.I. 2008/1097).

This remake of the Regulations remove the responsibilities from private owners of land adjacent to bathing water (small businesses, charities and other private persons in England and Wales) and give the relevant local authority responsibilities for the duties of the bathing water controller including responsibility for public information at the bathing water.

These Regulations bring into force Commission Implementing Decision 2011/321/EU of 27 May 2011, establishing, pursuant to Directive 2006/7/EC of the European Parliament and of the Council, a symbol for information to the public on bathing water classification and any bathing water advice against bathing. The Decision sets the symbols which are to be used at all bathing waters in Europe to advise the public on the quality of the water and advice against bathing for bathing waters where the water quality is poor. In Wales and England the “bathing prohibited” signs will not be used.

These Regulations also contain a number of changes to better reflect the exact wording of the Bathing Water Directive in response to a challenge from the Commission on the transposition of the Directive (2006/7/EC (OJ No L 64, 4.3.2006, p 37),

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

The legislation is being made on a composite basis as the Regulations are required to implement the Community law and it is desirable to have a common England and Wales regulatory regime which covers transposition of the Directive.

Section 3 of this Memorandum explains that 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 do not amend any provision of an Assembly Act or Measure. They do not impose obligations of special importance. Accordingly, the Welsh Ministers have determined that these Regulations are to be subject to the negative resolution procedure.

3. Legislative background

The National Assembly for Wales was designated (for the purpose of section 2(2) of the European Communities Act 1972) in relation to measures relating to water resources by the European Communities (Designation) (No.4) Order 2003/2901. That designation is now a designation of the Welsh Ministers by virtue of sections 59 and 162 of, and paragraph 28 of Schedule 11 to, the Government of Wales Act 2006.

These Regulations are subject to the negative resolution procedure.

The Bathing Water Directive 2006/7/EC requires, amongst other requirements, public information on water quality to be displayed in the near vicinity of all designated bathing waters. The purpose of the Directive is to preserve, protect and improve the quality of the environment and to protect human health by complementing the Water Framework Directive 2000/60/EC.

There are currently 100 designated bathing waters in Wales, 90 of which are controlled by 12 different local authorities ("LAs"). Ten are privately controlled, by eight different private controllers. Over the last two years the Welsh Government has received a total of 40 applications for bathing water designations with 19 demonstrating the requirements of the Directive for designation. It is expected that this trend will continue.

From 15 May 2012 **all** bathing water controllers, both LAs and private controllers, have been required to display, during the bathing season, information/signage offering a brief description of sources of pollution affecting the bathing water quality at designated bathing water sites. These descriptions were based on Natural Resources Wales profiles and enable bathers to make an informed decision on where and when to bathe. The information includes:

- The bathing water classification (currently in accordance with the old Directive 76/160/EEC)
- Any advice against bathing that has been introduced there, with reasons;
- A general description of the bathing waters based on its bathing water profile;
- Information on abnormal situations and their expected duration; and
- Information on where to find more detailed information.
- Specified information/warnings concerning short-term pollution.

An additional requirement under the Directive will need to be met from the 2016 bathing season, whereby all bathing water controllers will be required to display the appropriate symbol for the bathing water classification ('excellent', 'good', 'sufficient' or 'poor'). This will show the classification received at the end of the previous year's bathing season. At bathing waters classified as 'poor', the symbol for 'advice against bathing' must also be displayed. It is also anticipated that the information at all designated bathing water sites will be subject to ongoing changes to ensure that bathers have the most recent information available to them.

In 2011, to assist bathing water controllers to meet their information obligations, the Welsh Government made funding available for all bathing waters in Wales that were so designated prior to the 2011 bathing season. This funding represented a one-off payment for the 88 bathing waters designated prior to the 2011 bathing season and does not apply to any newly designated bathing waters after that date. The funding

was intended to cover the full cost of providing the required signage so as to reduce the financial burden of the water quality information requirement on bathing water controllers. The expectation was that signage should already be in place for the 2012 information requirements set out in the Directive. The Welsh Government also made a recommendation that signs should include space for a moveable panel or sticker to be added in order to meet the additional information requirements that will apply from the 2016 bathing season, minimising any future costs to bathing water controllers.

