

EXPLANATORY MEMORANDUM TO
THE PRIVATE WATER SUPPLIES (ENGLAND) (AMENDMENT) REGULATIONS
2018

2018 No. 707

1. Introduction

- 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 The instrument amends the existing legislative framework for drinking water quality in England in respect of private supplies. It is designed to implement changes made to Council Directive 98/83/EC on the quality of water intended for human consumption known as the Drinking Water Directive (“the DWD”) and make other substantive amendments to the legal regime. Private supplies are supplies of water other than those provided directly by a water undertaker from, for example, a natural spring or a borehole. These water supplies may be owned by, for example, private individuals, hospitals, schools or small businesses such as bed and breakfasts. Private supplies to single households are exempt from monitoring unless requested by the owner or user. Local authorities enforce the legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 This instrument amends the Private Water Supplies (England) Regulations 2016 (S.I. 2016/618) (the “2016 Regulations”). The 2016 Regulations transposed the DWD (OJ L 330, 5.12.1998, p.32) 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 (OJ L 296, 7.11.2013, pp.12-21). The 2016 Regulations also supplement the provisions set out in Chapter 3 of the Water Industry Act 1991 (1991 c.56). Local authorities have duties under sections 77 to 85 of the 1991 Act relating to private water supplies. They are also responsible for enforcing the 2016 Regulations, as amended by this instrument.
- 4.2 This instrument primarily transposes new monitoring requirements introduced by Commission Directive (EU) 2015/1787 (the “Directive”) amending Annexes II and III of the DWD. In particular, the amendments introduce a new risk based approach to monitoring and new specifications for the method of analysis of different parameters.

It also makes minor amendments to make the 2016 Regulations more readily understandable for the benefit of water undertakers. This is in keeping with the Government's commitment to better regulation.

- 4.3 This instrument is designed to sit alongside the Water Supply (Water Quality) (Amendment) Regulations 2018 (S.I 2018/706) which are being laid at the same time. These concern the regulation of public water supplies and make similar amendments to the Water Supply (Water Quality) Regulations 2016 (S.I. 2016/614) in order to transpose new requirements introduced into the DWD.

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 England.

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

What is being done and why

- 7.1 The primary purpose of this instrument is to transpose the Directive amending Annexes II and III to the DWD. The Directive introduces a risk based approach to monitoring which, if met, allows a reduction in the frequency of sampling and analysis of parameters. This is aligned with the principles of the World Health Organisation (WHO) which has developed the Water Safety Plan approach based on risk assessment and risk management principles. The Directive also specifies updated methods of analysis for certain parameters and performance characteristics in the light of scientific and technical progress. The production, distribution, monitoring and analysis of drinking water will also be secured by internationally recognised standards EN 15975-2¹ and EN ISO/IEC 17025², both of which require certification. The Drinking Water Inspectorate (DWI) has developed a risk assessment tool, for use by local authorities, that already meets standard EN 15975-2 and a scheme is currently being developed by them for EN ISO/IEC 17025. Although the Directive only requires the methods of analysis (and the quality management system practices surrounding them) to be performed to standard EN ISO/IEC 17025, we have extended this to cover actions leading up to analysis, for example, the collection, handling, storage and transportation of samples. This will ensure samplers are competent and reduce the risk of contamination of a sample before analysis occurs. These actions should be undertaken either to standard EN ISO/IEC 17025 or standard EN ISO/IEC 17024³. Local authorities are familiar with both standards and guidance on how to meet them is already available from the DWI.

¹ Entitled "Security of drinking water supply – Guidelines for risk and crisis management – Part 2: Risk management". See the Explanatory Note at the end of the instrument for information on how to obtain a digital or hard copy.

² Entitled "General requirements for the competence of testing and calibration laboratories". See the Explanatory Note at the end of the instrument for information on how to obtain a digital or hard copy.

³ Entitled "Conformity assessment. General requirements for bodies operating certification of persons". See the Explanatory Note at the end of the instrument for information on how to obtain a digital or hard copy.

