

EXECUTIVE NOTE

THE POLLUTION PREVENTION AND CONTROL (SCOTLAND) AMENDMENT REGULATIONS 2009 (SSI 2009/336)

Introduction

1. These Regulations follow the transfer of relevant functions to the Scottish Ministers by an order made under section 63 of the Scotland Act 1998 (“the Order”). This Order - the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2008 - came into force on 10 July 2008.
2. The Regulations are made under section 2 of the Pollution Prevention and Control Act 1999, and are subject to negative procedure in the Scottish Parliament.

Content of the Regulations

Legislative Background

3. The Regulations amend the Pollution Prevention and Control (Scotland) Regulations 2000 (“the principal Regulations”).
4. They do so by providing that, in relation to anything done or omitted or event occurring after the Regulations come into force, the principal Regulations are to be interpreted as extending to certain matters relating to energy efficiency. Those are the matters in relation to which functions were transferred to the Scottish Ministers under the Order.
5. A Regulatory Impact Assessment has been prepared and placed in the Scottish Parliament Information Centre. Copies can be obtained from the Scottish Government Environmental Quality Directorate, Victoria Quay, Edinburgh EH6 6QQ.

Policy Objective

6. The prevention and control of pollution in Scotland is generally devolved. Community obligations relating to integrated pollution prevention and control, such as Directive 2008/1/EC, are implemented through the Pollution Prevention and Control (Scotland) Regulations 2000, made by the Scottish Ministers under section 2 of the 1999 Act. Those Regulations establish a system of pollution control which is enforced by the Scottish Environment Protection Agency (SEPA). However, insofar as they require the regulation of energy efficiency, Community obligations also touch on the subject-matter of the Energy Act 1976, which is reserved by section D5 of Schedule 5 to the Scotland Act. The Order transferred to the Scottish Ministers regulation-making functions in the 1999 Act to ensure that they are able to use those functions to implement Community obligations concerning energy efficiency. The amendment to the principal Regulations made by the current Regulations will ensure that SEPA is fully empowered to include energy efficiency conditions in PPC permits.

Consultation

7. The Regulations were prepared following consultation with SEPA and a wide range of trade associations, business, local government and other interested organisations.

Financial Effects

8. The instrument has no financial effects on the Scottish Government, and imposes minimal additional burdens on SEPA.

9. The cost to industry from complying with Community energy efficiency requirements can vary significantly, depending on the industrial sector within which an installation lies, local circumstances, and the extent to which an installation has already introduced energy efficiency measures. These are described in the Regulatory Impact Assessment which has been completed for the Regulations. Energy efficiency measures will result in a net cost saving over the life of the measure to businesses themselves.

Environmental Quality Directorate
Scottish Government
October 2009

THE REGULATION OF ENERGY EFFICIENCY AT IPPC INSTALLATIONS

REGULATORY IMPACT ASSESSMENT

1. Title of proposal

The Regulation of Energy Efficiency at IPPC installations.

2. Purpose and intended effect

Objective

This partial Regulatory Impact Assessment reviews the likely effect of regulations (“**the proposed regulations**”) to enable the Scottish Environment Protection Agency (“**SEPA**”) to regulate energy efficiency measures at industrial installations falling within the scope of the Integrated Pollution Prevention and Control Directive (2008/1/EC) (“**the IPPC Directive**”) in Scotland. Directive 2008/1/EC, a consolidation, has replaced Directive 96/61/EC. The IPPC Directive defines an installation as a stationary technical unit where one or more activities listed in Annex I to the Directive are carried out.

The proposed regulations follow the transfer of relevant functions to the Scottish Ministers by an order made under section 63 of the Scotland Act 1998 (“**the Order**”). This Order - the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2008 - came into force on 10 July 2008.

The functions in question, previously exercisable solely by a Minister of the Crown, fall within the scope of Section D5 (energy conservation) of Schedule 5 to the Scotland Act and are, consequently, reserved. They relate to the regulation of energy conservation and consequently to the subject matter of the Energy Act 1976 (other than section 9).

The functions are transferred only so far as they are exercisable in relation to the implementation of Scotland’s obligations to comply with European Community law relating to energy efficiency. This transfer enables the Scottish Ministers to empower SEPA fully to regulate energy efficiency at IPPC installations.

