EXPLANATORY MEMORANDUM TO

THE PERSISTENT ORGANIC POLLUTANTS (AMENDMENT) (EU EXIT) REGULATIONS 2020

2020 No. [XXXX]

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 This instrument makes the necessary corrections to ensure that Regulation (EU) 2019/1021 of the European Parliament and of the Council on Persistent Organic Pollutants ("POPs") functions in Great Britain after the end of the Implementation Period. This instrument also makes amendments for purposes relating to the implementation of the Protocol on Ireland / Northern Ireland ("the Protocol").

Explanations

What did any relevant EU law do before Exit Day?

2.2 Directly applicable Regulation (EU) 2019/1021 enabled the EU and its Member States to implement the Stockholm Convention on Persistent Organic Pollutants and the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants.

2.3 The Stockholm Convention came into effect in 2004 and aims to eliminate or restrict the production and use of these persistent organic pollutants. It regulates the production, placing on the market, and use of persistent organic pollutants ("POPs"), which are banned or restricted under the Stockholm Convention with exemptions and limits for the quantity of the substance allowed in new articles. It also sets out requirements to take appropriate measures to destroy POPs waste and requirements to monitor and report on listed substance elimination, stockpiles and waste management. The UK is a Party to the Stockholm Convention in its own right and continues to be bound by its international obligations under the Convention following the UK's withdrawal from the EU.

Why is it being changed?

2.4 As retained EU law, the current regulation would not be effective in GB or UK law due to the deficiencies in the legislation arising from the withdrawal of the UK from the EU. This instrument makes minor and technical amendments to the existing legislation described above to ensure the legislation is operable after the end of the Implementation Period. The changes include amending references to the EU, EU institutions and EU administrative processes to domestic equivalents, updating legal references to refer to relevant domestic legislation and placing an obligation on the Secretary of State to publish reports previously sent to the Commission.

2.5 This instrument also transfers legislative and administrative functions that are currently conferred by EU legislation upon the Commission and the European Chemicals Agency ("ECHA"), to be exercisable instead by public authorities in GB, so that they can be exercised at national level after the end of the Implementation Period.

2.6 This instrument also creates a power which will allow GB to put in place the necessary measures to ensure the control and traceability of waste contaminated by relevant pollutants, as required by the existing EU regulation. The measures to be put in place must accord with Article 17 of Directive 2008/98/EC of the European Parliament and of the Council as amended, including most recently by the 2018 Circular Economy Package.

What will it now do?

2.7 Following the end of the Implementation Period, the amendments to Regulation (EU) 2019/1021 will enable GB to independently implement the Stockholm Convention by regulating the production, placing on the market, and use of POPs. The amendments will also enable GB authorities to regulate stockpiles of POPs and manage waste where POPs are present. They also set out monitoring and reporting requirements. Furthermore, the amendments will create a power which will enable GB to put in place the necessary measures to ensure the control and traceability of waste contaminated by relevant pollutants.

2.8 This instrument will ensure that the legislation described above for the regulation of POPs will operate effectively in GB, while EU legislation will operate in Northern Ireland, both for the purposes of implementing the Protocol.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

Regulation-making power created by virtue of regulation 14(4)

3.1 Regulation 14(4) substitutes paragraphs (5) and (6) of Article 7 of Regulation (EU) 2019/1021 with new paragraphs numbered (5) to (15). These new paragraphs:

- restate the duty imposed on Member States in existing paragraph (6) to take measures to ensure the control and traceability of waste contaminated by POPs (see the words before the semi-colon in new paragraph (7)); and
- create a new power to make regulations to implement that duty (see the words after the semi-colon in new paragraph (7) and also new paragraphs (8) to (15)).

3.2 This new power includes power to create criminal offences (see new paragraph (11)).

3.3 This new power is subject to the following limitations:

- regulations may not create offences for which individuals are capable of being sentenced to imprisonment for a term of more than 2 years (see new paragraph (13));
- no regulations may be made under the power on or after 31st October 2023 (see new paragraph (14)); and
- regulations which create offences are subject to the affirmative resolution procedure (see new Article 18(8)).

3.4 This new power is somewhat unusual in that the Commission does not have an equivalent power to make legislation in Regulation (EU) 2019/1021; it therefore is not the result of a "transfer" of an existing Commission legislative function to a UK authority.

