

**EXPLANATORY MEMORANDUM TO**  
**THE ENVIRONMENTAL PROTECTION (CONTROLS ON OZONE - DEPLETING**  
**SUBSTANCES) (AMENDMENT) REGULATIONS 2008**

**2008 No. 91**

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. **Description**

These Regulations carry forward further implementation of EC Regulation 2037/2000 on substances that deplete the ozone layer (“the 2000 Regulation”) by amending the Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2002 No.528 (“the 2002 Regulations”). The Regulations:-

(a) require prior authorisation of methyl bromide fumigations for quarantine and pre-shipment purposes and set out penalties for failure to do so;

(b) replace, update and add to enforcement powers for enforcement bodies and authorised persons;

(c) apply the provisions of these Regulations to offshore oil and gas installations that make use of ozone-depleting substances in equipment;

(d) create new offences and penalties in relation to failure to supply information/records about halon exports or supplying false information about proposed exports and new offences and penalties in relation to production/placing on the market of bromochloromethane in breach of EU/international bans;

(f) enable the Secretary of State to require persons to dispose of a controlled substance, a product or equipment because of improper export or placing on the market and for it to be an offence for failure to comply.

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

None

4. **Legislative Background**

4.1 These Regulations give further effect to provisions of the 2000 Regulation which is the legal instrument creating binding obligations in Member States to give effect to the requirements of the Montreal Protocol on Substances that Deplete the Ozone Layer. The EC Regulation is directly applicable in the UK although national secondary legislation is needed to create sanctions and penalties for infringement of the relevant obligations.

4.2 The proposals for the 2000 Regulation were the subject of EM 5999/99, which was considered by the by the House of Commons European Scrutiny Committee on 24th March 1999 and by the House of Lords Select Committee on European Communities on 23rd March 1999. Both Committees considered the EM to have no political or legal importance and cleared it. Amendments to the proposals were the subject of supplementary EM 6777/00.

4.3 EC Regulation 2037/2000 was amended by EC Regulation 1804/2003, including as regards the control of halon (a fire extinguishant) exported for critical uses and controls on bromochloromethane (a solvent). The 2002 Regulations therefore needed to be updated to take account of the additional obligations contained in EC Regulation 1804/2003.

## **5. Extent**

This instrument applies to Great Britain, including “offshore installations” as defined in Regulation 2(1), except in relation to importation where it will also apply to Northern Ireland.

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

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

## **7. Policy background**

7.1 The 2000 Regulation contains measures to protect the stratospheric ozone layer from emissions of ozone depleting substances. It gives effect to the provisions of the Montreal Protocol and its amendments and, in some cases, goes beyond its requirements. These Regulations strengthen and enhance the enforcement powers in the 2002 Regulations.

7.2 10 responses were received to a joint Defra/Scottish Executive/National Assembly for Wales consultation document. The consultation ended on 14 August 2007. There was overall support for the proposed Regulations and none of the respondents disagreed with the premise that they should be GB-wide. Some concerns were raised in relation to the information to be supplied in applications for methyl bromide fumigations and the territorial extent of offshore installations. Suggestions were made that there should be provision for protection against self-incrimination, powers for an enforcement officer to require immediate action to be taken if there is danger of serious pollution of the environment and fixed penalty notice powers to deal with businesses and private dwellings. The latter powers were not thought necessary because the instances of breaches would be so low as to be negligible - fridges with CFCs have not been produced since 1992 and the lifetime of a fridge is 12 to 18 years. With businesses, it is thought that a small fine would not act as a deterrent in the same way as a criminal record if advice is not heeded. Thus a warning, followed by criminal sanctions should be the method of dealing with ODS "emitters". The other suggestions for changes to the proposed amendment regulation have been taken on board as follows:-

(i) there is now an additional requirement that applicants for an authorisation to fumigate with methyl bromide should give the reasons why alternatives to methyl bromide cannot be used;

(ii) the definitions of “offshore installation” and “marine area” have been amended to make them clearer.;

(iii) the provision relating to a prohibition notice has been amended to make it possible for an enforcement officer to require immediate action to be taken when there is danger of serious pollution to the environment;

(iv) the protection against self-incrimination that exists in current GB ozone legislation has been carried through into these Regulations.

7.3 A summary of responses received and the Government’s response to them, will be published on the Defra website at <http://www.defra.gov.uk/environment/climatechange/fgas/index.htm>.