Background

The IPPC Directive introduced a regulatory system that uses an integrated approach to environmental protection by controlling emissions to air, water and land from those industrial activities falling within the scope of the Directive. Each installation must comply with the Directive’s requirements and regulators are responsible for exercising appropriate pollution controls by issuing permits containing conditions designed to protect the environment. The regulatory authority in Scotland is SEPA.

The IPPC Directive includes specific requirements for installations to be operated in such a way that *energy is used efficiently* (Article 3(1)(d) of the IPPC Directive) and that “Best Available Techniques (BAT)” are used. The aim of BAT is to prevent or reduce pollution to air, water and land from industrial activities and seeks to achieve this by balancing the cost to the operator against benefits to the environment. BAT considerations include the need to take account of energy efficiency involved in the consumption of raw materials (Articles 2(12) and 3(1)(a) and

Annex IV in IPPC). The aim of these requirements is to minimise pollution arising from the consumption of energy in industrial processes and associated environmental impacts. The use of fossil fuels to generate energy can result in the release of large amounts of carbon dioxide, a greenhouse gas that is a major contributor to global warming and climate change. Businesses, including those in sectors covered by the IPPC Directive, are currently responsible for about half of all the UK's carbon emissions. SEPA's regulation of industry has helped to reduce emissions of greenhouse gases by over 40% since 1990. There are important linkages, therefore, between the energy efficiency requirements of the IPPC Directive and the Government's climate change agenda.

The IPPC Directive was transposed in Scotland through the Pollution Prevention and Control (Scotland) Regulations 2000, SSI 2000 No 323 (“**the PPC Regulations**”), made under section 2 of the Pollution Prevention and Control Act 1999. The PPC Regulations establish a system of pollution control which is implemented by SEPA. However, insofar as it requires the regulation of energy efficiency, the Directive also touches on the subject-matter of the Energy Act 1976, a reserved area. The Order, therefore, transfers certain functions under the Pollution Prevention and Control Act 1999 and Environment Act 1995 to the Scottish Ministers, to be exercised concurrently with the Minister of the Crown, to ensure that Scottish Ministers are able to empower SEPA fully to regulate matters relating to energy efficiency at IPPC installations in Scotland.

Rationale for government intervention

SEPA, a Non Departmental Public Body, is responsible for implementing and enforcing environmental protection legislation in Scotland. This includes the PPC Regulations. Since devolution, the Scottish Ministers have been able to use regulation-making powers to confer functions on SEPA within devolved competence. While the bulk of what SEPA is required to do to fulfil the UK's obligations under the IPPC Directive falls squarely within devolved competence, the Scottish Government concluded that the reservation in Section D5 of Schedule 5 to the Scotland Act meant that SEPA lacked the necessary powers to include energy efficiency conditions within PPC permits.

While there is a specific exception to the reservation in Section D5 in Schedule 5 to the Scotland Act covering “the encouragement of energy efficiency other than by prohibition or regulation”, the Scottish Government believes it is insufficient to rely on operators merely to respond to encouragement by SEPA. SEPA needs to be able to set and enforce specific permit conditions. Although on the face of the PPC Regulations SEPA already has the power to include energy efficiency conditions in PPC permits, the Scottish Government concluded that this was not the case, because at the time the PPC Regulations were made the Scottish Ministers did not have the competence to give SEPA that power.

The UK Government introduced the Climate Change Levy in 2001 to help the UK meet its Kyoto treaty obligations to reduce greenhouse gas emissions. While most industrial plants are liable to pay the levy, operators can receive an 80% discount by participating in a Climate Change Agreement (CCA) under which operators are required to meet energy efficiency targets. Most industries falling within the scope of the IPPC Directive will be participating in a CCA and overall energy efficiency requirements of the Directive are expected to be achieved by that means. However, participation in a CCA is voluntary and not backed by fiscal enforcement. Individual installations may, in addition, fall short of specific IPPC energy efficiency requirements.

To resolve these issues, the section 63 Order was made to enable the Scottish Ministers to make the proposed regulations. The regulations will, in turn, provide SEPA with powers to include, and enforce, energy efficiency conditions in PPC permits, in compliance with the IPPC Directive. Under the PPC Regulations, IPPC installations are generally taken to mean “Part A installations”. The PPC Regulations also cover “Part B installations” (generally smaller plants with emissions only to air) which fall outside the scope of the IPPC Directive and are unaffected by the proposed regulations.

