

EXPLANATORY MEMORANDUM TO
THE ENVIRONMENTAL PROTECTION (MISCELLANEOUS AMENDMENTS)
(ENGLAND AND WALES) REGULATIONS 2018

2018 No. 1227

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument makes changes to the Environmental Permitting (England and Wales) Regulations 2016 (the 2016 Regulations) to improve performance at permitted waste sites.

2.2 The instrument also makes changes to one exemption and one exclusion in respect of flood risk activities in the 2016 Regulations and fixes an unintended consequence in relation to radioactive substance activities.

2.3 This instrument also introduces a fixed penalty notice for breaches of the household waste duty of care, which is set out in Section 34 of the Environmental Protection Act 1990.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales only.

4.2 The territorial application of this instrument is also England and Wales, with the exception of the introduction of the fixed penalty notice for breaches of the household waste duty of care which applies to England only.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State for the Environment has made the following statement regarding Human Rights:

“In my view the provisions of the Environmental Protection (Miscellaneous Amendments) (England and Wales) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument makes a number of changes to the 2016 Regulations, which set out an environmental permitting and compliance regime that applies to various activities and industries
- 6.2 The regulations seek to improve performance at permitted waste sites by inserting into Schedule 9 of the 2016 Regulations (waste operations and materials facilities) a requirement for permitted sites to produce and review a written management system where their permit does not already contain a condition for them to do so.
- 6.3 They also introduce a condition to environmental permits for waste operations for the operator to demonstrate to the regulator their compliance with a suitable accredited scheme.
- 6.4 In relation to flood risk activities, there are a number of exclusions and exemptions contained in the 2016 Regulations for low risk activities, enabling work to be undertaken in or around main rivers and sea defences without a permit. We are making amendments to one exclusion and one exemption, in order to extend situations where regulation is excluded or exempt.
- 6.5 In relation to waste radioactive sealed sources, the Environmental Permitting (England and Wales) (Amendment) (No. 2) Regulations 2018 (“the 2018 Regulations”) amended Schedule 23 (radioactive substance activities) to the 2016 Regulations to transpose the new requirements contained in the Basic Safety Standards Directive 2013/59/Euratom. The amendments resulted in an unintended consequence by requiring permit holders handling waste radioactive sealed sources to seek advice from a radioactive waste advisor (RWA) on certain matters relating to protecting members of the public from exposure to ionising radiation.
- 6.6 Section 34(2A) of the Environmental Protection Act 1990 places a duty on the occupier of any domestic property in England or Wales with regards to waste produced on the property. The duty is to take all reasonable measures to secure that any transfer of that waste is only to an authorised person or to a person for authorised transport purposes. It is a criminal offence to fail to meet this duty.
- 6.7 The fixed penalty notice in this SI is being introduced in England only. It is similar to the existing fixed penalty notice for fly-tipping added to the Environmental Protection Act 1990 by the Unauthorised Deposit of Waste (Fixed Penalties) Regulations 2016 (see section 33ZA of that Act).

7. Policy background

What is being done and why?

- 7.1 In relation to performance at waste sites, permits issued after 6th April 2008 typically include a condition for the waste operation to be managed and operated in line with a written management system. The regulations apply that condition to permits issued before 6th April 2008 that do not contain such a condition. This ensures all permitted sites will have the condition, contributing to better management, without having to wait for the condition to be inserted when permits are periodically reviewed.
- 7.2 The written management system must be a document or documents which identify and minimise the risks of pollution arising from the operation, and must be reviewed and

