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Department
for Environment
Food & Rural Affairs

Environmental Permitting

Consultation on draft Environmental Permitting (England and Wales) (Amendment) Regulations 2013 – a package of proposals

February 2013



Llywodraeth Cymru
Welsh Government

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Scope of the consultation

Topic of this consultation:	A package of amendments to the Environmental Permitting (England and Wales) Regulations 2010
Geographical scope:	England and Wales.

Basic Information

To:	All operators who come within scope of the environmental permitting framework, particularly those using ground source heating and cooling systems; waste operators.
Body/bodies responsible for the consultation:	Department for Environment, Food and Rural Affairs and Welsh Government
Duration:	7 February to 4 April 2013. As a consequence of the limited scope of the changes proposed, the consultation will run for 8 weeks. This is line with the UK Government's Consultation Principles published in 2012 and with Welsh Government consultation guidelines.
Enquiries:	Eddie Bailey – 020 7238 6294 – eppadministrator@defra.gsi.gov.uk
How to respond:	By post to Environmental Permitting Consultation, Defra, Area 2C Ergon House, Horseferry Rd, London SW1P 2AL. By E-mail to eppadministrator@defra.gsi.gov.uk or, in Wales, by post to: EPR Consultations, Radioactivity and Pollution Prevention Branch, Welsh Government, Cathays Park, Cardiff CF10 3NG. By e-mail to RPPMailbox@wales.gsi.gov.uk
Additional ways to become involved:	As these are largely technical issues with largely specialist interests, this is a written exercise, although we shall be happy to respond to any questions you may have about it.
After the consultation:	When this consultation ends, we will put a copy of the responses, subject to confidentiality requests in the Defra library at Ergon House, London. The responses will help us draft the amending Regulations for which we shall seek Parliamentary approval, the aim being to bring them into force on 1 st October 2013.

Introduction

1.1 The Environmental Permitting (England and Wales) Regulations 2007¹ ('EP Regulations 2007') established an environmental permitting framework which came into force in April 2008. It comprised a common set of definitions, processes and controls for the permitting of specified activities to prevent pollution. In doing so, it rationalised various permitting regimes into a common framework that is easier to understand and use. For example, it allowed businesses that would otherwise require several permits for activities falling under the regulations on a single site to have just one permit and enabled regulators to focus resources on higher risk activities. It cut administrative red tape without affecting environmental standards.

1.2 The EP Regulations 2007 brought together the permitting and compliance regimes for waste management licensing and pollution prevention and control. Subsequently, the framework was an efficient way to provide the permitting aspects necessary to implement the Batteries and Mining Waste Directives.

1.3 In April 2010, the Environmental Permitting (England and Wales) Regulations 2010² ('EP Regulations 2010') replaced most of the EP Regulations 2007 and expanded the permitting framework to include a number of other former consenting and authorisation regimes covering water discharge and groundwater activities and radioactive substances regulation. Further amendments have subsequently been made to further enhance permitting processes and procedures³.

1.4 The following changes are proposed to the EP Regulations 2010, to take effect from October 2013:

- Removing the requirement for waste businesses to have to secure planning permission for certain waste operations before an environmental permit can be issued (see section 2);
- Providing a registration scheme for low risk discharges to groundwater from some Ground Source Heating and Cooling systems (see section 3);
- Simplifying requirements on regulators in maintaining twin systems of public registers containing information connected with permit determinations (see section 4);
- Possibly transferring the handling of appeals under the Environmental Permitting Regulations 2010 by the Planning Inspectorate, under delegated powers from the Secretary of State and Welsh Ministers, to the environment jurisdiction of the First Tier Tribunal (see section 5);
- Making a number of other miscellaneous proposals (see section 6):
 - Minor simplifications to regulators' handling of standard rules permits

¹ S.I. 2007/3538 as amended by S.I. 2009/1799 and SI 2009/3381.

² <http://www.legislation.gov.uk/ukdsi/2010/9780111491423/contents>

³ <http://www.legislation.gov.uk/uksi/2012/630/contents/made>

- Simplifying requirements relating to landowner permission to clean up
- Correcting two oversights in respect of permit transfers
- Allowing greater flexibility in relation to the service of notices on the body corporate.

1.5 This consultation should not be confused with one being conducted on a separate proposal to amend the Environmental Permitting (England and Wales) Regulations 2010 that will regulate the operation of Materials Recovery Facilities.⁴

1.6 The proposals have been considered by the UK Government's Regulatory Policy Committee, details of which can also be found in the Regulatory Triage Assessments on our consultation webpage at <http://www.defra.gov.uk/consult/open/>. The proposals will apply to firms of all sizes.

1.7 Please note that where references in the consultation document are made to the Environment Agency, they should be read as meaning Natural Resources Wales in so far as they relate to the exercise of the regulator's functions in Wales after the end of March 2013.

1.8 A number of questions are posed throughout the document, brought together for ease of replying in Annex 1. The draft amending Regulations are at Annex 2. Although we would welcome comments in any form, it would help with the analysis of responses if you could respond using the appropriate question numbers.

