

Explanatory Memorandum to The Water Supply (Water Quality) Regulations 2018.

This Explanatory Memorandum has been prepared by 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

Cabinet Secretary/Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Water Supply (Water Quality) Wales Regulations. I am satisfied that the benefits justify the likely costs.

Lesley Griffiths

Cabinet Secretary for Energy, Planning and Rural Affairs.

25 May 2018

1. Description

Council Directive 98/83/EC (the Drinking Water Directive (DWD)) has been amended by Commission Directive (EU) 2015/1787 (Directive 2015/1787) to align with the World Health Organisation (WHO) principles for the risk based sampling and analysis of drinking water supply, reflecting scientific and technical progress in the protection of public health. To transpose the DWD.

The Water Supply (Water Quality) Regulations 2018 will revoke and replace the Water Supply (Water Quality) Regulations 2010 transposing the additional requirements of Council Directive 98/83/EC.

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

These Regulations apply to the operations of water companies providing drinking water operating wholly or mainly in Wales. As such they apply in parts of England and are laid simultaneously in Parliament and the National Assembly for Wales as required by section 59(4) of the Government of Wales Act 2006 ("GoWA 2006").

Paragraph 3 of this Memorandum explains that these Regulations are made partly in reliance on section 2(2) of the European Communities Act 1972. By virtue of section 59(3) of GoWA 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.

As these Regulations are directly transposing the requirements of the Directive, the Welsh Ministers have determined that these Regulations are to be subject to the negative resolution procedure.

The transposition deadline for the 2015 Directive was 27 October 2017, which has not been met.

The regulations impact on water undertakers who have responsibilities in both England and Wales. Following engagement with the water companies, officials agreed to align the Welsh set of Regulations with the English Regulations; to ensure water companies were not working to two different sets of Regulations with differing requirements, which would impact on their operational efficiency and removes duplication of work within the affected water undertakers. Officials therefore agreed to work to Defra's timeline to ensure that any changes made to the English Regulations were also included in the Welsh Regulations.

Defra's timeline has been delayed due to a number of circumstances including delays in their consultation process. If the Welsh Regulations were laid before the final amendments to the English Regulations were made, the regulations

would once again differ in specifics for no policy reason. This would not be in the interests of the water undertakers impacted by these Regulations. Defra accept that the delay in laying these regulations is due to the English timeline slipping.

3. Legislative background

These Regulations are made by the Welsh Ministers in exercise of the powers conferred by—

- (i) section 2(2) of the European Communities Act 1972 (“the 1972 Act”), in relation to the Welsh Ministers’ designation in relation to the quality of water intended for domestic purpose or for use in a food production undertaking; and
- (ii) sections 67, 69, 77(3) & (4) and 213 of the Water Industry Act 1991 (“the 1991 Act”).

Section 2(2) of the 1972 Act provides that Ministers may be designated to make provision for the purpose of implementing EU obligations, or for the purpose of dealing with matters arising out of or related to any such obligation. Section 59(1) of GoWA 2006 provides that section 2(2) may be used to designate the Welsh Ministers. The Welsh Ministers are designated for the purposes of section 2(2) of the 1972 Act in relation to the quality of water intended for domestic purposes or for use in food production undertaking. The National Assembly for Wales was originally designated by means of The European Communities (Designation)(No 7) Order 2002 and those functions are now exercisable by the Welsh Ministers by virtue of section 162 of, and paragraphs 28 and 30 of Schedule 11 to GoWA 2006.

The relevant functions of the Secretary of State under the 1991 Act were transferred to the National Assembly for Wales by virtue of the National Assembly for Wales (Transfer of Functions) Order 1999 as follows—

- Functions under section 67 were transferred for
 - a) the making of regulations concerning water supplied using the supply system of a water undertaker, in relation to the supply system of any water undertaker whose area is wholly or mainly in Wales; and
 - b) the making of regulations concerning water supplied other than using the supply system of a water undertaker, in relation to Wales, by article 2 of, and Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999;
- Functions under sections 69 and 77 were transferred in full;
- Functions under section 213 were transferred to the Assembly to the same extent as the powers, duties and other provisions to which that section applies were exercisable by the Assembly.

The functions conferred on the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999 are now exercisable by the Welsh Ministers by virtue of section 162 of, and paragraphs 28 and 30 of Schedule 11 to, GoWA 2006.

As outlined above, the Regulations are subject to the negative procedure, and are required to be laid before both the National Assembly for Wales and Parliament by virtue of section 59(4) of GoWA 2006 and paragraph 2(2) of Schedule 2 of the 1972 Act, due to the fact the Regulations will relate to cross border bodies.

4. Purpose & intended effect of the legislation

This instrument applies to England and Wales.

The policy objectives of these regulations are to:

- Update legislation to be aligned with the updates of the latest World Health Organisation (WHO) principles for the sampling and analysis of public drinking water supplies;
- Make other technical and drafting improvements to the legislation, following stakeholder engagement on the Water Supply (Water Quality) Regulations 2010, which will provide clarity on existing requirements;
- Transpose Commission Directive (EU) 2015/1787 that amends Annexes II and III of the DWD.

