

BHSEA

Environmental Law Update

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12th December 2016

Overview

- Environmental Permitting
- Waste
- Circular Economy
- Nuisance
- ESOS
- REACH
- Renewable Heat Incentive
- Sentencing Guidelines for environmental and H&S offences
- Brexit

Environmental Permitting (1)

- Certain activities set out in EPR 2010 require an environmental permit
 - Installations
 - Waste operations
 - Mining waste operations
 - Small waste incineration plant
 - Solvent emission activities
 - Stand-alone water discharge activity
 - Stand-alone groundwater activity
 - Activities involving radioactive substances
 - Flood risk activities
- Some exemptions apply, including for certain low risk storage, treatment and use of waste activities

Environmental Permitting (2)

- Medium Combustion Plants Directive implementation
 - Applies to engines, boilers, furnaces and turbines under 50MW
 - Estimated c.30,000 plants affected, many backup boilers
 - Many previously unregulated plant will require an environmental permit from their local authority
 - New plants require permit from 20 December 2018
 - Existing plants 5-50MW require permit by January 2024
 - Existing plants 0-5MW require permit by January 2029
 - Permits will set limits on emissions of nitrogen dioxide, sulphur dioxide and particulates for new and existing gas, oil and solid-fuelled plants
 - Some exemptions and relaxations of emissions limits will apply
 - Consultation closes 8th February

Environmental Permitting (3)

- EA Fire Prevention Plan Guidance
 - New EA Fire Prevention Plan (FPP) Guidance v3 published July 2016
 - Objectives:
 - Minimise likelihood of fire happening
 - Aim for fire to be extinguished within 4 hours
 - Minimise the spread of fire within a site / to neighbouring sites
 - Sets out requirements businesses storing combustible waste must meet to be granted an environmental permit.
- EA says alternatives allowed with full technical justification – but in practice is the burden of justifying an alternative too great?
- How do operators maintain their throughput in light of the requirements of the guidance?

Environmental Permitting (4)

- **Requirements include:**

- duration and method of waste storage
- maximum stack sizes
- minimum separation distances between stacks
- fire prevention methods
- detecting and suppressing fires
- containing and mitigating fires and managing fire water

- **Criticisms from industry:**

- Lack of flexibility to adopt alternatives
- Maximum stack sizes and minimum stack heights – problematic for space constrained sites and impacts site economics
- Advice not taken from Chief Fire Officer's Association



Waste (1)

- Waste Framework Directive
 - “Waste means any substance or object which the holder discards or intends or is required to discard”
- Deceptively simple
- Intent of the holder as objectively inferred from the circumstances – NOT just subjective test
- Some key principles:
 - No or negative value may suggest material is waste...
 - ...but materials with economic value can still be waste
 - Materials that are contaminated may be waste...
 - ...but the fact a material poses no harm to the environment does not mean it is not a waste
 - “Discard” includes recycling and recovery...
 - ...and both deliberate and accidental discards

Waste (2)

Byproducts

- Waste Framework Directive
 - Material which is not the primary aim of the production process is a non-waste byproduct if:
 - Further use is certain
 - The material can be used directly without any further processing...
 - ...as an integral part of the production process...
 - ...further use of the material is lawful
- Secondary products – not byproducts and not waste



Waste (3)

End of Waste

- Is your material a waste?
 - Subject to the Waste Framework Directive
 - Not a byproduct or secondary product
 - Has been “discarded”= “waste”
- Will remain waste until subjected to a “complete recovery operation”:
 - Includes both recovery and recycling
 - More than merely changing the nature or composition of a substance – creating a new material / product
 - Pre-treatment and pre-processing is not sufficient



Waste (4)

Legal Test for end of waste

- OSS Group Ltd v Environment Agency and DEFRA
 - A material will be rendered a non-waste where it “*has been converted into a distinct, **marketable** product, which can be **used in exactly the same way** as an ordinary [non-waste material], and **with no worse environmental effects**”*”



Waste (5)