3.5 Defra considers the creation of this power to be appropriate for the following reasons:

- Article 7(6) of Regulation (EU) 2019/1021 requires Member States to take measures to ensure the control and traceability of waste contaminated by POPs in accordance with Article 17 of Directive 2008/98. Article 17 of Directive 2008/98 also refers to Articles 13, 35 and 36 of that Directive and collectively they are the requirements for managing hazardous waste. Those provisions of Directive 2008/98 are reflected in new paragraphs (7) to (15) of Article 7, which set out the scope of the new power to make regulations.
- Additional measures relating to the control of waste contaminated by POPs are complex and will require consultation. Defra does not consider it is in any position to implement additional measures under section 2(2) of the European Communities Act 1972 before Implementation Period Completion Day.
- Section 2(2) will be repealed on Implementation Period Completion Day by section 1 of the Withdrawal Act. In light of this, the department considers it is appropriate to create the new power, subject to the scope and limitations described above, in order that it will be able to meet the duty to take measures to ensure the control and traceability of waste contaminated by POPs, which will continue to exist in UK law on and after Implementation Period Completion Day.

Regulation-making power created by virtue of regulation 23

3.6 Regulation 23 substitutes Article 18 of Regulation (EU) 2019/1021 with a new Article 18 which contains provisions that allow the Secretary of State and devolved administrations to making new regulations. It details that regulations made under New Article 18(1) may contain consequential, incidental, supplementary, transitional or saving provisions. Where regulations made under new Article 18(1) amend primary legislation, they are subject to the affirmative resolution procedure (see new Article 18(5)).

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.7 The territorial application of this instrument includes Scotland, Wales and Northern Ireland.

3.8 The powers under which this instrument is made cover Great Britain (see section 24 of the European Union (Withdrawal) Act 2018) and the European Union (Withdrawal Agreement) Act 2020, the territorial application of this instrument is not limited either by the Act or by this instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of regulations 1, 2, 3, 4, 5, 13, 15, 17, 19, 29 and 30 in this instrument is the United Kingdom. The territorial application of all remaining regulations is Great Britain.

4.3 The retained law is incorporated into domestic law under section 3 of the European Union (Withdrawal) Act 2018 save insofar as it applies to Northern Ireland for the purposes of the Protocol. Accordingly, this instrument will only have practical application in Northern Ireland in relation to regulations 1, 2, 3, 4, 5, 13, 15, 17, 19, 29 and 30.

5. European Convention on Human Rights

5.1 Minister Rebecca Pow has made the following statement regarding Human Rights:

"In my view the provisions of the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 On 23rd June 2016, a referendum on the UK's membership of the EU took place which concluded in a vote to the leave the EU. The UK ceased to be a Member State of the EU on 31st January 2020. This began an Implementation Period which is scheduled to end on 31st December 2020.

6.2 To ensure that the UK has a working statute book on completion day of the Implementation Period, the Withdrawal Act incorporates EU law as it stands, into domestic law. It also creates temporary powers to make secondary legislation to correct laws that would otherwise no longer work appropriately once the UK had left the EU.

6.3 On 21st December 2018, the Persistent Organic Pollutants (Amendment) (EU Exit) 2018 Regulations were laid in Parliament. That instrument made corrections to Regulation (EC) No 850/2004 on POPs to ensure that it remained operable after the UK left the EU.

6.4 On 15th July 2019 that EU Regulation was revoked and replaced with Regulation (EU) 2019/1021 of the European Parliament and of the Council on persistent organic pollutants.

6.5 This instrument amends Regulation (EU) 2019/1021 in order to ensure that it remains operable after the end of the Implementation Period.

6.6 This instrument also transfers legislative and administrative functions that are currently conferred by EU legislation upon the Commission and the ECHA, to be exercisable instead by public authorities in Great Britain, so that they can be exercised at national level after the end of the Implementation Period. It also requires the UK to put in place necessary measures to ensure control and traceability of waste contaminated with POPs listed in Annex 4 to the regulation, within the scope of Article 17 of Directive 2008/98/EC, which is set out in this regulation.

6.7 This instrument further revokes part 3 and 4 of the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2018 (S.I. 2018/1405) which made corrections to the, now repealed, Regulation (EC) No 850/2004 on POPs; and regulation 2 of the Environment and Wildlife (Legislative Functions) (EU Exit) Regulation 2019 (S.I. 2019/473) which transferred legislative functions contained in Regulation (EC) No 850/2004 on POPs.

7. Policy background

What is being done and why?

7.1 POPs are substances identified as toxic, persistent bio-accumulative and subject to long range transportation. The intention is to have regulations for GB which, at the end of the Implementation Period, set out the same restrictions as the EU regulations on production, placing on the market, and use of POPs and also sets out the same exemptions to those restrictions. The regulations will also prohibit the import of intentionally produced POPs. They will set limits for the concentration of POPs in products and limits above which POPs in waste must be destroyed or irreversibly transformed. They will require that stockpiles and wastes be identified and managed to reduce or eliminate POPs releases from these sources. Parties to the Stockholm Convention are also required to report on their management of POPs and this is also set out in the regulations. The changes covered by this instrument include:

- amending references to the EU and EU institutions and administrative processes to GB equivalents;
- updating legal references to refer to relevant GB legislation; and
- retaining the requirements for the governments of the UK to monitor and report.

