



RESPONSE TO THE ENVIRONMENT AGENCY CONSULTATION ON PROPOSALS FOR THE FIRE PREVENTION PLAN GUIDANCE, NOVEMBER 2015

1. The UK Environmental Law Association (“**UKELA**”) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA’s members are involved in the practice, study or formulation of environmental law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Waste Working Party.
3. UKELA welcomes the opportunity to comment on the proposals for the fire prevention plan guidance and makes the following comments on the proposals.

GENERAL COMMENTS

4. UKELA does not have any specific comments on the technical questions posed in the consultation document (Q1-Q19) but only wishes to comment in response to Q20 of the Response Form (“*Please tell us if you have any other views or comments on the guidance that have not been covered by previous questions*”).
5. UKELA notes the reasons behind the revision of the fire prevention plan guidance (“**Guidance**”) – fires on waste management sites – and understands and supports the Environment Agency’s objectives in avoiding

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further fires. However, UKELA's view is that the consultation proposals raise some broader legal principles which need to be considered, in particular:

- a. the duplication of regulatory controls, which potentially creates a situation for operators in which they are faced with breaching one regulator's requirements in order to comply with another regulator's requirements;
 - b. the introduction of burdens that are not apparently subject to a test of reasonableness or that can be challenged by appeal to a court or tribunal - there is no apparent scope to appeal where a requirement for a FPP is based on invoking an existing permit condition, such as the need for a written management system to address certain matters; and
 - c. the legal status and enforceability of the Guidance.
6. UKELA believes that the consultation proposals create a real risk of duplication of regulation between the Environment Agency and Fire & Rescue Authorities. The latter have powers and duties under the Regulatory Reform (Fire Safety) Order 2005 in relation to the taking of general fire precautions by responsible persons in respect of non-domestic premises (which includes waste sites). "General fire precautions" are broadly defined in Article 4 of the 2005 Order and comprise:
- a. measures to reduce the risk of fire on premises and the risk of the spread of fire on premises;
 - b. measures in relation to the means of escape from premises;
 - c. measures for securing that, at all material times, the means of escape can be safely and effectively used;

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- d. measures in relation to the means for fighting fires on premises;
 - e. measures in relation to the means for detecting fire on premises and giving warning in case of fire on premises; and
 - f. measures in relation to the arrangements for action to be taken in the event of fire on premises, including:
 - i. measures relating to the instruction and training of employees; and
 - ii. measures to mitigate the effects of the fire.
7. It seems clear to UKELA from Article 4 above that the regulation and enforcement of general fire precautions in relation to waste sites falls within the jurisdiction of Fire & Rescue Authorities and not the Environment Agency. UKELA suggests that the Environment Agency's jurisdiction under the Environmental Permitting (England and Wales) Regulations 2010 in respect of fires should be limited to the mitigation of the impacts of fires at waste sites on the environment and should not extend to fire prevention and general fire precautions. However, the focus of the Guidance is almost exclusively on fire prevention. UKELA would welcome an explanation from the Environment Agency of the legal basis for seeking to regulate fire risks at waste sites in the light of the powers and duties of Fire & Rescue Authorities under the 2005 Order and the lack of equivalent powers and duties in the Environmental Permitting (England and Wales) Regulations 2010.
8. The duplication of regulation between the Environment Agency and Fire & Rescue Authorities means that waste site operators have to produce two separate sets of fire documentation - one for compliance with the 2005 Order and one for the compliance with their environmental permit. This creates a risk of conflict between the documentation produced for each enforcing

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authority if there is a difference of opinion between the Environment Agency and the relevant Fire & Rescue Authority.

9. Given that Fire & Rescue Authorities have a statutory responsibility for the enforcement of general fire precautions at waste sites, UKELA's view is that their opinion should take precedence. In this regard, UKELA wishes to draw to the Environment Agency's attention a recent appeal decision in relation to an Enforcement Notice served in respect of a site operated by H Ripley & Co Limited (appeal ref: APP/EPR/15/371).
10. UKELA is aware of the recently-published "Cutting Red Tape Review of the waste and recycling sector", which also highlights the potential overlap or duplication between different regulators:

*"Explore opportunities with business to reduce overlap or duplication with obligations imposed by other organisations such as the Fire and Rescue Service, insurance companies or the Health and Safety Executive and revise guidance by August 2016"*¹

11. UKELA notes that the requirement for operators to produce a fire prevention plan ("FPP") has been introduced with no consultation until now. As such, the requirement has not been subject to proper scrutiny to assess its reasonableness. The only means for an operator to challenge the requirement is to appeal against a refusal to grant an environmental permit (where the permit is refused on the grounds of an inadequate FPP) or to appeal against an enforcement notice served on it for breaching a condition of its environmental permit. Both these courses of action involve a considerable degree of risk for operators.

¹ Cutting Red Tape Review of the waste and recycling sector, BIS/16/154, page 25

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12. Anecdotal evidence from UKELA members indicates that there are operational difficulties in gaining approval of FPPs from the Environment Agency. This experience is supported by the evidence presented in the consultation document, which states:

“We have reviewed 80 FPPs of which 4 have been approved. 3 of these plans followed the minimum standards of the guidance. In most of the 80 FPPs we have assessed, the operators are proposing deviations that do not offer an acceptable level of protection to people and the environment...”

13. Based on the consultation document, the operational difficulties in gaining approval for FPPs result from the need to achieve the standards required by the Environment Agency. In respect of the requirement for an approved FPP, the current guidance document, “Fire prevention plans Version 2, March 2015”, states:

“You must follow this guidance if you are storing combustible waste at permitted sites. It tells you the fire prevention standards you must follow.

These standards must be in your working plan or management system and implemented on your site. If they are not, the Environment Agency may take enforcement action.”

14. Further to the comments made in paragraph 7 of this response, UKELA would welcome an explanation from the Environment Agency of the following:

- a. the legal status of the guidance in view of the mandatory language used in it; and
- b. the legal basis on which the provision of a FPP is being required and on which any consequent enforcement action that might be taken in respect of the requirement would be based, particularly where the

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need for an approved FPP is not a specific condition of the environmental permit.

15. UKELA would welcome the opportunity to discuss the above issues with the Environment Agency.

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