

EXPLANATORY MEMORANDUM TO

THE ENVIRONMENTAL PERMITTING (ENGLAND AND WALES) (AMENDMENT) (ENGLAND) REGULATIONS 2015

2015 No. 324

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 attached Regulations give the Environment Agency the power to accept enforcement undertakings for non-compliance with certain offences under the Environmental Permitting (England and Wales) Regulations 2010 ('the EP Regulations').

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

3.1 None.

4. Legislative Context

4.1 Part 3 of the Regulatory Enforcement and Sanctions Act 2008 (the RES Act) makes a range of civil sanctions available to regulators to use in cases of non-compliance with regulatory requirements. These include enforcement undertakings, which are voluntary offers made by offenders to restore and remediate any damage they have caused, in agreement with the regulator, without attracting a criminal record. Where an enforcement undertaking is not complied with, the regulator will be able to prosecute for the original offence.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for water, forestry, rural affairs and resource management, Dan Rogerson has made the following statement regarding Human Rights: in my view the provisions of the Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2015 are compatible with the Convention rights.

7. Policy background

7.1 Reviews by Sir Philip Hampton on 'Reducing administrative burdens: effective inspection and enforcement'¹ and Professor Richard Macrory on 'Regulatory Penalties'², led to the RES Act. This introduced a range of civil sanctions, including enforcement undertakings. Civil sanctions introduce greater flexibility in the way in which regulators secure compliance by allowing them to issue administrative penalties and reserve criminal prosecution for the most serious offences.

7.2 Defra's Fairer and Better Environmental Enforcement review worked with business groups, non-governmental organisations, professional interests, and regulators to develop a scheme for using civil sanctions as part of a fairer and more effective enforcement system. It resulted in the Environmental Civil Sanctions (England) Order 2010 and the Environmental Civil Sanctions (Miscellaneous Amendments) (England)

¹ <http://webarchive.nationalarchives.gov.uk/+http://bis.gov.uk/policies/better-regulation/improving-regulatory-delivery/assessing-our-regulatory-system>

² http://webarchive.nationalarchives.gov.uk/20071001182242/bre.berr.gov.uk/regulation/reviewing_regulation/penalties/index.asp

Regulations 2010 ('civil sanctions orders') which came into force on 6 April 2010. These enabled the Environment Agency to use civil sanctions for a range of environmental offences.

7.3 Timing issues meant that it was not possible to introduce civil sanctions into the EP Regulations at that time. Their introduction was then put on hold, as Government reviewed the use of civil sanctions under the RES Act more broadly. The review concluded with a Written Ministerial Statement to Parliament (8 November 2012) that powers to impose fixed monetary penalties, variable monetary penalties and restoration notices would generally only be granted where their use was restricted to businesses with more than 250 employees. Powers to agree enforcement undertakings and impose stop and compliance notices could be granted without size restriction. The statement did not apply to civil sanctions already in force.

7.4 The introduction of enforcement undertakings for environmental permitting is in line with the Written Ministerial Statement. The EP Regulations already contain powers to serve enforcement and suspension notices.

7.5 The amendment Regulations introduce no new regulatory requirements, make no changes to existing offences or existing enforcement mechanisms beyond allowing the Environment Agency to accept enforcement undertakings from those who voluntarily offer them. For the Environment Agency to accept an enforcement undertaking there must be clear recognition of any failings or harm caused by the relevant person. Where relevant, the regulator will look for director or board level commitment to restoration and future compliance. This could initially be set out in a letter and developed into a formal action plan by the relevant person in consultation with the regulator. The enforcement undertaking should set out the actions to be taken and the timetable agreed with the regulator.

7.6 Defra intends to consolidate this change, along with those made previously to the EP Regulations and will consult on proposals in mid-2015, with the intention to lay consolidated Regulations in parliament in 2016.

8. Consultation outcome

8.1 Defra's Fairer and Better Environmental Enforcement project was part of the transformation of the regulatory landscape envisaged by the Hampton and Macrory reviews. There was extensive engagement with a wide range of stakeholders, including business groups and non-governmental organisations, professional interests, and regulators.

8.2 The initiative led to a public consultation in 2009 that proposed introducing civil sanctions for a range of regulatory systems, including the EP Regulations. There were 84 responses to the consultation, a summary of and Government response³ to which are publicly available. Overall, respondents supported the Government's proposals for the introduction of civil sanctions. In total 93% of respondents agreed that enforcement undertakings should be introduced to help ensure a proportionate approach to non-compliance. No respondent disagreed, although some offered comments on the practical implementation of the new powers. The Environment Agency subsequently produced guidance to allay those fears.

8.3 In 2010 a second consultation was held, seeking views on a range of permitting issues, including introducing civil sanction powers for non-compliance with EP Regulations. The consultation proposed fixed monetary penalties, variable monetary

³ <http://archive.defra.gov.uk/environment/policy/enforcement/pdf/summary-reponses.pdf>

penalties, and enforcement undertakings. There were 57 responses and overall, respondents were supportive of the proposals. Most respondents agreed that civil sanctions should be made available to the Environment Agency, in addition to their existing enforcement powers. Respondents' concerns centred on the practical implementation of the new powers to ensure consistency in their application. Similar concerns were raised in relation to the Environment Agency's own consultation on how it proposed to use the powers. It has subsequently produced guidance on procedures, processes and monitoring.

8.4 In September 2014, officials convened a stakeholder workshop to retest the proposition among business and others that enforcement undertakings should be available for offences under the EP Regulations. The 15 attendees from businesses, business groups, professional interests and the Environment Agency agreed that they saw some benefit both to the regulator and regulated and that the consultation respondents' comments on enforcement undertakings remained valid. The workshop attendees did not think that a further consultation was needed.

9. Guidance

9.1 To ensure enforcement is in accordance with better regulation principles, Defra will write to the Environment Agency setting-out the expectation of how environmental permitting enforcement undertakings will be used.

9.2 The Environment Agency is reviewing all of its guidance as part of Defra's Smarter Environmental Regulation Review. It will be updating its guidance on enforcement matters in light of the conclusions of its review.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies, unless the person has failed to comply with the law. In such cases, regulators will have a new power to accept an enforcement undertaking for some environmental permitting offences. Allowing a more proportionate and effective sanctions regime will be better at levelling the playing field for compliant business. The reputational impact of an enforcement undertaking, when things go wrong, will be less than the stigma of a criminal conviction. Benefits to society include giving priority to restoration of harm, ahead of criminal convictions.

10.2 The impact on the public sector is similar to the above.

10.3 These amendment Regulations implement changes that are part of the wider package of measures described in the full Impact Assessment for the Fairer and Better Environmental Enforcement review published in 2010⁴.

11. Regulating small business

11.1 The amendment Regulations apply to small business, but there will be no obligation for enforcement undertakings to be used. They are voluntary offers, made by offender and not imposed by the regulator.

12. Monitoring & review

12.1 In compliance with the requirements of the RES Act, we will review the use of enforcement undertakings three years after they come into force.

13. Contact

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⁴ <http://archive.defra.gov.uk/environment/policy/enforcement/pdf/fbee-impact-assessment100406.pdf>