4. Purpose & intended effect of the legislation

The current regulations require compliance with the Directive by a range of organisations, individuals and co-owners of bathing water sites. This means that in some cases the process of identifying a controller of a bathing water site can be complex. In these instances there is a risk of non-compliance with the requirements of the Directive, and potential infraction proceedings, due to lack of clarity about where responsibilities under the Bathing Water Regulations 2008 lie.

The principle difference between these Regulations and the Bathing Water Regulations 2008 is that responsibility for the duties of the bathing water controller (including responsibility for public information at the bathing water) is removed from private owners in England and Wales and is placed on the relevant local authority.

Going forward, with the additional information requirement under the Directive being introduced from the start of the 2016 bathing season, there is a risk that private controllers may not understand their obligations or may not be willing or able to meet the costs of displaying this information, especially if further privately controlled bathing waters become designated. This could lead to the water quality information not being made publicly available at certain designated bathing waters and could create a potential public health risk for bathers using the sites. It could also put Wales at risk of not fully complying with the Directive.

In addition, signs provided by a range of different organisations will lack consistency, making it more difficult for bathers to understand and compare information between bathing waters. **The regulatory change proposed in the regulatory impact assessment (RIA) is for control¹ of bathing waters to be transferred to LAs** where they are not currently the controller, making the provision of bathing water quality information more consistent across Wales. LAs would not be expected to

¹ The bathing water controller, under the Bathing Water Regulations 2008, has “*control of the land immediately adjacent to the bathing water which is normally used to access the bathing water from the landward side and, where the bathing water is tidal, control of such land above the high water mark*” (Reg 2.1 (b)). The bathing water controller is responsible for providing the water quality information in the vicinity of designated bathing water sites.

assume any other management responsibilities at bathing waters over and above those set out in the Bathing Water Regulations 2008.

The objectives of the proposed regulatory change to bathing water controller responsibilities are:

- that all designated bathing waters display the water quality information required by the Directive as a minimum;
- that information is provided in such a way as to minimise costs and the administrative burden for all bathing water controllers, especially those currently defined as 'private controllers' (including small businesses, charities and individuals);
- there is consistency in presentation of the water quality information;
- that public information about water quality is displayed at bathing water sites to enable individuals to make informed decisions on where and when to bathe
- that the Welsh Government complies fully with the Directive

These Regulations implement the Commission Implementing Decision 2011/321/EU of 27 May 2011, establishing, pursuant to the revised Bathing Water Directive (2006/7/EC) of the European Parliament and of the Council, a symbol for information to the public on bathing water classification and any bathing water prohibition or advice against bathing

These Regulations also contain a number of changes when compared to the Bathing Water Regulations 2008 to ensure that the Regulations properly reflect the wording of the Bathing Water Directive 2006/7/EC in response to a challenge from the Commission on the transposition of that Directive .

5. Consultation

Details of the consultation are included in the Regulatory Impact Assessment.