- **Waste Duty of Care**

- Chain of custody in relation to movements of waste
- Waste can only be transferred to an authorised party:
 - Waste carrier (in transit)
 - Appropriately licensed facility to accept the waste
- Waste transfer notes used to document transfers
- Waste transfer note needed for transfer from manufacturing plant to e.g. waste transfer station and relevant checks must be undertaken by operators consigning and accepting waste
- No waste transfer note needed for overseas transfer of waste – Waste Shipments Regulation applies instead
- CL:AIRE Code of Practice – construction sector

Waste (6)

- **Transfrontier shipment of waste**
 - WSR applies to shipments of RDF for recovery to EU Member States
 - Prior notification of shipments required – possible to obtain “season ticket” for regular or multiple shipments
 - Primary obligation to notify falls on the party making or intending to make the shipment – however a wide net is cast and other parties in the supply chain may also be considered responsible for making a notification



Waste (7)

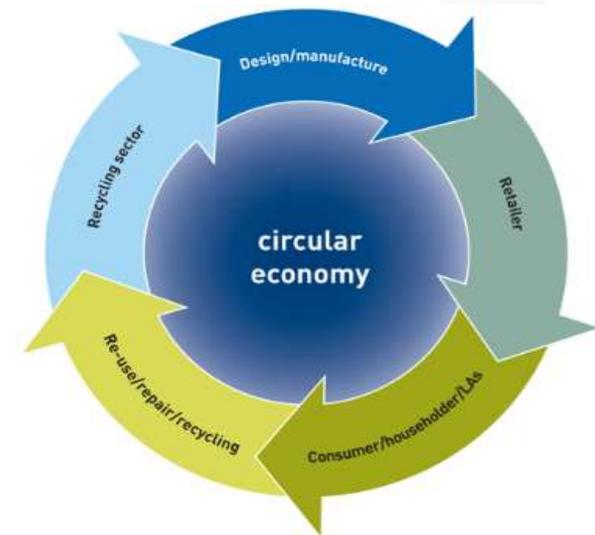
- HMRC Proposals to rationalise landfill tax
 - HMRC Policy Paper published 5th December - proposes to repeal Prescribed Activities Order, which specifies actions subject to the tax rather than materials that are exempt
 - Instead any material disposed of at a landfill site will be taxable unless “expressly exempt” - means waste used to temporarily cap landfill sites and waste generated through construction of temporary roads, either within the disposal area or adjacent to it, will still be taxable - something landfill operators have been fighting against since 2008.
 - Proposes two new exemptions: “materials that can legally be deposited outside of the landfill cell” and an exemption for the drainage layer of a landfill cell including any pipes inserted into the cell for the purpose of “extracting surplus liquid or gas”



Circular Economy (1)

*“...In a circular economy the **value** of products and materials is **maintained** for as long as possible; waste and resource use are **minimised**, and resources are **kept** within the economy when a product has reached the end of its life, to be used **again & again** to create **further value**”*

European Commission, Dec 2015



Circular Economy (2)

- **Action Plan** covers **full product life cycle** + **4 draft Directives** will amend key EU waste legislation
- **Increased target of 65% by weight for preparing municipal waste for re-use and recycling by 2030 (down from 70% in 2014)**. There is an interim target of 60% by 2025.
- **Increased recycling target of 75% by weight for packaging waste by 2030**, with an interim target of 65% by 2025. Specific waste types are simplified with both 2030 and 2025 targets
- A more **ambitious target** for **plastic packaging** recycling. New targets are introduced for recycling wood packaging and there is a new provision to ensure the separate collection of bio-waste
- Gradual limitation of the landfilling of municipal waste to **10% by 2030**.
- Greater simplification of law on **by-products** and **end-of-waste** status
- Measures to promote **waste prevention** (including for food waste) and re-use



Circular Economy (3)

EU Action Plan

- **Marine Litter:** an aspirational target to reduce marine litter 30% by 2020 has been retained
- **Industrial Sustainability:** from 2016 onwards, BREFs will include specific information on best waste management and resource efficiency practices
- **Mining waste:** in 2018, the Commission will issue guidance and “promote best practices” on mining waste to improve recovery of raw materials
- **Wastewater:** new legislation on minimum requirements for reusing treated wastewater for irrigation and groundwater recharge will be proposed in 2017



