

POLICY NOTE

THE ENVIRONMENTAL REGULATION (SIGNIFICANT ENVIRONMENTAL HARM) (SCOTLAND) ORDER 2014

SSI 2014/324

1. The above instrument is made in exercise of the powers conferred by section 40(6) of the Regulatory Reform (Scotland) Act 2014 (“the 2014 Act”). The instrument is subject to the negative procedure.

Policy Objectives

2. The 2014 Act’s primary aim is to introduce various measures to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment.
3. Part 3 of the Act provides a simpler legislative framework so that the Scottish Environmental Protection Agency (SEPA) can be more transparent, accountable, proportionate, consistent and targeted in carrying out its regulatory functions. This will enable SEPA to better identify, and focus most effort on, the most important environmental risks and harms, ensuring more effective and efficient protection of the environment and reducing the regulatory burden on business.
4. As part of this framework, section 40 establishes a new criminal offence relating to significant environmental harm which provides that:

It is an offence for a person to—
 - (a) act, or permit another person to act, in a way that causes or is likely to cause significant environmental harm, or
 - (b) fail to act, or permit another person not to act, in a way such that (in either case) the failure to act causes or is likely to cause significant environmental harm.
5. Section 40(6) provides for a defence to be available in respect of the significant harm offence if the act or failure to act which constitutes the offence was authorised under, or otherwise carried out in accordance with, the applicable legislative requirements – namely regulations made under section 18 (or an authorisation given under such Regulations) or another enactment that is specified by Order for these purposes.

6. Regulations made under section 18 of the 2014 Act will, in due course, provide for an integrated authorisation framework which will provide for regulated activities which may be authorised by SEPA. Until that point, the defence available under section 40(6) will be that the acts, or failures to act, were authorised by or otherwise carried out in accordance with the enactments specified in the Schedule to this Order.
7. As such, this Order is needed to ensure that it is a defence for a person charged under section 40(1) to show that their actions were authorised by, or were otherwise carried out in accordance with (1) the existing range of environmental authorisations and legislative requirements until such time as they are replaced by Regulations made under section 18 of the Act, and (2) those environmental regimes which are not intended to be brought under section 18 Regulations.
8. The enactments which currently provide for authorisations and environmental legislative requirements which are appropriate to provide a defence to the significant harm offence are listed in the Schedule to the Order.
9. These consist of enactments relating to muirburn, species licences, nuclear site licences, licences for deposits in the sea, sludge, waste management licences, the accumulation, use of radioactive material and mobile radioactive apparatus, authorisations of disposal and accumulation of radioactive waste, discharges of oil from ships at sea, offshore chemical permits, landfill permits, oil discharge permits, discharge of sewage and garbage from ships at sea, marine licences, various exempt radioactive substances activities, water use licences, registrations and activities subject to general binding rules, waste management licences and exempt waste activities, Pollution Prevention and Control Part A and B permits, and offshore combustion permits.
10. It will be a defence for a person charged under section 40(1) to show that the acts or failures to act that constituted the offence were authorised by, or otherwise carried out in accordance with, one of these regulatory regimes.
11. For example, a person who causes significant environmental harm by abstracting water from inland waters could have a defence if the abstraction was authorised by a water use licence granted by SEPA under regulation 8 or was deemed to have been authorised under regulation 6 of the Water Environment (Controlled Activities)(Scotland) Regulations 2011 (“the 2011 Regulations”). However, if the abstraction was carried out in breach of any licence condition, or was not carried out in accordance with the general binding rules, the abstraction would not be considered to have been “authorised by” or “otherwise carried out in accordance with” the 2011 Regulations and as such the person would not have a defence under section 40(6).

12. Similarly, a person who carries out an activity that is an exempt activity under regulation 17 of the Waste Management Licensing (Scotland) Regulations 2011 will only have a defence under section 40(6) of the 2014 Act if that person complies with the requirements of the exemption, including the conditions and limitations in Schedule 1 to the 2011 Regulations or the underlying “relevant objectives” requirement of regulation 17(7), and if they fail to do so then the act or failure to act that constituted the offence will not be considered to have been carried out in accordance with that enactment.

Consultation

13. A public consultation paper, “Consultation on Proposals for an Integrated Framework of Environmental Regulation”, was published prior to the development and introduction of the Bill for the 2014 Act in May 2012. This closed in August 2012, and non-confidential responses and an analysis are available on the Scottish Government website ([Consultation Analysis](#)) ([Consultation Responses](#)).

14. The design and intent of SEPA’s new enforcement powers and new court powers under the 2014 Act, including relevant offences, was also the subject of a separate consultation undertaken between July and October 2014. The consultation proposed listed “relevant offences” for the purposes of the above provisions from the 2014 Act. Non-confidential responses will be made available on the Scottish Government website. An analysis of these responses will also be published in due course.

15. In addition, informal consultation with stakeholders (including judicial bodies, regulated businesses, trade bodies and non-governmental organisations) was undertaken throughout the Bill process, and continues to be undertaken in relation to the implementation of the 2014 Act.

Impact Assessments

16. An Equality Impact Assessment (EQIA) was carried out prior to introduction of the Bill. No equality impacts were identified. A copy of this is available on the Scottish Government website ([EQIA](#)).

Financial Effects

17. A Business and Regulatory Impact Assessment (BRIA) was carried out prior to introduction of the Bill. A copy of this is available on the Scottish Government website ([BRIA](#)).