



## **RESPONSE TO THE ENVIRONMENT AGENCY'S CONSULTATION ON THE CHARGING PROPOSALS TO TAKE EFFECT IN ENGLAND IN APRIL 2018**

### **CONSULTATION CLOSES 26 JANUARY 2018**

1. The UK Environmental Law Association ("UKELA") aims to make the law work for a better environment and improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study and 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 Environment Agency charge proposals and makes the following comments on the proposals. In principle, the Environment Agency's aim to more closely link its charges to the cost of regulation combined with its commitment to provide a fair and transparent charging scheme is welcomed by UKELA.

### **CONSULTATION QUESTIONS**

#### **SECTION 2.4 - SUPPLEMENTARY TIME AND MATERIALS CHARGES**

**1. Do you agree with the proposals to charge fixed charges where we have greater certainty over costs and time and materials in other instances?**

- Fixed costs will provide a level of certainty and consistency; however, care should be taken to avoid some applicants making disproportionate contributions comparative to the actual regulatory services that they receive. Further, one-off costs such as first year charges could deter new entrants. A combined fixed costs and time and materials approach does appear to be a sensible way forward; however, the Environment Agency should clarify what it considers to be "unusual activity" and "events that are not part of the usual planned regulatory activity", so that applicants can manage costs. The example provided (assessments of reports relating to improvement conditions) does not appear to be unusual. Upfront cost assessments / indications for costs of time and materials would also be helpful to applicants.

#### **SECTION 2.8 - TRANSITION FROM EXISTING SCHEME TO PROPOSED SCHEME**

**2. Please tell us if you have any comments about the proposed transitional arrangements outlined in section 2.8.**

- The proposed start date of 1 April 2018 for these charges may not give those affected sufficient time to plan for the increase in costs that they may face and to amend business plans in the light of the changes for new applications.
- First year charges should only be used to the extent that they reflect the actual additional costs of regulation and should not deter or prohibit new activities. Such charges could lead to

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businesses refraining from liaising with the Environment Agency at an early stage, leading to an increase in complications at later application stages.

- If the proposed annual subsistence charges will operate under a two tier system in 2018/2019, care should be taken to avoid creating unfairness between the subsistence of existing permits and new permits.

### **SECTION 3 – ENVIRONMENTAL PERMITTING REGULATORY APPROACH**

#### **3. Please tell us if you have any comments about the common regulatory framework outlined in section 3.1.**

- The overall aim of each customer paying for the regulatory services that they actually receive is considered to be a sensible approach. However, the proposed framework of a baseline cost for services that will be required by all customers carrying out a permitted activity and supplementary costs needs further clarification. For example, clarity is needed on what activities fall within the baseline for each permitted activity and the cost of extra regulatory involvement, whether such involvement is an optional enhanced service or a supplemental additional cost.
- It would be useful to clarify whether the regulatory approach outlined will be upgraded following the introduction of new charging. For example, there may be a need for additional resourcing for 'duly made' checks for permit applications, which can take many months, and improving the accuracy, completeness and accessibility of the Environment Agency's public register.
- One of the adverse consequences of moving over to gov.uk from the Environment Agency's own website was the loss of hundreds of regulatory guidance documents, which provided operators with certainty on technical regulatory requirements and compliance expectations. The section on standard setting does not refer to the updating and publication of regulatory guidance notes, which appears to be a missed opportunity to reinstate the guidance notes for the benefit of both regulator and operator.

### **SECTION 4 – THE MODEL FOR THE EPR CHARGING SCHEME**

#### **4. We anticipate that there will be time saving for businesses if you no longer are required to complete an OPRA profile. Do you agree?**

- Yes

#### **5. How much time do you think will be saved by not having to complete an OPRA profile as part of a permit application? (in hours)**

- N/A

#### **6. Who usually completes the OPRA profile that is required when applying for a waste, installations or mining waste permit?**

- N/A

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**7. How much time do you think will be saved by not having to annually review your OPRA profile? (in hours, per year)**

- N/A

**8. Who usually completes the annual review of your OPRA profile?**

- N/A

**9. Do you agree with the proposal to include only basic pre-application advice in all of our application charges?**

- Advice from the Environment Agency during the pre-application stage is crucial to provide applicants with confidence in the regulatory process and to clarify expectations specific to their planned project or activity. Therefore a basic standard fee would appear appropriate in principle, provided that it will cover the advice that the majority of applicants require during the pre-application process.