Circular Economy (4)

- **Quality Standards:** development of new quality standards for secondary raw materials will begin in 2016 alongside a proposal for reforming “end-of-waste” criteria
- **Construction and Demolition:** guidelines for encouraging materials reuse and recycling. 2016 recycling protocol, guidelines for pre-demolition assessments and environmental life-cycle assessments for buildings
- **Chemicals:** the “interaction of legislation on waste, products and chemicals must be assessed”



Circular Economy (5)

- BSI is consulting on the world's first Circular Economy standard (BS 8001)
 - Asks for opinions on what constitutes a Circular Economy
 - Asks whether respondents agree with its distinction between “resource efficiency” and “circular economy”
 - Closes 15th January 2017
- Circular Economy also to be taught on International Baccalaureate

Nuisance (1)

- Statutory Nuisance – Environmental Protection Act 1990
 - Local authorities obliged to investigate statutory nuisances in their area
 - Can serve abatement notice – failure to comply is criminal offence
- Private Nuisance
 - Claim can be brought by an individual / company
 - Interference with the use or enjoyment of land, which causes injury in relation to an ownership right in that land
- Public Nuisance – harder to prove

Nuisance (2)

- A party can be found liable in nuisance even if it is complying in full with any relevant planning permissions and/or the conditions of any relevant environmental permits (Biffa case)
- Very difficult to demonstrate a prescriptive right to e.g. generate noise / odour (Coventry case)
- Ministry of Sound
 - Put in place easement re residential housing development, granting MoS the right to emanate sound waves over the development
 - Unlikely to be water-tight

ESOS (1)

Energy Savings Opportunity Scheme (ESOS)

- Applies throughout UK to large undertakings and their corporate groups. Qualify if on **31 December 2014**:
 1. You had 250 or more employees in the UK, **or**
 2. You had fewer than 250 employees, but have:
 - an annual turnover exceeding 50m euros **and**
 - a balance sheet exceeding 43m euros, **or**
 3. You were part of a corporate group that includes a UK undertaking that meets criteria (1) or (2) above
- Public bodies are not included, but are encouraged to undertake voluntary audits



ESOS (2)

- Six principal requirements:
 1. Measure your total energy consumption – in each subsequent 4 year compliance period
 2. Conduct an energy audit to identify cost-effective energy efficiency improvements you could make
 3. Appoint a Lead Assessor
 4. Obtain Board sign off
 5. **Report to Environment Agency – needed to have notified compliance by 5 December 2015**
 6. Keep records of your compliance
- EA Guidance published 17 February 2015



ESOS (3)

- Calculate total energy consumption
- Identify areas of significant energy consumption
- Appoint a lead assessor
- Notify Environment Agency – was to be submitted by **5 December 2015**
- Keep records to show compliance
- NB. Ensure you have ESOS compliant energy audits based on 12 months' verifiable data



ESOS (4)

- No requirement to act on recommendations in audit, but doing so may cut costs
- EA has reported high levels of non-compliance and says it will increase enforcement in this area through Enforcement Notices
- Civil sanctions will be used where Enforcement Notices not complied with

REACH

- ECJ judgment September 2015 –articles within a complex product needed to be treated in the same way as isolated articles. Notification requirement to ECHA for articles which are components of a complex product when they contain a substance of very high concern in a concentration above 0.1% <http://www.out-law.com/en/articles/2015/september/cjeu-clarifies-measurement-of-dangerous-substances-in-products/>
- New additions to the candidate list <http://echa.europa.eu/candidate-list-table>
- Supply chain issues – next registration deadline for low volume substances supplied at ≥ 1 tpa - 1 June 2018 (PHASE 3)



Renewable Heat Incentive (1)

- 15 years of support
- Deliver heat through liquid or steam
- Eligible uses
 - Process heating
 - Hot water heating
 - Space heating
- Parasitic loads
- Energy from Waste installations
 - Tariff earned only on electricity generated from the biomass element of the feedstock
 - No sustainability criteria for wastes and residues



Renewable Heat Incentive (2)

- Preliminary accreditation
 - Planning consent must be in place or evidence that none required provided
- Full accreditation
 - Can only be granted one installation commissioned
 - As long as no changes to installation on RHI Scheme since preliminary accreditation, and constructed in accordance with application for preliminary accreditation will grant full accreditation
 - Owner must make application
 - “new” plant - any equipment, apparatus or appliance which is necessary for, and integral to, the generation of heat using eligible sources of energy and technologies.

