

Explanatory Memorandum to The Waste (Meaning of Recovery) (Miscellaneous Amendments) (Wales) Regulations 2016 and The Marine Licensing (Exempted Activities) (Wales) (Amendment) Order 2016.

This Explanatory Memorandum has been prepared by the Department of Environment and Sustainable Development 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's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Waste (Meaning of Recovery) (Miscellaneous Amendments) (Wales) Regulations 2016 and The Marine Licensing (Exempted Activities) (Wales) (Amendment) Order 2016.

Lesley Griffiths
Cabinet Secretary for Environment and Rural Affairs

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1. Description

The Waste (Meaning of Recovery) (Miscellaneous Amendments) (Wales) Regulations 2016 and The Marine Licensing (Exempted Activities) (Wales) (Amendment) Order 2016 implements Commission Directive EU 2015/1127 which makes changes to Annex II of Directive 2008/98/EC (of the European Parliament and of the Council) on waste and repealing certain Directives¹ (“the Waste Directive”). These changes take effect from 31 July 2016.

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

These statutory instruments follow the negative procedure and are subject to annulment by the National Assembly for Wales. The Marine Licensing (Exempted Activities) (Wales) (Amendment) Order 2016 will be made under section 2(2) of the European Communities Act (ECA) 1972 (c 68). The Waste (Meaning of Recovery)(Miscellaneous Amendments)(Wales) Regulations 2016 is being made under the ECA and other enabling powers. The Welsh Ministers consider that it is appropriate to follow negative Assembly procedure when using the ECA powers because the purpose of these instruments is to implement EU obligations, which are minor and technical in nature, and have limited or no impact in Wales. The other enabling powers require the negative procedure to be followed.

3. Legislative background

The Welsh Ministers make both these instruments in exercise of the powers conferred by section 2(2) of the ECA 1972, and in the case of the Waste (Meaning of Recovery)(Miscellaneous Amendments)(Wales) Regulations 2016, also section 2 and Schedule 1 of the Pollution Prevention and Control Act 1999, sections 11, 12 and 13 and 36 of the Waste Emissions and Trading Act 2003 and sections 5 and 19 of the Waste (Wales) Measure 2010.

The Welsh Ministers are designated for the purposes of section 2(2) ECA 1972, in relation to the prevention, reduction and management of waste (S.I. 2010/1552) and to the prevention, reduction and elimination of pollution caused by waste and the management of packaging and packaging waste (S.I. 2005/850). Powers of the Assembly under S.I. 2005/850 are now exercisable by the Welsh Ministers by virtue of paragraph 30 of Schedule 11 to the Government of Wales Act 2006.

Commission Directive 2015/1127 amends Annex II (Recovery Operations) of the Waste Directive to insert a Climate Correction Factor (CCF) adjustment to the ‘R1’ formula. Changes need to be made to UK domestic legislation to give proper effect to these EU obligations, as domestic legislation has been drafted

¹ Directive 2008/98/EC of the European Parliament and of the Council on waste:
<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:312:0003:0030:en:PDF>

in such a way that it will not be automatically updated as relevant EU legislation is changed from time to time.

Under section 80 of the Government of Wales Act 2006, an EU obligation of the United Kingdom 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. Since the Welsh Ministers have executive functions in relation to relevant domestic legislation for these purposes, the Welsh Ministers are required to make the necessary changes to Welsh secondary legislation, in order to transpose the forthcoming changes to EU law in relation to Wales.

Therefore, in legislation which contains references to 'Annex II of the Waste Directive', those references will need to be substituted by references to the Waste Directive as amended by Commission Directive 2015/1127. The Waste (Meaning of Recovery)(Miscellaneous Amendments)(Wales) Regulations 2016 makes consequential amendments to the following statutory instruments:-

- The Landfill Allowances Scheme (Wales) Regulations 2004 (S.I. 2004/1490 (W.155));
- The Hazardous Waste (Wales) Regulations 2005 (S.I. 2005/1806 (W.138));
- The Recycling, Preparation for Re-use and Composting Targets (Monitoring and Penalties) (Wales) Regulations 2011 (S.I. 2011/1014 (W. 152)).
- The Environmental Permitting (England and Wales) Regulations 2010 (S.I. 2010/675);
- The Waste (England and Wales) Regulations 2011 (S.I. 2011/988).

