

Constitutional and Legislative Affairs Committee Report

CLA493 – The Environmental Permitting (England and Wales) Regulations 2015

These Regulations transpose Article 14(5)–(9) of Directive 2012/27/EU on energy efficiency, which aims to promote efficiency in heating and cooling. Articles 14(5) –(9) specify that when certain large, new, industrial installations are planned or existing such installations are substantially refurbished, a Cost–Benefit Assessment (“CBA”) must be undertaken examining the viability of operation in co–generation (Combined Heat and Power – “CHP”) mode. Where the CBA finds that co–generation is viable, the installation must operate in that mode.

Procedure: Affirmative

1. Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument:

1. These Regulations have not been made bilingually. Paragraph 4 of the Explanatory Memorandum states that it was not possible for the Regulations to be made bilingually as they are composite regulations applying to England and Wales. The Regulations are subject to approval by the National Assembly for Wales and the UK Parliament and therefore the Welsh Government says that it has not been possible to make them bilingually. It was decided to make these Regulations on a composite basis because of the existing England and Wales environmental permitting regime. It is notable that Scotland and Northern Ireland have drafted their regulations separately. **[Standing Order 21.2(ix) – not made bilingually]**

2. Unusually, these Regulations have been laid with a number of known errors in the regulations. Several errors were discovered in the draft statutory instrument as laid before Parliament on 17 December 2014. **[Standing Order 21.2(vi) – defective drafting]**.
3. Paragraph 10 of the Explanatory Memorandum summarises the known errors. Taking into account the relatively short length of these Regulations the number of errors are significant. Paragraph 10 of the Explanatory Memorandum states as follows:

“10. The errors that it is proposed will be corrected prior to the making of the statutory instrument are as follows:

- a) In regulation 5(3), in the new sub-paragraph (1A) to be inserted in paragraph 1 of Schedule 8 to the principal Regulations (as defined in regulation 1(3) of the draft regulations), the reference to “paragraph 2 of Section 1.1” should be a reference to “paragraph 1A of Section 1.1”. This is clearly an error as there is no paragraph 2 of Section 1.1 of Part 2 of Schedule 1 to the principal Regulations. This paragraph should refer to the new paragraph 1A as inserted by regulation 4(2), as referenced by regulation 5(2) of the draft regulations.
- b) In regulation 6, which inserts the new Schedule 8A:
 - i. The title to regulation 6 reads “Energy Efficiency Directive”, and the title to the new Schedule 8A reads “Energy Efficiency Directive: promotion of efficiency in heat and cooling”. They are clearly in error as they do not accord with the title given to Schedule 8A in the operative

provision inserted (by regulation 3 of these regulations) into regulation 35 of the principal regulations. It is proposed to correct these provisions so that Schedule 8A is consistently titled.

ii. in paragraph 1(1), in paragraph (b) of the definition of “installation”, reference to “small waste incineration operation” should refer to “small waste incineration plant”. This is clearly an error as the defined term in the principal Regulations is “small waste incineration plant” – see regulation 2(1) of the principal Regulations.

iii. in paragraph 1(2) (c) in the reference to the interpretation of installation, the words “within the meaning of Part 1 of Schedule 1” should be removed. This is clearly an error as in the previous paragraph 1(1), there is a definition of “installation” which is not the same as the definition of “installation” within the meaning of Part 1 of Schedule 1 to the principal Regulations due to the inclusion in the former of all small waste incineration plants (the latter includes only small waste incineration plants that are also Part B activities in Section 5.1 of Part 2 of Schedule 1 to the principal Regulations). Paragraph 1(2) (d) also requires this wider definition of “installation”.

iv. In the title to the table in paragraph 11, the reference to “Radios” should read “Radius”. This is clearly a typographical error.”

4. The Joint Committee on Statutory Instruments raised further points and requested clarification from the Department for Environment, Food and Rural Affairs. These have since been resolved.

2. Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.

