

Explanatory Memorandum to The Environmental Permitting (England and Wales) (Amendment) (No. 3) Regulations 2015.

This Explanatory Memorandum has been prepared by Environment and Sustainable Development Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Environmental Permitting (England and Wales) (Amendment) (No. 3) Regulations 2015.

Carl Sargeant AM
Minister for Natural Resources
6 October 2015

1. Description

This instrument amends The Environmental Permitting (England and Wales) Regulations 2010 (S.I. 2010/675) (“the 2010 Regulations”) primarily to strengthen existing powers for Natural Resources Wales to tackle waste crime and poor performing sites in the waste and other industries within the Environmental Permitting regime. The same powers also extend to local authorities in Wales in relation to regulated facilities for which they are the regulator. It amends existing powers to make the following changes:

- enable the regulator to suspend a permit where an operator has breached a condition of their permit and there is a risk of pollution; this provision will enable the regulator to specify, in a suspension notice, the steps that must be taken by the operator to remedy the breach of the permit and to remove the risk of pollution;
- enable the regulator to require the operator to display a sign which informs the public that no further waste can be brought onto the facility in cases where a permit is suspended and there is a need to prevent more waste entering a site;
- enable the regulators to take steps to remove a risk of serious pollution;
- make it less onerous for the regulator to make an application to the High Court for an injunction to enforce compliance with an enforcement or suspension notice by removing certain preconditions.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

This instrument makes amendments to existing England and Wales Regulations and is being made on a composite basis (by the Welsh Ministers in relation to Wales and by the Secretary of State in relation to England). As this composite SI is subject to approval by the National Assembly for Wales and by UK Parliament, it is not considered reasonably practicable for this instrument to be made or laid bilingually.

There is no difference in policy on these proposals and the Regulations will be used by industry operating across borders in Wales and in England.

3. Legislative background

The Welsh Ministers will make the changes to the 2010 Regulations using the enabling powers in the Pollution Prevention and Control Act 1999 (“the PPCA”) (in particular section 2 and Schedule 1) which confer wide powers on the Welsh Ministers to make provision, in relation to Wales, for the regulation of polluting activities. The 2010 Regulations were made using these powers. These powers were transferred to the National Assembly of Wales by article 3 of the National Assembly for Wales (Transfer of Functions) Order 2005/1958.

Those functions of the Assembly were transferred to the Welsh Ministers pursuant to section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006.

This Instrument follows the negative procedure and is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

4. Purpose & intended effect of the legislation

Illegal operators in the waste management industry pollute the environment, endanger human health and show disregard for the neighbouring community. Their flouting of the Regulations ranges from unsightly, often dangerous fly-tipping to mountains of rubbish sometimes containing tens of thousands of tons of waste that can catch fire, pollute water, provide a breeding ground for rats and flies and give off smells that make life unpleasant for those living nearby. Those responsible can leave authorities and landowners / landlords to clear up the mess and deal with the consequences.

Pollution incidents from persistent poor performing waste operations and inadequate site management impact on the quality of air, water and land. The Welsh Government has seen a number of major waste fire incidents at permitted waste sites in Wales, impacting on air quality and other aspects of the environment and on human health from the large amounts of smoke and fumes emitted from these sites.

The reputable waste management industry provides a key service to the UK economy. The Welsh Government recognise that tackling waste crime and persistent poor performance is important to legitimate businesses, which are often undercut by criminals, which can undermine their confidence to invest. The reputable industry estimates the cost of waste crime to the UK economy at £568 million a year, however it is not possible to estimate the proportion in Wales based on available data. The companies in the waste industry that operate to the highest standards need support from government and responses to the consultation on these amendments were strongly in favour of them. It is, therefore, considered essential to take effective action against the small minority of rogue operators who are undermining and undercutting the law-abiding majority.