Please return comments to:

By e-mail: eppadministrator@defra.gsi.gov.uk
By post to: Environmental Permitting Consultation
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Or in Wales

By e-mail: RPPMailbox@wales.gsi.gov.uk
By post to: EPR Consultations
Radioactivity and Pollution Prevention Branch
Welsh Government
Cathays Park
Cardiff CF10 3NG

⁴ <http://www.defra.gov.uk/consult/2013/02/01/mrf-env-permit-consult-0201/>

1.9 In line with Defra's policy of openness, at the end of the consultation period, copies of the responses we receive may be published in a summary of the responses to this consultation. If you do not consent to this, you must clearly request that your response be treated as confidential. Any confidentiality disclaimer generated by your IT system in email responses will not be treated as such a request. Respondents should also be aware that there may be circumstances in which Defra and the Welsh Government will be required to communicate information to third parties on request, in order to comply with its obligations under the Freedom of Information Act 2000.

1.10 This consultation will run for 8 weeks until 4 April 2013.

Sequencing of planning and environmental permitting for certain waste operations

The proposal

2.1 We propose to provide greater flexibility around the requirement for waste businesses to have to secure relevant planning permission for certain waste operations as a pre-requisite to the grant of an environmental permit.

Discussion

2.2 The Environment Agency and, in limited circumstances, local authorities determine applications for waste management activities under the Environmental Permitting (England and Wales) Regulations 2010. For certain waste activities that were previously regulated through the waste management licensing system up until 2007, an environmental permit cannot be issued unless relevant planning permission is in place. This maintains the arrangement that has existed since waste licensing was first introduced and reflects the complementary roles of planners and the Environment Agency in delivering the health and environmental objectives of the Waste Framework Directive.

2.3 For other regulated activities - including larger waste incinerators and other large industrial plants - permits may be issued regardless of the planning status of a waste facility. This pre-requisite need for planning permission, termed by some as the "planning bar", was reviewed firstly in the Penfold Review⁵ of non-planning consents and more recently under the environment theme of the Red Tape Challenge⁶. It was concluded, with Ministerial agreement, that consideration should be given for its removal, subject to public consultation.

2.4 Planning authorities and pollution control authorities have powers and duties that complement each other in contributing towards the protection of the environment and enhancing the quality of life of local communities. The Penfold Review acknowledged that the contribution to sustainable development needs to be a joint one that collectively addresses both whether a development should be allowed to go ahead (the 'if' decision) and how it should be built and operated (the 'how' decision(s)). This distinction between 'if' and 'how' decisions was discussed in a joint Defra/CLG study looking at the interaction between planning and pollution control and published in 2007. That work concluded that: 'the questions of 'if' and 'how' are not really separable, and essentially constitute two aspects of one decision-making process'.

⁵ See <http://www.bis.gov.uk/penfold>

⁶ See <http://www.redtapestchallenge.cabinetoffice.gov.uk/themehome/environment-2>

2.5 The Penfold Review acknowledged that conceptually it is attractive to suggest that the planning system should be the sole arbiter of the ‘if’ decision and non-planning consents should confine themselves to dealing with ‘how’ a development should be built or operated. However, the review also acknowledged that making such a distinction across the board would be fraught with practical and legal problems and necessitate an overhaul of multiple regimes which would be difficult to justify.

2.6 The requirement to secure relevant planning permission before an environmental permit can be issued may not add any additional environmental benefit but can add a significant administrative burden on business and regulators. It is estimated by the Environment Agency that 10% of applications for waste management activities affected by the requirement for prior planning consent are delayed because the status of planning permission is not clear at the time of applying for the permit. In the worst cases where planning decisions are delayed by appeal proceedings, permit decisions cannot be made until after the conclusion of the appeal, adding considerable time to the process.

2.7 The removal of the pre-requisite need for planning permission would also bring these waste operations into line with other activities subject to environmental permitting.

2.8 Defra and DCLG have closely examined the interface between the planning and environmental permitting regimes in order to develop a protocol on the considerations for the sequencing of applications under the current legislation. This will be published in Spring 2013 to help businesses, planners and regulators. The Environment Agency has published its Planning & Permitting Guidelines⁷ as a source to help business, planners and regulators understand the same interface and what the Environment Agency’s role is in each decision. The combination of the protocol and guidance will help address the issues that might arise if operators are free to choose to sequence planning and permitting applications in any way they see fit.

2.9 There are a number of issues that might be affected in the event that the pre-requisite need for planning permission is removed. At the simplest level an operator may opt to obtain a permit but is subsequently refused planning permission and therefore unable to operate.

2.10 It is also for planning authorities to determine whether proposed waste management operations are appropriate both in terms of the type of operation and its status under the waste hierarchy and it is in line with the relevant local waste management plans.

2.11 Some types of operation have particularly close links between the planning and permitting decisions. For instance Annex I of the Landfill Directive, sets out specific considerations concerning the *location* of a proposed landfill. These requirements will be relevant to both planning authorities and the Environment Agency in arriving at a judgement about the suitability of the location of a proposed site and the requirements to be imposed.

⁷ <http://www.environment-agency.gov.uk/business/regulation/139378.aspx>

2.12 The Environment Agency may also not grant an environmental permit for a mining waste facility (where one is required) if the use of the site requires planning permission and no such permission is in force. In addition the legislation sets out that the environmental permitting conditions prevail where there is inconsistency between the planning conditions and the environmental permit. There is therefore a particularly close link between planning and permitting in respect of mining and extractive wastes.