3. Consultation

Before making the Order, the following organisations were consulted:

- Department for Business, Enterprise and Regulatory Reform
- Department for Environment, Food and Rural Affairs
- Scotland Office
- Office of the Advocate General for Scotland
- Scottish Environment Protection Agency

Before making the proposed regulations, the following organisations were consulted:

- representative organisations of affected industrial sectors
- professional organisations
- selected operators
- Scottish local authorities

4. Options

Non-implementation of the energy efficiency requirements of the IPPC Directive is not a realistic option since failure to implement the Directive fully would carry the risk of infraction proceedings by the European Commission, with the ultimate possibility of fines.

The Scottish Government has considered whether SEPA could simply go ahead and include energy efficiency conditions in permits for IPPC installations where necessary. However, legal advice indicates this would be ultra vires and that SEPA would have no mechanism by which to enforce those conditions. If SEPA were to include energy efficiency conditions in these permits, or attempt to enforce compliance with such conditions, it would leave itself open to challenge either through an appeal to the Scottish Ministers or the sheriff, or judicial review.

SEPA were invited to say whether it could achieve the energy efficiency objectives of the IPPC Directive other than through PPC permit conditions relating to energy efficiency, that is to say whether energy efficiency could result from other conditions not specifically about energy efficiency. SEPA were also asked how practicable it would be to rely on simply encouraging operators to adopt energy efficiency measures. It is clear that neither option would guarantee the requirements of the Directive being met.

The Scottish Government explored options for addressing this issue other than through the Order and proposed regulations, for example whether it would be appropriate for the UK Government to confer these functions on SEPA. However, whilst the UK Government has powers to do this, the Scottish Government believed it would be more appropriate for Scottish Ministers to legislate in subject areas that would generally be devolved but for the application of a particular reservation in

the Scotland Act on energy conservation. The subject matter covered by the IPPC Directive is otherwise almost entirely devolved and it seemed appropriate that the energy efficiency provisions in the Directive were regulated by SEPA through the existing provisions of the PPC Regulations made by the Scottish Ministers. It would be administratively cumbersome for businesses to deal with regulations concerning energy efficiency at IPPC installations and with separate regulations for all other IPPC requirements. There would also be different appeal arrangements.

The Scottish Government concluded that the optimum solution would be to obtain the transfer of the relevant functions to the Scottish Ministers and then to empower SEPA to implement and enforce IPPC's energy efficiency requirements at IPPC installations in Scotland.

5. Costs and benefits

Sectors and groups affected

The IPPC Directive introduced pollution controls in a wide range of industrial sectors, including:

- Fuel production and combustion;
- Metal production and processing;
- Mineral industries;
- The chemical industry;
- Waste management (mainly landfill and incineration);
- Pulp and paper manufacture;
- Pre-treatment of dyeing of textiles;
- Tanning of hides and skins;
- Slaughterhouses;
- Food and drink processing;
- Disposal or recycling of animal carcasses;
- Surface treatment;
- Intensive pig and poultry farming.

In a number of sectors, capacity thresholds apply. Only those installations with operating capacities above the relevant threshold fall within the scope of the Directive. Thresholds are set out in the Directive itself. Some 500 installations in Scotland are covered by IPPC and, therefore, liable to comply with the energy efficiency requirements of the Directive. The installations affected are in both the private and public sectors, including local authorities.

Benefits

The implementation of cost-effective, technically proven energy efficiency measures offers the potential to make a significant contribution to reduce pollution and its global impacts. Other benefits are reduced depletion of non-renewable resources and potential reductions in the use of other raw materials. Collectively these measures would bring environmental and human health benefits.

The introduction of energy efficiency measures can bring about substantial savings and have a direct effect on the bottom-line profitability and competitiveness of a business. Examples of savings are shown below.

(a) A dairy identified that they could make energy savings of around £38,000 per year (equivalent to savings of around 500 tonnes of carbon dioxide per year). Some of these savings (about £7,200 or 160 tonnes of CO₂) could be achieved with zero capital cost, with a further £2,410 (equivalent to 32 tonnes of CO₂) of savings achievable by capital expenditure which could be recouped within 1 year. The remaining savings would payback over a five year period.

(b) A paper mill identified £15,000 of savings per annum that could be realised from its compressed air systems through attending to leaks. This more than covered the PPC application fee.

