



## **Response to the Department for Environment and Rural Affairs and Welsh Government consultation on the Consolidation of the Environmental Permitting (England and Wales) Regulations 2010 (as amended)**

The UK Environmental Law Association 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.

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.

UKELA makes the following comments on the consolidated regulations.

### **Preliminary Observations**

UKELA welcomes this consolidation. Our research report on *The State of UK Environmental Law in 2011-2012* ('the 2012 report') highlighted the need for routine consolidation of legislation that is subject to frequent and/or complex amendments (paragraphs 3.7, 4.4 and 4.5 of the report, available at <http://www.ukela.org/aim5>). The Environmental Permitting Regulations 2010 certainly fall within that category, having now been amended some 13 times. This has adversely affected the coherence, transparency and accessibility of the legislation as it has become increasingly difficult to gain a full, clear picture of the law.

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill



The 2012 report also highlighted how the use of referential drafting to transpose European Directives can impede legislative transparency and accessibility. The report gave the example of the Environmental Permitting Regulations 2010 which rely heavily on this technique (see paragraphs 3.8 and 3.9 of the 2012 report). Legislative provisions that require a person to act in accordance with Article X of Directive Y are impossible to understand without a copy of the relevant Directive. Even armed with a copy of the Directive, ambiguities in the text of the Directive itself often make it hard to interpret precisely what is required.

The draft consolidated Regulations continue the practice of referential drafting. To help mitigate the resulting problems of legislative transparency and accessibility, steps should be taken to give readers of the legislation easier access to the relevant Directives. For example, the version of the Regulations on [legislation.gov.uk](http://legislation.gov.uk) (operative provisions and Explanatory Note) could include links to online copies of Directives, or the Directives could be Annexed to the Regulations by other means.

Guidance will continue to be an important tool in understanding and interpreting the Regulations. UKELA understands that the guidance on the Environmental Permitting Regulations is in the process of being revised. UKELA welcomes this work. The core permitting guidance in particular would benefit from updating and reviewing. The revised guidance should be easy for those reading the legislation to locate, for example through links in the version of the Regulations on [legislation.gov.uk](http://legislation.gov.uk) (operative provisions and Explanatory Note), as well as through Gov.UK. Users should be able quickly to find both the relevant guidance document, and the sections of that document that relate to particular regulations or Directive

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill



provisions referred to. The guidance itself should spell out key provisions of Directives and make it easy for readers to access the full Directive texts. The guidance should also guide on how to interpret and apply Directive provisions that are ambiguous.

### **Particular drafting points**

UKELA has no specific drafting comments on the consolidated regulations.

### **Additional changes to the Environmental Permitting Regulations concerning mobile plant**

UKELA understands that the purpose of the present consolidation exercise is simply to consolidate the various sets of regulations; not introduce policy changes.

However, we would take this opportunity to remind Defra of paragraph 38.19 in the General Guidance Manual on Policy and Procedures for A2 and B installations, which states as follows:

"Provision will be made, as soon as an opportunity arises, to amend the EP Regulations, to deal with cases where the hire company and the customer company have their principal place of business in different local authority areas. It is intended to specify that the hire company's local authority will be responsible for handling the transfer procedures, although it will be open to authorities in the usual way to make arrangements under section 101 of the Local Government Act 1972 (as amended). For example, if it seems desirable to undertake a site inspection after issuing a first fixed-term, this could be done by the customer company's local authority. "

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill



It would seem sensible to try to bring this change within the newly consolidated Regulations, rather than by a subsequent amending instrument.

UKELA would also suggest that it is timely now (rather than in a subsequent amending instrument) to revise the Environmental Permitting Regulations to clarify the position of mobile crushing machines that can be used to crush a range of materials including, but not limited to, concrete, bricks and tiles. This issue has come up in the case of *London Borough of Newham v Recycled Material Supplies Ltd*. That case has highlighted difficulties determining whether such a machine falls within the definition of 'Part B mobile plant' (specifically, one of the *Other Mineral Activities* under Section 3.5 paragraph (c) of Schedule 1, Part 2), or the definition of a 'Waste mobile plant'. The case has raised the possibility that a machine might flip between two permits – one regulated by the Local Authority, the other by the Environment Agency – depending on its load. This is an uncertain situation for an operator, and could lead to confusing and potentially conflicting double regulation.

