

Explanatory Memorandum to the Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (England and Wales) (Amendment) Regulations 2024

This Explanatory Memorandum has been prepared by the Climate Change and Rural Affairs Group and is laid before Senedd Cymru in conjunction with the above subordinate legislation and 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 Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (England and Wales) (Amendment) Regulations 2024 ("the 2024 Regulations").

Lesley Griffiths
Minister for Rural Affairs and North Wales, and Trefnydd
13 March 2023

PART 1

1. Description

- 1.1 The 2024 Regulations are being made to clarify technical language in existing domestic legislation for polychlorinated biphenyls (“PCBs”). In 2020, amendments were made to the Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (England and Wales) Regulations 2000 (“the 2000 Regulations”) to reflect a new Stockholm Convention and EU requirement to remove equipment containing volumes of PCBs over a certain threshold before the end of 2025. Stakeholders subsequently highlighted that there was some ambiguity in the language introduced to the 2000 Regulations by those 2020 amendments.
- 1.2 The amendments made by the 2024 Regulations are considered necessary to provide clarity to stakeholders around references to volumes of PCBs in equipment, by removing any ambiguity over which pieces of equipment must be removed from use by the 2025 deadline.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

- 2.1 The 2024 Regulations clarify amendments previously made by the Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (England and Wales) (Amendment) Regulations 2020 (“the 2020 Regulations”). The 2020 Regulations were made for England and Wales by the Secretary of State, with consent of the Welsh Ministers, using powers contained in section 2(2) of the European Communities Act 1972. These powers are no longer available to us.
- 2.2 The 2024 Regulations, are being made on a composite basis. This is being done to maintain a consistent statute book for businesses operating in England and Wales. There is no policy divergence, and the amendments being made by the 2024 Regulations are to an existing English language statutory instrument covering England and Wales. The amendments are to clarify the meaning of existing regulations and do not constitute policy change for either the Welsh or UK Government.
- 2.3 As the 2024 Regulations will be subject to UK Parliamentary scrutiny, it is not considered reasonably practicable for the 2024 Regulations to be made or laid bilingually.

3. Legislative background

- 3.1 Section 2(1) of the Pollution Prevention and Control Act 1999 (“the 1999 Act”) states that the Secretary of State may by regulations make provision for any of the purposes listed in Part I of Schedule 1 of the 1999 Act; and Part II of that Schedule has effect for supplementing Part

I. Council Directive 96/59/EC on the disposal of polychlorinated biphenyls and polychlorinated terphenyls has been designated as a relevant directive for the purposes mentioned in paragraph 20(2)(i) of Schedule 1 of the 1999 Act. The regulation-making functions in Section 2(1) of the 1999 Act were transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 2005 (SI 2005/1958) and subsequently to the Welsh Ministers pursuant to paragraph 30 of Schedule 11 to the Government of Wales Act 2006.

- 3.2 The 2024 Regulations will amend the 2000 Regulations (SI 2000/1043), as previously amended by the 2020 Regulations (SI 2020/489).
- 3.3 The 2000 Regulations were amended by the 2020 Regulations to reflect the 2019 re-cast EU Persistent Organic Pollutants (POPs) Regulation, which increased efforts to identify and remove from use certain pieces of equipment by 31 December 2025, in line with the EU's (and UK's) obligations under the Stockholm Convention.
- 3.4 When the 2020 Regulations were made, there was some potential ambiguity in the interpretation of which pieces of equipment need to be identified and decontaminated or removed from use by the deadline of 31 December 2025.
- 3.5 The 2024 Regulations will remove ambiguity of interpretation regarding volumes of PCBs and fluids containing PCBs in four places in the 2000 Regulations, as amended by the 2020 Regulations.
- 3.6 The 2024 Regulations are made under the Senedd's negative procedure.

4. Purpose and intended effect of the legislation

- 4.1 Polychlorinated biphenyls (PCBs) are a type of persistent organic pollutant (POP). POPs are substances identified as being toxic, persistent, bio-accumulative and subject to long-range transport across international borders. The UK and the EU are Parties to the Stockholm Convention on POPs, a global United Nations treaty which aims to eliminate or restrict the production and use of these substances. PCBs were one of the original twelve POP substances known as the 'dirty dozen' that were the first to be banned under the Stockholm Convention.
- 4.2 Parties to the Stockholm Convention are committed to removing PCBs from production and use. The use of PCBs has been regulated in the UK since the early 1980s but some PCBs still exist in use, predominantly within high voltage transformer equipment in our national energy infrastructure. Oils containing PCBs can leak from transformer equipment and enter the environment, where, having a range of toxicities, they can cause serious health effects in humans and animals.

