

Explanatory Memorandum to the Environmental Permitting (England & Wales) (Amendment) Regulations 2018

This Explanatory Memorandum has been prepared by the Department for 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 Environmental Permitting (England & Wales) (Amendment) Regulations 2018 and I am satisfied that the benefits justify the likely costs.

Hannah Blythyn
Minister for Environment
11 December 2017

1. Description

The primary purpose of the instrument is to amend the Environmental Permitting (England and Wales) Regulations 2016 (S.I. 2016/1154, “the 2016 Regulations”), so as to transpose EU Directive 2015/2193 of the European Parliament and of the Council of 25 November 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants (“the Medium Combustion Plants Directive”), and to introduce additional controls in respect of combustion plant used to generate electricity. The instrument extends the scope of the 2016 Regulations to include permitting requirements for the operation of medium combustion plants and generators in order to regulate emissions to protect air quality.

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

Use of a ‘composite’ statutory instrument

The purpose of the Medium Combustion Plant Directive and the controls is to address emissions of nitrogen oxides, sulphur dioxide and particulate matter which could otherwise cause pollution. Existing provisions in the 2016 Regulations already subject combustion plant in the 20 megawatts-thermal (MWth) to 50MWth range, together with incineration and co-incineration plant, to the requirements of the environmental permitting regime across England and Wales. This commonality with the provisions of the MCPD makes the 2016 Regulations an appropriate vehicle for MCPD transposition.

This composite statutory instrument applies to England and Wales, amends a composite statutory instrument (the 2016 regulations) and is subject to approval by the National Assembly for Wales and by the UK Parliament. Accordingly, it is not possible for this Instrument to be laid or made bilingually. The instrument applies in relation to Wales and England, with the exception of regulation 17 (amendment of provisions relating to enforcement undertakings), which amends a part of the 2016 regulations that applies in relation to the Environment Agency only, regulation 19 (amendment of the Air Quality Standards (Wales) Regulations 2010, which applies in relation to Wales only), and regulation 18 (amendment of the Air Quality Standards Regulations 2010, which applies in relation to England only).

Consultation

In accordance with section 2(4)¹ of the Act, the Welsh Ministers have consulted, amongst others, Natural Resources Wales (NRW).

¹ as amended by article 4 of, and paragraphs 394 and 395 of Schedule 2 to, the Natural Resources Body for Wales (Functions) Order 2013 (S.I. 2013/755 (W.90)).

Late transposition of an EU obligation

The deadline for all Member States to have legislation in place for transposing the Medium Combustion Plant Directive is 19 December 2017. Delays to finalising the draft regulations following consultation have meant this deadline will not be met.

Confirmation of making of the Pollution Prevention and Control (Designation of Directives) (England and Wales) Order 2017

Subject to resolution of the Assembly and both Houses of Parliament, this statutory instrument will be made pursuant to section 2 of, and Schedule 1 to, the Pollution Prevention and Control Act 1999 (c.24). Several paragraphs of Schedule 1 are engaged, including paragraph 20(1)(b). That paragraph may only be used in relation to a “relevant directive”. An order designating the Medium Combustion Plant Directive as a “relevant directive” under paragraph 20(2)(c) of Schedule 1 to the 1999 Act has been made by the Welsh Ministers in relation to Wales and has come into force.

3. Legislative background

The 2016 Regulations, presently only apply domestic emission controls to combustion plant with a thermal rated input of over 20MW, to combustion plant with an aggregated thermal rated input of over 50MW (by virtue of the EU Industrial Emissions Directive (Directive 2010/75/EU) and to waste incineration and co-incineration plant.

This Instrument transposes, in relation to England and Wales, the Medium Combustion Plant Directive, by amending the 2016 Regulations to include within the environmental permitting regime all combustion plant with a thermal rated input of 1MW or more and less than 50MW (“Medium Combustion Plants”). As part of the transposition of the Medium Combustion Plant Directive, this Instrument amends the Air Quality Standards (Wales) Regulations 2010 (S.I. 2010/1433) and the Air Quality Standards Regulations 2010 (S.I. 2010/1001) to include a requirement to assess the case for applying more stringent emission controls in respect of medium combustion plants when reviewing the air quality plans developed for the purpose of those regulations.