More information about this point is provided in the operator's submissions annexed to this response. UKELA takes a neutral position in these proceedings. Our concern is simply that the regulatory position should be clarified to provide legal certainty.

**27 October 2015**

**Contact:**

Rosie Oliver

UKELA's working party adviser

[rosie@ukela.org](mailto:rosie@ukela.org)

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill



## Annex

### **Need to clarify definition of Mobile Plant: Submissions on behalf of the operator, in the case of *London Borough of Newham v Recycled Material Supplies Ltd.***

As a result of the amalgamation of various environmental legislation, on one interpretation of the Environmental Permitting (England and Wales) Regulations 2010 (as amended) ('the 2010 Regulations'), as recently ruled by a Crown Court, there can be dual regulation by Environment Agency ('EA') & Local Authority ('LA') of the same activity namely the crushing and screening of tiles, bricks and concrete at the same time. This could not have been the intention of parliament and accordingly an appeal has been lodged with the Court of Appeal on this point. On behalf of the operator, it is submitted that the operation on site falls under the jurisdiction of the EA and not the LA. Whilst aware that the proposed consolidation is simply intended to consolidate, this is an important point, which needs clarification.

Regulation 8 of the 2010 Regulations provides: In these Regulations, "regulated facility" means any of the following (a) an installation (b) mobile plant (c) a waste operation (d) ...

Regulation 32 of the 2010 Regulations deals with the jurisdiction of the EA and LA respectively. The basic rule in Regulation 32(1) (a) is functions in relation to a regulated facility will be exercisable by the EA but this is subject to the following caveat. Functions in respect of waste mobile plant are exercisable by the EA (Regulation 32 (1A) and functions in relation to a regulated facility of the following description are exercisable by the LA (Regulation 32 (2)):

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill



(b) a Part B installation or Part B mobile plant, but not in respect of any of the following regulated facilities carried on at the installation or by means of mobile plant –

(i) a waste operation (unless it is a Part B activity)

The 2010 Regulations introduced the definition of mobile plant.

Regulation 2 defines mobile plant as meaning any of the following –

(b) Part B mobile plant

(c) waste mobile plant

Part B mobile plant has the meaning given in paragraph 1 of Part 1 of Schedule 1 namely it means plant **that is designed to move or be moved** whether on roads or other land and that is used to carry on a Part B activity.

Part B activity means an activity falling within Part B of any Section in Part 2 of Schedule 1.

Section 3.5 *Other Mineral Activities* Subsection (c) in Part 2 of Schedule 1 provides: The crushing, grinding and other size reduction, with machinery designed for that purpose of bricks, tiles or concrete. Subsection (d) provides: Screening the product of any activity described in paragraph (c).

Waste mobile plant means plant that is

(a) designed to move or be moved whether on roads and other land

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill



(b) used to carry on a waste operation and

(c) not an installation or Part B mobile plant

The EA in EA Regulatory Guidance Note ('RGN') 2, Appendix 4 'Understanding the Scope of mobile plant' relies upon three factors to determine whether an activity can be regulated under a mobile plant permit. They are:

1. Environmental impact of the activity
2. Mobile nature of the plant
3. Intention of the operator

Paragraph A4.15 looks at what a "mobile plant activity looks like". A key factor is whether the operator intends to use the plant for a long time on one site. The EA also takes into consideration the effort required to move and set up the plant. The greater the effort needed, the less likely it is to be considered mobile.

Another factor the EA takes into account is whether the plant is moved to the waste or the waste is moved to the plant. In the case of the latter, it is less likely to be considered mobile plant.

The EA will refuse a mobile plant permit for the activity if it is considered necessary to protect land by using the statutory surrender test.

The EA in the RGN takes a sensible and pragmatic view to defining mobile plant determined by the degree of protection required for the environment. Therefore if you have an operator carrying out a large scale waste operation e.g. producing

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill



aggregate by importing significant quantities of waste to a site including but not limited to tiles, bricks and concrete where crushers and screeners are permanently located and the operator has no intention of moving the plant, the EA would refuse a SR2010 No 11 permit for mobile plant (which would only require notification for surrender) and instead insist on the operator having a SR2010 No 12 site based permit which has the safeguards of statutory surrender test and plant although mobile is treated as *stationary* plant forming an integral part of a waste operation. Much in the same way as “mobile plant” is treated at an installation.

