24th September 2010

Response by the United Kingdom Environmental Law Association to the DEFRA Consultation Paper on Draft Environmental Permitting (England and Wales) (Amendment) Regulations 2011

Introduction

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 and formulation of environmental law in the UK and the European Union. UKELA 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.

Comments on Consultation Questions

3. Question 1

UKELA considers more accessibility of those involved in consultations is helpful for key stakeholders. The 8 week period may be short for some parties and at particular times of year e.g Christmas and Summer Holidays where 4 weeks may effectively be lost.

Workshops are generally constructive but need to have reasonable geographical spread otherwise prejudicial for some residents of some parts of England and Wales. In addition some formal recognition of the insights gained by the process should always be provided to participants after the event.

4. Question 2

UKELA considers this to be a sensible approach as it avoids pointless applications and could help to preserve value in a business at a crucial period for personal representatives. Possibly there could be some flexibility to notify "as soon as reasonably practicable" to ensure permits do not lapse when the delay is due to matters outside the control of the personal representatives.

5. Questions 3 & 4

UKELA would support these changes

6. Question 5

UKELA supports this proposal as it avoids any possibility of duplication of effort and enables the local authority to deal with any related signage. The only concern may be that routing requirements are notoriously difficult to enforce by planning and highways departments and tying obligations to some element of the permit may be more persuasive. It may be appropriate to include a general obligation in permits requiring all

elements of the Planning Permission to be complied with. This would provide Environment Agency Officers with appropriate leverage to require operators to address nuisance issues (e.g. noise, dust, mud on the road) while leaving the technical review to the body best placed to address this i.e. the Planning Authority. It should be noted that this is effectively already the situation for the landform for landfills where the local authority determine the appropriate profile through planning but the Environment Agency require this to be met during the closure and surrender process. There may be sensitivities about jurisdiction over enforcement of planning controls which would need careful consideration as planning principles are principally the responsibility of planning authorities.

7. Question 6

This would seem to be a rational approach but is a technical issue rather than a legal one.

8. Question 7

UKELA feels that these changes which deal principally with the scope of exemptions are best dealt with by the operators who utilise such exemptions.

9. Question 8

UKELA welcomes the extension of Civil Sanctions to the offences under the Environmental Permitting Regulations 2010.

UKELA does however have a serious concern that the offences under Section 33(1) of the EPA do not come fully within the civil sanctions system and only the stop notice sanction is currently available. There seems to be a perception in DEFRA that only serious fly-tippers are caught by this sub-section. This shows a lack of understanding of the position in practice.

Many cases involve unintentional breaches of Section 33(1) where waste is deposited or permitted to be deposited where there is a genuine and/or reasonable belief that it is authorised. The law is such that a prosecutor has only to show knowledge of the deposit not knowledge of a breach of the law as a result of the deposit. In many of these cases there is no or minimal environmental harm actual or threatened and they would be highly suitable cases for civil sanctions.

In addition recent case law has made the threshold for an offence under 33(1)(c) lower and this section is often added as an additional charge in a wide variety of cases. We can see no reason not to bring this within the system.

It seems a shame that many of the existing waste cases will not have the flexibility afforded by the sanctions regime. In addition the use of a significant VMP may be an expedient way of imposing a penalty on a regular fly tipper who may otherwise be used to exploiting the criminal court system and he would be unlikely to receive much comfort from a Tribunal on appeal with related costs exposure for him.

Is the rationale that if the prosecutor wishes to do so it can use EPR offences for waste activities (and these will have sanctions available for them) and it is keeping Section 33 for serious cases only?

It seems anomalous to exclude section 33 offences. In terms of seriousness and environmental impact breaches of the old PPC Regulations now in the EPR could be equally if not more significant yet civil sanctions will apply to these.

Would it not be sensible to make sanctions available to as wide a range of offences as possible and leave distinctions to emerge through enforcement policies because at the moment it is unclear what guiding principles are being used to differentiate various offences and to the outsider the process appears somewhat arbitrary.

UKELA would be happy to discuss this further with DEFRA should it so wish.

10. Question 9

It would seem appropriate to keep ship dismantling under EPR as it is essentially a waste activity where the impact is likely to be land-based in terms of movement and handling of the arisings. This could apply to some other activities and perhaps should not be limited to ship dismantling but should apply generally to activities below the MHWS generating wastes for handling ashore.

11. Question 10

We would support in principle the idea of, as far as possible, a single body for environmental appeals which, following introduction of the Civil Sanctions will be split between HM Courts, the First Tier Tribunal and the Planning Inspectorate. We fully support the contention in the consultation that these can raise complex issues both technically and legally and that there would therefore be value in concentrating appeals in one body. This would increase the level of expertise acquired by those hearing appeals, to the benefit of all. We understand a study is under way on this topic.

It seems that there will initially be several changes to the EPR 2010. Regular consolidation of the SI would be appreciated by those who use the Regulations on a regular basis, especially given that www.legislation.gov.uk does not currently update statutory instruments.

12. We hope the comments are helpful and UKELA would be happy to elaborate on any of these issues if thought helpful.

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