#### **SECTION 4.3.1 - DISCRETIONARY ENHANCED PRE-APPLICATION ADVICE SERVICE**

**10. Do you agree with the proposal for a discretionary enhanced pre-application advice service?**

- Yes (see above); however the proposal for a discretionary enhanced pre-application advice service needs greater transparency, as pre-application discussions may be delayed (and applications rushed) if pre-application costs are unattractive to applicants. For example, transparency will be needed upfront as to: (i) the estimated cost for the service ; (ii) when these will be incurred; and (iii) what is contained within the service that has been paid for.

#### **SECTION 4.3.2 - NON-DISCRETIONARY SUPPLEMENTARY APPLICATION CHARGES**

**11. To recover our costs we intend to charge each time we review a waste recovery plan. Do you agree with this approach?**

- Yes; however, the flat charge does not appear to take into account whether the review will involve minor or substantial variations or revisions and the cost may not be proportionate to the work actually undertaken by the Environment Agency.

**12. Do you agree with our proposals to retain a proportion of the fee to cover costs associated with processing poor applications?**

- A proportion of the fee being retained appears sensible, but the fee proposed appears excessive. A large proportion of the charging scheme is based on the actual time spent, charged at around £100 per hour. Checking that an application is duly made was only intended as an initial check of the application; however, the Environment Agency's practice appears to be to 'front load' permit application reviews before duly made status is determined and the statutory time period commences, which is inconsistent with due process for permit applications set out in the Environmental Permitting Regulations ("EPR"). A cap of £1,500 therefore appears excessive for a simple checking process. It is recognised that not every poor

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application will be immediately obvious to identify; however, by streamlining the duly made status as originally intended, a lower capped non-refundable fee would be fairer.

**13. Do you agree with the proposals to recovering additional costs for determining public interest applications through time and materials?**

- Yes, subject to the Environment Agency providing reasons why the application in question meets the criteria for high public interest.

**14. Do you agree with the fixed charge approach for application amendments during determination?**

- N/A.

**15. Do you agree with our proposal to recover costs of determining permits using novel technologies through time and materials charging?**

- Yes; however, to safeguard innovation, excessive fees must be avoided, otherwise only large commercial organisations will be able to afford permits for novel technologies.

**16. Do you agree with our proposals to charge for further information requests not covered within the baseline charge?**

- No. A large proportion of the charging scheme is based on the actual time spent, charged at around £100 per hour. UKELA would like to see an alternative proposal whereby the charge reflects the additional assessment costs that result from the additional requests.

**17. Do you agree with our proposal to use the new application fee as the basis for variation and surrender charges?**

- N/A.

**18. Do you agree with our approach for discounting batch transfers to a single operator at the same time?**

- Yes.

**SECTION 4.4 - APPLICATION FOR MULTIPLE ACTIVITIES UNDER ONE PERMIT**

**19. Do you agree with the approach we have used to cover our costs associated with determining permits at multi-activity sites?**

- Yes, in principle; however, it appears that the reduced fee for an activity carried out multiple times on the same site should be more than a 10% reduction, owing to the level of duplication and time the Environment Agency will potentially save.

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#### **SECTION 4.6 - SUPPLEMENTARY SUBSISTENCE CHARGES (COMPLIANCE STAGE)**

**20. Please tell us if you have any comments about the approach to annual subsistence charging outlined in sections 4.5 and 4.6.**

- Both the baseline and supplemental subsistence charges will need to be transparent with their scope so that it is clear what regulatory activity is captured by which charge. It will also be necessary for there to be a mechanism for determining the charge and scope where one-off or uncommon situations arise that are not provided for within the charging scheme. Further information should be provided on the activities that would fall within each of these charges so that this proposal can be more fully considered.

#### **SECTION 4.6.1 - NON-PLANNED COMPLIANCE WORK**

**21. Do you agree with our approach to charging for non-planned compliance work at permitted sites?**

- N/A.