2.13 Overall benefits during the period 2014 to 2020 are estimated to fall in the range of £4.7m to £12.2m NPV across England and Wales: between £1.4m and £8.5m for business and between £3.2m and £3.7m for regulators. Please see the Regulatory Triage Assessment at <http://www.defra.gov.uk/consult/open/> for further information.

2.14 None of the issues above is necessarily a barrier to removing the pre-requisite need for planning permission to the grant of an environmental permit. However they do indicate the need for close consideration of sequencing to cater for particular circumstances for different types of waste operation.

Question 1: Do you support the proposal to provide greater flexibility to waste operators by removing the pre-requisite requirement for planning permission to the grant of a permit for certain waste operations? If not, why not?

Question 2: If you do agree to the removal of the pre-requisite need for planning permission do you have any comments whether that should be in all circumstances or whether some activities still merit the planning determination to precede the permitting decision?

Question 3: Do you have any comments on specific issues that might require amended or further guidance on the interface between planning and permitting?

Question 4: Do you have any comments on the transition costs and other costs (at section 2.13) arising from this change in policy?

Ground Source Heating and Cooling

The proposal

3.1 We propose to provide a registration scheme for low risk discharges to groundwater from 'open loop' Ground Source Heating and Cooling (GSHC) systems. Evidence suggests that these systems pose a limited risk to the environment where they meet certain conditions.

Discussion

3.2 GSHC systems use the constant temperature of the ground and/or groundwater to provide fully or partially renewable heating and cooling in buildings. These systems can also provide some heating for hot water in buildings. Efficient systems can result in greenhouse gas emission savings compared with conventional heating and cooling with on average one unit of electricity generating three to four units of heating or cooling.

3.3 There are two basic types of GSHC systems; closed and open loop. The Environment Agency has no regulatory remit over closed loop systems as these systems do not abstract or discharge water. They work by circulating a fluid in an enclosed pipe in the ground, taking heat or cold from the environment for heating or cooling buildings and then discharging the spent heat or cold back into the environment. These are, and are predicted to be installed in higher numbers than open loop schemes.

3.4 The Environment Agency regulates open loop GSHC systems which take water from the environment and discharge it back at a different temperature. Currently there are only a small number of applications for permits for open loop GSHC systems. However, it is possible that this will significantly increase in the future aided by government financial incentives, such as the Renewable Heat Incentive.

3.5 Under current legislation, applicants are required to apply for a bespoke environmental permit to discharge the water back into the ground. They are also required to pay an annual subsistence charge. For low risk schemes, the requirement for a discharge permit could present a barrier for the uptake of a technology, which can reduce greenhouse gas emissions. Similarly for the Environment Agency, determining, issuing and maintaining these permissions can take considerable resource which is not proportionate for low risk systems. However, EA has recently streamlined its process for dealing with GSHC applications.

3.6 The proposed amendment to EPR is to exempt certain low risk non-consumptive open loop GSHC systems, which meet the following criteria:

- Heating-only systems with a volume of less than 1500m³ per day;
- Heating-dominated systems with a volume of less than 430m³ per day
(these are systems used for both heating and cooling where the design is based on more heating than cooling by more than 20% over a 5-year design period);

- Balanced systems, with a volume of less than 430m³ per day.
(these are systems used for both heating and cooling with a +/- variation of not more than 20% over a 5-year design period);
- Cooling-only or cooling-dominated system, with a volume of less than 215m³ per day.
(Cooling dominated systems are used for both heating and cooling where the design is based on more cooling than heating by more than 20% over a 5-year design period).

3.7 Owners of new systems meeting one of these criteria would not be required to apply for a permit or pay an annual subsistence charge for the discharge. Instead, under the exemption they would be required to register their system on an Environment Agency data base, which is free and will speed up the process considerably. To qualify for this exemption, owners would need to ensure that their systems meet and continue to meet the following conditions, that:

- Nothing should be added to the water discharged from the system;
- The temperature of the water discharged from the system must not vary by more than 10°C compared with that in the aquifer from which it was abstracted;
- The system must not be on a known contaminated site or have had a previous contaminative use;
- The water from the system must not be discharged less than 50 metres from a groundwater dependent European site or a Site of Special Scientific Interest;
- The water from the system is not discharged within 50 metres of a point at which water is abstracted from underground strata (unless the owner also owns the abstraction borehole), or a zone defined by a 50-day travel time for groundwater to reach a groundwater abstraction point that is used to supply water for domestic or food production purposes (also known as Source Protection Zone 1);
- The discharge of water from the system should be to the same aquifer as that from which it was abstracted.

3.8 The proposal would also benefit owners of existing systems which meet the criteria and conditions of the exemption, as they would no longer have to pay an annual subsistence charge. It should be noted that under the current abstraction licensing framework, open loop systems will continue to require permissions for the abstraction from the Environment Agency. The abstraction licensing system is currently being reviewed. Systems will also continue to require a Groundwater Investigation Consent.

3.9 The proposed amendment would only affect heating and cooling systems which discharge to groundwater, and not those that discharge to surface water.

Question 5: Do you agree with the proposal to deregulate the discharge from certain low risk GSHC systems? If not, why not?

Question 6: Do you agree with the criteria and conditions attached to the exemption? If not, why not?

