

Explanatory Memorandum to The Nitrate Pollution Prevention (Wales) (Amendment) Regulations 2012

This Explanatory Memorandum has been prepared by Department for Environment and Sustainable Development and is laid before the National Assembly for Wales in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Nitrate Pollution Prevention (Wales) Regulations 2008

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1. Description

The EC Nitrates Directive (91/676/EEC) (“the Nitrates Directive”) is intended to reduce water pollution caused by nitrates from agricultural sources and to prevent any further pollution. The Nitrates Directive is transposed in Wales by the Nitrate Pollution Prevention (Wales) Regulations 2008 (as amended) (“the 2008 Regulations”)¹.

Since the introduction of the Nitrates Directive in 1991, Member States have been required to assess and designate areas as Nitrate Vulnerable Zones (NVZs) and produce an Action Programme of measures to reduce levels of nitrogen entering watercourses. Member States are required to review their implementation of the Nitrates Directive every four years. The outcome of the review is used to make appropriate amendments to the NVZs and/or the measures in the Nitrates Action Programme. A review is currently underway, and must be completed by the end of 2012.

The 2008 Regulations provide for appeals to be made against proposed designations, but the provisions relate specifically to the 2008 designations process. It is therefore necessary to replace them by making the present Regulations. This will ensure that persons affected by the emerging conclusions of the review will be notified of the Welsh Government’s proposals and have an opportunity to appeal against them.

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

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

These Regulations do not amend an Assembly Act or Measure, or an Act of Parliament, nor do they create offences, impose civil penalties or involve substantial government expenditure. The provision made by them consists of applying, to the current review of NVZ designations, a process for the making and determination of appeals. That process, in its key features, is the same as that provided by the 2008 Regulations, although subject to limited technical amendment and elaboration intended to improve clarity and certainty.

Accordingly, the Welsh Ministers have determined that these Regulations are to be subject to the negative procedure.

¹ S.I. 2008/3143 (W.278), amended by S.I. 2010/489 (W.55)

3. Legislative background

Section 2(2) of the European Communities Act 1972 provides that a Minister of the Crown or government department may be designated by Order in Council for the purposes of making provision to implement any EU obligation of the United Kingdom, or dealing any matters arising out of or related to such obligations.

This power to designate was extended to the National Assembly for Wales by Section 29(1) of the Government of Wales Act 1998. The European Communities (Designation) (No.2) Order 2001² designated the Assembly for the purpose of section 2(2) in relation to the protection of waters against pollution caused by nitrates from agricultural sources. As this is the subject matter of the Nitrates Directive, it follows that the Assembly was empowered to make any legislation necessary to transpose the Directive. However, the Order authorised the Assembly only to make regulations which applied in relation to Wales.

By virtue of section 59 of, and paragraph 28 of Schedule 11 to, the Government of Wales Act 2006, the designation of the Assembly now has effect as a designation of the Welsh Ministers. In reliance on this designation, the Welsh Ministers have made the 2008 Regulations and the present Regulations, which, taken together, transpose the Nitrates Directive in relation to Wales.

4. Purpose & intended effect of the legislation

The 1991 Nitrates Directive requires Member States to establish Action Programmes, which set out specific good agricultural practice measures for farmers to follow in order to reduce nitrate pollution. It requires Member States to apply the Action Programme either throughout their national territory (whole Wales NVZ designation), or to specific areas where farmers have to implement the measures (with farmers in other areas being subject only to other national baseline standards).

The Nitrates Directive requires reviews of both the extent of the NVZs and the effectiveness of the Action Programme every four years. The outcomes of the reviews are to be used to make appropriate amendments (i.e. revise the NVZs and/or the Action Programme measures). A review is currently under way and must be completed by the end of 2012.

The Welsh Government consulted on its review in December 2011. The consultation period closed on 16 March 2012. The consultation sought views on, amongst other matters, whether it was appropriate to continue with the current regime of designation of discrete NVZs, or to adopt a whole territory designation approach.

² SI 2001/2555

Details were given of the process which it was intended to follow if the discrete NVZ designation approach were to be adopted. This process consisted of Environment Agency recommendations to the Welsh Government, publication and notification to affected farmers of those recommendations which the Welsh Government was minded to accept, and a 28 day “window” for making of appeals, which would be handled by the Planning Inspectorate.

Following consideration of the consultation responses (see Section 5 below), the Welsh Government decided to continue the existing regime of discrete NVZ designations, and to give effect to its proposals for appeals.

Part 2 of the 2008 Regulations made provision for appeals and for the review of nitrate vulnerable zones, but the appeal provisions relate specifically to the 2008 designations process. It is therefore necessary to replace them, and that is the purpose of the present Regulations. The new provisions carry forward the key features of the previous provisions, but with elaboration of some details and technical changes to procedure which are intended to improve the clarity and effectiveness of the appeal process. The 2008 Regulations provided for designation of NVZs, but for affected persons to be able to apply for a declaration that land should not be designated. However, if that application was successful, the result was not a revocation of the designation but provision that the land should be treated as if it had not been designated. The present regulations make provision for a process of provisional designation (following recommendations by the Environment Agency), for appeals, and for the outcome of the appeals to be binding on the Welsh Government when it makes its final decision.