- 7.2 The WHO's Water Safety Plan approach has already been adopted, in part, in the 2016 Regulations. This instrument will therefore replace and updated the existing risk based approach. The criteria to reduce the frequency of or cease sampling and analysis has also been changed to allow further reductions and, where appropriate, allow the cessation of monitoring for parameters.
- 7.3 This instrument includes transitional and saving provisions primarily related to the need to revert to standard monitoring frequencies for all parameters until the new risk based criteria can be applied, and the change to performance characteristics. Most local authorities are already monitoring based on risk, but the criteria in the 2016 Regulations to allow the reduction or cessation of monitoring was not based on WHO guidelines which have now set more stringent standards before sampling can be reduced and monitoring of parameters stopped. Data will therefore need to be gathered to apply the new criteria but any data collected before this instrument comes into force can be relied upon. Old performance characteristics can continue to be used during a transitional period beginning with the date on which this instrument comes into force and ending with 31 December 2019. The relevant provisions in the 2016 Regulations are therefore saved (with a modification) until the transitional period comes to an end.
- 7.4 The instrument also gives effect to two domestic policy changes. The first relates to notices served under regulation 18 of the 2016 Regulations. If any private supply of water intended for human consumption constitutes a potential danger to human health, the local authority must serve a notice on the relevant person specifying, amongst other things, what action is necessary to restore and maintain the wholesomeness of the water supply. Should that action not be undertaken within 28 days of the notice being served, a local authority can now perform remedial work in the interest of protecting public health and recover the costs reasonably incurred in doing so. The second relates to removing the maximum amounts that local authorities can charge for the activities undertaken to fulfil their duties in respect of private water supplies. In 2016, through stakeholder engagement and Dialogue App⁴, the DWI established that for some local authorities the current maximum amount of fees, set in 2010, was insufficient to cover the costs of undertaking mandatory sampling and analysis. Section 77(4)(d) of the Water Industry Act 1991 states that the regulations may provide for the recovery by local authorities of costs they reasonable incur. Local authorities have warned that, if fees are not revised, there is a risk that the standards of services they supply could be impacted so increasing the risk to health of private water supplies consumers. As there are a number of safeguards⁵ in place to ensure that local authorities will only charge the amount necessary to recover the expenses incurred, and to future-proof the Regulations against regular revision to the fees due to rising costs from laboratories, inflation, etc. this instrument removes the maximum amounts from the face of the Regulations. This has been agreed by Her Majesty's Treasury.

⁴ Dialogue App is an online discussion and crowd sourcing tool that allows the user to engage with stakeholders to shape early policy development, obtain evidence and discuss ideas.

⁵ Local authorities must apply rigour when establishing (and publishing) the charges for the activities involved. They are subject to external annual audits that will check their charging policies and, within each authority, Chief Finance Officers are responsible for the proper administration of financial affairs. If an owner/user of a private water supply is concerned that local authorities are charging beyond full cost recovery, the charges can be challenged through the formal complaints procedures that all local authorities will have in place. Complaints can also be made directly through the Chief Finance Officer or to the external auditors.

- 7.5 The instrument incorporates some additional wording and updates some out of date references in the 2016 Regulations to improve clarity, in keeping with the Government's commitment to better regulations, and transposes a change resulting from Council Directive 2013/51/EURATOM.
- 7.6 On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period, the Government will continue to negotiate, implement and apply EU legislation.
- 7.7 This instrument is laid later than the Directive's deadline. The write round to the Home Affairs and Reducing Regulation sub-committees seeking cross government clearance to launch the consultation was anticipated for May 2017, but was delayed until 13 July, a month after the General Election and shortly before summer recess. A 6 week consultation on this instrument and S.I. 2018/706 was launched on 12th September and closed on 24 October, 3 days before the transposition deadline. We received a total of 225 responses, considerably higher than previous consultations. It therefore took longer than anticipated to review and summarise the responses, as well as undertake changes to the draft instrument and complete other government processes prior to laying.

Consolidation

- 7.8 The Department does not intend to consolidate the relevant legislation. The 2016 Regulations were a consolidation and this is the first set of amendments since, therefore consolidation at this stage is not suitable.

8. Consultation outcome

- 8.1 A public consultation on this instrument and the Water Supply (Water Quality) (Amendment) Regulations 2018 ran for 6 weeks from 12 September to 24 October 2017. All local authorities in England (approximately 300) were invited to respond to the consultation. Local authorities then engaged with private water supply owners and/or users via letter, email, social media and published notices of the consultation on their websites. We received 201 responses, 105 via Citizen Space and 96 via email or post, in respect of this instrument. There were 48 from local authorities and local authority water groups, 146 from those that use a private water supply (of which 46 owned a business), and 7 from other relevant organisations, for example, the British Standards Institute and the Chartered Institute of Water and Environmental Management. The DWI held 6 workshops across the country between 8 September and 7 October 2016 to which all local authorities were invited and during which presentations to explain the changes to Annexes II and III and the impact these would have on local authorities were provided. Given the very specific nature of the instrument, the prior engagement with local authorities, and the number of private water supplies affected by the changes (approximately 12,000 of the 39,400 private water supplies in England), a 6 week consultation period was considered to be appropriate for responses in this case.
- 8.2 Whilst respondents were generally in favour of the instrument, they raised a number of concerns. Of the respondents that answered, 35% welcomed the new risk based approach to standard EN 15975-2 (see paragraph 7.1) and thought it would continue to protect drinking water supply whilst focussing sampling and analysis on the highest