This Instrument also amends the scope of the 2016 Regulations to introduce domestic permitting requirements for certain plant used to generate electricity with a rated thermal input below 50MW (“specified generators”), some of which will also be Medium Combustion Plant. The term “specified generators” includes single plant and groups of plant located on the same site which are operated by the same operator and for the same purpose. Certain individual generators with a rated thermal input below 1MW are also in scope.

4. Purpose & intended effect of the legislation

Improving air quality across Wales, in order to reduce the burden of poor air quality on human health and the natural environment, is an absolute priority for the Welsh Government and this is reflected in our National Strategy: Prosperity

for All. Clean air is important for us all, but particularly for those who are most sensitive, including the very young, elderly people and those with certain health conditions. In addition, Wales, and the rest of the UK, is subject to EU and international obligations to protect air quality by preventing harmful pollutant levels and limiting national emissions of pollutants (under the EU Ambient Air Quality Directive 2008/50/EC) and the United Nations Convention on Long Range Trans-boundary Air Pollution).

The European Commission carried out an extensive review of EU air policy between 2011 and 2013, which included stakeholder engagement and public consultation. Informed by the review, the Commission published in December 2013 the Clean Air Package, which included proposals to regulate emissions from Medium Combustion Plants, since they are an important source of emissions which were not regulated at the EU level (plant with a rated thermal input of 50MW and above are subject to emission controls under the Industrial Emissions Directive). On the 25 November 2015 the Medium Combustion Plant Directive was made. The Directive requires the operation of Medium Combustion Plant to be subject to authorisation in a manner that enables the imposition of conditions upon emissions of nitrogen oxides, sulphur dioxide and particulates/dust into the air. Permit conditions also require the testing of emissions periodically to demonstrate compliance with the relevant emissions levels.

The 2016 Regulations provide a 'one-stop-shop' for environmental permitting in England and Wales, bringing together the process for applying for, regulating and measuring compliance in environmental permitting. The framework was originally created in 2007 to make the permitting process more efficient and effective and to reduce the burden associated with the various separate permitting regimes that had gone before.

In accordance with the Medium Combustion Plant Directive, from 20 December 2018, operators of new Medium Combustion Plant will require a permit to operate, at which point those plants will have to comply with the emission limit values for certain pollutants (according to fuel type). Operators will also need to keep a record of operations to demonstrate compliance with their permit conditions for at least 6 years. A long implementation period is provided for existing Medium Combustion Plant, in order to provide operators with sufficient time to adapt technically to the requirements.

This Instrument also imposes domestic controls in respect of Specified Generators, some of which will be Medium Combustion Plant. Developments in the energy market in recent years have led to rapid growth in the use of low-cost, small-scale flexible power generators, many of which operate on diesel fuel. These plant are not currently subject to emission controls and can have very high emissions of nitrogen oxides.

Operators of these plant will be required to comply with applicable emission limits. Older, existing generators, and those already providing certain services to the national electricity transmission system, will benefit from a longer timescale for compliance depending on the rated thermal input of the generators, emissions, operating hours and the duration of the relevant agreements. These 'transitional arrangements' have conditions associated with them to avoid giving a competitive advantage to older, generally more polluting,

generators when bidding to provide services in the energy market. A competitive advantage could incentivise their use with a resultant impact on emissions.

5. Consultation

A joint Wales and England consultation on proposals to transpose the Medium Combustion Plant Directive and on additional controls on combustion plant used to generate electricity opened on 16 November 2016 and closed on 8 February. The consultation period lasted for 12 weeks and there were 112 responses in total. Responses were largely from the energy sector and industry but responses were also received from NGO's, Local Authorities and members of the public.

A summary of responses and the Government response can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/626803/mcpd-generator-consult-sum-responses.pdf . This document lists the consultation questions, summarises responses and who responded, and outlines decisions made as a result of consultations responses.

PART 2 – REGULATORY IMPACT ASSESSMENT

Two Regulatory Impact Assessments are provided, which consider the impact of the legislation on an England and Wales basis. One Impact Assessment focuses on the changes required to transpose the Medium Combustion Plant Directive. The other Impact Assessment considers the additional domestic controls being placed on 'Specified Generators'.