

POLICY NOTE

THE WATER INTENDED FOR HUMAN CONSUMPTION (PRIVATE SUPPLIES) (SCOTLAND) REGULATIONS 2017

S.S.I. 2017/282

These Regulations (“the Regulations”) are made in exercise of the powers conferred by sections 76F(5) to (8), 76J, 101(1) and (1A) and 109(1) of the Water (Scotland) Act 1980, section 47(2) to (4) of the Local Government in Scotland Act 2003, and section 2(2) of the European Communities Act 1972. The Regulations are subject to the negative procedure.

Policy objectives

1. The Regulations aim to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that the water meets water quality standards. The main purpose of the Regulations is to revoke and replace (and partly re-enact with modifications) the provisions of the Private Water Supplies (Scotland) Regulations 2006 (“the 2006 Regulations”) so far as they applied to a “Type A supply”, to make fresh and supplementary provisions to transpose and implement for Scotland:

- Council Directive 98/83/EC on the quality of water intended for human consumption⁽¹⁾ (“the Drinking Water Directive”), including in particular the amendments made by Commission Directive (EU) 2015/1787 (“the Amending Directive”)⁽²⁾; and
- Council Directive 2013/51/Euratom laying down requirements for the protection of the health of the general public with regard to radioactive substances in water intended for human consumption⁽³⁾ (“the Euratom Directive”),

for private water supplies which are subject to the provisions of the Drinking Water Directive. The Amending Directive amends Annexes II and III to the Drinking Water Directive and requires to be transposed into domestic legislation by 27 October 2017, which is the date of coming into force of the Regulations.

2. The opportunity has been taken to -

- more closely align the drinking water quality provisions with the provisions of the Drinking Water Directive;
- restructure those provisions to make them easier to follow; and
- confer additional enforcement powers on local authorities so as to give them the tools they need to ensure water supplied by means of private water supplies meets the water quality standards.

⁽¹⁾ OJ L 330, 5.12.1998, p. 32, as amended by Regulation (EC) No 1882/2203 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1), Regulation (EC) No 596/2009 of the European Parliament and of the Council (OJ L 188, 18.7.2009, p. 14) and Commission Directive (EU) 2015/1787 (OJ L 260, 7.10.2015, p. 6).

⁽²⁾ OJ L 260, 7.10.2015, p. 6

⁽³⁾ OJ L 296, 7.11.2013, p. 12.

3. The Regulations include new provisions regarding risk assessment which are a consequence of transposing the Amending Directive. Under Part 3 of the Regulations local authorities must carry out a risk assessment in relation to the water supplied through each private water supply system to premises in their area to establish if there is any risk that the water could pose a potential danger to human health, with each initial risk assessment being completed before 1 January 2022. The risk assessment must be carried out using a methodology which is approved by the Drinking Water Quality Regulator for Scotland (DWQRS). Risk assessments are to be reviewed and if necessary updated at least every 5 years, or earlier if there are adverse changes to the quality of the water or modifications to the supply system. There are also requirements in relation to registration and risk assessment of unused or disused systems being brought into use.

4. Part 5 of the Regulations sets out requirements for local authorities to ensure that regular monitoring of the quality of water in their area is carried out to check that water available to consumers meets the prescribed water quality standards, and requires local authorities to prepare and implement a monitoring programme for each supply zone. The supply zone will be designated by the DWQRS who will determine which private supplies form part of the supply zone. This Part also specifies the methods of analysis to be used. The detailed requirements regarding monitoring and methods of analysis are given in schedules 3 and 4 of the Regulations, which transpose the new Annexes II and III of the Drinking Water Directive.

5. The other main provisions in the Regulations are as follows.

6. Part 1 makes general provision for citation, commencement, extent, application, interpretation etc. This Part also makes further provision in relation to supply zones and water from those supplies which are exempt from the Regulations. Water is generally exempt if the water is supplied from a private water supply system which provides (in total) less than 10 m³ of water a day or serves (in total) fewer than 50 persons. However, water is not exempt if it is supplied as part of a commercial or public activity, or it is supplied to premises used for a commercial or public activity.

7. New provision in relation to a register of supply systems is contained in Part 2. The register is to contain information in relation to each large private water supply system used to supply water to premises in a local authority's area and the quality of the water in and supplied by the system. The detail of the information required is specified in schedule 1 of the Regulations and the contents of the register are to be reviewed annually. The owner of premises which receive water through an unrecorded part of a supply system must give the local authority for the area the information it needs to register that part of the system. This part of the Regulations also contains requirements for local authorities to provide access to certain information about water quality.

8. Part 4 makes provision in relation to water quality standards and duties. This part sets out the requirements for water quality at each point of compliance as specified in the Drinking Water Directive and introduces a duty of care on a person not to take any action which has the effect of a deterioration in the water quality and to ensure that no substance or material used or introduced into a supply of water either remains in the water at concentrations higher than necessary or reduces the protection of human health.

9. Part 6 makes provision in relation to investigation and remedial action. It sets out requirements for local authorities to investigate failures of water to meet the prescribed parametric values and ensure remedial action is taken and inform consumers of the water if the water supply poses a potential danger to human health.

10. Part 7 makes provision in relation to information and reporting. It places duties on owners of premises served with a private water supply to provide consumers of the water with information on its quality and, in commercial or public premises, to display a notice with information about the source, quality and treatment of the water. Part 7 also places duties on local authorities to provide information on water quality annually to certain public authorities and on the DWQRS to publish a report on private water quality in Scotland every three years.