(c) A drill cuttings plant submitted information that indicated it could save about 2% of its energy usage (equivalent to 23 tonnes of CO₂ per annum) at no extra cost.

(d) A horticulturalist undertook to service its 2 boilers twice a year instead of once and lag the heating pipes leading from the boilers. These measures led to a 20% reduction in the amount of gas consumed and significant cost savings.

It is considered likely that similar savings could be achieved across most of the industrial installations regulated under the PPC Regulations. Collectively this would bring environmental and human health benefits. However, this could only be achieved fully by empowering SEPA to enforce energy efficiency, as the PPC Regulations intended. As the above examples show, many of the costs of implementing energy efficiency measures can be offset by the savings.

Costs

The IPPC Directive specifically requires that installations falling within the scope of the Directive should be operated in such a way that energy is used efficiently. Operators are required to demonstrate that they have systematically developed proposals to apply BAT. Energy efficiency is one of several considerations to be taken into account when determining BAT. The cost of complying with energy efficiency requirements can vary significantly, depending on the BAT requirements for a particular sector or individual installation taking account of local circumstances, and the extent to which an operator has already introduced energy efficiency techniques in a plant.

Techniques for optimising energy efficiency range from simple measures, involving no or minimal capital costs, such as good housekeeping, insulation or motor controls, to more complex measures such as process integrated heat recovery. There are organisations that will provide an energy audit and advice on energy savings free of charge (e.g. the Carbon Trust and Energy Saving Trust). It is only where the cost of introducing energy efficiency measures have a long payback period that investment in such measures may be less attractive to businesses.

The above examples demonstrate that many of the costs involved in deploying energy efficiency measures or procedures can be offset by savings. Nevertheless, if a company is unwilling to invest in the initial cost of introducing energy efficiency measures SEPA is, at the present time, unable to require operators to introduce such measures. The proposed regulations will provide SEPA with the powers to do so.

Administrative costs for operators involved in implementing IPPC energy efficiency provisions, e.g. the cost of preparing SEPA's permit applications, monitoring and reporting data, will vary widely depending on the sector and size of the installation. Any additional cost involved in including energy efficiency matters in these issues is likely to be minimal.

6. Small/Micro firms impact test

The IPPC Directive does not contain any “triviality” provision. This means that where there is no relevant threshold, any business, irrespective of its size, operating in a sector falling within the scope of the IPPC Directive may potentially have to comply with the Directive, including its energy efficiency provisions. However, IPPC applies capacity thresholds for a range of industrial activities; small-scale businesses operating in these sectors will, therefore, be unaffected by the proposed regulations. Many small industrial activities are likely to be regulated as PPC Part B installations which do not need to comply with IPPC requirements.

Energy efficiency measures introduced by small businesses can make good business sense. In some instances cost savings following the introduction of energy efficiency measures could be achieved within a relatively short payback period. When SEPA determines whether an activity is BAT compliant or not, it has to take into account the likely costs and benefits of a measure by assessing whether the measure is technically and economically viable. The practical effect of this is that SEPA is required to take a proportionate approach to regulation. This includes an assessment of whether an activity meets the criteria for low impact installations, which involves simpler regulation and lower regulatory charges.

7. Legal Aid impact test

The PPC Regulations already provide that operators can appeal to the sheriff following a decision by Scottish Ministers in pursuance of an appeal against a regulatory decision by SEPA. The regulations also provide access to justice provisions to enable non-governmental organisations promoting environmental protection to have the legality of SEPA’s regulatory decisions reviewed by the courts. These are in addition to the established domestic judicial review procedures. Any new power given to SEPA to include energy efficiency conditions in PPC permits will increase the opportunity for appeals to be taken to the sheriff or for judicial reviews, although, in practice, it is likely to make minimal difference. This could potentially increase the use of legal processes, although it is not expected there will be any significant impact on the legal aid fund in Scotland.

8. Test run of business forms

SEPA’s current application and other forms already cover the energy efficiency requirements of IPPC. Forms have been “test run” with industry and SEPA will continue to review its forms on a regular basis.

