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Cabinet dros yr Amgylchedd a Materion Gwledig
Cabinet Secretary for Environment and Rural Affairs



Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff
CF99 1NA

13 July 2016

Dear Huw

I have laid a Statutory Instrument Consent Memorandum (Memorandum) in relation to the Waste (Meaning of Recovery) (Miscellaneous Amendments) Regulations 2016 ("the Regulations") which were laid in Parliament on 12 July by the Secretary of State (SoS) for Defra on a UK basis to come into force on 3 August 2016. The regulations amend section 33(13) of the Environmental Protection Act 1990 and section 75(5) of the Marine and Coastal Access Act 2009 and include provisions for Wales and the other devolved administrations. Whilst I have laid the Memorandum, I do not intend to table a Statutory Instrument Consent Motion.

Energy from waste facilities dedicated to the processing of municipal solid waste must meet the 'R1 accreditation threshold', set out in Annex II of the EU Waste Framework Directive (Directive 2008/98/EC) ("the Waste Directive"), in order to be classed as recovery. This will allow facilities to receive and process waste from other Members States whilst non-R1 incinerator facilities cannot. The Regulation implements the changes made by Commission Directive 2015/1127 which amends Annex II of the Waste Directive by adding a Climate Correction Factor (CCF) into the R1 formula. This will help energy from waste operations in warmer climates across the EU, be classified as recovery and obtain the R1 accreditation as it is technically more difficult to produce electricity from waste in warmer climates than colder climates. The UK is required to transpose Commission Directive 2015/1127 by 31 July 2016.

The Regulations make consequential amendments to a number of statutory instruments and two Acts of Parliament to substitute references to the 'Waste Directive' for reference to the Waste Directive as amended by EU Directive 2015/1127. The Memorandum (a copy of which is enclosed) explains in more detail the background to the amendments to the EPA and MCAA which are technical in nature.

I have laid the Memorandum in accordance with the requirement under Standing Order (SO) 30A for “a member of the Welsh Government ..[to].. lay a memorandum (“a statutory instrument consent memorandum”) in relation to any relevant statutory instrument laid before the UK Parliament by UK Ministers”. I consider the Regulations to be a relevant statutory instrument because they make provision in relation to Wales amending primary legislation within the legislative competence of the Assembly, and are not incidental or consequential provisions relating to matters that are not within the Assembly’s legislative competence.

The SoS, in this case for Defra, has the choice to determine whether the instrument is made under negative or affirmative procedure. Given that these are minor and technical changes to implement EU obligations, the decision has been made by Defra to amend the two Acts of Parliament and make the changes in their instrument via the negative procedure. Therefore, the Regulations were made at the same time as they were laid, and provided no Member of Parliament “prays” against, they will come into force on 3 August. It is for you to decide whether you wish, as the responsible committee referred to under Standing Order 30A, to consider and report on the Memorandum.

I have considered carefully whether I should proceed to table a Statutory Instrument Consent Motion under SO 30A.10, to be debated after the 35 days allowed for scrutiny by the responsible committee has elapsed. There is no requirement for the Welsh Government to do so but normally, we would table a motion to debate so that the Assembly can give its consent, or not, before the relevant statutory instrument is made.

In this case, as the Regulations will already have been made before any such debate could be held by the Assembly, I have decided that I will not proceed to lay a motion to debate as any decision made by the Assembly in a later debate is unlikely to have any practical effect. Each case would have to be considered on its merits, however, in these Regulations, the amendments in question are minor and technical in nature, do not make substantive changes to policy and are unlikely to have any impact on operators in Wales. I do not think there is merit in holding an Assembly debate on whether consent should be given to provision in Regulations which have already been made and where the provision in question is consequential in nature and not a substantive policy change. It is of course still open to any Assembly Member, if they feel strongly that the Memorandum should be debated, to lay a motion to debate this in Plenary.