The objective of the Regulations is to include new EU requirement for the risk based sampling and analysis of drinking water supply, reflecting scientific and technical progress in the protection of public health

This will enable water undertakers and the Welsh Ministers to make informed and valid decisions for the reduction or cessation of sampling, enabling resources to be focused on higher risk supplies whilst ensuring public health protection is not compromised.

Following stakeholder engagement on the 2010 regulations and subsequent amendments to the 2010 Drinking Water Regulations, other improvements have been made to the Regulations which provide clarity on existing requirements making it more readily understood by the water industry.

The 2010 Regulations have been consolidated into new regulations to transpose the latest amendments to the DWD, rather than amending regulations being issued. This approach provides for a more accessible regime than transposing the DWD through further amendments to the 2010 Regulations, and also allows the wider clarifications to the Regulations to be addressed.

Implementation of the Directive by administrative or non-regulatory means, such as guidance or a code of practice, would not transpose the Directive into national law and would not achieve the controls and measures needed to monitor and enforce the Directive's standards and other wholesomeness requirements.

The Water Supply (Water Quality) Regulations 2018 clarify the regulatory requirements in respect of the aspects relating to public water supplies provided by water undertakers operating wholly or mainly in Wales, and water supply licensees using the supply system of such undertakers. As such, they apply to Wales and those parts of England supplied by such undertakers or licensees. Separate regulations are made in Scotland, Northern Ireland and for undertakers of licensees whose supply area is wholly or mainly in England.

The Council of the European Union adopted the amendments to Annexes II and III of the DWD on 6th October 2015.

Annexes II and III to the DWD lay down the minimum requirements of the monitoring programmes for all water intended for human consumption and the specifications for the method of analysis of different parameters.

Annex II to the DWD grants a certain degree of flexibility in performing the audit monitoring (group B parameters) and check monitoring (group A parameters), allowing for less frequent sampling under certain circumstances. The specific conditions to perform the monitoring of parameters at appropriate frequencies and the range of monitoring techniques need to be clarified in the light of scientific progress.

Since 2004, the World Health Organisation has developed the water safety plan approach which is based on risk assessment and risk management principles, laid down in its Guidelines for Drinking Water Quality¹. Those Guidelines, together with standard EN 15975-2 concerning security of drinking water supply, are internationally recognised principles on which the production, distribution, monitoring and analysis of parameters in drinking water is based. Annex II of the Drinking Water Directive is therefore aligned to the latest updates of those principles, and our regulations will also need to reflect this alignment.

5. Consultation

The Regulations are a direct transposition of an EU Directive. The Directive requirements are very specific and do not give the Welsh Government discretion on how they can amend the regulations in terms of what the stakeholders must do. Due to these limitations a public consultation exercise has not been carried out, however officials have actively engaged with the water undertakers operating wholly or mainly in Wales, who will be impacted by changes to these regulations throughout their development to ensure that they are fit for purpose.

PART 2 – REGULATORY IMPACT ASSESSMENT

Introduction

Defra and the Drinking Water Inspectorate (DWI) have prepared a Regulatory Impact Assessment on an England and Wales basis, this can be accessed via the following link:

https://consult.defra.gov.uk/water-quality/drinking-water-regulations-2017/supporting_documents/Public%20Regulations%20Consultation%20Document.pdf

The European Union Drinking Water Directive (Council Directive 98/83/EC) concerns water intended for human consumption and sets out the standards and requirements for drinking water. This Directive is currently transposed into National Regulations and enforced in respect of public water supplies in England and Wales through The Water Supply (Water Quality) Regulations 2010 (as amended) for Wales) and the Water Supply (Water Quality) Regulations 2016 (for England).

Directive 2015/1787 updates the monitoring programme in the Drinking Water Directive (DWD) which sets a minimum frequency of sampling and analysis but also introduces a new risk assessment approach. Comprehensive monitoring and analysis incurs significant costs, especially where a large number of parameters need to be considered. Risk assessed flexible monitoring frequencies present potential cost-saving opportunities and reduces the collection of data that provides little or no information on the quality of drinking water but also protects public health by targeting high risk supplies.

For a water company to qualify for a monitoring variation the risk assessment implemented will need to be certified against the criteria set by the United Kingdom Accreditation Service (UKAS). This may require water companies to review and improve their risk approach to achieve certification, however, introducing a risk assessment will provide more effective use of water companies' resources whilst maintaining confidence in the quality of the water.

Directive 2015/1787 also introduces a change to the method of analysis of different chemical and indicator parameters. Laboratories will require guidance on the method to ensure a consistent approach and an appropriate amount of time will need to be provided for them to adapt to the new approach.

Once the Directive is transposed, Member States may extend the use of the current method of analysis (which uses 'trueness', 'precision' and 'limit of detection') until 31 December 2019. This is to provide laboratories with sufficient time to adapt to the proposed changes to the approach to 'uncertainty of measurement' (UoM) under the amendments for Annex III.

Options

The RIA presents the following three options:

Option 0: Do Nothing (i.e. do not transpose the EU Directive);

Option 1: Transpose Directive 2015/1787 in full with no further amendments; and

Option 2: Transpose Directive 2015/1787, also incorporating corrections to wording and clarification amendments to The Water Supply (Water Quality) Regulations 2016.