#### **SECTION 4.6.2 - A NEW CHARGE AT THE COMMENCEMENT OF OPERATIONS**

**22. Do you agree with the additional charge to cover extra regulation work in the first year of operation on an activity?**

- Yes; however, UKELA would note that the benefits of additional early engagement to the operator should not be outweighed by the costs of such engagement with the Environment Agency, as a one-off fixed fee may not reflect the service actually provided, or encourage more frequent visits by officers to justify the fee. This amount should also be capped to prevent the one-off charge being a deterrent or barrier to SMEs.

**23. Do you agree that this first year charge should apply across all regimes and sectors under EPR or should it apply to some sectors only? (If so which sector/s?)**

- N/A.

#### **SECTION 4.6.3 PRE OPERATIONAL AND PRE CONSTRUCTION CHARGES**

**24. Do you agree with our approach to charging for pre operational and pre construction?**

- N/A.

#### **SECTION 4.7 - SUBSISTENCE CHARGES FOR MULTI-ACTIVITY OPERATIONS**

**25. Please tell us if you have any comments regarding our proposed arrangements to recover regulatory costs at multi-activity sites?**

- In principle, this approach appears to be more transparent than the last regime and it does seem a sensible approach to achieving the balance between the Environment Agency covering its costs and the charges that an operator will be faced with.

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## SECTION 4.8 - PERMIT COMPLIANCE

### 26. Do you agree with our interim arrangements for compliance rating outlined above?

- N/A.

UKELA has no comments on the following questions:

- Questions 27 to 28 "Flood and Coastal Risk Management"
- Question 29 "Radioactive Substances Regulation Nuclear Sites"
- Question 30 "Radioactive Substances Regulation non-nuclear Sites"
- Questions 31 to 35 "Water Quality and Groundwater Discharges"
- Question 36 "Installations: Chemical Sector"
- Question 37 "Installations: Refineries and Fuels Sector"
- Question 38 "Installations: energy from waste – incineration and co-incineration"
- Question 39 "Installations: Food and Drink Sector"
- Questions 40 to 41 "Installations: Onshore Oil and Gas Sector"
- Question 42 "Installations; Paper, Pulp and Textile Sector"
- Question 43 "Installations: Combustion and Power Sector"
- Question 44 "Installations: Mining Waste Sector"
- Question 45 "Installations: Metal Sector"
- Question 46 "Installations: Cement and Lime Sector"
- Question 47 "Intensive Farming Sector"
- Question 48 "Waste Land Spreading (Mobile Plant) Sector"
- Question 49 "Waste: Waste Transfer and Treatment Sector"
- Question 50 "Waste: Landfill and Deposit for Recovery Sector"
- Question 51 "Waste: T11 Repairing or Refurbishing Waste Electrical and Electronic Equipment (WEEE)"
- Questions 52 to 55 "Water Abstraction proposals for 2018/19"

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- Questions 54 to 55 "Control of Major Accidents and Hazards (COMAH)"
- Questions 56 to 57 "European Union's Emissions Trading Scheme (EU ETS)"

## **SECTION 5.5 – WASTE ELECTRICAL AND ELECTRONIC EQUIPMENT (WEEE)**

### **58. Do you agree with our proposed increases to large producer charges?**

- Yes, if a charge increase is needed to provide appropriate regulation, a minimal charge would appear proportionate in principle.

### **59. Do you agree with our proposed increases to AATF and AEs charges?**

- Yes, if a charge increase is needed to provide appropriate regulation, a minimal charge would appear proportionate in principle.

### **60. Do you agree with our proposal to introduce an annual subsistence charge for compliance schemes?**

- Clarification is needed to confirm whether the proposed annual subsistence charge of £12,500 for compliance schemes is in addition to the registration fees passed on to the Environment Agency and whether the subsistence charge will be payable in the same year as the one-off approval fee of £12,150. If the subsistence charge is in addition to the one-off scheme approval fee, this could act as a deterrent to new WEEE producer compliance schemes being established.

## **SECTION 6.1 – DEFINITION OF WASTE SERVICES**

### **61. Have you used our Definition of Waste panel service?**

- N/A.

### **62. Do you use the waste quality protocols or other end of waste framework?**

- N/A.

### **63. Do you support our proposal to recover the cost of providing Definition of Waste services outlined in section 6.1?**

- Yes.