7.2 Furthermore, Regulation (EU) 2019/1021 grants the Commission powers, for the purpose of adapting to scientific and technical progress, to amend POPs waste concentration limits in the Annexes to the Regulation; and to amend Annexes to the Regulation to ban/restrict/modify the use of POPs in accordance with international agreements. This instrument transfers these functions to the Secretary of State, the Welsh Ministers and the Scottish Ministers. The Secretary of State may exercise the functions on behalf of a Devolved Administration with its consent. In Northern Ireland these powers will remain with the Commission. For direct Stockholm Convention activities the Secretary of State represents the UK. In addition, Regulation (EU) 2019/1021 requires the UK to take the necessary measures to trace and control POPs specified in Annex 4 to the Regulation, once they become waste. Additional powers have been included in this instrument to allow GB to develop waste tracking and control measures to facilitate the identification of POPs waste, the tracking of movements of that waste, confirmation of appropriate disposal and the creation of criminal sanctions in addition to those already in place. The measures to be taken have not been developed yet and any legislative changes will be subject to the affirmative resolution procedure no later than the 31st October 2023.

7.3 This instrument also imposes obligations on the competent authority in Northern Ireland, the Department of Agriculture, Environment and Rural Affairs ("DAERA") where there are provisions implementing UK wide obligations under the Stockholm Convention which will require input from Northern Ireland. These include provisions relating to the obligations to report to the Secretariat of the Stockholm Convention and consider Stockholm Convention proposals for new POPs substances.

8. European Union (Withdrawal) Act 2018 / Withdrawal of the United Kingdom from the European Union and European Union (Withdrawal amendment) Act 2020

8.1 This instrument is being made in exercise of the powers conferred by sections 8(1) and 8C(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal)

Act 2018. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the annex to this Explanatory Memorandum.

9. Consolidation

9.1 Defra does not intend to consolidate the relevant legislation at this time.

10. Consultation outcome

10.1 As there is no policy change, no public consultation was required. The purpose of this instrument is solely to enable the current legislative and policy framework to remain unchanged at the end of the Implementation Period.

10.2 Devolved Administrations were consulted on earlier drafts and given the opportunity to propose amendments to the text.

10.3 Selected stakeholders, representing industry and non-government associations were also consulted at stakeholder meetings in June and July 2018.

11. Guidance

11.1 Guidance is not being provided in relation to this instrument.

12. Impact

12.1 There is no, or no significant impact on business, charities or voluntary bodies as existing regulatory standards have not changed.

12.2 There is no, or no significant impact on the public sector as existing regulatory standards have not changed.

12.3 An Impact Assessment has not been prepared for this instrument as no significant, impact on the private or voluntary sector is foreseen and this instrument relates to maintenance of existing regulatory standards.

13. Regulating small businesses

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 As this instrument is made under the Withdrawal Act, no review clause is required.

15. Contact

15.1 Alison Elliott at the Department for Environment, Food and Rural Affairs, telephone: 02080266547 or email: Alison.elliott@defra.gov.uk can be contacted with any queries regarding this instrument.

15.2 Gabrielle Edwards, 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 Rebecca Pow MP, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a negative procedure SI.	Explain why the SI should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees.
Appropriate-Ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2.	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2.	Explain the good reasons for making the SI and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2.	Explain what, if any, amendment, repeals or revocations are being made to the Equality Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA 2018 SIs.	Explain the SI, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the SI, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		powers in Schedule 2 to create a criminal offence.	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by SI.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under s. 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA 1972.	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA 1972, identifying the relevant law before exit day, and explaining the SI's effect on retained EU law.
Scrutiny statement where amending regulations under s. 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA 1972.	Statement setting out: a) the steps which the relevant authority has taken to make the draft SIs published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft SI, and c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the SI or draft SIs which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. **Appropriateness statement**

1.1 Rebecca Pow, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Persistent Organic Pollutant (Amendment) (EU Exit) Regulations 2020 does no more than is appropriate".

1.2 This is the case because this instrument corrects deficiencies as necessary to ensure that we can continue to control substances considered persistent organic pollutants in the UK after the end of the Implementation Period.

2. **Good reasons**

2.1 Rebecca Pow, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 This instrument corrects deficiencies as necessary to ensure that we can continue to control substances considered persistent organic pollutants in the UK after the end of the Implementation Period.

3. **Equalities**

3.1 Rebecca Pow, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, has made the following statement:

"This instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

3.2 Rebecca Pow, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to this instrument, I, Rebecca Pow, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010".

4. **Explanations**

4.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.

5. **Criminal offences**

5.1 No criminal offences are created by this instrument.