Costs and benefits

The following is a summary of the costs and benefits identified in the England and Wales RIA.

Option 0: Do nothing

Costs

This is counter to UK preferred policy and would be a missed opportunity to update our drinking water legislation in the light of scientific and technical progress.

Failure to transpose by the deadline set in Directive 2015/1787 of 27 October 2017 would also be in breach of our obligations under EU law, thus giving rise to some risk that the Commission will bring infraction proceedings for non-transposition and the associated costs.

Benefits

There are no additional benefits identified with this option.

Option 1 Transpose Directive 2015/1787 with no further amendments:

Costs

Drinking Water Inspectorate

The England and Wales RIA identifies transitional costs to the DWI of £350,000 to cover the costs of making changes to the database containing water sample data, establishing the Risk Assessment certification scheme and for the development of the policy and guidance. The same cost would be incurred whether the Regulations are introduced in England and Wales or on an England only basis.

Water companies

DWI was commissioned to calculate the costs and benefits of each option to the water industry. Due to the cross border nature of the water companies, the analysis covers the costs to the industry in both England and Wales.

There will be an initial cost to water companies to establish the new risk assessment (RA) process of £1.6m over three years (includes application, administration, improvement work, laboratory charges) and an additional cost of £1.6m spread over the 10-year appraisal period to maintain the system (including increased E.coli sampling annually and certification renewal after 5 years).

The public drinking water supply in England and Wales is provided by water undertakers. Of the 26 incumbent water supply companies in England and Wales, 5 companies serve customers in Wales but only 2 would generally be regarded as Welsh businesses. On this basis, it is anticipated that only a relatively small proportion of the water industry costs identified above would fall to Welsh businesses.

Benefits

This would meet the main objective of updating legislation to be aligned with the latest WHO principles for the sampling and analysis of public drinking water supply

The quality of public drinking water is monitored by water companies in order to protect public health and safeguard the welfare of individual consumers. The economic case for this intervention is based partly on the positive externalities (benefits for the general population) of preventing water-borne illness reaching any individual. In addition there is the equity or 'merit good' consideration that every individual deserves to receive wholesome water as a basic necessity and right, whether or not they are in a position to appreciate what it involves and demand it from their supplier. Water companies provide assurance to water consumers about the safety of water supplied to them both in their own home and in other commercial or public premises. Particular characteristics or parameters of the supply are monitored, for example specified bacteria and metals within the water that are potentially harmful in high concentrations.

The revised Annex II of the DWD establishes the criteria under which risk assessed decisions are made which will enhance confidence in the protection of public health through further assurance for the quality of public water supplies. In providing for a consistent approach, it will also enhance confidence at national level in the robust nature of the risk assessments being undertaken.

There are potential cost-savings to the water industry reflecting reduced water sampling requirements. It is estimated implementing the new RA process will reduce the number of samples from 911,085 to 102,265 per annum (based on 2015 figures). Based on the Drinking Water Inspectorates (DWI) charges to water companies this would save the industry £444,840 by year 3. There would also be a potential saving in analytical costs (due to reduced sampling) which is estimated to be £900,000 by year 3. As with the costs identified above, the majority of these savings would be expected to fall to businesses in England (due to the relative number of businesses).

Each of the water companies supplying properties in Wales is also responsible for supplying some properties in England. Introducing these Regulations in parallel to those in England avoids a situation whereby the water companies have to adhere to two separate systems.

Option 2: Transpose Directive 2015/1787, also incorporating corrections to wording and clarification amendments

Costs

The costs for this option are expected to be the same as those for Option 1.

Benefits

The benefits identified under Option 1 will also apply to this option.

In addition, taking the opportunity to clarify some of the existing regulatory provisions would be beneficial for the practical application of the Regulations and would reduce uncertainty amongst the industry. The changes include:

- Improvements to definitions where current definitions have been determined as ambiguous through consultation and review;
- Changes to terminology to align with the DWD; and
- Where requirements are conditional, that the conditions are clear and mutually exclusive.

Summary and preferred option with description of implementation plan

Option 2 is the Welsh Government's preferred option as we support the principle of the proposals made under Directive 2015/1787 in allowing for a risk assessed approach to monitoring and analysis and changing the performance characteristics of certain parameters via the UoM methodology. This will provide for more effective and proportionate monitoring and analysis with water companies able to focus their efforts in maintaining the quality of public drinking water supply. At the same time, other amendments to the Regulations will provide clarity on existing requirements making it more readily understood by the water industry.

Competition Assessment

The competition filter test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	Yes (see below)
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	
Q4: Would the costs of the regulation affect some firms substantially more than others?	Yes (see below)
Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

Q1-3: Drinking water in England and Wales is supplied by private water companies that operate in de facto local monopolies due to the economies of scale in water collection, treatment and distribution. The industry is regulated by Ofwat who are responsible for ensuring consumers are protected.

Q4: The Regulations may have a differential impact depending upon firm size. Smaller firms may incur a higher cost to secure certification of their Risk Assessment methodology.