## **8. Impact**

A Regulatory Impact Assessment is attached to this memorandum

## **9. Contact**

Stephen Reeves at the Department for Environment, Food and Rural Affairs Tel: 020 7238 3138 (e-mail: [stephen.reeves@defra.gsi.gov.uk](mailto:stephen.reeves@defra.gsi.gov.uk)) can answer any queries regarding the instrument.

# **FINAL REGULATORY IMPACT ASSESSMENT FOR THE ENVIRONMENTAL PROTECTION (CONTROLS ON OZONE-DEPLETING SUBSTANCES) (AMENDMENT) (REGULATIONS) 2008**

## **1. Purpose and intended effect**

### **(a) Background**

The Montreal Protocol is the international agreement which combats the threat of damage to the ozone layer in the stratosphere by controlling the production and consumption of ozone-depleting substances. In the EU the Protocol is implemented by EC Regulation 2037/2000 on substances that deplete the ozone layer and is directly applicable in the UK. Domestic legislation in Great Britain is in the form of Statutory Instrument 2002 No.528 (The Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2002), which set out sanctions and penalties for each of the obligations in the EC Regulation.

These proposed amending Regulations (at Annex A) are intended to:

- (i) prescribe requirements for persons intending to fumigate with methyl bromide for quarantine or pre-shipment purposes (QPS) to obtain prior authorisation from port health authorities and local authorities;
- (ii) amend the powers currently provided for enforcement of the obligations in EC Regulation 2037/2000 on substances that deplete the ozone layer so as to provide additional enforcement powers for the Environment Agency, the Scottish Environment Protection Agency and local authorities and to remove references to any functions to be exercised by the Health and Safety Executive;
- (iii) apply the relevant provisions of the amended SI 2002/528 to offshore oil and gas installations;
- (iv) prescribe new offences and penalties in relation to failure to supply information/records about halon exports or supplying false information about proposed exports and new offences and penalties in relation production/use of bromochloromethane in breach of EU/international bans;
- (v) provide powers for the Secretary of State to require persons to dispose of improper exports of a controlled substance, a product or equipment and for it to be an offence for failure to do so.

These Regulations will be applicable to England, Scotland, and Wales, the marine area and, in relation to importation, in Northern Ireland. Separate Regulations will be issued by the Department of the Environment in Northern Ireland.

### **(b) Objective**

Requirements for persons intending to fumigate with methyl bromide (an ozone-

depleting substance) for quarantine or preshipment purposes to obtain prior authorisation from port health authorities and local authorities and sanctions for failure to do so. Updating existing sanctions and enforcement powers.

### **(c) Rationale for Government intervention**

The EC Regulation covering ozone-depleting substances requires fumigations with methyl bromide to be authorised, so not implementing this part of the Regulation could be seen as a breach of EU law with the possibility of infractions proceedings by the European Commission and potential fines against the UK Government. In addition, Article 21 of EC Regulation 2037/2000 required the UK to introduce penalties for breaches of the Regulation. Because this Regulation has been amended, further provision needs to be made in Great Britain for consequential offences and penalties. Because the Environment Agencies and local authorities will be the main enforcing authorities rather than the Health and Safety Executive (HSE), the Regulations need to be amended to remove reference to HSE powers. Finally, as oil and gas installations make use of ozone-depleting substances, the scope of the Regulations need to be extended accordingly.

### **(d) Sectors and groups affected**

The background section at 1(a) above sets out the purpose of the amending regulations. These following groups may be affected:

- those fumigating with methyl bromide for quarantine and preshipment purposes;
- stakeholders, personnel and businesses that produce/use/handle ozone-depleting substances that may therefore be liable to enforcement action;
- those concerned with exports of halons (fire protection) for critical uses;
- those concerned with production or placing on the market of solvents (bromochloromethane is a banned solvent).

There are a significant number of offshore oil and gas (O&G) installations that will be affected by the proposed amended Regulations. BERR (Department for Business Enterprise and Regulatory Reform) formerly the Department of Trade and Industry (DTI), is the competent authority for offshore oil and gas matters and would remain responsible for administering / enforcing the relevant provisions on offshore installations that fall within its remit.

## **2. Options**

The options are severely constrained. The UK must meet its obligations under EC Regulation 2037/2000 as amended. The options are:

**(i) Option 1** – ‘do nothing’, i.e. not to introduce the new proposed amendments to SI 2002 No.528 - The Environmental Protection (Controls on Ozone-Depleting Substances) Regulations;

**(ii) Option 2** - to introduce the new proposed amendments to SI 2002 No.528.

### **3. Costs and Benefits**

#### **(i) Option 1 – No amending Regulations**

Doing nothing would be the simplest and least cost way forward in the short term. However it would not meet the need to ensure proper implementation of the EC Regulation. At worst, there would also be a further risk of the UK being referred to the European Court of Justice by the European Commission for under-implementation of the Regulation and, in the longer term, this could result in an unfavourable ruling and significant daily fines. It is Government policy to avoid referral wherever possible.