The Welsh Government and Defra are working with NRW and the Environment Agency to take tougher and speedier action against illegal operators and persistent poor performing permitted sites using existing powers. We want to strengthen the regulators' powers to enforce effectively and provide them with more flexibility to take the most immediate and appropriate action to tackle waste crime and persistent poor performers. The amendments contained in this instrument are intended to support this objective.

Although the focus of Welsh Government is on the regulation of waste operations, the amendments to legislation in this instrument apply to other activities regulated under the environmental permitting regime. It would not

make sense to subject waste operations to a different enforcement regime from other industries regulated under the same system and legislation.

5. Consultation

The proposed amendments to the 2010 Regulations were the subject of public consultation for 10 weeks between 26 February and 6 May 2015.

There were 89 responses to Part 1 of the consultation document which sought views on the proposed regulatory amendments set out in this instrument. There were 26 responses from local authorities; 21 from individual companies; 15 from trade associations; 8 from organisations categorised as “Other Public Bodies” (this includes various fire and rescue services and local authority representative organisations); and 6 from private individuals, 5 from professional bodies, 5 from consultancies and 3 from non-governmental organisations (NGOs).

Of the 89 responses received, 78 were from organisations and individuals based in England and 11 were from organisations and individuals based in Wales.

Around 83% of respondents supported the proposal to widen the power of suspension. Around 90% of respondents supported the proposal to enable the regulators to specify steps to remedy the cause of pollution and require operators to erect signage indicating waste that cannot be accepted at the site. In addition, 95% of respondents supported the proposal to widen the power of the regulators to remove the risk of serious pollution and 89% of respondents supported the proposal to enable the regulators to make an application to the High Court more easily by removing the current precondition.

The summary of responses to the consultation and the Government response is available at: <https://www.gov.uk/government/consultations/waste-crime-improving-enforcement-powers-to-reduce-persistent-non-compliance-at-waste-handling-sites>

6. Regulatory Impact Assessment (RIA)

The powers provided by these Regulations will be available, in relation to Wales, to Natural Resources Wales (“NRW”) and Welsh local authorities who are the regulators for Wales under the 2010 Regulations. As NRW regulate the majority of environmental permitted sites relating to waste operations, the data on costs associated with enforcement action has focussed on NRW. The proposals will not result in any costs to legitimate businesses. The new powers will benefit businesses as the regulators will have more effective powers to enforce against illegal waste operators who often unfairly undercut compliant waste operators. There are no expected impacts on those businesses, charities or voluntary bodies that are in compliance with their environmental permits. The direct impact of this SI by the proposed changes to the power of suspension and the power to make an application to the High

Court would be on those businesses who fail to comply with the conditions of their permit or who operate illegally. The regulators will continue to consider the requirements of the Regulators Code and their internal delegation and enforcement procedures so it is likely (though not necessary) that warnings will have been given to an operator prior to exercise of these powers. The proposed change to the power, regulation 57 of the 2010 Regulations, to remove a risk of serious pollution is also linked to the commission of an offence.

The amendments in the instrument are targeted primarily at waste operators who persistently breach the conditions of their environmental permits and those who are operating illegally. These poor performing operators of these regulated facilities represent 5% of environmental permitted operations in Wales. NRW is aware of 87 illegal waste sites (for the reporting period of April – November 2014) operating outside the environmental permitting regime.

The Welsh Government does expect to see an increase in the need for the regulators to exercise the wider power of suspension or the wider power to remedy pollution. The majority of enforcement action by NRW can be taken using the existing powers; however, these proposals will help NRW to take quicker and tougher enforcement action in a limited number of serious cases. This will help to reduce the need for the public purse having to bear some of the costs from clearing pollution and remediating sites. The number of cases where action is required is expected to be quite low as it is only around 5% of the industry who are poor performers. Since its inception in April 2013, NRW have made no applications to the High Court for an injunction and therefore no custodial sentences or fines have arisen as a result of a failure to comply with such an injunction. The proposed change to the power will make it less onerous for NRW to make an application to the High Court for an injunction and the Welsh Government expects a small increase in the number of proceedings which NRW commence in the High Court.

