

EXPLANATORY MEMORANDUM TO
THE ENVIRONMENTAL PERMITTING (ENGLAND AND WALES) (AMENDMENT)
REGULATIONS 2014

2014 No. 255

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 Environmental Permitting (England and Wales) Regulations 2010 (S.I.2010/675) (“the 2010 Regulations”). The amendments do the following:

- require certain material facilities (MFs) that separate out single stream waste materials from mixed waste materials of household or similar origin, to sample the quality of their input and output material streams and to make this information transparent;
- remove the requirement for waste businesses to have to secure planning permission for certain waste operations or mining waste operations before an environmental permit can be issued;
- make provision relating to the enforcement of Commission Regulation (EU) No 493/2012 laying down detailed rules for the calculation of efficiency levels for recycling waste batteries and accumulators;
- provide a registration scheme for low risk discharges to groundwater from some Ground Source Heating and Cooling systems, allowing such activities to be exempt from the need for a permit;
- simplify requirements on regulators in maintaining twin systems of public registers containing information connected with permit determinations;
- make a number of other more minor miscellaneous proposals to simplify permitting procedures for regulators (including service of notices, revisions of standard rules and variations of permits);
- clarify the position relating to the exercise of functions in relation to waste mobile plant;
- make some corrections to errors arising from previous amendments transposing the industrial emissions Directive (2010/75/EU) in February 2013.

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

3.1 This instrument corrects a number of minor errors introduced by S.I. 2013/390 (which transposed the industrial emissions Directive). The Department has decided to

apply the free issue procedure in relation to this instrument, for recipients of S.I. 2013/390.

4. Legislative Context

4.1 Prior to the coming into force of the 2010 Regulations on 6 April 2010, the environmental permitting regime was set out in the Environmental Permitting (England and Wales) Regulations 2007 (S.I. 2007/3538) (“the 2007 Regulations”). The 2007 Regulations created a single regulatory framework in England and Wales for waste management licensing and pollution, prevention and control activities. They transposed the provisions of 11 EU Directives which impose obligations required to be delivered through permits or capable of being delivered through permits. The 2007 Regulations were amended in 2009 to transpose the permitting and compliance requirements of the Mining Waste Directive (Directive 2006/21/EC) and the Batteries Directives (Directive 2006/66/EC) and to revise the provisions relating to exempt waste operations. The amending instruments were S.I. 2009/890, 2009/1799 and 2009/3381.

4.2 On 6 April 2010, the 2007 Regulations were revoked, subject to some savings and exceptions, and re-made as the 2010 Regulations with the addition of permitting regimes covering water discharge consenting, groundwater authorisations and radioactive substances regulation.

4.3 Proposals to regulate Materials Facilities and introduce a new schedule to the 2010 Regulations are part of ongoing work to ensure improvement in the quality of recyclate. The information on the quality of recyclate produced by MFs is needed to help demonstrate compliance with the separate collection requirements of Article 11 of Directive 2008/98/EC (the revised Waste Framework Directive) and deliver high quality recycling. The amending Regulations will allow local authorities and waste management companies the opportunity to demonstrate that co-mingling is capable of delivering high quality recycling.

4.4 The Environmental Permitting (England and Wales) (Amendment) Regulations 2013 (S.I. 2013/390) were made primarily in order to transpose the industrial emissions Directive (2010/75/EU). A few drafting errors have subsequently been discovered, some of which frustrate in minor ways the intended policy of transposing the Directive without accretion (“gold plating”).

4.5 Commission Regulation (EU) No 493/2012 of 11 June 2012, lays down detailed rules on calculating the efficiencies of the recycling processes of waste batteries and accumulators. It also requires the recyclers of batteries and accumulators to report on the efficiency of their operation to the competent authority in their member state. It applies to recycling processes from 1 January 2014, with the first report required by 30 April 2015. As an EU Regulation it is directly applicable to battery and accumulator recyclers in the UK and across the EU. The UK is legally obliged under the Batteries Directive to report annually to the European Commission on levels of recycling achieved and whether the stipulated recycling efficiencies have been met.

5. Territorial Extent and Application

5.1 The instrument extends to England and Wales. It applies to the sea adjacent to England and Wales out as far as the seaward boundary of the territorial sea.

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

7.1 The environmental permitting framework has rationalised various permitting regimes that control pollution from business and domestic activity into a common framework that is easier to understand and use than the previous consenting regimes. For example, it allows businesses that would otherwise require several permits for activities falling under the regulations on a single site to have just one permit; and it enables regulators to focus resources on higher risk activities. It cuts administrative red tape without affecting environmental standards.

