RESPONSE TO DEFRA'S CONSULTATION ON DRAFT ENVIRONMENTAL PERMITTING (ENGLAND AND WALES) (AMENDMENT) REGULATIONS 2013 – a package of proposals

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 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.

3. UKELA makes the following comments on the Defra/Welsh Government consultation on the draft Environmental Permitting (England and Wales) (Amendment) Regulations 2013 – a package of proposals.

Sequencing of planning and environmental permitting for certain waste operations

Question 1: Do you support the proposal to provide greater flexibility to waste operators by removing the pre-requisite requirement for planning permission to the grant of a permit for certain waste operations? If not, why not?

4. UKELA recognises that the present requirement for planning permission to be granted prior to the grant of a permit for certain waste facilities adds

regulatory complexity for applicants, environmental regulators, planners and interested persons and does not appear to provide significant environmental benefit.

5. UKELA believes that the applicant should be allowed to choose between submitting an application for one type of consent prior to the other or to choose to submit both in parallel, as in different circumstances either may be preferable and their determination independently of each other should not reduce the level of environmental protection provided by the current arrangements.

6. Allowing the environmental regulators to reach their decision independently of the planning process may also help the overall process by providing earlier assessment of, and clarity on, the environmental risks and mitigation. At present there can be some duplication of effort as the planners seek, for very sound reasons, to pre-empt the detailed assessment that would be undertaken later by the environmental regulators. Therefore UKELA supports the proposal to remove the pre-requisite requirement for planning permission to the grant of a permit for certain waste operations.

Question 2: If you do agree to the removal of the pre-requisite need for planning permission do you have any comments whether that should be in all circumstances or whether some activities still merit the planning determination to precede the permitting decision?

7. UKELA agrees with the removal of the pre-requisite need for planning permission in all circumstances, as there is no obvious reason relating to environmental protection why the determination of a planning application should have any impact or influence on the independent and objective

assessment of an application for an environmental permit. In fact, the opposite may be true where the grant of a planning permission, on land use grounds, may result in a greater imperative to grant rather than refuse a permit even in circumstances where there may be environmental concerns. In saying this, UKELA does, however, recognise the significance that planning permission has in determining 'need' and the appropriateness of land use. There is logic in obtaining planning permission in advance of an environmental permit, but no reason on grounds of environmental protection why that should act as a restraint on the independent consideration and assessment of environmental permitting issues which may well help inform the planning process.

Question 3: Do you have any comments on specific issues that might require amended or further guidance on the interface between planning and permitting?

8. UKELA endorses a clear separation of the roles and responsibilities of authorities for planning and permitting. There must be a clear allocation of responsibilities for consultation processes between the decision-making authorities and applicants, particularly if planning and permitting are encouraged to be applied for concurrently (parallel tracked) to retain independence of the decisions. It is important that pre-application discussions take place in both permit and planning application processes and an indication of the likely outcome provided wherever possible, to prevent wasted time and resources. Given the change that is proposed, amended or further guidance on the independent roles and responsibilities of the relevant authorities would be likely to assist in reinforcing the clear separation that is required between potentially concurrent activities and avoiding unnecessary duplication of effort.

Question 4: Do you have any comments on the transition costs and other costs (at section 2.13) arising from this change in policy?

9. UKELA notes the decrease in estimated costs to business and regulators where a permit determination could be made more quickly instead of being delayed by a planning application decision that may be going through an appeals process. Costs may be less if the choice is made to parallel track submissions of planning and permit applications at the same time.

Ground Source Heating and Cooling

***Question 5: Do you agree with the proposal to deregulate the discharge from certain low risk GSHC systems? If not, why not*?**

10. UKELA supports deregulation where this can be completed without increasing environmental risks. However, in the absence of any scientific justification for the rules presented it is difficult to assess the potential impacts of the proposed change. It is, however, noted that average groundwater temperatures in much of the UK are around 10 degrees Celsius – the temperature limits proposed therefore suggest that a doubling of temperatures to 20^{o}C or a reduction to close to 0^{o}C would be acceptable; this may be the case but in the absence of any properly quantified assessment of risk it is difficult to be certain.

11. It is also noted that there is no proposed restriction on systems close to non-ecologically designated surface waters or wetlands. The potential changes in groundwater temperature could, in certain circumstances give rise to "heat pollution" of the surface waters. This could have impacts on oxygen levels

(gas solubility decreases within increasing temperature) and could also affect nutrient metabolism and ecological changes.

Question 6: Do you agree with the criteria and conditions attached to the exemption? If not, why not?

12. See comments in paragraphs 10 and 11 above. The only comment we would add is to query the practicability of enforcing the proposed exemption conditions.

Simplifying public register requirements

Question 7: Do you agree with the proposal to remove the requirement for local authorities to maintain duplicate public register permit information to that held by the Environment Agency? If not, why not?

13. UKELA queries whether a "straw poll of 17 [unidentified] local authorities" is sufficiently representative to be able to justify the proposal. It is unclear from the consultation whether all of the information that would have been made available by local authorities and the Environment Agency in duplicate registers will continue to be made available, albeit in the one register. On the assumption that it will, UKELA has no other comments.