Simplifying public register requirements

The proposal

4.1 We propose to stop regulators from having to maintain twin systems of public registers containing information connected with permit determinations. Evidence suggests that providing duplicate entries at local authority offices is unnecessary as these are not sufficiently referred to by the public or business to justify the associated costs.

Discussion

4.2 Currently, in most cases, the Environmental Permitting Regulations 2010 require local authorities to maintain a duplicate of the Environment Agency's public information relevant to their area on their own public register. They also require the Environment Agency to provide relevant local authorities with the information necessary to comply with this duty.

4.3 A straw poll of 17 local authorities provided evidence that these duplicate entries at local authority offices are not sufficiently referred to by the public or businesses to justify the costs associated with the process. Seventy-five per cent had had no visits to view this part of the public register in the past 10 years, 15% had had one visit and only 10% had had more than one and fewer than five visits.

4.4 The aim of this proposal is therefore to remove this obligation. The Environment Agency will instead take compensatory measures to ensure that such information remains available to those who request it in a less costly, more targeted way, namely:

- Increase the provision of information on the internet, access to which is free in libraries. This is in line with the UK Government's "digital by default" agenda;
- Send out hard copy or emailed documents to members of public/ businesses who request them. This information is free of charge unless a copyright licence is requested where a charge of £50 + VAT would apply;
- In keeping with its commitment to the Environment Agency's Public Participation statement, provide enhanced opportunities for engagement and access to information in the case of sites of high public interest, through libraries, surgeries, exhibitions, public meetings etc.

4.5 A move to a single register will result in savings both within the Environment Agency and local authorities of around £0.5M per year.

Question 7: Do you agree with the proposal to remove the requirement for local authorities to maintain duplicate public register permit information to that held by the Environment Agency? If not, why not?

Question 8: Do you agree with the proposed arrangements to ensure the information is available to those seeking it?

Environmental permit appeals handling

The proposal

5.1 We propose the possible transfer of the handling of appeals under the Environmental Permitting (England and Wales) Regulations 2010 from the Planning Inspectorate (PINS) to the Environment jurisdiction of the General Regulatory Chamber (First tier Tribunal).

Discussion

5.2 A new, specialised “environment” jurisdiction of the First-tier tribunal (FTT) was set up in 2010 following Defra and Welsh Government legislation to introduce a range of new civil sanctions for certain environmental offences. Judges and expert members were appointed to deal with appeals, with flexibility as to where the tribunal sits and how it conducts its procedures. See <http://www.justice.gov.uk/tribunals/environment>

5.3 Prior to the creation of the new jurisdiction there had been no single, first choice appeal forum for environmental regulation. Existing appeal arrangements have grown up in a piecemeal fashion and established on an ad hoc basis. The establishment of the FTT provides an opportunity to consolidate environmental appeals across a wide range of laws, in line with the Coalition Government’s policy of streamlining regulatory structures. In 2011 a report by Professor Richard Macrory highlighted a lack of consistency in environmental appeals and suggested a greater use of the FTT – see http://www.ucl.ac.uk/laws/environment/index.shtml?pub_reports

5.4 It is argued that use of the FTT should offer advantages in the way in which appeals are handled, namely:

- A clear, consistent and easily understood route of appeal;
- Established and transparent rules of procedure and active case management by tribunal judges;
- Ability of the tribunal to sit with non-legal members (who are either professionally qualified or qualified by experience in their field) or expert assessors;
- Procedural flexibility, able to hear cases quickly and strike out cases with no reasonable prospect of success;
- A clear onward route of appeal to the Upper Tribunal which has the status of the High Court.

5.5 Historically, appeals under the Environmental Permitting Regulations (EPR), and previous consenting regulations streamlined by the introduction of the EPR, have been handled by the Planning Inspectorate (PINS), under delegated authority from the Secretary of State and Welsh Ministers. Regulation 31 of, and Schedule 6 to the EPR set out a detailed system of rules relating to appeal procedure. Additionally, PINS already handles a very large

caseload of appeals under planning legislation and other more specialised environmental appeals such as those under the EPR.

5.6 PINS has developed considerable expertise in handling environmental appeals. It has an established, ready network of experienced Inspectors to call on to handle a caseload that runs to approximately 60 EPR appeals per year, of which about one-third result in an Inspector's decision after either an inquiry, hearing or an exchange of written representations, with the remainder resolved through negotiation between the operator and regulator.

5.7 There are some similarities when comparing the FTT's approach to that of PINS in handling appeals under EPR. Currently PINS is able to offer:

- Flexibility as to where a hearing or inquiry is held, ideally as close to the affected site as practicable;
- Clear established routes of appeal with a dedicated administrative team dealing with the appeals and facilitating negotiations between the parties (FTT on the other hand can facilitate mediation and encourages parties to consider Alternative Dispute Resolution);
- Hearings and inquiries held by a single appointed Inspector with the necessary technical knowledge and qualifications to deal with the wide variety of planning, environmental and transport related casework;
- Inspectors with the knowledge of the applicable legislation, have access to legal advice if novel points of law arise, and are experienced in conducting either informal hearings or large public inquiries;
- Transparent procedural rules under the relevant legislation, or by reference to well used procedures from planning appeals to ensure fairness;
- An established organisation with strong administrative systems and an experienced workforce covering a wide variety of planning and environmental legislation.