11. New provision in relation to enforcement powers is contained in Part 8. This places a duty on local authorities to monitor compliance with, and enforce the provisions of, the Regulations. It gives local authorities power to serve a notice (an “information notice”) on a person requiring the person to provide information including relevant documentation on water quality, and also confers powers of entry and inspection in relation to establishing compliance with the Regulations. It introduces provision for remediation and enforcement notices by reference to schedules 6 and 7 respectively. A remediation notice can be served by a local authority where it reasonably believes that a supply of water poses a potential danger to human health or fails to meet the water quality standards. An enforcement notice can be served where the local authority reasonably believes that a person has contravened or is contravening a requirement of the Regulations and is not rectifying the contravention or preventing its recurrence. With both forms of notice there is a right of appeal to the sheriff, and action can be taken by the local authority in response to a failure to comply with a notice. Failure to comply with a notice is an offence.

12. Part 8 also makes provision for a local authority to act where it reasonably believes urgent action is required to reduce or remove a risk to public health or the quality of a water supply as a result of a person’s contravention or failure to comply with the Regulations. The local authority may undertake the necessary work itself or serve an emergency notice on the person requiring them to take such steps as it considers necessary. Part 8 also contains a new power of the DWQRS to give directions or guidance to local authorities as to the exercise of their functions under the Regulations.

13. New provision in relation to offences is made in Part 9. An offence is committed by a person failing to comply with the duty to provide information, duties in relation to bringing into use unused or disused systems, and duties of care in relation to supplies of water and substances and materials; failure to comply with an information notice; obstruction or failing to comply with a requirement under the powers of entry provisions; failure to complete a step required by an emergency notice; and making false statements in applications or in the furnishing of any information required. The penalties vary as to the gravity of the offence, with offences which more directly impact on human health attracting a higher maximum fine.

14. For the purposes of the Water (Scotland) Act 1980, Part 10 specifies when water to which the Regulations apply is to be treated as being wholesome. The water is to be regarded as wholesome if it satisfies the water quality standards of the Regulations and unwholesome if it does not.

15. Schedule 1 contains details of the information which each local authority register of private water supply systems is to contain or specify and the dates by which the register must contain that information.

16. Schedule 2 sets out the parameters and parametric values as prescribed in the corresponding Annex I of the Drinking Water Directive. The parameters are grouped into microbiological, chemical and indicator parameters.

19. Schedule 5 contains provisions for derogations, as permitted by the Drinking Water Directive, but without the provision for a third derogation approved by the European Commission which was included in the 2006 Regulations.

20. Schedule 8 sets out further provision in to relation powers of entry, including giving notice, authorisation by warrant, evidence of authority, securing premises on leaving, compensation and protection of commercially confidential information.

21. Schedule 9 sets out provisions in relation to the recovery of reasonable expenses for certain activities by local authorities, namely collection and analysis of water samples and carrying out and reviewing risk assessments. The aim of the provision is to ensure that local authorities are able fully to recover the costs of their enforcement of these Regulations. Owing to the diversity of private supplies across Scotland upper limits on these costs are now not specified as they may vary from area to area, but the principle that cost recovery should be for expenses reasonably incurred remains.

Consultation

22. A public consultation on a draft of the Regulations took place from 6 May to 28 July 2017. The principal amendments made in response to the consultation were as follows:

- A provision included in the consultation draft to allow representations to be made against the intention to serve a remediation or enforcement notice was subsequently removed from the Regulations as local authorities had found similar provisions in other legislation not to be useful and there is in any case a right of appeal against the serving of a notice.
- A stylistic drafting change was made, to no longer use the term “small supply” to describe supplies exempt from the Regulations, as this description thought be misleading.
- The different definitions of “relevant person” have been merged into one and additional qualifying factors introduced.
- The information to be recorded in the register of private supplies has been reduced and simplified.
- Provisions imposing additional duties on water suppliers have been removed in the light of a strong body of opinion that these were potentially too onerous and liable to have unintended adverse consequences on users and consumers of private water supplies.
- The judgment on whether water used in food production can or cannot affect the wholesomeness of the product, and therefore whether or not it is water intended for human consumption, has been made the responsibility of the competent authority, that is Food Standards Scotland or the relevant local authority, rather than the Drinking Water Quality Regulator for Scotland.

Impact assessment

23. A partial Business and Regulatory Impact Assessment (BRIA) was included with the consultation. A full BRIA has since been completed, having regard to the consultation responses. An Equality Impact Assessment (EQIA) and a Child Rights and Wellbeing Impact Assessment (CRWIA) were not carried out as the Regulations are not considered to have any significant impact in relation to these matters.

Financial effects

24. The Regulations will have some financial impact on local authorities and owners and users of public supplies which are detailed in the BRIA. In summary, over the 4 year phasing-in period of the new risk assessment requirements, the total additional costs to all owners and users across Scotland are estimated to be £94,000, an additional annual cost of £23,500. The Regulations require a risk assessment and then a review after 5 years, therefore when compared against the requirements for current supplies of a review every year, it is likely that the cost for each risk assessment for each supply over ten years will be reduced.

25. Under the new sampling regime, additional monitoring may be necessary to develop an evidence base to allow the removal of certain parameters from monitoring programmes. To mitigate this and the substantial costs that would be incurred by monitoring each supply over the three years specified in the Amending Directive it is proposed to monitor by supply zones which will be groups of private water supplies. The current annual cost of analysis is estimated to be £232,700. It is estimated that the annual monitoring costs will be in the range of £276,000 - £456,000. It is not possible to be more exact until the findings of the research programme into water supply zone designations is complete and the number of zones known.

Drinking Water Quality Division
The Scottish Government
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