

EXECUTIVE NOTE

The Contaminated Land (Scotland) Regulations 2005 SSI/2005/658

The above instrument is to be made in exercise of the powers conferred by section 20 of, and schedule 2 to, the Water Environment and Water Services (Scotland) Act 2003. The instrument is subject to affirmative resolution Parliamentary procedure.

Policy Objectives

The purpose of the instrument is to amend Part IIA of the Environmental Protection Act 1990 (“the 1990 Act”), which was inserted by section 57 of the Environment Act 1995. It also makes amendments to the Contaminated Land (Scotland) Regulations 2000 (“the 2000 Regulations”). Part IIA of the 1990 Act establishes a contaminated land regime, under which local authorities have a duty to identify and secure the remediation of “contaminated land” in their area. At present, section 78A(2) makes provision to define “contaminated land” as “any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that (a) significant harm is being caused or there is a significant possibility of such harm being caused; or (b) pollution of controlled waters is being, or is likely to be, caused”. While actual or possible harm must be “significant”, any degree of pollution or likely pollution of controlled waters may result in the polluting land being designated as contaminated. This could lead to the situation where trivial amounts of pollution would result in land being designated as contaminated, and subject to the requirements of Part IIA.

The 2000 Regulations make provision in relation to the circumstances in which contaminated land requires to be designated as a special site, and provides for a remediation regime, regulated by SEPA, in that regard.

The amendments, which are mainly operational or technical in nature, are designed to achieve the following policy objectives:

- To remedy the anomaly described above as regards trivial amounts of pollution resulting in land being designated as contaminated under Part IIA of the 1990 Act, and to prevent disproportionate environmental regulation being applied to such land, the definition of “contaminated land” in section 78A(2) of the 1990 Act is amended (regulation 2(3)(a)).

- The Water Environment and Water Services (Scotland) Act 2003 (“the 2003 Act”) makes provision to implement the provisions of European Parliament and Council Directive 2000/60/EC, which establishes a framework for Community action in the field of water policy (“the Water Framework Directive”). Section 3 of the 2003 Act provides for a definition of “water environment” which is to replace the term “controlled waters” currently provided for at section 78A(9) of the 1990 Act (by reference to section 30A of the Control of Pollution Act 1974). Draft regulation 2(3)(1) amends section 78A(9) of the 1990 Act to replace the definition of “controlled waters” with a definition of the “water environment”. The effect of the amendment is to accommodate this change in terminology, and to ensure consistency of approach in the operation of the pollution control regimes provided for under Part IIA of the 1990 Act and the 2003 Act, which concern contaminated land as a source of pollution of the water environment.

- Currently, the 1990 Act makes provision for a definition of “pollution of controlled waters” based on the pollution offence in section 30A of the Control of Pollution Act 1974. This terminology is inconsistent with the pollution control regime in the 2003 Act and this could conceivably create operational difficulties for SEPA and local authorities. To address this, draft regulation 2(3)(1) amends section 78A(9) of the 1990 Act by introducing a definition of “pollution” in relation to the water environment with reference to the definition of pollution provided at section 20(6) of the 2003 Act.

- Scottish Ministers already have powers under section 78A(5) of the 1990 Act to issue guidance on the matter of “harm” to human health or the wider environment. Draft regulations 2(3)(d) and (e) amend sections 78A(5) and (6), respectively, of the 1990 Act to make provision for powers to issue such guidance as may be required on the criteria to be used in determining what pollution of the water environment is to be regarded as “significant” and on whether there is “a significant possibility of such pollution being caused”.

In addition, the draft Regulations make two technical refinements to the 1990 Act required as a consequence of the amendments we are proposing to the contaminated land regime, as described above:

- amendment of section 78YB of the 1990 Act to clarify that a remediation notice should not be served by a local authority under Part IIA, if and to the extent that SEPA exercise powers under the Water Environment (Controlled Activities) (Scotland) Regulations 2005 . This has the effect of removing land which may be the subject of enforcement action under those Regulations from the contaminated land regime provided for under Part IIA to avoid duplication of regulation; and
- amendment of section 79(1B) of the 1990 Act, on statutory nuisance, to reflect the changes proposed to Part IIA with particular regard to the definition of land in a “contaminated state”.

Commencement

Draft regulation 1(2) provides for the provisions in draft regulation 2(3)(d) and (e), concerning the amendment of the existing guidance-making powers in the 1990 Act, to commence immediately after the draft Regulations are made. This is necessary to enable the statutory guidance which will accompany the draft Regulations to be laid for the consideration of Parliament. It is unreasonable to expect the regulatory authorities to comply with their new statutory obligations in the absence of such guidance. For this reason draft regulation 1(3), provides for commencement of the remaining provisions to be held over until 1 April 2006, at which time it is expected that Parliament will have considered the Guidance.

Consultation

In accordance with section 21(1) of the 2003 Act, the Executive consulted SEPA, local authorities and a wide range of trade, environmental and relevant business associations during the preparation of this instrument. The consultation period ran for 12 weeks between 10 February and 6 May 2005. Those consulted included:

Agricultural Industries Confederation
Chartered Institute of Waste Management
Confederation of British Industry (Scotland)
Contaminated Land: Application in Real Environments (CL:AIRE)
Federation of Small Businesses
Food Standards Agency
Friends of the Earth Scotland
Greenpeace
Health and Safety Executive
ICI
National Society for Clean Air - Scotland
Royal Environmental Health Institute of Scotland
Royal Town Planning Institute Scotland
Scottish Contaminated Land Forum
Scottish Enterprise
Scottish Power
Scottish Water

A summary of the substantive responses received to the consultation paper can be found on the Executive's website (www.scotland.gov.uk/publications).

Financial Effects

There are no financial implications for the Scottish Executive or for the regulatory bodies (local authorities or SEPA). The proposed amendments will ensure that land causing only trivial pollution of the water environment will no longer come within the scope of the contaminated land regime. This means that any potential remediation costs falling on the regulatory bodies in respect of sites that might otherwise have met the definition of the contaminated land regime will be removed. Similarly the proposed draft Regulations place no additional financial burdens on those who own or occupy contaminated land or who may be liable for the contamination (known as "appropriate persons").

Scottish Executive Environment and Rural Affairs Department
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