

Legislative Calendar 2007/2008



Check the Horizon

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IPPC Directive

Whilst the Directive is not due to be fully implemented until 30 October 2007, the European Commission (EC) is already looking at options for reform based on the first years of experience. An internet-based consultation questionnaire has been seeking views on a range of issues, including: whether Best Available Technique Reference Documents (BREFs) should be made binding on each individual IPPC permit; whether the administrative burden of implementing the regime should be reduced by integrating the current IPPC and sectoral directives or by combining and streamlining all reporting requirements from Member States to the EC and whether Member States should be allowed to reduce SO₂ and NO_x levels through emission-trading schemes, rather than through individual BAT-based permit conditions.

RoHS Directive

A consultation has been issued on the Restriction of the use of Certain Hazardous Substances in Electrical and Electronic Equipment Directive. Changes considered include expanding the product groups and substances covered; the regime's relationship with the Waste Electrical and Electronic Equipment Directive; and whether to integrate a uniform mechanism for demonstrating compliance. The EC anticipates that any legislative measures arising from the review will be presented in 2008.

Biofuels

The EU's recent consultation on proposals for a review of the Biofuels Directive builds on the EC's proposals for a new Energy Policy for Europe and a 'renewable energy roadmap'. This is expected to result in binding biofuels sales targets, in line with

the Community's long-term commitment to an EU-wide development of renewable energies, with the European Council endorsing a binding minimum target of 10 per cent by energy content for the share of biofuels in overall EU transport petrol and diesel consumption by 2020. The target will be subject to the sustainability of production and second-generation biofuels becoming commercially available, in addition to possible amendments to the Fuel Quality Directive to take account of blending fuel and vehicle engines. Proposals are expected to form part of the Commission's new renewables legislative package by the end of 2007.

Environmental Crime

A proposal for a Directive on the protection of the environment through criminal law was published by the Commission in February 2007. This will

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represent the first steps in criminalising unlawful environmental activities in some Member States; while in the UK, where criminal sanctions already exist in some areas, penalties are likely to be toughened, with the courts obliged to follow guidelines on sentencing. At the upper end of the scale, custodial sentences of up to ten years and fines of up to €1.5M are being proposed. Corporate bodies may be excluded in some jurisdictions where corporate criminal sanctions are incompatible with domestic law, with administrative penalties filling these gaps, although a body's officers could still face personal criminal liability in some circumstances. Some environmental breaches, including for example the unlawful treatment or shipment of waste for profit, or the unlawful operation of a plant, may be criminalised where the result of activities has an impact on humans and/or the environment and where these have been done: "intentionally" or with "at least serious negligence." Following final approval and adoption, the Directive is expected to have an 18-month time-frame for implementation, meaning that it could be transposed by late 2009.

Waste Framework Directive

Proposals to create a new Waste Framework Directive (WFD) include the revision and consolidation of existing waste legislation. The EC has proposed the introduction of an environmental objective into the WFD, focusing on the impacts of waste generation and management within the life cycle of resources.

While the proposed Directive does not amend the legal definition of the word "waste", it is recognised that it is necessary to clarify when waste ceases to be waste, both by the application of a two-stage test for materials from selected waste streams to be re-classified as: "secondary products, materials or substances," (that re-classification would not lead to overall negative environmental impacts and that a market exists from the resulting material), and through guidance based on the jurisprudence of the European Court of Justice for the existing WFD.

There may also be newly defined terms, including "re-use", "recycling", "by-products" and "treatment," targets for the recycling, reuse and prevention of waste and a timetable for a ban on recyclables from landfill.

The proposed WFD would require Member States to take measures to ensure that all waste undergoes waste-recovery operations (resulting in it serving a useful purpose in replacing other resources), something that Defra has raised concerns about, given that waste-recovery operations may be neither practicable nor environmentally sound in all circumstances. Minimum standards for permits for all waste disposal and recovery operations could be

introduced by the Commission under the revised WFD. These additional requirements could, Defra argues, force costs up across the sector, especially for businesses engaged in the disposal or recovery of waste. The UK consultation closed in January 2007.

Some of the other proposals include additional controls on hazardous waste and a requirement for the separate collection and treatment of biowaste following the Directive's adoption. The EC would have to develop a directive on biowaste by June 2008. Member States could also be required to draw up national prevention programmes designed to stabilise waste production at the level reached in 2008 by 2012. Differences between the European Parliament and Commission on the extent of binding provisions could delay the finalisation of the directive, which is expected to have an 18-month implementation period.