Regulation 2 revokes and replaces regulation 2 of the 2008 Regulations. Its purpose is to complement the provision made by Regulation 3 and clarify the application of the 2008 Regulations. Parts 3 to 8 of the 2008 Regulations comprise the Action Programme required by the Directive. However, the measures in the programme are only to be applied to land which has been designated as an NVZ. However, the remainder of the 2008 Regulations, as now amended, need to apply in relation to all of Wales. The new Regulation 2 gives effect to this.

Regulation 3 revokes and replaces Regulations 7, 8, 9 and 10 of the 2008 Regulations.

The **new Regulation 7**:

- a) makes provision to recognise the Environment Agency’s role in making recommendations to the Welsh Ministers as part of the review process, and for the Welsh Ministers to publish and notify to affected persons the recommendations they are minded to accept (with or without amendment)
- b) retains the current definition and designation of NVZs. It is intended that any amendments made to the current designations following the conclusion of the appeals process will be given effect by a further amendment of the 2008 Regulations in due course.

The **new Regulation 8** provides the right to appeal in terms equivalent to the right to apply for a declaration under the 2008 Regulations. The first of the specified grounds has been expanded to deal with the possibility of cross-border scenarios, so that a farmer who wishes to assert that their land does not drain into polluted water can do so irrespective of whether the polluted water is in Wales or England.

In relation to the second appeal ground, it is recognised that it is in theory possible that a farmer in Wales will wish to challenge the “polluted” status of water in England, and that no provision is made for this. However, the subject matter of an appeal here would be a decision made by the Secretary of State in relation to water in England, and the Welsh Ministers’ power to make the Regulations is limited to provision in relation to Wales. In any event, it is considered that this scenario (and its equivalent in relation to polluted water in Wales) is highly unlikely to arise in practice: if it should do so, the Welsh Government will work with Defra to ensure that any necessary further provision is made.

The **new Regulation 9** makes provision for the consideration and determination of appeals by a person appointed by the Welsh Ministers: as previously, it is intended that in practice this will be a Planning Inspectorate Inspector. The provision made about procedure broadly follows that made by the 2008 Regulations. However, to assist transparency and certainty, more detailed provision is made about aspects of the process (e.g. what is to happen if further information is needed or the appellant decides to withdraw their appeal). The provision made is modelled on the established process for planning appeals. In addition, to better reflect the independence of the appeal determination:

- a) it is expressly provided that, except as specifically set out on the face of the Regulations, the process is a matter for the appointed person to decide.
- b) the provision made by the 2008 Regulations to define the basis of the appointed person’s determination has been omitted. This is now left to appointed person’s discretion, but the normal public law principles relevant to appeal determinations will of course apply.

The **new Regulation 10** provides simply that the determinations of the appointed person are binding on the Welsh Ministers. The effect is the same as under the 2008 Regulations, namely that at the end of the process of review, the designations of NVZs will have effect in accordance with the appeal decisions.

5. Consultation

As stated above at Section 4, the Welsh Government recently consulted on the Review of Nitrate Vulnerable Zones in Wales. This consultation closed on the 16 March and asked for views on proposals to revise the coverage of Nitrate

Vulnerable Zones and modify the Nitrates Action Programme measures implemented within the Nitrate Vulnerable Zones.

The consultation included a section on the proposed appeals procedure, which would take effect as part of the process of the review if (and only if) the current approach of designating discrete NVZs were to be retained. It was considered unnecessary to ask any specific consultation question on the appeal proposals given that these amounted in essence to a continuation of the 2008 arrangements. However, respondents were asked to state, with reasons, whether they preferred the option of discrete designation (option 1) or the alternative of whole territory designation (option 2). As the appeal proposals formed an integral part of option 1 it was open to respondents to comment on them if they wished. However, the only responses received simply endorsed the inclusion of an appeals process.

6. Regulatory Impact Assessment (RIA)

An RIA has not been undertaken as these amendments to Regulations do not create an additional regulatory burden. This is in line with Section 4.2 of the Welsh Ministers' RIA code which states that the Welsh Ministers policy is not to carry out an RIA:

“Where routine technical amendments or factual amendments are required to update regulations etc. that have no major policy impact.”

The Regulations provide only for a process for the making and determination of appeals in relation to the current NVZ review, thus securing continuation of the regime established by the 2008 Regulations. To improve clarity and certainty, that process includes limited technical amendment and elaboration of the provision made for appeals by the 2008 Regulations, but the key features and effect remain as before.

The previous RIA, drafted when the 2008 Regulations were made, assessed both the environmental and economic impact of the action programme measures on affected farmers. It used the total number of affected farmers to assess the impact across the whole of Wales.

Following the completion of the current review and the determination of any appeal, it is envisaged that an RIA will be produced when further amendment regulations are made early next year to give effect to any revisions to the designation of NVZs and to the action programme.

Given the subject matter and effect of the Regulations, it is considered that they do not have any effect relevant to the statutory duties at sections 77 – 79 of the Government of Wales Act 2006, or to the statutory partners (sections 72 – 75).