5.8 It is difficult to estimate whether the transfer of appeals handling from PINS to the FTT would bring savings to the public purse. There would be some FTT start up costs to fund training and IT provision. Appeals, either to PINS or to the FTT, would continue to be free to appellants until any change in Government policy regarding full cost recovery is proposed.

The First-tier tribunal (FTT)

5.9 The FTT is empowered to deal with a wide range of issues which might form the substance of appeals, and to ensure the cases are dealt with in the interest of justice and minimising parties' costs. The composition of a Tribunal is a matter for the Senior President of Tribunals to decide and may include non legal members with suitable expertise or experience in an appeal in addition to Tribunal judiciary.

5.10 If the FTT is selected as the appropriate body to hear appeals in these matters then it would operate under the Tribunal Procedure (First-tier Tribunal) (General Regulatory

Chamber) Rules 2009⁸ which provide flexibility for dealing with individual cases. The General Regulatory Chamber rules can be found at:

<http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/tribunals-rules-2009-at010411.pdf>. Rule 2 of the General Regulatory Chamber Rules states its overriding objective as being to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the Tribunal judge wide case management powers in order to achieve these objectives.

5.11 The Tribunal may also hear an appeal either orally in a court room or determined on the papers only. This latter written procedure is used if both parties agree that the Tribunal may determine the appeal on the papers without holding a full hearing and the Tribunal is satisfied that it can determine the issues without one. However, unlike the current EPR system, there is no provision for matters to be dealt with by inquiry by an appointed person.

5.12 In addition, the rules relating to time limits for appealing to the FTT are generally shorter than those currently provided for by the EPR (FTT appeals must generally be brought within 28 days except in certain specified cases; EPR appeals can be brought within anything up to 6 months, depending on the nature of the appeal⁹). Any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal.

5.13 Under the Rules the FTT has the power to award costs against a party where it considers that a party has acted unreasonably in bringing, defending or conducting the proceedings.

5.14 The Lord Chancellor has the capacity to charge fees for appeals to the FTT, for example an application fee. Where he is proposing to introduce fees he is required to consult the Senior President of Tribunals and the Administrative Justice and Tribunals Council. Following this, any such proposal would be subject to secondary legislation that would need to be debated and agreed by both Houses of Parliament before it would take effect.

5.15 In conclusion therefore, we are minded to proceed with the transfer of appeals handling from PINS to the FTT as it would appear that there may be some benefits from the transfer, namely: flexibility about who forms the tribunal; the ability to strike out early cases with no reasonable prospect of success, leading to saved costs; and greater independence from Government. The draft Regulations attached to this document include provision to amend the appeals provisions of the EPR, including the revocation of Schedule 6, subject to a number of savings in relation to existing but undetermined appeals and matters in relation to which the current time limits for appealing have not expired. It should be noted that we do

⁸ S.I. 2009/1976

⁹ S.I. 2009/1976, rule 22(1); EPR Schedule 6, paragraph 3.

not propose that appeals under regulation 53 relating to confidentiality determinations (made under regulation 50) should be transferred to the FTT. We propose no change in this respect. Nor do our proposals affect the operation of regulation 62, relating to the referral to the appropriate authority of particular applications or classes of applications for determinations (save to the extent that any appeal under regulation 31 against a determination made under regulation 62 would made to the FTT).

Question 9: Do you consider that the FTT is an appropriate destination for appeals under the Environmental Permitting Regulations 2010, or should they remain with PINS?

Question 10: Do you consider that the General Regulatory Chamber Rules will suit the handling of these appeals? If not, why not?

Miscellaneous proposals

The proposals

6.1 We propose that the following miscellaneous proposals are included in the draft amending Regulations:

- Minor simplifications to regulators' handling of standard rules permits;
- Simplifying requirements relating to landowner permission to clean up;
- Correcting two oversights in respect of permit transfers;
- Allowing greater flexibility in relation to the service of notices on the body corporate.

Discussion

Minor simplifications to regulators' handling of standard rules permits

6.2 Under the Environmental Permitting (England and Wales) Regulations 2010 (EPR), before revisions to standard rules permits are made by the regulator, any operator who holds a permit that would be affected by the proposed revisions must be notified of those revisions and the date that they will come into force (which must not be less than three months from the date of the notification). This is a necessary protection for existing permit holders, as it allows operators time to decide whether they want to be subject to the new rules or withdraw from them, but can be problematic for new operators because it delays for three months the application of revised rules which are usually relaxations to compliance requirements. While very few operators would be affected by this change (fewer than a dozen a year), the proposal would introduce some welcome flexibility.

6.3 The EPR also require that revisions to standard rules permits must be consulted on except where the proposals comprise "only minor administrative changes". Consultation is conducted in accordance with the regulators' public participation statement which currently provides for a minimum 28 day period of consultation for revisions to rules. The consultation requirement can be problematic as some changes, whilst minor, cannot be termed administrative, for example assigning the right waste codes to the right waste activity descriptors. In other cases it has been necessary to amend the rules slightly to safeguard the environment and comply with EU Directive requirements. Adjusting the regulatory requirements to remove the condition that changes must be "administrative" in nature would provide more flexibility.

6.4 Government guidance to regulators on both the above issues would be provided to ensure they were appropriately applied by the regulator.

