

EXPLANATORY MEMORANDUM TO
THE ENVIRONMENTAL PERMITTING (ENGLAND AND WALES) (AMENDMENT)
(No. 2) REGULATIONS 2013

2013 No. 766

1. 1.1 This explanatory memorandum has been prepared by the Department for Environment Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the Environmental Permitting (England and Wales) Regulations 2010 (SI 2010/675), and is made on a composite basis with the Welsh Ministers. It enables take up of the derogation from the prohibition on the landfill of liquid waste in the case of metallic mercury which is allowed for by Regulation (EC) No 1102/2008 of the European Parliament and of the Council (on the banning of exports of metallic mercury and certain mercury compounds and mixtures and the safe storage of metallic mercury); it also implements the requirements of Council Directive 2011/97/EU amending Directive 1999/31/EC (as regards specific criteria for the storage of metallic mercury considered as waste) thereby allowing the storage of liquid metallic mercury waste for more than 12 months provided other relevant requirements are complied with. The instrument also includes the storage of metallic mercury wastes within the scope of the Control of Major Accident Hazards Regulations 1999 (SI 1999/743).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 These amendments arise from the need to transpose criteria for the safe storage of metallic mercury wastes as detailed in Directive 2011/97/EU. The provisions of this Directive are also linked to the derogation from the prohibition on liquid landfill allowed for by Regulation (EC) No 1102/2008.

4.2 Article 5(3)(a) of Council Directive 1999/31/EC (the Landfill Directive) prohibits the acceptance of liquid waste in a landfill. Regulation (EC) No 1102/2008 provides that, by way of derogation from Article 5(3)(a) of the Landfill Directive metallic mercury that is considered as waste may, in appropriate containment, be temporarily stored for more than one year in certain types of facility.

4.3 This instrument will enable regulators to exercise their relevant functions (e.g. to grant an environmental permit) so as to permit the storage of metallic mercury waste in accordance with the requirements of Regulation 1102/2008 and the storage criteria for liquid metallic mercury waste as specified in Directive 2011/97/EU.

4.4 Where the derogation on the landfill of liquid waste is used in relation to above-ground storage facilities, Regulation 1102/2008 provides that Directive 96/82/EC (on the control of major accident hazards involving dangerous substances) must be applied. Directive 96/82/EC has been implemented in Great Britain by the Control of Major Accident Hazards Regulations 1999, and to ensure implementation of this requirement this instrument amends those Regulations so as to bring such storage sites within their scope.

5. Territorial Extent and Application

5.1 In respect of the amendments to the Environmental Permitting (England and Wales) Regulations 2010, this instrument extends to England and Wales. In respect of the amendment to the Control of Major Accident Hazards Regulations 1999, this instrument extends to England and Wales and Scotland.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Mercury and its compounds are highly toxic to humans, ecosystems and wildlife. High doses can be fatal to humans, but even relatively low doses of mercury containing compounds can have serious adverse neurodevelopmental impacts, and have been linked with possible harmful effects on the cardiovascular, immune and reproductive systems. Mercury is persistent and can change in the environment into methyl-mercury, the most toxic form. Methyl-mercury readily passes both the placental and the blood-brain barrier, inhibiting mental development even before birth.

7.2 Regulation (EC) No 1102/2008 placed a ban on the export of metallic mercury in order to reduce the risk of exposure to mercury for humans and the environment. The export ban has resulted in surplus amounts of mercury in the Community and as a result the safe storage of mercury needs to be ensured.

7.3 The aim of Directive 2011/97/EU is to specify safe storage conditions for metallic mercury considered as waste. This instrument transposes the requirements of Directive 2011/97/EU through amendments to the Environmental Permitting regime for England and Wales.

7.4 Article 2 of Regulation 1102/2008 specifies that only certain types of metallic mercury are to be considered as waste and subject to the aforementioned export ban. As a

result, only these types of metallic mercury waste are captured under the provisions of Directive 2011/97/EU and this instrument. They are:

- (a) metallic mercury that is no longer used in the chlor-alkali industry;
- (b) metallic mercury gained from the cleaning of natural gas;
- (c) metallic mercury gained from non-ferrous mining and smelting operations; and
- (d) metallic mercury extracted from cinnabar ore in the Community as from 15 March 2011.