9. Competition assessment

In general, competitive advantage relates to the cost base of companies as well as the ability to grow and access new markets. As with any regulation, there is a potential cost implication in complying with the PPC Regulations. The introduction of the proposed regulations covering energy efficiency measures is not expected to make any significant difference to the overall impact of IPPC on businesses or their ability to compete in the market. As noted above, the introduction of energy efficiency measures can result in a net cost saving over time. Energy savings can, therefore, have a direct impact on the competitiveness of businesses. By demonstrating a commitment to reducing carbon emissions, businesses are likely to increase their appeal in the market place, thereby attracting a wider customer base.

10. Enforcement, sanctions and monitoring

The proposed regulations should not give rise to any new enforcement or sanction provisions. Compliance with energy efficiency conditions in PPC permits would be enforced by SEPA using the existing enforcement and offence provisions in the PPC Regulations. These enable SEPA to issue enforcement notices, suspension notices and revocation notices and require operators to take steps to prevent or remedy pollution.

The PPC Regulations already provide sanctions in relation to the application process. If applicants fail to meet the requirements which the application process places upon them, operators will find that the process takes longer or, in the extreme, that their application has been refused. If SEPA fails to meet deadlines without the agreement of the applicant, the application is deemed refused and SEPA may find itself confronted with an appeal. An appeal may also be triggered if an operator is dissatisfied with the outcome of their application. These sanctions would remain unchanged following the making of the proposed regulations.

The implementation of the PPC Regulations is monitored on an ongoing basis. This is being achieved by various means, e.g. by SEPA itself in the light of experience of operating the PPC Regulations; through Scottish and UK stakeholder groups; and by the European Commission under EU-wide reports on IPPC implementation.

11. Implementation and delivery plan

The issue identified in this RIA – the means by which Scottish Ministers can ensure implementation of the energy efficiency requirements of the IPPC Directive – has been addressed by making an order under section 63 of the Scotland Act to transfer relevant functions to Scottish Ministers (i.e. executive devolution). It is now proposed to make regulations to give SEPA powers to include, and enforce, energy efficiency conditions (in compliance with the IPPC Directive) in permits for IPPC installations. A summary of the key steps to deliver this objective is as follows:

- 10 July 2008 – section 63 Order comes into force transferring relevant functions to the Scottish Ministers.
- February to May 2009 – consultation on proposed regulations.
- October 2009 – lay regulations in Scottish Parliament.
- November 2009 – regulations come into force.

12. Post-implementation review

The IPPC Directive is currently being reviewed by the European Commission. A replacement Industrial Emissions Directive is expected to come into force during 2010. It is considered inappropriate to undertake any formal review of the energy efficiency provisions in the IPPC Directive whilst this process is underway. However, the practical effect of all regulatory powers given to SEPA is kept under ongoing review. This takes into account evidence derived from operators' and SEPA's experience in complying with the PPC Regulations and whether the provisions could be implemented more effectively or efficiently, or achieved in a manner that reduces the regulatory burden on businesses.

13. Summary and recommendation

The energy efficiency provisions of the IPPC Directive are mandatory at all industrial installations falling within the scope of the Directive. Scotland does not have the option to opt out of this obligation. Executive devolution of these functions puts Scotland on a par with the rest of the United Kingdom by allowing SEPA to include the same range of energy efficiency conditions in PPC permits as other UK regulators. Following the making of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2008, the proposed regulations will enable SEPA to regulate energy efficiency at industrial installations for the purpose of implementing the IPPC Directive in Scotland.

The cost of complying with the energy efficiency requirements of the IPPC Directive can vary significantly, depending on the industrial sector within which an installation lies, local circumstances, and the extent to which an installation has already introduced energy efficiency measures. The implementation of energy efficiency techniques offers the potential to make a significant contribution to the reduction of pollution and its global impacts; reduced depletion of non-renewable resources; and potential reductions in the use of other raw materials. Collectively these measures would bring environmental and human health benefits. Energy efficiency measures will result in a net cost saving over the life of the measure to businesses themselves.

Taking into account the obligation on Scotland to implement the energy efficiency requirements of the IPPC Directive; and having regard to the available options discussed in section 4 of this Regulatory Impact Assessment, it is recommended that the proposed regulations are introduced to allow SEPA to implement energy efficiency at IPPC installations.

14. Declaration and publication

I have read this Regulatory Impact Assessment and am satisfied that the benefits justify the costs.

Signed.....

Date.....

Richard Lochhead
Cabinet Secretary for Rural Affairs and the Environment
Scottish Government