PART 2 – REGULATORY IMPACT ASSESSMENT

Policy Options under Consideration

1. This RIA compares the proposed regulatory change option with the counterfactual 'do nothing' option, such that two options are presented in this RIA:
 - **Option 1** – 'Do nothing' baseline (counterfactual). Involves no change to current position, i.e. all responsibility rests with the current bathing water controllers, be they private or LAs, as per the current regulations.
 - **Option 2** – Regulatory change to transfer bathing water controller responsibility to LAs, requiring them to provide information at all designated bathing waters (including those that are privately controlled) in Wales.
2. The baseline number of designated bathing waters in Wales is 100 - the current (in August 2012) 90 that are the responsibility of LAs and the current 10 that are the responsibility of private controllers. It is assumed that, going forward, 10 new bathing waters will be designated each year.
3. The preferred option is Option 2, to introduce regulatory change that transfers bathing water controller responsibility from private owners to LAs. This is because the Welsh Government feels there is a risk of the required information not being provided at a number of privately controlled bathing waters, owing either to the cost and burden to small businesses and/or the willingness of private controllers to provide the information. It is important that the information requirements are adhered to in order to fully comply with the requirements of the Directive.
4. It is recommended that Option 2 is taken as the Welsh Government needs to take steps to ensure that the required information on water quality is provided at all bathing waters in Wales, both to enable bathers to make an informed decision about where and when to bathe and to comply with the Bathing Water Directive. Not providing this information would leave the public unaware of any potential problems with bathing water quality, which may pose a public health risk. In addition, it would mean that Wales would not be able to report full compliance with the signage elements of the Directive to the European Commission.
5. The signage requirements impose a duty of action and an associated cost on those who privately control designated bathing waters. These private owners may find it difficult and/or costly or be unwilling to provide the water quality information required by the Directive in the future – particularly once the additional signage requirements come into effect from the start of the 2016 bathing season. The burden on an individual controller of understanding and meeting the requirements of the Bathing Water Regulations 2008 (in order to procure and provide

appropriate signage at a single site) is greater than for an LA which is likely to have multiple sites and can benefit from 'economies of scale'.

6. It has been identified that in some circumstances there is a lack of clarity as to where controller responsibility rests, especially where bathing water sites are in co-ownership. The combination of this lack of clarity and the expected increase in requests for designation introduces a current and potentially growing risk of some private bathing water controllers failing to meet the requirements of providing public information on water quality at these sites.
7. The objectives of the proposed regulatory change, Option 2, are:
 - that all designated bathing waters display the water quality information required by the Bathing Waters Directive as a minimum;
 - that information is provided in such a way as to minimise costs and the administrative burden for all bathing water controllers, especially those currently defined as 'private controllers' (including small businesses, charities and individuals);
 - there is consistency in presentation of the water quality information;
 - that public information about water quality is displayed at bathing water sites to enable individuals to make informed decisions on where and when to bathe.

Costs and Benefits of each Option

Option 1 – 'Do Nothing'

8. Costs arising under the existing baseline fall mainly to local authorities ("LAs") and private controllers of designated bathing waters. The Welsh Government has already made funding available to LAs and private controllers with the intention of meeting the one-off costs of the water quality information requirements under the Bathing Water Regulations 2008 that came into force on 24 March 2012. It is thus assumed that all bathing water controllers have, or will have, claimed the necessary amount needed to meet their current signage obligations.
9. The main one-off cost to bathing water controllers under the 'do nothing' option is linked to the requirement to update their signs accordingly to meet the additional information obligations set out in the Directive, which will need to be in place from the start of the 2016 bathing season. It is assumed that, based on the Welsh Government recommendation made in 2011, all existing designated bathing water controllers will have taken these future changes into account and allowed for a moveable panel or sticker on their current signs in order to meet these additional information requirements. It is thus anticipated that the costs of meeting these requirements will be minimal.
10. However, where the advice from the Welsh Government has not been heeded, it is estimated that the one-off cost of producing a whole new sign to display all the

required information in 2016 could be up to £450² (current prices) for each designated bathing water site. As a maximum, if all the current 100 designated bathing water sites require new signs in 2016, along with the potential 10 new designations we estimate to have been made in each year between 2012 and 2015, the total one-off cost in 2016 could be up to £63,000 (140 x £450). These costs would fall to the relevant bathing water controllers under the ‘do nothing’ option (up to £6,300 to private controllers and up to £56,700 to LAs). However, it is assumed that a majority of controllers will have accounted for the known future additional signage requirements for 2016 and, as such, this estimated total cost is unlikely to be fully realised.