Environmental Liability Directive

The Environmental Liability Directive was due to come into force across the EU in April 2007, but its transposition has been delayed in the UK and other Member States. It is expected to be implemented in the UK following a further consultation in autumn 2007, and is expected on the statute book by late 2007/early 2008. The Directive is aimed at preventing environmental damage by obliging "operators" engaged in specified "occupational activities" (including, among others, IPPC permit holders, those involved in the processing of specified substances and waste management operations), to meet the costs of preventing and remediating environmental damage. This covers damage to protected species and habitats, to water covered by the Water Framework Directive and land contamination that creates a significant risk to human health. Operators face strict liability where environmental damage is caused by one of the specified occupational activities, and fault-based liability for damage caused by other activities to protected species and natural habitats where it can be shown that the operator is at fault or was negligent. Where operators can demonstrate that they were not at fault or negligent and that the environmental damage was caused by an authorised emission or event, Member States have discretion as to whether operators will be required to bear the costs of clean-up. In the UK, this 'permit defence' is only expected to be adopted in respect of aspects of the Directive additional to existing UK legislation, as compliance with permit conditions offers no defence against remediation liability under the UK's current contaminated land regime. The UK is expected to adopt the same position in relation to the 'state-of-the-art defence', which under the Directive may be open to operators who can argue that their actions

were not considered likely to cause environmental damage given current scientific/technical knowledge. Operators are automatically exempt from having to meet the costs of damage caused by a third party in spite of appropriate safety measures having been in place.

Water Framework Daughter Directives

The Water Framework Directive requires the European Commission to put forward specific measures to prevent and control water pollution, and two such measures are likely to be implemented within the next two years. A new Groundwater Daughter Directive was published in December 2006, and is due to be transposed by Member States by January 2009. The Directive imposes limits on pesticide and nitrate levels in groundwater and will also require compulsory limits on the levels of other hazardous substances present in groundwater, including cyanide, arsenic and biocides. The Commission has also proposed a Directive on environmental quality standards in the field of water policy, which is aimed at increasing protection for surface water by consolidating existing legislation and imposing new limits on concentration levels of dangerous chemical substances, including some types of pesticides and heavy metals that pose a particular risk to natural life and human health.

Soil Protection Directive

The European Commission adopted a Soil Thematic Strategy, including a proposed Soil Protection Framework Directive in 2006, which is unlikely to be finalised before 2008. This includes measures to address soil erosion, organic matter decline, compaction, salinisation and landslides, including requirements on Member States to identify areas of risk and develop associated programmes of measures and targets in these areas. Soil sealing will also be addressed by measures including the use of construction techniques and products allowing as many soil functions as possible to continue, something which may encourage the use of sustainable urban drainage methods.

Contamination will also be addressed by the Directive, with measures including a contaminated-sites inventory, the production of soil-status reports, identification of sites on which potentially polluting activities are taking place or have taken place, and the production of a remediation strategy for such sites. There are some similarities with the existing UK definition of contaminated land, although some adjustments to legislation will be required, including a more pro-active approach to identifying contaminated sites: competent authorities will be expected to have identified all sites where potentially polluting activities may have taken place within five years. ➤

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- ▶ covering IPPC sites, landfills and petrol stations, among others. Further targets for the identification of contaminated sites will see all identified sites being assessed by the competent authority within 25 years. Land owners and users will be required to take precautions to prevent and minimise damage to soil and site owners will have to prepare a soil status report before selling land, including a site history and an analysis of any substances linked to potentially polluting activities, the financial and administrative costs of which have created concerns for Defra. The flexibility provided by the Directive on the remediation and liability aspects of contaminated land could mean that much of the existing UK legislation addressing these points is effectively left in place.

EU Emissions Trading Scheme

The EU's Emissions Trading Scheme (ETS) was introduced to address the emissions of carbon dioxide and other greenhouse gases in order to combat climate change. Member States are required to set emission caps for all installations covered by the ETS through the allocation of allowances set out in a National Allocation Plan. These allowances can be traded between installations to address surpluses or shortfalls and there is some scope for allowances to be carried forward to or borrowed from a subsequent year's allocation. Other parties not covered by the scheme can also register to become involved in this trading. The scheme's first two-year phase ends in December 2007 and the second phase will run from 2008 to 2012. The scheme has been subject to EU-wide review with an EU-wide legislative proposal expected in autumn 2007 designed to optimise its potential to make cost-effective real emissions reductions in the long term. The proposals being considered include setting new tougher long-term EU-wide emissions reduction targets that offer greater certainty for business when planning for the future, creating a more liquid market by the expansion of the EU ETS to cover more sectors and gases (such as aviation and nitrous oxide from the production of ammonia and fertilisers), encouraging the auctioning of allowances in order to ensure a more efficient allocation and extending the scheme beyond Europe, both through the use of Clean Development Mechanisms, and linkage with other overseas schemes. The House of Commons Environmental Audit Committee has already warned businesses that they will soon have to accept some cutbacks in ETS allocations and make some real reductions in their emissions.

