

Major Environmental Legislative Developments in the UK and EU 2008 – 2009

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The Climate Change Act 2008

The substantial provisions of the Climate Change Act 2008 came into force on 26 January 2009. It enshrines the world's first long-term legally binding framework to tackle climate change by:

- setting a legally binding target that by 2050 the UK's greenhouse gas emissions will be cut by 80% against the 1990 baseline;
- introducing a carbon budgeting system capping emissions over five-year periods, with three budgets set at a time. On 31 May 2009, the Carbon Budgets Order 2009 (SI 2009/1259) came into force, setting out the level of the first three carbon budgets which run from 2008-12, 2013-17 and 2018-22;
- establishing the Committee on Climate Change to advise the Government on the level of carbon budgets;
- for the first time allowing Government to set regulations for the emissions in respect of aviation and shipping; and
- giving Government the power to create new emissions trading schemes more quickly and easily through secondary legislation.

The Climate Change Act 2008 (2020 Target, Credit Limit and Definitions) Order 2009 (SI 2009/1258) extended the application of the Act by changing the definition of emissions, to include all greenhouse gases and not just those arising from carbon dioxide. It has also increased the target for the reduction of emissions from the original level of 26% to 34% by 2020.

Energy Act 2008 and Planning Act 2008

The Energy Act implements the policy set out in the *White Papers on Energy* (May 2007) and *Nuclear Power* (January 2008). It covers (amongst many other areas): offshore gas infrastructure, carbon dioxide storage, Renewables Obligation, renewable heat incentives, decommissioning of energy installations (nuclear, offshore renewables, and offshore oil & gas) and smart meters.

The Planning Act 2008 is closely linked to the Energy Act and completes, along with the Climate Change Act 2008, the trio of Government's measures to provide the legal tools to implement the UK's energy and climate change strategy.

Environmental Damage (Prevention and Remediation) (England) Regulations 2009

The Environmental Liability Directive (ELD) (which is implemented by these Regulations) was meant to come into force across the EU in April 2007, but its transposition was delayed in the England until 1 March 2009.

The Regulations are aimed at preventing environmental damage by obliging operators involved in certain economic activities (including those who, operate activities under the Environmental

Permitting regime and are involved in processing of specified substances and waste management operations) to meet the costs of preventing and remediating environmental damage. Environmental damage covers damage occurring after **1 March 2009** to protected species and habitats, to surface or ground water (which causes deterioration in quality) and land (which results in significant harm/risks to health).

Operators face strict liability where environmental damage is caused by one of the specified economic activities (set out in Schedule 2 of the Regulations) and fault based liability for damage caused by *any other* activity to protected species and natural habitats where it can be shown that the operator is at fault or negligent. If the operator has a permit for a Schedule 2 activity, then provided the operator can show that (i) the damage was caused by an event or emission expressly authorised by the permit, and (ii) it was not at fault or negligent, then it will not be liable. Other defences and exemptions are set out in the Regulations.

Since there are already a number of existing environmental regimes in the UK that address environmental damage relating to contaminated land etc, the enforcement of the Regulations is complex for both operators and enforcing authorities. The Regulations are stated to be without prejudice to any other legislation relating to damage to the environment, which means that in some cases both regimes may apply, although Defra has provided guidance for operators and enforcing authorities in such situations.

Similar regulations came into force in Wales and Scotland in May 2009.

Directive on the Protection of the Environment through Criminal Law

Pursuant to this Directive Member States are required to criminalise certain breaches of EU environmental legislation by imposing sanctions. The type and level of the criminal penalty imposed is, however, left to each Member State. The Directive must be implemented by 26 December 2010 and requires penalties to be "effective, proportionate and dissuasive". Most, if not all of the activities listed in the Directive are already criminal offences in the UK. The recently enacted Regulatory Enforcement and Sanctions Act 2008 gives the Secretary of State the power to enfranchise environmental regulators (including the Environment Agency in England) to impose civil penalties on businesses, as an alternative to prosecution) and it remains to be seen how the Government decides these powers will interplay with the requirements of the Directive.

The Waste Framework Directive 2008 (WFD)

The WFD came into force in December 2008. Member States are required to implement the Directive by 12 December 2010. Defra has now closed stage one of its two stage consultation on the WFD and is expected to publish a report summarising the responses by 4 January 2010.

The WFD consolidates, revises and repeals parts of three existing Directives: (i) the existing Waste Framework Directive; (ii) the Waste Oils Directive; and (iii) the Hazardous Waste Directive. The WFD also brings in some new provisions. It establishes a more comprehensive waste hierarchy, the priority order for waste management being: (1) Prevention; (2) Re-use; (3) Recycling; (4) Recovery and (5) Environmental disposal. "Re-use" and "recycling" (amongst others) are newly defined terms in the WFD.

The following new exclusions have also been introduced and so are therefore out of the scope of the WFD:

- "land (in situ) including unexcavated contaminated soil and buildings permanently connected with the land" (and so deals with the concerns that arose following the European Court of Justice decision in *Van de Walle (Case C-1/03)* that such material could also be waste); and
- "uncontaminated soil and other naturally occurring material excavated in the course of construction activities where it is certain that the material will be used for the purposes of construction in its natural state on the site from which it was excavated."

Construction and land remediation practices should in theory benefit from these exclusions due to a reduction in regulatory obligations and costs.

The WFD also recognises the deep-rooted difficulty in ascertaining (i) the distinction between by-product and waste; and (2) when waste ceases to be waste. The WFD goes part of the way in clearing this area up by providing more detailed definitions for "by-product" and "end-of-waste".

In addition, the WFD provides for the setting of technical minimum standards for waste treatment activities which are not under the remit of the IPPC Directive (96/61/EC). However, there is a concern that this could lead to additional regulatory practical and financial constraints on businesses. Member States will also have the burden of creating waste prevention programmes (WPPs) by December 2013. Benchmarks will then need to be set for the measures included in the WPPs and reports will need to be made on any progress.

The Waste Batteries and Accumulators Regulations 2009

These Regulations came into force in May 2009 (subject to exceptions) and implement in the UK the waste battery provisions of the EU Directive on Batteries and Accumulators and Waste Batteries and Accumulators 2006/66/EC. The Regulations set requirements relating to waste battery collection, treatment, recycling and disposal for all battery types and echo the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (as amended), by imposing a duty on battery producers to fund such activities.

The REACH Enforcement Regulations 2008

The EU Regulation on the Registration, Evaluation and Authorisation (REACH) was adopted in 2006 and came into force on 1 June 2007 with its requirements being phased in over several years. The 2008 Regulations came into force on 1 December 2008 and provide an enforcement and penalties regime. The Health and Safety Executive, the Environment Agency and local authorities are responsible for overseeing the enforcement of the REACH Regulations in the UK relating to the manufacture, import, sale or use of substances without appropriate registration.

Phase 1 of the Environmental Permitting Regime

The Environmental Permitting (England and Wales) Regulations 2007 came into force in April 2008 to implement Phase 1 of the Environmental Permitting Regime. The Regulations replace 41 statutory instruments and have essentially created one single regulatory regime by integrating and streamlining Pollution Prevention and Control and Waste Management Licensing.

Phase 2 of the Environmental Permitting Regime has already begun to be implemented following the transposition of the permitting parts of the EU's Batteries Directive (transposed on 5 May by The Waste Batteries and Accumulators Regulations 2009) and the Mining Waste Directive (via The Environmental Permitting (England and Wales) (Amendment) Regulations 2009 which came into force on 7 July).

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