11. Potential recurring costs could arise for bathing water controllers under the ‘do nothing’ option, for instance when changes to signage is needed (e.g. maintenance or additional upgrading), although these are also expected to be minimal.
12. There is also a high potential cost associated with the ‘do nothing’ option if the bathing water quality information requirements under the Directive are not met. The potential difficulties associated with private controllers meeting their information obligations means that there is a potential risk of infraction. Therefore the ‘do nothing’ option is not preferable.

Option 2 – ‘Regulatory Change’

13. Additional costs (relative to the baseline) arising under the proposed regulatory change (option 2) are expected to be minimal. Costs arising for private controllers under the ‘do nothing’ option will simply be transferred to LAs under option 2. LAs will be the group mainly affected by any additional costs arising from the proposed changes, with very minimal potential costs of enforcement arising for the Welsh Government.

Costs to Local Authorities

14. Since only 10 of the 100 currently designated bathing waters in Wales are privately owned, with approximately 10 new designations expected per annum, the proposed regulatory change is expected to have a minimal impact on LAs. Table 1 sets out the LAs which would be impacted by the proposals, in gaining additional controller responsibilities for currently designated bathing waters. Since all of the LAs shown in Table 1 already hold controller responsibilities, the additional costs arising under option 2 are expected to be minimal.

Table 1 – Number of bathing waters to be transferred to LA control

Local Authority	Number of bathing waters they would gain controller responsibility for
Pembrokeshire County Council	3

² This figure is based on an estimate provided in Defra’s Impact Assessment of amendments to the definition of bathing water controller. We have added £60 to Defra’s £390 per bathing water estimate, to account for additional bilingual obligations in Wales.

Bridgend County Borough Council	2
Isle of Anglesey County Council	1
Vale of Glamorgan County Council	1
City and County of Swansea	2
Carmarthen County Council	1

15. This RIA highlights that relatively small costs are involved with the proposed regulatory change and hence a 'light touch' approach to the analysis has been adopted.
16. Through the transfer of control of designated bathing waters, LAs will incur additional one-off costs when new privately-owned bathing waters are designated, through having to ensure water quality information is displayed within the vicinity. Under the 'do nothing' option this cost would fall to the private controller of the bathing water, so this is essentially a transfer of cost from one party to the other.
17. Table 2 shows the number of current and estimated future bathing water designations by type of controller. There are currently only 10 privately controlled designated bathing waters and it is estimated that only one privately controlled new designation will be made per annum, so the costs that will be transferred to LAs under option 2 are expected to be relatively minor. In terms of new designations, for example, LAs will pick up the additional annual cost of signage for the one new privately owned designation (£450), and the potential 2016 signage costs of the 10 privately owned current designations (£4,500).
18. Table 2 also suggests that there will not be any overall additional information provision costs arising under option 2 compared to the baseline, since signage costs will simply be transferred from private owners to LAs as controllers of designated bathing waters. The total signage costs are upper estimates based on *all* designated bathing waters requiring new water quality information signs in 2016 to fulfil the additional requirements of the Directive. In reality, the total cost is likely to be much lower, although the overall outcomes will be the same (i.e. the cost impact of the regulatory change is expected to be neutral).

Table 2 – Current and New Bathing Water Designations and Signage Costs by Controller (2012 prices)

	Current designations in 2012 (signage costs incurred in 2016)	New designations per annum (2012-2015)
Option 1		
Privately Controlled (number)	10	1
LA Controlled (number)	90	9
Total Signage Costs – Private	£4,500	£450
Total Signage Costs – LA	£40,500	£4050
Total signage costs by 2016	£45,000	£18,000

Option 2		
Privately Controlled (number)	0	0
LA Controlled (number)	100	10
Total Signage Costs – Private	0	0
Total Signage Costs – LA	£45,000	£4,500
Total signage costs by 2016	£45,000	£18,000

Note: Total signage costs for current designations (both options) are upper estimates and are based on all current bathing water designations requiring new signage to meet the 2016 information requirement (i.e. 100 designated bathing waters x £450 signage cost).