The impact on the public sector is that NRW will have their powers made more robust and flexible, allowing them to consider the appropriate response in all the circumstances of each case. In the short term, any increased costs incurred by NRW as a result of these changes will be recovered through their fees and charges scheme, their proposals as set out in their recent consultation¹ to increase charges to cover the cost of regulating poor performers will support their regulatory efforts in this area.

These powers will assist the regulators in taking speedier and tougher enforcement action and it is anticipated that the number of cases where the public sector incurs substantial costs from the clearance of polluting sites should reduce. An impact of the costs to Wales is attached at Annex A. An impact of the costs to the Justice system has been jointly prepared with Defra and is available on request. This impact assessment concluded that the very small number of cases expected to reach the High Court (2 for Wales and 5

¹ Link to NRW consultation as follows:- <http://naturalresources.wales/about-us/consultations/our-own-consultations/consultation-on-our-charging-scheme-for-2016-17/?lang=en>

for England) would amount to a minimal impact to the Ministry of Justice. In the very rare case that non-compliance with an injunction leads to a custodial sentence, the costs could be passed on to the Welsh Government. However, this is a remote possibility given the very small number of cases reaching the High Court and also that the majority of those cases would likely result in a fine rather than a custodial sentence. It is not possible, therefore, to estimate the possible scale of any such costs.

This legislation has no impact on the statutory duties under sections 77-79 Government of Wales Act 2006 ("GOWA 2006") or statutory partners under sections 72-75 GOWA 2006 other than those stated above.

Annex A

Costs and Benefits

This section sets out the costs and benefits that might arise as a result of the proposed amendments to the legislation. As there are no costs to legitimate operators, a full impact assessment has not been carried out to accompany the consultation on proposals to enhance NRW's enforcement powers.

Who will be affected by these proposals?

While the proposals will apply to all operators of regulated facilities under the 2010 Regulations, the key groups that will be most affected are illegal/ non-compliant operators who act in breach of their environmental permit or exemption conditions. The proposals will also affect:

- NRW and on some aspects, local authorities who will be able to exercise discretion in the use of the enhanced powers once the legislation is amended;
- The High Court which will hear any cases brought before it in relation to injunctions and;
- The Planning Inspectorate (PINS) which manages the appeals procedure under the 2010 Regulations.

The proposed amendments are principally aimed at tackling illegal operators and persistent non-compliant operations under the environmental permitting regime. Legitimate businesses located in the vicinity of a non-compliant site may benefit from a reduction in the pollution or loss of amenity caused by a non-compliant site. Legitimate waste businesses should also benefit as these proposals should help reduce the frequency of undercutting by illegal waste operators. The enhanced powers will help create a level playing field to ensure that those businesses which breach their permit or operate without a permit are brought into compliance or face enforcement to protect human health and the environment.

Costs and benefits for business

Businesses that carry out activities in accordance with their permit or the conditions of their registered exemption are not expected to experience costs as a result of these proposals.

Businesses that carry out their activities illegally (for example those that engage in waste activities for which they do not have a permit or which are in breach of a permit or registered exemption) may experience costs as a result of these proposals. The costs for businesses that carry out illegal waste management activities have not been included in the assessment.

Businesses that operate in breach of the conditions of their permits are more likely to have their permits suspended or revoked and therefore are likely to lose their market share, leaving responsible contractors to compete effectively on price and quality of service. These proposals will make responsible waste

management a more attractive proposition, as well as benefitting the environment and local communities.

There could be some additional costs to landowners who become responsible for clearing increased amounts of abandoned waste. However, this will be rare and limited to occasions where an operator is not in a position to have enforcement action taken against them. Comments were sought during the consultation on the extent of any additional cost and ways of increasing awareness amongst landowners of their potential liabilities. The Welsh Government, jointly with Defra, will consider further with the regulators and the industry on what more can be done to improve the awareness of landowners and landlords to help prevent the abandonment of waste sites and minimise the consequences on the neighbouring community.