Within the UK, measures have been proposed to overhaul the environmental permitting programme, implement the tough new EU-wide regime on the use of chemicals, together with proposals focused on climate change and updating the UK's marine environment legislation.

Environmental Permitting Programme

Defra closed its third consultation on the Environmental Permitting Programme in April 2007 and the new Environmental Permitting (England and Wales) Regulations are expected to be finalised and come into force in 2008. The Regulations are designed to overhaul the existing Pollution Prevention and Control (PPC) and Waste Management Licences (WML) by streamlining both regimes and creating a common and simplified approach to permit applications, maintenance, surrender and enforcement. The new permitting regime is expected to continue to cover the same activities and have the same standards, with the automatic transfer of existing WMLs and PPC permits to the new scheme. Defra has commented that existing PPC users will notice little change, except that administration will be simplified, for example, by the consolidation of WMLs and PPC permits into one permit and reducing the amount of guidance and forms needed.

Review of the Exemptions from Waste Management Licensing

In addition to the new permitting regime, Defra is leading a review of the 51 exemptions from waste management licensing. This is being undertaken with the aim of providing a more risk-based and proportionate approach to the regulation of operations for waste recovery and disposal operations. All current exemptions are being assessed against new criteria (which may include, among others, whether the risk can be easily mitigated by simple general rules, operator competence is not needed or is easily accredited, and whether it is in the public interest to adopt a low regulatory approach), and which will be used to determine whether the exemption can remain. Following this review, there will be a consultation on draft-revised regulations, expected in 2008.

Climate Change Bill

The draft Climate Change Bill, issued in March 2007, and expected to reach the statute book by the summer of 2008, has proposals to enshrine UK carbon-dioxide targets for reduction into domestic legislation, something the accompanying consultation paper admits will be a progressively tightened constraint on businesses looking to invest in the UK, although the framework should take account of the extent to which the UK is acting unilaterally. Targets would be set on the basis of five-yearly carbon 'budgets' set for the following three periods to help provide business with some certainty as to the extent of the constraints, with scope for the budgets to be reviewed by Parliament where there were significant changes in circumstances. Aspects of the proposals resemble the EU Emissions Trading Scheme, as the government would be allowed to

buy overseas credits (eg: under the Kyoto Clean Development Mechanism) and 'bank' or 'borrow' limited amounts of credits from other budget periods where there is an excess or shortfall.

In order to achieve these aims, the draft Bill would enable the government to introduce new schemes (such as trading schemes covering particular sectors of the economy) without enacting further primary legislation.

Implementation of REACH Regulations

The UK is due to have an enforcement and penalties regime in place for the EU Regulation on the Registration, Evaluation and Authorisation of Chemicals (REACH) Regulations by December 2008: the Regulations themselves come into force from June 2007. The Regulations are designed to pass greater responsibility on to industry for the management of the risks from chemicals and to provide safety information through information and registration requirements, and creates a European Chemicals Agency to run databases that will allow businesses and users to find hazard information. Those parts of the Regulations that are to be enforced in the UK (including the manufacture, import, sale or use of substances without the appropriate registration, using hazardous substances in breach of authorisation terms or restrictions and failing to meet the information provision requirements) will be overseen by the Health and Safety Executive, the Environment Agency and local authorities, minimising the cost of implementation to business, and the government anticipates that a significant amount of enforcement activity will be the result of whistleblowing by business rivals and environmental groups.

Marine Bill

The government's White Paper on a proposed new Marine Bill was published in March 2007, with draft legislation expected to be published before the next general election, which must be held by 2010. The new legislation will aim to draw together existing legislation on marine areas and to update regimes dealing with activities driven by technology, such as wind farms and carbon capture and storage. The proposed bill will introduce a UK-wide system of marine planning (consistent with the Marine Policy Statement, regional marine plans and with the new land planning regime) and streamline existing marine licensing regimes, with the aim that any project will only require a single licence. The present licensing system for oil and gas installations is unlikely to be substantially changed. It will also cover conservation, fisheries and the establishment of a Marine Management Organisation, while coastal management is likely to be covered by separate proposals ●