19. However, the overall cost to LAs providing the required water quality information instead could in fact be relatively lower than the cost to private controllers under the 'do nothing' option, owing to the fact that many LAs hold controller responsibilities already, are likely to have multiple sites and can benefit from potential economies of scale. It is therefore anticipated that the additional costs to LAs associated with option 2 will be minor, and indeed relatively smaller than the costs arising for private owners under the 'do nothing' option, leading to a benefit under option 2. This assumption is supported by the fact that many LAs have not claimed under offer of funding made available by the Welsh Government in 2011, suggesting that they are able to absorb the costs of the water quality information requirements fairly easily.

Benefits to Private Owners

20. Existing private owners of designated bathing waters are expected to benefit in monetary terms from the changes under option 2 since they will no longer have to incur future costs arising from the information requirements set out under the Directive. However, it is anticipated that a majority of existing private controllers would have accounted for the changes due in 2016 when producing their existing signage and perhaps would have made use of the funding available from the Welsh Government in 2011. Hence, avoided costs in 2016 for private owners of existing designated bathing waters are estimated to be minimal.

21. Private owners of new bathing waters designated between 2012 and 2015 will also benefit under Option 2 from the avoided cost of providing the required water quality information, since this responsibility will instead fall to LAs. However, a majority of new bathing water designations are currently controlled by LAs; private owners are not always aware of the designation process or find it overly burdensome. Since 10% of currently designated bathing waters are privately controlled³ it is assumed that, as a maximum, 10% of new designations between 2012 and 2015 will also be privately controlled (i.e. one out of the ten estimated new designations per annum). It is estimated that signage to display the required bathing water quality information costs around £450 per designated bathing water site, so the potential cost saving to private controllers of newly designated bathing waters is £450 per annum between 2012 and 2015.

³ In 2012, 10% of the existing designated bathing waters are privately controlled (10 out of the 100) and 90% are controlled by LAs.

22. Private controllers of designated bathing waters will also benefit from no longer having to make themselves aware of the water quality information obligations or having to seek specialist advice from Natural Resources Wales on the requirements. It is anticipated that time and cost savings will arise as a result, although it has not been possible to quantify these for the purpose of this RIA due to lack of available evidence at this stage.

Benefits to the Public

23. Potential public health benefits could also be realised by the public if bathing water quality information is displayed at newly designated bathing sites, since bathers will be more informed about where and when to bathe. Public health benefits that are additional to the baseline are only likely to arise where water quality information is not currently available, or would not have been available under the 'do nothing' option. Option 2 will therefore only generate a potential public health benefit if it leads to water quality information being displayed where it previously was not, or if better quality information is provided.

24. The public will also benefit from the consistency of signage across designated bathing water sites in Wales under Option 2, potentially making the water quality information more accessible and easier to understand. This in itself could also lead to a potential public health benefit if bathers are able to make better informed decisions about where and when to bathe.

Overall Assessment of Option 2

25. Additional costs relative to the baseline will arise for LAs under option 2 with the transfer of control of designated bathing waters. Since the cost of the water quality information requirements will simply be transferred from private controllers to LAs, it is anticipated that the overall cost impact of option 2 will be neutral. However, the transfer of cost to LAs under option 2 could in fact result in a net benefit since it is anticipated that LAs may be able to fulfil the water quality information requirements at a relatively lower cost than private controllers.

26. Additional benefits relative to the baseline are likely to arise to the public (bathers) from having more consistency of signage across Wales and from having water quality information displayed at newly designated bathing sites. Private owners will also benefit in monetary terms from no longer having to fulfil costly water quality information requirements.

27. Perhaps the most significant benefit arising under option 2 is the expected increase in compliance with the Bathing Water Directive as a result of bathing water controller responsibilities being transferred to LAs. Option 2 is likely to substantially reduce the level of non-compliance with the Directive and hence to reduce the risk of infraction. Hence, option 2 is the preferred option and it is recommended that bathing water controller responsibilities are transferred to LAs in order to meet the objectives of the policy.

