

These notes refer to the Environmental Better Regulation Act (Northern Ireland) 2016 (c.13) which received Royal Assent on 11 April 2016

Environmental Better Regulation Act (Northern Ireland) 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

A commentary on the sections is provided below. Comments are not given where the wording is self-explanatory.

Part 1 – General Environmental Regulation

Section 1: General purpose: protecting and improving the environment

Section 1 sets out the general purpose of Part 1, i.e. to make, by regulations, provision for protecting and improving the environment and specifies that the purpose extends to provision regulating environmental activities and provision implementing EU obligations or other international obligations.

Section 2: Regulations relating to protecting and improving the environment

Section 2 (1) enables the Department to make provision by regulations for any of the matters specified in Schedule 1.

Subsection (2) sets out that the provision that may be made is provision for and in connection with the matters mentioned in section 1.

Subsection (3) allows for regulations to provide that specified provisions of the regulations have effect in relation only to specified regulated activities, the carrying on of regulated activities in specified circumstances or the carrying on of regulated activities by specified persons or classes of person.

Subsection (4) allows for regulations to modify any statutory provision or document, make different provision for different cases, provide for the delegation of functions and impose requirements.

Subsection (5) allows regulations to contain consequential, incidental, supplementary, transitional or saving provisions as necessary.

Section 3: Regulations relating to protecting and improving the environment: consultation

Section 3(1) requires the Department, before making regulations relating to protecting and improving the environment, to consult certain regulators and such other persons as it considers appropriate. Subsection (2) has the effect that such consultation can be undertaken prior to the coming into operation of this section

Section 4: Regulations relating to protecting and improving the environment: objective

Section 4 elaborates on the purpose of the Act. Whilst the key purpose of Part 1 of the Act is to protect and improve the environment, in making regulations for that purpose the Department is to have the objective of reducing the regulatory and administrative burden on those carrying on regulated activities.

Section 5: General environmental rules

Section 5 enables the Department, by regulations under section 2 pursuant to paragraph 4(3)(c) of Schedule 1, to provide for general environmental rules to impose conditions or requirements, prescribe standards or objectives to be complied with or achieved, and require standards or objectives specified in or under other statutory provisions to be complied with or achieved.

Subsections (2), (3) and (4) require the Department to publish a draft of the proposed rules and to publicise the opportunity to make representations and allow copies of the proposed rules to be available for public inspection. The Department will have regard to any representations made to it within the determined period.

Section 6: Interpretation

Section 6 defines terms used in Part 1 of the Act. It includes definitions of:

- “environmental activities” (to cover activities that are capable of causing, or liable to cause, environmental harm); and
- “environmental harm” (to cover a wide range of matters, including-
 - harm to the quality of the environment such as might be caused by, for example, polluting activities, and
 - offence to the senses of human beings such as might be caused by, for example, excessive noise or unpleasant odours or stench).

In this context, “activities” is also defined, so that it covers a broad range of matters including the production, treatment, keeping, transportation, depositing or disposal of substances.

The effect is that the Act enables the regulation under section 2 of a wide range of matters relating to environmental activities, and the prevention of environmental harm.

The definitions of “environmental harm” and “protecting and improving the environment” make reference to “ecosystems”. An ecosystem is a very wide ranging term and can be defined as including all of the living things (plants, animals and organisms) in a given area, interacting with each other, and also with their non-living environments (weather, earth, sun, soil, climate, atmosphere).

Part 2 – Powers of Entry and Associated Powers

Section 7: Repealing, etc. unnecessary or inappropriate powers of entry, etc.

Section 7 gives the Department the power, exercisable by regulations, to remove from existing legislation powers to enter land or other premises which it considers to be either unnecessary or inappropriate. Such regulations may also remove associated powers, for example, a power to search or inspect the premises entered into or to seize material found in such premises; the term is defined in section 14(1). The power to remove an associated power may be exercised independently from the power to remove a power of entry (and vice versa). Section 7 also gives the Department the power to remove from existing legislation offences (as described in section 9(1)(b)) connected with the powers of entry and associated powers.

Section 8: Adding safeguards to powers of entry

Section 8(1) gives the Department power, exercisable by regulations, to add safeguards to powers of entry or associated powers. Subsection (2) sets out a non-exhaustive list of the safeguards which may be included in such regulations. Any such safeguards would be in addition to those already contained in the legislation conferring the power of entry or associated power.