Article 3 (definitions) of the Marine Licensing (Exempted Activities) (Wales) Order 2011 (S.I. 2011/559 (W.81)) ('the 2011 Order') must be amended as it defines 'recovery', a term relevant to Annex II of the Waste Directive. The Marine Licensing (Exempted Activities) (Wales) (Amendment) Order 2016 amends the 2011 Order to reflect the changes made to Annex II of the Waste Directive, by EU Directive 2015/1127. A statutory instrument containing regulations cannot deal with amendments to an Order. Therefore, a separate Wales-only Order is required to make the change.

4. Purpose & intended effect of the legislation

The Waste Directive provides the legislative framework for the collection, transport, recovery and disposal of waste, and includes a common definition of waste. The Directive defines the term 'recovery' as "any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy".

Annex II of the Waste Directive sets out a non-exhaustive list of recovery operations, which are referred to as R1 to R13. Operations that use waste principally as a fuel to generate energy are classed as recovery operations.

An incineration facility dedicated to the processing of municipal solid waste is only classified as recovery if it meets a specific energy efficiency threshold. The formula for calculating energy efficiency is set out in Annex II of the Waste Directive and is commonly known as the R1 formula. For the incineration facility to achieve R1, the plant must meet the recovery threshold of 0.65 for installations permitted after 31 December 2008. Any plant which falls below this threshold is classed as a disposal installation.

A plant may wish to obtain R1 accreditation to enable them to issue Packaging Recovery Notes (PRN), under The Producer Responsibility Obligations (Packaging Waste) Regulations 2007. An Energy from Waste plant (EfW) can only become accredited to issue Packaging Recovery Notes (PRNs) for the packaging waste they process if they have R1 status. This ability to issue PRN's can generate additional income for an operator. An operator may also choose to apply for R1 status in order to be classified as a recovery operation, to allow them to import waste to the UK for recovery, it will also help demonstrate the efficiency and environmental sustainability of a facility.

Differences in climate across the EU mean that the production and use of energy from waste materials varies. It is technically more difficult to produce electricity from waste in a warm climate than in a cold climate. Plants in cold climates therefore have an advantage in both producing and using energy more efficiently. The changes to Annex II of the Waste Directive is the result of a study and recommendations made by the Joint Research Centre of the European Commission who advised the Commission that to achieve a level playing field in the EU, it was reasonable to compensate EfW plants affected by the impact of local climatic conditions by adding a Climate Correction Factor (CCF) into the R1 formula.

Commission Directive 2015/1127 inserts a CCF into the R1 formula, which will mean that some disposal incineration installations would now meet the R1 formula threshold and obtain R1 status if they applied for accreditation. The impacts of these changes on UK plants and industry are likely to be minimal.

5. Consultation

The Welsh Government and Defra carried out a short and focussed consultation from 5-29 January 2016 on the technical changes being made to legislation to implement the changes to the Waste Directive in Wales. The consultation sought views from Local Authorities, Natural Resources Wales, landfill and energy from waste operators, professional and membership organisations and businesses. One local authority and one professional body responded to the consultation in Wales. The local authority raised no concerns about the way that Welsh Government proposed to transpose this new EU Directive while the professional body supported the proposals.

6. Regulatory Impact Assessment (RIA)

These are technical amendments to legislation which will result in little or no impact to producers and operators in Wales; no existing incineration plant with R1 status will lose its accreditation and no plant will have to make operational changes as a consequence of the amendments. The amendment seeks to redress an imbalance that mainly affects plants in Southern European countries which have warmer climates.

Operators of UK plants have a choice in whether they seek to obtain R1 status, they do not have to obtain R1 status. However, incinerators being built under the Welsh Government's Residual Waste Infrastructure Procurement programme must be R1 status as a condition to obtain gate fee support from Welsh Government if they are burning Local Authority residual Municipal Waste in Wales. Currently, only one plant in Wales has applied for and obtained R1 status and another is planned in the near future in North Wales. Due to the UK's climate, the CCF is unlikely to be a determinative factor in a facility achieving R1 status.

Since these are routine technical amendments that are necessary to update regulations and that have no major policy impact, no formal detailed RIA is required beyond the statement above. Additionally, the instruments have no impact on statutory duties (sections 77 -79 GOWA 06) or statutory partners (sections 72-75 GOWA 06).