Uncertainty in New Designations

28. The main uncertainty associated with the economic assessment of the proposed regulatory option is the number of new bathing water designations estimated to arise each year. The estimated number of new designations is based on the 40 actual applications received by the Welsh Government in the last two years (as of August 2012).
29. 19 of the 40 applications received demonstrated the designation requirements of the Directive. Hence it is assumed, for the purpose of analysis, that around 10 new designations are likely to arise in each year between 2012 and 2015. However, there is some uncertainty associated with this estimate, to the extent that the number of designations could in fact be higher (or lower) in any given year. Any increase from the estimated 10 new designations per annum, however, is likely to be marginal and is unlikely to have any substantial impact on the overall costs of option 2.

Specific Impact Assessments

Small Firms Impact Test

30. Under the 'do nothing' option, small businesses/private controllers have to fulfil the water quality information requirements as set out in the Bathing Water Directive. Option 2 will reduce this administrative and cost burden on small businesses since it will transfer bathing water controller responsibilities to LAs.
31. Option 2 will also reduce the risk of non-compliance with the Directive since many small firms are currently unaware of their responsibilities under the Bathing Water Regulations 2008.

Health and Wellbeing

32. Option 2 is anticipated to increase the level of compliance with the water quality information requirements set out in the Directive, to the extent that their could be public health benefits arising as a result of improved water quality information being displayed. Along with the improved consistency of signage across Wales, this will make it easier for the public to decide where and when to bathe.

Welsh Language

33. The assessment of the preferred option (option 2) in this Impact Assessment accounts for the estimated costs of producing bilingual water quality information signs. Since controller responsibilities will be transferred to LAs under option 2, it is not anticipated that there will be any additional Welsh language impacts arising under the preferred option.

Summary of Specific Impact Tests

Test	Impact
Statutory Equality Duties	None
Economic Impacts - competition	None
Economic Impacts – Small firms	Yes
Environmental Impacts - GHG	None
Environmental Impacts – Wider environmental issues	None
Social Impacts – Health and well-being	Yes
Social Impacts – Human rights	None
Social Impacts – Justice system	None
Social Impacts – Rural proofing	None
Sustainable development	None
Welsh Language	Minor

Consultation

34. The Welsh Government undertook a targeted consultation (15 August to 26 September 2012) on proposed changes to the Bathing Water Regulations 2008.
35. The consultation letter was sent to all local authorities, private organisations and individuals defined as a bathing water controller under the Bathing Water Regulations 2008, and to local authorities who would be brought into the definition by the proposed amendments.
36. The aim of the consultation was to seek views on transferring the responsibilities for providing information about water quality and potential sources of pollution at designated bathing waters from private bathing water owners to local authorities in Wales.
37. Five responses were received, of those responses four supported the proposal to move bathing water controllers' responsibility under the Directive at privately owned bathing waters to local authorities, with one response objecting to the proposal.
38. The majority of responses who supported transferring responsibility to local authorities (option 2) identified that this proposal would ensure consistency of practices across designated bathing waters and would assist private beach controllers. It was also stated that option 2 would ensure that appropriate signage and current and relevant information relating to water quality is being appropriately displayed.
39. The proposed change to the regulations would mean that local authorities would be responsible for ensuring that the required information is present and correct at all designated bathing waters in Wales. It does not mean that local authorities would be expected to take on any additional responsibilities at privately owned bathing waters, other than those specified in the Directive.

40. Local authorities will have no powers of enforcement as a consequence of these changes. Where non-compliance with the Directive is identified, power of enforcement will remain with the Welsh Ministers.

Post Implementation Review

41. Natural Resources Wales are responsible for monitoring and enforcement carried out under the Bathing Water Regulations 2013. They report to the Welsh Government annually. These regulations will be reviewed five years after they are laid.