7.2 The phased approach to regulation, as described in section 4 above, has led to a more flexible, risk-based framework. It enables both an easier transposition of future EU Directives that include permitting requirements and additional suitable consenting regimes to be incorporated into it. For further policy background on the EP framework, see the Explanatory Memoranda on the EP Regulations 2007 at: http://www.opsi.gov.uk/si/si2007/em/uksiem_20073538_en.pdf; and on the EP Regulations 2010 at: http://www.legislation.gov.uk/uk/uksi/2010/675/pdfs/uksiem_20100675_en.pdf

7.3 The instrument makes a number of amendments to the Environmental Permitting framework. The MF amendment will help stimulate the market conditions necessary to improve the quality of the material produced by MFs, so that it can be more readily recycled. Currently the market is not working, partly because MFs are not measuring the quality of their output material or where they are measuring, making this information transparent, which causes inefficiencies in the market and MFs delivering recyclate of sub-standard quality. The proposed amendment will enable monitoring of the quality in MF outputs in a robust manner, helping to support objectives in the revised Waste Framework Directive, as well as the economy and growth of the recycling industry.

7.4 The majority of the rest of the amendments within the instrument are deregulatory. It will become easier for all waste businesses to decide how they want to sequence their applications for planning and environmental permissions, providing them with the same flexibility as businesses in other sectors. On ground source heating and cooling, a more targeted risk based approach will mean that low risk activities need only to register with the Environment agency rather than requiring a permit. There will be no reduction in

environmental protection. Other changes improve the procedural rules for regulators in the way they process aspects of the permitting process: amendments are made:

- (a) to allow for instruments to be served on or given to directors of bodies corporate;
- (b) relating to the variation by the regulator of the terms of an environmental permit when it is partially transferred from one operator to another;
- (c) to allow for revisions to standard rules for environmental permits which do not affect existing permits to take effect on publication of the rules;
- (d) to clarify the position relating to the exercise of functions in relation to waste mobile plant;
- (e) to remove the need for duplication of registers of certain information;
- (f) to remove a requirement on the regulator to serve a notice in relation to a proposed condition of an environmental permit requiring an operator to carry out works in relation to land which the operator is not entitled to do without obtaining the consent of another person.

7.5 The policy background to the batteries amendment is set out in paragraph 4.5 above.

7.6 The purpose of the industrial emissions Directive (2010/75/EU) is 'to achieve a high level of protection for the environment taken as a whole' from harmful effects of industrial activities. It recasts seven current Directives into a single one about regulating emissions from various industrial activities, ranging from power generation to intensive pig farming and waste incineration to dry cleaning. This instrument makes some corrections to the amending Regulations that transposed the Directive.

8. Consultation outcome

8.1 The instrument is being made following public consultations. A consultation ran from 1 February 2013 to 26 April 2013 and sought responses to proposals concerning MFs. A total of 88 responses to the consultation were received. Eighty respondents agreed with the need for Government intervention to improve material quality. Almost two thirds agreed with the proposals to mandate MFs to measure, sample and report on their material streams. The fundamental changes made following responses to the consultation include:

- increasing the amount of sampling MFs will undertake;
- retaining full transparency on information on quality of input and output;
- retaining the 6 month transition for MF operators to prepare, so sampling would begin in October 2014 and tie in with the next reporting period;
- replacing the independent audit proposal with the Environment Agency and Natural Resource Wales undertaking audits and inspections;
- retaining the 1000t threshold, but keep it under review.

8.2 Other issues raised by stakeholders during consultation resulted in removing the requirement to sample the residual waste stream due to concerns with health and safety of sampling staff. A summary of responses and the Government response to them can be found at <https://www.gov.uk/government/consultations/draft-materials-recovery-facility-mrf-regulations-for-insertion-into-environmental-permitting-england-and-wales-amendment-regulations-2013>.

8.3 A public consultation on the following proposals ran from 7 February 2013 to 4 April 2013, to:

- remove the requirement for waste businesses to have to secure planning permission for certain waste operations before an environmental permit can be issued;
- provide a registration scheme for low risk discharges to groundwater from some Ground Source Heating and Cooling systems;
- simplify requirements on regulators in maintaining twin systems of public registers containing information connected with permit determinations;
- possibly transfer the handling of appeals under the EPR 2010 from the Planning Inspectorate (PINS) to the environment jurisdiction of the First Tier Tribunal (FTT);
- make a number of other more minor miscellaneous proposals to simplify permitting procedures for regulators.

