

EXPLANATORY MEMORANDUM TO
THE PERSISTENT ORGANIC POLLUTANTS (AMENDMENT) (NO. 2)
REGULATIONS 2023

2023 No. 1217

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 His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument amends Annex 1, Part A of retained Regulation (EU) 2019/1021 of the European Parliament and of the Council on persistent organic pollutants (recast) (“the POPs Regulation”) in order to add perfluorohexane sulfonic acid (“PFHxS”), its salts and PFHxS-related compounds to the list of substances the manufacturing, placing on the market and use of which are prohibited under the POPs Regulation. This implements a change to the list of chemicals in Annex A of the United Nations Stockholm Convention on Persistent Organic Pollutants (“the Stockholm Convention”). It also sets limit values for PFHxS, its salts and PFHxS-related compounds occurring as an unintentional trace contaminant in substances, mixtures and articles.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument comes into force on the day after the day on which it is made. A later commencement date has not been pursued on the basis that, given that this instrument has been assessed to have minimal anticipated impact to businesses, and that current intentional use, manufacture and placing on the market of PFHxS, its salts, and related compounds within Great Britain is assessed to be minimal to nil, this instrument does not impose duties that are significantly more onerous than before.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is Great Britain.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is Great Britain.

5. European Convention on Human Rights

- 5.1 Minister Rebecca Pow, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, has made the following statement regarding Human Rights:

“In my view the provisions of the Persistent Organic Pollutants (Amendment) (No. 2) Regulations 2023 are compatible with the Convention Rights.”

6. Legislative Context

- 6.1 The United Kingdom is a party to the Stockholm Convention, which aims to prohibit, eliminate or restrict the production and use of persistent organic pollutants (“POPs”). The POPs Regulation implements the UK’s obligations under the Stockholm Convention. Annex 1 to the POPs Regulation contains a list of prohibited substances listed in the Stockholm Convention and in the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, alongside specific exemptions on intermediate use or other specifications.
- 6.2 The Conference of the Parties to the Stockholm Convention, at its tenth meeting, in June 2022, adopted an amendment to Annex A of the Convention, to list PFHxS, its salts, and related compounds. Each party to the Convention is required to prohibit and/or take the legal and administrative measures necessary to eliminate its production and use of the chemicals listed in Annex A subject to the provisions of that Annex. This instrument amends domestic legislation to implement the change to Annex A of the Convention.
- 6.3 This instrument also specifies unintentional trace contaminant (“UTC”) limits for PFHxS, its salts and related compounds, to define the concentration at which these can lawfully be found in a substance, article or mixture, where present unintentionally and in minimal amounts.
- 6.4 The instrument uses powers under Article 15(1) of the POPs Regulation, which gives the Secretary of State (with the consent of the Scottish Ministers and Welsh Ministers) powers to make regulations to amend Annex 1 in order to adapt it to changes to the list of substances set out in the Annexes to the Stockholm Convention or to modify existing entries or provisions in Annex 1 in order to adapt them to scientific and technical progress. It also uses powers to make incidental and supplementary provisions under Article 18(1) of the POPs Regulation.
- 6.5 Under regulation 5 of the Persistent Organic Pollutants Regulations 2007, any person who produces, places on the market or uses a substance in contravention of Article 3 of the POPs Regulation is guilty of an offence. The addition of PFHxS, its salts, and related compounds to Annex 1 of the POPs Regulation means that the prohibition in Article 3 of the POPs Regulation applies to an additional substance. This instrument therefore expands the scope of the offence. It is for this reason that the instrument is subject to the affirmative procedure under paragraphs 4 and 9(b) of Article 18 of the POPs Regulation.
- 6.6 Under the Windsor Framework, Regulation (EU) 2019/1021 on persistent organic pollutants (the “EU POPs Regulation”) applies directly in Northern Ireland. Amendments equivalent to those contained within this instrument have been made to the EU POPs Regulation by Commission Delegated Regulation (EU) 2023/1608 of 30 May 2023 amending Annex I to Regulation (EU) 2019/1021 of the European Parliament and of the Council as regards the listing of perfluorohexane sulfonic acid (PFHxS), its salts and PFHxS-related compounds. This instrument will therefore bring closer regulatory alignment between Great Britain and Northern Ireland.

7. Policy background

What is being done and why?