#### **(ii) Option 2 – Introducing new Regulations**

##### **Prior QPS authorisation**

**Benefits** – the principal benefits arise from ensuring that methyl bromide for QPS purposes is only used when there are no alternative fumigants available, with less methyl bromide being emitted which would in turn lead to less depletion of the ozone layer. Following a suggestion arising from the consultation on the proposed regulations, the Government has added an additional requirement that applicants for an authorisation to fumigate should give the reasons why alternatives to methyl bromide cannot be used. This should help to ensure that methyl bromide will only be used as a last resort.

**Costs** arise from compliance and, where it is not appropriate to use methyl bromide, any additional costs of alternative fumigants. The compliance costs arise because authorisations of fumigations would be required from port health and local authorities for quarantine and preshipment use.

There are around two dozen businesses, which may fumigate with methyl bromide for quarantine and preshipment purposes, of which about half carry out the majority of QPS fumigations. Methyl bromide is only used where strictly necessary. For example, an alternative fumigant (phosphine) is widely available and is similarly priced.

It will be for local or port health authorities to decide what level of fee would be reasonable to charge for authorising QPS use. This might be a flat fee of £100 for processing an application for quarantine fumigations. This amount would cover administration costs of processing the application, transport costs to and from the site of inspection, and personnel costs. This cost would be the same regardless of the size of the consignment where, for example, a group of containers form part of a load that is being fumigated. The fee must also be paid even if it is decided that methyl bromide is not the most appropriate substance to use for fumigation. In the case of preshipment fumigation (of exports), the amount of administrative work would be less and would not involve inspections of cargo. Authorities will consider further what would be a suitable fee for issuing a preshipment authorisation.

The general presumption, based on decisions taken by Parties to the Montreal Protocol, is that there is a need to refrain from using methyl bromide and to use non-ozone depleting technologies. Therefore the expectation is that requests for authorisation would only be made if there were no adequate alternative, bearing in mind that use of alternatives such as phosphine would not result in a cost penalty since both chemicals currently cost about the same amount.

Based on returns from fumigators in respect of QPS fumigations in 2005, there were 2,358 treatments of timber, furniture, clothes, rice and mixed goods and about 14 tonnes of methyl bromide was used. However, it is not known exactly how many consignments these treatments represent because, as already explained, a consignment may consist of more than one container. It is therefore impossible to say exactly how many applications for authorisations there would be, only that they are likely to be fewer than the maximum number of consignments treated in 2005 and because the QPS use of methyl bromide is reducing.

The estimated cost of the Regulation is provided in the table below:

<b>Option</b>	<b>Costs</b>	<b>Benefits</b>
<b>1. Do nothing</b>	None	Financially, none  Politically, large as not implementing EC law
<b>2. Introduce new Regulations</b>	£100 x number of consignments	Financially, small/none  Politically, large as implementing EC law. Some reduced use of methyl bromide.
<b>Total</b>	Up to £235,800 per annum*	-

\* in practice this would be reduced if lower fees are charged for pre-shipment authorisations and QPS authorisations cover several containers.

### **Costs/benefits - offshore installations**

It is understood that there are a significant number of offshore oil and gas installations that will have some equipment containing ozone-depleting substances i.e. refrigeration, air-conditioning and fire protection equipment. BERR is the competent authority for offshore oil and gas matters and will remain responsible for administering and enforcing the relevant provisions of the amending Regulations on offshore installations that fall within its remit. From an offshore oil / gas perspective, the potential costs and associated benefits of compliance with the relevant provisions of

proposed Regulations are not expected to be significant as they should not represent major changes to current operational procedures.

#### **Costs/benefits - Halon/fire protection**

Export of halon for critical uses are a very specialised sector and already subject to export authorisation controls operated by the European Commission. The proposed new offences and penalties in relation to failure to supply information/records about halon exports or supplying false information about proposed exports will therefore have no practical direct effect on the operation of the businesses involved.

#### **Costs/benefits - Bromochloromethane**

It is already illegal in the UK to produce/use bromochloromethane in breach of EU/international bans as the controls introduced by EC Regulation No 1804/2003 had direct effect.

#### **Costs/benefits - additional enforcement powers**

Offences and penalties already exist for other activities relating to ozone-depleting substances. The proposed additional enforcement powers simply update and amend powers already provided for in SI 2002 No. 528.