- kept up to date. The operator must also keep a written record of activities under the written management system and any review or update of the system.
- 7.3 A second condition is also introduced for the operator to regularly give information to the regulator demonstrating their compliance with the Chartered Institution of Wastes Management/Waste Management Industry Training & Advisory Board Operator Competence Scheme available at <https://wamitab.org.uk/wp-content/uploads/2018/09/CIWM-WAMITAB-Operator-Competence-Scheme-Version-9-Final.pdf> or the EU Skills Competence Management System available at <https://www.euskills.co.uk/wp-content/uploads/2018/11/Competence-Management-System-Requirements-Version-4-April-2015.pdf>. If an operator does not comply with either, they must also inform the regulator of that in their waste return.
- 7.4 These conditions are intended to improve the performance of operators in the waste sector, reducing the environmental harm arising from poorly managed sites.
- 7.5 In relation to introducing the fixed penalty notice for breaches of the household waste duty of care, a new section 34ZA of the Environmental Protection Act 1990 is inserted after section 34. This enables an enforcement authority in England, either the Environment Agency or a local authority, to give a person who has failed to comply with their waste duty of care under section 34(2A) a fixed penalty notice (“FPN”). The FPN offers the person the opportunity to discharge their criminal liability upon paying the fixed penalty.
- 7.6 Two thirds of fly-tipping incidents involve household waste, often as a result of an individual breaching their duty of care to ensure their waste is taken away by an authorised carrier. The FPN is intended to reduce the flow of waste to those who would go on to dispose of it illegally. The FPN allows a more proportionate approach to enforcement both for local authorities in costs of enforcement, and for householders in size of penalty and avoiding a criminal record.
- 7.7 The FPN allows an enforcement authority set a payment level between £150 and £400, with a minimum early payment of £120. This ensures the combination of illegal disposal and penalty is higher than the cost off legitimate disposal. If a person pays the notice within 14 days of the date of the notice, they cannot be convicted for the offence.
- 7.8 When a notice is issued, it must set out the 14 day period during which proceedings will not begin and that payment during that period discharges criminal liability, the amount of the penalty, any options for early payment, the permissible method of payment, and that an authority may not issue a person an FPN for an offence if they have already been issued one for that offence by that or another authority. It must also explain that the notice contains an offer to discharge liability by paying a penalty but there is no requirement to accept that offer, and that the person can make representations to the authority about the allegations contained in the notice.
- 7.9 In relation to flood risk activities, we are proposing changes to one exemption and one exclusion to make the regulations clearer and less bureaucratic. The changes include the following:-
- 7.10 Schedule 3, Chapter 5, Part 4, paragraph 20 provides an exemption on construction of fish passage notches on an existing impoundment. This instrument removes the reference to fish passage so as to allow the exemption to cover notches more generally.

- 7.11 Schedule 25, Part 2, Section 2, paragraph 5 provides an exclusion on erection and use of ladders and scaffold towers. This instrument broadens the exclusion to extend to “other similar access or service apparatus used for access, maintenance or repair”.
- 7.12 In relation to radioactive substances activities, the 2018 Regulations made two amendments for waste radioactive sealed sources. A waste radioactive sealed source is a source containing radioactive material where the structure is designed to prevent dispersion of radioactive substances, and which is now unwanted or requires disposal. One was to Part 6, paragraph 4, which removed the exemption from the requirement for an environmental permit for operators accumulating waste high-activity or similar sealed sources. Another was to add Part 4, paragraph 7, which imposed requirements on permit holders handling radioactive waste to seek advice from an RWA on public protection matters. The combined effect of the amendments was to require operators accumulating waste high-activity or similar sealed sources to obtain a permit and to consult an RWA on public protection matters. Other waste sealed sources (of lower activity) are generally exempt from permitting. Where a permit holder handled a waste sealed source, the amendments meant that an RWA would also have to be consulted in relation to that source. Previously, permit holders handling waste sealed sources were not required to consult an RWA on such matters.
- 7.13 Imposing these additional requirements on operators in relation to radioactive substance activities would involve additional costs and an unnecessary regulatory burden. About 400 businesses could be affected. As there are no discharges to the environment from sealed sources there is no public exposure, and it is considered disproportionate and of no benefit to the environment in most circumstances to require operators handling waste sealed sources to consult an RWA on matters relating to public protection. The Ionising Radiations Regulations 2017 require all operators to consult radiation protection advisers, so the requirements of the Basic Safety Standards Directive are satisfied.
- 7.14 This instrument removes the need to seek advice from an RWA on public protection matters in relation to waste that is a sealed source.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 This instrument does not involve consolidation.

10. Consultation outcome

- 10.1 In January 2018 Defra and the Welsh Government jointly consulted on proposals to tackle crime and poor performance in the waste sector and introduce a new fixed penalty notice for the householder waste duty of care. The consultation closed on 26 March. 275 responses were received. The summary of responses and government response are available at: <https://www.gov.uk/government/consultations/reducing-crime-at-sites-handling-waste-and-introducing-fixed-penalties-for-waste-duty-of-care>.

- 10.2 Responses to the consultation were received from local authorities, businesses, private individuals, non-government organisations, trade associations, professional bodies, consultants and others.
- 10.3 Proposed changes across the four elements of past performance, management systems, technical competence and financial competence and provision received a high level of support, although opinions varied regarding the estimated costs and benefits of the proposals.
- 10.4 The majority of respondents also supported the introduction of an FPN and agreed that it would help to tackle fly tipping. However, there was widespread agreement that householders are insufficiently engaged in their responsibilities under the waste duty of care. Defra has carried out research on how best to address this. There were mixed views on the necessity of a process for challenging FPNs as they would be offered in place of prosecution for an existing criminal offence, and this has been factored into the SI.
- 10.5 To support introduction of the FPN, a supplementary consultation on updates to the Waste Duty of Care Code of Practice and new guidance for local authorities in England on the use of the FPN ran from 3rd July to 27th August 2018. This was carried out jointly with the Welsh government in relation to the Code of Practice. The majority of respondents supported the new documents, with some suggestions of revised wording to provide greater clarity. The summary of response to this supplementary consultation is available at:
<https://www.gov.uk/government/consultations/household-waste-duty-of-care-updating-the-guidance>.
- 10.6 In respect of the changes to flood risk activities, a joint consultation by Defra and the Welsh Government on amending some of the exemptions and exclusions was published on 11 April 2018 and ended on 20 June 2018. 14 respondents submitted comments.
- 10.7 A summary and response to the consultation was published on 13 September 2018 and can be found at: <https://www.gov.uk/government/consultations/environmental-permitting-amending-flood-risk-exclusions-and-exemptions>. Overall, the majority of respondents supported the proposed changes.
- 10.8 In relation to radioactive substances activities, no consultation has been carried out as we are correcting an unintended consequence which caused an unnecessary burden on some operators.