- 7.1 Persistent organic pollutants (POPs) are substances identified as toxic, persistent, bio-accumulative and subject to long range transportation. The United Kingdom is a party to the Stockholm Convention, which aims to prohibit, eliminate or restrict the production and use of POPs. The Conference of the Parties to the Stockholm Convention, at its tenth

meeting, adopted an amendment to Annex A of the Convention to list PFHxS, its salts, and related compounds.

- 7.2 Like other POPs, PFHxS is very resistant to chemical, thermal and biological degradation, which makes it persistent in the environment. It is part of the per- and polyfluoroalkyl substances (PFAS) group of chemicals and is one of the most frequently detected and predominant PFASs in human blood.
- 7.3 Annex 1, Part A of the POPs Regulation contains a table of prohibited substances alongside specific exemptions on intermediate use or other specifications where relevant. This instrument will add PFHxS to this table in line with the United Kingdom's obligations under the Stockholm Convention. This will mean that the use, manufacture and placing on the market of PFHxS, its salts, and related compounds in any article, substance or mixture will be unlawful, except in certain very limited cases, including those set out in paragraphs 7.4 and 7.5.
- 7.4 This instrument also specifies unintentional trace contaminant ("UTC") limits for PFHxS, its salts and related compounds, to define the concentration at which these can lawfully be found in a substance, article or mixture, where present unintentionally and in minimal amounts. Without a defined UTC limit, the prohibition would apply to articles, substances or mixtures in which any amount of the relevant substance were found. The addition of a UTC for PFHxS provides clarity of the regulatory position to industry.
- 7.5 This instrument sets a UTC limit of 0.025 mg/kg for PFHxS and its salts where present in substances, mixtures or articles, and an equivalent limit of 1 mg/kg for PFHxS-related compounds. The instrument also sets a UTC limit of 0.1mg/kg for PFHxS, its salts, and PFHxS-related compounds where present in concentrated fire-fighting foam mixtures.
- 7.6 The higher UTC limits for PFHxS, its salts, and PFHxS-related compounds where present in concentrated fire-fighting foam mixtures acknowledges the presence of PFHxS in some of these products. Setting a UTC for PFHxS in concentrated fire-fighting foam mixtures at the proposed level would ensure it is low enough to avoid the substance being used as an active ingredient.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 There is no plan to consolidate relevant legislation at this time.

10. Consultation outcome

- 10.1 There were opportunities for UK stakeholders to feed into earlier engagement – both UK and Convention led – at various stages before PFHxS was adopted for elimination under the Stockholm Convention, following the initial proposal of PFHxS as a POP in 2017. This included public calls for information and opportunities to comment on draft risk profiles and risk management evaluation documents. Defra received no evidence to suggest that exemptions or derogations were required by industry.
- 10.2 No specific consultation has been carried out in relation to this instrument because it implements an international obligation. However, a recent Defra-led consultation (held between 2 March 2023 and 27 April 2023) on other potential amendments to the POPs Regulation stated the intention to list PFHxS in Annex 1 of the POPs Regulation in order to meet the UK's international obligations under the Stockholm Convention.

10.3 Defra consulted with devolved administrations and their competent authorities in the preparation of the consultation, as well as other relevant bodies, including the Environment Agency, the Health and Safety Executive and other government departments.

11. Guidance

11.1 Guidance around the management of POPs is already publicly available on GOV.UK and is owned and updated by the Environment Agency. The amendments outlined in this instrument will be reflected in this guidance as necessary.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A De Minimis Assessment (DMA) is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 This instrument applies to activities that are undertaken by small businesses. No significant impact on small businesses is foreseen as a result of this instrument.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Rebecca Pow has made the following statement:

“The Government has considered the need for a review of the Regulations in accordance with sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015. This instrument amends the POPs Regulation to reflect a change in international law, with the further addition of a low-impact exemption for unintentional presence of a substance as a trace contaminant. The economic impact of this instrument has been assessed to be below £5million and therefore a statutory review clause would not be proportionate. Further, the prohibition of a substance in line with international law, and intended for environmental protection, would not be appropriate for review.”

15. Contact

15.1 Lyndon Ashmore, in the Department for Environment, Food and Rural Affairs, mail: lyndon.ashmore@defra.gov.uk, phone: 07721683581, can be contacted with any queries regarding the instrument.

15.2 Rachel Irving, Deputy Director for Chemicals, Pesticides, and Hazardous Waste, at the Department for Environment, Food, and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Rebecca Pow MP at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.