

**EXPLANATORY MEMORANDUM TO**  
**THE ENVIRONMENTAL PERMITTING (ENGLAND AND WALES)**  
**(AMENDMENT) REGULATIONS 2018**

**2018 No. 110**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs (Defra) and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

- 2.1 The primary purpose of the instrument is to amend the Environmental Permitting 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 domestic emission controls in respect of certain types of electricity generator. 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. The instrument also extends enforcement undertakings to flood risk activities, in respect of the Environment Agency in England, to provide greater consistency across regulated sectors and options for enforcement.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 The deadline for the transposition of the Medium Combustion Plants Directive is 19 December 2017.

*Other matters of interest to the House of Commons*

- 3.2 The entire instrument applies only to England and Wales, with the exception of regulation 18, which applies in England only, and regulation 19 which applies in Wales only.
- 3.3 The 2016 Regulations apply to England and Wales only, and the subject matter (environmental permitting) is fully devolved. Scotland and Northern Ireland have equivalent domestic legislation.
- 3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter or the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament or the National Assembly

for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

#### **4. Legislative Context**

- 4.1 The 2016 Regulations, which were made to consolidate 15 previous amending instruments, presently only apply domestic emission controls to individual combustion plants with a thermal rated input of over 20MW and to installations undertaking combustion activities with an aggregated thermal rated input of over 50MW, by virtue of the EU Industrial Emissions Directive (EU 2010/75).
- 4.2 This instrument transposes, in England and Wales, the Medium Combustion Plants Directive, by amending the 2016 Regulations to include within the environmental permitting regime all combustion plants with a thermal rated input of 1 or more and less than 50MW (“Medium Combustion Plants”).
- 4.3 The instrument also amends the scope of the 2016 Regulations to introduce domestic permitting requirements for plants used to generate electricity with a rated thermal input below 50MW (“generators”). For the purpose of the instrument generators are single plants or a group of plants at a site which are operated by the same operator and for the same purpose. In certain circumstances individual generators with a rated thermal input below 1 MW can be in scope.
- 4.4 The instrument amends the Air Quality Standards Regulations 2010 (S.I. 2010/1001) and the Air Quality Standards (Wales) Regulations 2010 (S.I. 2010/1433) 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.
- 4.5 The instrument also extends enforcement undertakings, in respect of the Environment Agency in England, to flood risk activities. This amendment provides consistency across the environmental permitting activities regulated under the 2016 Regulations, and allows the regulator to accept offers from offenders to repair damage caused as an alternative to criminal proceedings.

#### **5. Extent and Territorial Application**

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is set out in Section 3 under “Other matters of interest to the House of Commons”.

#### **6. European Convention on Human Rights**

- 6.1 The Parliamentary Under Secretary of State for the Department of Environment, Food and Rural Affairs, Thérèse Coffey has made the following statement regarding Human Rights:

“In my view the provisions of the Environmental Permitting (England and Wales) (Amendment) Regulations 2018 are compatible with the Convention rights.”

## 7. Policy background

### *What is being done and why*

- 7.1 On 23rd June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. The Prime Minister began the negotiations to exit the EU on 15 March. Until exit negotiations are concluded, the UK remains a full member of the European Union and all rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.
- 7.2 Recognising the need for action to improve air quality, 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 (as noted above, plants 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 Plants Directive was made, which needs to be transposed into UK law by 19 December 2017. The Directive requires the operation of Medium Combustion Plants to be authorised by permits in order to impose conditions upon emissions of nitrogen oxides, sulphur dioxide and dust into the air. Permit conditions also require the testing of emissions periodically to demonstrate compliance with the relevant emissions levels. There is therefore **no alternative to regulation for transposition**.
- 7.3 The 2016 Regulations, which were made to consolidate 15 previous amending instruments, 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 bureaucratic burden associated with the various separate permitting regimes that had gone before. The 2016 Regulations implement domestic provision but also transpose 15 European Directives.
- 7.4 In order to continue to have environmental permitting dealt with in a single set of regulations, it was decided that the most appropriate way to transpose the Medium Combustion Plants Directive was to amend the 2016 Regulations by extending the scope of the existing permitting regime to include these plants.
- 7.5 In accordance with the Directive operators of new Medium Combustion Plants will require a permit to operate plants from 20 December 2018, at which point those plants will have to comply with the emission limit values for certain pollutants (which depends on the fuel used). 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 Plants, in order to provide operators with sufficient time to adapt technically to the requirements. This means operators of existing medium combustion plants only come within the permitting regime from 2024 or 2029, depending upon the plant’s rated thermal input.
- 7.6 The instrument also imposes domestic controls in respect of electricity generators. 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 generators are not currently subject to emission controls and can have very high emissions of nitrogen oxides. These generators can cause breaches in the ambient air quality limits set in the Air Quality Standards Regulations 2010 (S.I. 2010/1001) and the Air Quality Standards (Wales) Regulations 2010 (S.I. 2010/1433). As set out in the UK plan for tackling roadside nitrogen dioxide concentrations<sup>1</sup> published in July, poor air quality is the largest environmental risk to public health in the UK and investing in cleaner air and doing even more to tackle air pollution are priorities for the UK government. Tackling the problem of nitrogen oxide concentrations is a significant challenge and it is the only statutory air quality limit that the UK is currently failing to meet.