Renewable Heat Incentive (3)

- Recently introduced biomass sustainability rules require participants to report on biomass sustainability in order to claim tariff

RHI
Renewable Heat Incentive

Sentencing Guidelines (1)

- Came into force on **1 July 2014**
- Relates to Section 33 EPA 1990 waste offences, and Regs 12 and 38 of the EP Regulations 2010
- Sets out an indicative list of “other environmental offences”
- 12-step sentencing process
- Uses turnover as a starting point for setting fines
- Court must consider the real economic impact of a fine
- Offence ranges, offence categories, category ranges and starting points
- Applies in England and Wales only



Sentencing Guidelines (2)

- **Thames Water (June 2015)** fined £250,000 plus costs for polluting a nature reserve with raw sewage
 - First test of the Guideline for a “very large organisation” - £1.9bn turnover + £346m profit for year to March 2014
 - “Category 2” harm and negligence
 - Fine upheld by Court of Appeal, which said it would have had “no hesitation” in imposing a substantially higher one



- **United Utilities (March 2015)** fined £750,000 and ordered to pay £38,000 in costs for a “reckless failure” of procedural responsibility

Sentencing Guidelines (3)

- **Thames Water (January 2016)** fined a record breaking £1,000,000 plus costs following discharges into the Grand Union Canal.
 - “Category 3” harm and negligence
 - Fined despite having spent £30,000 on improvement works
 - *“the time has now come for the courts to make clear that very large organisations...really must bring about the reforms and improvements for which they say they are striving because if they do not the sentences passed upon them for environmental offences will be sufficiently severe to have a significant impact on their finances.”*
- **Yorkshire Water (January 2016)** fined £600,000 plus costs after a sewage pipe burst in Wakefield.
 - “Category 2” harm and negligence



Sentencing Guidelines (4)

- Increasingly “risk based” approach to regulation
- Proceeds of Crime Act 2002 (“**POCA**”)
- Increased use of “dawn raids”
- Cap lifted on fines for offences from 12 March 2015
- Use and extension of Civil Sanctions
- Changes on the horizon following 2015 Defra consultation



Cyfoeth
Naturiol
Cymru
Natural
Resources
Wales



Environment
Agency



Pinsent Masons

Brexit (1)

- Access to the single market:
 - Hard Brexit: wide choice of applicable legislation
 - Soft Brexit: Norwegian model would require retention of most EU environmental law (but notably not Habitats and Birds Directives)
- New trade agreements:
 - Could result in increased trade to/from other countries and major trading blocs
 - Potential for need to engage with environmental regulation (especially re products) emanating from other international trading blocs?
 - Increased relevance of environmental law driven by international law (including Paris Agreement and COP22)?

Brexit (2)

- Extent of UK Government environmental and climate change objectives and commitment, balanced against desire for major infrastructure development and need to attract and support industry
 - ClientEarth litigation and Heathrow Airport expansion
 - Recent rulings on need for Government to meet targets for local air quality under Air Quality Directive could constrain major infrastructure development
 - Potential target for any review?
 - Birds and Habitats Directives also potentially constrain development, so could be a target for review?
 - EU ETS and Climate Change Agreements / State Aid for energy intensive industries

Brexit (3)

- Sector Specific Issues:
 - Waste: Circular Economy / focus on resource had potential to drive economic benefits – will this now go on the back burner?
 - Energy: could any removal of State Aid obligations open the door for increased Government support for e.g. renewables (or nuclear), and would this be politically palatable / will the UK remain part of the Internal Energy Market?
 - Manufacturing: will likely still need to comply with some EU legislation to sell their products in the EU?

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