### **64. Please tell us if you have any further comments on Definition of Waste Charging proposals.**

- The Definition of Waste service is generally regarded as a valuable resource for operators in a complex area of law. Whilst the Environment Agency has been careful to advise that the outcome is merely the opinion of the panel based on the information submitted, the opinion of the regulator is often crucial to the bankability of projects by opening up markets and opportunities which are not otherwise available under the waste regulatory regime. Owing to the inherent uncertainty of the law, operators and investors are generally very cautious in

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proceeding without this regulatory approval, as the consequences of the regulator disagreeing may give rise to criminal or civil liability exposure.

- An unintended consequence of the Definition of Waste service providing a formal opinion as an optional service is that some operators make a decision themselves (deterred by costs), and will not apply for a permit, undermining those who have gone through the process and potentially creating market distortions. The source of funding for inspecting activities or sites which have self-certified is unclear; there is a strong argument against the cost being borne by customers of the Definition of Waste Service.
- It is UKELA's understanding that the waste management industry recognises that the Definition of Waste service will need to be funded by those who use the service, provided the service demonstrates "value for money".
- It is UKELA's understanding that the estimated charge for high complexity submissions could be around £23,000. Costs of this level could lead to an increase in competitors seeking to avoid the charge by requesting information held by the Environment Agency under the Environmental Information Regulations 2004 ("EIR") for similar submissions. UKELA would recommend that the Environment Agency reviews its guidance on how it can handle information so that it remains compliant with the EIR whilst balancing the interests of operators in being able to provide commercially sensitive information as part of submissions, without this information getting into the hands of competitors or those who are seeking to avoid the charges.
- Customers will need regular updates on costs, in particular where it becomes apparent to the Environment Agency that the cost estimate needs to be materially revised. Guidance on submissions should be made available to applicants so that they can take proactive steps to manage costs and understand the process.
- Previously the Definition of Waste service has only provided an opinion of the panel based on the information submitted, and the charge proposal document does not suggest that this will change, referring to a "formal opinion". Users and investors may expect a more definitive answer from the Environment Agency as to whether a material or substance is waste if the service is chargeable, particularly for highly complex areas.
- Excessive charges could also act as a deterrent to innovation, as complex and novel technologies are likely to incur higher charges.
- Not all substances or materials will involve a permitted process. Where a permitted process is relevant, there should not be any duplication in fees for the submission and fees for reviewing the application insofar as it contains information already reviewed by the Environment Agency.
- It is important that the Environment Agency co-ordinates with other agencies on Definition of Waste services, including NRW, SEPA and NIEA to ensure consistency across the UK.

UKELA has no comments on the following questions:

- Question 65 to 66 "Planning advice"
- Question 67 "Marine licensing advice"

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- Question 68 "Forwards Look for Abstraction Charges"
- Questions 69 to 73 "Forward look for Navigation charges"

#### **SECTION 8.1 – COMMENTS ON SPECIFIC ISSUES**

**74. Please give us any further comments on our proposals which have not been covered elsewhere in the questions, i.e. if none of the questions throughout the consultation have enabled you to raise further specific issues with these proposals please set them out here with any accompanying evidence.**

- In the introductory section (page 7) the EPR are noted to effect some control over "tens of thousands" of exemptions. The figure for exemptions could actually be much higher, and this is an area which needs to be tightened up in order to reduce criminal activity and ensure a level playing field between legitimate operators. Such lower risk activities are the most simple authorisations to obtain at the least cost, but as a result are open to more abuse and cost to the taxpayer. The charging scheme does not appear to take into account ensuring compliance with registered exemptions and delivering a proportionate inspection regime.
- To deliver confidence in charging for services, there must be an independent appeal mechanism in place for operators who have grounds to appeal the imposition of certain charges. There is no mention of an appeal system in the consultation and UKELA would urge the Environment Agency to put in place an effective and independent appeal process.

**75. We would be interested in any analysis you have that suggests our proposals will influence the market conditions in your sector and whether there will be an impact on future investment decisions and on new entrants to the sector?**

- N/A

**76. Do you have any analysis that suggests the charge increases will impact on SMEs in your sector? If so, which companies are most likely to be affected and what do you think will be the consequences?**

- N/A

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