Section 9: Rewriting powers of entry

Section 9 gives the Department the power, exercisable by regulations, to rewrite powers of entry or associated powers. Such regulations might consolidate a number of powers of entry exercisable for similar purposes. The power extends to rewording related legislation and connected offences. Whilst regulations under this section may alter a power of entry or associated power and any safeguard linked to such powers, the combined effect of the changes must be to add to the level of protection afforded by the safeguards when taken together (subsection (5)).

Subsection (3) provides for the treatment of offences. In general terms, an offence that is tried summarily (usually in the Magistrates’ Court) falls into one of two categories: (a) an offence that can only be tried summarily; and (b) one that can be tried either summarily or on indictment.

Subsection 3(b)(ii) makes the distinction between the different formulae for expressing the maximum fines applicable to those offences which are triable only summarily (a fine not exceeding level 5 on the standard scale) and those

which are triable either summarily or on indictment (a fine which must not exceed the statutory maximum).

While level 5 on the standard scale and the statutory maximum are both currently £5,000, they are two distinct legal concepts and the monetary values may diverge in the future.

Section 10: Review of powers of entry

Section 10 places a duty on the Department to conduct a review of powers of entry and associated powers within 2 years of the coming into operation of this section. In conducting a review the Department must consider whether, in relation to each power of entry (and associated power), to exercise the regulation making powers in sections 7, 8(1) or 9(1). A report of the review is to be prepared and laid before the Assembly.

Section 11: Consultation requirements

Section 11 requires the Department, before making regulations relating to a power of entry or associated power or an offence connected with the exercise of any such power, to consult with appropriate persons representing the views of stakeholders pertinent to such powers.

Section 12: Regulations

Section 12 provides that regulations made by the Department under section 7, 8(1) or 9(1) may modify any statutory provision or include such consequential, incidental, supplementary, transitional or saving provisions as the Department considers appropriate.

Section 13: Code of practice in relation to powers of entry

Section 13 places a duty on the Department to prepare a code of practice in relation to the exercise of powers of entry and associated powers under statutory provisions under which the Department has a function related to environmental activities or protecting and improving the environment. The Department is required to publish a draft of the code, invite representations on it and consider them.

After making any necessary changes to the draft code as outlined in subsection (2)(c) the Department must then lay the code in draft before the Assembly (subsection (3)). If the Assembly does not resolve as mentioned in subsection (4), the Department must publish the finalised code in any manner that it considers appropriate and review it from time to time.

Subsection (9) provides that a person must have regard to the code of practice when exercising the powers of entry or associated powers to which the code relates. Failure to adhere to any aspects of the code would not, of itself, render a person liable to civil or criminal proceedings (subsection (10)) however, the code is admissible in such proceedings (subsection (11)) and a court or tribunal

may take into account any failure of a person to comply with the duty to have regard to the code (subsection (12)).

Section 14: Interpretation

Section 14 defines terms used in Part 2. The section includes a definition of “premises”. The definition makes it clear that “premises” includes any land, vehicle, vessel, aircraft or hovercraft, and any tent or moveable property. However, it is an inclusive definition so, in addition to the things listed, the term bears its ordinary, natural and literal meaning and would, therefore, include a wide range of houses or buildings including residential premises.

Part 3 - Amendments to the Clean Air (Northern Ireland) Order 1981

Section 15: Authorised fuel

Section 15 simplifies the procedure for declaring a fuel to be an authorised fuel for the purposes of the Clean Air (Northern Ireland) Order 1981 (“the 1981 Order”). It replaces the definition of “authorised fuel” in Article 2(2) of the 1981 Order with a new definition. The new definition provides that authorised fuel means a fuel that is included on a list of authorised fuels published by the Department. Previously the Department authorised fuels by regulations.

Section 16: Exempt fireplaces

Section 16 simplifies the procedure for exempting classes of fireplace from the provisions of Article 17 of the 1981 Order. Under the amended procedure the Department must publish a list of those classes of fireplace that are exempt. Previously the Department exempted classes of fireplace by regulations.

Part 4 – Amendments to the Environment (Northern Ireland) Order 2002

Section 17: Removal of assessments under Article 13

Section 17 removes the requirement in Article 13 of the Environment (Northern Ireland) Order 2002 (“the 2002 Order”) for district councils to undertake a Further Assessment of air quality in Air Quality Management Areas.