11. Guidance

- 11.1 Guidance for local authorities on the use of the fixed penalty notice can be found at: <https://www.gov.uk/government/publications/household-waste-duty-of-care-fixed-penalty-notice-guidance>.
- 11.2 The Waste Duty of Care Code of Practice has also been updated to provide greater detail for householders on meeting their duty of care. This has been laid before parliament separately and can also be found at <https://www.gov.uk/government/publications/waste-duty-of-care-code-of-practice>.
- 11.3 In relation to the Environmental Permitting Regime, core guidance can be found at <https://www.gov.uk/government/publications/environmental-permitting-guidance>.

[core-guidance--2](https://www.gov.uk/guidance/flood-risk-activities-environmental-permits) and regime specific guidance for floods can be found at <https://www.gov.uk/guidance/flood-risk-activities-environmental-permits>.

12. Impact

- 12.1 The impact on business of changes to improve operator performance is expected to be a one off cost of approximately £10.5 million, with an equivalent annual net direct cost to business of £1.4 million. There is expected to be an ongoing yearly costs to the regulator of approximately £85,000 to complete checks, but a yearly benefit of £0.94 million from dealing with fewer pollution incidents and poor performing sites. The overall benefit to society from avoided environmental damage and disamenity impacts is expected to be approximately £12.2 million per year after the first year. There is no, or no significant impact on charities or voluntary bodies.
- 12.2 A full Impact Assessment is submitted with this memorandum in relation to improving operator performance is published alongside the Explanatory Memorandum on the [legislation.gov.uk](https://www.gov.uk) website.
- 12.3 For the introduction of the fixed penalty notice, there is no, or no significant, impact on business, charities, voluntary bodies or the public sector.
- 12.4 For the changes relating to radioactive substances activities there is no, or no significant, impact on business, charities, voluntary bodies or the public sector.
- 12.5 In respect of the changes to exemptions and exclusions in relation to flood risk activities, there is no significant impact on business given that the changes are deregulatory.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses in relation to improving operator performance, flood risk activities and waste radioactive sealed sources.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken in relation to operator performance is that the regulator would expect an operator to produce a management system which is proportionate to its size and scale. Smaller sites will be required to complete and implement a less comprehensive system in comparison to a larger complex site. In addition, smaller sites performing lower risk activities would be expected to undertake a more straightforward technical competency qualification.
- 13.3 The basis for the final decision on what action to take to assist small businesses was taken because small businesses account for a large part of the waste sector so excluding them would fail to improve operator performance across the sector and the associated risk of environmental and social impacts.
- 13.4 The proposed changes to flood risk activity exemptions and exclusions will primarily affect those individuals, businesses and organisations that carry out works on or near to main rivers, such as: landowners and farmers; internal drainage boards; Canal and Rivers Trust; local authorities; riparian owners ; and environmental groups. The changes are intended to introduce more flexibility for individuals and businesses.
- 13.5 The changes related to radioactive substances activities remove a burden on businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation in relation to operator performance is for the regulators to analyse the number of poor performing sites on a quarterly basis and publish figures on an annual basis. Data from the regulators on the number of poor performing sites will be analysed on an annual basis to monitor and assess the effectiveness of the intervention.
- 14.2 For the fixed penalty notice, local authority guidance includes reporting requirements on the use of the FPN to allow monitoring of whether usage is appropriate. This will supplement existing fly-tipping reporting requirements.
- 14.3 For changes related to flood risk activities, the Environment Agency will continue to monitor the use of the exemptions and exclusions.
- 14.4 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Minister Coffey has made the following statement that a statutory review clause has not been deemed appropriate as the expected annualised net impact on business is less than £5 million and there are no additional factors making one necessary.

15. Contact

- 15.1 Stephen House at the Department for Environment, Food and Rural Affairs. Telephone: 020 802 64132 or email: stephen.house@defra.gsi.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Chris Preston at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister Coffey at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.