Costs and benefits for the regulator (Natural Resources Wales)

NRW may incur some additional costs from additional regulatory effort in issuing and enforcing suspension notices; no estimates are currently available on the anticipated extra regulation and costs of issuing/enforcing suspension/revocation notices. They would also incur some occasional additional costs in supervising the compliance associated with the suspension of the permit. However, the number of cases where notices are expected to be required each year is low and NRW will only do this where it believes that failing to take this action would result in a high risk of pollution or public amenity loss.

It is anticipated that these enhanced powers will lead to a reduction in the number of sites that pose a high risk to the environment, which over time will mean a reduction in clean-up, enforcement and regulatory costs as sites move into compliance. Similarly costs borne by local authorities, including the fire services, to tackle waste fires should begin to reduce. The cost of disposing of waste from fires at waste sites has been estimated by NRW to be in excess of £2 million. This does not include the costs of haulage, remediation, supervision etc. A fire at one illegal waste site resulted in a total cost of over £1.5 million to all the agencies involved.

In addition, current and past cases indicate that clean-up costs of abandoned waste sites on private land can cost anywhere between £250k and £5million. Nine sites have been abandoned in Wales since April 2013. NRW is monitoring these sites as well as other sites which were abandoned prior to this time. Increased powers should benefit landowners as it will enable NRW to act earlier to reduce the incidence of sites with significant quantities of abandoned waste.

The most notable benefit for NRW will be the reduction in costs associated with emergency preventative action to avoid pollution and amenity loss and any associated clearance costs, although this has to be balanced against any additional enforcement costs.

Poor performance waste sites in Wales

There are 656 permitted waste facilities in Wales which are operational, accepting and handling waste on site. Around 5% of these sites are persistent poor performers who fail to adequately comply with the conditions of their permits, of which more than half of these sites continue to fail for more than two years.

Poor performers are considered to pose a greater risk of pollution and nuisance such as fire, odour and dust. Dealing with these problems can take significant amounts of time and resource to resolve which means substantial costs for both the NRW and the tax payer.

In their annual review of performance across the waste sector in Wales, NRW reviewed the compliance assessment plans for poor performing sites and estimated that each poor performer on average takes 43 days of regulatory effort. This equates to 1,462 days of effort required in total and the cost to the regulator is estimated at £324k. For one site, this could equate to £9.5k of regulatory effort some of which could be partly recovered through their fees and charges scheme but not all.

For example, for an end of life vehicle dismantling site with an annual throughput less than 2,500 tonnes, the flat subsistence charge recovered through NRW's fees and charges scheme for 2015/16 is £779. If this site had a compliance banding of a poor performance site, the charge would be 150% of the flat subsistence rate, or £1,169. This would fund around 6 days of regulatory effort. Whereas on a typical poor performing site of this type, NRW is likely to spend around 27 days' worth of regulatory effort, equivalent to a subsistence charge of £5,400.

Similarly for a non-hazardous household, commercial and industrial waste transfer station with an annual throughput of less than 25,000 tonnes, the flat subsistence charge recovered through NRW's fees and charges scheme for 2015/16 is £2,347. With a poor performing compliance band, the charge is increased to £3,506 which funds around 17.5 days regulatory effort. A typical poor performing site of this type may take closer to 44 days' regulatory effort in a year, equivalent to a subsistence charge of £8,800.

The proposed changes will enhance the current regime by enabling the regulators to take swift enforcement action before a situation posing significant risk develops. The proposals may also remove a small burden on HM Courts and Tribunals Service by providing alternative enforcement options for NRW.

Benefits will also be felt by the general public and local businesses in areas near poor performing waste sites, from a reduction in harm to local communities and disruption to their lives. Reducing non-compliance in the industry is also likely to have a benefit for the Welsh Government in protecting revenues from Landfill Disposals Tax once it is devolved in 2018.