- 4.3 In May 2001, the text of the Stockholm Convention was put forward for adoption by the Conference of Plenipotentiaries and included the requirement for parties to the Convention to identify and remove from use certain pieces of equipment by 2025. This obligation was brought into UK law in 2020 following a re-cast of the EU POPs Regulation in July 2019 which included the addition of this 2025 deadline.
- 4.4 Since the 2020 Regulations came into force, Defra has identified an ambiguity in how certain references to volumes of PCBs can be interpreted. The regulations currently refer to removal of equipment containing certain volumes of 'PCBs', so can be read as applying to just the volume of PCBs substances themselves, whereas the original policy intent was for removal of equipment containing certain volumes of 'fluids containing PCBs'. The intention was for the volume to refer to the complete volume of oils within which the PCB substances are mixed. This reflects long-established practice in both international and domestic law, namely the EU PCBs Directive 96/59/EC, which came into force in 1996, the UN Stockholm Convention on POPs, the PCBs Regulations themselves, and the retained EU POPs Regulation.
- 4.5 This is a technical change only with no policy changes. Certain references to volumes of 'PCBs' within four provisions will be amended to refer to certain volumes of 'fluids containing PCBs'. This will more clearly reflect the original policy intent of those four provisions and will ensure that there is no ambiguity over which pieces of equipment must be removed from use by the 2025 deadline.

5. Consultation

Formal consultation

- 5.1 A bilingual consultation on the draft proposed statutory instrument ran for six weeks on Defra's Citizen Space consultation platform from 19 May to 30 June 2023. This was a joint consultation carried out by the UK and Welsh Governments. In addition to submitting responses on the platform, respondents were also able to reply by email to a Defra and/or Welsh Government mailbox and by posting a printed response to a Defra office.
- 5.2 The consultation requested stakeholders' views on a draft of the proposed statutory instrument that will amend four provisions in the PCBs Regulations, and sought confirmation from stakeholders that the proposed amendments will clarify the requirements for removal of PCB-containing equipment by the end of 2025.
- 5.3 Eleven responses were received. Ten respondents were supportive of the proposals, commenting that they agreed that the proposed amendments would remove uncertainty in the existing version of the 2000 Regulations. One respondent (a company that, according to Natural Resources Wales, no longer has any PCB-contaminated

equipment registered in Wales) was in opposition to the proposed amendments and commented that the proposals would increase the cost and timescale for compliance. Following the consultation, Defra engaged with the single respondent who had identified a predicted increase in their compliance costs to help them more accurately identify and refine their initial cost estimates.

- 5.4 In light of responses to the consultation and consideration of the de minimis impact assessment subsequently carried out by Defra, as well as the importance of the PCBs Regulations to prevent harm to human health and the environment, the UK and Welsh Governments both concluded that the measures proposed in the consultation are proportionate and have agreed to proceed with the proposed changes to the PCBs Regulations for England and Wales as set out in the consultation documents.
- 5.5 A bilingual summary of consultation responses and Government response has been published jointly by Defra and the Welsh Government here: [Summary of responses and government responses](#)

Duty to consult

- 5.6 Section 2(4) of the 1999 Act requires Ministers to consult the Environment Agency, Natural Resources Wales, such bodies or persons appearing to be representative of the interests of local government, industry, agriculture and small businesses respectively as they consider appropriate, and such other bodies or persons as they consider appropriate, before making regulations under Section 2(1).

6. Regulatory Impact Assessment (RIA)

- 6.1 In line with the Welsh Ministers' RIA code for subordinate legislation¹, an RIA has not been prepared for this instrument as it consists of technical amendments which are required to change the wording of the law rather than its purpose or effect, for the purpose of avoiding possible misinterpretation.
- 6.2 In 2020 Defra carried out a full Impact Assessment (IA)² which provided an assessment of the main impacts of the 2020 amendments to the 2000 Regulations. This IA involved a full economic assessment of key monetised and non-monetised costs, and key monetised benefits and non-monetised benefits of testing, removing and replacing contaminated equipment before the end of their useful life. Key risks, sensitivities and assumptions were also considered, in addition to the impact of the amendment to the 2000 Regulations on small businesses, public bodies and manufacturers of transformer equipment.

¹ <https://www.gov.wales/welsh-ministers-regulatory-impact-assessment-code-for-subordinate-legislation-2021-html>

² <https://www.legislation.gov.uk/ukxi/2020/489/impacts>

6.3 The amendments made through this instrument do not change the effect of the existing legislation, nor is there any change to existing policy. Therefore no further Integrated Impact Assessment has been carried out for this instrument.