- 7.7 The UK government is also committed to reducing overall national emissions in accordance with the United Nations Convention on Long-Range Transboundary Air Pollution (specifically, the Gothenburg protocol, agreed in November 1999<sup>2</sup>) which set maximum national emission ceilings for various pollutants including nitrogen oxides, that had to be met from 2010 onwards. The protocol was amended in 2012 to set even more stringent ceilings that will apply from 2020, which at a European level will be implemented by the EU National Emissions Ceilings Directive (2016/2284).
- 7.8 As an increase in the use of generators has been identified as a source of an avoidable increase in national emissions of nitrogen oxides and their use contributes to local concentrations of the pollutant, domestic regulatory action is needed. This instrument will ensure that the use of generators will not have undesirable adverse air quality impacts as it extends the environmental permitting regime so that from 1 January 2019, new generators will be required to comply with emission controls for nitrogen oxides. Operators will be required to submit emissions data to demonstrate compliance with applicable emission limits when applying for an environmental permit and then monitor emissions in order to demonstrate compliance. Older, existing generators, and those already providing certain services to the National Grid, 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.
- 7.9 Regarding flood risk activities: at present, the Environment Agency can, as an alternative to other means of enforcement, use enforcement undertakings under the Environmental Permitting Framework for a number of environmental permitting activities, including waste management, water quality (discharges of sewerage to rivers and groundwater) and installations for industrial processes.
- 7.10 Enforcement undertakings are currently unavailable for flood risk activities. In order to ensure consistency across Environmental Permitting schemes, the instrument revokes paragraph 1(2) of Schedule 26 to the 2016 Regulations so that enforcement undertakings will become available in the case of offences relating to flood risk activities in England.

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<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/633270/air-quality-plan-detail.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/633270/air-quality-plan-detail.pdf)

<sup>2</sup> <http://www.unece.org/info/ece-homepage.html>

### ***Consolidation***

- 7.11 No consolidation is planned at this stage, since this is the first of a series of planned amendments of the 2016 Regulations.

## **8. Consultation outcome**

- 8.1 A joint consultation by Defra and the Welsh Government on reducing emissions from medium combustion plants and generators was published on the 16th November 2016 and ended on 8th February 2017 (duration 12 weeks).
- 8.2 112 respondents submitted comments: 3 private individuals, 39 Energy companies, 3 NGOs, 7 regulators, 5 public sector bodies, 30 Industry bodies, 1 plant abatement manufacturer, 1 from the leisure/retail sector, 2 service industry, 2 small/micro businesses, 14 local authorities and 14 others.
- 8.3 There was strong support for transposing the Medium Combustion Plants Directive and introducing the emission controls for generators through an amendment to the 2016 Regulations.
- 8.4 The Department acted on widespread concerns about the impact to air quality by not transposing later application of stricter emission controls for plants providing district heating or firing biomass, since it would provide a very small saving for operators compared with the potential benefits for air quality.
- 8.5 There was widespread support for introducing emission controls to generators while exempting backup generators which provide power in emergencies, and those used with a nuclear safety role at nuclear sites. The Department acted on concerns about leaving regulatory gaps and also acted to amend proposals in respect of generators in response to concerns that those initially proposed would not be achievable by a large number of existing generators.
- 8.6 A summary and response to the consultation on reducing emissions from Medium Combustion Plants and generators was published on 11 June 2017, which can be found at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/626803/mcpd-generator-consult-sum-responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/626803/mcpd-generator-consult-sum-responses.pdf)

## **9. Guidance**

- 9.1 A suite of Government guidance on environmental permitting under the 2016 Regulations is published at <https://www.gov.uk/topic/environmental-management/environmental-permits>, which explains the environmental permitting system in detail. This guidance will be updated by the Environment Agency in dialogue with stakeholders to reflect the requirement for compliance with this instrument.

## **10. Impact**

- 10.1 The impact on business, charities and voluntary bodies is set out in the Impact Assessments submitted with this memorandum. However, charities and voluntary bodies will largely not operate Medium Combustion Plants or generators and so will not be impacted. An enforcement undertaking will only impact on businesses if a business has failed to comply with a flood risk permit or done work where they were required to hold a permit.

- 10.2 The impact on the public sector is in terms of the duties of the Environment Agency in implementing the instrument. The Environment Agency is familiar with environmental permitting and will recover operating costs from permit holders through charges to permit holders set in charging schemes approved by the Secretary of State. There will be a small initial transitional cost to develop the systems required for implementation and training of staff which are set out in the Impact Assessments.
- 10.3 Impact Assessments for transposition of the Medium Combustion Plants Directive and for the generator controls are submitted with this memorandum and published alongside the Explanatory Memorandum on the [legislation.gov.uk](http://legislation.gov.uk) website.
- 10.4 Regarding the impact of enforcement undertakings: An enforcement undertaking will only impact on businesses if a business has failed to comply with a flood risk permit or completed work where they were required to hold a permit. It is not aimed specifically at business and does not apply across the board to business.
- 10.5 Enforcement undertakings are voluntary offers made by offenders to restore and remediate any damage they have caused, in agreement with the regulator, without attracting a criminal record. Enforcement undertakings are more proportionate and less costly than prosecution for less serious offences and are more likely to bring businesses back into compliance. They can be quicker to conclude than prosecution, and hence less costly for all parties

## **11. Regulating small business**

- 11.1 The legislation applies to activities that are undertaken by small businesses.

## **12. Monitoring & review**

- 12.1 The Medium Combustion Plants Directive requires the European Commission to report upon progress in relation to the energy efficiency of Medium Combustion Plants and assess the benefits of setting minimum energy efficiency standards in respect of such plants by 1 January 2020. The instrument amends the review provision in the 2016 Regulations so that the legislation is reviewed in line with the 2016 Regulations.
- 12.2 The regulators will provide information to Defra which will enable the Department to monitor the effectiveness of these measures.

## **13. Contact**

- 13.1 Sejal Mahida at the Department for the Environment, Food and Rural Affairs (Telephone: 02082258451 or email: [Control.Pollution@defra.gsi.gov.uk](mailto:Control.Pollution@defra.gsi.gov.uk)) can answer any queries regarding the instrument.