Section 18: Amendments consequential on the amendments to Article 13

Section 18 makes consequential amendments to the 2002 Order.

Part 5 – Amendments to the Water and Sewerage Services (Northern Ireland) Order 2006

Section 19: Enforcement authorities

Section 19 makes various amendments to the Water and Sewerage Services (Northern Ireland) Order 2006 (“the 2006 Order”) which transfer responsibility for water quality enforcement action functions and duties in respect of the public

supply from DRD to DOE and allows DOE to gain premises entry and access rights for the purposes of water contamination investigation of private and public water supplies.

Section 20: Regulations relating to wholesomeness of water

Section 20 makes various amendments to the 2006 Order which transfer sole power from DRD to DOE for making regulations which set out the standards and requirements which must be met for water to be considered wholesome and the responsibilities of a water undertaker with regard to fulfilling its duties to provide wholesome water.

Section 21: Appointment and powers of inspectors

Section 21 makes various amendments to the 2006 Order which transfer sole power from DRD to DOE to appoint officers to act on its behalf for the purposes of enforcing the relevant legislation relating to water quality of both private and public water supplies.

Section 22: Publication of certain information and advice

Section 22 amends the 2006 Order to provide DOE with the powers to publish information in respect of its functions relating to both public and private water supplies.

Section 23: Transitional provisions

Section 23 inserts a new Article 302A into the 2006 Order which sets out transitional provisions to ensure that there is no effect on, or alteration to, previous actions and regulations made by 'the Department', i.e. DRD, under the powers and functions of the 2006 Order which are now transferred fully to DOE by this Act.

Part 6 - Miscellaneous and Supplementary

Sections 24 to 28

Sections 24 to 28 deal with the Assembly procedures to be followed in relation to regulations and orders under the Act, interpretation, repeals and revocations, commencement and the short title of the Act.

SCHEDULE 1: MATTERS FOR, OR IN CONNECTION WITH, WHICH REGULATIONS MAY BE MADE UNDER SECTION 2

Schedule 1 specifies matters for, or in connection with, which regulations may be made under section 2.

Paragraph 1: Emissions

Paragraph 1 enables the regulations to establish emission standards and requirements and to authorise making of plans for emission limits and quotas.

Paragraph 2: Emissions trading scheme

Paragraph 2 authorises the making of emissions quota trading or transfer schemes and makes provision for penalties in respect of contravention of a scheme.

Paragraph 3: Regulators

Paragraph 3 enables the regulations to specify the authorities on whom regulatory functions are conferred (defined as “regulators”), and enables the Department to give guidance and directions to regulators. It also provides for empowering regulators to appoint persons to exercise functions and powers conferred by the regulations, and to confer powers on persons so appointed.

Paragraph 4: Regulation of activities

Paragraph 4 enables the regulations—

- to prohibit the carrying out of a regulated activity,
- to prohibit the carrying out of a regulated activity unless authorised by or under regulations, or
- to authorise the carrying out of a regulated activity in accordance with a permit, or subject to a requirement to register the carrying on of the activity, or subject to compliance with “general environmental rules” (see also section 5 in that respect).

Paragraph 5: Permits

Paragraph 6: Registration

Paragraph 7: Provisions common to permits and registration

Paragraphs 5, 6 and 7 enable the regulations to specify the procedures relating to authorisation of regulated activities by permits and registration. The effect of these paragraphs is to allow for detailed procedural provisions to be included in the regulations governing how an application for the permit or registration may be made, how that application will be assessed and how a permit or registration may be granted. They also provide a framework for the extent to which the regulations may allow requirements to be imposed in permits and registrations, as well as allowing regulations to provide mechanisms for transfer, variation, and consolidation, and for suspension and revocation of permits or registration (together with a requirement to take associated preventative or remedial action). These provisions also enable the regulations to specify when registration may be refused and when a registration may lapse.

Paragraph 7 also allows provision to be made in connection with permits or registrations for multiple activities or for activities across multiple sites or for multiple persons to be granted a permit or registration. It allows “standard rules” provision to be made, and provides the basis for the fit and proper person test to

be applied before a permit or registration is granted to a person or transferred, and to allow a permit or registration to be varied, suspended or revoked if the operator has ceased to be a fit and proper person.