risks. The remaining 65% did not disagree that the approach would continue to protect drinking water supply but opposed the costs involved in changing the approach and thought it would mainly impact small and micro businesses in rural areas. Of the 39,400 private water supplies, 6,300 require a monitoring programme that can be based on risk. These are either large private water supplies or, irrespective of volume, are part of a commercial or public activity. Establishments providing water as part of a commercial or public activity cannot be exempted in view of Article 3(2)(b)⁶ of Council Directive 98/83/EC. The small and micro business moratorium is no longer in force and, in any event, does not apply to measures implementing EU obligations. Further, 4.2% of tests on private water supplies failed to meet the standards in 2016 (compared to only 0.04% of tests on public water supply). The supplies failing the standards are of unsafe microbiological quality, with 7.4% of samples containing E.coli and 7.9% containing Enterococci. This means that the water supply is contaminated with faecal matter and there is a risk that harmful pathogens will also be present. Introducing the new risk based criteria will require local authorities to reassess the supplies in their area against WHO guidelines and, by submitting the results of the risk assessment to the Secretary of State, will provide consistency of approach. This in turn should improve the risk to public health.

- 8.3 The change to performance characteristics was supported by 68% of respondents but 19 private water supply owners/users were concerned that any costs incurred by laboratories when complying with the changes proposed would be passed on to themselves. Until guidance (part of the Standards Committee if Analysts (SCA) blue books) for calculating the performance characteristics is implemented by laboratories, the costs to change performance characteristics is unknown. However, the Government believes that laboratories will absorb the costs to change (as it is within their best interest if they want to secure a contract with a local authority).
- 8.4 12 local authorities sought further information on the accreditation of their sampling officers to standard EN ISO/IEC 17024 (for the collection, handling, transportation and storing of samples). Some recognised the benefits of accreditation but others thought that it was disproportionately expensive. A pilot sampling officer accreditation scheme has been launched which will inform guidance and better determine the costs. Local authorities will have 2 years from when the instrument comes into force to arrange for the sampling officer to be certified to the standard. For those local authorities which are using the guidance published by the DWI, sampling officers should already be taking samples to the standard.
- 8.5 Finally, 83% of local authorities supported the proposal to remove the maximum limits local authorities can charge for performing their statutory duties, compared to 51% of private water supply owners/users who objected. Of those that provided comments, 38 private water supply owners/users said there would be no incentive for local authorities to control their fees, 23 requested standard rates to ensure consistency across England, and 10 said there would need to be a transparent charging policy. Although maximum limits are removed by this instrument from the 2016 Regulations, local authorities still need to establish a fee for each activity and are encouraged to publish their charging policies online. As explained in paragraph 7.4, local authorities can only charge the necessary amount to recover the expenses

⁶ This states that “Member States may exempt from the provisions of this Directive: water intended for human consumption from an individual supply providing less than 10 m³ a day as an average or serving fewer than 50 persons, unless the water is supplied as part of a commercial or public activity”.

reasonably incurred. Rates across England cannot be standardised as each local authority has different factors that must be taken into account.

9. Guidance

- 9.1 The DWI will publish revised guidance on their website providing detail on the practical application of the 2016 Regulations as amended by this instrument and clarity on technical aspects relevant to the provision of drinking water.

10. Impact

- 10.1 There is no specific impact on charities or voluntary bodies. There will be an impact on businesses. Of the 6,300 private water supplies most impacted by the changes, approximately 80% are businesses (the remaining 20% are public buildings, for example, council offices). The main cost arises from the changes to the risk based approach to monitoring. For the local authority to revert to a comprehensive monitoring programme and gather the data to apply the new risk criteria, we have estimated a net increase of £1.3m per year for 3 years with an average price increase from £260 to £600 per year. After that, costs are expected to revert back to approximately £260 although with the potential to produce savings of £0.21m per year because of the new risk based approach. Removing the maximum limits on the amount local authorities can charge will impact 12,000 private water supplies, approximately 80% of which are businesses. Using the estimated increases provided by local authorities during workshops in September and October 2016 (see paragraph 8.1), it is estimated that those businesses will incur a total additional cost of £0.8m per year.
- 10.2 The impact on the public sector comes from the need for local authorities to embed and familiarise themselves with the new risk based approach. It is estimated that one person for five days per local authority will be required at an average full economic cost of £45,000 a year (210 effective days). As there are approximately 260 local authorities involved in private water supply sampling in England, the estimated total cost to local authorities will be £0.28m.
- 10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses. They are already subject to the current monitoring arrangements and, as mentioned in paragraph 8.2, they cannot be exempted from the new risk based monitoring requirements.

12. Monitoring & review

- 12.1 Regulation 22 of the 2016 Regulations requires the Secretary of State to carry out a review of the Regulations and to produce a report setting out the conclusions of the review within 5 years of the date on which the 2016 Regulations came into force (the first due in June 2021) and at 5-year intervals thereafter.

13. Contact

- 13.1 Louise Hunt at the Department for Environment, Food and Rural Affairs (Telephone: 0208 225 8467 or email: louise.hunt@defra.gsi.gov.uk) can answer any queries regarding this instrument.