Question 8: Do you agree with the proposed arrangements to ensure the information is available to those seeking it?

14. Broadly, but it will be important to ensure that it is clear from all regulators how this information can be accessed.

Environmental permit appeals handling

Question 9: Do you consider that the FTT is an appropriate destination for appeals under the Environmental Permitting Regulations 2010, or should they remain with PINS?

15. UKELA acknowledges that environmental permit appeals may include points of law as well as scientific or engineering issues. As such, we agree that the First-tier Tribunal (FTT) would be an appropriate body to hear such appeals. The Environment jurisdiction has expert members appointed already, some of whom would be appropriately qualified for such work. In particular, the ability to appeal on matters of law to the Upper Tribunal rather than the High Court is likely to result in speedier and potentially cheaper decisions for all parties. It is noted that DCLG recently suggested that judicial oversight of the planning system could also be provided by the Upper Tribunal.

16. UKELA also recognises that at present the FTT is not equipped to conduct public inquiries to investigate wider issues of public importance; we would therefore support Defra's intention that the ability to "call in" applications remains with the Secretary of State.

17. Notwithstanding its general support for the principle of the FTT hearing EPR appeals, UKELA has some concerns about the reduction in the time limits for bringing EPR appeals to 28 days:

    (a) A reduction in the appeal period from, in some cases, six months to 28 days would represent a significant curtailment of appellants' current legal rights.

    (b) UKELA also believes that it may result in an increase in the number of EPR appeals. The current time limits for EPR appeals to the Planning Inspectorate allow potential appellants and decision-makers ample opportunity to negotiate before an appeal must be lodged and in

practice many appeals are avoided because the potential appellant and the decision-maker reach a settlement before it is necessary to lodge an appeal. A 28 day period for bringing an appeal allows little opportunity for negotiation and UKELA believes that this would result in more appeals being lodged simply to protect appellants' positions while negotiations with the decision-maker continue.

(c) Some EPR appeals require the gathering, consideration of and submission of complex technical evidence and a 28 day appeal period would be challenging for appellants in such cases. Again, there is a strong likelihood that appeals would be lodged simply to protect the appellant's position while the appellant more fully considers the merits of pursuing the appeal.

For these reasons UKELA suggests that the existing time limits for bringing EPR appeals should be retained. UKELA also suggests that the Government bear in mind the consequences of reducing the time limit for lodging planning appeals from six months to three months under the Planning and Compulsory Purchase Act 2004 – an increase in the number of appeals and the reinstatement of the six month time limit for lodging appeals.

18. With regard to confidentiality appeals (regulation 53 appeals) it is not clear why the Government does not propose to transfer these also to the FTT. The FTT already holds jurisdiction regarding appeals against information rights decisions and therefore has expertise in matters of confidentiality. The proposed divergence of regulation 53 appeals and those regarding permit determinations and conditions may not be necessary.

19. In terms of venues, UKELA strongly supports the view that permitting appeals for facilities based in Wales should be heard in Wales. The Tribunal already sits in Wales, so hopefully this could be accommodated.

20. In summary, UKELA is keen to see more appeals cases consolidated within the new First-tier Tribunal (Environment). UKELA members assisted Professor Richard Macrory with his research on strengthening the new tribunal (referred to at paragraph 5.4 of the consultation). Our response of October 2010 to Professor Macrory's research questions identified a number of problems with the current array of appeals procedures for environmental cases, and advantages in consolidating them in the new environmental tribunal. We identified appeals under the Environmental Permitting Regulations as prime candidates for transfer to the new environmental tribunal (see page 5 of our response, available at www.ukela.org/envlitwp).

Question 10: Do you consider that the General Regulatory Chamber Rules will suit the handling of these appeals? If not, why not?

21. Yes. See comments in paragraphs 15-18 above.

Miscellaneous proposals

Question 11: Do you agree with these miscellaneous proposals? If not, which ones do you disagree with and why?

22. UKELA agrees with the clarification and flexibility in the miscellaneous proposals.

EPR Consolidation

23. The Environmental Permitting (England and Wales) Regulations 2010, SI 2010/675 (EPR 2010) have been amended at least five times since 2010. UKELA notes that the government has recently published an unofficial consolidation of EPR 2010 to show the changes made by the Environmental Permitting (England and Wales) (Amendment) Regulations 2013 (SI 2013/390). However, further sets of amending regulations are due to come into force this year, and therefore, UKELA urges the government to consider publishing a full consolidation of EPR later this year.

24. Consolidation would bring benefits in terms of making the legislation more coherent and easier to follow. This is consistent with the findings summarised in our research report *The State of UK Environmental Legislation in 2011-2012*. This report highlights the importance of addressing the present lack of coherence and transparency, and recommended that governments consolidate legislation more routinely. It is available at www.ukela.org/Aim5

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Contacts:

Angus Evers
c/o SJ Berwin LLP, 10 Queen Street Place, London EC4R 1BE
Telephone: 020 7111 2763
Email: angus.evers@sjberwin.com

Peter Harvey
c/o Practical Law Company, 19 Hatfields, London SE1 8DJ
Telephone: 020 7202 1237
Email: peter.harvey@practicallaw.com

Co-Convenors, UK Environmental Law Association Waste Working Party