Simplifying requirements relating to landowner permission to clean up

6.5 The EPR allow for the imposition of off-site conditions in environmental permits and require third parties to grant consent to operators (subject to compensation) so that the operator can comply with any off-site condition. However where the Environment Agency (or where appropriate, a local authority) proposes to include an off-site condition in a permit, it must serve a notice on every person who would have to grant rights of entry to the operator so that the operator could comply with the condition. The notice served by the Environment Agency forms part of the consultation on the proposed permit.

6.6 Historically water discharge consents under Water Resources Act 1991 (now water discharge activity permits under EPR) relating to water company combined sewer overflows and emergency overflows had a condition requiring the clean-up of sewage debris around the overflow and in waters and adjoining land downstream of the sewer outfall. This condition was subject to appeals which were upheld but some water companies have now suggested that these conditions should be the subject of off-site consultation. The Environment Agency takes the view that the off-site consultation provisions were not intended to cover situations of this type and do not need to be interpreted in this way. However, an amendment would be beneficial to clarify the position.

6.7 The condition in water discharge activity permits relates to permit holders clearing up when the discharge from their overflow results in solid sewage matter being deposited in waters or on banks of waters. At the time the permit is granted it cannot possibly be known whether the condition will be engaged as unless and until there is an unacceptable discharge of sewage from an overflow there is no breach of condition if sewage is not cleaned up.

6.8 Therefore it is impossible for the Environment Agency to comply with regulatory requirements in respect of the clean-up condition because it will not know at the time of the application for a permit which landowners or occupiers have to be consulted. There could be a number of third parties on to whose land the water company may need to have access to clean-up sewage debris but that would not be known until the discharge has occurred, i.e. once the permit is granted and the water discharge activity operational. This proposal is therefore intended to clarify the regulatory position.

Correcting two oversights in respect of permit transfers

6.9 These are two technical corrections to bring greater consistency in how the regulator can handle the transfer of permits. Firstly, the regulator is currently able to vary the terms of a permit when it is partially being surrendered by the operator but it does not have the same ability in relation to the notification of a partial transfer from one operator to another. Secondly, where an enforcement notice applies to a permit it continues to apply when the permit is transferred to another operator, but there is no equivalent provision for suspension notices. This proposal will correct these anomalies.

Allowing greater flexibility in relation to the service of notices on a body corporate

6.10 Regulation 10 of EPR governs the service of notices etc under the Regulations. In the case of “bodies corporate”, it specifies that service must be on the secretary or clerk. However, some companies do not have a secretary or clerk and this hinders the service of such notices etc. This proposal would expand the regulation 10 provision to include the director of a company as well as the secretary or clerk to allow greater flexibility to regulators.

Question 11: Do you agree with these miscellaneous proposals? If not, which ones do you disagree with and why?

Annex 1 – list of consultation questions

Sequencing of planning and environmental permitting for certain waste operations

Question 1: Do you support the proposal to provide greater flexibility to waste operators by removing the pre-requisite requirement for planning permission to the grant of a permit for certain waste operations? If not, why not?

Question 2: If you do agree to the removal of the pre-requisite need for planning permission do you have any comments whether that should be in all circumstances or whether some activities still merit the planning determination to precede the permitting decision?

Question 3: Do you have any comments on specific issues that might require amended or further guidance on the interface between planning and permitting?

Question 4: Do you have any comments on the transition costs and other costs (at section 2.13) arising from this change in policy?

Ground source heating and cooling

Question 5: Do you agree with the proposal to deregulate the discharge from certain low risk GSCHC systems? If not, why not?

Question 6: Do you agree with the criteria and conditions attached to the exemption? If not. Why not?

Simplifying public register requirements

Question 7: Do you agree with the proposal to remove the requirement for local authorities to maintain duplicate public register permit information to that held by the Environment Agency? If not, why not?

Question 8: Do you agree with the proposed arrangements to ensure the information is available to those seeking it?

Environmental permit appeals handling

Question 9: Do you consider that the FTT is an appropriate destination for appeals under the Environmental Permitting Regulations 2010, or should they remain with PINS?

Question 10: Do you consider that the General Regulatory Chamber Rules will suit the handling of these appeals? If not, why not?

Miscellaneous proposals

Question 11: Do you agree with these miscellaneous proposals? If not, which ones do you disagree with and why?

Annex 2 – Draft amending Regulations

STATUTORY INSTRUMENTS

2013 No.

ENVIRONMENTAL PROTECTION, ENGLAND AND WALES

The Environmental Permitting (England and Wales) (Amendment) Regulations 2013

<i>Made</i>	- - - - -	***
<i>Laid before Parliament</i>		***
<i>Laid before the National Assembly for Wales</i>		***
<i>Coming into force</i>	- - -	<i>1st October 2013</i>

The Secretary of State, in relation to England, and the Welsh Ministers, in relation to Wales, have in accordance with section 2(4) of the Pollution Prevention and Control Act 1999(¹⁰) consulted—

- (a) the Environment Agency;
- (b) such bodies or persons appearing to them to be representative of the interests of local government, industry, agriculture and small business as they consider appropriate; and
- (c) such other bodies or persons as they consider appropriate.

The Secretary of State in relation to England, and the Welsh Ministers in relation to Wales, make the following Regulations in exercise of the powers conferred by section 2 of, and Schedule 1 to, the Pollution Prevention and Control Act 1999(¹¹).