The proposed amending Regulations do not therefore in themselves create additional cost and benefits in relation to impacts on sectors identified in this final RIA. It will only be a person/company that is subject of enforcement action that may be required to take steps to remedy a contravention of the Regulation and in doing so may incur costs. If an enforcing authority is obliged to take steps to remove a danger, it can do so at the expense of the person/company involved. Where a person/company infringes the requirements of the Regulation and in doing so commits an offence and is found guilty, then additional costs may be imposed in the form of a fine.

#### **4. Small Firms Impact Assessment**

There are four 'large' organisations in the relevant fumigation market, though the majority of the organisations that would be affected by this Regulation – specifically the use of methyl bromide by fumigators – are small and medium-sized enterprises (SMEs). However, we do not consider that the Regulation would disproportionately affect SMEs. The other provisions in the proposed Regulations will not substantively affect existing company operations.

#### **5. Competition Assessment**

It is not expected that the Regulation would have any adverse impact on competition in the sectors, as all organisations would be treated the same, and the additional enforcement framework (which has been consulted on) only penalises those breaching the current legislation. Consultation with industry leads us to believe that at present a minimal amount of methyl bromide fumigations are carried out, which are only allowed in certain, strictly controlled circumstances, so it is unlikely any companies will be penalised.



## **6. Consultation**

During the drafting of this proposed amendment Regulation Defra has consulted informally on a wide scale. An implementation group consisting of the devolved administrations and potential enforcement bodies Local Authorities Co-ordinators of Regulatory Services (LACORS) and the Environment Agency (EA) was set up earlier last year to assist in the development of these regulations and to develop a suitable enforcement regime. Defra has also worked closely with other Government Departments such as HM Revenue and Customs as well as BERR. In relation to methyl bromide, Defra has consulted informally with the British Pest Control Association as well as liaising with other parts of Defra such as the Plant Health and Seeds Inspectorate.

In respect to the offshore O&G industry, BERR has been liaising with Oil & Gas UK (formerly the United Kingdom Offshore Operators Association (UKOOA)) on the specific Articles in the EC Regulation that would be most prevalent for the offshore oil and gas industry (e.g. preventing leakages of controlled substances (Article 17)). Reporting of offshore O&G emissions is carried out via the Environmental Emissions Monitoring System (a computerised database for managing environmental data relating to emissions / discharges from offshore installations). BERR will also therefore, establish with Oil & Gas UK and operators the extent to which releases of any ozone-depletion substances from appliances on platforms (e.g. refrigeration systems, air conditioning units, and fire protection equipment) can be quantified / reported in accordance with the provisions of the EC Regulation being enforced.

## **7. Summary and recommendations**

Based on the potential costs of not implementing the proposed amended Regulations, and the comparatively small costs of implementing them, we recommend that the Government accept Option 2, i.e. to introduce new Regulations.

## **8. Enforcement, sanctions, monitoring and review**

The EC legislation is in the form of a Regulation (EC Regulation 2037/2000 on substances that deplete the ozone layer). The EC Regulation has direct effect in the UK once it comes into force, with no further transposition being necessary. However national secondary legislation is needed under Article 21 of the EC Regulation for Member States to create penalties for infringements of the relevant obligations in the Regulation, including additional penalties arising from amendments to the EC Regulation. The same powers will also be conferred on the Secretary of State for BERR to ensure regulatory compliance (as appropriate) by operators of offshore oil and gas installations.

The proposed amending Regulations provide new powers for the Secretary of State, the Environment Agency, SEPA or local authorities to appoint such persons, as he or they consider appropriate for the purposes of enforcing the Regulations. These Regulations will be applicable to England, Wales and Scotland. Northern Ireland will be introducing their own separate regulations.

In England, Scotland and Wales, Defra is working closely with the Environment Agency, Scottish Environment Protection Agency and LACORS (Local Authorities Coordinators of Regulatory Services) to prepare for the implementation of these Regulations. A joint risk based enforcement model has been proposed by the Environment Agency and the Local Authorities. As part of preparatory work for this enforcement work, LACORS will be carrying out initial intelligence work on the F Gas regulation. Once the proposed provisions are in operation Defra will work with devolved administrations and enforcing authorities to ensure a proportionate, risk-based approach to enforcement.

**9. Ministerial Declaration**

I have read the Regulatory Impact Assessment and I am satisfied that the balance between costs and benefits is the right one in the circumstances.

Signed by the responsible Minister

.....Phil Woolas.....

Date

.....16 January 2008.....

**10. Contact point**

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