5. These Regulations transpose Articles 14(5)–(9) of Directive 2012/27/EU on energy efficiency. The deadline for making these Regulations was 5 June 2014. These Regulations are over 9 months late and the Welsh Government is at risk of EU infraction proceedings. Paragraph 6 of the Explanatory Memorandum states that “delays to finalising the regulations following consultation have resulted in this deadline being missed.” **[Standing Order 21.3(iv) – inappropriately implements European Union legislation]**

6. Despite the defects noted in paragraphs 2 and 3 above, and in paragraphs 9 and 10 of the Explanatory Memorandum, it was decided not to withdraw and re-lay these regulations due to the lack of Parliamentary time left before prorogation. Bearing in mind that these Regulations are being made significantly after the transposition deadline of June 2014 a further delay would not have been helpful. Additionally, because they are composite Regulations, the Welsh Government is unable to lay amended regulations with corrections because the same version must be laid for debate in the Assembly as laid in Parliament. Both the Welsh and UK Governments intend to make corrections after the respective debates. We find this to be wholly unsatisfactory as it is proposed to make Regulations that differ significantly from those approved. The Regulations should be made as approved. We accept that despite the defects, that would be preferable to further delay in implementing the EU law obligations. **[Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly.]**

3. Government Response

Response to the issues that have been raised by the Legal Advisers to the Constitutional and Legislative Affairs Committee.

Point 1 – Standing Order 21.1(ix) – not made bilingually

1. These composite Regulations apply to England and Wales and are subject to approval by the National Assembly for Wales and by Parliament. Accordingly, it is not considered reasonably practicable for this Instrument to be laid or made bilingually.

2. Use of the existing environmental permitting regime allows implementation of the requirements of Article 14(5)–(9) of Directive 2012/27/EU in a manner which limits the additional burdens on operators and regulators. Almost all installations subject to the requirements of those articles are already subject to the environmental permitting regime. At present, that regime is provided for by the Environmental Permitting (England and Wales) Regulations 2010. The current statutory instrument transposes article 14(5)–(9) by amending the 2010 Regulations, which are also composite regulations, and so were made in English-only. A composite approach here is appropriate to ensure a consistent and expedient of Article 14(5)–(9) across England and Wales using the existing environmental permitting regime.

3. All the administrations have transposed article 14(5)–(9) by making amendments to their respective environmental permitting regimes. England and Wales currently has a single environmental permitting framework; Scotland and Northern Ireland have their own separate environmental permitting regimes.

Point 2 – Standing Order 21.2(vi) – defective drafting

4. This point is accepted.

5. These regulations, made by the Welsh Ministers in relation to Wales and the Secretary of State in relation to England, are made using a single composite statutory instrument. It is appropriate that identical versions of this single instrument are debated in both Welsh and English legislatures. There are, as the draft report states, a number of drafting defects in the draft statutory instrument as laid. These defects were discovered only after the draft instrument was laid in Parliament. The defects were drawn to the attention of the Committee in the Explanatory Memorandum (at paragraph 10) laid with the draft statutory instrument. That paragraph is reproduced in paragraph 3 of the draft report. None of the drafting defects highlighted for correction are substantive in nature. For the reasons set out in paragraph 10 of the Explanatory Memorandum, they are clear errors and it is considered that correction upon making is appropriate and this will be done.

Point 3 – Standing Order 21.3(iv) – inappropriately implements European Union legislation

6. This point is accepted. The deadline for transposition of article 14(5)–(9) of Directive 2012/7/EU was missed by all UK administrations due to delays in finalising the content of the respective transposing regulations.

Point 4 – Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly

7. The draft report refers again to the drafting defects identified in Point 2. It notes that the Welsh and UK Governments intend correcting the drafting defects prior to the regulations being made. The draft report goes on to state that the Committee considers it to be “wholly unsatisfactory as it is proposed to make Regulations that differ significantly from those approved. The Regulations should be made as approved”.
8. The Welsh Government accepts that statutory instruments should be free from drafting defects. In this case, the defects highlighted for correction are minor, and are clear errors. The correction of these defects will not change the substantive legal effect of Regulations that will have been approved by the Assembly. The Welsh Government do not propose any corrections to this statutory instrument that would result in a substantive change to the legal effect of the subordinate legislation contained within the instrument. The same principle is applied here as is applied when correcting minor and clear drafting defects in negative procedure statutory instruments where such defects are discovered after the instrument is made.
9. As noted in the draft report, this is an exceptional situation that was further compounded by the proximity of prorogation of Parliament. This exceptional approach has been taken to avoid a risk of further delay in transposing article 14(5)–(9) of Directive 2012/27/EU. We do not foresee that this situation will, and take steps to ensure that it does not, arise again.

4. Committee Consideration

The Committee considered the instrument, along with the Government response, at its meeting on 9 March 2015 and reports to the Assembly in line with the reporting points in sections 1 and 2 above.