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Environmental Permitting (England and Wales) (Amendment) Regulations 2013 and come into force on 1st October 2013.

(2) In these Regulations, “the Principal Regulations” means the Environmental Permitting (England and Wales) Regulations 2010(¹²).

⁽¹⁰⁾ 1999 c. 24. Functions of the Secretary of State under or in relation to section 2, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales, except in relation to offshore oil and gas exploration and exploitation, by article 3(1) of the National Assembly for Wales (Transfer of Functions) Order 2005 (S.I. 2005/1958). But this was subject to article 3(2), which provided that, so far as any of those functions are exercisable by the Secretary of State in relation to a cross-border body but which, by their nature, are not functions which can be specifically exercised in relation to Wales, such functions are exercisable by the Assembly in relation to that body concurrently with the Secretary of State. Functions of the National Assembly for Wales were transferred to the Welsh Ministers by section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 (c. 32).

⁽¹¹⁾ The following relevant amendments have been made to Schedule 1. Paragraph 21A was inserted by section 38 of the Waste and Emissions Trading Act 2003 (c.33); paragraph 24 was amended by S.I. 2005/925, Schedule 6, paragraph 2, and paragraph 25 was amended by section 105(1) of the Clean Neighbourhoods and Environment Act 2005 (c. 16).

Amendment of the Environmental Permitting (England and Wales) Regulations 2010

2. The Principal Regulations are amended in accordance with regulations **Error! Reference source not found.** to 13.

Regulation 10 (giving notices, notifications and directions, and the submission of forms)

3. In regulation 10 of the Principal Regulations—

- (a) in paragraph (4), after “given to” insert “a director of that body or”;
- (b) in paragraph (6)—
 - (i) in sub-paragraph (a), after “corporate” insert “, a director of that body”;
 - (ii) in sub-paragraph (a)(ii), after “of the” insert “director.”.

Regulation 21 (transfer of an environmental permit)

4. In regulation 21⁽¹³⁾ of the Principal Regulations—

- (a) in paragraph (7)—
 - (i) after “an enforcement notice” insert “or a suspension notice”;
 - (ii) after “the enforcement notice” insert “or, as the case may be, the suspension notice”;
- (b) after paragraph (8) insert—

“(9) Paragraphs (10) and (11) apply to a partial transfer if the regulator considers it necessary to vary the environmental permit conditions to take account of that transfer.

(10) The regulator must serve a notice on the operator specifying—

- (a) the regulator’s view under paragraph (9);
- (b) the variation; and
- (c) the date the variation takes effect.

(11) If the date specified in the notice under paragraph (10)(c) is later than the date specified in the notification under paragraph (5)(c), the variation and partial transfer both take effect on the later date.”.

Regulation 26 (preparation and revision of standard rules)

5. In regulation 26(3) of the Principal Regulations—

- (a) omit “administrative”;
- (b) after “changes” insert “or changes which the authority considers necessary for the purpose of preventing serious pollution”.

Regulation 28 (notification of revision of standard rules)

6.—(1) Regulation 28 of the Principal Regulations is amended as follows.

(2) In paragraph (2)—

- (a) omit sub-paragraph (b);
- (b) in sub-paragraph (c)—
 - (i) omit “on this date”,
 - (ii) after “permit” insert “3 months after the date of service of the notification or, as the case may be, when published under regulation 26(5)”.

(3) Omit paragraph (3).

(4) In paragraph (4), for “The” substitute “Subject to paragraph (4A), the”.

⁽¹²⁾ S.I. 2010/675, amended by S.I. 2010/676, 2172; 2011/881, 988, 1043, 2043, 2377, 2933; 2012/630, 811.

⁽¹³⁾ Regulation 21 was amended by regulation 7 of S.I. 2012/630.

(5) After paragraph (4), insert—

“(4A) In relation to a relevant environmental permit, the revised rules take effect 3 months after the date of service of the notification referred to in paragraph (2), except where the revisions comprise only minor changes or changes which the authority considers necessary for the purpose of preventing serious pollution.”.

Regulation 31 (appeals to an appropriate authority)

7.—(1) Regulation 31 of the Principal Regulations is amended as follows.

(2) In the heading, for “an appropriate authority” substitute “the First-tier Tribunal”⁽¹⁴⁾.

(3) In paragraphs (2), (6) and (7), for “the appropriate authority” in each place occurring substitute “the First-tier Tribunal”.

(4) Omit paragraph (8).

(5) In paragraph (13), for “the appropriate authority” in each place occurring substitute “the First-tier Tribunal”.

(6) Omit paragraph (14).

Regulation 46 (duty of the regulator to maintain a public register)

8. In regulation 46 of the Principal Regulations, omit paragraphs (4), (5) and (6).

Schedule 3 (exempt facilities: descriptions and conditions)

9. In Part 3 of Schedule 3 to the Principal Regulations, after paragraph 3 insert—

“Open-loop ground source heating and cooling systems

4.—(1) For the purpose of paragraph 5(a)(i) of Schedule 2, the description is the discharge of water to ground or groundwater from a heating or cooling system to which sub-paragraph (3) applies with altered temperature.