8.4 We received 53 responses. Over three-quarters of respondents supported the removal of the pre-requisite requirement for planning permission to the grant of a permit for certain waste operations. All those who commented on it agreed with the proposal to deregulate discharges from certain ground source heating and cooling systems. Some concerns expressed about the criteria and conditions attached to the proposed exemption are being addressed by some modifications to them in the instrument. There was near unanimity with the proposal to stop regulators needing to maintain duplicate public registers and overall support for the compensatory measures set out in the consultation document. The minor miscellaneous proposals to simplify some permitting processes also received wholesale support from the few respondents who commented on them, except one, as explained in paragraph 8.7 below.

8.5 Two of the proposals – to transfer the handling of EPR appeals from PINS to the FTT; and to adjust the requirements on regulators to consult when they wish to make minor variations to standard rules permits – are not being taken forward within this set of amending Regulations.

8.6 On the proposed transfer of the handling of appeals from PINS to the FTT, a number of respondents raised concerns about the reduction in time limits for lodging certain types of appeal under the EPR, for example against conditions set down in bespoke permits, from six months to 28 days as laid down in the rules of procedure for the FTT. While it has been agreed that the six month appeal period can be retained for such appeals, there are other issues around the funding of start-up costs and the necessary

training for Tribunal panel members that need to be resolved before any transfer of appeals handling can take place. The Department is giving further consideration to these issues, and the proposals do not form part of this instrument.

8.7 In relation to the Environment Agency and Local Authorities consulting on minor variations to standard rules permits, a number of respondents expressed concern about the lack of transparency around the criteria to be used by regulators in determining what constituted minor administrative changes. They could not support the proposal without further explanation. In response, the proposal has been withdrawn to allow the regulators to consider whether they wish to pursue the amendment at a later stage, underpinned by guidance to business.

8.8 A summary of responses and the Government response to them can be found at <https://www.gov.uk/government/consultations/draft-environmental-permitting-england-and-wales-amendment-regulations-2013>.

8.9 In relation to the implementation of the EU Regulation on waste battery recycling, a four week consultation exercise was conducted from 13 August to 10 September 2013. Due to the shortened consultation period, and the small number (7) of battery recyclers affected, each business was contacted individually to ensure that they were aware of the consultation and give them full opportunity to comment. At the same time, the consultation was also sent to the Defra Batteries Steering Group, which comprises representative businesses covered by the Regulations, as well as published online. There was a nil response to the consultation.

8.10 Although corrective in nature, the amendments relating to the transposition of the industrial emissions Directive were consulted upon via existing industry forums, with no concerns expressed about the proposals.

9. Guidance

9.1 Separate new guidance on the MF provisions will be published shortly, to ensure MF operators are aware of their responsibilities before the regulations' sampling requirements become applicable in October 2014.

10. Impact

10.1 Impact Assessments are attached to this memorandum and will be published alongside the Explanatory Memorandum on the National Archives website. The impact on business, charities or voluntary bodies is as described in the Impact Assessments.

10.2 There is no impact on the public sector beyond the provision to lift the requirement on local authorities to maintain duplicate public register information on permits also held by the Environment Agency/Natural Resources Wales; and to simplify certain processes associated with permitting. These savings to the regulator are also described in the Impact Assessment.

11. Regulating small business

11.1 The draft instrument applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is one of reduction of administrative burdens and simplification of regulation.

11.3 The cost to small business was considered as part of the Impact Assessment. Proposals to reduce administrative burdens should particularly help small firms as they generally have less time to spend on red tape. As the draft instrument introduces further simplification measures, it will apply to micro-businesses and start-ups. A waiver to that effect from the micro and start-up business moratorium was agreed on 16 January 2013.

11.4 To take account of small businesses, the MF proposal retains a 1000t threshold on operators before the requirements for sampling are applicable. Following consultation, a mechanism to apply time-based sampling frequency was removed, as it was felt this would disproportionately impact on small businesses and put them at a competitive disadvantage.

12. Monitoring & review

12.1 A post-implementation review of the 2007 Regulations was undertaken in Autumn 2009 and published in February 2011) – see <http://archive.defra.gov.uk/environment/policy/permits/documents/ep2007pir-summary.pdf> . The overall finding was that there was support for the principles and aims of the environmental permitting programme. Respondents, both business and regulator, welcomed the increased flexibility and streamlining enabled by the 2007 Regulations and with the way in which the Environment Agency was approaching putting these into practice, recognising that further improvements could be made to processes and procedures. A fuller review of the 2010 Regulations is scheduled to be initiated in 2014, while the MF proposal will be reviewed later in 2017 at the start of the third year of implementation.

13. Contact

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