Regards
Lesley

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STATUTORY INSTRUMENT CONSENT MEMORANDUM

The Waste (Meaning of Recovery) (Miscellaneous Amendments) Regulations 2016

1. This Statutory Instrument Consent Memorandum (“Memorandum”) is laid under Standing Order 30A.2. Standing Order 30A prescribes that a Memorandum must be laid and a Statutory Instrument Consent Motion may be tabled before the National Assembly for Wales (“Assembly”) if a UK statutory instrument makes provision, in relation to Wales, to amend primary legislation within the legislative competence of the Assembly.
2. The Waste (Meaning of Recovery) (Miscellaneous Amendments) Regulations 2016 were laid before Parliament on 12 July 2016 and come into force on 3 August 2016. The Regulations can be found at:

<http://www.legislation.gov.uk/ukxi/2016/738/contents/made>

Summary of the Regulations and their objective

3. The objective of The Waste (Meaning of Recovery)(Miscellaneous Amendments) Regulations 2016 (“the Regulations”) is to amend relevant UK statutory instruments and Acts to implement changes to waste legislation required as a result of Commission Directive 2015/1127. This Directive makes changes to the ‘R1’ energy efficiency formula within Annex II of the EU Waste Framework Directive (2008/98/EC) (“The Waste Directive”).
4. Annex II of the Waste Directive sets out a non-exhaustive list of recovery operations, these are referred to as R1 to R13. Under the Waste Directive, recovery means “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”.
5. Operations which use waste principally as a fuel to generate energy are classed as R1 under Annex II. An incineration facility dedicated to the processing of municipal solid waste is only classified as recovery if it meets a specific energy efficiency threshold commonly known as the R1 formula. Commission Directive 2015/1127 amends Annex II of the Waste Directive by applying a Climate Correction Factor (CCF) to the R1 formula.
6. To transpose Directive 2015/1127, changes need to be made to UK legislation to give proper effect to EU legislation, in part because domestic legislation is drafted in such a way that it will not be automatically updated when relevant EU legislation changes. Legislation that contains references to the Waste Directive will need to be amended to ensure the references relate to the Waste Directive as updated by the EU Directive 2015/1127.

7. As a consequence of the changes made by Commission Directive 2015/1127, the Regulations amongst other things make amendments to Section 33 of the Environmental Protection Act (EPA) 1990 and Section 75 of the Marine and Coastal Access Act (MCAA) 2009. Section 33(13) of the Environmental Protection Act 1990 applies to England and Wales. Section 75(5) of the Marine and Coastal Access Act 2009 applies to the UK.
8. The Regulations also make amendments to a number of statutory instruments on an UK basis, save for the following paragraphs 6, 8-10 and 12 of the Regulations which extend to England only.

Provision to be made by the Regulations for which consent is sought

9. Section 33(13) of the Environmental Protection Act 1990 is amended by paragraph 2 of the Regulations which substitute the reference to Annex I or II of the Waste Directive to the Waste Directive as last amended by Commission Directive (EU) 2015/1127. Similarly, section 75(5) of the Marine and Coastal Access Act 2009 is amended by paragraph 3 of the Regulations which substitute the reference to Waste Directive to the Directive as last amended by Commission Directive (EU) 2015/1127.
10. It is the view of the Welsh Government that the provisions described in paragraph 9 above fall within the legislative competence of the National Assembly for Wales in so far as it relates to environmental protection, including pollution, nuisances and hazardous substances, and prevention, reduction, collection, management, treatment and disposal of waste under paragraph 6 (Environment) of Part 1, Schedule 7, to the Government of Wales Act 2006.

Why is it appropriate for the Regulations to make this provision?

11. The amendments are necessary to give effect to the recent changes made to the Waste Directive as outlined in paragraph 3. The changes are minor and technical in nature and do not afford any discretion in terms of policy or drafting as between Wales and the other administrations in the UK.
12. It is the view of the Welsh Government that it is appropriate to deal with the changes to the Environmental Protection Act 1990 and the Marine and Coastal Access Act 2009 in these Regulations as it provides the most practical and proportionate approach to making these technical amendments for Wales alongside amendments for the other devolved administrations in the UK. This ensures a common approach to transposing the Commission Directive across the UK.
13. This Statutory Instrument Consent Memorandum relates to regulations laid in the UK Parliament under the negative procedure which automatically become law unless there is an objection from a member of either House of Parliament. If there is no such objection, the regulations would come into force on 3 August 2016.

Financial implications

14. There are no anticipated financial implications for the Welsh Government.

Lesley Griffiths AM
Cabinet Secretary for Environment and Rural Affairs
July 2016