Paragraph 3.20 of the Core Guidance relating to the 2010 Regulations states - European Commission guidance explains the definition of installation and considers the meaning of ‘stationary’. The Commission guidance considers the question of whether plant that is designed to be moved periodically but which in practice operates from the same location for some time, should be considered to be ‘stationary’. Suggested tests include: length of time the plant is expected to or does in fact, remain stationary; the nature of the activities and their environmental impact and the degree of physical installation involved in moving and establishing the plant.

The Commission guidance also concludes that whilst the term ‘stationary’ means the installation as a whole should be stationary, it may still include plant or equipment which is mobile. For example, plant that is mobile, which meets the criteria for being a directly associated activity will be regarded as part of the installation and will not be treated as mobile plant within the meaning of the Regulations.

‘Stationary’ is not defined in the 2010 Regulations, nor is ‘stationary technical unit’.

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill



The site subject to the court proceedings is permitted as a waste operation by the EA originally under a SR2010 No 12 permit (i.e. a site based permit) later varied to a bespoke permit to increase the annual throughput to 230,000 tonnes of 'non-hazardous' 'organic R3' and 'inorganic (R5)' for 'storage' and 'physical treatment consisting only of sorting, separation, screening, crushing and blending of waste for recovery as a soil, soil substitute or aggregate. The permit includes the terms crushing and screening and covers a much wider range of waste than just bricks, tiles and concrete and allows for the production of soil, soil substitute and aggregate.

The prosecution conceded that what was going on at the site was a waste operation (as defined by Regulation 8 of 2010 Regulations) involving the recovery of waste. The site takes in waste of various sorts involving bricks, tiles and concrete and substantial quantities of soil, tarmac, ballast and other materials, crushes and screens that waste, to produce aggregate which can be recycled. The machines used to carry out the crushing and screening are designed to move if so required and is the only mobile plant on site.

It was advanced on behalf of the operator that if they were crushing and screening other wastes or producing a soil, soil substitute or aggregate by crushing waste including but not limited to bricks, tiles and concrete it was an activity outside of Part B Paragraph 3.5 (c) of Schedule 1. In other words, Paragraph 3.5 (c) is limited to the crushing of bricks, tiles and concrete only.

Absent the word 'only' in Paragraph 3.5 (c) the judge would not infer that was how the paragraph was supposed to be read. Clearly, it must be limited to brick, tiles and concrete because otherwise an operator could crush bricks, tiles, concrete and

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill



asbestos using a Part B mobile plant permit which would just be a nonsense. The judge was persuaded that there is nothing in the legislation to indicate that crushing of bricks, tiles and concrete ceases to be a Part B activity because the same machine simultaneously crushes and screens other material. The result of his ruling is that when a crushing machine is crushing, for example, concrete and ballast the activity is regulated by both the EA as a waste operation and the LA as Part B mobile plant. Again, this is just simply a nonsense. Either a particular activity is Part B if it is processing bricks, tiles and concrete or it is a waste operation. But it cannot be right that the operation flips between two permits depending on the load of the machine. The EA permit permits the crushing and screening of bricks, tiles and concrete and a long list of other waste and therefore encompasses all activities on site. A Part B permit is surplus to requirements on the facts of the given case.

The court refused to accept that the plant was anything other than mobile plant because it is designed to move or be moved and the judge ruled the 2010 Regulations cannot be interpreted in accordance with the EA guidance/PNG which has no standing in law.

Even if the court is right and the only interpretation of the 2010 Regulations (contrary to European Commission and EA guidance) is that the plant must be classified as mobile on the basis it is designed to move, then the plant must be 'waste mobile plant' which again is regulated by the EA.

The LA suggests the EA has no jurisdiction at all to regulate the crushing of bricks, tiles and concrete given the 2010 Regulations. Even though not accepted by the judge, this must be wrong because if those wastes, as they do here, form part of mixed loads any treatment of those loads must be regulated by the EA.

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill



The 2010 Regulations are designed to ensure that the LA only retains control of the least complex and polluting activities and emissions to air whereas the higher risk waste operations capable of releasing substances, vibrations, heat and noise require tighter controls to protect air, water and land. Such protection can only be achieved if the approach by the EA in RGN is adopted contrary to one interpretation of the 2010 Regulations as adopted by the Crown Court judge.

Samantha Riggs  
Dr Anna Willetts

16th October 2015

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283  
Registered office: One Glass Wharf, Bristol, BS2 0ZX

President: Rt Hon Lord Carnwath CVO of Notting Hill