7.5 The Department for Environment, Food and Rural Affairs engaged actively with industry stakeholders and the UK regulators on the implementation of Directive 2011/97/EU. This engagement revealed no evidence of any UK business currently storing the above types of metallic mercury waste long enough to be subject to the Directive.

7.6 The Department considered whether the provisions of Directive 2011/97/EU could be implemented in the UK through non-regulatory intervention. The Landfill Directive, which Directive 2011/97/EU amends, sets out criteria and standards for the disposal of waste by landfill. In England and Wales the Landfill Directive is implemented via the Environmental Permitting Regulations (England and Wales) 2010. It is the view of the Department that transposition via an amendment to Environmental Permitting Regulations provides the clearest and simplest mechanism for introducing the specific measures for the storage of metallic mercury waste which will meet the United Kingdom's obligations to transpose Directive 2011/97/EU and which are consistent with our overriding obligations to protect human health and the environment.

7.7 The Department understands and appreciates that industry needs assurance of a level playing field before they are likely to invest in developing facilities that can meet the strict storage criteria laid down in the Directive. It is the view of the Department that this level playing field is most effectively and assuredly achieved by changes to the environmental permitting legislation which governs waste management operations.

8. Consultation outcome

8.1 The transposition of Directive 2011/97/EU was subject to informal engagement with industry stakeholders prior to the launch of a formal public consultation on the specific transposition proposals. This engagement revealed no evidence of any UK business currently storing the relevant types of metallic mercury waste long enough to be subject to the Directive. Given the outcome of this prior engagement and in accordance with the new Government guidance on public consultations a six week public consultation was considered appropriate and proportionate. The six week public consultation on the proposed amendments to the Environmental Permitting (England and Wales) Regulations 2010 was launched on the 14 December 2012.

8.2 The consultation was published on the website of the Department for Environment, Food and Rural Affairs. Details of the consultation were notified to over 250 stakeholders. This list included companies that handle and produce mercury waste,

the principal trade association and professional bodies for the waste management sector, the Confederation of British Industry, the UK environment and health and safety regulators and the devolved administrations.

8.3 There was limited public interest and only eight responses to the consultation were received. There were five responses to the specific questions raised in the consultation; three were “no comment”, the other two supported the proposals. Of the remaining responses two were questions from producers of mercury waste who wished to know how the proposals would affect them; neither was affected by the proposals. The final response consisted of comments on the subject of mercury waste exports from a waste management company. A summary of the consultation responses and the consultation paper are available on the Department’s website (<http://www.defra.gov.uk/consult/>). The responses received by the Department did not indicate that there were any reasons to alter the Department’s proposals to transpose Directive 2011/97/EU.

9. Guidance

9.1 The Department does not intend to issue further guidance in respect of these Regulations, but will keep this issue under review.

10. Impact

10.1 It is currently believed that there will be no impact on business, charities or voluntary bodies. Engagement with industry has revealed no evidence of businesses, charities or voluntary bodies that store the relevant types of metallic mercury waste for greater than 12 months.

10.2 As it is believed that there is no one storing metallic mercury waste long enough to be subject to this instrument no impact on the public sector is envisaged.

10.3 Accordingly an Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to small businesses if they decide they wish to store the relevant types of metallic mercury waste for longer than 12 months. Engagement with industry has revealed no evidence that there are any businesses in the UK currently storing metallic mercury waste for longer than 12 months.

11.2 A formal public consultation was carried out in December 2012; this included seeking the views of small businesses.

12. Monitoring & review

12.1 The Environmental Permitting (England and Wales) Regulations 2010 contain a general review clause and the first report under this requirement must be published before the 6th April 2017.

12.2 This review will be carried out by the Department for Environment, Food and Rural Affairs in consultation with stakeholders and other government departments; it will be a proportionate check that the regulations are functioning as intended.

13. Contact

Patrick McKell at the Department for Environment, Food and Rural Affairs (Tel. 020 7238 4407 or email patrick.mckell@defra.gsi.gov.uk) can answer any queries regarding the instrument.