

Explanatory Memorandum to the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017

This Explanatory Memorandum has been prepared by the Department for 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 Environment (Water Framework Directive) (England and Wales) Regulations 2017.

Carwyn Jones
First Minister of Wales
16 March 2017

1. Description

To consolidate, and update the drafting style of, the Regulations which transposed Directive 2000/60/EC (The Water Framework Directive (WFD)). This serves the dual purpose of making the transposition instrument more transparent and of meeting a commitment made in the UK formal response to a Reasoned Opinion of the European Commission. The opinion asserted that the Directive had not been transposed correctly in the UK.

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

Where these Regulations relate to cross-border river basins, they are to be made jointly with the Secretary of State. In so far as relating to river basin districts wholly in Wales or wholly in England, the Regulations are to be made compositely.

The Regulations are made using powers under the s2(2) of the European Communities Act 1972 and there is a choice as to whether the affirmative or negative procedure apply. These Regulations are made to ensure correct transposition of the Water Framework Directive and so there is little discretion involved. The Regulations also do not amend any provision of an Assembly Act or Measure. Therefore, the negative resolution procedure is deemed appropriate for making these Regulations.

As the Regulations will be subject to UK Parliamentary scrutiny, it is not considered reasonably practicable for this instrument to be made or laid bilingually.

To date, the Welsh Government has tended towards transposing EU Directives compositely with Defra. This was due in part, to the fact that the Environment Agency acted as the main environment regulator for both the Welsh Government and UK Government.

With the creation of Natural Resources Wales in 2013, there is more scope to operate differently in Wales; however with respect to this particular Directive, there is limited scope to transpose directions differently due to the river basin areas that are partly in Wales and partly in England.

The Welsh Ministers have the power to give Natural Resources Wales directions for the implementation of EU obligations such as this. However, that power only covers river basin districts wholly in Wales. If the Welsh Government were to undertake a separate transposition it would only apply to the Western Wales river basin and the Severn and Dee River Basins would still need to be directed jointly with Defra.

Transposing the directive on an England and Wales basis ensures there is consistency in delivery, which is something that the European Commission is keen to see with regards to the overall Water Framework Directive. This is especially relevant in Wales given that the Severn and Dee river basin districts are both cross border river basins.

3. Legislative background

The WFD introduced a comprehensive river Basin management planning system to protect and improve the ecological and chemical health of our rivers, lakes, estuaries, coastal waters and groundwater. The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 (the 2003 Regulations) transposed the WFD in England and Wales. These Regulations revoke and replace the 2003 Regulations.

Section 80 of the Government of Wales Act 2006 (“GOWA 2006”) states that an obligation of the UK 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.

Section 59 of GOWA 2006 enables the Welsh Ministers to be designated for the purposes of section 2 (2) of the European Communities Act 1972 (“the ECA 1972”). Section 2 (2) of the ECA 1972 enables designated Ministers or departments to implement EU obligations and rights. The Welsh Ministers are designated for the purposes of section 2(2) of the ECA 1972 in relation to water resources by virtue of Article 3 of European Communities (Designation) (No. 4) Order 2003/2901 (the original designation has transferred to the Welsh Ministers from the National Assembly for Wales by virtue of sections 59 and 162 of, and paragraph 28 of Schedule 11 to GoWA 2006). That designation also provides that where regulations are to be made under this designation in relation to or identifying river basin districts which lie partly in England and partly in Wales, they shall be made jointly with the Secretary of State.

The Welsh Ministers can therefore make the Regulations using the enabling powers in section 2(2) of the ECA 1972 in relation to river basin districts which lie wholly in Wales, and jointly with the Secretary of State in relation to districts lying partly in England and partly in Wales.

4. Purpose & intended effect of the legislation

The Water Framework Directive (WFD) established a strategic framework for protecting and improving the water environment, reflecting and building on practice in the UK at the time it was developed, initially under a UK presidency. It came into force in December 2000. Specific environmental objectives and measures for individual bodies of water are identified through a 6-yearly river basin planning process. All key stages in the river basin planning process are subject to stakeholder engagement and extensive public consultation.

In October 2015 the European Commission issued a Reasoned Opinion (RO) which claimed that the UK had failed to transpose the WFD correctly. A Reasoned Opinion is a formal determination by the European Commission that the Member State is in breach of its legal obligations and may be followed by a referral to the Court of Justice of the European Union (CJEU) if the Commission is not satisfied with the response of the Member State.

The main complaints in the Reasoned Opinion relate to the use of referential drafting in the legislation that transposed the WFD. This is a legal drafting technique where our legislation refers to certain provisions of the Directive in place of copying the text of the Directive into national legislation. The technique was used extensively in the 2003 Regulations, including for some of the main Articles. While this technique enables transposing legislation to be concise and avoids gold plating, the Commission considers that it does not provide sufficient clarity for the public and operators.

The formal response to the RO defended the important principle that Member States may choose the form and methods for implementing directives. The revised Regulations continue to use the referential drafting technique for technical annexes, which the Commission has acknowledged do not always need to be copied into national legislation. However, the revised Regulations provide greater transparency and clearer transposition by copying out the key Articles of the WFD. This change of drafting style for the main Articles of the WFD represents a significant concession to the Commission in order to reduce the likelihood of the case being referred to the CJEU.

5. Consultation

A public consultation has not been carried out. As the updated legislation is being revised to address a technical drafting issue and does not change the nature of any of the provisions of the existing legislation, the revised Regulations do not affect any public or private interest or change any aspect of the implementation of the Directive. Natural Resources Wales have been fully engaged in the development of these regulations.

6. Regulatory Impact Assessment (RIA)

Since the Regulations have no new impact on any private or public interest the public or business, an impact assessment has not been prepared for this instrument.