(2) For the purpose of paragraph 5(a)(ii) of that Schedule, the conditions in relation to a groundwater activity of that description are—

- (a) that nothing should be added to the water discharged from the system;
- (b) that the temperature of the water discharged from the system must not vary by more than 10° C compared to that in the aquifer from which it was abstracted;
- (c) that the scheme must not be on a known contaminated site or have had a previous contaminative use;
- (e) that water from the system must not be discharged less than 50 metres from a groundwater dependent European site or site of special scientific interest;
- (f) that water from the system is not discharged within—
 - (i) 50 metres of a point at which water is abstracted from underground strata, or
 - (ii) a zone defined by a 50-day travel time for groundwater to reach a groundwater abstraction point that is used to supply water for domestic or food production purposes;
- (g) that the discharge of water from the system should be to the same aquifer as that from which it was abstracted.

(3) This sub-paragraph applies to a system—

- (a) that involves—
 - (i) the abstraction of water to obtain heating or (as the case may be) cooling, and

⁽¹⁴⁾ Appeals to the First-tier Tribunal will be allocated to the General Regulatory Chamber by virtue of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (S.I. 2010/2655, to which there are amendments not relevant to this instrument). Procedural rules for that Chamber are set out in the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (S.I. 2009/1976 (L. 20), relevant amending instruments are S.I. 2010/43 (L. 1) and 2011/651 (L. 6)).

- (ii) the subsequent discharge of that water; and
- (b) that is—
 - (i) a heating-only system with a volume of less than 1500 cubic metres per day;
 - (ii) a heating-dominated system or a balanced system, in either case with a volume of less than 430 cubic metres per day; or
 - (iii) a cooling-only system or a cooling-dominated system, in either case with a volume of less than 215 cubic metres per day.

(4) In this paragraph—

“balanced system” means a system used for both heating and cooling with a plus or minus variation of not more than 20% over a 5-year design period;

“cooling dominated system” means a system used for both heating and cooling where the design is based on more cooling than heating by more than 20% over a 5-year design period;

“European site” has the meaning given in regulation 8 of the Conservation of Habitats and Species Regulations 2010⁽¹⁵⁾;

“heating-dominated system” means a system used for both heating and cooling where the design is based on more heating than cooling by more than 20% over a 5-year design period;

“site of special scientific interest” has the meaning given in section 52(1) of the Wildlife and Countryside Act 1981⁽¹⁶⁾.”.

Schedule 5 (environmental permits)

10. In Part 1 of Schedule 5 to the Principal Regulations—

- (a) in paragraph 5(4)(d), for “(d) or (e)” substitute “(d), (e) or (f)”;
- (b) in paragraph 9—
 - (i) in sub-paragraph (1), after “permit” insert “, other than a condition to which sub-paragraph (1A) applies”;
 - (ii) after sub-paragraph (1) insert—

“(1A) This sub-paragraph applies to a condition that does not specifically identify the land in relation to which the operator is required to carry out works or, as the case may be, do other things.”;
- (c) in paragraph 17, omit sub-paragraph (2)(a)(iii).

Schedule 6 (appeals to the appropriate authority)

11. Schedule 6 to the Principal Regulations is omitted.

Schedule 9 (waste operations)

12. In Schedule 9 to the Principal Regulations omit paragraph 3 (grant of an environmental permit for a relevant waste operation: requirement for prior planning permission).

Savings in relation to appeals etc.

13. Nothing in regulation 7, 10(c) or 11 applies in relation to—

- (a) any appeal made under or by virtue of regulation 31, 78, 79, 81, 82, 95, 96, 98 or 99 of the Principal Regulations and not finally determined at the time these Regulations come into force;
- (b) the making of any appeal in relation to which, immediately before the coming into force of these Regulations, the time for making the appeal under paragraph 3 of Schedule 6 to the Principal Regulations as in force at that time had not expired;

⁽¹⁵⁾ S.I. 2010/460, to which there are amendments not relevant to this instrument.

⁽¹⁶⁾ 1981 c. 69; the definition was inserted by the Countryside and Rights of Way Act 2000 (c. 37), section 75(1) and Schedule 9, paragraph 5(1) and (2).

- (c) any reference to Schedule 6 to the Principal Regulations in regulations 53(5), 62(5) and 72C(2) of those Regulations.

Date

Name
Parliamentary Under Secretary of State
Department for Environment, Food and Rural Affairs

Signed on behalf of the Welsh Ministers

Date

Name
Minister for Environment and Sustainability Development
One of the Welsh Ministers

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Environmental Permitting (England and Wales) Regulations 2010 (S.I. 2010/675) ("the 2010 Regulations").

Regulation **Error! Reference source not found.** makes amendments relating to the service of instruments on directors of bodies corporate.

Regulation 4 makes amendments in relation to transfer of environmental permits.

Regulations 5 and 6 make amendments in relation to standard rules for environmental permits.

Regulations 7, 10(c) and 11 amend the provision relating to appeals under regulation 31 of the 2010 Regulations, providing for such appeals to be made to the First-tier Tribunal. Regulation 13 contains related savings provisions.

Regulation 8 removes the requirement on a local authority to include on its register certain information which is included on the Environment Agency's public register.

Regulation 9 provides for the discharge of water from certain open-loop heating and cooling systems to be an exempt groundwater activity for the purposes of the 2010 Regulations.

Regulation 10 amends the consultation requirements relating 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

Regulation 12 removes the requirement on the regulator not to grant an environmental permit for certain waste

[IA text]