Paragraph 7 also provides for requirements for remedial /preventative action to be taken where a permit or registration has been surrendered, suspended or revoked which could be in addition to any conditions of the licence (sub-paragraph (11)).

Paragraph 7 also provides for any person whose consent would be required before any works could be carried out under sub-paragraph (11) (most frequently the landowner) to be required to grant to the licence holder, or join in granting, such rights as will enable them to comply with the condition.

Paragraph 8: Determination of matters by regulators

Paragraph 9: Making of rules and imposition of conditions

There are supplementary provisions at paragraphs 8 and 9. Paragraph 8 allows regulations to make provision for anything in paragraphs 5 to 7 which could be provided for by the regulations to be instead determined by the regulators. Paragraph 9 allows regulations to provide for the Department and regulators to have regard to specified principles and for regulators to have regard to any directions or guidance in imposing conditions.

Paragraph 10: Charging schemes

Paragraph 10 enables the regulations to authorise the Department to charge fees or make, vary or revoke schemes imposing charges in respect of the testing, sampling and analysis of substances, and assessing the effect on the environment of the release of such substances. These charges can be imposed prior to the grant of a permit or registration or in assessing compliance with the condition of a permit or registration. Paragraph 10 also enables charges to be authorised under the regulations, and the making, etc. of charging schemes by the Department, in respect of, or in respect of applications for, the grant of a permit and the variation, transfer, surrender or revocation of a permit or registration. It also applies to charges in respect of the subsistence or consolidation of permits and registrations and other specified matters. Paragraph 10 also enables the regulations to regulate the procedures for the making of such schemes.

Paragraph 11: Information, publicity and consultation

Paragraph 11 enables the regulations to secure that publicity is given to specified matters, and that public registers are maintained by regulators in respect of such matters. They enable persons to be required to provide information and/or compile information on emissions, energy consumption and energy efficiency, and waste. They also enable the regulations to require or authorise regulators to carry out consultation in connection with the exercise of any of their functions. Paragraph 11 also enables the regulations to authorise regulators to hold a public

local inquiry in respect of the exercise of any of their functions and for them to take account of any representations made as a result of any inquiry.

Paragraph 12: Enforcement and offences

Paragraph 12 enables the regulations to confer functions on regulators with respect to compliance with, and enforcement of, the regulations. This includes conferring a power to arrange for preventative or remedial action to be taken at the expense of the persons carrying on a regulated activity and to arrange for the taking of samples or making copies of information. It also enables the regulations to authorise regulators to serve various notices on persons carrying on regulated activities.

It also enables the regulations to provide that regulators may require any person served with such a notice to pay the costs incurred up to the date of service of the notice. It enables the regulations to provide for enforcement of notices in the High Court. It enables the regulations to create offences and provide for defences and evidentiary matters and allows offences to be triable summarily only or on indictment. It also provides the maximum punishments for the offences that may be set out in the regulations and enables regulations to provide for a court to be able to order remedial action where a person has been convicted of an offence and for that person to pay to a regulator the investigation costs incurred by the regulator.

Paragraph 13: Appeals

Paragraph 13 enables the regulations to provide for rights of appeal for various matters, and for the determination of such appeals as well as the payment of associated fees or costs.

Paragraph 14: Compensation

Paragraph 14 enables provision to be made to make a regulator liable to pay compensation to any person in respect of any loss or damage sustained by them as a result of certain action taken by the regulator, e.g. the revocation or modification of a permit in certain circumstances. It also enables compensation to be payable by a permit/registration holder to a landowner/landlord in such circumstances. Sub-paragraph (3) expressly expands the regulation making powers in relation to compensation to provide, for example, the basis on which any amount paid is to be assessed, when and how applications may be made and providing for the persons or bodies by whom, and the manner in which, any dispute is to be determined.

Paragraph 15: Service of notices and other documents

Paragraph 15 enables provision to be made for the service of notices or other required documents.

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Paragraph 16: Application to the Crown

Paragraph 16 provides the application of the regulations to the Crown.

Paragraph 17: Interpretation

Paragraph 17 contains definitions of various terms used in the Schedule.

SCHEDULE 2: REPEALS

Schedule 2 lists the repeals brought in by the Act.

SCHEDULE 3:: REVOCATIONS

Schedule 3 lists the revocations brought in by the Act.